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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 673 OF 2011

1. Sanjay Sahebrao Savant
Age 21 years, Occ:Agriculturist.
2. Sahebrao Mininath Savant
Age 51 years, Occ:Agriculturist.

Both R/o. Khudus, Tal:Malshiras,
District : Solapur.
(At present lodged in Sub-Jail
Malshiras).

...Appellants
Orig.Accused 1 and 2.

Versus

The State of Maharashtra
(At the instance of Malshiras
Police Station in connection of
C.R.No.93/2009)

...Respondent

Mr.D.G.Khamkar for the Appellants.

Mr. H. J. Dedia, A.P.P for the Respondents-State

***CORAM : SMT.V.K.TAHILRAMANI &
REVATI MOHITE DERE, JJ.***

DATE : 2nd MARCH, 2017

ORAL JUDGMENT (Per Smt. V. K. Tahilramani, J.) :

1. The appellants, original accused nos.1 and 2 have preferred this appeal, against the Judgment and Order dated 29th April, 2011, passed by the learned Ad hoc Additional Sessions Judge, Malshiras in Sessions Case No.34 of 2010. By the said Judgment and Order, the learned Sessions Judge, convicted both the appellants under Sections 302 and 323 r/w 34 of the Indian Penal Code. For the offence punishable under Section 302 r/w 34 of the Indian Penal Code (for short 'I.P.C'), both the appellants were sentenced to suffer rigorous imprisonment for life and fine of Rs.3,000/- each, in default to suffer rigorous imprisonment for 1 year. For the offence punishable under Section 323 r/w 34 of the I.P.C, both the appellants were sentenced to suffer simple imprisonment for 1 year and fine of Rs 500/- each, in default to suffer simple imprisonment for 1 month. The learned Sessions Judge directed that both the sentences of imprisonment shall run concurrently.

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

The informant, PW 2 - Shivaji was residing at Shivtej Nagar, Khudus, in Taluka - Malshiras, District - Solapur. Deceased - Tanaji who was his brother was also residing along with his wife - Kavita at Shivtej Nagar, Khudus. Shantabai was the sister of Tanaji and PW 2 - Shivaji. She was married to appellant no.2 - Sahebrao. Appellant No.2 - Sahebrao along with his wife - Shantabai and their children i.e. appellant no.1- Sanjay and Amol i.e. juvenile offender were also residing at Shivtej Nagar. Thus, the appellants, the deceased and the first informant were all residing in the same locality. There were strained relations between PW 2 - Shivaji, deceased - Tanaji and their sister - Shantabai, since last about 20 years. The incident occurred on 18th December, 2009. At about 8.30 p.m. PW 2 - Shivaji was at home along with his wife - Parwati and son - Sagar. Deceased-Tanaji along with his wife PW 3 - Kavita was present in his house. The house of Tanaji was situated about 5 to 10 feet away from the house of PW 2 - Shivaji. At about 8.45 p.m. both the appellants along with juvenile offender - Amol came to the house of Shivaji. They called Shivaji and Tanaji out of the house. They started abusing them. Thereupon, Shivaji and

deceased - Tanaji questioned them why they were abusing. Then, appellant no.1 - Sanjay inflicted blow with an axe on the head of Tanaji. Tanaji sustained injury. The juvenile offender - Amol gave a blow with an iron rod on the left wrist of PW 2 - Shivaji. Appellant no.2 - Sahebrao dealt blow with stick on Tanaji. Kavita i.e. wife of Tanaji, son of Tanaji, Sagar i.e. son of Shivaji and others came on the spot and rescued them from the clutches of the accused persons. Tanaji was taken to the hospital. PW 2 - Shivaji lodged FIR. Thereafter, investigation commenced. Tanaji expired on 21st December, 2009 at about 9.00 a.m. in the hospital. The dead body of Tanaji was sent for postmortem. PW 8 - Dr.Ramesh Ukrande performed the postmortem. In his opinion the cause of death was 'shock due to fracture of skull and haemotoma'. After completion of investigation, charge-sheet came to be filed.

3. Charge came to be framed against both the appellants under Sections 302, 326, 323, 504 and 506 Part-II r/w 34 of I.P.C. The accused pleaded not guilty to the said charge and claimed to be tried. Their defence is that of total denial and

false implication. In addition appellant no.2 had raised the defence of *alibi*.

4. The learned Sessions Judge after going through the evidence adduced in this case, convicted and sentenced both the appellants as stated in paragraph 1 above. Hence, this appeal.

5. We have heard the learned counsel for both the appellants and learned A.P.P for the State. We have carefully considered their submissions, Judgment and Order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the same, for the below mentioned reasons, we are of the opinion that both the appellants assaulted Tanaji.

6. The conviction of the appellants is based on the evidence of two eye-witnesses i.e. PW 2 - Shivaji and PW 3 - Kavita. Shivaji is the first informant in the present case. He is the brother of deceased - Tanaji. PW 3 - Kavita is the wife of

deceased – Tanaji. Shivaji has stated that he, his brother – Tanaji and the appellants all resided in the same locality i.e. Shivtej Nagar. Shantabai was his sister as well as the sister of Tanaji. There were strained relations with Shantabai since last 20 years. Shivaji has stated that the incident occurred on 18th December, 2009 at about 8.45 p.m. At that time he along with his wife and his son were present in the house. Tanaji along with his wife was present in the house of Tanaji. The house of Tanaji was situated at a distance of about 5 to 10 feet away from the house of Shivaji. At about 8.45 p.m the appellants along with juvenile offender – Amol came to their house on a motor bike. They called Shivaji and Tanaji out of the house. They took them in front of a cattle shed and started abusing them. Then, appellant no.1 – Sanjay inflicted blow with an axe on the head of Tanaji. Tanaji sustained injury. The juvenile offender – Amol gave a blow with an iron rod on the left wrist of PW 2 – Shivaji. Appellant no.2 – Sahebrao dealt blow with stick on Tanaji. Kavita i.e. wife of Tanaji, son of Tanaji, Sagar son of Shivaji and others came on the spot and rescued them from the clutches of the accused

persons. Tanaji was taken to the hospital. PW 2 – Shivaji lodged FIR.

7. The second eye witness is PW 3 - Kavita. Kavita was the wife of deceased – Tanaji. She has stated that on 18th December, 2009 at about 8.45 p.m. the appellants along with juvenile offender – Amol came to their house and called her husband – Tanaji and Shivaji out of the house. Accordingly, Tanaji and Shivaji went out of the house. The accused persons took Tanaji and Shivaji in front of a cattle shed. She also followed Tanaji, Shivaji and the accused persons with a lantern and torch in her hands. She saw the juvenile offender – Amol inflicting a blow with an iron rod on the left hand of Shivaji. Appellant no.1 – Sanjay gave a blow with an axe on the head of Tanaji. Appellant no.2 – Sahebrao dealt blow with stick on Tanaji. Tanaji sustained injury on his head.

8. Learned Counsel for the appellants submitted that the evidence of both the eye witnesses cannot be believed because the evidence of DW 1 – Mahadeo Chavan shows that appellant

no.2 was not in Shivtej Nagar or Khudus, but, infact he was in village - Mohi on 18th December, 2009. He placed reliance on the evidence of DW 1 - Mahadeo. Mahadeo has stated that he met appellant no.2 in village Mohi at about 7.00 p.m. He was talking to the appellant no.2 for about an hour. However, PW 2 and PW 3 have categorically stated about the presence of both the appellants in Shivtej Nagar on 18th December, 2009 at 8.45 p.m. Both of them have stated about the participation of both the appellants in the incident. Nothing has been elicited in the cross-examination of these two witnesses, so as to disbelieve their testimony. In this view of the matter, we are not inclined to place any reliance on the evidence of DW 1 - Mahadeo.

9. That Tanaji met a homicidal death is brought out by the evidence of PW 8 - Dr.Ukrande, who performed the post-mortem on the dead body of Tanaji. On external examination, he saw the following injuries:-

1. Abrasion 1" in length on left cheek.
2. C.L.W. 1/2" X 1/4" X 1/4" on right great toe.
3. Sutured wound left temporo parietal region.
6" in length, bone deep, multiple fractures of skull

in temporo parietal region.

According to Dr. Ukrande, the probable cause of death was shock due to fracture of skull on left temporo parietal region, with extra cerebral haematoma of left temporo parietal region with sub dural haematoma of right parieto occipital region. According to Dr. Ukrande, the injury no.3 was possible by axe (Article - A) and injury nos.1 and 2 were possible by stick (Article - C).

10. Mr. Khamkar submitted that PW 7 - Dr. Anant Kulkarni was the first doctor who examined and treated Tanaji and he has noticed only one injury on the head of Tanaji. Dr. Kulkarni has not noticed any other injury on the body of Tanaji. He submitted that this shows that the other injuries i.e. injury nos.1 and 2 noticed by PW 8 - Dr. Ukrande were not caused in the incident. He drew our attention to the evidence of PW 7 - Dr. Kulkarni, who had stated that he was attached to Ashwini Hospital on 18th December, 2009. At about 10 p.m. Tanaji was admitted in the hospital and Tanaji had an injury on the head i.e. C.L.W. over left

temporal region, 4 cms X 1 cm X 1 cm. Mr. Khamkar also pointed out the indoor case paper of Ashwini Hospital pertaining to Tanaji, which is at Exhibit – 36. This case paper shows only one injury on the body of Tanaji, which injury was on the head.

11. Mr. Khamkar submitted that appellant no.1 had given one blow with an axe on the head of Tanaji. As far as appellant no.2 is concerned, he has given a blow of stick which has not even caused any injury to Tanaji. Mr. Khamkar relied on the decision of the Supreme Court in the case of **Mavila Thamban Nambiar v/s State of Kerala**,¹ In the said case the appellant had caused stab injuries on the right side of the chest as well as right cheek with scissor. The Supreme Court negated the contention that the appellant had committed the act in exercise of the right of private defence. However, the Supreme Court held that the appropriate conviction would be under Section 304 Part II of I.P.C and sentenced the appellant to rigorous imprisonment for 7 years. The Supreme Court in the case of **Jawahar Lal and Anr v/s State of Punjab**² also looking to

1 (2009) 17 SCC 441

2 AIR 1983 SC 284

the fact that one blow was inflicted with knife converted the conviction from Section 302 of I.P.C. to Section 304 Part II of I.P.C and sentenced the accused therein to rigorous imprisonment for 5 years. In the case of ***Jawahar Lal (supra)***, both the appellants were armed with knives. The Supreme Court observed that a Punjabi carrying a knife is not at all an unusual feature nor can it furnish an indication that it was carried by them to facilitate inflicting a fatal injury. Mr. Khamkar submitted that in the present case also the appellants are agriculturalist, hence, an agriculturalist being armed with an axe cannot be said to be an unusual feature nor can it furnish an indication that it was carried by the appellant no.1 to facilitate inflicting a fatal injury. Mr. Khamkar further pointed out that the appellant no.1 like the first appellant in the case of ***Jawahar Lal (supra)*** was a young boy. He had given one blow with an axe. Though, PW 2 had stated that the incident took place for about 15 to 20 minutes and PW 3 had stated that the incident took place for about 30 to 40 minutes, only one blow was given by the appellant no.1 without any attempt to give a second blow. Only one injury was sustained by Tanaji, which was on the head.

There is not even a slightest indication that appellant no.1 even attempted or that appellant no.2 even attempted to cause any more harm to Tanaji. As observed earlier as far as appellant no.2 is concerned, he is stated to have assaulted with a stick and no injury was caused to Tanaji on account of this assault. However, his act shows that he shared the common intention with appellant no.1. Moreover, it is seen that Tanaji did not expire on the spot but he expired on 21st December, 2009 i.e. 3 days after the incident. More over, at the spot there was complete darkness which can be seen from the fact that Kavita carried a lantern and torch with her when she followed Tanaji, Shivaji and the appellants.

12. In view of the above discussion and the two decisions of the Supreme Court mentioned above, we set aside the conviction and sentence under Section 302 of I.P.C. Instead both the appellants are convicted under Section 304 Part II of I.P.C. For the said offence they are sentenced to suffer rigorous imprisonment for 8 years and fine of Rs.3,000/- each, in default to suffer simple imprisonment for 1 year. The conviction

and sentence under Section 323 r/w 34 of I.P.C is maintained. Both the substantive sentences of imprisonment shall run concurrently. The appellants are entitled to set off in accordance with law.

13. The Appeal is partly allowed to the aforesaid extent.

(REVATI MOHITE DERE, J.)

(V. K. TAHILRAMANI, J.)