

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 744 OF 2017

Subhash Ramji Kumbhar,
Age : Adult, Occ: Labour,
R/at, Sopan Pawar Chawl,
Near Hanuman Temple, Thergaon,
Gaonthan, Thergaon, Pune and
Survey No. 34/2.2, Shastrinagar,
Rahatni, Pune. ... Appellant.
(Yerwada Central Prison)

V/s.

State of Maharashtra. ... Respondent.
Through Hinjewadi Police Station, Pune.

Mr. Sushil Inamdar, advocate appointed for appellant.

Ms. M.H. Mhatre, APP for the State.

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**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

**RESERVED ON : SEPTEMBER 25, 2020.
PRONOUNCED ON : OCTOBER 6, 2020.**

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The Appellant herein questions the Judgment and Order dated 24/4/2017 passed by the Additional Sessions Judge, Pune in Sessions Case No. 936 of 2013, thereby convicting the appellant for

offence punishable under section 302 and 504 of the Indian Penal Code and sentencing him to suffer Imprisonment for life and to pay fine of Rs. 10,000/- I.d. to suffer R.I. for 6 months.

2 The factual matrix of the case in a nut shell is follows :

P.W. 1 Mr. Pawar happens to be owner of the premises in which the appellant was living as a tenant alongwith his wife Vaishali and children. P.W. 3 happens to be the neighbour of the appellant. His house is adjacent to the house of the appellant. P.W. 4 Nitin Pawar is the son of P.W. 1. He owns a rickshaw. On 4th August, 2013 P.W. 3 Ramzan Loni had telephonically called upon P.W. 1 at about 1.45 p.m. and informed him about quarrel ensued between the appellant and his wife. He further informed P.W. 1 that the appellant had stabbed his wife Vaishali and that he was detained by the people living in the neighbourhood in order to restrain him from fleeing away. Upon receiving the said information, P.W. 1 alongwith his son Nitin(P.W. 4) rushed to the spot in the rickshaw, which belonged to Nitin. They were aghast on seeing the wife of the appellant in a pool of blood on a mat. There were bloodstains on the clothes worn by the appellant. Upon enquiry by P.W. 1, the appellant had chosen to remain silent and did

not offer any explanation. P.W. 1 alongwith P.W.4 and the appellant had taken Vaishali to YCM Hospital in an auto-rickshaw.

3 While in transit, upon enquiry by P.W.1 Mr. Pawar, injured had disclosed that “on that day in the afternoon, she had cooked food and requested her husband to have meals, but he was insisting upon her to cook scrambled eggs(Andda Bhurji). It was her contention that since the meals were already cooked, he should not insist upon cooking something in addition. The appellant had abused her and thereafter, he had taken knife lying on the kitchen platform and stabbed it into her stomach. By the time, they reached the hospital, she succumbed to the injury and was declared dead by the doctor. The statement of P.W. 1 was recorded by the police. P.W. 1 in the said statement had disclosed to the police, the incident narrated by Vaishali which resulted in her death. On the basis of the said report, Crime No. 342 of 2013 was registered.

4 After completion of investigation, charge-sheet was filed and the case was committed to the Court of Sessions and registered as Sessions Case No. 936 of 2013. At the trial, prosecution has examined 9 witnesses to bring home the guilt of the accused.

5 The substantive evidence of P.W. 1, 2, 3, 4, 6 and 9 would be relevant to determine whether the conviction of the appellant for an offence punishable section 302 of the Indian Penal Code is sustainable in law.

6 P.W. 1 has deposed before the Court in consonance with the FIR. According to him, the appellant was residing in a room on rent alongwith his wife and children since 4 months prior to the incident. Accused was employed as painter. He has given narration of the transaction leading to death of Vaishali in her own language. He had asserted that Vaishali was conscious while in transit to the hospital. He has specifically stated that while in transit to the hospital, the injured had disclosed to P.W. 1 that on that day, “she had cooked food and asked her husband to have meals. He started abusing her and insisted upon her to cook scrambled eggs. She had stated that she has already cooked food and she would not cook scrambled eggs in addition. Her husband had then drawn knife lying on the kitchen platform and stabbed it into her stomach.” This disclosure was made in the presence of the accused to which he did not react. On the way he did not try to flee away. According to P.W. 1, Vaishali was alive

when she was admitted in the hospital. However, records of YCM Hospital shows that she was brought dead. As far as the statement of the victim to P.W. 1 is concerned, the defence has failed to create any dent in his testimony by way of cross-examination.

7 P.W. 2 Shamrao Tambe has proved Exh. 17, which is the scene of offence panchanama. The contents of Exh. 17 would indicate that at the time of drawing scene of offence panchanama, black colour knife was seized, which was 7 to 8 inches in length. It is admitted in the cross-examination that when he reached the scene of offence on 4/8/2013 at about 8 p.m., the room was open. The police were already in the room and P.W. 2 was informed that the police wanted to seize the bloodstained mat and knife. P.W. 2 has specifically stated that the knife was bloodstained. The recitals of Exh. 17 would show that there were four eggs on the kitchen platform and cooked food in 2 pans. Rest of the articles were lying helter skelter. The said kitchen knife was the weapon of assault.

8 P.W. 3 Ramzan Lone is the neighbour who had first reached the house of appellant upon hearing abuses hurled by the appellant to his wife followed by a shriek shout of his wife. Thereafter, the

neighbours had reached. It was the accused who had opened the door of the house. According to him, wife of the accused was moaning with pain and the accused was trying to flee away.

9 P.W. 4 Nitin Pawar is the son of P.W. 1. His testimony is in consonance with testimony of P.W. 1. He has also deposed before the Court about the statement of the deceased Vaishali, in which she explained the circumstance of the transaction in which she had sustained the fatal injury. The only additional circumstance deposed by P.W. 4 is that the accused had consumed alcohol and therefore, he had no occasion to flee. Since he was driving the vehicle, he could not see as to whether Vaishali was conscious when she was admitted in the hospital. The injured was declared to be dead. P.W. 1 who had first hand information, derived from the victim, had informed the police about the voluntary statement made by Vaishali while in transit. Hence, the accused was taken into custody by the police in the hospital itself.

10 The credibility of all the four witnesses could not be shattered by the defence in the course of cross-examination.

11 PW.6 Dr. Prakash Rokade has performed autopsy on the dead body of Vaishali. He has proved the post mortem notes which are at Exh. 25. He has explained number and nature of injuries sustained by the injured, which turned to be fatal which are as follows :

“(i) Deep stab wound seen over the umbilical region of the abdomen 3 cms. above umbilicus and 2 cms. to the left of midline of size 1.5 cms. x 1 cm. viscera deep, horizontal, exposing the intraabdominal subcutaneous tissue, margins clean cut soaked in blood, angles, medical sharp, lateral lacerated, reddish.”

(ii) Incised wound left gutter of left side heamatoma noted, phalanx palmer aspect, horizontal, size 2.5 cms x 0.2 cms x dermis deep with margins clean cut blood soaked edges reddish.”

The cause of death is due to heamorrhagic shock due to deep stab injury to the abdomen and intraabdominal injury to the omentum and intestine.

12 PW. 8 Sakharam Bokephode is the panch for inquest panchanama, which is at Exh. 8. It is undisputed document and therefore, no discussion is necessary.

13 PW.9 Nilesh Jagdale is the investigating officer. He has deposed before the Court the steps taken by him in the course of investigation. It is admitted in the cross-examination that although the police staff is lodged at YCM hospital, they had not given any information about the death of Vaishali nor intimation was received from YCM authorities. According to him, he had arrested the accused at 8 p.m. in the police station. It is admitted in the cross-examination that the deceased had narrated the incident to Nitin Pawar. In the cross-examination, it is admitted that the accused was taken into custody at the hospital itself, but the arrest panchanama is recorded in the police station. According to the Investigating Officer, accused was in custody much prior to 8 p.m.. There were no injuries on the person of the accused when he was arrested. The fact that the statement of the other neighbours was not recorded is admitted by the investigating officer.

14 Post-mortem notes would show that the probable cause of death is haemorrhagic shock due to deep stab injury to the abdomen and intraabdominal injury to the omentum and intestine. The said injury was fatal. Another injury was on the left index finger at the

proximal Phalanx palmer aspect, horizonatal, dermis deep. The second injury may be caused on the part of the victim in the course of an attempt to resist the blow of knife or to evade assault.

15 The scene of offence panchanama would show that the investigating agency had seized a bloodstained knife and bloodstained mat. They have also seen four uncooked eggs on the platform and cooked food in the pan. This would lead corroboration to the disclosure statement of the victim.

16 On the basis of the evidence adduced by the prosecution, it is admitted position that the deceased Vaishali was the wife of the present appellant. At the time of incident, husband and wife were at home. She had cooked food, which was seen in the cooking pan at the time of conducting the scene of offence panchanama. There were eggs on the kitchen platform. A black colour bloodstained kitchen knife was seized at the time of scene of offence panchanama. The neighbours had rushed to room of the appellant upon hearing altercation between the couple followed by a loud shriek of Vaishali. When the neighbours rushed to the room, the door was opened by the appellant, who had fresh blood stains on his shirt. P.W. 1 and P.W. 4

have substantiated the contention that the injured had disclosed to them the circumstance in which she sustained the fatal injury. The defence has utterly failed to dislodge the said contention.

17 The statement made by the victim to P.W. 1 and P.W. 4 while in transit is an oral dying declaration under section 32 of the Indian Evidence Act. It is a statement made by the injured, as to the cause of her death. There was no time to procure written dying declaration as she was declared as “Brought dead” by the hospital. The accused who was in the company of the deceased at the relevant time has maintained silence, which speaks volumes for itself.

18 The testimony of P.W. 1 and P.W. 4 is unshattered. The substantive evidence of P.W. 1 and P.W. 4 is direct evidence. It is a fact, proved by them as they had first hand knowledge of the facts to be proved. It is cogent and convincing evidence which establishes that the oral dying declaration of Vaishali is voluntary, truthful, convincing and therefore, inspires the confidence of the Court.

19 It is the contention of the learned Counsel for the appellant that the couple is blessed with children. However, the

children have not been examined by the prosecution. The children would be the first person to have witnessed the incident. According to the learned Counsel, an adverse inference ought to be drawn by the Court. It is also vehemently submitted that there is no written dying declaration. She was taken dead to the hospital and hence, it is doubtful as to whether such statement was made to P.W. 1 and P.W. 4 while in transit. A doubt is also expressed about her consciousness, while in transit.

20 Learned APP to nullify the submission of the learned Counsel for the appellant submits that besides this sole incident, either P.W. 1, P.W. 4 or the deceased had any axe to grind against the appellant in order to falsely implicate him in the present case. The incident had occurred on the spur of the moment. There is no remote record to show that P.W. 1 and P.W. 4 were on inimical terms with the appellant.

21 Learned APP submits that the appellant has not offered any explanation as stipulated under section 106 of the Indian Evidence Act as to the injury caused to his wife, a fact which was within his special knowledge and the conviction of the appellant is therefore, justified. It

is submitted that the dying declaration is further fortified by the statement of the accused under section 313 of the Code of Criminal Procedure, 1973 wherein he has asserted that he had gone to buy eggs and when he returned home, he saw his wife in a pool of blood.

22 The question that falls for determination before the Court in the facts of the case would be what is the offence committed by the accused. What has to be seen is what was the degree of injury, the accused actually intended or whether he had knowledge as to the probable consequences of such injury.

23 Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death. The act of the appellant would be an act covered under section 300 Exception 4 of the Indian Penal Code which reads as follows :

“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—

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.”

Whether culpable homicide is committed with intention or knowledge is paramount for the purpose of determining the nature of the offence as well as for determining the measure of sentence to be passed on the accused.

24 The assault by the appellant on his wife was not pre-meditated. There is no material on record to remotely suggest that he had any intention to cause her death. A quarrel had ensued on a trifling issue. His rage had overpowered his passive mind and in an impulsive moment, the rage had converted itself into an act of assault by a kitchen knife, lying nearby. For a fraction of moment, he had lost control of himself. We feel that although the accused had cognition of his act, he had no intention to commit an act, which would result in the death of his wife and therefore, his act of causing that fatal injury would fall under section 304 part II of the Indian Penal Code.

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which

the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

25 In the facts of this case, it would be relevant to refer to the judgment of the Hon’ble Apex Court in the case of **Virsa Singh v/s. State of Punjab reported in 1958 AIR 465**. The Hon’ble Apex Court has held as follows :

“The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved.”

26 In the present case, it seen that it was a trifling issue and the accused/appellant had no intention to cause the injury which would result into her death. However, the fact that he had assaulted the victim with knife on the stomach would be sufficient to infer that

as a prudent person, he had knowledge that in all probabilities, said injury may cause death.

27 In the case of **Kesar Singh & anr. vs. State of Haryana** reported in **2008 AIR SCW 6769**, the Hon'ble Apex Court has observed thus :

“It can thus be seen that the 'knowledge' as contrasted with 'intention' signifies a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive.”

28 In the case of **Jai Prakash vs. State (Delhi Administration)** reported in **1991 SCC (2) page 32**, the Hon'ble Apex Court reiterated the guiding principles laid down in the case of **Virsa Singh(cited supra)** as follows :

“The `intention' and `knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words `intention' and `knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that

such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he , must have been aware that certain specified harmful consequences would or could follow. But the knowledge is bare awareness and not the same thing as 'intention' that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposely doing of a thing to achieve a particular end.”

29 In all such similar cases, the Hon’ble Apex Court in a catena of pronouncement has held that there was no intention to cause that particular injury, as in those circumstances, the accused could have been barely aware, i.e. only had knowledge of the consequences.

30 Once, it is established by the extenuating circumstances that the ingredient of intention cannot be established or that having regard to the facts of the case, it cannot be said that the accused had an intention to cause the said fatal injury. By inference, only knowledge can be attributed to the accused of the consequences that may follow and hence, it would be culpable homicide punishable under section 304 II of the Indian Penal Code.

31 As far as an offence punishable under section 504 of the

Indian Penal Code is concerned, it would be relevant to refer to the deposition of P.W. 1 Mr. Pawar, while testifying the incident as narrated by the deceased. All that is stated is that the deceased has disclosed that the accused husband had abused her. It is an omnibus allegation. There is no material to hold that the appellant had intentionally insulted and thereby, provoked his wife or anyone else to break public peace, or commit any other offence. There was no intentional insult extended either to the deceased or neighbour. Hence, the appellant deserves to be acquitted of the offence punishable under section 504 of the Indian Penal Code.

32 In view of the above discussion and totality of evidence, it would be difficult to hold the accused guilty for an offence punishable under section 302 of the Indian Penal Code. Hence, the circumstances in which the incident has occurred leads us to a conclusion that conviction for an offence punishable under section 302 of the Indian Penal Code would be unsustainable in the eyes of law and the appellant instead deserves to be convicted for an offence punishable under section 304 II of the Indian Penal Code.

33 The Learned Counsel is appointed through Legal Aid

Committee and has assisted the Court to the best of his capacity to espouse the cause of the appellant. Hence, he is entitled to the professional fees as per rules.

34 Hence, following order is passed :

ORDER

- (i) The appeal is partly allowed.

- (ii) The Order of conviction and sentence of imprisonment imposed upon the accused/appellant for the offence punishable under section 302 and 504 of the Indian Penal Code, vide Judgment and Order dated 24/4/2017 passed by the Additional Sessions Judge, Pune in Sessions Case No. 936 of 2013 is hereby quashed and set aside.

- (iii) The appellant is hereby acquitted of the offence punishable under section 302 and 504 of the Indian Penal Code. Instead, the appellant is hereby convicted for the offence punishable under section 304 Part II of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of 9 years. The sentence of fine is

maintained.

(iv) The appellant is entitled to set off for the period already undergone.

(vi) The appeals are disposed of accordingly.

35 This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J. JAMADAR, J)

(SMT. SADHANA S. JADHAV, J)