

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.13 OF 2012

Ravi Narsappa Mehtre & Anr. ... Appellants
versus
State of Maharashtra ... Respondent

.....

- Mr.Niranjan Mundargi, Advocate for the Appellants.
- Mr.H.J.Dedhia, APP for the State/Respondent.

**CORAM : A.A. SAYED &
SARANG V. KOTWAL, JJ.
RESERVED ON : 10th AUGUST, 2017
PRONOUNCED ON : 22nd AUGUST, 2017**

JUDGMENT (PER : SARANG V. KOTWAL, J.) :

1. The present appeal is filed by Ravi Narsappa Mehtre and one Rajiv @ Abbas Rafiulla Shah challenging the judgment and order dated 29/11/2011 passed by the Extra Joint Ad-Hoc Additional Sessions Judge, Sewree, Mumbai, in Sessions Case No.689/09. The Appellants were accused Nos.1 and 2 respectively in the said case. Besides the present Appellants, there were two more accused i.e. accused No.3 Nagesh @ Nagya Narsappa Badoor and accused No.4 Sachin Sunil Trimukhe. The accused No.3 was acquitted from all the charges framed against

him. The accused No.4 was convicted for the offence punishable u/s 323 r/w 34 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.15,000/- and in default of payment to suffer rigorous imprisonment for four months. The said accused No.4 Sachin Trimukhe has not preferred any appeal. The present Appellants were both convicted for commission of offence punishable u/s 302 r/w 34 of the Indian Penal Code and they were sentenced to suffer imprisonment for life and to pay a fine of Rs.20,000/- each and in default of payment of fine to suffer rigorous imprisonment for one year each. The Appellants and co-accused were charged u/s 452 r/w 34 of IPC and all of them were acquitted of the said charge. By way of the present appeal, the Appellants have challenged the said judgment and order of conviction and sentence passed by the trial Judge on 29/11/2011.

2. Both the Appellants were facing the charge of commission of murder of one Miraj Khan. The incident had occurred on 12/07/2009 between 05.45 p.m. to 06.05 p.m. in

front of New Fashion Saloon, Dharavi, Mumbai. During the incident one Nitin Jaiswar had suffered injuries on his nose and therefore the accused faced the charge u/s 323 r/w 34 of the Indian Penal Code.

3. The FIR in the present case was lodged by one Haider Ali Wakeel Ali Ansari, who was working as Barber in the New Fashion saloon. P.W.2 Haider Ali was acquainted with deceased Miraj Khan and injured Nitin Jaiswar as well as with all the accused. According to him, on 12/07/2009, at around 05.45 p.m., the deceased Miraj Khan and Nitin Jaiswar came to his shop for having a shave. At around the same time all the accused came to his shop under the influence of liquor. P.W.2 has deposed that, while the Appellant No.2 Rajiv @ Abbas Rafiulla Shah was chewing Gutkha, some of it was sprinkled on the face of Miraj Khan. When Miraj Khan asked the Appellant to be careful, the Appellant No.2 started abusing him and there was exchange of words between Miraj Khan and Nitin Jaiswar on one hand and all the accused on the other. The accused No.4

Sachin Sunil Trimukhe gave fist blow on Nitin Jaiswar's nose, due to which he suffered bleeding injury and Nitin Jaiswar went away from the shop. All the accused and Miraj Khan at that point were outside the shop. Both Appellants entered the shop again. The Appellant No.1 picked up a scissor and the Appellant No.2 picked up a razor from the shop. The Appellant No.2 threatened the said Miraj Khan by saying that he would not leave him alive. At that stage, the Appellant No.1 stabbed Miraj Khan on the stomach and the Appellant No.2 assaulted him on the neck causing bleeding injuries and thereafter all the accused ran away from the spot. Miraj Khan walked with difficulty upto one Dinesh Kiran Stores, which was located in another lane and collapsed in front of it. Thereafter Nitin Jaiswar and Miraj Khan's Uncle Naimuddin shifted him to Sion Hospital, where Miraj Khan succumbed to his injuries. The police were informed and they came to the saloon. The P.W.2 gave his statement, which was treated as FIR and offence was registered vide C.R.No.221/09 at 07.25 p.m. on 12/07/2009 itself u/s 302, 323, 452 r/w 34 of the Indian Penal Code.

4. After registration of FIR the investigation was carried out, different pachanamas were drawn, the accused were arrested and weapons were seized at the instance of the present Appellants and after completion of investigation, the charge-sheet was filed and the case was committed to the Court of Sessions. On the conclusion of trial, the Appellants were convicted and sentenced as mentioned before.
5. We have heard the learned counsel Mr.Niranjan Mundargi, for the Appellants and the learned APP Mr.H.J. Dedia for the State.
6. During the trial, the prosecution examined 15 witnesses. The defence examined two defence witnesses, but they were not concerning the present Appellants and therefore we are not referring to their evidence.
7. The prosecution heavily relied on the evidence of P.W.2 Haider Ali Wakeel Ali Ansari and P.W.4 Nitinkumar

Munnilal Jaiswar. Out of those two P.W.5 Nitin Jaiswar was an injured eyewitness. The P.W.2 Haider Ali was the first informant and has deposed about the incident as mentioned hereinabove. The said witness has identified the weapons before the Court as being the same weapons, which were used by the Appellants.

8. The learned counsel Mr.Mundargi has invited our attention to the cross-examination of the said witness. In paragraph No.12 of his cross examination he has stated that, in his presence the police seized razor and scissor lying at the spot of incident. Mr.Mundargi submitted that according to prosecution case, the weapons were not seized from the spot, but were recovered at the instance of Appellants after a few days and therefore it cannot be inferred that P.W.2 is a truthful and reliable witness. Mr.Mundargi also invited our attention to paragraph No.14 of his cross-examination, wherein the said witness has categorically admitted that before his evidence was recorded by the Court on 04/09/2010, his statement was read over to him by the police at the police station and that he was instructed to give evidence as per the said statement and he was

also instructed to identify weapons before the Court and that he was deposing according to such instructions. This admission undoubtedly is a very serious matter and if it is true, he can be termed as a tutored witness. In cases of such nature, the trial Court can direct enquiry and take suitable action. In response to this submission, the learned APP Mr.Dedhia, submitted that the examination-in-chief of the said witness was over on 04/09/2010 and his cross-examination was conducted on 16/11/2010 and at that time some admissions favouring the accused were given by the said witness, indicating that the said witness was won over. We deprecate this practice of keeping so much gap between the examination-in-chief and the cross-examination. Once the sessions case has begun and particularly when a witness is deposing before the Court, then the trial Court should make efforts to conduct the sessions case on day to day basis and at any rate it is highly desirable that the evidence of one witness is completed within a short span of time.

9. In this case, we are not giving so much importance to

this admission for the reason that the accused/Appellants have not carried this admission to its logical end and have not confronted the investigating officer in respect of such admission. Therefore at this stage it is difficult to record a finding as to whether really such incident of tutoring had taken place or whether such witness was won over. Similarly we are also not giving much importance to any admission that the weapons were seized from the spot, because otherwise we find that this witness is a natural and reliable witness and has promptly given his statement before the police which was treated as FIR. In the said FIR there is no mention of such seizure of weapons from the spot. The FIR was lodged immediately at 07.25 p.m. i.e. within less than two hours from the occurrence. The incident had taken place near his Barber shop. The spot of incident panchanama corroborates his version in respect of said incident.

10. Mr.Mundergi further criticized his evidence on the ground that though the said Dinesh Kirana Stores was not visible from his Barber shop, he has deposed that, the deceased fell

down in front of Dinesh Kirana Stores. We do not find this part of his evidence of much importance, because the fact remains, which is proved by the other circumstances; that Miraj Khan had walked upto the said Dinesh Kirana Stores and had fallen down there.

11. The P.W.2 is corroborated in material particulars by P.W.5 Nitin Jaiswar, who himself had suffered injury in the incident. The P.W.5 Nitin Jaiswar has deposed that at around 05.30 p.m. he had gone to the shop of P.W.2 with Miraj Khan and at that time all the accused came there and there was exchange of words because the Appellant No.2 was chewing Gutkha and sprinkled it on Miraj Khan. When he tried to intervene, the accused No.4 Sachin Trimukhe gave fist blow on his nose causing bleeding injury and therefore he went a little distance away and stood there. From there he saw that both Appellants entered the shop and came out with weapons in their hands. The Appellant No.1 stabbed Miraj Khan on the stomach and the Appellant No.2 gave a blow of razor from ear to chest.

12. P.W.5 Nitin Jaiswar has further deposed that Miraj Khan walked for some distance and then fell down in a nearby lane. Thereafter this witness informed Miraj Khan's uncle Naimuddin Khan (examined as P.W.4) and both of them shifted Miraj Khan to Sion Hospital, where, on examination Miraj Khan was declared dead. The P.W.5 has identified the weapons before the Court. Statement of this witness was recorded by the Metropolitan Magistrate, 32nd Court, Bandra, Mumbai, on 24/07/2009 u/s 164 of Code of Criminal Procedure, which is exhibited as Ex.95. Mr.Mundargi invited our attention to the fact that there was omission in respect of the Appellant No.2 chewing Gutkha and spitting on Miraj Khan. We find that though there is an omission to that extent in the statement recorded u/s 164 of Cr.P.C., this fact is not an omission in his statement recorded by the police u/s 161 of Cr.P.C. In any case this omission does not go to the root of the matter and he is consistent in his version in respect of the main incident of assault by the Appellant with the deadly weapons like scissor

and razor. This witness has thus materially corroborated the evidence of the P.W.2.

13. Mr.Mundargi has submitted that there are indications that the police were not aware about the identity of assailants and therefore entry in ADR at Sion Hospital mentions that the unknown persons had assaulted the deceased. In this connection the person who made entry in the ADR is not examined by the prosecution. Therefore we are not giving much importance to the said entry in the ADR which is on record at Ex.98. There is nothing to suggest that such information was given either by P.W.2 or by P.W.5 to the police or authorities in the hospital.

14. Mr.Mundargi further invited our attention to the fact that there were two inquest panchanamas i.e. Ex.55 and Ex.93. Here again Ex.93 mentions that Miraj Khan was assaulted by unknown persons. Ex.55 is silent as to who had committed assault on Miraj Khan. While it is true that both the inquest panchanamas appeared to have been conducted at the same

time between 09.15 p.m. to 09.50 p.m. by the same investigating officer, but there were different panchas for both the panchanamas. Mr.Mundargi submitted that such procedure throws doubt on the honesty of investigation. While it is true that such procedure is highly irregular and there is no explanation forthcoming; Inquest panchanamas are basically conducted to note down the injuries on the dead body and the condition of the dead body. They cannot form a basis on which any conclusion can be drawn about occurrence of actual incident and they certainly cannot displace evidence of the eyewitnesses.

15. The prosecution has relied on recovery of the weapons at the instance of both the Appellants. For the said purpose prosecution has examined P.W.13 Nasir Nazir Ahmad Shaikh. In his presence the Appellant No.1 produced a scissor which was hidden by him between the Pan Shop and public toilet near Shivaji Vidyalaya. He was also panch for recovery of razor at the instance of the Appellant No.2 which was recovered from behind a hut near Shivaji Vidyalaya. The C.A. report shows that the

scissor was showing presence of human blood of 'B' Group and razor was stained with human blood and the result for grouping was in conclusive. We find that this circumstance is also corroborating piece of evidence in favour of the prosecution.

16. The prosecution has further relied on the seizure of clothes of the accused for which P.W.10 Kailash Kanti Solanki was examined as the panch. However, he has not supported the prosecution case and was declared hostile. In this context the only evidence available is that of the investigating officer who says that the clothes of the accused were seized under panchanama at the police station and such panchanama of seizure of clothes was proved through him and was taken on record and marked at Ex.86. The C.A. report shows that the clothes of both the Appellants showed presence of blood group 'B' which was the blood group of the deceased. Though the pancha to this seizure of clothes has turned hostile, the investigating officer has proved the panchanama. But even without referring to this circumstance we are satisfied that the

prosecution has sufficiently proved its case, beyond reasonable doubt.

17. Apart from these witnesses which are referred hereinabove, the prosecution has examined P.W.1 Jyotiram Shripati Pawar as the panch for spot panchanama, P.W.3 Rajendra Dukhiram Yadav as the panch for one of the inquest panchanamas (Ex.55), P.W.4 Naimuddin Abdul Majid Khan, who was deceased Miraj Khan's uncle and who had carried Miraj to Sion Hospital, P.W.6 Shrirang Bhau Dalvi, who was the photographer who had taken photographs at the spot, P.W.7 Nazare Alam Naziruddin Khan, was the brother of the deceased, P.W.8 Shyamlal Sanairam Jaiswar, was the panch before whom the clothes of the deceased were seized, P.W.9 Dr.Kuldeep Prakash Gaikwad who had examined injured P.W.5 and has proved his injuries, P.W.11 Dr. Anagha Atul Joshi, was examined to prove the injuries of P.W.5, P.W.14 Kamalakar Mahadev Fondke, PSI, was the first investigating officer who had recorded the FIR and inquest panchanamas, P.W.15 Ashok

Baban Papale, who had conducted the further investigation, arrested the accused and filed the charge-sheet. All these witnesses are examined to prove the other circumstances as referred hereinabove.

18. After appreciating the entire evidence on record we are satisfied that the evidence of P.W.2 Haider Ali and P.W.5 Nitin Jaiswar is consistent, cogent and reliable. The prosecution has sufficiently proved that they were eyewitnesses and we can safely rely on their evidence. They are further supported by the recovery of the weapons which show presence of blood of the deceased on the scissor and human blood on the razor.

19. Mr.Mundargi next submitted that even if the incident is proved, the offence will not fall within the definition of murder as provided u/s 300 of the Indian Penal Code. It would fall within 4th exception provided therein, which reads thus;

“Exception 4 –

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of

passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

20. Mr.Mundargi has further submitted that there was no premeditation in commission of offence. It was committed in a sudden fight and was committed in the heat of passion upon a sudden quarrel. He further submitted that the Appellants even had not taken undue advantage or had not acted in a cruel or unusual manner and therefore the case would not fall within the definition of 'murder' as mentioned in section 300 of the Indian Penal Code.

21. The learned counsel Mr. Mundargi in support of his submissions relied on the judgment of ***Pulicherla Nagaraju Alias Nagaraja Reddy, vs. State of A.P., reported in (2006) 11 Supreme Court Cases 444.*** In this case the Hon'ble Supreme Court has discussed various factors guiding the Courts in determining whether the case falls u/s 302 of 304 of the Indian Penal Code. It is held that the Courts must ensure that cases u/s

302 are not converted to one u/s 304 Part I and II and vice versa. The Hon'ble Supreme Court has given a list of certain circumstances which can be determining factors in deciding whether the case falls u/s 300 of the Indian Penal Code.

We find that the ratio in this case does not support the contention of Mr.Mudargi and in fact cautions the Court while converting the case from 302 to 304 Part I and II.

22. Mr. Mundargi has further relied on the case of ***Sukhbir Singh vs. State of Haryana, reported in (2002) 3 Supreme Court Cases 327***. In that case the Hon'ble Supreme Court has held that the said case fell within the Exception 4 of section 300 of the Indian Penal Code so far as Appellant therein was concerned. In the said case, the Hon'ble Supreme Court had given benefit to the Appellant therein and he was not held responsible for the injuries caused by others. We find that the attending circumstances in that case were different from the present case before us and therefore this case does not support

the submission of Mr.Mundargi in the present case.

23. Mr.Mundargi has further relied on the case of ***Ankush Shivaji Gaikwad vs. State of Maharashtra, reported in (2013) 6 Supreme Court Cases 770***. In that case, the accused had hit the deceased with iron rod on head without premeditation in a sudden fight and the deceased had succumbed to the injuries after four days. In that case, the deceased had survived for four days. Therefore this case also does not support Mr.Mundargi in his contention.

24. Mr.Mundargi has further relied on the case of ***Surinder Kumar vs. Union Territory, Chandigarh, reported in (1989) 2 Supreme Court Cases 217***. In that case, one of the prosecution witnesses had taken out a pen knife and the accused therein had picked up a knife from kitchen and while the deceased in that case had intervened, in the course of the scuffle he received three injuries and out of which one on the chest was

proved to be fatal. This case is distinguishable on facts. Accused therein had not intended to assault the deceased. The fight was going on between the accused and another witness in that case and in the scuffle the deceased had suffered the fatal injury.

Therefore even this case is not applicable in the present case.

25. Lastly, Mr.Mundargi relied on the case of *Mavila Thamban Nambiar vs. State of Kerala, reported in (2009) 17 Supreme Court Cases 441*. In that case, the accused had inflicted the blow with scissor on the right side of the chest of the deceased. In that case it was found that the accused had not acted in an unusual and cruel manner. Moreover, in that case the action of the accused was not preceded by the threats showing his intention to commit Therefore, even this case does not support the contention of Mr.Mundargi that the case would fall within the exception u/s 300 of the Indian Penal Code.

26. In this connection we can refer to the medical evidence

in the present case. The prosecution has examined P.W.12 Dr.Rajesh Chandrakant Dere, who had conducted the post mortem. He mentioned the injuries as under;

- (1) Chop wound of size 33 x 9 cm x tissue deep from left mastoid to right anterior chest 5 cm above right nipple with underlining structure cut.
- (2) Stab injury of size 1 cm x 0.5 c.m. in left hypochondriac region.

On internal examination he found following injuries;
Laceration wound to liver of size 2 cm x 0.5 x tissue deep on left lobe of liver on cut section congested.

27. He opined that the injury No.1 was possible by the razor and injury No.2 was possible by the scissor which was before the Court. He has given probable cause of death as *“Hemorrhagic shock following chop injury over neck (unnatural).”* Though the said Doctor has restricted his opinion to the chop injury over neck, we find that even the stab injury has penetrated upto liver and has caused cut over liver and therefore we find that even that injury was grievous endangering life. The

injury caused by razor was having the dimension of 33 cms x 9 cm and was tissue deep. We find that this injury was quite serious and life threatening. The width of the injury was 9 cms which was quite wide and length was 33 cms. Thus, we find that this blow was quite serious and deliberate. From the record it appears that the blow of razor was given after the Appellant No.1 had stabbed the deceased on the stomach. The scissor was having 8 inches long blade and its total length was 14 inches which shows that even the scissor was long and a deadly weapon. The P.W.2 has categorically stated that the Appellant No.2 had threatened to kill the said Miraj Khan. Thereafter both the Appellants had given these blows one after the other in quick succession. From this we can come to the conclusion that though it was a sudden fight, the common intention had developed at the spot between both the Appellants and their intention was to commit the murder of said Miraj Khan. It is not possible to record a finding that offender had not taken undue advantage or had not acted in a cruel or unusual manner. Looking at the nature of the injuries, the weapons used and the

immediately preceding threat given to the deceased coupled with the helpless condition of the deceased, we find that the Appellants had taken undue advantage and had acted in a cruel manner and the case will not fall within the fourth exception to the definition of murder u/s 300 of the Indian Penal Code. With the result, we hold that the prosecution has proved its case beyond reasonable doubt and therefore there is no merit in the Appeal. Hence the following order:

ORDER

The Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)