

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 508 OF 2014**

Mohammad Azad Baharammiya Khan]
Convict No. C/9323]
at present in]
Nashik Road Central Prison, Nashik].. Appellant
[Ori.Accused]

Vs.

The State of Maharashtra]..Respondent

....
Ms. Sarojini Upadhyay Advocate appointed for the Appellant
Smt. V.R. Bhonsale A.P.P. for the State
....

**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J. &
SMT. SADHANA S. JADHAV, J.**

DATED : JANUARY 05, 2016

ORAL JUDGMENT: [PER ACTING CHIEF JUSTICE]

1 This appeal is preferred by the appellant-original accused against the judgment and order dated 10.3.2014 passed by the learned Additional Sessions Judge, Raigad-Alibag in Spl.Criminal Case No. 10 of 2013. By the said judgment and order, the learned Sessions Judge convicted the appellant

under Sections 302, 307 r.w. 34 of IPC and under Sections 3(2)(5) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. For the offence under Section 302 read with Section 34 of IPC & under Section 3(2)(5) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 the appellant has been sentenced to life imprisonment and fine of Rs.1000/- i/d R.I. for one year. For the offence under Section 307 read with Section 34 of IPC and under Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the appellant has been sentenced to R.I. for ten years and fine of Rs.1000/- i/d R.I. for one year. All the substantive sentences were directed to run concurrently. It may be stated here that the appellant came to be acquitted of the offence under Section 3(1)(10) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2 The prosecution case, briefly stated, is as under:

(i) PW 1 Rajesh was a plumbing contractor. He had five workers i.e. PW 2 Pradeep, Ramesh, Abdul, Kuldeep (deceased) and appellant Mohammad Azad. The appellant was

staying alone in one room on the first floor of Swaraj Emperor building and the other four workers including deceased Kuldeep and PW 2 Pradeep, were residing in another room on the first floor of the very same building.

(ii) On 18.3.2010 the appellant and absconding accused Abdul went to the ground floor. Kuldeep, PW 2 Pradeep and Ramesh had dinner and went to sleep. Thereafter at about mid-night Pradeep heard shouts of Kuldeep. Pradeep was awoken. He saw Abdul was holding a wooden bar (Danduka) and the appellant was holding a spade (Fawada). The appellant gave blow on the head of Pradeep. Pradeep saw that Kuldeep was lying in a pool of blood. Pradeep then came and told watchman to give a telephone call to their employer. The watchman then telephoned employer i.e. PW 1 Rajesh. Rajesh then came to the spot. He saw that Kuldeep was lying in a pool of blood. He also saw that Pradeep had sustained injury. Rajesh then made enquiry with Pradeep. Rajesh then went to police station and lodged F.I.R. Thereafter investigation commenced. The dead body of Kuldeep was sent for post-mortem. PW 5 Dr. Naik conducted the post-mortem on the

dead body of Kuldeep. During external examination, it was noticed that Kuldeep was bleeding from the nose and right ear and mouth. There was contused lacerated wound on the left angle of mandible and on the left fronto parietal region of skull with depressed fracture of skull. According to Doctor, the injury was by hard and blunt object and cause of death was due to shock due to fracture of skull with left subdural haematoma. After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against the appellant under sections 302, 307 read with Section 34 of IPC and under Sections 3(1)(10) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and also under Section 302 and 307 of IPC and under Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1

above, hence, this appeal.

4 We have heard Ms. Sarojini Upadhyay the learned advocate appointed for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the prosecution has not proved its case beyond reasonable doubt that the appellant assaulted Kuldeep and Pradeep.

5 Only one eye witness has been examined in the present case i.e. PW 2 Pradeep. Pradeep has stated that he and his brother Kuldeep, Ramesh and Abdul were residing in one room and the appellant was residing in another room besides their room. Pradeep was working with Rajesh (PW 1) who is a sub-contractor and Ramesh, Kuldeep, Azad and Abdul were also working for Rajesh. Pradeep has stated that at about 9.30 p.m. the appellant told Kuldeep that your brother is getting more amount. Thereafter the appellant and Abdul went

to the ground floor. After that Kuldeep, Ramesh and Pradeep had dinner and went to sleep. Thereafter at about mid-night Pradeep heard shouts of Kuldeep. Pradeep was awakened. He saw Abdul was holding a wooden bar (Danduka) and the appellant was holding a spade (Fawada). The appellant gave blow on the head of Pradeep. Pradeep saw that Kuldeep was lying in a pool of blood. Thereafter Pradeep came to the ground floor and saw that watchman was present. He told the watchman to telephone their employer. He then gave a call to Hitesh who had given sub-contract of plumbing work of Swaraj Emperor building to Rajesh.

6 Ms. Upadhyay pointed out that the only eye witness examined in the present case is PW 2 Pradeep. She submitted that no reliance can be placed on the evidence of PW 2 Pradeep because the statement of Pradeep was recorded 2-3 months after the incident. She drew our attention to the cross-examination of PW 2 Pradeep wherein in paragraph 4, Pradeep has admitted that after 2-3 months police came to him and he informed the police about the incident after 2-3 months. No explanation has been furnished by the prosecution for the

delay in recording the statement of PW 2 Pradeep. Looking to the inordinate delay in recording the statement of Pradeep, we do not find it safe to rely on his evidence. There is another reason why we do not find it safe to rely on the evidence of PW 2 Pradeep. PW 3 Hitesh has stated that on 19.3.2010 at about 3.00 am. the watchman had telephoned him. The watchman gave the phone to Pradeep (PW 2). Pradeep was saying on the telephone that " `somebody' had beaten them." This shows that first in point of time, Pradeep had not mentioned to Hitesh that he and his brother were assaulted by the appellant. As the appellant, Kuldeep, Pradeep, Ramesh and Abdul were all working for Hitesh, Hitesh knew all the workers, hence, if PW 2 Pradeep and his brother had really been assaulted, the appellant would have informed Hitesh about this fact. It is also to be noted that PW 2 Pradeep has stated that no quarrel had ever taken place between him and the appellant or between the appellant and deceased Kuldeep any time prior to the date of incident. According to the prosecution, in the incident Ramesh was also assaulted by the appellant and Abdul, however, PW 2 Pradeep has stated that Ramesh was not knowing what happened at the time of the incident. It appears

that it was the deceased as well as PW 2 Pradeep and others all were sleeping when they were assaulted, hence, they did not know who actually assaulted them. It is because of this reason that Pradeep had told Hitesh on phone that "somebody" had beaten them.

7 Looking to the above facts, we are of the opinion that reliance cannot be placed on the evidence of sole eye witness PW 2 Pradeep. Besides the evidence of PW 2 Pradeep there is no other evidence which directly connects the appellant with the crime. In this view of the matter, we are of the opinion that the prosecution has not proved its case against the appellant beyond reasonable doubt. Hence, the following order is passed:

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and order dated 10.3.2014 passed in Spl. Criminal Case No. 10 of 2013 by the learned Additional Sessions Judge, Raigad-Alibag thereby convicting and sentencing the appellant under Sections 302, 307 read with

Section 34 of IPC and under Section 3(2)(5) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is set aside. The appellant is acquitted thereunder.

(iii) Fine amount if any, paid, be refunded to the appellant. The appellant be set at liberty forthwith, if not required in any other case.

(iv) We quantify legal fees to be paid by the High Court Legal Services Committee to the appointed advocate Ms. Sarojini Upadhyay at Rs.5000/-.

[SMT. SADHANA S. JADHAV J.]

[ACTING CHIEF JUSTICE]