

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1022 OF 2011
WITH
CRIMINAL APPLICATION NO. 1338 OF 2011

Sameer Gulam Hussain Shaikh	...	Appellant
Vs.		
The State (At the instance of Antop Hill Police Station)	...	Respondent

Mr. Milan Desai i/b. Mr. T.R. Patel, Advocate for the appellant/applicant.
Mr. H.J. Dedia, APP for Respondent - State

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

DATE: AUGUST 25, 2016

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

This Appeal is directed against the judgment and order dated 5th May, 2011 passed by the Additional Sessions Judge, Greater Mumbai thereby holding the appellant/accused guilty for the offences punishable under section 302 of Indian Penal Code and he is sentenced to suffer life imprisonment.

2. It is the case of the prosecution that deceased Noor Hasan and accused Sameer Ghulam Hussain Shaikh were residing in the rooms next to each other at mezzanine floor in Akbar Suleman compound, Antop Hill, Mumbai. Noor Hasan was a maternal cousin of the accused. The incident of assault has taken place on 6th April, 2010 on the staircase of their

residence. It is the case of the prosecution that Noor Hasan was addicted to liquor. On that day at 11 p.m., he came home drunk and started abusing wife, mother and also father of the accused, accused and his siblings. Thereafter he had dinner in his house and came out and started abusing the father of the accused and his mother and wife. At that time, accused came out of the house and stabbed on the chest of the deceased and ran away. The incident was witnessed by wife and mother of Noor Hasan. The injured Noor Hasan was immediately shifted to the hospital. He was treated, however he breathed last in the early morning on the next date. Thereafter, Rihana, wife of deceased, gave information about the incident to the police of Antop Hill police station in the morning. PW-10 D.S. Awhad who was working as P.S.I. at Antop Hill Police Station on that date, recorded the information given by Rehana and registered the offence at C.R. No. 128 of 2010 against the appellant under section 302 of Indian Penal Code. The accused was arrested on the same day. The police recorded statements of the witnesses. They drew inquest panchnama. Post-mortem was conducted on 7th April, 2010. The police recorded spot panchnama. Other panchnama of seizure of clothes of the deceased and seizure of clothes of the accused were drawn. During the course of the investigation, he recorded the statements of other witnesses and after completion of the investigation, he submitted the charge sheet in the Court of learned Magistrate and thereafter the case was committed to the

Sessions Court. The learned Sessions Judge framed the charge under section 302 of the Indian Penal Code on 5th August, 2010. The accused pleaded not guilty and the trial was concluded in conviction. Hence, this Appeal.

3. There are two eye witnesses in the present case, i.e., PW-1 Rehana Noor Hasan, wife of the deceased and PW-2 Zaitunbi Usman Razak Shaikh, mother of the deceased. The incident of assault has taken place on the staircase of the house. The accused and the deceased were residing in the rooms, which are opposite, on the mezzanine floor. They were cousins.

4. The learned counsel for the appellant submitted that the evidence of these two witnesses is full of omissions and material contradictions. As per the evidence of the witnesses, the assault has taken place on the staircase. However, the evidence of both the witnesses if scrutinized, it was difficult for the accused to reach to the deceased without crossing PW-1 Rehana who was standing near the deceased on the staircase itself. He further submitted that there are discrepancies in the evidence of PW-1 Rehana and PW-2 Zaitunbi on the point how the incident of assault has occurred. He submitted that whether accused came from his house from the mezzanine floor and after descending he assaulted the deceased or

whether accused came from outside and after ascending he assaulted the deceased is vague. He argued that he has preferred Application No. 1338 of 2011 under section 391 of Cr. P.C. for recording additional evidence at the appellate stage, as there is no cross-examination on the point of actual assault and the sequence of the movements of the accused and the deceased. He submitted that this evidence is necessary to give a fair trial to the accused. He further submitted that the appellant/accused is a boy of 18 years old and he is in prison since the date of incident. He submitted that there is confusion in respect of FIR, as PW-10 Investigating officer Mr. D.S. Awhad has produced another FIR Exhibit 42 and the FIR which is proved by the prosecution through PW-10 is marked as Exhibit 14. He submitted that there are material discrepancies in both the FIRs. The learned counsel further pointed out that though the witnesses have stated that the accused assaulted thrice on the chest of the deceased but as per the medical evidence which is brought on record by the prosecution through PW-7 Dr. Dheeraj Buchade in his examination-in-chief, he has stated that there is one stab wound on the left side. The learned counsel submitted that considering the medical evidence and as there is only one wound, the ocular evidence and medical evidence do not tally and thus both the witnesses who claimed to be an eye witnesses might not have seen the actual assault. Considering the quality of the evidence and these major discrepancies, the appellant/accused is to be acquitted and the

judgment of the trial Court is to be set aside.

5. Learned APP opposed the Appeal and has submitted that there are two eye witnesses who are consistent on the act of the assault by the accused. Learned APP supported the judgment of the trial Court.

6. We have perused the evidence of PW-1 Rehana Noor Hasan and PW-2 Zaitunbi Usman Razak Shaikh. The incident has taken place in the house on the staircase. The accused and the deceased were cousins, who are residing next to each other. Thus, though the incident has taken place at 11 p.m., there is no question of of any mistaken identity on account of lesser light. Both the witnesses have stated that the deceased when was on the staircase, the accused arrived there with the knife and stabbed thrice on his chest. We do not find any significant omission or contradiction in the evidence of these two witnesses whose presence at the relevant time was most natural and we have no hesitation to rely on the evidence of these two witnesses on the point of assault.

7. We rely on the medical evidence of PW-9 Dr. Harshwardhan S. Shirsat who was working in Lokmanya Tilak Municipal Corporation General Hospital, Sion where deceased Noor Hasan was attended first in Emergency Ward and prepared the papers which is marked as Exhibit 38

and also on PW-7 Dr. Dheeraj Buchade and postmortem note Exhibit 31. The postmortem discloses that the cause of death is haemorrhagic shock due to stab injury (unnatural). After going through the evidence of Dr. Buchade and postmortem notes, we found that there is only one stab wound on the chest. Thus, there is discrepancy in the ocular evidence and medical evidence in respect of how many times the accused assaulted deceased on his chest. We have to go by the medical evidence, as it is a physical fact which shows that there was only stab injury on the left side of the chest. The evidence of PW-1 and PW-2 is relied to the extent of accused assaulting blow of knife on the chest of the deceased. How many times he stabbed the deceased whether once or thrice can be answered on the basis of medical evidence. It appears that stabbing was only once. This discrepancy of how many times the blows were mounted can be explained. The incident has taken place on the staircase at 11 p.m. There may be problem of clear visibility and it may be perception of the witnesses when they saw actual assault. There might have been more than one blow mounted by the accused, however, those might have been missed. This is how PW-1 and PW-2 could have perceived that accused mounted more than one blow, i.e., three blows. We also take into account that the incident has taken place on the staircase.

8. Thus, we are of the opinion that the evidence tendered by the

prosecution is sufficient to prove that accused has assaulted the deceased and the deceased succumbed to the said injury. To that extent, we confirm the judgment passed by the learned trial Judge.

9. Alternatively, the learned counsel for the accused has submitted that it is not the case of murder but it is a culpable homicide not amounting to murder, as the deceased was continuously abusive towards the accused and his father just prior to the assault. He has submitted that the accused be given the benefit of Exception 4 under section 300 of Indian Penal Code and the sentence of the accused be reduced from life imprisonment.

10. Learned APP while opposing this submission has relied on the postmortem notes and the evidence of the doctor.

11. As discussed above, the accused had inflicted one blow on chest and the deceased succumbed to the said injury. The evidence of PW-1, wife of the deceased and PW-2, mother of the deceased discloses that the deceased on that night abused the mother, wife, father of the accused and the accused himself and his siblings. Thereafter the deceased had his food. At around 11 p.m. he again came out and started abusing the father of the accused. Considering this evidence, we are of the opinion that this continuous abuses had caused accused to be enraged and due to this

provocation, in the heat of anger, he has assaulted the deceased with knife. It is not the case of the prosecution that the accused was already armed with weapon. It is not a premeditated attack and the accused has not taken any undue advantage or acted in cruel or unusual manner. Therefore, we are inclined to bring his case under Exception 4 of Section 300 and reduce the sentence and bring the offence under section 304 Part-I for 7 years and to pay of fine of Rs.7,000/-, i/d. to suffer R.I. for one year.

12. Appeal is partly allowed.

13. The learned counsel for the appellant is not pressing Application No. 1338 of 2011 which is preferred under section 391 of Cr. PC for adducing additional evidence. Accordingly, Application is disposed of.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)