

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1205 OF 2012

Iqbal @ Bada Khan Nasir Shaikh
Aged 22 years,
r/w.Rasid Compound, In front of
Barkat Park Building, Iyas Chawl,
Room, Kausa, Mumbar, Dist. Thane.

...Appellant

V/s.

The State of Maharashtra
(through Mumbra Police Station in
C.R.No.I-314 of 2011)

...Respondent

.....

Mr. Ganesh Bhujbal. Appointed Advocate for the Appellant.

Mr. S.V. Gavand, APP for the Respondent/State.

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CORAM : A.M.BADAR, J.

DATED : 9th OCTOBER 2018.

ORAL JUDGMENT :

1. By this appeal, the appellant/accused is challenging the judgment and order dated 25th September 2012 passed by the learned Additional Sessions Judge, Thane in Sessions Case No.394/2011, thereby convicting the appellant/accused of the

offence punishable under Section 304 Part II of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years apart from imposing fine of Rs.5000/- and in default directing him to undergo rigorous imprisonment for three months.

2. Brief facts leading to the prosecution of the appellant/accused can be summarized thus :

(a) The incident in question allegedly took place about 9.30 a.m. to 11.00 a.m. of 21st June 2011 at Rashid Compound, Kausa, Mumbra, District Thane. Wasim Faruq (since deceased), on that day had been to the house of the PW5 Jakir Yusuf Beg. Said Wasim Chapra was friend of Shamiulla, who happens to be brother of PW5 Jakir Yusuf Beg. At about 11.30 a.m. of that day, appellant/accused Iqbal Shaikh came at the house of PW5 Jakir Yusuf Beg and called Wasim Chapra outside the house. When Wasim Chapra went out of the house of PW5 Jakir Yusuf Beg, the appellant/accused started quarrel with him. He slapped and assaulted Wasim Chapra. Then by lifting a bamboo stick, appellant/accused Iqbal Shaikh assaulted Wasim Chapra. Wasim Chapra became unconscious and fell down on the spot.

(b) PW5 Jakir Yusuf Beg then informed about the incident to PW1 Faruq Chapra, who happens to be father of deceased Wasim Chapra. PW1 Faruq Chapra rushed to the spot of the incident. By that time, Wasim Chapra was taken to the Shahin Hospital. PW1 Faruq Chapra then shifted his son Wasim Chapra to Kalsekar Hospital. However, the doctors of the said hospital declared him died. Hence, PW1 Faruq Chapra lodged report (Exh.13) of the incident to Mumbra Police Station on 21st June 2011 itself. Accordingly, Crime No.I-314/2011 came to be registered against the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code as well as under Section 37 read with 135 of the Maharashtra Police Act, 1951.

(c) Routine investigation followed. The investigating officer visited the spot of the incident and drew Spot Panchanama (Exh.15). He seized wooden bamboo. Dead body was sent to autopsy and report of post-mortem examination came to be collected by the investigating officer. On completing routine investigation, the appellant/accused came to be chargesheeted for the offence punishable under Section 302 of the Indian Penal Code

as well as under Section 37 read with 135 of the Maharashtra Police Act, 1951.

(d) The charge for the offence punishable under Section 302 of the Indian Penal Code and under Section 37 read with 135 of the Maharashtra Police Act, 1951 was framed and explained to the appellant/accused. He abjured his guilt and claimed trial. In order to bring him the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. First informant Faruq Chapra is examined as PW1. PW2 Shamiulla and his brother PW5 Jakir Yusuf Beg are stated to be the eye witness to the incident in question. One more eye witness namely Siraj Shaikh was examined as PW3. Medical Officer of Kalsekar Hospital namely Dr. Nazrin Mujahid Khan is examined as PW4. Medical Officer of CSM Hospital namely Dr. Dattatray Vishnu Kulkarni is examined as PW6. Report of post-mortem examination of deceased Wasim Chapra is at Exh.29. Investigating Officer Shankar Jadhav is examined as PW7.

3. Defence of the appellant/accused was that of a total denial. He however did not enter in the defence.

4. After hearing the parties by the impugned judgment and order, the learned trial Court came to the conclusion that the prosecution is successful in proving the offence punishable under Section 304 Part II of the Indian Penal Code as the appellant/accused had no intention to kill deceased Wasim Chapra and the entire incident took place without any premeditation as well as preparation. Bamboo stick lying on the spot of the incident was used for assaulting deceased Wasim Chapra and there was no intention on the part of the appellant/accused to kill him. Accordingly, the learned trial Court sentenced the appellant/accused for rigorous imprisonment for ten years for the proved offence apart from directing him to pay Rs.5000/- towards fine and in default to undergo further rigorous imprisonment for three months.

5. I heard Shri. Bhujbal, the learned counsel appointed to represent the appellant/accused at the cost of the State. He vehemently argued that the learned trial Court has rightly disbelieved PW2 Shamiulla Beg because this witness has deposed what was taught to him by police. He was found under influence

of the drug by the learned trial Court. The learned Counsel further argued that in the similar way the learned trial Court ought to have rejected version of child witness namely PW5 Jakir Yusuf Beg. His cross examination also shows that he has deposed as per guidance of the police. It is further argued that PW2 Shamiulla Beg has not deposed about presence of PW5 Jakir Yusuf Beg on the spot of the incident. Similarly, PW 3 Siraj Ahmed Iqbal Shaikh had not identified the weapon of the offence. His evidence suffers from omission. With this, it is argued that the appellant/accused deserves acquittal.

6. The learned APP supported the impugned judgment and order of conviction by contending that there is reliable evidence of PW3 Siraj Ahmed Shaikh and PW5 Jakir Yusuf Beg to sustain the conviction as well as the resultant sentence recorded by the learned trial Court.

7. I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

8. Homicidal death of Wasim Chapra occurring on 21st June

2011 is not in dispute. The defence has not disputed inquest panchanama (Exh.14) so also report of post-mortem examination of deceased Wasim Chapra, which is at Exh.29. These documents are specifically admitted by the defence. Still in order to bring on record cause of death of Wasim Chapra, the prosecution has examined Autopsy Surgeon Dr. Dattatray Vishnu Kulkarni as PW6. His evidence shows that there were four external injuries over dead body of Wasim Chapra. The injuries found were thus:-

- 1) *Abraded contusion Lt antecubital fossa (Front of elbow Jt) 2x1 cm.*
- 2) *Abraded contusion linear Lt side of neck at base of skull, below Lt ear, 9x5 cm obliquely horizontal.*
- 3) *Scabbed abrasion linear Lt side of neck 1.5x.1 cm.*
- 4) *Partially headed abrasion RT hand, near thumb, dorsally, 0.5 cm in diameter with scab around.*

9. Cause of death of deceased Wasim Chapra, as stated by PW6 Dr. Dattatray Kulkarni, was intra-cranial hemorrhage due to injury on the neck at base of skull caused by hard and blunt impact. With this evidence on record the learned trial Court

rightly concluded that Wasim Chapra died homicidal death on 21st June 2011.

10. Now, let us examine whether it is proved by the prosecution that the appellant/accused was author of injuries suffered by deceased Wasim Chapra. Perusal of the Record and Proceedings shows that spot of the incident is not disputed by the defence. The spot panchanama (Exh.15) is the admitted document. Thus, the defence has also admitted seizure of Bamboo stick from the spot of the incident as recorded in spot panchanama (Exh.15). As stated, according to the prosecution case, the deceased was assaulted by means of bamboo stick by the appellant/accused.

11. PW3 Siraj Shaikh is stated to be one of the eye witness in the crime in question. He is a rickshaw driver. On 21st June 2011 he dropped one of the passenger at the Rashid Compound and then he was present at the spot for smoking a cigarette. His evidence shows that he had seen a quarrel between deceased Wasim Chapra and the appellant/accused Iqbal Shaikh. This witness deposed that Wasim Chapra fell down during the course of

that quarrel. The appellant/accused then lifted a bamboo which was lying there and assaulted Wasim on his neck. This witness further deposed that then he himself, PW2 Shamiulla and others took deceased Wasim to the hospital. Even if it is held that this witness has not stated to police that during quarrel, Iqbal slapped Wasim and Wasim fell down, this omission which is brought on record from the cross examination is inconsequential. In fact, this witness has not deposed in the chief-examination that during the course of the quarrel, Iqbal slapped Wasim causing his fall. What is stated by the PW3 Siraj in his chief examination is to the effect that he had seen Wasim and Iqbal quarreling. He further stated that Wasim fell down. Then he stated that Iqbal assaulted. Thus, even if this witness has not stated the incident in proper sequence, then also it is not possible to hold that his evidence to the effect that the appellant/accused assaulted the deceased by means of bamboo stick on the neck of the deceased, has come on record by way of improvement in his version. This witness was a natural witness to the incident in question. He is totally disinterested witness. He has no reason to depose a lie against the

appellant/accused. Failure to identify the weapon i.e. bamboo stick after more than a year of the incident cannot be a reason to disbelieve his version about the incident. Thus, evidence of PW3 Siraj is sufficient to hold that it was the appellant/accused, who assaulted the deceased on the neck by means of bamboo stick causing fatal injuries to the deceased. Therefore, even if apart from evidence of PW2 Shamiulla, evidence of his brother PW5 Zakir is ignored for the reason of tutoring by police, then also there is trustworthy evidence of PW3 Siraj Shaikh on record to hold that the prosecution has proved the fact that the deceased was assaulted by the applicant/accused causing his death.

12. The learned trial Court rightly held that death of the Wasim was not caused by the appellant/accused with the requisite intention, but the act was done with the knowledge that it is likely to cause death of Wasim. Therefore, no infirmity can be found in conviction of the appellant/accused for the offence punishable under Section 304 Part II of the Indian Penal Code.

13. Now, let us examine whether the learned trial Court imposed proper punishment on the appellant/accused for the

offence punishable under Section 304 Part II of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for ten years by the learned trial Court apart from imposition of fine of Rs.5000/- and default sentence of three months. While imposing punishment, the Court is required to keep due regard to all attending circumstances, in which the offence took place. The degree of criminality shown while committing the crime is a relevant factor. The punishment is required to be proportionate and commensurate with the gravity as well as nature of crime and the manner in which the offence is committed by the applicant/accused. Circumstances of the accused also forms relevant consideration while imposing punishment on him.

14. As pointed out above, the incident took place because of quarrel between the appellant/accused and deceased Wasim Chapra. Perusal of the sentencing trend in past for the offence punishable under Section 304(II) of the Indian Penal Code shows that sentence of 10 years of rigorous imprisonment is too harsh considering the facts and circumstances of the case. In the matter of **Shivappa Buddappa Kolkar alias Buddappagol vs. State of**

Karnataka¹, modifying the conviction of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Honourable Supreme Court had imposed sentence of imprisonment for a period of five years apart from fine of Rs.7,000/- on the appellant/accused. In the matter of **Padmakar s/o. Dadarao Thorat vs. The State of Maharashtra**² Division Bench of this Court by modifying the conviction of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the offence punishable under Section 304(II) of the Indian Penal Code, had sentenced the appellant/accused therein for rigorous imprisonment for 5 years apart from payment of fine of Rs.500/-. Similarly, in the matter of **Manke Ram vs. State of Haryana**³ by altering the conviction of the appellant/accused therein from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Honourable Supreme Court was pleased to award sentence of 5 years of

1 AIR 2004 SUPREME COURT 5047

2 2015 ALL MR (Cri) 2628

3 2003 CRI.L.J. 2328

rigorous imprisonment apart from fine of Rs.2,000/- on the appellant/accused therein. Considering this trend in sentencing for the offence punishable under Section 304(II) of the Indian Penal Code, it needs to be held that the sentence imposed on the appellant/accused is disproportionate, and therefore, needs to be scaled down.

15. Considering the totality of circumstances, I am of the considered opinion that sentence of eight years rigorous imprisonment for the offence punishable under Section 304 Part II of the Indian Penal Code shall be the appropriate punishment to the appellant/accused for the offence held to be proved against him. Therefore, the sentence imposed on him is scaled down to the rigorous imprisonment for eight years. As such, the order;

- : ORDER : -

- (i) The appeal is partly allowed.
- (ii) Conviction of appellant/accused Iqbal @ Bada Khan Nasir Shaikh of the offence punishable under Section 304 Part II of the Indian Penal Code is maintained. However, sentence of rigorous imprisonment of ten years imposed on the appellant/accused on

this count is scaled down to the rigorous imprisonment for eight years.

(iii) Sentence of fine as well as the default sentence awarded by the learned trial Court is however maintained.

(iv) With this modification in sentence, the appeal stands disposed off.

(A.M.BADAR J.)