

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.718 OF 2020
(Mehatab Esmile Fakir Vs. The State of Maharashtra)
IN
CRIMINAL APPEAL NO.235 OF 2020

Mr.S.J.Salunke, Advocate for the applicant.
Mr.S.G.Sangle, APP for State.

**(CORAM : RAVINDRA V. GHUGE AND
B.U.DEBADWAR, JJ.)**

DATE : 12/10/2020

PER COURT :

1. The applicant is before us upon being convicted by the impugned judgment and order dated 30/11/2019 delivered by the learned Additional Sessions Judge, Omerga in Sessions Case No.16/2018. The operative part of the order (Clauses 1 to 7) read as under :-

“1. The Accused No.1 Maksud Mohemmed Patel, accused No.2 Maheboob Ismile Fakir are acquitted u/s 235(1) of the Cr.P.C. for the offence punishable under section 302 r/w 34, 447 r/w 34, 506 r/w 34 of the Indian Penal Code.

2. The accused No.2 Mehatab Ismile Fakir is acquitted u/sec.235(1) of the Cr.P.C. for the offence punishable under section 25 r/w 4 of the Indian Arms Act.

3. Accused No.3 Mehatab Ismile Fakir is convicted u/s 235(2) of

Cr.P.C. for the offence punishable under section 302 of IPC. He is sentenced to suffer life imprisonment and pay fine of Rs.5,000/- (Five thousand only) I/d S.I. for two months.

4. Accused No.3 Mehatab Ismile Fakir is convicted u/s 235(2) of Cr.P.C. for the offence punishable under section 447 of IPC. He is sentenced to suffer rigorous imprisonment for 3 months and pay fine of Rs.500/- (Five hundred only) I/d S.I. for two week.

5. Accused No.3 Mehatab Ismile Fakir is convicted u/s 235(2) of Cr.P.C. for the offence punishable under section 506 of IPC. He is sentenced to suffer rigorous imprisonment for 2 years and pay fine of Rs.2,000/- (Two thousand only) I/d S.I. for one month.

6. The accused No.2 Mehatab Ismile Fakir in custody since 26-04-2018. he is entitled for set off u/s 428 of Cr.P.C.

7. All sentence shall run concurrently.”

2. The applicant, vide this application, seeks the suspension of the sentence and prays for bail during the pendency of the appeal before this Court.

3. We have heard the learned Advocate for the applicant/ appellant on 30/09/2020 and today, extensively. The learned APP appearing on behalf of the State has prayed for rejection of the application. With the assistance of the learned Advocates, we have gone through the R & P which has been received from the learned

Sessions Court and have perused the concerned papers, threadbare.

4. The learned Advocate for the applicant has contended as under :-

[a] The impugned judgment is passed on surmises and conjectures.

[b] The prosecution has not proved the charge levelled upon the appellant, beyond reasonable doubt.

[c] The defence of the accused is more probable.

[d] P.W.No.5, an eye witness, is not reliable and trustworthy.

[e] The testimony of P.W.No.1 Dr.Basavaraj Dhani and the post mortem notes at Exh.35 falsify the contention of P.W.No.5.

[f] There is a delay in lodging of the FIR.

[g] The depositions of the witnesses are full of contradictions.

[h] The eye witness P.W.No.5 was read out his statement u/s 161 of the Cr.P.C. by the Public Prosecutor before he stepped into the witness box.

[i] The alleged recovery of the weapon, is not incriminating.

[j] The clothes of the appellant accused have not been seized.

[k] The articles seized and recovered were not sealed properly before sending them to the Chemical Analyzer.

[l] The possibility of an early hearing of this appeal is remote and hence the sentence may be stayed and bail may be granted.

[m] In the matters of **Satish s/o Sushilkumar Shukla and another Vs. The State of Maharashtra [2018 ALL MR (Cri.)3620]** and in the matter of **Saurabh alias Dabba Vilas Adlag Vs. State of Maharashtra [2019(3) ABR (CRI) 598]**, the Law is settled that if a witness is read out his statement u/s 161 of the Cr.P.C. before he enters the witness box in the Court, his testimony needs to be discarded.

5. The learned APP has strenuously opposed the application. He contends that after a complete trial, the learned Sessions Court has come to a conclusion that it was the applicant who had committed the murder of Abhijit Ram Pawar. The accused had hidden a knife beneath his clothes prior to inflicting grave injuries on Abhijit, which caused his death. This indicates that the accused had come with preparations and a premeditated intention to cause the death of Abhijit. The case of the accused squarely falls within Section 299 and 300 of the IPC and hence punishable u/s 302.

6. He further submits that P.W.No.5 Irfan Fakir is a very close relative of the appellant, being his nephew. He was the eye witness, who saw the accused inflicting knife injuries on the abdomen of the

deceased. The moment the accused struck various blows of the knife on the stomach of the deceased, the eye witness, being of a tender age, got terribly frightened and started running towards the village. His uncle, the accused, threatened him by saying that if he divulged the incident to any villager, he would murder the eye witness as well. The learned APP, therefore, contends that in this backdrop, it is extremely dangerous for releasing the accused on bail since he would not hesitate to take revenge on the eye witness.

7. He further submits that the first vicious blow of the knife on the abdomen of the deceased was witnessed by P.W.No.5. Due to extreme fright and terror, he could not even think of wearing his chappals when he started running towards the village. The post mortem report indicates that the accused continued to inflict knife blows on the neck, hands, upper abdomen, naval region, etc. The death was caused due to Cardio Respiratory arrest owing to hemorrhagic shock due to multiple injuries.

8. We find from the post mortem report that the following injuries were inflicted upon the deceased :-

- “1. Chop lacerated wound on left neck side :
i. 2x1x0.5 cm*

ii. 3x1x0.5 cm.

both wound were near thyroid cartilage left side and horizontal.

iii. 6 x 1x 3 cm near cricoid cartilage left side horizontal.

Underlying muscles are divided, left carotid artery and jugular vein of neck were cut.

iv. 1x1x0.5 cm. near cricoid cartilage horizontal.

2. Chop lacerated wound on left wrists joint :

i. 2x0.5x0.5 cm oblique.

3. Chop lacerated wound on left web of index finger and middle finger 1 x 0.5 x 0.5 cm.

4. Chop lacerated wound below sternum 4 x 1 x 0.5 cm. oblique towards right directed from above downward.

5. Chop lacerated wound on left side of upper quadrant of abdomen.

i. 2 x 1 x 0.5 cm towards right directed from above downwards.

ii. 3 x 1 x 0.5 cm near navel towards right directed from above downwards.

iii. 3 x 1 x 0.5 cm towards left directed from above downwards.

iv. 4 x 1 x 0.5 cm towards right directed from above downwards.

6. Chop lacerated wound on left side of lower quadrant of abdomen. 8x 1 x 1 cm towards right directed from above downwards.

7. Chop lacerated wound on right side of upper quadrant of abdomen near navel. 2 x 1 x upto peritoneal cavity omentum

was protruding out of walls.

All those injuries are mentioned by me in a para 17 of the postmortem report.

All those injuries are caused due to sharp object and within 6 hours.

3. I examined the abdomen the walls, peritoneum were sustained injuries as mentioned in column No.17.

4. The last meal intact approximately 6 hours prior to death.

5. In my opinion the death is caused due to cardio respiratory arrest due to hemorrhagic chock due to multiple injuries.”

9. We have perused the testimony of the witnesses. P.W.No.1 is the doctor, who had conducted the post mortem/autopsy upon the dead body of Abhijit Ram Pawar. The death of Abhijit is a result of several knife injuries, inflicted by the accused, from the neck downwards up to the naval on his abdomen.

10. We have perused the deposition of P.W.No.2, the father of the deceased. Abhijit is said to have been stabbed and inflicted with knife injuries between 12.30 to 1.00 a.m. on 23/04/2018. The postmortem was conducted between 5.30 a.m. to 7.00 a.m. Thereafter, the funeral took place and P.W.No.2 registered an FIR on

23/04/2018 at 14.46 hours. We do not find that there is any delay which would affect the case of the prosecution in the light of these facts.

11. We have also perused the testimony of the 2 panch witnesses, P.W.No.4 Haridas and P.W.No.6 Dipak. They have supported the case of the prosecution. P.W.No.3 Mahadev has testified that when he visited the land of Vitthal Pawar alongwith others, he saw the dead body of Abhijit Pawar and also saw the accused running away from the spot. The knife has been recovered. The accused had thrown the knife into a well having water inside. The blood stains were not found on the knife. However, P.W.No.1 testified that the knife shown to him had caused the injuries on the body of the deceased.

12. In so far as the contention of the applicant that P.W.No.5 was read over his statement recorded u/s 161 of the Cr.P.C. and therefore his testimony in this case has to be completely discarded, is concerned, we find that the said submissions cannot be supported only for the reason that the said statement was read out to him. Such is not the law laid down by this Court in **Satish Sushilkumar Shukla** (supra). What has been observed in the said judgment is

that the conviction can be based on the testimony of a sole eye witness. Even if he was read over the complaint prior to his stepping into the witness box, it would be unsafe to base the order of conviction solely on the basis of his evidence unless there is some corroboration.

13. The judgment delivered by the learned Division Bench of this Court in **Satish Shukla** (supra) was not cited before this Court, while deciding the case of **Saurabh Adlag** (supra). Nevertheless, this Court, while deciding the Saurabh Adlag case (supra) at Nagpur, observed that P.W.No.1 and P.W.No.5 may have been manufactured witnesses and they could not be relied upon as being eye witnesses. Hence their testimony was held to be untrustworthy. Having discarded their testimonies, there was no material before the Court, by which the conviction could be supported.

14. The learned Full Bench of the Gujarat High Court has held in the case of **Nathu Manchhu Vs. The State of Gujarat [AIR 1978 Gujarat 49 Full Bench]** that even if a statement recorded u/s 161 of the Cr.P.C. reading over to the witness before he enters the witness box would not be the only ground for completely discarding his

testimony. It would have to be analyzed whether his evidence is inadmissible and/or affects its probative value and contravenes Section 162(1) of the Cr.P.C.

15. In the case of Gopal Madhukar Bombatkar Vs. State of Maharashtra [2014(3) Mh.L.J. (Cri.) 511], the learned Single Judge has concluded that if the contention of a witness having been tutored before he enters the witness box, is put forth, his testimony can be considered in the light of the contradictions available or highlighted and if such testimony then appears to be unreliable, it can be discarded.

16. We find from the record that the accused has not made an attempt to establish that P.W.No.5 was a tutored witness and because his statement u/s 161 of the Cr.P.C. was read out to him, it can be wholly discarded. In Satish Shukla (supra), it was brought on record that the Investigating Officer had instructed the witness to depose in favour of the prosecution in the manner in which he was tutored. In the instant case, P.W.No.5 has spoken the truth on oath by saying that he had visited the office of the Public Prosecutor and had read his statement made earlier. While saying this, he stoutly denied that the Public Prosecutor has tutored him or told him to

deposit in a specific manner. In the case of Saurabh Adlag (supra), the learned Division Bench noticed that the testimony of both the eye witnesses was wholly unreliable since the Investigating Officer had vitiated their testimonies by giving them heavy assistance which was intended to manipulate their testimony.

17. The applicant has contended that there is a civil dispute between his family and the family of the eye witness P.W.No.5. We do not find that this dispute could be the driving force behind P.W.No.5 in deposing against the applicant. He was the person who had started running towards the village having been terrified on seeing the accused stab Abhijit on his abdomen and because of he having alerted the villagers, that the 2 panch witnesses and other witnesses rushed to the scene of crime and P.W.No.3 saw the accused running away.

18. In the light of the above and considering the various types of wounds inflicted by the applicant upon the deceased as is evidenced vide the post mortem report and keeping in view that he had held out a threat to the eye witness, his nephew, of murdering him, we do not find that this is a fit case in which the sentence could be suspended and the applicant can be enlarged on bail.

19. The application is, therefore, rejected.

(B.U.DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)