

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

CRIMINAL APPEAL NO.310 OF 2014

Mohan Maruti Nasare,
Age : 22 years, Occ. Driver,
r/o. Shakti Grocery shop,
Tukde Layout, Behind Nagpur
Medical College and Hospital,
Ajani, Nagpur

..Appellant

Vs.

The State of Maharashtra,
Through Rural Police Station,
Laatur, Tq. Latur

..Respondent

Mr. M.A.Tandale, Advocate for appellant (appointed)

Mrs. D.S.Jape, APP for respondent

**CORAM : T.V. NALAWADE AND
R.G. AVACHAT, JJ.**

DATE : SEPTEMBER 03, 2019

JUDGMENT (PER R.G. AVACHAT, J.) :-

This is an appeal from conviction. The appellant has been convicted for the offence of murder and therefore, sentenced to suffer life imprisonment and pay a fine of Rs.500/- by the judgment and order

dated 07.01.2014 passed by learned Sessions Judge, Latur in Sessions Case No.32 of 2013.

2. The facts, in brief, are as under :-

Prashant (deceased) was in transport business. He owned a tempo bearing registration No.MH-32-Q-2362. The deceased himself would drive the said tempo. He had employed the appellant as a Cleaner on the tempo.

On 18.12.2012, the duo (the deceased and the appellant) were proceeding in the tempo along Latur-Nanded road. They went to a roadside hotel/Dhaba - 'Radhika Lunch Home', within the limits of village Kolpa, Tq. and Dist. Latur. After taking their meals, both of them were sitting on a cot (*Baaj*) in the front yard of the Dhaba. An altercation ensued between the two. The appellant assaulted the deceased with a wooden plank. As a result of the assault, the deceased failed on the ground. The appellant took up a tile (*Shahabadi Farshi*) ad-

measuring 60 cm. x 46 cm. x 3.5 cm. and dropped it onto the head of the deceased. As a result, the deceased died on the spot.

A waiter of the Dhaba informed the said fact to PW 1 – Nandkishor, Police Patil, of village Kolpa. He rushed to the Dhaba and after having seen the scene, he contacted the Police Station, Latur, on telephone and gave report of the incident.

3. Based on the report given by PW 1 – Nandkishor, FIR (Exh.3) came to be registered vide C.R. No.166 of 2012. PW 4 – Anwar Khan, Police Inspector, attached to the Police Station, Latur, rushed to the scene of the offence. Inquest on the dead body was conducted under panchnama (Exh.27). The scene of offence panchnama (Exh.26) was drawn. Statements of the persons acquainted with the facts and circumstances of the case came to be recorded. The dead body was subjected to post-mortem examination. The appellant came to be arrested on the spot. Clothes on the person of both appellant and

deceased were taken charge of. The articles namely, tile and three pieces of the plank were also taken charge of. Blood samples of both appellant and deceased were obtained. All these articles came to be chemically analysed. Reports thereof were received. On completion of the investigation, the appellant came to be proceeded against by filing charge-sheet before the Court of Judicial Magistrate, First Class.

4. Learned Judicial Magistrate, First Class, committed the case to the Court of Sessions for trial. Learned Sessions Judge framed charge (Exh.4). The appellant pleaded not guilty. His defence was of total denial. In his examination-in-chief under Section 313 of the Code of Criminal Procedure, the appellant came with a case that there was one truck stationery out side the Dhaba. The deceased was abusing some persons working on the said truck. The appellant had gone to ease himself behind the Dhaba. At that time, he heard cries of the deceased. He, therefore, rushed towards the truck to find the

deceased lying in the injured state and assaulters fleeing away.

5. To sustain the Charge, the prosecution examined ten witnesses. Two of them, gave eye-witness account. On appreciating the evidence in the case, the Trial Court found it to be a case of murder and not of culpable homicide not amounting to murder.

6. Heard Mr. Tandale, learned Counsel, who was appointed to represent the appellant, and Mrs.Jape, learned APP for the respondent.

7. Mr.Tandale, learned Counsel for the appellant, would submit it to be a case of culpable homicide not amounting to murder, punishable under Part II of Section 304 of the Indian Penal Code ("I.P.C.", for short). According to him, the appellant did not have an intention to eliminate the deceased. A sudden quarrel erupted between the two. The appellant might have lost power of self control and assaulted the deceased. The offence did not take

place with premeditation. It took place in a sudden fight in a heat of passion upon sudden quarrel. In support of his contentions, learned Counsel has relied on certain judgments in the cases of (i) **Cherlopalli Cheliminabi Saheb and anr. Vs. State of A.P., AIR 2003 SC 1014;** (ii) **Mavila Thamban Nambiar Vs. State of Kerala, (2009)17 SCC 441;** and (iii) **Dinesh s/o. Ganesh Deshpande and ors. Vs. State of Maharashtra, 2005 All.MR.(Cri.) 144.**

8. Learned APP would, on the other hand, submit that it is a case of murder. The trial Court has, therefore, rightly convicted the appellant. Thus, learned APP supports the impugned judgment and order.

9. We have considered the submissions advanced on behalf of the appellant and the respondent – State. Perused the record. Admittedly, the incident took place in front of a roadside Dhaba. Both the appellant and the deceased had been to the Dhaba to take meal. PW 2 – Ganesh, owner of Dhaba, and PW 3 –

Shivaji, a waiter in the Dhaba, claimed to have witnessed the incident. The evidence of both these witnesses is to the effect that the appellant and the deceased, after taking their meals, were sitting on a wooden cot (*Baaj*) in the front yard of the Dhaba. Some altercation took place between the two. The appellant pushed the deceased off the cot and assaulted him with a wooden plank lying in the nearby. The evidence indicates that the wooden plank was thick. Still the plank broke into three pieces as a result of beating. As soon as the deceased fell to the ground, the appellant took up a full size *Shahabadi Farshi* and dropped it onto the head of the deceased. As a result thereof, the deceased died on the spot. Although both these witnesses (PW 2 – Ganesh and PW 3 – Shivaji) were subjected to searching cross-examination, nothing could be elicited to doubt veracity of their evidence.

10. Police Patil of the village (PW 1) rushed to the scene of offence in response of a telephonic

call. He lodged the FIR (Exh.3). In response to the telephonic information, PW 4 – Anwar, the Police Inspector, rushed to the scene of offence along with his assistant. The scene of offence panchnama (Exh.26) was drawn. The panchnama delineates that the deceased was lying dead.

11. The appellant was taken into custody at the spot itself. The article namely, *Shahabadi Farshi*, three pieces of the wooden plank, etc., were taken charge of. As stated above, the clothes on the person of the deceased and the appellant as well, were seized. Blood samples of the duo were obtained. These articles were subjected to chemical analysis. The C.A. reports are at Exh. PW 6 – Dr.Swapnil Aakhade, conducted post-mortem. The post mortem report (Exh.30) indicates the deceased to have suffered the following injuries :-

(1) Contused lacerated wound extending from right occipital region to right temporal region of scalp of size 8.5

cm. x 2.5 cm. x 0.4 c.m, red in colour, hair bulbs, crushed on margins of wound.

(2) Contused lacerated wound behind right ear and 2 cm. below right mastoid of size 2 cm. x 0.8 cm. x 3 cm, red in colour.

(3) Contusion of size 10 cm. x 4 cm extending from right suprascapular region to middle 1/3rd of medial border of right scapular region, bluish purple in colour.

(4) Contusion of size 12 cm. x 10 cm. on left side of face extending from forehead to left cheek, bluish in colour.

12. PW 6 – Dr. Swapnil opined that the deceased died of head injuries associated with contusion on right kidney. The trial Court has rightly appreciated the evidence in the case. On re-appreciation of the evidence, we do not have any reason to resile from the conclusion drawn by the Trial Court, that as a result of the assault, the deceased died. It is a

case of culpable homicide. The question is, whether it is a case of culpable homicide not amounting murder.

13. Section 300 defines 'murder' as under :-

"300. Murder - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly. - If the person committing the act knows that it is so imminently

dangerous that it must, in all probability, cause death or such bodily as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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 provisos :-

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.-

Thirdly.-

Exception 2.

Exception 3.

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.

Exception 5 -

14. Section 105 of the Evidence Act, reads thus:-

105. Burden of proving that case of accused comes within exceptions.- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

15. The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by

Section 105, the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under Section 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the Court, after due consideration of

the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly, (**Vijayee Singh and ors. Vs. State of U.P., AIR 1990 SC 1459**).

16. Here, the appellant came with a case of denial. His defence is, as has been stated herein above. True, the facts and evidence in the case by themselves may bring the case constituting an offence of culpable homicide not amounting to murder.

17. However, re-appreciation of the evidence in the case would indicate that there was an altercation between the appellant and the deceased. The appellant did not give details, as to how and why altercation took place. There is also nothing to indicate the deceased to have had assaulted the appellant first. It was the appellant, who took up a thick wooden

plank and gave its number of blows on the head, a vital part of the body of the deceased. The deceased failed to the ground. The appellant picked up a full size *Shahabadi Farshi* and dropped it onto the head of deceased, due to which the deceased died instantaneously. The number of injuries on the person of the deceased, use of full size *Shahabadi Farshi* and smashing the head of the deceased therewith, lead us to conclude that the case of the appellant falls under Clause II of Section 300 of the I.P.C. The same indicates the appellant to have had intention of causing such bodily injuries, which is likely to cause death of the deceased. The appellant appears to have acted in a cruel and unusual manner. There is nothing to indicate the appellant to have lost his self-control by sudden provocation, so as to bring his case within the 'Exception 1' or 'Exception 4' to Section 300 of the I.P.C.

18. We have carefully perused the authorities relied upon. We found them to be quite

distinguishable on the facts and appreciation of the evidence in the case. Consequently, the appeal fails. The same is, therefore, dismissed.

19. Fees of learned Counsel, who has been appointed to represent the case of the appellant, be paid as per the rules.

[R.G. AVACHAT, J.]

[T.V. NALAWADE, J.]

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