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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.267 OF 2012

Sunil Bhimrao Lakade,]
age: 23 years, Occn. Driver,]
residing at : A-1 building,]
Flat no.02, Opp. Indrayani Nagar,]
Chinchwad, Pune]
(at present lodged in Yerwada Central]
Jail,Pune)] ... Appellant
] (Orig. accused No.1)

V/s.

The State of Maharashtra]
At the instance of Nigdi Police] Respondent
Station, Pune] (Orig. Complainant)

Mr. D. G. Khamkar, Advocate, for the Appellant.

Mrs. S. D. Shinde, A.P.P., for the Respondent-State.

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

DATE : 11TH FEBRUARY, 2015.

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

1. The appellant is the original accused No.1, who stand convicted for the offence punishable under Section 302 of the Indian

Penal Code and sentenced to suffer imprisonment for life; by judgment dated 20.2.2012, in Session Case No.247 of 2009, by the Additional Sessions Judge, Pune, by this appeal challenges the correctness of the conviction and sentence.

2. The facts as are necessary for deciding this appeal are as follows :-

On 18.12.2008, at about 9.00 p.m. when P.W.9 API Jitendra Koli was on duty at Yamuna Nagar Police Chowky attached to Nigadi Police Station, Pune, P.W.1 Mahadeo Patre came to the police chowky and gave information about the murder of his cousin Ashok Patre. P.W.9 API Koli recorded his complaint vide Exhibit 26 and on the said complaint registered C.R.No.405 of 2008, for the offence punishable under Section 302 read with 34 of the Indian Penal Code against present appellant and two other co-accused by name Bhanudas Hake and Balu Kate. On the registration of F.I.R., he had handed over the investigation of the said case alongwith his report Exhibit 39 to P.W.12 PI Bhimrao Tile.

3. On receiving the investigation of the said C.R., in the early morning of 19.12.2008, P.W.12 PI Tile verified the complaint and immediately went to the spot where the dog squad and I-car were present.

The spot of the incident was on the road in front of Jai Swami Samarth Industries. One of the eye witnesses to the incident, Dnyaneshwar Manohar showed the spot of incident. P.W.12 PI Tile conducted the spot panchnama (Exhibit 48) in the presence of panchas and at the time of panchnama collected blood mixed mud, sample mud, three stones, footwear and the bracelet from the spot. P.W.11 PSI Pille from the dog squad who was present there kept a big stone which was seized under panchnama in one polythene bag and the second stone was collected in LDC bag by the person from dog squad.

4. As in the incident, deceased Ashok Patre was injured and was referred for medical aid, on arrival in the hospital, he was declared dead. Therefore, PSI Ghadge conducted inquest panchnama (Exhibit 49) and sent the dead body for postmortem. Meanwhile P.W.12 PI Tile recorded the statements of eye witnesses and arrested the appellant and the other accused under arrest panchnama (Exhibit 30) and seized the clothes on their person under the same panchnama (Exhibit 30). On the same day Police Constable Waikar produced the clothes of deceased with his blood samples, which were seized under panchnam (Exhibit 57). P.W.12 PI Tile sent all the seized muddemal articles to Chemical Analyzer vide letters Exhibti 65 and 66.

5. On 20.12.2008, PI Tile alleged to have test identification of the accused by the dog squad which was conducted by P.W.11 PSI Pille. Under the said test identification, present appellant and two other accused came to be identified by the dog who was given the smell of the blood stains on the stones seized from the spot. P.W.11 PSI Pille submitted his report vide Exhibit 46.

6. During the course of further investigation, present appellant gave disclosure statement on 19.12.2008 in the presence of P.W.4 panch Ganesh Ghode, leading to recovery of his clothes (Exhibit 63) and tempo (Exhibit 64). On 26.12.2008, P.W.12 PI Tile recorded statements of two eye witnesses namely P.W.2 Pritam Telang and P.W.6 Vinod Shirshetty. On receipt of postmortem report (Exhibit 42) and C.A. report (Exh. 67 to 73), P.W.12 Tile filed present chargesheet in the Court against present appellant and two other accused, for the offence punishable under Section 302 read with 34 of the IPC.

7. On the case being committed to the Sessions Court, the trial Court framed charge (Exhibit 18). On charge being read over and explained to the appellant and two other accused, they abjured the guilt

and claimed trial raising defence of false implication.

8. In support of its case, the prosecution examined 12 witnesses including five eye witnesses, out of which two were declared hostile. The prosecution has also placed reliance on the seizure panchnama and the evidence of test identification parade of the accused by the dog squad. Then the prosecution led evidence of Medical Officer P.W.10 Dr. Subhash Madane, who has conducted postmortem and evidence of P.W.11 PSI Pille and P.W.12 PI Tile, who had conducted the investigation.

9. To substantiate their defence, the accused also led evidence of two defence witnesses viz. D.W.1 PSI Suresh Ghadge, D.W.2 Head Constable Ghagre.

10. On appreciation of evidence led before it, the trial Court convicted and sentenced the appellant as aforesaid, while acquitting the original accused No.2 Bhanudas Hake and accused No.3 Baloo Kate, giving them benefit of reasonable doubt.

11. This judgment of the trial Court is being challenged in this appeal by learned counsel for the appellant Shri D.G. Khamkar whereas;

supported by learned Additional Public Prosecutor Smt. S.D. Shinde.

12. In our considered opinion, in order to effectively deal with the rival submissions, advanced by both the learned counsel, it would be useful to refer to evidence on record. To prove that the death of deceased Ashok Patre was homicidal in nature, the prosecution has examined P.W.10 Dr. Madane, who has conducted postmortem on the dead body. On his examination, P.W.10 Dr. Madane found following external injuries :-

- i) contused lacerated wound right side parieto temporal area of scalp, directed transversely 8 cm x 3 cm in dimension. Base shows fracture skull bone into multiple pieces with crushed scalp dura and brain protruding out;
- ii) contused lacerated wound right side above injury No.1 right temporo occipital area of scalp directed obliquely 4 cm x 1 cm in dimension. Base shows fracture skull bone;
- iii) Contused lacerated wound right side above injury No.1 and anterior to injury No.2 of column No.17 directed obliquely 5 cm x 1 cm in dimension. Base shows fracture skull bone and crushed brain protruding out;
- iv) Contused lacerated wound left side temporal area of scalp, directed obliquely 3 cm x ½ cm bone deep in dimension;
- v) continuous lacerated wound left side above and anterior to injury No.4 directed obliquely 3 cm x ½cm bone deep in dimension;
- vi) CLW left pinna irregularly;

vii) CLW left mastoid area directed irregularly 3 cm ½ cm bone deep in dimension;

viii) multiple abrasion right side Zygomatic area right cheek and right temporo mandible angle and chin, reddish in colour.

ix) multiple abrasion right shoulder right side of chest area, right knee, right ankle, left side of buttock area.

x) CLW left wrist flexor aspect 2 cm x 1 cm in dimension directed irregularly.

PW. 10 Dr. Madane, found following internal injuries;

i) right sided parieto temporal – occipital scalp crushed and haematoma blood adherent to scalp correspond injury nos 1, 2, 3 of column No.17.

ii) Left sided scalp lacerated correspond to injury nos 4 and 5.

iii) Skull bones – right parieto temporal occipital bone fracture into multiple pieces through which crushed dura and crushed brain herniating out correspond to injury nos 1, 2, 3 of column No.17.

iv) right parieto temporal lobe.

v) left parieto temporal lobe contused.

According to him, the cause of death was traumatic and haemorrhage shock due to head injury. Accordingly he has issued postmortem report Exhibit 42. In his evidence before the Court, he has

further stated that all the injuries were antemortem in nature and sufficient in ordinary course of nature to cause the death. Further he was shown muddemal article No.3 the stone seized from the spot at the time of panchnama and he has opined that the injuries sustained by the deceased can be caused by article No.3 stone. There is nothing in his cross examination to challenge the cause of death which is proved to be homicidal in nature.

13. To prove the complicity of the accused in the said act of injuring the deceased, the prosecution relied upon evidence of eye witnesses and evidence relating to the identification of the accused by the dog. P.W.1 Mahadeo Patre is the informant on whose complaint offence was registered (Exhibit 26). According to him on the day of incident at about 8.45 p.m. after taking liquor, he and deceased Ashok Patre came at Golden Chowk, there accused No.1 Sunil, accused No.2 Bhanudas and Anand Danane, a juvenile in conflict with law, were sitting and consuming liquor. Deceased Ashok asked Anand as to why he was consuming liquor though he was a small boy. According to his evidence, as Anand was the son of deceased Ashok's brother, he asked the said question to Anand. However, accused No.1 Sunil, got annoyed and told deceased Ashok that he has no concern and he should remain away. On that count, quarrel ensued and accused No.1

Sunil and Anand took Ashok in three wheeler tempo bearing No.MH-13-AS/6253 and went away. They did not allow P.W. 1 or the witness accompanying him to sit in the tempo. According to P.W.1 Mahadeo, he became worried about the safety of Ashok and hence called him on his mobile 7 to 8 times, but there was no response. By that time, P.W. 2 Pritam came there. P.W.1 informed him about the incident; then both of them went in search of tempo. At Parshuram Chowk, near Jai Rubber Industries, they found Ashok lying in a pool of blood which was oozing from his head. Police had already arrived there and they took Ashok to YCM Hospital. Thereafter P.W.1 Mahadeo went to the police station and lodged complaint.

14. This witness is, thus, not an eye witness to the actual incident of assault. His evidence more or less goes to show that in his presence accused No.1 Sunil had taken the deceased in his tempo and thereafter he found the deceased in injured condition.

15. The prosecution has then relied on the evidence of P.W. 2 Pritam Telang, an eye witness to the incident. He has deposed that when P.W.1 Mahadeo informed him that deceased Ashok was taken in the tempo by accused No.1 Sunil. He himself and P.W.1 Mahadeo took search of the deceased and the accused. At about 9.45 p.m. he heard

shouts near Shri. Samarth Engineering Works, hence he ran towards the spot from where he had heard shouts and saw that the deceased Ashok was lying on the floor and accused No.1 alongwith co-accused was beating him with stone. When he reached there, accused ran away from the spot.

16. However, in his cross examination, it is brought on record that on the spot of incident though the police were present, he did not tell anything to them about the accused beating the deceased with stone. Further, he has admitted that he went to YCM hospital alongwith two other persons and there Doctor declared Ashok dead. He was in the hospital for about half an hour, but even then he did not tell the police or Doctor anything about his witnessing the incident. After the date of incident, his routine continued, but he never went to police station on his own to give his statement till the police called him on 26.12.2008. Thus, there is inordinate delay in recording of his statement. The incident has taken place on 18.12.2008 whereas; for the first time he has disclosed about the fact of his witnessing the incident to the police on 26.12.2008. It is despite the fact that he had ample opportunities to inform the police about it immediately after the incident and thereafter also.

17. Further in his cross examination he has also admitted that there was no electricity in that area at the time of incident and he has seen the incident in the moon light which also creates serious doubt about the veracity of his evidence that he has seen the accused beating the deceased. Though he has attributed role of beating accused No.1 and other co-accused Bapu Kate and juvenile Anand Danane also, out of them the trial Court has already given the benefit of doubt to accused accused No.2 Bhanudas Hake and accused No.3 Baloo Kate. The trial Court has also, therefore, found it difficult to place implicit reliance on the testimony of this witness though the trial Court has added advantage of watching the demeanor of the witnesses at the time of recording evidence. In our considered opinion, the testimony of this witness which suffers from infirmities stated above, is bereft of credibility and therefore cannot be relied upon.

18. Third eye witness examined by the prosecution is P.W.3 Ankush Patre. According to him, P.W.1 Mahadeo told him about the quarrel and then alongwith Mahadeo he went to Parshuram Chowk and there he saw the accused No.1 Sunil and other accused beating Ashok with stones. However, in his examination-in-chief itself, he has admitted that when they reached the spot, accused persons had ran

away towards Garware Wall Ropes Company. Further, in his cross examination he has admitted that though he was on the spot for about 10 minutes and at that time the police had also come there, he did not inform about the incident to the police. Further he has admitted that he saw the incident from a distance of about 30 to 35 feet. He was on eastern side of the road whereas; the incident has taken place on southern side. He has admitted that there was heavy traffic on the road at that time and the deceased was encircled by the people. Thus, how far he was able to actually witness the incident and the involvement of the accused therein is seriously in question, considering the fact that he has not disclosed about the incident to the police either on the spot or even in the hospital where according to him he was present for half an hour.

19. Last two eye witnesses examined by the prosecution namely P.W.6 Vinod Shirshetty and P.W.7 Ashok have not supported the prosecution case. Both of them are declared hostile and cross examined by the APP, without any success.

20. Though the prosecution has placed reliance in such situation on the evidence of P.W. 11 PSI Pille to prove test identification of the accused by dog squad; in the first place the

evidence about it, is too shaky and too weak to be accepted. As per the evidence of P.W.11 PSI Pille, the blood stained stones were handed over to him by P.W.12 PI Tile after the spot panchnama, which necessarily indicates that the blood stained stones were handled by others at the time of spot panchnama. In such situation, on the basis of those blood stained stones, test identification of the accused persons, after two days becomes seriously doubtful. The evidence about the same cannot be relied upon without there being any corroborating or supporting evidence on record.

21. The last circumstance relied upon by the prosecution is shirt of the accused No.1 Sunil being found stained with blood and the recovery of the same at the instance of accused No.1 under panchnama (Exhibit 13). To prove this recovery, the prosecution has examined P.W.4 panch Ganesh Ghadi and P.W.12 PI Tile, the Investigating Officer. The prosecution has also relied upon the C.A. report which discloses human blood of "AB" group on the shirt. According to prosecution, the deceased was having same blood group of "AB" and hence it is a connected link. However, this material incriminating circumstance is not put to the accused No.1 Sunil while recording his statement under Section 313 of the Code of Criminal Procedure. Though there is reference of the clothes being sent to C.A.,

the contents of C.A. report being not put to the accused in order to elicit his explanation for the same, this circumstance needs to be excluded from consideration now to prove the involvement of the accused in the offence.

22. To sum up, therefore, except the circumstance of last seen together, proved through the evidence of P.W.1 Mahadeo Patre, the prosecution has not succeeded in proving any other incriminating circumstance by cogent, reliable and convincing evidence on record. It is significant to note that the trial Court has also not found the evidence of eye witnesses reliable. As a result thereof when the case stands on the circumstantial evidence alone, as per settled position of law, each and every circumstances on which the prosecution wants to place reliance has to be established satisfactorily and proved circumstances should be capable of forming a chain so complete that no other inference but that of the guilt of the accused alone can be drawn therefrom. In the instant case, the prosecution has failed to do so. Consequently this appeal deserves to be allowed.

23. Accordingly Criminal Appeal 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.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]q