

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 01 OF 2012

Rajpal S/o Shyamrao Gadpayale,
Aged about 43 Years, Occ – Tailoring,
R/o. Satephal, Tq-Chandur Railway,
Distt - Amravati

.... **APPELLANT**

// **VERSUS** //

The State of Maharashtra,
through Police Station Officer,
Talegaon Dashashar,
District - Amravati

.... **RESPONDENT**

Shri Yash Bhelande, Advocate h/f Shri P.R. Agrawal, Advocate for appellant
Shri I.J. Damle, A.P.P for respondent-State.

CORAM : SMT. M.S. JAWALKAR, J.
DATE OF RESERVING THE JUDGMENT : 27th SEPTEMBER, 2022.
DATE OF PRONOUNCING THE JUDGMENT : 30th SEPTEMBER, 2022.

JUDGMENT:

Heard learned Advocate for the appellant and learned
Assistant Public Prosecutor for the respondent-State.

2. The present appeal is filed by the appellant being aggrieved by the judgment and order of conviction dated 05/12/2011, passed by the learned Ad-hoc Additional Sessions Judge, Amravati in Sessions Trial No. 180/2008. By the said

judgment the appellant came to be convicted for the offence punishable under Section 307 of the Indian Penal Code and sentenced the appellant to suffer rigorous imprisonment for three years and six months and to pay a fine of Rs. 2000/- and in default of payment of fine amount, to suffer further rigorous imprisonment for three months.

3. The prosecution story in brief is as under:

On 12/08/2008, at 11.30 to 12.00 hours, when Sau Lata Tirmare, wife of injured Suresh was fetching water from the public tap, the accused who was sitting on the brink of nearby well, taking advantage of her loneliness, came near her and started abusing her. He also said that because of her, he was convicted for two years and hence, he will not leave her. Upon hearing this, Lata called her husband, her husband came and persuaded the accused and asked him to go to his house and both left to their respective houses. It is further alleged that after some times, when her husband while proceeding to his work, the accused who was sitting on the brink of well, he obstructed, hold and dashed victim on the ground and by taking out a weapon like knife, from the waist, stabbed on stomach of victim. On the cry of victim, the informant Lata, Atul,

Hanumant etc. rushed to her husband. When the accused was about to give second stab, Atul hold it snatched the knife and separated the accused. Because of said stabbing into stomach, her husband received serious injury. Intestines and food protruded from the stomach. He was immediately shifted to the hospital at Chandur Railway. He was thereafter referred to Irwin Hospital, Amravati.

4. According to Lata, three years prior to the incident, this accused had outraged her modesty and in that case, he was convicted by the Court. Being annoyed due to conviction, this applicant attempted to kill her husband.

5. The First Information Report No. 45/2008, was lodged for the offence punishable under Section 307 of the Indian Penal Code. The Investigating Officer visited the spot and prepared spot panchanama before the panchas. Dying declaration of injured Suresh was recorded, in which he disclosed that the accused stabbed him into his stomach.

6. The Investigation officer arrested the accused, recovered knife kept hidden in the house of the accused in presence of panchas. During investigation, Investigating Officer seized clothes

of the accused also seized the clothes of the victim. The blood sample also was collected. The seized articles were referred for C. A. examination.

7. After necessary investigation, police filed charge-sheet before the learned Court of Judicial Magistrate First Class, Dhamangaon Railway.

8. The learned Counsel for appellant-accused submitted that the offence under Section 307 of the Indian Penal Code is not at all attracted. If the complaint is perused, it is the contention of the complainant that the accused talked with him in a filthy language and threatened that as he was sentenced to suffer imprisonment for two years because of the complainant, he would not leave her. It is a matter of record that the accused was convicted at the instance of the complainant. Learned Counsel further submitted that it cannot be the motive for assault to the husband of the complainant. If at all wanted to take revenge, he would have assaulted the complainant herself. At least, there is no motive against the husband of complainant.

9. The prosecution has examined total eight witnesses. PW-1 – Sau. Lata Sureshrao Tirmare, in her deposition, deposed that the after few minutes, the accused returned back and sat on the brink of well. Her husband took meal and was on the way to his working place, accused shouted towards her husband, so he stopped. Then the accused rushed towards her husband holding him laid down to the earth. He had hidden knife near his waist, took the knife out and stabbed her husband. As her husband started shouting, Atul Patle, Hanumantrao Thawkar rushed towards her husband. The accused was about to give second blow, at that time, Atul Patle snatched the knife from his hand and Hanumantrao Thawkar took the accused away.

10. Learned counsel for the appellant pointed out that even PW-2-Suresh (victim) deposed that when he was passing near from the well, the accused stood in front of him and called him, so he stopped. Then the accused caught him in his arms, dashed him down and stabbed him with an article like knife. He shouted. That time, Atul Patle rushed to the spot and restrained the accused from giving second blow. PW-3 Atul Patle deposed that the accused took out a knife which was hidden near the waist and stabbed Suresh

Tirmare with it on his abdomen. Suresh shouted loudly. Then Hanumant Thawkar, Latabai and myself rushed towards the spot, when I heard the shout of Suresh first, I had reached the spot. The accused was about to give a second blow, I caught hold his hand and restrained him and took him by the side. In his statement under Section 164 of the Code of Criminal Procedure, he deposed that when the accused attempted to deliver another blow of knife, he caught his wrist and snatched the knife possessed by him. PW-8-Shankar Tulshiramji Kodape, who is panch witness to the recovery of knife, which is alleged to be recovered from the hidden place of the house of the accused. Both the panch witnesses of recovery i.e. PW-7 Hidayatkhan Niyamatkhan and PW-8-Shankar Kodape did not supported the prosecution.

11. Learned counsel submitted that the investigation is not beyond suspicion. When witnesses are saying that Atul Patle then snatched the knife, how can the prosecution had recovered the said knife from the house of the accused. It is the contention of the appellant that the complainant was not present on the spot when the incident occurred. In his deposition, there are material omissions that while giving statement, she had not stated that the accused had

threatened that he will not spare her husband too. Learned counsel pointed out that the statement of witness Atul Patle recorded under Section 164 of the Code of Criminal Procedure, he has stated that when he came outside after taking meal, he saw that the victim and the accused were talking to each other. At that time, some altercation took place between them which resulted into the scuffle between them in which victim fell on the road and accused fell on him. Then he took out the knife possessed by him from the waist and stabbed in the abdomen of the victim.

12. It is contended by the learned counsel for the appellant that there was no intention of killing the victim. There was some altercations resulted into scuffle and the incident took place. Thus, the prosecution miserably failed to establish any intention to commit the murder of the victim. Section 307 of the Indian Penal Code is attracted only when any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder. From the evidence of PW-1 Sau. Lata Sureshrao Tirmare, it reveals that she was not present at the time of actual incident. The prosecution witnesses did not state the actual genesis of the incident.

13. On medical evidence, the learned Counsel pointed out from deposition of PW-5 who deposed that injury was caused by sharp edged weapon if the patient would have not been treated immediately he might have expired. The contention of the appellant is that it was not deposed by the Doctor that injury caused was sufficient in ordinary course of nature to cause death. There may be any injury if it is not treated immediately may be the cause for death of that person but that does not mean that injury caused is sufficient in the ordinary course of nature to cause death.

14. It is further contended that the prosecution deliberately not brought on record how the injury sustained to the accused. As pointed out, there is scuffle between the accused and the victim. Those injuries caused to accused also. There is no independent witness examined. So far as Atul Patle is concerned, he is working as a labour for victim which he has admitted in cross. He admitted that he is neighbour of Lata and working as an agriculture labourer. He had been to the Court along with Suresh victim. So he is also interested witness. Though it had come in the deposition of complainant, there was crowd, no independent witness is examined by the prosecution. PW. 7 and 8 did not support the prosecution. The

Chemical Analysis report if perused, only human blood is detected, however no conclusive proof thereof found in result. The seizure panchanama are not beyond suspicion, the clothes of the accused were seized after three days. Though clothes were seized on 14/08/2008, it was sent to chemical analyser on 16/10/2008. Nothing is brought on record that during this period who was in custody of those articles. Prosecution has not examined any moharir or carrier in respect of seized articles.

15. Though the complainant claims to be present at the time of incident, neither clothes of complainant nor of Atul Patle who accompanied the victim to the hospital were seized. Therefore, it is doubtful whether complainant was present at the time of incident on the spot. The learned Counsel for appellant submitted that no ingredients attracting Section 307 of the Indian Penal Code are proved. At the most Section 324 may be attracted. The appellant has already undergone imprisonment for around 1 ½ years. As such, in the alternatively he prayed for the sentence, he undergone to be treated as sufficient and released the accused.

16. Learned Counsel for appellant relied on following

citations in support of his above contention:

1. *Ansar Dastgir Aitawade and others Vs. The State of Maharashtra and others, reported in 2018(3) AIR Bom.R (Cri) 744.*
2. *Punjab S/o Motiram Waghmare Vs. State of Maharashtra, reported in 2014 ALL MR (Cri) 3926.*
3. *Babarao and others Vs. State of Maharashtra, reported in 2018 ALL MR (Cri) 25.*
4. *Lalit @ Lallu Vinodchandra Shaha Vs. State of Maharashtra, reported in 200 ALL MR (Cri) 327.*
5. *Sanjay Sukhdeo Telore Vs. State of Maharashtra, reported in 2014 ALL MR (Cri) 3235.*
6. *Chudaram Vs. State of Maharashtra, reported in 1995(3) Crimes 428.*
7. *Ekos Joseph Vargis Vs. State of Maharashtra, reported in 1999 Cri LJ 1430.*

17. As against this, learned Additional Public Prosecutor vehemently opposed the appeal. He pointed out the judgment and order passed in Summary Criminal Case No.1214/2005 which was filed at the instance of complainant against the accused. By the said judgment, present accused was convicted and directed to suffer

rigorous imprisonment for two years. Thus, he submitted that there was a motive for the accused to commit an offence. The investigating officer has duly proved spot panchanama, recovery panchanama and seizure panchanama. The Doctor has deposed that if the patient was not treated immediately he would have expired that shows that the injury was sufficient in the ordinary course of nature to cause death. It is submitted that there is no case made out to acquit the appellant. The deposition are consistence and corroborative to each other. As such appeal be dismissed.

18. I have heard both the parties at length. Now rival contention falls for my determination. The first contention that there was no motive to assault to the victim. Even if it is admitted that earlier complaint and prosecution of the accused were at the instance of complainant and victim ought to be his target and not her husband, however when there are eyewitnesses motive is immaterial. From the evidence of P.W.-3, it appears that there was some quarrel between the victim and accused which turned into the altercation and scuffle between them. As such, it appears that the said incident occurred due to sudden quarrel and scuffle between the accused and victim.

19. On perusal of statement of witnesses, the accused about to give second blow was restrained by Atul Patle and he snatched the knife if that would be the case, recovery of knife from the house of accused appears to be improbable. Even, witness no.2 and recovery panch witness (P.W.-8) not supported the prosecution case. P.W.-8 were permitted to cross-examine on this point, however, nothing material the prosecution could brought on record. The accused also sustained injuries to his back and abrasion which supports the scuffle between the victim and accused.

20. The learned Counsel relied on *Punjab Waghmare* (supra), wherein the accused was tried for attempt to murder. Though there were allegation of inflicting blow with the spade and medical report and chemical analyses reports were also supporting the injury and blood of injured was detected on the clothes of injured and on the spade, still the Bombay High Court held that as no witnesses in cross admitted that there was a scuffle between the accused and injured and accused has also suffered injuries, the benefit of doubt needs to be extended to the accused and was acquitted.

21. Similar is the view taken in ***Babarao*** (supra), in the said matter, there is no evidence to show that the axe alleged to be used to assault to deceased having blood of blood group of deceased and also recovery of axe from the accused as per his confession statement held as doubtful. In the said matter, in view of the evidence of P.W.-2, who was the star witness of the incident, appears to be doubtful because as per her evidence, she herself and her husband caught hold the accused and snatched the axe from him, accused slap her and ran away. The said witness did not stay further in her cross-examination that accused taken axe with him. As such recovery is held as not proved. In this matter also though witnesses states that after the incident and before accused could give second blow the witness Atul Patle snatched knife from the hands of accused. However, there is nothing on record to show that the said knife is taken away by the accused with him and hidden it in his house. As such, recovery of knife from the house of the accused is appears to be improbable and create doubt.

22. So far as medical evidence is concerned, the Doctor though deposed that if patient would not have been treated immediately he might have expired. The learned Counsel for

appellant relied on ***Sanjay Telore*** (supra) wherein the Bombay High Court held that medical evidence do not show that cut injury was sufficient to cause death in ordinary course of nature. The evidence also not sufficient to ascertain intention of accused, it is held as under:

“6. I have gone through the evidence of PW.1- the injured, PW.7- Medical Officer and PW. 10- Medical Officer who has personally examined PW.1. At the outset, it may be mentioned here that PW.-10 has nowhere stated that the injury suffered by PW.-1 was sufficient to cause death in ordinary course of the nature. The injury is described as cut injury with the dimensions 6 cm X 3 cm X 1 cm. The evidence of PW.-1 does not, in any manner, indicate that the applicant wanted to commit murder of PW.-1 or wanted to cause bodily injury to PW.-1 which was sufficient to cause death in ordinary course of nature. There is insufficient evidence to ascertain intention of the applicant. As already stated, the medical officer has not stated anything about nature of injury. There is no evidence that the injury was sufficient to cause death in ordinary course of nature. In my considered opinion, therefore, the injury caused by the appellant was not with an intention to cause death or to cause bodily injury sufficient to cause death in ordinary course of nature.”

He also relied on ***Lalit @ Lallu Vinodchandra Shaha*** (supra) wherein conviction under Section 307 of the Indian Penal Code altered to one under Section 324 of the Indian Penal Code and sentence reduced accordingly. The said alteration of Section 307 to

324 is on the ground that accused inflicted solitary injury not dangerous to life.

23. The learned Counsel also relied on ***Chudaram*** (supra) wherein the Bombay High Court partly allowed the appeal altering the conviction under Section 307 to under Section 324 read with 34(2) of the Indian Penal Code.

24. There was only solitary blow of a sharp weapon, the recovery of weapon itself is doubtful, it is not deposed by the Doctor that it was sufficient to cause death in the ordinary course of nature. It is also came on record that there was quarrel and scuffle between the victim and accused. However, investigation is silent on the fact that who was the aggressor in the scuffle. The so called motive even if presumed would be there, it is against the complainant-wife of victim. The learned Counsel for appellant placed on record copy of judgment in Criminal Appeal No.157/2007 whereby the judgment in Summary Criminal Case No.1214/2005 which was filed at the instance of complainant came to be set aside and accused was acquitted by the learned Sessions Judge.

25. The learned Counsel relied on judgment *Ekos Joseph Vargis* (supra) wherein Bombay High Court altered the conviction under Section 307 to one under Section 324 of the Indian Penal Code. There was altercation between accused and victim and accused inflicted solitary blow with pen knife on abdomen of victim.

26. As such though involvement of the accused appears in the incident but conviction under Section 307 of Indian Penal Code cannot be sustained. For the reasons that the witness of prosecution themselves has stated that there was a quarrel and scuffle between victim and accused. Secondly, there is only one solitary stab injury into the abdomen. It has not established that who was the aggressor in the scuffle. The Doctor has not termed the injury as sufficient to cause death in ordinary course of nature.

27. Learned Additional Public Prosecutor drawn my attention to the statement of Doctor that if the patient was not treated immediately who would have expired and it has to be therefore concluded that the injuries was dangerous to life. However, in view of the principle laid down in above referred citations absence of statement by the Doctor to the effect that the injury was

dangerous and sufficient to cause death in the ordinary course of nature, it cannot be concluded that injury was sufficient to cause death in the ordinary course of nature. The panch witnesses of seizure and recovery did not stand by the prosecution. There is no explanation whatsoever or evidence when knife was snatched by witness Patle how it can be recovered from the house of accused. The Chemical Analyzer report is of no use as there is no evidence laid by the prosecution explaining to the extent that after the seizure of clothes on 13/08/2008 why it was not sent immediately and send it on 16/10/2008. There is no explanation that in whose custody it was. No carrier was examined. As such possibility of tampering of samples cannot be ruled out.

28. The incident is of ten years old and from evidence, it appears that there was altercation and scuffle between the accused and victim. As such prosecution failed to prove that there was intention to cause death or to cause bodily injury which is sufficient to cause death in ordinary course of nature. There are improvement in version of complainant by adding threat to her husband so also in the version of other witnesses. Witnesses are interested witnesses. The investigation is not beyond suspicion. If Exception-4 to Section

300 of the Indian Penal Code is perused which describes culpable homicide when not amounting to murder. If it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner, then such is the exception, to culpable homicide amounting to murder. This exception even equally applicable in case of attempt to commit murder. However in view of evidence of eyewitnesses the accused gave a blow which definitely suggest that he has committed offence under Section 324 of the Indian Penal Code.

29. As such, the ends of justice would be squarely satisfied if the conviction and sentence of the appellant under Section 307 of the Indian Penal Code is altered to the conviction under Section 324 of the Indian Penal Code. Accordingly, I proceed to pass the following order:

ORDER

- i) The present appeal is partly allowed.
- ii) The conviction of the appellant for having committed offence under Section 307 of the Indian Penal Code is set aside.

iii) The appellant is convicted for the offence under Section 324 of the Indian Penal Code and his sentence reduced to the period already undergone and fine amount which is already deposited.

iv) In addition to that, the appellant is directed to pay fine amount of Rs.15,000/- which is directed to be paid as compensation to the victim within a period of four weeks, in default to undergo simple imprisonment for one month.

v) Bail bond stands discharged.

[SMT. M.S. JAWALKAR, J.]

R.S. Sahare