

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 48 OF 2013

Abhijit Patil,
Son of Babasaheb Patil,
Major, Indian National,
Resident of Nanu Colony,
Rawanfond, Margao, Salcete, Goa.
Presently lodged as Convict Prisoner
No.106/2013 at Central Jail,
Aguada.

... Appellant

V e r s u s

State of Goa,
Through P.I. Margao Town Police Station,
Margao Town Police Station,
Margao, Goa.
(Above are registered a dresses)

... Respondent

Shri S. G. Desai, Senior Advocate with Advocates Shri Pavithran
A.V. and Shri S. Keny for the Petitioner.

Shri S. R. Rivankar, Public Prosecutor for the Respondent/State.

**CORAM: C. V. BHADANG &
PRITHVIRAJ K. CHAVAN, J J.**

DATE: 7th JULY, 2017.

ORAL JUDGMENT (PER C. V. BHANDANG, J.):

By this appeal, the appellant is challenging the judgment dated 29/4/2013 passed by the learned Sessions Judge at Margao in Sessions Case No. 32/2010/I. By the impugned judgment, the appellant has been convicted for the offence punishable under section 302 of I.P.C. and has been sentenced to

suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for six months.

2. The prosecution case may be briefly stated thus:-

That the deceased, Miss Mushrufia Shaikh alias Muskan and the appellant were both working as receptionists in a Hotel by name Nanutel at Margao. It is said that the appellant was in love with the deceased and the deceased was not inclined to reciprocate. The incident in question has happened on 13/6/2010 at about 16.25 hours opposite Keni Petrol Pump and in front of Shashikant Naik shop, near old bus stand at Margao in which the accused had stabbed Muskan with a knife on the neck and on the other parts of the body, causing her death.

3. On the basis of a complaint lodged by one Noorudin Shaikh (PW.2) an offence under Section 302 of I.P.C, was registered against the appellant. During the course of the investigation the Investigating Officer PSI Santosh Desai (PW.15) recorded statement of the witnesses, drew the spot panchanama of the scene of offence. The inquest panchanama of the dead body of Muskan was drawn and the dead body was sent for post mortem examination. PW.8 Dr. Swetlana Gomes conducted the post mortem examination in which she found as many as 18 stab

injuries on the person of the deceased. The Investigating officer also conducted certain seizures. An identification parade was held by PW.6, S. B. Faria, Special Judicial Magistrate in which the witnesses have identified the appellant to be the assailant. After completion of the investigation, a charge sheet came to be filed before the learned Judicial Magistrate First Class at Margao, which was committed to the Court of Sessions.

4. The learned Sessions Judge framed charge against the appellant for the offence punishable under Section 302 of I.P.C, to which the appellant pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution examined as many as 15 witnesses and produced the contemporary record of the investigation. The appellant neither entered into the witness box nor examined any defence witnesses.

6. The learned Sessions Judge on appreciation of the evidence on record found that it was the appellant who stabbed Mushrufia Shaikh alias Muskan on her neck and other parts of the body with the intention of causing her death and which injuries had ultimately resulted into her death. In that view of the matter, the learned Sessions Judge convicted the appellant for

the offence punishable under Section 302 of I.P.C. and sentenced him as stated above. Feeling aggrieved, the appellant is before this Court.

7. We have heard Shri S. G. Desai, the learned Senior Counsel for the appellant and Shri S. R. Rivankar, the learned Public Prosecutor for the respondent/State. With the assistance of the learned counsel for the parties, we have gone through the evidence and the impugned judgment of the learned Sessions Judge.

8. At the outset it may be mentioned that Shri Dessai, the learned Senior Counsel for the appellant has restricted his challenge in this appeal. It is submitted that the offence, if at all which can be said to be made out against the appellant, would be the one under Section 304 of I.P.C and not under Section 302 of I.P.C., as has been found by the learned Sessions Judge. Shri Desai, the learned Senior Counsel for the appellant submits that the act of the appellant would be covered by Exception 1 and/or Exception 4 to Section 300 of I.P.C. It is submitted that the appellant and the deceased both were in love with each other and the incident in question had happened when the deceased refused to accompany the appellant. It is submitted that there is

evidence of PW.3, the mother of the deceased, which would go to show that on the previous day of the incident there was some exchange of messages between the appellant and the deceased, which the prosecution has not brought on record. In the submission of Mr. Desai, this is a lacuna which has resulted into the appellant being handicapped to bring on record the circumstances in which the incident had occurred and to show that there was a grave and sudden provocation. It is submitted that the failure of the prosecution to bring on record the transcription of these mobile messages, has thus prejudiced the appellant. The learned Counsel has taken us through the evidence of the prosecution witnesses in order to urge that there was some altercation between the deceased and the appellant, in which the deceased had said to the appellant that she will hit him. In the submission of Mr. Desai, this is a provocation grave and sudden enough to bring the offence within the ambit of the Exception 1 to Section 300 of I.P.C. Mr. Desai at one stage submitted that the prosecution failed to prove the motive in this case. It is submitted that in all probability the appellant has committed offence, whilst being deprived of the power of self control and as such, this Court may extend the benefit of Exception 1 to Section 300 of I.P.C. and modify the conviction to the one under Section 304 of I.P.C.

9. Shri Rivankar, the learned Public Prosecutor has submitted that there are as many as 18 injuries found on the person of the deceased. He points out that there is overwhelming evidence to show that the appellant who was carrying the knife was following the deceased and there is eye witness account to show that the even after the deceased fell down, the appellant continued with his assault. The learned Public Prosecutor was at pains to point out that this is a case of a premeditated assault showing depravity. It is submitted that the offence under section 302 of I.P.C is clearly made out. The learned Public Prosecutor submits that incidents of the present nature are on a rise and perpetrators in such cases have to be dealt with sternly.

10. We have given our anxious consideration to the circumstances and the submissions made and we do not find that any case for interference is made out. Although, the learned Senior Counsel for the appellant has restricted his submissions in so far as the modification of the conviction to the one under Section 304 of I.P.C. is concerned, it would be necessary to briefly examine the nature of the evidence led and the circumstances in which the incident has occurred in order to find out the offence, for which the appellant can be held guilty of.

11. The prosecution in this case has examined in all four eye witness namely, (PW.1) Shaikh A. Kadar, (PW.9), Mohan Chari, (PW.12), Altaf Kalmani and (PW.13), Rajendra Naik.

(PW.1) Sheikh Abdul Kadar is the bus driver of a mini bus on the route from Gogol Housing Board heading to the bus stand. He states that once in a month for one week, his route is from KTC bus stand to old bus stand and then to a place called Khargil in Maina Curtorim. He states that on 13/6/2010, he was operating the bus on Khargil route. He came to the old bus stand at 16.25 hours to proceed to Khargil. He parked his vehicle and alighted from the bus when he noticed that one girl who used to work in Nanutel hotel, Margao and whom this witness was knowing by face was entering his bus with one boy who was following her. Then this witness went for tea when he heard shouts and when he came back he saw that the girl had fallen on the road and the boy was "sitting on her" and was stabbing her with a knife. He claims that he caught the boy's hand and pulled him back and some other persons also came to his help. He then went and brought a spanner. The boy asked this witness not to interfere, however seeing his spanner, the boy ran towards the old bus stand. He was caught hold of and was handed over to the police. This witness has stated that, prior to the date of the incident, he had seen the appellant on two or three occasions,

who used to sit next to the said girl in the bus.

12. (PW.9) is a motorcycle pilot by profession. He states that on 13/6/2010 at about 4.15 p.m. he was waiting for a customer at the State Bank of India stand, when one girl came towards him and asked him to drop her. She was wearing a yellow colour chudidhar, she was followed by a boy, who came near her and stabbed her in the stomach. This witness claims that even after the girl fell on the ground the boy further stabbed her about 8 times on the neck and other parts of the body and a lot of people had gathered at the spot.

13. (PW.12), Altaf Kalmani is an employee working at Umesh Keni Petrol Pump at Margao, near Fatima Convent High School at Margao. This witness states that on 13/6/2010 at about 4 to 4.30 p.m., he was at the petrol pump when he heard shouts of a girl and found that the appellant was stabbing the girl with knife, who was lying on the road. This witness claims that the appellant stabbed the girl with a knife about 5 to 6 times on her body including stomach, neck and back.

14. (PW.13), Rajendra Naik is running a shop near old bus stand at Margao, near State Bank of India, opposite Keni Petrol

Pump. He states that on 13/6/2010, he was in his shop. At about 4.20 to 4.30 p.m., he heard shouts of one girl from the place where the motorcycle pilots used to stand. He claims that a boy was stabbing a girl with a knife near the motorcycle pilot.

15. In this case, an identification parade was conducted by PW.6, S. B. Faria, Special Judicial Magistrate. In the identification parade, the aforesaid eye witnesses have identified the appellant to be the assailant of Muskan. The cross examination of eye witnesses is mostly confined to challenge the identification aspect. The evidence about the identification parade has not been challenged before us. The appellant was apprehended with the blood stained clothes on his person.

16. Dr. Svitlana Gomes, (PW.8) had conducted the post mortem examination on the dead body of Muskan. She found the following external injuries on the person of the deceased:

Sr. No.	Nature of Injuries	Causative weapon	Ante/post mortem
1.	Defence stab injury of 4 x 1 ¼ cms. On the outer aspect of the upper arm.	sharp	Fresh and ante-mortem
2.	Red bruise of 5 x 3 cms. On the palm	blunt	Fresh and ante mortem
3.	A stab injury of 3 x 1.5 x 5 cms deep on the left side of the neck and it	sharp	- do -

	has cut the underlying blood vessels and muscles		
4.	A stab injury of 2x1x2 cms. On the outer aspect of the neck.	- do -	- do -
5.	A deep stab injury of 1.5 cms x 1 x 3cms on the right front of the shoulder.	- do -	- do -
6.	A stab injury 3 x 1.5 x 5 cms on the right angle of the jaw bone.	- do -	- do -
7.	Penetrating stab injury of 3 x 1 cm on the right upper half of the neck with an exit injury of 4 cms. Behind the outer aspect of the injury.	- do -	- do-
8.	A stab injury of 2.5 x 1.5 cms. Deep up to the right back of the scalp.	- do -	- do -
9.	A stab injury of 1.5 x 1 x 2cms deep, behind right ear.	- do -	- do -
10	A stab injury of 2.5 x 1 x 5 cms. Deep directed from below upwards up to the posterior aspect of the occipital bone.	- do -	- do -
11.	A penetrating stab injury of 4 x 1.5 x 6 cms. Deep from the left anterior front the left anterior front of the neck, and 3 cms. Anterior from the breast and 3 cms. from the mid line.	- do -	- do -
12.	A stab injury of 2.5 x 2 x 6 cms. Deep on the left lower front of the breast.	- do -	- do -

13.	A stab injury of 3.5 x 2 cms on the outer aspect of the breast.	- do -	- do -
14	A stab injury of 2 x 1 x 6 cms. deep from left to right and upwards of the left epigastric region of the abdomen	- do -	- do -
15.	A stab injury of 2.5 x 1 cms. of the left abdominal region, 3 cms. from the naval.	- do -	- do -
16.	A stab injury of 3 x 1 cms., 3 cms below the naval.	- do -	- do -
17.	A stab injury on the right pelvic front and 9 cms below the naval.	- do -	- do -
18.	A stab injury of 2.5 x 1.5 cms. On the right coastal aspect of the chest	- do -	- do -

In her opinion, the cause of death was due to hemorrhagic shock as a result of multiple stab injuries, which were fatal in the ordinary course of nature. She has proved the post mortem report (Exhibit 33).

17. The question is whether the act of the appellant can attract Exception 1 or Exception 4 to Section 300 of I.P.C and in our opinion the answer has to be in the negative. Exception 1 and Exception 4 to Section 300 I.P.C may be reproduced thus:

Exception 1- When culpable homicide is not

murder- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisions-

First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly- that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation - It is immaterial in such cases which party offers the provocation or commits the first assault.

18. It can thus be seen that under Exception 1, culpable homicide is not murder, if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or of any other person by mistake or accident. The first proviso to Exception 1 would indicate that such provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. The 'Explanation' annexed to Exception 1 to Section 300 of I.P.C, would indicate that the question whether, the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

19. Under Exception 4, culpable homicide is not murder, if it is committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or usual manner.

20. We would now examine the contentions raised on behalf of the appellant in the context of the circumstances and the evidence on record. Under Exception 1, it has to be shown that, in the first instance, there was a grave and sudden provocation, coming from the deceased and secondly such

provocation was grave and sudden 'enough', to prevent the offence from amounting to murder. This later aspect would predominantly depend upon the facts and circumstances of each case. In the present case, we find that there is no evidence of any provocation as such forthcoming from the deceased, which can be gathered from the evidence of the eye witnesses, much less, any such provocation being grave and sudden 'enough' to prevent the offence from amounting to murder within the meaning of the explanation to Exception 1 of Section 300 of I.P.C. The learned Senior Counsel for the appellant has strenuously urged that PW.3, Zainb Bi Shaikh has stated in her evidence that on the previous day of the incident, the deceased had received some messages on her phone during the night at about 8.30 pm and when she had inquired with the deceased as to who had sent those messages, the deceased had told that it was the appellant who had sent the messages. It is submitted that the prosecution has failed to bring on record these messages which would have indicated, the circumstances as to whether there was any grave and sudden provocation forthcoming from the deceased. In our considered view, the submission cannot be accepted. Even assuming that there were some messages exchanged between the appellant and the deceased on the previous night of the incident i.e at about 8.30 p.m., such messages cannot form the

basis of any grave and sudden provocation the following day at 4.30 p.m. Exception 1 envisages a provocation which is grave and sudden i.e on the spur of the moment on account of which a person may be deprived of the power of self-control. We also find that all that PW.3 has stated is that the appellant had sent some messages, which were received by the deceased. The evidence of PW.3 does not show that there were any messages sent by the deceased to the appellant, which in a given case can be of a provocative nature. Even assuming that there were any such messages sent, that in our considered view cannot amount to grave and sudden provocation for an incident on the following day. In fact, the evidence shows that the appellant has committed the offence with premeditation. He was following the deceased with a knife in his possession. A submission was made on behalf of the appellant that the appellant was usually carrying a knife. That can hardly be a justification. The fact remains that the appellant, had followed the deceased with a knife and has brutally assaulted her in broad day light in a public place. Thus, we find that there is no evidence that any provocation was offered by the deceased, much less, any grave and sudden provocation which is enough to prevent the offence from amounting to murder, within the meaning of the Explanation to Exception 1 of Section 300 of IPC.

21. Even so far as Exception 4 is concerned, the same cannot come to the aid of the appellant for more reasons than one. Exception requires 4 ingredients to be satisfied (i) that there was a sudden fight (ii) that there was no premeditation (iii) the act was done in a heat of passion (iv) the assailant had not taken any undue advantage or acted in a cruel or unusual manner. In the present case, we find that there is a clear evidence to show that the appellant had done the act with premeditation in as much as, he had followed the deceased with the weapon, namely the knife in his possession. There is absolutely no evidence to show that there was any sudden fight or that the act was done in a heat of passion. The learned Counsel for the appellant urged that there was a mutual love relationship between the appellant and the deceased and in all probability, on account of the refusal by the deceased that the appellant might have committed the act, which according to the learned counsel for the appellant should be treated as having done in a heat of passion. We would tend to disagree. At the cost of repetition, it needs to be stated that there is no evidence of any sudden fight or the act being done in a heat of passion. On the contrary there is enough evidence to show that it was a premeditated act. The fourth requirement is about the assailant not having taken undue advantage or having acted in a cruel or unusual manner. The learned counsel for the appellant

has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Surinder Kumar Vs. Union Territory, Chandigardh, (1989) 2 SCC 217**, in order to submit that the number of wounds caused during the offence is not decisive factor, but what is important is that the occurrence must be sudden and unpremeditated and the offender must have acted in a fit of anger (see para 7).

22. In the case of **Surinder Kumar** (supra), there was a heated exchange in which PW.2 was alleged to have showered filthy abuses and had threatened to throw out the utensils and lock the kitchen. The appellant accused got enraged, went into the kitchen and returned with a knife and inflicted single blow on the neck of PW.2 and three blows on Nityanand, as a result of which Nityanand died. It can thus been seen that in the peculiar facts of that case, the benefit of Exception 4 was given to the accused. In our view the present case is distinguishable. There is evidence that the appellant continued to assault the deceased even after she collapsed and was lying on the street in a pool of blood. Thus, in our view the forth requirement, namely that of the appellant having not taken undue advantage or acted in a cruel or an unusual manner, is not satisfied in this case so as to extend the benefit of Exception 4 of Section 300 of I.P.C.

23. It was faintly submitted on behalf of the appellant that the prosecution has not proved motive. In the first place, there is enough evidence to establish motive in this case namely, the appellant being in love with the deceased and the deceased not reciprocating the advances. That apart, it is trite that in a case where there is evidence of the eye witnesses, the presence of motive falls into insignificance. We find that there is overwhelming evidence as to the occurrence of the incident forthcoming from the eye witnesses to establish complicity of the appellant in the offence.

24. We have carefully gone through the impugned judgment and we do not find that it suffers from any infirmity so as to require interference. In the result, the Appeal is hereby dismissed.

PRITHVIRAJ K. CHAVAN, J.

C. V. BHADANG, J.

Ap/