

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.94 OF 2012

Bashir Sheikh @ Shetta Abdul Gaffar Sheikh.	]	
Age : 39 years,	]	
R/o. Motilal Chawl No.5, V. K. K. Nagar,	]	
Behind Nokia Bar, Chembur,	]	
Mumbai – 400 089.	]	... Appellant /
		Orig. Accused No.1.

Versus

The State of Maharashtra	]	
(At the instance of Senior Inspector of Police,	]	
Tilak Nagar Police Station, vide their	]	
C.R.No.10 of 2010)	]	... Respondent

ALONG WITH

CRIMINAL APPEAL NO.168 OF 2012

Mr. Babu @ Kalya Babu Ganthad Rehman	]	
Shaikh	]	
Age : 20 years,	]	
R/o. Garib Janta Chawl, V. K. K. Nagar,	]	
P. Y. Thorat Marg, Chembur,	]	
Mumbai – 400 089.	]	... Appellant /
		Orig. Accused No.2.

Versus

1. State of Maharashtra	]	
2. The Senior Inspector of Police,	]	
Tilak Nagar Police Station,	]	
(C.R.No.10 of 2010)	]	... Respondent

Mrs. Anjali Awasthi for Appellant in Criminal Appeal No.94 of 2012.
 Mr. H. K. Prem for Appellant in Criminal Appeal No.168 of 2012.
 Mr. Y. M.Nakhwa, APP for State in both Criminal Appeals.

CORAM :- A. A. SAYED &
SARANG V. KOTWAL, JJ.
RESERVED ON :- 13 SEPTEMBER, 2017
PRONOUNCED ON :- 19 SEPTEMBER, 2017

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

1. Both these Appeals are preferred by two different accused challenging the same Judgment and Order dated 10/01/2012 passed by the learned Extra Joint Adhoc Additional Sessions Judge, Sewree, Mumbai, in Sessions Case No.285 of 2010 and therefore both these Appeals are disposed off by this common Judgment. Criminal Appeal No.94 of 2012 is preferred by the original accused no.1 Bashir Shaikh @ Shetta Abdul Gaffar Shaikh and Criminal Appeal No.168 of 2012 is preferred by the original accused no.2 Babu @ Kalya Babu Ganthad Rehman Shaikh.

2. For the sake of convenience, the Appellants in both the Appeals are referred to as the accused as per their serial numbers in the Sessions Case. Both these accused were convicted under Section 302 read with 34 of the IPC and were sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- each and in default of payment of fine, to suffer R.I. for two years. They were acquitted from the charges for commission of offence under Section 504 read with 34 of the IPC. There was a third accused by name Amina Hamja Shaikh who was acquitted of all the charges framed against her i.e. under Section 302 and 504 read with 34 of the IPC.

3. The prosecution case pertains to the murder of one Shiva Khabale. He was murdered outside his house in Krishna Menon Nagar, Chembur, Mumbai. According to the prosecution case, both these accused had assaulted Shiva with a knife at around 11.00 p.m. on 08/01/2010. The FIR in this case was lodged by PW 1 Ujwala Khabale who was the mother of the deceased. During investigation, many suspects were arrested but against most of them charge-sheet was not filed and it was filed only against the aforementioned three accused. After filing of the charge-sheet, the case was committed to the Court of Sessions for trial.

4. During trial, the prosecution examined 11 witnesses. PW 1 Ujwala Vilas Khabale was the mother of the deceased who had lodged the FIR and she was examined as an eye witness to the incident. PW 2 Dr. Baban Shavkha Tadvhi had conducted the post-mortem examination on the dead body of the deceased and had found 8 injuries on the dead body of the deceased out of which two were incised wounds on the chest, one was an incised wound over the abdomen and the rest were abrasions on the leg, shoulder and back. Thus, the main injuries which had caused death were of the size 6cm X 2cm and 9cm X 2cm both cavity deep on the chest and the cause of death was shock due to stab and incised wound (unnatural). PW 3 Kumar Pille was the panch for spot panchanama. There is not much dispute about the spot of incident. PW 4 Mayuri Vilas Khabale was the sister of the deceased and was examined as another eye witness to the incident. PW 5 Suresh Uttam Jadhav and PW 6 Kautik Namdeo

Sonavane were examined as the panchas in whose presence the murder weapon i.e. knife and clothes were recovered at the instance of accused no.1 from his house. The CA report tendered by the prosecution shows presence of human blood of 'A' group on the knife and presence of human blood on the clothes. However, the blood group of the blood on the clothes was inconclusive. PW 7 PSI Jagannath Bhivaji Kamble was the S.H.O. of Tilak Nagar Police Station. On 08/01/2010 he had received the information about the incident. He had gone to Rajawadi Hospital where the deceased was taken. He had recorded the statement of PW 1 which was treated as the FIR. The FIR was exhibited at Exh.46. PW 8 PSI Vijay Vishnu Kadam was another Investigating Officer in whose presence the recovery of weapon and clothes was effected. PW 9 Afzal @ Guddu Majid Shaikh and PW 10 Mehmunabi Shaikh Madar Shaikh were examined as the eye witnesses to the incident but they have not supported the prosecution case and were declared hostile. PW 11 PI Vilas Hiranman Shinde was the Investigating Officer who had completed the investigation and had filed the charge-sheet.

5. Heard Mrs. Anjali Awasthi, learned Counsel for Appellant in Criminal Appeal No.94 of 2012, Mr. H. K. Prem, learned Counsel for Appellant in Criminal Appeal No.168 of 2012 and Mr. Y. M. Nakhwa, learned APP for State in both Criminal Appeals.

6. The prosecution case is based on the evidence of two eye witnesses i.e. PW 1 Ujwala Khabale and PW 4 Mayuri Khabale. PW 1

Ujwala had lodged the FIR. She has stated that at about 11.00 p.m. on 08/01/2010, there was a quarrel between her son Shiva and the boys from the neighbourhood. The quarrel took a serious turn and therefore she took her son Shiva inside the house and latched the door. Thereafter many people gathered outside their house and they were throwing stones and hurling abuses at them. Getting annoyed, Shiva went out. PW 1 and PW 4 followed him and they saw that Shiva had fallen down and he was bleeding. This witness has deposed that Shiva was assaulted with a knife by Kalya Babu and Amina's brother. Amina and her daughter-in-law were abusing. This witness has further deposed that Amina and her brother known as Shetta were present in the Court. After narration of the incident, she deposed that the police came with a vehicle and removed Shiva to Rajawadi Hospital. She herself and her daughter PW 4 went with them. Shiva was declared dead at the hospital and thereafter police recorded her statement and treated it as FIR. Significantly, she has described the assailants as Kalya Babu and one Amina's brother. Though she has identified Kalya Babu as accused no.2 and Amina's brother whom she had referred to as Shetta in the Court as accused no.1, in her FIR, she has not mentioned the name 'Shetta' but she has merely stated that Amina's brother assaulted. Moreover, she has not stated in her FIR that Kalya Babu had assaulted by knife. This improvement from her FIR is brought out on record in the cross-examination. Thus, as far as the accused no.2 is concerned, there is an important omission in her police statement in respect of his participation in the incident and assault with knife on the deceased. As far as the accused no.1 is

concerned, his identity is seriously in dispute. In the FIR, she has merely referred to the main assailant as Amina's brother. In the cross-examination, she has admitted that she was not aware as to how many brothers Amina had. Therefore in this circumstance, it was imperative that the police should have conducted a test identification parade to enable her to fix the identity of accused no.1 as the main assailant who was described as Amina's brother in the FIR. There is absolutely no explanation offered on behalf of the prosecution as to why the identification parade was not held or why it was not possible or was not felt necessary to hold the identification parade. It is quite obvious that this witness was not knowing the accused no.1 by name. No description of the assailants was given in the FIR. Therefore, we are not inclined to place much reliance on the identification of accused no.1 in the Court for the first time. It is also important to note that before the trial Court, there were only three accused out of whom one was a lady. Therefore, it was not very difficult for this witness to have identified the accused no.1 sitting in the dock as Amina's brother. She has also not explained as to how during the deposition she was saying that Amina's brother known as 'Shetta', was present in the Court. If she was aware that Amina's brother was known as Shetta, she would not have failed to mention that Shetta had assaulted. In her cross-examination, she has admitted that she travelled to Rajawadi Hospital when her son was removed to the hospital and at that time, she had not informed the police about the name of the assailant. In her cross-examination, she has stated that when she came out of her house, her son was lying in an injured

condition. In that case, she could not have seen the actual assault on the deceased. She has further admitted in para 14 of her cross-examination that she had told the police that the assailant was unknown. In that view of the matter, it is extremely doubtful whether she has witnessed the incident. Moreover, as mentioned earlier, the identity of the accused no.1 as the assailant is not properly established through her evidence. As mentioned earlier, there is an important omission in respect of the role played by the accused no.2. Therefore, the evidence of this witness is not reliable.

7. The next important witness is PW 4 Mayuri who was the sister of the deceased. She has stated that on 08/01/2010, there was a quarrel between the deceased Shiva and the neighbouring boys and after that Shiva was taken in the house by PW 1 and PW 4. Then there was pelting of stones on their door. She heard the voice of the accused Babu Kalya. Thereafter Shiva opened the door and went out of the house. Thereafter PW 1 and this witness followed him. She has further deposed that she knew the accused who were present in the Court, and they were Amina's brother Shetta, Babu Kalya and Amina. She has further deposed that the accused assaulted her brother and that Amina's brother Bashir Shaikh @ Shetta assaulted her brother by a big knife on his chest and stomach. Shiva fell down in a pool of blood and then the accused ran away. Thereafter, Shiva was admitted in the hospital by the police and this witness accompanied them. From her deposition, it is clear that she has not ascribed any specific role to the accused no.2 except making general

allegations that all the accused assaulted her brother. The specific role is given to the accused no.1 that he assaulted her brother by a big knife on chest and stomach. However in her cross-examination, she has admitted in para 12 that she had not stated before the police in her statement that Amina's brother Bashir Shaikh @ Shetta assaulted her brother by a big knife on his chest and stomach. This was an important omission from her police statement which is brought on record. In fact, she has admitted in her cross-examination that she did not know Bashir Shaikh (accused no.1) by his name and that she had taken his name for the first time. She had also not mentioned description of the unknown person in her statement and that during recording of her statement by the police, she had not stated the name 'Shetta' to the police. Thus, it is quite obvious that she was not knowing the accused no.1 at least by name and no identification parade was held to enable her to identify the accused no.1 as the assailant. Very significantly, in para 9 of her cross-examination, she has clearly admitted that after one and half months, for the first time police recorded her statement about the incident and that after one and half months for the first time she had stated to the police as to how and who assaulted her brother. In our opinion, this admission destroys her evidence and we are not prepared to place reliance on her evidence because she has not immediately or within a reasonable time told the police about the assault and the assailants. Thus, she had clearly implicated the accused as an afterthought. In fact, she has given peculiar answers in her deposition, because, she has stated that after they had received the dead body, they had gone to their native

place for funeral and they did not return to Mumbai till hearing of the case and that she did not remember as to whether her supplementary statement was recorded at Mumbai or at her native place. Therefore, it is extremely doubtful as to whether even after one and half months her statement was recorded by the police at all. Thus, we can only conclude that she had not narrated the incident and the identity of the assailants to the police before her deposition was recorded in the Court during trial.

8. The other two eye witnesses i.e. PW 9 Afzal Shaikh and PW 10 Mehmunabi Shaikh, as mentioned earlier, have turned hostile and they have not supported the prosecution case and therefore we have not taken their evidence into account.

9. The next circumstance brought on record by the prosecution was in respect of recovery of clothes and knife which were recovered at the instance of the accused no.1. This recovery was effected from the house of the accused no.1 at his instance and as mentioned earlier, the weapon shows presence of human blood of group 'A' and the clothes show the presence of human blood. In this respect, the learned Counsel for accused no.1 rightly submitted that the two panchas examined by the prosecution to prove the recovery have turned hostile and they have not supported the prosecution case. Even if we take into account the evidence of PW 8 PSI Kadam in respect of such recovery, he has admitted that it is not specifically mentioned in the panchanama that the clothes and the weapon were

sealed by him. The panchanama is exhibited at Exh.54. In the said panchanama, it is mentioned that the clothes and the weapons were kept in one packet and a label with the signatures of panchas was pasted on it. When this is seen in juxtaposition with the CA report Exh24, it is seen that the CA report mentions that the CA had received two sealed parcels with seals intact. Thus, when the panchanama shows that there was only one packet and the CA report shows that there were two sealed packets, the only inference which could be drawn is that after seizure, there was a possibility of tampering with the clothes and weapon when they were separated and put in different packets but not in presence of the panchas. Therefore, we are not placing much reliance on this recovery and the CA report in that behalf.

10. With the result, we find that the prosecution has failed to prove its case beyond reasonable doubt. Hence we pass the following order :

ORDER

- (i) Both the Appeals are allowed.
- (ii) The conviction and sentence recorded by the learned Extra Joint Adhoc Additional Sessions Judge, Sewree, Mumbai, vide Judgment and Order dated 10/01/2012 passed in Sessions Case No.285 of 2010, convicting both the Appellants under Section 302 read with 34 of the IPC and sentencing them to suffer imprisonment for life and to pay a fine of Rs.10,000/- each and in default of payment of

fine, to suffer R.I. for two years, are set aside and the Appellants are acquitted of the charges levelled against them.

- (iii) The Appellant in Criminal Appeal No.94 of 2012 is in custody. He shall be released forthwith, if not required in any other case.
- (iv) The Appellant in Criminal Appeal No.168 of 2012 is on bail. His bail bonds shall stand discharged.
- (v) Both the Appeals are disposed off in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)