

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 470 OF 2000**

Mr. Mohammad Arshad Haji Shabbir Shaikh, Age : 30 years, R/at : Room No. S-1, Plot No. 8, Baiganwadi, Govandi, Mumbai – 400 083 (Presently at Arthur Road Central Prison, Mumbai).	}	...Appellant (Orig. Accused)
Versus		
The State of Maharashtra (At the instance of Shivajinagar Police Station, Mumbai)	}	...Respondent

**Mr. Ganesh Gole a/w Mr. Bhavin Jain for the Appellant.
Mr. Arfan Sait, APP for Respondent – State.**

**CORAM : PRASANNA B. VARALE &
N. R. BORKAR, JJ.**

RESERVED ON : JULY 30, 2021.

PRONOUNCED ON : MARCH 7, 2022.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order dated 12.06.2000 passed by the learned Sessions Judge for Gr. Mumbai in Sessions Case No. 713 of 1999 whereby the appellant – original accused who was charged for commission of offences punishable under Section 302 of the Indian Penal Code (for short 'IPC') convicted and awarded sentence for life imprisonment along with fine, filed the present Criminal Appeal.

2. The case of prosecution, can be summarized as follows:

It is the case of prosecution that the accused and deceased Mohammed Gouse were known to each other and had business dealings. According to the prosecution in the premises wherein the accused was running Hotel Umar Azmi was let out by Mohamed Mushraf Mustafizoraman (PW 4). It is the case of prosecution that a demand for refund of the deposit amount for said premises was made by the accused from P.W. 4. The deceased was supporting the demand made by accused. It is also the case of prosecution that the premises right in front of Umar Azmi Hotel was also in possession of the accused. It is the case of prosecution that on the fateful day i.e., 15.02.1999, certain people including the deceased came to the said Umar Azmi Hotel and made demand for refund of the deposit from P.W. 4. Then P.W. 4 gave promise that he will refund the said amount at subsequent date. After some discussion, P.W. 4 went to his house which was right above the said Umar Azmi Hotel.

3. After having heard the some commotion near the above said Hotel premises, Maruti Govind Kamble (P.W. 1) – Complainant found the people running here and there and saw that a person was lying in injured condition in the gutter. It is also the case of prosecution that the said aspect was also seen by P.W. 4 from his premises over the said hotel. As the said person was seen lying injured in the gutter, P.W. 1 – Complainant and other persons shifted injured to Rajwadi Hospital. At the Rajwadi Hotel, injured declared dead.

4. Then FIR was lodged at the instance of P.W. 1 – Complainant and on the basis of FIR investigation was started. The present accused came to be arrested on 20.02.1999. After some investigation a voluntary statement was made by the accused on 24.02.1999 which leads to recovery of knife which according to the prosecution was blood stained. Then blood stained clothes of accused were seized on 07.03.1999. Then certain steps were taken in the investigation, such as, recording the statement of witnesses, recovery of articles, sending articles for CA, obtaining report

from CA, then obtaining postmortem notes. On completion of investigation, charge-sheet came to be filed in the Court of JMFC. As the offence being exclusively triable by the Court of Sessions, case was committed to the Court of Sessions, Mumbai. On appreciation of evidence, learned Sessions Judge, passed the order of conviction. Hence, the present Appeal against conviction.

5. The prosecution in support of it's case, examined as many as 11 witnesses.

6. As the investigation was set in motion on the lodgment of FIR by Maruti G. Kamble (PW 1). It would be appropriate to refer to the evidence of this witness first.

7. Maruti Govind Kamble (PW 1) – Complainant, in examination-in-chief, stated that he was working as labourer in 1999. On 15.02.1999, he was on leave. On that day, at about 06.00 p.m. he left his house for personal work and on his way out he went to a video shop of his friend Abdul Salam. That shop is on plot no. 8 and 9 and is known as 'Amit' Video'. At that

shop, he was chit-chatting with his friend. Then after sometime, he saw that the shop owners in that area were lowering down shutters of their shops and thus he turned around to find the reason therefor. At that time, he found the road totally empty. As he came out on the road, he found a person in a gutter. He went near him and found him gasping and he was in the gutter upto his navel or a little above that. Then he called his friend, and others and all of them numbered about 5-6 persons pulled him out. Then they made him to lie down on the road and from nearby STD booth called the police. Then he saw his clothes blood stained and noticed an injury on his neck. Then the injured person became unconscious. Then police van came and he was placed in that van and taken to Rajawadi Hospital. This witness also accompanied the police. On admission in the hospital, doctor declared injured dead. The police found pager, diary and the driving license from the person of the deceased on the basis of which he was identified. He came to know that the injured was a resident of Chita camp.

In the cross-examination, this witness admitted

that he saw 15-20 people running on the road. The distance between shop where he was sitting and the gutter was about 100 feet. The STD booth was about 100-120 feet away from the place of incident and it was not closed.

8. Shaikh Mastan Ali Abdul Sattar (PW 2), is the panch witness. This witness in his examination-in-chief, stated that on 15.02.1999 at around 11.00 p.m. he was called by Shivaji Nagar Police Station, for acting as a panch. He does not remember the hotel today. In the kitchen of that hotel the police took charge of blood scrapping from a chair. They also took charge of blood stained oil from the road between plot nos. 8 and 9. They took charge of a chappal from the gutter / nala. Then he saw the gutter personally. Then his presence the police took measurements of various distances. Then this witness identified all the articles produced by police in Court.

In the cross-examination, this witness stated that the shutter of the hotel was open when the police took charge of blood scrapping. The said shutter was open

when he entered in the kitchen of the hotel. He did not know the policemen who were in the civil dress. The measurements were taken in the presence of these panch witnesses. The hotel and the gutter were on the same side of the road. The recording of the panchnama commenced immediately at around 11.00 p.m. Then certain suggestion were given that this witness signed on a ready made panchnamas at the police station, he was not the witness to taking charge of the articles and measurements, theses suggestions were denied.

9. Nasim Ahmed (PW 3), in his examination-in-chief stated that he was carrying on business of sugarcane juice in the name and style Afzal Juice Centre. This witness had given his shop to one Arshad. He did not know Babulal and Mohamad Gouse.

In the cross-examination, this witness stated that he was paying the rent to the corporation. It was an oral understanding between him and the accused, for the shop. Nothing elicited from the evidence of this witness.

10. Mohamad Musharaf Mustafizoramn (PW 4) is the star witness, as claimed by the prosecution. This witness, in his examination-in-chief, stated that he knows Farukh. He had a shop of clothes. On 15.02.1999, this witness was at his workplace between 11.00 am and 04.00 pm. He met the accused on the ground floor. This witness came to know that the shop opposite his shop was also taken over by the accused. Then this witness was called by the accused at 05.00 pm and he demanded refund of the deposit for his shop as according to him his business was running at a loss. At that time, there were about 4-5 person in that shop and one of them repeating the statement of the accused and said that he should refund the deposit after deducting the rent dues from the accused. Then this witness told to them that he will try to get the money for refund as early as possible. Then this witness stated that he went upstairs. After about one hour, he heard shouts 'mar dala', 'mar dala' from the said shop. He saw from the window that people were running here and there. The shop owners were pulling down shutters of their shops and saw a person in the gutter. Then this witness came

down and saw people lifting that man from the gutter. Then police came and took away that person from the gutter. This witness further stated that as he was not able to see properly from his premises he came down and found the man in the gutter was the same person who had requested him in the shop to refund the money of deposit of the accused. He did not know how the man in the gutter got injured. He did not meet anyone when he came down. The statement of this witness was recorded by the police on the same day of incident at night. This witness had told everything to the police. It was read over and explained to him. Then permission was sought to contradict the witness under Section 162 of Code of Criminal Procedure. Permission was granted. This witness stated that what is read out to him did not occur at that time. Then this witness stated that he cannot explain as to how it is so recorded by police.

In the cross-examination, this witness stated that those five people present in the shop were discussing amongst themselves. This witness did not know anyone of them. This witness reached there only after the injured

was removed by the police. Statement of this witness was recorded on next day at about 04.00-05.00 a.m. The statement of this witness was partly recorded at spot and partly at the police station. Then certain suggestions were given to extent that he was not at home and he saw nothing, there was no request for the refund of money deposited, and he was falsely deposing at the behest of the police, all these suggestions were denied.

11. Nanku Murari Ansari (PW 5) is another panch witness to seizure panchnama. In examination-in-chief, this witness stated that on 24.02.1998, he was called by Shivaji Nagar Police Station, at about 03.30 a.m to act as panch witness. There was another panch at that time. A person in custody desired to make a voluntary statement and to show the place where the weapon was kept. Then police recorded the same and obtained his signature thereon. Then the accused led them to a hotel. He does not remember the name of hotel. The said hotel was closed. Then he called a person from the premises on the top of the hotel and that person came down. Then that person opened the hotel and from a bag

accused brought knife. The said bag was near the kitchen room of that hotel. The same was recorded by the police and his signature was obtained on the panchnama. The total length of the knife was 12 inches.

In the cross-examination, this witness stated that he was a tailor and was staying at a distance of about 50 to 100 feet from the police station. He had gone to bathroom and on return he was called by the police. The officer was Pawar along with Havildar Sonawane. This witness stated that those police personnel know him. Then he was told about the facts of the case and panchnama is to be drawn of the weapon of offence. This witness further stated that before recording the statements the names and addresses of the panchas were not recorded. He does not know Marathi. His name and address was recorded by the police. In his presence the name and address of other person was not recorded. First his name and address was inquired and thereafter he signed. This witness signed on the paper on which his name and address was recorded. The bag was not taken charge by the police.

12. Sayadali Jawedali Kazi (PW 6), is another panch witness to seizure panchnama of clothes. In examination-in-chief, this witness stated that on 07.03.1999, he was called at 07.30 pm by Shivaji Nagar Police Station to act as panch. He was called to the officer's room where as person in custody desired to show the clothes kept by him. This witness was made to sign on a written full-scape paper. The said paper was written about the case of murder. Then accused led them to Ghatkopar, Deonar Link Road, Dumping ground. In his presence the accused took out clothes from a pipe. The same was taken charge by the police and then this witness came back to police station. This witness was made to sign on the document at police station.

In the cross-examination, this witness stated that on taking the clothes in his hand, this witness stated that the clothes were similar but were red stained at that time. He signed at both places only at the police station. This witness stated that he does not know Marathi. Then this witness admitted that his name is not Sayadali Jawedali Shaikh. This witness denied that he was impersonating and deposing in place of Sayadali

Jawedali Shaikh. This witness further stated that he has no concern with the police.

13. PSI — Sunil Shankar Bhosale (PW 7), is the investigating officer. On 15.02.1999, he was attached to Shivaji Nagar Police Station, as SHO. He was on duty from 8.00 pm to 8.00 am next morning. Around 8.00 pm he received phone call from control room informing that an injured has been shifted to Rajawadi hospital by mobile in that area. Then he went with the staff to the hospital and came to know that the said injured was declared dead before admission. Then this witness stated about the steps taken by him in investigation such as, recording the statement of witnesses, drawing various panchnamas, etc. Thereafter the matter was transferred to PI-Gire.

In the cross-examination, this witness stated that the format u/Sec. 154 of Code of Criminal Procedure is filled by him. The same was filled up after the inquest panchnama and return to the police station. This witness was present at the time of search of the deceased. Then this witness denied the suggestion that

statement of PW was recorded before the inquest panchnama. This witness admitted that Ex-8 does not show sealing. He did not take advise of seniors before completing 154 format. He went to the scene of offence at 11.00 p.m.

14. Balkrishna Pandurang Hankare (PW 8), is the Medical Officer, attached to Addl. Coroner's Court Rajawadi. This witness stated that a dead body of Mohd. Gous Abdulla Shaikh was forwarded by PSI-Bhosale of Shivaji Nagar Police Sttion, which was brought by PC-21877 and the dead body was identified by his assistant. The body was received at 01.30 a.m and the PM was completed till 10.30 am and 11.15 am on 16.02.1999. Then this witness noted the injuries in Col. 17 and internal injuries in Col. 20(D) as well as Col. 21, which are as follows:

1. Stab injury on right supra clavicular region horizontally 2x1x8 cm deep in chest, bleeding (+) double sharp edged gapping (+).
2. Stab injury in left side epigastric region obliquely to left side and upward direction 8x2.2xAbdomen (18 cm.) deep, Double sharp edged with Appeared end. On left side, gapping present, intestive protruding.
3. Stab bellow Injury No. 3 verticle 2.5x1.5x8 cm deep to the right side (In the skin)

double sharp edged.

4. Stab injury on lateral side of upper left thigh verticle 4 cmx1.5 cm. 5 cm deep upto bone-Double edged.
5. Stab on right side abdomen, bellow costal margin 5x2x6 cm in the skin thappered end on left side double sharp edged.
6. Abrassion Horizontal below injury no. 5 2x0.5 cm.
7. Ventricle stab injury along the medical border of left seapulla at upper region double sharp edges 2 cmx1.2x3 cm skin deep only.

Along with diagrammatic representation other injuries discovered by external examination or palpations fractures etc.: No fracture evident.

Then a question asked to this witness that: can you say definitely that the injuries shown against serial Nos. 17 and 18 are ante-mortem injuries?: Yes, Antemortem.

Head-

Injuries under the scalp, their nature:- NAD,

Skull-Vault and base-discrib e fractures, their sites, dimentions, directions etc:- Intact.

Brain - The appearance of its coverings, size, weigh and general condition of the origin itself and any abnormality found in its examination to be carefully notes (weight M.3 gram F.2.75 grams). :- Pale.

Thorax- Walls, ribs, cartilages... Pleanura Infact, pale.

Larnyx, Trachea and Bronchi.

Right Lung : Stab injury on apex of right

lung 2 cm x 3.5 cm deep – Bleeding (+).
Right Haemothorax -1200 ml. Blood present.
Left Lung – Pale.

Pericardium – Heart with weight. Empty,
NAD.
Large vessels.

This witness opined that the cause of death was hemorrhagic shock due to stab injury. (Injury to the lung & liver) (Unnatural).

The injuries noted by him are sufficient to cause death in normal course. Injuries 1 and 2 are themselves sufficient to cause death in normal course. The weapon can be long and sharp namely a double-edged weapon. The injuries noted by him are possible by this instrument.

In the cross-examination, this witness stated that the injuries 1 to 5 and 7 are possible by double-edged sharp weapon and therefore, it is so recorded. The article shown to him can be considered as single-edged weapon. The other edge is too thin. It is not sharp.

15. Mahejabin Shaikh Mannan (PW 9). This witness deposed that in 1999, was working in the office of Babubhai as Estate agent. Babubhai was known as Gous.

The office timings were 10.00 am to 07.00 pm. This witness was on duty on 15.02.1999. Then he attended the duty at 10.30 a.m. His boss was in the office in the evening. In the evening at about 03.30 pm a phone call was received from Arshadbhai. The said Arshad came to his office at 04.30 pm. They had a discussions in the office and thereafter both of them went out. The said Babubhai expired on 15.02.1999. His statement was recorded by police.

In the cross-examination, this witness stated that he was receiving the phone calls. They left the office at 05.00 / 05.30 pm. He continued to be in the office. He cannot say where they went and whether they went together.

16. Abdulla Abdulsuban Shaikh (PW 10) is the father of deceased. This witness deposed that on 15.02.1999 at about 08.45 pm he received a phone call from Rajawadi Hospital from police that injured by name Mohd. Gous was admitted and he went to the hospital. He was told that deceased was assaulted by bottle. Then he went to the hospital at 09.30 pm. This witness stated that he

was estate agent. He knew some of his friends. He was staying at my place and would go to his native place and come back and stayed at his place. A loan of Rs. 60,000/- was given to the accused for business purpose but the business went in loss. A further demand of Rs. 20,000/- was made which was not given to him. All this transpired in December 1997. This witness further deposed that he was aware that the amount of Rs. 60,000/- was given by deceased to accused as he told him not to give Rs. 20,000/- as earlier Rs. 60,000/- was not returned by the accused. The dealings were in the office or at the residence. His statement was recorded by the police. The money was taken for expenses. He was not aware in what business/profession the accused was involved. This witness came to know before the death of his son that the accused was carrying on business of hotel at plot no. 8, Govandi. The hotel was known as 'Azmi Hotel'.

In the cross-examination, this witness stated that the business of his son and the office premises was at Nerul. It takes about 15 to 20 minutes from his place to Nerul. That business was since about 1995. No one

else was partner in that business. Then this witness stated that there was no fight over money between deceased and Abdul Rehman in January 1999 however, there were bitter exchange at his place when he directed deceased not to allow to sit in the office. The accused used to sit in the office. This witness did not tell the police about loan of Rs. 60,000/- given to the accused for business which went into loss. He did not even tell police about the other loan of Rs. 20,000/- which was not given. This witness accompanied 15 people from his locality to the hospital. PI- Gire was present at the hospital. He also told this witness about the incident. Then statement of this witness was recorded immediately. This witness did not tell about the financial transactions with the accused to the police.

17. Bharat Ramchandra Gire (PW 11), is the investigating officer. This witness stated that on 15.02.1999 he was PI at Shivajinagar Police Station. The matter was transferred to him on 16.02.1999 by Sr.P.I. Prior thereto the matter was under investigation of PSI-Bhosale (PW 7). Then this witness

told about the steps taken by him in investigation such as, recording the statement of witnesses, effecting the arrest of accused, drawing various panchnamas, collecting CA report and pm notes, etc.

In the cross-examination, this witness stated that he was aware of the CR right from 15.02.1999. He did not record the statement of Abdul Rehman. This witness admitted that they did not seal the hotel premises. Both the hotels were visited for clue. They were not able to locate any weapon. The accused was arrested from outside a masjid at Bhandup-Sonapur. This witness was with his staff at that time. One person was with them who was known to the accused. No arrest panchnama was recorded. This witness stated that he questioned accused in Marathi and Hindi and accused answered them in Hindi, after understanding their questions in Marathi. They were enquiring about Article 4 and 5. Then accused disclosed only about Article 4 on 24.02.1999 and did not disclose about the clothes. The panchas enquired from the accused what he has to say. Then this witness stated that he went to the spot on 16.02.199, and visited thereafter also for four times.

He did not open that shop on all the four occasions. He met PW 4 during those visits. There is no difference between Chaku and Suri. Article 4 can be referred by both the names. The regzine bag was not taken charge. He did not feel it necessary to take charge of the bag as it was not found to be blood stained.

18. The trial court while convicting the accused has recorded the following findings in paragraph no.45.

"45. Now the question arises as to who is responsible for the said homicidal death ?

*The documents, records, testimony and arguments that are on record clearly indicate the presence of the accused and the deceased in Umar Azmi Hotel at about 5.00/5.30 p.m. They are seen in the Hotel by P.W.4. **The attack or actual assault is not seen by anyone** and therefore the circumstances which forces the Court to believe the story of prosecution are to the effect that they were together, there was need for refund of deposit for whatever reasons best known to them and therefore a demand was made in unison by the accused and the deceased from P.W. 4 for refund of the said deposit in relation to the premises known as Umar Azmi Hotel and therefore the common interest of both of them – the accused and the deceased was, refund of the deposit from P.W. 4. It would therefore be clear that there was common interest of the accused and the deceased in getting the refund of the deposit which may also be inter connected or inter woven with the factum for coming together for money and therefore the*

testimony of P.W. 10 comes into picture. It is on record that a demand for Rs.20,000/- was made by the accused from P.W. 4 and his son. All this put together would show clearly without any doubt that the accused was in need of funds and as those funds did not materialise from P.W. 10 or the deceased, the said premises of Umar Azmi Hotel was sought to be surrendered and deposit claimed. All this clearly forms a complete chain of circumstances leading to one positive inference that the accused is responsible for inflicting injuries on the deceased Mohmed Gous and these injuries led to the death of the said deceased.

I am therefore more than convinced that the accused is guilty of the homicidal death of the deceased.

*... ..
... .."*

(emphasis supplied)

19. According to the prosecution, the incident took place in the hotel itself. According to PW 4 when he was called by the accused at about 5.00 p.m. and demanded the refund of deposit, at that time in addition to the deceased 4 to 5 persons were there in the Hotel. Admittedly, there is no direct evidence in relation to alleged assault.

20. As regards the recovery of weapon, the Investigating Officer has admitted in his evidence that the hotel premises was not sealed. After the incident

they searched both the hotel premises, but were not able to locate any weapon. PW 8 Balkrishna P. Hankare, the Medical Officer who conducted postmortem on the dead body of the deceased has stated that the injuries were caused by double edged sharp weapon and the knife which allegedly came to be recovered at the instance of the accused is single edged weapon. Therefore, no reliance can be placed on the alleged recovery.

21. As regards the motive, the father of the deceased PW 10 Abdulla Shaikh has admitted in cross-examination that he did not disclose to the police about the loan of Rs.60,000/- given to the accused for business. He even did not disclose about other loan of Rs.20,000/- which was demanded by the accused. Therefore, the trial court ought not to have relied upon the said evidence of PW 10 as motive to connect the accused with alleged crime.

22. Considering overall facts and circumstances, the trial court was not justified in convicting the appellant/accused for alleged offence. In the result,

the following order is passed.

O R D E R

A] Criminal Appeal No. 470 of 2000 is allowed.

B] The impugned judgment and order dated 12.06.2000 passed by the Additional Sessions Judge for Greater Mumbai in Sessions Case No. 713 of 1999 convicting the appellant – original accused **Mohammad Arshad Haji Shabbir Shaikh** for the offence punishable under Section 302 of the IPC is set aside and he is acquitted of the said offence.

C] His bail bonds shall stand cancelled.

D] The fine, if any, paid by the appellant – original accused, be refunded to him.

(N. R. BORKAR, J.) (PRASANNA B. VARALE, J.)