

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 413 OF 1997

Husain Mohammed Shakil @
Husain Mohammed Shaikh
ordinarily residing at Room No. 125,
New Madina Stores, Dadabhai
Cross Lane, Andheri, Gaondevi
Dongar, Andeheri(W), Mumbai. ..Appellant.
v/s.

The State of Maharashtra.
(At the instance of D.N. Nagar Police
Station in C.R. No. 611 of 1992) ..Respondent.

Ms. Anjali Patil a/w. Mr. Arun Rajput, advocate for appellant.

Mr. S.R. Agarkar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : SEPTEMBER 18, 2019.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 304 Part II of the Indian Penal Code and is sentenced to suffer R.I. for 5 years and to pay fine of Rs. 500/- I.d. to suffer S.I. for 15 days by Additional Sessions Judge, Gr. Bombay vide Judgment and Order dated 28th April, 1997 in Sessions Case No. 95 of 1993.

Talwalkar

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) That on 17th October, 1992 one Asif Amir Khan rushed to D.N. Nagar Police station and lodged report alleging therein that on 15th October, 1992 at about 12.30 p.m. he had solicited handloan of Rs. 50/- from one Ayub Khan.

(ii) Ayub had disclosed to him that he had given loan of Rs. 2500/- to Santosh and Santosh had called him in the evening for the repayment. He had also disclosed to Asif that there was a quarrel between himself and Santosh.

(iii) He has further alleged that on 16/10/1992 at about 8.45 p.m. when he was passing from in front of Madina Stone on Gaodevi Road, he noticed his friend Ayub running and he was being followed by 6 persons namely, Kammu, Hussain, Santosh, Ajiz, Jaffar and Rahim. That Ayub was trying to take shelter near Rajdhani Bakery. However, he was accosted by Kammu, who gave blow of wooden stump on his head. The stump was broken into two pieces. Ayub still managed to run towards Asif. He fell down on the road. At that time all the above mentioned persons started assaulting him with hockey sticks, stumps, kukri and knife. Kammu had once again given blow of stump on his head, which broke into two pieces. That

Ayub shouted for help. But looking at the weapons with which the assailants were armed, Asif did not dare to intervene.

(iv) He soon saw that Husain i.e. the present appellant gave blow of kukri on the chest of Ayub followed by a blow from Santosh. He had sustained bleeding injury. Ajiz was armed with sword and was attempting to give blow of sword but could not succeed.

(v) Meanwhile, the brother of Ayub had reached the spot. He also did not dare to intervene. Thereafter, Asif, Amzad and others had taken Ayub to Cooper Hospital, when he was declared dead before admission. Asif had approached police station and lodged report. He was knowing the accused person.

(vi) At the time of lodging of FIR, he has also given description of the clothes worn by the accused at the time of incident. On 14/7/1993 the appellant was arrested. On the basis of the report of Asif, Crime No. 611 of 1992 was registered at D.N. Nagar Police Station. After completion of investigation, charge-sheet was filed. At the trial, prosecution has examined as many as 12 witnesses.

3 At the trial, prosecution has examined P.W. 2, P.W. 3 P.W. 4, P.W.5 and P.W. 10 as eye witnesses. P.W. 8 Dr.

Talwalkar

Rajaram has been examined to prove post mortem notes and substantiate the cause of death whereas, P.W. 9 Dr. Shridharrao Patil has been examined to prove that Hussainn Shaikh and Santosh had sustained injuries in the said transaction.

4 P.W. 10 Asif has stated before the Court in consonance with the FIR and has specifically stated that Hussain had assaulted Ayub at chest by Khanjir and Santosh had assaulted with kukri. The omissions in the cross-examination are to the extend of overt act attributed to Jaffar. The defence has failed to create any dent by way of cross-examination.

5 P.W.2 Satish Bose has deposed before the Court that on 16/10/1992 he was talking with his friend Salim and he suddenly noticed Ayub Khan was running. He was assaulted with stump by the accused No. 3. He has seen the incident in as much as he had seen Ayub running and shouting for help, he was being followed by 6 to 7 people. He was initially assaulted with stump and when he fell down the accused No. 1 assaulted him with kukri. It is specifically stated that the present appellant was assaulting with kukri. P.W. 2 was acquainted with Ayub since childhood. In the cross-examination, it is elicited that when P.W. 2 first saw Ayub, he

saw him running towards Usmania dairy. The witness has further stated that prior to the incident, he had seen Ayub talking with Accused No. 2.

6 P.W. 3 Abdul Kayyum had reiterated same allegations. In the cross-examination, he has admitted that he would not be able to give overt act of each of the accused and their complexion.

7 P.W.4 is also an eye witness and he has corroborated with the evidence of P.W. 2 and P.W. 3. He has specifically stated that Ayub was assaulted with the stump, which had broken into pieces. According to him, Hussain had assaulted him on chest and Santosh had assaulted on waist again. He was hardly 15 years at the time of the incident. His evidence is not shattered.

8 P.W.5 Shabbir Abdul Bashir is also an eye witness. He had seen the assault on the deceased Ayub. Accused Ajiz has been exonerated since it is the contention of the witness that he was not armed with any sword. In the cross-examination, P.W. 6 Yusuf Khan, who also claimed to be eye witness, has stated that the accused had removed the said kukri which was kept in the scrap (Bhangar) from the backside of the truck.

9 The case since rests on direct evidence i.e. in the form of five eye witnesses and Dr. Rajaram Marathe, who has proved the post mortem notes, which is at Exh. 23, it would not be necessary to discuss the evidence of the panch witness, who have made frail attempt to prove the recovery of weapons at the hands of the accused presence.

10 P.W. 8 Dr. Rajaram Marathe has deposed before the Court that he has found following injuries on the person of the deceased:

- (i) I.W. 8 X 3 cm. Cavity deep on Lt. Upper medial region.
- (ii) I.W. 4 X 2 X cavity deep on Lt. Infraaxillary.

There were injuries on the head which were noticed on internal examination.

- (i) Contusion 3 X 4 cm. on left temporal parietal region.
- (ii) Contusion 3 x 4 cm. on Rt. Temporal parietal region.

He has opined that the cause of death was shock and haemorrhage due to multiple injuries. That all the injuries were on vital parts of the body and were likely to cause death. Doctor has stated that the dead body was brought alongwith ADR report marked at Exh. 25.

Talwalkar

11 P.W.9 Dr. Shridharrao Patil had examined the present appellant on 21st October, 1992 and had noticed wound of left upper arm, middle portion, lateral aspect 3 x 1 cm. in size. There was scab formation and that the injury must have been caused 4 to 5 days prior to the examination. In the examination in chief itself, P.W. 9 has stated that the injuries could be caused since accused was holding a sword. It is elicited in the cross that the injury to accused No. 1 Husain is possible, if he comes in contact with any hard and blunt substance.

12 In the present case, charge was framed under section 302 of the Indian Penal Code. In the course of investigation, kukri was recovered at the instance of the present appellant from one parked old motor lorry from Gilbert Hill Road on 27/10/1992. Unfortunately, although it is a case of a direct evidence, which is consistent in nature, the learned Sessions Judge has arrived at a conclusion that the appellant had no motive to assault Ayub. That he neither had intention or knowledge that his assault would be fatal. The other accused, who had assaulted on the head with hockey sticks and stumps have also been convicted only under section 323 of the Indian Penal Code. In fact, the blow was so forceful that the stumps had broken into 3 pieces at the first instance and it had broken into two pieces at the second instance. It could not have been

said by any stretch of imagination that the offence committed would be under section 323 of the Indian Penal Code.

13 Section 302 of the Indian Penal Code reads as follows :

“302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.”

In fact, the material on record would show that the appellant had no personal grudge against the injured. That he had no intention to commit murder or culpable homicide. He had accompanied the principal accused, armed with a weapon, only to threaten or create terror in the mind of the injured and witnesses and in the said course had voluntarily assaulted the deceased which turned out to be a fatal injury. Taking an overall view of the fact situation, it can be said that the appellant had committed an offence punishable under section 326 of the Indian Penal Code. Moreover, he had not taken undue advantage of the situation.

14 It is further unfortunate that the State has not filed any appeal either for enhancement of sentence or challenging the acquittal under section 302 of the Indian Penal Code. The

contents of FIR have not been proved by the prosecution also. The examination-in-chief is not in consonance with the FIR.

15 It is further pertinent to note that the accused Rahim Anwar Sayyed was absconding as trial had started and thereafter, he was tried in Sessions Case No. 579 of 1993. It was observed by the learned Sessions Judge at the outset that the accused Rahim alongwith co-accused Hussain Shakil, Jaffar and Azij Khan had formed an unlawful assembly with an intention to kill Ayub Khan. In Sessions Case No. 579 of 1993 eye-witnesses were examined once again. The prosecutor for no reason had requested the court to declare the witnesses hostile. Accused Rahim was acquitted of all the charges levelled against him. It was observed in the said judgment that the eye witnesses had not attributed any specific overt act to accused Rahim. As a matter of fact, an inference was drawn that the accused tried in Sessions Case No. 95 of 1993 were responsible for the death of Ayub.

16 As on today, the accused is more than 60 years old. The incident is of the year 1992. The learned Counsel for the appellant submits that as an under-trial prisoner, the appellant had undergone 10 months in custody. It is stated that he was taken into custody on 20th April, 1997. Although this Court had

Talwalkar

granted bail on 20/7/1997, the appellant could not be released on bail for more than 1 and ½ years. That the appellant is a father of 2 minor daughters aged about 10 years and 3 years. The learned Counsel for the appellant has prayed for leniency towards the appellant and prayed for the sentence for the period already undergone. The appellant has voluntarily agreed to pay fine of Rs.76,000/- out of which Rs.75,000/- shall be paid to the Family of the deceased. The appellant undertakes to work with Juvenile Justice Board on every Sunday for a period of one year and shall undertake the work assigned by the Magistrate at Juvenile Justice Board, Dongri.

17 The same will have to be considered in the interest of justice, since the appeal could not be heard for about 22 years. It would not be in the interest of justice to remand the accused to custody. Hence, he deserves to be sentenced to the period already undergone and to pay fine of Rs. 76,000/-.

18 Hence, following order is passed :

ORDER

- (i) The appeal is partly allowed.
- (ii) The conviction and sentence passed against the appellant by the Addl. Sessions Judge, Gr. Bombay vide Judgment and Order dated 28/4/1997 is hereby quashed and set

Talwalkar

aside. The Appellant is convicted for the offence punishable under section 326 of the Indian Penal Code and sentenced to the period already undergone. The appellant is also sentenced to pay fine of Rs. 76,000/-, out of which Rs.75,000/- shall be paid to the Family of the deceased.

(iii) The appellant shall deposit Rs.76,000/- in the Sessions Court within a period of four weeks from today.

(iv) The learned Sessions Court shall issue notice to one of the parents of the deceased.

(v) The appellant undertakes to work with Juvenile Justice Board on every Sunday for a period of one year and shall undertake the work assigned by the Magistrate at Juvenile Justice Board, Dongri.

(vi) The bail bond stands cancelled.

(vii) Writ be issued expeditiously.

20 The appeal is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]