
(2017) 12 BOM CK 0114
In the Bombay High Court
Case No : 76 of 2017

Ayaz Khan Azad Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 12-12-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 302](#),
[Section 324](#) - Punishment for mur

Citation : (2017) 12 BOM CK 0114

Hon'ble Judges : R.K.Deshpande, M.G.Giratkar

Bench : DIVISON BENCH

Advocate : Anzar Baig Mirza, A.M.Deshpande

Judgement

1. Appellant has challenged the Judgment of conviction in Sessions Trial No.27 of 2014, by which he is sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/in default to suffer rigorous imprisonment for one year for the offence punishable under Section 302 of the Indian Penal Code. He is also convicted for the offence punishable under Section 324 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/in default to suffer rigorous imprisonment for one month.

2. The case of prosecution against the appellant, in short, is as under : Azad Khan was the father of appellant. On the day of incident i.e. on 7.4.2014, at about 8.00 a.m. Azad Khan (father of appellant) was tying buffalo in front of the house. Appellant started murmuring/abusing Azad Khan. Azad Khan asked him as to why he was murmuring/abusing them. Appellant took out a knife and suddenly stabbed Azad Khan. Younger brother of complainant namely Fayyaz Khan went to help father. At that time, accused also stabbed Fayyaz Khan. People gathered there. One Sheikh Riyasu (PW3) came there. He caught hold of the appellant. In the scuffle, Sheikh Riyasu also sustained injury to his hand. Thereafter, Dulekhan, Shahajad Khan, Akhilkha came there. Accused rushed on

them with knife. They ran away. Appellant also ran away from the spot of incident. Thereafter, injured Azad Khan and Fayyaz Khan both were taken to the hospital. They were declared dead.

3. Ejaj Khan Azad Khan (PW1) went to the Police Station and lodged report (Exh.30). Crime was registered against the accused.

4. Dr.Chaitanya Shriram Kulkarni (PW9) performed post mortem on the dead body of Azad Khan. He found eleven injuries on the dead body. As per his opinion, cause of death was due to stab injuries. Accordingly, he issued Post Mortem Report (Exh.48). Thereafter, he started post mortem on the dead body of Fayyaz Khan. He found ten injuries on dead body. As per his opinion, cause of death was due to stab injury to vital organs. Accordingly, he issued Post Mortem report (Exh.49).

5. Investigating Officer Digambar Totaram Arakhrao (PW10) went to the spot of incident, prepared spot panchanama and arrested the accused. Accused confessed to show the knife hidden in his house. Accordingly, his confessional statement was recorded. Accused produced knife from his house. Investigating Officer recorded statements of witnesses and sent all the seized property to the Chemical Analyser, Amravati. After complete investigation, filed charge sheet before the Judicial Magistrate, First Class. Same was committed to the Court of Sessions at Akot.

6. The trial Court has framed charge at Exh.21. Same was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried. Appellant has taken a defence of insanity.

7. To prove the guilt of accused, prosecution has examined following witnesses :

- a. Ejaj Khan Azad Khan (PW1).
- b. Nusarat Khan Barkat Khan (PW2).
- c. Sheikh Riyasu Sheikh Jalil (PW3).
- d. Shehejad Khan Azad Khan (PW4).
- e. Abdul Ansar Sheikh Raheman Qureshi (PW5).
- f. Sabir Khan Jabir Khan (PW6).
- g. Rizwan Ali Mushtaque Ali (PW7).
- h. Firoz Khan Vazir Khan (PW8).
- i. Dr.Chaitanya Shriram Kulkarni (PW9).
- j. Digambar Totaram Arakhrao (PW10).

8. The statement of appellant was recorded under Section 313 of the Code of Criminal Procedure. After hearing prosecution and defence, the learned trial Court convicted the appellant for the offence punishable under Sections 302 and

324 of the Indian Penal Code and sentenced him, as stated above.

9. Heard Mr. Anzar Baig Mirza, learned Counsel for the appellant. He has submitted that the learned trial Court has wrongly relied on the evidence of Ejaj Khan Azad Khan (PW1) and Shahajad Khan Azad Khan (PW4). In fact, they are not eye witnesses of the incident. Even though Sheikh Riyasu Sheikh Jalil (PW3) has not supported prosecution, the learned trial Court convicted the appellant for the offence punishable under Section 324 of the Indian Penal Code for causing hurt to him.

10. Learned Counsel has submitted that the witnesses have admitted in the cross-examination that the behaviour of appellant was changed prior to two months of the incident. Learned Counsel has submitted that he was in mental hospital during pendency of trial. This fact is not considered by the trial Court and the appellant is wrongly convicted. At last, prayed to allow the appeal and acquit the appellant.

11. Heard Mr. A. M. Deshpande, learned A.P.P. for the State. He has submitted that Ejaj Khan (PW1) and Shahajad Khan (PW4) are real brothers of appellant. There is no reason to disbelieve their evidence. Deceased were none else than father and brother of the appellant. Evidence of Ejaj Khan (PW1) and Shehejad Khan (PW4) are well corroborated by the evidence of other witnesses. Appellant himself confessed to show the knife which was used in the crime. The said knife was seized as per the confessional statement. Seized property was sent to Chemical Analyser, Amravati. C.A. Report is at Exh.60. As per the C.A. Report, blood was detected on knife. Blood group was of "B" group. Therefore, it is clear that appellant had committed murder of his father and brother. Learned trial Court has rightly convicted the appellant. Hence, the appeal is liable to be dismissed.

12. Perused the evidence on record. Ejaj Khan (PW1) has stated in his evidence that appellant is his real brother. They are eleven brothers. Nine of them are married. They all reside separately. Appellant always used to have bickering with his father. On 7.4.2014, at about 8.00 a.m., his father was tying buffalo in front of the house. Appellant approached to the father and was abusing/murmuring. When his father asked him as to why he was abusing, the appellant took out knife and stabbed him on his chest. Fayyaz Khan reached there and asked the appellant as to why he assaulted their father with knife. Then appellant stabbed Fayyaz Khan on his stomach. Sheikh Riyasu (PW3) caught hold of the appellant. He also sustained injury to his hand. His other brothers and people reached there, but appellant rushed on them having knife. Due to fear, they ran away. Thereafter, appellant also ran away. Both the injured Azaz Khan and Fayyaz Khan were taken to the Government hospital, Akola. Both were declared dead. Ejaj Khan (PW1) lodged the report as per Exh.30.

13. Nusarat Khan Barkat Khan (PW2) has stated about the Spot panchanama (Exh.33) prepared in his presence by the police.

14. Sk. Riyasu Sk. Jalil (PW3) has not supported to the prosecution. But he has stated in his examination in chief that he was proceeding to market. People were running. There was crowd. He was injured with knife in the hands of accused. Then he went home. This witness was cross-examined. In the cross-examination, he has admitted that, at the time of incident, people were running. He saw knife in the hands of accused.

15. Shahajad Khan Azad Khan (PW4), brother of appellant, has stated that, on 7.4.2013, at about 8.00 a.m., he was at home. Wife of Fayyaz called him and stated that appellant assaulted Fayyaz with knife. He ran towards the market. He saw Fayyaz Khan was lying there. He saw the accused stabbing his father on chest. Accused removed the knife and then rushed on him. He ran away. After sometime, he came back and took both of them to Government hospital, Akola. Both were declared dead by the Medical Officer.

16. Abdul Ansar Sheikh Raheman Qureshi (PW5) has stated in his evidence that he is a Butcher by profession. He was present in the shop at about 7.00 to 7.30 a.m. in Somwar weekly market. Ayaz Khan (appellant) came there and asked for knife. Appellant was saying that the rope is stuck in the nose ring of bullock and therefore, he wanted the knife. He did not give him knife. Appellant had scuffle with him. He took knife and ran away. He fell down. Thereafter, he came to know that the appellant has stabbed his father and brother by the same knife. He identified the same knife before the Court.

17. Sabir Khan Jabir Khan (PW6) has stated that, in his presence, appellant confessed to show the knife. Accordingly his statement was recorded. Thereafter, they proceeded to the house of appellant. The appellant produced the knife from his house which was seized by the police.

18. Rizwan Ali Mushtaque Ali (PW7) and Firoz Khan Vazir Khan (PW8) have not supported the prosecution.

19. Dr. Chaitanya Shriram Kulkarni (PW9) has stated about the post mortem conducted on the dead body of Azad Khan and Fayyaz Khan. As per his evidence, Azad Khan sustained about 11 injuries and Fayyaz Khan sustained about ten injuries. As per his opinion, all the injuries were caused by knife. As per his opinion, cause of death of Fayyaz Khan and Azad Khan was due to injuries to the vital organ of the body. Accordingly, he issued Post Mortem Reports (Exh.48 and 49).

20. Nothing is brought on record in the cross-examination of any of the material witness to disbelieve their testimony. Ejaj Khan (PW1) and Shahajad Khan (PW4) are the real brothers of appellant. There was no reason to falsely implicate the appellant.

21. Learned Counsel for the appellant tried to show that appellant was not mentally fit at the time of incident and therefore, he should not have been convicted. During the course of cross-examination to Ejaj Khan (PW1), Sheikh

Riyasu (PW3) and Shahajad Khan (PW4), some suggestions were given. These three witnesses are the nearest relatives of appellant. They have stated that one month prior to the incident, behaviour of appellant was changed. Ejaj Khan (PW1) has stated that previously appellant was drinking liquor, but before one month he started smoking ganja. But all these three witnesses have denied that the appellant was behaving like insane person. Nothing is brought on record to show that, at the time of incident, appellant was insane.

22. Evidence of Ejaj Khan (PW1), Sheikh Riyasu (PW3) and Shehejad Khan (PW4) show that, at the time of incident, appellant stabbed his father and brother namely Azad Khan and Fayyaz Khan by a sharp weapon i.e. knife. Appellant immediately ran away from the spot of incident. If really the appellant was insane, he would not have ran away. It is clear from the evidence of Ejaj Khan (PW1) and Shehejad Khan (PW4), brothers of appellant that the appellant was maintaining his family. This itself shows that he was not insane at the time of incident.

23. During the pendency of trial, appellant was sent to mental asylum. The reason behind mental imbalance, he might have felt guilty for committing murder of his own father and brother. Moreover, he was not getting ganja etc. in jail and therefore, he might have been in a disturbed condition.

24. It is important to note that the appellant might have been insane after the date of incident. He has to prove his defence that, at the time of incident, he was insane. Appellant failed to prove that he was insane at the time of incident. Therefore, appellant failed to establish his defence as per the provisions of Section 84 of the Indian Penal Code. Nothing is on record to show that the appellant was of unsound mind at the time of incident. Learned trial Court has rightly given reasons about the same.

25. In respect of the offence punishable under Section 324 of the Indian Penal Code, the learned trial Court has wrongly convicted the appellant. Offence punishable under Section 324 of the Indian Penal Code registered for causing hurt to Sk. Riyasu (PW3). Injured Sk. Riyasu himself has not stated anything against the appellant. He has only stated that he was injured with knife in the hands of accused. But he has not stated that accused caused any injury. Moreover, injury of Sk. Riyasu (PW3) is also not proved by the Medical evidence. Therefore, conviction of accused for the offence punishable under Section 324 of the Indian Penal Code is wrongly awarded.

26. In respect of offence punishable under Section 302 of the Indian Penal Code, prosecution has proved beyond reasonable doubt that the appellant has committed murder of his father Azad Khan and brother Fayyaz Khan. Ejaj Khan (PW1) and Shahajad Khan (PW4) are the eye witnesses of the incident. They are real brothers of the appellant. Nothing is brought on record to disbelieve their evidence. They have categorically stated that appellant stabbed Azad Khan and Fayyaz Khan by knife. Their evidence is also corroborated by the evidence of

Abdul Ansar (PW5).

27. Abdul Ansar (PW5), who is a butcher by profession, has stated in his evidence that accused came to his shop early in the morning at about 7.00 to 7.30 a.m. and demanded knife. When he refused, appellant scuffled with him, took knife and ran away. After sometime, he came to know that appellant committed murder of his father and brother. This witness identified the knife (Article A) before the Court stating that it was the same knife which was taken by the appellant from his shop.

28. Evidence of Ejaj Khan (PW1) and Nusarat Khan (PW2) is also well supported by the evidence of Dr. Chaitanya Kulkarni (PW9). As per his evidence, injuries found on the dead body of Azad Khan and Fayyaz Khan were stab injuries. Knife (Article A) was shown to this witness before the Court. As per his opinion, the injuries found on the dead body of Azad Khan and Fayyaz Khan might be caused by said knife.

29. As per the evidence of Medical Officer Dr.Digambar Kulkarni (PW10), death of Azad Khan and Fayyaz Khan was homicidal. C.A. Report (Exh.60) shows that knife (Article 7) and Payzama (Article 8) were stained with blood of blood group "B". Other articles were also stained with human blood. The blood group "B" was of Azad Khan. Knife (Article 7) was seized from the appellant as per his confessional statement.

30. As per evidence of Sabir Khan (PW6), appellant confessed to show knife which was hidden in his house. Accordingly, his confessional statement was recorded. Thereafter, they proceeded with appellant to his house. He produced knife from his house. The same was seized in his presence.

31. From the evidence on record, it is clear that the appellant has committed murder of his father and brother. Evidence of Ejaj Khan (PW1) and Shahajad Khan (PW4) is also supported by the evidence of Sheikh Riyasu (PW3) and Abdul Ansar (PW5). Their evidence is also supported by recovery of weapon from the accused. C.A. Report also corroborates the evidence of Ejaj Khan (PW1) and Shahajad Khan (PW4). All these evidence show that prosecution has proved guilt of the accused beyond reasonable doubt.

32. Learned trial Court has rightly convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code, but the learned trial Judge has not considered the evidence of Sheikh Riyasu (PW3). Offence punishable under Section 324 of the Indian Penal Code was registered against the appellant for voluntarily causing hurt to Sk. Riyasu (PW3). Sk. Riyasu himself not stated that appellant voluntarily caused hurt to him. Moreover, injury of Sk. Riyasu is not proved by any Medicolegal Certificate. Medical Officer who had examined Sk. Riyasu (PW3) not examined by prosecution. Therefore, conviction of the appellant for the offence punishable under Section 324 of the Indian Penal Code is liable to be set aside.

33. Prosecution has proved beyond reasonable doubt about commission of murder by the appellant of his own father and brother. Therefore, conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code is liable to be maintained. Hence, we pass the following order. // ORDER //

The Criminal Appeal is partly allowed.

The impugned Judgment of conviction for the offence punishable under Section 324 of the Indian Penal Code is hereby quashed and set aside.

The appellant/accused is hereby acquitted of the offence punishable under Section 324 of the Indian Penal code.

Conviction in respect of the offence punishable under Section 302 of the Indian Penal Code is maintained as it is.

The record and proceedings be sent back to the trial Court.