

Sharayu Khot.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 483 OF 1999

Shri Yashwant Shivaji Kamble

**...Appellant
(Original Accused)**

Versus

1. State of Maharashtra

2. Shri. Tukaram Ghewari

...Respondents

Ms. Madhavi Tavanandi, for the Appellant.

Ms. P.P. Shinde, APP, for the Respondent-State.

**CORAM : ABHAY S. OKA & AND
RIYAZ I. CHAGLA, JJ.**

DATE : 3 March 2018

ORAL JUDGMENT : (Per A.S. Oka, J.)

1. By this Appeal, the Appellant-Accused has taken an exception to the judgment and order dated 30 July 1999 passed

by the learned Additional Sessions Judge at Kolhapur. By the said judgment and order, the Appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code. He was sentenced to suffer life imprisonment and to pay fine of Rs. 5,000/-. In default of the payment of fine, he was directed to undergo rigorous imprisonment for further two years.

2. The Appellant was arrested on 4 January 1998 which is the date of the incident and he continued to be in the custody throughout the trial. By the order dated 28 June 2000 passed by a Division Bench of this Court, he was ordered to be enlarged on bail and accordingly, he has been enlarged on bail.

3. The prosecution case in brief is that the Appellant was employed as a cook in a hotel known as 'Vishwas Hotel' situated in front of the District Court, Kolhapur. The victim Ramchandra was about 16 years old boy who was working as a waiter in the said hotel along with other boys.

4. It is the case of the prosecution that on Sunday, 4 January 1998, which was a weekly holiday for the hotel the incident occurred. At the time of the incident, the deceased and other boys employed in the said hotel situated in the area of CPR Hospital in front of District Court, Kolhapur were playing a game of cricket in open courtyard of CPR Hospital. The Appellant-Accused was preparing food at that time in the hotel. According to the case of prosecution, the owner of the hotel, Umesh (PW-6) visited the hotel at about 10.30 a.m., when the Appellant was sitting in the hotel. On enquiry, he told PW-6 that he was preparing food for the boys working in the hotel.

5. While the victim was playing cricket along with the other boys employed in the hotel, at about 2.00 p.m., he told other boys that he was hungry. Therefore, he left the place where they were playing and entered the hotel.

6. PW-2 Suresh and PW-4 Sachin are the persons who were employed in the hotel along with the deceased and who

were playing cricket. 10 to 15 minutes after the deceased entered the hotel, the boys who were playing cricket heard the shouts. They realized that the noise was of the deceased. They rushed to the hotel. According to the prosecution, a scuffle was going on and the Appellant was holding collar of the deceased. It is the case of the prosecution that the Appellant told that the deceased was teasing him and therefore, he used a dagger in his hand and gave a blow on the left hand side of the back of deceased Ramchandra. It is alleged that the Appellant along with the weapon ran away towards the side of the District Court. The deceased was taken to hospital where he was declared as dead.

7. It appears that the Appellant appeared before the P.S.O of Laxmipuri Police Station and gave information to the police that he has injured the deceased.

8. Postmortem was done by PW-3 Dr. Manishi Nagaonkar. The cause of death was assigned by her as

“Hemorrhagic shock due to penetrating lung and heart injury”.

9. The prosecution examined eleven witnesses. PW-1 Banda Katkar and PW-2 Suresh Khot are the alleged eye witnesses. PW-4 Sachin Yadav is the owner of tea stall near C.P.R. Hospital. PW-5 is Shivaji Dalavi who identified the body of the deceased, PW-3 Dr. Manishi Nagaonkar did autopsy on the dead body. PW-7 Ashok Yenehavdikar was PSI on duty at Laxmipuri Police Station. PW-8 Ravindra Patil was the police constable on emergency duty. PW-9 Sadashiv Sutar was API attached to Laxmipuri Police Station, who had registered First Information Report and had carried out investigation. The learned Additional Sessions Judge has believed the evidence of the prosecution and convicted the Appellant as aforesaid.

10. The learned Counsel appearing for the Appellant has taken us through the oral and documentary evidence. She submitted that going by the evidence of PW-3 Dr. Manishi, there is only a single injury on the lung of the

deceased. She pointed out that though the prosecution has described the weapon of the offence as Jambiya, it is in fact a kitchen knife. She pointed out that after playing cricket for a considerably long time, the deceased entered into the kitchen as he was hungry. The Appellant was cooking food for the boys working in the hotel. Her submission is that the fact that there was no intention on the part of the Appellant to commit murder is very clear. She submitted that there was no premeditation. Moreover, it appears that there was some dispute, as the deceased was not given proper food. She submitted that even according to the prosecution's case, only one blow of weapon was given by the Appellant, which unfortunately proved to be fatal. Her submission is that in absence of evidence regarding the presence of intention on the part of the Appellant, the prosecution has not established that the Appellant has committed culpable homicide amounting to murder. Her submission is that as there was no intention on the part of the Appellant to cause such death, he could not have been convicted for the offence punishable under Section 302 of the Indian Penal

Code. She relied upon a decision of the Division Bench of this Court in *Dattatray Shamrao Chopde Vs. State of Maharashtra*¹.

11. Learned Public Prosecutor invited our attention to the evidence of PW-2 and PW-4. She submitted that it is clear from postmortem notes and evidence of Dr. Manishi that the blow penetrated one lung and caused heart injury as well. She would, therefore, submit that the intention was very much there.

12. We have given careful consideration to the submissions. The only question to be decided is, whether the Appellant is guilty of commission of the offence punishable under Section 302 or the offence punishable under Section Part of Section 304 of the Indian Penal Code.

13. We have perused the evidence of Dr. Manishi who conducted autopsy. From her evidence and from the

¹ *Criminal Appeal No. 770 of 2005 dated 9 April 2014*

postmortem notes at **Exh.17** and in particular, from Column 17 of postmortem notes, it is clear that there was only one injury on the back left side of the chest (4th intercostal space penetrating stab wound). We have already noted the prosecution's case as regards the incident. The deceased and other boys employed in the hotel were playing cricket in open courtyard of CPR Hospital which is close to the hotel. They were playing cricket from the morning till around 2.00 p.m. According to case of PW-2, the deceased left the game of cricket and told others that he was hungry and therefore, he wants to eat. After he left the playing area, the incident occurred in 10-15 minutes. Going by the evidence of PW-2, it appears that the deceased was teasing the Appellant. Even according to the case of prosecution, the Appellant was preparing food for the deceased and other boys playing cricket who were employed in the hotel.

14. Therefore, the case made out by the Appellant regarding the absence of premeditation will have to be accepted. Taking the prosecution case as it is, it is very difficult to

attribute an intention to the Appellant of causing death or an intention of causing such bodily injury as he knew was likely to cause the death of the person to whom harm is caused. Considering the manner in which injury was inflicted upon the deceased, it cannot be disputed that the Appellant had knowledge that his act is likely to cause death.

15. Therefore, this is a case where by setting aside the conviction under Section 302 of the Indian Penal Code, the accused will have to be convicted for the offence punishable under the second part of Section 304.

16. Now the question is what should be the sentence. The submission of the learned APP is that maximum sentence of ten years should imposed, as the Appellant is guilty of causing the death of a 16 years old boy, who was working in the same hotel. Learned Counsel appearing for the Accused pointed out that the arrest panchnama discloses that at the time of arrest on 4 January 1998, the age of the Appellant was about

42 years. Therefore, today the Appellant is a senior citizen having 62 years of age. She, therefore, prayed for leniency.

17. The deceased had entered the kitchen of the hotel where the Appellant was cooking food. The age of the deceased was only 16 years. Going by the prosecution case, there must have been of altercation between the Appellant and the deceased. The Appellant inflicted an injury on the deceased, which penetrated his lungs and also caused injury to the heart. Moreover, the deceased was only 16 years boy. In normal course, we would have been justified in sentencing the Appellant to serve the maximum term of ten years. In this case, the Appellant-Accused is on bail since end of June 2000 and within the span of 17-18 years, he has become a senior citizen. Considering these circumstances, we are of the view that in the facts of the case, the Appellant will have to be undergo rigorous imprisonment for seven years. The order regarding fine will have to be maintained.

18. Accordingly, we pass the following order.

- (i) Appeal is partly allowed;
- (ii) The conviction of the Appellant-Accused under Section 302 of the Indian Penal Code is converted into conviction for the offence punishable under second part of Section 304;
- (iii) The Appellant-Accused is sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 5,000/- (Rupees Five Thousand only). In default payment of fine, he shall undergo rigorous imprisonment for a period of two years;
- (iv) We grant time of six weeks to the Appellant-Accused to surrender from the date on which this judgment and order is uploaded;
- (v) The Appellant-Accused will be entitled to set off for his period of detention from 4 January 1998 till he was released on bail on the basis of the order dated 28 June 2000;
- (vi) The Appeal is partly allowed on the above terms.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]