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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.653 OF 2009.

1. Jivya Dharma Chothe	]
age: 35 years,	]
2. Lakshi Arjun Mirka	] <u>Appellants</u>
age: 30 years,	] (Original
	] Accused Nos
Both residing at Gadchichala Sherpada	] 1 & 2)
Tal. Dahanu, Dist.Thane	]

V/s.

The State of Maharashtra	]
At the instance of Kasa Police Station	].... Respondent
District Thane	]

ALONGWITH
CRIMINAL WRIT PETITION NO.628 OF 2010

1. Jivya Dharma Chothe	]
age: 35 years,	]
2. Lakshi Arjun Mirka	] Petitioners
age: 30 years,	] (Original
	] Accused Nos
Both residing at Gadchichala Sherpada	] 1 & 2)
Tal. Dahanu, Dist.Thane	]

V/s.

The State of Maharashtra	]
At the instance of Kasa Police Station	].... Respondent
District Thane	]

Ms. Rupali Manik Shinde, appointed advocate for the Appellants and for petitioners.

Mrs. V. R.Bhosale, APP for the State.

CORAM : SMT. V. K. TAHILRAMANI, ACTING C.J. & DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 3RD FEBRUARY 2016.

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

1. The appellants, who are original accused Nos 1 and 2 in Sessions Case No.923 of 1996, stand convicted for the offence punishable under Section 302 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- each in default to suffer rigorous imprisonment for six months, by judgment and order dated 5.9.2008 of Additional Sessions Judge, Palghar. By the impugned judgment, they are also convicted for the offence punishable under Section 324 read with 34 of the Indian Penal Code. However, no separate sentence is passed for the said offence.

2. Being aggrieved by the said judgment and order, the appellants

have preferred this appeal challenging their conviction and sentence. A separate Writ Petition No.628 of 2010 is preferred by them seeking relief of set off under Section 428 of the Code of Criminal Procedure, which is not granted by the trial Court, on the ground that punishment imposed on them is of life imprisonment.

2. Brief facts of the appeal and writ petition can be stated as follows :-

P.W.1 Kakad was resident of Jambhachya Pada. His brothers P.W.3 Lakhma, Dhanaji and Mahadu, since deceased, were residing separately, in the same locality. His sister Tulsabai was married to P.W.8 Dharma, who was also residing nearby. It is alleged that two months prior to the date of incident, wife of Dharma's brother Navsha, died due to illness. But Navsha believed that she was killed due to black magic practised by Tulsabai, the sister of P.W.1 Kakad. On account of that, there was dispute between P.W.8 Dharma and his brother Navsha. To avoid further dispute, Dharma and his wife shifted to village Jambhyacha pada. P. W. 1 Kakad and his brothers allowed Dharma to construct his house adjacent to their house.

3. The incident giving rise to this case took place on 13.2.1996. On that day at about 6.00 p.m. P.W.1 Kakad heard shouts of his brother Mahadu to save him as he was being assaulted. P.W.1 Kakad, therefore, rushed to the spot. On the way, he met P.W.8 Dharma, who had several injuries on his hand. On enquiry with Dharma, he informed P. W.1Kakad that he was assaulted with iron bar by appellant Nos. 1 and 2. When P.W.1 Kakad reached to the spot which was near to his house, in Shetpada, he found that appellant Nos. 1 and 2 were inflicting blows of iron bars on the head, neck and legs of his brothers Mahadu and Dhanaji. Mahadu had become unconscious due to the assault. Dhanaji also due to assault became unconscious. When P.W.1 Kakad tried to intervene in the incident, he was also assaulted and hence sustained injury on his leg. P.W.2 Lakhma also rushed to the spot hearing shouts and commotion. He rescued P.W.1 Kakad from the clutches of the appellants. P.W.4 Tulshi who had also rushed there, intervened in the scuffle and snatched away iron bar from the hands of appellant No.1. Both the appellants ran away from the spot of incident. Dhanaji died on the spot whereas Mahadu died on the next day in the morning.

4. As at night there was no conveyance facility to reach police station from Jambhyacha Pada, the incident was reported to the police by P.W.1 Kakad, on the next day early in the morning. On his complaint (Exh.32), the offence was registered. During the course of investigation, the spot panchnama (Exh.35) was made in the presence of P.W.2 panch, Balu Kharpade. From the spot blood stained soil, two iron bars, one wooden stick and hammer came to be seized under panchnama Exh.36. As a part of further investigation, statements of witnesses were recorded, inquest panchamas were made on the dead bodies of Mahadu and Dahanaji, both the dead bodies were sent to postmortem examinations. On the receipt of postmortem reports and further to completion of investigation, chargesheet was filed in the court against the appellants and co-accused No.3 Soma, who as per prosecution, case was carrying stick with him and has also participated in the assault.

5. On committal of the case to the Sessions Court, trial Court framed charge (Exh.13). The appellants pleaded not guilty and claimed to be tried, raising the defence of denial and false implication. In support of its case, prosecution examined in all 10 witnesses and on appreciation of

their evidence, trial Court was pleased to convict and sentence appellant Nos 1 & 2, as referred above, whereas acquitted co-accused No.3 Soma.

6. Being aggrieved thereby, this appeal and Writ Petition, are preferred by the appellants. In these matters, we have heard learned counsel for the appellants and learned APP. In our considered opinion before adverting to rival submissions advanced by them, it would be useful to refer to the evidence on record.

7. Prosecution case against appellants stands on the evidence of four eye witnesses whose evidence, we find to be thoroughly consistent, reliable and sufficient to inspire confidence in the judicial mind. Out of them, P.W.1 Kakad, P.W.3 Lakhma are the real brothers of deceased Mahadu and Dhanaji. As per evidence of P.W.1 Kakad, on hearing shouts for help from his brother Mahadu, he rushed towards the spot of incident which was at Shetpada, near their house. On the way he met P.W.8 Dharma, who had injury on his hand. On enquiry with Dharma, he informed that the said injury was caused to him by appellant Nos. 1 and 2 with iron bar. According to evidence of P.W.1 Kakad, he went ahead and found that appellant Nos. 1 and 2 were assaulting his brothers Mahadu and Dhanaji

with iron bar on their head, neck and legs. When he tried to intervene, he was also assaulted by Appellants and sustained injuries on the left side of his eye, cheek, chin. When his brother P.W.3 Lakhma came there, he was also assaulted with stone and sustained injury on his leg. Meanwhile P.W.4 Tulshi and others came there. P.W.4 Tulshi snatched iron bar from the hands of appellant No.1. Then appellants ran away from the spot. However, by that time both Mahadu and Dhanaji had become severely injured. Dhanaji died on the spot whereas; Mahadu succumbed to the injuries on the next day in the morning.

8. This evidence of P.W.1 Kakad gets complete support and corroboration from the evidence of P.W.3 Lakhma and P.W.4 Tulshi, who had rushed to the spot alongwith Kakad and had witnessed the incident. There is also evidence of P.W.5 Lahnya, who is an eye witness to the incident as he has also rushed to the spot on hearing commotion. He has also deposed about appellant Nos. 1 and 2 assaulting deceased Mahadu and Dhanaji with iron bars and P.W.1 Kakad and P.W.3 Lakhma intervening in the assault.

9. This oral evidence of four eye witnesses further gets

corroboration from the medical evidence of P.W.10 Dr. Laxman Kalangada, who was attached to Primary Health Centre at Chinchani and has conducted postmortem examination on the dead bodies of Dhanaji and Mahadu.

10. On examination of the dead body of Dhanaji, he found following external injuries, which he has noted in column No.17 of postmortem (Exh.68).

- ➔ C.L.W. over right parietal region 3" x ½" scalp deep.
Transversely
- ➔ C.L.W. just near right ear pinna 1" x ½"
- ➔ C.L.W. over left parietal region 2" x 2" scalp deep, vertically.
- ➔ Deep abrasion over left shoulder.

On internal examination, he found following injuries.

- ➔ Fracture of right parietal bone and laceration over right parietal bone.
- ➔ Fracture of right parietal bone and laceration over right parietal lobe,.
- ➔ Laceration over right parietal lobe.

According to him these injuries were of fatal nature and the cause of Dhanaji's death was Cardio respiratory failure due to sub dural and intra cerebral haemorrhage due to head injury over right parietal bone.

11. On examination of the dead body of Mahadu, he found

following external injuries, which he has noted in column No.17 of postmortem (Exh.69).

- ➔ C.L.W. over left parietal region 1" x ½" scalp transversely
- ➔ Deep abrasions over left shoulder.
- ➔ Deep abrasions over left shoulder.
- ➔ Multiple minor abrasions on left knee side.
- ➔ Minor abrasion on lower back left side.
- ➔ Contusion over right parietal region.

On internal examination, he found following injuries.

- ➔ Fracture of right parietal bone
- ➔ Fracture of left parietal bone.

According to him, the cause of Mahadu's death was Cardio respiratory failure due to sub dural and intra cerebral haemorrhage due to head injury over right parietal bone.

12. In his opinion, the injuries found on the dead bodies of Dhanaji and Mahadu are possible by hard and blunt object like iron rod.

13. As regards injuries sustained by P.W.1 Kakad, the prosecution has led evidence of P.W.9 Dr. Hirve, who has examined Kakad on

14.2.1996 and found following injuries which are noted in injury certificate Exh.59.

- ➔ C.L.W. over left ziaomatic region 1” x ½ cm muscle deep transversely.
- ➔ Minor abrasions over right calf muscles.

14. According to him, injuries were caused by hard and blunt object. Though suggestion was put to him in cross examination that injuries caused to P.W.1 Kakad may be self inflicted, no such suggestion is given to P.W.1 Kakad in his evidence before the Court.

15. Further corroboration to the case of prosecution is coming from the evidence of P.W.2 panch Balu Kharpade, in whose presence scene of offence panchnama was drawn. According to him, two iron bars, one wooden stick and hammer were found lying on the spot of incident alongwith the dead bodies of Dhanaji and Mahadu.

16. Though prosecution has also examined two more eye witnesses, viz P.W.6 Arjun and P.W.8 Dharma, they have not supported the prosecution and hence declared hostile. However, in our considered opinion, the evidence of the four eye witnesses referred above, which is supported and corroborated with the medical evidence, and circumstantial

evidence is more than sufficient to prove the guilt of the appellant Nos 1 and 2.

17. Learned counsel for the appellants has, however, challenged the case of prosecution, mainly on two grounds. Firstly, it is submitted that there is delay in lodging the complaint as the incident has taken place on 13.2.2006 at about 6 to 7.00 p.m.; whereas F.I.R. Exh.32 is lodged on the next day at about 10.00 a.m. However, in our considered opinion, the cause for delay in lodging F.I.R. is mentioned in the complaint and also in the evidence of P.W.1. Kakad. It is deposed by him that there was no conveyance facility available to reach nearby Kasa Police Station at night and therefore, he went there on the next date. It is pertinent to note that even necessary medical help also could not be given to Mahadu for want of sufficient means of conveyance. As a result, he succumbed to injuries sustained in the assault on the next day morning. When admittedly Jambhyacha Pada and the Shetpada where the incident took place is far away from the locality, being a tribal area, delay of few hours caused in lodging the F.I.R. cannot become fatal, in the light of the evidence that there was no means of conveyance at night.

18. The next ground on which prosecution case is challenged is for non examination of Investigating Officer. It is urged that there are discrepancies in the evidence of prosecution witnesses. Moreover, two prosecution witnesses, namely P.W.6 Arjun and P.W.8 Dharma, are declared hostile and hence examination of Investigating Officer was essential. According to learned counsel for appellants, non examination of Investigating Officer, has resulted into failure of justice. However, we are not inclined to accept this submission because in each and every case non examination of Investigating Officer does not result into causing prejudice to the accused or result into failure of justice. Each case has to be decided on its own merits. In the instant case, whatever discrepancies are pointed from the evidence of eye witnesses are so minor that they need to be ignored, as they do not affect the credibility and the core version of the incident as given by them. These discrepancies instead of demolishing the prosecution case give an inbuilt guarantee of the truthfulness of witnesses and therefore, examination of investigation officer was not necessary to prove these discrepancies.

19. As regards evidence of hostile witnesses namely P.W.6 Arjun

and P.W.8 Dharam, even if it is excluded from consideration as done by the trial Court and this Court, it does not affect the merits of prosecution case. Therefore, non examination of Investigating Officer in the instant case is not having any adverse effect on the fate of the case or it does not cause any prejudice to the appellants.

20. In consequence, on appreciation of entire evidence on record, we find that the prosecution has succeeded in proving its case against appellant Nos 1 and 2 beyond reasonable doubt. Hence their conviction for the offences punishable under Sections 302 and 324 read with 34 of the Indian Penal Code, as recorded by the trial Court does not call any interference. The appeal, therefore, needs to be dismissed.

21. As regards Writ Petition preferred by the appellants, we find merit therein as the trial Court has denied them the benefit of set off under Section 428 of the Code of Criminal Procedure, only on the ground that sentence imposed on them is of life imprisonment, which is not the correct legal position. Section 428 of the Code of Criminal Procedure does not exclude convicts sentenced to life imprisonment from getting benefit of set off. For ready reference provisions of Section 428 of the Code, can be

reproduced as follows :-

“428. Period of detention undergone by the accused to be set off against the sentence of imprisonment:- Where an accused person has, on conviction, been sentenced to imprisonment for a term [not being imprisonment in default of payment of fine] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him”.

The Proviso to the said Section added by an Amendment Act, 2005, makes the position further clear by stipulating as follows:-

“Provided that in cases referred to section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section”.

22. In view of this legal position, we hold that the appellants are entitled to the benefit of set off for the period which they have undergone in

jail since the date of their arrest on 14.2.1996.

23. To sum up therefore, Appeal stands dismissed.

24. Criminal Writ Petition is allowed. The appellant Nos. 1 and 2 are entitled to the set off for the period already undergone by them in jail since 14.2.1996.

25. Fees payable to the Legal Aid Counsel, are quantified at Rs.5,000/-.

[ACTING CHIEF JUSTICE.]

[DR. SHALINI PHANSALKAR-JOSHI, J.]

C E R T I F I C A T E

Certified to be true and correct copy of the
original signed judgment.