

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

CRIMINAL APPEAL NO.344 OF 2015

Sameer Khan Alias
Wasim Azgar Nehal Azgar
Aged 24 years, Indian Inhabitant
Presently at Central Jail
Nasik, Maharashtra

.... Appellant
(Orig. Accused)

versus

The State of Maharashtra

... Respondent

.....

- Mr. Aniket Vagal, Advocate for Appellant .
- Mr. S. S. Hulke, APP for State/Respondent.

**CORAM : S. S. SHINDE &
SARANG V. KOTWAL, JJ.**

**RESERVED ON : 14th MARCH, 2022
PRONOUNCED ON : 17th MARCH, 2022**

JUDGMENT (PER : SARANG V. KOTWAL, J.)

1. The Appellant has challenged the Judgment and Order dated 27/11/2014 passed by the Sessions Judge, Raigad, at Alibag in Sessions Case No.20 of 2013. The Appellant was the only accused in that case. The Appellant was convicted for the offence punishable u/s 302 of the Indian Penal Code and was

sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- and to suffer rigorous imprisonment for one year in default of payment of fine. The Appellant was given set off for the period for which he was in jail during the trial.

2. Heard Mr. Aniket Vagal, learned counsel for the Appellant and Mr. S. S. Hulke, learned APP for the State.

3. The prosecution case is about commission of murder of one Devi Deepak Sarkar @ Deepti Sameer Khan (the deceased in this case) committed by the present Appellant. Both of them were residents of Barvadih, Zarkhand. The Appellant was having a shop for recharging of mobile phones. The deceased used to come to his shop for recharging her phone. Slowly their friendship grew into love affair. Earlier both of them had eloped together. On that occasion they had returned. But again the deceased left her house. The deceased was residing at Kongaon, Taluka Panvel, District Raigad. The Appellant used to visit her. There was a quarrel between them on 03/10/2012 in the evening. On the next date on 04/10/2012 at about 04.30 p.m.

there was again quarrel between them and on this occasion, the Appellant committed her murder by throttling her. The neighbours had reached the room, where the murder was committed, on hearing noise. They saw the Appellant jumping out of the window and running away. The deceased was lying dead. Therefore the landlord Janardan Gharat lodged his FIR. The investigation was conducted and the Appellant was arrested on 05/10/2012. After completion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions. At the conclusion of the trial the Appellant was convicted and sentenced as mentioned earlier.

4. During trial the prosecution examined in all 10 witnesses;

- ◆ P.W.1 - Janardan Janu Gharat and P.W.3 Harish Tejab Shetty, had seen the Appellant jumping out of the window and running away after commission of crime.
- ◆ P.W.2 – Faik Nijam Patel, had seen the Appellant going away towards high way in a frightened condition at about 04.30 p.m. on 04/10/2012.

- ◆ P.W.4 – Deepak Sarkar, is the father of the deceased and he has given history of relationship between the Appellant and the deceased.
- ◆ P.W.5 – Dr. Basavraj Sangnath Lohare, had conducted the post-mortem examination.
- ◆ P.W.6 – Jayavanti Janardhan Gharat was Pancha for Inquest Panchanama.
- ◆ P.W.7 – Ashok Narayan Patil, was a Pancha for recovery of clothes of the Appellant.
- ◆ P.W.8 – Vinayak Ramchandra Patil, was a Pancha for Spot Panchanama.
- ◆ P.W.9 – Jagdish Namdeo Patil, was a Pancha for arrest of the Appellant.
- ◆ P.W.10 – PI Adhikrao Mahadeo Pol, was the Investigating Officer.

The prosecution has also produced C.A. certificates on record.

5. The defence of the Appellant was of total denial. He has not taken any specific defence.

6. Learned counsel Mr.Aniket Vagal submitted that the incident is a result of sudden quarrel and in the heat of passion the Appellant has committed this act. His subsequent conduct

and his repentance of the act before P.W.3 saying that he had committed a mistake; shows that he had not intended to commit murder of the deceased.

7. Mr.Vagal emphasized on his submissions that this is not a case of murder, but the offence is of lesser degree and it falls within the exceptions mentioned in section 300 of the IPC defining murder.

8. On the other hand, learned APP Mr. S. S. Hulke submitted that the prosecution has proved all the necessary facts. The prosecution has proved beyond reasonable doubt that it was a case of homicide and the Appellant had committed this crime.

9. According to the learned APP, if the Appellant was taking up a defence that the offence was a lesser degree, it was for him to prove that his act fell in one of the exceptions mentioned in section 300 of the IPC. In this case the Appellant has failed to discharge his burden. The Appellant cannot take

advantage of the prosecution evidence on record in this case to discharge the burden. There is nothing to support the theory that the incident had taken place in a sudden quarrel and the Appellant has not taken any undue advantage or has not acted in a cruel manner. Learned APP therefore submits that the offence squarely fell within the meaning of murder as defined u/s 300 of the IPC.

10. We have considered these submissions.

PW.5 Dr. Basavraj Lohare had conducted the post-mortem examination. He had found following injuries;

- A) Finger nail marks (crescentic)(curve shape of nail) mark abrasions on the front of neck ((S) shape) 0.5 cm in length each.
- B) Irregularly distributed finger marks (Bruises) over anterior aspect of neck, multiple 3 cm, 5 cm, 6 cm and 2 cm.
- C) Bruises on right side neck 4 cm x 2 cm diffused swelling noted.
- D) Bruises on left side of neck 3.5 cm x 2 cm.
- E) Fracture hyoid bone noted.

11. According to him the cause of death was 'asphyxia due to throttling'. He has stated that the deceased had died because of the compression of trachea. There was no cross-examination of this witness. The evidence of this witness leaves no manner of doubt to conclude that the deceased had died because of throttling.

12. As far as complicity of the Appellant is concerned, the prosecution has relied on the evidence of P.W.1 and P.W.3. The P.W.1 was the landlord in whose room the deceased was residing. It was Room No.2, on the second floor. He has stated that the Appellant used to meet the deceased. He has identified the Appellant before the Court. He has further deposed that on 03/10/2012, he had seen the deceased and the Appellant going to the market. That time P.W.1 had enquired with the deceased about the Appellant. The deceased had told him that he was her husband. After they returned home, there was a quarrel between the deceased and the Appellant. P.W.1 went there. After the

quarrel had stopped, he came back. On 04/10/2012 at about 04.30 p.m. when he was in his house, again he heard the quarrel between the Appellant and the deceased. He went to the room. He called them, but they did not respond. P.W.1 then came down and got four more persons with him, as he suspected some serious problem. All of them again went to the room No.2. They pushed the door. It is his case that he saw the Appellant running away through the window of that room. The window was near the kitchen. It was not having any grill. The P.W.1 asked the Appellant to stop, but he did not stop and ran away. All of them entered the room. They saw that the deceased was lying on the bed. She was not responding. There was no movement. P.W.1 could see the signs of throttling and marks on the throat. According to him, the deceased was lying dead there. P.W.1 then went to the police station and lodged his FIR against the Appellant. The FIR is produced on record at Ex.17. He showed the spot to the police. He identified the Appellant's clothes when produced during the trial. In his cross-examination he has stated that the height of each floor was 12 ft. They knocked on the

door for about 5 minutes. There was some contradictions in his FIR and deposition before the Court as to whether he had seen the Appellant and the deceased going to the market on the previous day of the incident or about 8 days prior to the incident. In our opinion these contradictions do not go to the root of the case. Beyond this, nothing much was elicited from his cross-examination. The record shows that the FIR was lodged immediately at about 06.15 p.m. at New Panvel police station.

13. PW.3 Harish Tejab Shetty was residing in the same building on the first floor. He was knowing the deceased as well as the Appellant. According to him, he had seen the Appellant on one or two occasions, while the Appellant was going to the room of the deceased. The Appellant was native of Zarkhand and whenever he went to Zarkhand he used to call the deceased telephonically and some times if her phone was not reachable, he used to call this witness. He has stated that, on 03/10/2012, he had heard quarrel between the Appellant and the deceased at about 07.00 p.m. On 04/10/2012, when he was in the house, at

about 4 to 4.30 p.m., he heard shouts from the deceased. He went there. P.W.1 and his son were present there. The door was shut from inside. All of them opened the door with some force. P.W.3 has stated that he had seen the Appellant running from the window of the room. They asked him to stop, but he did not stop. He was wearing a blue coloured T shirt. They saw that the deceased was lying on the ground. There were signs of throttling. P.W.1 then called the police. The police came there and made enquiries. P.W.3 gave phone number of the Appellant to the police. P.W.3 was taken to Pune as the location of the Appellant's phone was showing that he was in Pune. After some time, the location was shown at Lonawala and then at Panvel. P.W.3 was taken to Panvel. During that time, P.W.3 received a phone call from the Appellant. It is his case that the Appellant said that he had committed a mistake. On the instructions of the police P.W.3 told the Appellant that the deceased was still alive and was in the hospital. The Appellant came to the S.T. stand at Panvel. The police arrested him there. In the cross-examination, P.W.3 has accepted that his statement was recorded on

12/10/2012. The deceased had started residing in that building since one month prior to the incident. According to him, the Appellant was staying with her. He was confronted with some omissions from his police statement. He could not explain as to why those omissions occurred. The police statement did not mention that he had heard shouts from Deepti. In the police statement it was not mentioned that the Appellant had called him and had admitted to his mistake and that the police had instructed the P.W.3 to tell the Appellant that the deceased was still alive.

14. P.W.2 Faik Nijam Patel is another witness examined by the prosecution to show the Appellant's presence near the spot. He had stated that on 04/10/2012 at about 04.30 p.m. he had seen a boy wearing blue coloured T shirt and having sack on his back going towards high way in a frightened condition. This witness had seen the deceased with that boy on some occasions. The deceased and the Appellant had come to his shop on one or two occasions. But this witness did not know the Appellant's

name. On 08/10/2012, P.W.2 was called to the police station and there he identified the Appellant as the boy who was accompanying the deceased. He could not explain as to why his police statement did not mention that the Appellant and the deceased had come to his shop in the past.

15. P.W.4 Deepak Sarkar is the father of the deceased. He has deposed as to how the Appellant and the deceased got acquainted. He has stated that both of them had eloped in the past, but they were apprehended by the police. That incident had taken place in January 2011. In the same year 2011 the deceased left their house under some pretext. He called the Appellant to make enquiries, but the Appellant gave evasive replies. On 04/10/2012 the deceased made a telephonic call and told this witness's wife i.e. mother of the deceased that she was going to marry a boy by name Rajesh and was not planning to marry the Applicant. She also informed that the Appellant used to come to her for taking money. She further told that on that day also the Appellant was to come for taking money. This

conversation had taken place at about 01.30 p.m. His cross-examination does not reveal anything of significance.

16. Consideration of this evidence shows that P.W.1 and P.W.3 are important witnesses. The prosecution case rests on their evidence. Both have consistently deposed that at the time of the incident they and others had gone to the room of the deceased. They had opened the door with force. They had seen the Appellant jumping out of the window and then running away. The deceased was lying dead in that room. There were signs of throttling. All this is consistently deposed. There is no serious challenge to this evidence. There are some omissions from the police statement of P.W.3. His statement is also recorded a little belatedly. However, P.W.1's evidence does not suffer from any infirmity. He is a natural witness. He was residing on the ground floor. He had deposed about the quarrel that had taken place in the previous evening and also about the incident on 04/10/2012. The FIR is lodged immediately at 06.15 p.m. on 04/10/2012. There was no reason for him to

concoct a false story. There was no enmity between this witness and the Appellant. This witness had regularly seen the Appellant with the deceased.

17. PW.2 also gives some corroboration to evidence of these two witnesses. He had not gone to the spot of incident, but he had seen the Appellant going towards high way in a frightened condition. He has identified the Appellant in the police station. The Investigating Officer could have taken precaution to conduct the identification parade for PW.2 to enable him to identify the Appellant. But in any case his evidence is not the main evidence in this case. The incriminating evidence is that of PW.1 and PW.3 and in particularly that of PW.1. Father of the deceased has given a history between the couple. Significantly he has deposed that on the date of incident the deceased had called them and had expressed her desire not to marry the Appellant, but to marry some other person. The evidence of this witness is not seriously challenged by the defence.

18. Though, the CA report does not exactly help the prosecution case, the Spot Panchanama and other investigation carried out, does support the evidence of these main witnesses.

19. The Appellant has not offered any explanation whatsoever. The prosecution has definitely proved its case that the Appellant was inside the room when the incident had taken place and when the witnesses entered the room, he ran away by jumping from the window. The deceased was lying dead. It was incumbent upon the Appellant to explain the situation which was within his exclusive knowledge as per the requirement of section 106 of the Indian Evidence Act. Apart from that, as claimed by Mr.Vagal, if his case fell within any of the exceptions to the definition of murder u/s 300 of IPC, it was for the Appellant to have discharged his burden to prove that his case fell in any of the exceptions. In this case either on his own or on the basis of the evidence led by the prosecution; the Appellant has not discharged his burden.

20. Mr.Vagal relied on a few judgments as follows:

- (i) Judgment of Hon'ble Supreme Court in the case of ***State of U.P. Vs Lakhmi***, as reported in ***AIR 1998 SUPREME COURT CASES 1007***.

Mr.Vagal relied on the observations in paragraph No.16 of this judgment, wherein it is observed that;

The law is that burden of proving such an exception is on the accused. But the mere fact that accused adopted another alternative defence during his examination under Section 313 of the Cr.P.C. 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.”

In this case before the Hon'ble Supreme Court, the deposition of witnesses positively suggested that the accused would have seen something lascivious between his wife and P.W.2 in that case, when he entered the house from the field. Thus there was some positive indications in that case. However, in the present case before us, there is no such evidence direct or indirect in favour of the Appellant.

- (ii) Mr.Vagal then relied on the judgment of Division Bench of this Court in the case of ***Shivpujan Harishankar Yadav, Vs. State of Maharashtra, dated 06/01/2021 passed in Criminal Appeal No.1035 of 2015.***

In that case, the accused had sustained bleeding injury and in the same transaction he had committed murder of his wife by strangulating her with a nylon rope. In that situation, his defence was held to be probable. However, in the present case, there is not a single indication of similar nature, which could have helped the Appellant.

- (iii) Mr.Vagal then relied on the judgment of a Division Bench of this Court dated 15/02/2022 passed in Criminal Appeal No.978 of 2012 in the case of ***Pravin Khimji Chauhan, Vs. The State of Maharashtra.***

In that case, the conviction of the Appellant was converted from section 302 of IPC to section 304 (Part-I) of the IPC. Mr.Vagal submitted that in that case the deceased wife of the accused had suffered 26 incised wounds and stab wounds and yet it was held by the Division Bench that it was a case of culpable homicide, not amounting to murder.

The discussion in paragraph Nos.12 and 15 of that judgment shows that the Division Bench had referred to the statement of the accused in that case recorded by the police which showed that he was left with a feeling of mortification. According to him he was left with a wounded pride, which resulted in the brutal death of his wife.

It appears from this discussion that the Division Bench had referred to the statement given by the accused to the police, which was in the nature of confession. Mr. Vagal could not point out how that confession was admissible for any purpose and therefore the Appellant cannot take advantage of those observations made in that case.

21. Considering this discussion it is clear that the prosecution has proved its case beyond reasonable doubt. On the other hand, the Appellant has not even probablised his defence. No specific defence under sections 105 and 106 of the Indian Evidence Act, 1872, was taken and it cannot be said that the burden on him could be discharged on the evidence of the prosecution itself. The prosecution has thus proved its case beyond reasonable doubt. There is no scope to hold that this is not a case of murder, but is that of culpable homicide not amounting to murder. Therefore we do not find any reason to interfere with the impugned judgment and order. Hence the Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)