

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1462 OF 2011**

Dharmaraj Alias Sai Laxman Das,
Aged : 22 Years, Occupation : Electrician,
Residing at Building No.20-B,
Room No. 503, Hiranandani Akuruti,
Sai Co-op. Housing Society,
Lalu Bhai Compound, Govandi,
Mumbai-400 043.

.....Appellant

Vs.

The State of Maharashtra
(At the instance of Shivaji Nagar Police
Station vide C.R. No. 163 of 2010)

....Respondents.

Ms. Payoshi Roy I/by Dr. Y.M. Chaudhary for the Appellant.
Mr. J.P. Yagnik, APP for the Respondent-State.

**CORAM : A. S. OKA, AND
A. S. GADKARI, JJ.
RESERVED ON : 17th JANUARY, 2019
PRONOUNCED ON : 5th FEBRUARY, 2019.**

JUDGMENT (PER A.S. GADKARI, J.):

The Appellant has impugned the Judgment and Order dated 22nd September, 2011 passed by the learned Second Additional Principal Judge, City Sessions Fast-Track Court, Sewree, Mumbai in Sessions Case No. 541 of 2010, convicting the Appellant under Section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- in default of

payment to suffer further rigorous imprisonment for one month.

2 Heard Ms. Payoshi Roy I/by Dr. Y. M. Chaudhary for the Appellant and Mr. J.P. Yagnik, the learned APP for the Respondent-State. Perused the entire record.

3 Shorn off unnecessary details, the prosecution case in brief is that, the Appellant was residing on the fifth floor of the Sai Co-Operative Housing Society, Hiranandani Akruti, Lallubhai Compound, Mumbai.

 The first informant Smt. Rahma Khatun Hakim Shaikh (P.W. No. 1), the mother of Yusuf Shaikh (deceased) was residing on the fourth floor of the same building. The incident in question took place on 20th May, 2010 at about 23.45 hours (11.45 p.m.) in front of the said building. On that day, there was quarrel between son of the first informant namely Yusuf (deceased) and his wife Nasima. The deceased thereafter, went down the stairs and sat in an Auto-rickshaw. Smt. Rahma (P.W. No. 1) told her son Yusuf (deceased) that, it is time to go to sleep as he had to go to work on the next day in the morning. However, Yusuf (deceased) did not listen and by looking towards their window situated on the fourth floor abused her younger son namely Bilal Shaikh (P.W. No. 2). The Appellant was standing in the balcony

of his house situated on the fifth floor. When the deceased was abusing Bilal Shaikh (P.W. No. 2), the Appellant felt that Yusuf (deceased) was shouting at him and therefore, the Appellant asked Yusuf (deceased) as to whether he would come up or the Appellant should come down, to which Yusuf (deceased) answered as to what the Appellant would do by coming down. The Appellant thereafter climbed down five floors and immediately gave 4 to 5 blows with a knife which was in his hand to Yusuf (deceased). Due to the said assault, Yusuf (deceased) fell down. The people who gathered there, immediately rushed Yusuf (deceased) to Rajawadi Hospital. The Doctors, after examining Yusuf, declared him brought dead.

4 The police were immediately informed about the said incident who apprehended the Appellant within an hour from the time of incident along with a blood stained knife, which was in his possession. The autopsy of Yusuf (deceased) was conducted by Dr. Pravin S. Bagul (P.W. No. 18). The autopsy surgeon noticed following 7 external injuries which are as under:-

- a) *Stab wound over right side of chest near axilla fold and 5 cm. Away from nipple oblique direction, sharp edges of size 2 x 1 cm with blood oozing deep injury.*

- b) *Stab wound over mid chest in sternum region, vertical direction, sharp edges of size 2 x 1 cm deep inside.*
- c) *Stab wound over left side of chest medial to nipple 4 cm away from the mid line, size 2.5 x 1.5 cm sharp edges into deep inside.*
- d) *Old healed wound over right side of neck below mandible/with tailoring effect with granulation tissue of healing size 2 x .5 cm with scar formation, with fibrosis at neck. Multiple four healed scar mark noted over right neck and left of the neck.*
- e) *Old healed wound over right side chest 3 cm above nipple vertical direction with tailoring effect of size 3 x .25 cm with reddish granulation tissue noted.*
- f) *Old healed wound over left forearm region transverse direction. Multiple healed scar noted.*
- g) *Old healed multiple scar wound over abdomen noted.*

5 After completion of investigation, police submitted charge-sheet in the Court of Metropolitan Magistrate. 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 said case to the Court of Sessions as contemplated under Section 209 of the Code of Criminal Procedure-1973.

The Trial Court framed charge below Exhibit-4 and the

plea of the Appellant was recorded below Exhibit-5. The charge was read over and explained to the Appellant to which, he pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined in all 18 witnesses. The Trial Court, after recording evidence and after hearing the parties to the said case, was pleased to convict the Appellant by the impugned Judgment and Order dated 22nd September 2011.

6 Ms. Payoshi Roy, the learned counsel for the Appellant submitted that, the Appellant did not had intention to commit murder of Yusuf (deceased) and it is due to the grave and sudden provocation caused by the deceased, in the heat of passion without pre- meditation and without taking undue advantage of the situation has committed the said act of assault. She further submitted that, it is due to the abuses given by the Yusuf (deceased) to the Appellant, the Appellant got provoked and in the heat of passion, he rushed down five floors and immediately assaulted the deceased with the knife. She further submitted that, it took hardly any time to climb down five floors and due to the said short span of time the Appellant did not get time of reflection before committing the said act of assault and therefore, the Appellant may be given benefit of Exception 4 of Section 300 of the

Indian Penal Code. She submitted that, if the benefit of Exception 4 of Section 300 of the Indian Penal Code is given to the Appellant, then his act would fall within the purview of Section 304 (Part-II) of the Indian Penal Code. In support of her contention, she relied on the following decisions of the Hon'ble the Supreme Court.

- a) *K.M. Nanavati Vs. State of Maharashtra,*
(1962 Supp (1) SCR 567: AIR 1962 SC 605 : (1962)
1 Cri. LJ 521);
- b) *Amrithalinga Nadar Vs. State of Tamil Nadu,*
(AIR 1976 SC 1133);
- c) *Akhtar Vs. State,*
(AIR 1984, Allahabad 262);
- d) *V. Sreedharan Vs. State of Kerala,*
(AIR 1992 SC 754);
- e) *Murli Alias Denny Vs. State of Rajasthan, (1995 Supp*
(1) SCC 39);
- f) *Sukhbir Singh Vs. State of Haryana,*
(AIR 2002 SC 1168);

g) *State of U.P. Vs. Shyam Veer & Ors.,*

(2005) 10 SCC 611); and

h) *Ravindra Shalik Naik & Ors. Vs. State of Maharashtra,*

(2009 Cri.L.J. 1549).

She, therefore, prayed that the Appeal may be allowed in its entirety or in the alternative, the conviction of the Appellant may be modified and he may be convicted under Section 304(Part-II) of the Indian Penal Code.

7 Per contra, the learned APP vehemently opposed the Appeal and submitted that, the Appellant had sufficient time to think over while climbing down five floors and before assaulting the deceased with the knife. He submitted that, the Appellant while coming down from fifth floor to the ground floor had come with pre-meditation and preparation to assault the deceased with a knife which he was holding. He therefore, submitted that the afore-stated decisions relied upon by the learned counsel appearing for the Appellant are of no help to her. He, therefore, prayed that the present Appeal may be dismissed by maintaining the conviction and sentence

of the Appellant.

8 The record indicates that, there were 7 eye-witnesses to the incident of assault by the Appellant. However, two eye-witnesses namely Smt. Noorjahan Jafar Shaikh (P.W. No. 4) and Mr. Amjad Riyasat Khan (P.W. No. 8) have been declared hostile by the prosecution, as they have resiled from their original statements under Section 161 of the Code of Criminal Procedure.

9 Smt. Rahma Shaikh (P.W. No. 1), is the mother of Yusuf (deceased) and first informant in the present crime. In her testimony, she has stated that there was a quarrel between her son Yusuf (deceased) and his wife Nasima (P.W. No. 3). She first saw it from her residence situated on fourth floor and came down. She told Yusuf (deceased) that, it was time to go to work. However, he sat in an Auto-rickshaw. Yusuf (deceased) looked towards their window and abused her younger son Bilal Shaikh (P.W. No. 2). At that time, the Appellant was on the fifth floor in his house and asked Yusuf (deceased) why he was abusing him. Yusuf (deceased) told him that, he was abusing Bilal (P.W. No.2). The Appellant told him that, he is a Don and that Yusuf should know it. The Appellant also told Yusuf (deceased) that, he will come down and show it to Yusuf (deceased).

She has further stated that, the Appellant then came down, pushed her aside and then assaulted Yusuf (deceased) with a knife on his left side of chest, abdomen and his right side of the chest. She saw blood flowing and was shocked and started calling for help. Mr. Bilal (P.W. No. 2) and Mrs. Nasima (P.W. No. 3) took Yusuf (deceased) to Rajawadi Hospital. She rushed to police station. The police arrested the Appellant after about an hour. She confirmed with the police that the Appellant had assaulted Yusuf (deceased).

In her cross examination, omissions to the extent that *'Yusuf told the Appellant that he was abusing Bilal; Dharamraj-the Appellant told Yusuf that, he is a Don and that, he would show it to him; the Appellant also told Yusuf (deceased) that he will come down and show it to him'*, have been brought on record by the Appellant.

10 Mr. Bilal Shaikh (P.W. No. 2) is the younger brother of Yusuf (deceased). In his testimony, Bilal has stated that, the Appellant was residing on the fifth floor and he along with his family members were residing on the fourth floor of the same building. That, on 20th May, 2010 at about 11.45 p.m., he was standing in his balcony. At that point of time, his deceased brother Yusuf was standing down near the building. His mother Smt. Rahma Shaikh

(P.W. No. 1) was also there with Yusuf (deceased). His mother was asking Yusuf (deceased) to return to home, however, Yusuf (deceased) was not prepared for. The Appellant was standing in the balcony of his house. He knows the Appellant by name Sai. His brother was asking him to be in home, to which the Appellant felt that his brother was shouting at him. The Appellant asked his brother Yusuf (deceased) as to whether he was coming up or the Appellant should come down, to which his brother Yusuf (deceased) told the Appellant as to what the Appellant would do by coming down. The Appellant thereafter climbed down and pushed his deceased brother and mother and immediately gave about 4 to 5 blows with a knife on the deceased. Due to the push, the deceased fell down. He witnessed the said incident from his gallery and immediately came down and tried to catch hold the Appellant. However, the Appellant fled away from the spot. He along with his sister-in-law Mrs. Nasima (P.W. No. 3) immediately rushed the injured Yusuf to Rajawadi Hospital, where the doctors after examining declared him brought dead.

11 Mrs. Nasima Yusuf Shaikh, (P.W. No.3) is the wife of Yusuf (deceased). Mrs. Nasima, (P.W. No. 3) in her testimony has stated that, on 20th May 2010 at about 11.00 p.m. she was in her

house. Yusuf (deceased) came home took food and went down. She was sitting downstairs near the neighbouring building and Yusuf (deceased) was sitting in an Auto-rickshaw. She was about 8 to 10 feet away from her husband. Her brother-in-law Bilal (P.W. No. 2) was in the gallery of the fourth floor. Her mother-in-law was asking Yusuf (deceased) for returning home as he had to go to work next day morning, however, he was not prepared. The accused was standing in the balcony of his house situated on the fifth floor. She has stated that the Appellant told Yusuf (deceased) that '*go and sleep, why he is doing a drama, otherwise the Appellant would come down*'. Yusuf (deceased) replied that '*what the Appellant would show by coming down*'. The Appellant thereafter came down from his house with a knife and assaulted Yusuf (deceased) with it on his chest. The Appellant after assaulting Yusuf (deceased) fled away from the spot. Yusuf fell down sustaining knife injuries. She along with Bilal (P.W. No. 2) took Yusuf in injured condition to Rajawadi Hospital in an Auto-Rickshaw. The Medical Officer after examining Yusuf declared him brought dead.

12 Mr. Samad Mohd. Umar (P.W. No. 5) and Mr. Shabbir Abbas Shaikh (P.W. No. 6), the other two eye witnesses in their

testimony have narrated similar version as has been stated by the earlier three witnesses.

13 Thus, the evidence on record clearly indicates that it was the Appellant who challenged the deceased and when the deceased questioned him as to what the deceased would do by coming down, it is the Appellant who rushed by climbing down five floors of the building, came at the scene of offence by holding a knife in his hand and immediately assaulted Yusuf (deceased) on his chest. As noted earlier, the Appellant gave multiple blows on the abdomen of the deceased. The evidence on record clearly reveals that the Appellant came down from his house equipped with a knife with pre-meditation to assault the deceased.

14 The evidence further clearly indicates that, no quarrel took place between the Appellant and the deceased and as noted earlier, it is the Appellant who, challenged the deceased for no reason. The Appellant was having sufficient time to pacify himself and to cool down while climbing down five floors of the said building and before actual assault on deceased. The act of the Appellant of coming at the scene of offence with a knife in his hand clearly indicates that it is with pre-meditation and preparation to commit the crime, he came

there and assaulted deceased.

15 We, therefore, are not inclined to accept the submissions of the learned counsel appearing for the Appellant that, the act of the Appellant would fall within the purview of Exception 4 of Section 300 of the Indian Penal Code. To bring a case under Exception 4 of Section 300 of the Indian Penal Code, all the ingredients mentioned in it must be found. It is to be noted here that, the word "*sudden fight*" occurring in Exception 4 of Section 300 of the Indian Penal Code is not defined in the Code. It takes two to make a fight. To attract Exception 4, sudden fight must take place in the heat of passion upon a sudden quarrel. The word "*sudden*" is a prefix to both the words "*fight*" and "*quarrel*". Therefore, if after a sudden quarrel, there is a time for the passion to cool down, the resultant fight cannot be a sudden fight. Hence, in a case where there is a time to cool down after a sudden quarrel, Exception 4 will not apply.

16 In the present case, as noted earlier, it is the Appellant who challenged the deceased and came at the scene of offence with a knife in his hand and assaulted the deceased with it on the vital parts of the body. The Appellant was on the fifth floor. The deceased was standing on the ground floor. After a quarrel, the Appellant got hold

of a knife in his home on the fifth floor. He climbed down the staircase to the ground floor. Hence, there was sufficient time to cool down by the time he reached the ground floor. The injuries mentioned by the Medical Officer (P.W. No. 18) in the postmortem report would clearly indicate that the blows of knife were given on vital parts of the body. All the witnesses have consistently stated that it is the Appellant who came at the scene of offence holding a knife in his hand and immediately assaulted the deceased with the said knife. Therefore, the case of the Appellant is not covered in any of the exception of Section 300 of the Indian Penal Code and particularly the Exception 4. None of the decisions relied upon by the Appellant apply to the facts of the case.

17 In that view of the matter, in our considered opinion, the prosecution has proved the case against the Appellant beyond a reasonable doubt and the finding of conviction recorded by the Trial Court against the Appellant needs no interference, since those are in consonance with the evidence brought on record by the prosecution.

18 The Appeal is devoid of any merits and is accordingly dismissed.

(A.S. GADKARI, J.)

(A.S. OKA, J.)