

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.706 OF 2014

Dashrath Pandurang Khilare, Convict No.C-16846, presently in Yerawada Central Prison, Pune - 6	... Appellant
v/s	
The State of Maharashtra	... Respondent

Shri A.G. Toraskar, appointed Advocate by Legal Aid for Appellant.
 Smt G.P. Mulekar, APP for Respondent - State.

**CORAM: SMT V.K. TAHILRAMANI &
 SHRI B.P. COLABAWALLA JJ.**

DATE : 23RD MARCH 2015

ORAL JUDGMENT (PER SMT V.K. TAHILRAMANI J.):

1. The Appellant - original Accused has preferred this Appeal against the judgment and order dated 16th May 2014 passed by the learned Additional Sessions Judge, Pune in Sessions Case No.362 of 2012. By the said judgment and order, the learned Additional Sessions Judge convicted the Appellant under section 302 of IPC and sentenced him to RI for life and to pay fine of Rs.5,000/-, in default, RI for six months.

2. The prosecution case briefly stated is as under :-

PW 5 - Vrushali was the wife of the Appellant. The Appellant started ill-treating Vrushali. Vrushali then contacted her mother and told her about the ill-treatment. In the meanwhile, a daughter was born to Vrushali from the Appellant. The Appellant then insisted that Vrushali should bring some cash amount from her mother and on this count, he physically ill-treated Vrushali. The Appellant also threatened that if she failed to get the amount, he would send her for prostitution to Kamathipura. On 2nd December 2010, the Appellant picked up a quarrel with Vrushali on account of money when she had gone to attend the marriage of her brother Sagar (PW 6) at Bhigwan. Vrushali informed about this to her mother and brothers. They inquired with the Appellant. The Appellant then left for Mumbai. Thereafter, Vrushali went to reside with the Appellant at Mumbai. At Mumbai the Appellant assaulted Vrushali because she had informed her mother and brothers about the incident which occurred on 2nd December 2010. Due to the assault Vrushali sustained fracture to her left hand. She then took

treatment from J.J. Hospital. Due to constant ill-treatment, Vrushali came and started residing with her mother and her brothers since July 2011. The Appellant came to the house of the mother of Vrushali and abused her and threatened her. Vrushali then lodged NC at the Police Station. The Appellant then went to Sainath Steel Corporation where Vrushali's brother Sagar and Swapnil were working and threatened them with dire consequences.

PW 6 – Sagar Dhawade was the brother of Vrushali. Deceased Swapnil was also the brother of Vrushali. PW 1 – Santosh Nazarkar was the cousin brother of Vrushali. Santosh was also residing at Pune where Vrushali was residing with her mother and brothers. PW 6 – Sagar and PW 1 – Santosh were doing joint business styled as Sainath Steel Corporation at Sadgurunagar, Bhosari, Pune. Deceased Swapnil was helping them in the said business. The Shop and the Company used to remain open from 8.00 a.m. to 8.00 p.m. every day.

The incident took place on 24th January 2012. At about 8.00 p.m., the Shop and the Company were closed. PW 6

- Sagar went home. PW 1 - Santosh was returning home on his Hero Honda bike alongwith Swapnil. Swapnil was sitting on the pillion seat of the bike. At about 8.15 p.m. they reached Swami Samarth Petrol Pump. At that time, two persons who were sitting on a bike came from behind the bike of PW 1 - Santosh. Santosh heard noise of fire arm. When Santosh looked towards the sound of fire arm, he noticed that the Appellant was sitting on the pillion seat of the other bike. The appellant had a pistol in his hand. Santosh identified him as Swapnil's sister Vrushali was married to the Appellant. Soon after Santosh heard the sound of fire arm being fired, Swapnil put his head on the shoulder of Santosh. Hence Santosh tried to take his motorcycle to the side of the road.

Meanwhile, Swapnil fell down from the moving bike. Then Santosh stopped his bike and noticed serious injury above left eyebrow of Swapnil from which there was profuse bleeding. In the meanwhile, the Appellant alongwith the unknown rider of the bike fled from the spot. Santosh then with the help of a stranger took Swapnil to Desai Hospital, Bhosari. The doctor advised Santosh to take Swapnil to Sant Dnyaneshwar Hospital,

Bhosari. Accordingly, Santosh took Swapnil to the said Hospital. He gave message on telephone about Swapnil having sustained fire arm injury and the fact that Swapnil was admitted in the Hospital. Then relatives of Swapnil came to the said Hospital. PW 1 - Santosh lodged FIR on the same day i.e. 24th January 2012 at about 11.00 p.m. The said FIR was under section 307 r/w section 34 of IPC and section 3 r/w section 25 of the Arms Act. Thereafter, investigation commenced. The appellant was arrested. Swapnil expired on 25th January 2012 at about 11.15 a.m. Section 307 was then converted to section 302 of IPC. The fire arm which was used for firing at Swapnil was recovered at the instance of the Appellant. After completion of investigation, the charge-sheet came to be filed.

3. Charge came to be framed against the appellant under section 302 and under section 3 r/w 25(1)(B)(a) of the Arms Act. The Appellant pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the Appellant as stated in paragraph 1 above, hence this

Appeal.

4. We have heard the learned Advocate for the Appellant and the learned APP for State. We have carefully considered their submissions, the judgment and order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the same for the below mentioned reasons, we are of the opinion that the Appellant fired at Swapnil with a pistol and caused his death.

5. The conviction of the Appellant is mainly based on the evidence of PW 1 – Santosh who is an eye-witness to the incident. Santosh was the cousin brother of deceased Swapnil. Santosh has stated that Swapnil was the son of his maternal aunt – Alka Dhawade. Alka resided at Pimpale Gurav in Pune where Santosh also resided. Swapnil had an elder brother Sagar (PW 6) and four married sisters. Out of the four sisters, one sister – Vrushali (PW 5) was married to the Appellant about 11 years prior to the incident. About two and half years prior to the incident, the marriage of Sagar (PW 6) who was the brother of Vrushali took place. Vrushali came alongwith the Appellant

for the said marriage. At that time, Vrushali informed Santosh and her brother that the appellant had earlier married on two occasions and he deals in the business of illicit liquor and he constantly demanded cash from her and threatened that if she did not give him cash, he would compel her to go for prostitution at Kamathipura, Mumbai. Due to this, Vrushali refused to join the Appellant for cohabitation after the marriage of her brother Sagar. The Appellant then made an attempt to set on fire the house where Vrushali was residing with her mother and brothers. On account of this, a report was lodged at Walchandnagar Police Station. Santosh has further stated that since about four years prior to the incident, he had started joint business with PW 6 – Sagar and his brother-in-law Sanjay Atole. The said business was styled as Sainath Steel Corporation and it was situated at Sadgurunagar, Bhosari, Pune. He had also started a Company styled as 'Sairupee' which was manufacturing tin-sheets. Swapnil was helping them in the said business. The Shop and the Company used to remain open from 8.00 a.m. to 8.00 p.m. every day. On 24th January 2012, the Shop and the Company were opened at 8.00 a.m. At 8.00 p.m. the Shop and the company were closed. Sagar (PW 6) left

on his motorcycle and went home. Santosh alongwith Swapnil left for home on Hero Honda bike of PW 1 Santosh. Swapnil was sitting on the pillion seat of the bike. At about 8.15 p.m. they reached near Swami Samarth Petrol Pump. At that time two persons came on a bike from behind them. Santosh heard sound of firing from firearm, hence he looked towards the sound. Santosh noticed that the Appellant was sitting on the pillion seat of the other bike and the Appellant was armed with a pistol. Meanwhile, Swapnil fell down from the moving bike. Then Santosh stopped his bike and noticed serious injury above left eyebrow of Swapnil from which there was profuse bleeding. In the meanwhile, the Appellant alongwith the unknown rider of the bike fled from the spot. Santosh then with the help of a stranger took Swapnil to Desai Hospital, Bhosari. Thereafter, on advise of doctor, Swapnil was taken to Sant Dnyaneshwar Hospital, Bhosari. Considering Swapnil's critical condition, he was admitted in Birla Hospital where he succumbed to the injury. Meanwhile at 11.00 p.m. Santosh lodged FIR at Bhosari Police Station on the very same day. Thus, on scrutinising the evidence of PW 1 – Santosh, it is clear that the Appellant fired at Swapnil due to which Swapnil sustained injury and thereafter

died.

6. Shri Toraskar, learned Advocate for Appellant submitted that the evidence of PW 1 - Santosh cannot be relied upon because according to the prosecution, the clothes worn by him were stained with blood as he had carried Swapnil in an injured condition to the Hospital. These clothes were seized under panchanama Exh.30. Shri Toraskar pointed out that the evidence of PW 2 - Samadhan, who is the panch witness, who has deposed about seizure of blood-stained clothes of PW 1 shows that PW 1 - Santosh was not present when the seizure of his clothes took place in the Police Station. Assuming that PW 1 was not present when the clothes were seized and even assuming that there is no reliable material to show that the blood-stained clothes were his clothes, the testimony of PW 1 - Santosh that he witnessed the incident has not been shattered. Thus we find no reason to discard the testimony of PW 1 - Santosh which clearly shows that the Appellant fired at Swapnil.

7. The motive for the Appellant to commit the crime is brought on record through the evidence of PW 1 - Santosh, PW 5

- Vrushali and PW 6 - Sagar. Santosh has stated that Vrushali was married to the Appellant about 11 years prior to the incident. About two and half years prior to the incident, when marriage of Sagar took place, Vrushali came to attend the marriage with the Appellant. At that time, Vrushali informed PW 1 - Santosh and her brothers that the Appellant had performed two marriages and he had two minor children. The Appellant had demanded cash and told her that if she does not bring it, she has to go for prostitution in Kamathipura, Mumbai. Santosh further stated that about two and half years prior to the incident, the Appellant made an attempt to set the house of Swapnil on fire. Therefore, a report was lodged with Walchandnagar Police Station. The evidence of Santosh shows that Vrushali was residing with her brother Swapnil alongwith her minor daughter Vaishnavi. The evidence of PW 10 API Anant Motesardar shows that two NCs were lodged against the Appellant. One NC was lodged by Vrushali's mother Alka Dhawade. Alka lodged the NC against her son-in-law Dashrath Khilare (Appellant). In the said NC, Alka stated that the Appellant came and told her that she should send her daughter Vrushali to him for cohabitation and if she did not send her

daughter, he would finish all of them. This NC is at Exh.62.

8. The evidence of PW 5 - Vrushali also shows the motive for the Appellant to commit the murder of her brother Swapnil. Vrushali has stated that the Appellant was her husband. Vrushali was residing at Sudarshannagar in Pimpale Gurav, Pune alongwith her minor daughter Vaishnavi, mother Alka, brothers Swapnil and Sagar and Sagar's wife Reshma. Brother Sagar (PW 6) was running Sainath Steel Corporation at Bhosari in partnership with Santosh Nazarkar (PW 1) and Sanjay Atole. Swapnil used to look after the said business. The Appellant insisted that Vrushali should bring cash from her mother and on that count he physically ill-treated Vrushali. The Appellant also threatened that if Vrushali failed to bring cash amount from her mother, he will compel her to go for prostitution at Kamathipura, Mumbai. He also threatened the other family members of Vrushali. Vrushali has further stated that on 2nd December 2010, marriage of her brother Sagar was to take place. Hence she came to Pune on 1st December 2010 alongwith the Appellant. After the marriage, the Appellant picked up a quarrel with Vrushali in relation to cash. Vrushali

narrated about this to her mother and brothers. Meanwhile, the Appellant left for Mumbai. Vrushali went to Mumbai and resumed cohabitation with the Appellant. Thereafter, the Appellant again assaulted Vrushali due to which she sustained fracture to her left hand. The Appellant continued with the same sort of ill-treatment, hence, Vrushali with her minor daughter left the house of the Appellant. Vrushali then started residing with her mother and brothers at Pune. The Appellant then came to the house of the mother and abused her and threatened her. He also threatened her brother, hence, she lodged NC with Sangvi Police Station on 29th July 2011. Thus, Vrushali has stated that the appellant also threatened her brothers with dire consequences. This is corroborated by the evidence of PW 10 – API Motesardar whose evidence shows that Vrushali lodged a NC against the Appellant. In the said NC, it was stated that after the Appellant broke her hand, she started residing in her maternal house. Then appellant had threatened her brother. Thus, the evidence of Vrushali shows that the Appellant had grudge against her brothers. This was the motive for the Appellant to commit the murder of Swapnil who was the brother of Vrushali. Vrushali has also stated that the

Appellant used to put pressure on her mother and brothers to send her to the house of the Appellant for cohabitation.

9. The last witness on the point of motive is PW 6 - Sagar. He was the brother of Vrushali and brother-in-law of the appellant. Sagar has stated that he was residing at Pimpale Gurav with his wife Reshma, his mother Alka, his sister Vrushali and his brother Swapnil. He used to run a shop styled as Sainath Steel Corporation in Bhosari in partnership with his brother-in-law - Sanjay Atole and PW 1 - Santosh. His brother Swapnil was looking after the shop. The shop timing was 8.00 a.m. to 8.00 p.m. On 24th January 2012, at 8.00 p.m., he left the shop and was proceeding home. At that time, he received a phone call informing him that some untoward incident has occurred in relation to his brother Swapnil. He was instructed to visit the Hospital. In the Hospital, PW 1 - Santosh informed him that when Santosh was proceeding on the motorcycle alongwith Swapnil, at that time, one motorcycle came near them. Santosh heard the sound of shot from fire arm. Then Santosh saw the Appellant on the pillion seat of the motorcycle. Sagar has stated that his sister Vrushali resided with the Appellant since

many years. Sagar stated that his marriage took place on 2nd December 2010. At that time, Vrushali informed that the Appellant had demanded that she should bring cash from her mother and brothers, otherwise he will compel her to go for prostitution at Kamathipura, Mumbai. In July 2011, Vrushali came back to the house of her mother and brothers in Pune. Thereafter, she did not join the Appellant for cohabitation. Due to this, the Appellant started harassing them. The appellant had also set their house on fire on 24th August 2011. Hence Vrushali's mother Alka had lodged report with Walchandnagar Police Station. This is corroborated by the evidence of PW 10 – API Anant Motesardar whose evidence shows that such NC was lodged by Alka. Sagar has further stated that the Appellant had threatened that he would destroy their lives. On 4th September 2011, the Appellant had come to their shop and had abused him and his brother Swapnil. Hence, a NC was lodged by him with Bhosari Police Station. The said NC report is at Exh.47. Thus if the evidence of Santosh, Vrushali and Sagar is taken together, it shows that the relations between the Appellant and the deceased were not cordial and that the Appellant tried to set the house of the deceased on fire some time prior to the

incident and the Appellant had also given threats to the deceased that he would kill him.

10. The learned counsel for the Appellant submitted that all the three witnesses i.e. PW 1 – Santosh, PW 5 – Vrushali and PW 6 – Sagar are interested witnesses and hence their testimony cannot be relied upon. However, it may be noted that nothing has been elicited in the cross-examination of any of these three witnesses so as to disbelieve their testimony. We find their evidence to be creditable and trustworthy, hence we have no hesitation in relying on the same.

11. In addition to the evidence of PW 1 – Santosh who is an eye witness, the prosecution is relying on the circumstance of recovery of motorcycle and pistol at the instance of the Appellant, PW 4 – Ajay is the Panch witness who has deposed about this recovery. He has stated that in his presence in the Police Station, the Appellant made a statement that he would discover his motorcycle and pistol used in the crime. Thereafter, the Appellant led the Police and Panchas and pointed out the motorcycle. The said motorcycle was seized.

Thereafter, the Appellant led them to one canal and pointed out that he had thrown the pistol in the canal. At that time, water was flowing in the canal. No swimmer was available to enter into the water of the canal to trace the pistol. Thereafter, one fisherman – Ashok Koli (PW 12) agreed to enter in the water and trace out the pistol. The evidence of PW 12 – Ashok Koli shows that he entered into the canal and after diving a few times he found the pistol. As per the evidence of PW 4 – Ajay this pistol was seized and sealed at the spot.

12. The pistol which was seized was sent to the ballistic expert alongwith empty cartridge which was found at the spot of the incident. The ballistic report (Exh.82) shows that the pistol was capable of chambering 9 mm pistol cartridges. The residue of fired ammunition – nitrite was detected in the barrel washings of pistol showing that the said pistol was used for firing prior to its receipt in the laboratory. One 9 mm pistol cartridge from laboratory stock was successfully test fired through the said pistol. Regarding the empty, it is stated that it is fired 9 mm pistol cartridge case. The characteristic features of the firing pin impression on the empty tally with the cartridge test fired

from said pistol showing that the empty has been fired from the said pistol. The ballistic report also supports the prosecution case.

13. Shri Toraskar, learned counsel appearing for the Appellant submitted that the circumstance of recovery cannot be believed because water was flowing through the canal with great force, hence, it is not possible that the pistol would be found at the same spot where the Appellant had thrown it. As far as this submission is concerned, from description of the pistol, it appears to be a heavy one, hence it must have immediately sunk in the water in the canal. Moreover, PW 12 being a fisherman, knew swimming and only after several attempts he took the pistol out of the water. Thus we find nothing improbable in the prosecution story in relation to recovery of pistol at the instance of the Appellant.

14. It is the prosecution case that the appellant fired a shot from the pistol Art.13 on the head of Swapnil and caused his death, this is borne out by the medical evidence. P.W. 8 – Dr Sonawane has conducted the post mortem on the dead body of

Swapnil. On external examination, Dr Sonawane found the following injuries :-

“Sutured wound over left side of forehead, exact above left eyebrow towards medial side, vertical, held with 3 black sutures.

Dr Sonawane found following corresponding internal injuries on opening the sutures :-

(i) star shape lacerated wound tearing subcutaneous tissue underneath muscle coat, blackening the walls and floor, huge haematoma over bi-frontal, more on left side, extending upto left temporal, left temporal muscles show haematoma.

(ii) Circular puncture hole fracture of left side of frontal bone, involving whole thickness, margins inverted and lacerated size - 1.75 cm x 1.70 cm, forming the wound of entry.

(iii) Underneath dura rupture, circular, margins lacerated, underneath arachnoid matter rupture. Penetrating wound over left frontal lobe, piercing the cerebral parenchyma, associated with contusion with subarachnoid haematoma, further penetrating left parietal lobe going downwards, piercing brain stem, then slightly turning upwards and penetrating inner table left occipital lobe, turning medially and exiting outer table of medial aspect of left occipital lobe, the inner tract of penetrating injury of cerebrum shows lacerated margins of size - 14 cm x 2.5 cm.

(iv) Further, the penetrating wound fractured the inner table of mid occipital bone, circular, with everted margins involving whole thickness, exiting out with everted margins and lacerated. Size - .75 cm x .75 cm. Underlying muscles and sub-cutaneous tissues shown corresponding circular wound of exit,

margins everted and lacerated, size .5 cm x .5 cm, circular. Whole tract shows laceration and blackening over its floor with signs of inflammation.

(v) Haemorrhages were seen over left posterior cranial fossa, over all rest part of brain was pale.

According to Dr Sonawane, death of the above said person has taken place due to shock following fracture of skull with wound of entry and exit and injury to brain due to forceful penetrating discharge from firearm. In the opinion of Dr Sonawane, the above external and internal injuries were sufficient in ordinary course of nature to cause death and the above said injuries can be caused by country made pistol.

15. Shri Toraskar, learned Advocate for the Appellant submitted that the incident took place on 24th January 2012 at about 8.15 p.m. and Swapnil expired on 25th January 2012 at 11.15 a.m. He submitted that this shows that the injuries caused by the Appellant to Swapnil were not serious and Swapnil expired due to negligence in the medical treatment given to him. As far as this submission is concerned, from the injuries already noted in the paragraph above it is seen that the external and internal damage caused to Swapnil was extensive.

From the nature and extent of the external and internal injuries, it can be said that it was only on account of medical treatment given immediately to Swapnil that he managed to survive till the next day. Looking to the evidence on record, we do not find any merit in this submission made by the learned counsel for the Appellant.

16. On going through the record, we are of the opinion that there is sufficient evidence to prove beyond reasonable doubt that the appellant fired a shot with the pistol on the head of Swapnil and caused his death. Thus, we find no merit in the Appeal, Appeal is dismissed.

17. We quantify legal fees to be paid to Advocate Mr. A.G. Toraskar by the High Court Legal Services Committee at Rs. 5,000/-.

(SHRI B.P. COLABAWALLA, J.) (SMT V.K. TAHILRAMANI J.)