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समक्ष माननीय उच्च न्यायालय, जबलपुर म.पु.

दांडिक अपील क्र. 2515 /99

Single Bench (Criminal)

अपीलार्थी

:-

॥ जेल में ॥

अज्जू उर्फ अजीज मुसलमान, आत्मज मोहो

कययूम मुसलमान, आयु 25 वर्ष, साकिन

नया पारा डबरी स्कूल के पास, नयापारा

रायपुर ॥ म. पु. ॥

वि रु द्ध

प्रत्यार्थी

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म. पु. शासन

दांडिक अपील अंतर्गत धारा 374 ॥ 2॥ दण्ड प्रक्रिया संहिता 1973

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Vijay Rai

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O/A. Advocate General
M. P. JABALPUR

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NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 2512 of 1999

- Mohd. Jalil & Anr.

---- appellant

Versus

- State

---- Respondent

And

CRA No. 2695 Of 1999

- Firoz Khan

---- appellant

Vs

- The State Of M.P.

---- Respondent

And

CRA No. 2515 Of 1999

- Ajju @ Aziz Musalman

---- appellant

Vs

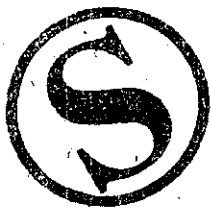
- State

---- Respondent

For Appellants	:	Shri LC Dash, Advocate
For Respondent-State	:	Shri SK Mishra, PL for the State

Hon'ble Shri Justice Goutam Bhaduri

Order On Board



29/08/2017

1. These appeals are against the judgment dated 01.09.1999 passed in ST No.105/99 by the Vth Additional Sessions Judge, Raipur, whereby the appellant Aju @ Aji Musalman was convicted under Section 307 IPC and appellants Firoz Khan, Mohd. Jalil and Shakil were convicted under Section 307 read with Section 34 of the IPC and sentenced to undergo 5 years R.I. with fine of Rs.500/-. It was further ordered that in absence of payment of fine two months additional RI was directed.
2. These three separate set of appeals have been preferred by respective accused/appellants i.e. CRA No.2512/1999 was preferred by Mohd. Jalil S/o Abdul Hafiz & Shakil S/o Gulam Rasool, CRA No.2515/1999 was preferred by Aju @ Aji Musalman and CRA No.2695/1999 was preferred by Firoz Khan. Initially, it was submitted by the State counsel that he has received an information that the appellant Shakil, S/o Gulam Rasool (A-2 in CRA No.2512/1999) has died on 08.03.2008. The information received from the office of Municipal Corporation is placed on record. Consequently, the appeal preferred by Shakil bearing CRA No.2512/1999 stands abated with respect to him.
3. In other appeals, frequent calls were made right from Monday i.e. on 21.08.2017 and name of the concerned counsel were displayed in the board requesting them to appear and argue the case for whom they have accepted the brief. Despite sending of message by the Court, no counsel appeared nor any representation was made on behalf of the appellants. In the circumstances, Shri LC Dash, Advocate, who is in the panel of the Legal Aid Committee was requested to assist the Court. Shri LC Dash, Advocate, therefore, was appointed to provide legal aid in the Court. Shri LC Dash, Advocate after meticulously going through the record for a considerable



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time made his submission.

4. As per the case of the prosecution, on 06.12.1998 at about 7 pm at a place known as Handipara, Raipur appellant Aju @ Ajij Musalman (A-1) assaulted the complainant Salim (PW-1) by way of a knife, which was enough to cause his death and the allegations against the other accused are that they in furtherance of this also assaulted by way of hand & fists and belt. The prosecution case is further that on the date of incident i.e. on 06.12.1998 at about 5 pm some dispute had taken place between Salim, the complainant and Aju @ Ajij Musalman (A-1) over payment of rent for the cycle. Subsequently, the complainant/victim when went to the betel shop of one Dau, at that time, Aju @ Ajij Musalman (A-1), Firoz Khan (A-2), Mohd. Jalil (A-3) and Shakil (A-4) came there and after extending threat to kill the complainant, assaulted by way of knife, which was obstructed by the complainant by his hand. Subsequently, Aju @ Ajij Musalman (A-1) again gave a blow by way of knife, whereby the injury was inflicted on his chest, Firoz Khan (A-2) assaulted by way of a belt and the other accused Mohd. Jalil (A-3) & Shakil (A-4) assaulted by hand & fists. When the complainant raised alarm, then some persons came there and the incident was seen by Kishore Kumar Makhija (PW-6), Bhim Rao @ Bhau Barve (PW-3) and the mother of the victim. Thereafter, the accused fled away from the scene. Subsequently, the victim was taken to the District Hospital, report was made and the case was registered under Section 307 read with Section 34 of the IPC. The injured was subjected to medical checkup. The map of spot was prepared and different statements of the witnesses were taken and on the memorandum of Aju @ Ajij Musalman (A-1) and Firoz Khan (A-2) knife and belt were seized. Thereafter, after completion of the investigation charge-sheet was filed before the Court.

5. During the course of trial, the appellants abjured their guilt and claimed to be tried. The prosecution on their behalf has examined 14 witnesses including primary witness/victim Salim (PW-1), father of the victim Munir Musalman (PW-4), Mother of the victim Nasiban Bi (PW-5), Doctor Smt. Kiran Agrawal (PW-13). Eyewitnesses to the incident Bhim Rao @ Bhau Barve (PW-3) and Kishore Kumar Makhija (PW-6) have not supported the case of the prosecution. The trial Court after evaluating all the statements convicted the accused as aforesaid. Hence this appeal.
6. Shri LC Dash, learned counsel for the appellants would submit that the victim in this case itself has also not supported the case of the prosecution. It is further contended that the evidence of Salim (PW-1) would show that false allegations have been attributed because of the fact that the brother of the complainant had assaulted the accused, for which a report was made, while negotiating the same when the accused refused to take back the report lodged, some scuffle took place, therefore, the intention to kill cannot be attributed to the present appellants. It is further submitted that except Ajju @ Ajij Musalman (A-1) no allegation is on other appellants Firoz Khan (A-2), Mohd. Jalil (A-3) and Shakil (A-4) of inflicting injury by knife. It is further contended that the statement of the Doctor Smt. Kiran Agrawal (PW-13) would show that the nature of injury was not fatal and there was no premeditation of mind, therefore, the conviction made by the Court cannot be sustained.
7. Per contra, learned State counsel opposes the arguments advanced by learned counsel for the appellants and submit that the finding reached by the court below is well merited, which do not call for any interference.
8. Perused the record of the court below. The victim Salim, who is examined



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as PW-1, narrating the incident in examination-in-chief has stated that he identifies all the appellants and stated that all the appellants have assaulted him. He further stated that at about 7 O' clock he was sitting near his house, all the appellants came there and inflicted injury by way of a knife and belt, whereby he sustained injury on his chest. He further stated that after receiving injury, he went to the police station and thereafter to the Hospital and his statements were recorded. It is further stated that at the time of incident Bhim Rao @ Bhau Barve (PW-3) and Kishore Kumar Makhija (PW-6) were present there. Bhim Rao @ Bhau Barve (PW-3) had stated that while he was coming back after lodging the report against one Tiharu Ram, he saw that the victim Salim was going on a Luna with Kallu & Kishore and Salim was bleeding from his chest. On asking, it was stated that he was assaulted by way of a knife, but who had assaulted, it was not disclosed. Thereby, Bhim Rao @ Bhau Barve (PW-3) has not supported the case of the prosecution. Likewise, statement of Kishore Kumar Makhija (PW-6) has completely denied the incident, he has also not supported the case of the prosecution.

9. Further in examination in chief, the statement would show that the victim has stated that he do not know who has given the blow of knife to him as it was all dark. The victim was also declared hostile. After declaring him hostile, he reiterated to the statement made to the police under Section 161 of the Cr.P.C. which is marked as Ex.P/1. Reading of the statement would show that over payment of rent of a cycle, a dispute had occurred with Ajju @ Ajij Musalman (A-1), therefore, Ajju @ Ajij Musalman (A-1) had come with a knife along with other accused persons. He further identified the accused Ajju @ Ajij Musalman (A-1) in the Court and stated that he had disclosed the police that Ajju @ Ajij Musalman (A-1) has given him the knife blow

preceded by a life extending threat. In Ex.P/1 it was stated that Firoz Khan (A-2), Mohd. Jalil (A-3) and Shakil (deceased)(A-4) had caught hold of him thereafter Ajju @ Ajij Musalman (A-1) has assaulted, but the said fact has not been stated in the examination-in-chief at the first instance. The witness further stated that while quarrel was going on, it was seen by Nasiban Bi (PW-5) and Kishore Kumar Makhija (PW-6).

10. In the cross-examination, the victim admitted the fact that some quarrel had taken place over payment of rent of a cycle with the victim, his uncle and brother. The witness further accepted that while he entered into some quarrel with Abdul Bhai, Firoz Khan tried to intervene, therefore, some quarrel took place with Firoz Khan. Further it is stated that on the same day, the brother of the victim Lallu had abused and had quarreled with elder brother of Firoz Khan, thereafter Firoz Khan (A-2) and Lallu (brother of the victim) had entered into a quarrel & scuffle as Lallu had assaulted one Jalil with a wooden plank on his head and Lallu had also sustained some injuries on his head. The victim further admitted the fact since Lallu, who is the brother of the victim, had assaulted Firoz Khan (A-2) and Mohd. Jalil (A-3), as such the present appellants Ajju @ Ajij Musalman (A-1), Firoz Khan (A-2), Mohd. Jalil (A-3) and Shakil (A-4) after lodging a report at Ajad Chowk Police Station were coming back at 7 O'clock. At that time, the victim was also coming back to his house from the betel shop. The witness further stated that since all the four accused had lodged a report against his brother in the police station, as such he was angry with the appellants. He further narrates that he asked the appellants why they have made report in the police station and suggested for settlement, on which Firoz Khan (A-2) refused to settle on the reason that Lallu, brother of the victim, had frequently assaulted them, therefore he would not compromise. The

witness further stated that the conversation of settlement was going on behind the betel shop of Bhau, where one dairy is also situated. He further stated that when the accused refused to take back their report despite the request made by the victim, it resulted into the serious dispute. He also admitted the fact that while they were coming back from police station all the accused were with empty hands. He further admitted that since the report made by the accused were not taken back, in a result dispute & scuffle took place in between the victim and all the four accused persons and in order to save himself, the victim fell down and he admits the fact that who has assaulted by way of knife, he has not seen because it was all dark. He stated that the moment he got injury, he cried for help and hearing the same his mother came and at that time all the accused fled away. Further in respect of identification, he admitted the fact that the identification was narrated by the brother of the victim Lallu and he does not know who is Ajjju. He further submits that at the instance of police, certain thumb impressions were taken on the blank papers by the police and he also admits that while he was in hospital, he was unconscious at that time police had obtained thumb impression on the statements. Therefore, the statement of the victim would show that there is serious inconsistency and variance in the statement appears and practically he himself has not supported the case of the prosecution.

11. Initially the victim had made a omnibus statement inculcating all the four accused that they have assaulted the victim. Subsequently, when the prosecution declared him hostile, he reverted back to his statement under Section 161 Cr.P.C. and attributed allegation of assault by knife on Ajjju @ Ajjj Musalman (A-1). Subsequently, in the cross-examination, it is stated that since all the accused had made a report against his brother as such he

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was enraged and was persuing the accused to take back the report, which they refused, therefore, some scuffle took place and who has assaulted him he does not know. The witness has refused to identify the accused and stated only on the basis of the statement of his brother he has named and identified the accused. More so, he admitted the fact while he was in the unconscious state in the hospital, his statement was recorded and thumb impression was taken by police on the papers thereby the victim himself has disowned the actual happening of the fact. In the cross-examination, he admitted the fact that when the scuffle took place, in order to save himself, he fell down on the floor, on which the pickets were embedded to tie the cattles, who has actually assaulted has not been clearly established and serious inconsistency and omission appeared in the statement of the victim.

12. Now turning to the statement of Nasiban Bi (PW-5), who is the mother of the victim and in examination-in-chief she has attributed that the assault was made by Ajju @ Ajij Musalman (A-1). Subsequently, in the cross-examination, she admitted the fact that one Lallu has assaulted the brother of Firoz Khan, for which a report was made and an advise was given to take back the report. On narrating the incident, it is stated that after hearing the noise *bachao* Nasiban Bi (PW-5) went there, at that time appellants were running away from the spot and it was dark as the time had already passed of 7 pm. Further she stated that initially Ajju @ Ajij Musalman (A-1) has assaulted by way of a steel blade, subsequently by knife.

13. Therefore, taking into statement of the injured Salim (PW-1) along with the statement of the mother Nasiban Bi (PW-5), which would show that some dispute and scuffle took place in between the appellants and the injured, thereafter the injury was inflicted. The reason for the dispute is stated that the injured pressurized the appellants to take back some report and on that

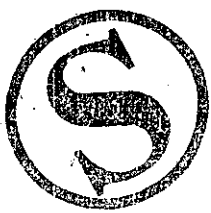
dispute aggravated. Who has inflicted the injury is not clear even by the injured itself as he has not supported the case of the prosecution.

14. The doctor Smt. Kiran Agrawal is examined as PW-13 and the injury report was given by Ex.P-15 A. Following injuries were noticed:-

- "(i) Incised wound over middle of front of chest in the size of $1\frac{1}{2}$ x $\frac{1}{2}$ cm.
- (ii) Lacerated wound of 2 x 0.5 cm x scalp deep over occipital parietal region.
- (iii) Incised wound of $1 \times \frac{1}{2}$ cm over Lt. mid axillary line.
- (iv) Pin point abrasion over neck.
- (v) Abrasion of 6 cm x 0.1 cm circular with contusion over middle third near the scapular region of back.
- (vi) Abrasion of 2 x 2 cm over right great-toe
- (vii) Abrasion of 1 x 0.5 cm over left shoulder."

15. The doctor Smt. Kiran Agrawal (PW-13) further stated that the injury No.1 & 3 can be caused by hard and sharp object, injury No.2, 4 to 8 caused by hard and blunt object. In respect of Injury No.1, 2, 3 & 5 the injured was referred to surgery department and for injury No.4 he was referred to ENT department. With respect to the query report, the doctor vide Ex.P/17 after examining the knife opined that the injury over the chest of the injured could have been caused by such weapon i.e. the knife. In the cross-examination she further admitted that injury No.1, 2 & 3 could have been caused if someone falls on the sharp object but all the injuries could not have been come at one time.

16. There is no evidence to the fact that the said injury was fatal to the life as



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doctor Smt. Kiran Agrawal (PW-13) though has stated that no specific opinion could have been given as the injured was referred for further query.

17. The witness Santosh Kumar Singh (PW-2) before whom the memorandum and seizure was made has not supported the case of the prosecution. Likewise, Bhim Rao @ Bhau Barve (PW-3) has also not supported the memorandum and the seizure.

18. The entire evidence adduced by the prosecution would show that the injured Salim (PW-1) himself has not supported the case of the prosecution. The mother of the victim Nasiban Bi (PW-5), who is stated to be the eyewitness has also not supported the case of the prosecution. When the victim himself has not supported the case of the prosecution as also the evidence of the mother of the victim would show that she has not seen the incident, how the injury inflicted on the victim becomes doubtful. The victim Salim (PW-1) in his statement has stated that the police has recorded his statements while he was in unconscious state. The defense raised by the appellant that during scuffle the victim fell down on the pickets which were buried in place of incident, he got the injury also raises a probable doubt to the alleged incident. Furthermore, if the prosecution itself is not able to prove the incident, in such case benefit of doubt leans in favour of the appellants. In the circumstances, after evaluating the entire evidence, I am of the opinion that doubt has been created in the evidence adduced by the prosecution as to who has inflicted the injury and whether the injury has been caused by all the accused or not. The nature of injury and the fact that the victim fell down on the spot where some pickets were embedded to tie the cattle thereby he sustained injury also can be presumed specially when it is the statement of victim that all the accused were empty handed at the time of incident. Accordingly, the facts would suggest a doubt has been created in

happening of incident. Accordingly, the conviction made by the trial Court cannot be sustained and as the benefit of doubt leans in favour of the accused.

19. In the result, all the appeals are allowed and the conviction & sentence imposed on appellants Aju @ Ajij Musalman (A-1), Firoz Khan (A-2), Mohd. Jalil (A-3) are set aside. They are acquitted of the charges. The appellants are on bail. Their bail bonds shall continue for a period of 6 months in view of the provision contained under Section 437-A of Cr.P.C.

Sd/-
Goutam Bhaduri
Judge

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