

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.590 OF 2010

Rizwan @ Kunnuka Chota Nati]
Shaukatali Idris,]
Age : 20 Yrs., Himmat Nagar,]
(Sangam Nagar), Near Imran Hotel,]
Antop Hill, Mumbai – 400 032.]
[At present Accused is in Nashik Road]
Central Prison, Nashik] Appellant

Versus

The State of Maharashtra,]
(Thru' Wadala T.T. Police Station)] Respondent

Mr. Aniket Vagal for the Appellant.

Mrs. S.D. Shinde, A.P.P., for the Respondent-State.

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

DATE : 9TH FEBRUARY, 2015.

ORAL JUDGMENT [Per P.V. Hardas, 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.1,000/-, in default of which to undergo further R.I. for 15 days by the Additional Sessions Judge, Greater Bombay, by Judgment

dated 21st February, 2009 in Sessions Case No.64 of 2008, by this Appeal questions the correctness of his conviction and sentence.

2. Facts, as are necessary, for decision of this Appeal may be stated thus :

PW-10 PSI Hukumgir Gosavi, who was attached to Wadala T.T. Police Station and was on duty on 16th October, 2007, received a message at 9:30 p.m. from the Sion Hospital about admission of the injured in the hospital. PW-10 PSI Gosavi, on receiving the said information, proceeded to the Sion Hospital and noticed PW-1 Mohammed Mustakin Ansari, father of the injured standing near the dead body of deceased Mustaq. Statement of PW-1 Mohd. Mustakin was recorded by PW-10 PSI Gosavi at Exhibit-15. The printed F.I.R. is at Exhibit-35. On the basis of the report of PW-1 Mohd. Mustakin, an offence against the Appellant was registered. Clothes of the deceased were seized under Seizure Memo at Exhibit-23. An Inquest Panchanama in the presence of witnesses was drawn at Exhibit-22 and the dead body was referred for post mortem examination. PW-10 PSI Gosavi then visited the scene of the incident and drew the Scene of the Incident Panchanama at Exhibit-33. Further investigation was handed over to PW-12 PI Vilas Chavan.

3. PW-12 PI Vilas Chavan, who was also attached to the Wadala T.T. Police Station, was entrusted with the investigation of Crime No.213 of 2007 by PSI Gosavi. He, accordingly, arrested the Appellant on 17th October, 2007 under Arrest Panchanama (Exhibit-19). The clothes on the person of the Appellant were seized under the said Panchanama. The clothes, on their seizure, were sealed in a paper wrapper with the seal of the signature of the Panchas. On 20th October, 2007, during custodial interrogation, the Appellant expressed his willingness to point out the knife, which has been concealed by him. Accordingly, the Memorandum Panchanama was drawn in the presence of Panchas at Exhibit-31. The Appellant led the Police and the Panchas and produced a knife, which was seized under Panchanama (Exhibit 31-A). The knife is Article No.1. Statements of witnesses were recorded and the Appellant was referred for medical examination. The Appellant was examined by PW-5 Dr. Pratap Anand, who noticed that the Appellant had sustained the following injuries :-

“[1] Abrasion over dorsum of right hand at base of index finger 1 cm x ½ cm brownish in colour and tender. It might have been caused due to hard and blunt object. Age was 24 to 48 hours.

[2] Incised wound ½ cm skin deep on lateral aspect of proximal phalynx of right index finger, oblique, brownish, tender. The injury might have been caused due to hard and sharp object. Age of injury 24 to 48 hours.”

4. The Injury Certificate of the Appellant is at Exhibit-21. The seized property was thereafter referred to the Chemical Analyzer under requisition letter at Exhibit-39. After the completion of investigation, a Charge-Sheet against the Appellant was filed.

5. The deceased was initially examined by PW-7 Dr. Mukesh Jha, who was working as a Casualty Medical Officer in the Lokmanya Tilak Hospital. On examining the injured, he had noticed that the injured had sustained the following injuries :-

- “(i) First injury was clean and incise and deep on the right side of the chest. Its dimension was 2 cm x 2 cm. I could not assess depth of the injury;
- (ii) Second injury was penetrating injury of the left side of the abdomen at para umbilical region. Its dimension was 2 cm x 2 cm and it was very deep;

- (iii) Third injury was at the right side of lip. Its dimension was 1 cm x 0.2 cm and it was muscle deep.”

The pulse was not palpable and the blood pressure was unrecordable. There was no heart sound and respiration. PW-7 Dr. Jha, therefore, declared him dead. Necessary entry was taken in the register at Exhibit-28. PW-7 Dr. Jha issued the certificate at Exhibit-29.

6. Post mortem on the dead body of the deceased was performed by PW-11 Dr. Rajesh Dere, who had noticed that deceased had sustained the following external injuries :-

- “(i) Incise wound of 1 x 0.2 x 1 cm over left side of lip;
- (ii) Stab wound of 2 x 2 cm with intestines protruding over left para umbilical region;
- (iii) Stab of 4 x 2 x 3 cm over left side of chest, 3 cm away from mid sternal line;
- (iv) CLW of 4 x 1 x ½ cm over left arm midal aspect.”

On internal examination, he noticed the following injuries :-

- “(i) Peritoneum torn over left abdomen;
- (ii) Cavity blood of 150 ml. in abdomen. Blood was preserved EDTA.”

He, therefore, opined that the probable cause of death was *“haemorrhagic shock following stab wound (unnatural)”*.

7. The Post Mortem Report is at Exhibit-37.

8. On committal of the case to the Court of Sessions, the Trial Court vide Exhibit-8 framed charge against the Appellant for the offence punishable under Section 302 of the IPC and under Section 135 of the Bombay Police Act. The Appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 12 witnesses. The defence of the Appellant was of denial. The Trial Court, on appreciation of the evidence, convicted and sentenced the Appellant as afore-stated.

9. We have heard Mr. Aniket Vagal, the learned Counsel for the Appellant, and Mrs. Shinde, the learned A.P.P. In order to effectively deal with the submissions advanced before us, it would be useful to refer to the evidence of the Prosecution Witnesses.

10. Prosecution has examined PW-1 Mohammed Mustakin Ansari, father of deceased Mustaq, who deposes that his son Mustaq was

working as a "Tailor". In respect of the incident, he deposes that on 16th October, 2007, at about 8:30 p.m., one woman had come to his house and had informed him that the Appellant was assaulting his son Mustaq. PW-1 Mohammed Ansari, therefore, proceeded to the scene of the incident and noticed his son lying in pool of blood having sustained injuries. He, therefore, shifted the injured to the Sion Hospital, where he was declared dead, on examination by the Medical Officer. He lodged his oral report at Exhibit-15. He has also deposed that, prior to the incident, the relations between the Appellant and the deceased were not strained due to any quarrel. In cross-examination, he has admitted that he does not recollect the name of the woman who had informed him about the incident.

11. Prosecution has examined two eye witnesses. PW-2 Sayrabanoo, a child witness, aged 9 years, deposes that she knew the deceased, who was working in the tailoring shop in front of her house. According to her, on the date of the incident, at about 8:30 p.m., she was playing in front of the house and noticed the Appellant assaulting deceased Mustaq by knife. After assaulting the deceased, the Appellant fled from the scene of the incident. PW-2 Sayrabanoo claims that, on seeing the incident, she was frightened and, therefore, cried out. She had then gone to the house of

the deceased and informed the mother of the deceased about the incident. She has also identified the Appellant as an assailant. In cross-examination, she has admitted that there were no street lights near her house. She has also deposed that she, along with other three friends, used to play in front of her house. An omission is elicited that she had not stated in her statement that she had informed the mother of the deceased.

12. Prosecution has examined PW-3 Sakirali Ansari, who deposes that the deceased was his brother-in-law, who was working as a Tailor. On 16th October, 2007, he had gone to the house of PW-1 Mohammed Ansari and thereafter was standing in front of the grocery shop of one Yadav. At that time, he had noticed the Appellant assaulting deceased Mustaq by knife. On receiving the injuries, Mustaq fell on the ground. He deposes that thereafter PW-1 Mohammed Ansari rushed to the scene of the incident and removed the injured to the Sion Hospital. The deceased was declared dead on examination by the Medical Officer. In cross-examination, he has admitted that in his previous statement, he had stated that he was standing in front of the house of one Jadhav. He could not explain the omission regarding the reference to the grocery shop of Yadav. He has admitted that he has witnessed the incident approximately from the distance of 10 meters. He has admitted that he has not attempted to

rescue the deceased. He has volunteered that he was apprehending danger to his life as the Appellant was armed with knife. In fact, according to PW-3 Sakirali, none of the persons had intervened to apprehend the Appellant.

13. Prosecution has examined PW-9 Dattaram Jadhav, who stated that he was running a grocery shop. He has admitted that he knew the deceased, who was residing with his parents and brothers. According to PW-9 Dattaram, on 16th October, 2007, there were a quarrel between the deceased and some other persons, whose name he does not know. Father of the deceased has pacified the quarreling persons. He has then admitted that he does not remember the date. According to him, after one or half month of that incident, he had noticed one girl by name Sayra came running in the lane shouting that "brother is assaulted". According to him, he came out of the shop and noticed the deceased lying on the ground having sustained injuries. According to him, a crowd had collected there and the injured was then shifted to the hospital. An omission is elicited that he has not stated in his previous statement that he has noticed one girl by name Sayra crying out that brother was assaulted.

14. Mr. Vagal, the learned Counsel for the Appellant, on the strength of this evidence has urged before us that there is variations in the evidence of PW-2 Sayrabanoo and PW-3 Sakirali. It is also urged before us that the presence of PW-3 Sakirali is not referred to by PW-1 Mohammed Ansari. It is also urged before us that there was darkness due to which the identification of the Appellant would be rendered doubtful. The learned A.P.P. has supported the findings arrived at by the Trial Court.

15. PW-2 Sayrabanoo is a child witness. We are conscious of the fact that the child witnesses are susceptible to being tutored. PW-2 Sayrabanoo, who is cross-examined at length, has repelled the suggestion of the Accused that she had been tutored. There is nothing on record to indicate that PW-2 Sayrabanoo had been tutored. In fact, her presence at the scene of the incident is deposed by PW-9 Dattaram. PW-9 Dattaram has also deposed about noticing the dead body of deceased soon after PW-2 Sayrabanoo had cried out. None of the omissions, which have been elicited in the cross-examination of the witnesses, have been proved from the Investigating Officer. Resultantly, therefore, we find that the omissions, which have been elicited, cannot assist the Appellant. The evidence of PW-2 Sayrabanoo stands fully corroborated by evidence of PW-3 Sakirali. There are slight variations in respect of the timings of the incident, but such variations are natural in the testimony of two eye

witnesses, who depose about the same incident. We do not find the magnitude of variations to be such as to reject the testimony of the eye witnesses. Thus, the evidence of the eye witnesses fully establishes the assault by the Appellant on the deceased. The evidence of the eye witnesses is further corroborated by the medical evidence and by seizure of the knife at the instance of the Appellant. Even the knife was found stained with the blood group matching that of the deceased. As regards the blood found on the clothes of the Appellant, the result thereof was inconclusive. However, the Trial Judge, while questioning the Appellant under Section 313 of the Code of Criminal Procedure, has not questioned the Appellant regarding the findings of the Chemical Analyzer and, consequently, the findings of the Chemical Analyzer will have to be left out of consideration. However, the eye witness account clearly establishes the involvement of the Appellant as the assailant, who had stabbed the deceased.

16. Thus, in our opinion, the Prosecution has proved the offence against the Appellant beyond reasonable doubt. The Appeal filed by the Appellant, being sans merit is, therefore, dismissed confirming his conviction and sentence.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]