

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 976 OF 2014

Sushil Tanaji Thite]
 Aged about 38 years, Residing at Room No. 12,]
 Rama Jeeva Chawl, Near Saibaba Mandir, Match]
 Factory Lane, Kurla (West), Mumbai -400 070]
 At present undergoing the sentence imposed]
 upon him at Mumbai Central Prison, Mumbai] .. Appellant
 V/s.

1. State of Maharashtra]
 (at the instance of Senior Inspector of Police,]
 Kurla Police Station vide C.R.No. 133 of 2013)]

2. Lalprasad Gangaram Gupta]
 Aged about 44 years, Residing at Room No.18,]
 Kanji Chawl, Match Factory lane, Kurla (West),]
 Mumbai – 400 070] .. Respondents

WITH

CRIMINAL APPEAL NO. 770 OF 2015

State of Maharashtra]
 (Through : Kurla Police Station, Mumbai)] .. Appellant
 V/s.

Sushil Tanaji Thite]
 R/at : Rama Jeeva Chawl, Room No. 12,]
 Near Saibaba Mandir, Match Factory Lane,]
 Kurla (West), Mumbai - 70] .. Respondent

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- Mr. Nitin Sejpai a/w. Mrs. Pooja N. Sejpai, Ms. Akshata Desai, Mr. Siddharth Gharat for Appellant in Cri. Appeal No. 976/2014 and for Respondent No.1 in Cri.Appeal No. 770/2015.
- Mrs. M. M. Deshmukh, APP for Respondent-State in Cri. Appeal No. 976/2014 and for Appellant-State in Cri. Appeal No. 770/2015.

CORAM : A. S. GADKARI AND
 SHIVKUMAR DIGE, JJ.

RESERVED ON : 4th July 2023

PRONOUNCED ON : 18th July 2023

JUDGMENT (Per : Shivkumar Dige, J.) :-

1. The challenge in this Appeal by accused – Appellant is to the Judgment and Order passed by the learned Sessions Judge, Greater Mumbai in Sessions Case No. 749 of 2013. The State Government has also filed Appeal against the acquittal of Appellant under Section 302 of IPC. As both these Appeals are against same Judgment and Order, we have decided these Appeals by this common Judgment.

2. The Appellant is convicted for an offence punishable under Section 304(I) of the Indian Penal Code, 1860 (for short “IPC”) and is sentenced to suffer imprisonment for life. Fine is imposed upon him of Rs.20,000/-, in default of payment of fine to suffer rigorous imprisonment for six months.

The Appellant is acquitted for the offence under Section 302 of IPC and under Section 37(1)(a) punishable under Section 135 of the Bombay Police Act.

3. It is the prosecution’s case that, on 13.05.2013 at about 10:30 p.m. PW-1 Mr. Mahesh Yadav was chitchatting with his friend Shri. Sunil Gupta (deceased) outside his house. After chitchatting for some time, Sunil went to his house for dinner. When he was returning to his house, on road he met Shri. Sushil Thite, the

Appellant. The Appellant told PW-1 Mr. Mahesh that, his mobile was stolen. The Appellant made enquiry with PW-1 Mr. Mahesh where was the house of the boy who was wearing spectacles, with whom he was chitchatting. The Appellant alleged that, the said boy had stolen his mobile. PW-1 Mr. Mahesh told him that, he did not know anything about said boy.

4. Thereafter, Appellant took PW-1 Mr. Mahesh to the chawl of Prabhakar Mitra Mandal and insisted on him to give name and address of the boy, who was wearing spectacles. PW-1 Mr. Mahesh made a phone call to the said boy and asked whether he had taken mobile of the Appellant. The said boy replied that, he had not taken mobile of the Appellant. He further said that, he will come there within five minutes. Sunil (deceased) arrived there within five minutes, a quarrel started between the Appellant and Sunil over stealing of Appellant's mobile. The Appellant alleged that, Sunil had taken away his mobile, when he was consuming liquor sitting in chair outside the library of Prabhat Mitra Mandal. The Appellant pushed Sunil, Sunil questioned Appellant why he pushed him and he has not taken his mobile. Appellant threatened him saying "मैं तेरेको दिखाता हूँ मैं क्या करता हूँ" and left from the said spot. Appellant returned after five minutes, at that time he was holding

knife in his hand. The Appellant threatened Sunil with knife, he gave push to the Appellant and ran away towards the Gupta Terrace. The Appellant followed him. Sunil hid behind an auto-rickshaw, stationed outside the Gupta Terrace. Appellant reached there. At that time, father and brother of the Appellant reached at the said spot. The father of Appellant tried to hold the hand of the Appellant, but he rescued himself and gave blow of knife on the left side, of the chest of the Sunil and threatened everyone with the knife in his hand and ran away from the spot. PW-1 Mr. Mahesh with the help of others took the injured Sunil to Bhabha Hospital. After examining, Doctor declared him dead before admission. Pursuant to the complaint lodged by PW-1 Mr. Mahesh, an offence was registered with Kurla Police Station, against the Appellant under Section 302 of IPC and under Section 37(1)(a) read with Section 135 of Bombay Police Act.

5. During the course of investigation, the Appellant was arrested. The clothes of the Appellant stained with blood and knife used in offence were seized in the presence of panchas by seizure panchanama. The police recorded the statements of witnesses. After completing investigation, charge-sheet was filed against the Appellant. The case was committed to the Sessions Court, Mumbai. Charge was framed against the Appellant, he denied the charges and

claimed to be tried. Statement under Section 313 of Criminal Procedure Code, 1973(for short "Cr.P.C.") was recorded. The defence of the Appellant is of total denial. Considering the evidence produced on record and submissions of both the learned Counsels, the Sessions Court convicted the Appellant as mentioned above.

6. It is contention of learned Counsel for the Appellant that, Appellant has been falsely involved in this case. He was not present at the time of incident, but this fact is not considered by the Trial Court. In alternative it is contention of the learned Counsel that, the crime was committed at the spur of moment. There was no preparation of the said crime. Only one blow was given by the Appellant which shows that, he had no intention to kill the deceased. There was no rivalry between the deceased and Appellant. The trial Court has given sentence of life imprisonment under Section 304(I) of IPC, which is on very higher side, it should be reduced to 10 years or the sentence undergone by the Appellant.

7. It is contention of learned APP that, there was intention of the Appellant to kill the deceased, as after the quarrel Appellant went to his house and brought the knife, which was hidden by him. He assaulted the deceased with knife on his chest i.e. on vital part of the body, which shows that, he had knowledge about the impact of assault. Learned APP further submitted that, after the assault, it has

come in the evidence of the witnesses that, Appellant did not allow other persons to come near to the deceased to help him. The Appellant prevented other persons from helping to deceased. It shows his cruelty. The Trial Court has not considered this fact and has convicted the Appellant under Section 304(I) of the IPC, it should be under 302 of IPC hence requested to allow the Appeal filed by the State Government and dismiss the Appeal filed by the Appellant.

8. We have heard the submissions of both the learned Counsels, perused the Judgment and Order passed by the Trial Court. To prove its case, the prosecution has examined 12 witnesses. The prosecution's case is based on direct evidence. There is no dispute about homicidal death of the deceased as it has been caused due to knife injury inflicted by the Appellant.

9. PW-7 Dr. Sanjay D. Wathore at Exhibit-28 states that, he conducted postmortem of the dead body of the deceased and he found external and internal injuries in the dead body of the deceased. The said injuries were ante-mortem. He opined that, Sunil died due to Haematoma due to stab injury on the left side of the chest. He further stated that, the said injuries were possible by the knife (Article-1). Considering the evidence of this witnesses as well

as Appellant has not disputed the homicidal death of Sunil, it proves that, the death of Sunil was homicidal.

10. The incident was witnessed by PW-1 Shri Mahesh Yadav. The information about the incident was given to the Police by him. This witness at Exhibit-12 states that, on 13.05.2013, at about 10:30 p.m. he was chitchatting with his friend Shri. Sunil Gupta (deceased) outside his house. After chitchatting for some time, Sunil went to his house for dinner. This witness was returning to his house, on road he met Shri. Sushil Thite, the Appellant. The Appellant told him that, his mobile was stolen away. He asked, this witness where was the house of the boy who was wearing spectacle, he had stolen his mobile. This witness contacted said boy and asked him whether he had taken mobile of the Appellant. The said boy replied in negative and said he will come there within five minutes. Sunil (deceased) arrived there within five minutes. Then quarrel started between the deceased Sunil and the Appellant on account of the mobile. The Appellant alleged that, when he was drinking liquor sitting on the chair in front of the library of Prabhat Mitra Mandal, the Sunil took away his mobile. The Appellant then pushed Sunil. Sunil asked the Appellant why he pushed him when he had not taken his mobile. Thereafter, the Appellant again pushed Sunil and further threatened him, that “mai tere ko dikhata hu mai kya

karta hu” and left. After five minutes Appellant came there with his right hand behind his back. The Appellant caught hold the collar of Sunil and started abusing him. The Appellant was holding a knife with the blade of six inch and handle of green colour. He started threatening Sunil by showing that knife. Sunil pushed him and ran towards Gupta Terrace. The Appellant ran behind him, deceased Sunil concealed himself behind an stationed auto-rickshaw near Gupta Terrace. The Appellant was searching for him. Sunil then started coming towards this witness from the opposite direction of the auto-rickshaw. The Appellant followed him with knife. The father and brother of the Appellant came there. The Appellant abused Sunil. He was brandishing the knife. One Mayur Jadhav, Siddheshwar Shinde and Raju Anna came there, but nobody dared to intervene due to the fear of the Appellant who was holding the knife. The father of the Appellant tried to hold his hand, however Appellant rescued his hand and assaulted Sunil with knife on the left side of his chest. Sunil shouted and called this witness. This witness caught hold of Sunil, at that time Appellant was threatening everyone with the knife. Thereafter, Appellant ran away from the spot. This witness further stated that, Mangesh Nanekar and he took Sunil in auto-rickshaw of Raju Anna to Bhabha Hospital. Doctor examined Sunil and declared him dead. This witness

informed the police about the incident. On his report, police registered F.I.R. (Exhibit- 13). In cross examination, this witness admitted that, incident of assault by knife took all of a sudden. Nothing elicited in cross examination of this witness to disbelieve his version about assault by Appellant with knife on the chest of the deceased. The evidence of this witness is corroborated by the evidence of the eye witnesses, i.e. PW-2 Mr. Ashok Pawar (Exhibit-14), PW-4 Mr. Mayur Jadhav (Exhibit-21), PW-5 Mr. Siddheswar Shinde (Exhibit-24). PW-4 and PW-5 were present at the time of incident. They have stated that, Appellant assaulted Sunil with knife. They have seen it. Whereas PW-2 had come to the spot of incident after assault by Appellant. From the evidence of these witnesses it reveals that, on the day of incident, Appellant stabbed with knife in the left side of chest of Sunil. Nothing is elicited in the cross examination of these witnesses to disbelieve their evidence. The clothes of the Appellant were stained with blood. It was seized in the presence of Panchas, PW-9 Mr. Rishikesh Jagtap at Exhibit-40 has stated that, Police seized clothes of Appellant and knife, having blood stains on its blade, from possession of the Appellant in his presence. The panchanama was prepared, it is at Exhibit-41. PW-11 Mr. Devram Burud at Exhibit-47 has stated that, on the day of incident he was attached to Kurla Police Station as a Police Sub-

Inspector. After receiving information of incident, this witness registered crime under Section 302 of I.P.C. Police constables brought the Appellant to the police station at about 2:10 clock at mid night. The Appellant was holding blood smeared knife in his hand. This witness called two panchas and seized clothes of Appellant and knife in their presence and prepared panchanama it is at Exhibit-41. The knife is at Article-1. In cross examination this witness admitted that, he did not record the statements of police constables who brought the Appellant to police station.

11. From the evidence of these witnesses as well as eye witnesses, it proves that, Appellant assaulted Sunil with knife on his chest, due to said assault, Sunil died. It is the contention of learned Advocate for Appellant that, the sentence imposed by the Trial Court is on higher side, whereas it is the contention of learned APP that, the act of the Appellant falls under Section 302 of IPC.

The Hon'ble Apex Court in the case of *Rampal Singh Vs. State of Uttar Pradesh*¹ has observed that:

“20. In order to hold whether an offence would fall under Section 302, or Section 304 Part I IPC, the courts have to be extremely cautious in examining whether the same falls under Section 300 IPC which states whether a culpable homicide is murder, or would it fall under its five Exceptions which lay down when culpable homicide is not murder...”

1 (2012) 8 SCC 289

In other words, Section 300 states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five Exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut of culpable homicide that “amounting to murder” as well as that “not amounting to murder” in a composite manner in Section 300 of the Code.

21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is, (a) those in which the death is *intentionally* caused; and (b) those in which the death is caused *unintentionally* but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really ‘murder’, but mitigated by the presence of circumstances recognised in the Exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in *Fatta v. Emperor*, 1151. C. 476 (Refer : *Penal Law of India by Dr. Hari Singh Gour, Volume 3, 2009.*)

22. Thus, where the act committed is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the Exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed.

29. From the above statement of this witness, it is clear that there was heated exchange of words between the deceased and the appellant. The deceased had thrown the appellant on the ground. They were separated by Amar Singh and Ram Saran. She also admits that her husband had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death.

31. This evidence, examined in its entirety, shows that without any premeditation, the appellant committed the offence. The same, however, was done with the intent to cause a bodily injury which could result in the death of the deceased.”

In above case, the Hon’ble Apex Court has altered the offence under Section 302 of IPC under which, the Appellant was held guilty, to offence under Section 304(Part-I) of IPC.

In the present case, in the background of facts projected by the prosecution clearly shows that, blow of knife was given in the course of sudden quarrel. There was no premeditation. Only one blow was given. Appellant did not act in cruel manner. In the

essence Section 302 of IPC has no application and fourth exception of Section 300 of IPC applies. It reads:

“Culpable homicide is not 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.”

The help of exception 4 can be invoked if death is caused :

- (a) Without premeditation
- (b) In a sudden fight
- (c) Without the offender having taken undue advantage or acted in a cruel manner.

To bring this exception, all the ingredients mentioned above must be found. The word ‘fight’ is not defined in IPC. 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. In the present case, it has come on record that, the incident happened in sudden quarrel. There was no previous rivalry. The incident happened in period of half an hour, there was no premeditation. It has come in evidence of PW-5 an eye witness that, the knife used by Appellant to assault the deceased was kitchen knife (Article-1). It is the contention of learned APP that, as the

Appellant has acted in cruel manner, the Appellant prevented the first informant and others from helping the deceased. It appears from record that, after assault on deceased, PW-1, Shri. Mahesh caught hold of him and with the help of other persons he carried the deceased in hospital. It is not proved that, the Appellant has acted in cruel manner. From the evidence on record it proves that, act of Appellant does not fall under Section 302 of I.P.C. It is the contention of learned Counsel for Appellant that, punishment awarded by the Trial Court is on higher side.

The punishment for 304 (Part-I) of IPC is imprisonment for life or imprisonment of either description for a term which may extend to ten years and fine. While awarding the sentence of life imprisonment, the Trial Court has observed that, the Appellant has killed the boy aged about 18 years on account of petty ground without bothering about the serious effects on his parents and other family members. From the previous record of the Appellant, it seems that, he tends to commit the acts of violence for his greed. The evidence clearly shows that, the Appellant indulged in threatening persons with knife and extracting money from them. The Trial Court further observed that, such a person does not deserve any leniency. Considering the facts and circumstances of the case, the Trial Court has imposed maximum punishment prescribed

for the offence under Section 304(Part-I) i.e. imprisonment for life. In our view, the Trial Court has swayed away in the emotions and oral evidence of witness regarding background of the Appellant but no evidence is produced on record to prove that, Appellant had criminal antecedents and any offences were registered against him. Mere statements of witness is not sufficient to prove that, the Appellant was a person who extracted money from the people in that, area on the point of knife unless some evidence is produced on record if any crime was registered against Appellant about said crime. Prosecution has not produced any evidence in that regard. The Appellant is of 32 years age. It has been proved that, the offence happened in sudden quarrel without premeditation and in the span of half an hour. In our view, the sentence imposed by the Trial Court is on higher side.

12. In view of the above, the following Order:-

ORDER

- (i) Appeal is partly allowed.
- (ii) The sentence imposed upon the Appellant for the offence under Section 304(I) is altered/modified to ten years of rigorous imprisonment. Appellant is also directed to pay fine of Rs.20,000/- in default of payment

of fine to suffer further rigorous imprisonment for one year.

(iii) Appeal No. 770 of 2015 filed by the State is dismissed.

(iv) Appellant shall be released on completion of sentence as directed unless required in any other case/cases.

13. In view of the disposal of the Criminal Appeals, Interim Application No. 4052 of 2022 will not survive and same is also disposed off.

(SHIVKUMAR DIGE, J.)

(A.S. GADKARI, J.)

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