IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.604 OF 2019

1. Javed Ahmed Khan, Age 23 yrs.
2. Imran Aslam Khan, Age 30 yrs.
3. Sarfaraz Nisar Ahmed Khan, Age 3 yrs.
4. Taufiq Ibrahim Shaikh, Age 30 yrs.
5. Shabuddin Khurkul Chaudhari, Age 34 yrs.

All adults Indian habitants,
all residing at 121, Shantaram Bhatt Chawl,
National Library Road, Bandra (W),
Mumbai – 400 050. ...Applicants

vs.

The State of Maharashtra ...Respondent

*****

Mr. Ninad Muzumdar and Ms. Radhika Mundada:	Advocate for Applicants.
Mr. H.J. Dedhia:	APP for State.

*****

CORAM : S. M. MODAK, J.
DATE : 26th APRIL 2024

P. C. :-

1. As directed on 1st April 2024 about taking assistance of the present medical officer attached to Cooper Hospital, Juhu, today

learned APP has produced the note recording the *post-mortem* findings in a readable manner. It is taken on record and marked as Annexure- 'X'.

2. Learned Advocate Shri Muzumdar read over the observations noted on page 4 of that document. It reads thus :-

> "Bilaterally, both the lungs are filled with thickly packed cavities of greenish yellow and foul smelling pus filled spaces of Tubercular Granulation 200 ml of blood found in Thoratic cavity."

These are the observations recorded in column number 20(d) relating to lung examination. However, they were not readable.

3. **According to him**, it suggests accumulation of blood in the thorax cavity and foul smelling pus found in the lung cavities. According to him, it rules out the possibility of homicidal death due to the assault as per the case of the prosecution. He reiterated his earlier submission that there is no material to frame charge under section 302 of IPC and why he should face trial for such serious offence.

4. Whereas, **according to the learned APP**, this can be considered at the time of recording of evidence. He emphasized on one incident of

vomiting of blood by the deceased soon after the incident. According to him, it is the medical officer who can only explain whether the death was due assault or due to tuberculosis or due to dual reason. According to him, medical officer is expected to note his observations when *post-mortem* was performed and oozing of blood cannot be noted down in the *post-mortem*. According to him, if the applicant is discharged for offence under Section 302 of IPC, the prosecution will loose an opportunity to adduce the evidence.

Prosecution Case

5. On this background, I have again perused the papers and gone through the findings given by the trial Court. The following facts emerges:-

(a) FIR was filed by one Hasnur V. Khan on 22nd December 2014 with Bandra Police Station. First informant Hasnur plies auto-rickshaw near Bandra Railway Station.

(i) On 22nd December 2014 at 12.00 noon, one bicycle came and there was some altercation. That person called his friend. The first informant was frightened. Said person took custody of rickshaw. Somehow, he hides himself near the bus depot.

He saw his maternal brother Isrul going in a rickshaw towards the direction of Lucky Hotel. The incident was narrated to him and was instructed to take custody of rickshaw.

(ii) Badruddin brother of Isrul called the first informant and informed him that Isrul is admitted in Bhabha Hospital. He died there. On this background, he lodged complaint with Bandra Police Station against 4 persons (page 27).

(iii) There is inquest panchanama which was performed at Bhabha Hospital.

(iv) There is statement of Nasim Khan dated 22nd December 2014. There is a statement of Nasim Salim Khan dt. 22nd October 2014. He had seen Isrul sitting in auto-rickshaw and he omitted. They shifted Isrul to Bhabha Hospital when he died. (page 56).

(v) There is one statement of Jamir Pawar dated 22nd December 2014. On 22nd December 2014 at about 12.00 noon he was present near the Bandra Railway Station bus stop. He has also seen the first informant Hasnur in his auto rickshaw. He saw four persons coming from Nandi Galli and beat auto

rickshaw driver Hasnur. He also witnessed Hasnur handing over key to another person (who is deceased). The prosecution claims he is an eye-witness.

(vi) In second incident, 4 persons beat another person to whom key of auto-rickshaw was given (he is deceased Isrul).

6. On this background, it is important to see the final result in *post-mortem* report. It is in two parts:-

(i) **Opinion given prior to receipt of viscera report** is as follows:-

"*A death due to sudden cardio-respiratory arrest coupled with Hemorrhagic shock coupled with Haemothorax however final cause is awaited for viscera report and CA (chemical analyzer) of Blood.*"

(ii) Whereas after receipt of viscera report in the negative final cause of death was ascertained as :

"*A Death due to Hemorrhagic shock coupled with Haemothorax with sudden cardio-respiratory arrest in a case of Bilateral pulmonary Tuberculosis.*"

7. So we have got the statements of some of the witnesses on one hand and the observations made in the *post-mortem* report on the other hand. Mr. Muzumdar invited my attention to certain observations in the *post-mortem* report. They are as follows :-

(a) Column No.18 – no external injuries were noticed

(b) Doctor has examined head, thorax and abdomen. Nothing abnormal was found while examining the head whereas, while examining thorax the findings are recorded which are already reproduced above.

8. In final cause of death, Medical Officer has noted the following facts:-

a. There was hemorrhagic shock.

b. It was coupled as haemothorax coupled with sudden cardio-respiratory arrest in a case of bilateral pulmonary tuberculosis.

9. According to Mr. Muzumdar he could not find any observations in the book on Medical Jurisprudence by Modi in respect of such observations. He has also placed relevant pages from the said book. From Google, he has produced the pages containing the meaning of

'**haemothorax**'. It indicates accumulation of blood in the lungs. The cause of haemothorax are also stated therein and one of them is lungs infection such as tuberculosis. According to him, accumulation of blood in the lungs was not due to the physical assault but it was due to tuberculosis suffered by the deceased.

10. Now, while hearing this revision, this Court is required to deal with question whether accumulation of blood was due to beating or tuberculosis and whether offence under Section 302 is made out for the purpose of framing of charge. It is true that in the final cause of death the *post-mortem* Doctor has given various reasons. After reading it, we can certainly find that there was accumulation of blood in the lung cavity. We can also find that there was pus formation in the cavities of lung. Now, the Court has to decide whether weightage has to be given to oral version or to his findings. Trial Court has rejected all these contentions.

11. It is no doubt true that once such opinion was given, in fact, it was foremost duty of the Investigating Officer to seek opinion of *post-mortem* Doctor on this aspect. That to say, whether the accumulation of blood was due to the assault or not.

12. The learned APP earlier sought time to verify the charge-sheet and even he has obtained certified copy from the trial Court. He could not place on record any further correspondence made by the Investigating Officer with the *post-mortem* doctor.

13. Now, the issue is if this Court will accept the contention of the Applicant then the charge cannot be framed under Section 302 of the IPC and there is no other section of IPC which was applied which warrants trial by the Sessions Court. In that case, the outcome will be sending back the case to the Metropolitan Magistrate. If such course of action is followed and if the trial will be conducted by the Court of Metropolitan Magistrate, the prosecution will not get an opportunity to prove this *post-mortem* because cause of death will be outside the scope of inquiry before the Court of Metropolitan Magistrate. In such an eventuality, I am preferring the option of trial by the Court of Additional Sessions Judge only. It is for the reason that one witness has stated about vomiting by the deceased. Furthermore, the witness has also stated about assault by fist and blows. I think these materials along with the findings in *post-mortem* report about accumulation of blood in the lung cavity is sufficient for trial by the Court of Additional

Sessions Judge.

14. The prosecution needs to be given an opportunity to prove its case. So I am not in favour of discharge. I do not find any illegality in the findings by the trial Judge. At the same time, I am inclined to give some directions to the prosecution for the purpose of protecting the right of accused to meet out the case at an early stage. In given situation, I think it will be foremost duty of the prosecution to examine the *post-mortem* Doctor. If it is done accused will get an opportunity to challenge that piece of evidence at an early stage. Therefore, I am also inclined to expedite the trial. Though Mr. Muzumdar done his best to convince me, I am unable to agree. All the points can be decided at the time of trial. In view of that, following order is passed :-

ORDER

(i) Hearing of the case is expedited and be disposed of as early as possible not later than six months from receipt of the order by the trial Court.

(ii) Applicant to place this order before the trial Court.

(iii) Let prosecution to examine the *post-mortem* doctor first and then remaining witnesses.

(iv) All contentions of the Applicant are kept open including the contention to request the Court to frame charge under lesser offence.

(v) Revision Application is disposed of.

(vi) On the date fixed, let the trial Court to frame charge.

(vii) Copy of this order be sent to the trial Court.

(viii) Applicant and prosecution to assist in expedite disposal of the case. Trial Court is at liberty to control their behaviour if found dilatory and also to impose costs.

[S. M. MODAK, J.]