

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.719 OF 2007**

1. Namdev Mahadev Dhumal
 2. Anil Namdev Dhumal
 3. Sunil Namdev Dhumal
- all residing at Babla Niwas,
Vishnawi Nagar, Virar (East),
Taluka : Vasai.

...Appellants.

versus

State of Maharashtra
(at the instance of Virar Police Station)

..Respondent.

.....
Mr. Manoj Mohite with Mr. Yashpal Thakur i/b Mr. Salim A. Shaikh
for the Appellant.

Mr. A.S. Shitole, Addl.P.P. for the State.

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

Judgment reserved on : 22nd September, 2015.

Judgment pronounced on : 6th October, 2015.

JUDGMENT (PER A.S. GADKARI, J.) :

The Appellants have challenged the judgment and order dated 18th June, 2007 passed by the 2nd Ad-hoc Additional Sessions Judge at Palghar, District Thane in Sessions Case No.12 of 2006 thereby convicting them for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- each. In default of payment of fine to further suffer simple imprisonment for one month. The Appellants have

also been convicted under Section 324 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years. The Trial Court has directed that the substantive sentences to run concurrently.

2. The facts which give rise and necessary to decide the present Appeal can briefly be stated as under :

(i) The date of incident is 9th October, 2005. Deceased Bhavin Jayesh Parekh was a builder by profession and was running a firm in the name and style of Deep Construction at Sainathnagar, Virar (East). On 9th October, 2005 at about 6 p.m. Hardik Rathod (P.W.1) was sitting in the office of deceased Bhavin Parekh at Virar (East). The said office was on the ground floor and there was an open space in front of the said office. Bhavin Parekh had constructed a building known as Babla Niwas. The drainage pipeline of the said Babla Niwas was broken and for the purpose of repairing the same, each of the residents of Babla Niwas was to contribute Rs.50/-. The said contribution was to be deposited with builder Bhavin Parekh. The Appellant No.1 – Namdev did not give his contribution. The Appellant No.1 had been to the office of Bhavin at about 6 p.m. and abused him. Bhavin Parekh left the office. Thereafter Hardik Rathod along with Bhavin Parekh had been to one site where the construction of a chawl was in progress. On their way Babla Niwas was situated. The

Appellant No.1 was sitting near the staircase of the said building. The house of the Appellants was in room No.2 on the ground floor of the said Babla Niwas. While Hardik Rathod and Bhavin Parekh were passing by the said Babla Niwas, the Appellant No.1 again started abusing them. Bhavin Parekh (deceased) told the Appellant No.1 that, the Appellant No.1 may not pay towards the contribution, but the Appellant No.1 should not visit his office and abuse him (Bhavin). However, the Appellant No.1 continued abusing Bhavin and assaulted Bhavin with hand.

(ii) In the meanwhile, the Appellant Nos.2 and 3 also came there. They assaulted Bhavin Parekh. The Appellant Nos.2 and 3 caught hold of Bhavin Parekh. Hardik Rathod (P.W.1) and Harshad Sankpal (P.W.2) tried to separate Bhavin from the clutches of the Appellant Nos.2 and 3. At that time the Appellant No.1 came there and gave a blow with knife on the stomach of Hardik Rathod. Hardik shouted and asked his friends, that they should run as Hardik was assaulted. When Hardik and Harshad started running towards the road, the Appellant No.1 chased them. After some time the Appellant No.1 returned back. Hardik and Harshad also followed him to see Bhavin Parekh. They saw that Bhavin Parekh was caught by the Appellant Nos.2 and 3 and the Appellant No.1 was assaulting Bhavin with knife on his chest. After the assault Bhavin ran towards Hardik and Harshad and

they started running. However, after running some distance, Bhavin Parekh collapsed on the ground near the shop viz. 'Usha Ladies Tailor'. Hardik and Harshad lifted Bhavin and put him in an auto-rickshaw and took him to hospital. Bhavin was declared dead before admission at the hospital. Hardik was treated by the doctor.

(iii) Thereafter Hardik went to Virar Police Station and lodged First Information Report. On the basis of the First Information Report, offence bearing C.R. No.I-224 of 2005 under Sections, 302, 324, 504 read with Section 34 of the Indian Penal Code came to be registered. The investigation was handed over to Police Sub-Inspector Shivaji Gaikwad (P.W.5). PSI Shivaji Gaikwad conducted the spot panchanama Exhibit 24. He also drew inquest panchanama (Exhibit 33). He thereafter sent the body of deceased Bhavin Parekh for postmortem. He recorded the statements of witnesses. He also seized the clothes of the deceased which were received from the Rural Hospital by effecting a panchanama (Exhibit 35). He also seized the clothes of the Appellant Nos.2 and 3 which are at Exhibits 27 and 25 respectively. He arrested the Appellants. After receipt of the report from Chemical Analyser and the postmortem notes, he submitted charge-sheet in the Court of Judicial Magistrate, First Class against the Appellants. The case was committed to the

Court of Sessions as contemplated under Section 209 of the Criminal Procedure Code.

(iv) The Trial Court framed charge below Exhibit 8 for the offence punishable under Sections 302, 324 read with Section 34 of the Indian Penal Code, to which the Appellants pleaded not guilty and claimed to be tried. The defence of the Appellants was of total denial. The Trial Court after recording the evidence and after hearing the parties to the said case was pleased to convict the Appellants by the impugned judgment and order dated 18th June, 2007 as stated herein above.

3. Heard Mr. Manoj Mohite with Mr. Yashpal Thakur, learned counsel for the Appellants and Mr. A.S. Shitole, learned APP for the State and with their assistance, we have also perused the entire record pertaining to the present case.

4. The prosecution in support of its case examined in all five witnesses. P.W.1- Hardik Piyush Rathod is the injured eye witness. P.W.2 - Harshad Jagannath Sankpal is the friend of deceased Bhavin Parekh and Hardik Rathod (P.W.1). P.W.3 - Dilip Girdhar is a panch witness to the recovery of knife at the instance of the Appellant No.1- Namdev. P.W.4- Dr. Swati Sarkate is the medical officer who conducted autopsy on deceased Bhavin Parekh. P.W.5 is PSI Shivaji Gaikwad, the investigating

officer of the present crime.

5. P.W.1- Hardik Rathod in his testimony has deposed that he was knowing deceased Bhavin Parekh. Bhavin Parekh was builder and was running a firm in the name and style of Deep Construction at Sainathnagar, Virar (East). That on 9th October, 2005 at about 6 p.m. he was sitting in the office of deceased Bhavin Parekh at Virar (East) which was situated on the ground floor and there was an open space in front of the said office. Bhavin Parekh had constructed a building known as Babla Niwas. The drainage line of the said Babla Niwas was broken and for the purpose of repairing the same, each of the residents of Babla Niwas was to contribute Rs.50/-. The said contribution was to be deposited with builder Bhavin Parekh. The Appellant No.1- Namdev Dhumal did not give the said contribution. At about 6 p.m. the Appellant No.1 had been to the office of Bhavin Parekh and abused him. Thereafter Bhavin Parekh left the office. P.W.1- Hardik Rathod along with Bhavin Parekh went to the site where the construction of a chawl was in progress. On the way, there was Babla Niwas. The Appellants were residing in room No.2 on the ground floor of the said Babla Niwas. The Appellant No.1 was sitting near the staircase of the said building. While Hardik Rathod and Bhavin Parekh were passing by the said Babla Niwas, the Appellant No.1 again started abusing them, upon which

Bhavin Parekh (deceased) told him that, the Appellant No.1 may not pay the contribution, but he should not visit his office and abuse him (Bhavin). However, the Appellant No.1 continued abusing him and assaulted Bhavin with hand. In the meanwhile, the Appellant Nos.2 and 3 also came there and assaulted Bhavin Parekh. The Appellant Nos.2 and 3 caught hold of Bhavin Parekh. At that time Hardik Rathod (P.W.1) and Harshad Sankpal (P.W.2) tried to rescue Bhavin from the clutches of the Appellant Nos.2 and 3. At that time the Appellant No.1 came there and gave a blow with knife on the stomach of Hardik Rathod. Hardik raised shouts that the Appellant No.1 was having a knife and they should run as Hardik was assaulted. When Hardik and Harshad started running towards road, the Appellant No.1 chased them. After some distance, the Appellant No.1 returned back. Hardik and Harshad also followed him to see Bhavin Parekh who had not come with them. They saw that Bhavin Parekh was caught by the Appellant Nos.2 and 3 and the Appellant No.1 was assaulting Bhavin with knife on his chest. After the said assault Bhavin ran towards Hardik and Harshad. Hardik, Harshad and Bhavin started running. However, after running some distance, Bhavin Parekh collapsed on the ground near Usha Ladies Tailor. Hardik and Harshad lifted Bhavin, put him in an auto-rickshaw and took him to Sanjivani Hospital, Virar (West). Before admission, the doctors declared Bhavin dead. Hardik was treated at Sanjivani

Hospital. Doctor put stitches on his wound. Hardik thereafter went to Virar Police Station and lodged his complaint. In the detailed cross-examination of Hardik Rathod (P.W.1), no material which is beneficial to the Appellants has been brought on record.

6. P.W.2 - Harshad Jagannath Sankpal is a friend of Hardik Rathod (P.W.1) and was also knowing Bhavin Parekh (deceased). P.W.2 in his testimony has also reiterated the facts which have been stated by P.W.1 - Hardik Rathod in his testimony. He has also stated that when they tried to rescue Bhavin Parekh from the clutches of the Appellant Nos.2 and 3, Hardik Rathod told him to run away as the Appellant No.1 has got knife and has assaulted Hardik on his stomach. Thereafter P.W.2 and Hardik started running. They thought that Bhavin Parekh might be following them. Hence, they turned back and saw that the hands of Bhavin Parekh were caught by the Appellant Nos.2 and 3 and the Appellant No.1- Namdev gave a knife blow to the chest of Bhavin Parekh. Thereafter Bhavin Parekh relieved himself and started running towards them and after running some distance, he collapsed near the shop of Usha Ladies Tailors. There was a deep injury on his chest. They lifted Bhavin Parekh and by putting him in an auto-rickshaw brought him to Sanjivani Hospital. The doctors declared Bhavin dead before admission.

7. P.W.3- Dilip Girdhar is a panch witness to the discovery of

knife at the instance of the Appellant No.1. This witness is a formal witness who has proved the memorandum panchanama dated 16th October, 2005 and recovery panchanama of the knife in question which is at Exhibit 23.

8. P.W.4 – Dr. Swati Sarkate was then attached to Virar Hospital as Medical Officer. She conducted the autopsy/postmortem on 9th October, 2005 on the dead body of Bhavin Parekh. During the postmortem examination she found stab wound of 5 cm x 3 cm x 5 cm on the right side of the chest which was incised wound over 3rd and 4th intercostal cartilage, haemothorax, thoracic cavity with blood. During the internal examination she also noticed an injury of 3 cm x 2 cm cut over arch of aorta extending in the mucous membrane seen blood oozing from it. She therefore opined that the deceased died due to hemorrhagic shock due to rupture of arch of aorta due to stab wound. P.W.4 has stated that the stab injury mentioned in the postmortem notes was possible by Article A (knife).

9. P.W.5 – PSI Shivaji Gaikwad, the investigation officer in his testimony has narrated the various steps taken by him during the course of investigation of the present crime. P.W.5 in his testimony has stated that at the instance of the complainant Hardik Rathod (P.W.1) he effected a panchanama of scene of offence by visiting the spot in presence of panchas. The said

panchanama is at Exhibit 24. This witness has also proved various other documents which are on record. In the cross examination of this witness, no material has been elicited by the Appellants which would help them in discrediting the testimony of this witness.

10. The evidence on record shows that the knife which was recovered at the instance of the Appellant No.1, in the presence of P.W.3 – Dilip Girdhar was stained with human blood. During the course investigation bloodstains were also found on the clothes of the Appellant No.1. The Chemical Analyser's report discloses that the blood which was found on the knife and clothes of the Appellant No.1 was of 'O' group. The blood group of the deceased was also 'O'.

11. Mr. Mohite, learned counsel for the Appellants submitted that P.W.1, the injured eye witness and P.W.2 in their testimony have stated that the Appellant No.1 armed with a knife came on the spot subsequently and therefore, the Appellant Nos.2 and 3 cannot be said to share common intention with the Appellant No.1 in inflicting the blow of knife on P.W.1 and on Bhavin Parekh (deceased). Mr. Mohite drew our attention to the scene of offence panchanama effected at the instance of the complainant Hardik Rathod (P.W.1) wherein it has been stated by the said witness i.e. P.W.1 that when the Appellant Nos.2 and 3 started

assaulting Bhavin Parekh and Hardik Rathod, the Appellant No.1 – Namdev Dhumal went to his house which was situated very near to the spot of incident and brought a knife and thereafter caused stab wound on the stomach of Hardik Rathod. Mr. Mohite, therefore, contended that the Appellant Nos.2 and 3 did not share common intention with the Appellant No.1 while inflicting stab wound on P.W.1- Hardik and deceased Bhavin Parekh. A close scrutiny of the evidence on record discloses that P.W.1- Hardik and P.W.2- Harshad in their testimony have categorically stated that after the Appellant No.1 caused stab wound on Hardik, he along with Harshad started running towards road. That Appellant No.1 chased them and after some distance the Appellant No.1 returned back. Hardik and Harshad also followed him to see Bhavin Parekh who did not come with them. Hardik and Harshad saw that Bhavin Parekh was caught hold by the Appellant Nos.2 and 3 and the Appellant No.1 was assaulting Bhavin with knife on his chest. This testimony of the eye witness is nowhere shaken in their cross-examination by the Appellants and therefore, we find that the Appellant Nos.2 and 3 helped the Appellant No.1 in causing the stab wound on the chest of deceased Bhavin Parekh. We are therefore of the considered opinion that the Appellant Nos.2 and 3 do share common intention with the Appellant No.1 in causing the stab wound to deceased Bhavin Parekh on his chest.

12. Mr. Mohite thereafter submitted that in the present case the Appellant No.1 has given only one single blow on deceased Bhavin Parekh. Likewise, he has also inflicted one single blow with knife on the injured Hardik (P.W.1). He submitted that the incident of stabbing has resulted from the occurrence of a scuffle between the Appellant No.1 on one side and Bhavin, Hardik and Harshad on the other side. He therefore submitted that the present case would fall under Exception 4 of Section 300 of the Indian Penal Code and therefore would attract an offence punishable under Section 304 Part II of the Indian Penal Code. Mr. Mohite further contended that the act of the Appellant No.1 is not premeditated in view of the statement made by P.W.1- Hardik while effecting the scene of offence panchanama coupled with the evidence on record and the present case involves only a single blow of knife by the Appellant No.1 on deceased Bhavin Parekh. He further contended that P.W.4- Dr. Swati Sarkate has nowhere stated that the injury which was caused by the Appellant No.1 was sufficient in the ordinary course of nature to cause death and therefore, the present case falls within the ambit of Exception 4 of Section 300 of the Indian Penal Code. In support of his contention Mr. Mohite relied upon a decision of the Supreme Court in the case of Bunnilal Chaudhary v. State of Bihar reported in AIR 2006 SC 2521 = (2006) 10 SCC 639. A

close scrutiny of the evidence of P.W.4- Dr. Swati Sarkate who conducted the postmortem examination of deceased Bhavin Parekh in her testimony has nowhere stated that the injury caused by the Appellant No.1 to deceased Bhavin, was sufficient in the ordinary course of nature to cause death. That was not even stated to be likely to cause death. It appears that there was no motive or intention of the Appellants to commit murder of deceased Bhavin Parekh. The Appellant No.1 had caused an injury to P.W.1- Hardik and thereafter Hardik started running from the scene of offence. Likewise, after receiving an injury on the chest Bhavin Parekh also started running from the scene of offence and subsequently at some distance, he collapsed. This is a case involving a single blow of knife by the Appellant No.1. We are of the considered opinion that the Appellants did not intend to commit murder of Bhavin Parekh and the Appellant No.1 during the course of a sudden quarrel caused injuries to Bhavin. As stated herein above, P.W.4 – Dr. Swati Sarkate has nowhere stated or opined that the injury received by deceased Bhavin was sufficient in the ordinary course of nature to cause death or likely to cause death.

13. Taking into consideration the entire evidence available on record, we are of the opinion that the case of the Appellants falls within the purview of Exception 4 of Section 300 and therefore,

the offence committed by the Appellants is punishable under Section 304 Part II of the Indian Penal Code. We therefore modify the conviction of the Appellants from an offence punishable under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code to Section 304 Part II read with Section 34 of the Indian Penal Code and the Appellants are sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- each. In default of payment of fine, to further undergo rigorous imprisonment for one month. The conviction and sentence of the Appellants under Section 324 read with Section 34 of the Indian Penal Code is maintained.

14. Hence the following order :

- i) The conviction and sentence of the Appellants under Section 302 read with Section 34 of the Indian Penal Code is set aside and instead of that the Appellants are convicted under Section 304 Part II read with Section 34 of the Indian Penal Code. The Appellants are sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- each. In default of payment of fine, to further suffer rigorous imprisonment for one month.
- ii) The conviction and sentence of the Appellants punishable under Section 324 read with Section 34 of the Indian Penal Code is hereby maintained.

iii) The substantive sentence awarded to the Appellants to run concurrently. The Appellants are entitled for set off as contemplated under Section 428 of the Criminal Procedure Code against the substantive sentence.

The Appeal is partly allowed in the aforesaid terms.

(A.S. GADKARI, J.)

(ACTING CHIEF JUSTICE)

CERTIFICATE

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