

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO.663 OF 2014**

Shaikh Isa Shaikh Piran  
Age : 37 years, R/o House No. 581,  
Hudco, Shivaji Nagar, Jalgaon,  
District Jalgaon.

Appellant

**Versus**

The State of Maharashtra  
Through Police Inspector,  
City Police Station, Jalgaon,  
District Jalgaon.

Respondent

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Mr. U.L. Telgaonkar, Advocate for the appellant.  
Mr. S.D. Ghayal, A.P.P. for the respondent - State.

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CORAM : **V.K. JADHAV AND  
SANDIPKUMAR C. MORE, JJ.**

DATE : 03-01-2022.

JUDGMENT (Per V.K. Jadhav, J.) :

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Jalgaon dated 06.09.2014 in Sessions Case No. 98/2012.

2. Brief facts leading to the prosecution case are as follows:

Deceased Javed and the appellant-accused were residing in the same building. Deceased Javed alongwith his wife Najmabi and children was residing on the first floor, whereas the appellant – accused alongwith his wife Nooribi was residing on the ground floor. On 04.03.2012 at about 10.30 p.m. quarrel had taken

place between the appellant – accused Shaikh Isa and his wife Nooribi. Appellant - accused Shaikh Isa was under the influence of liquor. Deceased Javed went to interfere and pacify the quarrel. Thus, the appellant - accused Shaikh Isa got annoyed because of his interference and replied that deceased Javed should not interfere in the quarrel between husband and wife. There was exchange of words between them. Appellant - accused Shaikh Isa then went inside his house, brought knife and gave blow of the knife on the abdomen of deceased Javed, in consequence of which deceased Javed had sustained bleeding injury to his abdomen. His wife Nooribi had also assaulted deceased Javed by pelting a brick on his back. Deceased Javed was immediately taken to the hospital. However, he succumbed to the injury on 07.03.2012.

3. PW-1 Police Head Constable Kailash Chavan had recorded the complaint – cum – dying declaration of deceased Javed in Civil Hospital, Jalgaon. On the basis of the said complaint – cum – dying declaration, Crime No. 21/2012 came to be registered for the offences punishable under Sections 326, 337, 323, 504, 506 read with Section 34 of the Indian Penal Code (for short “I.P.C.”) at Police Station, Jalgaon against the appellant - accused Shaikh Isa and his wife Nooribi. On 07.03.2012 deceased Javed died in the hospital due to said injury on his abdomen and accordingly charge under Section 302 of I.P.C. came to be added.

4. PW-12 A.P.I. Balasaheb Waichale was assigned with the investigation of the crime. Accordingly, he visited the spot and carried out spot panchanama (Exh.68) in presence of panchas. He had also seized the piece of brick from the spot of the incident. During the course of investigation, on 06.03.2012 wife of the deceased namely Najmabi had produced clothes of deceased Javed which he was wearing at the time of the incident. Those clothes were one pant and shirt, stained with blood. Thus, the said clothes were seized in presence of panchas under panchanama (Exh.69). On 07.03.2012 after receiving the information about death of deceased Javed in the hospital, inquest panchnama (Exh.82) was drawn. On the same day PW-12 A.P.I. Balasaheb Waichale had effected arrest of the accused under arrest panchnama and also added Section 302 of I.P.C. against the accused. On 08.03.2012 while accused Nooribi was in the police custody, she had shown her ready and willingness to produce weapon knife used in the assault. Accordingly, memorandum panchnama (Exh.83) was prepared in presence of panchas and knife used in the assault came to be seized from the concealed place as shown by co-accused Nooribi by drawing seizure panchnama (Exh.84). Furthermore, on the same day PW-12 A.P.I. Balasaheb Waichale had seized clothes of appellant - accused Shaikh Isa while he was in police custody, in presence of panchas under seizure panchnama. The said panchnama is marked at Exh.85. Investigating Officer A.P.I. Balasaheb Waichale also recorded statements of the witnesses and

further sent the seized articles in the crime to the office of Chemical Analyzer. He had also obtained memorandum of postmortem examination (Exh.72). On completion of investigation, PW-12 A.P.I. Balasaheb Waichale has filed charge-sheet against the accused persons.

5. Learned Additional Sessions Judge has framed charge vide Exh.3 against both the accused persons for having committed offences punishable under Sections 302 and 323 read with Section 34 of I.P.C. The contents of the charge were read over and explained to both the accused in vernacular and both of them pleaded not guilty to the charge and claimed to be tried. Prosecution has examined in all 12 witnesses to substantiate the charges levelled against accused persons. After completion of prosecution evidence, statements of accused under Section 313 of the Code of Criminal Procedure (for short "Cr.P.C.") came to be recorded. Defence of the appellant - accused is of simple denial. It is the defence of appellant - accused that the deceased was under the influence of liquor, he fell down from the staircase and sustained injury.

6. Learned Additional Sessions Judge, vide judgment and order dated 06.09.2014, has convicted the appellant - accused for the offence punishable under Section 302 of I.P.C. and sentenced him to suffer imprisonment for life. Learned Sessions Judge, however, acquitted the appellant - accused of the offence punishable

under Section 323 of I.P.C. Learned Sessions Judge has convicted accused No. 2 Nooribi for the offence punishable under Section 323 of I.P.C. and sentenced her to suffer imprisonment already undergone by her. Thus, the said Nooribi has not preferred appeal. The operative part of the order of sentence passed by the Additional Sessions Judge dated 06.09.2014 reads as under :

- “(1) Accused No.1 Shaikh Isa Shaikh Piran R/o Jalgaon is hereby convicted for the offence punishable under Section 302 of the Indian Penal Code vide section 235 (2) of Code of Criminal Procedure. He is sentenced to suffer life imprisonment with fine amount of Rs. 5,000/- (Rs. Five Thousand only). In default of payment of fine, he shall undergo further simple imprisonment of 3 months.*
- (2) However, Accused No.1 Shaikh Isa is acquitted of the offence punishable under Section 323 of Indian Penal Code vide section 235 (1) of Code of Criminal Procedure.*
- (3) Accused No.2 Nooribi @ Rukhsana Shaikh Isa R/o Jalgaon is hereby convicted for the offence punishable under section 323 of the Indian Penal Code vide section 235 (2) of Code of Criminal Procedure. She is sentenced to suffer imprisonment already undergone by her.*
- (4) Accused No.2 Nooribi is acquitted of the offence punishable under Section 302 of Indian Penal Code, vide section 235 (1) of Code of Criminal Procedure.*
- (5) Set off be given to accused No. 1.*

- (6) *Accused No.2 Nooribi shall surrender her bail bonds.*
- (7) *Accused No. 2 Nooribi to submit P.B. of Rs. 5,000/- as compliance of section 437A of Cr.P.C., which shall be in force for six months.*
- (8) *Muddemal property, being worthless, be destroyed after appeal period is over”.*

7. Learned Counsel for the appellant - accused submits that PW-1 Police Head Constable Kailash Chavan was not authorized by the then Police Station Officer of the concerned police station to record the statement of deceased Javed in the hospital. Furthermore, the said Police Head Constable Kailash Chavan has not requested the doctor in writing to certify the fit state of mind of deceased Javed to give statement. Learned Counsel submits that he has only asked the doctor on duty as to whether the patient was in a condition to give statement and when doctor said yes, he went to record the statement of deceased Javed. Learned Counsel submits that there is neither certification nor PW-1 Police Head Constable Kailash Chavan got himself satisfied about the fit state of mind of deceased Javed to give statement. Learned Counsel submits that even though the deceased was literate person, the complaint – cum – dying declaration (Exh.45) does not bear his signature and it bears thumb impression. Learned Counsel submits that neither on the top of the said dying declaration nor at the bottom the doctor has put his endorsement. Further, there is no reference

in the evidence of PW-1 Police Head Constable Kailash Chavan that the treating doctor was present alongwith him while recording the complaint – cum – dying declaration of deceased Javed.

8. Learned Counsel for the appellant - accused submits that so far as PW-3 Najmabi, wife of deceased Javed, is concerned, she is not eye witness to the incident. On that day there was dinner function in House No. 581. The said House No. 581 belongs to the mother-in-law of deceased Javed. At about 10.00 p.m. PW-3 Najmabi had gone to her house on the first floor and her husband deceased Javed was present in the House No. 581. PW-3 Najmabi has deposed that she heard shouts from the ground floor, and therefore, rushed there. She saw her husband in injured condition.

9. Learned Counsel submits that so far as the evidence of another eye witness PW-8 Shabanabi is concerned, the relations between the husband of the said witness and appellant - accused were strained on account of lodging of complaints against each other. Learned Counsel submits that PW-8 Shabanabi is highly interest witness and she has even exaggerated her version. Learned Counsel submits that PW-10 Dr. Rati Attarde, who had conducted postmortem examination of the dead body deceased Javed, has also admitted that the injury No. 2 which is the only single injury, is possible by fall on the pointed iron strip. Learned Counsel submits that it is a specific defence of the appellant - accused that deceased Javed was under the influence of liquor and

he fallen down from the stairs under the influence of liquor. Learned Counsel submits that mother-in-law of deceased Javed and other witnesses have not supported the prosecution case and even mother-in-law of deceased has deposed before the Court that deceased Javed had sustained injury accidentally.

10. Learned Counsel submits that the prosecution has failed to prove the case beyond reasonable doubt against the appellant - accused. Learned Counsel for the appellant - accused, in the alternate, submits that the incident had taken place without any pre-meditation and it has taken place as of sudden in the hit of anger during the course of quarrel. It is the case of a single blow. Learned Counsel submits that there is nothing in the evidence of prosecution witnesses to infer about the murderous intention on the part of the appellant - accused at the time of giving blow on the abdomen of deceased Javed. Learned Counsel, in the alternate, submits that at the most the appellant - accused can be convicted for the offence punishable under Section 304 (II) of I.P.C. This is a case of culpable homicide not amounting to murder.

11. Learned A.P.P. submits that the prosecution case rests upon direct evidence. Medical evidence also corroborates the prosecution case. Deceased Javed had tried to pacify the quarrel and anyway he was not aggressive, however, for no reason the appellant - accused got annoyed. Learned A.P.P. submits that the appellant - accused has not instantly assaulted the deceased with

the help of knife, but as per the evidence of prosecution witnesses, the appellant - accused went inside the house, brought knife and thereafter given blow of the knife on the abdomen of deceased Javed. Learned A.P.P. submits that this particular gap / pause itself indicates about the murderous intention on the part of the appellant - accused. Learned A.P.P. submits that though the recovery is at the instance of co-accused, the same is admissible against the appellant - accused. PW-10 Dr.Rati Attarde has also admitted that injury No.2 (injury Nos. 1 and 3 are operational injuries) is possible by use of weapon (Article 'D' knife) before the Court. Learned A.P.P. submits that the prosecution has proved it's case beyond reasonable doubt. There is nothing in the cross-examination of PW-8 Shabanabi that there is civil dispute between the parties nor any document is placed on record to indicate the relations between her husband and appellant - accused became strained on account of certain criminal complaints lodged against each other. Learned A.P.P. submits that PW-8 Shabanabi is an independent eye witness and there is nothing in her cross-examination to disbelieve her evidence. Learned A.P.P. submits that alternate argument is not available to the appellant - accused since his murderous intention at the time of incident was apparent. Learned A.P.P. submits that CA reports (Exhs. 73 to 75) demonstrate that human blood was found on the blade of the knife and particular blood was found on the clothes of deceased and the same blood group was found on the shirt of the appellant - accused.

12. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witnesses; the statement of the appellant – accused recorded under Section 313 of Cr.P.C. and the impugned judgment.

13. So far as the homicidal death is concerned, the prosecution has examined PW-10 Dr. Rati Attarde. She has noted two sutured wounds on the abdomen and one drain on the left side lower part of the abdomen. However, the first and third wounds, as stated by PW-10 Dr. Rati Attarde, were operative injuries and the second injury was the stab injury. The said wounds were antemortem in nature. PW-10 Dr. Rati Attarde, on internal examination, has also found peritoneal red colour fluid in the cavity and one sutured wound in small intestine about 4 cms in length. She has also noted the contusion over the liver right lobe of size 5 x 4 cm approximately and further the laceration of left side of right lobe over liver of size 5 x 3 x 2 cm approximately. She has also noted contusion of 1 cm over left lobe. In her opinion, the said injury No.2 in Column No. 17 corresponding to findings in Column No. 21 of the postmortem report is sufficient in the ordinary course of nature to cause death. The postmortem report bears her signature and it is marked at Exh. 72. Though PW-10 Dr. Rati Attarde has denied that injury No. 2 in postmortem report (Exh.72) is possible by fall on iron rod, however, she has accepted that if one falls on the pointed iron strip, such injury can be caused. However, there is nothing in the cross-examination of the prosecution witnesses, especially the eye

witness to point out that during the said quarrel, or under the influence of liquor, deceased fallen down on the sharp side of the iron strip and thus sustained injury. There is nothing further in the cross-examination to draw any other inference about the death. We are of the opinion that the prosecution has proved beyond doubt the homicidal death in this case.

14. So far as evidence of PW-2 Najmabi, wife of deceased Javed, is concerned, the learned Counsel for the appellant - accused has rightly pointed out that she is not an eye witness to the incident. In examination-in-chief itself PW-2 Najmabi has deposed that after attending dinner function on the ground floor in House No.581, she went to her house at first floor at 10.00 p.m. She heard shouts from the ground floor, and therefore, she rushed there. Thus, certain time is required to come to the ground floor from the first floor. PW-2 Najmabi has further stated in her examination-in-chief itself that she saw her husband in injured condition.

15. PW-8 Shabanabi is an independent witness to the incident. She is neighbour and accused resides in front of her house. She has deposed that in the quarrel, appellant - accused went inside the house, brought the knife and gave blow of knife on the stomach of deceased Javed. Even she has identified the knife used in the assault when shown to her in the Court. Though an attempt was made in her cross-examination to brand her as an interested witness, however, there is nothing in her cross-

examination to suggest that there were inimical terms between her husband and the appellant - accused. Even though there is reference of criminal complaints, however, no copies of the complaints were shown to this witness nor those were placed on record. It is well settled that the evidence of interested witness cannot be rejected outrightly for the sole reason that he is interested witness. On careful and close scrutiny of the evidence of PW-8 Shabanabi, we find that she has given true account of the incident.

16. We do not think that the recovery of weapon knife at the instance of co-accused Nooribi is not admissible against the appellant - accused. It has been specifically recorded in the memorandum panchnama that after the incident co-accused Nooribi has concealed the said weapon. We can certainly read the said part of the memorandum panchnama, which is admissible. Furthermore, human blood was found on the blade of the knife. Similarly, the shirt of the appellant - accused also came to be seized during the course of investigation. There was blood stains on it and as per CA report (Exh. 73), the same blood group appeared on the shirt of the appellant - accused, that of the blood group of the deceased on his clothes.

17. Thus, considering entire aspect of the case, we are of the opinion that the prosecution has proved the incident. We find much substance in the alternate submission made on behalf of the appellant - accused. It appears that on the day of incident there was

dinner party at the ground floor in House No. 581. Deceased Javed alongwith his wife PW-2 Najmabi were residing on the first floor, whereas appellant - accused alongwith his family members was residing on the ground floor. As per the spot panchnama (Exh. 68), the incident had taken place in front of House No. 581 at the distance of 10 ft. It further appears that the incident had taken place without any pre-meditation. In fact, the quarrel had taken place between the appellant - accused Shaikh Isa and his wife co-accused Nooribi. Deceased Javed was also present in the said dinner party and he had attempted to pacify the quarrel. Thus, the appellant - accused got annoyed because of the same. In the hit of anger as of sudden, he brought knife from his house and gave a single blow of the knife on the abdomen of deceased Javed.

18. In the case of **Jagriti Devi vs. State of Himachal Pradesh** reported in **(2009) 14 SCC 771**, the Supreme Court has dealt with the question as to whether Section 304 Part II of I.P.C. is applicable only when exceptions to Section 300 of the I.P.C. cover the case. The Supreme Court says that Section 304 Part II of I.P.C. applies only when the exception to Section 300 of I.P.C. covers a case, is misconceived. Though the learned A.P.P. has vehemently submitted that the appellant - accused went inside the house, brought knife and thereafter gave blow of the knife on the abdomen of deceased Javed, however, we cannot ignore that the incident had taken place without any pre-meditation as of sudden during the course of quarrel. We do not find any murderous intention on the

part of the appellant - accused. It is a case of culpable homicide not amounting to murder. Had there been murderous intention on the part of the appellant - accused, he could have given several blows of the knife. Thus, this case certainly falls under Section 304 Part II of the I.P.C.

19. We were informed by the learned A.P.P. and learned Counsel for the appellant - accused that the appellant - accused has undergone the imprisonment of near-bout 10 years so far. The appellant - accused came to be arrested on 07.03.2012. He remained under trial and even after filing of appeal against the judgment and order of conviction, this Court has not released him on bail. Thus, it is clear that the appellant - accused is in jail undergoing sentence for near-about 9 years and 10 months. In our considered opinion, the appellant - accused can be convicted under Section 304 Part II of the I.P.C. for the imprisonment which he has already undergone. Hence, we proceed to pass the following order.

### **ORDER**

- (i) Criminal Appeal No. 663 of 2014 is hereby partly allowed.
- (ii) The impugned judgment and order dated 06.09.2014 passed by the Additional Sessions Judge, Jalgoan in Sessions Case No.98/2012 convicting the appellant - accused Shaikh Isa Shaikh Piran for the offence punishable under Section 302 of the Indian Penal Code is hereby converted into Section 304 Part II of the Indian Penal Code and the appellant - accused Shaikh

Isa Shaikh Piran is sentenced to suffer imprisonment which he has already undergone, with no fine amount.

- (iii) The appellant-accused Shaikh Isa Shaikh Piran shall be released forthwith, if not required in connection with any other crime.
- (iv) The appellant-accused Shaikh Isa Shaikh Piran shall execute P.B. of Rs. 15,000/- with one surety of the like amount to appear before the higher court as and when notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.
- (v) Criminal Appeal No. 663 of 2014 is accordingly disposed of.

**(SANDIPKUMAR C. MORE, J.)**

**(V.K. JADHAV, J.)**