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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.367 OF 2009

Mohd Sharif Mehboob Badshakhan	]
age: 45 years, Indian inhabitant	].. <u>Appellant</u>
Residing at Haji Chawl, Jogeshwar	] (Original
(East) Mumbai 400 060	] accused.
	] No.1

V/s.

The State of Maharashtra	]
At the instance of Meghwadi Police Station	] .. Respondent
Mumbai	]

Mr. C. K. Talekar, for the Appellant.
Mr. A. S. Shitole, APP for the Respondent-State.

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

DATE : 12TH FEBRUARY 2016.

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

1. The appellant, who stands convicted by the judgment and order dated 31.01.2009, of Additional Sessions Judge, Greater Bombay in Sessions Case No.230 of 1999, for the

offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer rigorous imprisonment for one month, by this appeal challenges his conviction and sentence.

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

On 22.11.1998, in the afternoon at 12.30 p.m. while P.W.1 Gausbee Shaikh was chitchatting alongwith her mother, P.W.2 Fatimabee and her sister-in-law P.W.3 Tajbano, present appellant alongwith his brother Kalia Kasam - absconding accused No.3, Imambi-accused No.2 and one Dilshad -accused No.4, came to their house with weapons in their hands like sword, chopper and gupti and started abusing and instigating the parents of P.W.1 Gausbee. Hence her brother Noor came out of the house to pacify and request them. However, he was assaulted by accused with weapons in their hands. Appellant herein was carrying sword in his hand and he inflicted blows of sword on Noor due to which Noor sustained injuries and fell down.

3. P.W.1 Gausbee and her mother P.W. 2 Fatimabee took injured Noor to Meghwadi police and from there to Cooper

hospital. Noor was declared dead on admission. In the hospital itself complaint of P.W.1 Gausbee came to be recorded. On her complaint (Exh.18), C.R.No.169 of 1999 was registered against in all four accused persons. The Investigation of the said C.R. was handed over to P.W.11 Police Inspector Pawar.

4. During the course of investigation, P.W.11 PI Pawar has recorded statements of witnesses, conducted spot panchnama and seizure panchnama of the weapons and the cloths of the deceased and appellant. At the instance of appellant, sword came to be seized under panchnama (Exh.46). Further to completion of investigation, chargesheet was filed in the Court against in all four accused persons.

5. During pendency of the trial, accused No.4 Dilshad died and hence case was abated against him; whereas accused No.3 Kasam is absconding, hence his case was separated. The trial was proceeded against appellant and his wife Imambi accused No.2 only.

6. On committal of the case to the Court of Sessions, trial Court framed charge against the appellant and co-accused vide Exh.10. The appellant pleaded not guilty and claimed to be

tried. In support of its case, prosecution examined in all 14 witnesses and on appreciation of their evidence, trial Court was pleased to hold guilt of the present appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and convicted and sentenced him as aforesaid.

7. This judgment of the trial Court is challenged in this appeal by learned counsel for appellant; whereas supported by 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.

8. Prosecution case against appellant stands on the evidence of four eye witnesses, whose presence at the spot is natural and proved on record. P.W.1 Gausbee is real sister of deceased; P.W.2 Fatimabee is the mother, P.W.3 Tajbano is the sister-in-law; whereas P.W.4 Ali Ahmed is the neighbour. Their evidence goes to prove that the father of the appellant and father of deceased were real brothers. There was dispute between them relating to property. The cases were filed and pending in the Court. On account of this dispute, on the date of

incident while P.W.1 Gausbee was chitchatting with her mother and sister-in-law, appellant came there alongwith co-accused. All of them were armed with weapons. They started giving abuses to the father of P.W.1 Gausbee. Then Noor, came out of the house to pacify them. However, appellant and co-accused assaulted him with sword, chopper and gupti. It is further deposed by P.W.1 Gausbi that she and her sister-in-law P.W.3 Tajbanoo came out of the house and found that the appellant was having sword in his hand and he has assaulted Noor with the said sword.

9. P.W.2 Fatimbai and P.W.4 Ali Ahmed have also deposed about the incident and assault on Noor by deadly weapons. Though P.W.2 Fatimabi has not specifically attributed incriminating act to the appellant, she has deposed about his presence at the time of incident. Similarly though P.W.4 Ali Ahmed has deposed that the appellant has assaulted the deceased with chopper, in our considered opinion, having regard to the fact that the incident has taken place in the year 1998 and his evidence is recorded 10 years thereafter in the year 2008, there is possibility of his memory failing or getting confused

about exact nature of weapon. But the fact remains that he has also deposed about assault on the deceased Noor and has also spoken about involvement of the appellant in the said assault. Moreover, as per his evidence, appellant was apprehended on the spot itself. Not only that, as per evidence of P.W.10 panch Siddiqui and P.W.11 IO PI Pawar, at the instance of appellant, sword was seized from the heap of debris at the spot shown by him under panchnama Exh.46.

10. There is further corroborating evidence in the form of prompt lodging of F.I.R. The complaint of P.W.1 Gausbee was recorded in the hospital itself vide Exh.18 and offence was registered within two hours thereafter at about 2.30 p.m.

11. The medical evidence of P.W.9 Dr. Manik Sangale, who has conducted postmortem on the dead body of Noor also proves that he has found three incised wounds and the cause of the death was shock due to stab injury to abdomen. In his opinion, the injuries were antemortem and sufficient in the ordinary course of nature to cause the death.

12. In our considered opinion, this evidence of eye witnesses, supported and corroborated with medical and other

circumstantial evidence about recovery of weapon at the instance of appellant, is more than sufficient to prove on record the guilt of the appellant.

13. The only submission advanced by learned counsel for appellant is that the incident has taken place in a sudden fight. There was no intention on the part of appellant or co-accused to commit murder of Noor. Noor had come out of the house all of sudden. Moreover, there was only one fatal injury found on his body, therefore, the case of the appellant is covered by *fourth exception to Section 300 of IPC*.

14. However, we are not inclined to accept this submission as the evidence on record proves that it was not the case of sudden fight and it was also not a case of single blow given in a hit of passion. Conversely, the evidence on record proves that the appellant, alongwith co-accused had come to the house of deceased fully armed with sharp edged weapons like sword, chopper and gupti. Therefore, it was with premeditation. Medical evidence on record proves that though one injury to abdomen is proved to be fatal, there were other two more incised wounds and abrasions found on the body of Noor.

Therefore, it also cannot be said that the appellant or co-accused have not taken undue advantage or not acted in cruel or unusual manner. Hence all the necessary ingredients of *fourth exception to section 300 of IPC*, are not satisfied in the instant case. It may be true that the appellant and the co-accused had not intended to cause the death of Noor, but then case falls under Section 301 of IPC under the doctrine of transfer of malice as all the ingredients of the offence of 301 of IPC are being made out. The conviction of the appellant, therefore, as recorded by the trial Court, for the offence under Section 302 of IPC needs to be confirmed. The appeal, hence, stands dismissed.

[ACTING CHIEF JUSTICE.]

[DR. SHALINI PHANSALKAR-JOSHI, J.]