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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 250 OF 2009

Mohd. Sattarul Najrul Mulla
r/o. Uttar, 24, Pargan,
Thana Bashirhat, Gam Devak,
West Bengal.

(Presently lodged in Arthur Road Jail)

... Appellant

vs.

The State of Maharashtra

... Respondent

Mr. K.M. Sangani, Advocate for the appellant.

Mrs. A.S. Pai, APP for the respondent/State.

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

JULY 14, 2016.

JUDGMENT (Per Mrs. Mridula Bhatkar, J.)

This Appeal is directed against the judgment and order dated 10th February, 2009 passed by learned Sessions Judge, City Civil & Sessions Court, Greater Mumbai thereby convicting the appellant/accused for the offences punishable under section 302 r/w. 34 of the Indian Penal Code and is sentenced to suffer imprisonment for life and to pay fine of Rs.500/-, in default further to suffer R.I. for 15 days.

2. The case of the prosecution is as follows:

Complainant Rashid Gazi Ahmed Gazi was resident of Shivajinagar, Govandi, Mumbai. He was having the business of cloth cover. His nephew Ayub and his real brother Wahid used to help him in the business. He had employed two workers, i.e., appellant/accused Mohd. Sattarul and co-accused Rana Mulla. They all used to sleep in the shop. The incident of assault has taken place on the night intervening 12th August, 2007 and 13th August, 2007. On 12th August, 2007, deceased Wahid had collected money of Rs.4,000/- from the party of which the appellant and other accused had knowledge. However, on the same night, Wahid handed over the said amount to his brother, i.e., complainant, which fact was not known to the accused. On 12th August, 2007, the accused, Wahid and Ayub were sleeping in the shop. In the morning, when complainant arrived at the shop, he was surprised to see that the shop was not opened and the door was not locked from inside, so he shouted but nobody responded. When he went inside, he found Ayub was sleeping and one person was covered in bed cover. When he took out the cover, he noticed his brother Wahid had sustained injury on his neck. He was lying in pool of blood and was dead. His servants, i.e., appellant/accused and other accused were not in the shop.

He woke up his nephew, who was not aware what happened on that night and how Wahid was killed. Thereafter he went to police station and gave information to the police, pursuant to which FIR was lodged at C.R. No. 272 of 2007 with Shivajinagar Police Station. The police conducted inquest and spot panchnama. They found axe lying on the spot. The postmortem was conducted on the body of Wahid. After investigation, the police arrested the appellant and other accused. At the instance of co-accused Rana, who was juvenile in conflict with law, a shop from where the axe was purchased and the said shopkeeper were traced. So also the other shop where the blade of the axe was sharpened was also traced. The police drew panchnama to that effect. The clothes of the appellant/accused were also seized and sent for chemical analysis. The human blood was found in the clothes and on the blade of the axe. After completion of the investigation, the police filed charge-sheet in the Magistrate court. Thereafter the matter was committed to the Sessions Court. The learned Sessions Judge framed charge. The accused pleaded not guilty, as they were not present in the room when the incident has taken place and that they are innocent and not committed any offence. The learned trial Judge rejected the said defence and after appreciating the evidence of the

prosecution, convicted accused no. 1 as mentioned above. Accused no. 2, being juvenile, was not tried before the learned Sessions Judge. Hence, this Appeal.

3. The case of the prosecution is entirely based on circumstantial evidence. The prosecution has examined total 12 witnesses. PW-1 Rashid Gazi Ahmed Gazi is a complainant who gave FIR which is marked as Exhibit 9. PW-2 Khan Altaf Atta Hussain Pathan, who is panch for the panchnama of the shop from where the axe was purchased (Exhibit 30) and also recovery of blood stains clothes (Exhibit 33). PW-3 Munir Abdul Jabbar Shaikh is a shopkeeper from where the axe was purchased. PW-4 Pawankumar Siyaram Vishwakarma is a shopkeeper from where the blade of the axe was sharpened. PW-5 Ayofar Gazi, PW-6 Shaikh Mastan Ali Abdul Sattar is panch of inquest panchnama (Exhibit 18) and spot panchnama (Exhibit 19), PW-7 Dr. Pravin Sakharam Bagul who carried out postmortem, PW-8 Madhukar Pralhad Bage, Metropolitan Magistrate, who recorded statement of juvenile accused Rana @ Samir on 18th October, 2007 under section 164 of Cr. P.C. PW-9 Santosh Dnyaneshwar Bhandara, P.I. attached to Shivaji Nagar Police Station, PW-10 David Dadu Alhat,

P.S.I. who recorded FIR of PW-1, PW-11 Sunil Rajaram Ghosalkar, P.S.I., Crime Branch. Thane where panchnama of purchase of axe and sharpening of blade of axe was drawn and who called panchas. PW-12 Sharad Nilkanth Shalu is a finger print expert.

4. The learned counsel Mr. Sangani for the appellant took us to the entire evidence of all the witnesses. He has argued that the evidence of PW-1 Rashid Gazi and PW-5 Ayofar Gazi are full of inconsistencies. There are material omissions in the evidence of PW-1 Rashid Gazi, if his evidence is compared with the evidence of PW-10 David Dadu, P.S.I., who recorded the FIR. He submitted that the evidence of PW-2 Khan Altaf Pathan cannot be relied in respect of blood stained clothes on this appellant/accused, i.e., recovery of lungi and red T-shirt. He submitted that in the evidence of PW-5 Ayofar Gazi, witness has stated that police had taken one red T-shirt and lungi from the house , thus there is no such recovery of the clothes. He further submitted that the said panchnama of PW-2 Khan Altaf and subsequent witnesses PW-3 Munir Shaikh and PW-4 Pawankumar cannot be relied because none of the two shops were already known to the shops. He relied on paragraph 9 of the cross-examination of

PW-9 P.I. Santosh Bhandare. He relied on the admission given by him that his predecessor had information about the two shops from where the axe was purchased and from where the blade was sharpened. He further submitted that as per the case of PW-1 Rashid Gazi, Ayub was sleeping in the shop, however, he is not examined as a witness. He further submitted that the evidence of finger expert PW-12 Sharad Shalu is not carried, as the evidence of alleged chance print of accused no. 1 is false. He further submitted that the learned trial Judge ought not to have believed the evidence of these witnesses and hence the judgment of conviction is to be set aside and the Appeal be allowed.

5. Learned APP opposed this Appeal and supported the judgment of the learned trial Judge. She relied on the medical report, postmortem and evidence of doctor that Wahid was murdered on the night of 12th August, 2007 and from the evidence of PW-1 Rashid Gazi and PW-5 Ayofar Gazi it is proved that on that night accused was sleeping in the said room.

6. This case stands on the circumstances. Nobody has seen the actual assault on Wahid. As per the case of the prosecution, on that night four

persons were sleeping in the said shop. Two accused persons were absconding from that day and fourth one was Ayub, who is nephew of the complainant. As per the evidence of PW-1 Rashid had seen all the four persons at 10.30 p.m. on the night of 12th August, 2007. On the next morning at 8 a.m., when he went to shop, he found the door was not locked, so he pushed it and went inside the shop. He noticed the dead body of his brother Wahid. Ayub was sleeping but the two accused persons were not present. When he woke up Ayub, he informed that he knew nothing as to what happened. However, he being there, his evidence was necessary on the point whether accused were present till he and Wahid slept. He is not examined by the prosecution. He should have been examined on the point that whether accused persons were present till he and Wahid Slept on that night. The accused were not found in the morning and Wahid was found injured and dead, this circumstance goes against the accused and it can be easily guessed that they must have assaulted the deceased and so they left the premises. However, such inference of a common man is not acceptable in law, as all the circumstances should be unimpeachable and no room should be left for doubt that accused might not have committed this crime.

7. Let us advert to the main evidence of the prosecution, i.e., panchnama (Exhibits 30 and 33) and evidence of three main witnesses PW-2, PW-3 and PW-4. PW-3 deposed that he has acted as panch and he was called by the police. In his presence, the police asked the juvenile accused, i.e. Rana from where axe was purchased, at that time, he told that he would show the shop from where the axe was purchased and then he took panch and police to the shop of PW-3 Munir Shaikh. Thereafter he also took them to the shop of PW-4 Pawankumar who sharpened the blade of the axe. The way the police have investigated this case and the manner in which the evidence is brought before the Court is in fact inadmissible and cannot be relied. This is not the voluntary statement of the accused. The accused showed the shop and the shopkeeper PW-3. However, it is not a recovery of any article. A shopkeeper cannot be a recovered, thus it is hit under section 161 of Cr. P.C. or under section 25 of the Evidence Act which is not admissible in the evidence. PW-3 and PW-4 before the Court have stated that they have identified accused no. 2 as a person who has come to their respective shops and purchased the axe and got the blade sharpened. However, it is to be noted that PW-3 has admitted the fact that the police often visit his shop for making enquiry regarding stolen articles

and due to the nature of the business, he is required to keep good relations with the police. Thus the evidence of these two witnesses are not reliable. At the time of spot panchnama, axe was found at the spot and it was seized by the police. It was blood stained but the recovery of red T-shirt and lungi is found doubtful as PW-5 Ayofar Gazi has stated that police at the time of spot panchnama took one red T- shirt and lungi and same was shown as clothes recovered. The report of chemical analyzer discloses that there was a human blood. The blood group was found inconclusive.

8. PW-12 Sharad Shalu is finger print expert. We do not find it worth to consider his evidence. As per the case of the Investigating officer a bottle and glass was found at the time of spot panchnama and one chance finger print was found on the glass and the finger print expert gave report that it was finger print of accused no. 1. This is not an incriminating circumstance against this appellant/accused, as this accused was admittedly staying in the same room, so finding of his finger print on the articles in the room was natural.

9. Thus, the circumstantial evidence produced by the prosecution does

not establish a complete chain of circumstances. There are many loop holes and we are of the view that prosecution has failed to prove the case against the accused and hence we set aside the judgment and order of conviction under section 302 r/w. 34 against the appellant/accused and allow this Appeal.

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