

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

CRIMINAL APPEAL NO.106 OF 2010

Raja @ Raju Kannan Naidu
Aged 33 years, Indian Inhabitant,
residing at Guru Teg Bahadur Nagar,
Ravali Camp, MHADA Chawl,
Zopadpatti, Mumbai – 37.
(At present at Arthur Road
Central Prison)

... Appellant/ Accused

versus

The State of Maharashtra
(At the instance of
Azad Maidan Police Station,
Vide C.R.No.101/07)

... Respondent

.....

- Mr.Sachin B. Chandan, Advocate for the Appellant.
- Mr.H.J. Dedhia, APP for the State/Respondent.

CORAM	:	A.A. SAYED & SARANG V. KOTWAL, JJ.
RESERVED ON	:	22nd SEPTEMBER, 2017
PRONOUNCED ON	:	12th OCTOBER, 2017

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

1. The present Appeal is preferred by the Appellant challenging the Judgment and Order dated 23/01/2009 passed by the Additional Sessions Judge, Greater Bombay, in Sessions

Case No.599/07, whereby the Appellant was convicted for the offence punishable u/s 302 r/w 34 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for life and was directed to pay a fine of Rs.1,000/- and in default of payment of fine to undergo rigorous imprisonment for one year. The Appellant was also convicted for the offence punishable u/s 324 r/w 34 of IPC and was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/- and in default of payment of fine to undergo further rigorous imprisonment for six months. All the substantive sentences were directed to run concurrently and the Appellant was given benefit of set off u/s 428 of Cr.P.C. for the period which he was under trial prisoner.

2. Though the conviction is recorded u/s 302 r/w 34 and 324 r/w 34 of IPC, he was the sole accused and the charges were framed only u/s 302 and 324 of the Indian Penal Code and therefore conviction u/s 302 r/w 34 and 324 r/w 34 of IPC was not proper.

3. The FIR in this case was lodged on 16/04/2007 vide C.R.No.101/07 at Azad Maidan Police Station u/s 302 and 324 of IPC by one Deepak Shekhargol at 10.25 a.m. The said Deepak was the injured eyewitness. According to the prosecution case, at about 05.45 a.m. to 06.00 a.m. on 16/04/2007, the Appellant assaulted one Kadar Khan @ Laden with wooden stick and stone and committed his murder. In the process, he assaulted the said Deepak as well. The police were informed and Kadar Khan @ Laden was removed to the hospital. He succumbed to his injuries at about 08.05 a.m. on 16/04/2007 itself. After registration of the FIR, the spot panchanama was carried out. The wooden plank and stones were seized from the spot. At about 03.15 p.m. on the same day, the Appellant was arrested. His clothes were seized. Statements of various witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed in the Court of the learned Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai. Thereafter the case was committed to the Court of Sessions and

was tried as Sessions Case No.599/07 before the learned Additional Sessions Judge, Greater Mumbai. The Appellant was the sole accused in the said case. The charges were framed u/s 302 and 324 of IPC.

4. During trial, the prosecution examined 11 witnesses including the injured first informant, Medical Officer who had treated the injured Deepak and the deceased, when he was admitted in the hospital and the Medical Officer who had conducted the post-mortem examination. The prosecution further examined the Pancha who was present during the spot panchanama and another Pancha in whose presence, the Appellant was arrested and in whose presence, the clothes of the accused were seized. Rest of the witnesses were related to the investigation of the offence.

5. The prosecution has mainly relied on the evidence of eyewitnesses. The first of such eyewitnesses was P.W.1 Bajrangi Vishwakarma. He has deposed that he was knowing the

Appellant as well as the deceased. He has deposed that, on 16/04/2007, in the morning, there was an altercation between the Appellant and the deceased at Azad Maidan. During the altercation, the Appellant took up a piece of wood and assaulted Laden on his head and face due to which, Kadar @ Laden fell down on the ground. One Deepak Shekhargol, who was present nearby, who tried to intervene, was also assaulted by the Appellant with the stick on his head. Police were informed telephonically and they removed the injured to the hospital. This witness had informed the police by using the mobile phone of one Munna.

6. P.W.2 Hussain Ali Mohd. Ali Shaikh was another eyewitness who used to sleep at Azad Maidan. According to him besides him, the other persons were also regularly sleeping at Azad Maidan. On the day of incident at about 05.30 a.m. to 06.00 a.m., he woke up because of some noise and he saw that scuffle was going on between Laden and the Appellant and during that scuffle, the Appellant assaulted Laden with stick. In short, he has deposed on similar lines as those of P.W.1.

7. P.W.3 Jumal @ Munna Mushtaque Ahmed Pathan was another eyewitness. He has narrated the incident in the same manner as P.W.1 and P.W.2. In addition, he has stated that the Appellant picked up stone and hit on the chest of Laden. He has further deposed that the Appellant was shouting that he would shower Laden with his own blood. Thereafter, the police came there and Laden was removed to the hospital. The injured eyewitness and the first informant Deepak Shekhargol was examined as P.W.5. He has also narrated in the same manner as P.W.1, P.W.2 and P.W.3. He has deposed that when the Appellant assaulted Laden by stick on his head, the stick broke and then the Appellant assaulted Laden by stone and when this witness tried to intervene, the Appellant assaulted on his forehead with the same stone. Thereafter this witness has deposed about his lodging of the FIR.

8. P.W.4 Hasim Varun Kamparia was a Pancha witness, who was present when the spot panchanama was carried out

and the stones and sticks were recovered from the spot of incident at Azad Maidan. P.W.9 Paraglal Surajpal Chaurasia was examined as a Pancha. He was present when the Appellant was arrested at 03.30 p.m. at Azad Maidan on 16/04/2007. In his presence, the clothes of the Appellant were seized.

9. P.W.6 Dr. Helasicar Sadashiv Yashawant had examined the injured Deepak Shekhargol and had noticed four injuries i.e. two injuries below left eye, one abrasion on the right elbow and one trauma over left lower chest. All these injuries were stated to be simple injuries.

10. P.W.7 Dr. Rahul Chavan had examined deceased Kadar Khan @ Laden when he was admitted to G.T. Hospital. He noticed three injuries. Out of which, one injury on the head admeasuring 4 cm x 2 cm x 1 cm, and it was stated to be grievous injury. Other two injuries were simple in nature. He further deposed that Kadar Khan @ Laden's condition worsened and he succumbed to his injuries at 08.05 a.m.

11. P.W.10 Dr. Nandratna Sadashiv Paikrao had performed post-mortem on the dead body of Laden. He had noted five injuries on the dead body. He noticed following injuries;

- (1) Imprint abrasion of left forearm, dorsal aspect 2 in number;
1st - 3 cm x 1/2 cm
2nd - 2 cm x 1/2 cm
- (2) CLW on right pinna mid region
1 – 2 x 1/2 x 1/2 cm
- (3) CLW on left side of forehead above lateral side of eyebrow (bone deep)
1 – 3 x 2 x 1/2 cm
- (4) Abrasion on left cheek
1 – 8 x 1/2 cm
- (5) Imprint abrasion on left leg below knee over tibia
1 – 8 x 1/2 cm

He further opined that the injuries were sufficient in the ordinary course of nature to cause death. The cause of death was given as death 'due to head injury'. Thus, it can be seen that there was only one major injury on the head, which led to the death of the deceased.

12. P.W.8 ASI Pradeep Balkrishan Ghag stated that, on 16/04/2007, he was busy in Nakabandi. He received a phone call from his control room and was informed about the incident at Azad Maidan. He rushed to the spot. He saw the injured Laden lying at the spot. He was shifted to G.T. Hospital. P.W.8 ASI Ghag further stated that on the way to the hospital, the injured Kadar Khan @ Laden told him that the Appellant had assaulted him by stick, wooden plank and stone and also had assaulted his friend Deepak Shekhargol.

13. P.W.11 API Parshuram Kisan Kale had conducted the investigation and had filed the charge-sheet.

14. On careful perusal of the evidence, it is quite clear that, through evidence of the eyewitness, the prosecution case has successfully proved that the incident of assault took place at Azad Maidan on 16/04/2007 at 06.00 a.m. The deposition of the eyewitnesses is consistent and nothing much is elicited from the cross-examination of these witnesses to discredit their

evidence. Their evidence is corroborated by the medical evidence. The injuries found on the person of the deceased Laden, is consistent with their depositions.

15. The prosecution case is greatly bolstered by the evidence of the injured eyewitness P.W.5 Deepak Shekhargol, who not only was an eyewitness, but was injured during the transaction due to assault by the Appellant, when this witness tried to intervene in the quarrel between the Appellant and the deceased. There is no reason to disbelieve this witness, particularly when he had suffered injuries and his injuries are proved through independent evidence of the Medical Officer treating him. All these witnesses are natural witnesses, as they were sleeping nearby overnight and were knowing each other. The eyewitnesses even have spoken about the presence of each other and therefore we find the evidence of these eyewitnesses as cogent and reliable.

16. Besides the direct evidence, there is evidence of P.W.9

who had shifted the deceased to the G.T. Hospital and on the way the deceased who was still alive at that time, narrated the incident. The statement made by Kadar Khan @ Laden to this witness amounts to oral Dying Declaration, when Kadar Khan @ Laden had clearly told this witness that the Appellant had assaulted him with the wooden stick. Therefore, this is an additional circumstance in favour of the prosecution.

17. The clothes seized from the person of the Appellant were sent for chemical analysis and they showed presence of human blood of blood group 'B'. The blood group of the deceased from his clothes was seen to be 'B' group and the blood group of the Appellant himself was of 'A' group. Therefore, it can safely be concluded that the blood of the deceased was found on the clothes of the Appellant. This is an additional corroborative piece of evidence against the Appellant.

18. Considering all this evidence on record, we are of the opinion that the prosecution has successfully established the

occurrence of incident and that the Appellant himself had assaulted the deceased.

19. We have heard Mr.Sachin Chandan, the learned counsel appearing for the Appellant and the learned APP Mr.H.J. Dedhia for the State.

20. Learned Counsel Mr.Sachin Chandan submitted that even if it is assumed that the Appellant had assaulted the deceased, there was no intention to commit murder of the deceased and therefore the offence would not fall within the section 300 of the IPC.

21. We find considerable force in this submission. From the evidence of the eyewitnesses it is clear that the incident was a result of scuffle between the Appellant and the deceased. In fact, the evidence of the important injured eyewitness Deepak Shekhargol, P.W.5, shows that the Appellant snatched the stick, which was in the hands of the deceased and assaulted Laden on his head. Thus, it is quite obvious that there was no premeditation

or preparation on the part of the Appellant to commit the murder. The incident has clearly occurred on the spur of the moment, as a result of sudden quarrel and scuffle between the Appellant and the deceased. Therefore, the present case would fall within the fourth exception mentioned u/s 300 of the IPC. There was only one serious injury on the head of the deceased. Therefore, it cannot be said that the Appellant took undue advantage or acted in a cruel manner.

22. However, we do not agree with the learned counsel Mr.Chandan that the case would fall under second part of section 304 of IPC. The evidence of P.W.3 Jumal @ Munna Pathan shows that while assaulting, the Appellant was shouting that he would shower the deceased with his own blood. Thus, the assault was caused with intention of causing bodily injury, which was likely to cause death. Therefore, the offence u/s 304-part I is clearly made out. At the same time, the assault on injured Deepak and his injuries are proved and therefore the offence u/s 324 of IPC is sufficiently proved by the prosecution.

23. Therefore, we are of the opinion that the prosecution though has succeeded in proving occurrence of the incident, the ingredients of section 302 are not made out and to that extent, the impugned judgment and order needs interference. Hence the following order :

ORDER

1. The Appeal is partly allowed.
2. The conviction and sentence recorded by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.599/07 convicting the Appellant u/s 302 r/w 34 and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo rigorous imprisonment for one year, are set aside. Instead of that, the Appellant is convicted for the offence punishable u/s 304-Part I of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- and in default of payment of fine to suffer rigorous imprisonment for six months.

3. The conviction u/s 324 r/w 34 of IPC is altered to that of u/s 324 of IPC. The sentence imposed on him, of rigorous imprisonment of two years and to pay a fine of Rs.500/- and in default of payment of fine, to suffer further rigorous imprisonment for six months, is maintained.
4. The substantive sentences to run concurrently.
5. The Appellant shall be given benefit of set off u/s 428 of Cr.P.C. for the period of his detention during investigation and till conclusion of the trial.
6. The learned counsel Mr.Sachin Chandan, who was appointed in this matter and has assisted us during hearing of this Appeal, shall be paid his fees as per the rules, by the High Court Legal Aid Authority.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)