

PETITIONER:
L.L. KALE

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT: 30/11/1999

BENCH:
M.B.Shah, G.B.Pattanaik

JUDGMENT:

PATTANAİK, J.

The appellant stood charged along with two other accused persons under Sections 147, 148, 302, 307, 326 and 324 read with Sec. 34 of the Indian Penal Code for having caused the death of Shankar on 2nd February, 1981 at II A.M. and injuring PWs 2, 5 and 7 in course of the said incident. The Sessions' Trial was registered as Sessions Case No. 94 of 1984. Prior to this case, in respect of the same incident, one Ankush Landya Kale was tried in Sessions Case No. 279 of 1982 and was acquitted by the learned Sessions Judge. The said order of acquittal became final, not having been challenged in any higher forum. Apart from these four accused persons, the prosecution alleged that there was another accused, who is still absconding and has not been arrested. So far as the three accused persons, who stood their trial in the case in hand, the learned Sessions Judge convicted the present appellant under Section 302 and sentenced him to imprisonment for life. So far as the charge under Section 302/34 or in the alternative Sec. 302/149 is concerned, the learned Sessions Judge acquitted the other two accused persons. So far as the charges under Section 320 read with Sec. 34 and under Sec. 326 read concerned, the learned Sessions Judge acquitted all the accused persons. He however convicted all the three accused persons under Section 148 and sentenced them to rigorous imprisonment for one year thereunder and also convicted them under Section 324 read with Sec. 149 IPC and sentenced them to undergo rigorous imprisonment for 1-1/2 years each and a fine of Rs. 300/-, in default to suffer further R.I. for two months. On appeal, the High Court affirmed the conviction of the appellant under Section 302 as well as under Section 324 IPC and affirmed the sentence thereunder. The High Court also affirmed, the conviction and sentence against the two other accused persons under Section 324 read with Sec. 149, but modified the sentence to the period already undergone. The conviction and sentence passed by the Sessions Judge under Section 148 IPC, however was quashed and hence, the present appeal by The appellant, L.L.Kale. alone.

Mr. V.A.Mohte, the learned senior counsel, appearing for the appellant does not assail the conviction and sentence of the appellant under Section 324 read with Sec. 149 IPC but has seriously assailed the conviction of the appellant under Section 302 and submitted that under the facts and circumstances of the present case, it cannot be said that the prosecution case as against the appellant

has been proved beyond reasonable doubt.

The prosecution case in nutshell is that the complainant and the accused persons are related to each other and the deceased Shankar was uncle of PWI Govind. The accused persons are all brothers and it is alleged that PWI and the deceased used to make false complaints of theft of crops against the accused persons, on which score, the police had raided the house of accused persons on several occasions. On 1.2.1981, as Govind PWI did not return to his house, his wife and PWs 2, 5 and 7 went to Shankar, who was then working in the field. Shankar also came with them and made some query and learnt that the accused persons had taken away Govind with them. They then approached PW3 for his help to trace out Govind but said PW3 directed them to go to police and inform the police about the same. When police was approached, it was learnt that both Govind and accused Ankush were with the police and therefore, they went to the police station and brought Govind with them. On 2.2.1981, at about 5 A.M., while Govind was returning home from his field, these accused persons met him on the way. There was a scuffle and then Govind was taken to one Kumbhar Guruji and Ankush informed the said Kumbhar Guruji that Govind was caught red handed, while stealing corn from his field but sometime after both Ankush and PWI came on foot and on the way met the other accused persons. The prosecution alleged that the accused persons, finding Govind alone, started assaulting him with different weapons like gupti and this was seen by deceased Shankar, PW2, PW5 and PW7, who came on the railway line. Seeing these people, the present appellant who was armed with gupti, rushed towards the deceased and gave a blow on his chest and two other blows on the back and left side of the head. The other accused persons also started assaulting PWs 2, 5 and 7. on account of which, they were also injured. Shankar fell down on getting the fatal blows and died at the spot. Govind PW1 wanted to carry the deceased to the dispensary but accused persons prevented him on the plea that they would pay Rs.3000/-, if the dead body was thrown to Ujani Dam. This was however not acceptable to PWI and, therefore, PWI carried the dead body to Bhigwan Dispensary and he was accompanied by PWs 2, 5 and 7. PWI then went to the police station and narrated the entire incident which was treated as F.I.R. Exh.9 and the police started investigation. On completion of investigation, the police submitted the charge-sheet. As has been stated earlier though the charge-sheet was filed against the five accused persons, only accused

Ankush was tried in Sessions Trial No. 279 of 1982 and the three others were tried in Sessions Trial No. 94 of 1984. out of which the present appeal arises. Though the prosecution examined a number of witnesses but the prosecution case hinges upon the ocular statement of PWs 1, 2, 5 and 7, of whom PWs 2, 5 and 7 were injured and the cadence of Dr. D.B. Taware, who conducted the autopsy over the dead body of Shankar. -According to the medical evidence the deceased had four injuries and all the injuries were ante-mortem in nature and death was on account of injuries 3 and 4 namely:

"3. Deep punctured wound in xiphoid process measuring 3-1/2 x 1-1/2 cm. x 5 cm. deep by putting probe.

4. Incised deep wound below the lower end of scabula

measuring 1 "1/2 x /2 x 7 cm. probe."

The doctor had further opined that these two injuries could be caused by sharp edged weapon like gupti. The

aforsaid medical evidence unequivocally indicates, that Shankar Sayan Bhosale. met a homicidal death and the said conclusion has not been assailed in any forum. The learned Sessions Judge, on elaborate discussion of the evidence of four eye witnesses came to the conclusion that PWI Govind was not present at the time of incident and, therefore, his evidence cannot be pressed into service for bringing home the charge against the accused persons. He however, relied upon the evidence of the three injured witnesses PWs 2. 5 and 7 and came to the conclusion that it was appellant (L.L.Kale), who caused the injury on deceased Shankar by means of a gupti and also caused injuries to the injured witnesses and their evidence establishes the charge of murder against, the accused appellant beyond reasonable doubt. He, therefore convicted the appellant of the charge under Section 302 IPC. On an appeal being carried, the learned Judges of the High Court without any discussion of the evidence on

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record abruptly jumped to the conclusion that the conviction of the appellant under Section 302 remains unassailable.

At the outset, and after going through the impugned Judgment of the High Court; we have no hesitation to come to the conclusion that the learned Judges have failed to discharge their duty of an Appellate Criminal Court inasmuch as the evidence on record has not been looked into, nor has there been any appreciation of the evidence, excepting, affirming the conclusion of the learned Sessions Judge. Neither the credibility of the witnesses has been examined nor the Appellate Court has drawn its conclusion, after examining the cadence on record. The Appellate Court while sitting in appeal against the Judgment of the trial Judge is duty bound to be satisfied that the guilt of the accused has been established beyond all reasonable doubt. To say the least, the impugned Judgment of the High Court suffers from proper judicial approach in a case of murder.

Mr. Mohta, learned senior counsel, appearing for the accused appellant in assailing the conviction under Section 302 submitted with force that the evidence of PWs 2. 5 and 7 cannot be held to be truthful and reliable in view of their earlier statements made in Sessions Trial No. 279 of 3982, wherein the accused Ankush was being tried and such earlier statement on being duly confronted, the witnesses have offered no explanation for reconciling the two versions and, therefore the conviction being based on such infirm evidence, the said cannot be upheld. '

; Dr. Rafeev B. Masodkar; appearing for the State, on the other hand contended (hat notwithstanding the alleged inconsistency between the statement of the witnesses in the

earlier sessions trial, and the present proceeding, the role ascribed to the appellant has been consistent and. therefore, the conviction of the appellant remains unassailable.

in view of the rival submissions at the Bar, and in view of the fact that the High Court itself has not appreciated the evidence on record, we have ourselves examined the evidence of the aforesaid three injured witnesses PWS2, 5 and 7. PW 7 though in his statement in chief, had stated that accused Layalasha (the appellant), gave blow with gupti on the chest of Shankar and another blow with gupti on the back of Shankar. as a result of which Shankar fell down but in the earlier trial in Sessions Case No. 279/82, he had not stated so and on the other hand had stated that accused Ankush gave two gupti blows to Shankar, one on the stomach and other on the back side of the ear. On being confronted, he denied to have stated so in the earlier trial and further states that he cannot assign any reason as to why it has been so recorded. This former statement of the witness having been duly confronted to PW7, wherein a completely different picture had been given, it is difficult to place any reliance on any part

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of the evidence of the said witness. In other words, while in the trial against Shankar the very witness had ascribed the role of giving two blows by gupti to Aikush, in the present case he ascribed the same role to the appellant. This in our opinion makes the witness wholly unreliable and the Courts below committed error in relying upon such testimony to bring home the charge against the accused appellant. It may be noticed at this stage that the medical evidence was categorical to the effect that only two injuries on the deceased could be caused by gupti, namely injuries No. 3 and 4. PW2 who also claimed to be eye witness to the occurrence, had indicated in her Examination in Chief that appellant Layalasha gave blow with gupti on Shankar. According to her, appellant was armed with gupti and Ankush was armed with stick and it is appellant Layalasha that gave two blows by means of gupti, one on the chest and another on the head of Shaiikar, as a result of which Shankar fell down. Her evidence in the earlier sessions case was

confronted to her, wherein she has not stated about the accused Layalasha (appellant), giving two gupti blows on Shankar. On the other hand, she had also stated that Ankush gave blows with gupti, one on the back and other on the back side of the ear and according to her she cannot assign any reason as to why the record in the earlier proceeding is different from what she has stated. Needless to mention that the statement of the witness in the former trial was duly confronted when she was being examined in the present case. Looking at her statement in the earlier proceeding, as confronted by the defence in the present case, it would transpire that the witness has given a clear go by to what she had stated in the former proceeding inasmuch as while she had stated in the former proceeding that it was the accused Ankush who gave a gupti blow on Shankar but in the present case she has stated that it is the appellant Layalsaha, who gave the gupti blows. In this view of the

matter, in our considered opinion. no reliance can be placed on the said

testimony. The only other evidence is that of PW5, but she also stands on the same footing. Though in Examination in chief in the present proceeding, she has stated that appellant rushed towards them and gave blows with gupti on the chest of Shankar but in the earlier statement made in Sessions Case No. 279/82, which had been confronted, she had categorically stated that it is Ankush who gave blows with gupti, one on the back side and other on the back side of the right ear of Shankar. Apart from the fact that in the earlier statement, the gupti blows on the deceased was ascribed to Ankush, even in respect of the other injured persons also the witness had made prevaricating statements, which were duly confronted and no explanation had been offered for the same. On going through the examination of this witness, we have no hesitation to come to the conclusion that the witness is unreliable and the evidence cannot be pressed into service in bringing home the charge against the accused appellant. We are not discussing the evidence of PW1 on whom, the learned

Sessions Judge did not rely upon and even the learned counsel for the respondent also in course of arguments has stated that he does not press into service the evidence of said witness. In the aforesaid premises and in view of our conclusion on the trustworthiness of the three injured witnesses 2, 5 and 7; it is difficult for us to hold that the prosecution case can be said to have been proved beyond reasonable doubt. Consequently, the conviction and sentence of the appellant of the charge under section 302 IPC cannot be sustained and we accordingly set aside the same.

This appeal is allowed. The appellant be set at liberty forthwith unless required in any other case.