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

CRIMINAL APPLICATION No. 373 OF 2019
IN
CRIMINAL APPEAL No. 400 OF 2019

Sajaykumar Shivmangal Bharati	...Applicant
Vs.	
The State of Maharashtra and Anr.	...Respondents

Mr. Samyak K. Gimekar for Applicant
Ms. Pallavi Dabholkar-APP

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : MARCH 14, 2019

P.C.:

1. Heard. This is an application under Section 389 of Cr.P.C.
2. The Applicant is convicted for the offence punishable under Section 304 (II) of the Indian Penal Code and he is sentenced to suffer R.I. for 10 years by the Additional Sessions Judge, City Civil & Sessions Court, Greater Mumbai vide judgment and order dated 26th February, 2019 in Sessions Case No. 580 of 2015.
3. In fact, the Applicant was charged with an offence punishable under Section 302 r/w. 34 of the Indian Penal Code. However, on the basis of the evidence adduced by the prosecution, the Applicant has been convicted for an offence punishable under Section 304(II) of the Indian Penal Code.

4. It is the case of the prosecution that the deceased Firoz Shaikh was running a chicken shop just next to his house. That the Original Accused No.1 Kundan Choudhary and his friends had been to the chicken shop on 26th January, 2015. They used to purchase chicken on credit. The deceased Firoz Shaikh had refused to sell the chicken unless the earlier dues were cleared. There was an altercation between them and at that time, the Accused Kundan and his associates i.e. the present Applicant and Original Accused Nos. 1 and 3 had given blows on the chest of Firoz and had almost throttled him to death.

5. Perused the evidence recorded at the time of trial. According to the prosecution, PW-2 and PW-3 are the eye witnesses to the incident. PW1 happens to be the wife of deceased Firoz. PW2 is the neighbor of deceased Firoz and PW3 Tahir was working for the deceased.

6. The learned counsel for the Applicant challenges the evidence of the eye witnesses on the ground that PW1 the wife of the deceased could not have been an eye witness and even if she had been an eye witness, there was no occasion for her to be acquainted with the customer and PW3 has not named PW1 as the person, who was present at the time of offence.

7. PW2 has stated that on 26th January, 2015, three persons had come to the shop of deceased Firoz, there were verbal altercations. PW2 has identified them. After hearing the quarrels, he along with his mother and sister had rushed to the spot and upon seeing them, the accused had started fleeing from the spot. He has specifically stated that one person had pressed the neck of the deceased, another had given kick blows on the chest and another person had given fist blows on the chest. He has marked the presence of the wife of the deceased as she was shouting loudly. She had also fallen down. Accused No.1 was apprehended by the neighbors. PW2 and PW3 had apprehended the accused Kundan Choudhary on the spot and other persons had managed to escape. PW2 has identified all the three persons in the test identification parade and had attributed specific role to them.

8. PW3 has categorically named Kundan Choudhary, who was apprehended at the spot.

9. PW7 Dr. Shashank Tyagi has stated that he had received inquest panchnama and the statements of the relatives of the deceased. The cause of death could not be ascertained. He has specifically stated as follows:

“On External examination of the dead body, we had found cyanosis present on nail beds bilateral hands. We had

found abrasion over medial inner aspect of lower lip measuring 0.5 c.m x 0.3 cm. Reddish in colour, abrasion over right side of face of 3 cm below the lateral end of right eye and 7 cm in right tragus measuring 0.2 cm. X 0.2 cm reddish in colour. Meninges (covering over the brain) was found intact and congested. Brain on cut section, multiple petechial hemorrhages were found present in white matter at places, congested and edematous.”

10. The learned counsel for the Applicant is placing implicit reliance upon the statement of the doctor which reads that “*On the basis of the injuries found on the dead body, I can say that the cause of death might be due to cardiac arrest due to vagal inhibition*”. However, it is to be appreciated that it is admitted by the doctor that he could not ascertain the actual cause of death at the time of issuance of final cause of death certificate also. The admission of the doctor is important to the extent that “injuries mentioned in Column No.19(iii), 20 (d), (e) and (g) are possible due to compression of neck and multiple punches over chest region. All the injuries are antemortem injuries.

11. This Court cannot be oblivious of the fact that this is a case of direct evidence. Ocular evidence would prevail over the medical evidence. It cannot be denied that the fist and kick blows extended by the accused persons have resulted into death. It is, in these

circumstances, the applicant does not deserve to be enlarged on bail during the pendency of the appeal. The application being sans merits stands rejected and disposed of accordingly.

[SMT.SADHANA S. JADHAV, J.]

V.A. Tikam