

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.130 OF 2016

Shaikh Musa s/o Shaikh Yakub,
Age 26 yrs., Occ. Labour,
R/o Khandoba Bazar,
Tq. & Dist. Parbhani.

... Appellant

... **Versus** ...

The State of Maharashtra
Through the Police Station Officer,
Nanalpeth Police Station,
Parbhani.

... Respondent

...

Mr. P.S. Paranjape, Advocate for appellant

Mr. R.D. Sanap, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI
Y.G. KHOBRADE, JJ.

RESERVED ON : 10th APRIL, 2023

PRONOUNCED ON : 03rd MAY, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

his conviction by learned Additional Sessions Judge, Parbhani on 12.01.2016 in Sessions Trial No.119/2013 after holding him guilty of committing offence punishable under Section 302, 307, 323 of the Indian Penal Code, 1860.

2 The prosecution story is that PW 1 Shaikh Sami Shaikh Jamalsa is resident of Khandoba Bazar, Wangi Road, Parbhani, where he resides with three sons and four daughters and wife. He lodged report with the Police Chowky of Civil Hospital, Parbhani around 9.00 p.m. on 29.04.2013. In his First Information Report he has stated that there was quarrel around 11.00 a.m. on the same day in between his wife and niece residing in the neighbour. It was on account of placing of stone on the drainage in front of the house. Thereafter when he as well as his sons were in the house around 6.00 p.m., the son of his niece i.e. present accused started giving abuses to his son by coming in front of the house. His son Shaikh Ajmat went near accused and said that he should not abuse. At that time, accused took out knife and by saying that he would kill, stabbed Ajmat on his right side of the back. Ajmat received severe injury because of the said stabbing, then informant's another son Shaikh Mohd. went to catch accused with his friend Isaq Khan, at that time accused assaulted Mohd. with the same knife to the left side of the chest of Mohd. and right wrist of Isaq Khan. At the same time, brother of the accused, who is juvenile, came there and he also assaulted

Shaikh Mohammad by knife on the left thigh. Informant himself, Chand Khan, Syed Khan, Sattar Khan, Syed Yaseen Syed Ibrahim, Sher Khan, Anwar Khan, Rais Khan, Chand Khan were present and they separated all of them. In the said quarrel and assault, Shaikh Ajmat died on the spot. His dead body as well as the two injured persons were taken in auto rickshaw to Civil Hospital, Parbhani. Informant himself had accompanied them with others. The accused persons had fled from said spot.

3 On the basis of the said First Information Report offence vide Crime No.78/2013 came to be registered under Section 302, 307, 326 read with Section 34 of the Indian Penal Code. Inquest Panchnama was executed and the dead body was referred to postmortem. After the postmortem was done, provisional death certificate was collected. Panchnama of the spot was executed with the help of panchas, statements of witnesses under Section 161 of the Code of Criminal Procedure were taken. Accused/appellant came to be arrested on the same day and while in police custody he gave memorandum and discovered two knives. In presence of panchas his memorandum as well as discovery panchnama has been executed. The injured persons were admitted to different hospitals. Their statements under Section 161 of the Code of Criminal Procedure were recorded. Articles were seized and sent to chemical analysis. After the completion of investigation

charge sheet in respect of present appellant came to be filed with Judicial Magistrate First Class, Parbhani and as regards the juvenile, it was before the Juvenile Justice Board.

4 After the committal of the case charge was framed against the appellant/accused at Exh.5, for the offences punishable under Section 302, 307 and 324 of the Indian Penal Code. When he pleaded not guilty, trial has been conducted. Prosecution has examined in all 14 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the learned Trial Judge has held that the offences are proved against the accused/appellant beyond reasonable doubt. The accused has been sentenced to suffer imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer simple imprisonment for one year, for the offence punishable under Section 302 of the Indian Penal Code. He has been further held guilty of committing offence punishable under Section 307 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 14 years and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer simple imprisonment for one year. Further, the accused has been sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer simple imprisonment for two months for the offence

punishable under Section 324 of the Indian Penal Code. This Judgment of conviction is under challenge in this appeal.

5 Heard learned Advocate Mr. P.S. Paranjape for the appellant and learned APP Mr. R.D. Sanap for the respondent and perused the evidence on record.

6 It has been vehemently submitted on behalf of the appellant that the learned Trial judge has not appreciated the evidence properly. The prosecution case is based on the testimony of PW 1 Sami, PW 2 Shaikh Mohammad and PW 13 Isaq Khan. All the three are eye witnesses and PW 2 and 13 are the injured. Their testimonies are full of contradictions and omissions going to the root of the case and, therefore, they ought not to have been believed by the learned Trial Judge. PW 1 Sami has stated that after the alleged assault by knife by the appellant Ajmat died on the spot, however, this fact is not supported by PW 2 Mohammad and PW 13 Isaq Khan. Further, it is stated that the quarrel had taken place due to keeping of stone on the Nali i.e. drainage. It had taken place in the morning between the wife of the informant and his niece Munnibee, who resides in the neighbourhood. As per the testimony of PW 1 Sami, though he had seen the incident and states in the First Information Report that he had accompanied the injured

and the dead body to Civil Hospital, he takes a somersault in examination-in-chief and says that he felt giddiness and fell down and had not accompanied the injured and the dead body to hospital. He has stated that he went to hospital around 7.00 p.m. and then reported the incident at 9.00 p.m. Therefore, there is apparent delay in lodging the First Information Report. It has also come on record that in between there is a Police Chowky i.e. on the road on the way to go to Civil Hospital and when PW 1 Sami had gone afterwards, he could have definitely taken a stop at Police Station, informed the incident to police and police might have accompanied him to hospital. There is no explanation for the delay. Further, he is totally silent on the point, as to where PW 2 Mohammad was after the postmortem of Ajmat was executed. In his cross-examination he has voluntarily stated that the knife was in the hand of police when he was giving complaint. Still the police i.e. PW 12 PI Uday Khanderao has misused the powers and shown the said recovery of the knife under Section 27 of the Indian Evidence Act. Further, police atrocities can be seen from the fact that even the discovery of the weapon, which is alleged to have been used by the juvenile, is also shown from the present appellant. Such discovery is unbelievable.

7 Learned Advocate for the appellant has further submitted that the statement of PW 2 Mohammad under Section 161 of the Code of

Criminal Procedure has been belatedly taken after about eight days and there is no explanation to the same by PW 12. He has denied that Ajmat has died on the spot. The admissions given by him in the cross-examination have not been considered by the Trial Court. In his examination-in-chief he has stated that he has become unconscious, but in his statement under Section 161 of the Code of Criminal Procedure he has not disclosed the said fact. He has not disclosed the history about his own injury to the Doctor also. If we consider the testimony of PW 4 Dr. Rubina, who had examined PW 2 Mohammad, then it can be seen which is coupled with injury certificate Exh.19 that the injury that was suffered by Isaq Khan was simple in nature and as regards Mohammad also she had noticed three injuries with sharp object, two of them were on the thighs and one was on the left side of anterior chest wall, but the nature is said to be simple. Therefore, she does not corroborate to the testimony of PW 2 Mohammad that Mohammad was unconscious after the incident. PW 4 Dr. Rubina in her cross-examination has stated that injuries noted by her in Exhs.19 and 20 are possible by self infliction. She has not explained as to why the admission for eight days was prescribed when the injuries were simple. Therefore, the medical evidence is also not supporting the ocular evidence. PW 5 Feroz is the relative of informant and, therefore, bound to support him. His testimony is unbelievable. PW 13 Isaq has also stated in his cross-examination that he never disclosed about the

history in Government Hospital, Parbhani. PW 14 Dr. Suryakant Deshmukh, who had examined Mohammad Isaq says that there was injury to the right palm. He found in the extensor of wrist joint and thumb was absent and the injury was grievous in nature. It has not been extracted from the witness in his examination-in-chief as to what kind of treatment was given to Isaq Khan. Still he says that if the timely treatment would not have been given, the injuries would have caused permanent disability of that limb to Isaq. He says that the injury was grievous in nature, but as regards Isaq is concerned, the charge was under Section 324 of the Indian Penal Code, which requires simple injuries. It has come on record that the incident has taken place in the evening and many people had gathered. Still no independent witness has been examined. There were many lacunas in the investigation and, therefore, the learned Trial Judge ought to have come to the conclusion that the offence has not been proved beyond reasonable doubt.

8 The learned APP for the prosecution supports the reasons given by the learned Trial Judge. The ocular evidence of PW 1, 2 and 13 stood corroborated by the other evidence. Merely because PW 2 Mohammad came to know about the death of his brother Ajmat after about eight days, it cannot be said that Mohammad would not have been present at the spot, he has not received injuries and, therefore, as regards Section 302 of the Indian Penal

Code is concerned, the prosecution has proved the offence beyond reasonable doubt. The probable cause of death as per the autopsy report is, “due to haemorrhagic shock secondary to lung laceration and with haemothorax”. Use of the weapon like knife and stabbing is definitely give the knowledge that accused wanted to kill Ajmat and if the injuries caused to Mohammad would not have been treated within reasonable time, then he would have succumbed to the injuries. In fact, there was no reason for Isaq to go in between but still when he went to rescue the injured and deceased, he was also assaulted by the present appellant. When all these things have been done with knowledge and then the murder weapon has been discovered by the present accused, then it cannot be said that any illegality or error has been committed by the learned Trial Judge in convicting the appellant. The appeal deserves to be dismissed.

9 After taking note of submissions on both sides, we would like to re-appreciate the evidence which is within the powers of the Appellate Court. From the testimony of PW 1 Sami – the informant, it can be seen that he wanted to pose himself as an eye witness. In examination-in-chief he has stated about the incident that had taken place in the morning around 11.00 a.m. of 29.04.2013. It was the dispute between his wife and his niece Munnibee. He has not stated, as to on what count they had fought, but in

the First Information Report he says, it was on account of placing of stone on the drainage in front of the house (घरासमोरील नालीवर दगड ठेवण्याचे कारणावरून). Thereafter, he says that around 6.00 p.m. on the same day the accused was abusing his son Ajmat. He himself was at a distance of about 10 feet and that the accused was threatening Ajmat that he would assault him with knife. The informant went to rescue Ajmat and while he was taking his son by the side, accused gave blow of knife on back of his son and his son died on the spot. If we consider his First Information Report, he has stated that accused was abusing his son in front of the house, at that time, Ajmat went near him and asked him not to abuse, at that time, accused took out knife and by saying that he would kill him, he had given blow to the right side of the back. It is stated that accused had stabbed Ajmat with knife. Thus, the story in First Information Report as well as his examination-in-chief differs. Further, the natural question would be, when a person is asking another or making request, he would be facing the person to whom the request is made. The back side of the person will not be reachable to the person assaulting. Now, in examination-in-chief, as aforesaid, he says that he was taking the stone by the side and in that process the blow was received by his son on the back. Thus, this contradiction will have to be considered in favour of the accused. Another fact to be noted is that in the examination-in-chief he has not at all stated, where exactly the incident had taken place, but from the First

Information Report Exh.12, it appears that it had taken place in front of his house. At this stage itself if we consider the spot panchnama Exh.29 and the rough map drawn on the same, then there is no house of the informant nearby the spot of incident. Even PW 2 Mohammad has also not specifically stated where exactly the incident has taken place. He has stated that he was coming from Namaj and he as well as his friends were standing in Khandoba Bazar, at that time accused was watching him in anger and, therefore, he had asked accused, why he is staring at him and then accused started abusing, Ajmat intervened and then accused gave blow of knife to Ajmat. Thus, he gives a different place and also a different story. Before proceeding further, as regards PW 1 Sami is concerned, he has not given any reason as to why the accused was abusing Ajmat. The connection between the morning incident and the evening incident is not at all established. Further, the conduct of the father is unbelievable. In his First Information Report he has stated that he along with his friends had taken the dead body of Ajmat and the two injured persons in auto rickshaw to hospital, but in the examination-in-chief he has conveniently stated that he felt giddiness and did not accompany the dead body as well as the injured person. The point of delay in lodging the First Information Report may not be appealing, as alleged delay is of two hours only, but still the conduct on the part of PW 1 Sami is required to be considered. His examination-in-chief as well as the First

Information Report Exh.12 would give a clear picture that he was under the impression that Ajmat expired on the spot. In spite of death of his son how he could not have accompanied both the sons to the hospital, is a question, and no satisfactory answer/explanation has been given by PW 1 Sami. It will not be out of place to mention here that at one place in examination-in-chief he says that he had carried his son at hospital, but at the another place in the examination-in-chief itself he has stated that his sons had carried injured to hospital and then he went to hospital at 7.00 p.m. This contradiction/anomaly has been created in the examination-in-chief itself and there is no attempt by the prosecution to get clarification in respect of the same. In the cross-examination, however, he has categorically stated that he had not accompanied to Ajmat in auto rickshaw to hospital. He has stated in the First Information Report as well as in examination-in-chief that certain other persons were also present at the spot and who had tried to rescue Ajmat from the clutches of accused. However, none of them has been examined by the prosecution for the reasons best known to it. Therefore, his testimony is unbelievable.

10 PW 2 Mohammad is the brother of deceased Ajmat/son of PW 1 Sami and injured. As aforesaid, he has stated when he was coming from Namaj along with friends and was standing in Khandoba Bazar, accused was

staring at him in anger and, therefore, he asked as to why he is staring at him. Accused started abusing. Ajmat asked accused, as to why he is abusing, then accused gave blow of knife to Ajmat. Therefore, Mohammad rushed. Accused gave blow of knife on Mohammad's chest and left thigh. Accused also gave blow of knife on the right hand of Isaq Khan, who is friend of Mohammad. According to this witness, the incident took place as a stone was kept on the village drainage. Again at the costs of repetition, it is to be noted that when the said act of keeping the stone on the drainage had taken place, who had done it, has not been brought on record by the prosecution. What was the connection between the morning incident and the evening incident is not stated by PW 2 Mohammad also. In the examination-in-chief itself he has also made contrary statements. At one place he says that accused had assaulted him by knife on his chest as well as on the left thigh and at another place he takes the name of juvenile – brother of the accused and says that the minor had given blow of knife on his left thigh. He then says that he had become unconscious in the hospital. It has been rightly pointed out by the learned Advocate for the appellant that the statement of this witness has been recorded belatedly and no proper explanation is coming from the Investigating Officer. Further, the place of incident given by this witness is different than in the testimony of PW 1 Sami and First Information Report. In the cross-examination he has stated that since two months prior to

the date of incident Ajmat was residing separately in Amim colony, then, the question arises – what was the reason for Ajmat to be at home where PW 1 Sami and PW 2 Mohammad were residing. No doubt, they are his father and brother and he can visit his house at any time, but still when he is residing separately from them, there should be some reason as to why he would have come to meet his parents and brothers. It has come on record that Ajmat was doing the business of fodder, so also PW 1 Sami, but PW 2 Mohammad says that he was not in the business of fodder selling and, therefore, it appears that he says that when he was returning from Namaj, the incident has taken place. From the testimony of this witness also it can be seen that many persons had gathered at the spot, but none of them has been examined by the prosecution. Another fact to be noted from his cross-examination is that he has denied that he had given history at the time of admission. The question would be then, who has given. Prosecution has examined PW 4 Dr. Rubina, who had examined PW 2 Mohammad as well as PW 13 Isaq. In her entire examination-in-chief she has not disclosed that when Mohammad was brought to hospital he was in unconscious state. There is no record produced by the prosecution to prove that how many days PW 2 Mohammad was admitted in the hospital. If those details would have been given, that would have been the answer to the point of delay in recording the statement under Section 161 of the Code of Criminal Procedure. In his examination-in-chief

PW 2 Mohammad has stated that after receiving the injuries he had become unconscious, but in his statement under Section 161 of the Code of Criminal Procedure he has admitted that while recording his statement he had not stated before the police that he was unconscious. When this is the material improvement and rather corroborated by the medical evidence that he was not unconscious, then there ought to have been explanation from the Investigating Officer regarding the delay in recording the statement under Section 161 of the Code of Criminal Procedure. He had sufficient time to improve the story also. When he himself had not given the history of assault and also the fact that he was not accompanied by PW 1 Sami, then, who had given the said history to PW 4 Dr. Rubina, is a question, because the medical certificate shows that he had received injuries. Therefore, the testimony of this witness is also untrustworthy.

11 PW 13 Isaq Khan is the injured witness. He has deposed almost on the same line of PW 2 Mohammad. PW 13 Isaq in his testimony has stated that there was dispute between accused, deceased and his father and brother on account of keeping stones on drainage line. That means, this witness was not even knowing as to for what purpose the abuses had taken place before assaulting deceased as well as he himself and PW 2 Mohammad. PW 13 Isaq has stated that he was coming from offering Namaj around 5.30

p.m. on 29.04.2013. He saw that the accused was abusing deceased and then accused giving blow of knife on the back of deceased. He says that he himself as well as Mohammad went to rescue, but at that time accused gave blow of knife on his right hand. When he was rescuing deceased, accused gave blow of knife on the right hand of Isaq. He has stated that initially he as well as Mohammad were shifted to Government Hospital and then he was shifted to Parbhani ICU Hospital. The record would show that there is some endorsement by the Doctors regarding the unconsciousness and unfitness of the present witness PW 13 and even if we give concession; yet, there is considerable delay in taking his statement under Section 161 of the Code of Criminal Procedure. PW 2 and 13 are almost denying the fact that Ajmat had expired on the spot. It is also to be noted that he has also not stated that he had given history to the Government Hospital or to Parbhani ICU Hospital. Then, again question will come, who had given that history. The position of the private Doctors as well as the Government Hospital authorities in not taking down that history from the patient, who were in conscious state, is not understandable. Nobody else can give the history than the victim himself. Both of them have not supported the statement in the First Information Report that Ajmat expired on the spot. Therefore, his testimony is also unbelievable.

12 The testimony of PW 4 Dr. Rubina would show that she had examined PW 2 and 13 and she has proved Medico Legal Certificates Exhs.19 and 20. It is stated in the said certificates that those injuries sustained by both of them are simple. If they both had sustained simple injuries, what was the need for her to admit them and the admission is for a considerable period. As regards treatment to PW 2 Mohammad is concerned, the treating Doctors from the Civil Hospital have not been examined. PW 14 Dr. Suryakant Deshmukh is the Medical Officer from Parbhani ICU Care Hospital where PW 13 Isaq was admitted. He says that he found the injury on the person of Isaq is, “suture wound on dorsal and radial aspect of right fore arm”. Further examination showed that in the extensor of wrist joint and thumb, there was major injury and then he carried out the operation. He then says that the injuries were grievous in nature. When one Doctor had found it simple, how the another Doctor can find it to be grievous, is a question. According to the cross of PW 4 Dr. Rubina, the injuries mentioned in Exh.20 i.e. injuries to Mohammad can be self inflicted also and she also states that injury mentioned in Exh.19 i.e. the injury certificate of Isaq can be self inflicted. No further clarification has been sought by the prosecution, when there was some contradiction in examination-in-chief and the cross.

13 Next in line is PW 7 Kapil, who is the auto rickshaw driver, who

had taken Ajmat and Mohammad in his auto rickshaw to hospital. His examination-in-chief would show that Imran had come to call him and when they both went to Kadbi Mandi (fodder market), he had carried Ajmat and Mohammad in his auto rickshaw. He does not say that they were taken from the place near the house of PW 1 Sami or they were in front of their house when they boarded his rickshaw. Therefore, the place of incident from his testimony also is different and in his cross-examination he says that about 200 persons had gathered at the spot.

14 PW 8 Dr. Shaker Karim is the autopsy surgeon. He had found single stab wound over left back at the level of fourth thoracic vertebra 5 c.ms. lateral to mid line of right side and the dimensions were 4 c.ms. X 1.5 c.ms. X 17 c.ms. deep, communicating with the pleural cavity directed anteriorly and inferiorly towards right side. He has given the cause of death as, “due to haemorrhagic shock due to lung laceration with haemothorax”. He has also stated that the injury was possible by Article No.6 i.e. knife. Even if we say that the accused has not brought any evidence to discard the testimony of this witness; yet, the other facts will have to be considered as to whether the knife which has been recovered in this matter was the murder weapon and whether the said discovery can be considered at all.

15 PW 5 Feroz is the panch to the discovery panchnama. Though he has proved memorandum panchnama Exh.27, in his cross-examination he has admitted that his maternal sister is given to the brother of deceased. That means, he appears to be a relative. Merely because he is relative he cannot discard the evidence. But it will have to be seen whether any such discovery was made by the accused before this witness or not. The cross-examination is too technical and we do not find that there is any point in discarding the testimony of this witness. Even if we hold that the accused has discovered the said weapon i.e. knife; yet, whether the prosecution was able to prove the guilt of the accused beyond reasonable doubt, is still a question.

16 PW 12 is the Investigating Officer, who has not explained the delay in recording the statements of witnesses. He has given the account of the investigation, he has carried out. The question still remains is, as to how the present accused could have discovered knife which was allegedly used by the juvenile.

17 Though the fate of the charge sheet of the juvenile has not been brought on record, as to whether still it is pending or it has already been decided; yet, as per the prosecution story, it had invoked Section 34 of the

Indian Penal Code. Why the juvenile would have got himself involved for the same intention the present accused had while committing the offence, is a question. Presence of juvenile is not stated by PW 1 in his examination-in-chief, but when Article No.7 knife was shown to him, he says, it was in the hand of juvenile. PW 13 Isaq only says about presence of the juvenile and not attributes any further role. Thus, there is variance between these eye witnesses in respect of involvement of juvenile. This variance ultimately affects the entire prosecution story.

18 In the present case the evidence of eye witnesses and the injured persons themselves is unbelievable and untrustworthy. There was no motive for the accused to commit any offence as alleged. The place is shown different and the conduct of the witnesses is doubtful, statements of the injured were recorded belatedly. On these grounds the learned Trial Court ought to have given benefit of doubt to the accused. When the prosecution evidence is not inspiring confidence, then definitely the Courts have to consider giving benefit of doubt. Because doubts are created in view of the major shortfalls in the evidence of the prosecution. The findings arrived at by the Trial Court is perverse. It is not merely because two views are possible, this Court is taking the second view, but the glaring lacunas have not been considered by the Trial Court. The conviction to the appellant, therefore,

deserves to be set aside by allowing the appeal. Hence, following order.

ORDER

1 The appeal stands allowed.

2 The conviction awarded to appellant/accused Shaikh Musa s/o Shaikh Yakub in Sessions Trial No.119/2013 by learned Additional Sessions Judge, Parbhani on 12.01.2016 after holding him guilty for committed an offence punishable under Section 302, 307, 324 of the Indian Penal Code, 1860 stands quashed and set aside.

3 Accused Shaikh Musa s/o Shaikh Yakub stands acquitted of the offence punishable under Section 302, 307, 324 of the Indian Penal Code. He be set at liberty, if not required in any other case.

4 The fine amount paid/deposited, if any, be refunded to the accused/appellant after the statutory period.

5 We clarify that there is no change as regards the order of disposal of muddemal.

6 Pending application, if any, stands disposed of.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)