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|--------------------------------|---|-------------------------------------|
| Babubhai Laxman Bhamaniya      | ) |                                     |
| age about 55 years, adult      | ) |                                     |
| Occupation NIL, as lodged in   | ) |                                     |
| Nashik Road Central Prison -   | ) |                                     |
| Nashik Convict No.C-7386       | ) |                                     |
| Indian Inhabitant, resident of | ) |                                     |
| Versova Andheri (W), Mumbai    | ) |                                     |
| - 400 061                      | ) | ....Appellant<br>(Original Accused) |

The State of Maharashtra )  
(at the instance of Versova )  
Police Station Andheri (W) )  
C.R. No.90/2008) ) .....Respondent  
(Orig. Complainant)

— — —

Mr H.J. Dedhia, APP for the Respondent/State.

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**DATE: 9<sup>th</sup> AUGUST, 2018**

1] Being aggrieved by the Judgment and Order dated 14/11/2008

passed by the learned Sessions Judge, Mumbai in Sessions Case No.479 of 2008, thereby convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs 5,000/- and in default thereof to suffer rigorous imprisonment for six months, Appellant has approached this Court. Appellant is also convicted under section 324 of the IPC and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs 1,000/- and in default thereof to suffer rigorous imprisonment for three months. He has also been convicted for the offence punishable under Section 506(II) of the IPC and sentenced to suffer rigorous imprisonment for one year.

2] The prosecution case, in brief, is thus :-

3] The accused alongwith his wife P.W.1 - Jaya and his son deceased Mukesh were residing in a room in Shiv Gulli, Versova Andheri. Near their house, the sister of P.W.1 - Jaya i.e. P.W.2 - Laxmi as well as daughter of Laxmi i.e. P.W. 5 - Asha also used to reside. The accused, initially, was doing the work of watchman but

he had left the job. P.W. 1 – Jaya was in the business of selling fish. On the date of incident i.e. on 17/03/2008, at around 3.00 P.M., after doing her business, she came home. At that time, she noticed that there was a quarrel between her husband and her son deceased Mukesh. On being inquired, her son deceased Mukesh told her that the accused had given food which was meant for her to one unknown person. She states that, however, she asked her son to remain quiet. It is further version of P.W. 1 – Jaya that, at around 8.00 P.M., her husband, without talking to any one, went to sleep on the mezzanine floor of the house. At that time, her son was sleeping on the lower portion of the house. At around 3.30 A.M., she heard cries of her son. On being awakened, she saw that her husband was not on the place where he used to sleep and therefore she went down. She saw that her husband was assaulting the deceased with iron rod. She shouted and attempted to save her son. However, the accused also assaulted her. Due to injuries sustained by her, she fell on one side. Due to her cries, her sister and sister's daughter also came there. The accused threatened all three of them that if they inform about the incident to police, they would also receive the same fate. As such, she

gave false information to police that the deceased had fallen down from the stairs and received injuries. However, after gathering courage, she has lodged the FIR.

4] On the basis of oral report of P.W. 1 – Jaya, crime came to be registered. At the conclusion of investigation, charge-sheet came to be filed in the Court of learned Metropolitan Magistrate for the offences punishable under Sections 302, 324 , 504 and 506 (II) of the Indian Penal Code. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the Sessions Court.

5] The learned Trial Judge framed charges. The accused pleaded not guilty and claimed to be tried. At the conclusion of trial, the learned Trial Judge passed the order of conviction and sentence as aforesaid. Being aggrieved thereby the present appeal.

6] Mr. Deshmukh, the learned Counsel appointed to appear on behalf of the Appellant, submitted that the star witness P.W. 1 – Jaya has turned hostile and therefore the order of conviction is not

sustainable. He further submitted that, the evidence of P.W. 2 – Laxmi and P.W. 5 – Asha is also of no use to the prosecution inasmuch as none of them had actually seen the incident. He further submitted that, there is an inordinate delay in lodging the FIR. The learned Counsel therefore submitted that the order of conviction recorded by the learned Trial Judge would not be sustainable.

7] Mr. Dedhia, the learned APP appearing on behalf of the State, submitted that the learned Trial Judge on the basis of appreciation of evidence has rightly arrived at a conclusion that the accused is guilty and therefore no interference is warranted in appeal.

8] In the present case, P.W. 1 – Jaya is a star witness. No doubt, she has not fully supported the prosecution case. However, by now, it is a settled position in law that, such part of the evidence of hostile witness which is found to be trustworthy can always be taken into consideration. In the present case, P.W. 1 – Jaya has supported the prosecution version with regard to earlier incident of there being quarrel between her son deceased Mukesh and her husband on her husband giving food meant for her to his friend. She has also

supported the prosecution case with regard to she and accused going to mezzanine floor for sleeping and her son deceased Mukesh sleeping on the ground floor. She however states that, when she came down, she saw Mukesh lying in injured condition and the accused was standing there with iron rod. Mukesh was having bleeding injury on his head. After she shouted, Laxmi and her daughter Asha came there. The neighbours also gathered there. She felt giddiness and fell down and sustained injury to her forehead. However, in her cross-examination by learned APP, she has admitted that she saw the accused assaulting Mukesh by iron rod. She further admitted that, when she tried to intervene, the accused assaulted her with iron rod, which caused injury to her head. She has further admitted that the accused threatened her as well as Laxmi and Asha to kill them if they disclosed the incident to anybody. No doubt, again in her cross-examination by the accused, she has stated that she has not seen the accused while giving blow of iron rod to Mukesh.

9] It could thus be clearly seen that her evidence insofar as the quarrel between her husband and son in the afternoon, in the evening she and her husband going on mezzanine floor for sleeping, the

deceased sleeping on the ground floor and thereafter she hearing cries of her son and therefore getting up, after getting up the accused not being found at the place where he was sleeping, she therefore going down on the ground floor where she saw the deceased with injuries and the Appellant armed with rod standing near the deceased, has gone unchallenged.

**10]** Her evidence to this effect is duly corroborated by evidence of her sister P.W. 2 – Laxmi. She states in her evidence that, she heard cries at around 3.30 A.M. and she went to room of Jaya. She saw Mukesh was lying in injured condition. The accused was also present there. Mukesh had sustained injury on his head. She further stated that, the accused had given threats that if his name is disclosed to anybody then that person will have to face the consequences. The evidence of P.W. 5 – Asha, who is daughter of P.W. 2 – Laxmi is to the same effect.

**11]** It is further to be noted that P.W. 6 – Nitin Pali has proved recovery of crowbar used in the crime under memorandum of the accused under Section 27 of the Evidence Act which was concealed

below the heap of wooden articles behind the temple.

12] It is to be noted that the incident has occurred in the four corners of the house wherein the accused, deceased and P.W. 1 – Jaya were residing. It is proved beyond reasonable doubt that when P.W. 1 – Jaya woke up, hearing cries of her son deceased Mukeh and went to ground floor, she saw the deceased was lying in injured condition and the accused was standing behind, armed with iron rod. In these circumstances, the burden would shift on the accused under Section 106 of the Evidence Act to explain as to how the injuries were received by the accused. The accused has given his explanation in his statement under Section 313 that the deceased had fallen from the mezzanine floor and sustained injuries. However, P.W. 8 – Dr. Prakash Shinde has clearly stated in his evidence, that injuries which were suffered by the deceased are not possible due to fall from high place or table or any other hard object. He has deposed that the injuries sustained by the deceased are possible by iron rod i.e. Article-A. It could thus be seen, that the explanation given by the accused has been found to be false. The appeal therefore fails.

**13]** In the result we pass the following order :-

**ORDER**

**(i)** The appeal is dismissed.

**(ii)** The fees of the learned Counsel appointed to appear on behalf of the Appellant is quantified at Rs 10,000/- to be paid by High Court legal Services Authority.

**(iii)** The High Court Legal Services Authority is directed to pay an amount of Rs 10,000/- as donation on behalf of Mr. Veerdhawal Deshmukh to Kirtikar Law Library.

**(SARANG V. KOTWAL, J.)**

**(B. R. GAVAI, J.)**