

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.172 OF 2006

Ashok s/o. Tukaram @ Babu Awachar,
Age : 23 years, Occ. Labourer,
r/o. Karegaon,
Tq. and Dist. Parbhani ..Appellant
(Orig. accused)

Vs.

1. The State of Maharashtra, (Prosecution)
2. Mirabai Madhav Awachar,
Age : 25 years Occ. Agri.,
r/o. Village Karegaon,
Tq. and Dist. Parbhani ..Respondents

Mr. Chaitanya C. Deshpande, Advocate i/b. Mr.C.R.
Deshpande, Advocate for appellant

Mr. S.K.Tambe, APP for respondent no.1

Mr. B.A.Shinde, Advocate for respondent no.2

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

**RESERVED ON : NOVEMBER 09, 2017
PRONOUNCED ON : NOVEMBER 16, 2017**

JUDGMENT (PER SANGITRAO S. PATIL, J.) :

Being aggrieved by the judgment and order
dated 27.01.2006 passed in Sessions Case No.52 of

2005 by the learned 1st Ad-hoc Addl. Sessions Judge, Parbhani, convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code ("I.P.C.", for short) and sentencing him to suffer imprisonment for life and to pay a fine of Rs.25,000/-, the present appeal has been preferred.

2. The case of prosecution, in brief, is that on 11.02.2005 at about 4.00 p.m., the appellant, the deceased Madhav Uttamrao Awachar, one Prabhakar Rangoba Awachar, Ashok Sahebrao Awachar and Bhagwat Uttamrao Poul were gambling by playing a game called "Nakkhi Dua" near the compound wall of Telephone Office in front of the Regional Transport Office on the left side of Parbhani to Vasmat road, running West to East, at Parbhani. The informant namely, Subhash Dattarao Awachar, who is the cousin of the deceased Madhav, one Manohar Sahebrao Awachar and Vishnu Sahebrao Awacher were watching that game. The deceased Madhav placed a bet of Rs.10/- and won the game. Therefore, he asked the appellant to pay him

Rs.20/-. However, the appellant refused to pay that amount to the deceased Madhav. On that count, altercation and scuffle took place between them. The informant and other persons, who were watching the game, separated the appellant and the deceased Madhav. At that time, the appellant took out a knife from the watch-pocket of his pant and pierced it in the chest of the deceased Madhav causing him a bleeding injury. The deceased Madhav collapsed on the ground. The informant and Vishnu Sahebrao Awachar took the deceased Madhav to the Civil Hospital, Parbhani in an auto-rickshaw. The Medical Officer examined him and declared that he was dead.

3. The informant went to the Police out-post situate in the premises of Civil Hospital and intimated about murder of Madhav. He then went to his village in the auto-rickshaw and came back to the hospital along with his parents. At that time, P.S.I. Shejal, Mondha Police Station, Parbhani, recorded statement of the informant, which is treated as

F.I.R. On the basis of that F.I.R., Crime No.37 of 2005 came to be registered against the appellant for the offences punishable under Sections 302 and 504 of the I.P.C. The investigation followed. Inquest of the dead body of Madhav was prepared. His body was referred to Civil Hospital for post-mortem. Dr.Kankute conducted post-mortem on 11.02.2005 between 10.10 p.m. and 11.10 p.m. He noticed a perforating stab injury in the chest of the deceased Madhav. He opined that that Madhav died of 'Cardio-respiratory failure due to hemorrhagic shock due to puncturing stab injury to heart'. The spot panchnama was prepared. Statements of witnesses were recorded. Blood stained knife and full-pant and full-shirt of the appellant came to be discovered pursuant to the disclosure statement made by him. They were sent to the Chemical Analyzer for analysis and report. The said articles were found stained with blood of 'AB' group, which was that of the deceased Madhav. After completion of the investigation, the appellant came

to be charge-sheeted for the offence punishable under Section 302 of the I.P.C.

4. The case being triable by the Court of Session, the learned Chief Judicial Magistrate committed it to the Sessions Court for trial. It came to be assigned to the 1st Ad-hoc Addl. Sessions Judge, Parbhani. The learned trial Judge framed charge against the appellant for the offence punishable under Section 302 of the I.P.C. vide Exh.4 and explained the contents thereof to him in vernacular. The appellant pleaded not guilty and claimed to be tried. His defence is that of total denial and false implication on account of previous rivalry.

5. After scrutinizing the evidence adduced by the prosecution, the learned trial Judge held the appellant guilty of the above-mentioned offence. He, therefore, convicted and sentenced the appellant for the said offence, as stated above.

6. The learned Counsel for the appellant submits that the informant is the cousin of the deceased Madhav. The informant had demanded Rs.2,000/- from the appellant about eight days prior to the date of the incident for purchasing a she-buffalo. The appellant had refused to pay that amount to the informant, therefore, their relations had become strained. The informant had threatened the appellant to complain against him for taking money from the needy persons by falsely assuring them to get their works done. Therefore, according to the learned Counsel, the informant lodged a false F.I.R. against the appellant. He submits that there has been delay of three hours in lodging the F.I.R. Moreover, there is delay of one day in sending copy of the F.I.R. to the Magistrate. This delay has not been explained by the prosecution. He submits that the prosecution has examined only those witnesses who are close relatives of the deceased Madhav. Some of the witnesses did not support the prosecution. The

evidence of the informant and other witnesses, who tried to implicate the appellant for the offence of murder, is not reliable. He, therefore, submits that the appellant may be acquitted of the above-mentioned offences.

7. In the alternative, the learned Counsel submits that the incident had taken place on the spur of moment without any pre-determination. The appellant had no intention to kill the deceased Madhav. In fact, both of them were good friends. Their respective fathers also were good friends. During the course of scuffle, under the heat of anger, the appellant seems to have stabbed the deceased Madhav. In the circumstances, relying on the judgment in the case of **Jagtar Singh Vs. State of Punjab, 1983 CJ (SC) 139** and **Abani K. Debnath Vs. State of Tripura, 2005 CJ (SC) 11**, he submits that at the most, offence under Section 304 Part II of the I.P.C. can be said to have been established against the appellant. He submits that the appellant is a

young person, who was aged about 22 years at the time of the incident. He is a married person having responsibility of his family. He has no criminal antecedents. In the circumstances, the learned Counsel submits that if the appellant is held guilty for the offence punishable under Section 304 Part II of the I.P.C., he may be shown leniency in the matter of punishment.

8. On the other hand, the learned A.P.P. submits that though the incident took place on a trivial reason, the appellant gave a calculated blow of knife on the vital part of the body i.e. chest of Madhav, causing him serious injury to which, he succumbed immediately after the incident. He submits that the evidence of the informant is corroborated by other witnesses. The appellant was friend of the deceased Madhav. There was no enmity between the informant and the appellant on any count. There was no reason for the informant to lodge false F.I.R. and

depose false against the appellant. He submits that the evidence of the prosecution is quite sufficient, cogent and clinching to establish guilt of the appellant for committing murder of the deceased Madhav. The medical evidence also supports the case of the prosecution. According to him, the learned trial Judge has rightly considered the evidence on record and has rightly convicted and sentenced the appellant. He, therefore, prays that the appeal may be dismissed.

9. It has come in the evidence of the informant that at the time of the incident, the appellant, one Prabhakar Awachar, Ashok (PW 2)(Exh.14) and Bhagwat (PW 5)(Exh.18) were gambling by playing a game called "Nakkhi Dua". Vishnu (PW 3)(Exh.15), Manohar (PW 4) (Exh.16) and himself were watching that game. After sometime, the deceased Madhav also came there and placed a bet of Rs.10/-. After winning in that game, he asked the appellant to pay him Rs.20/-. The appellant refused to pay that amount. Therefore,

altercation and scuffle took place between them. Ashok (PW 2) and himself separated them. Thereafter, the appellant took out a knife from the watch-pocket of his pant and pierced it in the chest of the deceased Madhav. The deceased Madhav collapsed on the ground. The appellant ran away therefrom. Blood started oozing from the chest injury of the deceased Madhav. He was taken to the Civil Hospital in an auto-rickshaw. The Doctor examined him and declared that he was dead.

10. It has come in the evidence of P.S.I. Shejal (PW 9)(Exh.39) that after receiving a message from the P.S.O. on his cell phone, that a person, who was admitted in the Civil Hospital, Parbhani, was murdered, he took entry in the station diary (Exh.48) and went to the Civil Hospital, Parbhani. He states that the informant narrated before him the manner in which the incident took place. He reduced that information into writing, as mentioned in the F.I.R. (Exh.13) and went back to the Police Station.

Thereafter, he registered the crime on the basis of that F.I.R. (Exh.13).

11. As seen from the endorsement made on the F.I.R. (Exh.13) as well as in the station diary (Exh.48), the offence was actually registered at 7.00 p.m. on the day of the incident itself. As a matter of fact, the F.I.R. (Exh.13) was recorded by P.S.I. Shejal (PW 9) in the Civil Hospital, Parbhani much prior to the registration of the crime in the Police Station. The F.I.R. is running into two handwritten pages. P.S.I. Shejal (PW 9) certainly must have required some time for recording F.I.R. (Exh.13) in the Civil Hospital, approaching Mondha Police Station and then registering the crime. In the circumstances, some delay in registering the crime in the Police Station would be of no consequence. There is nothing on record to show that the informant narrated the incident as mentioned in the F.I.R. (Exh.13), on the say of anybody else, who wanted to falsely implicate the appellant in the incident in question. The

informant has flatly denied that he ever had demanded Rs.2,000/- from the appellant, the appellant refused to pay that amount to him and therefore, he had a grudge against the appellant. This reason suggested on behalf of the appellant is not at all probable and natural. It has come in the cross-examination of the informant that the appellant and the deceased Madhav were friends. Their respective fathers also were friends. If that be so, there was no reason for the informant to lodge a false report against the appellant. There is no objectionable delay in lodging the F.I.R. (Exh.13). The informant cannot be said to have lodged false F.I.R. (Exh.13) against the appellant. The evidence of the informant has been corroborated by the contents of F.I.R. (Exh.13).

12. The copy of F.I.R. (Exh.13) seems have been sent to the learned Chief Judicial Magistrate on 12.02.2005. As stated above, the crime was registered on 11.02.2005 at about 7.00 p.m. The copy of F.I.R. was sent to the learned Chief Judicial Magistrate on

the next working day. As such, there cannot be said to be any delay in sending the copy of F.I.R. to the learned Chief Judicial Magistrate.

13. Bhagwat (PW 5), who was gaming at the time of the incident, fully corroborates the evidence of the informant on all material particulars.

14. Ashok (PW 2), Vishnu (PW 3) and Manohar (PW4) also are the eye witnesses to the incident. Ashok (PW 2) supports the case of the prosecution in his examination-in-chief, but in the cross-examination, he took a somersault and resiled from his previous statement. Vishnu (PW 3) and Manohar (PW4) did not support the prosecution. Both of them resiled from their previous statements. They have been cross-examined by the learned A.P.P. The evidence of P.S.I. Shejal (PW 9) proved the statements made by them before him while recording their statements under Section 161 of the Code of Criminal Procedure, which have been denied by them

before the Court. It is clear that they were won-over by the appellant and therefore, did not support the prosecution by changing their versions. Therefore, their evidence would not create any doubt about the case of the prosecution.

15. Dr.Kankute (PW 6)(Exh.28), who conducted post-mortem of the body of the deceased Madhav on 11.02.2005 between 10.10 p.m. and 11.10 p.m. in the Civil Hospital, Parbhani, deposes that he noticed only one stab injury on the chest of the deceased Madhav perforating left artery having size 2 cm. x 2½ cm. x 1½ cm. in 8 cm. deep. On internal examination, he found perforating injury on pleura on left side. He found perforating wound on pericardium. Heart was containing bleeding clots with stab injury with left artery having size 1½ x 1 cm. He opined that Madhav died of cardio-respiratory failure due to hemorrhagic shock due to perforating stab injury to heart. Accordingly, he prepared memorandum (Exh.29) of the post-mortem. He further opined that the above-

mentioned injuries were possible by knife (Art.7) shown to him. In his cross-examination, he denied that the above-mentioned injuries were possible if a person falls on pointed glass during scuffle. The evidence of Dr.Kankute (PW 6) fully corroborates the case of the prosecution that the death of Madhav was homicidal and was the result of perforating injury in the chest caused by a knife.

16. It has come in the evidence of Narayan (PW7) (Exh.32) and Shejal (PW 9) that they prepared panchnama (Exh.33) in respect of spot of the incident and seized the samples of blood stained earth, blood stained pebbles, paper and plain earth from the spot of the incident under the same panchnama.

17. It has come in the evidence of Suresh (PW 8) (Exh.35) and P.S.I. Shejal (PW 9) that on 03.03.2005 at about 4.00 p.m., when the appellant was in the police custody, he gave a disclosure statement and offered to produce his clothes and knife concealed

under the roof of his farm-house. Accordingly, the memorandum (Exh.36) of that statement was recorded. They further state that the appellant took them to his farm-house. He entered into his farm-house and took out a knife (Art.7), full-shirt (Art.8) and full-pant (Art.9), which were stained with blood, from under the tin-roof of the farm-house. They seized the said articles under panchnama (Exh.37). Nothing has been elicited in the cross-examination of these witnesses to doubt their evidence in respect of discovery of above-mentioned articles pursuant to the disclosure statement made by the appellant.

18. The informant as well as Bhagwat (PW 5) identified the knife (Art.7) as the same that was used by the appellant at the time of the incident for causing hurt to the deceased Madhav.

19. The blood stained clothes of the deceased Madhav were also seized. His blood sample was collected. A.S.I. Kashibai (PW 10)(Exh.52) states

that as per the directions of P.S.I. Shejal (PW 9), she carried the seized articles of Crime No.37 of 2005 to the Chemical Analyst with letter (Exh.40). P.S.I. Shejal (PW 9) states that the report (Exh.41) is in respect of the seized articles, while C.A. report (Exh.42) is in respect of the blood sample of the deceased Madhav. The blood group of the deceased Madhav was 'AB'. The knife (Art.7) and pant (Art.8) of the appellant, which were seized at his instance, vide panchnama (Exh.37), were found to have stained with blood of 'AB' group. This is an an additional circumstance to connect the appellant with the incident in question.

20. As stated above, there is direct as well as circumstantial evidence to connect the appellant with the incident in question. The said evidence is quite natural and reliable. The learned trial Judge has rightly appreciated the said evidence and rightly held that the appellant pierced knife in the chest of the deceased Madhav causing him serious injury, to

which he succumbed.

21. Now, the question is whether, the offence of murder made punishable under Section 302 of the I.P.C. has been established against the appellant. From the ocular evidence, it is clear that the altercation and scuffle took place between the appellant and the deceased Madhav on a trivial ground that the appellant refused to pay Rs.20/- to the deceased Madhav against his bet of Rs.10/-, which he had won in the game. It seems that during the course of the scuffle on that count, the appellant, in the heat of passion, stabbed the knife in the chest of the deceased Madhav. It was a single blow of knife. The appellant cannot be said to have taken undue advantage or acted in unusual manner. In the case of **Jagtar Singh** (supra) cited by the learned Counsel for the appellant, the accused, in a trivial quarrel, wielded a weapon like knife and landed a blow thereof in the chest of the deceased Narinder Singh. Considering this fact, it was held that the accused

was liable to be convicted for the offence punishable under Section 304 Part II of the I.P.C. and not under Section 302 of the I.P.C. In the case of **Abani K. Debnath** (supra) cited by the learned Counsel for the appellant, the accused were convicted for the offence punishable under Section 302 read with Section 34 of the I.P.C. It was noticed that the death had been preceded by mutual fight over a trifle matter of grazing of cows. During the course of scuffle, the accused namely Abani Debnath rushed to the spot and gave 'Dao' blow on occipital region of the deceased, who died after five days of the incident. The Doctor opined that the cause of death was head injury and spinal injury in cervical region. It was held that in the facts and circumstances of the case, no offence under Section 302 of the I.P.C. can be said to have been disclosed and consequently, the accused had been convicted for the offence punishable under Section 304 Part II of the I.P.C.

22. In the present case also, there was no premeditation or malice on the part of the appellant prompting him to think of causing death of the deceased Madhav. As a matter of fact, the deceased Madhav and the appellant were friends. The incident took place on a very trivial ground followed by a scuffle. During the course of this scuffle, under the heat of passion, the appellant inflicted a single blow of knife in the chest of the deceased Madhav causing him serious injury, to which he succumbed. In the circumstances, Exception 4 under Section 300 of the I.P.C. would be applicable to the facts and circumstances of the present case, wherein it is stated that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion and without the offender having taken undue advantage or acted in a cruel or unusual manner. We, therefore, hold that the appellant cannot be said to have committed offence of murder made

punishable under Section 302 of I.P.C. The appellant committed culpable homicide not amounting to murder and can be said to have inflicted blow of knife on the chest of the deceased Madhav with the knowledge that it was likely to cause death, but without intention to cause death, or cause such bodily injury as is likely to cause death. Thus, the present case would fall under the four-corners of Section 304 Part II of the I.P.C. The prosecution has established guilt of the appellant beyond reasonable doubt for offence punishable under Section 304 Part II of the I.P.C. Considering the serious consequences of the act of the appellant, we are not inclined to extend him the benefit of Probation of Offenders Act.

23. The appellant was aged of 22 years of age at the time of the incident. He is a married person and has responsibility of his family. The incident took place under the heat of passion during the course of the scuffle without any intention on the part of the appellant to cause death of Madhav. The appellant

does not have any criminal antecedents. In the circumstances, we think fit to show some leniency in the matter of inflicting punishment. However, while showing leniency to the appellant, agonies of the widow and children of the deceased Madhav cannot be ignored. They will have to be given some solace by increasing the amount of fine, which would be paid to them by way of compensation, if recovered. In our view, it would be just and proper to sentence the appellant with rigorous imprisonment for seven years and to increase the amount of fine from Rs.25,000/- to Rs.40,000/-.

24. In the result, we pass the following order :-

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and order of conviction and sentence passed against the appellant for the offence punishable under Section 302 of the Indian Penal Code, are

quashed and set aside. Instead, he is convicted for the offence punishable under Section 304 Part II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.40,000/- (Rs.Forty Thousand), in default to suffer rigorous imprisonment for one year.

- (iii) The appellant shall surrender to his bail bonds before the trial Court, within a period of two weeks from today, for undergoing the sentence passed against him by this order.
- (iv) If the appellant fails to appear before the trial Court within two weeks from today, then the trial Court shall issue coercive process to secure his presence.
- (v) The appellant be given set off in respect of the period of imprisonment suffered by him

in connection with the present case vide Section 428 of the Code of Criminal Procedure.

- (vi) The amount of fine, if recovered, be paid to the widow of the deceased Madhav, namely Mirabai wd/o. of Madhav Awachar, r/o. village Kargaon, Tq. and Dist.Parbhani.
- (vii) The appeal is accordingly disposed of.

[SANGITRAO S. PATIL, J.]

[SUNIL P. DESHMUKH, J.]