

(Order)

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Cri. Appeal No. 0352 of 2007
with Cri. Appeal No. 0379 of 2008

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Appeal No. 0352 of 2007

District : Nanded

Sayed Afsar s/o. Sayed Khaja,
Age : 22 years,
Occupation : Fishery,
R/o. Brahmapuri, Chauphala,
Nanded, Dist. Nanded.

.. Appellant.

versus

The State of Maharashtra,
Through Police Station,
Itwara, Nanded.

.. Respondent.

.....

Mr. T.W. Pathan, Advocate, for the appellant.

*Mr. A.A. Jagatkar, Additional Public Prosecutor,
for the respondent.*

.....

With

Criminal Appeal No. 0379 of 2008

District : Nanded

The State of Maharashtra,
through Police Station,
Itwara, Nanded.

.. Appellant.

versus

1. Sayed Afsar s/o. Sayed Khaja,
Age : 22 years,
Occupation : Fishery,
R/o. Brahmapuri, Chauphala,
Nanded.

... contd.

2. Gaffarkhan s/o. Ismailkhan Pathan,
Age : 20 years,
Occupation : Fishery,
R/o. Brahmapuri, Chauphala,
Nanded. } .. Respondents.

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*Mr. A.A. Jagatkar, Additional Public Prosecutor,
for the appellant.*

Mr. T.W. Pathan, Advocate, for respondent no.01.

Mr. G.P. Shinde, Advocate, for respondent no.02.

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**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 27TH AUGUST 2018.

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

01. Criminal Appeal No. 352 of 2007 is preferred by original accused no.01 against the judgment and order of conviction recorded by the Ad hoc Additional Sessions Judge-2, in Sessions Case No. 101 of 2001, on 08.08.2007. By the said judgment and order, the appellant - accused no.01 is convicted for the offence punishable under Section 304(I) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years with fine of Rs.1,000/-, in default of payment of fine, rigorous imprisonment for three months. He was also convicted of the offence punishable under Section 504 of the IPC and sentenced to suffer rigorous imprisonment for six months. The

substantive sentences are to run concurrently. He is acquitted of the offence punishable under Section 323 of the IPC.

02. Criminal Appeal No. 379 of 2008 is preferred by the State of Maharashtra with a prayer for convicting original accused no.01 for which he was charged i.e. Section 302 of the IPC and also against the order of acquittal recorded against original accused no.02 for offences punishable under Sections 323, 302, 504, read with Section 34 of the IPC.

03. It is necessary to consider the evidence of Medical Officer who had conducted the autopsy. PW 11 Dr. Balaji had conducted the post mortem on 11.11.2004. Dead body of Quadeer was referred to him. He had found punctured stab wound over anteromedial aspect of left thigh (at the junction of upper and middle third) with dimensions of 3 x 1.5 cm, sharp edges, spindle shaped. He has stated that the injury was ante mortem. He had not noticed any injury on the scalp. According to him, the probable cause of death is "Hemorrhagic shock, due to stab injury to left thigh". He has stated that the injury and bleeding was sufficient in ordinary course of nature to cause death. According to him, if the patient would have been brought immediately to the hospital, then the deceased would have survived. Evidence of this witness will have to be read with the evidence of informant

and other 5 witnesses, who are the eye witnesses.

04. PW 1 Shabbirkhan has deposed that after he and his brother Quadeer had returned, accused Sayeed Khaja and his son Rayees had raised quarrels with them on the count of place to sit for fishing near the river. That quarrel was solved by son of informant and others. Thereafter he went to his brother Quadeer's house with son Saleem. They had Iftar and then all three came out of the house for Namaz. Accused Afsar, Sayeed Khaja, Gaffarkhan and Ameen came running towards them. Afsar had Jambiya (Big knife) with him. He abused and then inflicted blow on the thigh of Quadeer with said knife. Gaffar and Ameen were holding Quadeer at that time. Quadeer sustained bleeding injury and he fell down. Accused persons then ran away. He has stated that they had taken Quadeer to police station in a cycle rickshaw. He was then taken to Civil Hospital. Thus, it can be seen that if the injured would have been taken directly to the hospital that too by some faster mode of transport, there were chances of survival. He has not stated that no other faster mode of transport was available.

05. If we consider his testimony as it is, it can be seen that Afsar had come with preparation to cause injury to deceased. He was annoyed with the fact that Quadeer and informant were using his place of fishing near the river. However, we can not infer that he had

intention to commit murder of Quadeer. He had dispute with informant also, but it appears that Quadeer prayed to the injury. It was a single blow. It has struck the left thigh of Quadeer. If Afsar had the intention to commit murder of Quadeer, and when he was having big knife with him; it was easy for him to give a blow directly on the chest of deceased. It is not the case of the prosecution that in fact the blow was intended on the chest, but Quadeer resisted or made moves and then the said blow has hit the thigh of deceased. Thus, from the testimony of PW 1 Shabbirkhan it appears that accused No. 1 had no intention to commit murder of Quadeer.

06. PW 2 Zahedabee is the widow of deceased. She had come out of the house after hearing shouts. She has deposed that she had seen accused Gaffar and Ameen had caught hold of her husband and accused Afsar had given blow of the knife on his left thigh. Thus, she corroborates the informant. It is to be noted that in her cross, she has admitted that prior to the dispute which had taken place earlier, the relationship between her family and family of accused were good. The said earlier dispute was also resolved with the intervention of people and police. Therefore, there was no reason for Afsar to commit murder of Quadeer. It appears that he was angry due to the utilization of his place of fishing by informant and Quadeer.

07. Testimony of PW 3 Saleem, PW 4 Alsam and PW 7 Ibrahim are on same line. It was tried to be submitted on behalf of accused No. 1 that the testimony of these witnesses is not trustworthy. PW 3 Saleem has improved his version. PW 4 Alsam had no reason to be present at that place as he is resident of another area. PW 7 Ibrahim was the tenant of deceased Quadeer. Therefore, all these witnesses were interested witnesses. It is to be noted that presence of PW 3 Saleem was disclosed in the FIR itself. He was also proceeding with informant and deceased. Therefore, his presence can not be doubted. The so called improvements do not go to the root of the case. His testimony can not be discarded only on that ground. PW 4 Aslam has given reason for his presence at the relevant time at that place. According to him, he was on his way to Masjid for Namaz. Hence, his presence also can not be doubted. Testimony of PW 7 Ibrahim can not be discarded only on the ground that he is tenant of deceased and therefore he is interested. Since he is resident of that area, his presence can not be doubted. All these witnesses have said same fact. However, as aforesaid, Afsar had no intention to kill Quadeer. He would have directly given the blow in the chest, if he had such intention.

08. The panch witness PW 12 Madhukar and PW 13 Azizul have proved the panchnama of seizure of clothes of deceased and informant. PW 10 Manzoor is the panch

to the seizure of clothes of accused persons. However, in his cross he has stated that he is not aware about the contents of panchnama. Therefore, the said panchnama appears to be doubtful. Though it is stated in the said panchnama that the clothes of all the accused were blood stained, yet it ought to have been conclusively proved. None of the eye witnesses have stated that the clothes of the accused became blood stained.

09. Prosecution has come with a case that the weapon used in the commission of offence was discovered by Afsar. Prosecution has examined PW 6 Abbas – panch to prove the said discovery. He has deposed that Afsar had made statement and then led to the discovery of Jambiya (Big knife). There was nothing in his cross, which will create doubt about his version. The knife was concealed in a bush. Afsar had the knowledge about the place and therefore, the said discovery can be said to be relevant under Sec. 27 of Indian Evidence Act.

10. Thus, the evidence adduced by prosecution would show that Afsar was annoyed with the fact that informant and Quadeer had used the place of Afsar to catch fishes and therefore wanted to deter them. At the cost of repetition, it can be said that the circumstances does not show that he had the intention to commit murder of Quadeer. The site chosen by him to

inflict injury would indicate his intention. The learned Trial Court has rightly held that offence punishable under Sec. 302 of Indian Penal Code has not been proved against anybody. However, accused Afsar has been held guilty of committing offence punishable under Sec. 304 part I of Indian Penal Code. We do not agree with the same. The case would fall under Sec. 304 Part II of Indian Penal Code. The act was with an intention to cause bodily injury and Afsar was holding knife, which would have caused offence punishable with imprisonment of either description, hence Part II of Sec. 304 of Indian Penal Code will be attracted.

11. Prosecution has filed appeal challenging the acquittal of accused No. 2 Gaffar also. As regards his participation is concerned, his presence has been told by the witnesses. At the first place, it is to be noted that accused No. 1 Afsar was not present at the time of earlier dispute. He appeared only at the time of second incident, that too with big knife. Accused No. 2 Gaffar can not be said to have knowledge about the same, therefore, there was no question of sharing common intention with accused No. 1. Secondly, it is stated that accused No. 2 had caught hold of deceased. However, there is no conclusive evidence about it. He has been rightly acquitted by the learned Trial Court. It was the possible view that can be taken under the circumstances of the case.

12. Therefore, taking into consideration the discussion above, we hold that prosecution has proved that accused No. 1 has committed offence punishable under Sec. 304 part II of Indian Penal Code. Hence, the punishment awarded to him deserves to be proportionately awarded. The learned Trial Court has awarded imprisonment for 10 years. It is on the higher side. It would be appropriate to award rigorous imprisonment for 5 years to accused No. 1 for the said offence. As regards offence under Sec. 504 of Indian Penal Code is concerned, it is stated that accused Afsar uttered that, "Chhinalke Hamare Jage Pe Machhi Pakadte, Tum Ko Abhi Dekhate". This can not be taken as intentional insult, giving provocation to other person to break public peace. None of the witnesses have deposed about their reaction on hearing those words from accused No. 1. If those words had not resulted in any reaction, it will not amount to giving provocation. Hence, the conviction of accused No. 1 for the offence punishable under Sec. 504 of Indian Penal Code deserves to be set aside.

13. There is no merit in the appeal preferred by prosecution. It deserves to be dismissed. The appeal preferred by accused No. 1 deserves to be partly allowed. Hence, following order:

ORDER

1. Criminal Appeal No. 352 of 2007 is partly allowed.
2. The judgment and order of the Trial Court, convicting and sentencing appellant Sayed Afsar Sayed Khaja for the offence punishable under Sec. 304 Part I of Indian Penal Code is hereby modified. The sentence for offence punishable under Sec. 304 Part I of Indian Penal Code is set aside and the appellant is convicted for the offence punishable under Sec. 304 Part II of Indian Penal Code. Instead of sentencing him for 10 (ten) years, he is sentenced to suffer Rigorous Imprisonment for 5 (Five) years for the aforesaid offence and to pay fine of Rs.1,000/- (Rupees One Thousand Only) in default of payment of fine, he is to further undergo Rigorous Imprisonment for 3 (three) months.
3. He will be entitled to the set off for the period for which he was behind bars in this crime.
4. He is to surrender his bail bonds for undergoing remaining part of sentence.
5. Warrant of conviction be sent against him

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immediately for sending him to jail for
undergoing the sentence.

6. Appellant is hereby acquitted of the
offence punishable under Sec. 504 of
Indian Penal Code.

7. Criminal Appeal No. 379 of 2008 filed by
the State stands dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

(T.V. Nalawade)
JUDGE

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Bhagwan
Govindrao
Puranik

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by Bhagwan
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