

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

CRIMINAL APPEAL NO.804 OF 2012

Ramzan s/o Vazir Shaikh,]
Age: 24 years, Oc: Service,]
R/o: Saibanagar, Near Bhairavnath]
General Stores, Kalwa, Dist: Thane,]
(At present in Central Jail, Thane)]..Appellant
(Org. Accused)

Versus

The State of Maharashtra]
(Through Kalwa Police Station)]..Respondent

Mr. Nitin Sejpal a/w Mrs. Pooja Sejpal and Ms. Akshata Desai,
Advocates for the Appellant.

Mr. Ajay Patil, APP for the Respondent - State.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 3rd JULY, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Being aggrieved by the judgment and order passed by the learned Session Judge, Thane in Sessions Case No.324 of 2007, thereby convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code ("IPC" for short) and sentencing him to suffer imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine to suffer further

rigorous imprisonment for one year, the Appellant has approached this Court.

2] The prosecution case in brief as could be gathered from the material placed on record is thus :-

The deceased Nitin Shantaram More, who was employed as driver in Thane Municipal Corporation was residing along with his brother PW-3 – Sachin, his mother Shakuntala and his wife PW-13 – Neeta. On the date of the incident i.e. on 8th April 2007, their relative PW-11 – Vasant had come to their house for giving invitation card of the marriage of his son. At around 5.00 to 5.30 p.m. all of them i.e. deceased Nitin, PW-3 – Sachin, PW-11 – Vasant and Shakuntala, mother of the deceased were talking to each other on first floor. PW-13 - Neeta after bathing a child left him on the first floor and went down stairs for cooking. At around 6.00 p.m., the accused arrived in front of the house and called the deceased out of the house. The deceased came in the balcony of the first floor and saw the accused standing in front of the grocery shop of his house. The accused hurled abuses and exhorted the deceased saying

that “Kya re bhai ho gaya kya”. It is the prosecution case that the motive for committing the crime was that the sister of the accused had love affair with one Dnyaneshwar Patil and that the deceased had allowed him for roaming on the motor-bike with him. After abusing the deceased, the Appellant started assaulting the deceased with the knife. When PW-3 – Sachin, PW-13 – Neeta and mother of the deceased came there, he started wielding knife and threatened that if anyone comes forward, he would also attack them. After sometime, he left.

3] The deceased was immediately taken to the Government Hospital, Kalwa. The medical experts examined the deceased and provided first-aid treatment being a medico legal case No.10911 of 2007. The requisite information was given to the Police Station Kalwa. PSI Nikumb recorded statement of the deceased, on which endorsement of the medical officer was also taken. After going to Police Station, on the basis of the oral statement of the deceased, an FIR came to be registered vide Crime No.I-107 of 2007 for the offence punishable under Section 307 of the IPC. The deceased was taken for further treatment to Government Hospital at Sion. The

deceased was hospitalized for almost three days and succumbed to injuries on 11th April 2007. On the death of the deceased, the crime came to be converted for the one punishable under Section 302 of the IPC. Upon completion of the investigation, a charge-sheet came to be filed before the learned Magistrate, Thane. Since the case was exclusively triable by the learned Sessions Court, the same to be committed to the learned Sessions Court. Learned Trial Judge framed the charges below Exh.7. The accused pleaded not guilty and claimed to be tried. Hence, the present Appeal.

4] Mr. Nitin Sejpal, learned counsel appearing on behalf of the Appellant submits that, all the witnesses are interested witnesses, being wife, brother and relative of the deceased. He submits that the only independent witness has not supported the prosecution case. He submits that on the basis of such interested witnesses, conviction cannot be sustained. Mr. Nitin Sejpal, learned counsel appearing on behalf of the Appellant in the alternate submits that the case would fall at the most under Part I of Section 304 and not under Section 302 of the IPC. He further submits that the deceased has not died due to the injuries, which were sustained

by him as a result of assault. The deceased was kept in hospital for three days. He submits that had the deceased been given proper treatment, he would have survived. He in the alternative submits that the conviction under Section 302 of the IPC needs to be altered to Part I of Section 304 of the IPC.

5] Mr. Ajay Patil, learned APP submits that the learned Trial Judge has upon proper and correct appreciation of the evidence has passed the order of conviction as aforesaid. He therefore submits that no interference in the present case is warranted.

6] No doubt that in the present case, three eye witnesses are the relative of the deceased and as such interested witnesses. However, merely because witnesses are interested witnesses, cannot be a ground to discard their testimony. The only requirement is that their evidence has to be scrutinized with greater caution and circumspection.

7] We have scrutinized the evidence of all the three

witnesses. PW-3 – Sachin, brother of the deceased states that on 7th April 2007, his brother Nitin had gone to market, where Dnyaneshwar Patil happened to meet him. They both came to their house at about 11.00 p.m. by motorcycle. On seeing Dnyaneshwar Patil on their motorcycle, accused and his maternal uncle started hurling abuses to Nitin. He states that on 8th April 2007, his relative PW-11 – Vasant had come to their house to give invitation of marriage of his son. He states that when they were sitting in their house, wife of deceased came to his house alongwith her son. After leaving her son at his house, she went to her house on ground floor. He states that after sometime, accused called his brother on ground floor. The deceased went on the ground floor. Accused took his brother towards their grocery shop. Accused questioned deceased for moving Dnyaneshwar Patil on motorcycle. Accused then attacked deceased on stomach by means of knife. He dealt two blows on neck, one on stomach, one on right eye and one on right shoulder. He states that on hearing cries of his brother, he himself, his mother and wife of deceased rushed towards place of incident. However, accused threatened them that if they dared to come forward, he would assault them. Accused was wielding knife in his

hand and then ran away from the spot. He further states that he himself, his mother and his friend Amit carried deceased in an auto rickshaw to Municipal Corporation Hospital, Kalwa and thereafter he was advised to shift to Sion Hospital. He expired on 11th April 2007. This witness has been thoroughly cross-examined. However, the defence has not been in a position to bring on record anything to damage his testimony.

8] PW-13 – Neeta, is wife of the deceased. Her evidence is also similar with that of PW-3 – Sachin. Even in spite of lengthy cross-examination, nothing damaging has come on record. PW-11 – Vasant is the relative, who had come to their house to give invitation card. His evidence is also similar with that of PW-3 – Sachin and PW-13 – Neeta. His evidence is sought to be challenged on the ground that his statement is recorded belatedly. Merely because his statement is recorded belatedly, cannot be a reason to discard his testimony. Even if his testimony for a moment is kept aside, we find that the testimony of PW-3 – Sachin and PW-13 – Neeta is sufficient enough to prove guilt of the accused.

9] Apart from that we find that the prosecution version is totally fortified by the First Information Report, which is recorded on the basis of the statement of the deceased after he was admitted in the hospital. Since the deceased died after making the statement, the same now needs to be treated as dying declaration under Section 32 of the Evidence Act. The said statement is recorded by PW-7 – Pralhad Nikumbh, API. PW-5 – Dr. Dinesh Shendarkar has given an endorsement with regard to mental and physical fitness of the deceased to make dying declaration. It would be relevant to refer to true translated version of the said statement :-

“Yesterday the date 7.4.2007 in the evening, I had been to market in connection with some work. In the market I met Dnyaneshwar Patil, residing at our Saibanagar. Thereafter, at 11:00 pm I dropped him at his house. At that time, Ramzan's maternal uncle had hurled abuses at me because Dnyaneshwar Patil is having love affair with Ramzan Shaikh's sister. However, I have not lodged complaint at the police station about he hurling abuses at me.

On this day the date 8/4/07, I went to work as usual, came back home at 4.30 pm had my meal and was sitting at home. In the evening at 6.00 o'clock,

Ramzan Shaikh called out to me and asked me to come out saying in Hindi, "Come out". Therefore, I went near him as he was standing near our shop. At that time, Ramzan Shaikh started abusing me and said to me in Hindi, "What's up brother, have you finished taking Dnyaneshwar for ride on bike" and as he said so, he suddenly took out a knife and stabbed me in my stomach. As a result I fell down. At that time he again assaulted me with knife near my eyes and at other places. Therefore, I started shouting, " Save me, Save me". At that time my wife, mother and brother came running, they took me and have admitted me in Chhatrapati Shivaji Hospital for medical treatment. Where I been given medical treatment and I am fully conscious.

Thus, yesterday the date 7.4.07 at 11.00 PM in the night, as I brought Dnyaneshwar Patil on my motorcycle and as he is having love affair with Ramzan Shaikh's sister, on this day the date 8.4.07 at 6.00 in the evening, while I was sitting in my house, Ramzan Shaikh, residing at Saibanagar, having grudge about this in his mind, called me out of my house saying in Hindi, "Come out" and as soon as I went out near the shop, he said to me in Hindi, " What's up brother, have you finished taking Dnyaneshwar for ride on a bike" and while abusing me he stabbed me in my stomach

and assaulted me near my eyes with the help of knife, he was holding, thereby tried to kill me. Hence, I have a complaint as above.”

10] In view of the aforesaid dying declaration duly corroborated by the evidence of PW-3 – Sachin, PW-11 – Vasant and PW-13 – Neeta, we find that the prosecution has proved beyond reasonable doubt that it is the present Appellant is the author of the assault on the deceased.

11] In so far as alternate submission of the learned counsel is concerned, we find that merely because the death has occurred after number of days from the date of the assault, cannot be a sole ground to give benefit to the Appellant and bring the case under Part I of Section 304 of the IPC. The accused with premeditated mind armed with knife had come to the house of the deceased and had called the deceased outside his house by hurling abuses on him and assaulted him with knife. When relatives of the deceased came there to save him, he wielded knife and threatened them by saying if they come forward, he would also assault them. We find that case of the present Appellant would not come within any of the *BGP*.

exceptions under Section 304 of the IPC. As such, the conviction under Section 302 of the IPC needs to be maintained. Accordingly, the Appeal is dismissed.

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]