

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 655 OF 2014

Gulzar@ Langda Gulzar Nassem Shaikh	)	
Aged : 23 yrs., Occ : Nil	)	
Residing at Building No.10, Room No. 710	)	
Shivshahi Prkalp, Goregaon (East),	)	
Mumbai [Presently in Thane Central Prison]	)	.. Appellant
V/s.		
State of Maharashtra	)	.. Respondent

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- Mr. Ajinkya Udane, Advocate for the Appellant.
 - Mrs. M. M. Deshmukh, APP for Respondent-State.
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**CORAM : A. S. GADKARI AND
SHIVKUMAR DIGE, JJ.**

RESERVED ON : 2nd AUGUST 2023

PRONOUNCED ON : 26th SEPTEMBER 2023

JUDGMENT (Per : Shivkumar Dige, J.) :-

1. Appellant (original accused) has impugned Judgment and Order dated 19.04.2014 passed by the Additional Sessions Judge, Borivali Division, Dindoshi, Mumbai in Sessions Case No. 73 of 2010 under Sections 302, 323, 324 read with 34 of Indian Penal Code (for short "IPC") and under Section 37(1) read with 135 of Bombay Police Act. Appellant is convicted for the offence punishable

under Section 302 of IPC and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/- (Rupees Two Thousand only), in default of payment of fine, Appellant shall further suffer rigorous imprisonment for a period of three months. He has also been convicted for the offence punishable under Section 324 of IPC for causing hurt to PW-1 Amol Suresh Ghuge and sentenced to suffer rigorous imprisonment for a period of 3 years and to pay a fine of Rs.2,000/-, in default of payment of fine to further suffer simple imprisonment for a period of 3 months. Appellant is also further convicted for the offence punishable under Section 324 of IPC for causing hurt to PW-3 Pintya @ Vikrant and sentenced to suffer rigorous imprisonment for a period of 3 years and to pay fine of Rs.1,000/-, in default of payment of fine to further suffer simple imprisonment for a period of two months. Appellant is acquitted under Section 323 of IPC and 37(1) read with 135 of Bombay Police Act.

2. It is the prosecution's case that, on 01.03.2010 at about 8:30 p.m. PW-1 Amol along with his friends Pintya, Chirag and Nannu were roaming in Jarimari area, at that time Pintya went to the house of Ammu (his girlfriend) for collecting his pant and Nannu went to pan shop for lighting cigar. At that time, Appellant

was standing near panshop, started abusing Nannu. Therefore Nannu asked him why he was abusing him? Then Appellant took out sura (big knife) from his waist and assaulted Nannu. Complainant tried to prevent him but sustained injuries on his left hand by that sura. The accused No.3 Wahidali gave a blow of sura on his backside. Appellant gave blow of sura on his right leg. Pintya came to rescue of Nannu from assault. Accused No.3 Wahidali gave blow of sura on his forehead. Chirag also came there. Accused No.2 Javed gave blow of stone to Chirag and Appellant gave blow of sura on the chest of Nannu. After seeing the incident people gathered there. Appellant and co-accused ran away from spot of incident. Brother of Nannu, Salim took them to Kanchi hospital. Thereafter Nannu was admitted to Bhagwati hospital where doctors declared him dead.

2.1 The complainant lodged complaint against the Appellant and other co-accused. Police arrested Appellant and other two accused viz. Javed Shaikh and Wahidali Shah. After completion of investigation chargesheet was filed. The case was committed to the Sessions Court. Charges were framed against Appellant and co-accused. They pleaded not guilty and claimed to be tried. To prove its case, prosecution has examined 12 witnesses. Statements under

Section 313 of Cr.P.C. of Appellant and co-accused were recorded. Defence of Appellant was of total denial. In support of his defence, Appellant examined himself as defence witness.

2.2. Considering the submissions of all the parties and evidence on record, the learned trial Court by a Judgment and Order has convicted Appellant and acquitted co-accused Nos.2 and 3.

3. We have heard learned Counsel for Appellant and learned APP. Perused the record and Judgment and Order passed by the learned Trial Court.

4. The prosecution's case is based on direct evidence, as at the time of incident PW-1 to PW-5 were present. In the said incident, PW-1, PW-2, PW-3 and PW-5 were injured.

4.1. It has come in the evidence of PW-1 Amol Ghuge that, on 01.03.2010 at about 8:30 p.m., he, Pintya, Chirag and Nannu were roaming in Jarimari area near building No.20. Pintya had gone to the house of his girlfriend Ammu for collecting his pant. At that time, Nannu went towards pan shop for lighting cigar. Appellant was present there, at pan shop. He started abusing Nannu. Nannu asked him why he was abusing. Then Appellant took out sura from his waist and assaulted Nannu with that sura (big knife). This witness tried to prevent Appellant, he sustained

injury on his left hand by that sura. At that time, accused No.3 Wahidali assaulted this witness by sura on his backside. Appellant gave blow of sura on the right leg of this witness. Pintya came to rescue this witness. Accused No.3 inflicted blow of sura on his forehead. Chirag also came there. Accused No.2 gave blow of stone to Chirag. Appellant gave blow of sura on the chest of Nannu. This witness sustained injuries. Salim brother of Nannu lifted this witness, Nannu and others, and took them to Kanchi hospital. Medical treatment was given to them in that hospital. Nannu was subsequently admitted in Bhagwati hospital. While taking treatment Nannu died in hospital. This witness lodged complaint against the Appellant and other co-accused. This witness identified knife (Article-B) which was in the hands of Appellant. In cross examination this witness stated that, stone was not collected by police from the place of incident. Nothing elicited in cross examination of this witness to disbelieve his evidence.

4.2. Evidence of this witness is corroborated by evidence of PW-2 Honif M. Shaikh @ Chirag, PW-3 Vikrant @ Pintya Shinde, PW-4 Pratik Bhalekar and PW-5 Bharat Taman. It has come in the evidence of these witnesses that, on the day of incident they saw that, Appellant assaulted deceased with big knife (sura). PW-2

Hanif @ Chirag and PW-3 Vikrant @ Pintya had sustained injuries in the said quarrel. Nothing elicited in the cross examination of these witnesses to disbelieve their evidence regarding assault by Appellant with knife on deceased. It has come in the evidence of PW-7 Rajan Sutar and PW-11 Rameshwar Suple, Investigating Officer that, on 18.03.2010 Appellant made disclosure statement about producing knife (sura) used in the crime and clothes worn by him at the time of incident. Accordingly, police recorded his memorandum statement which is at Exhibit-49 and in pursuant of the said statement, knife and clothes were recovered. Police prepared panchanama of it. The knife i.e. Article-B was having blood stains.

4.3. From the evidence of these witnesses it is proved that, Appellant had assaulted deceased with sura (big knife) on his body. There are minor discrepancies in the statement of witnesses. Some witnesses have stated, assault was on the chest of Nannu, whereas some witnesses stated that, it was on stomach. But all these witnesses have categorically stated that, Appellant had assaulted deceased with sura.

5. It is the contention of learned Counsel for the Appellant that, the recovery of the knife and clothes worn by Appellant at his instance are suspicious, as these were seized on 18.03.2010 whereas

incident was happened on 01.03.2010 i.e. after 17 days. In our view, the knife was hidden in the white colour bag which was kept under a gunny bag of sand. The knife (Article-B) was having blood stains. The C.A. report at Exhibit-58 (collectively) and C.A. report at Exhibit-42 and Exhibit-45 (collectively) indicates that, the blood group of deceased was 'B' and blood group of Appellant was 'AB'. This C.A. report shows that, blood stains on the shirt of Appellant and knife seized (Article-B) were of blood group 'B'. It shows it was blood group of deceased. Appellant has not given any explanation about it nor this witness was cross examined on this point. We do not see any merit in the contention of learned Counsel that, there was gap of 17 days for seizer of knife and clothes.

6. There is no dispute about the homicidal death of deceased. PW-9 Dr. Kiran Kalyankar, who conducted post-mortem on the dead body of deceased has stated that, the cause of death of deceased was hemorrhage and shock due to incised stab wound perforating liver. Post mortem report is at Exhibit-54. The Appellant has not disputed the homicidal death of deceased.

7. It is the contention of learned Counsel for Appellant that, Appellant was not present at the time of incident but this fact is not considered by the Trial Court. In support of his defence

Appellant examined himself stating that, he was not present at the time of incident. But it appears that, it was a feeble attempt of Appellant to screen himself from murder of deceased. It is significant to note that, though the Appellant had taken plea of alibi but no suggestion was given to any prosecution witnesses that, at the time of incident Appellant was not present. We do not see merit in contention that Appellant was present at the time of incident.

8. It is the contention of learned Counsel for the Appellant that, act of Appellant would not fall under Section 302 of IPC as the incident happened all of a sudden during quarrel. There was no premeditation by the Appellant for commission of offence and therefore act of Appellant would fall under Section 304(Part-II) of IPC. He relied on the decisions in Criminal Appeal No. 83 of 2004, Criminal Appeal No. 310 of 2014 and Criminal Appeal No. 554 of 2014 of this Court. Trial Court while convicting Appellant under Section 302 of IPC has observed that, Appellant was holding knife and he assaulted the deceased with knife. It shows the act of Appellant was premeditated.

8.1. In our view, from the evidence on record it appears that, the incident happened suddenly when deceased had gone to pan shop for lighting cigar and there was altercation between him and

Appellant. Thereafter, Appellant took out knife tucked in his waist and gave blow of it to the deceased.

9. After taking into consideration the entire evidence of prosecution witnesses, we are of the view that, the act committed by Appellant falls under the Exception- 4 of Section 300 of IPC which reads as under :

“Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

Appellant while assaulting with knife on deceased had knowledge that, said assault would cause death of deceased. Therefore, Appellant is guilty of commission of offence under Section 304 (Part-II) of IPC. The view taken by co-ordinate bench of this Court in the said Appeals (supra) is squarely applicable to the present case.

10. In view of the above, we pass following Order :

- (i) Appeal is partly allowed.
- (ii) The impugned Judgment and Order of the learned trial Court is set aside.
- (iii) Appellant is convicted for the offence punishable under Section 304(Part-II) of IPC. He shall suffer rigorous imprisonment for a period of 10 years

and pay a fine of Rs.10,000/-, in default of payment of fine to further suffer rigorous imprisonment for three months.

- (iv) Appellant shall be released from jail on completion of sentence as directed, unless required in any other case/cases.
- (v) Registrar (Judicial – I) is directed to communicate present Judgment and Order to the concerned jail Authority as expeditiously as possible.

(SHIVKUMAR DIGE, J.)

(A.S. GADKARI, J.)

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