

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

**CRIMINAL APPEAL NO.746 OF 2012
WITH
CRIMINAL APPLICATION NO.318 OF 2016**

Shaktisingh Jasmatsingh Dudhani	]	
R/o Naya Bhimnagar, Kansai Road,	]	
Near Ambarnath Railway Station	]	
Infront of Omkar Medical Stores	]	
Ambarnath (West).Original Residence:	]	
Vadali Badnera, Tah. & Dist. Amravati	]	...Appellant
		(Orig. Accused No.1)

vs.

The State of Maharashtra	]	...Respondent
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**AND
CRIMINAL APPEAL NO.1230 OF 2012
WITH
CRIMINAL APPLICATION NO.1443 OF 2018**

Badshah Singh Ajab Singh	]	
Amravati Zilla, Taluka Amravati	]	
Bus Stop, Badali, Sudarshan Nagar,	]	
Tikpure, Maharashtra State	]	...Appellant
		(original accused No.2)

vs.

The State of Maharashtra	]	...Respondent
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Dr. Yug Mohit Chaudhary for the appellant in Appeal No.746/2012.

Smt. Harjeet Kaur for the appellant in Appeal No.1230/2012.

Mr. Arfan Sait, APP for the Respondent.

**CORAM : B. P. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.
DATE : 12/03/2019.**

JUDGMENT: (Per B. P. Dharmadhikari, J.)

. Accused No.1-Shaktisingh Jasmatsingh Dudhani is the appellant in Appeal No.746/2012 while accused No.2-Badshah Singh Ajabsingh Tak is the appellant in Appeal No.1230/2012. They were accused

in S.C. No.375/2009 and 198/2010 before Extra Joint Ad Hoc Additional Sessions Judge, Thane. The said Court as on 27/4/2012 punished both of them for offence punishable under section 460 of IPC and sentenced them to suffer imprisonment for life.

2. The fact show that they are convicted in relation to incident dated 18/4/2009 when at about 2.30 a.m. in the night they broke into the house of complainant Sameer (PW-5). At that time they broke open the main door of flat of complainant, flashed torch light on his face. One person with pen knife removed gold chain from his neck and took him at the knife point towards his mother's bedroom while one person stopped at that place only. Others went to bedroom of his brother and in an effort to open the door, damaged the door frame. His brother (deceased) Sanjay opened the door and pushed three accused persons and tried to caught hold of those persons and complainant Sameer caught hold of one person and put him in the bathroom. That person is accused No.1. Other accused ran away. Remaining persons were scuffling with his brother Sanjay. One of the persons who ran away, came back and stabbed pen knife in the chest of Sanjay. One person hit rod on Sanjay's head. Sanjay sustained bleeding injury and fell down. Remaining persons ran away from spot. Sanjay shouted, neighbours gathered and deceased was taken to hospital. According to prosecution those persons were talking in Hindi.

3. Learned Advocate appearing for accused No.2 has relied upon inconsistencies in narration of eye witnesses viz., PW-3 and PW-5. She submits that Badshah was caught sometime in September 2009 from Amravati jail and there is no incriminating material against him except identification. None of the eye witnesses have given details of his personality or his being a turban wearing Sikh. The test identification parade was conducted one year after the arrest and only complainant

Sameer participated in it. There were only two Sikhs persons in test identification parade and Sameer identified accused No.2. She points out that though learned counsel for accused No.2 insisted for his physical presence during trial, other eye witnesses claimed that they identified him through Video Conference facility. Thus proper procedure does not appear to have been followed, recorded and has not been accordingly made part of trial. She submits that conviction of appellant is therefore totally unwarranted.

4. Advocate Chaudhary appearing for accused No.1 has restricted his argument only to urge that provisions of section 460 of IPC apply to offence which occur while committing lurking house trespass. Accused No.1 was put in bathroom and therefore was not part of remaining events or action. He therefore cannot be roped under section 460 of IPC. In the alternative without prejudice he submits that if accused No.1 was apprehended and other accused persons ran away, offence of lurking house trespass comes to an end, action of one person returning back and stabbing Sanjay thereafter needs to be viewed as an independent act and accused No.1 cannot be punished for it. Lastly, he pointed out that Shaktisingh Dudhani is in custody and in jail from 18/4/2009 and would be completing 10 years of imprisonment in next month.

5. Learned APP appearing for respondent/State pointed out that there are two injured eye witnesses who have identified both accused persons. Complainant identified Badshah in identification parade and no objection to it has been taken at any point of time. Executive Magistrate who conducted it was examined as witness and he has brought on record that all formalities were completed and necessary opportunity to change clothes, to shift his position was given to Badshah. He argues that contentions which have factual bearing, therefore cannot be entertained for

the first time in appeal.

6. He further submits that when other two eye witnesses viz., PW-2 Suhasini (the mother of deceased) and PW-3 (the widow of deceased) identified Badshah through video conference facility, again no objection was raised. Evidence of PW-2 and PW-3 has been recorded on 13/3/2012. Evidence of complainant (PW-5) has been recorded on 19/3/2012. This material therefore shows again an effort to raise factual controversy for the first time.

7. Learned APP adds that there is no reason for injured eye witnesses to lie or to falsely implicate the accused persons. Apprehending accused No.1 Shaktisingh at the spot by people is not in dispute and burden was therefore upon the accused persons to explain why they trespassed into the house of deceased and injured witnesses. He relies upon section 106 of the Evidence Act for said purpose.

8. Lastly, our attention is invited to provisions of section 460 of IPC. Learned APP states that merely because accused No.1 was restrained, house trespass does not come to an end. Similarly, if persons ran away, the act of one of them returning back and forking knife on deceased cannot be seen as an independent or individual act. It is part of same offence of lurking house trespass and the distinction sought to be made by Advocate Chaudhary is unsustainable. Learned APP relied upon the judgment of Hon'ble Apex Court in *Haradhan Das vs. State of West Bengal*¹ particularly paragraph 28, to urge that the law does not envisage common intention or common object under section 460 of IPC. It is sufficient that accused persons have acted jointly and committed offences stated in section 460 of IPC.

¹ 2013 ALL MR(Cri) 737 (SC)

9. Perusal of oral evidence of complainant Sameer reveals that after breaking door four persons entered his house and one person flashed torch on his face. Another person who had knife put it on Sameer's neck and snatched his gold chain. He took him to bedroom of his mother by putting pen knife on his back. Mother also woke up by that time. Those persons put Sameer and his mother at one place and then three persons went to another bedroom. One of them had a rod another had two knives and one person had a screwdriver. They started damaging front portion of bedroom. Marble frame was completely damaged. His brother pushed all three persons and the person near the complainant was taken by the complainant to hall. All four persons were beating. One person left the house and went outside. Complainant pushed one person inside the bathroom. From subsequent events and narration it appears that this person is accused No.1-Shaktisingh. Another person who was near his brother went outside and came back. He stabbed his brother with pen knife on chest. Third person was caught by his brother that person gave blow of iron rod on head of his brother. Person who was pushed inside the bathroom beat complainant and his mother by pen knife. He sustained injury on chest, shoulder and left hand. His mother also sustained injury on her hand. His brother fell down and blood was oozing from his chest, mouth and head. All three persons ran away, person who was in bathroom also tried to run away but he caught him. That person was shouting "Badshah Badshah" Then neighbours came.

10. In next paragraph, in his deposition he pointed out identification parade at Thane jail on 28/9/2010. He identified accused No.2 Badshah there. He also identified him at Video conference. He claimed that Badshah poked pen knife in chest of his brother. He also claimed that he gave description of two remaining accused persons.

11. In his cross examination, he accepted that he did not inform police about person in bathroom injuring him by knife. He also stated that he did not give detail description of the face. He could not explain why fact that accused had shouted “Badshah Badshah” did not appear in his police report.

12. Deposition of PW-2 Mother Suhasini shows that four person came to her with Sameer. One of them caught hold of her while remaining three went to bedroom of her elder son. They tried to damage door and her son (deceased Sanjay) opened the door from inside. His son tried to push those persons and those three persons started beating her son. She shouted. One person caught hold and remaining persons caught hold of her and younger son (PW-5) Sameer and remaining persons caught hold of Sanjay, they injured her son with knife and rod on various parts of body. They beat him on head and by pen knife on chest. She also sustained injury on her hand by knife. Sameer was also injured by knife. People gathered and her son fell down on earth. They caught one person and three persons ran away. Though her son fell down, one assailant who had gone outside, came back and pierced knife in body of her son.

13. PW-3-Mansvi, the widow of Sanjay has deposed that when her husband opened the door of bedroom three persons were standing. Her husband was pushing them and was taking them in hall. Her brother in law Sameer gave dash to Shaktisingh inside the bathroom. She could see because various lights, light of passage light in hall were onn. One assailant hit rod on head of Sanjay, the other accused whom she saw in Video Conference poked knife in chest of her husband. They tried to run away but Sameer caught hold of accused No.1 She has deposed in cross examination that her attention was focused on her husband and she was anxious about her daughter. Till then she was not aware that one accused was thrown in

bathroom.

14. Thus, specific evidence of complainant Sameer shows that one person had screwdriver while another person had two knives and one person had rod. Fourth person had left house and stood outside. One person near his brother went outside and came back and he stabbed his brother with pen knife on his chest. Third person who was caught by his brother gave blow of iron rod on head of his brother.

15. As against this mother Suhasini does not state that one of the four persons went outside and stood there. She also does not state that one of the assailants went out and came back.

16. PW-3 widow states that three persons were standing in front of her bedroom door. She did not speak of any fourth accused but pointed out that Sameer gave dash to Shaktisingh and pushed him inside bathroom. She then states that her attention was focused on her husband and accused No.2 poked knife in the chest of her husband.

17. When Sameer was first accosted, person who had knife with him put it on his neck and snatched his gold chain, Sameer nowhere states that said person was accused No.2. According to Sameer, person with two knives had taken gold chain from him. Obviously, that person was not accused No.2. He also states that one person standing near his brother went out, came back and he stabbed his brother by pen knife on his chest. He states that accused No.2 poked pen knife in chest of his brother. Neither PW-2 nor PW-3 states that accused No.2 was standing near Sanjay, he went out came back and then poked knife into his chest.

18. Accused No.2 is arrested on 18/9/2009 and his TIP parade is

conducted on 28/9/2010 i.e. after one year and 10 days of his arrest. This delay is not explained by prosecution. Not only this, the fact that accused No.2 happened to be a Sikh with turban is not reflected in FIR or then in statements of any of the eye witnesses. Test Identification parade panchanama shows that total 8 persons were exhibited. It is recorded that all dummies were of age height of accused No.2 and their faces were also similar. If prosecution was aware beforehand that accused No.2 was a Sikh with turban, there was no question of non Sikh persons i.e. those not wearing turbans to be used as dummies. Deposition of Naik Tahsildar Exh.62 does not record that Sikh persons wearing turban were exhibited as dummies along with accused No.2.

19. In Court when PW-2 Suhasini identified accused No.2 through video conference, accused No.2 was in jail at Amravati. Deposition of PW-2 mentions that along with so many person accused No.2 was brought in video conference hall at Amravati. Only two out of them were having beard and remaining were without any beard or turban. Two persons only were having turban, witnesses then identified accused No.2. PW-3-Manasvi in her deposition states that accused seen by her in video conference poked knife in chest of her husband. Her evidence as recorded does not show when she was taken to video conference room. After she entered witness box, she has deposed that she knows the person she saw in video conference. PW-5 -Sameer whose evidence has been recorded on a later date submits that he identified accused No.2 in Video conference. Again whether video conference was conducted on that day after he stepped into witness box is not recorded anywhere. All of them attended and participated in video conference together.

20. It appears that learned counsel for accused No.2 was not ready to conduct matter in absence of accused No.2. These facts are recorded in

paragraph No.56 of the judgment. In the light of these objections and provisions of section 273 of Cr.P.C. when video conference was arranged, proper records have not been made to show that each prosecution witness was taken separately in video conference room at different time after they entered into witness box and took oath. The identification of accused No.2 by PW-2 and PW-3 through video conference therefore does not inspire any confidence. Similarly, as recorded supra identification of said accused by complainant Sameer in test identification parade on 28/9/2010 becomes doubtful.

21. Though prosecution claims that at the instance of accused no.2 knife was recovered, recovery is after several months and that too from an open space. Knife with blood was not sent to Chemical Analyzer at all and hence there is no finding of any human blood on it. This discussion therefore casts serious doubt on story of prosecution that accused No.2 was part of group who committed offence under section 460 of IPC on 18/4/2009.

22. Insofar as participation of accused No.1 is concerned, the fact that he was apprehended at spot is not in dispute. He was not carrying any weapon and he was pushed into bathroom. Total number of participants whether it is 4 or 5, also becomes doubtful. Eye witnesses nowhere state that this accused was any way instrumental in attacking deceased Sanjay. However, the fact that he was present at spot cannot be ignored. Three persons were having iron rod, two knives and one screwdriver. Knife used for stabbing was a pen knife. Prosecution itself claims that one of the three persons who had ran away came back and stabbed deceased. Considering the entire sequence of events, effort made by Advocate Chaudhary to disassociate accused No.1 from the crime commenced cannot be countenanced. However prosecution cannot point out why proper

description of other persons was not obtained from eye witnesses. They have not explained the purpose for which these persons including accused No.1 entered the house. Why complainant and others did not describe accused or disclose fact that one or more of them were Sikhs is not clear.

23. Taking over all view of the matter, we find that the punishment of imprisonment for life imposed upon accused No.1 unsustainable. Section 460 also envisage imprisonment of either description for a term which may extend to 10 years and fine. Said accused has already put in about 9 years in jail. We have already given benefit of doubt to accused No.2. In this situation, we find that rigorous imprisonment for a term of 10 years shall meet ends of justice. Accordingly, I pass following order:

1. Criminal Appeal No. 1230 of 2012 is allowed by giving benefit of doubt to original accused no. 2 Badshah Singh Ajab Singh Tak. He is acquitted of the charge as framed.
2. Criminal Appeal No. 746 of 2012 is partly allowed by deleting the punishment of imprisonment for life and by substituting it with punishment of R.I. for 10 years.
3. The operative order dated 27/4/2012 delivered by the Extra Joint Ad Hoc Additional Sessions Judge, Thane in Sessions Case No. 375 of 2009 and Sessions Case No. 198 of 2010 is modified to that extent.
4. Accordingly original accused no. 2 Badshah Singh Ajab Singh Tak be released from jail forthwith if his custody is not required by the State in any other matter.

5. Respondent State shall consider the period of remission earned by original accused no. 1 Shaktisingh Jasmatsingh Dudhani and thereafter if he has already completed 10 years of imprisonment, he shall also be released forthwith if his custody is not required in any other matter.

6. The rest of the operative part is maintained as it is.

7. In view of above order, pending criminal applications also stand disposed of.

(PRAKASH D. NAIK, J.)

(B. P. DHARMADHIKARI, J.)