

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 35 OF 2017**

Shankar @ Bhagirath Bachaku Zha,
Age 32 years, Occu.:- Service,
R/o. Ravikamal Mill Co. Honad,
Taluka Khalapur,
District Raigad.

Permanent R/o.

Bharat Khand,
Post & Tal. Darbata,
District Khaadiya,
State of Bihar
(At present lodged at Nashik Road
Central Prison, Nashik)

.....Appellant
(Orig. Accused)

Vs.

The State Of Maharashtra,
(Vide Sessions Case No.119 of 2013
arising out of C.R. No.115 of 2013
registered at Khopoli police Station)

.....Respondent

Ms. Ameeta Kuttikrishnan, appointed Advocate for the Appellant.
Mr. S.S. Hulke APP, for the Respondent-State.

**CORAM : A. S. GADKARI AND
RAJESH S. PATIL, JJ.
DATE : 19th JULY, 2022.**

ORAL JUDGMENT (PER A. S. GADKARI, J.):

Appellant has questioned correctness of Judgment and Order dated 24th November, 2015 passed by the Additional Sessions Judge, Raigad-Alibag in Sessions Case No.119 of 2013, convicting the Appellant

for the offence punishable under Section 302 of the Indian Penal Code (for short, "*the IPC*") and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine to further suffer rigorous imprisonment for six months and under Section 201 of the IPC and sentence to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/- in default of payment of fine to further suffer rigorous imprisonment of one month. Trial Court has directed that, the substantive sentences shall run concurrently.

2 Heard Ms. Kuttikrishnan, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for the Appellant and Mr. Hulke, learned APP for the State. Perused entire record.

3 Shorn off unnecessary details, it is the prosecution case that, the Appellant was brother-in-law of deceased Deepak Yadav. The sister of deceased Deepak Yadav is the wife of the Appellant. Appellant was working with Ravi Kamal Mill Company situated at village Honad, Taluka Khalapur, District Raigad. Appellant had brought deceased Deepak Yadav to work in the said company. Appellant, deceased Deepak Yadav another worker Ishwar Prasad Yadav and Rajesh J. Choudhary (PW-1) i.e. the informant, were working in Wheat Cleaning and Washing department in the said company. Rajesh J. Choudhary (PW-1) was working as machine operator in the said company. On 14th July, 2013, the duty timing of Rajesh J. Choudhary (PW-1) was from 8.00 p.m. to 8.00 a.m.. In the wee hours of

15th July, 2013 i.e. at about 2.00 a.m., Rajesh J. Choudhary (PW-1) did not see Deepak Yadav (deceased) in the department in spite of search. He therefore asked the Appellant where Deepak Yadav (deceased) was, to which Appellant replied that Deepak Yadav had ran away by leaving the work. The informant Rajesh J. Choudhary (PW-1), thereafter engaged himself in his work. In the morning of 15th July, 2013 at about 8.00 a.m. after completing his duty hours, Rajesh J. Choudhary (PW-1) went to his house. The Manager of the said company, Durgaprasad L. Somani (PW-5), gave a phone call to Rajesh J. Choudhary (PW-1) and asked him to come into company's office at about 10.00 a.m. Accordingly, Rajesh J. Choudhary went to the company's office. Durgaprasad L. Somani, Manager of the said company questioned Rajesh J. Choudhary as to where Deepak Yadav (deceased) is, to which Rajesh replied that, Deepak Yadav (deceased) had ran away, as was told to him by the Appellant about the same. Durgaprasad L. Somani (PW-5) therefore asked the Appellant where Deepak Yadav (deceased) was, to which Appellant replied that, a quarrel took place between himself and Deepak Yadav (deceased) and he killed Deepak Yadav (deceased) as he got angry and due to the same he assaulted Deepak Yadav (deceased) with an iron rod and thereafter threw his body in the stream which was at the back side of the company. The reason for the said assault was told by the Appellant to Durgaprasad L. Somani (PW-5) was that, Deepak Yadav (deceased) instigated his wife by saying that, though the

Appellant is a handicap person, why she performed marriage with him. That led to quarrel which ensued in the assault by the Appellant upon Deepak Yadav (deceased).

4 Police were immediately informed about the said fact. Jagannath N. Chavan (PW-9) Police Sub Inspector, then attached to Khopoli Police Station, recorded first information report (Exh-12) of Rajesh J. Choudhary (PW-1) bearing Crime No.115 of 2013 for the offence under Sections 302 and 201 of the IPC. The investigation of the said crime was immediately handed over to Smt. Jayashri M. Kulkarni (PW-10), Assistant Police Inspector, then attached to Khopoli Police Station. She visited the spot of incident and effected spot panchanama (Exh-17). She found iron rod which was used for the commission of offence by the Appellant lying at the spot of offence. She also seized the said article by the same panchanama in presence of panch witness Tukaram D. Sadambar (PW-2). Rajesh J. Choudhary (PW-1) showed the place where the Appellant was provided residential accommodation. In presence of Tukaram D. Sadambar (PW-2), police seized clothes of the Appellant by effecting seizure panchanama (Exh-18). The police subsequently sent those articles to the Forensic Science Laboratory, Mumbai. The Chemical Analyser submitted report of Analysis at (Exh-48 colly). The Assistant Chemical Analyser gave report dated 6th June, 2014 stating that, the blood found on weapon of assault i.e. iron rod and clothes of Appellant were of human origin,

however the blood group was inconclusive.

Dr. Prasad B. Rokade (PW-8) conducted autopsy on the body of Deepak Yadav (deceased) on 15th July, 2013 at about 5.50 p.m. he found that, the rigor mortis was well marked in the whole dead body. The dead body was not decomposed and was fresh. The right eye of dead body was swollen and tongue was inside the mouth. Blood was oozing from nose and ears. On examining, he found following injuries-

- i) head injury on the right occipital region 7.9 cm. X 4 to 5 cm.
- ii) There was incised looking wound on forehead between the eye brows. The said injury was 3 cm. X 3 cm. there was fracture on the frontal bone.
- iii) There was laceration on left thigh and swelling and fracture of femur.
- iv) Abrasion on neck 2 cm. x 1 cm.
- v) Pattern bruise on back side

On internal examination he found that, skull vault was fractured. The size of said fracture was 6 cm. X 8 cm. long. He therefore opined that the injury on the occipital region of head is sufficient for cause of death of Deepak Yadav (deceased). He finally opined that, the cause of death was due to cardio respiratory failure (arrest) due to hypo volumic shock due to head injuries. He accordingly prepared postmortem note (Exh.35).

5 Assistant Police Inspector, Smt. Jayashri M. Kulkarni (PW-10) after completion of investigation, filed charge-sheet in the Court of Judicial

Magistrate First Class, Khalapur. As the offence alleged to have been committed by the Appellant under Section 302 of the IPC, is exclusively triable by the Court of Sessions, learned Judicial Magistrate, First Class, Khalapur committed the said case to the Court of Sessions as contemplated under Section 209 of the Cr.P.C.

The Trial Court framed charge below Exh.4. The said charge was read over and explained in vernacular language to the Appellant, to which he denied, pleaded not guilty and claimed to be tried. The defence of the Appellant was of total denial and false implication.

6 The prosecution, to establish guilt against the Appellant and in support of its case examined in all 10 witnesses namely, (1) Rajesh J. Choudhary (PW-1), who lodged first information report (Exh-12), (2) Tukaram D. Sadambar (PW-2), panch witness to the spot and seizure of iron rod i.e. weapon of assault Panchanama (Exh-17) and also panch of seizure of clothes of Appellant (Exh-18), (3) Ramesh R. Dhumal (PW-3), panch witness to inquest panchanama (Exh-20), (4) Umeshprasad L. Yadav (PW-4), foreman working in the said company, (5) Durgaprasad L. Somani (PW-5), Manager of the company, (6) Parashuram D. Badhe (PW-6) Mandal Officer who drew sketch of scene of offence/spot (Exh-28), (7) Chandrakant Gaikwad (PW-7) panch witness of seizure of clothes of deceased (Exh-31), (8) Dr. Prasad B. Rokade (PW-8), Medical Officer, conducted autopsy and issued provisional postmortem certificate (Exh-34)

and prepared postmortem report (Exh-35), (9) Jagannath N. Chavan (PW-9) Police Sub Inspector, recorded first information report (Exh-12) of Rajesh J. Choudhary (PW-1) and (10) Smt. Jayashri M. Kulkarni (PW-10) Assistant Police Inspector and investigating Officer of the crime.

7 After recording evidence of the prosecution witnesses, statement of Appellant under Section 313 of Cr.PC. (Exh-5) was recorded. The Trial Court, by its impugned Judgment and Order has convicted and sentence the Appellant as noted hereinabove.

8 Ms. Kuttikrishnan, learned Advocate appointed for the Appellant submitted that, the prosecution case is mainly based on extra judicial confession given by the Appellant to Rajesh J. Choudhary (PW-1), Umeshprasad L. Yadav (PW-4) and Durgaprasad L. Somani (PW-5). She submitted that, prosecution has failed to examine Hariram Kokne to whom Durgaprasad L. Somani (PW-5) the Manager of the company, had asked to call Appellant to the company. She submitted that, Hariram Kokne was a material witness and failure of prosecution to examine him creates doubt about the prosecution case. She submitted that, there were many workers present in the night shift on the day of occurrence of incident. She submitted that, the weapon used for the present crime i.e. the iron rod was found at the scene of offence itself. That, the clothes of the Appellant were found in his room which was shown by Rajesh J. Choudhary (PW-1) and were not seized at the behest of Appellant by recording panchanama under

Section 27 of the Evidence Act. She submitted that, these circumstances lead to drawn an the inference that, there may be some other person who might have committed the present crime and therefore the Appellant may be granted benefit of doubt.

In her alternate argument, she submitted that, the alleged crime committed by the Appellant was due to sudden and grave provocation caused by the deceased Deepak, as can be discerned from the alleged extra judicial confession given by him and therefore the Appellant cannot be held guilty of an offence under Section 302 of the IPC and the act of the Appellant would fall within the purview of Section 304 (II) of the IPC. She therefore submitted that, the present Appeal may be allowed by setting aside impugned Judgment and Order and in the alternative, the conviction of the Appellant be reduced to a lesser offence under Section 304 of the IPC.

9 Per contra, Mr. Hulke learned APP vehemently opposed the Appeal and submitted that, the Appellant was having motive to commit the present crime. The Appellant himself has confessed that, as the deceased who was his brother-in-law was instigating his wife for separation on the ground that, the Appellant is a handicap person and she should not have married with him. He submitted that, human blood stains were found on the clothes of the Appellant and there is no explanation offered by him for the same, is a strong circumstance against the Appellant for upholding his

conviction. He therefore prayed that, the present Appeal may be dismissed.

10 Perusal of evidence on record reveals that, the prosecution case is based on four major circumstances namely-

- i) Motive;
- ii) Extra-judicial confession given by the Appellant;
- iii) Appellant led the police and other witnesses to the spot of incident where the weapon used in the present crime i.e. iron rod with blood stains, was recovered; and
- iv) The blood stained clothes of the Appellant were seized from his room.

11 Rajesh J. Choudhary (PW-1), Umeshprasad L. Yadav (PW-4) and Durgaprasad L. Somani (PW-5) are the witnesses before whom the Appellant gave extra-judicial confession. All the three witnesses have unequivocally deposed that, when the Manager Durgaprasad L. Somani (PW-5) asked the Appellant where Deepak Yadav (deceased) was, to which the Appellant replied that, in the night a quarrel took place between him and Deepak Yadav (deceased), due to which Appellant got angry, killed Deepak Yadav (deceased) and threw his body in a streamlet situated in the back side of the company. Upon further being asked about the same, the Appellant gave reason that, Deepak Yadav (deceased) instigated his wife by saying that, as to why she married with the Appellant who is a handicap.

After the said extra-judicial confession given by the Appellant, Durgaprasad L. Somani (PW-5) asked Rajesh J. Choudhary (PW-1) to give a call to the Khopoli Police Station. Police Sub Inspector, Jagannath N. Chavan (PW-9) thereafter recorded first information report (Exh-12) of Rajesh J. Choudhary (PW-1) and Smt. Jayashri M. Kulkarni (PW-10) thereafter conducted investigation of the present crime.

12 The evidence on record clearly indicates that, the spot panchanama (Exh-17) and the seizure panchanama of clothes of Appellant (Exh-18) were not seriously disputed by the Appellant. The blood stains found on the weapon used in the present crime and on the clothes of the Appellant have been analysed and the report of the Chemical Analyser discloses that, the blood was of human origin however the blood group could not be detected.

Thus, the prosecution case is mainly based on extra-judicial confession of the Appellant to the PW Nos.1, 4 and 5 along with other attending circumstances as narrated hereinabove.

13 A minute perusal of the extra-judicial confession of the Appellant given to PW Nos.1,4 and 5 would clearly indicate that, in the intervening night of 14th July, 2013 and 15th July, 2013 at about 2.30 a.m. there was a quarrel between the Appellant and Deepak Yadav (deceased), on account of Deepak instigated wife of the Appellant to separate herself from Appellant on the count that, he is a handicap person. It clearly

appears that, due to the said saying by deceased, it causes grave and sudden provocation to the Appellant and in the fit of rage, he assaulted Deepak (deceased) with an iron rod which was part of the machinery lying at the place of the incident.

14 Medical evidence on record reveals that, Deepak Yadav (deceased) had suffered two major injuries on his head i.e. Nos. i) and ii) as noted earlier. The Medical Officer (PW-8) has clearly opined that, the injury on the occipital region of head was sufficient for cause of death.

It thus appears to us that, due to the quarrel between the Appellant and Deepak Yadav (deceased) on the intervening night on 14th July, 2013 and 15th July, 2013, the Appellant got suddenly provoked and in the fit of rage, assaulted Deepak Yadav (deceased) with an iron rod which was lying therein as noted earlier.

The evidence on record shows that, the Appellant did not act in a cruel or unusual manner. As noted above, Deepak Yadav (deceased) caused grave and sudden provocation to the Appellant being handicap and married with the sister of deceased. Appellant has not committed the act in a premeditated manner. He did not come at the scene of offence with any weapon in hand. He has used an iron rod as a “tool or weapon” which was lying at the spot, for assaulting deceased, resulted into his death.

15 To bring the case within the exception 1 of Section 300 of the IPC, the ingredients mentioned therein must be found for its application to

the facts of the case in hand. To invoke exception 1 of Section 300 of the IPC following requirements must be satisfied viz. (i) Whilst deprived of the power of self-control by grave and sudden provocation; (ii) causes the death of person who gave the provocation or (iii) causes the death of any other person by mistake or accident.

16 According to us, Exception 1 of Section 300 of IPC will be applicable to the case in hand and therefore the present case would fall under purview of Section 304 (Part II) of the IPC. In view thereof, we hereby convict the Appellant under Section 304 (Part II) of the IPC and sentence him to suffer rigorous imprisonment for 10 years. The impugned Judgment and Order dated 24th November, 2015 is modified to that extent. The fine amount imposed by the Trial Court is hereby maintained.

Appeal is partly allowed in the aforesaid terms.

17 Before parting with the Judgment, this Court places on record a word of appreciation for the efforts put in by Ms. Kuttikrishnan, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing cause of Appellant, as she was thoroughly prepared in the matter and rendered proper assistance to the Court.

(RAJESH S. PATIL, J.)

(A.S. GADKARI, J.)

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SHARNAPPA
MASHALKAR

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