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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 197 OF 2011

Annaso Barikrao Gholve
Age 25 yrs.
Residing at Prathamesh Nagar,
Appa Pada, Kurar Village, Malad East,
Mumbai 400 097

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr. Priyal Gopaldas Sarda for appellant.
Smt. V. R. Bhonsale, APP for State.

CORAM: P. V. HARDAS &
A. S. GADKARI, JJ.

JUNE 26, 2015.

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

1. The appellant, who stands convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.1000/-, in default of which to undergo further RI for one month, by the Additional Sessions Judge, Borivali Division, Dindoshi, Goregaon, Mumbai, by judgment dated 12/11/2010, in Sessions Case No. 25 of 2010, by this appeal challenges his conviction and sentence.

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

PW 7 – PSI Babasaheb Gosavi, who was attached to the Kurar Police Station and was on night duty between the night of 7/11/2009 and upto 8 a.m. of 8/11/2009, received a message at about 1.50 a.m. on 8/11/2009 from the Bhagwati Hospital about admission of injured Dayanand in the hospital due to stab injury. PW 7 – PSI Gosavi was further informed that injured Dayanand had succumbed to his injuries. PW 7 – PSI Gosavi, therefore, rushed to the hospital and noticed the dead body of Dayanand. He also noticed PW 1 – Salim Abdul Shaikh present near the dead body. Accordingly, the statement of PW 1 – Salim was recorded at Exh. 14. On the basis of Exh. 14, an offence vide Crime No. 252 of 2009 was registered under Sections 302 and 504 of the IPC. An inquest panchanama was drawn in the presence of PW 2 – Sitaram at Exh. 17. The blood stained clothes of deceased were also seized under the inquest panchanama. The dead body was thereafter referred for postmortem examination. In the presence of the panch witnesses, the scene of the incident panchanama was drawn at Exh. 15. from the scene of the incident,

sample of blood mixed mud and ordinary mud was seized. Further investigation was entrusted to PW 8 – PI More.

PW 8 – PI More, who was also attached to the Kurar Police Station, was entrusted with the investigation of the said crime. The appellant/accused was arrested by API Marathe on 8/11/2009 at 1.35 p.m. On 11/11/2009, during custodial interrogation, the appellant expressed his willingness to point out the place where a knife had been concealed. A memorandum was accordingly drawn in the presence of panchas at Exh. 19. The appellant led the police and the panchas to a place near a mango tree and from a heap of the bricks near the mango tree produced a knife which was seized under panchanama at Exh.20. The said knife was wrapped in Khaki coloured paper and label bearing signature of the panchas was pasted on the paper. On 17/11/2009, the seized property was referred to the Chemical Analyzer along with PW 5 – Police Constable Anil under requisition at Exhs. 32 and 33. Statements of witnesses were recorded and further to the completion of investigation, a charge-sheet against the appellant was filed.

Postmortem on the dead body of deceased Dayanand was

performed by PW 6 – Dr. Sunil Birhade. PW 6 – Dr. Birhade noticed the following external injuries :

- (1) Evidence of E/O incise stab wound (ISW) over right side of abdomen; 3 cm. lateral to mid-line; 13 cm above and medial to right interior superior iliac spine 12 cm below and lateral to umbilicus, obliquely placed, spindle shape of 3x2x5 cm.
- (2) Internal injuries on dissection of external injuries: I) Abdominal skin subcutaneous tissue, muscle cut perforated peritoneums was cut and perforated right colon lower lobe of, liver is cut. Blood with blood clots present in abdominal cavity.

On internal examination, the following injuries were noticed:-

Abdominal muscle were found cut. Peritoneum was cut and perforated under the incise stab wound. In abdominal cavity 600 blood with clots was present. In stomach 100 cc semi-digested food with alcoholic odour, mucosa was congested.

Right colon was cut; lower lobe of liver was cut.

He, therefore, opined that deceased Dayanand had died due to the incise stab wound. The postmortem report is at Exh. 25.

3. On the case being committed to the Court of Sessions, trial court vide Exh. 3 framed charge against the appellant for offence punishable under Section 302 of the Indian Penal Code. The appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 8 witnesses. The trial court accepting the prosecution evidence, convicted and sentenced the appellant as afore-stated.

4. We have heard the learned counsel for the appellant and the learned APP and 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 PW 1 – Salim Shaikh, who is an eye witness to the incident. PW 1 – Salim deposes that he was managing two garages at Hanuman Nagar, Kandiwali (East). His

daughter Afsana was running a beauty parlor in the vicinity of the Appa Pada Road. Near the said beauty parlor, there was a welding work-shop of deceased Dayanand. PW 1 – Salim had noticed his daughter Afsana going on the motorcycle of deceased Dayanand and, therefore, had questioned her as to how she was riding on the motorcycle of the deceased. Afsana had disclosed to Salim that she intended to marry deceased Dayanand. Thereafter Dayanand was frequently visiting the house of PW 1 – Salim. It appears that on 7/11/2009, Afsana was not traceable and, therefore, search was made by PW 1 – Salim, deceased Dayanand and the younger daughter of PW 1 – Salim. Since whereabouts of Afsana were not traced, PW 1 – Salim was going in his car, which was driven by his driver, for lodging a report at the police station. After he crossed some distance, he noticed the appellant and deceased Dayanand standing in the dark and talking with each other. He, therefore, asked Dayanand to accompany him for lodging a report as Afsana was not found. The appellant came near PW 1 – Salim and told Salim that deceased Dayanand would not come for lodging the report. The appellant, thereafter, abused Dayanand in filthy language and removed a knife from his pocket and tried to stab Dayanand. Dayanand managed to evade the blow and moved around. The appellant followed him and thereafter stabbed Dayanand on his stomach. The appellant removed

the knife from the stomach of Dayanand and fled from the scene of the incident. On sustaining the injury, Dayanand collapsed on the ground. PW 1 – Salim telephoned the police. According to Salim, his son PW 4 – Noor Shaikh arrived there and removed injured Dayanand to the hospital. Salim thereafter went to the police station and narrated the incident and thereafter his statement was recorded and the investigation commenced.

6. In cross-examination he has admitted that prior to the incident, he had no occasion to see the accused. He has denied the suggestion that at the time of the incident, there was complete darkness. He was confronted with portions marked “A”, “B” and “C” from his previous statement. He has admitted that he had initially noticed Dayanand and the accused from a distance of 8 to 10 ft. when they were talking. He has admitted that the FIR does not contain the description of the accused.

7. PW 4 – Noor Shaikh, son of PW 1 – Salim deposes that on 7/11/2009 after midnight, he had received a telephone from one Rakesh, who informed him that the dead body of Dayanand was lying near the Machhi Market on the Appa Pada Road. PW 4 – Noor therefore, rushed to the scene of the incident and noticed Dayanand unconscious. He then hired

an auto-rickshaw and carried injured Dayanand to the Bhagwati Hospital. According to Noor, the medical officer declared Dayanand dead on examination. In cross-examination, he has admitted that at the scene of the incident he had noticed about 5 to 7 persons, who had assembled there. He has admitted that out of those 5 to 7 persons, none was knowing Dayanand and, therefore, Noor alone had identified Dayanand.

8. The learned counsel for the appellant has urged before us that no reliance whatsoever can be placed on the testimony of PW 1 – Salim. Presence of PW 1 – Salim is not deposed to by his son PW 4 – Noor. According to PW 1 – Salim he was present at the scene of the incident when his son PW 4 – Noor had carried injured Dayanand to the hospital. Curiously, PW 4 – Noor makes no reference to the presence of PW 1 – Salim at the scene of the incident. We further find that the appellant was a stranger to PW 1 – Salim. Salim has admitted that he had not met the appellant earlier. PW 1 – Salim also does not refer to the presence of an adequate illumination at the scene of the incident. No Test Identification Parade had been conducted. In such circumstances, therefore, in our opinion, no reliance can be placed on the testimony of PW 1 – Salim in respect of the identity of the appellant as the assailant.

9. Prosecution has examined PW 3 – Ahmed Sayyad, a panch to the disclosure memorandum alleged to have been made by the appellant. PW 3 – Ahmed deposes about the appellant expressing his willingness to point out the place where a knife had been concealed and about the recording of the memorandum at Exh. 19. He has admitted that when he was called by the Head Constable to the police station for acting as a panch, the Head Constable had informed him that the appellant was going to point out the knife and, therefore, PW 3 – Ahmed should act as a panch. In the light of the aforesaid, in our opinion, no reliance can be placed on the discovery memorandum at Exh. 19 as the police were aware about the place where the knife had been concealed and that the appellant would be making a disclosure statement regarding the knife. Though the report of the C.A. indicates that the knife was stained with blood of “A” group, the evidence of PW 5 – Police Constable Anil indicates that he had not stated in his previous statement about receiving the parcels for onward transmission to the C.A. in a sealed condition. The sealing of the article at the scene of the incident and article being retained in the police station in the same condition is of vital importance. In the present case PW 5 – Police Constable Anil is a carrier and he does not refer to receiving the

parcels for onward transmission to the C.A. in a sealed condition. If this evidence is lacking, in our opinion, no reliance can be placed on the discovery of the knife and the finding of the C.A. about presence of blood of “A” group would lose its importance.

10. We further find that PW 6 – Dr. Birhade, who had performed the postmortem examination, has admitted in the cross-examination that the injury sustained by the deceased was spindle shape injury and has admitted that the knife seized at the behest of the appellant was not a spindle shape weapon. If the knife which was seized was not a spindle shape weapon, it obviously could not have caused the injury. Thus even on this core, the finding of blood of “A” group on the said knife would be inconsequential.

11. In the light of what has been discussed above, in our opinion, prosecution has failed to prove beyond reasonable doubt that it was the appellant who had stabbed the deceased. Prosecution has not led any evidence in respect of the motive for the appellant to have committed murder of deceased Dayanand. For all the aforesaid reasons, in our opinion, the appellant is entitled to be given the benefit of doubt.

12. Accordingly, Criminal Appeal No. 197 of 2011 is allowed and 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.

(A. S. GADKARI,J.)

(P. V. HARDAS,J.)