



**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.303 OF 2017

Aslam s/o Babulal Shaikh,
Age 23 years, Occu. Labourer,
R/o Karanji, Tq. Kopergaon,
District Ahmednagar

... APPELLANT

VERSUS

The State of Maharashtra
Through the Police Station Officer,
Police Station, Kopergaon,
Tq. Kopergaon, Dist. Ahmednagar
(Copy to be served on the
Public Prosecutor, High Court of
Judicature at Bombay,
Bench at Aurangabad

... RESPONDENT

.....
Mr. S.J. Salunke, Advocate for appellant
Mr. S.D. Ghayal, Addl. P.P. for respondent
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 5th January, 2024

Date of pronouncing judgment : 10th January, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The challenge in this appeal is to a judgment and order dated 29/6/2017, passed by learned 2nd Additional Sessions Judge, Kopergaon in Sessions Case No.58/2016. Vide impugned judgment and order, the appellant has been convicted for offence

punishable under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life with fine of Rs.2000/-, in default to undergo rigorous imprisonment for six months.

FACTS

2. The appellant along with his parents was tried for offences punishable under Sections 302, 323, 504 read with Section 34 of the Indian Penal Code. The parents of the appellant have been acquitted. The State has not preferred appeal against their acquittal.

3. The case of the prosecution in brief is that, it was a day of Ramazan Eid. There is a Masjid, "Jama Masjid" at village Karanji Bk., Taluka Kopargaon, District Ahmednagar. Most of the Muslim (male) persons of the village had been to the Masjid to offer prayers. It was about 10.00 a.m., after prayers were over, most of them left the Masjid. About 52 acres of land belongs to Masjid (Wakf). Most of the land was given to Muslim persons for cultivation. Babulal, father of the appellant was, as such, given 1 acre of land. He had sold it to one Aarne of village Shirdi. Office bearers of the Wakf had, therefore, preferred an application to the Wakf Board. It was allowed. Shri Aarne had to return the land to the Masjid. It was in the year 2007, a Trust (Wakf) was formed and registered. Ayub Banemiya (P.W.3) was the President and Hyder

Shaikh (deceased) was the Vice President. 5 more persons were the trustees.

4. Shabbir Shaikh (P.W.1), who is brother of Hyder (deceased), Babulal, his son Aslam (appellant) and 6 – 7 others remained in the Masjid to discuss over the land for “Kabrastan”. Babulal and the appellant questioned as to why a land is proposed to be bought for Kabrastan when the Masjid (Wakf) held a lot of land. They also asked for accounts of the funds of the Wakf. A quarrel, therefore, ensued between Babulal and appellant on one hand and the deceased on the other. Meanwhile, the mother of the appellant too came there. Persons became physical with each other (short of scuffle). The appellant allegedly went to his house in the nearby of the Masjid and returned with a Gupti like weapon. He gave two blows near right ribs of Hyder. Hyder fell down. The appellant and his father thereafter went away.

5. Hyder was rushed to local hospital. Since his condition was serious, he was shifted to Critical Care Hospital at Kopergaon. P.W.1 Shabbir, in the meanwhile, approached the Police Station and lodged F.I.R. (Exh.10). Crime vide C.R. No.85/2016 for offence punishable under Sections 307, 323, 504, read with Section 34 of the Indian Penal Code came to be registered against the appellant and his parents. Hyder succumbed to the injuries. Section 302 of

the Indian Penal Code, therefore, came to be invoked.

6. P.W.8 Shahaji (Police Inspector) was entrusted with the investigation. He paid visit to the scene of offence. Crime scene panchanama (Exh.25) was drawn. The appellant was arrested. Pursuant to the disclosure statement made by him, a knife came to be recovered. The dead body was subjected to post mortem examination. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant and his parents were proceeded against by filing the charge sheet.

7. Learned Additional Sessions Judge (Trial Court) framed the Charge (Exh.5). The appellant and others pleaded not guilty. It was their defence that, in view of a long standing enmity, a false crime has been registered. Hyder died of injuries suffered on account of his fall on the iron rods lying in the Masjid premises for construction purpose.

8. To brine home the charge, the prosecution examined 8 witnesses and produced in evidence certain documents. Learned trial Court, by the judgment and order, convicted the appellant and sentenced as stated above.

9. Heard. Learned counsel for the appellant would submit

that, the so called eye witnesses examined in proof of a charge were inimical with the appellant and his family members. The dispute over affairs of the Wakf was there. Learned counsel took us through the evidence of P.W.2 Altaf to suggest that, both Altaf and P.W.1 Shabbir (informant) were present at one of the shop blocks outside the Masjid. They entered the Masjid only after hearing cries. The informant is none other than the real brothers of the deceased. His claim to have had witnessed the incident stood falsified by the evidence of P.W.2 Altaf. The trial Court has, therefore, rightly not believed the evidence of both these witnesses. According to learned counsel, then remained the evidence of P.W.3 Ayyub. This witness too was inimical with the deceased. He had lodged a police report against the appellant and his father one year before the incident. This witness claims to have had shifted the injured to the hospital. There was admittedly profused bleeding. Had P.W.3 Ayyub really been there to take the deceased to the hospital, clothes on his person must have stained with blood. The investigating officer did not seize his clothes nor did he (P.W.3 Ayyuub) offered the same to the investigating officer. So far as regards recovery of knife pursuant to disclosure statement is concerned, the learned counsel would submit that, the Chemical Analyser's report indicates no blood grouping of the blood stains found on the said article could be determined. According to him, it

is the case of the prosecution that an assault was made with a weapon like Gupti. The article before the Court is a knife. Our attention has also been adverted to the evidence of the Medical Officer (P.W.6 Dr. Krishna), who conceded to the suggestions that the injuries found on the person of the deceased could be possible if iron rod gets pierced in a body. In support of his submissions, the learned counsel relied on the following authorities :

- (1) State of Rajasthan Vs. Teja Singh [2001 ALL MR (Cri) 994]

Alleged eye witness stated that she had lifted the body of the deceased which was bleeding and her clothes had become blood stained. Investigating Officer failed to recover the said clothes giving room for a genuine complaint that her presence is doubtful.

- (2) State of Punjab Vs. Harbans Singh & anr. [(2003) 11 SCC 203]

Non-examination of independent witness, certainly throws considerable doubt on prosecution case.

- (3) Kalyan Deorao Sawase Vs. State of Maharashtra
2022 Cri.L.J. 1088

Mere recovery of a weapon/ article on the disclosure statement given by the accused u/sec. 27 of the Evidence Act is a weak kind of evidence and cannot be wholly relied upon and conviction cannot be based upon discovery.

- (4) Pophya Motya Valvi Vs. State of Maharashtra
1979 Cri.L.J. 1310

Blood stains on the clothes of agriculturist would hardly provide any incriminating evidence.

- (5) State of U.P. Vs. Mohd. Iqram & anr. [2011 AIR SCW 3844]

Circumstances not put to accused in his examination u/sec.313 of Cr.P.C. cannot be used against him.

10. The learned Addl. P.P. would, on the other hand, submit that presence of P.W.3 Ayyub at the scene of offence has not been disputed. He took us through the reasons given by the trial Court for convicting the appellant. According to learned Addl. P.P., the evidence on record has rightly been appreciated. No case for interference with the impugned judgment and order is, therefore, warranted. Learned Addl. P.P. ultimately urged for dismissal of the appeal.

11. We have considered the submissions advanced. Let us turn to the evidence on record. It was Ramazan Eid. Most of the Muslim persons of village Karanji had gathered in Jama Masjid, at the village to offer prayers. It was little past 10.00 a.m. on 7/7/2016, after prayers were over, most of the persons went away. Admittedly, deceased Hyder suffered the injuries in an incident that occurred in Masjid after prayers were over. The question is, whether deceased met with homicidal death or was it an accident as has been suggested by learned counsel for the appellant. Post mortem report (Exh.31) records the cause of death as, "Hypovulmic shock due to lung injury". Clause 17 of the post mortem report indicates Hyder to have suffered following surface injuries :-

- (1) Stapled sutured operative wound on right side of chest wall starting from mid posterior axillary line of 7th rib directly forward downward towards mid line up to mid clavicular line up to 10th rib, 42 cm. in length and 2 cm.

in width.

- (2) Sutured stapled wound right infra scapular area horizontal.
- (3) Sutured stapled operative wound on back of postal margin 5 x 1 cm.
- (4) Operated drained output of injury axillary line on 10th rib 3 x 2 cm., bleeding.

12. P.W.6 Dr. Krishna had conducted the post mortem examination. He admitted the suggestions given to him in his cross-examination to the effect that, Injury Nos.1 and 2 may be possible by insertion of an iron rod. Dr. Krishna's evidence does not, therefore, lead us to infer the deceased to have died as a result of stab injuries. We have, therefore, to advert to the eye witness account.

13. P.W.1 Shabbir (informant) is a real brother of the deceased. He may, therefore, be said to be an interested witness. In his examination-in-chief, he narrated the incident. It is in his evidence that, after an oral wrangle between the deceased on one hand and the appellant and his father on the other, the appellant went home and came back with a Gupti like weapon. He did not say it was a Gupti. It is further in his evidence that, the appellant gave two blows with the said weapon.

14. We do not propose to refer to evidence of P.W.1

Shabbir in extenso in view of evidence of P.W.2 Altaf being grossly inconsistent with material particulars of the evidence of P.W.1 Shabbir.

15. P.W.2 Altaf testified that, after the prayers were over on 7/7/2016, he was present at one of the shop blocks outside the Masjid. P.W.1 Shabbir was with him. On hearing the shouts/ noise emanating from the Masjid, both of them went in. He saw Hyder (deceased) lying on the ground. Both Ayyub and Banemiya lifted him. He and Shabbir assisted Ayyub and Banemiya to make Hyder sit on the motorbike. Shabbir (P.W.1) sat on the motorbike to hold Hyder. Altaf was riding the motorbike. Hyder was first rushed to a local hospital. He did not accompany them to the local hospital. Hyder was then shifted to a hospital at Kopargaon. He went to Kopargaon.

16. Close reading of the cross-examination of P.W.3 Ayyub indicates that, what has been deposed to in his examination-in-chief has not at all been denied or taken exception to. True, it has come on record during the cross-examination of P.W.1 to P.W.3 that, females are not allowed to enter Masjid for prayers and no weapon is allowed to be carried there. Our attention has also been drawn to the scene of offence panchanama (Exh.25) to suggest the building material like sand and iron rods were stored in the Masjid. P.W.2

Altaf admitted that, place whereat Hyder was lying had blood stains. Clothes on the person of Ayyub and Banemiya were blood stained. **It is reiterated that, whato has been deposed by P.W.2 Altaf in his examination-in-chief has not at all been traversed in his cross-examination.** Although his evidence falsifies P.W.1 Shabbir to have been inside the Masjid while the incident took place, his evidence (P.W.2 Altaf) goes a long way to establish that while he entered the Masjuid, P.W.3 Ayyub and Banemiya lifted Hyder and took him to a local hospital on a motorbike. As such, presence of P.W.3 Ayyub at the time of the incident in Masjid gets established.

17. Let us now turn to the evidence of P.W.3 Ayyub. It is in his evidence that, after the prayers were over, 7 – 8 persons remained behind. Others left the Masjid. Deceased Hyder, Banemiya, Mukhtar, he himself, appellant and his father remained behind. A discussion over shortage of land for Kabrastan was there amongst the persons present in the Masjid. The appellant and his father asked Hyder to return 1 acre land to them. A quarrel, therefore, ensued between appellant and his father on one hand and the deceased on the other. Parties became physical with each other (scuffled). The father of the appellant caught hold of collar of the father of P.W.3 Ayyub. The appellant assaulted Hyder with a knife (Sura). He gave two blows therewith. Hyder fell down. He was shifted to a local hospital of Dr. Jadhav and then taken to

Critical Care Centre at Kopargaon.

18. In the cross-examination of P.W.3 Ayyub, it has come on record that, there was profused bleeding. In the first breath he stated that clothes on his person were stained with blood. He then changed his version to state that only his hands were stained with blood. Our attention has also been drawn to the scene of offence panchanama and the photographs thereof to indicate the presence of P.W.3 Ayyub thereat. His evidence also indicates that he met the investigating officer after Hyder breathed his last. For the next 5 – 6 days, he was in the village itself. He also admitted to have had lodged police report against the appellant and his father about one and a half year before the incident. The said report was in relation to a quarrel over a lavatory of Masjid.

19. The question is, whether conviction can be sustained on the sole testimony of P.W.3 Ayyub. At the cost of repetition, it is stated that, presence of this witness in the Masjid at the very time of incident has been proved by the evidence of P.W.2 Altaf. P.W.1 to P.W.3 are the cousins of the appellant. There was no family feud. A dispute was over management of the affairs of the Wakf. No questions were put to P.W.3 Ayyub and/or the investigating officer as to how many days after the incident his statement was recorded. No question was put to P.W.3 Ayyub in his cross-examination to

dispute his presence in the Masjid at the relevant time. It being a Ramazan Eid, almost all the Muslims were expected to be in the Masjid to offer prayers. Accordingly, all of them were there. Nothing has been brought on record by the defence to suggest P.W.3 Ayyub was elsewhere at the relevant time. The defence that the deceased suffered injuries as a result of fall on iron rod does not appeal. The deceased suffered 4 injuries. 2 or 3 of them could be said to have been possibly caused if iron rod gets pierced. For causing such kind of injuries, a fall of a person has to be on iron rods standing vertical and not lying flat. True, no weapon is permitted to be carried inside of Masjid. There is, however, nothing to indicate that persons entering the Masjid were first frisked at the gate and whatever impermissible to be carried in is required to be removed. The fact remains that, the appellant must have with him a knife like weapon with which he gave two blows. The investigating officer was also not questioned as to why did he not seize blood stained clothes of the persons who claim to have rushed Hyder to the local hospital.

20. So far as regards the evidence of seizure of knife pursuant to the disclosure statement is concerned, we are not inclined to give much importance thereto since blood group of the blood stains found thereon could not be ascertained. C.A. report in that regard is inconclusive. The C.A. reports though admitted in

evidence have not been put to the appellant during his examination under Section 313 of the Code of Criminal Procedure.

21. So far as regards the authorities (supra) relied on by learned counsel for the appellant are concerned, we need to observe that the each prosecution case is decided on peculiar facts and circumstances appearing therein. The facts of Teja Singh (supra), it was an appeal against acquittal. It has been observed in para No.4 of the said judgment as under :

“4. We have examined the evidence of the three eye-witnesses as also that of Iqbal Singh (PW-10) the Investigating Officer. We have also perused the evidence of Ram Pratap, Sarpanch (DW-1) and we do not find any reason to differ with the finding of the High Court which sitting as the first Court of appeal on facts, had every right to re-appreciate the evidence. In our opinion, the High Court, in that process, has not committed any error. As a matter of fact, the explanation put forth by the learned counsel in regard to the delay in the F.I.R. reaching the court is not tenable because assuming that there were some Court holidays that cannot be a ground for the delay in the F.I.R. reaching the Magistrate, because requirement of law is that the F.I.R. should reach the concerned Magistrate without any undue delay. We are of the opinion that the explanation given by the prosecution regarding the delay in the F.I.R. reaching the Magistrate is neither convincing nor acceptable.”

22. So far as regards judgment in Harbans Singh (supra) is

concerned, the prosecution witnesses and the respondents belong to different political fractions. They were not on friendly terms. P.W.4 and P.W. 11 therein were found to be partisan witnesses. We reiterate that, there can hardly be a precedent in a criminal case based on facts.

23. We reach the conclusion that, uncontroverted evidence of P.W.2 Altaf makes out the presence of P.W.3 Ayyub in the Masjid while the incident took place. No particular number of witnesses are required to prove a fact in issue. Although P.W.3 was not on friendly terms with the deceased, the reason therefor was not personal. The defence version that the deceased died on account of his accidental fall on iron rods is highly improbable. As such, it was a case of culpable homicide. Now the question is whether it is a murder or culpable homicide not amounting to murder.

24. We, therefore, need to advert to Sections 299 and 300 of the Indian Penal Code, which read thus :

299. Culpable homicide.— Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder.— Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of

causing death, or—

2ndly.— If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.— If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.— If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

.....
.....

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.

25. There is nothing to indicate the offence to have been committed with premeditation. The incident was preceded by a quarrel and even manhandling between the parties. The appellant fished out a knife like weapon and gave its two blows. The incident took place in a spur of moment. The appellant cannot be said to have had intended to commit murder of Hyder. All of them had

been to the Masjid to offer prayers. The appellant's case gets covered by Exception 4 to Section 302 of the Indian Penal Code. The nature of injuries suffered and it being a case of two blows, the case falls in Part I of Section 304 of the Indian Penal Code since intention to kill is there. The Apex Court, in case of **Anbazhagan Vs. The State, represented by the Inspector of Police** (Criminal Appeal No.2043/2023, decided on 20/7/2023, observed :-

“60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:-

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the

IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3)

(4)

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.”

We are, therefore, inclined to partly allow the appeal.

The appellant is in jail since the day of his arrest except his release on provisional bail on account of Covid-19. As such, he is actually in jail for little over 6 years. We, therefore, propose to sentence him to rigorous imprisonment for a period of eight years with no alteration in the amount of fine imposed by the trial Court.

26. In the result, the appeal partly succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is partly allowed.

(ii) The order of conviction and the consequential sentence of the appellant for offence punishable under Section 302 of the Indian Penal Code, passed by learned 2nd Additional Sessions Judge, Kopargaon in Sessions Case No.58/2016 vide judgment and order dated 29/6/2017, is hereby set aside. Instead, the appellant is convicted for the offence punishable under Section 304 (Part I) of the Indian Penal Code and therefore sentenced to suffer rigorous imprisonment for eight years and to pay fine of Rs.2000/- (Rupees two thousand).

(iii) Rest of the terms of the impugned order of conviction and sentence to stand unaltered.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-