

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 734 OF 2014

Shaikh Samad s/o Shaikh Gafoor
Age 27 years, Occ. Nil,
R/o. Madinanagar Nanded
Tq. and Dist. Nanded
(at present is in jail)

...Appellant
(Ori. Accused)

versus

The State of Maharashtra
Through Police Station Itwara
Nanded, Tq. and Dist. Nanded
(Copy to be served on P.P.
High Court Bench at Aurangabad)

...Respondent

.....
Mr. Gajanan G. Kadam, advocate for the appellant
Mr. S. J. Salgare, A.P.P. for respondent State
.....

**CORAM : V. K. JADHAV AND
SANDIPKUMAR C. MORE, JJ.**

DATED : 2nd MARCH, 2022

JUDGMENT (PER V.K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order of conviction dated 28.08.2014 passed by the Sessions Judge, Nanded in Sessions Case No. 95 of 2013.

2. Brief facts giving rise to the prosecution case are as follows:-

a) P.W.1 Shaikh Iliyas Shaikh Mannan is the owner of Hotel Guljar, situated at Degloor Naka, Nanded. He daily starts the

business of said hotel at about 4.00 a.m. and ends at 9.00 a.m. The customers usually come to the said hotel to eat "*Tahari*" (a special dish made of rice, meat and spices). On 2.11.2012, he had opened his hotel as usual early in the morning, prepared "*Tahari*" and kept it for sale to the customers at 5.00 a.m.. Deceased Shaikh Qayum Shaikh Usman came to his hotel at about 5.00 a.m.. The appellant-accused also came there after five minutes. Some other customers were also present in the said hotel. At that time a quarrel had taken place between the appellant-accused and deceased Shaikh Qayum. The appellant-accused was looking towards deceased Shaikh Qayum angrily and also abusing him uttering that he will kill him by penetrating a knife. P.W.1 informant Shaikh Ilyas had apprehended that those altercations may affect his other customers. Further, the appellant-accused was creating terror by showing a knife. He had driven both of them outside of his hotel. At that time, the appellant-accused was holding a knife in his hand. While on road, he also heard deceased Shaikh Qayum abusing accused by referring his mother and sister and also pleading not to beat him with knife. The appellant-accused had questioned the deceased as to why he is abusing him by referring his mother and sister and thus stabbed deceased Shaikh Qayum with knife in his abdomen. The intestine of deceased Shaikh Qayum protruded out of the hole caused due to said stab injury and he had started shouting for help. Thereafter, the appellant-accused ran towards Khuba Masjid.

b) After some time, police came there and deceased Shaikh Qayum was taken to the hospital. On the basis of complaint Exh.19 (Exh.66) lodged by P.W.1 Shaikh Iliyas (owner of the said hotel Guljar) crime No. 77 of 2012 for the offence punishable under Section 302 of I.P.C. came to be registered with police Station Itwara, Nanded. P.W.1 Shaikh Iliyas turned hostile. However, he has only accepted his signature on the said complaint Exh.19 and the contents thereof are proved through P.W.18 P.I. Nagnath Kode and the same is therefore marked Exh. 66. P.W.18 P.I. Nagnath Kode, the senior police inspector of Itwara police station Nanded, took over investigation of the crime.

c) Meanwhile, deceased Shaikh Qayum was taken to the Government Hospital in injured condition and died in the hospital. P.W.18 P.I. Kode went to the civil hospital for drawing inquest panchnama Exh.83. He had noticed that there was a stab wound on the stomach towards right side below umbilici and intestine had come out. There were also injuries on right cheek, upper lip and chin.

d) Thereafter, P.W.18 P.I. Kode visited the spot and drawn the spot panchnama Exh.25. He found the blood spilled on the ground. He had collected plain earth from that spot and also swab of blood stain wipe. He also collected blood soaked earth from the spot.

e) P.W.18 P.I. Kode had thereafter effected arrest of the

appellant-accused Samad by drawing arrest panchnama Exh. 67. At the time of arrest, personal search of the appellant-accused was conducted. During his search, a knife was found in the right side pocket of his pant. The said knife was having some blood stains. Accordingly same was seized in presence of panchas. The said panchnama is marked at Exh.30 and Exh.30-A. The seizure panchnama Exh.50 about seizure of clothes on the person of deceased was also drawn. On the same day, he had recorded the statements of head constable P.W.9 Shaikh Rajjak Shaikh Jainuddin and others during the course of investigation. On 6.11.2012 he had collected the blood samples for comparison and analysis. On 19.11.2012, he had forwarded the muddemal properties, such as clothes seized from the person of accused, knife found in the pocket of his pant, clothes of deceased, blood swab, plain earth and blood soaked earth collected from the spot and the blood sample of accused and deceased collected by the doctor to Forensic Science Laboratory, Aurangabad for the purpose of scientific investigation alongwith letter at Exh.54. He had requested the Special Judicial Magistrate to record the statements of eye witnesses under Section 164 of Cr.P.C. Since sufficient evidence was available against the appellant-accused, P.W.18 P.I. Kode filed charge sheet against him for the offence punishable under Section 302, 504 of IPC r.w. Section 7 of Criminal Law Amendment Act. He has thereafter forwarded the C.A. report received from the Forensic Science Laboratory. The C.A. reports are marked at Exh. 70 to 73.

f) On 13.9.2013 vide Exh.6 charge under Section 302 of I.P.C. r.w. Section 7 of the Criminal Law Amendment Act and under Section 504 of IPC came to be framed against the appellant-accused to which he has pleaded not guilty and claimed to be tried. The prosecution has examined in all 20 witnesses to substantiate the charge levelled against the accused. The defence of the appellant-accused is of total denial and false implication. After examining the appellant-accused under section 313 of Cr.P.C. and hearing both sides, the learned Sessions Judge, Nanded by impugned judgment and order dated 28.8.2014 in Sessions Case No. 95 of 2013 has convicted the appellant-accused for the offence punishable under section 302 of I.P.C. The operative order of judgment of conviction and sentence is reproduced herein below:-

ORDER

01. Accused Shaikh Samad s/o Shaikh Gafoor is hereby found guilty and convicted vide Section 235(2) Cr.P.C. of the offence punishable u/s 302 Indian Penal Code and is sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.1000/- (Rs. One thousand), in default to suffer S.I. for three months.

02. Shaikh Samad s/o Shaikh Gafoor is hereby acquitted vide Section 235(1) Cr.P.C. of the offence punishable u/s 504 IPC.

03. Accused is in custody since 02.11.2012, he is entitled to set off u/s 428 Cr.P.C.

04. The seized muddemal properties, except knife, being worthless, be destroyed after the appeal period is over, after confirming that no appeal is filed.

05. Knife be sent to District Magistrate, Nanded for disposal according to law after the appeal period is over, after confirming that no appeal is filed.

06. The copy of judgment be furnished to accused free of costs.

07. Pronounced in open court on 28.8.2014.”

3. Learned counsel for the appellant submits that the so called eye witnesses, including P.W.1 informant Shaikh Iliyas, to the incident, have not supported the prosecution case in any manner. All of them have turned hostile. Learned prosecutor before the trial court has declared the said eye witnesses hostile and subjected them to cross examination under the permission of the Court. Leaned counsel submits that the said eye witnesses, who have made different statements at different times, are having no regard for the truth. Their evidence is liable to be rejected in toto. However, learned Judge of the trial court has committed grave error of law in relying upon the evidence of those hostile eye witnesses to some

extent.

4. Learned counsel for the appellant submits that as per the prosecution story, deceased Shaikh Qayum had made oral dying declaration before P.W.9 Police Head Constable Shaikh Rajjak, who was attached to Itwara police station, Nanded. The learned counsel submits that the prosecution has not produced on record any admissible documents of the concerned police station to show that said police Head Constable Shaikh Rajjak was on good morning patrolling duty in Degloor Naka area. Further, said police head constable P.W. 9 Shaikh Rajjak has not lodged complaint on the basis of said oral dying declaration made to him by deceased Shaikh Qayum on behalf of the State nor there is entry in the record of the concerned police station about the fact that deceased Shaikh Qayum had made oral dying declaration. Learned counsel submits that P.W.9 police Head Constable Shaikh Rajjak for the first time has deposed before the court about oral dying declaration made to him by deceased Shaikh Qayum. Further P.W.13 Mohd. Mustafa Abu Bakar, in whose auto rickshaw deceased Shaikh Qayum was taken to the hospital, has not supported the prosecution story to the extent of oral dying declaration made by deceased Shaikh Qayum to police head constable P.W.9 Shaikh Rajjak.

5. Learned counsel for the appellant submits that since all the eye witnesses have not supported the prosecution case, the prosecution

case rests upon circumstantial evidence. There is no chain of circumstantial evidence to establish the guilt of the appellant-accused. Further, there is no corroboration to the evidence of the alleged oral dying declaration. Further the recovery of blood stained earth and sharp iron knife at the instance of the appellant-accused is doubtful. It is very unlikely on the part of the appellant-accused to move alongwith the weapon knife used in the assault in the pocket of his pant till his arrest was effected on 2.11.2012 at 3.30 p.m.. Learned counsel submits that is no connecting evidence against the appellant-accused. Learned counsel submits that at the most, strong suspicion is created against the appellant-accused, but the suspicion, however strong it may be, cannot take place of proof. The appellant-accused is thus entitled for benefit of doubt.

Learned counsel for the appellant, in order to substantiate his submissions, placed reliance on the following cases:-

- i) Parubai vs. State of Maharashtra, reported in AIR 2021 SC 3784;
- ii) Satwa Wakode vs. State of Maharashtra, reported in 1996 Cri. L.J. 4028;
- iii) Ram Narain Singh and others vs. State of Punjab, reported in AIR 1995 SC 1727;
- iv) Vasant Ramchandra Gaikwad vs. The State, reported in 2012

Bom C.R. (Cri.) 173;

- v) Mohammed Parvez vs. The State of Maharashtra, reported in 2015 ALL MR (Cri.) 966;
- vi) Audumbar Digambar Jagdane and ors. vs. State of Maharashtra, reported in 1999 Cri.L.J. 1936;
- vii) Ram Kishan Singh vs. Harmit Kaur and Ors. Reported in AIR 1972 SC 468.

6. Learned A.P.P. submits that the prosecution has proved the homicidal death of deceased Shaikh Qayum. Though eye witnesses have not supported the prosecution case, however, they have supported the prosecution case to the effect and extent that deceased was lastly seen alive in the company of the appellant-accused and after very short span deceased Shaikh Qayum was found in injured condition. The prosecution has also proved oral dying declaration made by deceased Shaikh Qayum before P.W.9 police Head Constable Shaikh Rajjak. There is recovery of blood stained clothes and weapon knife used in the commission of crime. C.A. report also supported the prosecution story. The trial court has rightly convicted the appellant-accused. There is no substance in this appeal and the appeal is liable to be dismissed.

7. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witnesses; the

statement of the appellant-accused recorded under Section 313 of the Cr.P.C. and the impugned judgment.

8. It is true that P.W.1 informant Shaikh Iliyas Shaikh Mannan, P.W.3 Mohd. Shafiulla Mohd. Masiulla, P.W.4 Mohd. Azaz Mohd. Iqbal, P.W.5 Mohd. Harun Mohd. Rashid, P.W. 7 Shaikh Nazim Shaikh Razzak, P.W.8 Sayed Quyam Sayed Jafar, P.W.13 Mohd. Mustafa Abu Bakar, P.W. 15 Shaikh Jabbar Shaikh Yousuf, P.W.16 Shaikh Chand Shaikh Amir and P.W.17 Sayed Feroz Sayed Amir have not supported the prosecution case, as they resiled from their statements recorded by the police. They were subjected to cross examination at length by the learned A.P.P. on behalf of the State. It is well settled that the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting *en bloc* the evidence of the witness. However, the court has to be very careful in appreciating his evidence. The evidence of such witness has to be read and considered with a view to find out whether any weight should be attached to it. Normally, the court should look in the corroboration from some other witness.

10. In the instant case, P.W.1 Shaikh Iliyas admitted that he is owner of hotel, name and styled as "Hotel Guljar" at Degloor Naka, Nanded. He runs the said hotel between 5.00 a.m. to 9.00 a.m.. In his examination in chief itself, though he has denied about the

knowledge of the incident, however, in para 3 of his examination in chief, he has deposed as follows:-

“3. I do not know anything about the incident. On the date of incident accused Samad and deceased Shaikh Qayum had come to my hotel for taking breakfast at 5.30 a.m. There was exchange of abuses between them in the hotel. I asked them to go out of my hotel. I do not know what happened after they left my hotel. Thereafter I got busy in my business and did not leave my hotel till it was closed.”

In para 5 and 9 of his cross examination at the hands of learned A.P.P. before the trial court, P.W.1 Shaikh Iliyas has stated as follows:-

“5. It is not correct to suggest that deceased was also known very well to me. It is correct to suggest that on 2.11.2012 accused and deceased both had come to my hotel for having breakfast at about 5.30 a.m. It is correct to suggest that at that time one Lakdiwala Bagwan and son of Qureshi were also present in my hotel. It is correct to suggest that accused and deceased and other customers were sitting separately on independent tables. It is correct to suggest that accused was abusing deceased Qayum and staring at him with anger. It is not correct to suggest that at that time accused also threatened deceased Qayum to show him quickly and will kill him by stabbing knife. It did not happen that accused then took out knife and was creating terror in hotel amongst other customers.

9. It is correct to suggest that, after Fazra Namaz my friend Harunbhai had come to me on that day. It is correct to

suggest that he asked me what happened in front of my hotel. He also told me that one person was lying injured in the Masjid. It is correct to suggest that Harunbhai also told me that said person told him that he was stabbed in front of my hotel. At that time I only replied Harunbhai that there was exchange of abuses between accused and deceased and drove them out of my hotel. I did not tell Harunbhai about any incident of flashing of knife by accused or injuring to the deceased.”

a) P.W.3 Mohd. Shafiulla Mohd. Masiulla has not supported the prosecution case. However, he runs omelet and tea hand cart at Degloor Naka. The name of his business is “Sadabahar Omelet”. He runs the said business of Omelet cart from 5.00 a.m. to 8.00 p.m. He has admitted and accepted to the extent that Hotel Azam Tahari was also opened at 5.00 a.m. He has also accepted that on 2.11.2012 he had opened his hand cart stall in the morning. The Guljar Hotel and Azam Hotel were opened at the similar time. He has also accepted that at that time he heard noise of quarrel coming from Guljar Hotel.

b) P.W.5 Mohd. Harun Mohd. Rashid is vegetable vendor. On the day of incident, he had offered Fazar Namaj (early morning prayer) in Khuba Masjid. After the Namaj, he had seen a young boy lying in a tin shed of the Masjid near Wazu Khana (place for ablution before Namaj). He saw that there was injury on his abdomen. He has not supported the prosecution case further and therefore, he was subjected to cross examination at length by the learned A.P.P.

c) P.W.13 Mohd. Mustafa Abu Bakar is the auto rickshaw owner. He has deposed that on 2.11.2012 he was standing at Degloor Naka at 6.00 a.m. alongwith his auto rickshaw. P.W.9 police Head Constable Shaikh Rajjak came near his auto rickshaw on motorcycle and informed him that he has to go to the hospital. Thereafter, he followed him and went near Khuba Masjid alongwith his auto rickshaw. Some persons from Masjid brought a young boy from Masjid and put him in his auto rickshaw. One constable also sat in auto rickshaw. He brought the said auto rickshaw to the hospital. He was declared hostile, as he resiled from his earlier statement. He was subjected to cross examination by learned A.P.P. In para 3 he has stated that at that time several persons who had come for Namaj in the Masjid were present. He has further accepted that the said person kept in auto rickshaw was talking with the police man sitting in auto rickshaw and he was conscious. Though in the cross examination on behalf of the accused, he was suggested in the following manner. The learned Judge of the trial court has recorded the same in question and answer form. In para 5 of the cross examination the question put by the defence and the answer given by this witness to the said question read thus:-

"05.

Qus. Will it be correct if I suggest that you don't know whether that person was alive when put it in your auto rickshaw or was dead at that time or died on the way or in the hospital?

Ans: He was alive when was put in my auto rickshaw and I remember that he was alive till Bafna Corner, thereafter I did not give much attention as was driving the auto rickshaw."

d) P.W.15 Shaikh Jabbar Shaikh Yousuf, who is close relative of deceased Shaikh Qayum has also not supported the prosecution case and resiled from his earlier statement. He was also subjected to cross examination. On 2.11.2012 he was informed by some of his friends about quarrel and therefore, he went to the Government Hospital. He met deceased Shaikh Qayum. P.W.15 Shaikh Jabbar has deposed that at that time deceased Shaikh Qayum was speaking. He has also accepted in para 3 of his cross examination that deceased Shaikh Qayum was escorted in the hospital by police officers. However, he has denied about oral dying declaration made to him by deceased Shaikh Qayum in the hospital.

e) P.W.16 Shaikh Chand Shaikh Amir has also resiled from his earlier statement. Thus, he was subjected to cross examination by learned A.P.P. before the trial court. At the time of incident, he was working at Moujjan (care taker and calling Aajan) in Khuba Masjid situated at Degloor Naka, Nanded. On the day of incident, he was in Masjid for Fazar Namaj at 6.00 a.m. He has deposed that at that time he saw one person lying in a tin shed beside the Masjid. He was bleeding through stomach. In para 3 of his cross examination, he has accepted that several persons including Mohd. Harunbhai

and Mohd. Khaja had come in the Masjid to offer Namaj at that time. He himself, said Harunbhai, Khajabhai and other persons had gone near to the said person and saw him. There was injury to the right side of stomach and it was bleeding. In para 4 of the cross examination, P.W.16 Shaikh Chand Shaikh Amir has accepted that at that time police Head Constable Shaikh Rajjak and police Constable Kawade had also come to the said spot.

f) P.W.17 Sayed Feroz Sayed Amir has also not supported the prosecution case as he resiled from his earlier statement and subjected to cross examination at the hands of learned A.P.P. before the trial court. He has deposed that on 02.11.2012 he was going to a hotel at Degloor Naka at 6.00 a.m. for having breakfast. He saw two youths quarrelling with each other near Chattubhai's hotel at 6.00 a.m. Both were abusing each other. Then they engaged in physical quarrel. In para 3 of his cross examination at the hands of learned A.P.P. he has accepted that quarrel was going on between accused Samad and deceased Shaikh Qayum. He has also accepted that the hotel owner had driven both of them out of hotel. He has also accepted that they were again quarrelling and abusing each other on road.

11. Though the aforesaid witnesses have turned hostile and have not supported the prosecution case, however, their evidence is not liable to be discarded in toto. They are the witnesses from the area

where the incident had taken place. Their presence at the relevant time on the spot or near the spot appears to be natural and well explained by them. However, for some reason, if they have not supported the prosecution case, their evidence cannot be liable to be rejected in toto. Their evidence is consistent to the extent that the appellant-accused Samad and deceased Shaikh Qayum had been to hotel Guljar for having breakfast and at that time the quarrel had taken place between them. Even though the owner of hotel Guljar had driven both of them out of his hotel in anticipation of trouble to other customers, however, even on road also the quarrel was continued. Shortly after that, deceased Shaikh Qayum was found in injured condition below the tin shed of Khuba Masjid. Even it has also come in their evidence that deceased Shaikh Qayum was alive till he was put in auto rickshaw and also on the way while being taken to the hospital.

12. P.W.9 police Head Constable Shaikh Rajjak buckle No. 1436 was on night duty from 1.11.2012 8.00 p.m. to 2.11.2012 8.00 a.m. and one constable Mr. Kawade was also alongwith him. From 4.00 a.m. to 6.00 a.m. they were doing good morning patrol duty. They came to know that in tin shed of Khuba Masjid one person was lying in injured condition. They went to the spot. They found that one person was lying in the tin shed in naked condition. He was alive. They asked him his name and address. He told his name as Shaikh Qayum Shaikh Osman, aged 22 years, resident of Islampura. He was

in injured condition and his intestine had come out of stomach. They asked him about his injury. He replied that in front of Tahari Hotel of Iliyas, one Shaikh Samad (appellant-accused) stabbed him with knife in the abdomen on the pretext why he had abused to said Samad (appellant-accused). He also told that after stabbing him Shaikh Samad (appellant-accused) ran towards Khuba Masjid, therefore, he had followed him in that direction. Further deceased Shaikh Qayum told them that as pain increased he came under that shed and removed his clothes to subside the pain as those were brushing with intestine. P.W.9 head constable Shaikh Rajjak further deposed that he himself and police constable Mr. Kawade put clothes on his body with the help of persons came there from mosque and called auto rickshaw to take him to the civil hospital. P.W.9 Shaikh Rajjak has further explained that the appellant-accused Samad is history sheeter and several offences are registered against him.

13. We have discussed in earlier paras that even though the eye witnesses have not supported the prosecution case, however, they have accepted that deceased Shaikh Qayum was lying in injured condition below the tin shed and police went there. The prosecution has examined P.W.2 Syed Ayub Syed Khaja to prove the contents of spot panchnama Exh.25. The blood was found spread on the road in front of Guljar Hotel near Degloor Naka.

14. We find no substance in the submissions made on behalf of

the appellant that evidence of P.W. 9 head constable Shaikh Rajjak is not reliable. There is no reason to discard the evidence of P.W.9 Shaikh Rajjak for the reason that he had not filed complaint on behalf of the State against the appellant on the basis of the dying declaration made by deceased Shaikh Qayum. P.W.18 P.I. Kode has also deposed that during the course of investigation he has recorded the statement of P.W.9 Head Constable Shaikh Rajjak. We have to repeat here again that the hostile witnesses have also accepted the presence of P.W.9 Shaikh Rajjak and Police Constable Wakade below the tin shed and also to the effect that injured was taken to the hospital in auto rickshaw by them. Further, deceased Shaikh Qayum has made oral dying declaration and told P.W.9 Head Constable Shaikh Rajjak that he was stabbed by the appellant-accused in front of Hotel Guljar. Thereafter, the appellant-accused ran towards Khuba Masjid. Deceased Shaikh Qayum also followed him and due to pains he fell down in the tin shed of Khuba Masjid. The spot of incident where he was stabbed is on the road in front of Hotel Guljar.

15. P.W.2 Syed Ayub Syed Khaja, who is panch witness of spot panchnama Exh.25, has also deposed that blood was spread on the road in front of said hotel. The police collected sample of said blood with a cotton swab. Similarly, police also collected simple earth from that spot. Thus, the dying declaration in this case is reliable, cogent and explains the events that had happened in their normal course

which was not only a mere possibility but leaves no doubt that such events actually happened as established by the prosecution.

16. Since the eye witnesses have turned hostile and thus there is no eye witnesses to the actual incident, however, deceased Shaikh Qayum was lastly seen alive in the company of the appellant-accused and the quarrel between them was witnessed. Further, within a very short span deceased Shaikh Qayum was found in injured condition below the tin shed of Khuba Masjid where he has orally given cause of injuries sustained by him on his abdomen to P.W.9 Head Constable Shaikh Rajjak.

17. P.W.18 the investigating officer, P.I. Nagnath Kode has effected arrest of the appellant-accused by drawing arrest panchnama Exh.67. As per the contents of said panchnama, on 2.11.2012 at about 15.30 hours the appellant-accused was arrested in connection with the said crime.

18. P.W.4 Mohd. Azaz Mohd. Iqbal has not supported the prosecution case to the extent of proving the contents of panchnama Exh.30. However, P.W.18 P.I. Nagnath Kode has deposed about the said panchnama. Seizure panchnama Exh.30 was drawn on 2.11.2012 in between 15.00 to 15.30 hours i.e. prior to effecting arrest of the appellant-accused in terms of the arrest panchnama Exh.66. The shirt on his person was seized. Right sleeve of the shirt

was stained with blood and a knife was also found in the pocket of his pant. The said pant was also seized alongwith the said knife. The incident had taken place in the morning of 2.11.2012 and within few hours the appellant-accused was arrested. It is thus not unusual that the accused was wearing the same clothes and kept weapon in the pocket of his pant. The same also appears to be probable for the reason that the appellant-accused is a history sheeter.

19. The seized articles came to be referred to the Chemical Analyser for analysis. The prosecution has also examined P.W.20 Vijaya Padale, the Chemical Analyser. The prosecution examined her to remove confusion about the number of exhibits and the C.A. reports referring those exhibits. P.W.20 Vijaya Padale, Chemical Analyser has removed all confusions. It thus appears that in terms of C.A. report Exh.72, the blood group of deceased Shaikh Qayum is "B" and the blood group of the appellant-accused Samad is "O". As per the C.A. report Exh.71, the blood detected on the clothes of appellant-accused was found to be of human and blood found on the blade of knife was also of human. The blood on the blade of knife was of blood group "B".

20. The prosecution has examined P.W.10 Dr. Naresh Zanjad to prove the post mortem report Exh.41. P.W.10 Dr. Zanjad has conducted post-mortem examination on the dead body of deceased Shaikh Qayum. He has noted the following injuries on the deceased

body of deceased Shaikh Qayum.

“i) Abrasion over right side of face below and lateral to eye 3x1 cm reddish.

ii) Abraded contusion seen over right side of lower lip, laterally 1 x ½ cm with two lacerated wound over inner mucosal surface. 0.5 cm x 0.5 cm x 0.5 cm, margins irregular, reddish.

iii) Abraded contusion over right side chin below angle of mouth, laterally 2x1 cm, reddish.

iv) Contused lacerated wound over chin, mid line 1.5 cm x 0.5 cm x muscle deep, irregular in shape, margins irregular, reddish.

v) Single stab wound seen over right side of lower abdomen, 4 cm lateral to mid line, 10.5 cm medial to anterior superior iliac spine and 7.5 cm below and lateral to umbilicus of size 2.3 cm x 1 cm x cavity deep, and on approximation of edges 2.5 cm in length with protrusion of coils of intestine through stab wound. Stab wound was elliptical in shape, horizontally placed with both angles acute, directing backward and slightly downwards, margins were clean cut, reddish.

On dissection, stab wound passes through skin, subcutaneous tissue and rectus muscle planes into peritoneal cavity. Through and through puncture wound seen over jejunum about 40 cm from lower end of stomach of size 2 cm in length with puncture wound seen

over mesentry near jejunum of size 1.5 cm in length, elliptical with hemorrhagic area seen at multiple places at serosal surface of illium. Through and through puncture wound seen at internal iliac artery and vein at the level of L5-S1, with retro peritoneal muscles on right side showed gross haemorrhage. Stab wound extend posteriorly up to muscle planes, retro peritoneally right side at the level of sacroiliac joint.”

21. During internal examination, P.W.10 Dr. Zanjad has noted the following injuries.

“Brain matter was pale and edematous.

Both lungs were pale and edematous.

Abdomen -

Peritoneal cavity contain about 2 ltrs of fluid blood with blood clots.

Stab wound involving contents of abdominal cavity mentioned in column No.17, injury No.5.

Stomach-

Contain 600 ml of yellowish semi digested food material with rice particles and pieces of meat distinguishable, no abnormal smell perceived. Mucosa pale.

Evidence of stab wound to the small intestine mentioned in column no. 17, injury No.5.

Liver, spleen, kidneys were pale”

In the opinion of P.W.10 Dr. Zanjad, all the injuries were ante mortem in nature. Brain matter was pale and edematous. Both lungs were pale and edematous. On internal examination of abdomen, he found stab wound involving contents of abdominal cavity mentioned in column no.17, injury No.5. He has also noted stab wound to the small intestine mentioned in column No.17, injury No.5. He has noted that the stomach contain 600 ml of yellowish semi digested food material with rice particles and pieces of meat distinguishable, no abnormal smell perceived. In his opinion, the cause of death is Haemorrhagic shock due to stab wound over abdomen. He has further accepted that the said injury is possible by use of knife article A. He has also explained to court's query that injury damaged internal parts such as small intestine (jejunum is part of small intestine), and blood supplying small intestine i.e. mesentry and internal iliac artery and vein which supplies blood to important organs of pelvic region which was also punctured and two ltr. blood was present in that pelvic due to said punctured wound. There is nothing in the cross examination to draw any other inference about death. The medical evidence fully corroborates the prosecution story even to the extent that before death deceased Shaikh Qayum alongwith the appellant-accused had been to hotel Guljar for having breakfast "*Tahar*" which contains rice, meat and spices.

22. In the case of ***Parubai vs. The State of Maharashtra (supra)*** relied upon by learned counsel for the appellant-accused, it is held by the Supreme court that position of law is well settled that the links in the chain of circumstances is necessary to be established for conviction on the basis of circumstantial evidence. Mere suspicion would not be sufficient, unless the circumstantial evidence tendered by the prosecution leads to the conclusion that it “must be true” and not “may be true”. The Supreme Court has also held that the suspicion, however strong, cannot take the place of proof.

23. The learned counsel for the appellant-accused has placed his reliance on the cases as mentioned in foregoing paras. However, the law is well settled about appreciation of oral dying declaration so also the appreciation of evidence of hostile witnesses. Thus, even considering the ratio laid down in the above cited cases relied upon by the learned counsel for the appellant, in our considered opinion, the prosecution has proved its case beyond reasonable doubt against the appellant-accused. There is chain of well established circumstantial evidence coupled with oral dying declaration of deceased Shaikh Qayum to P.W.9 police Head Constable Shaikh Rajjak, who has no reason to depose falsely against the appellant-accused.

23. In view of above discussion, we find no fault in the judgment and the order of conviction passed by the trial court convicting

thereby the appellant-accused for the offence punishable under section 302 of I.P.C. and sentencing him to suffer rigorous imprisonment for life. There is no substance in this criminal appeal. The appeal is thus liable to be dismissed. Hence, we proceed to pass the following order:-

O R D E R

Criminal appeal is hereby dismissed.

(SANDIPKUMAR C. MORE, J.)

(V. K. JADHAV, J.)

rlj/