

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 612 OF 2015**

Tanmay Y. Sarkar @ Aziz @ Nazrul Shaikh }
Age-24 years, Occupation-Labour }
R/at: Plot No. 712, Building No. 4, }
New Mahakalinagar, Lagun Road, }
Malwani, Malad (W), Mumbai. } Appellant

Versus

The State of Maharashtra } Respondent

Mr. Lokesh Zade for the Appellant.

Mr. S.R. Agarkar-APP for the State.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

RESERVED ON : 17th December 2020

PRONOUNCED ON : 21st January 2021.

JUDGMENT :- (PER SADHANA S. JADHAV, J.)

1. The appellant herein is convicted for the offence punishable under Section 302 and is sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- (Rupees One Thousand Only), in default to suffer further simple imprisonment for one month. He is also convicted for the offence punishable under Section 201 of Indian Penal Code and is sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.1000/- (Rupees One Thousand Only), in default to suffer further simple imprisonment for one month by Additional

Sessions Judge, City Civil and Sessions Court, Dindoshi in Sessions Case No. 22 of 2011 vide Judgment and Order dated 9th December 2014. Being aggrieved by the said judgment and order, the appellant herein has filed the present appeal.

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

a) On 29th August 2010, P.S.I., S.A. Pawar (PW.6) attached to Malwani Police Station received an information from the control room that a person was lying unconscious at New Mahakali Nagar, S.R.A Building No.4, Room No. 712. He reached the said spot along with the police staff and found a person lying in Room No.712. It was noticed that the said person had sustained injury just below the chest. A local Doctor was summoned, who upon examination declared the said person as dead. The police were informed that the injury was caused by a sharp weapon. In the meanwhile, Abdul Gafar Mohmmmed Kushan Mulla (PW.2) who happened to be a friend of the deceased reached the spot. The police recorded his statement and on the basis of the said statement Crime No. 215 of 2010 was registered for the offence punishable under Section 302 of Indian Penal Code and investigation was set in motion. PW.2 had expressed his suspicion against the appellant who is the step son of the deceased Nazrul. That, the appellant was taken into custody by the police. The wife of the deceased namely Salmabi @ Maya Shaikh Nazrul Shaikh

was also arrested. After completion of investigation, the charge-sheet was filed. The accused had pleaded not guilty. The accused no. 2 Salmabi has expired during the pendency of the trial.

3. The prosecution has examined as many as 8 witnesses to bring home the guilt of the accused.

4. The conviction of the accused is mainly based on the evidence of PW.2 Abdul Gafar S/o Khushal Mulla, PW.7-Digambar Kambli, the next door neighbour of the deceased.

5. PW.6.-Mr. S. Sanjay Pawar, has deposed before the Court that he was attached to Malwani Police Station and that on 29th August 2010 at about 00.25 hours he had received an information from the control room that a person is lying unconscious at New Mahakali Nagar, Room No. 712. He had reached the said spot along with police staff within 10 minutes. They had seen a person lying on the floor in an injured condition in Room No. 712. The police had called the Doctor who had declared the injured dead. In the meanwhile, PW.2 had arrived on the spot. He had expressed suspicion on the appellant.

6. The inquest panchnama which is at 'Exhibit-61' shows that initially A.D. No. 91 of 2010 was registered under Section 174 of Cr.P.C. The inquest panchnama was recorded at about 1.35 a.m. to 2.15 a.m. in the presence of PW.2, who had maintained silence. At that juncture, PW-2 had only identified the dead body, to be that of Nazrul. PW.1 Doctor Kailash Jaiswal was also summoned by the police. The

police had then recorded the statement of PW.2 who informed the police that the accused nos.1 and 2 had called him to their house since the husband of the accused no. 2 was ill.

7. The testimony of PW.2 would show that he is the owner of the tailoring shop situated at Building No.8 near Ideal School. The deceased Nazrul was working with him for almost 2 and ½ years in the past and discontinued to work for him after closure of that shop. The deceased was an Alcoholic. He has further deposed that the accused no. 1 herein is the son of Salmabi begotten from her first husband. She had then married to Nazrul Shaikh and was residing with him. The bone of contention between the couple was that, Salmabi was insisting upon the deceased to sell the said residential premises and to give her half amount of the sale proceeds.

8. According to PW.2, on 28th August 2011, at about 10.00 p.m. to 10.30 p.m. Salmabi accompanied by her son i.e. the appellant visited the shop of PW.2 and informed him that he should accompany them since Nazrul was ill. PW.2 was further informed that in fact, they had summoned a Doctor to examine Nazrul and that the Doctor had declared him dead. PW.2 then followed Salmabi and the appellant to their house. He noticed a stab wound on Nazrul. He had not noticed any blood on the ground. He gathered an impression that the accused had killed Nazrul. He approached the Malwani Police Station and lodged the report. The said report is at 'Exhibit-30'. PW.2 has admitted in the cross-examination that he was not in touch with the deceased after the deceased had stopped working with him and therefore, was

not sure as to whether Nazrul and Salmabi continued to quarrel.

9. It is admitted that the deceased used to do the cutting work of the garments in his house. He has denied the suggestion that he has intended to purchase the room occupied by Nazrul.

10. PW.5-Dr. Sunil Birhade has performed autopsy on the dead body of the deceased Nazrul. The dead body was referred for postmortem along with the inquest panchnama in A.D.R No. 91 of 2010 and postmortem was conducted in between 3.00 p.m. to 4.00 p.m. The column no. 17 of postmortem note would show that the deceased has sustained the following injuries.

E/O. Incised stab wound present over epigastric region of abdomen, in the midline, 2cm below xiphisternum process spindle shaped, Both angles are acute, vertical; size 2.5 cm x 1.5 cm x Abdominal Cavity deep.

On dissection of injury No. 1 internal injuries are : Skin and Subcutaneous tissue is cut through and through, abdominal muscles over epigastric region are cut and perforated, mesentery is cut and perforated, stomach is cut and perforated, medical lobe of liver is cut through and through Blood with blood clots present in track of Incised Stab Wound.

Injuries under the scalp their nature - NIL.

The stomach contents are as follows:-

E/O.100 cc semi digested food, sourish odour mucosa congested.

E/O. Upper part of Stomach at lessor curvatin is cut and perforated.

The cause of death is Hemorrhage and shock due to incised stab wound (unnatural).

11. According to PW.5, the injury mentioned in Column No.21 is corresponding to injury no. 1 in Column no. 17. PW.5 has further admitted in the cross examination that the nature of injury is incised wound and if a person falls on a sharp object lying vertically then possibility of such injury cannot be ruled. According to him, the dead body was received for postmortem in the morning at 8.30 a.m. and till 3.00 p.m. the dead body was kept in the mortuary and according to PW.5 the deceased had expired within three hours after last meal. The inquest panchnama was conducted between 1.35 a.m. to 2.15 a.m. i.e. prior to registration of the offence against the appellant.

12. The First Information Report was recorded at about 3.00 a.m. on 29th August 2010. It is apparent that the police had reached Room No. 712 before PW.2 and that there was no one at home when the police had reached.

13. The sequence of events would show that the police was informed about the death of Nazrul before arrival of PW.2. The information had reached the police at about 00.25 hours. At about 1.40 a.m. PW.1 had examined Nazrul and at 3.00 a.m. the crime was registered against the present appellant. Initially A.D. No. 91 of 2010 was registered and the inquest panchnama was also conducted in A.D. enquiry.

14. It appears from the records that PW.6, Pawar was the first person to reach Room No. 712. He had summoned a local Doctor who had, upon examination, declared Nazrul Khan dead. The local Doctor

had issued the certificate to that effect which is at 'Exhibit-27'. It is seen from the evidence of PW.6 that PW.2 had reached the scene of offence only after Nazrul Khan was declared dead and he had expressed suspicion against the appellant who happens to be the step son of the deceased. The suspicion expressed by PW.2 was the foundation for the arrest of the present appellant. PW.6 had then registered Crime No. 215 of 2010 against the appellant and PW.2 was shown as the first informant. The First Information Report shows the name of the appellant as the sole accused.

15. PW.6 in his evidence has feigned ignorance about the ownership of Room No. 712. He has further candidly submitted that he was not aware as to whether accused no.2 was shown as nominee of deceased. It is admitted by PW.6 that it has transpired in the course of investigation that the deceased was an alcoholic and the profession of the deceased was cutting master in tailoring. PW.6 had noticed an overlocking machine and table used for cutting the clothes in the said room. The articles used for cutting clothes were also found on the table of the said room. The deceased had sustained a single injury below chest admeasuring about 2 cm. PW.6 has also admitted that in the course of investigation he had not found any incriminating material against the accused no. 1.

16. PW.7-Digambar Kambli who was residing in front of house of Nazrul has deposed before the Court that the deceased was an alcoholic whereas the accused no. 2 was suffering from diabetes. That the appellant was also consuming alcohol everyday. The neighbours

usually used to hear them quarreling but since the accused and the deceased were speaking in Bengali language the neighbours could not gather the reason for their quarrel.

17. According to PW.7, on the day of the incident i.e. on 28th August 2010 at about 8.00 p.m or 8.30 p.m. the accused no.2 had knocked at their door and asked for water. While she was leaving the room of PW.7 they saw the appellant and Nazrul present in their house. He had heard them quarreling. At about 8.00 p.m. to 8.30 p.m. when he opened the door he had seen that people had gathered outside the room of Nazrul Shaikh and he had heard people saying that the accused had committed the murder of Nazrul Shaikh.

18. In the cross-examination there is an admission that when the doors of both the houses are closed then witnesses could not have heard conversations/hot discussions from the house of the accused. He also admitted that it would be difficult to distinguish as to whether the high pitch voice could be termed as a quarrel. It is admitted that from 7.00p.m. to midnight, he had not opened the door of his house.

19. PW.8.-Jaideep Surve is the investigating officer who has filed a charge-sheet in the present case. He had arrested accused no.2 Salamabi on 2nd September 2010. PW.8 has proved the omissions and contradictions in the evidence of the witnesses.

20. Upon, meticulous scrutiny of the evidence adduced by the prosecution, it is clear that the present appellant was present in the house of deceased when the incident occurred. There is evidence of

last seen “against the accused no.1”. It is also clear that when Salmabi returned to her house after drinking water from the house of PW.7, Nazrul was in the exclusive company of the appellant soon before his death. According to the prosecution, the motive for commission of offence is that the accused no.2 was insisting upon Nazrul to transfer the residential premises in her name or to make her the nominee of the said property which was denied by Nazrul. There is evidence on record which would show that the deceased had placed on record his photo identity with his wife. The prosecution, on the basis of evidence of PW.7 has established that the appellant was last seen in the company of deceased.

21. PW.2 had categorically stated that there used to be frequent quarrels between husband and wife on account of transfer of the property in her name in the same breath, PW.2 has also admitted that he had no knowledge as to whether the quarrels between the couple were persisting even after he had left the employment of PW.2. The motive is attributed to accused no. 2 as she wanted to sell the flat and get half share of the price.

22. PW.3/A, Parmeshwaran Naidu, happens to be the Chief Promoter of the S.R.A Scheme at Malwani. According to him, deceased Nazrul was the original resident of room no. 30 in the Chawl. Subsequently, he was allotted flat No. 712 in building no.4 in the scheme initiated under the Slum Rehabilitation Scheme. On 29th August 2010, PW.3/A had learnt about the demise of Nazrul Shaikh, he has placed on record the extracts of the allotment list of rehabilitation

of the said building dated 13th June 2007. He has admitted before the Court that the deceased and the accused were living together in room no. 712. He has placed on record the photocopies of the extracts which show the photograph of the deceased along with accused no.2.

23. The learned counsel for the appellant submits that the appellant was not residing along with accused no.2 and Nazrul as he happens to be the son of the accused no. 2 begotten from her first marriage. The learned counsel for the appellant has then submitted that even according to PW.7 he had heard high pitch voices from the house of Nazrul just before the incident and according to him they were quarreling. Hence, learned counsel submits that taking into consideration the fact that the deceased has sustained a single injury the possibility that one of the accused has caused the said injury in a heat of passion cannot be ruled out.

24. It is also submitted that although the appellant was shown as the sole accused in the first information report, it had transpired in the course of investigation that the accused no.2 was also arraigned as an accused in the said offence as the deceased was last seen in the company of accused nos. 1 and 2. In fact, accused no.1 was arrested only on the basis of the suspicion expressed by PW.2. Hence, PW.6 Mr. Pawar has also admitted candidly that in the course of investigation no incriminating material had surfaced against the accused no.1. It is also submitted that in the statement under Section 313, the accused no. 1 has stated that Nazrul had returned home in an inebriated state, he was trying to work on the machine when he accidentally fell on the

vertical stand of the reel appended to the sewing machine. He was unable to balance himself or stand straight. The accused has stated before the Court that it was he who had called upon the police and informed the police as well as summoned the Doctor for examining Nazrul and some of the neighbours had advised him to call some relatives or friends and therefore, they had been to the house of PW.2. However, the neighbours presumed that they had fled. That, the accused have been falsely implicated.

25. As against this, the learned APP has rightly submitted that the evidence of PW.7 is sufficient to establish that the appellant was quarreling with his step father at the relevant time.

26. It is also submitted that it cannot be said the deceased had met an accidental death by falling on the machine, and that the accused has raised a false defence. Moreover, there is recovery of the knife at the instance of the accused no.1. The recovery of the knife by itself may not be an incriminating circumstance but the fact that the accused was last seen in the company of the deceased would assume significance. Moreover, the accused has admitted his presence in Room No. 712 with the deceased and has stated that he had set the law into motion. It is seen from the records that the accused was taken into custody on 28th August 2010.

27. Column no. 17 of the postmortem notes would clearly show that there was a single injury on the person of the deceased admeasuring 2.5cm x 1.5cm x abdominal cavity deep and the evidence sustains a finding that the accused had given a single blow to the

deceased on the vital part. The act of the accused would fall under exception 4 of Section 300 of Indian Penal Code. Exception 4 of Section 300 of Indian Penal Code read as follows:-

“Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner”.

28. In the case of *Guljar Husain Vs. State of U.P.*, reported in 1993 Supp. (1) SCC 554, the Apex Court held as under:-

“Single knife blow inflicted in abdomen of deceased resulting in death within two hours- In the circumstances conviction altered from Section 302 IPC to Section 304 Part-I IPC and sentence altered from life imprisonment to 10 years’ RI”.

29. On the basis of the evidence adduced by the prosecution and in view of the above discussion, it can be said that the accused has inflicted the fatal blow on the deceased without any premeditation, and in a heat of passion on the spur of the moment. The accused has not taken undue advantage of the situation. Hence the accused is liable to be convicted for the offence punishable under Section 304, Part-I of Indian Penal Code. A substantive sentence of rigorous imprisonment for ten years would meet the ends of justice. Hence, the following order:-

ORDER

- i) The appeal is partly allowed.
- ii) The order of conviction and sentence for the offence

punishable under section 302 of Indian Penal Code vide judgment and order dated 14th January 2015 passed by Additional Sessions Judge, City Civil and Sessions Court, Dindoshi in Sessions Case No. 22 of 2011 is hereby set aside.

- iii) The appellant instead is convicted of the offence punishable under section 304 Part I of Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years. The sentence of fine is maintained.
- iv) The appellant is entitled to set off under Section 428 of Cr.PC.
- v) The appellant is acquitted of the offence punishable under section 201 of Indian Penal Code.

30. The appeal is accordingly disposed of.

(N.J. JAMADAR, J)

(SMT. SADHANA S. JADHAV, J)