CASE NO.:
Appeal (crl.) 336 of 2002

PETITIONER:
Suresh Sitaram Surve

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 25/11/2002

BENCH:
S. Rajendra Babu, P. Venkatarama Reddi & B.N. Srikrishna.

JUDGMENT:

J U D G M E N T

P.Venkatarama Reddi, J.

The appellant alongwith nine others faced trial before the Court of Sessions for Greater Bombay on the charges under Sections 143, 144, 302 read with Section 149 and 326 read with Section 34 of IPC for committing the murder of one Prakash Gopal Katkar on the night of 12th February, 1981 and for causing injuries to five others who are prosecution witnesses 3 to 7. Amongst those injured witnesses, excepting PW 7, others are close relations of the deceased living in the same or opposite house i.e., at Khatkar Chawl No.1 and 2, Hanuman Nagar, Ghatkopar. PW 7 was the neighbour. Learned Addl. Sessions Judge acquitted all the accused. On appeal by the State, the High Court convicted the appellant for the offence under Section 302 IPC and sentenced him to life imprisonment and to pay a fine of Rs.500/-. Three other accused who are not appellants before us were held guilty of the offence under Section 324 IPC read with Section 34 IPC. Accordingly, the State's appeal was allowed. As the High Court found that only four persons including the appellant participated in the attack, it excluded the applicability of Section 149 IPC.

The incident had taken place on the night of 12th February, 1981 outside and within the house of the deceased and the prosecution witnesses. The appellant-accused was also resident of the same locality. According to the prosecution there was enmity between the deceased and the family of the appellant which is borne out by certain events that occurred in October, 1978. On 11th February, 1981, i.e., the day previous to the date of offence the accused 1 to 6 (appellant being 5th accused) hurled abuses at the deceased and his family members in front of his house. On the date of incident at about 8.30 P.M., as the deceased was entering the bye-lane reaching to his chawl, the accused persons were pelting stones on the chawl and also hitting the windows with sticks. They were armed with different weapons like Farshi, Gupti, Iron Bars and sticks. Soon thereafter, they surrounded the deceased Prakash Khatkar and began to assault him. He was initially assaulted with Farshi by the first accused (brother of the appellant). When he fell at the steps leading to the chawl, the appellant pierced Gupti into the stomach of deceased. He was also assaulted by other accused with the weapons in their hands. When the family members of the deceased intervened, they were not spared. The accused assaulted the brother of the deceased (PW6), his mother (PW3), his sister (PW4) and his brother's wife (PW5) inside the house. PW7 who was the neighbour was the last person to be attacked by the appellant. Injuries were inflicted on PWs 3,4,6 and 7 by the accused party. PW2 the brother of the deceased took the deceased and other injured to the hospital along with a constable (PW9) and he lodged FIR on the same night. PW11 held the post-mortem examination of the dead body of Prakash Katkar. PW 18, the R.M.O. of the hospital apart from noting the injuries on the deceased, examined the other injured and issued wound certificates.

On reappreciation of the evidence, the High Court found that the acquittal of all the accused was unjustified. In short, the High Court recorded its views as follows:-

"In our view, the learned judge has wrongly discarded the evidence of all the eye witnesses on the ground that they are members of one family and have tried to give the minute details of the incident, though it is observed by him that being the relations of the deceased by itself would not be the ground to discard the evidence of eye witnesses. Although there was sufficient light according to the learned judge at the place of incident and undisputedly the place of incident was in and near the house of the witnesses at night time when all the witnesses were supposed to be in their house, their evidence has not been believed. The FIR was lodged immediately after the incident by the brother of the deceased. After going through the evidence of the eye witnesses and other witnesses we are of the view that some of the accused are liable to be convicted".

The High Court relied on the evidence of PWs 2 to 6 notwithstanding certain improvements here and there. However, the High court was not inclined to attach weight to the evidence of PW 7 as her testimony was found to be doubtful, though not false.

The trial court held that an unlawful assembly of not less than 5 persons in prosecution of common object to kill the deceased, did in fact commit the murder of Prakash. The trial court, however, doubted the identity of the accused ad expressed the view that it was not possible to say as to who the real culprits were, though there was a strong suspicion against accused Nos.1,3,5 and 8. In the elaborate judgment of the trial court, we find more of narration of events, evidence and arguments, but, the reasoning is scanty. The fact that there were no independent witnesses excepting PW 7 who was close to the family of the deceased ad that the witnesses could not have spoken to the minute details of the attack had considerably weighed with the trial judge in disbelieving the prosecution case. As regards PW 7, the learned Sessions Judge commented that she mixed up the identity of A 5 (Appellant) and A 2 as she stated that it was Chandu (A 2) who inflicted the injury on the deceased with Gupti.

As rightly observed by the High Court, the trial court was not justified in discarding the evidence of injured eye witnesses (excepting PW 7) in toto on the ground of inimical disposition towards the accused or the improbability of narrating the details of actual attack. True, their evidence has to be scrutinized with caution taking into account the factum of previous enmity and the tendency to exaggerate and to implicate as many as possible. But on a perusal of the evidence tested in the light of the broad probabilities, the High Court was justified in reaching the conclusion that the prosecution witnesses are natural witnesses and they could not have concocted the case against the accused without any basis. The fact that the FIR was lodged almost immediately after the occurrence naming the appellant as the main assailant lends positive assurance to the credibility of the prosecution case as unfolded by the eye witnesses most of whom were injured. Both the trial court and the High Court found that there was sufficient light emitted by the tubelight in front of the house to identify the accused who were known persons. The fact that the incident occurred outside and inside the house cannot be doubted as there was blood both at the steps where the dead body lay and inside the house and weapons stained with human blood were found lying in the adjoining narrow lane and the injuries were found on almost all the inmates of the house. It is highly unlikely that within a short time of the occurrence the prosecution party could have come forward with a false version implicating the persons who were not at all scene, while leaving out

real culprits. The eye witnesses' account of the attack by the appellant is quite consistent. Though certain doubts are sought to be created as to the genesis of the incident ad the manner of attack by taking us through the topography of the scene of offence, we are not at all convinced that the prosecution case is belied on account of such factors. The argument that the injuries on the appellant were not explained by the prosecution and therefore the prosecution case of the appellant being an aggressor is open to doubt has no substance at all. In the course of examination of PW 5 under Section 313 Cr.P.C., the appellant while denying his presence in the course of the incident had stated that while returning home from his vegetable shop, he was assaulted by a crowd in a passage but he could not recognize them on account of darkness. Thus, he does not attribute the injury to the deceased or the prosecution party nor does he suggest that he acted in self-defence. While on this aspect, the High Court also observed that the possibility of the accused being injured when the deceased or the prosecution witnesses tried to resist the attack cannot be ruled out. Considering the facts and evidence on record, we affirm the finding of the High Court that the appellant in the company of others did attack the deceased with a dangerous weapon, namely, Gupti and the prosecution case in this regard cannot be thrown out on the tenuous grounds made out by the trial court.

It was next contended that the evidence being not categorical about the overt acts attributed to the appellant and the appellant having been excluded from the purview of Section 149 or Section 34 I.P.C. should not be held guilty of indulging in fatal attack on the deceased. It is point out that the oral evidence does not conform to the medical evidence and there is an element of doubt whether the appellant was responsible for inflicting all or any of the severe injuries found on the body of the deceased. To appreciate this argument, first, it is necessary to refer to the evidence of PW11, who held the post-mortem on the body of the deceased. PW11 deposed that he found the following external injuries on the body of the deceased:

1. Stab wound on front of abdomen 2" x 1" and deep upto abdominal cavity; oblique in direction.
2. Stab wound oblique in direction on the right side of infroaxillary area at the level of 11th rib, 2"x " x 4" deep.
3. Stab wound at left epigastric region 1"x x 2", horizontal.
4. Stab wound on left side of infroaxillary area at level of 9th rib 1" x 1/2"x 3", oblique.
5. Abrasion 1"x " above left clavicle.
6. Abrasion on right shoulder 2"x 1".
7. Incised would 2" x 1/2"x 1/2", horizontal.

He stated that the spot of injury No.7 was inadvertently not mentioned by him. From the panchnama Ext. 19 coupled with the evidence of the doctor (P.W.18) who examined the dead body in the presence of panchas, the High Court inferred that injury No.7 was on the right scapular region. PW 1 further stated that injury No.1 to 4 and 7 must have been caused by '5 distinct blows' and the said injuries could be caused by a sharp and long object. Injury No.7 could be caused by a weapon like Article No.1 (farshi) and that the other four injuries by Article No.2 (gupti). Injury Nos.5 and 6 could be caused by sticks or iron bars or by fall. He opined that the cause of death was shock and hemorrhage due to injuries on the body. He further clarified that the external injury No.2 corresponds to internal injury No.21 and that external injury No.3 corresponds to internal injury No.20. He was also of the opinion that injury No.20 was necessarily fatal and injury No.21 could also cause death if the patient was not immediately treated.

Item No.21 of post-mortem report is 'abdomen'. In that, he noted rupture of right lobe of liver with injury of 1" x 1" x 1/2'" . Item No.20 is 'thorax'. Against the columns 'pericardium and heart', it was noted that there was rupture from anterium 1" x " and opening upto the cavity of the

right chamber of heart. Plural cavity was found to be full of blood, the reason being that there was rupture of heart. PW 11 stated that the injuries 2, 3 and 4 "added blood in it".

In the light of the above medical evidence, the next question is whether it can be safely said that the appellant alone had inflicted the fatal injuries i.e. injuries 2 and 3 mentioned supra. That takes us to the analysis of ocular evidence. Almost all the witnesses say consistently that the appellant pierce the weapon (Gupti) into the stomach/abdomen of the deceased. The evidence scrutinized carefully reveals that the appellant pierced the weapon once and at one spot only. This is what PW 3 says:-

Accused No.1 gave blow with Farshi on the thigh of Prakash. Accused No.5 pierced Gupti into the stomach of Prakash. The witness demonstrates how and at what angle the appellant (A 5) thrust the Gupti.

PW 4 stated as follows:-

"Accused No.1 gave a blow with Farshi on the right thigh or Prakash. Prakash fell down. Accused No.5 then pierced a Gupti in the stomach of Prakash, after taking the Gupti out. (Witness demonstrates). It was so taken from the round bamboo".

Again at paragraph 14, he stated that he could see clearly the Farshi with which a blow was given to Prakash. Suresh took out the Gupti from its wooden case and pierced it at 180 degree angle while holding it at his waist level.

This is what PW 5 had to say on the actual attack : "Raghunath Surve (A 1) gave a blow on the thigh of Praskash with a Farshi. Prakash fell down on the steps. Suresh (A 5) then pierced a Gupti in the chest or in the stomach of Prakash. I now say that it was in the center i.e. between chest and stomach". Witness then demonstrates the manner in which the Gupti was pierced.

PW 6 deposed :-

"The accused surrounded Prakash. Accused no.1 had a Farshi in his hand. He gave a blow with a Frashi on the thigh of Prakash. Besides, accused No.1 gave two blows on the right side just above the waist. Prakash fell down below the steps. Suresh came from his house and he had a Gupti in his hand. It was open. He pierced it in the stomach of Prakash". (The witness demonstrates by just pushing his hand in the front direction in 180 degree angle).

Even PW 2 who stated in the FIR that the appellant gave Gupti 'blows' to the deceased, stated in his deposition that Suresh (Appellant) pierced Gupti in the stomach of Prakash. However, it is doubtful whether PW 2 could have noticed the actual spot of the body where the weapon was inserted as, according to PW 5 , he was sitting at a distance holding his baby.

The High Court commented that the eye witnesses merely stated that the appellant pierced Gupti into the abdomen of Prakash without stating how many times. On that premise, the High Court held that the appellant inflicted all the injuries on the abdomen and chest with Gupti.

We do not think that his approach of the High Court vis--vis the overt acts attributable to the appellant 5th accused is tenable. The High

Court failed to consider certain crucial aspects in this regard. Every witness in precise terms speaks to the infliction of injury on the stomach/abdomen. In fact, they proceed to give a graphic description of the stabbing by demonstrating the same in the court. It is not a case where the witnesses said in general terms that the appellant stabbed the deceased. On a plain reading of the relevant portions of the depositions extracted above, it appears that they witnessed only one injury being inflicted by the appellant with Gupti. At any rate, there is scope for doubt or ambiguity; if so, the prosecution should have specifically elicited from the eye witnesses that the appellant resorted to stabbing more than once. Moreover, the evidence of some of the witnesses reveal that the accused surrounded the deceased and more than one person was armed with Gupti. It transpires from the evidence of PW 17 the I.O., that two Guptis were recovered in the bye-lane near the scene of offence. It is therefore quite probable that one or two companions of the accused could have caused the injuries found around the chest and abdomen with Gupti or a sharp weapon. It is also worthy of note that accused No.1 brother of the appellant, allegedly inflicted an injury on the thigh of the deceased with a Farshi. No injury was, however, found on the thigh of the deceased. It is quite likely that the injury attributed to A 1 could have landed at one of the vital spots. This possibility also cannot be ruled out. Under these circumstances, a reasonable doubt arises whether the injuries 1 to 4 were all caused by the appellant-accused alone who was armed with a Gupti. It is, therefore, not possible to connect all the severe injuries on the abdomen, infroaxillary, and epigastric regions to the appellant. Nor it is possible to hold beyond doubt that the fatal injury No.3 on the epigastric region or for that matter even injury No.2 on the infroaxillary area which according to PW 11 was capable of causing death if it was not attended to immediately, were inflicted by none other than the appellant. It was only PW 5, brother’s wife of the deceased, who put up an improved version stating "I now say that it was in the center i.e. between chest and stomach", so as to connect the appellant with the most serious injury on the epigastric region. It is highly doubtful whether she could have noticed in that melee the exact spot of the attack. In fact, it has come out in cross-examination that in the statement recorded by the police she did not specify the spot which she had mentioned in the course of examination in Court.

Despite the above loophole in the prosecution case, the appellant who undoubtedly participated in the attack cannot be absolved of the guilt. We may recall that all the witnesses unequivocally spoke to the fact that the appellant did inflict an injury by piercing Gupti into the stomach or abdomen of the deceased. Thus, going by the evidence on record, it can be safely concluded that the appellant did inflict one of the four injuries noted (1 to 4) in the post mortem report. Though it is not possible to say with reasonable certainty that he is the person who caused the injuries 3 and 2 which are the most severe injuries, even then the other two injuries i.e. stab wound on the front of the abdomen 2"x1", deep upto the abdominal cavity and stab wound on left side of infroaxillary area 1"x1/2 " x3" are, by any objective standards, sufficiently serious injuries, whether or not they are injuries sufficient in the ordinary course of nature to cause death. Any one of them is severe enough to infer that it was likely to cause death. The appellant accused undoubtedly intended to cause such bodily injury, though we are not in a position to say positively on an overall view of the case, that the appellant himself intended to cause death. Therefore, he, in our opinion, is liable to be held guilty of offence under part I of Section 304 IPC. Accordingly, he is convicted under Section 304 IPC and sentenced to R.I. of seven years and to pay a fine of Rs.1,000/-. In default of payment of fine he shall suffer imprisonment for a further period of four months. Accordingly, the appeal is party allowed and the conviction and sentence recorded against the appellant stands modified.