

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 763 OF 2009**

Khurshid Aalam Abdul Kayyum	]
Shaikh @ Khurshid Langada	]
Aged 24 years, Resident of Plot	]
No. 5/B/5, Road No. 8,	]
Baiganwadi, Govandi, Mumbai-	]
400 043	].. Appellant
	[Ori. Accused]

Vs.

The State of Maharashtra	].. Respondent
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Mr. Amin Solkar Advocate along with Ms. Misbaah Solkar
Advocate for the Appellant

Ms. R.M.Gadhvi A.P.P. for the State

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**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J. &
SHRI.A.S.GADKARI, J.**

DATED : OCTOBER 06, 2015

ORAL JUDGMENT: [PER ACTING CHIEF JUSTICE]

1 This appeal is preferred by the appellant-original accused against the judgment and order dated 28.11.2008 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 840 of 2007. By the said judgment and order, the learned Sessions Judge convicted the

appellant under Section 302 of IPC and sentenced the appellant to life imprisonment and fine of Rs.2000/- i/d R.I. for two months.

2 The prosecution case, briefly stated, is as under:

Deceased Salim Khan was the husband of PW 1 Rahimunissa. PW 2 Mujjaffar was the son of deceased Salim Khan and Rahimunissa. On 14.8.2007 at about 10.00 p.m. Salim Khan went out of the house. As he did not come back for a long time, PW 1 Rahimunissa and PW 2 Mujjaffar went in search of Salim Khan. They saw him standing near welcome hotel for fodder. At that time, Rahimunissa and Mujjaffar told Salim Khan that they would see about the fodder on the next day and they should return to their house. When they were about to return to their house, the appellant came to the spot. At that time, it was 10.30 p.m. The appellant started giving abuses to Salim Khan. Salim Khan asked the appellant why he was abusing and Salim Khan gave a slap to the appellant. The appellant then took out a knife which was kept at his waist and assaulted Salim Khan on the chest with the knife. Salim Khan sustained bleeding injury and

fell down. Salim Khan was taken to the hospital where he was examined and declared dead. Rahimunissa lodged F.I.R. (Exh.9). Thereafter investigation commenced. After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against the appellant under Sections 302 of IPC and under Section 37(1) read with Section 135 of Bombay Police Act. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal. It may be stated here that the appellant came to be acquitted of the offence under Section 37(1) read with Section 135 of Bombay Police Act.

4 We have heard the learned counsel for the appellant and the learned A.P.P for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties,

the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the appellant assaulted Salim Khan with a knife which led to the death of Salim Khan.

5 The conviction is based on the evidence of PW 1 Rahimunissa, PW 2 Mujjaffar and PW 12 Mohd. Yusuf. All these three witnesses are eye witnesses to the incident. PW 1 Rahimunissa has stated that on 14.8.2007 at about 10.00 p.m. her husband Salim Khan went out of the house. As he did not come home for a long time, Rahimunissa went in search of him. Rahimunissa found her husband waiting for fodder. Rahimunissa told Salim Khan that they will see about fodder the next day and they should return to their house. When they were about to return to their house, the appellant came there. It was about 10.30 p.m. The appellant started giving abuses to her husband. Her husband then asked the appellant why he was abusing and gave a slap to the appellant. The appellant then took out a knife which was kept at his waist and assaulted Salim Khan on the chest with the knife. Salim Khan fell down.

6 PW 2 Mujjaffar was the son of deceased Salim Khan. Mujjaffar has stated that on 14.8.2007 at about 10.00 p.m. his father went out of the house to bring fodder for she-goat. As his father did not come back for a long time, he and his mother Rahimunissa went to look for his father. They saw him standing in front of welcome hotel. They told him that they will see about fodder on the next day. At that time, the appellant came there and abused his father. Then the appellant took out a knife and assaulted his father on the chest.

7 The evidence of PW 12 Mohd. Yusuf shows that on 14.8.2007 at about 10.15 p.m. deceased Salim Khan had given them tea from welcome hotel. Thereafter, the appellant came to the hotel and picked up a quarrel with Salim Khan (deceased). He stated that thereafter Salim Khan pressed his hand on his chest and started shouting. They noticed that blood was oozing from the injury on the chest of Salim Khan. At that time, PW 1 Rahimunissa and PW 2 Mujjaffar were present on the spot. Nothing has been elicited in the cross-examination of any of the three eye witnesses so as to cause us to disbelieve their testimony.

8 It is the prosecution case that the appellant assaulted Salim Khan with a knife and caused his death. This is supported by medical evidence. PW 10 Dr. Jawle conducted the post-mortem on the dead body of Salim Khan. On external examination, he found following injuries:

"Stab wound at chest which was oblique in direction of '8' shape, whose upper border starts at 4 cm below left nipple 8 x 1 x 7 cm deep. The margins were reddish regular and edematous where only upper margin shows contusion. There was fracture of 5th and 6th ribs with intercostal muscles with sharp margins".

 According to Dr. Jawle, the cause of death was due to shock due to stab wound to vital organ.

9 Mr. Solkar, the learned counsel appearing for the appellant submitted that even if it is accepted that the act of the appellant of assaulting Salim Khan with a knife resulted in his death, the case would not fall under Section 302 of IPC but it would fall under Section 304 Part-I of IPC. He pointed out

that the evidence on record shows that when the incident occurred, a quarrel was going on between the appellant and deceased Salim Khan which has been deposed about by PW 12 Mohd. Yusuf. He pointed out that Mohd. Yusuf has stated that deceased Salim Khan gave them tea from welcome hotel and thereafter the appellant came to the hotel and picked up quarrel with Salim Khan. Thereafter they noticed that Salim Khan had injury on the chest. Mr. Solkar also drew our attention to the evidence of PW 1 Rahimunissa who was the wife of the deceased. Rahimunissa has stated that when they were about to return to their home, the appellant came there and started giving abuses to her husband Salim Khan. Her husband asked the appellant why he was abusing and then her husband gave a slap to the appellant thereupon the appellant took out knife which was kept at his waist and assaulted Salim Khan on the chest. Mr. Solkar pointed out that the evidence of PW 1 Rahimunissa and PW 2 Mujjaffar shows that the appellant gave just one blow with the knife on the chest of Salim Khan. Mr. Solkar submitted that the assault was not premeditated or preplanned but it happened on the spur of moment in a fit of anger. Mr. Solkar reiterated that the fact that the incident

occurred during a sudden quarrel and after deceased Salim Khan had slapped the appellant, it would bring the case under Exception 4 to Section 300 of IPC and would thus, be covered by Section 304 Part-I of IPC.

10 Exception 4 to Section 300 of IPC reads as under:

"Exception 4. -- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. -- It is immaterial in such cases which party offers the provocation or commits the first assault."

11 To invoke Exception 4 to Section 300 of IPC four requirements must be satisfied namely;--

- (i) it was a sudden quarrel;
- (ii) there was no premeditation;
- (iii) the act was done in the heat of passion; and
- (iv) the assailant had not taken any undue advantage or acted in a cruel or unusual manner;

The cause of quarrel is not relevant nor is it relevant who offered provocation or started assault. What is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger.

12 The first three requirements mentioned above are satisfied. Looking to the injuries sustained by Salim Khan, it cannot be said that the appellant has taken any undue advantage or acted in a cruel and unusual manner. Looking to all these facts, we are of the considered opinion that the case falls under Section 304 Part-I of IPC.

13 Considering the evidence on record, we are of the view that Exception 4 to Section 300 of IPC applies to the facts of the present case and the appropriate conviction would be under Section 304 Part-I of IPC. Hence, the following order is passed:

ORDER

(1) The conviction and sentence imposed on the appellant under Section 302 of IPC vide judgment and order

dated 28.11.2008 in Sessions Case No. 840 of 2007 is set aside. Instead, the appellant- Khurshid Aalam Abdul Kayyum Shaikh @ Khurshid Langada is convicted under Section 304 Part-I of IPC and sentenced to R.I. for eight years and fine of Rs. 2000/- in default S.I. for one month.

(2) Appeal is partly allowed to the aforesaid extent.

A.S.GADKARI, J.

ACTING CHIEF JUSTICE

Kandarkar

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment.