

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 775 OF 2015

- . Abbas @ Kalu Shah S/o Osman Shah
Age : 23 years, Occ. : Labourer,
R/o. Galli no. 13, Sanjay Nagar,
Mukundwadi, Aurangabad. ... Appellant

Versus

- . The State of Maharashtra ... Respondent

...

Mr. Anil B. Salve and Mr.S.U.Shaikh, Advocate for Appellant
Mr. S. D. Ghayal, APP for Respondent – State

...

WITH

CRIMINAL APPEAL NO. 675 OF 2018

- . The State of Maharashtra,
Through Police Inspector,
MIDC CIDCO,
Police Station, Aurangabad ... Appellant

Versus

1. Osmanshah S/o Gulabshah,
Age : 55 years, Occu. Labour,
R/o. Brijwadi, Tq. & Dist. Aurangabad.
2. Fatemabi W/o Osmanshah,
Age : 50 years, Occu. Household,
R/o. Brijwadi, Tq. & Dist. Aurangabad.
3. Pashushah S/o Osmanshah,
Age : 27 years, Occu. Labour,
R/o. Brijwadi, Tq. & Dist. Aurangabad.
4. Kalushah S/o Osmanshah,
Age : 23 years, Occu. Labour,
R/o. Brijwadi, Tq. & Dist. Aurangabad. ... Respondents
(Orig. Accused)

...
Mr. S. D. Ghayal, APP for Appellant - State
Mr. Anil B. Salve and Mr. S. U. Shaikh, Advocates for Respondent No.4
...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

**RESERVED ON : 17 AUGUST, 2023
PRONOUNCED ON : 31 AUGUST, 2023**

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Original accused no.4 / appellant in Criminal Appeal No.775 of 2015 is dissatisfied on account of his conviction by learned Additional Sessions Judge, Aurangabad, holding him guilty under Section 304 Part II of the Indian Penal Code (IPC) and sentencing him to suffer seven years rigorous imprisonment and to pay fine. At the same time, State is also aggrieved on account of acquittal of accused nos.1, 2, 3 and accused no.4 / appellant from charge under Section 302 of the Indian Penal Code (IPC).

FACTS LEADING TO TRIAL

2. Informant, deceased and accused are residents of same locality. Six months prior to 20-06-2010, there were quarrels between accused no.4 / appellant and informant, who are cousins. In that background, at around 08:30 p.m. on 20-06-2010, when informant's brother namely Imran Shah @ Lala Shah was standing near his house, at that time, accused no.4 Kalu started hurling abuses on Imran because of previous quarrel. Informant and his

mother both heard noise and shouts and therefore, they both came out and they saw accused Kalu assaulting Imran. Accused Kalu rushed to his house and returned back with knife and he stabbed Imran on chest and all other accused present there, were fled away. Imran was shifted to hospital, but on examination, Doctor declared him dead. Resultantly, **PW1** Irfan set law into motion by lodging report on the strength of which **PW8** Pandit and **PW9** Namdeo carried out investigation and chargesheeted all four accused.

Learned Additional Sessions Judge, Aurangabad framed charges, allowed prosecution to lead its evidence and after recording statement of accused under Section 313 of the Code of Criminal Procedure and answers, he appreciated oral and documentary evidence and held that prosecution has established charge against accused no.4 Kalu, but only for offence under Section 304 Part II of the IPC and not for offence under Section 302 of the IPC. Remaining accused were given clean chit and hence, the above appeals.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant in Criminal Appeal No.775 of 2015 would submit that prosecution had not proved its case beyond reasonable doubt. According to him, there is no independent witness, rather there are only interested witnesses like brother and mother of

deceased. It is pointed out that though PW5 Sk.Wasim, a grocery shop owner is examined, he has not supported prosecution. According to learned Counsel several lapses, contradiction and inconsistencies appear in the prosecution evidence, more particularly, on the point of actual spot of incident. According to him, spot panchanama shows distinct place, whereas witnesses speak about occurrence taking place at a different place and therefore, the evidence of prosecution is full of ambiguities. He pointed out that recovery is also at the belated stage and therefore, even such circumstance is doubtful. Learned Counsel took us through the evidence of each of the prosecution witnesses and even answers given by them in their cross-examination and according to him, such substantive evidence of prosecution witnesses itself renders case of prosecution doubtful. Thus, according to him, with such quality of evidence, case of prosecution ought not to have been accepted by the learned trial Judge, but same having been done, he submits that there is need to re-appreciate and re-examine the evidence and therefore, he prays to set aside the judgment under challenge.

On behalf of State :

4. In answer to above, learned APP pointed out that motive is cogently established because there was background of quarrel since previous to the incident. According to learned APP, there is direct

evidence in the form of informant and his mother. That incident had taken place near to their house. Hearing shouts and noise, they had come out of house and they had seen deceased being beaten and thereafter, they had seen accused no.4 Kalu running to his house and returning back with knife and he has used the same by stabbing deceased in a vital part like chest. That PW7 Dr.Tasgaonkar, Autopsy Doctor has confirmed death due to stab injury. Therefore, it is his submission that ocular evidence is finding support from medical evidence. There is recovery at the instance of accused no.4. Therefore, it is his submission that learned trial Judge has rightly held accused guilty, but his grievance is that the offence under Section 302 being made out, conviction ought not to have been recorded and lowered down to offence under Section 304 Part II of IPC. He emphasized that when the evidence was very clear that accused ran to his house and returned armed with deadly weapon like knife, his intention was explicit. He had come with an intention to commit murder. Therefore, death was result of assault and it was a full proof case attracting penal action under Section 302 of the IPC and nothing less than that. However, learned trial Judge has failed to consider and appreciate the law and so he prayed to set aside conviction under Section 304 Part II of the IPC and to convict all accused alongwith accused no.4 for offence under Section 302 of the IPC.

5. Prosecution has adduced evidence of nine witnesses, their status and role are as under :

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Irfan Shah Akram Shah is brother of informant. His evidence is at Exh.18. He deposed that there was quarrel between him and accused Kalu, who was residing in their neighbourhood. According to him, on 20-06-2010 at around 08:30 p.m. accused Kalu initially hurled abuses on his deceased brother in the backdrop of previous quarrel. Thereafter, accused ran to his house, came back with a knife and stabbed his brother in the chest.

PW2 Shakilabi Akramsha is mother of deceased. Her evidence is at Exh.21. She also stated that at around 08:30 p.m. there was quarrel in front of shop of Mehmood Shah. She heard noise of crying. She and her elder son came out of house and saw all accused assaulting her son Imran. They tried to separate the quarrel but in-vain. According to her, accused Kalu rushed to his house, brought a knife and gave a blow of knife on left side of chest of her son Imran causing him bleeding injury. Neighbours gathered, accused ran away and her son was shifted to GHATI hospital, where he died.

PW3 Sk.Osman Sk.Biban is Pancha to spot. His evidence is at Exh.26. He deposed regarding acting as Pancha and in his presence Police collecting earth with and without blood vide Panchanama Exh.27.

PW4 Sk.Shabbir Sk.Isaq is Pancha to memorandum of disclosure and its recovery under Section 27 of the Indian Evidence Act, at the instance of accused Kalu on 27-06-2010. His evidence is at Exh.28. He identified both memorandum and panchanama of knife, which was said to be recovered from house of accused.

PW5 Sk.Wasim Sk.Mahemood is owner of a grocery shop. His evidence is at Exh.31. He stated that the occurrence had taken place on 20-06-2010 at around 08:45 p.m. According to him, there was quarrel between accused and deceased near Masjid. He tried to separate the quarrel, but he could not succeed. Therefore, he came back to his shop, he closed the shop and again went to separate the quarrel and thereafter, he went house. He denied seeing any assault by knife. Therefore, he was declared hostile and subjected to cross.

PW6 Hanif Shah Ibrahim Shah is brother of PW2 Shakilabi. His evidence is at Exh.32. He claims that he received a phone call informing about assault on Imran.

PW7 Dr.Girish Vijay Tasgaonkar is Autopsy Doctor. His evidence is at Exh.41. He opined death of Imran to be because of “shock due to stab injury to heart”. He identified post mortem report Exh.42.

PW8 Pandit Sandu Tathe (PSI) and **PW9** Namdeo Manohar Thombre (PI) are Investigating Officers, who carried out investigation at respective times. Their evidence are at Exh.45 and Exh.54 respectively.

6. Here from chargesheet Exh.1, it is evident that all four accused namely (1) Osmanshah s/o Gulabshah (2) Fatemabi w/o Osmanshah (3) Pashushah s/o Osmanshah and (4) Kalushah s/o. Osmanshah were tried for commission of offence under Section 302 read with 34 of the IPC. It seems that learned trial Judge has acquitted all accused for offence under Section 302 read with 34 of the IPC, but accused no.4 / appellant is held guilty only for offence under Section 304 Part II of the IPC and made to suffer sentence for seven years rigorous imprisonment. Both appellant as well as State are questioning the said judgment.

7. In view of the above charge, it is to be seen whether death of Imran is shown to be homicide. On going through inquest panchanama, we came across deceased suffering injuries on middle and left side of chest with horizontal abrasion on chest. At the same time, if we go through the evidence of **PW7** Dr.Tasgaonkar, Autopsy Doctor, we see that he came across the following injuries :

External injuries :

1. Stab-wound over left parasternal region, over chest, elliptical in shape, both the angles were acute, margins were blood infiltrated of size 2.5 x 1 cms and cavity deep and on approximation size was 3 x 0.5 cms. Distance of wound from :-

- a. midline .. 2 cms,
- b. left mid-clavicle .. 12 cms,
- c. left nipple ... 08 cms and
- d. pubic symphysis ... 41 cms.

Direction of wound was upwards, medial and backwards.

Track of wound - skin, superficial fascia, inter-coastal muscles in 2nd space, anterior wall with cavity and posterior wall of right ventricle of heart. Evidence of contusion over inter-coastal muscle of 2nd space dark reddish in colour.

2. Penetrating wound over left side of chest 0.5 cm above left nipple of size 1 x 1 cm, both the angles acute, margins blood infiltrated, running backwards, penetrates skin, superficial fascia and muscles, depth was 1.5 cms,

3. Two linear abrasions present over sub-costal area running horizontally in line one over right side of 11 cms length and another on left side of 06 cms in length, reddish separated by 2.5 cms.

4. Abrasions two in numbers over left knee, one over anterior aspect of size 0.5 x 0.5 cm and other over lateral aspect of size 1 x 0.5 cm. oblique and reddish.

Above all the injuries were ante-mortem in nature.

Internal injuries :

Stab injury over heart, over right ventricle, anterior wall – cavity - posterior wall.

After the postmortem, Autopsy Doctor opined that the probable cause of death was 'shock due to stab injury to heart'.

In **cross-examination**, Autopsy Doctor has admitted that he has not seen the weapon. He denied that it is necessary in every case for causing elliptical injury, the weapon must have sharp edges from both the sides. He admitted that injury nos.1 and 2 mentioned in column no.17 are possible by a sharp and pointed weapon. He stated that dimensions of injuries to heart are not mentioned in post mortem report. There are some brownish stains on seized knife, but no signs of mud. He denied that injuries noted in column no.17 are not possible by seized knife. Taking into account the length, breadth and depth of injuries noted by Autopsy Doctor in column no.17, more particularly, injury nos.1 and 2, it is evident that death is attributed to subjected injuries. These injuries are turned out to be fatal and hence, the opinion of the Doctor. Taking into account substantive evidence of medical expert, the manner of cross, we are of the considered opinion that death of Imran is nothing but homicidal one.

8. The fundamental objection of appellant accused is that there is no credible, trustworthy evidence and that there is no independent evidence,

except testimonies of interested witnesses. Further according to him, there is only a single blow. There being no intention or premeditation and occurrence taking place all of a sudden, neither Section 302 nor Section 304 could be attracted.

ANALYSIS

9. After carefully scanning the evidence, we are not impressed with the argument advanced before us that there is no credible independent evidence and only interested witnesses are examined, for the simple reason that it is not always necessary that in every occurrence there should be an independent witness. It is equally settled position in law that if mere related witnesses are examined, then there is no automatic presumption that they are interested persons. Law is fairly settled that mere witnesses to be close relatives, is no good ground to reject their testimonies. Only requirement is that their evidence is required to be scanned with complete circumspection, care and caution. Law to this extent has been dealt in various pronouncements time and again and the few noted cases are as under:

1. ***Bhagwan Jagannath Markad v. State of Maharashtra***; (2016) 10 SCC 537.
2. ***Ravasaheb @ Ravasahebgouda and Others v. State of Karnataka***; (2023) 5 SCC 391.

In the light of above discussion, here evidence reveals that alleged occurrence has taken place near house of informant. It is quite possible that at such point of time, there may not be an independent witness or neighbour. Similarly, in our opinion, merely because there is a single blow, always there is no presumption that case would not come out of purview of Section 302 of the IPC. It depends and defers from case to case. Here evidence suggests assault by appellant Kalu with knife and deceased died only due to it.

10. Now let us deal with objection of State. Learned APP would strenuously submit that taking sequence into consideration as it is emanating from the prosecution evidence, accused Kalu ran back to his house and came armed with deadly weapon like knife and he inflicted blow on the vital part and therefore, learned trial Judge erred in convicting accused Kalu only for offence under Section 304 Part II, rather according to him, it is a clear case of murder.

For attracting offence under Section 300 of the IPC, culpable homicide is murder, if the act by which death is caused is done -

1stly with intention of causing death;

2ndly with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;

3rdly with intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly - with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Offence is not murder if it is demonstrated that the case falls within five Exceptions to Section 300 of the IPC.

Exceptions to murder :

(culpable homicide not amounting to murder)

1. *Grave and sudden provocation.*
2. *Right of private defence*
3. *Exercise of legal powers*
4. *Death caused in sudden fight*
5. *Death with consent*

The Hon'ble Apex Court in the case of ***Surinder Kumar v. Union Territory, Chandigarh; (1989) 2 SCC 217*** has observed that “to derive benefit of Exception 4 to Section 300 of the IPC, it has to be satisfied that **firstly** it was a sudden fight, **secondly** there was no premeditation, **thirdly** act was done in a heat of passion, **fourthly** assailant had not taken any undue advantage or acted in a cruel manner”.

11. Here the learned trial Judge has held accused guilty for offence under Section 304 Part II and there is challenge by the State to the same.

Very recently the Hon'ble Apex Court has elaborately discussed subtle distinction between Section 304 Part I and Part II in the judgment of *Anbazhagan v. The State represented by the Inspector of Police* (Criminal Appeal no.2043 of 2023, decided on 20-07-2023). In paragraph no.60 of the said judgment the Hon'ble Apex Court has elaborately discussed applicability and attractability of Section 304 Part I / Part II. Certain principles are enunciated by referring to previous legal pronouncements.

12. Keeping in mind above legal position, if we visualize the sequence in which the occurrence took place, it is emerging that, appellant Kalu is also resident of same vicinity. **PW1** Irfan and **PW2** Shakilabi claim that there was previous quarrel. On what count, is not clarified by any of them. According to PW1 Irfan and PW2 Shakilabi, they saw appellant and others assaulting deceased after quarrel. They claim to have seen appellant Kalu rushing to his house and returning with a knife. So much of the sequence shows that initially there was mere verbal exchange of words as word used is "quarrel". Till that point of time, appellant Kalu was undisputedly not armed. This indicates that he has no premeditation or intention to commit murder. Therefore, definitely it is not a case attracting offence under Section 302 of the IPC. However, accused Kalu seems to have rushed to his house midway during quarrel and this shows that in a heat of passion, he seems to have run home

and returned armed with a knife. The subsequent part of the episode therefore seems to have developed suddenly upon quarrel. However, sight cannot be lost of the fact that a knife has been brought and further put to use and therefore, knowledge that such weapon would cause death or an injury, which could be fatal, can definitely be attributed to him. Therefore, it is a perfect case, which attracts Exception 4 to Section 300 of the IPC i.e. there to be a sudden fight; there to be no premeditation; act done in sudden anger and passion and further no undue advantage seems to have been taken by appellant Kalu nor he is shown to have acted in a cruel manner.

Therefore, in our considered opinion, taking the above circumstances, its background, the case would not fall under Section 304 Part II but would attract charge under Section 304 Part I.

CONCLUSION

13. There is no premeditation or intention to kill. Circumstances for attracting Exception 4 to Section 300 of the IPC are shown to be existing. In the totality of the circumstances and the evidence, it is not a case falling under Section 304 Part II rather it falls under 304 Part I.

14. We have gone through the ruling relied by learned Advocate for appellant accused in the case of *Nagaraj Reddy v. State of Tamil Nadu; 2023(3) R.C.R.(Criminal) 165*. In that case, testimony of elder brother was

found to be patently interested one. It was also noticed by the Hon'ble Apex Court that inspite of availability of independent witnesses, they were not examined and hence, benefit was extended.

Here it is not so. Prosecution has examined only **PW1** Irfan and **PW2** Shakilabi as incident had allegedly taken place in front of their house and both of them were present in their house. It has not been shown who were other independent witnesses present around so as to hold that they were withheld and only interested witnesses were examined. Hence, their evidence has been rightly considered and taken into account even by the learned trial Judge. For the said reasons, above ruling does not come to the rescue of the appellant.

The learned Advocate for the appellant accused has also relied on the cases of *Khema @ Khem Chandra Etc. v. State of Uttar Pradesh*; 2022 AIR (Supreme Court) 3765, *Nand Lal and others v. The State of Chhattisgarh*; 2023 AIR (Supreme Court) 1599, *State of Andhra Pradesh v. Punati Ramulu*; 1993 AIR (Supreme Court) 2644 and *Gurmukh Singh v. State of Haryana*; 2009 (Sup) AIR (Supreme Court) 2922, however, the facts in these cases are patently distinguishable with the facts of the case in hand and as such cannot be taken recourse to.

15. In the light of above discussion, here sentence awarded though for Section 304 Part II of the IPC is of seven years, we are told that appellant has already undergone the same. Even if we have altered the offence from Section

304 Part II to Part I, as regards to sentence part is concerned, we maintain the sentence as already undergone. Rest of the order of the trial Court is maintained.

ORDER

(I) Criminal Appeal No.775 of 2015 filed by original accused no.4 is dismissed.

(II) Criminal Appeal No.675 of 2018 filed by State is partly allowed.

(III) The judgment and order passed in Sessions Case No.55 of 2011 by the Additional Sessions Judge, Aurangabad on 06-10-2015, convicting original accused no.4 - Abbas @ Kalu Shah S/o. Osman Shah for the offence punishable under Section 304 Part II of the IPC, stands set aside.

(IV) Original accused no.4 - Abbas @ Kalu Shah S/o. Osman Shah is held guilty for committing offence punishable under Section 304 Part I of the IPC and is hereby sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for six months, which sentence is already undergone by him now.

(V) Under the said circumstance, no need to issue any warrant or direct original accused no.4 to surrender. Hence, bail taken under Section 390 of the Code of Criminal Procedure is hereby cancelled.

(VI) It is clarified that rest of the operative order passed by the trial Court is maintained.

(VII) The Additional Sessions Judge, Aurangabad as well as the Superintendent, Central Prison, Harsool, Aurangabad, to take note of this judgment.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT