

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 207 OF 2014

Ramesh Malihari Jaiswal)
Aged About-20 years, Occ. Tailor,)
R/At-Panchdev Seva Sangh, Shrirampada,)
Ambyachi Bharani,)
Khindipada, Bhandup (West),)
Mumbai - 400 078.) ... Appellant
(Accused is in Nasik Central Jail)) (Original Accused)

V/s.

The State of Maharashtra)
(At the instance of Bhandup Police Station)) ... Respondent

Mr. Veerdhaval Deshmukh for Appellant.
Mrs. Geeta P. Mulekar, APP for Respondent-State.

CORAM : A.S. GADKARI AND
SHIVKUMAR DIGE, JJ.

DATE OF RESERVING : 7th JULY, 2023.

DATE OF PRONOUNCEMENT : 18th AUGUST, 2023.

Judgment (Per Shivkumar Dige, J.) :

1. Appellant has impugned Judgment and Order dated 7th February 2014 in Sessions Case No. 555 Of 2012 passed by learned Additional Sessions Judge, City Civil Court, Greater Mumbai, whereby Appellant is convicted for the offence punishable under Section 302 of Indian Penal Code (for short "IPC") and he is sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/-, (Rupees Ten
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Thousand Only), in default of payment of fine, to suffer simple imprisonment for a period of two months.

2. The brief facts of the case are as under :

Appellant along with other persons was residing in one room. They used to sleep on mezzanine floor of that room. Appellant was annoyed due to offending act of deceased Ramniranjan. He had informed it to PW-1 Amarjeet Jaiswal. Few days before the incident, Appellant had brought a knife which was noticed by PW-1 Amarjeet. On 30th April 2012, all were asleep, when around 4.00 am of 1st May 2012, quarrel started between Appellant and deceased. Appellant assaulted deceased with knife, due to that assault, deceased died on the spot. After receiving information, police came at the spot. Appellant was present there, he was arrested by police. Knife and clothes of Appellant were seized. On the basis of complaint filed by PW-1 Amarjeet, police registered FIR against Appellant.

3. After completion of investigation, charge-sheet was filed. Case was committed to Additional Sessions Court at Mumbai. Charge was framed against Appellant. He pleaded not guilty and claimed to be tried. The prosecution has examined in all 8 witnesses. The statement of Appellant under Section 313 of the Code of Criminal Procedure [for short 'Cr.PC.'] was recorded. His defense was of total denial.

4. Considering the evidence on record and submissions of both the learned counsel, learned Trial Court convicted Appellant as mentioned above.

5. Heard learned counsel Mr. Veerdhaval Deshmukh for Appellant and learned APP Mrs. Geeta Mulekar for the State.

6. It is the contention of learned counsel for Appellant that, the Judgment and Order passed by Trial Court is based on inferences, conjunctures and surmises, it is liable to be quashed and set aside. Learned counsel further submitted that, Trial Court has convicted Appellant on the basis of evidence of PW- 1 Amarjeet which is contradictory and inconsistency with the statements of prosecution witnesses. Trial Court ought to have considered that, the examination-in-chief of the PW-1 Amarjeet who himself admitted that, his statement was not read over to him by police after recording it and he has signed the said statement without its contents being read over and on the say of police. Learned counsel further submitted that, the Trial Court failed to consider the deposition of PW- 2 Anis Ansari who has not supported the prosecution case. PW- 5 Akhtar Shah, panch witness has not supported the prosecution case about preparation of spot panchnama. In cross examination, PW- 5 has admitted that, at the time of preparation of spot panchnama on mezzanine floor by police, he was stopped downstairs by police and after completion of the panchnama, police called him on the mezzanine floor and obtained his signature on the panchnama and told him that, they have taken the articles with them and obtained signatures on the label and police did not read over the panchnama to him and only on the say of police, he has put his signature. Learned counsel further submitted that, the Trial Court failed to

consider that, in cross examination of PW- 5, he has admitted that police reached the spot of incident at about 05.30 am. but in the spot panchnama at 'Exhibit-22', it is mentioned that, panchnama started at about 05.05 am. and was completed on 07.30 am.. It creates doubt about truthfulness of spot panchnama. Investigating Officer has not recorded the statement of sister of Appellant from whom Appellant had brought the knife and prosecution has not examined the Doctor who was present at the time of preparing spot panchnama. He further submitted that, present case does not fall under Section 302 but it comes under Section 304 (I) of IPC. The Trial Court failed to appreciate the evidence produced on record and has passed order mechanically without going through the material placed on record. Hence requested to allow the appeal.

Learned counsel relied on the decisions of Hon'ble Apex Court in *(i) Sachchey Lal Tiwari Vs. State of Uttar Pradesh reported in (2004) 11 SCC 410*, *(ii) Budhi Singh Vs. State of Himachal Pradesh reported in (2012) 13 SCC 663* and *(iii), Dauvaram Nirmalkar Vs. State of Chhattisgarh reported in 2022 SCC Online SC 955*.

7. It is the contention of learned APP that, the prosecution case is based upon direct evidence. There is direct evidence of PW-1 Amarjeet who was eye witness to the incident that, all the room partners had their meals and went to sleep on mezzanine floor of the room, Appellant was sleeping alongside of deceased. At about 4.00 am on 1st May 2012, PW-1 Amarjeet heard noise of shouting and he got up and saw that, Appellant

and deceased were having scuffle with each other, Appellant was holding the same knife which he had brought 10 to 20 days prior to the incident. To his horror, PW-1 noticed that, Appellant inflicted blows with the said knife on the neck, upper portion of ear and shoulder of deceased, he received bleeding injuries and blood was coming out of the injuries in a large quantity and he fell down without making any movement. The nature of injuries caused to deceased shows that, it was not caused accidentally but those were inflicted with force. Considering the evidence on record, the Trial Court has convicted Appellant and therefore no interference is required in it.

8. We have heard submissions of both the learned counsel, perused record and impugned Judgment and Order.

9. There is no dispute about homicidal death of Ramniranjan. It is the case of the prosecution that, Appellant assaulted Ramniranjan with sharp knife. PW-6 Dr. Sanjay Wathore who conducted post-mortem on dead body of deceased has stated that, cause of death was due to shock (haemorrhagic) with sharp cutting injuries at neck region and cut throat. He further stated that, the injuries were possible by only sharp big weapon and not by sharp small weapon. Post-mortem report is at 'Exhibit-25'. Injuries mentioned in column no. 17 of 'Exhibit-25' can be caused by 'Article-A' (knife). So the death of Ramniranjan was homicidal death. Appellant has not disputed homicidal death of deceased.

10. The prosecution case is based on direct evidence. PW-1 is eye-witness of the incident. He has stated that, he was staying at Panchdev Seva Sangh, with Ramsevak Jaiswal, Abhimanyu Jaiswal, Appellant and deceased. He was knew of them very well. 15 days prior to the incident, Appellant told him that, deceased was doing carnal intercourse with him. When this witness suggested to Appellant that, he would speak to deceased and he would ask him to stop such behaviour, Appellant told him not to disclose this fact as it will ruin his status. 20 days prior to the incident, this witness saw that, Appellant had brought one big knife. When this witness asked Appellant about the knife, he told him that, the knife belonged to his sister and he had brought it only for the purpose of sharpening it.

10.1. This witness further stated that, on the night of 30th April 2012 after taking dinner they all had slept on the mezzanine floor. At that time, Appellant had slept near deceased. In the early morning of 1st May 2012 around 04.00 a.m., this witness heard screams. He immediately got up and saw Appellant and deceased were scuffling with each other. He saw that, Appellant was holding same knife which he had brought 20 days prior to the incident. He saw that, Appellant inflicted injuries on neck, upper portion of ear and shoulder of deceased, he suffered bleeding injuries on his person, thereby blood oozed from his body in large quantity. Thereafter he fell down without any movements. When the scuffle was going on, other persons sleeping there got up and some one informed to police. Appellant was lying near the dead body of deceased. After some

time API Mr. Sakharam Bankar PW- 7 came at the spot of incident. He immediately called a doctor from neighbourhood. Dr. Shailesh Verma came there. After examining deceased, he declared him dead. Thereafter police took this witness and Appellant to police station. Police inquired with this witness about the incident and recorded his statement. It was treated as FIR (Exhibit-15). This witness identified the knife shown to him as 'Article – A'.

10.2. In cross- examination, this witness admitted that, when his statement was recorded by the police, he had stated that, 20 days prior to the incident of murder, he had seen Appellant with one big knife, he cannot say why the police did not mention about 20 days and why it is recorded as before 10 days. He also admitted that, his statement was not read over to him by the police after recording it. He signed the said statement without its contents being read over to him. This witness denied the suggestion that, in the present case, police suspected him for murder of the deceased and in order to escape from accusation he had given false statement against Appellant. This witness denied the suggestion that, he did not witness the incident but he had concocted a false story in order to escape from the clutches of the police.

11. To corroborate the evidence of this witness, prosecution has examined PW- 3 Rambahadur Pal, who was residing in the next room where the incident happened. He has stated that, Anis Ansari (PW- 2) used to come there for sleeping. On 30th April 2012, he returned from his work at 09.30 p.m. He slept around 11.30 p.m. to 11.45 p.m. Anis Ansari (PW- 2)

was with him. At 04.00 am, he heard a noise from the adjacent room where five persons were residing, hence he woke up. He opened the door of his room. Other people had come out of their rooms. People were asking whether there was a thief. Again he heard noise from mezzanine floor. There was a grill to the mezzanine floor. It was dark. One person from the inside switched on the light of mezzanine floor and opened the lock and grill. This witness and another person went on mezzanine floor. They saw that, two persons with blood stains on their person were lying there. Then they came down. This witness stated that, Appellant present before the Court was one of the person who was lying on the mezzanine floor. Nothing beneficial to the Appellant is elicited in the cross examination of this witness.

12. To corroborate evidence of this witness, prosecution examined Mr. Prem Khatri (PW- 4). He has stated that, on 30th April, he was called at the spot of the incident from the place of his duty which was at a distance of half kilometer from the spot of incident. When he reached the said spot, people were standing there. A murder was committed on mezzanine floor. He saw a dead body. He also saw Appellant sleeping near the dead body. He stated that, Appellant before the Court is the same person who was sleeping near the dead body. Nothing elicited in cross-examination of this witness.

From the evidence of these witnesses, it establishes that, Appellant had assaulted deceased Ramniranjan with a knife and after assault he slept near the dead body.

13. PW- 7 Shri. Sakharam Banker, Assistant Police Inspector, who visited the spot of incident after receiving the information has stated that, when he visited the spot of incident, he saw one person was lying on bed with bleeding injuries. A knife was lying on the side of that injured person. This witness had called the doctor. This witness seized articles including knife in presence of panchas. The Panchanama is at 'Exhibit-22'. Knife is at "Article-A". PW-2 Anis Ansari did not support prosecution case.

14. It is the contention of learned Advocate for Appellant that, PW- 1 Amarjeet has falsely implicated Appellant. According to him, in the absence of evidence of other eye witnesses, testimony of PW- 1 Amarjeet should not be accepted to be true.

15. The burden on the parties to establish their respective cases in a criminal trial is two-fold. The higher is on the prosecution to establish its case beyond reasonable doubt and the lower is on the accused to prove his plea by a mere preponderance of probability. It is enough for Appellant to raise a reasonable doubt about his guilt.

16. In present case, there is direct evidence of PW-1 Amarjeet against Appellant who is the eye witness. PW-3 Rambahadur and PW-4 Prem Khatri have stated about presence of Appellant on the spot of incident. There is no dispute about homicidal death of deceased. PW -6 Dr. Sanjay Wathore who has conducted post-mortem on dead body of Ramniranjan has stated that, in column no.17 of post-mortem report, it is mentioned that, there were total 11 ante mortem injuries on the dead body

of Ramniranjan. In our view, considering nature of the injuries on the body of Ramniranjan it is not possible that, the said injuries were caused accidentally or during scuffle. There were 11 grievous injuries which shows that, these were inflicted by sharp weapon with force. Appellant has come with two-fold defense. On one side, Appellant has taken defense that he has been falsely implicated in this case and on other side, Appellant has taken defense that on the night of the incident, Appellant was at the house of his sister. Appellant has not produced any evidence to prove his plea of alibi. Moreover, police has arrested Appellant from spot of incident. We do not see merit in contention of learned counsel for Appellant that, he has been falsely implicated. Moreover, it has not come on record that, there was enmity between Appellant and PW-1 Amarjeet nor any suggestion was given to PW-1 Amarjeet in cross examination that, due to enmity, he implicated Appellant in false case. It falsifies the defence of Appellant.

17. It is the contention of the learned counsel for Appellant that, the prosecution did not examine other three persons who had slept in the same room at the time of incident. It creates doubt about the prosecution case. It is true that, the prosecution has not examined Ramsevak Jaiswal and Abhimanyu Jaiswal as witnesses. Not examining these witnesses, cannot dent the prosecution case nor wipe out prosecution evidence on record, when it has been proved that, Appellant is author of injuries caused to deceased. It is the contention of learned counsel for Appellant that, in evidence of PW- 1 Amarjeet and PW-5 Akhtar Shah, Panch witness, they

have admitted that, recorded statement of PW-1 was not read over to him by police after recording it and he had signed the said statement without its contents being read over and on say of police. PW-5 has admitted that spot panchanama was not read over to him and he does not know Marathi language. In our view, though in the cross examination, these witnesses have stated that, statement of PW-1 and spot/inquest panchanama were not read over to them by the police officer or they do not know Marathi language in which spot/inquest panchanama was prepared would not affect trustworthiness of their evidence. What PW-5 has stated is not contradictory to the contents of the panchanama which is at 'Exhibit-22'. The fact that, PW-5 did not read the panchanama and signed on panchnama at the instance of the police would not discredit correctness of the panchanama since the witness does not contradict the contents of the panchanama.

18. It is the contention of learned counsel for the appellant that, finger prints on seized weapon i.e. knife were not sent for examination, hence it is not proved that, who had used it. In our view, the weapon of offence was not subjected for any test for finger print would not stand to the benefit of Appellant since the evidence on record is such that, it points out guilt of Appellant unequivocally.

19. It is the contention of learned Advocate for Appellant that, Appellant assaulted deceased in sudden fight. The act of Appellant falls under Section 304(I) of IPC but this fact is not considered by the Trial

Court. It is contention of learned APP that, Appellant had inflicted multiple injuries on the body of deceased with a knife, which was brought by him 20 days prior to the incident. It has come in evidence of PW-1 that, Appellant had shown him big knife 20 days prior to the incident and by same knife, he assaulted the deceased. In cross-examination, this witness admitted that, in statement before police it was recorded as 10 days prior to incident, it has come in evidence of PW-1 that, Appellant had told him he had brought the said knife from his sister's house for sharpening. Prosecution has not proved that, from where the said knife was brought, nor it proved that it was with Appellant at the time of sleeping. It reveals from record that, the mezzanine floor where the incident happened was a small room, where five persons were sleeping in huddle. Had the Appellant carried the said knife 10 to 20 days prior to the incident, certainly any one of the five persons would have noticed it. We are of the view that, prosecution failed to prove that, Appellant had brought knife 20 days prior to the incident.

20. As per prosecution's case, motive behind the murder of deceased was his offending act of doing unnatural sex with Appellant. PW-1 has stated that, Appellant told him that, he was annoyed by the offending act of deceased. Appellant was immediately arrested from the spot, FIR was lodged immediately against Appellant but no medical examination of Appellant was done to prove that, unnatural sex was done with him.

21. Now question remains whether the Act of Appellant falls under Section 302 or Section 304(I) of IPC. To prove guilt under Section 302 of IPC, premeditation and intention to kill are important aspects amongst others. From the evidence on record, it is not established that, Appellant had the intention to kill the deceased or it was premeditated crime. Prosecution failed to prove that, knife used in crime was brought by Appellant. Knife is the most easily available weapon in kitchen of every house. Five persons were residing in one room. It has come on record that, they used to prepare food on ground floor of that room.

22. Considering evidence on record, in our view, present case falls under Exception 1 of Section 300 of IPC. Exception 1 to Section 300 recognises that, when a reasonable person is tormented continuously, he may, at one point of time, erupt and reach a break point whereby losing self-control, going astray and committing the offence. However, this defense would not be available if the act was committed with premeditation and intention to kill.

23. In present case, it has come on record that, Appellant was annoyed with offending act of deceased, there was scuffle between Appellant and deceased, a grave and sudden provocation took place. Appellant had caused such bodily injury to deceased, which to his knowledge was likely to cause death which would fall under exception 1 of Section 300 and therefore an offence under Section 304(Part I) of IPC.

Hon'ble Apex Court in the case of *Dauvaram Nirmalkar (Supra)* in paragraph Nos. 9, 10 and 13 has observed as under:

9. Exception 1 differs from Exception 4 of Section 300 of the IPC. Exception 1 applies when due to grave and sudden provocation, the offender, deprived of the power of self-control, causes the death of the person who gave the provocation. Exception 1 also applies when the offender, on account of loss of self-control due to grave and sudden provocation, causes the death of any other person by mistake or accident. Exception 4 applies when an offence is committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and the offender commits culpable homicide without having taken undue advantage of acting in a cruel and unusual manner. The Explanation to Exception 4 states that in such cases it is immaterial which party gives the provocation or commits the first assault.

10. Interpreting Exception 1 to the Section 300 in K.M. Nanavati v. State of Maharashtra, this Court has held that the conditions which have to be satisfied for the exception to be invoked are (a) the deceased must have given provocation to the accused; (b) the provocation must be grave; (c) the provocation must be sudden; (d) the offender, by the reason of the said provocation, should have been deprived of his power of self-control; (e) the offender should have killed the deceased during the continuance of the deprivation of power of self-control; and (f) the offender must have caused the death of the person who gave the provocation or the death of any other person by mistake or accident. For determining whether or not the provocation had temporarily deprived the offender from the power of self-control, the test to be applied is that of a reasonable man and not that of an unusually excitable and pugnacious individual. Further, it must be considered whether there was

sufficient interval and time to allow the passion to cool. K.M. Nanavati (supra) succinctly observes :

“84. Is there any standard of a reasonable man for the application of the doctrine of “grave and sudden” provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately,

85. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code, 1860 (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by

lapse of time, or otherwise giving room and scope for premeditation and calculation.”

...

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by Ashworth in the following words:

“[T]he significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties.”

In the above case, the Hon'ble Apex Court has altered conviction from Section 302 to 304(I) of IPC. The ratio laid down by Hon'ble Apex Court in the above case is squarely applicable to present case.

24. In view of the above, the following Order :

- (i) Appeal is partly allowed.
- (ii) The conviction imposed upon Appellant for the offence under Section 302 of IPC is altered and the Appellant is convicted for the offence punishable under Section

304(Part-I) of IPC. He shall suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/-, in default of payment of fine to further suffer simple imprisonment for two months.

(iii) Appellant shall be released from jail on completion of sentence as directed, unless required in any other case/cases.

25. Registrar (Judicial II) is directed to forward the copy of this Judgment to the Superintendent of Arthur Road Jail, wherein the Appellant has been lodged.

(SHIVKUMAR DIGE, J.)

(A.S. GADKARI, J.)