

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.83 OF 2017

SHANKAR HANUMANT NAGAM)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Nitesh Hinduja, appointed Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

DATE : 6th MARCH 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 7th January 2017 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.276 of 2013, thereby convicting him of the offence punishable under Section 307 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 5 years apart

from direction to pay fine of Rs.2,000/- and in default, to undergo further simple imprisonment for 3 months.

2 Facts, in brief, leading to the prosecution and resultant conviction of the appellant/accused can be summarized thus :

- (a) First Informant/PW1 Suraj Sarvande is brother of injured PW5 Kiran Sarvande. They both were residing at Lokmanya Tilak Nagar, Maratha Colony, Santacruz (East), Mumbai. The incident in question took place on 4th October 2012 at Lokmanya Tilak Nagar, Mumbai. At about 8.00 p.m. of that day, PW1 Suraj Sarvande along with his friends including PW4 Manohar Nalawade were chitchatting in front of the chawl, where they used to reside. Appellant/accused Shankar Nagam was resident of the nearby chawl. At about 9.30 p.m., appellant/accused Shankar Nagam started quarreling with Abhishek Walke. PW1 Suraj Sarvande, PW4 Manohar Nalawade and their friends Akshay Naik and Deepak Yeram intervened in that quarrel and sent appellant/accused Shankar Nagam to his home.

Chitchatting of PW1 Suraj Sarvande with his friends continued thereafter and his brother PW5 Kiran Sarvande joined them subsequently.

- (b) The incident in question took place at about 11.45 p.m. of 4th October 2012. When PW1 Suraj Sarvande, his brother PW5 Kiran Sarvande, PW4 Manohar Nalawade and their friends were chitchatting, appellant/accused Shankar Nagam came, whipped out a knife from his waist and questioned the gathering as to why they had intervened in his quarrel. He threatened them that he will not spare them. At that point of time, PW5 Kiran Sarvande tried to pacify appellant/accused Shankar Nagam by taking him aside. However, the appellant/accused gave blows of knife on chest and stomach of PW5 Kiran Sarvande.

- (c) Injured PW5 Kiran Sarvande was then taken to V.N.Naik Hospital at Santacruz and from there he was shifted to Nanavati Hospital, Mumbai, where he was treated by PW6

Dr.K. Matchavel and PW7 Dr.Nishant Rao. He was also treated at Sion Hospital, Mumbai.

- (d) Report of the incident came to be lodged on 5th October 2012 by PW1 Suraj Sarvande and accordingly Crime No.257 of 2012 came to be registered at Nirmal Nagar Police Station, Mumbai. During course of investigation, statement of witnesses came to be recorded. The appellant/accused came to be arrested. Clothes of the victim came to be seized and injury certificates were collected. On completion of investigation, the appellant/accused came to be charge-sheeted.
- (e) Charge for the offence punishable under Sections 307 and 506 of the Indian Penal Code was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all 12 witnesses including the injured, eye witnesses to the

incident and the Medical Officers who either treated the injured or who issued medical certificates in respect of injury suffered by him.

- (f) Defence of the appellant/accused, as seen from the line of cross-examination of prosecution witnesses as well as from his statement under Section 313 of the Code of Criminal Procedure is that of total denial. According to him, he was beaten by injured as well as alleged eye witnesses to the incident and one of them attempted to assault him by means of knife. However, that blow landed on person of PW5 Kiran Sarvande.

- (g) The learned trial court, after hearing the parties, was pleased to convict the appellant/accused and sentenced him as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocate appointed to represent the appellant/accused at the costs of the State. He

argued that statement of Abhishek Walke is not recorded by the police. It has come on record through evidence of PW5 Kiran Sarvande that the appellant/accused was unable to walk due to heavy drinking and PW5 Kiran Sarvande had gone towards the appellant/accused. The learned advocate further argued that clothes of PW5 Kiran Sarvande were seized after twenty days, though he was discharged from the hospital on 15th October 2012. The injured as well as eye witnesses are having friendly relations and PW1 Suraj Sarvande is brother of the injured. As such, their evidence cannot be accepted. Arrest Panchnama Exhibit 18 shows that the appellant/accused was injured in the incident but the prosecution has not explained as to how he suffered injuries. Thus, the prosecution has suppressed genesis and occurrence of the incident. Similarly, there is no evidence to show that the appellant/accused intended to cause death of the injured.

4 As against this, the learned APP supported the impugned judgment and order of conviction and resultant sentence by contending that weapon used and number of blows

dealt on the victim coupled with parts of the body chosen for inflicting wounds, reflects intention of the appellant/accused.

5 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution. PW5 Kiran Sarvande is injured in the incident in question. Eye witnesses to the incident are his brother PW1 Suraj Sarvande, who lodged the First Information Report (FIR) soon after the incident and PW4 Manohar Nalawade, who was one of the members of the group, which was chitchatting near the residential chawl of the injured PW5 Kiran Sarvande. Injured PW5 Kiran Sarvande, as seen from evidence of doctors examined by the prosecution, had suffered five stab wounds on stomach as well as on chest. There is no suggestion to the prosecution witnesses that such type of injuries can be caused by self infliction nor is it the defence of the appellant/accused. This implies that PW5 Kiran Sarvande is an injured witness. This is a case of single injured and single accused. In such cases, theory of false implication does not

deserve a moments consideration. As other witnesses are brother and friend of the injured, their evidence will have to be examined closely with due care and caution in order to rule out the possibility of false implication. Perusal of cross-examination of the injured as well as both eye witnesses shows that it is not the defence of the appellant/accused that they were on inimical terms with the appellant/accused, and therefore, they had falsely implicated him in the crime in question. On this backdrop, clear, cogent and consistent version coming on record from mouth of PW1 Suraj Sarvande and PW4 Manohar Nalawade is to the effect that when they were initially chitchatting in front of their residential chawl, at about 9.30 p.m., there was worldly duel between the appellant/accused and one Abhishek Walke. Both these witnesses have stated that they along with others intervened in that quarrel and sent the appellant/accused to his home after pacifying him. Their testimony shows that the appellant/accused was under the influence of liquor. Version of both these witnesses shows that then they continued chitchatting with their friends and then PW5 Kiran Sarvande joined them. Congruous testimony of

PW1 Suraj Sarvande, PW4 Manohar Nalawade and PW5 Kiran Sarvande shows that at about 11.45 p.m. of 4th October 2012, the appellant/accused again came on the spot and questioned the group, which was indulged in chitchatting, as to why they intervened in his quarrel. The appellant/accused, as stated by these witnesses, then took out a knife and started terrorising the group by saying that he will not allow them to go scotfree. The injured as well as both eye witnesses then stated that injured PW5 Kiran Sarvande approached the appellant/accused for pacifying him. However, the appellant/accused gave blows of knife on his chest, stomach and arm.

6 Defence of the appellant/accused that he was beaten by the prosecution witnesses and during the course of beating some one attempted to give blow of knife on him but that blow mislanded on person of injured PW5 Kiran Sarvande, is noted only for the purpose of rejection. Medical evidence shows that injured PW5 Kiran Sarvande had suffered five stab wounds and stab wounds in such large number cannot be caused because of

mislanding of a blow intended to harm the appellant/accused. In this view of the matter, I see no reason to disbelieve ocular version about the incident coming on record from mouth of the injured as well as his brother and friend.

7 Now let us examine nature of injuries suffered by injured PW5 Kiran Sarvande. PW6 Dr.K. Matchavel is holding qualification of Masters in General Surgery and he was working with Nanavati Hospital as a General Surgeon. This witness examined PW5 Kiran Sarvande at about 2.00 a.m. of 5th October 2012. As per version of this General Surgeon, he noted multiple stab injuries on left epistemic region, side of chest, on iliac fossa and on middle axillary of PW5 Kiran Sarvande. PW7 Dr.Nishant Rao, who was assisting PW6 Dr.K. Matchavel has stated that following were the injuries on the person of PW5 Kiran Sarvande :

- i) stab injury 2 x 1 cm in anterior axillary line
 lateral to the one breast
- ii) 2 x 1 cm in posterior axillary line
- iii) 3 x cm in epigastrium 2 cm from mid-line.
 2 point below left side

- iv) chest above anterior superior iliac spine 3 x 1 cm
- v) near iliac crest 1 x 1 cm

8 PW7 Dr.Nishant Rao testified that perusal of report of ultrasound of abdomen and pelvis of PW5 Kiran Sarvande reflected moderate left hemothorax and perforation hemoperitoneum. Substantial left sided pleural effusion with laminar spread was noticed and therefore, PW5 Kiran Sarvande was required to be taken up for surgery immediately. Six perforations were seen in jejunum of PW5 Kiran Sarvande, half feet away from duodeno jejunal flexure. This Medical Officer further deposed that Hemotona was seen in the left renal fossa of PW5 Kiran Sarvande and all those injuries were grievous in nature, sufficient in the ordinary course of nature to cause death of a human being. There is nothing in cross-examination of this witness to disbelieve his version about the damage caused to the victim by infliction of several blows of knife.

9 It is seen from evidence of the injured witness as well as eye witnesses that at the time of the incident, the appellant/accused had consumed liquor. But that cannot be a defence for inflicting blows of knife on vital parts of body of injured PW5 Kiran Sarvande. Whether the assault was an attempt to murder PW5 Kiran Sarvande or whether this act of the appellant/accused constitutes some other offence will have to be examined from proved circumstances. Culpable homicide is a genus and murder is its species. The Indian Penal Code practically recognizes three degrees of culpable homicide. Culpable homicide of the first degree is the gravest form which is defined as 'murder' and is made punishable under Section 302 of the IPC. The second may be termed as 'culpable homicide of second degree', which is made punishable under first part of Section 304 of the IPC. The last degree of culpable homicide is 'culpable homicide of third degree' which is made punishable under second part of Section 304 of the IPC. For making out the offence of murder punishable under Section 302 of the IPC, the prosecution is firstly required to

establish that a bodily injury is present on the victim. Secondly, the prosecution is required to establish nature and size of the injury on the victim. Then the prosecution is enjoined to prove that there was intention to inflict the particular injury, by adducing clear and cogent evidence for clarifying that such an injury was not accidental or unintentional. Possibility of injury of other kind intended by the appellant/accused is required to be ruled out. Lastly, the prosecution has to establish that the injury so caused was sufficient to cause death in the ordinary course of nature. If all these factors are established, then only the offence defined under Section 300 of the IPC and punishable under Section 302 of IPC is made out. The offence punishable under Section 307 of the IPC is made out when the accused have intended to commit murder and in pursuance of that intention does any overt act towards commission of murder. In order to establish the offence punishable under Section 307 of the IPC, the prosecution is required to establish the intention or knowledge of committing murder and doing of an act towards it. Thus, Section 307 of the IPC contemplates intention or knowledge and not the

consequence of the actual act done for the purpose of carrying out the intention.

10 In the case in hand, the injured was not concerned with the quarrel of the appellant/accused with Abhishek Walke. The appellant/accused was pacified by PW1 Suraj Sarvande and PW4 Manohar Nalawade when he indulged in quarrel with Abhishek Walke. The appellant/accused was sent back to his home by this witness as well as others, at about 9.30 p.m. of 4th October 2012. However, the appellant/accused armed with a knife appeared on the spot of the incident again at 11.45 p.m. and started terrorising the group of boys who had pacified the quarrel. When PW5 Kiran Sarvande attempted to pacify him, the appellant/accused gave several blows of knife on vital parts of body of PW5 Kiran Sarvande. This shows that without any provocation either by the injured or by other prosecution witnesses, the appellant/accused inflicted wounds by giving blows of knife on vital parts of body of PW5 Kiran Sarvande. The incident did not take place in a sudden fight, in the heat of

passion upon a sudden quarrel. Infact, the quarrel took place at about 9.30 p.m. and that too, with some other persons. The appellant/accused, though had been to his house, thereafter reappeared on the scene of the incident, after about two hours, armed with a knife and then assaulted one of the members of the group, who was chitchatting in front of residential chawl. If nature and seat of injury inflicted on PW5 Kiran Sarvande are considered, then it is seen that the assault was with the intention of causing such bodily injuries, as the appellant/accused was knowing to be likely to cause death of PW5 Kiran Sarvande. Still, he ventured to cause wounds on vital parts of body of injured PW5 Kiran Sarvande, and as such, it cannot be said that the offence is not falling under the penal provisions of Section 307 of the Indian Penal Code.

11 Arrest Panchnama shows that the appellant/accused was having injuries at the time of his arrest. However, clear, cogent and consistent evidence of injured PW5 Kiran Sarvande which is supported by PW1 Suraj Sarvande and PW4 Manohar

Nalawade does not allow me to hold that the prosecution has suppressed the genesis of the incident. At the most, it can be said that after the murderous assault on PW5 Kiran Sarvande, members of the group who were chitchatting in the locality must have assaulted the appellant/accused. Therefore, the appellant/accused is not entitled for any benefit of doubt on this aspect.

12 With this evidence, the prosecution has certainly established the offence punishable under Section 307 of the Indian Penal Code and the learned trial court has taken a very lenient view in imposing the sentence on the appellant/accused. Therefore, no interference in the impugned judgment and order is required at the hands of this court. The appeal fails, and therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)