
(2013) 09 BOM CK 0127
In the Bombay High Court
Case No : Criminal Appeal No. 952 of 2011

Mohd. Shafiq Samsuddin Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : (2013) 6 ABR 391 : (2013) ALLMR(Cri) 4410

Hon'ble Judges : P.V. Hardas, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : Arfan Sait, appointed, for the Appellant; F.R. Shaikh, APP, for the Respondent

Final Decision : Dismissed

Judgement

P.V. Hardas, J.—The appellant/original accused No. 1, who stands convicted for an offence punishable u/s 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs. 5000/-, in default of which to undergo RI for six months, by the Additional Sessions Judge, Bombay, by judgment dated 26/10/2010 in Sessions Case No. 610 of 2009, by this appeal questions the correctness of his conviction and sentence. Facts in brief as are necessary for the decision of this Appeal may briefly be stated thus:--

PW 9-Police Constable Santosh Dhumal, who, on 6/7/2009, was attached to the Dongri Police Station, was informed by two unknown persons, who had come to the police station, that there was some incident at the Takiwala building. PW 9-Police Constable Dhumal accordingly communicated the information to PSI Gangurde and along with Police Constable Sawant proceeded to the scene of the incident in a police vehicle. On reaching the scene of the incident, they noticed that some persons had caught an accused at the Takiwala building. The clothes of the accused were blood stained and there was an injury to his finger. Accused, at that time, had a knife in his hand. PW 9-Police Constable Dhumal removed the knife from the hand of the culprit. Subsequently, Police Head Constable Yadav also reached the scene of the incident. PW 9-Police Constable Dhumal and Police

Head Constable Yadav then brought the culprit to the police station and handed him over to PSI Rane. The persons, who had apprehended the culprit, were also present at the police station: In the presence of panchas, the accused was searched and one mobile hand-set and one cap were found in the possession of the accused. The knife was handed over to PSI Rane. PW 9-Police Constable Dhumal had identified the person who was caught by him at the Takiwala building as the appellant/accused.

PW 25-PSI Balasaheb Gangurde, who, on 6/7/2009, was attached to the Dongri Police Station, was informed by Police Constable Gaikwad about receipt of message from the J.J. Hospital regarding the admission of one Nasreen in the hospital. On reaching the J.J. Hospital, the Medical Officer informed PW 25-PSI Gangurde about the demise of the victim. PW 25-PSI Gangurde drew the inquest panchanama of the dead body of deceased Nasreen in the presence of panchas at Exh. 29. The dead body was thereafter referred for post-mortem examination. On reaching the Police Station, statement of PW 1-Murtuza Ujjainwala was recorded at Exh. 20. On the basis of the report of PW 1-Murtuza, offence vide Crime No. 82 of 2009 u/s 302 of the Indian Penal Code was registered. The appellant/accused was arrested. After registration of the offence, PW 25-PSI Gangurde proceeded to the scene of the incident and in the presence of the panch witnesses, drew the scene of the incident panchanama. From the scene of the incident, he seized one pant, one button of shirt, one slipper, one mat stained with blood, one piece of flank, a piece of gunny bag, one maxi. The scene of the offence panchanama is at Exh. 31. All the aforesaid articles were found in the house of deceased Nasreen. The other slipper i.e. the slipper of the left leg was found beneath the scaffolding, which was erected for repairs of the building. The sketch map is at Exh. 94. Statements of PW 2-Surendra, PW 10-Juzar, PW 13-Rajesh, PW 22-Khujema and PW 28-Asif Indorewala were recorded. The clothes of deceased Nasreen were seized under seizure memo at Exh. 23. The seizure panchanama of the articles found in the house is at Exh. 32.

PW 24-PSI Rane, who was also attached to Dongri Police Station, was informed by PW 25-PSI Gangurde about receipt of the message from the hospital. Meanwhile, two constables had produced the appellant/accused before PW 24-PSI Rane. Personal search of the accused was taken in the presence of panchas and his clothes were seized. Three buttons of the shirt of the accused were missing. One mobile hand-set was found in the pant pocket of the accused. All the articles were seized in the presence of panchas under seizure memo at Exh. 35. He has identified the knife (Article No. 1) and clothes of the appellant (Article No. 2 Colly.). He has identified the appellant as the accused who had been produced before him.

PW 27-PI Avinash Kanade, who was attached to Dongri Police Station, was entrusted with the investigation of Crime No. 82 of 2009. He recorded the statements of Police Constable Tanaji Pituk, Police Constables Yadav and Suresh Sawant who had gone to the scene of the incident immediately on being

informed. He also recorded the statement of PW 1-Murtuza. During investigation, it transpired that there was a dispute between original accused No. 2 and deceased Nasreen and some complaints had been filed by them against each other. He recorded the statement of PW 28-Asif and thereafter arrested accused No. 2-Juzar Nalwala. House search of the appellant was taken in the presence of panchas. The panchanama is at Exh. 100. PW 27-PI Kanade also recorded the statement of mother of the appellant. Statement of Police Constable Naresh, who had carried the seized articles to the Chemical Analyzer was also recorded. The seized articles were referred to the Chemical Analyzer under requisition at Exh. 106. The copy of the order issued u/s 37(1)(3) of the Bombay Police Act is at Exh. 119 Colly. The arrest panchanama of accused No. 2 is at Exh. 24. The house of accused No. 2 was searched on 18/8/2009 in the presence of panchas. The panchanama is at Exh. 120. On 19/8/2009 search of the shop of accused No. 2 was undertaken and the panchanama is at Exh. 37. During the search, some documents i.e. the telephone bills, receipts etc. were seized. The complaints between accused No. 2 and deceased were produced by PI Chavan, which were seized from him. Statement of PI Chavan was also recorded. Communications were addressed to the Tata Communication for providing the printouts of the call details. The print-outs are at Exh. 84, 85 and 86. The printouts in respect of accused No. 2 from the Airtel Company is at Exh. 69 Colly. Print-outs were also obtained in respect of another mobile which was used by accused No. 2 and the print-outs is at Exh. 62. Print-outs in respect of third mobile used by accused No. 2 was also obtained and the same is at Exh. 79 Colly. The print-outs in respect of the mobile of the absconding accused-Babulal is at Exh. 76 Colly. The printouts of the mobile used by deceased Nasreen is at Exh. 60 Colly. Sections 120B and 449 of the IPC were added and on completion of the investigation, a charge-sheet against the accused was submitted.

Post-mortem on the dead body of deceased Nasreen was performed by PW 15-Dr. Bansode. PW 15-Dr. Bansode noticed the following external injuries:--

I. Incised stab wound present on neck at centrally at thyroid cartilage with degloving of the skin of size 4 cm. x 6 cm. deep tissues exposed, margins red, underlying cartilages exposed on dissection, outer border of trachea, platysma, sternomastoid, carotid sheath and carotid artery teared.

II. Incised wound present on the face just below left eye at orbital region of size 2 cm x 1 cm and 0.5 cm. deep, both the angles are acute and margins are red.

III. Incised wound on forehead centrally vertical wound, oblique of size 5.4 cm. x 0.2 cm., red colour subcut deep.

IV. Incised wound on forehead (frontal region), vertically oblique of size 4 cm. x 0.2 cm. margins red colour.

V. Incised chop wound present on left temporal region with degloving of skin, scalp flap of size 10 cm. x 5 cm. muscle deep, margins red colour.

- VI. Incised stab wound present on neck at right lateral upper part, 5 cm. below and posterior to right ear of size 5 cm x 1.5 cm muscle deep, on dissection, underneath soft tissues cut sharply including muscles.
- VII. Incised wound present on neck at left lateral side on middle part of size 3 cm x 0.5 cm. x 0.5 cm. margins red colour, both angles acute.
- VIII. Stab injury on left arm, laterally at upper 1/3 part of size 5 cm. x 2 cm. tailing at lower side, injury is vertical and oblique, muscle deep, margins red.
- IX. Multiple superficial incised wounds 6 in number present on upper 2/3 part of left arm, laterally, injuries going from medial to lateral side, oblique red coloured.
- X. Incised stab wound present on dorsal aspect of left hand 4 cm x 2 cm, tendon (muscle) deep both the angles are acute, margin red colour, situated on lateral aspect.
- XI. Incised wound stab on left middle finger at middle phalanx of size 2 cm x 1 cm, by underlying fracture and exposing the bone, on dorsal aspect of finger, margin red, skin degloved and destructed.
- XII. Incised wound on palmar aspect of left hand of size 7 cm x 1.5 cm muscle deep and oblique extending from base of thumb (thenar aspect), margins red.
- XIII. Incised wound on palmar aspect of left hand at hypothenar aspect, horizontal of size 5 cm x 0.5 cm. muscle deep, margins are red.
- XIV. Incised wound on dorsal aspect of right hand, 8 cm x 6 cm, muscle deep with degloving of skin, tendons exposed, margin red, tendon cut at places.
- XV. Incised wound on right hand at the base of little finger of size 1 cm x 0.5 cm x 0.5 cm, margins red colour.
- XVI. Linear abrasion on right forearm at lower 1/3, 14 cm in length, red colour.
- XVII. Incised wound on palmar aspect of base of right hand, vertical 4 cm x 0.4 cm, muscle deep, margins red.
- XVIII. Multiple linear abrasion present on flexor aspect of right forearm at lower 1/3, irregular size and shape.
- XIX. Stab injury present on left shoulder at the top 2 cm x 1 cm, muscle deep, both the angles acute margins red colour.
- XX. Stab injury present on left epigastric region 3.5 cm. x 1 cm. cavity deep, 1 cm lateral to midline, margins red colour, one angle acute other blunt, on dissection mesentery vessels punctured at places.
- XXI. Incised wound on left shoulder, region (scapula) below shoulder blade, oblique of size 3 cm x 0.5 cm. x 0.2 cm, margins red colour, on dissection underlying soft tissue sharply cut.

XXII. Incised stab wound on post-aspect of left thigh at middle 1/3 part of size 5 cm. x 1 cm x 0.8 cm, margins red coloured.

XXIII. Incised wound on left calf lower leg on back 5 cm x 2 cm x 2 cm, both angle acute at 18 cm below knee joint, margins red.

XXIV. Incised wound on left calf at same level of above injury and 9.5 cm. medial to above injury of size 4 cm x 2 cm x 2.5 cm. muscle deep, margins red.

XXV. Incised stab wound on medial aspect of left thigh at middle 1/3 part, horizontal of size 3 cm x 0.5 cm, muscle deep, margins red.

On internal examination, he noticed,

I. Haematoma under scalp at left temperoparietal and occipital region, red colour.

II. Diffuse sub-arachnoid haemorrhage on left temporal region of brain.

III. Mesentery cut and hemorrhages at mesentery.

He, therefore, opined that all the injuries were anti mortem. According to him the injuries were fresh and were possible by sharp edged pointed weapon like knife. According to PW 15-Dr. Bansode, the cause of death was haemorrhage and shock due to multiple injuries (unnatural). The post-mortem report is at Exh. 52, while the final cause of death certificate is at Exh. 53.

2. On committal of the case to Court of Sessions, Trial Court vide Exh. 5 framed charge against the appellant and original accused No. 2 for offence punishable u/s 120B read with Section 302 and against the appellant for an offence simpliciter u/s 302 of the IPC. Prosecution, in support of its case, examined 28 witnesses. The defence of the appellant was of denial. Upon appreciation of the evidence of the prosecution, the trial Court acquitted original accused No. 2, but convicted the appellant for offence punishable u/s 302 of the IPC.

3. In order to effectively deal with the submissions advanced before us by the learned counsel for the appellant and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

4. Prosecution has examined PW 1-Murtuza Ujjainwala, who had lodged the First Information Report at Exh. 20. PW 1-Murtuza states that since last 15 years, he was residing in Room No. 41 of Takiwala Building, Block No. 1, Dongri. In adjoining room i.e. Room No. 42, deceased Nasreen and her husband PW 28-Asif Indorewala were residing. He then states that there is a iron-mesh door in addition to the wooden door to the said room. In respect of the incident, he states that on 6/7/2010 at about 8.15 a.m. he was present in his house as he was indisposed. At that time, he heard the shouts as "save save". He accordingly opened the door of his house and noticed that persons had gathered in the passage. Those persons were shouting as "see, fleeing away". PW 1-Murtuza, accordingly returned to his room and from the window shouted as "thief thief". The persons from another building came there and caught one person. According

to him, when he had heard the shouts as "save save" from the room of Nasreen, he noticed that the door of the room was closed. The door of the room of Nasreen was broken opened by the police and he noticed the dead body of Nasreen when it was removed from her room. He thereafter lodged his report at Exh. 20. Since PW 1-Murtuza did not support the prosecution, he was declared hostile and was cross-examined. He has then admitted in the cross-examination on behalf of the APP that he had seen a person descending the scaffolding which was erected outside the building. After the person had descended from the scaffolding, he was caught and was handed over to the police. PW 1-Murtuza did not identify the appellant as the person who had been apprehended by the people present there. In cross-examination on behalf of the appellant, he has admitted that subsequently he learnt that some persons had apprehended one person at the rear side of the building.

5. Prosecution has examined PW 10-Juzar Nalwala, who also states that he was residing in the Takiwala building about four years prior to the incident. At about 8.15 a.m. he was present in his room and had heard cries from the passage. The neighbours had assembled in the passage. The safety door of the room of the Nasreen was opened and he noticed Nasreen lying in the room. He states that he along with neighbour went to the ground floor and noticed that the people there had caught one person. There were blood stains on the face of that person and he was clutching a knife in his hand. The police arrived at the scene of the incident and took that accused along with them. PW 10-Juzar also could not identify the appellant as the same person who had been taken in the custody of the police. In cross-examination on behalf of the appellant, he has admitted that repairing and painting work to the rear of the Takiwala building was going on. He has admitted that there is a compound wall of 8 to 10 ft. between Darvez building and the Takiwala building. He has admitted in the cross-examination that he had seen the person who had been caught by the public. He, however, admits that he had not seen anyone while actually apprehending the accused.

6. Prosecution has examined PW 22-Khujema Abbas, who states that he was residing in Block "A" of Takiwala building and was occupying Room No. 45 on the third floor. He states that Room No. 42 in the same building was occupied by PW 28-Asif and his wife Nasreen. He states that PW 10-Juzar was occupying a room adjacent to his room, while PW 1-Murtuza was residing in the room adjoining the room of deceased Nasreen. In respect of the incident, he states that on 6/7/2009 he was sleeping in his room and was awakened on hearing the cries as "thief thief". On hearing the said cries, he came out of his room. The neighbours on the floor were proceeding to the ground floor for catching the thief. PW 22-Khujema states that he also went on the ground floor and noticed that one accused had been caught by the public. Two Police Constables were present there and the accused was then taken to the Police Station. There were blood stains on his person. He states that he had peeped in the room of Nasreen and had noticed Nasreen lying in a pool of blood.

7. Prosecution has examined PW 2-Surendra, who states that he was residing in the Darvez building which is adjacent to the Takiwala building. He states that he was residing in Room No. 6 on the ground floor of Darvez building. On 6/7/2009, in between 8 to 8.15 a.m. when he was in front of his room, reading a newspaper, he heard the cries as "save save" from the Takiwala building. Thereafter he heard the cries as "thief thief". He, therefore, saw towards the place from where the cries were coming and noticed one person descending the scaffolding which was erected to the Takiwala building for construction of the building. He noticed that the person was descending the scaffolding holding a knife in his hand. He noticed one person shouting from the window of the Takiwala building. Surendra states that there is a compound wall between Darvez building and the Takiwala building. Surendra scaled the wall and entered the premises of the Takiwala building; The person who was descending the scaffolding fell on the ground and started running. Two other boys from the building also came there and chased that person and Surendra caught the accused with the help of the other two boys. After about 2 to 3 minutes police arrived there and the accused was handed over to the police. The knife, which was in the possession of the accused was also handed over to the police. The accused was wearing jeans and chocolate colour shirt and the person who was apprehended disclosed his name as Mohd. Shaikh. Surendra has identified the accused as the same person who had been apprehended. In cross-examination on behalf of the accused, he has admitted that the scaffolding was erected to the Takiwala building for repairs of the building. He has admitted that the workers were working on each floor of the building, but volunteered that since it was morning, the workers had not arrived. He has admitted that the wall between Darvez building and the Takiwala building was about 6 to 7 ft. in height. He states that it is not easy for everyone to scale over the compound wall. In cross-examination, an admission has been elicited that knife in the hand of the person was blood stained. The knife was thrown by the accused on the ground after he had been apprehended. Surendra admits that the accused was apprehended by holding his shirt and pant and some blood stains adhered to the clothes of the Surendra. Surendra has admitted that the police had not seized his clothes.

8. Prosecution has examined P.W. 13-Rajesh, who states that since his birth he was residing in the Takiwala building and on the day of the incident was proceeding to answer the call of nature. At about 8 to 8.15 a.m. when he was present in front of the bath-room, he heard the cries as "thief thief". He immediately went to the open space of the building and noticed one boy descending the scaffolding which was erected for repairing of the building. The said boy fell from the first floor to the ground floor. Rajesh further states that one Surendra (PW 2) rushed to the scene of the incident and Surendra along with Anil Navare and this witness apprehended that boy. There was a knife in the hand of that boy and after the arrival of the police, the boy was handed over to the custody of the police. In cross-examination, he has admitted that he along with other two persons had caught and embraced that boy. Rajesh further admits

that he does not know if the clothes of the other two persons were stained with blood. He has admitted that he had not taken the knife in his hand for inspecting the knife. An admission has been elicited in the cross-examination that the clothes of the accused were blood stained. Rajesh admits that he had not seen any blood stains on the chappal of the accused.

9. Prosecution has examined PW 9-Police Constable Santosh Dhumal, who has stated about being informed about the incident in the Takiwala building and rushing to the Takiwala building accompanied by Police Constable Suresh Sawant. He states that on reaching the Takiwala building, he noticed that the people there had apprehended one culprit. There were blood stains on the clothes of the culprit and there was an injury to his finger. A knife was also being clutched by that culprit. Dhumal states that he removed the knife from the hand of the culprit. Thereafter, the culprit was handed over to PSI Rane and in the presence of the panch witnesses in the police station, the articles in the possession of the accused were seized. In cross-examination, he admits that the clothes of the persons who had caught the culprit were not stained with blood.

10. Prosecution has examined PW 24-PSI Premanand Rane, who states that two Constables had produced the appellant before him. On taking the personal search of the accused, he seized the shirt and the pant of the accused. He had noticed that three buttons of the shirt of the accused were missing. One mobile hand-set was found in the pant pocket of the accused. All the articles were seized under seizure memo at Exh. 35. Though he has been cross-examined, there is nothing on record which would assist the appellant.

11. The report of the Chemical Analyzer at Exh. 108 discloses that the knife was stained with blood of "B" group. The clothes of the appellant, namely, the shirt and the pant were also stained with blood of "B" group. The underwear of the accused was also found to be stained with blood of "B" group. The clothes of deceased were found to be stained with blood of "B" group. One button from the shirt of the appellant was found in the room of deceased Nasreen. The report of the Chemical Analyzer at Exh. 110 indicates that button which was found in the room of deceased Nasreen tallied with the buttons of the shirt of the appellant in respect of hue, design and physical properties. As per the report of the Chemical Analyzer at Exh. 111, the blood group of deceased Nasreen was determined as "B" group, while as per the report of the Chemical Analyzer at Exh. 118, the blood group of the appellant was determined as "O" group.

12. The appellant was examined by PW 16-Dr. Shivaji Dhond, who had noticed external injuries on the person of the appellant. He has opined that injury Nos. 1, 2 and 3, which were incised wounds, were caused by sharp edged weapon, while injury Nos. 4, 5 and 6, which were contusions and abrasions on the left lumber region and on the forehead and on the foot respectively, were caused due to blunt trauma due to fall from height. He has further opined that the age of the injuries was within 12 hours. The medical certificate of examination of the appellant is at Exh. 55. In cross-examination, he has admitted that injuries 1 to

3 may be possible by knife, tin, blade, chopper etc. Since accused No. 2 has been acquitted and the appellant has also been acquitted in respect of the charge u/s 120B, we do not refer to the evidence of the other witnesses in respect of the complicity of original accused No. 2 and in respect of the charge u/s 120B of the IPC.

13. The learned counsel for the appellant has urged before us that the prosecution has utterly failed to establish a nexus between the accused and the commission of the offence. The submission of the learned counsel for the appellant is that the accused was apprehended outside the building and in the absence of any witnesses testifying that the appellant was seen coming out of the room of deceased Nasreen, mere presence of the appellant near the Takiwala building by itself would not prove the offence against the appellant beyond reasonable doubt. It was next urged by the learned counsel for the appellant that there is a variance in the evidence of the witnesses in respect of the clothes of the appellant being blood stained. It was also urged before us that the appellant in his 313 statement has explained the injuries sustained by him as he claims that he was assaulted by the public. The learned APP has supported the findings arrived at by the trial Court.

14. Evidence of PW 1-Murtuza establishes that he had heard the cries "save save" and thereafter had seen one person descending the scaffolding. Similarly, evidence of PW 10-Juzar is that he had noticed that one person had been caught by the people present near the building and there were blood stains on the person. The person who had been caught was also carrying a knife in his hand. Evidence of PW 2-Surendra and PW 13-Rajesh clearly establish that they had seen the appellant descending the scaffolding and subsequently they had caught the appellant, who was then handed over in the custody of PW 4-Police Constable Suresh. Thus, the person, who was descending the scaffolding, was apprehended and was handed over to the police. The person, who was so descending has been identified as the appellant. The clothes of the appellant were stained with blood and the appellant was seen carrying the knife in his hand. The report of the C.A. establishes that the clothes of the appellant were stained with blood of "B" group. The knife, which was in the possession of the appellant, was also found stained with blood of "B" group. The blood group of the appellant has been determined as "O" group. The appellant had also sustained injuries, which corroborate the version of the witnesses that the appellant fell down from the scaffolding and was apprehended while he was attempting to flee. The defence of the appellant that he had sustained the injuries on account of the beating by the public is not well-founded. There is nothing to indicate, nor as it suggested to the witnesses that the persons had assaulted the appellant. Deceased Nasreen had sustained several injuries which ultimately resulted in her death. Though the appellant was not seen by anyone coming out of the room of Nasreen, in response to the cries, PW 1-Murtuza had seen the appellant descending the scaffolding. The appellant was immediately apprehended and the blood stained clothes as well as blood stained knife was seized. Thus, all this would establish a

link of the circumstantial evidence which, according to us, is so complete that it excludes every other hypothesis but the guilt of the accused. In addition, we find that the appellant has offered no explanation whatsoever for being present in the premises of the Takiwala building. The appellant, admittedly, does not claim that he was a resident of that building. In such circumstances, therefore, according to us, the circumstances, on which the prosecution has relied, have been fully established and the circumstances so established, have formed a complete chain, which excludes every hypothesis of the innocence of the accused and unerringly points to the guilt of the accused.

15. There is no doubt slight variance in respect of the evidence of the witnesses in respect of the accused clutching the knife when he was apprehended. One witness had stated that the accused had thrown the knife on the ground, while the other witness claims that the accused was still clutching the knife when he was apprehended by the people. According to us, this minor variation would not materially affect the fact that the accused was found in possession of a blood stained knife, which was ultimately seized by the police. Such minor variations are bound to occur in the evidence of the witnesses and we do not find that this variance would in any manner affect the credibility of either the evidence of the witnesses or the prosecution case.

16. In addition, we find that a button was noticed in the room of Nasreen and the said button tallied with the buttons on the shirt of the appellant. One chappal was also found in the room of Nasreen, while the second chappal was found near the scaffolding. Both the chappals were found to be stained with human blood, though in respect of one chappal, the blood group could not be determined. In respect of the other chappal, it was found to be stained with blood of "B" group. All these circumstances, according to us, establish the offence against the appellant beyond reasonable doubt. Appeal filed by the appellant being thus without merit, deserves to be dismissed. Accordingly, we dismiss this appeal, confirming the conviction and sentence of the appellant. Fees payable to the learned counsel appointed for the appellant quantified at Rs. 3000/-.