

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APEAL NO.183 OF 2007

Nitesh @ Natya Ramesh Thorat,]
Age : 24 Yrs.,]
R/of Railway Transit Camp,]
G/153, Mandala, Mankhurd,]
Mumbai – 400 043.] Appellant

Versus

The State of Maharashtra] Respondent

Dr. Yug Mohit Choudhary for the Appellant.

Mrs. Sangeeta D. Shinde, A.P.P., for the Respondent/State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 8TH APRIL, 2015.

PRONOUNCED ON : 9TH APRIL, 2015.

JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. The Appellant, who stands convicted for the offence punishable under Section 302 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer R.I. for four months, by the Additional Sessions Judge, Greater Bombay by Judgment dated 11th September, 2006 in Sessions Case No.396 of 2002, by this Appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

On 15th January, 2002, while PW-9 API Parshuram Kamble was on duty at Shivaji Nagar Police Station, at about 9 pm, he received wireless message conveying that an assault was made by pen knife against one person near Kurla Scrap, Mandala, Mankhurd, Govandi. He made Station Diary Entry to that effect and, along with his superior officer PW-10 PI Pandurang Aadhale, rushed to the spot. There he saw the blood drops at the scene of offence. He deputed one Police Constable at the scene of offence for protecting the same and on the information that injured Mohd. Umar @ Zinnu Mehendi Hasan Siddiqui was taken to Shatabdi Hospital, PW-9 API Kamble also went there.

3. On reaching at Shatabdi Hospital, PW-9 API Kamble came to know that injured Mohd. Umar has already succumbed to the injury. PW-1 Taufiq Shaikh was also present there. PW-9 API Kamble recorded complaint of PW-1 Taufiq. He informed about the same to the Police Station and obtained C.R. No.11 of 2002, which was registered against the Appellant and three other Accused. Hence, he made Inquest Panchanama (Exhibit-43) and again returned to the scene of offence. There in the presence of Panch PW-5 Shabir Nivasali, he drew the Scene of Offence Panchanama (Exhibit-24). From the spot, he collected the

blood mixed soil and ordinary soil. He also recorded the statements of some of the eye witnesses and on the next day further investigation of the case was handed over to PW-10 PI Aadhale. On investigation being entrusted to him, PW-10 PI Aadhale went to the spot and recorded the statements of two more eye witnesses, namely, Mohd. Nasim Mehandi and Dilshad Mohd. Lahari Sayyad. On 17th January, 2002, the Accused came to be arrested. At the time of arrest of the present Appellant and the other co-Accused Narsu, their blood stained clothes came to be seized under Panchanama (Exhibit-42).

4. During Police custody on 19th January, 2002, both the Accused were referred to Nagpada Police Hospital for collecting blood samples along with requisition letter (Exhibit-49). On 23rd January, 2002, during interrogation, present Appellant/Accused expressed his willingness to show the place where he has concealed the weapon of assault, the knife. His statement was reduced to Memorandum Panchanama (Exhibit-39) in the presence of the Panch PW-7 Vijay Kasale. The Appellant then guided the Police and Panch to his house and from the house he produced the knife, which was kept behind the rack of utensils. The said knife was seized under Panchanama (Exhibit-40).

5. On 6th February, 2002, PW-10 PI Aadhale sent all the seized articles to Chemical Analyzer vide requisition letter (Exhibit-50). After receipt of

Postmortem Notes (Exhibit-27) and further to completion of investigation, he filed Charge-Sheet in the Court against the Appellant and the co-accused Narsu on 12th April, 2002.

6. On the case being committed to the Sessions Court, the Trial Court framed charge against the Appellant and co-accused Narsu vide Exhibit-2. They pleaded not guilty and claimed trial.

7. In support of its case, Prosecution examined altogether 10 witnesses, including 4 eye witnesses, whereas, the Appellant examined his mother DW-1 Hirabai Thorat as Defence Witness to counter the Prosecution evidence relating to recovery of pen knife from her house. On appreciation of their evidence, the Trial Court held the guilt of the Appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 of the IPC and convicted and sentenced him, as stated above. As regards co-Accused No.2 Narsu, the Trial Court has acquitted him giving the benefit of doubt.

8. In this Appeal, we have heard the submissions advanced by learned Counsel for the Appellant Dr. Yug Mohit Choudhary and learned A.P.P. Mrs. Sangeeta Shinde. In order to effectively deal with their submissions, in our considered opinion, it would be useful to refer to the evidence on record.

9. To prove homicidal death of deceased Mohd. Umar, Prosecution has examined PW-6 Dr. Vithal Vihurkad, who, at the relevant time, was attached to Rajawadi Hospital and has conducted the postmortem examination on the dead body of the deceased on 16th January, 2002.

10. On external examination, he noticed one stab injury on the right side of the chest. It was oblique admeasuring 2.5 cm laterally from the mid line and 7.5 cm medially and below from the right nipple. The length of the injury was 4 cm. The width of the injury was 1.5 cm and the injury was opened in to the thoracic cavity. The one side of the injury was acute and the other side was abtuse.

11. On internal examination, he found rib nos.5 and 6 were cut. The injuries on the ribs were 5 cm x 0.5 cm and opened inside the cavity. The pleura was cut on the right side. Right lung middle lobe was cut medially. The length of injury was 2 cm. Width was 1 cm and it was passed through and through.

12. According to him, the injury was antemortem and sufficient in the ordinary course of nature to cause the death. In his opinion, the cause of the death was *“haemorrhage and shock due to stab injury on the chest”*. He has issued Postmortem Report (Exhibit-27) accordingly. Though this witness is cross-examined by the Defence Counsel, nothing worthwhile is

elicited in his cross-examination to disbelieve his opinion about the cause of the death, which is proved to be homicidal in nature.

13. To prove the complicity of the Appellant in the said incident, Prosecution has relied upon the evidence of four eye witnesses, which is more or less of a similar nature. PW-1 Taufiq, who has lodged the complaint and was an eye witness to the incident, has deposed that he is running a tea-stall at Janta Hotel since 1999. One Anilkumar, along with some other persons, was working with him in the said tea-stall. On 15th January, 2002, at about 8:30 pm, while Anilkumar was taking bath in front of the Hotel, two boys by name Shamsu and Raja came there and tapped on his head. Hence, PW-1 Taufiq asked them as to why they were teasing Anilkumar. Thereupon, both these boys Shamsu and Raja quarreled and abused Anilkumar and this witness also. After some time, both these boys returned along with the Appellant and the co-Accused. As per the evidence of PW-1 Taufiq, four of them started assaulting him by giving fist blows. Deceased Mohd. Umar, who was working in a rubber scrap gala nearby and was passing from the road, intervened and tried to save PW-1 Taufiq. At that time, Appellant removed the knife and assaulted deceased on the right side of his chest. Due to the assault, deceased fell down and then Appellant and the other co-Accused ran away from the spot. Deceased was then taken to Shatabdi Hospital, where he was declared

dead. Thereafter, the complaint of PW-1 Taufiq came to be recorded vide Exhibit-11. In evidence before the Court, he has identified the knife (Muddemal Article No.1), with which deceased was stabbed. He has also identified the clothes of the deceased (Muddemal Article No.2).

14. In his cross-examination it was brought on record that at the time of quarrel, these four persons were assaulting him by fists; he could not escape and he was scared. It was further brought out that the Appellant took out knife from his right pant pocket. Appellant was in front of him. Deceased came from right side to him when the assault took place.

15. His evidence stands completely supported and corroborated from the F.I.R. (Exhibit-11), which is lodged immediately after the incident. The offence was registered on the same night at about 10:20 pm and the F.I.R. contains all the details of the incident, as deposed by him.

16. His evidence gets further corroboration from the evidence of PW-2 Nizamali Sayyed, who was also doing the rubber scrap business near the spot of incident and knowing PW-1 Taufiq and also the deceased Mohd. Umar, who was related to him. As per his evidence, on the date of incident, at about 9 pm, he was sitting in the godown, whereas deceased along with Dilshad was going to bring ration. When they went outside the godown, he heard shouts. Hence, he came outside and saw the Appellant

and other co-Accused assaulting PW-1 Taufiq. He further found that when deceased intervened in the quarrel, the Appellant removed knife from his waist and assaulted on the chest of the deceased, due to which deceased collapsed on the ground. Then these four persons ran away, whereas, deceased was taken to Shatabdi Hospital, where he was declared dead. In evidence before the Court, he has also identified Muddemal Article No.1-knife and Muddemal Article No.2-the clothes of the deceased. In his cross-examination it is brought on record that the spot of the incident was hardly at the distance of about 15 ft. to 20 ft. from his godown and, therefore, he was very much in a position to witness the incident. Nothing worthwhile is elicited in his cross-examination also to challenge his presence or his credibility.

17. There is corresponding evidence of PW-3 Hasim Siddiqui, the brother of the deceased. According to him, on the date of incident, after finishing his work, he had been to the hotel of PW-1 Taufiq and was chit-chatting with him. At that time, he saw that Raja and Shamsu were teasing Anilkumar, who was taking bath by the side of the road. They were tapping on his head. Hence, PW-1 Taufiq confronted them. Thereupon Raja and Shamsu left, but after some time they again returned with the Appellant and co-Accused Narsu. All the four of them started assaulting PW-1 Taufiq. At that time, his brother deceased Mohd. Umar was

proceeding to bring ration and he tried to intervene to save PW-1 Taufiq. Thereupon Appellant removed knife from his waist and assaulted the deceased on his chest. When his brother fell down on the ground, all the four Accused ran away from the spot. In his evidence also, he has identified Muddemal Article No.1-knife and Muddemal Article No.2-clothes of the deceased.

18. In his cross-examination it is brought on record that he was walking behind his brother, when deceased was proceeding to bring ration. He has further stated that PW-2 Nizamali Sayyed and Islam Ali were coming out of their godown. According to him, at the time of assault, the distance between him and deceased was hardly of 5 ft. to 6 ft. A suggestion was put that the knives like Muddemal Article No.1 are available in the market, which suggestion he has accepted. His evidence has otherwise remained unshattered on record.

19. The evidence of these three eye witnesses gets support from the evidence of PW-4 Mohd. Arif Chowdhery, who is brother of PW-1 Taufiq. He was also knowing all the witnesses, deceased and the Accused. He has deposed about the manner in which the earlier incident of Shamsu and Raja teasing Anilkumar and the subsequent incident of Appellant assaulting the deceased, when he came to intervene to save PW-1 Taufiq, had occurred. In his cross-examination it is brought on record that he has

witnessed the incident from the distance of 30 ft. He reached to the spot within 5 seconds and the quarrel lasted for about 5 minutes.

20. This ocular account of the incident, which stands on the solid and strong footing of the evidence of four eye witnesses, whose presence at the spot is natural and whose evidence is of a conclusive and clinching nature, again stands corroborated from the recovery evidence of the knife at the instance of the Appellant from his house, in pursuance of the Memorandum Panchanama (Exhibit-39) and Seizure Panchanama (Exhibit-40). This Panchanama is proved through the evidence of Panch PW-7 Vijay Kasale and Investigating Officer PW-10 PI Aadhale. As per the C.A. Report (Exhibit-59), the blood stains found on the knife were of blood group "A". As per C.A. Report (Exhibit-28), the blood group of the deceased was "A", thereby establishing necessary link. Thus, in the instant case, the ocular evidence on record, if at all necessary, gets support from corroborating evidence of recovery of the weapon of assault thereby proving the complicity of the Appellant in the offence beyond any spec of doubt.

21. The learned Counsel for the Appellant also being fully aware of this overwhelming and clinching evidence appearing and proved against the Appellant in this case, has fairly conceded that he is not disputing the occurrence of the incident and the involvement of the Appellant in the said

incident. He is also not disputing the manner in which the incident had occurred, but he requests the Court to consider that the present case cannot fall under Section 302 of the IPC. According to him, the Appellant had absolutely no intention to assault the deceased, who had come there all of a sudden and merely intervened in the incident. Only one injury was inflicted to the deceased and hence there is reason to believe that it was an act done without any intention. Therefore, according to him, the case squarely falls under Section 304 Part II of the IPC.

22. In our considered opinion also, if the entire evidence, as discussed above, is appreciated in its proper perspective, it leads to only one conclusion that though there was knowledge on the part of the Appellant when he stabbed deceased with knife that this injury is likely to cause death, it does not indicate that he also had an intention to cause the death or an intention to cause such bodily injury as is likely to cause death. Therefore, in our opinion also, the present case falls under Part II of Section 304 of the IPC.

23. It is submitted by the learned Counsel for the Appellant that the Appellant is in Jail since last more than 8 to 9 years. Hence, considering this fact, in our opinion, as Appellant had already undergone more than sufficient punishment, he may be released from Jail by giving him the benefit of set off under Section 428 of the Cr.P.C.

24. Consequently, Criminal Appeal No.183 of 2007 is allowed partly. The conviction and sentence of the Appellant for the offence punishable under Section 302 of the IPC is set aside and he is convicted for the offence punishable under Section 304 Part II of the IPC and sentenced to suffer rigorous imprisonment for the period of eight years. The sentence of fine amount, as imposed by the Trial Court, is maintained. The Appellant may be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]