

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.494 OF 2014
ALONGWITH
CRIMINAL APPLICATION NO.299 OF 2017**

1. Smt.Ragini Goma Bhoir]
2. Goma M. Bhoir].. Appellants/accused
vs.
The State of Maharashtra]
(At the instance of Khargar Police Station)].. Respondents

Mr.Aniket Vagal, for Appellants.
Ms.M.H. Mhatre, APP for State.

**CORAM : SMT.SADHANA S. JADHAV &
N.R.BORKAR, JJ.**

**RESERVED ON : 20th JANUARY, 2021.
PRONOUNCED ON : 2nd MARCH, 2021.**

JUDGMENT : (PER : N.R.BORKAR, J)

1] This appeal takes an exception to the Judgment and order dated 30th April, 2014 passed by the Sessions Judge, Raigad, Alibaug, in Sessions Case No.102 of 2012. By the impugned Judgment and order, the appellants who were accused Nos.1 and 2 before the trial Court have been convicted for the offences punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer R.I. for life and to pay fine of R.5,000/- each and in default of payment of fine to suffer R.I. for 6 months.

2] The deceased Rekha was the wife of PW 1 Laxman Motiram Bhoir. Accused No.2 is the elder brother of PW 1 and accused No.1 is the wife of accused No.2. At the relevant time, the deceased and accused were residing in the same building at Village Kopara, Taluka – Panvel, District Raigad. PW 1 and his wife were residing on first floor and the accused were residing on the second floor. Parents of PW 1 and accused No.2 were residing on ground floor. There was only one water tap connection for the entire building.

3] The incident took place on 28th November, 2011. On the day of incident, in the morning hours at about 9.15 a.m. a quarrel took place between the accused No.1 and the deceased on account of drawing of the water from the water tap connection. It is alleged that while the quarrel was going on, accused No.2 came there with sickle and assaulted the deceased on her neck. Due to assault, the deceased fell down. The deceased was injured and was thus taken to MGM Hospital.

4] On the basis of report lodged by PW 1 with the Kharghar Police Station, the said Police Station registered crime against both the accused initially for the offence punishable under Section 307 read with 34 of the Indian Penal Code and under Section 4 read with 25 of the Arms Act. The deceased succumbed to her injury on 9th December, 2011. After the death of the deceased, offence was converted to Section 302 read with 34 of the Indian Penal Code. On completion of investigation, charge-sheet was filed against both the accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code.

5] The accused were charged and tried for the offence punishable under Section 302 read with 34 of the Indian Penal Code. As stated earlier, the trial Court convicted both the accused for the offences punishable under Section 302 read with 34 of the Indian Penal Code by the impugned Judgment and order.

6] We have heard learned counsel for appellants/accused and learned APP for the State.

7] The prosecution case is mainly based on direct evidence of eye witness viz. PW 1 Laxman Bhoir and the dying declaration of the deceased.

8] The following facts are not in dispute.

- (i) The deceased Rekha was the wife of PW 1 Laxman Bhoir
- (ii) The accused No.2 is the elder brother of PW 1 and accused No.1 is the wife of accused No.2.

9] Learned counsel for the appellants/accused has submitted that the evidence on record and more particularly, admissions in the cross-examination of PW 1 Laxman Bhoir will show that PW 1 was not present at the time of alleged assault. It is submitted that according to PW 1 many people had gathered at the place of incident, however, no independent witness has been examined. It is submitted that the trial Court thus committed an error in relying upon the evidence of PW 1 to convict the appellants/accused.

10] It is further submitted that the alleged dying declaration is doubtful. It is submitted that the evidence on record will show that the deceased, from the date of incident till her death, was in the Intensive Care Unit and was not in position to speak. It is submitted that considering the over all circumstances, the trial Court was not justified in concluding that the prosecution has proved it's case against the appellants/accused beyond reasonable doubt.

11] On the other hand, learned APP has supported the impugned judgment and order of the trial Court. It is submitted that the trial Court has rightly believed PW 1 Laxman Bhoir in absence of any reason for him to implicate the appellants/accused in a false case. It is submitted that after the incident the appellants/accused were absconding and therefore their complicity in the alleged crime is apparent. The learned APP has submitted that considering the evidence on record, the trial Court was justified in convicting the appellants/accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code.

12] The fact that the death of the deceased was homicidal has not been seriously challenged. Even otherwise, PW 17 Dr. Shashikant Madhavi who conducted postmortem has stated in his evidence that during the period from March, 2011 to April 2012 he was attached to Rural Hospital, Panvel. On 9th December, 2011, the dead body of Rekha Bhoir was received for postmortem examination. He examined the dead body and found that rigor mortis was slightly present in lower limbs. There was no sign of decomposition. On external examination he has noticed one suture wound over back of neck of size 8 cm. in length obliquely placed. On internal examination he found fracture

with subluxation vertebrae C-4 and C-5 present. The injury was ante-mortem. According to him, cause of death was shock due to injury to spinal cord by sharp edged weapon.

13] No material is brought on record nor it is suggested to PW 17 that the injury sustained by the deceased was either self inflicted or accidental. Considering these facts and circumstances, it will have to be held that the death of the deceased was homicidal.

14] The question is whether the accused No.2 is the author of injury sustained by the deceased and whether accused No.1 can be said to have shared common intention with accused No.2 to commit the murder of the deceased.

15] PW 1 Laxman Bhoir has stated that on 28th November, 2011, at about 6.00 a.m. he went out of the house to ply auto-rickshaw. At about 9.15 a.m. he received telephone call from one Pragati Koli and she told him to come home as his wife Rekha (deceased) and accused No.1 were quarrelling. He immediately came home. When he went to the first floor, he saw that his wife and accused No.1 were quarrelling. He tried to separate them. At that time, his elder brother accused No.2 came there running with sickle and gave a blow of sickle on the neck of his wife. He got frightened and before he could understand anything, accused Nos.1 and 2 ran away. His wife fell down. He raised shouts. Kunda Koli, Anusuya Koli, his mother Sonubai and sister Muktabai came there. They took the deceased to MGM Hospital in auto-rickshaw. PW 1 has stated that his wife succumbed to her injuries on 9th December, 2011.

16] In the cross-examination conducted on behalf of the accused except suggestions to PW 1 that he was not present at the time of alleged assault, which he has denied, there is no material on record to doubt the presence of the PW 1 at the time of alleged assault. We have already held that the death of the deceased was homicidal. In absence of any enmity between the parties, it is difficult for us to hold that the accused no.2 has been falsely implicated in crime in question. We also do not see any motive on the part of PW 1 to involve his own brother in such a serious crime.

17] It has come on record that that too in the cross-examination of PW 1 that at the time of assault, except him and accused Nos.1 and 2, nobody else was present on the first floor. If this is so, then there arises no question of examining any other witness with regard to the alleged assault.

18] There is one more circumstance, which shows complicity of the accused No.2 in crime in question. According to the prosecution after the incident the accused were absconding. PW 16 Kiran Patil, the Investigating Officer, has stated that they got secret information on 28th April, 2012 that accused no.1 had come to Papdicha Pada. He went there alongwith staff and apprehended accused No.1 from there. He has further stated that search for accused No.2 was taken and ultimately he was apprehended on 8th May, 2012. It is thus apparent that appellants/accused were absconding approximately for six months. The appellants/ accused have not rendered any explanation in relation to the said fact. The complicity of the present appellants/ accused in the crime in question is thus apparent.

19] As regards, dying declaration, PW 14 Sanjay Jadhav has stated in his evidence that during relevant period he was working with Khargar Police Station as Assistant Police Inspector. On 1st December, 2011 he was informed that the deceased is in a condition to speak. He went to the hospital. He sought opinion of the Medical Officer about the condition of the deceased. After obtaining the opinion of Medical Officer that the deceased is in a condition to give statement, he recorded her statement. The deceased disclosed to him that on 28th November, 2011 at about 8.00 a.m. the accused No.1 quarrelled with her on account of drawing of the water from the water tap connection. She further disclosed to him that while quarrel was going on, the accused No.2 came with a sickle and assaulted her on her neck and due to assault she fell down.

20] In the cross-examination, PW 14 has admitted that prior to recording of dying declaration they were in touch with the Executive Magistrate and one Special Executive Magistrate by name Mrs. Bhoir had office in front of their police station. He has further admitted that endorsement of the Medical Officer on Exhibit 48 (dying declaration) was taken after it was reduced into writing by him.

21] PW 11 Dr. Abhinandan Kadiyal was the Medical Officer, whose opinion was sought about the mental condition of the deceased on the date of recording her dying declaration. PW 11 has admitted in his cross-examination that on 1st December, 2011 the deceased was in Intensive Care Unit and only those patients whose condition is critical are kept in Intensive Care Unit. He has further admitted that, the condition of the deceased on that day was critical. He has further admitted that in Exhibit 47 it is mentioned that till 1st December, 2011

the deceased was not in a position to speak. It further appears from the evidence of PW 2 Dr. Nitin Kapoor who treated the deceased initially, that the deceased was kept on ventilator. There is no evidence at all to show that the condition of the deceased had improved and ventilator was removed. Considering the overall facts and circumstances it would not be safe to rely upon the dying declaration at Exhibit 48.

22] Even though we have held that it would not be safe to rely upon the dying declaration, however, in view of testimony of PW 1, which is corroborated by medical evidence coupled with subsequent conduct of appellants/accused, it will have to be held that, on the day of incident, the accused No.2 assaulted the deceased by sickle on her neck as a result of which she died on 9th December, 2011.

23] The question is now whether the trial Court was justified in convicting both the accused for the offences punishable under Section 302 read with 34 of the Indian Penal Code.

24] The Hon'ble Supreme court in the case of **Rohtas and Another vs. State of Haryana with Bijender vs. State of Haryana, AIR 2021 SC 114**, has held :

“ Although both Section 34 and 149 of the IPC are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds. Section 149 IPC assigns liability merely by membership of the unlawful assembly. In reality, such ‘common intention’ is usually indirectly inferred from conduct of the individuals and only seldom it is done through direct evidence.’

25] In the present case, neither overt nor covert act is attributed to accused No.1. According to PW 1, while quarrel was going on between the deceased and accused No.1, the accused No.2 came running there with sickle and assaulted the deceased on her neck. The assault by accused No.2 appears to be sudden. In the facts and circumstances of the present case, in our view, the trial Court was not justified in convicting the accused No.1 with the aid of Section 34 of the Indian Penal Code.

26] As regards the conviction of accused No.2 under Section 302 of the Indian Penal Code, we are of the view that considering the facts and circumstances of the present case, benefit of exception 4 to Section 300 of the Indian Penal Code needs to be given to him.

27] The act of the accused No.2 from the facts and circumstances of the case does not appear to be premeditated. It appears that accused No.2 got infuriated due to quarrel between the deceased and accused No.1, and in a heat of passion assaulted the deceased. PW 17 Dr. Madhavi who conducted the postmortem has stated that on external examination he had noticed only one sutured wound over back of neck. It is thus apparent that the accused No.2 has not acted in cruel manner as there is only one injury to the deceased.

28] Considering these facts and circumstances, we are of the view that the conviction of accused No.2 for the offence punishable under Section 302 of the Indian Penal Code cannot be sustained and

instead accused No.2 is convicted for the offence punishable under Section 304(I) of the Indian Penal Code. In the result, following order is passed :

ORDER

- i] Appeal is partly allowed.
- ii] The impugned Judgment and order dated 30th April, 2014 passed by the Sessions Judge Raigad, Alibaug, in Sessions Case No.102 of 2012 is set aside.
- iii] Accused No.2 is convicted for the offence punishable under Section 304(I) of the Indian Penal Code instead of Section 302 of the Indian Penal Code, and sentenced to suffer R.I. for 10 (Ten) years and to pay fine of Rs.5,000/- (Rs.Five Thousand Only) in default of payment of fine to suffer R.I. for 6 (six) months.
- iv] Accused No.1 is acquitted of all the charges levelled against her.
- v] Bail bonds of accused No.1 stand cancelled.
- vi] Accused No.2 is in jail. Accused No.2 is entitled to set off for the period of detention undergone by him till date.
- vii] Fine amount, if any, paid by accused No.1 pursuant to the impugned Judgment and order, be refunded to her.
- viii] Criminal Application No.299/2017 which is for bail does not survive and same stands disposed of.

[N.R.BORKAR, J]

[SMT.SADHANA S. JADHAV, J]