

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.38 OF 2019

Baburao @ Baban s/o Sarangdhar Khade
Age 48 years, Occu. Labour,
R/o Harischandra Rajachi Pimpri,
Tq. Wadwani, District Beed

... APPELLANT

VERSUS

The State of Maharashtra
Through : Police Inspector,
Police Station Murud,
Tq. & Dist. Latur.
(Copy to be served on the office of
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

... RESPONDENT

.....
Mr. S.T. Mahajan, Advocate for appellant
Ms. R.P. Gaur, A.P.P. for respondent
.....

CORAM : R.G. AVACHAT, J.

DATE : 13h MARCH, 2023

JUDGMENT :

This is an appeal from conviction. The appellant was convicted for the offence punishable under Section 304 Part II of the Indian Penal Code and therefore sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.20,000/- with default stipulation.

2. The facts giving rise to the present appeal are as follows :

Latabai - informant (P.W.1) was resident of village Borgaon Kale, District Latur. Fulchand (deceased) was her brother. He was residing along with his girl friend – Rani, as husband and wife. Before Rani developed emotional relationship with deceased Fulchand, she had similar relationship with the appellant herein. Both, the appellant and Rani were residing together as husband and wife. She, however, deserted the appellant and joined company of Fulchand. The appellant disliked the same.

3. The informant and Rani had been to the field of Bharat Admane for agricultural operations on 4/12/2016. Deceased Fulchand was at home. He came to the field and told the informant that the appellant has come to get Rani back. The informant, Rani and Fulchand, therefore, returned to the informant's home by 1.30 p.m. The informant's husband Angad and son Ram were also there. Appellant insisted Rani to accompany him back to his home. She refused. The appellant, therefore, threatened her of committing murder of someone if she did not join him. The informant asked the appellant to leave that place. The appellant manhandled the informant. He,

therefore, slapped him. Having seen the appellant assaulting the informant, Fulchand intervened. He (Fulchand) rushed towards the person of the appellant. The appellant, therefore, left informant and started beating up Fulchand. Fulchand fell on the ground. The appellant sat on his person and gave him fisticuffs. On having seen Fulchand developed his eyes white, the appellant fled therefrom. It was about 2.30 p.m. The informant and her husband took Fulchand inside the room. Fulchand vomited blood and became motionless. He was, therefore, immediately rushed to hospital of Dr. Bidve, who declared Fulchand dead on examination. The informant, therefore, lodged the F.I.R. (Exh.21).

4. A crime vide C.R. No.264/2016 under Sections 302 and 323 of the Indian Penal Code, therefore, came to be registered against the appellant. Scene of offence panchanama was drawn. Inquest was conducted. Dead body of Fulchand was subjected to post mortem examination. Viscera was preserved and sent for chemical analysis. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of investigation, the charge sheet was filed.

5. The case came to be committed to the Court of

Sessions for trial in accordance with law. The learned Sessions Judge framed the charge for offence punishable under Section 302 of the Indian Penal Code. The appellant pleaded not guilty.

6. To bring home the charge, the prosecution examined 8 witnesses and produced in evidence certain documents.

7. On appreciation of the evidence in the case, the learned Sessions Judge convicted the appellant for the offence punishable under Section 304 Part II of the Indian Penal Code and therefore, sentenced him as stated above.

8. Learned counsel for the appellant would submit that, the post mortem examination report does not indicate the deceased died as a result of the assault made by the appellant. He would further submit that, the Chemical Analyser's reports and Histopathology report were suppressed by the prosecution. The appellant was in fact assaulted. He suffered head injury. According to learned counsel, the cause of death was myocardial infraction with chronic congestion of lung. The deceased was addict of alcohol. Alcohol was found in viscera. There is no nexus between the assault and the cause of death. The learned counsel, therefore, urged for acquittal of the appellant.

9. The learned A.P.P. would, on the other hand, submit that, there is an eye witness account. The informant Latabai (P.W.1), her husband, Rani (P.W.2), Angad (P.W.3) gave the evidence consistent with the prosecution case. They are the eye witnesses. They testified in one voice, attributing the appellant to have assaulted the deceased. According to learned A.P.P., the deceased breathed his last within an hour of assault made by the appellant. The same suggests causa cuasans. The appellant has to be attributed with the knowledge that death would be the consequence of assault made by him. According to learned A.P.P., there is nothing to suggest the deceased was chronic alcoholic. She further submits that, the cause of death is attributable exclusively to the assault made by the appellant. She, therefore, urged for dismissal of the appeal.

10. Considered the submissions advanced. Perused the evidence relied on. Admittedly the appellant and Rani (P.W.2) were residing together as husband and wife. The relationship did not last long. Rani (P.W.2) started residing with the deceased Fulchand as his wife. The appellant disliked the same. On the fateful day i.e. on 4/12/2016, the appellant had, therefore, been to village Borgaon Kale, whereat both Rani (P.W.2) and Fulchand were residing. He insisted Rani (P.W.2) to

join him to his place. Rani refused. The appellant, therefore, gave threats of committing murder of someone. The informant, therefore, asked the appellant to leave the place. He picked up quarrel with the informant and even manhandled her. She slapped the appellant. Having seen the appellant assaulted the informant, her brother Fulchand (deceased) intervened. The appellant, therefore, started beating up the deceased. All this is in the evidence of the aforesaid three eye witnesses.

11. Deceased Fulchand became unconscious and even motionless as a result of beating by the appellant. It was a sudden fight. The appellant, therefore, could not be attributed to have made an assault with an intention of committing murder of Fulchand. The trial Court has, therefore, rightly acquitted the appellant of the charge of offence punishable under Section 302 of the Indian Penal Code. The State did not challenge the same.

12. The question is, whether the trial Court, in the facts and circumstances of the case, was justified in convicting the appellant of the offence punishable under Section 304 Part II of the Indian Penal Code.

13. P.W.7 Dr. Prachi Haridas conducted post mortem examination on the dead body of deceased Fulchand. It is in

her evidence that she did not notice any external injury on the person of the deceased. Even on internal examination, post mortem report was negative for any injury or any pathological disease. She, therefore, obtained viscera and opinion was reserved. It is further in her evidence that, she received pathological report on 17/2/2017. As per the said report, the cause of death may be myocardial infraction. According to her, the Chemical Analyser's report suggests ethyl alcohol was found in stomach contents. She gave final cause of death certificate (Exh.33). In her opinion, the cause of death was myocardial infraction with ethyl alcohol consumption. The C.A. report (Exh.35) suggests that the viscera contains 94 mg. of ethyl alcohol per 100 grams.

14. Myocardial infraction is a heart attack usually occurs when a blood clot blocks blood flow to the heart. When the Medical Officer who conducted the post mortem did not notice any external or internal injury and pathological report suggests the cause of death as - myocardial infraction with ethyl alcohol consumption, the prosecution could be said to have failed to prove beyond reasonable doubt that the deceased died as a result of assault made by the appellant. The benefit of doubt, therefore, needs to be extended to him. The fact, however, remains that, there is consistent evidence of three eye

witnesses to suggest the appellant to have assaulted the deceased with fists and kicks. The same constitutes an offence punishable under Section 323 of the Indian Penal Code, which is punishable with imprisonment which may extend to one year or with fine which may extend to one thousand rupees, or with both.

15. For the aforesaid reasons, the appeal partly succeeds in terms of the following order :-

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) Conviction and sentence imposed against the appellant by learned Sessions Judge, Latur vide judgment and order dated 30/11/2018 in Sessions Case No.21/2017 for offence punishable under Section 304 Part II of the Indian Penal Code is set aside. The appellant is acquitted of the offence punishable under Section 304 Part II of the Indian Penal Code.
- (iii) The appellant is, however, convicted for the offence punishable under Section 323 of the Indian Penal Code and, therefore, sentenced to suffer simple imprisonment for one year.

- (iv) The appellant has already been in jail for little over seven years. He be set at liberty immediately, if not required in any other case.
- (v) Fine amount, if paid, be refunded to him.

(R.G. AVACHAT, J.)

fmp/-