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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.71 OF 2007

Suresh @ Rashtraya Darekar Bhosale	]	
Age: 35 years,	]	
Occupation: Nil,	]	
residing at Kashthi, Shrigonda,	]	
District: Ahmednagar	]	... <u>Appellant</u>
	]	Ori. accused No.1.
(at present lodged in Yerwada Central	]	
Jail, Pune.	]	

V/s.

The State of Maharashtra	]	 <u>Respondent</u>
at the instance of Khandala Police Station	]	Ori. Complainant.
District: Satara.	]	

Mr. Pankaj Purway i/by Latika Misal, for Appellant.

Mrs. Sangeeta Shinde, A.P.P., for the Respondent-State.

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

DATE : 2ND MARCH, 2015.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. By this appeal, the appellant who is the original accused No.1 in Session Case No.31 of 1997, challenges the judgment of conviction and sentence, recorded on 8.1.1999, by the 3rd Additional Sessions Judge, Satara. By the said judgment, the appellant alongwith co-accused No.4 Bakish @ Bakesha was convicted for the offences punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- each in default to suffer rigorous imprisonment for three months. Both of them were further convicted for the offence punishable under Section 394 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.200/- each in default to suffer rigorous imprisonment for one month. The trial Court has also convicted them for the offence punishable under Section 397 read with 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.200/- each in default to suffer rigorous imprisonment for one month. The trial Court directed that all the substantive sentences of imprisonment shall run concurrently. By the said judgment, the trial Court acquitted remaining accused Nos 2, 3, 5 to 10 of all the charges levelled against them.

2. The facts which are necessary for deciding this appeal may be stated thus :-

On 04.10.1996, when P.W.No.14 Suman Kate was present in their house at village Shirval alongwith her family members. At about 1.00 a.m., some unknown persons entered into the house armed with spade and iron bar. They assaulted P.W.14 Suman, her sons P.W.16 Ganesh and deceased Prakash and grand son deceased Jignesh. Those persons also assaulted her daughter-in-law, Prabhavati and snatched her ornaments.

3. When the information of the incident was given to P.W.18 Sub Inspector Ramchandra Pathare, who was on duty at Khandala Police Station by P.W. 15 Sandesh, he recorded the said information in writing vide complaint Exh.101. On the said complaint he registered C.R.No.109 of 1996 and informed about the incident to P.W.17 Dy. S.P. Namdeo Chavan. P.W.17 Dy. S.P. Chavan, then went to the spot of incident in the early morning by which time, injured were taken to the hospital of Dr. Joglekar where Prakash and Jignesh were declared dead as they succumbed to the injures. On the spot of incident P.W.17 Dy. S.P.

Chavan, made panchnama of scene of offence Exh.28 and seized the weapons of assault viz. spade and iron bar which were lying there, under panchnama Exh.69. Meanwhile inquest panchnama was made on the dead body of Prakash and Jignesh by API Salunke. The dead bodies were sent for postmortem examination. The injured witnesses were also sent to Ruby Hall Clinic where they were admitted and being treated.

4. P.W.17 Dy S.P. Chavan, lifted from the spot foot prints with the help of experts under panchnama Exh.16. Further, he seized the clothes of the deceased Prakash and Jignesh which were produced by Head Constable Khairmode under panchnama Exh.33.

5. On 7.10.1996, P.W.17 Dy. S.P. Chavan, recorded statements of neighbouring witnesses including P.W.5 Kishor Todkari. On 7.10.1996 he recorded the statement of P.W.14 injured Suman and P.W.16 injured Ganesh. On 9.10.1996, Head Constable Mulani produced the clothes of injured which were seized under panchnama Exh.34 on 11.10.1996. Injury certificates were obtained from Ruby Hall Clinic vide Exh.35 to 37. The postmortem reports of the deceased Prakash and Jignesh were collected vide Exh.38 and 39 on 14.10.1996.

6. As part of further investigation P.W.17 Dy. S.P. Chavan, recorded the supplementary statements of injured witnesses on 15.10.1996 and 27.10.1996. He sent the seized Muddemal Articles to Chemical Analyzer vide requisition letter Exh.104. The appellant and the other co-accused who were arrested in C.R.No.43 of 1996 by Lonand Police Station, District Satara, came to be transferred in this C.R. on 1.11.1996.

7. On 5.11.1996, at the behest of the present appellant, in pursuance of memorandum panchnama Exh.48, one gold ear-ring, torch and Jambia were recovered from his hut under panchnama Exh.49. On the same day, he also produced one coat which came to be seized under panchnama. During the course of further investigation, some other stolen ornaments came to be seized at the instance of other co-accused No.4 Bakish @ Bakesha. The seized ornaments were shown to P.W. 14 Suman and she identified the same. Hence on completion of investigation initial chargesheet came to be filed against present appellant and accused Nos 2 to 5 on 30.1.1997, in the Court of Judicial Magistrate First Class at Khandala, District Satara. Subsequent thereto, remaining accused came to be arrested and after completion of investigation against them, supplementary chargesheet came to be filed.

8. On the case being committed to the Session Court, the trial Court framed the charge against the appellant and the other co-accused vide Exh.13 for the offences under Sections, 395, 396, 392 read with 397 and 460 of the Indian Penal Code. The appellant and the other co-accused pleaded not guilty to the charge and claimed to be tried raising defence of false implication.

9. In order to prove its case, the prosecution has examined altogether 18 witnesses. On appreciation of their evidence, the trial Court held the guilt of the present appellant and the co-accused No.4 Bakish @ Bakesha to be proved beyond reasonable doubt, for the offence punishable under Section 302, 394 and 397 of the Indian Penal Code and sentenced them as aforesaid.

10. This judgment of the trial Court is challenged in this appeal by the learned counsel for the appellant Mr. Pankaj Purway, whereas supported by the learned Additional Public Prosecutor Smt. S.D. Shinde.

11. In order to effectively deal with the submissions advanced by them, in our considered opinion, it would be useful to refer to the

prosecution evidence on record.

12. To prove the occurrence of the incident and complicity of the appellant in the said incident, the main reliance of prosecution is on the evidence of the injured witnesses viz. P.W.14 Suman, P.W.15 Sandesh and P.W.16 Ganesh. Their evidence is more or less of identical nature. According to their evidence, on the date of incident, all of them were sleeping in the house alongwith deceased Prakash and deceased Jignesh. At about 1.00 a.m. in the night, as deposed by them, some persons entered into house, assaulted them and the deceased with iron bar, spade and other weapons, snatched gold ornaments from them and then fled away. Due to injuries sustained in the assault, Prakash and Jignesh died. The postmortem reports are accordingly produced on record at Exh.38 and Exh.39 which prove their cause of death due to multiple injuries sustained by them. There are also injury certificates of P.W.14 Suman, P.W.15 Sandesh, and P.W.16 Ganesh vide Exh.35 to 37 which go to prove that as a result of assault, they were injured in the incident. Hence as regards the occurrence of the incident, there remains no reason to disbelieve the evidence of injured witnesses which is fully supported with the evidence of panch witnesses and also the evidence of P.W.17 Dy. S.P. Chavan.

13. The real question for consideration in this case is about the complicity of the appellant in the said incident. To prove identification of the appellant and other co-accused, the prosecution has relied upon the evidence of test identification parade which is proved through the evidence of P.W.11 Executive Magistrate Jagannath Bhise and P.W.8 panch Raghunath Babar. As per their evidence and the evidence of P.W.14 and 15, in the test identification parade, they identified the present appellant and the co-accused No.4 Bakish. However, in the evidence before the Court, both these witnesses have categorically stated that due to lapse of time, they are unable to identify any of the accused. Even as regards P.W.16 Ganesh, in the evidence before the Court, he was unable to identify correctly the present appellant.

14. Thus, in this case, there is no substantive evidence of identification of the appellant or the co-accused before the Court. Whatever evidence about their identification is, only relating to the test identification parade. Needless to state that, test identification parade is a part of investigation which is conducted mainly to assist the Investigating Officer to know whether the investigation is proceeding on proper track. The identification of the accused in the test identification parade cannot

substitute the substantive evidence of the eye witness in the Court about their identification. The evidence of identification of the accused in test identification parade is only of corroborative nature. In the instant case, therefore, even if the eye witnesses who are injured, have identified the appellant and other accused in test identification parade as they failed to identify them in the evidence before the Court, it has to be held that the prosecution has failed to prove the complicity of the appellant in the incident.

15. The second piece of evidence on which the prosecution has placed reliance is, that of recovery of stolen ornaments at the behest of the appellant. On this aspect, the prosecution has led evidence of P.W.3 Ravindra Pawar and P.W.17 Dy. S.P. Chavan. According to them, on 5.11.1996, the appellant gave disclosure statement that he will produce the weapons of the assault and gold ear-ring. The memorandum panchnama of his statement was prepared vide Exh.48. Thereafter the appellant guided them to his hut and produced the ear-ring, jambia and the torch which came to be seized under panchnama Exh.49.

16. This evidence relating to recovery, in our opinion, suffers from the major infirmity. The incident has taken place on 4.10.1996

whereas the alleged recovery is made on 10.11.1996 i.e. after more than one month. Therefore it cannot be said that this recovery was made soon after the incident of dacoity. Such recovery hence cannot implicate the appellant in the offence of dacoity, far remain, in the offence of murder. This is too slender a piece of evidence to be relied upon to convict the appellant for the offence punishable either under Section 394 or 397 of the Indian Penal Code.

17. As regards charge under Section 302 of the Indian Penal Code for which the trial Court has convicted the appellant and the other accused, it appears that no such charge was framed against them. The offence under Section 302 of IPC also cannot be treated as lesser offence to section 394 of IPC.

18. To sum up, therefore, it has to be held that the prosecution has utterly failed to prove its case against the appellant. The judgment of trial Court, therefore, is required to be quashed and set aside.

19. Consequently, Criminal Appeal No.71 of 2007 is allowed. The conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged

and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]
J.]judgment

[P.V.HARDAS,