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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.502 OF 2015

Vishnu Barkya Tumbada,	]	
Age: 44 years,	]	
Occupation : Nil,	]	
residing at: Savarkhand, Tumbadapada,	]	
Taluka: Palghar,	]	... <u>Appellant</u>
District: Thane.	]	Orig. accused
	]	
at present lodged in	]	
Nashik Road Central Prison	]	

V/s.

The State of Maharashtra	]	
At the instance of Manor-Palghar	]	 Respondent.
Police Station,	]	

Mr. Annu Kukra Moily, for Appellant.
Mr. H.J. Dedhia, A.P.P., for the Respondent-State.

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

DATE : 30TH APRIL, 2015.

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

1. The appellant, who stands convicted by the Additional Sessions Judge, Palghar, by his judgment dated 2nd April, 2008, in Session Case No.29 of 2007, for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for

life and to pay fine of Rs.1,000/-, in default to suffer rigorous imprisonment for one year, by this appeal challenges his conviction and sentence.

2. The facts, as are necessary for deciding this appeal, may be stated as under :-

On 23rd August, 2006, when P.W.4 Venu Tumbada returned to her house, from the field at about 5.00 p.m., she found her husband Bhima lying dead on the ground in front of the house of appellant, with various injuries on his person. On enquiry with the persons gathered there, she came to know that he was assaulted with axe by the appellant, as her husband Bhima has tried to intervene and persuade the appellant not to assault his mother, P.W.3 Shevanti. P.W.4 Venu, therefore, went to Manor Police Station and lodged complaint Exh.15.

3. On her complaint, Shri.Patil who was on P.S.O. duty has registered C.R.No.91 of 2006 and entrusted the investigation of the same to P.W.9 API Baravkar. P.W.9 API Baravkar, immediately, on taking over investigation of the said crime, went to the spot and conducted inquest panchanama on the dead body of Bhima Exh.12. Thereafter, he referred the dead body to Rural Hospital at Manor for postmortem examination. On the spot, P.W.9 API Baravkar, then drew scene of offence panchanama Exh.26 and from the spot he collected blood

stained mud, simple mud and one Odhani. By that time P.W.8 Yatin Sankhe produced the appellant with blood stained axe in his hand while he was running away from the spot. Hence the said blood stained axe came to be seized by P.W.9 API Baravkar under panchanama Exh.21. He also arrested the appellant under panchanama Exh.22 and seized blood stained clothes on his person.

4. Meanwhile blood stained clothes of the deceased came to be produced by ASI Shri.Jagdale and P.W.9 API Baravkar has seized them under panchnama Exh.27. All these seized articles were sent to Chemical Analyzer and C.A. Report is on record. The postmortem report exh.24 was collected. Further to completion of investigation, P.W.9 API Baravkar has submitted chargesheet in the Court against the appellant.

5. On the case being committed to the Sessions Court, the trial Court has framed charge against the appellant vide Exh.2. Appellant has denied the guilt and claimed trial.

6. In support of its case, the prosecution has examined nine witnesses. Out of them, six witnesses turned hostile. However, relying on the evidence of P.W.8 Yatain Sankhe and Investigating Officer P.W.9 API Baravkar, trial Court held the guilt of appellant to be proved and convicted and sentenced him, as stated above.

7. This judgment of the trial Court is challenged in this appeal by learned counsel for the appellant Shri. Moily and supported by learned APP for the State Shri. H. J.Dedhia. In order to effectively deal with the rival submissions advanced by them, in our considered opinion, it would be useful to refer to the evidence on record.

8. To prove homicidal death of deceased, the prosecution has relied upon the postmortem report Exh.24 which is admitted in evidence by learned counsel for the defence, hence exhibited in view of Section 294 of Code of Criminal Procedure. The postmortem report Exh.24 discloses the following external and internal injuries on the dead body of the deceased:-

- 1) Incised wound measuring 15 cms x 3 cms x 4 cms extending from right angle of mandible to left angle of mandible;
Horizontal, margins sharp. Right and left carotid arteries and adjoining vessels cut at this level. Trachea cut at this level.
- 2) Incised wound 3 cm below (1) right side of neck measuring 3 cm x 2 cms x 4 cms, horizontal, margins sharp.
- 3) Incised wound 4 cms below (2) measuring 4 cms x 2 cms x 3 cms horizontal on right side of neck, margins sharp.
- 4) Incised wound on left side of neck 1 cm below (1)

measuring 7 cms x 2 cms x 3 cms, horizontal margin sharp.

5) Incised wound in right parietal region measuring 6 cms x ½ cm x 1 cm. involving right parietal bone- fracture right parietal bone.

clotted blood around above injuries.

9. As per postmortem report, all these injuries were antemortem and the cause of death was cardio pulmonary failure due to haemorrhage. The fact that learned defence counsel has admitted postmortem report in evidence indicates that the appellant is not disputing homicidal nature of death.

10. To prove the complicity of appellant in the incident, though the prosecution has relied upon evidence of nine witnesses, as aforesaid, only two witnesses have supported the prosecution case and rest of them have turned hostile. They are cross examined at length by learned APP but nothing worthwhile is elicited in their cross examination to prove the prosecution case.

11. P.W.4 Venu Tambada is the first informant on whose complaint Exh.15, offence was registered. She is wife of the deceased Bhima. Admittedly she is not an eye witness to the incident and hence she has no knowledge as to how her husband has sustained injuries. However, the admissions given by her in evidence prove fatal to the

prosecution case. As per her evidence, her husband was assaulted with axe by accused and one axe was lying in the house with blood stains thereon. In her cross examination, she has deposed that the contents of the report of F.I.R. Exh.15 were not read over to her by the police. The police got written the said report. Further, she has admitted that when she went to police station, P.W.2 Rajani Nangare and P.W.5 Manjulabai were with her, from whom she has derived the knowledge of her husband having been assaulted by the appellant. However, both P.W.2 Rajani and P.W.5 Manjulabai have not supported the prosecution case and hence declared hostile. Thus, the evidence of P.W.4 Venu instead of taking the prosecution case further, damages it.

12. The material evidence on which the prosecution has placed reliance is that of P.W.8 Yatin Sankhe. According to him, on the date of incident, while he was proceeding on the road to reach at his construction site, he saw one person holding axe in his hand, passing by the said road. However, without paying attention to the said person, he proceeded further and saw some crowd gathered. When he enquired with the persons in the said crowd, he came to know that someone was assaulted and dead. When he made further enquiry about assailant, he came to know that the person whom he had seen on the road earlier with axe in his hand, was the assailant. Therefore, he returned and caught hold of that person and brought him to the spot. He

handed over the said assailant with axe to the police present on the spot. In evidence before the Court he has identified the appellant as the same assailant. He has also given the cause for identifying the appellant as the same person, as according to him, that person was limping.

13. In cross examination, however, he has admitted that the axe which he found in the hands of appellant was having broken handle, whereas the handle of the axe before Court is not broken. Further, he has admitted that he personally did not entrust the axe to the police; whereas the panchanama Exh.21 proved through the evidence of P.W.7 panch Asshok Wartha and P.W.9 API Baravkar, reveals that the axe was produced by P.W.8 Yatin Sankhe personally. Moreover, as stated above, as per evidence of P.W.4 Venu Tumbada, the axe was lying on the spot in the house of the deceased with blood stains thereon. Thus, there appear to be two axes, one at the spot and one, according to P.W.7 Sankhe, in the hands of the appellant. The axe which is produced before the Court, which appellant was having in his hand, as per P.W.7 Sankhe, is not the same as it is not having broken handle.

14. The CA report produced on the record reveals that only one axe was sent for chemical analysis and the grouping of blood stains found thereon could not be ascertained as the results were inconclusive. Hence prosecution has failed to establish the necessary link between

the weapon seized during investigation and its use in commission of the offence. Sufficient doubt is also created about the identity of the said weapon.

15. Even as regards the blood stained clothes of the appellant, which according to P.W.9 API Baravkar, were seized immediately at the time of his arrest under panchnama in presence of P.W.8 Ashok Vartha, the cross examination of the panch P.W.7 Ashok Vartha reveals that the appellant was not present at the time of seizure of these clothes and they were kept on the table and were not produced by the appellant. Further he has admitted that he does not know who has produced clothes. Apart from that, the CA report reveals that the results of grouping of the blood stains thereon were inconclusive. Hence the prosecution has failed to prove this fact also.

16. To sum up, therefore, there is absolutely no iota of incriminating evidence on record to prove the case of prosecution against accused. Consequently, 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.

17. Fees payable to Mr. Annu Moily, learned counsel appointed for the appellant quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]