

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.701 OF 2009

MOHD.KHALID VAIDUL REHMAN SHAIKH)
@ RAJU)
Aged about 21 years, Occupation : Service)
Residing at Behind Vikas Welfare)
Association Zopda, Near Creek, Gajdhar)
Bandu, Santacruz (West), Mumbai.)
At present in Nashik Road Central Prison)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Aniket Vagal, Advocate for the Appellant.

Mr.H.J.Dedhia, APP for the Respondent - State.

**CORAM : VK.TAHILRAMANI &
A. M. BADAR, JJ.**

DATE : 9th DECEMBER 2016.

ORAL JUDGMENT : (PER VK.TAHILRAMANI, J.)

1 The appellant who is original accused no.1 has preferred this appeal against the judgment and order dated 21st February 2009 passed by the learned 1st Ad-hoc Additional Sessions Judge, Greater Mumbai, in Sessions Case No.504 of

2008. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 for causing the death of Dasnamurthy and under Section 324 for causing injuries to PW1 Amitkumar. For the offence under Section 302 of the IPC, the appellant was sentenced to rigorous imprisonment for life and fine of Rs.3,000/-, in default, rigorous imprisonment for 6 months. For the offence under Section 324 of the IPC, the appellant was sentenced to rigorous imprisonment for 1 year and fine of Rs.1,000/-, in default, rigorous imprisonment for 4 months. The learned Sessions Judge directed both the substantive sentences to run concurrently.

2 The prosecution case briefly stated is as under :

 The informant is PW1 Amitkumar. He knew the deceased Dasnamurthy as well as all the accused, as they were residing in his locality. On 31st May 2008, at about 10.30 p.m., Amitkumar was returning home. His house was situated near Santacruz creek. When he reached near the creek, he saw the appellant and original accused no.3 quarreling with Dasnamurthy.

He tried to intervene in the quarrel. At that time, the appellant assaulted him. The mother of accused no.3 came there and took accused no.3 with her. The appellant ran away. Thereafter, Amitkumar and deceased Dasnamurthy were present at the spot. After five to ten minutes, the appellant returned back. He had a knife with him. Appellant was accompanied by accused nos.2, 3 and 4. Appellant assaulted PW1 Amitkumar with knife on his leg and back. Thereafter appellant gave blows with knife on the chest of Dasnamurthy. Dasnamurthy fell down. Dasnamurthy died on account of the said assault. Within a short time, police came to the spot. PW1 Amitkumar lodged FIR Exhibit 15. Thereafter, investigation commenced. After completion of investigation, charge-sheet came to be filed.

3 Charge came to be framed against the appellant and three other accused under Section 302, 307 and 324 read with Section 34 of the IPC. All the accused pleaded not guilty to the said Charge and claimed to be tried. The defence of the accused was that of total denial and false implication. After going through

the evidence adduced in this case, the learned Sessions Judge acquitted original accused nos.2 to 4 of all the Charges. However, the learned Sessions Judge convicted and sentenced the appellant as stated in paragraph 1 above, hence this appeal.

4 We have heard the learned counsel for the appellant and the learned APP for the State. We have carefully considered their submissions, judgment and order passed by the learned Sessions Judge and the evidence in this case. For the below mentioned reasons, we are of the opinion that the appellant assaulted Dasnamurthy and Amitkumar with a knife.

5 The conviction of the appellant is mainly based on the evidence of three eye witnesses i.e. PW1 Amitkumar, PW2 Rukaya and PW3 Anil. PW1 Amitkumar is an injured witness. Amitkumar has stated that on 31st May 2008, at about 10.30 p.m., he was returning home. His house was situated near Santacruz creek. When he reached near the creek, he saw the appellant and original accused no.3 quarreling with Dasnamurthy. He tried to

intervene in the quarrel. At that time, the appellant assaulted him. The mother of accused no.3 came there and took accused no.3 with her. The appellant ran away. Thereafter, Amitkumar and deceased Dasnamurthy were present at the spot. After five to ten minutes, the appellant returned back. He had a knife with him. Appellant was accompanied by accused nos.2, 3 and 4. Appellant assaulted PW1 Amitkumar with knife on his leg and back. Thereafter appellant gave blows with knife on the chest of Dasnamurthy. Dasnamurthy fell down. Dasnamurthy died on account of the said assault. Within a short time, police came to the spot. PW1 Amitkumar lodged FIR Exhibit 15.

6 The evidence of Amitkumar is further corroborated by the medical evidence. PW10 Dr.Zanwar examined Amitkumar on 31st May 2008 at 10.45 p.m. He found CLW on the lower part of the right side of back and CLW over calf. Dr.Zanwar has stated that both injuries were simple in nature and could be caused by knife Article 1.

7 PW2 Rukaya is the second eye witness. She has stated that PW1 Amitkumar is her son. She knew all the accused. She has stated that her daughter Sujata told her that some quarrel was going on at the creek and they should go there. Hence, she and Sujata went to the creek. When she reached the creek, she saw that all four accused were present there. Her son Amitkumar and Dasnamurthy were also present. Mohd.Khalid (appellant) was armed with a knife and accused Ashraf (original accused no.2) was armed with a bamboo. The appellant gave a blow with knife on the chest of Dasnamurthy. The appellant then gave a blow with knife on the back and leg of Amitkumar. She then took Amitkumar to Bhabha hospital.

8 The next eye witness is PW3 Anil. Anil has stated that he knew all the accused persons as they reside in his locality. He knew deceased Dasnamurthy as well as PW1 Amitkumar. Anil has stated that in his presence quarrel took place between Amitkumar, Dasnamurthy and accused persons. He tried to placate them. The appellant took out knife from his pocket. He gave two blows with

knife on the chest of Dasnamurthy. The appellant gave blow with knife on the back of Amitkumar. Mother and sister of Amitkumar reached there and then took away Amitkumar with them.

9 It is the prosecution case that appellant assaulted Dasnamurthy with a knife and caused his death. The medical evidence shows that Dasnamurthy had sustained five injuries. They are as under :

- i) Incised wound over chin, inferior aspect, horizontal, 1 cm lateral to midline on left side, size 1.5 cm x 0.5 cm x muscle deep
- ii) Stab wound over left side of chest 6 cms away from midline, 2 cms obliquely upward to left nipple, vertical, size 2 cms x 1 cm x query deep, lower angle comparatively acute (not sharp, weapon must be blunt), margins red
- iii) Stab wound on left side chest 1.5 cms middle to injury no.2, 5 cms lateral to midline, 3 cms away from left nipple, vertical, size 3 cms x 1 cm x query deep, lower angle comparatively acute (not sharp, weapon must be blunt), margins red

- iv) trade abrasion on right side of leg, horizontal, over right sterno mastoid muscle, size 1.5 cms in breadth and length 7 cms, both upper and lower margins brown colour,
- v) abrasion on left side of neck over left sterno mastoid muscle, size 2 cms x 0.5 cm, brownish colour.

In the opinion of Dr.Tasgaonkar, PW8, who conducted postmortem, death of Dasnamurthy was caused due to haemorrhage and shock on account of stab injuries and these injuries can be caused by weapon like knife.

10 The learned counsel for the appellant submitted that the act of the appellant would not fall under Section 302 of the IPC, but it would fall under Section 304 (Part I) of the IPC. He submitted that the incident occurred during a sudden quarrel and the evidence on record shows that the injured witness i.e. PW1 Amitkumar and two other persons along with Amitkumar were armed with deadly weapons at the time of the incident. To support this contention, he has drawn our attention to the evidence of PW2 Rukaya, who is the mother of Amitkumar. Mr.Vagal drew our attention to paragraph 3 and paragraph 6 of

the evidence of Rukaya. In paragraph 3 Rukaya has stated that her daughter Sujata told her that some quarrel was going on at the creek and she should go there. She and Sujata then went to the creek, where she saw that the appellant was armed with a knife and the appellant gave a blow with knife on the chest of Dasnamurthy and appellant gave a blow with knife on the back and leg of her son Amitkumar. PW3 Anil has stated that in his presence quarrel took place between Amitkumar, Dasnamurthy and the accused persons. He tried to placate them. At that time, appellant took out a knife from his pocket and he gave two blows with knife on the chest of Dasnamurthy. Thereafter, the appellant assaulted Amitkumar with knife on the back. Mr.Vagal submitted that in addition to the evidence of PW2 Rukaya and PW3 Anil, which shows that the incident took place during a sudden quarrel, he is specifically relying on the evidence of the injured witness i.e. PW1 Amitkumar to show that the deceased was armed with a hockey stick at the time of the incident. He drew our attention to the evidence of PW1 Amitkumar wherein he has stated that -

“It is true that Darshanamurti was armed with hockey stick, Prathamesh was having cycle chain & Manoj was having bamboo stick & I was having belt in defence.”

The evidence of PW3 Anil also shows that at the time of the incident, Prathamesh and Manoj, to whom PW1 Amitkumar has made a reference, were present. Thus, this shows that four persons on the side of the deceased were armed with weapons and on the other side only the appellant was armed with a knife. The learned counsel for the appellant submitted that the fact that four persons were armed from the side of the deceased shows that the appellant was exercising his right of private defence and thus the case would be covered by Exception 2 to Section 300 of IPC. He submitted that alternately, the case would fall under Exception 4 to Section 300 of the IPC.

11 No doubt, the evidence on record shows that the appellant assaulted the deceased, however, the main question which arises in the facts and circumstances of this case, is what is the nature of the offence proved against the appellant ? It is seen

that the incident had occurred during a sudden quarrel. It is also seen from the evidence on record that the injured witness, the deceased and two other persons were armed with weapons. Infact, the deceased was armed with a hockey stick. Looking to this fact, we find much merit in the submission that the appellant exercised the right to private defence. It is also seen that the incident occurred during a quarrel which is seen from the evidence of PW2 Rukaya and PW3 Anil. In this view of the matter, the case would also fall under Exception 2 and 4 to Section 300 of IPC.

12 In view of the above facts, we are of the opinion that the case would fall under Exception 2 as well as 4 to Section 300 of IPC. Hence, the conviction of the appellant under Section 302 of the IPC is set aside, instead, the appellant is convicted under Section 304 (Part I) of the IPC.

13 As far as the offence under Section 324 of the IPC is concerned, there is sufficient evidence on record, hence, conviction and sentence under Section 324 of the IPC is

maintained. However, as far as offence under Section 302 of the IPC is concerned, we set aside the conviction and sentence under Section 302 of the IPC, and instead, we convict the appellant under Section 304 (Part I) of the IPC. We are of the opinion that for the offence under Section 304 (Part I) of the IPC, sentence of rigorous imprisonment of 7 years with fine of Rs.3,000/-, in default, rigorous imprisonment for 3 months, would meet the ends of justice. The substantive sentences of imprisonment to run concurrently.

14 Appeal is partly allowed.

(A. M. BADAR, J.)

(V.K.TAHILRAMANI, J.)