

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

CRIMINAL APPEAL NO. 860 of 2017

Naushad Mekrani @ Batala

...Appellant

V/s.

The State of Maharashtra

...Respondent

Mr. Pawan Mali (Legal Aid) for the Appellant.

Mr. Arfan Sait, APP for the Respondent-State.

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

DATED : 21/01/2021.

JUDGMENT (PER S.M.MODAK, J)

. City Civil Judge Bombay tried Nafis Ahmad @ Guddu accused No.1 and Naushad accused no.2 for committing murder of one Hafiz Abdul Kalam Khan an offence punishable under Section 302 r/w 34 IPC. Trial Judge acquitted Nafis accused no.1 whereas hold Naushad guilty for offence under Section 302 of IPC. He has challenged the correctness of the said judgment.

2. We have heard learned advocate Shri Pawan Mali appointed through legal aid and learned APP Shri Arfan Sait. Both

of them have taken us through the record. The case is based on the evidence of 3 eye witnesses and corroborative evidence. Trial Court has not believed the evidence of PW No.3-Rakesh Narayan Chavan. So the appellant has focused on eyewitness account and corroborative evidence. Appellant's contention is that even if the story only of 2 eye witnesses is perused, we may find that they have got little chance to witness the actual assault by this appellant. They may be present at the spot, but they went near the deceased only after hearing the noise and actual assault also did not take place in their presence. Learned advocate has also pointed out certain inconsistencies in between the evidence of PW 1-Nitin Baban Kamble and PW-2-Azam Rehman Choudhary. Our attention is also drawn towards non identification of weapon/knife by PW-1- Nitin and PW-2-Azam. PW-1-Nitin was able to identify knife whereas PW-2 could not identify the knife.

3. Alternatively it is submitted that offence will not fall under Section 302 of IPC but under Part I of section 304 of IPC. Whereas learned Additional Public Prosecutor supported the judgment. According to him the evidence of 2 eye witnesses PW-1-Nitin and PW-2-Azam is clear and unequivocal. He also relied upon the evidence of seizure of knife at the instance of the appellant. To refute the alternate submission of learned advocate for the appellant, it is submitted that intention to commit murder can be clearly spelt

out on the basis of proved circumstances. There is focus on possessing the knife at the time of assault by this appellant. There is emphasis on the utterance/threat given by this appellant (after blows of knife were given) *“Kamal (absconding accused), pakdo sabko, sabko mar dalenge”*.

4. For better appreciation of evidence certain facts need to be considered. It is taken from the evidence of 2 eye witnesses PW 1- Nitin and PW 2-Azam. They are as follows:

- a) PW 1- Nitin, PW 2-Azam and deceased Hafiz alongwith with one Lallu Shukla went to the spot together. It is for the purpose of smoking of cigarette. The spot is situated on the footsteps going towards Sheetal Nagar and going through trees and shrubs near B.M.C. playground, national weight bridge.
- b) Accused persons including this appellant have not accompanied them to the spot. It has not come in evidence how accused arrived at the spot, when they have arrived & why they came there.
- c) Above mentioned prosecution witnesses first met near National Weight Center, Sakinaka Mumbai and then they went to hill.
- d) The incident took place on 7/10/2012 at about 4.00 p.m.

to 4.15 p.m.

e) On going to the hill, PW-1-Nitin , PW-2- Azam and Lallu Shukla stayed back and deceased Hafiz went towards the bushes(why he went there has not come in the evidence).

f) PW-1-Nitin, PW-2-Azam heard sound of talk hence they went towards the bushes (what happened near the bushes after deceased Hafiz went there till hearing of talks witness have not said anything)

5. These basic facts need to be understood. After the prosecution witnesses went towards the bushes, the incident of assault took place. It need to be understood. It is as follows:

a) Witnesses saw deceased Hafiz slapped Guddu accused No.1 (acquitted) (Reason for slap- has not come in evidence).

b) Then quarrel started. The present appellant Naushad gave 2-3 blows of knife on the chest of deceased Hafiz.

c) Acquitted accused No.1 Guddu and Kamal (not arrested) also assaulted Hafiz.

d) When witnesses tried to intervene, the present appellant Naushad threatened them to kill. As a result witnesses ran

away.

6. Through one Mukesh and Shafiq (brother of deceased) intimation was given to Sakinaka Police Station. Hafiq was taken to Rajawadi hospital. He succumbed to the injuries. PW-1-Nitin lodged complaint and offence under section 302 r/w. 34 of IPC was registered.

7. Apart from these two eye witnesses (PW 1- Nitin and PW 2-Azam) more witnesses were examined by the prosecution. Rakesh Chavan PW-3 is also an eye witness. But he is not believed. Defence admitted inquest panchanama. Following are the remaining witnesses:

a	PW-4-Hemant Krishna Shinde (page 78)	He gave intimation of the incident and assault on the deceased to Shafik (brother of deceased)
b	PW-5- Anil Narayan Mahamunkar (page 81)	Carrier of seized articles to Chemical Analyzer.
c	PW-6- Mainuddin Ibrahim Shaikh (page 91)	Seizure panch-knife from the appellant.
d	PW-7Abdul Rashid Jabbar Ali (page 102)	Spot panch
e	PW-8-Dr. Narendra Gangaram Shinde (page 109)	Post mortem
f	PW-9-Pandharinath Krishna Ghorpade	Investigation Officer

(page 128)	
------------	--

Findings of the trial Court

Homicidal death

8. On the basis of inquest panchanama and PM report trial court has rightly concluded about homicidal death. Defense has also admitted inquest panchanama Post mortem Doctor Shri Shinde has noticed antimortem injuries on the dead body. He has also described the location and nature of injuries. They are on chest and stomach. He opined that the deceased suffered hemorrhagic shock and it was due to stab wound and rupture of heart and liver. The trial Court has dealt with this evidence in paragraph Nos.15-19. We agree to those findings.

Involvement of Appellant.

9. Trial Court believed upon the testimony of PW-1 and PW-2. The trial Court has dealt with the objection about not witnessing anything earlier to hearing of noise (paragraph Nos.26 and 27). It is also not the case of PW 1- Nitin and PW 2-Azam that they know what transpired in between the deceased Hafiz on one hand and the appellant, other accused on the other hand. It is also true that the place where the witnesses were sitting and the place where the deceased was standing (though has the hill) are different. Trial Court observed “parade is not required as the witnesses and the

deceased were knowing each other”. Trial Court found the presence of the witnesses as natural. Trial Court also noticed two groups one belonging to witnesses and another belonging to deceased. Though enmity has not come on record (paragraph 33) trial Court also found presence of PW 2-Azam natural at the spot. Even though the witness was working, date of incident was holiday. (paragraph 33)

10. After appreciating the evidence, trial Court observed “there is nothing in the cross examination to show that he (PW-1-Nitin) could not have been there at given time” (paragraph No.29) About evidence of PW 2-Azam trial Court observed “there is hardly any challenge as regards identification of the accused persons by this witness” (paragraph No.33) Trial Court further noted “ the evidence is merely challenged that he is deposing false at the instance of brother of Hafiq- is denied” (paragraph No.34) Due to alarm both these witnesses ran away. This conduct was rightly considered as natural conduct.

11. Trial Court has rightly disbelieved PW-3 Rakesh. Trial Court has given reasons before coming to the said conclusion. Other prosecution eye witnesses have not named PW-3 being present at the spot. Trial Court has also considered post event conduct of this witness. After the assault, he has not informed anyone. (paragraph No.50). So what we find is the approach of the trial Court is

balanced. Trial Court has not accepted the prosecution evidence as it is. But the trial Court has tested the testimony from different angles and then arrived at a particular conclusion.

12. Trial Court was cautious enough to test the oral evidence and medical evidence. By comparing these kind of evidence, trial Court rightly came to conclusion about consistency in between them (paragraph No.54)

13. There is one more reason why we find the approach of the trial Court as rational. Trial Court has scrutinized the evidence of PW 1- Nitin and PW 2-Azam on one hand and that of PW-7-Abdul Ali spot panch on the other hand. Though trial Court noticed some variations, they were rightly not considered sufficient to disbelieve the evidence on that aspect. (paragraph No.55 and 63)

14. So what we find is the trial Court has not left any issue to be decided. There is scrutiny of evidence from all possible angles. We find no reason to interfere in any of the findings referred above.

Seizure

15. There is evidence of seizure of blood stained clothes and knife at the instance of this appellant. They were seized on 17/11/2012 and the appellant was arrested on 15/11/2012. Those

articles were seized from a loft of a bathroom situated on mezzanine floor of a building situated at Khairani Road near Durga mata mandir. The concerned witnesses are PW-6 panch witness and PW-9 (Investigation Officer). Their evidence was found reliable. Trial Court has attributed knowledge to the appellant about concealing knife. We accept their evidence and findings thereon.

16. There was a grievance about not putting the result of analysis of chemical analyzer to the appellant in his statement under section 313 of Cr.P. C. We have seen the record. There are chemical analyzer's reports at Exhibit 43 of articles of deceased about clothes of deceased and articles found at the spot (Exhibit 32), about clothes of appellant and knife (Exhibit 33). But they are overlooked by the trial Court. Trial Court observed "though the prosecution failed to produce chemical analyzer's report (paragraph No.70). This observation is not consistent with the record. There is no prejudice caused to the appellant due to considering the chemical analyzer's reports on one hand and putting them to appellant on the other hand. So we can only infer that knife and blood stain clothes are seized at the instance of appellant. It is difficult to infer that it is the same knife which was used as a weapon.

Role of accused

17. While appreciating the evidence vis-a-vis role of the accused persons, trial court is influenced by the fact that acquitted

accused No.1 Nafis has not used any weapon. The discussion find place in paragraph No.71, 72. Though accused No.1's presence is believed, trial Court has not considered it and exonerated him. There is no challenge to the acquittal of accused No.1. Trial Court considered the overact of this appellant about assaulting deceased with knife. It seems that trial Court has convicted this appellant for his individual act (and not for act committed in furtherance of common intention"). Considering that circumstance (not filing state appeal) we have to accept that finding.

Type of offence

18. Trial Court has discussed this issue in paragraph No.76 and 77. Trial Court considered the relationship between the act of assault and resulting injuries. When the blows were inflicted on heart and liver (vital parts) there will be certainly an intention to commit murder. Trial Court referred to celebrated case of *Virsa Singh*. Learned APP supported those findings whereas they are challenged on behalf of the appellant. We find some force in the arguments of learned advocate Shri Pawan Mali. We feel that the offence by the appellant will fall not under section 300 of IPC but will fall under part I of Section 304 of IPC. We will give reasons for the said opinion.

- a) The deceased Hafiz first slapped accused No.1 Guddu (and then this appellant stabbed the deceased). So it is not

that this appellant stabbed the deceased as soon as deceased came near to them.

b) There is nothing in the evidence about what sort of interaction took place between the deceased on one hand and the accused on the other hand.

c) There was no time gap in between the act of deceased going towards the bushes and the act of PW No.1, 2 proceeding towards the bushes.

d) There is reason to believe that the incident of assault took place in a spur of moment.

e) Though it is true that motive is not material in a case resting on direct evidence, still no reason for this assault had come on record (we have considered this circumstance not while dealing with the involvement of the appellant but only for dealing with the issue of gravity of offence.)

19. So we have balanced the above factors on one hand and other factors like part of the body attacked, weapon used, threat given when PW-1, 2 have desired to intervene on the other hand. We feel that the factors enumerated in earlier paragraph are predominant. Though they were part of evidence they were not considered as a totality of evidence. They weighed our mind and accordingly we conclude that the appellant is guilty of an offence not under section 302 but under section 304(I) of IPC. Consequentially

there is a need to alter the sentence also.

20. As mentioned above it is the deceased Hafiz who slapped acquitted accused No.1 Guddu. It has not come in evidence that the present appellant stabbed deceased soon after arrival of the deceased there. As such no evidence was adduced as to when the deceased went there and the reason for going to the spot. There is reason to believe that the incident has taken place in spur of moment. So these factors weigh our mind than the number of blows, location of the injuries and the weapon used that is why we hold that the appellant can be held guilty under section 304 Part I of IPC. Hence the following order:

- a) Appeal is partly allowed.
- b) The appellant is held guilty for the offence punishable under section 304 Part I of the IPC.
- c) Instead of life imprisonment the appellant is directed to undergo RI for 10 years.
- d) The order to pay fine of Rs.1,000/- and sentence in default of the fine will remain as it is.
- e) Rest of the order of the Trial Court is maintained.

f) The appeal is disposed of.

g) The Appellant is entitled for set-off for the period undergone and he be set free from the jail forthwith if not required in any other case.

S. M. MODAK, J

PRASANNA B. VARALE, J

R.S.
Karve

Digitally
signed by
R.S. Karve
Date:
2021.02.17
15:36:15
+0530