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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.768 OF 2006

Bhupendrasingh Nirmalsingh Malli,	]	
age: 28 years,	]	
residing at Brk No.734, Shastri Nagar	]	... <u>Appellant</u>
Punjab Colony, Ulhasnagar -3	]	Original
	]	accused
AT present lodged in Adharwadi	]	
Prison, Kalyan	]	

V/s.

The State of Maharashtra	]	... Respondent
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Mr. Shyam B. Keswani, for Appellant.

Mrs. A. S. Pai, APP , for the Respondent-State.

CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATE : 20th JULY, 2015.

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

1. The appellant, who stands convicted, for the offences punishable under Sections 147, 148, 326 and 302 read with Section 149 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- in default to suffer simple imprisonment for three months, by Ad Hoc Additional Sessions Judge, Kalyan, vide his judgment

dated 27.7.2006, in Sessions Case No.185 of 2004, by this appeal challenges his conviction and sentence.

2. Facts, as are necessary for deciding this appeal, may be stated as follows :-

On 4.7. 2002 at about 8.45 p.m. while P.W.1 Ambika Gaikwad present in the house, Smt. Kavira Jadhav informed her on telephone that her son Bharat was assaulted by some persons and he had been taken to Central Hospital in injured condition. P. W.1 Ambika, therefore, rushed to Ambarnath Police Station and from there alongwith police she went to Central Hospital. There her son Bharat was declared to be dead. She noticed injuries on his body and then again went to Ambarnath Police Station and lodged complaint Exh.14 against three accused viz. 1) Chhotu, 2) Shriram both resident of Katodwadi and 3) Kailas, resident of Punjab Colony, Ulhasnagar.

3. On her complaint (Exh.14), P.W.12 API Ghadasi, registered C.R.No.150 of 2002, for the offence punishable under Section 302 read with 34 of the Indian Penal Code. Then

in the presence of panchas, he made inquest panchnama Exh.56. and sent the dead body for postmortem. P.W.6 Dr. Vivek Malvi, conducted autopsy and found the cause of the death as haemorrhage shock due to multiple injuries.

4. As a part of further investigation P.W.12 API Ghadashi, then went to the spot of incident which was at Phule Nagar, Katodwadi, near Church and made spot panchanama (Exh.58) in the presence the panch witness P.W.10 Ram Jadhav. From the spot, he collected the blood stains, handle of sword and pair of chupple with blood stains thereon and simple soil. The clothes of the deceased were produced by Constable Rokade and they were seized under the panchanama (Exh.60) in presence of Panch P.W.11 Prabhakar Jadhav. Thereafter P.W.12 API Ghadashi, sent the seized muddemal articles to Chemical Analyzer vide requisition letter Exh.68. The Chemical Analyzer's Reports are produced in the case (Exh. Nos 49 and 50). The appellant herein was arrested on 20.5.2004. Further to completion of investigation, P.W. 12 API Ghadashi filed chargesheet in the Court against the appellant. In the said chargesheet remaining three accused by name Chhotu, Shriram and Kailas

@ Loha Jayswal were shown as absconding.

5. On committal of the case to the Sessions Court, the trial court framed charge against the appellant vide Exh.7. The appellant pleaded not guilty and claimed trial, raising defence of false implication.

6. In support of its case, prosecution examined in all 12 witnesses and on appreciation of their evidence, the trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt and convicted and sentenced him as aforesaid.

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

8. To prove the homicidal death of deceased Bharat, the prosecution has examined P.W.6 Dr. Malvi, who has conducted autopsy on his dead body on 5.7.2002 and found

following injuries.

External Injuries

1. Incise wound on middle of scalp 4" x ½" bone deep, vertical in direction.
2. Incise wound right occipital parietal region 2 ½"x ½" bone deep. Oblique in direction.
3. Incise wound on right upper third leg anterior aspect ½" x ½" bone deep transverse in direction.
4. Incise wound left arm upper third on lateral aspect 1½" x ½" skin deep vertical in direction.
5. Contusion right shoulder anterior aspect ½" x ½" blackish discolouration.
6. Contusion left shoulder anterior aspect ½" x ½".
7. Incise wound right side of base of neck 2" x ½" skin deep transverse in direction.
8. Incise wound right scapular region, lateral border of scapula at the level of D-4 level 1½" x ½"" right oblique in direction.

9. Incise wound left scapular region 2" x ½" medial border of scapula, D.4 level, left oblique in direction.

10. Incise wound left side of back at the level of D-7, transverse in direction 1 ½" x ¼", skin deep.

11. Incise wound left side of back at the level of L.3 left parietal spinal region, 2" x ½" muscle deep and transverse direction.

12. Incise wound left gluteal region, ½" x ½", muscle deep, upper outer quadrant of right oblique in direction.

13. Incise wound at gluteal region, 1" medial to trochanter 1½"x ½" muscle deep.

Internal injures.

1. Abdomen cut over small intestine and stomach.

According to him, the cause of death was haemorrhagic shock due to multiple injuries to the back and scalp and injury to small intestine and stomach. He has further opined that these injuries were antemortem and sufficient in the ordinary course of nature to cause death. His postmortem

report is produced at Exh.39.

9. To prove the involvement of the appellant in the homicidal death of Bharat, the prosecution has relied upon evidence of P.W. 3 Manojkumar Kutti, an eye witness and P. W. 2 Ajay Gosavi, friend of the deceased and an injured in the same incident. As regards evidence of P.W.1 Ambika the mother of the deceased is concerned, she was not an eye witness to the incident. She came to know about the assault on her son, from one Kavita Jadhav, and on the basis of the said information, she had rushed to the police and the hospital. Her complaint (Exh.14) reveals that it was lodged only against remaining three accused i.e. Chhotu, Shriram and Kailas @ Loha. The name of the present appellant, as admitted by her in her cross-examination, is conspicuously absent in her complaint (Exh.14). Therefore, her evidence is not helpful to the prosecution at all to implicate the appellant.

10. P.W.2 injured Ajay has deposed that the deceased was his friend and he was also knowing present appellant and other three co-accused. According to him, the relations between him and deceased on one hand and the accused on

the other hand were not good due to quarrel of minor nature which had taken place one month prior to the incident. It is his evidence that the accused had approached him and the deceased for settling the dispute and it was decided to meet on the ground situated in front of church at Ambarnath. Accordingly he himself, deceased and witness Dilip Ingale went to that spot. When they reached there, present appellant gave him a blow of weapon on his anus. Due to said blow, he felt giddiness and ran away from the spot to save his life.

11. Thus, P.W. 2 Ajay has not stated anything about assault on the deceased. He has only deposed about assault on him by the appellant. However, in his cross-examination, he has categorically admitted that in his statement recorded by police, he has not stated the name of appellant as the person causing injury by weapon to his anus. He has further admitted that the reason for not taking the name of appellant in his statement was that he was not knowing the appellant and his name. He has further admitted that he was called at Ambarnath police station for identifying the appellant. Thus, whatever, he has deposed in his examination-in-chief that the appellant has inflicted blow of weapon on him, being in nature

of omission and as he was not knowing the appellant before the incident, his evidence is of no help at all to the prosecution to implicate the appellant, even for causing injury to him, for the offence punishable under Section 326 of the IPC.

12. The third witness on which, prosecution is placing much reliance is that of P.W.3 Manojkumar Kutti. He has deposed that he was knowing the deceased Bharat, P.W.2 Ajay and the appellant. He was also knowing the other three co-accused. On the day of incident, they wanted to settle dispute with accused. Hence they went on the ground near church. According to him, there the appellant assaulted P.W.2 Ajay by means of knife. Thereafter P.W. 2 Ajay left the place. Then appellant and the other absconding accused started beating the deceased by means of knife. The appellant assaulted the deceased with knife on his stomach. However, the evidence of P.W.6 Dr. Malvi goes to show that there was no external injury on the stomach of the deceased. Hence the evidence of this witness that the appellant has assaulted deceased by knife on his stomach is not supported with the medical evidence.

13. It is pertinent to note that though Investigating Officer had made custodial interrogation with the appellant, the knife was not recovered at all. Moreover, P. W. 3 Manojkumar has admitted in his cross-examination that at the time of incident, he was not knowing the the appellant. Further omission is elicited in his cross-examination that he has not stated before the police that appellant assaulted deceased with knife on his stomach. He has also admitted that in his statement recorded by police, there is no mention that the appellant assaulted P.W.2 Ajay with knife. Thus, his evidence implicating the appellant with assault by knife on P.W.2 Ajay and the deceased, is again in the nature of improvement, hence cannot be relied upon. His further admission that, he was not knowing the appellant at the time of incident, totally demolishes the entire prosecution case.

14. Except for the evidence of these two witnesses, there is no other incriminating evidence on record brought by the prosecution against the appellant and the evidence of these two witnesses being in the nature of improvement and therefore, not convincing and reliable, the conviction of the appellant cannot be sustained for the offences with which he

is charged. This appeal is, therefore allowed. The conviction and sentence of the appellant for the offences punishable under Section 147, 148, 302, 326 read with Section 149 of the IPC is quashed and set aside and the appellant is acquitted of these offences.

15. If the appellant is in jail, he be released forthwith if not required in any other case. Fine amount, if any, paid by him be refunded to him.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V. K. TAHILRAMANI, J.]