

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

CRIMINAL APPEAL NO. 144 OF 2003

Feroz Khan s/o Habib Khan,
Age 24 years, Occu. Labour,
R/o. Old Jalna, Tq. & Dist.
Jalna.

... **Appellant**
(Ori. accused No. 1)

VERSUS

The State of Maharashtra

... **Respondent.**

...

Advocate for Appellant : Mr.G.D. Jain (appointed)
APP for respondent/State : Mr. P.G. Borade.

**WITH
CRIMINAL REVISION APPLICATION NO. 112 OF 2003**

Harunkhan s/o Sattarkhan,
Age 25 years, Occ. Rickshaw
driver, R/o. Old Jalna Tq. &
Dist. Jalna.

... **Applicant**
(Orig. Complainant)

VERSUS

- 1) Jafarkhan s/o Habibkhan,
Age 35 years, Occ. Labour,
R/o. Old Jalna Tq. & Dist.
Jalna.
- 2) Altafkhan s/o Yasinkhan,
Age 25 years, Occ. Labour,
R/o. Kazipura, New Jalna,
Tq. & Dist. Jalna.
- 3) Habibkhan s/o Ahmedkhan,
Age 55 years, Occ. Labour,
R/o. Old Jalna Tq. & Dist.
Jalna.

- 4) Afsarkhan Alias Ammukhan
S/o. Habibkhan, Age 45 years,
Occ. Labour R/o. Kazipura,
New Jalna, Tq. & Dist.
Jalna.

...Respondents

(Orig. accused No.
2 to 5)

Advocate for Applicant : Mr. M.C. Syed.

**CORAM : T.V. NALWADE &
K. L. WADANE, JJ.**

DATE : 05th June, 2018

JUDGMENT (PER K.L. WADANE, J)

1. This appeal is presented by the original accused No. 1 namely Feroz Khan s/o Habib Khan resident of Jalna against the judgment and order passed by the learned 2nd Additional Sessions Judge, Jalna, in Sessions Case No. 77/2002 on 30.01.2003, by which the present appellant has been convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs. 100/- in default rigorous imprisonment for three months. The appellant is also convicted for the offences punishable under section 452 and 324 of the Indian Penal Code and sentenced to rigorous imprisonment for two years and to pay fine of Rs. 100/-, in default, further rigorous imprisonment for three months for each offence.

2. Original complainant has filed Criminal Revision Application No. 112/2003 against the order of acquittal of the accused No. 2 to 5 and prayed to remand the Sessions Case for fresh enquiry and trial and decision on merits. Both, appeal as well revision are taken up together for disposal.

3. We have heard the arguments of Mr. Jain, learned counsel for appellant, Mr. Borade, learned APP for the respondent/State and Mr. Syed, learned counsel for revision applicant.

4. Brief facts of the case may be stated as follows:

Complainant Harun Khan (PW 1), a rickshaw driver by profession lodged a complaint to the police station Jalna alleging that on 22.01.2002 at about 9 am there was quarrel between his mother and wife of accused No. 2 Jaferkhan on account of small child. At that time accused No. 2 threatened the complainant and his family members. This fact was narrated to him by his mother.

5. On 23.1.2002 at about 9 a.m. when the complainant and his brother Gaffarkhan (since deceased) were taking their breakfast inside their house, at that

time somebody knocked the door of their house. Therefore Gaffarkhan went towards the door and opened it. When Gaffarkhan opened the door the present appellant Ferozkhan gave knife blow on the stomach of Gaffarkhan. Accused No. 2 Jafarkhan, his father Habibkhan (accused No. 4), Afsarkhan (accused No. 5) and one Nasru Khan entered into their house armed with sticks in their hand and started beating the complainant, his wife, mother and father.

6. Maternal uncle of complainant namely Babukhan (one of the injured), Salimkhan and Hamidkhan gathered there, at that time all the accused persons have also beaten them with the help of stick, kick blows, due to which the complainant's maternal uncle Babukhan (PW 5) received serious injuries on his neck and chest. One Mohd. Ayub, Jafer Bin Sayeed, Shaikh Mastan, Mannu and others intervened the matter. Thereafter the complainant and the persons assembled on the spot have taken Gaffarkhan to the Government hospital at Jalna, where he died during the medical treatment. Witness Babukhan was shifted to Government hospital at Aurangabad for medical treatment and after medical treatment he was discharged from the hospital.

7. It is further alleged that the complainant, his wife, mother, father and his maternal uncle have received serious injuries. Gaffarkhan succumbed to the injuries in the Government hospital at Jalna at about 10.30 a.m. After receipt of the first information report (Exh. 48), P.S.O. of Kadim police station Jalna registered the crime for the offences punishable under section 302, 147, 148, 149, 452, 326, 323 of the Indian Penal Code and under section 135 of the Bombay Police Act.

8. After registration of the crime initially the investigation of the crime was carried out by P.W. 14 Shaikh Sattar, PSI, of the said police station. He visited the spot and prepared spot panchnama (Exh. 36), inquest panchnama (Exh. 37). He arrested accused No. 1 on 23.1.2002. He seized the clothes of the deceased. Accused No. 1/appellant has made a statement that he will produce the weapon as per memorandum (Exh. 58) and in pursuance to the statement he has produced the knife (Article 3) vide Exh. 59.

9. On 06.02.2002 the investigation was handed over to PW 13 Mr. S.N. Nimmanwad, A.P.I. During the investigation Mr. Nimmanwad seized the clothes of injured Babukhan (PW 5). He recorded the statement of

witnesses including Babukhan, Sugrabi, Saminabi and others. Seized muddemal articles were sent to chemical analysis and its report is produced at Exh. 79. After doing as usual investigation, the investigating officer submitted the charge-sheet against the accused persons in the Court of Jt. J.M.F.C. Jalna, who committed the case for its trial to the Sessions Court accordingly. Learned 2nd Additional Sessions Judge, Jalna, framed the charge vide Exh. 25. Its contents were explained to the accused persons, to which they denied and claimed to be tried.

10. Defence of the present appellant can be seen from the statement under section 313 of the Code of Criminal Procedure that the deceased Gaffarkhan assaulted him with the help of iron rod on the reason of a small child, then there was scuffle and he did not know how Gaffarkhan received injuries. So looking to his statement under section 313 of the Code of Criminal Procedure it appears that the present appellant has not disputed his presence on the spot or the time and place of incident. On this background, the evidence adduced on behalf of prosecution has to be scrutinized.

11. We have gone through the entire evidence on record, oral as well as documentary. On perusal of the

same it appears that PW 1 Harunkhan-complainant, PW 2 Sattarkhan (father of the complainant), stated to be an eye witness, PW 3 Naser Bin Sayyed Mubarak Basme, a driver witness deposed that the accused No. 1 to 5 were seen running from the spot, PW 4 Shaikh Mastan Babamiya, a witness who assisted to lift the injured and keep them in the rickshaw, PW 5 Babukhan, eye witness and injured, PW 6 Jafer Bib Sayyed, before whom the injured were disclosed the name of the assailants, PW 7 Jarina Begum (wife of complainant), stated to be eye witness, PW 8 Azizkhan, panch witness to prove the memorandum and recovery of knife (Article 3), PW 9 Sugrabi w/o Sattarkhan (mother of the complainant) who had quarrel with the wife of accused No.2 on the previous day of the incident, PW 10 S.N. Bhange, A.S.I., who received complaint (Exh. 48), P.W. 11 police head constable Mr. Shelke, who carried the muddemal to Chemical Analyzer along with forwarding letter (Exh. 71), P.W. 12 Dr. Prashant Ambhore who examined Babukhan, Harunkhan and Sugrabi and issued injury certificates (Exh. 75, 76 and 77), P.W. 13 Mr. Nimmanwad and P.W.14 Mr. Hamid, who were the investigating officers.

12. To prove the offence punishable under section 302 of the Indian Penal Code initially it is for the prosecution to establish that the deceased Gaffarkhan had met with an homicidal death and to prove this fact the prosecution has relied upon the admitted documents i.e. inquest panchnama, postmortem report, coupled with oral evidence of PW 12 Dr. Prashant. On perusal of the inquest panchnama (Exh. 37) it appears that there was injury on the chest of the deceased Gaffarkhan. So the concerned Medical Officer has given provisional medical certificate (Exh. 38) and postmortem report (Exh. 41). Both the documents were admitted. On perusal of the postmortem report it appears that cause of death is due to haemorrhagic shock due to liver injury with multiple injuries. This certificate is issued by the Medical Officer, Civil Hospital, Jalna, who noted external injuries and internal injuries as follows :

1) Sutured wound present over lower chest wall ®, anteriorly at 10th rib region. After suture opened gush of blood came out.

Injury was Elliptical stab injury transversely placed.

1 ½ inch long x 1.05 cm breadth.

After exploring injury. Path. Cutting 8th rib,
injured superior surface of ® lobe of liver,
Diaphragm and ® pleura.

13. In addition to that PW 12 Dr. Prashant has deposed that on 23.01.2002 when he was attached to the Civil Hospital Jalna injured Gaffarkhan, Babukhan along with other injured persons were brought to the hospital for their medical treatment by their relatives. Gaffarkhan and Babukhan were seriously injured. Gaffarkhan succumbed to the injuries when the medical treatment was going on in the hospital. So looking to the contents of the postmortem report, which is an admitted document, coupled with the oral evidence of PW 12 Dr. Prashant, it appears that the homicidal death of Gaffarkhan has been proved by the prosecution.

14. After establishment of the homicidal death of the deceased, prosecution has to establish that who had caused the death or who was the author of the injuries sustained to deceased Gaffarkhan. To prove this fact, prosecution has relied upon oral evidence of the witnesses as referred above.

15. To prove the motive or reasons behind the crime the prosecution has examined PW 9 Sugrabi w/o

Sattarkhan, who deposed that one day earlier of the incident there was quarrel between herself and the wife of accused No. 2 on the reason of small children. On the date of incident at about 7 to 7.30 a.m. when she was standing in front of her house, wife of accused No. 2 abused her. Then accused No. 2 and his wife both have severely beat her with the help of stick. Therefore she went to police station to report the matter. So from the oral evidence of this witness, it appears that the main incident occurred due to previous quarrel between PW 9 Sugrabi and the wife of accused No. 2.

16. On scrutiny of the oral evidence of PW 3 Naser who deposed that accused No. 1 to 5 were seen running from the spot and accused No. 1 was holding knife. In the cross-examination this witness has admitted that he cannot say the names of the accused No. 1 to 5. On the sole admission it cannot be believed that this witness was knowing the names of accused No. 1 to 5. Therefore, the oral evidence of this witness is appears to be unacceptable.

17. Next witness PW 4 Shaikh Mastan deposed that he has assisted in lifting the injured Gaffarkhan and Babukhan in rickshaw. He further deposed that

Gaffarkhan and Babukhan have disclosed the names of the assailants. However, it is not established by the prosecution that what was the condition of the aforesaid injured at the time of alleged disclosure to this witness. Therefore, the evidence to that extent is unacceptable.

18. To establish offences levelled against the accused persons the prosecution has mainly relied upon the oral evidence of the eye witnesses PW 1 Harun-complainant, PW 2 Sattar, PW 5 Babukhan.

19. PW 1 Harun deposed that on 23.01.2002, in the morning, he himself, his wife, brother Gaffarkhan and his father were sitting inside their house. He further deposed that there was push to the door of their house. At that time Gaffarkhan opened the latches of the door, at that time accused No. 1 gave knife blow on the stomach of his brother. He further deposed that then all the accused No. 1 to 5 entered into their house along with one Altaf and accused No. 2 to 5 have beaten him, his wife, his brother, mother, with the help of stick. It also reveals from his oral evidence that meanwhile his maternal uncle PW 5 Babukhan came there. At that time the appellant/accused No. 1 assaulted him on his neck and chest with the help of knife. He

further deposed that after the incident injured Gaffarkhan and Babukhan were taken to Civil Hospital for medical treatment in the auto-rickshaw, where Gaffarkhan died at about 10.30 a.m. and the injured Babukhan (PW 5) referred to Ghati hospital, Aurangabad, as he had received serious injuries. This witness himself has reported the matter to the police station by filing first information report (Exh.48).

20. On perusal of evidence of PW 2 Sattar it appears that he has deposed as per the oral evidence of PW 1 Harun. From the record it appears that PW 5 Babukhan and Sugrabi were injured in the same incident, therefore, their oral evidence is also material to establish the offence.

21. PW 5 Babukhan deposed that on 23.1.2002 in between 8.30 a.m. to 9 a.m. he was going to petrol pump for fuel. He was passing in front of the house of Sattarkhan at that time he had seen accused No. 1 to 5 and one Altaf on road. Therefore, he had gone on the spot. At that time accused No.1/appellant stabbed Gaffarkhan on his stomach with the help of knife. Thereafter, Gaffarkhan fall on the earth. When this witness was climbing the stares of the house, accused No. 1 gave one blow of knife on his chest and accused

No. 2 and 5 caught hold him and accused No. 1 gave one blow of knife on his neck. Same is the version of another injured Sugrabi PW 9.

22. On perusal of evidence of PW 12 Dr. Prashant it appears that all the injured persons were referred for medical examination and on examination of Babukhan, PW 12 Dr. Prashant noted stab injury on the right infra memory region 5th intercostal space, 3 x 1 x 1 cms vertical and elliptical and second stab injury on left lateral side of neck behind ear 3 x 1 x bone deep vertical. PW 12 Dr. Prashant deposed that this witness was restless, therefore, he was suspecting lungs injury. Therefore the patient was referred to the Medical College and Hospital at Aurangabad for further medical treatment.

23. PW 12 Dr. Prashant noted the following injuries on the person of PW 1 Harun :

(1) Abrasion on left eye brow 1 x 1.5cm.

(2) Contusion on left scapula region, 5 x 5 cm.

Both injuries caused by hard and blunt object within 24 hours.

24. PW 12 Dr. Prashant also noted following injuries on the person of Sugrabi.

- (1) Abrasion on left forearm, multiple injury 9 to 10 cms region, flexor aspect, 1x2, 2x2, 3x1 cm.
- (2) Abrasion on left side neck, 2x1 cm.

Both the injuries are caused by blunt and hard object, within 24 hours.

25. So the complainant and Sugrabi are the injured persons and it is seen from the record that they received such injuries during the incident, due to which their presence at the spot of incident is proved and same is natural, being the family members of the deceased Gaffarkhan. Thus, the oral evidence of above said witnesses are very much clear to establish that the accused No.1 assaulted the deceased Gaffarkhan by stabbing him on the vital part of the body. On perusal of the cross-examination of the aforesaid witnesses, nothing is found to disbelieve the oral evidence of the aforesaid witnesses, therefore, there is no reason to disbelieve their oral evidence particularly when it is supported with other evidence like medical evidence.

26. Next aspect is regarding recovery of weapons at the instance of accused. PW 8 Azarkhan examined to prove the memorandum and recovery panchnama of the knife (Exh. 58 and 59), who deposed that on 27.01.2002

he was called by the police officer to act as a panch. In presence of this witness, the appellant/accused No. 1 has made a discovery statement and state that he is ready to produce the knife. Accordingly, memorandum panchnama was prepared at Exh. 58. In pursuance to the memorandum he produced one knife concealed under pitch. It was seized by the police as per panchnama (Exh. 59). From the chemical analysis report it appears that the sized articles i.e. clothes of the deceased, knife, were sent to chemical analyzer, on which human blood was detected.

27. To establish whether the incident occurred at a spur of moment or the accused was intending to commit the murder of the deceased. It is not a case that a sudden quarrel was taken place and therefore the accused No. 1 has picked up the weapon and stabbed Gaffarkhan. From the following circumstances it is very much clear that the accused No. 1 was intending to commit the murder of Gaffarkhan, the brother of the complainant, namely; (i) there was quarrel between the wife of accused No. 2 and Sugrabi i.e. the mother of the deceased on the previous day. (ii) The accused No. 1 already holding a knife in his hand entered in the house of the complainant indicates that the appellant

accused made preparation to commit serious offence.

(iii) The accused No. 1 stabbed Gaffarkhan as well as Babukhan on the vital part of their bodies with deadly weapon like big knife. (iv) The injuries were serious in nature and on the vital part of the bodies. (v) There was recovery of the knife, stained with blood at the instance of accused No. 1.

28. All the aforesaid circumstances clearly indicate that accused No. 1 has intention to commit murder of the family members of the complainant. Accordingly, he did it by assaulting Gaffarkhan on the vital part of his body. Fortunately, the another injured, who received serious injuries on his vital part of body is survived. All the aforesaid circumstances clearly indicate that the accused No.1 with intent to commit murder of Gaffarkhan has assaulted him and other witnesses. Therefore, the prosecution has successfully established the offence of murder against accused No. 1.

29. The original complainant has preferred Criminal Revision Application No. 112/2003 and thereby prayed to remand the matter. We have considered the oral evidence and the circumstances appearing in the evidence as against the accused No. 2 to 5. The

evidence against them are not free from material contradictions and omissions. The evidence of the prosecution is not consistent in material particular in reference to the assault on the injured persons and the particulars of the accused who assaulted them with which weapon. No doubt, the injury certificates of the three injured persons are on record. However, those are not sufficient to indicate that which particular accused has caused which injury to the injured witnesses. So considering the scope of the revision, it is not permissible to reappraiate the evidence. Therefore, the revision is liable to be dismissed.

30. In view of the above, we are of the opinion that the prosecution has succeeded in establishing the offence of murder against the appellant/accused No. 1.

31. We have carefully gone through the evidence on record, the reasons recorded by the learned Additional Sessions Judge and came to conclusion that the learned Additional Sessions Judge has rightly convicted the accused No.1/appellant and has rightly acquitted the accused No. 2 to 5.

32. In view of the above, we pass following order :

ORDER

1. Criminal Appeal No. 144/2003 and Criminal Revision Application No. 112/2003 are dismissed.
2. Appellant/accused No. 1 to surrender bail bond for undergoing the sentence.
3. Fees of learned counsel Mr.Jain, who is appointed as amicus-curiae, quantified to Rs. 7000/- (Rs. Seven Thousand only).
4. Criminal appeal as well as criminal revision application are disposed of.

(K. L. WADANE, J.)

(T.V. NALAWADE, J.)

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