

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 124 OF 2019

Badrialam Akabarali Shaikh

Age : 24, Occ. : Labour

R/o Lahujinagar Zopadpatti

Mohane, Taluka Kalyan

District Thane.

At present Kolhapur Central Prison (Kalamba)

Kolhapur.

... Appellant

V/s.

The State of Maharashtra

Through Mahatma Phule Police Station, Kalyan,

District : Thane.

... Respondent

Mr. Prosper D'souza, Appointed Advocate for Petitioner.

Ms. S.D Shinde, A.P.P. for Respondent-State.

**CORAM : A. S. GADKARI AND
PRAKASH D. NAIK, JJ.**

Date of Reserving the Judgment : 5th DECEMBER 2022

Date of Pronouncing the Judgment : 15th MARCH 2023.

JUDGMENT - (Per : Prakash D. Naik, J.) :-

1. Appellant is convicted vide Judgment and Order dated 10th October 2011 passed by learned Additional Sessions Judge, Kalyan in Sessions Case No.11 of 2009 for offence punishable under Section 302 of Indian Penal Code (*for short "IPC"*) and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/-.

2. The case of the prosecution is that, on 01.08.2008 Police Naik - Jagtap and others were on night duty at Mohane Chowki. They were attached to Mahatma Phule Police Station, Kalyan. They heard some noise

towards Ambivali Railway Station. They rushed towards the spot and noticed that, fight was going on between Raja Rathod and Badrialam. The accused Badrialam gave blow of Sura on the stomach of Raja Rathod and ran away. He was apprehended by Police with Sura (knife) in his possession. Injured was taken to hospital. His condition was critical. He was declared dead. C.R. No.I-280 of 2008 was registered. During the course of investigation, statement of witnesses were recorded. Clothes of the deceased and accused were seized. On completing investigation, charge-sheet was filed.

3. Charge was framed for offence under Section 302 of IPC vide Order dated 21.12.2010. The prosecution examined Seven witnesses. PW-1 Kashinath Keru Jagtap was attached to Mahatma Phule Police Station, Kalyan as Police Hawaldar. He lodged the First Information Report (for short "FIR"). PW-2- Robin Joseph Balid was panch witness for spot panchanama. PW-3 Natthu Barkya Gorat was Police Hawaldar attached to Mahatma Phule Police Station. He is the eye witness to the incident. PW-4 Bapu Daga Gajare was the Police Hawaldar, attached to Mahatma Phule Police Station. He has witnessed the incident. PW-5 Salim Usman Shaikh is the eye witness to the incident. PW-6 Chandrakant Baburao Shinde was the Police Inspector attached to Mahatma Phule Police Station. He is the Investigating Officer. PW-7 Dr. Ashwini Arvind Patil is the Medical Officer. Autopsy was conducted by this witness.

4. The trial Court after analyzing the evidence on record gave a finding that, the offence under Section 302 of IPC has been proved against the Appellant/Accused and thereby convicted him for the said offence.

5. Learned Advocate Mr. Prosper D'souza appointed to represent Appellant has challenged the Judgment of conviction and submitted that, the impugned Judgment and Order deserves to be set aside. The evidence of witnesses suffers from doubt. There are omissions and contradictions in the evidence. There are contradictions in respect to the fact that, the accused was caught by chasing after the incident of assault. The evidence of witnesses creates doubt and benefit of doubt must be given to the accused. The eye witnesses had seen the incident of assault from distance. There are contradictions in evidence of eye witnesses about distance from where they heard shouts and place of incident. There was darkness at the spot of incident. It was not possible for witnesses to see the incident of assault. Motive to commit crime is not proved. The offence under Section 302 of Indian Penal Code is not made out. At the most the Appellant could be convicted for offence under Section 304(ii) of IPC. There was no intention to commit murder.

6. Learned A.P.P. submitted that, there is sufficient evidence to convict the Appellant for offence under Section 302 of IPC. There are eye witnesses to the incident. There is no reason to disbelieve the version of eye witnesses. Minor contradictions would not affect the prosecution case.

The Appellant was armed with weapon. He assaulted the deceased on the vital part of his body which resulted into his death. The offence under Section 302 of IPC is clearly made out. There was no effective cross examination by the defence. Blood was found on the clothes of the accused. He did not offer any explanation in his statement under Section 313 of Cr.P.C. in respect to the findings of blood on his clothes. There are several eye witnesses to the incident. The oral evidence and the medical evidence proves that, Appellant is guilty of offence. The trial Court has analysed the evidence and assigned reasons for convicting the Appellant.

7. PW-1, Kashinath Keru Jagtap was attached to Mahatma Phule Police Station as Police Naik. According to him, he was on night duty on 01.08.2008 at Mohane Chowki, Beat No.6. Police Hawaldar B.D. Gajare (PW-4), Police Hawaldar S.G. Patil, Police Naik N.B. Gorad (PW-3) were also with him. They were standing in front of Police Chowki at open space. The incident had occurred on 01.08.2008 at about 23.15 hours. They heard shouts at a distance of 100 meters from Chowki. They rushed towards the spot of incident. Quarrel was going on between Raja Rathod and Badrialam Shaikh. The Appellant Badrialam Shaikh gave blows of Sura on the stomach of Raja. Badrialam started running away from spot. He was taken in custody. Sura was found in his possession. Police Hawaldar Gajare and Police Naik Gorad took him in custody. He was taken to Police Chowky. They took Sura in their custody. Injured was taken to

Rukminibai Hospital and he was admitted. Thereafter, he was transferred to Sion Hospital. He died in ambulance. Doctor declared him dead. He lodged FIR with Mahatma Phule Police Station. It is marked as Exhibit -8. He pointed out the place of incident to the Investigating Officer. He identified the Sura used by the accused for assaulting the deceased (Article No.2). He identified the accused before the Court. In the cross examination, he stated that, Ambivali Railway Station is at a distance of 5 km. from Mohane Chowki. There is only one road of 25 ft. width for Mohane Chowki from Ambivali Railway Station. Many persons are using the same road for going to Ambivali Railway Station. Persons selling vegetables and fish are sitting at Corner of Mahalaxmi hotel till 9.30 p.m. There are street lights of Corporation as well as NRC Company on that road. On the date of incident there was no moon light. Similar type of Sura is available in the market.

8. PW-2 - Robin Balid has deposed that, he was called by Mahatma Phule Police Station for recording panchanama at Mohane Chowki on 02.08.2008. They went to Lahuji Nagar. Blood was noticed on the road. Police collected it in bottle. There is hotel near the spot. Spot Panchanama was prepared (Exhibit – 10). He admitted the Panchanama to be same and identified his signature. In the cross examination he stated that, he had visited Mohane Chowki at 7.30 p.m. There was rain on previous night.

9. PW-3, Natthu Barkya Gorat is the Police Hawaldar. He was attached to Mahatma Phule Police Station. He was on night duty at Mohane Chowki of Mahatma Phule Police Station, on 01.08.2008 and 02.08.2008. He was standing in front of Mohane Chowki at about 23.15 hours along with PW-1 Police Naik - Jagtap and other police Staff. One Salim Usman Shaikh came there. They heard shouts from Ambivali Railway Station Road. All of them rushed towards the place from where they heard shouts. They reached near Laxmi hotel. They saw fight between deceased Raja and accused Badrialam. Accused was carrying Sura in his hand. They saw it from a distance. Accused gave blow of Sura in the stomach of Raja and started running away. They chased and caught him. He was brought to the place where the deceased was lying. Blood was oozing from the injury on stomach and shoulder of injured Raja. Injured was taken to Hospital. Sura was found in the possession of accused. He was taken to Mohane Chowki. Panchas were called. Blood stained clothes and Sura were seized under Panchanama. Raja Rathod died in the hospital. He identified Sura in the Court. He also identified the accused in the Court. He was also cross examined by the Advocate for the defence. He stated that, Laxmi hotel is at a distance of half k.m. from Mohane Chowki. They reached near Laxmi hotel within 2/3 minutes. There is only one road from Ambivali Railway Station to NRC passing through Mohane Chowki and Laxmi hotel. The Vegetable fruit sellers used to sit on the road near Laxmi

hotel. The accused started running towards Lahuji Nagar. There is residential locality in Lahuji Nagar. Nobody was present at Laxmi hotel, when they reached there. Similar type of Sura is available in the market.

10. PW-4 - Bapu Daga Gajare is the Police Hawaldar attached to Mahatma Phule Police Station. He was on night duty at Mohane Chowki on 01.08.2008. According to him at about 23.15 hours shouts were heard by him and others when they were standing in front of Mohane Chowki. They went running towards Laxmi hotel. They saw that, quarrel was going on between Raja Rathod and Badrialam. They saw Badrialam giving blow of Sura on the waist of Raja from some distance. Badrialam started running away after noticing that, the police had arrived at spot. He was chased and caught by police. PW-1 took injured to the hospital. Badrialam was taken to Mohane Chowki. His blood stained clothes and Sura were seized under panchanama. He prepared panchanama and identified his signature on it (Exhibit – 13). He identified Article No.2 – Sura. He identified Shirt (Article No.3) and Jeans (Article No.4). He also identified the accused before the Court. In the cross examination, he deposed that, Laxmi hotel is at a distance of 10 to 15 minutes from Mohane Chowki. Raja fell down on the road. Accused was running towards Ambivali Railway Station. They caught him at a short distance. Police staff called panchas at Mohane Chowki. The panchas came at 6.00 am. The deceased Raja was history sheeter in their record. Offences of theft and human body were registered

against him.

11. PW-5 Salim Usman Shaikh has stated that, he was proceeding to his house at Lahuji Nagar. 5 to 6 Policemen were standing in front of Mohane Chowki. PW-1 and PW-4 were acquainted with him. He approached them. Policemen started running towards Laxmi hotel after hearing shouts. He followed them. One person gave blow of knife to another. The Policemen took the injured to hospital. Some policemen caught the person, who assaulted the injured person. He identified the accused in the Court. He was again called by police at Rukminibai Hospital. Injured was declared dead. Inquest panchanama was prepared by the police (Exhibit -15). In the cross examination he deposed that, Lahuji Nagar comes first and thereafter Mohane Chowki while coming from Ambivali Railway Station. He was talking with the Policemen at Mohane Chowki for about 10 minutes. On 01.08.2008 there was no moon light. Street lights of the road were off on the night of 01.08.2008. There was darkness on the road when they were proceeding. It is correct to say that they were unable to see on the road when they were proceeding towards Laxmi hotel. However, there were lights where the murder took place. The public had caught hold of accused Badrialam on the spot. The trial Court has disbelieved this witness on his presence at spot of incident.

12. PW-6 Chandrakant Shinde was attached to Mahatma Phule Police Station as Police Inspector. He conducted investigation. According to

him he prepared spot panchanama (Exhibit – 10). He recorded statements of PW-3, PW-4 and PW-5 on 02.08.2008. He recorded statements of witnesses including Smt. Tarabai Rathod, sister-in-law of the deceased on 03.08.2008. He seized blood stained clothes of deceased. The seizure panchanama was recorded. He identified his signatures (Exhibit – 17). He sent seized weapon, clothes to F.S.L. for chemical analysis on 13.08.2008 (Exhibit – 18). In the cross examination, he stated that, he had prepared spot panchanama at about 8.00 to 8.45 am. on 02.08.2008.

13. PW-7 – Dr. Ashwini Patil was on duty as C.M.O. – Chief Medical Officer in Rukminibai Hospital at Kalyan on 02.08.2008. This witness conducted the post mortem on the body of deceased Raja on 02.08.2008. The witness noticed the following injuries on the body of the deceased.

- i) Incised wound over left arm 8 inches from left shoulder joint. Size of injury is 2X1 inch. It is subcutaneous deep, elliptical in shape, fresh bleeding is present.
- ii) Incised wound over left side of abdomen just below last rib left side about 2X1 abdominal cavity deep, stomach has get cut on antero medial and medial side. Size of this injury 1-1/2X1 inch, illiptical in shape, liver has get cut on medial side of right lobe about 1/1/2X1 inches, elliptical in shape, fresh, bleeding is present.

According to this witness, the cause of death of Raja Rathod is hemorrhagic shock due to internal haemorrhage due to incised wounds on

the body. Post-mortem notes of Raja (Exhibit – 21) were prepared. The witness also stated that, the external and internal injuries found on the body of Raja are possible by sharp weapon. Article No.2 was shown to witness. It was stated that, the external and internal injuries to Raja are possible by it. The external and internal injuries to the abdomen resulted in blood loss and cutting of liver which are sufficient to cause of death of human being in the ordinary course of nature. In the cross examination it was stated that, there is no possibility of primary medical aid to the deceased as there was hemoperitoneum of two liters which causes fall of abdominal pressure and thus death. There was no zig-zag type incised wound but clean cut injury. The witnesses denied that, the incised wound of deceased are not possible by Article No.2 – Sura having one side blade sharp.

14. We have scrutinized ocular evidence of the witnesses as aforesaid and the documentary evidence on record. We find that, there is sufficient evidence to prove the charge against the Appellant. There is no reason to disbelieve the version of witnesses. The witnesses to the incident are independent persons. Most of them are policemen. PW-1, PW-3 and PW-4 are policemen. They are consistent on the point of performing duty at Mohane Chowki, hearing shouts at about 23.15 hours towards Laxmi hotel, rushing towards spot of incident and having seen accused assaulting deceased with knife and that accused was caught near spot after chasing

him. Minor discrepancies in their evidence reflected through their cross examination does not affect the prosecution case. These witnesses are from Police department. They were discharging their duty. They caught the accused by chasing him. Their version is natural. They are not having any grudge against the Appellant. They have given cogent, consistent and natural evidence. There is no reason to falsely implicate the Appellant in the crime. The deceased was assaulted by the Appellant with knife. He was caught immediately by policemen and others by chasing. He was armed with weapon. It was seized from his possession. His blood stained clothes were also seized. The defence has urged that, there are some contradictions with regard to the distance from which the witnesses heard shouts at the place of incident. It is also urged that, there were no lights at the scene of offence. There are no other witnesses to the incident. The vendors, who used to be present at the spot of incident were not examined as witnesses. It is pertinent to note that, incident had occurred at 11.15 hours. The presence of vendors is not expected at spot of incident at the relevant time. The accused was armed with Sura. Accused gave blow on the body of the deceased and noticing policemen coming to the spot accused started running. He was chased and apprehended by Police immediately after commission of offence. Weapon of assault was recovered from him. The weapon was identified by the witnesses. The evidence of witnesses indicates that, there were street lights at the spot. Minor

contradictions are not sufficient to demolish the case of prosecution. Panchanama of scene of offence (Exhibit-10) have reference to Laxmi hotel at a distance of 15 ft. from Mohane Chowki. The defence had urged that, no witness from hotel was examined by prosecution. However, there is nothing on record to show that, the hotel was open in the late night at 23.15 hours. Statements of witnesses were recorded immediately after the incident. The medical officer has categorically stated that, death was due to hemorrhagic shock. The injuries are possible by weapon which was seized from the possession of accused. The injuries are sufficient to cause death. Considering the overt act attributed to the Appellant, Medical evidence, cause of death, there is no room for argument that, the offence under Section 302 of IPC is not made out. The submission that, the offence could be under Section 304(ii) also deserves to be rejected. Spot panchanama shows that, blood was found on the spot. The same was collected and sample of blood was sent for chemical analysis vide forwarding letter Exhibit – 18 on 13.08.2008. The C.A. Report Exhibit – 24 is on record. The C.A. Report Exhibit – 23 regarding blood of accused indicates that, the blood group is 'A'. The C.A. report Exhibit 24 regarding various articles reflects that, blood found at the spot of incident is human blood of 'B' group. The said Exhibit found mixed with blood. Exhibit – 2 Sura was stained with blood on blade. It was human blood though the blood group was inconclusive. The shirt of accused was stained with blood mostly on

front side. It was human blood of 'B' group. Thus the blood found at the spot of incident and blood found on shirt of accused was of same group. The jeans pant of accused was having human blood group was inconclusive. Shirt, pant and underwear of deceased were containing human blood of 'B' group. Thus, the blood found on spot, shirt of accused and clothes of deceased is of same group. It is pertinent to note that, blood group of accused is of 'A' group. The shirt of deceased had cut mark and it was soaked with blood. Pant and underwear of deceased were stained with blood. The evidence regarding seizure of blood stained clothes of accused and deceased is not sheltered in cross examination by accused. Taking into consideration the totality of all circumstances against the accused in the nature of evidence, we are of the opinion that, the prosecution has succeeded in proving the charge under Section 302 of IPC against the Appellant beyond doubt. The Appeal is devoid of merits and is required to be dismissed.

ORDER

- i) Criminal Appeal No.124 of 2019 is dismissed.
- ii) Impugned Judgment and Order dated 10th October 2011 passed by learned Additional Sessions Judge, Kalyan in Sessions Case No.11 of 2009 stands confirmed.

[PRAKASH D. NAIK, J.]

[A.S. GADKARI, J.]