

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 237 OF 2013

Salim Bora Rafik Shaikh
Age 26 years, Occ. Unemployed
Presently at Nasik Road Central Prison
Nasik, Bearing Barrack No.C/8273 ..Appellant

V/s.

The State of Maharashtra
At the instance of Dongri Police Station
in C.R.No.41/2009 bearing Sessions
Case No.453/2009. ..Respondent

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Mr. Sandeep Karnik, for the Appellant
Ms. Prajakta Shinde, APP for the Respondent / State.

**CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATE : 23 August 2021

JUDGMENT (Per C. V. Bhadang, J.)

. By this Appeal, the Appellant / Accused is challenging the judgment and order dated 20 April 2010 passed by the learned Sessions Judge for Greater Bombay at Sewree in Sessions Case No.453/2009. By the impugned judgment, the Appellant has

been convicted for the offence punishable under Section 302 of Indian Penal Code (IPC) for having intentionally caused the death of Shakil Papa Shaikh Chandiwala. The Appellant has been sentenced to suffer imprisonment for life and to pay a fine of Rs.1,000/- and in default, to suffer Rigorous Imprisonment for one month.

2. The prosecution case may be briefly stated thus-

That the Complainant P.W.3 – Ayub Habib Haider Sayyed was staying alongwith one Hanif, Ansar, Amjad, Amir, Usman and deceased Shakil Chandiwala in Room No.7 of Barkati House at Tandel Street, Dongri, Mumbai. P.W.3 and others were engaged in the business of extraction of gold and silver.

3. According to P.W.3, the deceased Shakil had advanced a hand loan to the Appellant and the deceased was demanding the said amount back. This according to the prosecution is the motive for the Appellant to commit murder of Shakil Chandiwala. There was a '*Julus*' on 8 April 2009. Therefore, P.W.3 and others had gone to watch the *Julus* at about 9.00 p.m. and returned at about 2 to 3 a.m. on 9 April 2009. The deceased came back at about 6.00 a.m. and was sleeping in the room. It is said that the Appellant came there at about 3.45 p.m. and assaulted the deceased with knife (Article A) resulting into severe injuries and bleeding. Shakil Chandiwala was taken to the J. J.

Hospital where on examination he was declared dead. On the basis of the complaint lodged by P.W.3 Ayub Sayyed, offence at C.R. No.41/2009 came to be registered with Police Station Dongri under Section 302 of IPC and Section 37(1)(a) and 135 of the Maharashtra Police Act. The investigation in this case was carried out by P.W.7 – PSI Balasaheb Gangurde and P.W.8 – PI Suresh Patil. During the course of investigation, a spot panchanama was drawn. The dead body was sent for post mortem examination which was conducted by P.W.9 – Dr. Sunanda Katke. According to the Investigating Officer, an information was received that Appellant was standing at bus stop on S.V.P. Road. P.W. 8 alongwith PSI Vasekar and staff went to the spot and arrested the Appellant in presence of P.W.2 – Murlidhar Patil who is a panch witness. According to the Investigating Officer, knife - Article A was recovered from possession of the Appellant alongwith his clothes which were blood stained. The Investigating Officer recorded the statement of witnesses. The seized articles were sent for the report of Chemical Analyser. On completion of the investigation, a chargesheet was filed against the Appellant.

4. The learned Sessions Judge framed charge against the Appellant for the offence punishable under Section 302 of IPC and Section 37(1)(a) and 135 of the Maharashtra Police Act. The Appellant pleaded not guilty to the charge and claimed to be

tried. The defence of the Appellant is one of the total denial and false implication. According to the Appellant, on 7 April 2009, he came from the village and attended the Julus on 8 April 2009. When he was having meals, on 9 April 2009 the police came and took him to Dongri Police Station and he was shown to be arrested and has been falsely implicated in the matter.

5. During trial, the prosecution examined in all nine witnesses and produced the record of the investigation. The Appellant did not lead any evidence in defence.

6. The learned Sessions Judge has convicted and sentenced the Appellant as aforesaid, while acquitted him for the offence punishable under the Maharashtra Police Act.

7. We have heard the learned counsel for the Appellant and the learned APP. With the assistance of the learned counsel for the parties, we have gone through the record.

8. It is submitted by the learned counsel for the Appellant that none of the prosecution witnesses namely P.W.3 Ayub Sayyed, P.W.5 Mohd. Abib, P.W.6 Noorjahan Ahmed are the eye witnesses to the alleged assault. The learned counsel has taken us through the evidence of these witnesses, in order to show that none of them claim to have actually witnessed the assault by the

Appellant on the deceased. It is submitted that arrest and recovery from the Appellant on bus stop of S.V.P. Road is also suspect. It is pointed out that P.W.2 Murlidhar Patil who is a panch had admitted that he has acted as a panch for Dongri Police in 10-12 cases. It is thus submitted that P.W.2 is a stock panch and no reliance can be placed on his evidence. It is submitted that it is improbable that the Appellant with blood stained clothes and a knife would stand in a crowded public place and that too on a public bus stand. It is submitted that the knife- Article A has not been found to have any blood stains and it is a common article which is available in market and therefore, cannot be said to be incriminating in nature. It is submitted that even the recovery of the clothes is also suspect. The learned counsel pointed out that as per the evidence of P.W.3 there were several inmates in Room No.7 namely Hanif, Ansar, Amjad, Amir, Usman and even P.W.6 Noorjahan had also come to the said room at the time of incident. It is submitted that although Noorjahan claims that the Appellant had come to the said room, she does not state about the Appellant carrying any weapon or any assault on the deceased by the Appellant. It is submitted that none of the other persons who are stated to be the occupants of the said room, as stated by P.W.3, are forthwith coming as prosecution witnesses. He submitted that the prosecution evidence falls short of proving the involvement of the Appellant in the offence, beyond reasonable doubt.

9. The learned APP has submitted that the evidence of P.W.3 would show that there was a clear motive in as much as the deceased had advanced a hand loan to the Appellant, which the deceased was demanding back. She submitted that annoyed by this, the Appellant has committed murder of the deceased. She submitted that evidence of P.W.3 Ayub Habib, P.W.5 Mohd. Abib and P.W.6 Noorjahan is sufficient to show the involvement of the Appellant in the assault alongwith evidence of Investigating Officer about the arrest of the Appellant with blood stained clothes and knife (Article A).

10. We have carefully considered the circumstances and the submissions made.

11. There is no dispute that Shakil Chandiwalla met with a homicidal death. P.W.9 Dr. Sunanda Katke who conducted the post mortem examination has found the following injuries on the dead body.

- 1. Stab wound over Rt. Side of chest 3.5 c.m. x 1.5 cm x 3 c.m. It is 5 cm above the nipple and 17.5 cm below right clavical. It is red colour with clean margin.*
- 2. E/o stab wound on right chest, 7 cm medial to above would 3 cm x 2 cm x 3.5 cm. It is 23 cm. below suprasternal notch and 11 cm away from nipple.*
- 3. E/o stab injury over abdomen, 17 cm. below injury No.2 measuring 8 cm x 7 cm through and*

through abdominal cavity with perforation of intestine outside abdomen.

4. E/o. two stab wounds on coils of small intestine purporting fully upto intestinal cavity exposing semi digested food outside.

She has opined that the cause of death is multiple stab wounds on chest and abdomen with perforation of abdomen, hemorrhage and shock due to stab injuries. Thus, it is clear that Shakil Chandiwalla met with a homicidal death. The question is whether the Appellant is the author of the injuries found on the person of Shakil Chandiwalla.

12. At the outset, it is necessary to note that there is no eye witness account of the incident of the assault available on record. P.W.3 had reported the incident to the Police in which he stated that at the time of incident he had gone to the house of one Hanif Bhai after having lunch in the hotel. At about 16.00 hours, he heard of a commotion that the Appellant Salim Bora has assaulted Shakil. Hence, he alongwith Sunny went to Barkati building where Shakil was lying in an injured condition in the passage. Although in the chief examination he stated that Appellant stabbed Shakil Papa on the chest and abdomen, in the cross examination, he has stated that after hearing the commotion/ shouts he reached at Barkati House and saw that Shakil Chandiwalla was lying in an injured condition. He claims that he learnt from the persons gathered there that Appellant had

come at about 3.45 p.m. and stabbed the deceased on chest and abdomen with a knife. The evidence of P.W.5 and P.W.6 is on the similar lines. Although P.W.6 states that the Appellant had come to the room where the deceased was sleeping she does not state that she had witnessed the assault by the Appellant on the deceased. It is necessary to note that none of the persons from whom P.W.3 Ayub Habib, P.W.5 Mohd. Abib and P.W.6 Noorjahan claim to have learnt about the assault by the Appellant, are forthwith coming as prosecution witnesses. In the absence of the examination these persons (from whom P.W.3, P.W.5 and P.W.6 claim to have learnt about the assault) the evidence of P.W.3, P.W.5 and P.W.6 on the point of assault becomes hearsay. In the absence of any eye witness account, the prosecution case can be said to be based on circumstantial evidence. It is significant to note that none of these witnesses had also claimed that they had seen the Appellant fleeing from the spot after assault.

13. This then takes us to the circumstance of the arrest. We have carefully gone through the arrest and recovery panchanama and the evidence of P.W.2 and P.W.8 in this regard. P.W.8 states that after drawing of spot panchanama, “when he had made inquiry” he came to know that accused was standing on S.V.P. Road near one bus stop. The source of such information, is not forthcoming in the evidence of P.W.8 much less, it is recorded in

the form of an entry in the case diary. The arrest of the Appellant is at about 7.05 hours on the same day i.e. about three hours after the incident. Learned counsel for the Appellant submitted that it is highly improbable that the Appellant with blood stained clothes and knife would stand at a public bus stop after three hours of the incident. We do find that it is improbable that the Appellant would stand with blood stained clothes and a knife at a public bus stand. There is one more circumstance why we find the arrest and the recovery suspect which is on account of the fact that the P.W.2 Murlidhar Patil who is stated to be the panch witnessing the arrest has admitted that Dongri Police knew him by name and he has acted as a panch in 10 to 12 cases of Dongri Police. P.W.2 is working as Hawker in Dongri area and resides at a distance of five minutes from Dongri Police Station. The fact that P.W.2 appears to be a stock panch is an additional circumstance on account of which we are unable to accept the recovery of the clothes and the knife from the Appellant at the bus stand on S.V.P. Road. There are no blood stains found on the knife (Article A).

14. In so far as the motive is concerned, the P.W.7 has admitted that he has not made any inquiry about borrowing of Rs.3,000/-. (P.W.3 claims that the Appellant had borrowed Rs.20,000/- from the deceased). Thus, the alleged motive by the prosecution also in our opinion is not established on record. As noticed earlier,

there were several occupants who were residing in Room No.7 alongwith the deceased. P.W.3, 5 and 6 also claim to have learnt of the assault from the public out of which none is forthcoming as prosecution witness. In such circumstances, in our considered view, it would be unsafe to find the Appellant guilty of the assault. It is now well settled that suspicion however strong cannot take the place of proof as held by the Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*¹ and *Shivaji Sahebrao Bobade and Anr. Vs. State of Maharashtra*². In our considered view, the Appellant is entitled to benefit of doubt.

15. In the result, the following order is passed.

ORDER

1. The Appeal is allowed.
2. The conviction of the Appellant for the offence punishable under Section 302 of IPC is hereby set aside.
3. The Appellant is acquitted of the offence as charged.

¹AIR 1964 SC 1622

²AIR 1973 SC 2622

4. The Appellant be set at liberty forthwith, if not required in any other offence.

5. Fine if paid, be refunded.

6. The order regarding disposal of muddemal property is hereby maintained.

(C. V. BHADANG, J.)

(NITIN JAMDAR, J.)