

JPP

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

CRIMINAL APPEAL NO. 178 OF 2013

Shaukat Ali Mohammed Hussein Shaikh
Aged : 29 yrs., Occ.: Tailor,
R/at : Dyaneshwar Nagar, Jai Maa
Sharda Rahiwasi Singh,
Galli No. 1, Room No. 19,
Kherwadi, Bandra (East),
Mumbai – 400 051.
(Presently lodged at Nasik Road
Central Prison).

... Appellant
Original Accused

V/s.

The State of Maharashtra
(At the instance of Kherwadi
Police Station vide C.R.No. 263 of 2008) ... Respondent

Ms. Nasreen S.K. Ayubi, Appointed Advocate for the Appellant.
Mr. V.B. Konde Deshmukh, APP for the Respondent - State.

***CORAM : S.S. Shinde and
A.S. Gadkari, JJ.***

DATE : 19th October 2018.

Oral Judgment (Per A.S. Gadkari, J.):

The Appellant has impugned the Judgment and Order
dated 11 September 2009, passed by the 1st Ad-hoc Additional

Sessions Judge, Greater Mumbai in Sessions Case No. 155 of 2009, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/-, in default of payment of fine to further suffer rigorous imprisonment for two months.

2. Heard Smt. Nasreen Ayubi, learned Advocate appointed by the Legal Aid Committee to represent the Appellant and the learned APP. Perused the entire record.

3. It is the prosecution case that the Appellant alongwith his wife and daughter namely Shabnam, aged about one and half years, was residing on the ground floor of Room No.19, Chawl No.1, Jai Ma Sharda Rahivasi Sewa Sangh, Sant Dnyaneshwar Nagar, Bandra (East), Mumbai – 400 051. The brother of the Appellant namely Mohamed Ali Mohamed Hussain (PW-1) was residing on the mezzanine floor with his wife in the said room. The access to the room of Mohamed Ali (PW-1) was provided by a separate staircase. The date and time of incident is 19.10.2008 at about 3.00 a.m.

. It is the prosecution case in brief that, the Appellant had borrowed a sum of Rs.1,000/- by hypothecating the ornament namely “Mangalsutra” of his wife namely Tabassum (deceased) with Bhagwantilal R. Kothari (PW-4) and the Appellant was not redeeming the same despite requests from his wife Tabassum (deceased). It is the further prosecution case, that Tabassum (deceased) therefore had threatened the Appellant that, if he does not redeem the said ornament from Kothari (PW-4), she will sell their daughter and from that, she would redeem the said ornament. This is the motive propounded by the prosecution for commission of the said crime. That on 19.10.2008 at about 3.00 a.m., the Appellant assaulted his wife Tabassum (deceased) with a blade of scissor and after hearing her shouts from the ground floor, Mohd. Ali (PW-1) i.e. the brother of the Appellant came down from the mezzanine floor which has a separate staircase and he peeped through the window of the room of the accused and noticed in the light of night lamp that, the Appellant was stabbing the deceased. As despite knocking the door repeatedly, the Appellant did not open the door, he went inside the room through

the window and put on the electric lights. He noticed that, blood was oozing from the abdomen of Tabassum (deceased) and the bed sheet was soaked with blood. Upon being asked to the Appellant, the Appellant told the aforesaid reason for assaulting Tabassum. Thereafter, Mohamed Ali (PW-1) and the Appellant took the deceased to Bhabha Hospital at Bandra. The said fact that Tabassum (deceased) was being removed from the said room by the Appellant and Mohamed Ali (PW-1) was seen by Mohamed Umar Ansari (PW-2), neighbour of the Appellant. After the deceased was admitted to hospital at 3.45 a.m., she succumbed to injuries at about 5.45 a.m. Dr. Rajesh Dere (PW-7) performed Autopsy on the dead body of Tabassum (deceased). During the course of post-mortem examination, Dr. Rajesh Dere (PW-7) noticed the following anti-mortem external injuries :-

- (I) Stab wound of size 3 c.m. X 2 c.m. X 2 c.m. over left side of chest at 10.00 O'clock position from left nipple. On dissection, injury to left lung present, tract director medially towards right (Sutured).
- (II) Stab wound of size 3 c.m. X 3 c.m. with intestinal loops

coming out over left side of upper abdomen directed medially.

(III) Punctured wound of size 1 c.m. X ½ c.m. over umbilicus.

(IV) Stab wound of size 2 c.m. X 2 c.m. with intestine visible over right lumbar region directed laterally.

(V) Incised wound of size 3 c.m. X 1 c.m. X 1 c.m. over right palm (right hand).

(VI) Contused Lacerated Wound of size 2 c.m. X 1 c.m. X ½ c.m. over right thigh on anterior upper 1/3 aspect.

(VII) Contused Lacerated Wound over left leg of size 1 c.m. X ½ c.m. anteriorly.

(VIII) Contused Lacerated Wound over right thigh laterally upper part of size 3 c.m. X 1 c.m. X ½ c.m.

(IX) Abrasion of size 2 c.m. X 1 c.m. over right knee.

. During the said postmortem examination, he further noticed the following internal injuries :-

(I) Haemothorax 50 m.l. in thorax.

(II) Left lingual lung tear sutured.

(III) Hemoperitoneum 50 m.l. in peritoneal cavity.

(IV) Small intestine perforation present.

. He therefore opined, as to the probable cause of death as “hemorrhagic shock due to stab wounds” (unnatural death).

4. During the course of investigation, the Police arrested the Appellant on the same day i.e. on 19.10.2008. The Appellant disclosed that he had concealed the said weapon beneath the cupboard which was lying in his house and from the said place he gave recovery of the said weapon. Recovery of a blade of scissor was effected under Section 27 of the Indian Evidence Act at the instance of the Appellant in presence of panch witness Nitin Wagle (PW-3). After completion of investigation, the Police submitted charge-sheet in the Court of the learned Metropolitan Magistrate, 32nd Court at Bandra, Mumbai.

. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Magistrate committed the case as contemplated under Section 209 of the Code of Criminal Procedure to the Court of Sessions, Mumbai, for trial.

5. After committal of the said case, the Trial Court framed charge on 3.6.2009 below Exhibit-2. The said charge was read

over and explained to the Appellant in vernacular language to which he denied and claimed to be tried. The defence of the Appellant is that deceased Tabassum had caused self-inflicted injuries in the fit of anger and he is not the author of the said injuries. He denied that he committed the present offence.

6. The prosecution, in support of its case, examined in all eight witnesses. The learned Trial Court, after recording the evidence and after hearing the parties to the said case was pleased to convict and sentence the Appellant by the impugned Judgment and Order dated 11.09.2009 as stated hereinabove.

7. A minute perusal of the evidence available on record would indicate that the Appellant and Mohamed Ali Mohamed Hussain Shaikh (PW-1), were residing in the same house. The Appellant was residing on the ground floor and Mohamed Ali (PW-1) was residing on the mezzanine floor. Access to the house of Mohamed Ali was separately provided by a staircase. Though Mohd. Ali has been declared hostile for not supporting the case of the prosecution with respect to the recitals of Exhibit-8, i.e. part of First Information Report, he in his examination-in-chief, has

stated that on 19.10.2008 at about 3.00 a.m. he woke up by hearing shouts from the ground floor and therefore, he rushed there. He repeatedly knocked the door of the Appellant, however, the Appellant did not open it. He therefore went inside the room from the window and switched on the light. He noticed in the light that, the Appellant was sitting in the said room alongwith his daughter and the head of the deceased was on his lap. He saw that, blood was oozing out from the abdomen of Tabassum (deceased) and the bed sheet was soaked with blood. He has further admitted that he, alongwith Mohamed Umar Ansari (PW-2), a neighbour had shifted Tabassum to Bhabha Hospital and in the said process his clothes namely shirt and lungi were stained with blood. In his cross-examination he has admitted that there are 50 houses situated in the said chawl. Mohamed Umar Ansari (PW-2) has corroborated the version of Mohamed Ali (PW-1) and has further stated that the distance between his house and the Appellant was only 5 feet. He has further stated that, at about 3.00 a.m. he heard the shouts and knocking the door and asking the Appellant to open the door and therefore, he peeped through

the gap of his door and saw Mohamed Ali (PW-1) asking through the window, to the Appellant, to open the door.

8. Thus, the presence of the Appellant at the scene of offence is an admitted fact. There is recovery of a blade of scissor effected at the instance of the Appellant in the presence of Nitin Wagle (PW-3). Bhagwantilal Kothari (PW-4), a jeweler by profession has admitted that by hypothecating the ornament of deceased Tabassum, namely “mangalsutra”, he had advanced a loan of Rs.1,000/- to the Appellant. The motive propounded by the prosecution for the commission of the present crime is that, the Appellant did not redeem the said ornament despite repeated request by Tabassum (deceased), she threatened him that she would sell their daughter, get the money and redeem the said ornament.

9. The defence of the Appellant that, the wounds suffered by Tabassum (deceased) were self-inflicted wounds has no substance in it as the Appellant, while cross-examining the witnesses have not put any relevant questions to them. The Medical Officer Dr. Rajesh Dere (PW-7) has in unequivocal terms

stated that, the death was caused due to hemorrhagic shock due to stab wounds (unnatural) and the external injury nos. I and II mentioned herein above are sufficient in ordinary course of nature to cause death. The perforation of lung and intestine of the deceased would indicate that the said stab wounds were caused with utmost force and the same are not possible by self-infliction, by the deceased.

10. The learned Counsel appearing for the Appellant submitted that it is during the course of quarrel and due to grave and sudden provocation, the Appellant assaulted the deceased and he had no intention to commit her culpable homicide and therefore, the present offence would fall within the purview of Section 304 Part II of the Indian Penal Code and not within the purview of Section 302 of the Indian Penal Code.

. The evidence on record clearly suggests that, the room wherein the Appellant was residing was situated in a densely populated locality. As noted above, Mohamed Ali (PW-1) and Mohamed Umar Ansari (PW-2) in their testimony have admitted that there were 50 rooms in the said chawl and the house of

Mohd. Umar Ansari (PW-2) was situated just adjoining to the house of the Appellant. Mohamed Umar Ansari (PW-2) is the immediate neighbour and whose house is situated hardly at a distance of 5 feet and he in the wee hours of 19.10.2008 did not hear quarrel from the house of the Appellant. Therefore, an irresistible inference can be drawn that the Appellant with pre-meditation has committed the present crime in the wee hours, when Tabassum (deceased) was fast asleep. The medical evidence is also silent on the part of any resistance by the deceased Tabassum.

11. After taking into consideration the entire evidence available on record, we are of the considered view that it is the Appellant who alone is the perpetrator of the present crime and has committed murder of his wife namely Tabassum on 19.10.2008 at about 3.00 a.m., as alleged by the prosecution. We find that there are no merits in the Appeal and the Appeal is accordingly rejected.

12. Before parting with the Judgment, we place on record our word of appreciation for the efforts put in by Smt. Nasreen

Ayubi, learned Advocate appointed by the Legal Aid Committee. We quantify her fees at Rs.10,000/- as professional charges. The concerned authority is hereby directed to pay the said professional remuneration to the learned Advocate Smt. Nasreen Ayubi within period of four weeks from the date of receipt of the present order.

(A.S. Gadkari, J.)

(S.S. Shinde, J.)