

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.410 OF 2013

Shambabu Lathujisingh Yadav,
Age 20 years, Occu. Ice Cream Vendor,
R/o.Footpath in front of Hotel Apolo,
Colaba, Mumbai 400 001.
Presently in the custody of
the Kolhapur Prison.

... **Appellant**

V/s.

The State of Maharashtra,
(Through Colaba Police Station
C.R.No.44/2011)

... **Respondent**

.....

Ms.Geeta Anand, Advocate for the Appellant.

Mr.V.B.Konde-Deshmukh, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 3rd MARCH 2016.

ORAL JUDGMENT :

1. This Appeal is directed against the Judgment and Order passed by the Assistant Sessions Judge for Greater Bombay in Sessions Case No.790 of 2011 convicting the appellant of an offence punishable under Section 307 of the Indian Penal Code read with Section 34 of the IPC and sentencing him to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.1000/-. There were two accused in the said case. The

appellant was the accused No.1 therein. The accused No.2 – one Kamarali – has been acquitted by the learned Assistant Sessions Judge.

2. The prosecution case, as put forth before the trial Court, in brief, be stated thus :

The appellant, one Atahussain Mohd. Hassan Shaikh (PW1) and his cousin Arif Shaikh Mohd. Hanif Shaikh (PW6) are all Ice Cream vendors, who carry on their business in the area near Gate of India. There were some disputes between them which arose over the business rivalry and in connection with the disparity in the price of the ice-cream that used to be sold by them. On 16/05/2011, while the Atahussain and his cousin Arif were proceeding on road from in front of Hotel Taj Mahal, one Kallu Hasibali (PW7) met them and then they all proceeded further together. The appellant and Kamarali – original accused No.2 – met them. The appellant and the Kamarali threatened Atahussain and Arif. The accused No.2 Kamarali caught Arif by his left arm and directed the appellant to stab him. That the appellant thereupon took out a knife which had kept near his waist, abused Arif, said that he would finish him (Arif), and gave a blow of the knife in the abdomen of Arif. Arif sustained a serious injury. A part of his intestine came out. When Arif started shouting, the appellant and Kamarali ran away. While running away with the knife, the appellant was apprehended by police naik Laxman

Sandav (PW2), who was on patrolling duty in that area. Atahussain lodged a report with the police, which was treated as the First Information Report and a Crime was registered. Investigation was carried out, which resulted in filing of charge-sheet against the appellant and the said Kamarali, alleging commission of an offence punishable under Section 307 of the IPC read with Section 34 of the IPC by them.

3. I have heard Ms.Geeta Anand, the learned counsel for the appellant. I have heard Mr.V.B.Konde-Deshmukh, the learned Additional Public Prosecutor for the Respondent/State.

4. I have carefully gone through the entire evidence adduced during the trial and the impugned Judgment.

5. *In his evidence, the informant Atahussain and the victim Arif (PW6) did not implicate Kamarali Shaikh. Kamarali was, therefore, acquitted by the learned Assistant Sessions Judge there being no evidence to show his involvement in the alleged offence.*

6. So far as the appellant is concerned, there is overwhelming evidence against him. Atahussain (PW1) and Arif (PW6) knew him. He has been named in the First Information Report as the actual assailant. The evidence of Atahussain (PW1) and Arif (PW6) is corroborated by the evidence of Kallu Shaikh (PW7), who is also an eye-witness to the incident.

7. The evidence of police naik Laxman Sandav (PW2) shows that while patrolling at the material time, he caught the appellant while the appellant was running with a knife in his hand. The evidence also shows that the knife was blood stained. The person apprehended by Laxman Sandav (PW2) has been identified by him as the appellant.

8. I have carefully gone through the cross-examination of these witnesses and I do not find that the version of any of these witnesses has been shaken in any manner by the cross-examination.

9. There is some other evidence against the appellant also which is in the nature of disclosure statement made by him, pursuant to which the shop from where he had purchased the knife used in the commission of offence was found. The evidence shows that similar knives were found in the said shop. I am, however, not inclined to give much importance to this evidence.

10. The clothes of the victim and also that of the appellant were taken charge of during the course of investigation. There were stains of blood on them, which was revealed to be human blood of group 'B', which is the blood group of the victim Arif (PW6).

11. After going through the evidence and the impugned Judgment the conclusion arrived at by the learned Assistant Sessions Judge the appellant had indeed assaulted victim Arif by knife by giving a blow on his abdomen, appears to be correct. Considering the nature of injury inflicted upon the victim, the part of body selected for giving the blow and the nature of the weapon used, the conclusion that the offence committed by the appellant would be one punishable under Section 307 of the IPC also appears to be correct. There is no challenge to the medical evidence that the injury caused to the victim was sufficient in the ordinary course of nature to cause death.

12. The only question that is seriously urged before me is of the propriety of the sentence of Rigorous Imprisonment for 10 years as has been imposed upon the appellant. It is submitted that the sentence is rather harsh and needs to be reduced.

13. It is submitted that the appellant comes from a lower strata of the society and that he is poor. It is also submitted that he is an orphan. It is also submitted that his age, at the material time, was about 19 years and he had no past criminal record. I find that the fact that the appellant is an orphan was pleaded before the learned Assistant Sessions Judge also.

14. Indeed, the appellant appears to be a poor person. It also appears that the appellant has resiled from his original case which was to the effect that the appellant and one Kamarali (accused No.2) had assaulted him. *The appellant, for reasons best known to him, has given a clean chit to Kamarali during his evidence in the trial.*

15. Considering all the relevant aspects of the matter, I am inclined to reduce the sentence imposed by the learned Assistant Sessions Judge on the appellant.

16. It needs to be mentioned that the learned Assistant Sessions Judge has committed an error in convicting the appellant in respect of offence punishable under Section 307 of the IPC read with Section 34 of the IPC. The prosecution case was that the assault was in furtherance of the common intention of the appellant and one Kamarali, but the learned Assistant Sessions Judge having found that Kamarali was not involved in the alleged incident, out to have convicted the appellant for an offence punishable under Section 307 of the IPC simplicitor. The mention of Section 34 of the IPC while convicting the appellant was uncalled for, though that was the original charge as per the prosecution case.

17. In the result, the conviction of the appellant is altered to that of an offence punishable under Section 307 of the IPC, simplicitor.

18. The substantive sentence imposed upon the appellant is reduced to the Rigorous Imprisonment for a period of eight years.

19. Subject to the correction in the operative order as regards the Section of Indian Penal Code under which the appellant stands convicted, and the reduction of the substantive sentence, as aforesaid, the appeal is dismissed.

(ABHAY M. THIPSAY J.)