

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 2 OF 2019

Mr. Joseph Yemmiganoor @ Kadakoti, son of Mr. Balraj Yemmiganoor @ Kadakoti, major in age, r/o Near Sulabh Toilet, Varunapuri, Vasco-Da-Gama, Goa.

N/o District Kurnool, Alur PS, Andhra Pradesh and presently lodged in Central Jail Colvale as Convict Prisoner No. 134/2014.

.... Appellant

Versus

1. State, Through Police Inspector, Vasco Police Station, Vasco, Goa.
2. Public Prosecutor, High Court of Bombay, Panaji, Goa.

.... Respondents

Mr. Pavithran A.V., Advocate for the Appellant.

Mr. S.R. Rivankar, Public Prosecutor for the Respondents.

Coram:- M.S. SONAK &
SMT. M.S. JAWALKAR, JJ.

RESERVED ON: 3rd January, 2020

PRONOUNCED ON: 14th January, 2020

JUDGMENT: (Per Smt. M.S. Jawalkar, J.)

Heard learned Advocate Pavithran A.V. for the appellant and Mr. Rivankar, the learned Public Prosecutor for the State, respondents.

2. Present Appeal is preferred against the judgment and order dated 13.06.2014 passed by the Additional Sessions Judge-1, FTC-1, South Goa at Margao in Sessions Case No. 28/2013, convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life and to pay a fine of Rs.10,000/-.

3. Prosecutions case in short is that on 25.08.2013 at 14:30 hours in House No. 353(1), Varunapuri, Vasco-Da-Gama, the accused, who is the husband of the complainant, assaulted her with slaps and fist blows, threatened her of consequences and further poured hot water on her body with an intent to kill her, thereby causing severe burn injuries and thereafter on 01.09.2013, the complainant while undergoing treatment at GMC, Bambolim, succumbed to her injuries, therefore the accused committed an offence punishable under Section 302 of the Indian penal code (IPC).

4. Charge against the accused has been framed under Section 302 of the IPC. On 10.12.2013, upon accused pleading “not guilty”,

the trial commenced, in which, the prosecution examined in all 12 witnesses. Thereafter, the statement of the accused under Section 313 of the Criminal Procedure Code (Cr.P.C.) came to be recorded. The accused/appellant herein neither examined himself nor any other witness in his defence. The learned Sessions Judge, vide impugned judgment and order dated 13.06.2014, has convicted the appellant for the offence under Section 302 of IPC and sentenced him to life imprisonment as aforesaid. Hence, the present Appeal.

5. Learned Advocate Mr. Pavithran for the appellant mainly challenged the judgment and order on the ground that the learned Sessions Judge totally failed to appreciate the evidence on record in its proper perspective and arrived at wrong conclusions. Firstly, the learned Sessions Judge failed to appreciate that the deceased died not on account of burn injuries, but, due to lack of medical treatment at GMC. There is evidence to that effect. Secondly, the learned Sessions Judge has failed to appreciate that there was no intention of whatsoever nature, on the part of the appellant to kill the deceased, as the

appellant was having good relation with the deceased and there was no previous enmity with her. It is submitted that the learned Sessions Judge failed to appreciate the conduct of the appellant previously and after the incident. Thirdly, the learned Sessions Judge totally erred in treating the statement made by the deceased to PW-6 Nisha Tumbare, who was an emergency medical technician on the ambulance, as “extra judicial confession” and the provision is wrongly applied. Fourthly, the learned Sessions Judge has wrongly held that the appellant has committed the offence under Section 300 of IPC and has failed to consider the ingredients of the said Section for convicting the appellant under Section 302 of IPC. He further contended that even if, it is presumed that dying declarations by the victim are duly proved, still the act of the appellant cannot be held as the act of culpable homicide amounting to murder.

6. Mr. Rivankar, the learned Public Prosecutor has per contra submitted that the judgment and order, convicting the appellant for the offence under Section 300 of IPC, is principally justified in view of

the dying declarations made by the victim. It is submitted that the appellant knowing well that his act of pouring hot water on the person of the deceased, may cause death and this act of pouring water was not immediately after quarrel. In view of that the learned Sessions Judge after considering the evidence on record was justified in holding that the accused had motive and intention to kill the deceased.

7. The learned Counsel for the appellant fairly conceded that there is no dispute about the reason for the fighting between the appellant and the deceased i.e. the appellant was asking his wife to have meals in one plate being an auspicious day for couples and she refused the same. Therefore, at the most, it can be said that in heat of anger, he has committed the alleged act. However, there was no premeditation or intention to kill his wife. It is further submitted that the act at the most, falls under Section 304 Part II and exception excepted under Section 300 of IPC. There are exceptions excepted under Section 300 of IPC for the act amounting to culpable homicide as murder. Said act of appellant covers under exception 4 of Section

300 of IPC, which reads 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 injury 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 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.”

8. The learned Counsel for the appellant in support of his contention submitted that the injuries caused to the deceased were not sufficient to cause death in ordinary course of nature and the cause of death is due to lack of medical treatment, thereby, causing infection. The learned Counsel for the appellant took us to the evidence of PW-9, Dr. Andre V. Fernandes, wherein, he has specifically stated in his examination in chief that the cause of such injury is due to the result of surgical procedure. He further submitted that the cause of death was certified as due to septicemic shock as a result of infected body surface scalds. The incident took place on 25.08.2013 and she died on 01.09.2013. It is admitted fact that there were around 30% burn injuries. Only on this back drop, the burn injuries cannot be said to be the reason for the death of the victim. In cross, the said witness also admits that infection can only be detected by blood culture report and it can be detected by looking at the burn injuries with naked eyes. He further pointed out that there is neither any suggestion by the prosecution to this witness that as to whether the injuries caused to the patient were sufficient in ordinary course of nature to cause death, nor

this witness has deposed that those injuries were sufficient to cause death in ordinary course of nature. The learned Counsel has relied on citation (1976) 2 SCC 788 in the case of **Jayaraj Vs. State of Tamil Nadu**, wherein the Hon'ble Apex Court held that:

“It was incumbent on the prosecution to question the medical witness specifically as to whether all or any of the injuries found on the deceased was sufficient to cause death in the ordinary course of nature. But this was not done. Also death resulted after nine or ten days during which the deceased was operated upon in the hospital. So the prosecution had failed to prove beyond all manner of doubt that this injury on the abdomen of the deceased, was sufficient to cause death in the ordinary course of nature. The act of the appellant did not amount to murder, the nature of the offence committed would be culpable homicide not amounting to murder.”

9. The learned Counsel also relied on citation **2000 CRI. L.J. 2389** in the case of **Sham Madhavrao Rupvatte Vs. State of Maharashtra**, wherein the Bombay High Court in similar set of facts held that the death occurred after more than 1½ months after the

incident. There is no evidence to the effect that her injuries were sufficient in ordinary course of nature to cause death. It was held that clause “thirdly” of Section 300 of IPC would be inapplicable. The accused could be said to have knowledge that by committing the said act, he was likely to cause her death in terms of clause “thirdly” of Section 299 of IPC. Therefore, the conviction was altered from one under Section 300 of IPC to Section 304 Part II of IPC.

10. These rival contentions of both the parties now fall for our consideration.

11. It is admitted fact that all the witnesses have not supported the prosecution case. We need not go into the facts of a homicidal death or the panchanamas of recovery of clothes of the deceased or the spot of incident. Insofar as the dying declarations are concerned, we do not see any reason to interfere in the finding recorded by learned Sessions Judge. There is no reason to disbelieve the same as part of the said dying declarations is also the statements of the accused i.e. the

reason for their fight and altercation. It is submitted by the learned Counsel for the appellant that when the four witnesses are turned hostile, the benefit of doubt must be given to the accused. The learned Public Prosecutor, Mr. S.R. Rivankar as against this, has relied on citation (2017) 1 SCC 529 in the case of **Ramesh & Others Vs. State of Haryana** and submitted that the witness turning hostile may be described as “culture compromise”. During trial, compromise acts as a tool in hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. It is submitted by the learned Public Prosecutor that the dying declaration is a substantive piece of evidence and may form sole basis of conviction, if found liable, even if some witnesses turned hostile. Now the question before us is whether the act of the appellant is to be considered as culpable homicide amounting to murder or not amounting to murder.

12. It is well settled position of law that culpable homicide under Section 299 of IPC consists in the doing of an act (i) with the

intention of causing death (ii) with the intention of causing such bodily injury as is likely to cause death (iii) with the knowledge that the act is likely to cause death. If “Intent” and “Knowledge” as the ingredients of Section 299 postulate the existence of a positive mental attitude and this mental condition contemplates is the special *mens rea* necessary for the offence. The first two condition contemplates the intention of causing death of the person and the intention for causing of an injury as is likely to cause his death. The knowledge is the third condition contemplating the knowledge of likelihood of the death of the person. The first clause of Section 300 of IPC reproduces the first part of Section 299 of IPC. Therefore, ordinarily, if the case falls within clause 1(a) of Section 299 of IPC, it would amount to murder. However, if one of the special exception under Section 300 of IPC applies for the offence, it would be culpable homicide not amounting to murder.

13. In the present case, there is nothing on record to show that there was premeditation or any intention to kill the victim nor there is

any record to show that the injuries suffered by the deceased were sufficient to cause death in the ordinary course of nature. It is also a fact on record as per victim and accused that there was fight between the deceased on refusal by victim, accused got enraged. Thus, neither there was any premeditation nor intention to kill. Therefore, it will fall under exception 4 of Section 300 of IPC. This exception deals with the situation where culpable homicide is not amounting to murder, if it is committed without premeditation in a sudden fight in a heat of passion upon a sudden quarrel and without the appellant having taken undue advantage or acted in a cruel or unusual manner. The material on record suggests that the assault took place in the course of sudden fight in heat of passion upon a sudden quarrel. In view of this evidence on record, the learned Sessions Judge ought not to have convicted the appellant under Section 302 of IPC, but, rather conviction was to be under Part II of Section 304 of IPC. Though, the act of the appellant was done with the knowledge that it was likely to cause death of his wife, the same was without any intention to cause death or cause bodily injuries, so as to likely to cause death. As the act

is committed without premeditation and in a sudden fight in a heat of passion upon a sudden quarrel, the act falls under exception 4 to Section 300 of IPC to treat culpable homicide as murder.

14. Though, the accused has taken up a plea that he was not present when the incident took place and he was out of the house to purchase grocery as per the demand of his wife, however, the burden of proving plea of “alibi” was on this accused. However, the accused has not examined himself nor any witness in his defence. There is no reason to disbelieve the dying declarations of the victim. Witness no. 1, 2, 3 and 5, who are the relatives and the neighbours of the complainant, examined by the prosecution, but those are declared as hostile witnesses and there is no consistency in their evidence with regard to presence or absence of the accused at the time of the incident. However, there are other evidence on record and specifically in view of the dying declarations, there is no doubt that the accused was present prior to the incident and at the time of incident. It was accused, who ought to have been established by cogent evidence to rebut the

evidence against him, of his presence at the time of the incident in the house.

15. Insofar as the extra judicial confession, as held by the learned Sessions Judge is concerned, we are of the considered opinion that the learned Sessions Judge has totally erred in applying the provisions of the “extra judicial confession”. The learned Sessions Judge has treated the statement made by the victim to PW-6, Nisha Tumbre, who was the emergency medical technician on ambulance, as extra judicial confession. The dictionary meaning of the word “confession” is a formal statement admitting one guilty of a crime or any wrong or illegality. There was no question of the victim making any confession. Not only this, the learned Sessions Judge has relied on citations without applying its mind, though the statements were made by the accused in the said citations and not by the victim. We totally agree with the learned Counsel for the appellant that there is no extra judicial confession on record. The provisions under the Evidence Act under caption “admissions”, when are relevant to the facts in issues,

“confession” is explained and when it is admissible and when it is not is explained in Evidence Act. So confession always relates to the person, who commits an illegality and not in respect of the statement made by any other persons. As such, we hold that finding of learned Sessions Judge to that extent is totally illegal and erroneous.

16. It is also pointed out by the learned Counsel for the appellant that the learned Sessions Judge held that there is admission on the part of the accused in statement recorded under Section 313 of Cr.P.C. The learned Sessions Judge reproduced the answer to question 200 in para 79 of the judgment. However, we do not see that there is any admission on the part of the accused about any commission of offence or his presence on the spot at the time of incident as is alleged. However, on considering the other evidence on record, it is beyond doubt proved that he was present at the time of the incident, though not admitted by him. It is a matter of record that the deceased sustained 30% to 36% burn injuries. She was admitted on 25.08.2013 and died on 01.09.2013. The medical evidence suggests that there was

severe infection on the whole body and the cause of death was showed as due to septicemic shock as a result of infected body surface scalds. In view of the fact that there was no suggestion to the Doctor nor the Doctor conducting the autopsy deposed that the injuries caused to the victim was sufficient in the ordinary course of nature to cause death, learned Trial Judge ought to have held that injuries were not sufficient to cause death in ordinary course of nature. Considering the other evidence on record, the appellant ought not to have been convicted under Section 302 of IPC, but rather conviction was called for under Part II of Section 304 of IPC. This is because though the act of the appellant was done with the knowledge that it was likely to cause death of his deceased-wife, the same was without any intention to cause death. There was no premeditation or motive. The act committed by the accused/appellant in sudden fight between the husband and the wife, which is excepted under exception 4 to Section 300 of IPC being culpable homicide amounting to murder. Therefore, the conviction is liable to be set aside under Section 302 of IPC and is required to be substituted with the conviction under Section 304 Part II of IPC.

17. We do not see any reason to interfere with the order for payment of fine of Rs.10,000/- and in default sentence of six months of simple imprisonment. Accordingly, we dispose off this Appeal by making the following order:

O R D E R

- (i) The Appeal is partly allowed.
- (ii) The conviction of the appellant under Section 302 of IPC is set aside and is substituted by conviction under Section 304 Part II of IPC.
- (iii) The appellant shall now suffer rigorous imprisonment of 10 years and pay fine of Rs.10,000/- and in default to undergo six months of simple imprisonment.
- (iv) The appellant is entitled of benefit in terms of Section 428 of Cr.P.C.
- (v) The impugned judgment and order stands modified accordingly.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.