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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 145 OF 2014
WITH
CRIMINAL APPLICATION NO. 639 OF 2015
IN
CRIMINAL APPEAL NO. 145 OF 2014**

Balu Dattu Thakre ... Appellant/Applicant
vs.
The State of Maharashtra ... Respondent

Mr. Hitesh P. Shah, Advocate for the appellant/applicant.
Mrs. A.S. Pai, APP for the respondent/State.

**CORAM: MRS. V.K. TAHILRAMANI &
MRS. MRIDULA BHATKAR, JJ.**

JUNE 7 , 2016.

ORAL JUDGMENT (PER MRS. MRIDULA BHATKAR, J.)

This Appeal is directed against the judgment and order dated 31st May, 2004 passed by the Additional Sessions Judge, Phalghar in Sessions Case No. 77 of 2002. The appellant is convicted for the offences punishable under section 302 of the Indian Penal Code and is sentenced to undergo R.I. for life and pay fine of Rs.500/-, in default of fine to undergo further R.I. for three months.

2. It is the case of the prosecution that the incident of murder has taken place on 22nd March, 2002. The appellant/accused and deceased are the residents of Village Manikpur. The appellant/accused was having illicit relationship with one lady named Shilu. Few days prior to the incident, the appellant/accused and Shilu had quarrel , so she left the house and went to her village. The deceased Motiram Mali went to the house of Shilu and brought her back. She started residing with Motiram in her house 2 to 3 days prior to the incident. Rama Motiram Mali, wife of deceased Motiram, is informant in this case. She was working in one plastic company. Shilu's stay with Motiram was not liked by the appellant/accused, therefore, he held animus against the deceased. On 22nd March, 2002, Motiram visited the house of his sister, who was the mother of Kunda (PW-4). Kunda and Avinash (PW-3) were the children of his sister. At around 1.30 to 2 p.m. Avinash returned home from school for lunch and went out to answer nature call, at that time, Vaibhav (PW-6), husband of Kunda (PW-4) was in the house alongwith Motiram. The appellant/accused, the neighbour of Kunda, who entered the house with axe and assaulted deceased Motiram on his head and throat. Rama Motiram Mali was in the company at around 2.15 p.m., Her nephew Avinash came to the company and told her that

accused had assaulted her husband. So she went to the house of Kunda, niece of Rama and real sister of Avinash and saw the body of her husband in the pool of blood. She shifted him to the hospital and was declared dead. Rama gave information to Manikpur Police Station and the offence was registered on the same day at C.R. No. 100 of 2002. The postmortem was conducted on the same day by Dr. Dongre (PW-2). The police drew spot panchnama, recorded statements of the witnesses and arrested the accused. They recovered axe at the instance of the accused and drew panchnama under section 27 of the Evidence Act. After completion of the investigation, police filed charge in the Court of Magistrate and the learned Magistrate committed the case to the Court of Sessions.

3. The charge of murder was framed against the appellant for the offences punishable under section 302 of IPC. The appellant pleaded not guilty and defended the case that he was innocent. The prosecution adduced oral as well as documentary evidence by examining 7 witnesses. The learned Sessions Judge after considering the evidence of the prosecution and the defence adopted by the accused held the accused guilty for the offence of murder and sentenced him for life. Hence, this appeal.

4. The learned counsel for the appellant/accused has submitted that the appellant/accused is innocent. There is no sufficient evidence to hold the accused guilty. The learned counsel argued that PW-4 Kunda Mhatre and PW-6 Vaibhav Mhatre did not support the case of the prosecution but the case stands only on the weak evidence of PW-3 Avinash Laxman Thakre, who is a child witness. He submitted that the learned Sessions Judge has erred in believing the evidence of PW-3 Avinash on the point of incident. He submitted that the Avinash has not seen the actual incident. He is not an eye witness. His evidence appears doubtful. He further submitted that the prosecution has tendered evidence of pancha PW-5 Sanjay Prabhakar Sawant to prove the recovery of the axe and towel. He relied on the cross-examination of the panch PW-5 Mr. Sanjay Prabhakar Sawant. Though he had said that axe was recovered at the instance of accused on 28th March, 2002, the said recovery is to be disbelieved, as pancha in the cross-examination has given admission that he has signed number of panchnamas and he has acted as pancha in false and fake currency note cases. The learned counsel further submitted that the panchnama (Exhibit 26) is a manipulated document and no weightage is to be given to the recovery of axe (Article 4). Therefore, it is a case of acquittal and the Appeal is to be

allowed.

5. The learned APP while opposing the appeal has supported the judgment and order passed by the learned Additional Sessions Judge. She argued that the evidence of PW-3 Avinash is reliable. He has maintained his version about the presence of the accused where the dead body of Motiram was lying. He has also stated that the appellant/accused was trying to conceal the axe in the house and told him that he should not disclose this fact to anybody. Learned APP further argued that the axe (Article 4) was identified by PW-3 Avinash. She submitted that the evidence of panch PW-5 Sanjay Sawant is to be believed. There is recovery of axe at the instance of the appellant. Hence, the Appeal is to be dismissed.

6. We have carefully perused the evidence produced by the prosecution. So far as the evidence is concerned, this case stands on the circumstantial evidence. It is to be noted that the prosecution could not prove the evidence of eye witness PW-6 Vaibhav Mhatre who did not support the case of the prosecution. He turned hostile and therefore he was cross-

examined by the prosecution during the trial. Therefore, the case entirely stands on the circumstantial evidence as it is recorded and produced before the Court. PW-3 Avinash is a star witness in the present case. His evidence is recorded on 26th December, 2003 and the incident has taken place on 22nd March, 2002, i.e., nearly 1 ½ year. At the time of recording of evidence, he was 14 years old. Thus, he was nearly 12 ½ years old when the incident took place. Avinash is a real brother of Kunda Mhatre. At the relevant time, Kunda along with her husband Vaibhav (PW-6) was residing in the house of her parents. Kunda has deposed accordingly and has also stated that appellant Balu Dattu Thakre is residing by the side of her parents house. Thus, the accused was neighbour of Avinash. At the relevant time, Avinash was school going boy. He used to come home in the recess for lunch everyday. On 22nd March, 2002, at around 2 p.m. he came home to take meal during the recess. He has stated that at that time, his sister Kunda, her husband Vaibhav and uncle Motiram (Deceased) were present in the house. Thereafter he went out to answer nature call and when he came back, he saw his uncle Motiram was lying in the courtyard of their house in pool of blood. He saw accused in the house who was trying to conceal the axe. Avinash has deposed that when appellant saw

him, he told him not to disclose this fact to anybody. It is true that Avinash has made a specific statement in his examination-in-chief that he has not seen the assailant who assaulted his maternal uncle, however, in the cross-examination he maintained his evidence that when he returned from school, appellant was present in the house. Thus, evidence of PW-3 on certain material points is supported with the evidence of other two witnesses, i.e., PW-4 Kunda and PW-6 Vaibhav. It is a settled position of law that the evidence of hostile witness, can be considered to the extent of what he has said in the examination-in-chief for the purpose of corroboration. Kunda has deposed that she was staying with her parents. Her brother Avinash used to come to house for lunch during recess, as he was studying in Ashram school. The incident has taken place at 2 p.m.. She has stated that her uncle Motiram Mali had come to her house. PW-6 Vaibhav has deposed that the accused is paternal uncle of his wife and he was staying earlier with one Shilu. He further stated that when he came home along with his wife Kunda at 2 p.m. he saw Motiram was lying dead in their house. Thus, the evidence of these two witnesses support the evidence of PW-3 Avinash on material points, i.e., Motiram was present in their house. The incident took place at 2 p.m. The presence of Avinash was natural as he used to

come for lunch. It can be inferred from the evidence of PW-3 Avinash that when he came home, Motiram was alive, however, when he went out to answer nature call, at that time also Motiram was alive and when he returned, he found Motiram was lying injured and accused holding axe was in the house. Though the evidence of Avinash is completely silent on the presence of PW-4 Kunda and PW-6 Vaibhav at the relevant time, the truthfulness of his evidence cannot be doubted, as there is no improvement or contradiction in his evidence. As argued by learned APP, in the cross-examination, his evidence remained unshaken.

7. It is to be noted that appellant is the paternal uncle of PW-4 Kunda and therefore, PW-4 and her husband Vaibhav (PW-6) did not want to speak against the accused . So, they did not support the case of the prosecution. If witness does not want to support the prosecution and if the prosecution is in a position to give a satisfactory reason for the refusal to stand by his version in the statement recorded under section 161 of Cr. P.C., then it is necessary for the Court while analyzing the circumstances to take into account the said reason and then weigh the evidence of other witness and those hostile witnesses. Thus, the fact that PW-4 Kunda and PW-6

Vaibhav did not support the prosecution is not unnatural, therefore, their refusal to support the case of the prosecution could not imbalance the evidence of PW-3 Avinash.

8. PW-3 Avinash was a child witness, however, he was not so young who do not understand much. He was a boy of 12 ½ years old. His presence was the matter of his routine. He did not claim that he saw the actual assault. Thus, it shows that the witness did not want to exaggerate the facts. He put the facts as he saw and perceived by him. A fact that Motiram had visited the house of his niece Kunda and he was alive when Avinash went out, is brought on record. When he returned, he saw his maternal uncle Motiram lying in a pool of blood and the appellant was standing with axe. The appellant was staying in the neighbouring house of Kunda. Therefore, the spot where the incident has taken place was very much accessible to the appellant. In village, axe, sickle are routinely found in the house, as these articles are used for the agricultural purpose. Therefore, the appellant with axe would not have been something abnormal. However, the fact that the appellant/accused was standing with axe where Motiram was lying in a pool of blood and he tried to hide the

axe are very important connecting circumstances. He also warned PW-3 Avinash that he should not disclose this to anybody. This is a concrete and sufficient circumstances which establishes nexus between the accused and the offence. We do not find any reason to disbelieve the evidence of PW-3 Avinash, who is a child witness. We do not find any exaggerated or false statement in his evidence and he has no vested interest in the incident.

9. PW-1 Rama Motiram Mali, wife of deceased Motiram, is the first informant. She has stated that her husband has brought Shilu from her village and she was staying with him 3 days prior to the incident and she told Shilu that she must leave the house. She has stated that the accused used to threaten her husband, as Shilu was staying in their house. She has stated that at about 2.15 p.m., when she was at her work place, Avinash PW-3 came there and told her that accused had assaulted her husband and when she went she saw her husband lying in a pool of blood in the courtyard of house of Kunda. Though she has admitted in the cross-examination that the accused did not threaten him in her presence but her husband had told her about the threats. Avinash has not stated in the evidence that he went to plastic company and told Rama that accused has

assaulted her husband. The statement made by Rama that she was informed by Avinash that accused assaulted her husband cannot be given weightage. Only on the point that she received information of assault from Avinash is material which corroborates the presence of Avinash immediately after the incident. Thus, it fortifies evidence of Avinash. Her evidence proves motive behind the murder.

10. PW-2 Soham Dyandeo Dongre is a medical officer who performed postmortem on 22nd March, 2002, i.e., on the day of assault. He found three external injuries on the body of Motiram. As per the evidence and as per the postmortem notes (Exhibit 16), one wound was found in the inner side front neck and other was on the head. He deposed that according to him the cause of death of the deceased is due to cerebral hemorrhage due to fracture of skull due to bleeding of neck because of hard sharp object. As the report shows that skull was fractured and he was bleeding from neck injury, this shows that the accused mounted assault on vital part of Motiram, i.e., skull and neck which manifest intention to kill the deceased.

11. PW-5 Sanjay Prabhakar Sawant is a panch, who has stated that axe,

which was kept under the leaves and hay, was recovered on 28th March, 2002 and panchnama is marked as Exhibit 26. It is true that in the cross-examination, panch gave admission that he has signed number of panchnamas. He has acted panch in many cases. Other panch Jitendra and he together have acted in number of panchnamas in the said police station. The submission of learned counsel for the appellant are accepted that he was a panch, however, there is nothing on record to show that the panch was having any criminal record and he is not a person of disrepute. It is to be noted that sometimes in cases it is difficult for the police to get panch, as people refuse to take part in the police investigation and judicial proceedings. The persons who are available and who understand their responsibility to come forward and participate in the judicial process are called as panch. Unless there is a criminal record or unless it shows that evidence of panch is doubtful due to his misdeeds, then only it is to be discarded. However, apart from recovery panchnama, evidence of PW-3 and other occural and medical evidence as discussed above though is short but sufficient. Therefore, we are of the view that it is not a case where the judgment of the trial Court is to be disturbed. We maintain the conviction and dismiss the Appeal.

12. Criminal Application No. 639 of 2015 filed by the appellant for speedy trial is disposed of, as it has become infructuous.

13. Office to communicate this order to the concerned jail authorities and to the appellant, who is in jail.

(MRS. MRIDULA BHATKAR,J.) (MRS. V.K. TAHILRAMANI, J.)