

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.692 OF 2016
WITH
CRIMINAL APPLICATION NO.738 OF 2016
IN
CRIMINAL REVISION APPLICATION NO.692 OF 2016

AMIR NANHEJAN SHAIKH AND ORS.)...APPLICANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.P.V.Vare, Advocate for the Applicant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 23rd FEBRUARY 2017.

ORAL JUDGMENT :

1 Admit. Heard forthwith by consent of parties.

2 By this revision petition, revision petitioner / accused
nos.1 to 3 are challenging the judgment and order passed by the

learned Additional Sessions Judge, City Civil and Sessions Court, Greater Bombay, Mumbai, on 23rd November 2016, passed in Criminal Appeal No.636 of 2011 thereby dismissing the appeal filed by them and confirming the judgment and order passed by the learned Ad-hoc Assistant Sessions Judge, City Civil and Sessions Court, Greater Bombay, Mumbai, on 18th October 2011, thereby convicting them of the offence punishable under Section 307 of the IPC and sentencing them to suffer rigorous imprisonment for 4 years each and to pay fine of Rs.1,000/- each, in default, to undergo further simple imprisonment for 1 month, by each of them. Revision petitioners are accused nos.1 to 3 respectively and they shall be referred to in their original capacity hereinafter.

3 Brief facts leading to the prosecution of accused persons can be summarized thus :

One Shehanaz is daughter of accused no.3 Najir Shaikh. She was in love with PW3 Hamid. The incident in question took place on 21st May 2008 in the vicinity of Mehek

General Stores, Anna Nagar, Dharavi. It is the case of the prosecution that, on that day, at about 9.30 p.m., accused no.1 Amir Shaikh saw PW3 Hamid talking with Shehanaz. He questioned PW3 Hamid and started assaulting Hamid. Then, accused no.3 Najir Shaikh – father of Shehanaz, came holding knife and started beating Hamid. At that point of time, PW2 Dastgir Shaikh intervened and tried to pacify the quarrel. Being infuriated by this act of intervention by PW2 Dastgir Shaikh, revision petitioners / accused persons assaulted Dastgir Shaikh by means of a sharp edged weapon. Revision petitioner / accused no.3 Najir Shaikh is stated to have assaulted PW2 Dastgir by means of knife and the blow given by him is stated to have landed at the stomach of PW2 Dastgir. Revision petitioner / accused no.1 Amir is stated to have assaulted PW2 Dastgir by means of a sword on neck, whereas, revision petitioner / accused no.2 Momeen Shaikh is stated to have assaulted PW2 Dastgir by means of a sickle on right hand wrist. Injured Dastgir was taken to Sion Hospital by informant PW1 Sayyed Asgar, who according to the prosecution case had witnessed the incident. At Sion Hospital,

injured PW2 Dastgir was treated by PW6 Dr.Deepak Mandwe. At the hospital itself, PW2 Dastgir lodged report Exhibit 14 against the revision petitioners / accused, which has resulted in registration of Crime No.87 of 2008 for offence punishable under Sections 307 and 504 read with Section 34 of the IPC and under Section 4/25 of the Arms Act, with Police Station Shahu Nagar, Mumbai.

4 Routine investigation followed. Weapons of offence came to be seized from accused persons. Statement of witnesses came to be recorded. Seized articles were subjected to Chemical Analysis. On completion of investigation, revision petitioners / accused were charge-sheeted.

5 The learned Ad-Hoc Assistant Sessions Judge, Greater Bombay, Mumbai, had framed charge for several offences against accused persons and ultimately, by the judgment and order dated 18th October 2011, revision petitioners / accused persons came to be convicted of the offence punishable under Section 307 read

with Section 34 of the IPC and they were accordingly sentenced as indicated in the opening paragraph of this judgment. The appeal filed by them came to be dismissed by the impugned judgment and order dated 23rd November 2016, by the learned Additional Sessions Judge, Mumbai.

6 I have heard the learned advocate appearing for revision petitioners / accused persons at sufficient length of time. By taking me through the evidence of PW6 Dr. Deepak Mandwe, the learned advocate argued that cross-examination of this medical witness goes to show that injury on abdomen of PW2 Dastgir is not possible by a knife. This witness has admitted that in case of an injury by knife, the direction of the wound will be straight with a fraction of deviation. Hence, in submission of the learned advocate appearing for revision petitioners, evidence of eye witnesses including that of injured Dastgir is totally contrary to the medical evidence on record, and therefore, entire evidence of the prosecution needs to be rejected. This, according to the learned advocate appearing for revision petitioners / accused

amounts to error of law, and as such, the impugned judgment and order needs to be quashed and set aside.

7 By taking me through the evidence of PW1 Sayyed Asgar and that of PW2 Dastgir, the learned advocate argued that evidence of both these witnesses is contradictory as PW2 Dastgir has deposed that accused no.3 Najir Shaikh came after the incident of quarrel started, whereas, PW1 Sayyed Asgar has deposed that accused no.3 Najir Shaikh was there since inception. The learned advocate further argued that evidence of PW3 Hamid has come on record by way of omission as proved by PW8 Sadanand Lohar, Investigating Officer. He further argued that statement of this witness was recorded belatedly and the injury certificate is not placed on record. Therefore, evidence of PW3 Hamid is of no assistance to the prosecution.

8 By taking me through evidence of PW5 Naushadali Shaikh – the panch witness, the learned advocate argued that evidence of this interested witness, who is brother of injured PW2

Dastgir cannot be acted upon to give a finding of the guilt. The learned advocate argued that cross-examination of this witness goes to show that police approached him at about 2.45 p.m., whereas, Memorandum Statement at Exhibit 23 shows that confessional statement of accused no.1 Amir Shaikh was recorded at 2.15 p.m. of 26th May 2008. Cross-examination of this panch witness shows that accused no.1 Amir Shaikh and accused no.2 Momeen Shaikh were frightened when their confessional statements were being recorded by PW8 Sadanand Lohar, API. As such, confessional statement cannot be said to be voluntarily disclosure statement of accused persons. It is further argued that cross-examination of this witness Naushadali Shaikh shows that second panchnama which relates to recovery of a sickle from accused no.2 Momeen Shaikh, infact, took place in the room of accused no.1 Amir Shaikh. With this, it is argued that recovery of weapons is not proved by the prosecution. By drawing my attention to evidence of PW8 Sadanand Lohar, it is argued that evidence of the Investigating Officer is contrary to the evidence of the panch witness.

9 The learned advocate appearing for accused persons further argued that the incident in question has resulted in registration of cross case against PW2 Dastgir and PW3 Hamid and one Zakir Shaikh for the offence punishable under Section 326 of the IPC and those accused in the cross case were acquitted by the judgment and order dated 19th October 2011 in Sessions Case No.462 of 2009. This fact, in submission of the learned advocate for revision petitioners goes to show that, infact, prosecution witnesses were aggressor in the episode. He argued that considering the factual backdrop in which the incident allegedly took place, if ultimately this court comes to the conclusion that accused revision petitioners have committed any offence, then, lenient view may be taken in the matter.

10 The learned APP supported the judgment and order of conviction recorded by the learned Ad-Hoc Assistant Sessions Judge, Mumbai, confirmed by the learned appellate court.

11 I have carefully considered the rival submissions and also examined record and proceedings of the courts below. At the outset, it needs to be mentioned here that accused persons have invoked revisional jurisdiction of this court and it is well settled that such jurisdiction can be exercised sparingly when there is glaring defect of procedure or manifest error on the point of law which resulted in miscarriage of justice. Sufficiency of evidence cannot be gone into in the revisional jurisdiction. If the finding is supported by some evidence, then such finding cannot be termed as perverse finding warranting interference in the revisional jurisdiction of this court. Keeping in mind this limited arena of revisional jurisdiction in which the court can examine the matter in hand, let us examine whether courts below have committed any error of law or perversity in recording a finding that revision petitioners / accused persons in furtherance of their common intention had attempted to commit murder of PW2 Dastgir on 21th May 2008 at about 9.30 p.m.

12 PW2 Dastgir is an injured witness. He being an injured witness, his version carries great weightage. His presence on the scene of occurrence cannot be doubted as he had sustained injuries in the incident in question. In the matter of **Bonkya vs. State of Maharashtra**¹ the Hon'ble Apex Court has held that injured witnesses are stamped witnesses whose presence admits no doubt. PW2 Dastgir in his evidence has stated that while going to the public toilet, he saw Shehnaz (daughter of accused no.3 Najir Shaikh) talking with PW3 Hamid. As per version of PW2 Dastgir, accused no.1 Amir Shaikh saw this and started assaulting PW3 Hamid. Then accused no.3 Najir came and started beating Hamid. At that time, as per version of PW2 Dastgir, accused no.3 Najir was holding a knife in his hand. As testified by PW2 Dastgir, he went to intervene and then the incident of murderous assault on him took place. As stated by PW2 Dastgir, accused no.3 Najir gave a blow of knife on his abdomen, accused no.1 Amir gave a blow of sword on his neck and accused no.2 Momeen gave a blow of sickle on his right hand wrist.

1 1995(2) SCC 447

13 PW1 Sayyed Asgar is the informant. He deposed that on 21st May 2008, he was at the STD Booth beside Mehek General Stores. As per his version, the incident took place at about 9.50 p.m. of 21st May 2008. So far as the incident is concerned, PW1 Sayyed Asgar deposed that accused no.3 Najir gave a blow of knife on abdomen of PW2 Dastgir whereas accused no.1 Amir gave a blow of sword on neck of PW2 Dastgir. This witness further deposed that accused no.2 Momeen gave a blow of sickle on right hand wrist of PW2 Dastgir. Evidence of this witness shows that he had taken injured PW2 Dastgir to Sion Hospital after the incident and at that place, his report Exhibit 14 came to be recorded by police.

14 PW3 Hamid in his statement stated before the court that he had love affair with Shehnaz – daughter of accused no.3 Najir Shaikh. As per his version, on 21st May 2008, when he was talking with Shehnaz, accused no.1 Amir came and questioned him apart from assaulting him. Then, PW2 Dastgir came and attempted to separate accused no.1 Amir and at that time, accused

no.3 Najir came with a knife and gave a blow thereof on abdomen of PW2 Dastgir. Accused no.1 Amir, as per version of this witness, gave a blow of sword on neck of PW2 Dastgir, whereas accused no.2 Momeen gave a blow of sickle on right wrist of PW2 Dastgir.

15 PW6 Dr.Deepak Mandwe is the Resident Medical Officer of Sion Hospital. As per his version, upon examination of injured PW2 Dastgir, he had noted following injuries on person of PW2 Dastgir :

- i) Stab wound on right side of the abdomen admeasuring 3 x 1 cm.
- ii) Stab wound on left side of the neck admeasuring 5x1x1 cm
- iii) CLW on right wrist admeasuring 3x1x1 cm
- iv) CLW on right arm admeasuring 4x1x1 cm

Cross-examination of this witness goes to show that he himself had not operated injured PW2 Dastgir but the operation was conducted by Dr.Sachin. However, this witness had prepared post operation notes as per instructions of the main surgeon. Cross-examination of this witness further shows that internal injuries mentioned in the certificate can be caused by a weapon like

Article 2 i.e. sickle. This witness has admitted that if the internal injuries are caused by knife, then direction of the injury will be straight with a fraction of deviation. With this material, as noted in foregoing paragraphs, it is an attempt to demonstrate that ocular evidence is at variance with the medical evidence. It is sought to be contended that the internal injury to the abdomen is caused not by a knife but by a sickle, and therefore, witnesses are telling a lie. However, careful scrutiny of cross-examination of PW6 Dr. Deepak Mandwe, does not show that direction of the internal injuries caused by a stab wound is not a straight wound with a fraction of deviation. As there is no question to this witness in the cross-examination, in order to elicit his admission that infact internal injury to the abdomen is not a straight injury and therefore cannot be caused by a knife, the half hearted cross-examination of this medical witness to the effect that internal injury by a knife is a straight wound with a fraction of deviation cannot be of any assistance to the defence. Nature of internal injury is not elicited in the cross-examination from this witness. On the contrary, in chief-examination, this Medical Officer, PW6

Dr. Deepak Mandwe has stated that there was gall bladder perforation apart from one perforation at D-3 part of duodenum.

16 The effect of variation in ocular evidence and medical evidence was considered by the Hon'ble Apex Court in the matter of Gangadhar Behera and Others vs. State of Orissa² and paragraphs 20 and 21 of the said judgment needs reproduction. They read thus :

“20 At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses’ account which had to be tested independently and not treated as the “variable” keeping the medical evidence as the “constant”.

21 In *Krishna Gopal case* the position has been succinctly stated as follows: (SCC pp. 313-14, paras 24-26)

“24 It is trite that where the eyewitnesses’ account is found credible and trustworthy,

² (2002) 8 Supreme Court Cases 381

medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

25 A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard

is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned author says: [See 'The Mathematics of Proof-II' : Glanville Williams : *Criminal Law Review*, 1979, by Sweet and Maxwell, p. 340 (342).]

The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two

doubts are not to be multiplied together. The one piece of evidence may confirm the other.' Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

26 The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense

and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.”

It is, thus, clear that if eyewitnesses account is found credible and trustworthy, then, medical opinion pointing out alternative possibilities cannot be accepted as conclusive to jettison trustworthy ocular evidence. In the case in hand, including the injured, all three eye witnesses are consistently stating about the weapon used and part of body chosen by each of the accused for giving blow of that weapon to injured PW2 Dastgir. I do not find any discrepancy or lacuna in evidence of any of these witnesses including the injured witness to jettison or discard their evidence in toto and in that view of the matter, it cannot be said that the learned trial court had taken perverse view in the matter. On the contrary, findings recorded by both courts below are perfectly in tune with the evidence adduced by the prosecution on record.

17 So far as alleged discrepancy in the evidence of PW1 Sayyed Asgar and PW2 Dastgir is concerned, one will have to keep in mind that the incident initially took place between PW3 Hamid and accused no.1 Amir. Then, PW2 Dastgir intervened in the incident. It appears that thereafter, PW1 Sayyed Asgar had witnessed the incident. Therefore, it cannot be said that each and every witness should depose about the incident as deposed by the another witness. Each witness can state before the court as to what he had seen or noticed as has been done in the instant case. Principles of appreciation of evidence of witnesses has been elaborated by the Hon'ble Apex Court in the matter of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarath**³. The Hon'ble Apex Court has observed that by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. The Hon'ble Apex Court has clarified that discrepancies which do not go to the root of the matter and which do not shake the basic version of prosecution case cannot be annexed with undue importance. In that sense, we are required to look upon

3 AIR 1983 SUPREME COURT 753

the evidence of injured witness PW2 Dastgir and eye witnesses PW1 Sayyed Asgar and PW3 Hamid. So far as order of the prosecution case about the assault by dangerous weapon on PW2 by accused persons is concerned, evidence of all these three witnesses is totally consistent, congruous and trustworthy.

18 PW1 Sayyed Asgar has promptly lodged the FIR of the incident in question. The FIR at Exhibit 14 corroborates the version of the first informant.

19 Though PW6 Dr. Deepak Mandwe, Resident Medical Officer had not operated injured PW2 Dastgir, his evidence categorically shows that upon a clinical examination of injured PW2 Dastgir soon after the incident, he had noted one stab injury on his stomach, one injury on his neck and one CLW on his right hand wrist, whereas another CLW on his right arm. These injuries found on person of PW2 Dastgir fully corroborate version of injured PW2 Dastgir as well as that of PW1 Sayyed Asgar and PW3 Hamid. As such, it cannot be said that finding of fact to that

effect recorded by the courts below is perverse or unsupported by the evidence adduced by the prosecution.

20 Much was argued about alleged omission from evidence of PW3 Hamid, come on record through evidence of PW8 Sadanand Lohar. I have carefully examined evidence of both these witnesses in order to consider effect of omission. It is seen that PW3 Hamid had not stated to police at the first available opportunity that accused Momeen assaulted him on his hand, accused Najir had caused injury to himself on his left hand and that he felt giddiness due to injury on his head or that family members of PW2 Dastgir came and took him to the hospital. Even if these improvements are ignored from the zone of consideration, then also, version of this witnesses PW3 Hamid about use of sharp edged weapon, infliction of injuries on parts of body of PW2 Dastgir and causing injury to PW2 Dastgir is not at all shaken. Hence, minor improvements made by PW3 Hamid are of no consequences to discard his evidence, which is not done rightly by learned courts below.

21 According to the prosecution case, weapons of offence came to be seized on the basis of disclosure statement of accused persons. PW5 Naushadali is stated to be the panch witness to the recovery at the instance of accused no.1 Amir and accused no.2 Momeen. His evidence is criticized by the learned advocate appearing for the revision petitioners, as noted in foregoing paragraph by stating that he is real brother of injured PW2 Dastgir. Infact, cross-examination of PW5 Naushadali and that of PW8 Sadanand Lohar do show that PW5 Naushadali is real brother of injured PW2 Dastgir. It was expected of a prudent Investigator to opt for a disinterested person to act as a panch witness. However, for reasons best known to the Investigator, PW5 Naushadali is chosen to act as a panch witness.

22 Effect of recovery not substantiated by panch witness came to be considered by the Hon'ble Apex Court in several matters. The position of law on this aspect is aptly summarized by the Hon'ble Apex Court in the matter of **Rameshbhai Mohanbhai Koli Vs. State of Gujarath**⁴. Paragraphs 23 to 25 of the said

4 2010 ALL MR (Cri) 3868 (S.C.)

judgment reads thus :

“**23** An argument was advanced about reliance based on the evidence of investigating officer. This Court in **State of U.P. Vs. Krishna Gopal and another (1988)4 SCC 302** has held that courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities. Prima facie, public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case [**Vide State of Kerala Vs. M.M. Mathew and Anr. (1978)4 SCC 65**)]

24 In **Modan Singh Vs. State of Rajasthan, (1978)4 SCC 435**, it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in **Mohd Aslam Vs. State of Maharashtra, (2001)9 SCC 362**. In **Anter Singh Vs. State of Rajasthan,**

(2004)10 SCC 657, it was further held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

25 This Court has held in large number of cases that merely because the panch witnesses have turned hostile is no ground to reject the evidence if he same is based on the testimony of the Investigating Officer alone. In the instance case, it is not the case of defence that the testimony of Investigating Officer suffer from any infirmity or doubt. [**Vide Modan Singh's case (supra) Krishna Gopal's case (supra) and Anter Singh's case (Supra).**]

23 It is, thus, clear that, evidence as to recovery need not be rejected on the ground that prosecution witnesses did not support the prosecution version. Even evidence of the Investigating Officer can be considered for proving recovery as official acts are regularly done is a wise presumption of law recognized by the legislature as seen from the provisions of Section 114 of the Evidence Act.

24 It was argued that evidence of PW5 Naushadali shows that police came to him at about 2.45 p.m. on 26th May 2008, when allegedly confessional statements of accused no.1 Amir and accused no.2 Momeen came to be recorded. By drawing my attention to the Memorandum Statement at Exhibit 23 of accused no.1 Amir, the learned advocate submitted that this Memorandum Statement came to be recorded at 2.15 p.m. on 26th May 2008, whereas, PW5 Naushadali in his cross-examination states that he was approached by police at about 2.45 p.m. With this, it is argued that a doubt is created in the version of interested witness PW5 Naushadali. At this juncture, it is apposite to note that confessional statement and resultant recovery were effected on 26th May 2008 whereas PW5 Naushadali entered in the witness box after more than 3 years i.e. on 20th August 2011. Sluggish chronometric sense of rustic persons is noted even by the Hon'ble Apex Court in several matters. A witness is not expected to keep a watch on each and every moment when he takes part in the investigation. Therefore, this discrepancy of thirty minutes cannot

be given any overbearing importance as it is well settled that a doubt must be a reasonable doubt. Apart from this, if we consider evidence of PW8 Sadanand Lohar, Investigating Officer, then by no stretch of imagination it can be said that recoveries of weapons at the instance of accused persons are not proved by the prosecution. No doubt, in cross-examination PW5 Naushadali – a panch witness, has stated that accused no.1 Amir and accused no.2 Momeen were frightened at the time of recording of their confessional statement but that by itself does not make recoveries effected at their instance inadmissible by jumping to the conclusion that disclosure statements made by them were not made voluntarily. Weapons seized at the instance of accused persons were sent for chemical analysis and reports of Chemical Analysis at Exhibit 38 to Exhibit 44 shows that seized weapons were stained with human blood. This evidence certainly incriminates revision petitioners / accused persons in the crime in question, and therefore, it cannot be said that guilt of revision petitioners / accused persons in assaulting injured PW2 Dastgir is not established by evidence adduced on record by the prosecution.

The finding to that effect recorded by courts below cannot be termed as perverse or unsupported by legal evidence.

25 Now next issue is as to which offence is proved against accused persons. Section 307 of the IPC makes an attempt to commit murder punishable. An accused can be said to have committed an offence punishable under Section 307 of the IPC if he does an act with such intention or knowledge and under such circumstance, that, if he by that act had caused death of a person, he would have been held guilty of the offence of murder punishable under Section 302 of the IPC. Therefore, for making an accused liable for punishment under Section 307 of the IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient if there is an intention coupled with some overt act in execution of such intention. It is needless to state that the intention or knowledge of accused persons must be such, as is necessary to constitute the offence of murder. Intention or knowledge is a state of man's mind. Such intention and knowledge is required to be gathered from all attending

circumstances such as nature of weapons used, manner in which the weapon was used, motive for the crime, force with which the blow was given, part of the body chosen for causing wounds etc. It is required to be seen whether, if really, the act had in fact accomplished, then, whether accused persons would have been liable for the offence of murder of the victim. As such, one will have to consider the definition of culpable homicide as given in Section 299 as well as that of murder as given in Section 300 of the IPC. The relevant portion of these sections read thus :

“Section 299 IPC - Culpable homicide – Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. **Explanation 1** – A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2 – Where death is caused by bodily injury, the person who causes such bodily injury

shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3 – The causing of the death of child in the mother’s womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.”

“Section 300 IPC – Murder – Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

2ndly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly – If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly – If the person committing the act knows that it is so imminently dangerous that it must, in all

probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

26 It is seen from the evidence of prosecution that the incident in question took place because accused no.1 Amir had seen Shehnaz (daughter of accused no.3 Najir) talking with PW3 Hamid. Accused no.1 Amir, as seen from evidence of PW3 Hamid, took exception to this act of PW3 Hamid and quarrel between them ensued. PW3 Hamid and PW2 Dastgir have in terms stated that accused no.1 Amir quarreled with PW3 Hamid and then assaulted PW3 Hamid by fist blows. So far as PW1 Sayyed Asgar is concerned, his evidence shows that he had seen quarrel between PW3 Hamid and PW2 Dastgir on one side and accused persons particularly between accused no.3 Najir and accused no.1 Amir on the other side. The fact that PW3 Hamid and PW2 Dastgir were prosecuted along with one Jakir Shaikh for offence punishable under Sections 324 and 506 read with Section 34 of the IPC vide Sessions Case No.462 of 2009 arising out of the same

incident cannot be lost sight of. This indicates that, infact, there was quarrel between the prosecuting party and accused persons over the issue of love affair between PW3 Hamid and Shehnaz – daughter of accused no.3 Najir. Eye witnesses namely PW3 Hamid and injured PW2 Dastgir are categorical in stating that incident of assault on PW2 Dastgir took place when he tried to intervene in the dispute between revision petitioners / accused persons and PW3 Hamid. Therefore, the moot question which falls for consideration is when PW2 Dastgir was not at all concerned with the point of dispute between revision petitioners / accused persons and PW3 Hamid, whether revision petitioners / accused persons actually intended to commit murder of PW2 Dastgir. It is seen from the evidence on record that revision petitioners / accused persons indulged in assaulting PW2 Dastgir without any premeditation, the reason as seen from the evidence of prosecution is, his intervention in the dispute between revision petitioners / accused persons with PW3 Hamid over the issue of love affair of PW3 Hamid with daughter of accused no.3 Najir. When PW2 Dastgir intervened, it is seen that all of a sudden fight

erupted between revision petitioners / accused persons on one hand and PW2 Dastgir on the other hand. There was, infact, no motive with revision petitioners / accused persons to assault PW2 Dastgir but for his intervention in their quarrel with PW3 Hamid. They neither intended to kill PW2 Dastgir nor they intended to inflict bodily injuries to PW2 Dastgir, sufficient in the ordinary course of nature to cause his death in the said sudden fight in the heat of passion. Though vital parts of body were chosen to give blow of sharp edged weapons, size of wounds reflected from the evidence of PW6 Dr.Deepak Mandwe, as noted in foregoing paragraphs, does not show that blows were dealt with by sufficient force to demonstrate the intention to kill. Infact, in his chief-examination, PW6 Dr.Deepak Mandwe has stated that stab injury to the abdomen was of the size 3x1 cm, and that, on the neck was of size 5x1x1 cm. His evidence shows that except injury to the abdomen, other injuries were simple in nature. This conduct of revision petitioners / accused persons does not reflect their intention to commit murder of PW2 Dastgir, particularly when they were armed with sharp edged weapons. Evidence of

prosecution does not establish any previous deliberation or determination on the part of revision petitioners / accused persons to eliminate PW2 Dastgir. It is seen that a fight suddenly took place over the issue of love affair between PW3 Hamid and Shehnaz – daughter of accused no.3 Najir. In that fight, revision petitioners / accused persons do not appear to have taken any undue advantage or acted in a cruel manner as seen from injuries on person of PW2 Dastgir though they were having sharp edged weapons. In this view of the matter, it cannot be said that by their act of assaulting injured PW2 Dastgir, accused persons, infact, attempted to commit his murder. The courts below failed to consider this aspect of the matter and committed error or law in holding that accused persons are guilty of the offence of an attempt to commit murder of PW2 Dastgir. To that extent, impugned judgment and order needs interference.

27 Now let us examine which offence is proved to have been committed by revision petitioners / accused persons. As noted in foregoing paragraphs, injured PW2 Dastgir had suffered

wounds on his abdomen, neck and right hand apart from the one on right arm. Section 320 of the IPC defines grievous hurt. It is not seen from evidence, either of PW2 Dastgir or that of PW6 Dr.Deepak Mandwe that injured PW2 Dastgir has suffered any of the hurt as described in Section 320 of the IPC. Infact, it has not come in his evidence as to how many days he was hospitalized. It is not brought on record that he had suffered, during the span of twenty days, severe bodily pain or that during this period, he was unable to follow his ordinary pursuits. Evidence of PW6 Dr.Deepak Mandwe does not show that injuries suffered by PW2 Dastgir endangered his life or that those wounds caused severe bodily pain to injured Dastgir for a period of twenty days or that during that period, he was unable to follow his ordinary pursuits. The document at Exhibit 30 is the discharge card of PW2 Dastgir. It is seen from the document at Exhibit 30 that Dastgir had taken treatment at the hospital from 21st May 2008 to 31st May 2008 and then he was discharged from the said hospital. It is, thus, clear that, though the offence defined in Section 320 of the IPC is not proved against revision petitioners/ accused persons, they are

certainly guilty of the offence punishable under Section 324 of the IPC as it is seen that they had caused hurt to PW2 Dastgir by sharp edged weapons, which can be used for stabbing or cutting or causing death of a person.

28 Now the question which falls for consideration is what should be the punishment or sentence which revision petitioners / accused persons deserve for this offence proved against them. It is duty of the court to ensure that accused persons receive appropriate sentence which must be in consonance with the gravity of the offence. The circumstances in which the crime in question took place is also relevant for determining punishment which is required to be imposed on accused persons. Considering the fact that the incident of assault took place all of a sudden without premeditation and over the issue of love relations between PW3 Hamid and Shehnaz – daughter of accused no.3 Najir, I am of the considered opinion that rigorous imprisonment for a period of 1 year to each of the revision petitioners / accused persons apart from payment of fine of Rs.1,000/- by each of them,

would meet the ends of justice. In the result, the following order :

ORDER

- 1) The Revision petition is partly allowed.
- 2) Conviction and sentence for the offence punishable under Section 307 of the IPC recorded by the learned trial court and confirmed by the learned appellate court against revision petitioners / accused persons is quashed and set aside.
- 3) Revision petitioners / accused persons are convicted of the offence punishable under Section 324 read with Section 34 of the IPC and they are sentenced to suffer rigorous imprisonment for One (1) year each and to pay a fine of Rs.1,000/- (Rupees One Thousand Only) by each of them. In default of payment of fine, each of them shall suffer simple imprisonment for One (1) month.
- 4) The Revision Petition is disposed of accordingly.
- 5) In view of disposal of the revision petition, all pending applications stand disposed of.

(A. M. BADAR, J.)