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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 578 OF 1995

1. Hamidulla Abdulgani Shaikh (Appeal dismissed as abated)
2. Abdulla Abdulgani Shaikh
Age 54 years,
Resident of Khakabavdi,
Gauripada, Babu Chuniwala Chawl,
Bhiwandi, Dist. Thane.

.. Appellants
(Org.Accd.Nos.1 & 2)

Vs.

State of Maharashtra

.. Respondent

Mr. Sachin Dhakephalkar for appellant no.2/accused no.2.
Mrs. S. D. Shinde, APP for State.

CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATED : FEBRUARY 13, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.]:

1. The appellants, who stand convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to imprisonment for life, by the Additional Sessions Judge, Thane, by judgment dated 12/09/1995, in Sessions Case No. 400 of 1993, by this appeal question the correctness of their conviction and sentence.

2. During the pendency of this appeal, the appellant/Original Accused No.1 – Hamidulla Abdulgani Shaikh expired and, therefore, the appeal, in so far as it questions the conviction and sentence of Original Accused No.1 was dismissed as abated on 30/1/2015. The present appeal questions the conviction and sentence of appellant no.2/ Original Accused No.2.

3. Facts in brief, as are necessary for the decision of this appeal, may be stated thus:-

PW 5 – PSI Pandurang More, who was attached to Bhoiwada Police Station and was on duty on 5/1/1993, recorded the report of Jubeda Ansari at Exh. 24. On the basis of the said report at Exh. 24, an offence vide Crime No. 4 of 1993 was registered under Sections 307, 323, 504 read with Section 34 of the IPC. Upon registration of the offence, PW 5 – PSI More proceeded to the scene of the incident and drew the scene of the incident panchanama in the presence of panchas at Exh. 22. From the scene of the incident, an iron bar (Article No.1), a wooden batten (Article No.2) and pieces of tiles were seized under the said panchanama. Statements of

witnesses were recorded and further investigation was then entrusted to PW 6 – PI Vishwas Nikam.

PW 6 – PI Vishwas Nikam, who was also attached to the Bhoiwada Police Station, visited the hospital where the injured was admitted. On the advise of the Medical Officer, the injured was shifted to Civil Hospital at Thane, where he was declared dead by the Medical Officer. An inquest panchanama of the dead body of deceased – Sherali was drawn at Exh. 29. The clothes of deceased were seized under seizure memo at Exh. 12. Section 302 of the IPC came to be added. The accused were arrested on the same day. Supplementary statements of the witnesses were recorded and the dead body was referred for postmortem examination. The seized property was thereafter referred to the Chemical Analyzer under requisition at Exh. 15. The report of the C.A. is at Exh. 16. Further to the completion of investigation, a charge-sheet against the accused was filed.

Injured Sherali was initially examined by PW 8 – Dr. Satish Talekar, who had noticed that injured Sherali had sustained the following injuries :-

- (i) 2 CLWs over the vertex region of the head central part 4" x 1/2" by bone deep, oblique and parallel to each other.
- (ii) Contused abrasion over the left infraclavicular region of the chest 3" x 1/2".
- (iii) Contused abrasion over the nose 1" x 1/2".
- (iv) Contused abrasion over the right zygomatic region of the chest 2" x 1" colour injury were red.

According to him, all the injuries were possible to be caused by hard and rough object. Injured was semi-conscious and was transferred after first aid to the Civil Hospital at Thane. The injury certificate is at Exh. 35.

Postmortem on the dead body of deceased Sherali was performed by PW 7 – Dr. Fulchand Dhengre, who noticed the following external injuries :-

- (i) Sutured wound on the parietal region vertex 2 1/2" in

length.

- (ii) Sutured wound on the parietal region 1/2" above the injury no.1 3" in length.
- (iii) Contusion with abrasion on the right infra orbital region laterally at the angle of eye 1" x 1 1/4" in diameter scap formation.
- (iv) Abrasion on the right supra orbital region 3/4" x 1/4" in diameter.
- (v) Minor abrasion on the right side below 3" in diameter.
- (vi) Contusion with abrasion on left clavicle region and chest size – 3" x 1 1/2" in diameter.
- (vii) Abrasion on left knee anterior above and below the knee 3 in number each 1 1/2" x 1 1/2" in diameter.
- (viii) Six minor abrasion on knee upper third brownish in colour.
- (ix) Abrasion on the bridge of the nose 1/4" in diameter.

According to him, all the injuries were antemortem and on internal examination, he noticed the following injuries:-

(i) Haematoma seen under the scalp on skull examination-

1. Cracked fracture of parietal and temporal bone sides 9" in length.
2. 4 Depressed fracture of both side parietal bone.
3. Cracked fracture of parietal bone of right side 1" x 1/4" in length.

On brain examination

Sub-dural haematoma completely with blood clots.

On Thorax examination

Fracture CI sternum at the clavicle region (Twelfth L Side)

According to him cause of death was due to multiple fracture of the skull bone with sub-dural haematoma. According to him, injuries i.e. Injury Nos.4, 5, 7, 8 and 9 were minor injuries. He has further admitted that injuries 4, 5, 8 and 9 could be caused in scuffle. The postmortem report is at Exh. 31.

3. On committal of the case to the Court of Sessions, trial court vide Exh. 5 framed charge against the accused for offence punishable under Sections 302 r/w 34, 323 r/w 34, 504 r/w 34 of the IPC and under Section

135 r/w 34 of the Bombay Police Act. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 8 witnesses. The defence of the accused was of denial. Trial court, upon appreciation of the evidence of the prosecution witnesses, convicted and sentenced the appellants as afore-stated.

4. We have heard Mr. Sachin Dhakephalkar, learned counsel for the appellant no.2 and the learned APP for the State. In order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. The entire prosecution case revolves around the testimony of the three eye witnesses, namely, PW 1 – Madina, PW 2 – Sahejeda and PW 3 – Sabahurnissa.

PW 1 – Madina deposes that she knew accused nos.1 to 4 who were her neighbours. Deceased Sherali was also her neighbour. According to her on 5/1/1993 in the morning at about 8 a.m., accused nos.1 to 4 had come in front of her house and were removing the drainage cover which

was of cement and has been referred to in the deposition as “Ladi”. According to Madina, her husband had asked the accused not to remove the said drainage cover and, therefore, there was a quarrel with the accused. At that time, deceased Sherahli came out of his house and also objected to the accused removing the drainage cover. According to Madina, accused no.2 – Abdulla brought a wooden-log, while accused no.1 – Hamidulla brought an iron bar. Accused No.1 – Hamidulla gave a blow of the iron rod on the head of deceased Sherahli, while accused no.2 – Abdulla gave blows of wooden-log on the chest and back and other parts of the body. Deceased Sherahli was injured and fell down and was rendered unconscious. Deceased Sherahli was taken to the hospital. In cross-examination, she has admitted as correct that the wooden-log was a part of the loom.

6. Prosecution has examined PW 2 – Sahejeda, who also deposes that the accused reside opposite her house. According to her, on 5/1/1993 at about 8 to 8.30 a.m., accused nos.1 to 4 were seen removing the cement drainage cover of the drainage. The removal of the said cover was objected to by PW 1 – Madina and there was exchange of abuses between them. Thereafter, deceased Sherahli intervened and questioned the accused as to why four persons were quarreling with PW 1 – Madina and her husband.

Accused No.1 – Hamidulla was holding an iron rod, while accused no.2 – Abdulla was holding a wooden log. Accused No.1 gave a blow of the iron rod on the head of the deceased, while accused no.2 – Abdulla gave blows of wooden-log on the back and chest of deceased. The wife of deceased also intervened and was assaulted by the accused. The accused then left the iron rod and the wooden log at the scene of the incident and fled. The police arrived and the injured was shifted to the hospital, where he succumbed to his injuries.

7. Prosecution has examined PW 3 – Sabahurnissa, who also deposes that the accused were residing opposite her house. According to PW 3 – Sabahurnissa, on 5/1/1993 at about 8 to 8.15 a.m. accused nos. 1 to 4 were seen removing the cement drainage cover of the drainage. It was objected to by PW 1 – Madina and her husband. All the accused then assaulted PW 1 – Madina and her husband. Deceased Sherali intervened and questioned the accused as to why four persons were quarreling with one person and his wife. The accused then attacked on deceased Sherali. Accused No.1 – Hamidulla brought an iron bar while accused no.2 brought a wooden stick. Accused No.1 Hamidulla gave a blow of iron rod on the head of deceased, while accused no.2 Abdulla gave a blow of stick on the

back and chest of the deceased. Wife of deceased also intervened and was assaulted. Injured Sherali was shifted to the hospital, where he succumbed to his injuries.

8. The facts of the present case certainly reveal that there was no prior meeting of mind as the accused could not have envisaged that the deceased would be intervening in their attempt at removing the cover of the drainage. In fact there could not have been any meeting of mind between the accused and it could not have been anticipated by the accused that PW 1 – Mandina and her husband would object to the accused removing the cover of the drainage. There was a quarrel between the accused and PW 1 – Madina and her husband. The evidence of PW 1 – Madina indicates that the accused had gone and brought the weapons. Evidence of PW 3 – Sabahurnissa also indicates that the accused had gone and brought the iron rod and the wooden stump. The evidence of PW 2 – Sahejeda, however, indicates that the iron rod and the wooden-log or stump were being carried by the accused. Obviously, these would be essential if the cement cover of the drainage was to be removed. It, therefore, cannot be said that the accused had come to the scene of the incident armed with weapons with the intention of assaulting deceased Sherali. As pointed out by us above, it

could never been anticipated by the accused that the deceased Sherali would be intervening and objecting to the accused at removing the cover of the drainage. No exhortations are alleged to have been given by either of the appellants to each other or to other to kill or finish deceased Sherali. Both the accused suddenly assaulted deceased Sherali with the iron rod and the wooden-log which they were carrying. As pointed out by us above, there is contradictory evidence as to whether accused went home and brought the iron rod and the wooden-log or whether the iron rod and wooden-log had been carried by the accused to the scene of the incident. The evidence of PW 2 – Sahejeda certainly indicates that the iron rod and the wooden-log were carried by the accused to the scene of the incident. On account of Sherali intervening, both the appellants suddenly assaulted Sherali. There was hardly any time for meeting of mind, nor could either of the accused envisaged and realized what was the intention of the individual accused. The intention, while assaulting deceased Sherali, obviously, could not have been to commit his murder. The incident was not of such a magnitude as would drive the accused to intend to commit murder of deceased Sherali. The intention of the accused at that point of time appears to us to be one of causing hurt to deceased Sherali in order to deter Sherali as well as the other witnesses from objecting to the accused in their efforts

at removal of the drainage cover. It was with this intention that the appellant/accused no.2 – Abdulla had wielded the wooden-log and had caused injury on the chest and the back of deceased. The aforesaid injuries had not resulted into any internal injuries which were responsible for causing death of deceased Sherali. In fact, the medical report also does not indicate that due to the blows given by accused no. 2 – Abdulla, there was fracture of any ribs. What is caused on account of the blows is a contusion on the chest. The blows had obviously not been given with such degree of force that they would cause the fracture of the ribs or fracture of any bones. As pointed out by us above, both the accused simultaneously attacked deceased Sherali and obviously there was no time for meeting of mind. One accused could not know what was the intention of the other accused and intention in such circumstances can be gathered by (i) the nature of the weapon which is alleged to have been used, (ii) nature of the injury which is caused to the injured, (iii) the situs, which is chosen by the accused for inflicting an injury and (iv) any exhortations or instigation by the accused while inflicting the injury.

9. A reference at this juncture may usefully be made to the judgment of the Supreme Court in Pandurang and ors. vs. State of

Hyderabad [AIR 1955 SC 216]. The Supreme Court, while dealing with the scope and application of Section 34 of IPC has held thus:-

“In the case of Section 34 it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; & if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case. The partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for

example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, to have the same intention independently of each other, e.g. the intention to rescue another, and if necessary to kill those who oppose.

It is true, prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or “the

incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.”

10. In the present case, accused no.2 – Abdulla is alleged to have wielded wooden-log and caused injury on the chest and back of deceased. As pointed out by us above, the blows did not result into any severe injury, much less, fracture of either ribs or any bones. There are no exhortations by the accused no.2 while delivering the blows to deceased Sherali which would reflect the intention of accused no.2. These factors, according to us, would certainly indicate that the intention of accused no.2 was not to cause death of deceased Sherali. Accused No.1 – Hamidulla who is now since deceased, had wielded the iron rod and hit the iron rod on the head of deceased. The force with which the blows by iron rod were given had resulted into fracture which was primarily responsible for death of deceased. The intention of accused no.1 cannot be attributed to accused no.2 - Abdulla, nor can it be said that the said intention was shared by accused no.2 – Abdulla. As pointed out by us above, there was hardly any time for meeting of mind and, therefore, each of the accused would be liable individually for the offence committed by them.

11. In our opinion, therefore, the conviction and sentence of appellant / accused no.2 – Abdulla Abdulgani Shaikh for offence punishable under Section 302 read with Section 34 of IPC would be wholly unsustainable. Accused No.2 – Abdulla could be attributed with the intention of causing injuries, no doubt, by a deadly weapon i.e. the wooden-log which was carried by him. Accused No.2 has also inflicted simple injuries with the said wooden-log. Accused No.2, therefore, in our opinion would be liable to be convicted and sentenced for offence punishable under Section 324 of the IPC. We are informed that accused no.2 – Abdulla has undergone 239 days imprisonment i.e. seven and half months. The incident had occurred in 1993 and this appeal had been filed by the appellant/accused no.2 in 1995. In the aforesaid facts, therefore, in our opinion, the sentence of seven and half months already undergone by appellant/accused no.2 – Abdulla would meet the ends of justice for offence punishable under Section 324 of the IPC.

12. Resultantly, therefore, we partly allow this appeal and quash and set aside the conviction and sentence of the appellant/accused no.2 – Abdulla Abdulgani Shaikh for offence punishable under Section 302 read with Section 34 of the IPC and instead convict him for offence punishable

under Section 324 of IPC and sentence him to the period of imprisonment already undergone by him. His bail bonds stand cancelled.

Appeal is thus partly allowed as indicated above.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)