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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.809 OF 2011.

The State of Maharashtra] ... Appellant

V/s.

Kailas @ Loha Ganesh Jayswal,]
age: 24 years, Occn. Agricultural]
r/o D Type Ordnance Estate, Ambernath] Respondent
Original, r/o Khatripur,] Orig. accused.
Post Manikpurhalva]
Tal. Bhosi, Dist. Mahu]
Uttar Pradesh.]

Mrs. A. S. Pai, APP for Appellant State.
Mr. D.S. Mhaispurkar, for the Respondent.

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

DATE : 20th JULY, 2015.

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

1. This appeal is preferred by the State, challenging the acquittal of the respondent, for the offences punishable under Sections 147, 148, 302, 326 read with Section 149 of the Indian Penal Code, by judgment and order dated

21.12.2010, in Sessions Case No.32 of 2007, by the Additional Sessions Judge, Kalyan.

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

On 4.7.2002, while P.W.1 Ambika Gaikwad, was in her house, at about 9.15 p.m, her brother's wife Kavita Jadhav informed her on phone that someone had assaulted her son Bharat and Bharat was taken to Central Hospital. Therefore, P.W.1 Ambika reached to Ambarnath Police Station and from there alongwith police she went to Central Hospital. There, she came to know that Bharat has already succumbed to the injuries sustained in the said assault. Subsequently, she also came to know from P.W.2 Manojkumar Kutti that the respondent and three other co-accused had assaulted Bharat, in his presence, in front of the church situated at Katodwadi, Ambarnath. Therefore, she went to Ambarnath Police Station and lodged complaint Exh.42 against the assailants.

3. On her complaint C.R. No.150 of 2002 came to be registered. During the course of investigation, statements of

witnesses were recorded. The postmortem report of deceased Bharat and injury certificate of P.W.3 Ajay were collected. The seized Muddemal Articles from the spot of incident, like blood stained clothes and handle of the sword, were sent to the Chemical Analyzer and further to completion of investigation, initially chargesheet was filed against the only arrested accused namely, Bhupinder Singh. Subsequent thereto, the present respondent came to be arrested by P.W.7 API Aher on 17.9.2006 and against him supplementary chargesheet is filed in the Court.

4. On committal of the case to the Sessions Court, trial Court framed charge against respondent vide Exh.9. Respondent pleaded not guilty and claimed trial.

5. In support of its case, the prosecution examined in all nine witnesses and on appreciation of their evidence, trial Court was pleased to acquit the respondent.

6. In this appeal, we have heard learned APP for the State and learned counsel for respondent accused. In order to effectively deal with rival submissions advanced by them, it

would be useful to refer to the evidence on record.

7. To prove the homicidal death of 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" on left shoulder anterior aspect.
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 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.

8. To prove involvement of the present respondent, in the homicidal death of Bharat, prosecution has relied on the evidence of three witnesses viz P.W.1 Ambika- the mother of the deceased Bharat, P.W.2 Manojkumar Kutti-eye witness and P.W.3 injured eye witness Ajay.

9. As regards evidence of P.W.1 Ambika, she was not eye witness to the incident. While she was in the house, she came to know about assault on her son Bharat. Then she reached to the police station, hospital and again to police station. On some information given to her by P.W.2 Manoj, she lodged complaint Exh.42 against present respondent and three other co-accused by name Bhupinder Singh, Shriram and Chhotu. In her cross-examination, however, she has admitted that when she went to the police station, she was not knowing as to who has assaulted her son. Further

omission is elicited to the effect that in her previous statement recorded by police, she has not stated that P.W.2 Manojkumar Kutti told her that present respondent and other three accused assaulted Bharat. She has also admitted that she does not know whether her son Bharat was knowing respondent accused. Resultantly her evidence is not of any help to the prosecution to prove involvement of the present respondent.

10. P.W.2 Manojkumar Kutti, on whose evidence the prosecution has placed much reliance, has deposed that in order to settle some quarrel that has taken place about 2 to 3 months prior to this incident, on 4.7.2002, they had assembled in front of the church. There present respondent assaulted Bharat with sword on his head and neck. The other co-accused also assaulted Bharat with weapons in their hands. However, in his cross-examination, he has admitted that in his statement recorded by police, he has not stated this material fact that the respondent assaulted deceased by means of sword on his head and neck. According to him, he has stated that the deceased was assaulted with gupti. However, neither sword nor gupti is recovered. He has also admitted in his cross-examination that he has disclosed the entire incident of

assault to the police in Central Hospital at Ulhasnagar, despite that his statement or his complaint is not recorded by the police. His statement is recorded on the next date of the incident. Further his cross-examination reveals that police had detained him for three days in respect of this incident. In view of these admissions on his part, his sole testimony cannot be relied upon to prove guilt of the respondent.

11. As regards assault on P.W.3 injured Ajay, he has attributed it to co-accused Bhupinder Singh. According to him after assault he has left the spot. Therefore, he has not stated anything about the assault on deceased and the names of other assailants. Further he has admitted in his cross-examination that he was not knowing the respondent nor the other co-accused before the incident. The Investigating Officer has not conducted test identification parade to prove identity of the respondent. Hence his evidence is also not helpful to the prosecution to prove it's case against the respondent.

12. Except for these three witnesses, no other eye witness is examined by prosecution and the evidence of these three witnesses is not helpful to the prosecution to prove its

case against respondent.

13. In our considered opinion, therefore, the view taken by the trial Court of acquitting respondent being the probable and possible view based on the evidence on record, no interference is warranted in the same. The appeal, therefore, stands dismissed. Bail Bonds of the respondent accused stands cancelled.

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