

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.445 OF 1997

Kuldeep Singh S/o Mohan Singh	]	
]@ Pappu @ Pappya.	]	
Residing at Municipal Building No.6,	]	
R.No.10, Raoli Camp, Sion-Koliwada,	]	
Bombay – 400 037.	]	... Appellant

Versus

The State of Maharashtra.	]	
(At the instance of Inspector of Police,	]	
Matunga Police Station)	]	... Respondent

Ms. Beerta H. Bajwa a/w Ms. Anchal Lalla & Ms. Manali Mengde i/b
M/s. Lalla & Lalla for Appellant.
Mrs. S. S. Kaushik, APP for State.

CORAM :- SARANG V. KOTWAL, J.
DATE :- 01 AUGUST, 2018

JUDGMENT :-

1. By this Appeal, the Appellant has challenged the Judgment and Order dated 01/04/1997 passed by the learned Sessions Judge, Greater Mumbai, in Sessions Case No.100 of 1984. By the impugned Judgment and Order, the Appellant was convicted for commission of an offence punishable under Section 304 (Part-II) of the IPC and was

sentenced to suffer R.I. for two years and to pay a fine of Rs.5000/- and in default of payment of fine, to suffer R.I. for six months. Originally, the Appellant was charged for commission of an offence punishable under Section 302 of the IPC but he was acquitted of the said charge and instead, was convicted only for an offence punishable under Section 304 (Part-II) of the IPC.

2. The prosecution case is that on 15/02/1983 at about 6.00 p.m. in front of Billu's Garage at Sion-Koliwada, Mumbai, the Appellant assaulted one Narendrasingh with an iron pipe. Narendrasingh suffered head injury. He was taken to Sion Hospital by his uncle PW 1 Ajitsingh. But without admitting him, he was taken to a private clinic and then to Ajitsingh's house. Ajitsingh, on the next day morning, found that Narendrasingh was not responding to his calls. Therefore, he was again taken to Sion Hospital where he was declared dead. Thereafter, Ajitsingh lodged his FIR with Matunga Police Station vide C.R.No.219 of 1983 under Section 302 of the IPC. The FIR was lodged at 8.30 a.m. on 16/02/1983. The FIR was lodged against one Pappu @ Pappi. According to the prosecution case, Pappu is the nickname of the present Appellant. The Appellant was arrested

on 17/02/1983. The investigation was carried out. The post-mortem examination was conducted. The spot panchanama was carried out. Statements of various witnesses were recorded. According to the prosecution case, bloodstained clothes and an iron pipe which is alleged to be the murder weapon, were recovered from the house of the Appellant at his instance. At the completion of the investigation, charge-sheet was filed. As the case was exclusively triable by the Court of Sessions, it was committed to the Court of Sessions for trial.

3. During trial, the prosecution examined PW 1 Ajitsingh who was the uncle of the deceased. He had lodged the FIR. PW 2 Shitalsingh was the cousin of the deceased and had witnessed the incident. PW 3 Dr. Parikh had seen Narendrasingh in his clinic around 8.00 p.m. on 15/02/1983. PW 4 Dr. Kisan Khade had conducted post-mortem examination on the dead body of the deceased. PW 5 Harbansingh was the pancha for the spot panchanama. He had turned hostile and did not support the prosecution case. PW 6 Dr. Rajkumar was examined in an endeavour to get the medical papers from Sion Hospital on record but the record was not available due to lapse of long period. PW 7 Mahindrasingh

was examined as another eye witness but he turned hostile and did not support the prosecution case. PW 8 Sohansingh was the pancha for inquest panchanama. PW 9 PI Prakash Shishupal was the Investigating Officer. Apart from these prosecution witnesses, two Court witnesses were examined. Court witness no.1 was ASI Kamble who was present at Matunga Police Station in the night of 15/02/1983. He had received message from Sion Hospital about Narendrasingh being admitted in the hospital with alleged history of assault. However when he visited Sion Hospital, Narendrasingh was not found in the hospital. Court witness no.2 PI Maruti Shinde was attached to Matunga Police Station at the relevant time and he was examined only on the point that statement of PC Nikam was recorded but PC Nikam had expired. Therefore, the evidence of these two Court witnesses do not support either the prosecution or the accused and is liable to be ignored totally.

4. PW 4 Dr. Kisan Khade had conducted the post-mortem on the dead body of the deceased Narendrasingh. He found the following injuries :

- (i) Stitched wound on (Rt.) parietal region, oblique, on opening the stitches it is seen to be contused lacerated wound with avulsion of lateral flap to small extent.
- (ii) Blackening of (Lt.) eye and area around.

The cause of death was due to 'harmorrhage and shock due to fracture of skull bones due to injuries with hard blunt object'. The post-mortem notes are produced on record at Exh.9. There is no serious challenge to this evidence that the deceased had died because of the head injury.

5. PW 1 Ajitsingh had lodged the FIR. He is not the eye witness to the incident but he has given background of the relationship between himself, PW 2 Shitalsingh and the deceased Narendrasingh. He has deposed that Narendrasingh was working as an auto-electrician and PW 2 Shitalsingh was a welder. PW 1 has further deposed that he used to regularly visit Billu Garage which was situated near Koliwada station. He has deposed that the Appellant was residing at Rawli Camp, Koliwada during that period. PW 1 has further deposed that on 15/02/1983, he returned from work at about 3.45 p.m. and then at about 4.45 p.m. he went to Billu Garage. At

that time, he saw Narendrasingh was lying on the footpath outside the garage and Shitalsingh was trying to lift him up and was trying to put him in a taxi. PW 1 has deposed that Shitalsingh told him that Narendrasingh was assaulted by Pappu with an iron bar. PW 1 has further deposed that he, along with Shitalsingh, took Narendrasingh to Sion Hospital. The Appellant's brother Vicky and two to three other other persons were present in the hospital and they pressurized them not to admit Narendrasingh in the hospital and instead, advised them to take Narendrasingh to Dr. Rao's clinic at Rawli Camp. He has further deposed that Dr. Rao gave Narendrasingh a tablet and thereafter they took Narendrasingh to his house. He has deposed that thereafter, they went to sleep and on the next day morning, he tried to wake Narendrasingh up but he did not respond. Therefore, Narendrasingh was taken to Sion Hospital where he was declared dead. After that, PW 1 went to Matunga Police Station and lodged his FIR. The FIR is produced on record at Exh.5.

In his cross-examination, PW 1 has deposed that when Narendrasingh was taken to Sion Hospital on the first occasion, one Police Constable was present there and he had made inquiry with PW 1. According to PW 1, the said Police Constable even made an entry.

In the further cross-examination, the defence has brought on record the omissions from his FIR in respect of Vicky's role. PW 1 has claimed that he had mentioned in the FIR that Vicky told him not to admit Narendrasingh in Sion Hospital. However, such statement was not found in the FIR. PW 1 could not offer any explanation as to why such statement was not found in the FIR. PW 1 was further confronted with his statement in the FIR that Narendrasingh refused to get himself admitted in Sion Hospital and insisted that PW 1 should take him to his residence. PW 1 then deposed that he had made the statement under the pressure exerted by the Appellant's brother.

6. PW 2 Shitalsingh is the most important witness in this case. He is the only eye witness examined by the prosecution. According to him, at the relevant time, he was residing with his uncle PW 1 Ajitsingh at Sion-Koliwada. PW 2 was cousin of deceased Narendrasingh who was also staying with PW 1 Ajitsingh. According to PW 2, Narendrasingh was working in Billu Garage at Koliwada as an electrician. He has further deposed that the Appellant was working in Prakash Auto Shop near Billu Garage. About the incident, PW 2 had deposed that, on 15/02/1983, he himself was working at Billu

Garage about 5.45 p.m. At that time, he heard a commotion outside the garage and he came out to see as to what was happening. He saw that there was a scuffle between Pappu and Narendrasingh. Pappu then went to a shop and brought an iron bar and assaulted Narendrasingh on his head. Narendrasingh fell down. In the meantime, PW 1 came there and with his help, Narendrasingh was taken to Sion Hospital. After that, PW 2 had narrated the events in the same manner as deposed by the PW 11 in respect of Narendrasingh being taken to Dr. Rao's clinic and then to his own house. He has further deposed that Narendrasingh died on the next day morning.

In the cross-examination, he has deposed that he himself was working in Billu Garage for about 7 to 8 months prior to the incident but did not get acquainted with the other workers in the compound. On a specific cross-examination regarding the identity of the Appellant, he has deposed that he came to know the accused since the day of the incident. He has further deposed that prior to the incident, he had seen the accused but had no occasion to talk to him. PW 2 has further admitted that he came to know the name of the accused from the persons who had gathered on the spot and he came

to know about his name only on the day of the incident. He has further deposed that he had mentioned only the name 'Pappu' to his uncle. He has further deposed that, he was unable to state as to who was the person who had given him the name of the accused as 'Pappu'.

7. PW 3 Dr. Parikh had seen Narendrasingh at about 8.00 p.m. on 15/02/1983. He has deposed that Narendrasingh was brought to his clinic by Vicky and other persons. According to PW 3, he had advised those persons to take Narendrasingh to Sion Hospital because he needed constant observation for two to three days.

8. PW 7 Mahindrasingh was another eye witness, according to the prosecution, but he turned hostile and did not support the prosecution case. Going through his evidence, it is found that he is an unreliable witness and therefore, his evidence cannot be taken into consideration for deciding this Appeal.

9. PW 9 PI Shishupal was the Investigating Officer. He has deposed that at about 11.30 p.m. on 15/02/1983, he received a message that one person by name Narendrasingh was admitted in

Sion Hospital. When he went there, he did not find any such person in the hospital. PW 9 then went to EPR counter. PW 9 has deposed that he verified the message from the EPR and found that one Narendrasingh was brought to the hospital by his uncle Ajitsingh with the history of assault by one Pappu. His further inquiry showed that Narendrasingh was not in the Sion Hospital and had left. On the next day, he made inquiries on the basis of the address of Narendrasingh and he came to know that Narendrasingh had expired. He was declared dead before admission at Sion Hospital. Thereafter, PW 1 gave his FIR and the investigation was carried out. According to him, the accused was arrested at Dadar Railway Station at about 3.45 a.m. on 17/02/1983. As against this statement, PW 1's evidence shows that PW 1 was called to Matunga Police Station at 1.00 p.m. on 17/02/1983 and the Appellant was arrested at 4.00 p.m. while alighting from a taxi outside Dadar Railway Station. PW 9 has further deposed that on 17/02/1983, the bloodstained clothes and the weapon of assault were recovered at the instance of the Appellant from his house. However, the weapon and the clothes were not produced on record and the panchanamas were produced on record and were marked for identification as 'X-3' and 'X-4'.

In the cross-examination, he was asked about the availability of the EPR. However, the EPR or the extract thereof was not part of this investigation. During the entire trial, such extract was not produced before the Court. The contradictions and omissions from the prosecution witnesses were put to him.

10. I have heard Ms. Beerta H. Bajwa, learned Counsel for the Appellant and Mrs. S. S. Kaushik, learned APP for State.

11. The learned Counsel for the Appellant submitted that the prosecution has not proved its case beyond reasonable doubt. The evidence of the eye witness PW 2 is not reliable. She further submitted that no other witness is examined though, according to the prosecution case, the incident had occurred in front of the garage in a crowded locality. She further submitted that there is no corroborative piece of evidence in the form of production of murder weapon or clothes worn by the accused at the time of commission of the offence, before the Court. She further submitted that the EPR is not produced on record. Therefore, the entry made therein is of no assistance to the prosecution.

12. As against this submission, Mrs. Kaushik, learned APP for the State, submitted that the evidence of PW 2 Shitalsingh was cogent and reliable and the conviction can be based solely on his evidence. She further submitted that though the trial has taken an inordinately long time, the prosecution cannot be faulted for the same and therefore, non-production of weapon or the clothes before the Court or even extract of the EPR during trial, could not be held against the prosecution.

13. I have considered the rival submissions made by both the Counsel. As mentioned earlier, the prosecution case solely rests on the evidence of PW 2 Shitalsingh. PW 1 Ajitsingh has merely given the background about himself, PW 2 and the deceased. According to PW 1, when he had reached the spot, Narendrasingh was already lying on the ground and PW 2 was lifting him. He has further deposed that PW 2 told him that one Pappu had assaulted Narendrasingh. Therefore, the evidence of PW 1 is in the nature of hearsay evidence and therefore, is inadmissible.

14. As far as the evidence of PW 2 Shitalsingh is concerned, though he claimed to be an eye witness to the incident, the question remains as to whether he was knowing the Appellant. PW 2 has deposed that he came to know about the accused only on the date of the incident. He has deposed that prior to that, he had only seen the accused. He has not elaborated as to whether he had seen him regularly. His cross-examination shows that PW 2 was not certain about the identity of the Appellant. He was not even knowing the name of the Appellant. He has admitted that name of the Appellant was given by a bystander who was present at the time of the incident. In this view of the matter, it was absolutely imperative for the investigating agency to have held a test identification parade to enable PW 2 to identify the suspect and fix the identity of the assailant. However, the investigating agency has not conducted any such test identification parade. The accused was identified by PW 2 in Court after a gap of about 11 years and therefore, I am not inclined to place much reliance on such identification in Court. The FIR mentions the name of the Appellant as 'Pappu @ Pappi'. The FIR is based on the information supplied to PW 1 by PW 2. Therefore, there is a serious doubt about the identity of the person by name Pappi. Furthermore, there is no evidence of any other witness that the Appellant was

known by the nickname 'Pappu'. Therefore, in my opinion, the evidence of PW 2 is not of such a nature that the conviction can be based safely only on his evidence. Even his conduct is unnatural. He had not taken steps to admit Narendrasingh in Sion Hospital. Such type of evidence definitely needs corroboration. In the instant case, there is absolutely no corroboration coming forth from any quarter. As far as the recovery of the weapon is concerned, the weapon was not produced before the Court and the explanation offered is not satisfactory at all. The CA report does not show that the clothes of the accused were having bloodstains or the weapon i.e. the iron rod was having the blood of the same group as that of the deceased. Another important aspect, in my opinion, is that the prosecution has utterly failed to examine other witness though even as per the prosecution case itself, the incident had occurred in the evening in the crowded area which was surrounded by garages and shops. The incident itself was witnessed by many other persons as was deposed by PW 1 and PW 2. Therefore, in this particular case, an adverse inference against the prosecution can be drawn that they have deliberately not examined the other witnesses as such evidence would have been against the prosecution.

15. There is another important aspect where the prosecution witnesses have given contrary versions. PW 1 has deposed that the Appellant was arrested on 17/02/1983 at about 4.00 p.m. outside Dadar Railway Station whereas the Investigating Officer has stated that he was arrested at 3.45 a.m. at Dadar Railway Station. PW 1 was categorical in stating that he was called at Matunga Police Station from where he was taken to Dadar Railway Station and the accused was arrested in front of him. These versions are contrary and cannot stand together. Therefore, there is a serious doubt about genuineness of the investigation itself.

16. In view of the above discussion, I do not find that the prosecution has proved its case beyond reasonable doubt and therefore, the Appellant is entitled for acquittal. Hence, the Appeal is allowed. The Appellant is acquitted of all the charges charged with. His bail bond shall stand discharged.

(SARANG V. KOTWAL, J.)