

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 186 OF 2014

Vitthal @ Abhijit Kalyan Warekar	]
Age 19 years,	]
Residing at Room No. 18,	]
"B" Camp Building,	]
Behind Latifa Compound,	]
J.B.Road, Parel, Mumbai-12	]
At present at Kolhapur Central Prison	]
Convict No. C-6052, Circle No. 3/3	]
Dist. Kolhapur, Kalamba - 416007	].. Appellant
	[Ori.Accused]

Vs.

The State of Maharashtra	]
R.A.K.Marg Police Station, Mumbai	].. Respondent

....

Dr. Yug Mohit Chaudhry Advocate for the Appellant
Mrs. G.P.Mulekar A.P.P. for the State

....

CORAM : SMT.V.K.TAHILRAMANI AND
DR.SHALINI PHANSALKAR-JOSHI, JJ.

DATED : SEPTEMBER 14, 2017

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, J.]

1 This appeal is preferred by the appellant - original accused against the judgment and order dated 31.8.2013 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 702 of 2010. By the said judgment and order, the learned Sessions Judge convicted the appellant under Sections 302 and 324 of IPC. For the offence under Section 302 of IPC, the appellant has been sentenced to life imprisonment and fine of Rs.1000/- i/d R.I. for six months. For the offence under Section 324 of IPC, the appellant has been sentenced to R.I. for one year and fine of Rs.1000/- i/d R.I. for three months. Both the sentences were directed to run concurrently.

2 The prosecution case, briefly stated, is as under:

(i) Deceased Dashrath @ Sikandar (hereinafter referred to as deceased "Dashrath") was the friend of the complainant PW 1 Govind. The appellant and the deceased were residing in the same area. On 11.7.2010 deceased Dashrath assaulted the son of Priya Warekar who was the aunt of the appellant.

(ii) The incident in question occurred on 11.7.2010 at about 9.30 p.m. Deceased Dashrath met PW 1 Govind near R.A.K. Marg Police Station. They went towards Bhoiwada Naka chitchatting with each other. While they were returning to their house, they saw the appellant standing near Latifa compound. The appellant called out to Dashrath, hence, Dashrath went near the appellant. The appellant told the deceased that he has not acted properly and consequences of the same would not be good. Verbal altercation also took place between the appellant and the deceased. Then the appellant stated that he will show the deceased and saying so, he removed knife from his pant and he started stabbing the deceased with the knife on the chest below rib, on the stomach etc. Dashrath sustained bleeding injuries. On seeing this, PW 1 Govind intervened. He caught hold of the knife, however, the appellant pulled the knife, due to which, PW 1 Govind sustained injuries on his fingers and on the palm of his hand. The appellant also assaulted Govind on his back with the knife. Meanwhile, Dashrath collapsed and fell on the ground. On seeing this, the appellant started running away with the knife, hence, PW 1

Govind followed him. Govind saw the appellant going into R.A.K. Marg Police Station. Govind also followed the appellant into the Police Station. At that time, he heard the appellant telling the police that the appellant had committed murder of Dashrath. The police made enquiries with Govind and Govind narrated the entire story to the police. Dashrath was brought to the hospital. He had already expired. Police recorded F.I.R. of Govind which is at Exh. 14. Thereafter the investigation commenced. PW 7 PSI More arrested the appellant. He took personal search of the appellant and found one knife with the appellant. He seized the blood stained clothes of the appellant under panchnama Exh.32. Thereafter dead body of Dashrath was sent for postmortem. PW 6 Dr. Nath conducted the postmortem on the dead body of Dashrath. He found eight injuries on the dead body of Dashrath. There were four punctured wounds on the left side of the chest, one incised wound on the left side of the chest, one punctured wound on the abdomen and two incised wounds over chin and on the left arm.

3 Charge came to be framed against the appellant

under Sections 302, 324 of IPC and 37(1) read with Section 135 of the Bombay Police Act. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal. It may be stated here that the learned Judge acquitted the appellant of the offence under Section 37(1) of Bombay Police Act for the offence punishable under Section 135 of the Bombay Police Act.

4 We have heard the learned counsel for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that the appellant assaulted Dashrath alias Sikandar with the knife and caused his death.

5 The conviction of the appellant is mainly based on the

evidence of PW 1 Govind who is an eye witness to the incident. Govind has stated that on 11.7.2010 at about 9.30 p.m. he was walking at J.B. Wadia Road. At that time, he met his friend Dashrath near R.A.K. Marg Police Station. They went a little ahead chitchatting with each other. Dashrath told Govind that while he was standing near one building, one boy spat at him. At that time, hot exchange of words took place between the deceased and the appellant. When PW 1 Govind and Dashrath were returning back, they saw the appellant standing near Latifa compound. The appellant called Dashrath, hence, Dashrath went near the appellant. Then both started talking with each other. Thereafter the appellant started quarreling with the deceased in loud voice. The deceased tried to pacify the appellant but the appellant was not ready to listen. The appellant told deceased that what he did, was not proper and the deceased will have to face consequences of the same. On saying this, the appellant started abusing the deceased. Hot exchange of words took place between the appellant and the deceased. Then the appellant told Dashrath that he will show him and the appellant removed knife from his pant and assaulted Dashrath on the chest, below rib, stomach etc.

Bleeding injuries were caused to Dashrath. On seeing the incident, PW 1 Govind tried to intervene. He caught the knife which was in the hands of the appellant. The appellant pulled the knife, due to which, Govind sustained injuries on his fingers and palm of his hand. The appellant also assaulted Govind on his back with the knife. In the meanwhile, Dashrath fell down. On seeing this, the appellant started running away with the knife. Govind followed the appellant to see where the appellant was going. He saw the appellant straightway going to R.A.K. Marg Police Station. Govind also followed him. Govind heard the appellant telling the police that he had committed murder of Dashrath. Then police made enquiries with Govind and Govind narrated the entire incident to the police. Thereafter F.I.R. of Govind came to be recorded. Thus, the evidence of PW 1 Govind shows that the appellant assaulted the deceased with knife on the chest, abdomen and various parts of body.

6 The evidence of PW 3 Police Naik Eknath shows that at about 11.15 p.m. the appellant rushed to the police station with a knife in his hand. The appellant gave his name as Vitthal alias Abhijit. The appellant told PW 3 Eknath that he had killed

Dashrath and Eknath should do what he wanted to do with the appellant, however, obviously, we cannot consider confession of the appellant to PW 3 Eknath and hence, it has to be excluded from consideration. The only evidence which we can consider is the conduct of the appellant in rushing to the police station with a blood stained knife in his hand and blood stained clothes which were on the person of the appellant. Eknath further stated that PW 1 Govind came immediately after the appellant to the police station. On enquiry, he gave his name as Govind Sawant. Govind pointed out finger towards the appellant and told that the appellant had stabbed Dashrath with the knife which was in the hands of the appellant. Govind further disclosed that while he was intervening in the scuffle between the appellant and the deceased, the appellant gave blows of knife on Govind and caused injuries to Govind. We would also like to advert to the evidence of PW 7 PSI More who has stated that the appellant had come to the police station on his own just before the arrival of the complainant. PSI More later arrested the appellant and in the presence of two panchas, he took personal search of the appellant. Thereafter during the personal search of the

appellant, a knife was found with the appellant which came to be seized. Clothes on the person of the appellant were also seized which were blood stained. Knife and blood stained clothes were seized under panchnama Exh. 32. The evidence of Investigating Officer PW 9 Police Inspector Thale shows that he sent these articles to the Chemical Analyser. As per the C.A. Report (Exh. 54), blood group of the deceased is "AB". As per the C.A. Report (Exh. 53), blood group of PW 1 Govind is "O". On the T-shirt of the appellant, blood of "O" group was found and on the pant of the appellant, blood of "AB" group was found.

7 The learned counsel for the appellant submitted that CA report Exh. 52 shows that the blood group of the appellant is also "AB". However, it is pertinent to note that in the statement under Section 313 of Cr.P.C., the appellant has not given any explanation for the presence of blood of "AB" group and "O" group on his clothes. He has not taken any defence that he was injured in the incident, hence, blood of "AB" group found on his pant, was his own blood. Looking to the above facts, presence of blood of "O" group on his T-shirt and presence of

blood of “AB” group on the pant of the appellant immediately after the incident, is a strong incriminating factor against the appellant.

8 It is the prosecution case as well as the evidence of PW 1 Govind that he was also assaulted by the appellant with the knife. The evidence of PW 8 Dr. Deshmukh corroborates the evidence of PW 1 Govind that he had sustained injuries with a knife. PW 8 Dr. Deshmukh has stated that on 11.7.2010 at about 11.15 p.m. he examined Govind (PW 1). The patient disclosed history of assault at about 11.00 p.m. On examination, he found the patient had sustained two injuries, first injury on 1st, 2nd and 3rd finger on the palm and second injury on the back.

9 That the deceased died a homicidal death is brought out in the evidence of PW 6 Dr. Nath and the other evidence on record. Dr. Nath conducted the post-mortem on the dead body of Dashrath. On external examination, Dr. Nath found eight injuries on person of Dashrath. They are as follows:

“(1) Incised wound present vertically over chin at midline 1.5 x 0.5 cm x muscle deep in size. Margins clean cut and ante-mortem blood clots, adherent along with the margins;

(2) Punctured wound present over left side of chest of size 3 x 1.5 cm externally, placed vertically, upper angle of the wound present 6 cm below suprasternal notch and 4 cm left midline. The crack of the wound cuts through the 3rd costal cartilage (right) is directed posteriorly downwards and laterally enters pleural cavity and punctured the upper lobe of left lung with a wound of size 2 x 1 x 1 cm. Antemortem blood clots are adherent along with margins of the wound;

(3) Punctured wound present over left side of chest of size 2 x 1 x externally. Upper angle of the wound present 3 cm laterally to lower angle of injury nos. 2 and 9 cms. below suprasternal notch. Wound is directed posteriorly downwards and medially, entered the left side of pleural cavity and punctured the left ventricle of the heart, with a wound of size 2 x 0.5 cm.

and ventricular cavity deep. Antemortem blood clots adherent along with the margin of the wound;

(4) Incised wound present over left side of chest 3.5 cm. x 2 cm. and muscle deep in size, upper angle present 1 cm laterally and above to upper angle of wound no. 3 and 8 cm below super sternal notch. Antemortem blood clots are adherent along with margin of the wound;

(5) Punctured wound present over left side of chest 3.5 x 2 cm. in size, obliquely placed upper angle of the wound joined to the lower angle of injury no.4 and 12 cm below suprasternal lungs. Wound is directed posteriorly downwards and medially, and passes through the pericardium producing wound of size 3 x 2 cm. and penetrates the left ventricle producing the wound of size 5 x 2 cm. and ventricular cavity deep;

(6) Punctured wound present over posterior lateral aspect of middle third of left arm 3 cm. x 2 cm. and muscle deep in size, wound is directed anteriorly medially and downwards, Antemortem blood clots

adhere to the margins of the wound;

(7) Punctured wound present over lateral aspect of left side of chest 3.5 x 1 cm. in size and placed obliquely with the upper angle medial then the lower angle. The upper angle of the wound is 18 cm. lateral to midline and 28 cm. below suprasternal notch. Wound is directed anteriorly, medially and downwards and reaches up to the left pleural cavity. Antemortem blood clots adherent to the margin of the wound;

(8) Punctured wound present over abdomen on the midline, 3 cm. x 2 cm. in size, wound is directed posteriorly downwards along the midline and opens up in to the peritoneal cavity, loops of intestine are protruding out of the wound.

According to Dr. Nath, all the injuries were ante-mortem in nature."

10 On internal examination, Dr. Nath found that injury on chest had punctured upper lobe of the left lung. It had also punctured left ventricle of the heart. In fact, the left ventricle of the heart was punctured at two places and size of the first wound was 2 x 1 x 1 cm. on upper lobe and size of

the second wound on left ventricle of the heart was 2 x 0.5 cm. As far as injury to the abdomen is concerned, loops of the intestine was protruding out of the stomach. In the opinion of Dr. Nath, the probable cause of death was "hemorrhagic shock as a result of multiple stab injuries- (unnatural)".

11 The learned counsel for the appellant submitted that even if the appellant had assaulted the deceased with a knife and further caused his death, the case would not be covered by Section 302 of IPC but it would fall under Section 304 Part-II of IPC or at the most, under Section 304 Part-I of IPC. He submitted that the case is squarely covered by Exception 4 to Section 300 of IPC, hence, the case would not fall under Section 302 of IPC, but it would fall under Section 304 Part-I or Part-II of IPC. To support this contention that the incident occurred during a sudden quarrel, he has placed reliance on the evidence of PW 1 Govind who has stated that hot exchanges of words took place between the appellant and the deceased and that the appellant and the deceased were quarreling and it was during this quarrel that the appellant assaulted the deceased with a knife. The learned counsel for the appellant submitted

that the incident was not pre-meditated or pre-planned and it happened on the spur of moment in a fit of anger. He submitted that in such case, the case would not fall under Section 302 of IPC. However, the learned A.P.P. pointed out that eight injuries were caused to Dashrath in the incident and six of the injuries were on vital parts of the body. She pointed out that five of the injuries were on the left side of the chest which are punctured wounds and one incised wound on the left side of the chest. She also pointed out that injury no.8 which is punctured wound over abdomen, caused loops of intestine to protrude out of the wound. She further submitted that the accused person can be given benefit of Exception 4 to Section 300 of IPC not only when the incident occurred during the sudden quarrel but when there is absence of pre-meditation and the accused should not have acted in a cruel or unusual manner or taken any undue advantage. She submitted that looking to the nature of injuries, the appellant has clearly taken undue advantage while assaulting the deceased who was unarmed and acted in a cruel manner.

12 In response to this submission made by the learned

A.P.P., the learned counsel for the appellant drew our attention to the decision of the Supreme Court in the case of **Byvarapu Raju Vs. State of A.P. and another**; reported in **(2007) 11 SCC 218**. He pointed out that in the said case, the deceased had sustained 13 injuries, yet, the Supreme Court held that the accused therein would be entitled to the benefit of Exception 4 to Section 300 of IPC, and observing thus, it was held that the case did not fall under Section 302 of IPC, but it fell under Section 304 Part-I of IPC. However, as far as this decision is concerned, it is noticed that the nature of injuries is not stated in the said decision. In the present case, there are eight injuries and six injuries out of eight injuries, were on vital parts of the body i.e. on the chest and abdomen. Looking to the nature of the injuries in the present case, it is apparent that the appellant acted in a cruel or unusual manner and has taken undue advantage of the situation by suddenly assaulting an unarmed person with a weapon like knife.

13 Thereafter, the learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of **Surinder Kumar Vs. Union Territory, Chandigarh,**

reported in **(1989) 2 SCC 217**. He placed reliance on the observations in paragraph 7 of the said decision to support his contention that to get benefit of sudden fight that is exception 4 to Section 300 IPC, the number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. He pointed out that the Supreme Court in this decision has observed thus:

“The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger”.

14 No doubt, the Supreme Court has observed as above, but immediately thereafter the Supreme Court has observed that the accused person can be given benefit if he has not taken any undue advantage or acted in a cruel manner. In the

present case, it is seen that out of the eight injuries, only two are on non-vital parts of the body i.e. chin and left arm. Five injuries were on the chest which were punctured wounds and fifth injury is incised wound on the abdomen. These injuries on the chest have punctured the left lobe of the lung and it had penetrated the left ventricle of the heart and the size of wound was 2 x 0.5 cm. and another injury was incised wound over the left side of the chest of the size of 3.5 cm. x 2 cm. In addition, it is seen that due to punctured wound on the abdomen caused by the appellant, the loops of the intestine had protruded out. Thus, it is seen that the appellant in the present case, has taken undue advantage that he was armed and the deceased was unarmed and he acted in a cruel manner.

15 Thereafter, the learned counsel for the appellant submitted that all the injuries were caused by the appellant to Dashrath when he was standing and once Dashrath collapsed, the appellant did not inflict any further injuries on Dashrath, hence, in such case, the appellant should be given benefit of Exception 4 to Section 300 of IPC. To support this contention, he has placed reliance on the decision of the Supreme Court in

the case of ***Sukhbir Singh Vs. State of Haryana*** reported in ***AIR 2002 SC 1168***. He placed reliance on the observations in paragraph 19 of the said decision which are as under:

“After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by fight, the accused who was armed with bhala caused injuries at random and thus, did not act in a cruel or unusual manner”.

16 Thus, the Supreme Court has observed that looking to the nature of two injuries, it cannot be said that the accused person therein had acted in a cruel manner or unusual manner. We have already discussed above the injuries caused by the appellant to the deceased. Looking to the nature of six injuries inflicted by the appellant on the deceased, it can certainly be inferred that the appellant acted in a cruel or unusual manner. We would also like to again advert to the

evidence of PW 1 Govind which shows that after Govind saw the appellant assaulting Dashrath with a knife, Govind intervened and the knife which was in the hands of the appellant, was caught by Govind but the appellant pulled the knife out of the hand of Govind, due to which, Govind had sustained injuries on his fingers and on palm of his hand. Thereafter, the appellant assaulted Govind on his back with a knife. Meanwhile, Dashrath fell down. Thereafter, the appellant ran away. Thus, had Govind not intervened when the appellant was assaulting Dashrath with a knife, the appellant would have continued to inflict further injuries on Dashrath. Thus, looking to the facts of the present case, it cannot be said that any of the decisions cited above, would apply to the facts in the present case.

17 The fourth exception of Section 300 of IPC covers acts done during the course of a sudden fight. The said exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But,

while in the case of Exception 1, there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet, the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation

and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 of IPC, is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passion to cool down. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must be shown that the offender has not taken any undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

18 No doubt, the evidence on record shows that the incident occurred during a sudden fight but as stated in the earlier paragraphs, the benefit of Exception 4 to Section 300 of IPC can be given if the death is caused in a sudden fight without premeditation and without the offender taking undue advantage or acting in a cruel or unusual manner. Last ingredient is not fulfilled in the present case looking to the number and especially nature of the injuries, hence, we are afraid that we cannot give benefit of Exception 4 to Section 300 of IPC to the appellant.

19 The learned counsel for the appellant further submitted that the conduct of the appellant of reporting to the police station and surrendering himself before the police immediately after the incident, should be taken into consideration for giving the benefit of Exception 4 to Section 300 of IPC. We are afraid that this conduct would not help the appellant in any manner for availing the benefit of Exception 4 to Section 300 of IPC.

20 Looking to the evidence on record, we are of the opinion that the prosecution has proved its case beyond reasonable doubt that the appellant assaulted Dashrath and caused his death. Thus, we find no merit in the appeal and the same is dismissed. However, set-off be granted in accordance with law.

[DR.SHALINI PHANSALKAR-JOSHI, J.] [SMT.V.K.TAHILRAMANI,J.]