

Kasam Abdulla Hafiz etc.

Vs

State of Maharashtra

(G. N. Ray, G. B. Pattanaik JJ)

04.12.1997

JUDGMENT

G.B.PATTANAİK, J.

1 This appeal is directed against the conviction and sentence of the appellant under Sections 304 Part-I and 324 I.P.C. passed by the Division Bench of the Bombay High Court in Criminal Appeal No.671 of 1992. The appellant who was the Assistant Public Prosecutor at the relevant point of time stood charged under Sections 302 and 307 of the Indian Penal Code for having committed the murder of one Manohar Deshmukh, father of PW-3 Nanda Deshmukh and injuring one Sanjay Patil, PW-2, respectively. The learned Sessions Judge, Raiged-Alibag, in Sessions case No.102 of 1990 convicted the appellant of the charge under Section 302 for having committed the offence of murder of Manohar Deshmukh and sentenced him to imprisonment for life. He also convicted the appellant under Section 307 for causing injuries and attempt to commit murder of Sanjay Patil, PW-2 and sentenced him to suffer rigorous imprisonment for five years, both the sentences having been directed to run concurrently. On appeal, the Division Bench of the Bombay High Court agreed with the conclusion of the learned Sessions Judge that it was the appellant who caused the injury on the deceased Manohar who ultimately succumbed to the injury and also caused injury on the person of Sanjay Patil PW-2 by means of the knife but taking into consideration the fact that relationship between the accused and the deceased and his family members were cordial till the date of the incident and further that the incident took place all of a sudden on the spur of the moment and the instrument that was used by the accused is such that the accused cannot be said to have the intention to cause the death of the deceased the High Court held the accused guilty under Section 304 Part-I I.P.C. and sentenced him to undergo rigorous imprisonment for a period of five years thereunder. So far as conviction of the appellant under Section 307 for causing injuries on the person of PW-2 is concerned the High Court took into consideration the size of the knife that was used and the manner in which the incident was alleged to have occurred and came to the conclusion that the offence should be one punishable under Section 324 I.P.C. and not under Section 307 I.P.C. For his conviction under Section 324 I.P.C., the appellant was sentenced to undergo rigorous imprisonment for two years and it was further directed that both the sentences would run concurrently. Hence the present appeal

2 Against the acquittal of the accused-appellant of the charge under Section 302 and 307 as well as against the sentence awarded by the High Court for five years imprisonment for the offence under Section 304 Part-I I.P.C, the State of Maharashtra has also preferred SLP (Crl.) No.3039 of 1994, wherein Court had passed an order "issue notice" and tagging the same with the Criminal Appeal No.531 of 1993. In the said SLP also leave is being granted herein and the matter is heard along with Criminal Appeal No.551 of 1993.

3 The prosecution case in nutshell is that the accused and PW-3 belong to the legal profession and

both of them were attached to the chambers of senior advocate Shri D.N.Patil The accused-appellant on being appointed as Assistant Public Prosecutor in the year 1988 left the chambers of Shri D.N.Patil and was residing in Sneha Apartment where the incident occurred. Nanda Deshmukh PW-3, lawyer by profession was continuing as junior to Shri D.N.Patil and was a divorcee She was also staying in the same building-Sneha Apartment on the first floor along with her parents The relationship between Nanda Deshmukh, PW-3 and the accused-appellant was all along cordial It was the further prosecution case that a criminal case under Section 395 I.P.C was being tried by the Additional Sessions Judge-Shri P.M.Joshi and D.N.Patil, Advocate was the defence lawyer along with Smt.Nanda Deshmukh and at the fag end of the trial Shri Patil could not attend to the proceeding and handed over the case to Smt.Nanda Deshmukh Ultimately, in that case the learned Additional Sessions Judge convicted the accused but released the accused on bond by applying the provisions of Probation of Offenders Act In March, 1990 in a get-together of some lawyers the accused made a statement that he had heard that Nanda Deshmukh had taken Rs.50,000/- in the name of the Judge in whose court the aforesaid criminal proceeding was pending When Nanda Deshmukh heard about this statement made by the accused she met the District Judge, Alibag, Mr.Vazalvar and complained against the accused-appellant that he is unnecessarily spreading false rumours It appears that the District Judge called a meeting of some of the lawyer and Additional Sessions Judge Shri Joshi and in that meeting the District Judge commented upon the conduct of the accused as to why he has been spreading rumours about Nanda Deshmukh that she had taken money in the name of the Judge The accused thereupon replied the District Judge that he had never said that the money was collected in the name of the Additional District Judge, Shri Joshi but he had only said that Nanda Deshmukh had taken a sum of Rs.50,000/- from the accused The senior lawyers who were present in that meeting told the District Judge that since the accused had not made any allegation against the District Judge, Shri Joshi but he merely stated that Nanda had taken money from the accused, the dispute is one between two individual lawyer and the judges should not be brought into the dispute Thereafter the meeting was dispersed and Nanda came home She was in a very agitated and disturbed mood on account of what happened in the chambers of the District Judge and to her father's query 'as to why she was in a agitated mood' she narrated the entire incident that had taken place in the chambers of the District Judge Shri Sanjay Patil, PW-2, who is the son of Nanda's senior Shri D.N.Patil was passing by that area and on seeing Nanda's car parked down stair came to Nanda's house and heard all that she was telling to her father It is at that point of time Nanda's daughter-Sonal who was standing near the window of the flat stated that accused has come On hearing from Sonal that accused has come, Nanda Deshmukh, PW-3 rushed to the ground floor followed by her father Manohar Deshmukh (the deceased) and Sanjay Patil, PW-2. Nanda Deshmukh asked the accused who was sitting in the car as to why he has been spreading rumours against her to which the accused reiterated that she had given money to the Judge- Shri P.M.Joshi The further prosecution case is that accused then came out of the car and rushed towards Nanda but deceased Manohar pulled Nanda back The accused then throw a brick towards the Manohar which hit in his abdomen thereupon the accused brought out a knife and gave a blow on the abdomen of the deceased-Manohar and while he was trying to give a second blow on the deceased it somehow missed and Sanjay Patil, PW-2, rushed to the accused and caught him by his hands Sanjay then pushed the accused against the compounded wall The accused, however, attacked Sanjay and gave a stabbing blow with the knife which hit Sanjay on his left hand Accused thereafter left the place in his car PW-9, one of the occupants of the said building reached the place and took Sanjay to the dispensary of Dr.Deshpanda where some first aid was given Thereupon Sanjay went to the Police Station and gave a report at 3.10 p.m. on 19th of March, 1990 which was treated as F.I.R.(Ex.30) On the basis of said F.I.R. a criminal case was registered and the police took up investigation and finally submitted the charge-sheet against the accused whereafter the accused was tried for the

offences as already stated Injured Manohar was taken to Dr Hoshing, PW-7 who examined him at about 2.30 p.m. on 19.3.1990. Looking at the injury on the abdominal region doctor took the decision that an emergency operation is necessary and accordingly operated upon the injured-Manohar. Manohar became serious in the Civil Hospital at Alibag and therefore he was taken to Hinduja Hospital, Bombay on 27.3.1990 and ultimately died in Bombay on 29.3.1990. It may be stated at this stage that accused himself after leaving the place of occurrence came to the court of the District Judge and narrated his version of the incident to him. The District Judge then called the Public Prosecutor and advised him to inform the police immediately about the occurrence. The police was then called and the accused himself gave a report in writing giving his version of the occurrence which was treated as F.I.R. of the counter case. The said counter case, however, ultimately ended in acquittal. The defence version of the incident as transpired from the complaint lodged by the accused himself on 19.3.90 as well as from the suggestions given to the prosecution witnesses and statement of the accused under Section 313 I.P.C. is that the Deshmukh family including Nanda, her parents and the maid servant Chhaya rushed from the first floor of the house and started assaulting the accused while he was still inside the car, even some dung was spread on his clothes and face, the accused then came out of his car and at that point of time the maid servant Chhaya handed over a knife to Sanjay, PW-2 and while Sanjay was attacking the accused with the knife he pushed the deceased on account of which the deceased received the injury on his abdomen and the accused came away from the place by driving his vehicle.⁴ The prosecution examined 13 witnesses in all in support of its case of whom PWs 2 and 3 are the eye witnesses to the occurrence. PW-7 is the Civil Surgeon of Civil Hospital, Alibag where the injured Manohar Deshmukh had been operated upon and PWs 8 and 10 are also the doctors attached to the said hospital at Alibag. Said PW-10, Dr Adhatrao had also examined the accused and had issued the Injury Certificate (Ex.61). PW-11 is the Medical Officer who has performed autopsy on the dead body of deceased Manohar and the post-mortem report given by him is Ex.68. PW-12 also is the doctor and was Associate Professor in Pathology and he had examined the viscera of the deceased. PW-13 is the investigating officer and he had recorded the statement of deceased Manohar at the Civil Hospital, Alibag in the evening of 19th of March, 1990 which has been treated to be the dying declaration (Ex.79). From the evidence of the doctors who had conducted the operation on deceased Manohar as well as the doctor who conducted the autopsy on the dead body of the deceased Manohar the learned Sessions Judge recorded a finding that Manohar met with a homicidal death and the said finding has not been assailed either in the High Court or in this Court. On 19th of March, 1990 an incident happened near Sneha Apartment is also not disputed nor is it disputed that on account of sustaining injury by means of a knife Manohar father of PW-3 ultimately died and Sanjay Patil, PW-2 also received some injuries. The dispute centres round the question as to what manner the incident occurred. While according to the ocular statements of eye-witnesses of PWs 2 and 3 deceased Manohar and Sanjay Patil PW-2 received the injuries on their person on account of stabbing blow being given by accused, according to the defence version it was Sanjay who was rushing towards the accused with the knife in his hand which he got from the maid servant Chhaya and accused then pushed the deceased Manohar on account of which deceased sustained the injury and ultimately succumbed to the same in the hospital. The learned Sessions Judge as well as the High Court relying upon the evidence of PWs 2 and 3 have concurrently found that the prosecution story unfolded through the evidence of these two witnesses is true and reliable and the defence version of the incident has not been accepted. The learned Sessions Judge came to the conclusion that the accused caused an injury on Manohar with the intention to kill him but the High Court reversed that finding and came to hold that there was no intention on the part of the accused to kill Manohar and accordingly altered the conviction of Section 302 to Section 304 Part-I I.P.C.⁵ Mr Shanti Bhushan the learned senior counsel appearing for the accused-appellant contended that the accused having sustained several

injuries on his person and the prosecution having not explained as to how those injuries could be sustained by the accused, the entire prosecution case as unfolded through the evidence of PWs 2 and 3 become vulnerable and as such no reliance can be placed on the said testimony and prosecution case must fail. The learned counsel further contended that from the prosecution evidence itself as well as from the injuries sustained by the accused it transpires that the accused was being assaulted by the deceased, his daughter Nanda, his wife, his maid servant and Sanjay, PW-2, while the accused was still sitting in his car and at that point of time the accused having apprehended danger to his life or at least danger of sustaining grievous injury in hands of the deceased and his family members, gave the single blow on the abdomen of the deceased in exercise of right of private defence on his person and therefore the conviction of the appellant is unsustainable. Mr Shanti Bhushan lastly submitted that even assuming the prosecution case as unfolded through the evidence of PWs 2 and 3 is wholly correct then yet the offence should be one at the most under Section 304 Part-II and not under Section 304 Part-I inasmuch as the act of the accused by which the death was ultimately caused cannot be said to have been done with the intention of causing death or of causing such bodily injury as is likely to cause death. This is apparent not only from the fact that the single blow was given but also from the fact that the injured was operated upon and survived thereafter till 29.3.1990 and there might be a variety of reasons for such death which may not be connected with directly to the injury that was caused by the accused on the abdomen of the deceased.

6 Shri Shah the learned senior counsel appearing for the State on the other hand repelled the contention raised by Mr. Shanti Bhushan and urged that there is no material available on record from which it can be said that the accused caused the injury in exercise of right of private defence. He further contended that in law the prosecution is not obliged to explain minor and superficial injuries on accused and non-explanation of such superficial injuries will not be fatal to the prosecution. But in the case in hand according to the learned counsel the prosecution has offered an explanation for the so-called minor injuries on the accused inasmuch as PW-2 Sanjay stated in his evidence that he pushed back the accused towards the wall and on account of such conduct he might have sustained some injuries. The learned counsel also urged that looking at the injury caused by the accused and the part of the body of the deceased where such injury was caused it must be reasonably held that the accused had the intention of causing said bodily injury which is likely to cause death and medical evidence clearly supports that view and consequently the accused was convicted by the High Court under Section 304 Part-I I.P.C. In support of the State's appeal, the learned counsel urged that the order of acquittal of the charge under Section 302 is unjustified as evidence reveals that accused with the intention of causing murder brought out the pen knife and pushed it inside the deceased Manohar. At any rate even if the accused can be said to have been rightly convicted under Section 304 Part-I by the High Court, the sentence awarded thereunder is wholly unjustified and this Court should enhance the sentence.⁷ In view of the rival submissions at the Bar and first and foremost question that arises for consideration is whether the non-explanation of the injuries found on the accused can be said to be fatal to the prosecution case and further whether the prosecution has offered any explanation which can be said to be acceptable. Mr Shanti Bhushan the learned senior counsel appearing for the accused-appellant strongly relied upon the decision of this Court in the case of *LAKSHMI SINGH AND OTHER Vs STATE OF BIHAR* (1976) 4 SCC 394 in support of his contention that non-explanation of the injuries on the accused by the prosecution is fatal to the prosecution case. In the aforesaid case this Court held that in a murder case the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

That the prosecution has suppressed the genesis and the origin of the occurrence and

has thus not presented the true version; that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

that in case there is defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

While observing this the Court hasten to add as held by this Court in STATE OF GUJARAT Vs. BAI FATIMA, (1975) 2 SCC 7 : "there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries" Bearing in mind the aforesaid principles of law the contention of Mr Shanti Bhushan on this score is required to be examined The accused as per the injury Certificate (Ex.61) given to him was found to have sustained the following injuries:"1) Contusion on back right scapular region vertically directed 103 cm x 2 red discoloration.2) Contusion on back right scapular region vertically directed 3 cm x 2 cm red discoloration.3) Abrasion on left ring figure proximal Phalank dorwal aspect 1 cm x 1 cm.4) Contusion on forehead middle region vertically directed 3 cm x 1/2 cm red discoloured.5) Abrasion at bridge of nose 1/2 cm.6) Contusion on right side of check inner aspect 2 cm x 1/2 cm red discoloration. Simple blunt object".

9 The dimension and nature of injuries clearly indicate that they are simple in nature There were two abrasions and four contusions These injuries found on the person of the accused are such that non-explanation to them could not be fatal to the prosecution case as was held by this Court in BAI FATIMA's case referred to supra (1975) 2 SCC 7 Mr Shanti Bhushan no doubt strenuously urged that the injury held by the doctor to be simple is in contradistinction to 'grievous' but the contusion on forehead though of dimension 3 cm x 1/2 cm must be held to be an injury of such nature which the prosecution was obliged to explain and in the absence of any explanation it ought to be held that the prosecution is not coming forward with true version of the case. We are unable to accept this submission of the learned counsel The principle that non-explanation of injury on the person of the accused would be fatal to the prosecution case would apply only when the injuries could be of such nature which the prosecution witnesses cannot but notice the same But the injury on the person of the accused even on the forehead which was found by the doctor is such that it would be difficult to held that the prosecution witnesses must be held to have noticed the same and must offer an explanation Such minor injuries can be caused for variety of reasons and the prosecution case must not suffer for non-explanation of such minor injuries We are therefore unable to accept the contention of Mr Shanti Bhushan on this score We also find sufficient force in the contention of Mr Shah, learned counsel appearing for the State-respondent that the prosecution has offered explanation for such minor injuries on the person of the accused PW-2, Sanjay Patil in his evidence has categorically stated that while the accused was attempting a second blow at the deceased he caught hold of writ of the accused and then pushed him back as a result of which the accused there dashed against the compound wall It is just possible that on account of such dashing the minor injuries on the person of the accused could have been possible That apart the accused was examined himself as DW- and has stated that while he was still inside the car the prosecution party namely deceased Manohar and his daughter assaulted him with stick, on that score also the accused might has sustained the injuries in question In this view of the matter on the materials on record we are not

in a position to hold that there has been no explanation for the minor injuries sustained on the person of the accused.¹⁰ The next question that would arise is whether the accused can be said to have inflicted the blow on the abdomen of the deceased while apprehending grievous injury on him from the prosecution party. In that event the benefit of Section 100 of the Indian Penal Code can be given to him. Under Section 100 of the Indian Penal Code the right of private defence of body extends to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated in six clauses of the said Section. According to Mr. Shanti Bhushan, the learned senior counsel appearing for the appellant when the accused was being assaulted with the 'tommy' a reasonable apprehension could have been caused that grievous hurt will otherwise be the consequence of the assault and therefore the accused was justified in giving the blow in exercise of his right of private defence on his person. It may be noticed that the accused though himself had been examined as a witness in the case as DW-2 but he has never uttered a word indicating that he had any apprehension of a grievous hurt being caused to him. It is of course true that in law a plea of right of private defence would be available to the accused even though the plea has not been taken by the accused provided the materials on record would justify such a plea. But since it is the apprehension of the accused which could be material to a plea of right of private defence and since the accused himself chose to be examined as a witness and has not uttered a word about such apprehension it would be difficult to sustain the plea. That apart from the materials available on record namely the prosecution evidence of the case, Mr Shanti Bhushan has not been able to lay his hand on any part of the evidence from which such a plea can at all be said to be available to the accused. As has been stated earlier the injuries which the accused has sustained on his person might have been caused while the accused was pushed by Sanjay and was dashed against the compound wall or even while the accused was sitting in his car and was said to have been assaulted by the deceased and his daughter by a stick. But the incident of stabbing on the abdomen of the deceased has not occurred while the accused was inside the car but on the other hand while he has come out and while the deceased wanted to prevent an attack by the accused on Nanda Dr Adhatrao, PW-10 in his evidence has categorically stated, after referring to the injury certificate mentioned in respect of the accused and after being shown iron tommy of the motor vehicle, that "after examining the article physically I state that the said article is neither heavy nor light I state that injuries of such nature on the person of Kasam Hafiz would not have accrued with forceful assault with such tommy and wooden stick". In the absence of any material on record to establish that the so-called assault by the tommy might have reasonably caused the apprehension in the mind of accused that grievous hurt will otherwise be caused and in view of the aforesaid positive evidence of the doctor referred to, it is difficult to hold that assault given by the accused can be said to be one in exercise of right of private defence on his person. We are therefore not in a position to sustain the contention of Mr Shanti Bhushan on this score. Though normally this court does not scrutinise the evidence of witnesses in a case where the two courts below have believed the evidence of the witnesses and have concurrently held that prosecution case has been established beyond reasonable doubt but in view of the contentions raised we have ourselves carefully scrutinised the evidence of two eye-witnesses PWs 2 and 3. On going through their evidence we find them to be wholly trustworthy and reliable and we do not find anything brought out in their cross-examination to impeach their testimony. On their evidence, in our considered opinion it must be held that the prosecution case has been proved beyond reasonable doubt that it is accused-appellant who caused the injury on the abdomen of the deceased-Manohar on account of which Manohar dies ultimately in the hospital.

¹¹ It may not be out of place to notice another argument advanced on behalf of the accused-appellant that the prosecution have not examined independent witnesses though available and have chosen to examine only the interested witnesses. On being asked, the counsel for the appellant could

not justify as to why Sanjay, PW-2 can be held to be an interested witnesses as the records of the case reveal Nanda, PW-3 and the accused both were working in the chambers of Shri D.N.Patil, father of Sanjay till accused was appointed as Assistant Public Prosecutor The relationship between them was very cordial and neither the accused has stated in his evidence nor there is an iota of material on record to hold that Sanjay had any axe to grind against the accused. He can not held to be interested in the prosecution and inimical to the accused and therefore must be held to be a wholly dis-interested witness That apart even the evidence on record does not disclose that there were other independent witnesses available and yet withheld by the prosecution from being examined, consequently no adverse inference can be drawn against the prosecution on that score In this connection, it may be worthwhile to note that the accused himself immediately after the occurrence has lodged a complaint which was treated as first information report in the counter case and nowhere in that complaint he has indicated as to any other outsider being present and seeing the occurrence In the aforesaid premises, the conclusion of the learned Sessions Judge as well as the High Court to the effect that the defence version with regard to the manner in which the injury could have been caused on deceased Manohar is wholly unsustainable and cannot be interfered by this Court On the other hand it must be held on the reliable and unimpeachable evidence of PWs 2 and 3 that the prosecution case has been proved beyond all reasonable doubts.¹² Mr. Shanti Bhushan's last argument on the question as to what offence can be said to have been caused requires consideration at this stage According to the learned counsel the acts cannot be said to have caused the injury on the deceased with the intention of causing such bodily injury as is likely to cause death and therefore the conviction under Section 304 Part-I is unsustainable The doctor PW-7 who examined the injured Deshmukh immediately after the occurrence and who thought it necessary to undertake an emergency operation clearly indicated in his evidence that the patient had stab wound over the abdomen and probably omentum was also seen in the wound. He further stated that he was of the view that the operation was immediately necessary and the patient would have died if the operation had not been undertaken He also stated looking at the injury of the deceased, that the instrument of stabbing must have moved inside the intestines and such injury could be inflicted with sharp object like knife and the injuries can be called dangerous He also opined that the injuries are sufficient in the ordinary course of nature to cause death in ordinary circumstances From the evidence of Sanjay it is crystal clear that not only the accused gave the stabbing blow on the abdomen of the deceased but even tried to give a second blow which missed and it is on that point of time Sanjay intervened and he was also ultimately injured Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the 1st part of Section 304 I.P.C. The guilty intention of the accused to cause such bodily injury as is likely to cause death is apparent from the fact that he did attempt a second blow though did not succeed in the same and it somehow missed In that view of the matter we are of the considered opinion that the High Court has rightly convicted the appellant under Section 304 Part-I I.P.C.¹³ Mr Shanti Bhushan in course of his arguments brought to our notice an affidavit filed in this Court by Shri D.N.Patil an advocate of Alibag, District-Raigad, Maharashtra The said affidavit is nothing but a character certificate in respect of the accused and in our view ought not to have filed by a senior lawyer of which obviously no use can be made In the aforesaid premises we do not find any merits in this appeal which is accordingly dismissed.¹⁴ Coming to the State appeal, in view of our conclusions arrived hereinbefore, we do not find any merit in the same No doubt the contention of Mr Shah the learned senior counsel appearing for the State on the question of sentence has some substance as ordinarily for conviction under Section 304 Part-I sentence of 5 years can be held to be not proper. But having considered the facts and circumstances of the case and reasons advanced by the High Court in giving such sentence we

are not inclined to interfere with the same. The appeal arising out of the SLP filed by the State accordingly also is dismissed.¹⁵ In the net result, therefore, both the appeals are dismissed. The bail bond furnished by the accused-appellant stands cancelled and appellant is directed to surrender to serve balance period of sentence.