

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

**CRIMINAL APPEAL NO.570 OF 2022 WITH
CRIMINAL APPLICATION NO.2194 OF 2022**

Kallusingh s/o Shankarsingh Rajput
Age 33 years, Occu. Labour,
R/o Plot No.82, Shantinayakan Nagar,
Maharun, Jalgaon, Tq. & Dist.
Jalgaon, at present Nashik Road
Central Prison, Nashik

... APPELLANT

VERSUS

The State of Maharashtra
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad)

... RESPONDENTS

.....
Mrs. Vaishali A. Shinde (More) Advocate for appellant
(appointed through Legal Services Sub-Committee)
Mr. R.B. Bagul, A.P.P. for respondent – State
.....

**CORAM : R. G. AVACHAT, AND
R. M. JOSHI, JJ.**

DATED : 5th DECEMBER, 2022.

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

The challenge in this appeal is to a judgment and order of conviction and sentence, dated 8/12/2021, passed by learned Sessions Judge, Jalgaon in Sessions Case No.136/2011. The appellant was convicted for the offence

punishable under Section 302 of the Indian Penal Code and, therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.5000/-, in default to undergo further simple imprisonment for three months.

2. Facts giving rise to the present appeal are as follows :-

Lilabai (P.W.5) is mother-in-law of the appellant. There was one more accused before the trial Court. He is co-brother of the appellant. Both of them had visited the house of their mother-in-law, Lilabai (P.W.5) on the fateful day. Suresh (P.W.6) had already been at the house of Lilabai (P.W.5). Both, the appellant and his co-brother suspected about illicit relationship between Lilabai (P.W.5) and Suresh (P.W.6). There was, therefore, quarrel between Suresh (P.W.6) on one hand and the appellant and original accused No.2 on the other. Asaram (deceased) had accompanied Suresh (P.W.6) to the house of Lilabai (P.W.5). He intervened in the quarrel. The appellant got annoyed thereby and, therefore, inflicted a knife blow just below the left arm pit of Asaram. Asaram was rushed to the hospital for treatment. His statement was recorded by a police officer, based on

which, Crime vide C.R. No.59/2011 came to be registered for offence punishable under Section 307 of the Indian Penal Code.

3. A Naib Tahsildar-cum-Executive Magistrate also recorded Asaram's statement. Asaram, however, succumbed to the injuries on 11/2/2011. Section 302 of the Indian Penal Code, therefore, came to be invoked in place of Section 307. After conducting all the necessary investigation, both, the appellant and his co-brother were proceeded against by filing a charge sheet.

4. On committal of the case, the trial Court framed the Charge (Exh.10). On appreciation of the evidence before him, the learned Sessions Judge convicted the appellant and sentenced him as stated above. The original accused No.2 came to be acquitted. The State has not preferred appeal against acquittal.

5. Heard. Learned counsel for the appellant would submit that, the F.I.R.-cum-dying declaration does not mention the name of the appellant nor his description has been given therein. The same could be said about dying

declaration recorded by the Executive Magistrate. The appellant was not subjected to test identification parade. Admittedly, Lilabai (P.W.5) has three sons-in-law. One of the remaining two might have been involved in the crime. She would submit, in the alternative that, the appellant did not have intention to kill Asaram. The weapon of assault was not a knife but was an article of a tin sheet. The cause of death indicate the deceased to have had suffered infection. As such, it may at the most be an offence punishable under Section 304 Part II of the Indian Penal Code. She would further submit that, the appellant has been behind the bars for over one and half year. She ultimately urged for release of the appellant with a sentence of imprisonment so far already undergone.

6. The learned A.P.P. would, on the other hand, submit that, an innocent person had to lose his life. The deceased had in fact intervened to subside the quarrel. The appellant assaulted with a knife-like weapon. He gave two blows, which proved to be fatal. Intention to kill was writ large. According to learned A.P.P., no interference with the impugned order is, therefore, warranted.

7. Considered the submissions advanced. Perused the evidence relied on. Dr. Kiran (P.W.10) conducted autopsy on the dead body of Asaram on 11/2/2011. He noticed following two injuries on the person of the deceased :-

- (1) Incised wound on upper region of chest near axilla left, size 4 cm x 3 cm x deep to bone
- (2) Incised wound on left of chest lateral to nipple laterally oblique measuring 3 x 2 x 2 cm.

Those were ante mortem

In his opinion, the deceased died of cardio respiratory arrest due to stab injury and laceration of lung (left) associated with surgical emphysema. According to the Medical Officer, the injuries suffered by the deceased were sufficient to cause his death.

8. P.W.1 Chhayabai is a widow of deceased Asaram. She is not an eye witness to the incident. Her evidence only suggests that, P.W.6 Suresh had taken the deceased with him to the house of Lilabai (P.W.5). P.W.2 Nilesh is a witness to the scene of offence panchanama. He did not stand by the prosecution. P.W.3 Dineshrao was brother of the deceased.

His evidence indicates that, he learnt about the incident from one Munshi Pawar. Whatever has been deposed to by Dineshrao was based on the information received from Munshi Pawar. As such, his evidence is hear-say. P.W.4 Shaikh Amin is a witness to the seizure of clothes of the deceased. He did not stand by the prosecution.

9. Lilabai (P.W.5) testified that, the appellant is her son-in-law. Suresh (P.W.6) is her husband. Her evidence further suggests that, there was a quarrel among the appellant, her husband and her neighbours. She, therefore, went to the residence of the appellant. The quarrel had already subsided. Her evidence further suggests that, P.W.6 Suresh had been to her residence as it was Sunday. On having seen him at her residence, the appellant was annoyed. The appellant questioned Suresh (P.W.6) as to his relationship with her. A quarrel, therefore, took place.

10. Lilabai (P.W.5), however, conveniently avoided to testify about having seen the appellant assaulting the deceased with a knife. Her evidence, however, undoubtedly suggests that, there was a quarrel between the appellant and P.W.6 Suresh. The same suggests the appellant's presence at

the scene of offence. The learned counsel for the appellant, therefore, could not be heard to say that, the identity of the assailant has not been proved.

11. Evidence of P.W.6 Suresh indicates, there was quarrel between him and the appellant. The appellant assaulted Asaram (deceased). Asaram was rushed to the hospital. He identified the appellant before the Court. During cross-examination, Suresh (P.W.6) testified to have not married Lilabai (P.W.5). He denied to have seen the appellant assaulted the deceased. In our view, his evidence in the examination-in-chief, however, could not get eclipsed.

12. On admission of the deceased to the hospital, his statement was recorded by a police officer. The same is at Exh.100. It is in the evidence of P.W.14 Bhausahab that, he went to the Civil Hospital. He recorded F.I.R.-cum-dying declaration of Asaram. Before recording the same, the Medical Officer on duty examined Asaram and certified him to be conscious and fit to make a statement. It was P.W.8 Dr. Umesh who had examined Asaram and certified him to be conscious oriented to make a statement. Certification given by him is at Exh.62.

13. Similar is the evidence of Dr. Reshma (P.W.9). Her evidence suggests that, she examined Asaram before his statement was recorded by Executive Magistrate. She found Asaram to be conscious oriented and fit to make a statement. She gave an endorsement to that effect vide Exh.65. P.W.12 Purushottam was the Executive Magistrate-cum-Naib Tahsildar at the relevant time. His evidence suggests him to have recorded the statement (dying declaration – Exh.92) given by Asaram.

14. Both the dying declarations recorded by Police Officer and the Executive Magistrate speak in one voice. These statements got more reliance in view of the fact that name of the appellant has not been mentioned therein since the deceased was not knowing the assailant. It, therefore, could not be said that, both the statements are products of imagination or tutoring. Both the statements undoubtedly suggest that the deceased intervened to subside the quarrel. Son-in-law of Suresh assaulted him with a knife.

15. It has already been observed hereinabove that the appellant's presence at the scene of offence has been

undoubtedly made out in view of the evidence of both Lilabai (P.W.5) and Suresh (P.W.6). Suresh (P.W.6) has even testified the appellant to have assaulted the deceased. As such, the fact that the appellant assaulted the deceased has been proved beyond reasonable doubt.

16. The question is, whether it is an offence punishable under Section 302 of the Indian Penal Code. Admittedly, there was a quarrel between the appellant and his so called father-in-law Suresh (P.W.6). The deceased had intervened to subside the same. The appellant was not armed with a knife. As such, it is not a case of premeditation. Close reading of the evidence would suggest the appellant to have assaulted the deceased with an article of tin sheet (not a knife). The assault was all of a sudden on account of intervention by the deceased. Close reading of the evidence would further suggest the appellant to have made one assault. True, there were two injuries on the person of the deceased. The medical papers of the Civil Hospital find place at Exh.63. The history recorded therein is – assault by metal *Patra* plus history of consumption of alcohol, incised wound over left side axilla apx. 3 x 2 x deep up to apx. 4 cm. stab injury.

17. The deceased died five days after the incident. As stated above, the cause of death was surgical emphysema. Surgical emphysema could be developed from injury and infection. The same suggests that, infection was set in due to injury caused by the assault. The same might have accelerated the death of Asaram. It has already been observed above that, the assault was not intended to kill the deceased. It would, therefore, not be an offence of murder. In our view, the appellant has to be attributed with a knowledge that the assault may prove fatal. It would, therefore, be an offence punishable under Section 304 Part II of the Indian Penal Code.

18. Considering all the facts and circumstances of the case, in our view, the sentence of imprisonment of five years would meet the ends of justice. In the result, the appeal partly succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The order of conviction and consequential sentence

dated 8/12/2021, passed by learned Sessions Judge, Jalgaon in Sessions Case No.136/2011, for the offence punishable under Section 302 of the Indian Penal Code is hereby set aside. The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code. However, 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 five years and to pay fine of Rs.500/- (Rupees five hundred), in default to suffer rigorous imprisonment for 15 days.

(iii) Consequently, Criminal Application No.2194/2022, filed for suspension of sentence, stands disposed of.

(iv) Fees of learned Advocate Mrs. Vaishali A. Shinde (More), appointed through Legal Services Sub-Committee is quantified at Rs.10,000/- (Rupees ten thousand).

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-