

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 590 OF 2016

Shivanand @ Shivaji Fakirappa Adakar, Age-31,
R/o Katkol, Tal-Ramdurga, Dist-Belgaum, Presently
residing at Darawanmala, Top, Tal-Hatakanangale,
Dist-Kolhapur (Presently Lodged at Central Jail, Kolhapur).

APPELLANT

- VERSUS -

State of Maharashtra, Through Inspector of Police,
Shiroli MIDC, Police Station, Kolhapur.

RESPONDENT

Ms Payoshi Roy i/by Dr.Yug Mohit Chaudhary, counsel for the appellant.
Shri S.V. Gavand, Additional Public Prosecutor for the respondent.

CORAM : NITIN W. SAMBRE AND N.R. BORKAR, JJ.

DATE : OCTOBER 30, 2023

ORAL JUDGMENT (PER : NITIN W. SAMBRE, J.)

Mentioned out of turn.

2. The Ad-hoc Sessions Judge-1, Kolhapur in Sessions Case No. 83 of 2012 convicted the appellant/accused for an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, 'the Code) and sentenced him to undergo life imprisonment with fine of Rupees One Thousand and in default of payment of fine, to suffer simple imprisonment for one month.

3. The genesis of the offence is based on the appellant marrying deceased Shantabai and the couple being blessed with a daughter named Sapna. The appellant alongwith wife and daughter had migrated to Darvan Mala, Top, Taluka Hatkanangale, District Kolhapur and started residing in the room built on the land which was taken on rent by PW1-Nanaso Kadam. The induction of the appellant as a tenant in the said property was by the owner of the farm and not by PW1-Nanaso. The appellant started doubting the chastity of his

wife-Shantabai since it was revealed that after her return from the house of her maternal aunt with the driver of Xylo Jeep, both of them had stayed together in the above referred rented house for a period of five to six days. Deceased Shantabai thereafter used to be frequently on the mobile. The said act on the part of the wife-Shantabai had infuriated the appellant resulting in regular quarrels. The prosecution further claims that the appellant being of quarrelsome nature, PW1 and PW2 had tried to counsel him not to quarrel.

4. On March 11, 2012, at about 12.00 p.m., the appellant and Shantabai started quarreling. Since the appellant had locked himself with Shantabai in their room after quarreling for some time and were not permitting their daughter Sapna to enter the said room, Sapna went to PW2 to inform about the same. This resulted in PW2-Bhagwan visiting the spot of incident alongwith PW1-Nanaso. They had requested the appellant to open the door to which the appellant responded that Shantabai was resting as she was not feeling well. On the PW1-Nanaso peeping from the door, noticed Shantabai lying in the pool of blood besides whom a blood stained axe was noticed.

5. As a sequel of above, PW1-Nanaso immediately rushed to the Police Station to summon the police authorities. The police personnel accordingly forcibly opened the door and noticed the dead body of Shantabai. On narration of the aforesaid incident by PW1-Nanaso to Police, the complaint came to be registered and the appellant was arrested.

6. After appreciation of the evidence of the prosecution witnesses, the Sessions Court has reached to the conclusion that the appellant has committed murder of his wife-Shantabai and as such, sentenced him to suffer life imprisonment.

7. The learned counsel for the appellant submits that the appellant is not questioning the very charge of having committed the murder of Shantabai, however, according to her the said act of the appellant is out of grave and sudden provocation. By inviting our attention to Exception-4 to Section 300 of the Code, the counsel for the appellant would urge that the act of the appellant at the most can be termed as the one under Part-I of Section 304 of the Code. In this backdrop, the counsel for the appellant submits that without questioning the judgment of conviction on merit, this Court is required to appreciate whether the case of the appellant falls under Exception-4 of Section 300 of the Code. That being so, the punishment of the appellant can be converted to that of ten years as under Part-I of Section 304 of the Code.

8. The counsel for the appellant has invited our attention to the testimony of PW1-Nanaso Kadam, who is examined at Exhibit 13; testimony of PW2-Bhagwan Sutar, who is examined at Exhibit 15; and the testimony of PW7-Dr. Santosh More, who is examined at Exhibit 36. According to counsel for the appellant, Shantabai had suffered three injuries which even could have been caused by the use of weapon from its blunt side. She would urge that PW1-Nanaso has specifically deposed that the appellant had quarreled

with Shantabai in the backdrop of the event of having spent around six days with the Xylo Driver. As such, she would urge that the aforesaid act of Shantabai had caused provocation which has resulted in the appellant assaulting her without intention to kill.

9. While countering the aforesaid submissions, the learned Additional Public Prosecutor would urge that the testimony of PW1-Nanaso and PW2-Bhagwan is required to be read as a whole. On appreciation of the evidence, it is quite apparent that the conduct of the appellant before and after the commission of the offence speaks of his intention to commit murder and not culpable homicide not amounting to murder. As such, the Additional Public Prosecutor would submit that the appeal is liable to be dismissed.

10. We have considered the rival submissions.

11. In view of the case of the prosecution, the charge was framed against the appellant on September 20, 2014 for an offence punishable under Section 302 of the Code at Exhibit 5/C.

12. PW1-Nanaso, who is examined at Exhibit 13, stated that the appellant was residing in one room alongwith his wife and daughter and was working in M.I.D.C. whereas deceased Shantabai occasionally used to work in his field. He has stated that at times there used to be quarrel between the

appellant and Shantabai in their room and both of them used to interact in Kannada language. He has further stated that on March 11, 2012 at about 12 p.m., there was a quarrel between the appellant and Shantabai wherein he had asked the appellant to stay calm or else vacate the room. On the same day at about 6 p.m. when PW2-Bhagwan called him and both of them peeped inside the room, they saw the dead body of Shantabai lying in the pool of blood. PW1-Nanaso has stated that they had reported the fact to the Police Patil. The Police Patil in turn informed one Ghodke, a police officer, who broke open the lock of the room. He has proved Exhibit 14, which is a report made to the police. He has further stated that about one and half month before, Shantabai went to her relatives place and returned after around fifteen days in a Xylo jeep. The driver of said Xylo jeep stayed with Shantabai for five to six days. The aforesaid conduct of Shantabai and her consistent engagement on mobile phone created a doubt in the mind of the appellant so also this witness. In the cross-examination, PW1-Nanaso has admitted that he was not knowing the driver of Xylo jeep and he had no occasion to interact with the said driver. He was only under the impression that the said driver had illicit relations with Shantabai. He further claimed that the appellant had doubted the character of Shantabai.

PW2-Bhagwan deposed on the same lines as that of PW1-Nanaso.

13. PW3-Vijay, who is examined at Exhibit 20, admitted his signature on the disclosure statement made by the appellant with regard to seizure of his

blood stained clothes. PW4-Rajendra, who is examined at Exhibit 26, also claimed to be a panch witness and has proved the inquest panchnama at Exhibit 27. PW5-Guruprasad, who is examined at Exhibit 28, is a witness to the act of forwarding Articles for Chemical Analysis whereas PW6-Gautam, who is examined at Exhibit 33, claimed to be on PSO duty on March 11, 2012. He has stated about PW1-Nanaso reporting the matter and he having directed recording of the complaint and registration of crime. The directions issued by him are proved at Exhibit 34. He has also proved the First Information Report at Exhibit 14.

14. PW7-Dr.Santosh, who is examined at Exhibit 36, had performed the Post-Mortem on the dead body of Shantabai. He has claimed that the body had following injuries:-

(1) Scalp Haematomas was present with injuries CLW at right and left frontal region. One was at occipital region and remaining two were on parietal region with fracture at right frontal region.

(2) The brain was congested with clots of 4x3 cm, 5x4 cm and 5x3 cm.

(3) Cause of death was head injury.

He has stated about the cause of death. He has also stated that the above injuries were possible by an axe Article 3 which was recovered from near the body. He has proved the post-mortem notes at Exhibit 37 and the death certificate at Exhibit 38.

15. PW8-Dilip, who is examined at Exhibit 43, is the Investigating Officer. He has stated about the opening of the door and seeing Shantabai lying on the ground with head injuries. He claimed to have recorded the statement of witnesses. He has stated about drawing of Exhibit 44-inquest panchnama of the dead body and Exhibit 16-spot panchnama. The seizure of the articles such as Chatai, blood from the spot with the help of cotton swab, broken Mangalsutra, empty mobile box and an iron axe with blood stains. He has proved the contents of the seizure panchnama.

16. In the aforesaid background, we have analyzed the evidence referred above. It can be noticed that Shantabai died of head injuries suffered at the right and left frontal region. The cause of death is said to be head injuries. There are no surface wounds noticed on the dead body. A perusal and analysis of the evidence of PW7-Dr.Santosh who performed post-mortem and issued death certificate would reflect that Shantabai died of four to five blows having suffer CLW on right and left frontal region. In the evidence of PW1-Nanaso and PW2-Bhagwan, it has come on record that there used to be frequent quarrels between the appellant and Shantabai as Shantabai was in the habit of being always busy on phone particularly after having returned and stayed with the driver of Xylo jeep for five to six days. PW1-Nanaso and PW2-Bhagwan also stated that the appellant was doubting the character of Shantabai because of aforesaid incident.

17. There are no eye witnesses to the incident. The incriminating material against the appellant which is available on record are his blood stained clothes for which he owe an explanation. The fact remains that the aforesaid act on the part of Shantabai of engaging regularly on phone and having stayed with the Xylo driver can be said to have brought unrest in their marital life and can be the reason for the frequent quarrels. There is no evidence on record to infer that there was any premeditation or preparation by the appellant for commission of the crime. Rather the quarrel preceding the death of Shantabai might be the reason of the appellant having got infuriated and assaulted Shantabai with an axe.

18. In the aforesaid background, in our opinion, the case of the appellant deserves to be considered under the provisions of Section 304 Part-I of the Code. So as to support the aforesaid view, reliance can be placed on the judgment of the Apex Court in *Pundalik Versus State of Maharashtra [(2010) 15 SCC 122]*. The aforesaid view is expressed by us having regard to the fact that the act was committed without premeditation as there is no evidence to that effect and the reason appears to be the quarrel before the incident in question for the events narrated hereinabove.

19. The Apex Court in paragraphs 17 and 18 of the judgment in *Baban Bandu Patil Versus State of Maharashtra [(2009) 12 SCC 685]* while dealing with the exceptions to Section 300 of the Code based on the judgment of the

Apex Court in *Dhirajbhai Gorakhbhai Nayak Versus State of Gujarat [(2003)*

9 SCC 322] has observed thus :-

“17. “6. For bringing in operation of Exception 4 to Section 300 IPC it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

7. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men’s sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A ‘sudden fight’ implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offender’s having taken undue

advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the ‘fight’ occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression ‘undue advantage’ as used in the provision means ‘unfair advantage’.”

These aspects have been highlighted in Dhirajbhai Gorakhbhai Nayak v. State of Gujarat, Parkash Chand v. State of H.P. (SCC pp. 383-84, paras 6-7), Byvarapu Raju v. State of A.P. and Hawa Singh v. State of Haryana.

18. Considering the background facts it would be appropriate to convict the appellant for offence punishable under Section 304 Part I IPC. Custodial sentence of 10 years would meet the ends of justice.”

20. Apart from above, in the matter of *Trimbak Versus State of Maharashtra [(2008) 17 SCC 213]*, the Apex Court in paragraphs 12, 13 and 14 has observed thus :-

“12. The pivotal plea relates to the applicability of Exception 4 of Section 300 IPC.

“12. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel

without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

13. *The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It*

takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proven facts of each case. For the application of Exception 4 [to Section 300 IPC], it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

14. It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors."

13. Considering the factual background of the case, in our considered view the appropriate conviction would be under Section 304 Part I IPC, and custodial sentence of ten years would meet the ends of justice.

14. The appeal is allowed to the aforesaid extent."

21. In the backdrop of the aforesaid law laid down by the Apex Court, if we consider the case in hand, in absence of there being premeditation and having regard to the quarrel just before the incident between the appellant and deceased Shantabai on her having stayed with a third person for about six days, it can be inferred that in the heat of passion upon a quarrel, the appellant has committed the offence without premeditation.

22. That being so, we deem it appropriate to partly allow the present criminal appeal and modify the sentence imposed on the appellant as under:-

- (I) Appellant-Accused Shivanand @ Shivaji Fakirappa Adakar is convicted for an offence punishable under Section 304 Part-I of the Indian Penal Code and is sentenced to suffer imprisonment for a period of ten years with fine of Rupees One Thousand and in default to pay the same, the appellant-accused to suffer imprisonment for a period of one month.
- (II) The rest of the order passed by the learned Ad-hoc Additional Sessions Judge-1, Kolhapur in the judgment dated December 31, 2015 is hereby maintained.
- (III) The appellant-accused be set at liberty if he has already undergone imprisonment as ordered hereinabove and if not required in any other offence.

23. The criminal appeal is partly allowed in aforesaid terms and disposed of.

(N.R. BORKAR, J.)

(NITIN W. SAMBRE, J.)