

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

CRIMINAL APPEAL NO.463 OF 2017

Sanjay @ Rani Bansi Pradhan
R/o Room No.11, Rahul Nagar,
Bandra Reclamation,
K. G. Marg, Bandra (W),
Mumbai.

...Appellant-Org.
Accused

V/s.

The State of Maharashtra

...Respondent

Mr. Kartik Garg for the Appellant (Legal Aid).
Mr. H. J. Dedhia, APP for the Respondent-State.

**CORAM : PRASANNA B. VARALE &
S. M. MODAK, JJ.**

RESERVED : 25th JANUARY, 2021.

PRONOUNCED ON : 12th FEBRUARY, 2021.

JUDGMENT (PER S.M.MODAK, J)

. Three persons viz first informant Smt. Jyoti Yedu-PW-3, accused Sanjay Pradhan @ Rani and the deceased were residing together at mezzanine floor of room situated in Rahul Nagar, Bandra (W) Mumbai. They were residing there since one and half month prior to the month of August 2015.

2. The room was owned by PW-1-Rafiq Abdul Shaikh. He used to reside on the ground floor of that room. PW-2-Alim Rafiq Shaikh also used to reside there. The first informant Jyoti and accused used to beg at various place and used to earn their livelihood. Whereas the deceased was earning by cleaning vehicles. Occupants of the mezzanine floor were supposed to reside peacefully. Their cohabitation last long only for one and half month.

3. The incident took place on 1/8/2015. Accused Sanjay murdered the deceased by assaulting him on his chest with the help of knife. The incident took place in the intervening night of 1/8/2015 and 2/8/2015.

4. The background for this incident is the accused disliked intimacy between the first informant Jyoti and the deceased. Infact deceased came to reside on mezzanine floor at later point of time. But he sidelined accused and developed a bondage with first informant. That is the cause of concern for the accused.

5. On fateful day the owner and his son heard noise in the mid night and when they went to mezzanine floor they noticed the deceased lying on the ground and the first informant giving him first aid treatment. Realizing discomfort, the accused(who was polio patient and using clutches) jumped from the mezzanine floor and

ran away. People gathered, the deceased was taken to Bhabha hospital. They have declared him dead. On the complaint of the first informant Jyoti, Bandra police station registered an offence punishable under section 302 of IPC against the accused. Accused was tried by the Sessions Judge, Bombay. Defence of the accused is of denial.

6. The prosecution has in all examined 10 witnesses.

7. The learned Sessions Judge found the accused guilty as per the judgment dated 9/12/2016 for the offence punishable under section 302 of IPC. He is challenging the correctness of the said judgment.

8. We have heard Mr. Garg, the learned Counsel (legal aid) for the Appellant and Mr. Dedhia, the learned APP for the Respondent-State.

9. The appellant challenged the judgment mainly on the ground that the evidence of the witnesses eye witness PW-3-Jyoti and PW-1-Rafiq and PW-2-Alim (who came at the spot later on) is not consistent and reliable. The findings are also challenged for the reason that there is inherent inconsistency in between the prosecution witnesses about the seizure of knife. According to the

appellant these grounds are sufficient to raise a reasonable doubt in the prosecution case and the appellant needs to be given benefit of doubt. Alternatively, it is submitted that the offence will not fall within the purview of section 302 of IPC. But at the most will fall under section 304 part I of IPC. As against this the learned APP supported the findings and according to him there is no inconsistency in the evidence of three witnesses and the findings on the point of recovery and seizure of weapon is reliable and trustworthy.

10. We have read the evidence of prosecution witnesses with the assistance of both the sides. It is true that only PW-3-Jyoti is named as an eye witness to the actual assault. Though it may be true that during her evidence before the Court, she tried to suggest that the owner PW-1-Rafiq and his son PW-2-Alim were present at the time of actual assault. However, correspondingly such reference does not find place in the evidence of PW-1-Rafiq and PW-2-Alim. Amongst them who is truthful and what is the effect of entire prosecution case will be decided later on. We proceed with the assumption that PW-3-Jyoti is only eye witness. Even if we consider the evidence of PW-1-Rafiq and PW-2-Alim (as it is) we can find that on the date of incident they have seen the first informant PW-3-Jyoti and the deceased on the mezzanine floor. They have also seen the accused there and running away by jumping. At the most both these

witnesses can be said to be the witnesses to the events that took place post the assault.

11. PW-4- Mohd. Ayub is the witness to the spot of incident Whereas PW-8-Mohd. Zuber is the witness to the inquest panchanama. PW-5-Dr. Vasant Sonarikar is the Medical Officer attached to Bhabha hospital who has examined the deceased and has certified him to be dead. Whereas PW-6- Dr. Archana Kaple attached to the same hospital has examined PW-3-Jyoti. PW-7-Dr. Swaroop Bhalepatil attached to Cooper hospital has performed autopsy on the dead body. PW-9-Ajay Bhosale completed the pre FIR formalities and part of post FIR investigation. He undertook inquest panchanama, got registered FIR, prepared spot panchanama. Whereas PW-10-Vijay Belge carried out remaining investigation.

12. It is true that there are certain inconsistencies in between the evidence of PW-1-Rafiq and PW-2-Alim on one hand and PW-3-Jyoti on the other hand. It pertains to exactly when PW-1 and PW-2 came at the spot. We do not think that such inconsistency is that type of inconsistency which compels us to disbelieve them. This type of inconsistency which has cropped up due to want of clear understanding of what the witness has said in the Court and due to recording it during evidence. We say so because we have minutely perused the evidence of these three witnesses and the FIR Exhibit

13. We will give reasons for that hereinafter.

13. We do agree that there is inconsistency in between PW-3-Jyoti on one hand and Memorandum panch PW-4-Mohd. Ayub on the other hand. It is on the point of at exact what place the knife as weapon of offence was found. PW-3 says that it is seized from the spot whereas memorandum panch PW-4-Mohd. Ayub says otherwise.

14. This memorandum was recorded on 4/8/2015. The appellant expressed his willingness to produce the knife and consequentially it was seized from the place below the staircase of Bismilla Building opposite Darga at Mahim. The seizure officer is PW-10-Vijay Belgi. As against this PW-3-Jyoti, the first informant during cross examination has stated a different place from where the knife was seized. It was from the loft room of their house (paragraph No.10). So we have got two places from where the knife is seized. One is stated by the first informant and second is stated by the Memorandum panch and the investigation officer.

15. This issue was agitated before the learned Sessions Judge. The learned Sessions Judge in paragraph No.22 has noted

"no doubt there is discrepancy in respect of recovery of knife. The effect thereof would be considered hereinafter."

The observation of this aspect find place in paragraph No.29 of the

judgment.

16. He observes *"since according to prosecution it was recovered at the behest of accused No.1 under section 27 and according to the informant it was recovered from the house itself immediately after the incident. However, said over zealous attempt on the part of investigation cannot stifle the case of prosecution."* So the learned Session Judge was conscious of this discrepancy. Over zealousness on the part of investigation was also noted by the learned Sessions Judge. According to him it will not affect the merits of the case. The merits about the circumstance of seizure of the knife on one hand and merit of the entire case on other hand differs. We feel that the prosecution evidence about recovery of knife at the instance of the appellant cannot be believed upon. PW-3-Jyoti has supported the prosecution, it cannot be said that she was won over. The answer given by her about seizure of the knife seems to be natural and if it is seized from the loft of the room, it cannot be seized at the same time below the staircase. So we are not inclined to accept the prosecution case about seizure of knife at the instance of the appellant.

17. As stated above there is no inconsistency in between PW-3-Jyoti on one hand and PW-1-Rafiq and PW-2-Alim on the other hand. It is on the point of at exact what time PW-1-Rafiq and PW-2-

Alim arrived at the spot. It will be material to consider how the event took place as deposed by these three witnesses. The important events are as follows:

- a) First informant, accused and the deceased returned home on the night of 1/8/2015. After taking dinner they slept.
- b) First informant heard shouts of deceased Raju "*Rani muze chod*"
- c) Owner PW-1-Rafiq and his son PW-2-Alim also heard shouts of deceased Raju in similar words.
- d) Witness Jyoti got up from the sleep. She saw deceased Raju lying and the accused sitting over him and pulling his hair.
- e) In spite of advice to leave the deceased, instead of accepting such advice accused beat the deceased.
- f) Witness took a broom and assaulted the accused.
- g) She called the owner for help. The owner and his son arrived at the spot.
- h) Accused assaulted deceased Raju with knife on his stomach.
- i) Accused gave bite on the hand of PW-3-Jyoti.

18. So if we read evidence of PW-3-Jyoti what one can gather is accused assaulted the deceased with knife after the owner and his son have arrived at the spot. This assumption may be due to the fact

that the events have been recorded in the evidence in that manner. On this background, if we read the evidence of PW-1-Rafiq and PW-2-Alim what we find is accused ran away with his clutches after opening of the door of the loft by these two witnesses. What both have said is relevant. It is as follows:

- a) They have heard shouts.
- b) They went to the loft to open the door.
- c) Accused Rani ran away with clutches.
- d) There was profused bleeding and there was injury to his stomach and Jyoti was applying turmeric.

19. So both have never said that they have witnessed the actual assault. We do not find that there is observation of the learned Sessions Judge on this aspect in the judgment. Probably it might not have been argued or it might have been overlooked by the learned Sessions Judge. It is argued on the part of appellant that the evidence of PW-3-Jyoti is not trustworthy and material portion from her evidence is not corroborated by PW-1-Rafiq and PW-2-Alim.

20. We have already said that there is inconsistency. We do not feel that the inconsistency is of such nature so as to treat PW-1-Rafiq as untrustworthy. When evidence is recorded it generally happens that witness used to answer all the questions put to him or her. Then witness used to give answer and such answer is dictated by

the learned presiding Officer to the Stenographer and then it is typed. The learned presiding Officer has to understand the answer given by the witness and then to translate it into English. In Session's Court at Bombay evidence is recorded only in English (and not also in Marathi) so there is every reason to believe that there is mistake in recording the answers. There is reason for such opinion. We have perused the FIR at Exhibit 13. It can be read into evidence for corroboration or contradiction. If we read it one can understand that first assault took place and then the owner and his son had arrived at the spot. For these reasons, we are not inclined to label the first informant as untrustworthy.

21. From her evidence we can gather the following facts:
 - a) The appellant was sitting over the deceased (and the deceased was in lying position).
 - b) The accused assaulted Raju on his stomach with the help of knife.
 - c) Due to the injuries, the deceased was unable to move. With the help of persons gathered there. PW-3-Jyoti shifted him to Bhabha hospital. She has not said about multiple blows by the accused.
 - d) Doctors have declared him dead.
22. Certain improvements made by her were pointed out.

They find place in paragraph No.8 of her evidence. Certain omissions pertaining to nature of her occupation and that of the accused were minor improvements. Beating the accused with broom by the witness is also considered as an improvement. The suggestion was put to her about the reason for quarrel in between the three occupants. It was on account of money. She has disassociated herself from that quarrel. It was in between the deceased and the accused only. The suggestion was also put to her about the assault on the deceased being made by her and not by the accused. It is denied. So no other material is pointed out from her evidence so as to make that defence probable. It is pertinent to note that even she had received injuries.

23. PW-6-Dr. Archana examined her. She had noticed bite mark on her right forearm. The certificate is at Exhibit 28. The injuries corroborate with the oral version given by her.

24. Through PW-7-Swaroop Bhalepatil the prosecution has proved the cause of death as shock due to stab injury over abdomen. The description is given in paragraph No.17 of the post mortem report. Prior to the post mortem carried out at Cooper Post Mortem Center Doctor Vasant Sonalikar examined the patient. He was unconscious. He has also noticed injury over the abdomen. He has taken care in issuing certificate. From the above evidence it is clear that there is corroboration to the oral testimony of PW-3-Jyoti by the

medical evidence.

Involvement of the Appellant

25. Even though PW-1-Rafiq and PW-2-Alim have not seen the actual assault, they have seen the appellant in the loft when they opened the door. The deceased and PW-3-Jyoti were also there. There is no reason to disbelieve these two witnesses about facts seen by them and deposed by them. Merely because the appellant was polio patient and using clutches it does not mean that he cannot run away. The act of running can be considered as an act of able bodied person running. This cannot be the ground to disbelieve the evidence of these two witnesses. Trial Court has rightly believed them. So we have got the eye witness account thereby clearly depicting about the role played by the appellant and we have got the evidence of PW-1-Rafiq and PW-2-Alim witnessing the presence of the accused at the spot. The conduct of running away by the appellant is inconsistent with the presumption of innocence.

26. As already observed this Court is not inclined to accept the evidence on the point of recovery of knife but the evidence referred above clearly suggest involvement of the appellant in the crime committed. So we have no hesitation in trying to accept the culpability of the appellant as liable for the unnatural death of the deceased.

Type of offence

27. Trial Court has held the appellant responsible for the offence punishable under section 302 of IPC. There is an argument on behalf of the appellant that offence under section 302 of IPC is not made out. Evidence is not to be appreciated in such manner as been discussed by the Hon'ble Supreme Court in the following judgments, which are relied upon by the appellant *Stalin vs. State*¹ and *Gurmukh Singh vs. State of Haryana*².

28. In case of *Stalin(cited supra)* the Hon'ble Supreme Court has reiterated various observations given by the Hon'ble Supreme Court in various cases. Many of these cases involves a single blow theory. Out of the cases reproduced therein, in some of the cases offence under section 304 Part I of IPC was held as proved and in some of the cases offence under section 302 of IPC was held to be proved. In case of *Stalin (cited supra)* the Hon'ble Supreme Court laid down various guidelines for consideration of the Court. Those guidelines assist the Court to arrive at a conclusion about applicability of a particular section that is to say Section 302, 304 of IPC. Those guidelines include type of weapon used, single blow or multiple blows, part of the body affected, whether the blow was due to provocation by the deceased or without provocation ? etc. All these guidelines suggest whether there was intention or whether there was knowledge.

1 (2020) 9 Supreme Court Cases 524

2 (2009) 15 Supreme Court Cases 635

29. In this case knife was used. It is pertinent to note the position of the accused and the deceased at the time of assault. The deceased was in a sleeping position and the accused was sitting on the person of the deceased. PW-7-Dr. Bhalepatil has noticed stab injury over the abdomen. Even though the evidence on the point of recovery of knife is not believed it does not mean that the use of knife for inflicting the injury has to be disbelieved. According to Dr. Bhalepatil the injury noticed by him was possible due to the knife shown to him. Though the first informant PW-3-Jyoti has not deposed about the quarrel between the deceased and the accused that took place prior to she woke up, during cross examination she has stated that the reason of the quarrel was money.

30. If a person sits on the person of any person and if he assaults the person in sleeping position with help of knife there can be no intention other than to commit murder or to cause bodily injury as is likely to cause death. So without any hesitation we hold that the act of the appellant falls within the purview of section 300 of IPC. Hence the appellant is rightly been convicted for the offence punishable under section 302 of IPC.

31. The facts of the above two referred cases are different from the facts before us. The circumstances mentioned above are sufficient enough to infer about the intention of the accused to

commit murder of the deceased. Hence we are not inclined to accept the submission made on behalf of the appellant to alter the conviction from section 302 of IPC to section 304 of IPC. For above reasons we find no merit in the point raised on behalf of the appellant about wrong appreciation of the evidence and also we find no merit in the submission for alteration of conviction. Hence the order:

- a) The Appeal is dismissed.
- b) We appreciate the assistance provided to this Court by learned Counsel Mr. Kartik S. Garg appointed through Legal Aid Services Authority for the appellant and quantify fees of the learned Counsel at Rs.10,000/- (Rupees Ten Thousand Only.)

S. M. MODAK, J

PRASANNA B. VARALE, J

R.S.
Karve

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