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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.621 OF 2013

- | | | | |
|-----|---|-----|-------------|
| 1. | Pandit @ Pradeep @ Sundar Shyam |] | |
| | @ Guddu s/o Fateram Banjare |] | |
| | Age : 30 years, |] | |
| 2. | Raju @ Chotelal @ Soko s/o Fateram Banjare] | | |
| | Age : 26 years, | | |
| | Both R/o Gopalbhai's Room, Lavaccha, |] | |
| | Piparia Kadhi, Taluka – Pardi, |] | |
| | District- Valsad, Gujarat. |].. | Appellants |
| vs. | | | |
| 1. | Union of India |] | |
| 2. | The State of Maharashtra |] | |
| | (Through Smt.Chhayaben Laxmanbhai |] | |
| | Patel, r/o Silvassa Dadra & Nagar Haveli |] | |
| | vide C.R.No.213 of 2019) |].. | Respondents |

Mr.Karl Rustomkhan, appointed Advocate for Appellants.

Mr.H.S. Venegaonkar, for Respondent No.1-Union of India.

Mr.S.S. Hulke, APP for Respondent-State.

**CORAM : S.S.SHINDE &
N.R.BORKAR, JJ.**

**RESERVED ON : 11.01.2022
PRONOUNCED ON : 11.03.2022**

JUDGMENT : (PER : N.R.BORKAR, J)

1] This appeal takes an exception to the Judgment and order dated 02.02.2013 passed by the learned Sessions Judge, Dadra and Nagar Haveli at Silvassa, in Sessions Case No.11 of 2012.

2] By the impugned Judgment and order, the appellants who were accused Nos.1 and 2 respectively before the trial Court have been convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.2000/- each in default to suffer rigorous imprisonment for one year.

3] According to PW 1- Karamveer Bharati, at the relevant time, he was working as Despatch Supervisor in Acme Tiles, Dadra and his duty hours were from 7.00 a.m. to 7.00 p.m. On 08.08.2009 at about 7.40 p.m. after completing his work, he came to fish market situated opposite to his company by his Honda Activa motorcycle for purchasing fish. When he was purchasing fish, he heard hue and cry. On hearing the said hue and cry he went in that direction. There was darkness at that place. He, therefore, started headlight of his bike and saw that the accused persons were assaulting the deceased Shiv Kumar. According to PW 1, the accused No.1 was assaulting the deceased by knife and accused no.2 was assaulting the deceased by stick. Due to the assault, the deceased fell down. The accused thereafter ran away from the place of incident. PW 1 went back to the fish market and tried calling on phone number 100, but the call did not get connected. Therefore, he rushed to Police Outpost Dadra and disclosed the incident to the police. On receiving information, PW 10 Mrs. Tandel

who was then working as PSI with Police Outpost Dadra, rushed to the place of incident alongwith other police personnel. When they reached there, they found that the deceased was already dead. On the basis of occurrence report submitted by PW 10 PSI Tandel, Crime No.213/2019 for the offence punishable under Section 302 read with 34 of the Indian Penal Code was registered. On completion of investigation charge sheet was filed against the present accused.

4] The accused were charged and tried for the offence punishable under Section 302 read with 34 of the Indian Penal Code. The learned trial Court convicted the accused for the said offences.

5] We have heard the learned counsel for the appellants and the learned APP for the respondent-State.

6] The learned counsel for the accused submits that the trial Court has erred in relying upon the evidence of PW 1, the alleged solitary eye witness to the incident. It is submitted that the conduct of PW 1 is not natural, as after witnessing the incident, he did not inform anyone around him even though the fish market was crowded. It is submitted that the statement of PW 1 came to be recorded only in the morning on 09.08.2009, after the accused were arrested.

7] It is further submitted that the trial Court has also erred in relying upon the evidence of PW 6 – father of the deceased. It is submitted that the evidence of PW 6 would show that he is a chance witness. It is submitted that no motive is attributed to the accused for the alleged crime. The learned counsel for the accused submits that the trial Court was, therefore, not justified in convicting the accused for alleged

crime. It is submitted that, the impugned Judgment and order, thus, needs to be quashed and set aside and the accused need to be acquitted.

8] On the other hand, the learned SPP submits that PW 1 is an independent eye witness to the incident. It is submitted that he has even identified the accused in test identification parade. It is further submitted that there is recovery of knife and blood stained clothes at the instance of accused. It is submitted that considering the evidence on record the trial Court was justified in convicting the accused and thus no interference is called for in the impugned Judgment and order.

9] We have perused the evidence on record and the Judgment of the trial Court.

10] The fact that the deceased Shiv Kumar had died homicidal death is not disputed before us. The question is whether the prosecution has been able to connect the accused with the crime.

11] According to PW-1, the solitary eye-witness to the incident, on the day of incident, at about 7.40 p.m., he came to fish market and while purchasing the fish, he heard hue and cry. On hearing the said hue and cry, he went in that direction. As there was darkness at that place, he switched on the headlight of his bike and saw that the accused persons were assaulting the deceased. According to PW-1, accused No.1 was assaulting the deceased by knife and accused No.2 was assaulting the deceased by stick.

12] In the cross-examination, PW-1 has admitted that the distance between the fish market and place of scene of offence was about 20 to 30 meters and the said place is situated in industrial area. One big company is situated towards eastern side of the scene of offence at the distance of 10 meters. He has admitted that there is one more company situated on the western side of place of incident and there were entrance gates to the said companies on eastern and western sides and security guards were deputed on the entrance gates.

13] PW-1 has further admitted that at the time of incident, fish market was crowded. Except him, no other person rushed to the place of incident. PW-1 has admitted that he had not made any attempts to call any other person present in the fish market to save the deceased.

14] It is difficult to accept the version of PW-1 that after hearing hue and cry except him, nobody else rushed to the place of incident, even though fish market was crowded. Assuming PW-1 alone had gone there, still his subsequent conduct of not calling other person even after witnessing the alleged assault does not appear to be natural.

15] According to PW-1, after the accused ran away from the place of incident he came back to fish market and tried to contact the police on phone number 100. As the call did not get contacted, he went to Dadra Police outpost. PW-1 has admitted that after coming back to fish market he did not disclose about the incident to anybody else in the fish market. This conduct also does not appear to be natural. PW-1 has further admitted that there was one big

company towards eastern side of the scene of offence at the distance of 10 meters and even security guards were deputed at the entrance gate of the said company. However, nobody from the said company had witnessed the said incident.

16] Apart from above, PW-1 was asked about registration number of his motorbike upon which he stated that, the said motorbike was purchased by him just before the incident and it was not registered with the registering Authority. This appears to be evasive reply. There are material omissions in the evidence of PW-1. Considering these facts and circumstances, it would not be safe to rely upon the evidence of PW-1.

17] The prosecution in addition to PW-1, to connect the accused with the alleged crime has examined PW-6 Munishram Khanna, the father of the deceased. According to PW-6 on 8.8.2009, at about 2.00 p.m., while he was returning home after answering nature's call and was in front of house of one Gopalbhai, he saw the accused standing there and were saying that they would kill somebody.

18] According to PW-6, at about 9.00 p.m., the police told him about the murder of his son. At that time, he felt that whatever words uttered by accused Nos.1 and 2 in the afternoon were in respect of his son and they murdered his son.

19] In the cross-examination, PW-6 has admitted that two women were cutting the fuel wood near the place where the accused were standing. He has admitted that there was no rivalry between the accused and his son.

20] It is difficult to accept the version of PW-6 that the accused would stand on road and would hatch the conspiracy to kill somebody that too in presence of other persons.

21] PW-6 has admitted that there was no rivalry between the accused and his son. Therefore, it is apparent that the accused had no motive to commit the alleged crime.

22] As regards recovery of knife, PW-13 PI Rameshbhai Gavit, the Investigating Officer, has stated that he recorded the memorandum of accused No.1 at about 3.45 p.m.. Whereas according to PW-2 Vipul Patel, the panch witness on the said memorandum and recovery panchanama, he reached to the police station at about 4.50 p.m. In view of this variance in timing, it would not be safe to rely upon the alleged recovery of knife.

23] Considering the above facts and circumstances, the impugned judgment and order of the trial court cannot be sustained. In the result, the following order is passed :

ORDER

a] Criminal Appeal is allowed.

b] The impugned judgment and order dated 02.02.2013 passed by the learned Sessions Judge, Dadra and Nagar Haveli at Silvassa in Sessions Case No.11 of 2012 convicting the **appellant No.1 Pandit @ Pradeep @ Sundar Shyam @ Guddu s/o. Fateram Banjare** and **appellant No.2 Raju @ Chotelal @ Soko s/o. Fateram Banjare** for the offence punishable under

Section 302 read with 34 of the Indian Penal Code is set aside and they are acquitted of the said offence.

c] The appellants are in jail, they be released forthwith unless their custody is required in connection with any other crime.

d] Both the appellants shall execute P.R. Bonds in the sum of Rs.15,000/- (Rupees Fifteen Thousand) each and one surety of like amount in terms of Section 437-A of the Code of Criminal Procedure, before the concerned trial court at Dadra and Nagar Haveli at Silvassa.

e] Before we part with the judgment, we appreciate the able and quality assistance given by Advocate Mr.Karl Rustomkhan, whose services have been engaged by the High Court Legal Aid Services Committee to appear on behalf of the appellants. The fees of appointed counsel for the appellants is quantified at Rs.10,000/- (Rupees Ten Thousand).

[N.R.BORKAR, J]

[S.S.SHINDE, J]