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

CRIMINAL APPEAL NO.345 OF 2010

1] Mohd. Sattar Mohd Iqbal Shaikh)
Age : 26 years, residing at :Near Mega)
Industries, Opp. Prabhu Hotel, Delhi)
Stand, Dhandabunder, Dongri, Mumbai)
)
2] Mohd. Sharif Mohd. Iqbal Shaikh)
Age : 26 years, Residing at: Near Mega)
Industries, Opp: Prabhu Hotel, Delhi)
Stand, Dhanabunder, Dongri, Mumbai)Appellants
(Original Accused Nos.1&2)

Versus

The State of Maharashtra)
(At the Instance of Dongri Police Station)
CR No.44/09)Respondents.

Mr. Taraq Sayyed Advocate for the Appellant.

Mr. V.V. Gangurde APP for Respondent / State.

**CORAM: B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE: 4th JUNE, 2018

ORAL JUDGMENT: (Per B.R. Gavai, J.)

1] Appeal takes exception to the Judgment and Order passed by the learned Sessions Judge at Sewree, Mumbai in Sessions Case No.469 of

2009, thereby convicting both the Appellants for the offence punishable under Section 302 of the Indian Penal Code and sentencing them for life imprisonment with fine of Rs 1000/- each and in default of payment of fine the Appellants have been directed undergo rigorous imprisonment for two months.

2] The prosecution story in a nutshell is thus:-

3] That a deceased Sanjay Gamre was residing at Danabunder. P.W.1 – Smt. Selvi Gamre is wife of the deceased. It is the prosecution case that, prior to about 6 months of incident occurring, Accused No.1 – Mohd. Sattar had tried to insult her when she was in house. On that count, there was an altercation between the deceased and Accused No.1.

4] It is the prosecution case that, on 14/04/2009, when the deceased and P.W. 1 – Smt. Selvi Gamre were going to hotel to avail food, Accused No.1 – Mohd. Sattar pushed her. On that count, there was fight between the deceased and Accused No.1. Accused No.1 caught hold of the deceased and Accused No.2 - Mohd. Sharif came

there armed with knife and assaulted the deceased, as result of which the deceased Sanjay fell down. He was brought to St. George Hospital wherein, he was declared dead. On the basis of the oral report lodged by P.W.1, the printed FIR came to be lodged below Exhibit-10-A. The Investigation Officer filed charge-sheet in the Court of learned Metropolitan Magistrate. Since the case was exclusively triable by the learned Sessions Judge, the same was committed to the learned Sessions Judge. The learned Sessions Judge framed the charges for the offence punishable under Section 302 of the Indian Penal Code and for the offence punishable under Section 37(1)(a) read with Section 135 of Bombay Police Act. The accused pleaded not guilty and claimed to be tried.

5] At the conclusion of the trial, the learned Sessions Judge convicted both the Accused for the offence punishable under Section 302 of the Indian Penal Code. However the learned Sessions Judge acquitted them for the offence punishable under the Bombay Police Act. Being aggrieved by the Order of conviction, the present appeal.

6] We have heard Mr. Sayyed, learned Counsel appearing on behalf

of the Appellants and Mr Gangurde, learned APP appearing on behalf of the State. We have perused the entire evidence with the assistance of the learned Counsel for the Appellants and the learned APP appearing for the State.

7] The prosecution case mainly rests on an ocular testimony of the wife of deceased viz. P.W. 1 – Smt. Selvi Gamre. Another alleged eye witness is P.W. 4 – Mohd Alim and P.W. 6 – Mohammad Shaikh is a panch witness who has proved the memorandum under Section 27 of Accused No.2 on the basis of which the knife alleged to have been used in the crime is recovered.

8] P.W. 1 - Smt. Selvi Gamre is a star witness. She has stated in her evidence with regard to the incident which had taken place prior to about six months of the incident wherein, Accused No.1 – Mohd. Sattar teased and assaulted her. She has stated that, she has narrated about the incident to her husband and as a result of which, an altercation took place between her husband and Accused No.1 – Mohd Sattar. With regard to the incident that had occurred giving rise to the present case, she has stated that Accused No.1 – Mohd. Sattar was

drinking liquor outside Prabhu Hotel. She and her husband had gone to Prabhu Hotel to avail food. Accused No.1 – Mohd. Sattar started abusing her husband and gave push to her. On deceased asking Accused No.1 as to why he had pushed his wife, a clash started between her husband and Accused No.1. Accused No.1 held her husband and she started separating them. She was pulling Sattar and had taken bite on the back of Sattar in order to release her husband from his clutches. She has stated that, thereafter Accused No.2 – Sharif, who is sitting in the Court, came from backside and gave a blow with knife on the neck of her husband. Thereafter, accused persons ran away.

9] Though in the examination-in-chief, P.W. 1 - Smt. Selvi Gamre has clearly implicated both the Appellants/Accused, perusal of her cross-examination would reveal that she has substantially changed her version. P.W. - Smt. Selvi Gamre, being a wife of the deceased, is an interested witness. No doubt that, the testimony of interested witness need not be discarded only on the ground that the witness is interested witness. However, evidence of such a witness has to be scrutinized with greater caution and circumspection. Only if such evidence is

found to be trustworthy, reliable and cogent, the conviction based on such evidence would be permissible.

10] In her evidence, P.W. 1 - Smt. Selvi Gamre has clearly admitted that, when she and her husband were crossing Prabhu Hotel, they were not aware that Accused Sattar was sitting there. In para 6 of her cross-examination, she has stated that she was attempting to separate her husband by pulling away Sattar. She has further admitted that her husband had broken the grip of Sattar prior to reaching the entrance of Laxmi Hotel. She has stated that, after loosing from the grip, her husband was looking towards Sattar. She has further admitted that, Accused No.2, till that moment, had not come there. She has stated that after her husband and Accused No.1 were separated, one Ganesh had held her husband and Sattar was held by one Ranganathan. She has further admitted that when both were held by other persons, they were not in a position to touch each other. She has further stated that, after her husband and Accused No.1 – Sattar were separated, Accused No.2 – Sharif came there. She has stated in unequivocal terms that Sharif had not come to the spot when her husband was separated by Ganesh, who had held him. It could thus

be clearly seen that, believing her testimony as it is that there was altercation between the deceased and Sattar and after altercation took place, both of them were separated then also, it is after both of them were separated, Accused No.2 – Sharif has assaulted the deceased with knife. It could thus be seen that the version given by her in examination-in-chief that Accused No.1 had caught hold of the deceased and Accused No.2 at that time assaulted the deceased, has been totally shattered. Except the evidence of this witness, there is nothing as against Appellant No.1/Accused No.1. We are therefore of the considered view that the conviction of Accused No.1 on the basis of the testimony of this witness would not be sustainable. It is further to be noted that, the another alleged eye witness i.e. P.W. 4 - Mohd Ali had not supported the prosecution case. We are therefore of the considered view that conviction of Accused No.1 – Mohd Sattar is not sustainable.

11] Insofar as Accused No.2 – Mohd Sharif is concerned, no doubt that against him also, the main evidence is that of P.W. 1 - Smt. Selvi Gamre. We have disbelieved her evidence insofar as implication of Accused No.1 – Mohd Sattar is concerned. However the principle

falsus in uno falsus in omnibus is not applicable in Indian jurisprudence. P.W. 1 - Smt. Selvi Gamre has clearly attributed role to Accused No.2. Her evidence, to that effect, is corroborated by the First Information Report, which was immediately lodged after the occurrence of the incident. No doubt, that the First Information Report is not a substantive piece of evidence. However, it can be used to corroborate the other evidence. In that view of the matter, we are inclined to believe the evidence of P.W.1 - Smt. Selvi Gamre insofar as the assault by Accused No.2 by knife on the deceased is concerned.

12] However, the question that would be required to be considered is as to whether conviction under Section 302 of the Indian Penal Code would be sustainable or not or as to whether Accused No.2 is entitled to be convicted for lesser offence. Perusal of the evidence would reveal that the motive is alleged only against Accused No.1. No previous enmity is attributed to Accused No.2. It is not even the prosecution case that Accused No.2 had come with an intention to cause death of the deceased. From the material placed on record, possibility of the prosecution not bringing the true genesis of the

incident, cannot be ruled out. As stated by P.W.1 - Smt. Selvi Gamre which is also corroborated by the evidence of P.W. 3 – Dr. Pratap Anand, there are injuries on the person of Accused No.1. The possibility of some altercation taking place between the deceased and his wife on one hand and both the Accused on the other and in that altercation in a heat of passion Accused No.2 assaulting the deceased cannot be ruled out. We are therefore of the considered view, that the conviction of Appellant No2/Accused No.2 for the offence punishable under Section 302 of the Indian Penal Code would not be sustainable. In our view the case, at the most, would fall in Part-I of Section 304 of the Indian penal Code. Accused No.2 has already undergone sentence of almost nine years and with remission, it would be much longer period. We find that such a sentence would sub-serve the interest of justice.

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

ORDER

(1) Appeal of Appellant No.1 – Mohd. Sattar Mohd. Iqbal Shaikh is allowed. The Judgment

and Order of his conviction and sentence is set aside. Appellant No.1 is already on bail. His bail bonds stand cancelled. The fine amount shall stand refunded to Appellant No.1.

(2) So far as Appeal of Appellant No.2 – Mohd Sharif Mohd. Iqbal Shaikh is concerned, the same is partly allowed and the Judgment and Order of his conviction under Section 302 IPC is altered to one under Part-I, Section 304 IPC. The sentence is reduced to the sentence already undergone by Appellant No.2. Rest of the order of fine etc. is maintained.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)