

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1066 OF 2005

Allabaksha Shiraj Desai,	]	
Age 32 Yrs., Occu. Labour,	]	
R/o. Rui, Tal. Hatkangale,	]	
Dist. Kolhapur	]	 Appellant

Versus

The State of Maharashtra,	]	
Thru' Hatkangale Police Station,	]	
Tal. Hatkangale, Dist. Kolhapur	]	 Respondent

Dr. Yug Mohit Chaudhary 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 : 12TH JANUARY, 2015.

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

1. The Appellant is the original accused convicted in Sessions Case No.12 of 2005 by the Additional Sessions Judge, Ichalkaranji by its Judgment dated 26th October, 2005 for the offence punishable under Section 302 of the IPC and sentenced to suffer life imprisonment and to pay fine of Rs.500/-, in default to suffer R.I. for one month. Hence, he has preferred this Appeal challenging the said Judgment of conviction and sentence.

2. Facts, which are necessary, for deciding this Appeal can be stated in brief as follows :-

On 10th July, 2004, while PW-13 PSI Shivaji Yadav was present at Hatkanangale Police Station. As per the directions of PI Ashok Belavate, he went to record the statement of injured Aadam, who was admitted in IGM Hospital at Ichalkaranji. After confirming from the Doctor that injured Aadam was in a fit condition to give the statement, PSI Yadav recorded his statement as per his say. In the said statement, Aadam attributed the cause of his injuries to the Appellant. In view thereof, C.R. No.58 of 2004 came to be registered by PSI Yadav against the Appellant for the offences punishable under Sections 326, 323 and 504 of the IPC. After recording of the C.R., he immediately went to the spot of incident and prepared scene of offence Panchanama. From the spot, he collected blood stained earth and normal earth under Panchanama (Exhibit-14). On the same day, he also seized the clothes of the injured under Panchanama (Exhibit-22) and arrested the Appellant at about 6:30 p.m. under Arrest Panchanama (Exhibit-16). By the said Panchanama, he also seized the blood stained clothes on the person of the Appellant. He then recorded the statements of about eight witnesses including the eye witnesses and other relatives.

3. As per further Prosecution case, Aadam succumbed to the injuries on the same day at about 9:30 p.m. After the Inquest Panchanama (Exhibit-18), his body was referred for post-mortem. Post-mortem on the body of the Aadam was conducted by PW-8 Dr. Dharangutte. According to him, the cause of death was intra-muscular and mediastinal heamorrhage. The post-mortem notes are at Exhibit-35. The charge under Section 302 of the IPC was added. PW-13 PSI Yadav then recorded supplementary statements of eight witnesses.

4. During Police custody, on 13th July, 2004, Appellant gave a disclosure statement in presence of Panchas vide Exhibit-20 and according to the said disclosure statement, there was recovery of the blood stained knife from the sugarcane field near the spot of incidence. It was seized under Panchanama (Exhibit-21).

5. On 17th July, 2004, a blood sample of the Appellant was obtained from the Medical Officer and on 22nd July, 2004, the entire seized muddemal and the knife were sent to C.A. along with the forwarding letter (Exhibit-46). On completion of investigation, the Charge-Sheet came to be filed in the Court.

6. The Trial Court framed charge against the Appellant vide Exhibit-1. The Appellant pleaded not guilty and claimed trial. His defence is of denial and false implication.

7. In order to prove the guilt of the Appellant, the Prosecution examined in all 13 witnesses including PW-1 Irfan, Panch to the Spot Panchanama (Exhibit-14); PW-2 Dastagir, Panch to the Seizure Panchanama of the clothes of the Appellant (Exhibit-15); PW-3 Parshuram Dongare, Panch to the Inquest Panchanama (Exhibit-18); PW-4 Mohan Waghare, Panch to the Memorandum and the Seizure Panchanama of the knife.

8. In addition to the evidence of these Panch Witnesses, the Prosecution mainly relied on the evidence of the eye witnesses, PW-5 Ashok Kambale and PW-12 Netaji Kalgutagi. The Prosecution also placed reliance on the evidence of one Husain Patekari, the nephew of the deceased, who was examined as PW-7 to prove that in his rickshaw the Appellant and deceased Aadam had left together. PW-6 Khudija is the material witness for Prosecution. She is mother of the deceased and before her, oral Dying Declaration is made by the deceased attributing the

cause of his injuries to the Appellant. PW-11 Dr. Madan Todkar has treated the deceased in the hospital and was present when oral Dying Declaration of Aadam (Exhibit-41) came to be recorded by PW-13 PSI Yadav. PW-9 Ananda Patil is the Police Constable, who was stationed at the hospital and PW-10 Dilip Khandekar is the Police Nayak, who carried muddemal in sealed condition to C.A.

9. Trial Court relied on the Dying Declaration of the deceased recorded by PW-13 PSI Yadav and also on the oral Dying Declaration made before PW-6 Khudija and the history recorded by PW-11 Dr. Todkar and held guilt of the Appellant to be proved beyond reasonable doubt for the offence punishable under Section 302 of the IPC and convicted him as stated above.

10. To prove the homicidal death of deceased Aadam, Prosecution has placed reliance on the evidence of PW-11 Dr. Todkar, who had treated him and PW-8 Dr. Dharangutte, who conducted post-mortem. As per the evidence of PW-11 Dr. Todkar, following injuries were found on the person of the deceased, when he was brought to the hospital in injured condition at about 11 a.m. :-

- “(i) Incised wound over left side of the neck, behind and below neck muscle, bone deep, muscle deep injury of 5 cm. X 3 cm. Was found. Its edges were clean and cut.
- (ii) Incised wound over left side of clavicle oblique in nature, edges were clean and cut, gaping 5 cm. x 3 cm. Direction above to downward.
- (iii) Incised wound over right side of mandible vertical, above downward direction of size 3 cm. X 2 cm. mandible deep and bleeding with clots were present.
- (iv) Incised wound on right arm, anterior and middle area aspect. Vertical, oblique in nature, of size 3 cm. x 2 cm. muscle deep. Fresh blood clots were present.
- (v) Incised wound over left thigh, vertical oblique in direction, on back middle 1/3rd and upper 1/3rd junction. It was muscle deep, bleeding was fresh. Bleeding clots were present.
- (vi) Incised wound over left arm, vertically oblique was found. It was fresh. Bleeding was present. It was muscle deep.
- (vii) Incised wound over back of neck, oblique in direction of size 1.5 cm. x 1 cm. Its edges were clean and cut. It was muscle deep. It was fresh. Bleeding was present. Clots were present.”

11. According to him, these injuries were grievous in nature and are possible due to sharp edged weapon like muddemal article no.9 recovered at the instance of the Appellant. PW-8 Dr. Dharangutte, who has conducted the post mortem, has also opined that the injuries found on

the dead body were sufficient in the ordinary course of nature to cause the death. According to him, both, the external and internal, injuries were correlated with each other and the cause of the death was intra-muscular and mediastinal heamorrhage.

12. In order to appreciate the submissions advanced at the Bar, it would be useful to recite the circumstances on which the Prosecution is relying and they can be stated as follows :-

- a) Homicidal death of Aadam.
- b) The eye witness account of PW-5 Ashok and PW-12 Netaji.
- c) Oral Dying Declaration of deceased before PW-6 Khudija.
- d) Evidence of PW-11 Dr. Todkar to prove the history of the incident as given by Aadam.
- e) Dying Declaration of the deceased recorded by PW-13 PSI Yadav.
- f) Evidence relating to recovery of knife under Section 27 of the Evidence Act.
- g) Seizure Panchanama of the blood stained clothes of the Appellant along with C.A. Report and, lastly,
- h) Evidence of PW-7 Husain Patekari, who saw the deceased and Appellant going together in his rickshaw.

13. Out of these circumstances, the Trial Court has discarded the evidence of the eye witnesses PW-5 Ashok and PW-12 Netaji on the ground that it contains improvements. The Trial Court has also not relied upon the evidence of recovery of knife at the instance of the Appellant as he was caught red handed by the Police and hence there was no time or opportunity for the Appellant to conceal the said weapon and, secondly, the recovery is also alleged to be made three days after the incident.

14. The Trial Court has also not relied upon the evidence relating to seizure of the clothes of the Appellant and the blood stains thereof of "O" Group on the ground that the blood group of the Appellant was also found to be "O", whereas there was no evidence of the blood group of the deceased.

15. While appreciating the evidence on record and on perusal of the Judgment of the Trial Court, we do not find any reason to interfere in the finding of the Trial Court of not relying on the referred evidence of recovery of knife and the blood stained clothes of the Appellant.

16. However, we find it difficult to accept the evidence relating Dying Declaration recorded by PW-13 PSI Yadav, which is relied upon by the Trial Court. The main reason why we find the evidence relating to Dying Declaration not worth placing reliance is that the scribe of the said Dying Declaration is not examined by the Prosecution. It is categorically admitted by PW-13 PSI Yadav that the statement of Aadam, which is treated as Dying Declaration (Exhibit-41), is recorded in the handwriting of his writer but the said writer is not examined by the Prosecution. In the case of **Muralidhar alias Gidda and Anr. V/s. State of Karnataka, (2014) 5 SCC 730**, the Hon'ble Supreme Court has held that *“the sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our opinion, this by itself creates a lot of suspicion about credibility of such statement and the prosecution has to clear the same to the satisfaction of the court.”* In view of this latest position of law, it becomes difficult to accept the evidence relating to this Dying Declaration as admissible or worth placing reliance.

17. That leaves us with the evidence of PW-6 Khudija and PW-7 Husain Patekari. Their evidence is of significance because both of them are

related to the deceased as well as to the Appellant. PW-6 Khudija is the mother of the deceased and at the same time mother-in-law of the Appellant. According to her evidence, Appellant used to frequently demand money from her son Aadam. Appellant has taken away the transport rickshaw from Aadam, but did not pay the installments of the rickshaw. On the date of incident, at about 9 a.m., when she and Aadam were present in their house, Appellant came there and demanded money from Aadam. Appellant also insisted on Aadam to stand surety for him in the Bank. Thereafter, Appellant and Aadam together went out and at about 11 a.m., she received the phone call that Aadam was assaulted and was admitted in IGM Hospital. She rushed there and found that Aadam was conscious and was talking. On enquiry by her, he told her that Appellant did not refund his money and assaulted him with knife as he refused to stand as surety for the Appellant.

18. Her evidence is pivotal as it proves two vital aspects viz. (i) that Appellant and Aadam left together from the house and (ii) there were disputes between them as Appellant was demanding money from Aadam and insisting on him to stand as surety for him.

19. Her evidence is vital as regards the oral Dying Declaration made by Aadam before her, when she immediately met him in the hospital. There is consistency throughout in her evidence on this material aspect. Trial Court has also, therefore, found it fit to rely on her evidence relating to oral Dying Declaration and we find no reason to interfere in the said finding of the Trial Court.

20. Then there is evidence of PW-7 Husain Patekari. He is the nephew of the deceased and his evidence also goes to show that on the date of the incident, at about 9:30 a.m., both, Aadam and Appellant came to him and borrowed his rickshaw and in that rickshaw went away. Thereafter, at 11 a.m. to 11:30 a.m., he received the message that Aadam was assaulted by knife. Thus, his evidence again supports the evidence of PW-6 Khudija that, both, Appellant and deceased left together in the rickshaw on the date of the incident. It is pertinent to note that in the same rickshaw, the incident given rise to the present Prosecution case has taken place.

21. As regards the actual incident, there is evidence of PW-5 Ashok and PW-12 Netaji. PW-5 Ashok is the Journalist of the Daily Newspaper "PUDHARI" and for the purpose of his work, he has to go to Kolhapur

frequently. On 10th July, 2004, he was going to Kolhapur on his motor cycle. When he reached near the gate of Shri Pant Vastrodyog Sahakari Sanstha, one person told him to stop there. At that time, he found that one person was running away after assaulting the other person in the rickshaw. The person in the rickshaw had sustained bleeding injuries over the neck. According to his evidence, the name of the person, who has stopped him, was PW-12 Netaji. It is his evidence that on his mobile phone he immediately informed Shivaji Nagar Police Station. Then Police came there. Till that time, he kept watch on the Appellant and not allowed him to run away. Thereafter, the Police took injured and Appellant along with them.

22. There is evidence of PW-12 Netaji, who was the person who has seen, as deposed by him, one person driving the auto-rickshaw and another person in the said rickshaw assaulting the Driver by knife. According to his evidence, he was walking on the road and after hearing the commotion, he stopped PW-5 Ashok, who was proceeding on the motor cycle and then PW-5 Ashok informed the Police on phone. Till then, he and Ashok waited and did not allow the Appellant to run away.

23. The Trial Court has not accepted their evidence on the ground that they have made some improvements while giving evidence before the Court. It is true that as regards the evidence of these witnesses that injured told them that Appellant has assaulted him with knife on account of dispute relating to the payment of money and of standing surety to the Appellant, their evidence is in the nature of improvement, because in their statements before Police, they have not disclosed the said fact. However, as regards the remaining part of their evidence like both of them having seen Appellant assaulting the deceased and thereafter keeping watch on the Appellant and informing the Police, their evidence is not in the nature of improvement. It is thoroughly consistent. Both of them are independent witnesses and there is no reason at all to disbelieve them. Moreover, merely because some part of their evidence is not found true by the Court is no reason to disbelieve their entire testimony. The maxim *falsus in uno falsus in omnibus* is not applicable in our law. Thus, in our opinion, the evidence of these two witnesses forms a further link as they had actually seen and accosted the Appellant on the spot.

24. Further crucial piece of evidence is that of PW-11 Dr. Todkar. He was very much present when injured Aadam was brought to the hospital at about 11 a.m. He examined him and found that Aadam was conscious

and talking with him. Aadam told him that he was stabbed by the Appellant. He has taken note of the statement in the case papers of Aadam. The case papers are produced on record at Exhibit-42 and there is clear noting to that effect. He has further stated that Aadam was repeatedly taking the name of the Appellant and, therefore, he has taken note of this in the case papers.

25. This noting, which is in the form of history given by the patient and which is rightly treated as oral Dying Declaration by the Trial Court, is challenged only on the ground that below this noting, there is endorsement in the case papers that patient was drowsy. However, PW-11 Dr. Todkar himself, who has made this noting, has clearly stated that injured was well oriented, conscious and in a fit state to give such statement. Otherwise there was no reason for him to make the noting. It is also pertinent to note that injured was thereafter alive till 9:30 p.m. and, therefore, there is no reason to hold otherwise.

26. Thus, there are three cogent and reliable pieces of evidence on record; (i) that of the oral Dying Declaration made before PW-6 Khudija, (ii) the history given before PW-11 Dr. Todkar in which Aadam has clearly attributed the guilt to the Appellant of stabbing him with knife and (iii) there

is evidence of eye witnesses who have seen the Appellant assaulting injured and accosted him after informing the Police and who are independent witnesses and lastly there is evidence of Appellant and deceased leaving together in the rickshaw of PW-7 Husain Patekari. These three pieces of evidence are so concrete and solid that it becomes difficult to draw any other inference than that of the Appellant being the culprit of causing the death of Aadam.

27. In the alternate, submission of the learned counsel for the Appellant/Accused is that the Prosecution case cannot fall under Section 302 of the IPC, having regard to the fact that there was some cause of altercation between the deceased and Appellant. As deposed by PW-12 Netaji, he heard the commotion which was in the nature of quarrel between the deceased and accused. Hence, he looked behind. According to him, the nature of injury is also not such that one can infer the intention on the part of the accused to kill the deceased. There was also no motive as such to kill the deceased and hence at the most one can infer the knowledge but not the intention of causing the death or causing such bodily injury as is likely to cause death.

28. We find no reason not to accept this submission in the fact situation of the present case. We, therefore, are of the opinion that the present case squarely falls under Section 304 Part II of the IPC, as the act of assaulting the deceased with knife is done by the accused with the knowledge that it is likely to cause death but without any intention to do so.

29. Hence, to that extent, this Criminal Appeal is partly allowed and the conviction and sentence of the Appellant for offence punishable under Section 302 of the IPC is hereby set aside and instead the Appellant is convicted for offence punishable under Section 304 Part II of the IPC and is sentenced to R.I. for eight years and fine of Rs.5,000/-, in default of which to undergo further R.I. for one month. Since the Appellant has already undergone the sentence imposed by us, the Appellant be released forthwith, if not required in any other case. Time of two months is granted to the Appellant for depositing the fine amount. Appeal is thus partly allowed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]