

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1035 OF 2015

Shivpujan Harishankar Yadav.  
Age: 30 years, Occ: Service,  
Residing at Bungalow No. 15,  
East Street, Camp, Pune.  
(At present accused lodged in  
Yerwada Central Prison, Pune.)

..Appellant.

v/s.

1 State of Maharashtra  
(At the instance of Lashkar  
Police Station)

..Respondent.

Mr. Aniket Vagal, advocate for appellant.

Mr. S.R. Agarkar, APP for State.

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

RESERVED ON : DECEMBER 18, 2020  
PRONOUNCED ON : JANUARY 6, 2021.

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

1 The appellant herein is convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs. 5,000/- I.d. to suffer six months rigorous imprisonment. Hence, this Appeal.

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2           Such of the facts necessary for the decision of this appeal are as follows :

On 30/12/2011 police Naik Avinash Badade(P.W.9) received telephonic call from his friend Mr. Amarjeetsing Aluwaliya(P.W.3), who informed him that a person residing in his neighbourhood had killed his wife and that the police should visit the spot immediately. Mr. Badade informed about the same to police inspector Sushama Chavan P.W. 13 and thereafter, Ms. Chavan along with Mr. Badade and other police staff visited the spot of incident i.e. bungalow No. 15 east street camp. The police had taken the accused i.e. present appellant in custody. The police had noticed that the accused had sustained bleeding injuries. The accused had disclosed his name as Shivpujan Yadav. The police had then taken the deceased, wife of the accused to Sassoon General Hospital. That the police had given the said information to the brother of the deceased i.e. Jagveer Daddi Yadav (PW.1). On the same day, Jagveer Yadav lodged FIR at Lashkar Police Station alleging therein that his sister was killed by the accused on the ground that the money which she had lent to her parents and brothers was not returned back. On the basis of the said report, Crime No. 192 of 2011 was registered at Lashkar Police Station against the accused for the

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offence punishable under section 302 of the Indian Penal Code.

3           At the trial the prosecution examined as many as 13 witnesses to bring home the guilt of the accused. The prosecution mainly rests on the evidence of P.W. 1 the brother of the deceased, P.W. 2 the minor son of the deceased, P.W. 3 Amarjeetsing Alluwaliya, P.W. 6 Dr. Amol Shinde, who had performed the autopsy on the dead body of the deceased-Tersee, P.W. 7 Dr. Mahesh Tengle who had examined the accused, P.W. 9 Avinash Badade who was the first person to receive the information, P.W. 10 Kaushalya Yadav, mother of the deceased and P.W. 13 Sushama Chavan.

4           P.W. 1 Jagveer Yadav has deposed before the Court that his sister Tersee was assaulted by the accused on trivial grounds. He was a hot tempered person. That accused had given Rs. 30,000/- to the deceased to seek an employment as a teacher in Madhya Pradesh. She failed to secure a job and therefore, she deposited the said amount in fixed deposit. The accused was demanding return of Rs. 30,000/-. The deceased has expressed her inability to return the same on the ground that she had kept the said money in fixed deposit. That his sister had offered to make a payment of Rs. 23,000 which was

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denied by the accused. And hence, there was quarrel between the couple. On 30/12/2011 the accused had allegedly killed his sister. When he reached the house of the accused and the deceased, he realised that his sister had been strangled with a rope. His nephew Sanjeev i.e. son of the deceased, upon enquiry, informed P.W.1 that there was a quarrel between his mother and father and that his father had killed his mother. He has proved the FIR. In the cross-examination, he has denied that he had any financial transaction with the accused. When he was confronted with the FIR, he stated that in fact, he has deposed before the Court in consonance with the FIR and that he cannot assign any reason for the omissions of the said contention in the FIR, as the said facts which he has deposed before the court do not find place in the first information report. The said omissions are proved by P.W.13 Sushma Chavan. She has categorically deposed before the court that the said facts were never disclosed by P.W. 1 to the police at the time of recording his first statement. In fact, the recitals of his statement under section 154 of the Code of Criminal Procedure, 1973 which is at Exh. 14, indicates that his parents had borrowed Rs. 30,000/- from the accused. The accused was seeking return of the said amount. That P.W. 1 had offered Rs. 7,000/- towards part payment which the accused refused and he was insisting that they shall

make one time payment of Rs. 30,000/-. Hence, there used to be intermittent quarrels.

5 P.W.2 Sanjeev happens to be minor son of the accused and deceased. According to him, his father was a gardener. On the day of incident, the accused demanded money from his mother. She was unable to pay and therefore, his father killed her by strangulating her with a rope and by assaulting her with a knife. He had denied the suggestion that the family had some visitors on the day of the incident. It is elicited in the cross-examination that on the day of the incident, the police had opened the lock of the room. His attention was drawn to the omissions in his previous statement. The said omissions are pertaining to the cause of quarrel. P.W.13 has proved the said omissions.

6 P.W.3 was residing in the neighbourhood of the accused. He deposed before the court that the accused was working as a gardener for Mrs. Poonawala who was caretaker of the said bungalow. That there used to be quarrel between the husband and wife. On the day of the incident he heard the son of the accused seeking help to rescue his mother. The couple was quarreling for about 10 to 15 minutes he therefore, called

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upon the police Mr. Badade to visit the house of the neighbour. He had subsequently learnt that Tersee, wife of the accused had died due to strangulation. When the police was taking the accused, P.W. 3 had noticed that the accused had sustained stab injuries. It is elicited in his cross-examination that he runs a Dhaba outside the bungalow where the accused was working as a gardener. The house of P.W. 3 and accused are adjacent to each other. According to P.W. 3, the deceased was also working as a maid servant in the bungalow of Poonawala. That the couple was leading a happy marital life along with their children. In the cross examination he had further stated that he was unable to recollect as to whether he had heard P.W. 2 raising cry for help. According to him, the safety door was locked and therefore, he could not enter the said room. He has also denied to have heard any cries of the accused that thieves had entered the house.

7 P.W. 5 Majid Khan was a panch to the scene of offence panchanama which is at Exh. 27. According to him, there were blood stains on the wood below the latch of the grilled door. Pieces of nylon rope were tied on the grilled door. Blood stained knife was lying near the bed inside the room. Bloodstains were found on the bed sheet and a brownish

colour full shirt which was torn and a white banian. There were broken pieces of bangles lying on the ground, shirt buttons had fallen on the ground. The police had seized all the articles and thereafter, he had signed the panchanama at Exh. 27 He had identified the articles which were seized at the time of recording of panchanama. In the cross-examination, he has admitted that he has no knowledge of the recitals of the panchanama and does not recollect as to whether household articles were scattered in the room. The recitals of the scene of panchanama would show that the shirt of the accused was stained with blood. The shirt was torn near the arm pit. The buttons of the shirt at Sr. No. 5 and 6 were broken. The banian which was worn by the accused was also stained with blood. The knife which was seized from the scene of offence was about 17 cm. long 2.5 cm. broad. The blade of the knife was sharp and was stained with blood.

8 P.W. 6 Dr. Amol Shinde had performed autopsy of the deceased Tersee on 30/12/2011. He had observed a completely encircling, horizontally directed backwards ligature mark present over the neck above thyroid cartilage. The skin over ligature mark was abraded, reddish brown with contusion over left side of neck above and below ligature mark. There were abrasions

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on the forehead and the face as well as on left elbow, dorsum of right hand, contusions over right forearm and left forearm, left wrist, left arm and left elbow. All injuries were ante-mortem. On internal examination P.W. 6 noticed haematoma over left frontal region and right parietal region. Haematoma was also noticed within thyroid and strap muscles of neck on left side corresponding to injury No. 1 under column No. 17. The doctor had opined that the cause of death was “due to ligature strangulation”. According to P.W. 6, the nylon rope at article A was used for causing the ligature mark on the neck of the deceased. It is admitted by P.W. 6 that the deceased had not sustained any bleeding injury but there were blood stains on the ground. There was no fracture of the thyroid bone and that the deceased had not sustained any injury by a sharp edged weapon. It is specifically denied that the ligature mark could be caused by any saree or any cloth. That the major veins were not cut. He has affirmed the suggestion that the possibility that the victim was attacked by more than two persons cannot be ruled out. However, it is further clarified that the injuries no. 2 to 12 mentioned in column No. 17 of the post mortem notes are simple in nature and are in the form of contusions and abrasions.

9 P.W. 7 Dr. Mahesh Tengale, the medical officer at Sassoon hospital at Pune had examined the accused on 30/12/2011. He has deposed before the court that on medical examination he had found following injuries on the person of the accused.

- (1) Linear Abrasion over right side of neck 6 x 2 cms.
- (2) Abrasion over 2 cms. below injury no. 1.
- (3) Abrasion over left elbow 3 x 2 cms.
- (4) Incised wound (IW) over left forearm lower end flexor aspect laterally 2 x 0.5 cms. x 0.5 cm.

According to him, injury no. 4 was caused by sharp edged weapon and other injuries were caused by hard and blunt weapon. The photo copy of the medical certificate tallied with the original register maintained by the hospital and is marked at Exh. 35. P.W. 7 has further opined as follows :

“Injury no. 1 to 3 are possible during the struggle to save one’s life. Injury No. 1 is possible by the nails of the hand whereas injury no. 4 is possible by weapon like knife.”

It is admitted in the cross-examination that the injured was brought to the hospital with the history of assault. Injury No. 4 was a clean cut injury. And that it was a bleeding injury and could be caused only by a sharp edged weapon.

10 P.W. 9 Avinash Badade was attached to cantonment police station. According to him on 30/12/2011 his friend Mr. Ahluwalia P.W. 3 had informed him telephonically that a person residing in his neighbourhood had killed his wife. He had conveyed the said message to P.W. 13 who was his superior officer. She had taken over the charge of the investigation. When they reached the spot it was P.W. 3 who had shown the location of the offence. It is admitted that P.W. 3 had not disclosed the name of the accused and therefore, the identity of the accused did not find place in his statement. That, the door of the house of the accused was already open. It is admitted that at the time of arrest the accused had bleeding injuries, but P.W. 9 had not taken him to the hospital. The accused had not disclosed that 3 unknown persons had entered into his house and mounted assault.

11 P.W. 10 Kausalya Yadav is the mother of the deceased and according to her, the accused had demanded Rs. 30,000/-

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from them and since the demand was not fulfilled her daughter was harassed and ill-treated by the accused.

12 P.W.13 Ms. Sushma Chavan is the investigating officer of Crime No. 192 of 2011 registered at Lashkar Police Station, Pune. She has deposed before the court that upon receipt of information from constable Badade i.e. P.W. 9, she had reached the scene of offence alongwith police staff. It was an outhouse of the bungalow. According to her accused himself had disclosed that he had killed his wife. The wife of the accused was lying on the cot. The body was sent to Sassoon hospital for post mortem. She has taken all the steps in the course of investigation i.e. she had conducted scene of offence panchanama, seized the articles from the spot, the brother of the deceased had lodged FIR and then she had arrested the accused. According to her, the owner of the Bungalow was Poonawala but he was not residing in the said bungalow but one Shehanaz Meharji was residing in the said bungalow as care taker. It is admitted that she had not recorded statement of any witness on the spot. That, the accused had sustained bleeding injuries on his person and therefore, was referred for medical examination. She has proved the omissions and contradictions in the evidence of the witnesses more particularly P.W. 1 and P.W. 2. She has

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specifically stated that P.W. 1 had not stated before the police that the accused had given Rs. 30,000/- to the deceased for seeking an employment and that since, she could not secure the job she had kept the amount of Rs. 30,000/- in fixed deposit and that she had brought back the said amount from Madhya Pradesh and returned it to accused and yet he was demanding the said amount again. That P.W. 2 had not stated before the police that his father had quarreled with his mother and assaulted her because she was not gainfully employed. And that the accused had demanded money from her and since she refused to pay she was killed by his father. P.W.13 has denied that it had transpired in the course of investigation that three unknown persons had entered the house of the accused and assaulted the deceased and accused with an intention to commit robbery and that Tersee had died in the said scuffle.

13        The learned Counsel for the appellant submits that the prosecution has failed to explain the injuries sustained by the accused. And therefore, the accused deserves to be acquitted of all the charges.

14        Per contra learned APP submits that the cause of death of the deceased as opined by P.W. 6 is death due to

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strangulation. And that there is clear evidence that the deceased was strangled with a nylon rope by none other than the accused. The very fact, that the accused had sustained injuries would show that he was present at the scene of offence and that he has not given a plausible explanation for the death of his wife in his presence. Moreover, the accused had adopted a false defence which is uncorroborated and far from reality. And therefore, the accused does not deserve any leniency.

15 P.W. 6 has opined that the injury no. 1 on the person of the accused seems to be caused by nails whereas injury no. 4 is caused by a sharp edged weapons and injury no. 2 and 3 are caused by hard and blunt object. It is therefore, clear that in the said altercation deceased was not passive and had rather attacked her husband with whatever weapons available in the house. The fact that the clothes of the accused were blood stained and torn and that traces of blood were found on the ground as well as on the nylon rope would clearly indicate that the accused had cut the rope only after he was assaulted. The deceased was then overpowered by the accused. The death was instantaneous. The medical evidence clearly indicates that the deceased had not sustained any bleeding injury. Injury no. 2 to 12 on the person of the deceased were simple injuries in the

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nature of contusions and abrasions. P.W. 2 was examined as an eye witness to the incident. His evidence is inconsistent with the facts on record. According to P.W. 2, his father had assaulted his mother with a knife, however, it is clear from the records that she had not sustained any bleeding injuries or any superficial injuries which can be said to have been caused by the knife, instead, it was the accused who had sustained a bleeding injury.

16        Upon meticulous evaluation of the evidence adduced by the prosecution and the testimony of the witnesses, the inference that can be drawn is that there was a scuffle between husband and wife on the day of incident. The cause of the quarrel as deposed by P.W. 1 does not inspire confidence as the contentions in the first information report are contrary to his substantive evidence. Irrespective of the cause of scuffle, it is clear that the altercation between the husband and wife had become violent. The possibility that the accused was first assaulted by the wife with a knife due to which he had sustained incised injuries on his forearms, and in that scuffle, he had lost his temper and was deprived of the power of self-control cannot be ruled out. And in the said transaction the accused had cut the nylon rope tied to the grill and strangulated

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his wife. The Court cannot be oblivious of the fact that Tersee had died a homicidal death at the hands of her husband and it also cannot be overlooked that the accused had sustained bleeding injuries in the same transaction and therefore, what falls for determination before this Court is as to whether the act of the accused is murder or culpable homicide not amounting to murder.

17        There is no doubt that the defence raised by the accused is incompatible with the evidence available on record however, the defence of the accused under section 313 of the Cr. P.C. is not on oath and the onus is not on the accused to prove his case beyond reasonable doubt. The accused only has to attempt to demonstrate the preponderance of probabilities and therefore, the contention of the learned APP that the accused is bound by the defence taken by him cannot be taken into consideration.

18        The Hon'ble Supreme in the case of **State of U.P. V/s. Lakhmi**<sup>1</sup> has held as follows :

The law is that burden of proving such an exception is

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<sup>1</sup>AIR 1998 SC 1007.

on the accused. But the mere fact that accused adopted another alternative defence during his examination under [Section 313](#) of the IPC without referring to Exception No. 1 of [Section 300](#) of IPC is not enough to deny him of the benefit of the Exception, if the Court can cull out materials from evidence pointing to the Existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through defence evidence or even through prosecution evidence by showing a preponderance of probability.

19 In the above circumstances, it would have to be determined whether the act committed by the accused would fall under section 302 of IPC or any exception under section 300 of IPC.

20 Exception 4 of Section 300 of the IPC reads as follows :

“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.”

21 In the case of Jayprakash v/s. State (Delhi Administration)<sup>2</sup> the Apex Court has held as follows :

“We may note at this stage that ‘intention’ is different from ‘motive’ or ‘ignorance’ or ‘negligence’. It is the ‘knowledge’ or ‘intention’ with which the act is done that makes difference, in arriving at a conclusion whether the offence is culpable homicide or murder. Therefore, it is necessary to know the meaning of these expressions as used in these provisions... The ‘intention’ and ‘knowledge’ of the accused are subjective and invisible state 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

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<sup>2</sup> 1991 2 SCC page 32,

harmful consequences would or could follow. But that 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 purposeful doing of a thing to achieve a particular end.”

The facts in the present case would clearly indicate that the accused who was deprived of his self control had on spur of the moment, achieved the desired consequences and therefore, the case of the accused would squarely fall under section 304 Part I of the Indian Penal Code.

22           Section 304 part I of the Indian Penal Code reads as follows :

**“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;”

23           The Hon’ble Supreme Court in the case of Kesar Sing

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and anr. v/s. State of Haryana<sup>3</sup> has observed that -

“intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore in the case of 'intention' mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention or not is a question of fact.”

In the facts of the said case, the Supreme Court had set aside the conviction of the accused for the offence punishable under section 304 Part II of the Indian Penal Code and had held the accused guilty of commission of the offence punishable under section 304 part I of the Indian Penal Code.

24 Facts of the present case are also similar to the above case which are as follows :

- (i) A quarrel had ensued between the couple.
- (ii) The said quarrel had taken a violent turn.
- (iii) The accused has sustained one contusion, two abrasions and an incised wound.
- (iv) He had then overpowered his wife and strangled

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<sup>3</sup> (2008) 15 SCC 753

her.

(iv) The incident had occurred on the spur of the moment.

The act of the accused was not premeditated.

(v) Even according to P.W. 3 the couple was leading a happy-married life till the date of incident.

(vi) He had silenced his wife by strangulation without any pre-meditation.

(vii) He had not even attempted to flee from the scene of offence.

(viii) The accused had not taken undue advantage of the situation nor acted in a cruel manner.

25 The learned counsel for the appellant submits that the accused is in custody since 30/1/2011 and that he deserves to be released forthwith. However, taking into consideration the gravity of the offence, we are of the opinion that a sentence of R.I. for 10 years would meet the ends of justice.

26 Hence, following order is passed:

**ORDER**

(i) The appeal is partly allowed.

(ii) The conviction of accused for the offence punishable

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under section 302 of Indian Penal Code vide Judgment and Order passed by the Additional Sessions Judge, Pune dated 16/5/2015 in Sessions Case No. 220 of 2012 is hereby quashed and set aside.

(iii) Accused-appellant is convicted for an offence punishable under Section 304 Part I of Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs. 1000/- i.d. to suffer Rigorous Imprisonment for one month.

(iv) The appeal is disposed of accordingly.

[N.J.JAMADAR, J]

[SMT. SADHANA S. JADHAV, J.]