

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.1266 OF 2008

Bhojraj @ Raj Lalkant Bhattarai,
Age.23 Yerars,
R/o.Silver Arch Building,
Garage No.14/1, N.C.Road,
Mumbai.

(Nashik Jail)

... **Appellant**

V/s.

The State of Maharashtra
(At the instance of Malabar Hill
Police Station in C.R.NO.34/07)

... **Respondent**

.....

Mr.S.R.Phanse, Advocate appointed for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent/State.

....

CORAM : A. M. BADAR J.

DATED : 4th JANUARY 2017.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order passed by the learned Ad-hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.566 of 2007 on 22/08/2008 thereby convicting him of offences punishable under Sections 307, 452 and 324 of the Indian Penal Code (In short, "the IPC"). For offence punishable under Section 307 of the

IPC, the appellant/accused was sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1000/- in default to undergo further rigorous imprisonment for two months. For the offence punishable under Section 452 of the IPC, he was sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.500/- in default to undergo further rigorous imprisonment for one month. For the offence punishable under Section 324 of the IPC, the appellant/accused was sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/- in default to undergo further rigorous imprisonment for a period of one month.

2 Background facts leading to the prosecution and conviction of the appellant/accused are thus :

(a) The appellant/accused was in employment of P.W.No.4 Suraj Prakash Kohali as a cook. Because of the incident of taking the car of the employee unauthorizedly and dashing it, he was terminated from the employment by P.W.No.4 Suraj Prakash Kohali in the year 2006.

(b) P.W.No.4 Suraj Kohali along with his son Rajesh Kohali (P.W.No.3) and Zhiba Rajesh Kohali (P.W.7) were residing with his family at Kohali House, 3rd Floor, Shantaram Narayan Lane, Walkeshwar Road, Mumbai.

(c) According to the prosecution case, in the night hours of 13/04/2007, P.W.No.2 Ramesh Kamat watchman of the building had seen the appellant/accused in the vicinity of the Kohali House. Thereafter, at about 4.15 a.m. on 14/04/2007, the appellant/accused committed house-trespass with an intention to commit murder of P.W.No.4 Suraj Kohali. Accordingly, armed with knife he entered in the room of P.W.No.4 Suraj Kohali, attempted to commit his murder by assaulting him by means of knife, so also by gagging his mouth and nose. Upon hearing sounds of commotion coming from the bedroom of P.W.No.4 Suraj Kohali, Sonibai Bane (P.W.No.5) maid servant of the family disclosed this fact to P.W.No.7 Zhiba Kohali, who in turn disclose the same to her husband P.W.No.3 Rajesh Kohali. Then P.W.No.3 Rajesh Kohali followed by his wife P.W.No.7 Zhiba Kohali and maid servant Sonibai Bane (P.W.No.5) entered in the bedroom of P.W.No.4 Suraj Kohali to see the appellant/accused gagging mouth and nose of P.W.No.4 Suraj Kohali by means of hand while armed with a knife. The appellant/accused then rushed towards P.W.No.3 Rajesh Kohali and attempted to assault him by means of knife. The blow of the knife landed on upper and lower lips of informant P.W.No.3 Rajesh Kohali. During the course of assault on him by the appellant/accused, there was injury to the palm of P.W.No.4 Suraj Kohali as he had held the blade of knife in order to save himself. As family members of the injured gathered, the appellant/accused ran away from the house. P.W.No.2 Ramesh

Kamat and informant P.W.No.3 Rajesh Kohali chased him for apprehending him. However, he could not be caught by them. P.W.No.4 Suraj Kohali and informant P.W.No.3 Rajesh Kohali were then taken to Breach Candy Hospital by P.W.No.8 Sunil Kohali. P.W.No.3 Rajesh then lodged report with Malabar Hill Police Station, which resulted in registration of Crime No.34 of 2007 against the appellant/accused for offences punishable under Sections 452, 307 and 324 of the IPC. P.W.No.9 PSI Vinayak Kanade visited the spot and prepared spot panchanama. Incriminating articles found on the spot were also seized. After completion of investigation, the charge-sheet was filed and ultimately after due trial, the appellant/accused was convicted and sentenced as indicated in the opening paragraph of this Judgment.

3 I have heard the learned Advocate appearing for the appellant/accused at sufficient length of time. Learned counsel appearing for the appellant/accused strenuously urged that considering the nature of injuries suffered by P.W.No.3 Rajesh and P.W.No.4 Suraj, it cannot be said that the appellant/accused intended to commit murder of the victim. For this purpose, the learned counsel for the appellant/accused placed reliance on ***State of Maharashtra v. Boda Ramji Patil*, 1978 Cr.L.J. 411** and ***Shamshuddin and Ors. v. State of Bihar*, 2011 Cri.L.J. 4521**. Learned counsel for the appellant/accused further argued that evidence of the prosecution is full of lacunae because the Doctor

who had examined P.W.No.3 Rajesh and P.W.No.4 Suraj was not examined. It is further argued that evidence of P.W.No.3 Rajesh suffers from infirmities, as he had not stated material aspects during the course of investigation and improved his story while in the witness box.

4 I have also heard the learned Additional Public Prosecutor appearing for the State. He supported the impugned Judgment and Order of conviction and sentence by contending that eye-witness account of injured witness is corroborated by other evidence adduced by the prosecution and, therefore, the appellant/accused is rightly convicted by the learned trial Court.

5 After hearing both the sides and careful perusal of record and proceedings, I am unable to concur with the submission of the learned counsel for the appellant/accused that the offence cannot be travelled to Section 307 of the IPC. In the matter of *State of Maharashtra v. Bodya Ramji Patil* (*supra*) the Division Bench of this Court in paragraph 11 of its Judgment has rightly held that for bringing home the guilt of the accused for offence punishable under Section 307 of the IPC, it is necessary to establish that if the victim would have met his death, the offence would have been under Section 302 of the IPC. In other words, for establishing the offence punishable under Section 307 of the IPC, the prosecution is obliged to establish that if the desired result

could have been achieved, then the offence would fall under the definition of Section 300 of the IPC punishable under Section 302 of the IPC. One cannot dispute this proposition. Similarly, in the matter of ***Shamshuddin*** (*supra*), the learned Single Bench of Patna High Court has held that in order to constitute the offence punishable under Section 307, it is desirable that the Doctor should have said that the injuries taken cumulative or solitary were dangerous to life or were endangering the life. I am unable to persuade myself to accept the position that in order to constitute the offence punishable under Section 307 of the IPC, it must be proved that the cumulative effect of the injury must be to endanger a human life. How the offence punishable under Section 307 of the IPC can be made out is aptly described in the matter of ***Vishu Vitthal Jadhav v. State of Maharashtra*** reported in **2004 Cr.L.J. 1786**. Relevant portion from paragraph 12 and 13 of the Judgment can be quoted with advantage and it reads :

“12. In *Sarju Prasad v. State of Bihar* (AIR 1965 SC 843) it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

13. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury.”

6 It is thus clear that in order to justify conviction under Section 302 of the IPC, an intention coupled with an overt act is sufficient. Keeping in mind this position of law, let us examine whether it is proved by the prosecution that the appellant/accused had attempted to commit murder of P.W.No.4 Suraj Kohali with such intention or knowledge and under such circumstances that if by that act he had caused death of P.W.No.4 Suraj Kohali, he would have been guilty of the offence of murder.

7 Congruous evidence of P.W.No.3 Rajesh Kohali, P.W.No.4 Suraj Kohali, P.W.No.5 Sonibai Bane, P.W.No.7 Zhibha Kohali along with evidence of watchman named Ramesh Kamat (P.W.No.2) goes to show that victims of the crime in question along with their family members were residing at Kohali building located at Malabar Hill of Bombay. Evidence of P.W.No.3 Rajesh and P.W.No.4 Suraj coupled with evidence of other witnesses goes to show that in the year 2006, the appellant/accused was in the employment of Kohali family as their cook, but subsequently, he came to be terminated as he had taken the car of his employer unauthorizedly and dashed it.

8 Evidence of watchman Ramesh Kamat (P.W.No.2) shows that at about 9.00 p.m. of 13/04/2007, the appellant/accused was seen wandering nearby the Kohali house where victims were residing.

9 What happened thereafter can be seen from evidence of P.W.No.4 Suraj Kohali, who is the victim of the crime in question. It is in his evidence that at about 4.00 a.m. on 14/04/2007 he felt that somebody is sitting on his chest. When he woke up, he saw that the appellant/accused was sitting on his stomach and pressing his mouth by a pillow. P.W.No.4 Suraj Kohali further deposed that the appellant/accused then attempted to stab him by means of knife causing bleeding injury to him. Evidence of P.W.No.4 Suraj Kohali further shows that when the appellant/accused was attempting to stab him, he had caught hold of blade of knife by his palm causing bleeding injury to his palm. Despite searching cross-examination of P.W.No.4 Suraj Kohali, nothing could be brought on record to disbelieve his version regarding presence of appellant/accused in the bedroom of P.W.No.4 Suraj Kohali while armed with a sharp edged weapon.

10 Evidence of P.W.No.4 Suraj Kohali is gaining corroboration from evidence of P.W.No.3 Rajesh Kohali, P.W.No.7 Zhiba Kohali and P.W.No.5 Sanibai Bane. Their congruous evidence shows that initially P.W.No.5 Sonibai Bane had heard some strange noise and, therefore, she disclosed this fact to P.W.No.7 Zhiba Kohali, who in turn has disclosed the said fact to her husband P.W.No.3 Rajesh. As the sound was coming from the bedroom of P.W.No.4 Suraj Kohali, they all went towards the bedroom of P.W.No.4 Suraj Kohali. P.W.No.3 gave a dash to the

door of the bedroom and switch on the light of the bedroom. Evidence of P.W.No.3 Rajesh shows that he saw the appellant/accused armed with knife present in the room of his father P.W.No.4 Suraj Kohali. Evidence of P.W.No.3 Rajesh further shows that the appellant/accused was attempting to stab his father Suraj Kohali (P.W.No.4) by means of knife. When P.W.No.3 Suraj Kohali shouted, the appellant/accused is stated to have rushed at him and gave a blow of knife to Rajesh Kohali also. Then the appellant/accused ran away and he was chased by P.W.No.2 Ramesh and P.W.No.3 Rajesh along with others. However, the appellant/accused managed to flee from the spot.

11 Evidence on record shows that thereafter P.W.No.8 Sunil Kohali had taken P.W.No.3 Rajesh and P.W.No.4 Suraj to Breach Candy Hospital, where they were treated. P.W.No.6 Dr.Vasudeo Ahuja has proved injury certificate of P.W.No.3 Rajesh Kohali and P.W.No.4 Suraj Kohali.

12 It is seen from the injury certificate at Exh.19 that P.W.No.4 Suraj had suffered injury admeasuring 2 cm. X 0.1 cm. X 0.1 cm. on right thumb medial aspect and another injury admeasuring 1 cm. x 0.1 cm. x 0.1 cm. on ring finger right medial side. Exhibit 20 is injury certificate in respect of P.W.No.3 Rajesh Kohali. He had suffered injuries on both his lips admeasuring 2 cm. x 0.2 cm. x 0.2 cm. and 1 cm. x 0.2 cm. x 0.1 cm. Finding

injuries on P.W.No.3 Rajesh Kohali and P.W.No.4 Suraj Kohali soon after the incident fully corroborates the version of injured witnesses P.W.No.4 Suraj Kohali and P.W.No.3 Rajesh Kohali.

13 Argument of the learned counsel for the appellant/accused that though neighbours had also chased the appellant/accused, they were not examined is noted for the purpose of rejection. Section 134 of the Evidence Act makes it clear that it is the quality which matters and not the quantity. Even otherwise, it is well settled that when the available evidence adduced by the prosecution is trustworthy and reliable, then there is no need to examine other witness who may be available and why may depose same facts. It is only when the evidence adduced by the prosecution suffers from infirmities, then non-examination of other witnesses though available makes a prosecution case doubtful. Such is not the case in hand. Eye witness account of injured witnesses in the case in hand is duly corroborated by other evidence adduced on record.

14 In the light of above discussion, the prosecution had successfully proved a fact that in the night intervening 13/04/2007 and 14/04/2007, the appellant/accused had entered in the bedroom of P.W.No.4 Suraj Kohali with a knife to commit an offence and thereafter attempted to kill P.W.No.4 Suraj Kohali and in that process had assaulted P.W.No.3 Rajesh Kohali by

means of a knife. Blood stained knife was ultimately recovered from the spot of the incident and it is seen that in chemical analysis blood of 'B' group was found on that knife. P.W.No.3 Rajesh Kohali and P.W.No.4 Suraj Kohali are also having blood of 'B' group. Thus forensic evidence also supports the evidence of injured witnesses.

15 Intention of the appellant/accused can be gathered from the attending facts. He was seen in the vicinity of the house of victims soon before the incident. Thereafter, he entered in the house of victims in the night hours. At that time, he was armed with a knife. Apart from this, eye witness account of the incident shows that the appellant/accused was attempting to gag nose and mouth of P.W.No.4 Suraj Kohali by pressing a pillow against his face. Moreover the appellant/accused had used sharp edged weapon for assaulting P.W.No.4 Suraj Kohali. All these facts proved by the evidence of prosecution shows that the appellant/accused was having necessary intention to commit murder of P.W.No.4 Suraj Kohali. For these reasons, I do not find any infirmity in the Judgment and Order of the learned trial Court convicting the appellant/accused of offences punishable under Section 307, 452 and 324 of the IPC. Similarly, the learned trial Court has kept in mind the principle of proportionality while imposing the sentence on the appellant/accused.

16 In this view of the matter, no case for interference with the conviction and sentence is made out. The appeal is, therefore, dismissed.

17 Fees of the learned counsel appointed to espouse the cause of the appellant/accused is quantified at Rs.5,000/- and the same be paid to him.

(A. M. BADAR J.)