

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.4 OF 2011

Riyajuddin Allauddin Khan @ Pammu
E/43, IOC Colony, G.P. Road Bungalow
Andheri (West), Mumbai-400058
(currently in Nashik Jail) ... Appellant

Vs.

State of Maharashtra
(through R.A.K. Marg Police station, Mumbai) ... Respondent

WITH
CRIMINAL APPEAL NO.846 OF 2010

Nasir Abdul Farid Khan @ Nasir Kanya
57, Charvi Chawl, Rahat Nagar
Pathan Masjid, Sewree Cross Road
Mumbai - 400031
(currently in Nashik Road Central Prison,
Nashik) ... Appellant

Vs.

State of Maharashtra
(through R.A.K. Marg Police station, Mumbai) ... Respondent

Mr.R.A. Shaikh i/b Abhishek yende, for the Appellants
Mrs.U.V. Kejriwal, APP, for Respondent – State

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

DATE: **JUNE 7, 2016**

ORAL JUDGMENT (PER MRS.BHATKAR, J.):

1. These two appeals are directed against the judgement and order

dated 17.8.2010 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.603 of 2007. The appellants Riyazuddin Allauddin Khan in appeal No.4 of 2011 is the original accused No.1 and appellant Nasir Abdul Farid Khan @ Nasir, Kanya in Criminal Appeal No.846 of 2010 is the original accused No.2 in the Sessions Case No.603 of 2007. The appellants were charged and convicted for the offence punishable under sections 302 r/w 34 of the Indian Penal Code and are sentenced to suffer life imprisonment and to pay a fine of Rs.2,000/- each and In default to undergo R.I. For six months. The Complainant Alangit Kamar Khan @ Kausar gave information to the police on 11.4.2007 of the murder of one Rajeshkumar Shreekrishnaji Shrivastav @ Raju by the appellants/accused at around 1430 hours pursuant to which the offence was registered at C.R. No.103 of 2007 with R.A.K. Marg police station, Mumbai. It is the case of the prosecution that the complainant Alangit and his brother Jehangir were in the business of making readymade garments on 10.4.2007. Accused No.1 Riyazuddin Khan @ Pammu, accused No.1 in the afternoon objected to the residents throwing trash or the dust in the dustbin fixed near his shop. Accused No.1 @ Pammu was also a resident of the locality from his childhood. The complainant challenged the said objection taken by accused No.1. At that time, the accused No.2, who was alongwith the accused No.1, abused and threatened the complainant. The People gathered. Accused No.1 brought a chopper from the

butchers' shop and by brandishing the said chopper, he threatened the complainant and other people. At that time, the deceased Raju intervened and tried to pacify the quarrel. At that time, accused Nos.1 and 2 asked Raju as to why he wanted to intervene in the matter. The next day, i.e., on 11.4.2007, when the complainant was at home, and his brother Jehangir and the deceased Raju were standing near his room, both the appellants arrived there and they asked Jehangir to tender apology for the incident of 10.4.2007. The complainant told them that this brother would not tender apology. However, accused No.1 insisted for apology and when it was refused, accused No.1 took out a weapon looking like a chopper or a sickle and he thrust it from the backside in the stomach of Raju who was quietly standing there. Due to this sudden attack, Raju started running. However, Nasir, accused No.2, caught Raju and assaulted him with the chopper. The said chopper broke because of the assault, however, he caught hold of Raju and accused No.1 stabbed on the chest of Raju. When people started coming there, they were warned and threatened by the appellants and thereafter the accused ran away. The complainant came running. His brother Jehangir and other people shifted Raju to KEM hospital. Raju was declared dead. The complainant rushed to the police station and gave the complaint. The police arrived at the spot, drew spot panchanama; recorded statements of the witnesses; arrested the accused and seized the blood stained clothes of the accused;

collected the post-mortem report and CA report and after completion of investigation, chargesheet was filed. The case was committed to the Court of Sessions.

2. The Sessions Court framed charge against accused No.1 and 2 (and another person by name Mohd. Javed Shafi Shaikh @ Chichi, who was acquitted from all the offences) under sections 302 r/w 34 of the Indian Penal Code and under section 4, 25 (1-B)(b) of the Arms Act and section 37 of the Bombay Police Act.

3. The prosecution examined 10 witnesses and produced articles so also documentary evidence before the Court. However the accused put up the defence that they are innocent and they have not committed any offence. After considering the evidence tendered by the prosecution and the defence adopted by the accused persons, the learned Sessions Judge held the accused Nos.1 and 2 guilty for the offence of murder of Raju. Hence, these appeals.

4. Mr.Shaikh, the learned Counsel for the Appellants, submitted that the conviction is based on erroneous appreciation of evidence. The evidence of PW1 and PW2, who claimed to be the eye witnesses, is not reliable. The prosecution could not establish any motive behind the murder. Though the complainant PW1 Alangit Khan @ Kausar, has given admission that the accused persons had no enmity against the

complainant or Raju or the witnesses. He argued that there are inconsistencies and contradictions in the evidence of PW1 and PW2. He submitted that as per the case of the prosecution on 10.4.2007, a small boy who wanted to dump trash in the public dustbin, was stopped by the accused No.1 Pammu who was running a cellphone store opposite the said dustbin. The learned Counsel submitted that the statement of the small boy was necessary to prove the incident of the earlier day. He argued that the incident of 10.4.2007 is imaginary and it is a bogus creation just to make out a case of motive for section 302 of the Indian Penal Code. On the point of the incident, he submitted that both the brothers i.e., PW1 and PW2, cannot be believed. At the time of incident, Alangit was on the loft of the house and so it was not possible for him to see the incident and also hear the conversation between the accused Nos.1 and 2 and Jehangir or Raju. He further submitted that the role attributed to Nasir is false. He was really not present on the spot. He further submitted that in the proforma of the FIR, the time of death is mentioned as 14.30 hrs. Then, at 14.45 hrs, the offence was reported. However, in the post-mortem notes, the time of death of Raju is mentioned after 3 pm (i.e., 1500 hours). Therefore, this complaint was subsequently manipulated as the complainant had no knowledge of the death of Raju. He further submitted that the prosecution has introduced a bogus theory of presence of two persons as assailants on the spot. In order to support his

submissions, he relied on the case papers of KEM hospital where the history of assault by known person is mentioned. He also relied on the case papers of the casualty of KEM hospital where the history of assault with sharp object by known person is mentioned. In the notes of case papers of KEM hospital, it is mentioned everywhere as by known 'person'. The learned Counsel submitted that nowhere it is mentioned in plural i.e., 'persons' but only in singular and it shows that the assault was committed only by one person. Thus, the incident has not taken place as described by eye witnesses and therefore, it is to be disbelieved. He further submitted that the statement of Hamid Kazi, an independent eye witness, is not examined by the prosecution. He further argued that this is not a case under section 302. At the most, it can be considered as a case under section 304(1) of the Indian Penal Code. He submitted that on the point of spot panchanama, PW5 Ajay Shonu Pawar, a panch witness, has turned hostile. The spot panchanama, which is produced as exhibit 29, proved through PW6 Anil Ramesh Sawant, is not reliable. Learned Counsel pointed out the list of articles produced by the prosecution and submitted that in the list, Article B is shown as broken knife and article I is also shown as knife. So, if at all, there was only one broken knife and as per the case of the prosecution, both the accused Nos.1 and 2 have assaulted the deceased with knife, then, that cannot be a true case. He submitted that as per exhibit 18 sketch, Shohrab hotel is not shown

anywhere and if the accused Nos.1 and 2 were near the Shohrab hotel, then, they were not present at the time of the incident. Hence, accused Nos.1 and 2 are to be acquitted.

5. Learned Prosecutor while opposing these appeals argued that the conviction is based on sound and sufficient evidence. There are two eye witnesses. The deceased was brutally murdered by the accused with the chopper. She submitted that the police have recovered the chopper. One is broken and one is intact. The deceased was taken to hospital but he was dead. The learned Prosecutor relied on the evidence of the eye witnesses so also the post-mortem report. She submitted that considering the quality of the evidence, the appeals be dismissed.

6. We have gone through the evidence of all the witnesses. In this case, there are two eye witnesses - PW1 Alangit and PW2 Jehangir, who are brothers and have stated that Riyajuddin @ Pammu was their neighbour and he used to run a cellphone store. It is true that none of them deposed that there was previous enmity between them and the appellants accused. Both of them have stated that the incident of quarrel on petty issue of throwing trash in the dustbin has taken place on the day earlier i.e., on 10.4.2007, when Pammu objected to the use of dustbin. The submissions of the learned Counsel that as no complaint was registered in respect of the said incident with the police, therefore, this incident is

imaginary and so also the statement of a small boy who went there to throw trash in the public dustbin and was prevented from doing so, is not recorded are material lacunae in the case of the prosecution are not at all convincing. It is to be noted that the appellant / accused No.1 was the neighbour of PW1 and PW2 and when he prevented the small boy from using the dustbin, these brothers intervened. So this was not a big quarrel though as per their evidence, accused No.1 went to butcher's shop and brandished chopper. The statement of the small boy is not recorded in the evidence. However, that it did not affect the credit of the witnesses. Both of them have corroborated with each other. The argument of the defence counsel that the evidence of these two witnesses cannot be relied as these two witnesses are interested, also does not carry any substance. We fail to understand how these two persons can be interested when their licensee Raju was killed in the broad day-light. PW1 Alangit has stated that after the incident of 10.4.2007, on the next day, when he was at home, he saw accused Nos.1 and 2 coming together towards their house. He was on the loft. One Pervez PW9 was present outside the garment unit and from the window of the loft, he noticed that the deceased Raju and his brother Jehangir were present and Riyajuddin @ Pammu asked Jehangir to tender apology to his brother about the incident on the day before. His brother refused. He also said that his brother would not and when Pammu heard the refusal, he took out the chopper and he tried to assault his

brother Jehangir. His brother rescued and then Pammu assaulted Raju, who was standing quietly with the chopper on his waist. He tried to run away. Nasir caught him. Nasir also was armed with the chopper. He also assaulted Raju with the chopper. However, the chopper used by Nasir broke, so Nasir caught hold of Raju and then accused No.1 Pammu assaulted Raju with the chopper. Nasir threatened the public who gathered there that if they intervened, they would be assaulted. Raju fell on the ground. PW2 Jehangir also stated the same facts. Thus, both the brothers have attributed the act of assault with knife to both the accused, i.e., accused No.1 and accused No.2. The first assault was mounted on Raju by Pammu i.e., accused No.1. The submissions of the learned Counsel that the appellants-accused Nasir is innocent and did not mount any assault on Raju, cannot be accepted in view of the clear and cogent evidence of these two witnesses, who attributed specific roles to accused No.1 Pammu and the accused No.2 Nasir. The blow given by Nasir to Raju was so forceful that the chopper broke in two pieces. The two pieces of the chopper i.e., the blade was separated from the handle were produced before the Court. Another chopper recovered from accused No.1 Riyajuddin was also before the court.

7. It was argued that the appellants did not want to assault Raju. He intervened and so accidentally he was assaulted. However, we discard this argument. Pammu mounted first blow on Jehangir, however, Jehangir

ran away. Raju was innocent, who was attacked by accused No.1. It might be a case of transferred malice but it is not the case that Raju intervened and accidentally he received a blow and the accused person did not intend to injure him. The Doctor Sunil S. Kadam, PW8, who conducted the post-mortem, has noted his observations in the post-mortem notes i.e., exhibit 35 and his evidence that there were nearly 9 injuries on the body of Raju and according to him, injury No.1 which was on temporal occipital region of the head, injury No.7 in the abdomen and injury No.8 which pierced the abdominal cavity, were on vital parts and all the injuries were sufficient in the ordinary course of nature to cause death and the death was caused due to haemorrhagic shock as a result of multiple stabs. The medical evidence corroborates the ocular evidence of PW1 and PW2. Raju was immediately shifted to hospital and when PW1 was giving the FIR, he received the information of death of Raju. There is no discrepancy in the time mentioned in the FIR or in the casualty report. Similarly, much was argued in respect of the record of his case papers and casualty report wherein history of assault by known 'person' is mentioned. It is true that such note is found everywhere, however, it is to be understood that when the person is taken to a casualty with such multiple injuries, the staff of the hospital took down the history, might have heard it by 'person' or 'persons' and he wrote it accordingly. The same history of assault was naturally carried forward in different papers prepared by

different Departments, where he was treated and taken. Therefore, it is not a doubtful situation and there is no discrepancy.

8. We are satisfied that there is a sufficient, consistent and cogent evidence which establishes that the both the appellants have killed the deceased brutally and hence, we dismiss the appeals.

(MRIDULA BHATKAR, J.)

(V.K. TAHILRAMANI, J.)