

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1011 OF 2012

- | | | |
|--------------------------------------|---|----------------|
| 1. Sou. Pratibha Prabhakar Karalkar, |] | |
| Age – 39 years, Occ. : Housewife. |] | |
| 2. Prabhakar Shankar Karalkar, |] | |
| Age – 40 years, Occ. : Service. |] | |
| 3. Kiran Jagannath Sakharpekar. |] | |
| Age – 35 years, Occ. : Service. |] | |
| 4. Kishor Budhya Dulsada. |] | |
| Age : 30 years, Occ : Service, |] | |
| All R/o. Kashigaon, New Gaothan, |] | |
| Dongari, Tal. & Dist. : Thane. |] | ... Appellants |

Versus

- | | | |
|------------------------------------|---|-----------------|
| 1. The State of Maharashtra |] | |
| 2. The Senior Inspector of Police, |] | |
| Through Kashimira Police Station, |] | |
| Dist. : Thane. |] | ... Respondents |

Mr. Aniket Vagal for Appellant Nos.1 and 2.

Mrs. Rupali Manik Shinde (Appointed Advocate) for Appellant Nos.3 and 4.

Ms. R. M. Gadhvi, APP for State.

CORAM :- A. A. SAYED &

SARANG V. KOTWAL, JJ.

RESERVED ON :- 06 SEPTEMBER, 2017

PRONOUNCED ON :- 15 SEPTEMBER, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is filed by the original accused nos.1, 2, 4 and 5 in Sessions Case No.3 of 2008 on the file of the learned Sessions Judge, Thane. The accused no.3 was a juvenile in conflict with law and his trial was separated. By the Judgment and Order dated 27/07/2012, the learned Sessions Judge, Thane, was pleased to convict the Appellants under various counts of the offences punishable under the IPC and the Appellants were sentenced as follows :

- (i) All the Appellants were convicted under Section 143 of the IPC and were sentenced to suffer R.I. for six months and to pay a fine of Rs.2,000/- each and in default of payment of fine, to suffer further R.I. for three months;
- (ii) All the Appellants were convicted under Section 148 of the IPC and were sentenced to suffer R.I. for two years and to pay a fine of Rs.3,000/- each and in default of payment of fine, to suffer further R.I. for six months;
- (iii) All the Appellants were convicted under Section 302 read with 149 of the IPC and were sentenced to suffer R.I. for life and to pay a fine of Rs.10,000/- each and in default of payment of fine, to suffer further R.I. for one year.

The Appellants were given benefit of set off under Section 428 of the Cr.P.C. and all the substantive sentences were directed to run concurrently.

2. The Appellant Nos.1 and 2 (original accused nos.1 and 2) are husband and wife. The Appellant No.3 (original accused no.4) Kiran is the son-in-law of the Appellant Nos.1 and 2 and the Appellant No.4 (original accused no.5) was their neighbour. Original accused no.3 was the son of Appellant Nos.1 and 2. He was a juvenile in conflict with law. Hereinafter, he is referred to as the accused no.3.

3. The prosecution case pertains to the murder of one Saheb Prajapati who was residing at Kashigaon, New Gaonthan, Dongri, Thane with his family consisting of his wife, a daughter and two sons. On 05/04/2006 at about 6.00 p.m., there was a quarrel between Saheb Prajapati's wife and the Appellant No.1's daughter on account of pet dog of the deceased having eaten bread kept by the Appellant No.1 on the roof of her house. Thereafter at about 9.30 p.m. when the deceased Saheb and his family were having dinner in their house, all the Appellants, with the juvenile in conflict with law accused no.3 (who is son of Appellant Nos.1 and 2), came to the house of Saheb. The accused were carrying weapons like wooden stick, logs and a knife. Saheb was dragged out of his house. There was a quarrel between the two families. According to the prosecution case, the accused no.3 assaulted Saheb with a knife on his abdomen causing the fatal injury. Saheb was removed to hospital where he was declared dead.

4. Saheb's widow Meeradevi lodged her FIR. The investigation was conducted. The accused were arrested. The knife

was recovered at the instance of accused no.3. Various panchanamas were drawn. Statements of witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The case was committed to the Court of Sessions for trial. Charges were framed on 27/09/2010 under Sections 143, 147, 148, 302, 323, 451 and 504 read with 149 of the IPC and in the alternative under Section 302 read with 34 of the IPC, Section 323 read with 34 of the IPC, 452 read with 34 of the IPC and 504 read with 34 of the IPC. The Appellants – accused pleaded not guilty to the charge and claimed to be tried.

5. During trial, the prosecution examined six witnesses. PW 1 Santosh Patil was a panch for the spot panchanama but he did not support the prosecution case. PW 2 Sunil Pansare was the panch who was present when the police had taken charge of the clothes of Saheb's sons Pramod and Manoj. PW 3 Meeradevi Prajapati was the widow of the deceased. She had lodged the FIR and she was an eye witness to the incident. PW 4 Pramodkumar Prajapati was the elder son of the deceased and was also an eye witness. PW 5 Dr.Rambhau Laxman Sanap had conducted the post-mortem examination on the dead body of the deceased Saheb and he found one incised wound of the size 8 cm X 5 cm X cavity deep on the abdomen and he had found that the death was due to haemorrhage and shock following stab injury over abdomen. PW 6 ACP Rajendra Ghule had investigated the offence. Besides this oral evidence, the prosecution also produced other documents including the medical papers in respect of the injuries suffered by the Appellant No.2 and sons of the deceased

Pramod and Manoj. All these three had suffered minor injuries. These medical papers were exhibited vide Exh.32.

6. The prosecution case mainly rests on the evidence of two eye witnesses PW 2 Meeradevi and PW 4 Pramod. In her evidence, PW 3 Meeradevi has described the earlier incident dated 05/04/2006 which took place at 6.00 p.m. in respect of the quarrel between the Appellant No.1 and her daughter on some petty issue involving this witness's pet dog. Thereafter, this witness has described the incident which took place at 9.30 p.m. According to her, she, along with her husband and children, was having dinner. At that time, all the accused barged into their house armed with knife and wooden logs. They started abusing and dragged her family out of the house in the lane. She has further deposed that accused no.4 Kiran and accused no.2 Prabhakar caught hold of her husband Saheb. The accused no.1 gave knife to her son accused no.3 who inflicted a blow on the stomach of her husband Saheb. She has further deposed that the accused no.4 Kiran assaulted Manoj with the wooden log and the accused no.5 Kishor assaulted Pramod with a heavy wooden stick. Thereafter the accused left the spot. Her husband was taken to police station and thereafter to Bhagwati Hospital where he was declared dead. Thereafter, she went to Kashimira Police Station and lodged her FIR which is exhibited at Exh.26. The police reached the spot, carried out the spot panchanama and recovered the wooden sticks from the spot.

7. PW 4 Pramodkumar Prajapati who is the son of the deceased and PW 3, has more or less deposed in a similar fashion except on some material aspect. There is a slight variance between their evidence. According to him at about 9.30 p.m. on 05/04.2006, all the accused came to their house. Accused Prabhakar was armed with a bamboo stick, accused no.3 was having a knife. His father was dragged out of the house. He has stated that the accused Kishor beat him up by fists and kick blows and accused Kiran beat his younger brother Manoj by fists and kicks. He has further deposed that accused no.1 Pratibha was instigating by saying, "*Maro, Maro*". He has further deposed that during the scuffle, the knife was handed over by accused no.3 to Pratibha but when she was instigating others, she again handed it over to accused no.3 who gave a blow with the knife on the abdomen of his father and thereafter the accused left the spot. Thereafter, this witness has described the events as deposed to by his mother PW 3.

8. The Investigating Officer ACP Rajendra Ghule has deposed about the investigation carried out by him. He has stated that two wooden logs were seized from the spot of incident. During investigation, accused no.1 and 2's son accused no.3, juvenile in conflict with law, produced a knife which was concealed in the bushes. After completion of the investigation, the I.O filed the charge-sheet.

9. We have heard Mr. Aniket Vagal, learned Counsel for Appellants Nos.1 and 2, Mrs. Rupali Shinde, learned Counsel for Appellant Nos.3 and 4 and Ms. R. M. Gadhvi, learned APP for the State. With their assistance, we have perused the record and proceedings of the case.

10. After reading the evidence carefully, we find that the evidence of PW 3 and PW 4 appears to be natural. They are the natural witnesses and there is nothing on record to conclude that they had not witnessed the incident. PW 3 has deposed about the earlier quarrel which took place at about 6.00 p.m. Both these witnesses PW 3 and PW 4 have deposed about the events which took place after 9.00 p.m. when the accused came to their house, dragged the deceased out and in that scuffle, he was assaulted. We see no reason to disbelieve these witnesses on the main aspect of assault on the deceased.

11. Having observed this, we find that their evidence does differ in important details, particularly in respect of the role played by accused no.1 Pratibha. Similarly, the roles attributed to accused Prabhakar and Kiran of catching hold of the deceased with the accused no.3 inflicting the fatal blow, also differ. This difference in the description of the roles is important in the context of deciding the common object of their unlawful assembly.

12. Though PW 4 has stated that the accused no.1 Pratibha was instigating other accused by saying “*Maro, Maro*”, PW 3, in her substantive evidence i.e. in her deposition, has not stated so. PW 3 has stated that accused no.1 Pratibha gave knife to her son accused no.3, then he inflicted the knife blow. She has not stated as to who was carrying a knife when all of them came together. From the record, it is apparent that the knife was about 35 cms in length. Therefore, it could not have been concealed. PW 4 has clearly stated when they came to their house, the accused no.3 was having a knife. He has further stated that during the scuffle, accused Pratibha was given that knife by the accused no.3 and she again handed it over to him whereon he dealt the fatal blow. It is noteworthy that he has admitted that he had not told the police that during the scuffle, the accused no.3 had handed over knife to his mother – accused no.1 Pratibha. So if according to PW 4, the accused no.3 was carrying a knife and he has not stated before the police that the accused no.3 had handed over that knife at any point to accused no.1, then it is not possible to conclude that accused no.1 handed the knife to the accused no.3. Therefore, to that extent, PW 4's evidence does not corroborate PW 3 Meeradevi's evidence in respect of Pratibha handing over knife to her son accused no.3.

13. PW 3 has stated that accused no.2 Prabhakar and accused no.4 Kiran caught hold of her husband Saheb and then the accused no.3 inflicted a knife blow. However PW 4 has not stated so in his deposition and no such role is attributed to accused nos.2 and 4 by

him. The FIR also does not mention that Prabhakar and Kiran had caught hold of the deceased to facilitate the accused no.3 to inflict knife blow on his stomach. Thus, this important role of holding the deceased by the accused nos.2 and 4 is not proved beyond reasonable doubt by the prosecution.

14. PW 3 has further stated that accused no.4 Kiran assaulted Manoj with a wooden log and accused no.5 Kishor assaulted her son Pramod with a heavy wooden stick. However, PW 4 Pramod has stated that both these accused Kiran and Kishor beat him and his brother with fists and kick blows. To that extent, PW 3 and PW 4 differ in the narration.

15. Thus, taking overall view of the deposition of PW 3 and PW 4, we find that though they were eye witnesses and their evidence can be relied on, still improvements in the evidence and their contradictions in respect of the actual events can be separated from their deposition which we find to be truthful. Thus, we find that the prosecution has proved beyond reasonable doubt that all the five accused came to the house of the deceased. The juvenile in conflict with law was carrying a knife. Saheb was dragged out. Thereafter abuses were hurled and the accused no.3 inflicted a knife blow on the abdomen of the deceased Saheb.

16. The crucial question now remains as to whether the common object of their unlawful assembly was to commit murder of

the deceased. In this connection, it can be seen that the incident which took place at 9.00 p.m. was an offshoot of the quarrel which had taken place at 6.00 p.m. between PW 3's daughter and the accused no.1 Pratibha. At that time, deceased Saheb Prajapati was not at home and he was not concerned with the quarrel. Therefore, when all the accused came together to the house of the deceased at 9.00 p.m., obviously, Saheb was not the target. Undoubtedly, the accused were having weapons and in particular the accused no.3 was carrying a knife but, apparently, they had not gone there to assault Saheb Prajapati. They wanted to question the PW 3 and her daughter regarding the incident which had taken place at 6.00 p.m. In the incident, the deceased and his family members were dragged out of the house. PW 3, in her cross-examination, has stated that the incident had lasted for about 10 to 15 minutes whereas PW 4 stated in his cross-examination that the incident lasted for about half an hour to one hour. Therefore, if the common object of the unlawful assembly of the accused was to commit murder of the deceased Saheb Prajapati, nothing prevented them from straightaway assaulting him and committing his murder. If the quarrel went on for at least 15 minutes or even for half an hour to one hour as deposed to by PW 4, then it clearly means that the common object was not to commit the murder but was to pick up a quarrel. Exh.32/2 produced on record by the prosecution shows that the accused no.2 Prabhakar had suffered CLW of dimension 2 inches x ½ inch over his right parietal region. This injury though appears to be simple, it was inflicted on the head and the prosecution witnesses have not explained this injury; which

suggests that there was some scuffle going on between both the parties and if in the scuffle the accused no.3 had assaulted the deceased, taking all these factors into consideration, the prosecution has not proved beyond reasonable doubt that the common object of the unlawful assembly was to commit murder of the deceased.

17. Though the PW 4 has stated that the accused no.1 was instigating others by saying “*Maro, Maro*”, PW 3, in her substantive evidence, has not stated so. In this context, Mrs. Rupali Shinde, the learned Counsel for the Appellant Nos.3 and 4, has relied on the Judgment of the Hon'ble Supreme Court in the case of ***Litta Singh and another Vs. State of Rajasthan***¹. In the said Judgment, the Hon'ble Supreme Court has held that the words “*Maro, Maro*” may not mean 'Kill, Kill'. The Hon'ble Supreme Court, in paragraph nos.16, 17 and 18, has held thus :-

“16. The word “*MARO MARO*” can never mean “*KILL KILL*”. The word “*KILL*” means to cause the death of a person or animal. It also means to put some one to death, to murder, to slaughter. On the other hand, the word “*MARO MARO*” means to beat, to cause assault. Here the thin line of distinction lies between the two words. If the voice is “*KILL KILL*”, it means to cause death of the person and to finish him. Had the intention of the person been to make such call or voice “*KILL KILL*” and on the basis of such call the accused persons had assaulted the deceased, then the intention would have been clearly to kill and murder the deceased. Here on hearing the call “*MARO MARO*”, the accused persons with Boga Singh started beating the deceased.

¹ AIR 2013 SUPREME COURT 2554

17. *Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandas (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him.*
18. *It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.”*

The learned Counsel for Appellants further relied on the Judgment of the Division Bench of this Court in the case of ***Jitendra @ Jitu Sakharam More & another Vs. State of Maharashtra***². The learned Counsel invited our attention to paragraph nos.13, 14 and 15 from the said Judgment which read thus :-

- “13. *As mentioned earlier, in our view, the learned Judge however, erred in convicting the appellants-Alex Joseph, Jitendra More, Vinod Jadhav and Agnelia*

² 2001 (5) Bom.C.R. 172

Fernandes for the offence under section 302 r/w 149 I.P.C. In our view, only an offence under section 304(2) r/w 149 I.P.C. is made out against the said appellants. In our view, an offence under section 302 I.P.C. simplicitor is made out against the appellant Nitesh Kasare.

We say this for reasons enumerated hereinafter :---

Firstly, the prosecution evidence does not suggest even an iota of enmity between the deceased Rajesh on one hand and the appellants on the other. It appears that when the deceased Rajesh proceeded to the rescue of Shaila's husband Mohan, the appellants were irked.

Secondly, the evidence of Jyoti shows that prior to assaulting Rajesh, the appellants stated take him and one of the assailants shouted that he should be shown how to do goondagiri. It is pertinent to mention that although Jyoti in a general manner stated that initially the appellants assaulted Rajesh but, excepting the two stab wound which were inflicted on Rajesh at the fag end by appellant Nitesh Kasare, the remaining injuries found on his person clearly show that the common object of the appellants was to teach a good lesson to the deceased Rajesh. But, even if a stricter view is taken then what can be said is that when the appellants chose to attack Rajesh in the manner mentioned earlier, they had the knowledge of his death as contemplated by second part of section 304(2) r/w 149 I.P.C.

Thirdly, the evidence of Jyoti shows that after the appellant-Nitesh Kasare had inflicted fatal gupti blow on the chest of the deceased Rajesh, the other appellants did not assault him or do anything which would suggest that they shared the object to murder him.

The medical evidence shows that it was this chest injury (Injury No.1) which was necessarily fatal.

14. *It would be pertinent to refer to the Division Bench decision of the Allahabad High Court rendered in the case of (Moti and others, appellants v. State, respondents), reported in 1967 Cri.L.J. page 117. In para 33, the Division Bench has observed thus :---*

"The question as to what was the common object of the unlawful assembly is essentially a question fact which has to be determined on the facts and circumstances of each case. The motive for the crime, the weapons used in the attack, the conduct of the assailants, both before and at the time of the attack are relevant considerations."

15. *We may also refer here to the decision of the Supreme Court reported in A.I.R. 1960 SC 775 (Shambhunath Singh and others, appellants v. State of Bihar, respondent). As is evident from a perusal of para 6 of the said judgment, Their Lordships have approved the following observations made in the case of (Jahiruddin v. Queen Empress) I.L.R. 22 Cal. 306.*

"But, members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly."

18. We find that the Judgments relied on by the learned Counsel for the Appellants are relevant and are applicable to the facts of the present case. From the prosecution evidence, it is clear that all the accused had gone there to pick up a quarrel with the deceased's family. They had not immediately inflicted the blow of knife and none of the accused inflicted injury or assaulted the deceased after the accused no.3 stabbed the deceased on his abdomen though it was possible for all the accused to cause continuous assault and cause more injuries and harm to the deceased. Thus, there was no intention to commit murder of the deceased but since the accused no.3 was carrying a knife, all of them must be held to have knowledge that the act done by him was likely to cause death. Therefore, we hold that the Appellants had formed an unlawful assembly and they have committed an offence punishable under Section 304 Part II read with 149 of the IPC. In this view of the matter, we are of the opinion that the sentence of R.I. for eight years to each of the Appellant for the commission of the offence punishable under Section 304 Part II read with 149 of the IPC will meet the ends of justice. Hence, we pass the following order :

ORDER

- (i) The conviction and sentence awarded to the Appellants for commission of offence punishable under Section 143 and 148 are maintained.
- (ii) The conviction under Section 302 read with 149 of the IPC and the sentence to suffer R.I. for life recorded against the Appellants are set aside and, instead, the Appellants are

convicted for the offence punishable under Section 304 Part II read with 149 of the IPC and they are sentenced to suffer R.I. for eight years and to pay a fine of Rs.10,000/- each and in default of payment of fine, to suffer further R.I. for one year.

- (iii) The Appellants shall be given benefit of set off under Section 438 of the Cr.P.C. for the period already undergone by them during the investigation and till the conclusion of the trial.
- (iv) The substantive sentences awarded to the Appellants shall run concurrently.
- (v) The Appeal is partly allowed in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)