

Vidya

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 545 OF 2014

Naseem Khan @ Laddu

s/o. Mustakim Khan

... Appellant

Vs.

The State of Maharashtra

... Respondent

Dr. Yug Mohit Chaudhary, Advocate for the appellant.

Mrs. A.S. Pai, APP for the Respondent/State.

CORAM: **MRS.V.K. TAHILRAMANI &
MRS.MRIDULA BHATKAR, JJ.**

DATE: **JUNE 13, 2016**

ORAL JUDGMENT (Per Mrs. Mridula Bhatkar, J.)

This Appeal is directed against the judgment and order dated 6th March, 2013 passed by the learned Additional Sessions Judge, Raigad-Alibag thereby convicting the accused for the offences punishable under section 302 of the Indian Penal code.

2. It is the case of the prosecution that one Shabbir Habibulla Khan was running a business of scrap material in a shop at Govandi. He removed the appellant/accused Naseem Khan @ Laddu from the work. The brother of the appellant/accused was working with Shabbir. The complainant Shamshulla Khan was nephew of deceased Shabbir. On the night intervening 21st July and 22nd July 2010, Shabbir, accused Naseem,

Mohammed Rafiq, Bilal Ahamad Fakrulla Khan, Rahim Abdul Ajiz Khan and Shamshulla Khan were sleeping in the shop. At around 2 a.m. to 4 a.m., complainant Shamshulla found that Shabbir was assaulted by Naseem and two stones were lying near his cot. The incident of assault was reported to the police. The police arrived at the spot. Shabbir was shifted to the hospital but was declared dead. At the instance of Shamshulla Khan, an offence was registered at C.R. No. 39 of 2010 at Navasheva Police Station, Navi Mumbai against the appellant/accused and other accused Bhola alias Mohamad Akalak Khan. The police drew spot panchnama, inquest panchnama and arrested the accused persons. Pursuant to the information given by the appellant/accused, the police drew recovery panchnama on 27th July, 2010. The blood stained clothes of the accused were seized and after completion of the investigation, the police filed charge sheet in the Magistrate Court. Thereafter the case was committed to the Court of Sessions, Raigad Alibag. The learned Sessions Judge framed charge against the appellant/accused Naseem and accused Bhola. The prosecution examined 9 witnesses and tendered oral as well as documentary evidence. After considering the said evidence, the learned trial Judge acquitted accused no. 1 Bhola from the offences punishable under sections 302 r/w. 34, 395, 397 and 109 of the Indian Penal Code. However, the appellant/accused no. 2 though was acquitted from the offences punishable under sections 395 and 397 but was

convicted for the murder of Shabbir under section 302 of the Indian Penal Code and was sentenced to suffer R.I. for life and a fine of Rs.5,000/- was imposed and in default, to undergo R.I. for one year. Hence, this Appeal.

3. In this Appeal, the prosecution could prove the homicidal death of Shabbir which has taken place on 22nd July, 2010 in the shop/hut. On this point, the prosecution examined first informant PW-3 Shamshulla Khan, PW-9 Investigating officer Vikram Sadashiv Jagtap. The police drew spot panchnama on the same day. Spot panchnama is marked "Exhibit 42". On the point of homicidal death, the evidence of medical officer PW-6 Dr. Manoj Kisanrao Bhadre is tendered. Dr. Bhadre has conducted postmortem on the body of Shabbir on 22nd July, 2010. The doctor has noted down the injuries external as well as internal in the postmortem report, which is marked as Exhibit 50. There was 7 to 8 CLW over the head and face. His parietal bone, cheek bone so also clavical bone were fractured. Multiple depressed fractures were found on parietal and tempo parietal bone and the doctor opined that those injuries must have caused by hard and sharp weapons and may be by sharp edged stone. He has opined that the cause of death was intracranial haemorrhage due to head injury.

4. The learned counsel for the appellant has submitted that the

prosecution could not prove a weapon by which the injuries were caused to the deceased. He submitted that all the injuries are CLWs, as according to the doctor, the injuries might have caused due to sharp edged stone. He submitted that in the evidence of PW-3 Shamsulla Khan, who is an eye witness, he has stated about one stone and then he made an improvement of two stones. He submitted that in the FIR (Exhibit 48) he did not say that the deceased was killed with the stone. Thus, there is omission of the stone, which is material.

5. The submissions of learned counsel on the point that the complainant did not mention the weapon by which the deceased was killed, cannot be appreciated. Though there is no direct statement that he saw the appellant assaulting the deceased with stone, there are statements that he saw appellant/accused mounting with something on the head of the deceased and there is a separate statement that thereafter he saw two stones lying near the cot. These statements are sufficient to convey the meaning that the deceased was assaulted with stone. While constructing the statements, one has to take into account the context and then only the omissions can be made out.

6. Though in the present case, the prosecution has established the cause of death as homicidal death of the deceased, the important question

that who committed the offence and whether the accused was the assailant, needed to be answered.

7. On the point of actual assault, the prosecution has relied on the evidence of PW-3 Shamshulla s/o. Abdul Ajiz Khan. He has stated that accused and his brother Bhola both were working with deceased Shabbir and accused was removed from the work by Shabbir two to three days prior to the date of incident. On the night intervening 21st July and 22nd July, 2010, according to him, Mohammed Rafiq Yusuf Khan, Bilal Fakrula Khan and Rahim Abdul Aziz Khan were present in the shop. After dinner they all slept. Deceased Shabbir and Naseem slept in the hut. There were a distance of 15 ft. between the complainant and Shabbir. He heard shouts of Shabbir at around 2 a.m. to 4 a.m. He saw accused was beating Shabbir with stone, so he screamed and at that time, appellant Naseem ran away. He and Mohammed Rafiq also ran away. At around 8 a.m., as per his evidence, he told Jabbar, brother of Shabbir on phone about the assault and then they all went to the spot where the police were already present.

8. The learned APP has fully relied on the evidence of PW-3, who is a sole eye witness. She submitted that the prosecution has proved that Shabbir was assaulted with stone by the appellant/accused. She

supported the judgment of conviction passed by the learned Sessions Judge.

9. Per contra, the learned defence counsel has rightly submitted that besides the evidence of PW-3 Shamshulla Khan, there is no other evidence on the point of incident. The learned defence counsel while assailing the evidence of PW-3 highlighted the discrepancies in the evidence of PW-3 and submitted that his evidence is without any corroboration, hence is not to be believed.

10. On perusal of the evidence of PW-3, some important questions about the conduct of the witness PW-3 arose in our mind. As per his case, he saw the incident of assault at around 2 a.m. to 4 a.m. He does not specify the time of assault but his approximation of the time is spread over to two hours. Assuming that he saw the accused assaulting the deceased, then he would not have kept quiet but have shouted. According to him, at that time in the hut other persons, i.e. Mohamad Rafiq Yusuf Khan, Bilal Fakrula Khan, Rahim Abdul Aziz Khan were present. If other three persons were present why he did not woke them up to help Shabbir. Shabbir was his uncle, yet he did not resist the assailant/appellant though he was not alone. There was no need for him to run away from the place because as per his version, before he ran away, appellant/accused himself

had run away. What was the point in running away from the spot along with Mohd. Rafiq. As per his case, if Mohd. Rafiq ran with him at 4 a.m., then Mohd. Rafiq was a material witness, however, he is not examined by the prosecution. Assuming that he ran away out of fear but he did not either go to the police or to the residents in the vicinity for help. In paragraph 5 of the cross-examination of the witness, admissions are sought that village Sonari was at the distance of 5 minutes walk from the shop, however, he did not inform anybody about the incident from 4 a.m. to 9 a.m. and Mohd. Rafiq was throughout with him. He arrived at the spot at 9 a.m. This conduct of the witness is extremely unnatural. His running away from the spot and his apprehension look artificial and the witness loses its credibility. In the criminal trial, conviction can be based on the uncorroborated evidence of sole witness, if the evidence of the said witness is found fully truthful, consistent, cogent and reliable. However, this evidence of PW-3 does not inspire confidence in the mind and it is difficult to believe that PW-3 was present at the time of incident and had seen the actual incident. Moreover, his evidence is doubtful on the background of admissions sought in the cross-examination in paragraph 6 of his evidence. He has admitted that a crime was registered against him at Uran police station by the accused. He admitted that it was true to say that Shabbir and Bhola had filed prosecution against him.

11. PW-4 Bilal Ahmed Fakrulla Khan is examined by the prosecution as panch who drew a spot panchanma (Exhibit 42) where the body of Shabbir was lying on the cot. In the cross-examination, this witness has said that in the morning at 9 a.m. PW-3 Shamshulla Khan came to his house and informed about the incident. As per the evidence of PW-3 Shamshulla Khan, Bilal Ahmed Fakrulla Khan was one of the persons who was sleeping in the hut on night between 21st to 22nd July, 2010. Thus the evidence of PW-4 and PW-3 is found inconsistent on the point. Evidence of PW-3 who is the only eye-witness is found doubtful. When the eye-witnesses are available, why prosecution did not examine them. So also PW-4 Bilal Fakrulla Khan who was in the room did not say a word about the assault. It only shows that the incident did not take place the manner in which PW-3 has deposed. The evidence of PW-3 Shamshulla Khan may not be true.

12. The prosecution has also relied on evidence of panchnama of clothes of the appellant/accused. PW-7 panch Saraftulla Hajimulla Khan did not support prosecution on the point of discovery. However, other witness, i.e., PW-8 Rahimmulla s/o. Saimohammad Khan is a panch on discovery. He has stated that at the instance of the accused, his clothes were recovered which were kept in the roof of hut. These clothes, i.e., shirt (Article 12) and jeans (Article 13) were found blood stained. These

clothes were sent to C.A. by Investigating officer. In CA report (Exhibit 63) it was reported that these two articles were found with few blood stains. The blood found on these clothes was human but the blood group was found inconclusive. This recovery and CA report cannot prove any nexus between the accused and the guilt. Therefore, we are of the view that the prosecution could not prove a fact that appellant/accused was the assailant of deceased Shabbir and he only had committed the murder of Shabbir. For want of credible, cogent, consistent evidence on the point of assault, we hereby set aside the judgment and order passed by the learned Sessions Judge and acquit the appellant/accused from the offences punishable under section 302 of the Indian Penal Code.

13. Appeal is allowed.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)