

(2006) 06 BOM CK 0056

In the Bombay High Court

Case No : Criminal Appeal No. 581 of 2000 in Sessions Case No. 656 of 1998 in C.R. No. 145/98

Abdul Karim Mohammed Shaban

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 20-06-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, 144, 147, 148, 149

Citation : (2006) CriLJ 3658 : (2007) 5 RCR(Criminal) 88

Hon'ble Judges : Roshan S. Dalvi, J;J.N. Patel, J

Bench : Division Bench

Advocate : Amin H. Solkar, instructed by Jagdish C. Shah, for the Appellant; A.S. Gadkari, Assistant Public Prosecutor, for the Respondent

Judgement

1. The appellant was tried along with four other accused by the Additional Sessions Judge, Sessions Court, Greater Bombay on a charge of having committed offence u/s 143, 144, 147, 148 and Section 302 r/w Section 149 of the Indian Penal Code. By judgment and order dt.30.3.00, the learned Trial Court found only the appellant(Original accused No. 2) guilty of having committed offence u/s 302 of the Indian Penal Code so convicted and sentenced him to suffer imprisonment for life and fine of Rs.2000 i.d. to undergo R.I. for six months. The trial court acquitted original accused No. 1, 3, 4 and 5 u/s 302 of the Indian Penal Code and convicted the original accused No. 1, 3 and 4 for having committed offence u/s 324 r/w 34 of the Indian Penal Code and sentenced them to suffer imprisonment for a period already undergone. All the accused were acquitted of the charge of forming an unlawful assembly having an object to commit murder of the deceased, Sayyed Farukh Sayyed Gafar.

2. The original accused No. 2, Abdul Karim Mohammed Shaban has only preferred an appeal against his conviction and sentence. The state has not challenged the acquittal of the accused persons of the charge of unlawful assembly having a common object to commit murder of the deceased that apart

even against other accused who were convicted only for committing offence u.s. 324 r/w sec. 34 of the Indian Penal Code though the victim was common and accused persons were concerned with the same transaction.

3. It is the case of the prosecution that the Appellant Accused had a quarrel with Sheikh Khaja P.W.No.4 over the issue that the said witness had abused and insulted his father. On this, the appellant accused threatened him that he will see him later on. This was on 18.3.98 at about 8 p.m. On the next day i.e. 19.3.98 at about 8 p.m. the appellant accused alongwith his associates i.e. original accused No. 1, 3 and 4 accosted Sheikh Khaja (P.W.No.4) who was standing near Paris Hair Cutting Saloon. The appellant accused gave a slap to him and then started assaulting alongwith the other co-accused. Somehow Sheikh Khaja escaped and ran towards his house followed by the accused who hurled abuses and threatened him to come out of his house. The said Sheikh Khaja saw at that time all the accused were armed with deadly weapons like appellant accused was having a long knife (Article 15), original accused No. 1 was having a sword (Article 18), accused No. 4 was having a chopper (Article 16) and original accused No. 3 was having a button knife (Article 17). Because of this, he did not come out of the house and therefore the accused persons left the place.

4. According to the prosecution, deceased Sayyed Farukh came to the house of Sheikh Khaja and he was informed by Sheikh Khaja and his family members that the quarrel has taken place between Sheikh Khaja and appellant accused. He was prevented from going out by members of his family as accused were armed with deadly weapons. But it appears that Sayyed Farukh decided to mediate in the matter by approaching a social worker by name Junaid Usman. Before Sayyed Farukh accompanied by Sajid Abdul Wahid Mujavar, P.W.No.1 could reach the office of Junaid Usman, all the accused persons who were waiting for Sheikh Khaja pounced on the deceased Sayyed Farukh.

5. It is the prosecution's case that the appellant accused was first to assault the deceased with long knife on his neck. Other accused persons joined him in assaulting the deceased with their respective weapons. Because of this, deceased sustained injuries and fell down. It was also the prosecution's case that at the relevant time when the deceased was being assaulted by these accused persons, Original accused No. 5, Faiyaz Mohd. Hanif Qureshi was instigating them.

6. After assaulting the victim who suffered injuries and fell down, all the accused ran away towards Farukh Masjid. The incident was also witnessed by one Rajesh Shinde, Auto Rickshaw Driver (P.W.No.3) who has deposed upon the complicity of original accused Nos.1 to 5. On seeing that Sayyed Farukh had been assaulted, he took him in his autorickshaw along with one Mustaq Ahmed. We may mention at this stage that the prosecution had not examined the said Mustaq Ahmed who was accompanying this witness Rajesh Shinde (P.W.No.3) while taking the injured Sayyed Farukh to Cooper Hospital. It is the prosecution's case that when the victim was taken to the hospital, he was declared dead by the doctors who attended at Cooper Hospital.

7. On 19.3.98 Police Inspector, Rane (P.W.No.9) who was attached to D.N.Nagar Police Station as Public Relations Officers and was on night duty at the relevant time from 8 p.m. to 8 a.m. got information from the police constable posted at Cooper Hospital that one person has been brought to the Hospital, who was assaulted in Juhu Galli and he died prior to his admission in hospital. This fact was informed by the P.S.O. on duty to P.I.Rane, (P.W.No.9) which came to be recorded in the station diary. P.I.Rane alongwith other police staff went to the Hospital and enquired with the persons who brought the injured to the Hospital. Accordingly, P.W.No.1 informed him that four persons assaulted the deceased and he identified the dead body of the deceased as Sayyed Farukh. This information was treated as F.I.R. (Ex.13) by PSI Dalvi and was reduced into writing in the presence and supervision of P.I.Rane. On the basis of F.I.R. the police registered the crime being Crime 145/98.

8. In the course of investigation, the police prepared inquest panchnama Ex.16, the clothes of the deceased came to be seized. The body was sent for autopsy and further investigation was carried out by P.I.Rane by visiting the spot where he prepared the spot panchnama Ex.21 and collected the samples. He recorded the statement of witnesses and was successful in arresting the accused persons particularly appellant accused No. 2 whose clothes were found having blood stains. The articles seized during the investigation were forwarded to the Chemical Analyser. On completion of investigation, police filed charge sheet in the court of Metropolitan Magistrate, Cr No. 44 at Andheri who committed it to the court of Sessions for trial.

9. The accused persons were charged for having committed offences under various sections which is already spelt out in the charge at Exhibit 2. All the accused persons pleaded not guilty and came to be tried. The prosecution in support of their case examined three witnesses as eye witness and panchas who were witness to the various panchnamas including discovery panchnama regarding the weapons seized from the accused persons. The trial court on conclusion of trial found that it is only the appellant accused who can be found guilty of having committed offence u/s 302 of the Indian Penal Code and this is how the appellant accused have been convicted.

10. Mr. Solkar, the learned Counsel for the appellant accused submitted that the conviction of the appellant accused u/s 302 of the Indian Penal Code is not justified in the facts and circumstances of the case. It is submitted that when the co-accused in the case have been let off with a conviction u/s 324 r/w Section 334 of the Indian Penal Code then the Trial Court has erred in convicting the appellant accused of the offence u.s. 302 of the Indian Penal Code simpliciter.

11. Mr.Solkar, the learned Counsel for the appellant accused submitted that strictly speaking there is no direct evidence as regards the assault on the deceased Sayyed Farukh by accused and if the evidence of P.W.No.1 Sajid Abdul Wahid Mujavar and P.W.No.3 Rajesh Babu Shinde is considered as a whole, it rather indicates that they are not the eye witnesses as they do not corroborate

each other and surprisingly Rajesh Shinde does not mention presence of Sajid Abdul Wahid Mujavar P.W.No.1 at the scene of the offence. It is submitted that by not examining Mr.Mustaq Ahmed who according to Rajesh Shinde, P.W.No.3 accompanied him alongwith the victim is fatal to the prosecution as the prosecution has suppressed evidence of material witness and in all probability, P.W.No.1 Sajid Abdul Wahid Mujavar might have reached Cooper Hospital on getting information that Sayyed Farukh was assaulted and even P.W.No.3 Rajesh Shinde must have arrived at the scene after the victim was assaulted and with the help of Mustaq Ahmed took him to Hospital.

12. Mr.Solkar, the learned Counsel for the appellant accused submits that if the prosecution's case is accepted by way of alternate plea, he submits that the case would not fall u/s 302 of the Indian Penal Code but will have to be treated at par with other co accused and can be convicted only for having committed offence u.s. 324 r/w 34 of the Indian Penal Code and if at all it is accepted that he is the author of the fatal injury caused on the neck then at the most his conviction can be held for having committed offence u.s. 326 of the Indian Penal Code.

13. He further extended his submission by stating that if the court takes an overall view of the situation as brought on record by the prosecution at the most, it is a case of one blow which was given by the appellant accused to the victim in the course of a transaction wherein he was being assaulted by several persons. He fairly conceded that the quarrel has not taken place with the victim but his brother in law and that the victim was unfortunately killed in the assault and therefore the court may also consider that the victim can be let off by sentencing him to the period already undergone as the case would be covered u.s. 304 Part II of the I.P.C. as it did not have any intention to commit murder of Sayyed Farukh and therefore the appeal may be allowed.

14. Mr.Gadkari, the learned A.P.P. submitted that the trial court was justified in arriving at a conclusion that the prosecution has proved that the appellant accused is guilty of committing murder of Sayyed Farukh. It is submitted that the very fact that all the accused came with preparation armed with deadly weapons, threatened and abused challenging Sheikh Khaza P.W.No.4 to come out of the house and then they saw his brother in law, have chose to assault him armed with deadly weapons and as the appellant accused caused the fatal injury as rightly observed by the trial court, the case of the Appellant accused will fall u/s 302 of the Indian Penal Code and he has been properly convicted under the said section.

15. The learned A.P.P. further submitted that the prosecution has not only proved his case against the appellant accused by tendering direct evidence in the form of witness P.W.No.1 and P.W.No.3 who stands duly corroborated by F.I.R.Ex.13 and the discovery panchnama. He further submitted that forensic evidence led by the prosecution by tendering report of chemical analyst clearly records that the clothes of appellant accused were having blood stains. The blood group could not be determined due to disintegration of the blood on the weapon (Article 15)

discovered from him.

16. It is submitted that the trial court has taken a proper view of the case against the appellant accused persons and on the basis of evidence on record found that the other co-accused in the case could only be convicted u/s 324 r/w 34 of the I.P.C.

17. It is submitted that appellant accused cannot claim any parity with other co-accused in the case as the role attributed to him is of assaulting victim on the vital part of the body i.e. neck which proved to be fatal. As the victim died instantaneously before he could be given medical treatment, is sufficient to attract the provisions particularly Clause III of Section 300 of the I.P.C. and therefore the trial court has dealt with their case separately and there is no legal impediment in the way of trial court in sentencing the appellant accused for having committed offence u.s. 302 of the Indian Penal Code which has been duly proved and therefore the appeal deserves to be dismissed.

18. The key issue for our consideration is whether the conviction of the appellant u/s 302 of the Indian Penal Code by the Trial Court is justified in the facts and circumstances of the case. This is so as the fact that the victim Sayyed Farukh's death was homicidal is not in dispute. The prosecution by examining P.W.No.2 and P.W.No.3 has sufficiently established that the appellant accused alongwith three others were the assailants armed with deadly weapons which has been recovered in the course of investigation. From that, we do not find that their evidence is unreliable. On the other hand, it stands from corroborated by the F.I.R. Ex.13 which has been immediately lodged by P.W.No.1.

19. In our view, the contention of the learned Counsel for the appellant accused that P.W.no.1 is not an eye witness cannot be accepted merely for the reason that PW.No.3 does not mention about his presence. It is also not required in law as these two witnesses had given their evidence as regards the incident as seen by them and they were not supposed to mark presence of each other.

20. On the other hand, P.W.No.1 was very specific while deposing before the court that it is P.W.No.3 who took the victim in his auto rickshaw to hospital and in all probability PW.No.1 followed him as deposed by him in his evidence as he was present in the hospital when the police reached Cooper Hospital on getting the information. According to us, so far as Mustaq Ahmed is concerned, his non-examination by the prosecution does not adversely affect the prosecution's case.

21. The prosecution by examining P.W.No.4 has brought on record the backdrop which led to the unfortunate incident in which Sayyed Farukh lost his life. The learned Counsel for the appellant has cited various authorities in support of his contention. He relied upon series of judgments, namely Jawahar Lal and Another Vs. State of Punjab, , Jagtar Singh Vs. State of Punjab, , Hem Raj Vs. The State (Delhi Administration), in order to show that the offence would fall u/s 304 Part II of the Indian Penal Code.

22. The learned A.P.P. submitted that in the case of Hem Raj v. The State (Delhi Administration), which has been relied upon by the learned Counsel for the appellant in similar facts and circumstances that the Supreme Court upheld the conviction of the appellant though there was a constructive charge against all the accused inclusive of appellant u/s. 302 r/w 34 of the Indian Penal Code. Since the evidence has disclosed that it is injuries inflicted by the appellant on deceased which proved fatal and therefore the court will have to consider the evidence on record against the appellant accused as sufficient to uphold his conviction u/s 302 of the Indian Penal Code.

23. In the present case, in order to arrive at a conclusion whether the conviction of the appellant accused by the court for having committed offence u/s 302 of the Indian Penal Code is justified or not, we have given our anxious consideration to the evidence on record. Sequence of events as narrated by the eye witnesses, rather go to show that it is appellant accused who gave first blow with the long knife (Article 15) on the neck. It has been deposed by P.W.No.1 that thereafter the appellant accused did not pursue further in order to give any further blow but he was followed by the co-accused in assaulting the victim. Therefore, considering the role which has been attributed to the appellant accused, we have no hesitation to arrive at a conclusion that the appellant accused alongwith the co-accused has come to the house of P.W.No.4 with an intention to teach him a lesson and when they could not find P.W.No.4, they assaulted his brother in law. Considering that the incidence was an outcome of a quarrel which preceded between P.W.No.4 and the appellant accused and it was in the course of same transaction that Sayyed Farukh was assaulted and the appellant accused having caused a single blow on the neck with long knife, it is a fit case for altering the conviction u/s. 302 to 304 part I of the I.P.C. We therefore find that the appeal preferred by the appellant accused deserves to be partly allowed.

24. The conviction and sentence of the appellant/accused for having committed offence u/s 302 of the Indian Penal Code is quashed and set aside. The appellant/accused is found guilty for having committed offence u/s 304 Part I and is convicted and sentenced to suffer rigorous imprisonment for 10 years and fine of Rs.2000/- i.d. to undergo R.I. for six months. Appeal is partly allowed.