

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.698 OF 2005

Jitu Rama Chauhan,	]	
Age 25 Years, Occ.: Nil,	]	
R/of Gokuldhan, Indira Nagar,	]	 Appellant /
Near Neta Chavan, Film City Road,	]	(Original Accused
Goregaon (E), Bombay.	]	No.3)

Versus

State of Maharashtra	]	 Respondent
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ALONG WITH

CRIMINAL APPEAL NO.993 OF 2009

1. Rajesh Shrinivas Kuken	]	
Age : 29 Years,	]	
R/at Juhu Galli, Nagappa Chawl,	]	
Room No.383, Andheri (W), Mumbai-400058	]	
	]	
2. Babu Mohd. Hussain Shaikh Menda Babu	]	
Age : 30 Years,	]	
R/at Andheri Gamdevi Road,	]	 Appellants /
Behind Noor Masjid, Din Bin Bibi Ki Chawl,	]	(Original Accused
Bombay – 400 058.	]	Nos.1 and 2)

Versus

State of Maharashtra,		
Thru' D.N. Nagar Police Station, Mumbai	]	 Respondent

Ms. Rebecca Gonsalves for the Appellant in
Cr. Appeal No.698 of 2005.

None for the Appellants in Cr. Appeal No.993 of 2009.

Mr. H.J. Dedhia, A.P.P., for the Respondent/State.

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

DATE : 27TH MARCH, 2015.

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

1. The Appellants in both these Appeals stand convicted by the Additional Sessions Judge, Mumbai by Judgment dated 13th May, 2005 in Sessions Case Nos.664 of 2003 and 836 of 2004 for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced to suffer R.I. for life and to pay fine of Rs.10,000/- each, in default to undergo further R.I. for one year.

2. Facts, as are necessary, for deciding these Appeals can briefly be stated thus :-

On 13th June, 2003, while PW-12 PI Bhaurao Bhavale was on night duty at D.N. Nagar Police Station, PW-9 PSI Mahesh Punde, who was on duty as SHO, received a message around 12:25 am that on account of a

fight, some persons were injured at Gilbert Hill area and they were shifted to Cooper Hospital. PW-12 PI Bhavale, therefore, along with PW-9 PSI Punde, went to Cooper Hospital. There he found that injured Indrajit Surya was declared dead and his widow PW-1 Tabasum was present in the hospital. He recorded her statement in the hospital itself. PW-9 PSI Punde obtained C.R. No.190 of 2003 on phone from the Police Station and registered the offence.

3. PW-9 PSI Punde then made Inquest Panchanama (Exhibit-21) and seized blood stained clothes of the deceased under Panchanama (Exhibit-14). He referred the dead body for postmortem examination. Postmortem Report is at Exhibit-19. Thereafter, PW-9 PSI Punde visited the spot and made Scene of Offence Panchanama (Exhibit-17). From the spot, he seized blood stained pillow cover under Panchanama. He recorded statements of some of the witnesses and then on the next day, entrusted investigation to PW-12 PI Bhavale, who arrested Accused No.1-Rajesh and Accused No.2-Babu.

4. During the course of investigation, at the instance of Accused No.1-Rajesh, PW-12 PI Bhavale seized his blood stained clothes under Panchanama (Exhibit-21), whereas, at the instance of Accused No.2-Babu, the weapon of assault i.e. iron rod came to be seized under Panchanama (Exhibit-26). Seized muddemal articles were sent to

Chemical Analyzer and C.A. Report is produced at Exhibit-33. Further to completion of investigation, PW-12 PI Bhavale filed Charge-Sheet in the Court against Accused Nos.1 and 2. Later on, Accused No.3-Jitu came to be arrested by PW-11 API Avinash Dharmadhikari. During his interrogation, at his behest, on 2nd October, 2003, the weapon of assault i.e. sword came to be seized under Panchanama (Exhibit-30). He sent the said muddemal article to the Chemical Analyzer. The C.A. Report is at Exhibit-31. Further to completion of investigation against Accused No.3, PW-11 API Dharmadhikari filed Supplementary Charge-Sheet against him.

5. On both these cases being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-2. The Accused pleaded not guilty and claimed trial.

6. In support of its case, the Prosecution examined in all 12 witnesses, principally, placing reliance on the evidence of PW-1 Tabasum and her son PW-10 Master Sonu. The Trial Court, on appreciation of the evidence on record, held the guilt of the Accused to be proved beyond reasonable doubt and convicted and sentenced them, as aforesaid.

7. In these Appeals, we have heard submissions of learned Counsel for the Appellants and learned A.P.P. However, before advertng to their submissions, it would be useful to refer to the evidence on record.

8. To prove the homicidal death of Indrajit, Prosecution has produced on record the Inquest Panchanama (Exhibit-14) and Postmortem Report (Exhibit-25). Both the documents are admitted in evidence by the Defence Counsel under Section 294 of the Cr.P.C., thereby not disputing the cause of the death, which is *“haemorrhage and shock on account of multiple stab injuries”*, thereby proving that it was a homicidal death.

9. To prove the complicity of the Accused in the said offence, the Prosecution has relied on the evidence of two eye witnesses, namely, PW-1 Tabasum, the wife of the deceased, and PW-10 Master Sonu, a small child witness of 7 years. Coming first to the evidence of PW-1 Tabasum, she has deposed that the day before the incident, at about 10 pm, two boys, whom she has later identified as Accused No.1-Rajesh and Accused No.2-Babu, came to her house and threatened her husband to vacate the said premises within 24 hrs., otherwise to face dire consequences. Her husband told those two persons to approach the owner of the premises. On the following day, her husband lodged a complaint at Andheri Police Station about this incident.

10. As per her evidence, on the next day, at about 11:30 pm, when she was watching T.V. along with her husband and her son, there was knocking on the door. On enquiries, Accused No.1 threatened them to

open the door. As her husband did not open the door, all the Accused broken open the door and entered into the house. Accused No.1-Rajesh had chopper in his hand, Accused No.2-Babu had an iron rod in his hand and Accused No.3 had a small sword in his hand. They attacked her husband. When she tried to intervene, she was slapped and made to sit in a corner. They also caused damage to the T.V. and then left. Thereafter she has lodged the complaint Exhibit-9.

11. In evidence before the Court, she has stated that on 15th June, 2003, she was called at Police Station and shown Accused Nos.1 and 2. She identified them. Subsequently, she was also shown Accused No.3 in the Police Station, whom she identified.

12. In her examination-in-chief, she has identified all the three Accused. However, in cross-examination, she has given some fatal admissions by stating that due to darkness in the house, she was not able to see the faces of any of the assailants, who had come to her house on the night of the incident. She has further admitted that, *"it is true that under mistaken belief, I had identified the wrong persons before the Police. Whatever I deposed before the Court that Accused No.1 had a chopper in his hand, Accused No.2 had iron rod in his hand and Accused No.3 had small sword in his hand was deposed by me under mistaken belief"*. She has further admitted that she has not given the description of any of the

Accused before the Police at the time of lodging the complaint. Further, she has stated that the person whom she has referred to in examination-in-chief may not be Accused No.3, as she has not seen him earlier. Hence, she might have wrongly identified him. Further she has stated that the person who was holding sword in his hand is not Accused No.3-Jitu.

13. In view of her fatal admissions in cross-examination by Defence Counsel, learned A.P.P. was granted permission under Section 154 of the Evidence Act to put leading questions to her in the nature of cross-examination and here again she has stated that whatever she has deposed in her cross-examination by Defence Counsel was under mistaken belief and Accused are the same persons. Learned Defence Counsel was, therefore, given one more opportunity to cross-examine her. Again she has changed the version by stating that *"I maintain that on the day of incident, I was in a frightened state and had wrongly named the accused persons. It is true that while deposing in the Court, I wrongly identified Accused Nos.1 to 3. It is true that none of the Accused had come to my house and assaulted my husband"*. Thus, in view of her constantly changing the stands, her evidence is not of any help to the Prosecution to prove the identification of any of the Accused.

14. The Prosecution has, therefore, relied upon the evidence of PW-10 Master Sonu, the son of PW-1 Tabasum and deceased Indrajit. At the

outset itself, it has to be stated that at the time of recording his evidence in the Court in the year 2005, he was of the age of 7 years and, therefore, it follows that at the time of incident in the year 2003, he was hardly 5 years of age. In evidence before the Court, he has stated that his father was killed by the Accused in his presence with assault by knife and sword on his neck. However, in cross-examination, he has admitted that on the date of the incident, he was sleeping in the inner room. He has not seen the Accused prior to this incident. The incident has not taken place in his presence. He was told what to depose in the Court. He was pointed out the Accused in the Court the day before, when he had come to give evidence. He had not seen them earlier. Thus, his evidence is again of no use at all to the Prosecution to prove the identification of the Accused.

15. Except for PW-1 Tabasum and PW-10 Master Sonu, there is no other eye witness to the incident.

16. In such situation, in the absence of substantive evidence proving the identification of the Accused as the assailants, whatever corroborative evidence brought on record by the Prosecution about recovery of the weapons of assault is of no relevance at all. In our considered opinion, therefore, the impugned Judgment of the Trial Court convicting and sentencing the Appellants is required to be quashed and set aside and the Appellants deserve to be acquitted.

17. Consequently, both these Criminal Appeals are allowed and the conviction and sentence of the Appellants is hereby quashed and set aside and they are acquitted of the offences with which they were charged and convicted. Fine, if paid by them, be refunded to them. Bail Bonds of Accused No.2-Babu Mohd. Hussain Shaikh Menda Babu stands cancelled. Since the Appellant/Original Accused No.3-Jitu Rama Chauhan in Criminal Appeal No.698 of 2005 and Appellant No.1/Original Accused No.1-Rajesh Shrinivas Kuken in Criminal Appeal No.993 of 2009 are in Jail, they be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]