

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.634 OF 2012
WITH
CRIMINAL APPLICATION NO.1470 OF 2016
WITH
INTERIM APPLICATION NO.1146 OF 2020**

Acquino Avith Martis

Aged : 24 years, Occ.: Nil,

R/o Rashmi Tanmaya, "A" Wing,

Room No.701, Bevhvarli Park,

Mira Road East, District Thane.

At present in judicial custody and

undergoing the sentence imposed upon

him at Kolhapur Central Prison.

... Appellant/ Applicant

V/s.

The State of Maharashtra

At the instance of Senior Inspector of

Police, Mira Road Police Station

vide their F.I.R. No.I-72 of 2009

... Respondent

Ms. Pooja N. Sejpal a/w Akshata Desai i/b. Mr. Nitin Sejpal, Advocate
for the Appellant/ Applicant.

Mr. Arfan Sait, APP for the Respondent – State.

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

RESERVED ON : 15th NOVEMBER 2021.

PRONOUNCED ON : 10th FEBRUARY 2022.

JUDGMENT : (Per Smt. Sadhana S. Jadhav, J.)

1. The appellant herein is convicted for the offence punishable under sections 302, 309 of Indian Penal Code and sentenced to suffer imprisonment for life and fine of Rs.10,000 (Ten Thousand Only), in default, to suffer R.I. for 6 months by the Ad-hoc District Judge – 3 and Additional Sessions Judge, Thane in Sessions Case No.301 of 2009 vide judgment and order dated 2nd May 2012. Hence, this appeal.

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

(i) One Paloma, daughter of Ligerio Fernandis (PW.2) was residing in Mira Road in a building namely Rashmi Hetal. She originally hailed from Goa. She was working in Mumbai at J.P Morgan Call Centre. She was in love with the accused. The appellant who was residing in 'A' wing building of the same Co-operative Housing Society in Room No.A-701 whereas Paloma was residing in 'B' wing building in Room No.B-6.

(ii) On 26th January 2009, at about 6.30 am, watchmen of the said Housing Society viz. Shailendra Singh Chandrika Singh (PW.3) lodged a report at Mira Road Police Station alleging therein that since 4 to 5 days prior to 26th January 2009 there was a quarrel between the

appellant and Paloma. The bone of contention was that the ATM Card of Paloma was lost and she suspected that it was in the custody of the appellant. She had expressed her apprehension to the watchman of the said society and had requested him to lock her door from outside after she returns home from her job and to hand over the key to her from the window. P.W.3 had obliged. On 26th January 2009, in the early hours the accused had been to the house of Paloma, he had given a call on her cell only to verify whether she is indoors. The watchman had asked him to leave the society and he had obeyed.

(iii) On 27th January 2009, at about 4.00 am, Paloma returned from her job. She had requested the watchman to accompany her to her house. He alongwith Mohan Yadav, another watchman had accompanied her upto her house. When she was opening the door they started descending the staircase and at that juncture, they heard a call from her to “save”. Upon returning, they saw the appellant assaulting Paloma with a sharp edged weapon. The watchmen immediately held him from behind. In the course of apprehending the accused had even bitten on his right hand. The people from the society had gathered and had taken her to the hospital. At the same time, the appellant had attempted to stab himself. On the basis of the said report, Crime

No.72/2009 was registered at Mira Road Police Station for the offences punishable under sections 302, 324 and 309 of IPC.

(iv) At the trial, the prosecution examined as many as 11 witnesses to bring home the guilt of the accused. P.W.3 happens to be the injured eye-witness and the complainant who had set the law into motion. Therefore, the prosecution has placed implicit reliance upon the evidence of P.W.3 and P.W.8 Mohan Yadav.

(v) Paloma had succumbed to the injuries and died on the same day in the hospital. Autopsy was performed on the dead body of Paloma by P.W.7 - Dr. Arun Koli and he had found the following injuries:-

- “1. Right leg thigh C.L.W. back side near knee 2 x 1 cm.
2. Abrasion on wrist joint 2 x 1 cm.
3. Right side knee joint abrasion 1 x 1 cm.
4. Stab wound over the chest front at the mid clavicle line
2 x 2 cm lateral to the sternum 2 cm. superior middle to
the left nipple.
5. Stab wound size 3 x 1 cm. deep blood and clots.”

3. P.W.-7 Koli opined that the injuries were dangerous and the cause of death was due to injury on the vital organ (heart) of the injured. He proved the contents of Exh.34 which are the post-mortem

notes. All that is elicited in the cross-examination of P.W.7 is that the injury nos.1 to 3 are minor injuries, however, injury no.4 is a dangerous injury and is not possible in the course of free fight.

4. P.W.2 – Ligirio Fernandis has deposed before the Court that his daughter Paloma was residing in Bombay and working in a Call Centre. Just a month prior to the incident, he had visited his daughter along with his wife and at that time, they had realised that Paloma was in love with the present appellant. At the same time, he had heard about the bad habits of the accused and had also warned his daughter. The parents had made an attempt to dissuade their daughter from continuing in the said relationship, however, it was of no avail. On 28th January 2009, he had received a phone call from his daughter Priyanka who also resided in Malad and she had informed him about the incident. He had asked his relative to visit the place of residence of Paloma and ascertain the actual position. By the time his relative viz. Santosh Pandey had visited the society, Paloma was taken to the hospital. The parents had then rushed to Bombay.

5. P.W.3 – Shailendrasingh was working as a watchman of Rashmi Hetal Co-op. Housing Society. He was well acquainted with the

deceased as well as the accused since they were residing in the same society. That, the deceased was residing in 'B' wing whereas the accused was residing in 'A' wing. P.W.3 has stated that he was well aware of the love affair in between the accused and the deceased as he used to often see them together. That, few days prior to the incident, there was a quarrel between the accused and the deceased since the deceased suspected that her ATM Card was in the custody of the accused. She had apprehended danger at his hands and therefore, she asked the watchman i.e. P.W.3 to accompany her upto her house everyday. That, on the unfortunate day, he was accompanied by Manoj Yadav, another watchman, to drop the deceased upto her house and while descending the steps he had heard her cry. In the course of accosting the accused, the accused had bitten him on his right hand. His injury certificate is at **Exh.40**. The same is issued by Dr. Prabhakar Sagaonkar who was working in Bhagwati Hospital. The bite injury was a simple injury. It was only upon hearing his hue and cry that the people in the society had gathered on the spot. P.W.3 had lodged the report at the Police Station and set the law into motion. He has proved the contents of the FIR which is at **Exh.19**.

6. The complainant was cross-examined at length. He claims to be acquainted with all the member residents of the society. The defence had suggested that the witness has a weak sight of the left eye and therefore, in all probabilities, must not have identified the accused. However, the same is negated by PW.3. He was aware of the fact that the accused and the deceased were in love and were to get married in the near future. In the cross-examination, all that is elicited is when he went towards the deceased he heard the shouts to save and when he reached there he saw the deceased and the accused lying in injured condition. After the injured were taken to the hospital, he had approached the Police Station to file a report. The police had conducted Panchanama of the scene of offence on the basis of what was shown to them by him. The defence has failed to create dent in the evidence of PW.3 who happens to be a natural witness.

7. PW.4 – Tukaram is a resident of Rashmi Hetal building. According to him, he was also acquainted with the accused and the deceased and that the accused was unemployed. The watchman i.e. PW.3 had called upon PW.4 soon after the incident. He had seen 2 watchmen and the accused and the deceased. The watchman had caught hold of the accused. The accused had also injured himself after

biting the watchman. He is a truthful witness who has stated that he had not actually seen the incident of assault but had seen that the clothes of the deceased were torn and that she succumbed to the injuries. He never had an occasion to have an interaction with the accused or the deceased. P.W.4 resides on the same floor as that of the deceased.

8. The prosecution has also examined another eye-witness i.e. Mohan Yadav – P.W.8 who was accompanying P.W.3 was working as a watchman at Rashmi Tanmay Apartment at Mira Road which is adjacent to Rashmi Hetal. On the unfateful night, P.W.8 was in the company of P.W.3. They both had accompanied the deceased to her house in the wee hours of 28th January 2009 when the incident occurred. He was also aware that there was intimacy between the accused and the deceased and they were to get married in near future. It appears that he was aware of the quarrel between the accused and the deceased in respect of the missing of the ATM Card of the deceased. He is also an eye-witness to the said incident. He has also seen the accused biting P.W.3 and thereafter, attempted to cause injury to himself. His evidence remains un-shattered.

9. The prosecution has examined Dr. Pramod T. Shinde – P.W.10 to establish the charge under section 309 of IPC. In fact, the complainant as well as Manoj Yadav – P.W.7 have categorically stated that the accused had attempted to commit suicide by the same knife. P.W.10 has deposed before the Court that on 28th January 2009, he examined Benjamin Martis. The injured himself had given history of suicidal stab injury. Upon examination, it was seen that he had sustained a stab wound upon epigastric region admeasuring 1.5 cm. the depth of the wound could not be ascertained and therefore, he had to undergo C.T. Scan and the diagnosis was “laceration of liver with left rib fracture”. From the appearance itself, the Doctor could draw inference that it was indeed a self-inflicted injury. The said injury was sufficient in the ordinary course of nature to cause death. It is true that it was not mentioned in the IPD case paper that the history of suicidal stab injury was given by the patient. The said certificate is at Exh.42.

10. P.W.11 - Mushtaque Ahmed is the investigating officer. He has deposed before the Court the steps taken by him in the course of investigation. He has proved the omissions and contradictions in the evidence of the witnesses examined by the prosecution.

11. The learned counsel for the appellant has vehemently argued that the appellant was arrested on suspicion since he was in love with the deceased. That the prosecution has not proved that the ATM card of the deceased was missing or was the bone of contention for the quarrel between the accused and the deceased. That the prosecution has not proved the ingress of the accused to the flat of the house of the deceased and hence, the accused deserves to be acquitted.

12. The learned counsel has drawn attention of this Court to the statement of the accused under section 313 of Cr.PC. and has submitted that he has been falsely implicated.

13. Per contra, the learned APP has supported the judgment of the trial Court and has submitted that it calls for no interference.

14. With the help of the learned counsel appearing for the accused and the learned APP we have gone through the evidence meticulously.

15. In the present case, the prosecution has established the following :-

(I) That the accused and the deceased were residents of the same

society and were residing in different buildings;

- (II) That the accused and the deceased were in love with each other;
- (III) That a quarrel had ensued between the accused and the deceased just 4 to 5 days prior to the incident on the suspicion nurtured by the deceased that in all probabilities, her ATM card was stolen by the deceased;
- (IV) That the deceased had apprehended danger at the hands of the accused and therefore, she had requested the watchman to lock her house from outside after she arrives and give the keys to her from the window;
- (V) On 27th January 2009, P.W.3 had seen the accused going near the house of the deceased and calling on her cell phone only to satisfy himself that she was at home;
- (VI) On 28th January 2009, due to apprehension the deceased had requested the watchman to accompany her to her house when she arrived home at 4.00 am.

16. The above facts established by the prosecution are sufficient to hold that the author of the fatal injury sustained by the deceased is none other than the appellant himself. The prosecution

has established the motive, the presence of the accused at the scene of offence and has also proved that the accused has caused hurt to himself at the same spot and had given history of suicidal injury to the doctor at the time of admission in the hospital. The prosecution has proved the guilt of the accused beyond reasonable doubt.

17. In view of the above discussion, the judgment of the trial court calls for no interference. Appeal is dismissed.

18. In view of the disposal of the Appeal, nothing survive in the applications and the same are disposed of accordingly.

(PRITHVIRAJ K. CHAVAN, J)

(SMT. SADHANA S. JADHAV, J)