

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1046 OF 2014

Rajaram Shankar Ahire,
Aged 50 years, R/o Village Vitave,
Taluka Chandwad, District Nashik ...Appellant

Versus

The State Of Maharashtra
(At the instance of Chandwad Police Station) ...Respondent

....

Mr. Veerdhaval P. Kakade, (Appointed) Advocate for the Appellant.

Mrs. M.H. Mhatre, APP for the Respondent – State.

....

**CORAM : PRAKASH D. NAIK, &
N. R. BORKAR, JJ.**

DATE : 4th DECEMBER, 2023.

JUDGMENT :

1. The Appellant is convicted for an offence under Section 302 of Indian Penal Code (for short 'IPC') vide Judgment and Order dated 10th December, 2014 passed by Learned Additional Sessions Judge, Niphad in Sessions Case No.57 of 2012.

2. The case of the prosecution is as follows :-

On 30th May, 2012 at about 9:00 p.m. the complainant went to the shop of one Kolhe to purchase soft drink and while proceeding towards the hotel of his maternal uncle, he heard the quarrel between his father and Accused. He went to the spot. He

SUNNY
ANKUSHRAO
THOTE

Digitally signed
by SUNNY
ANKUSHRAO
THOTE
Date: 2023.12.12
18:38:21 +0530

noticed that the Accused was under the influence of liquor. He was abusing his father. He caught hold of the collar of shirt of his father. The complainant intervened. The Accused went towards his house by abusing his father. The complainant and his father waited near the temple. Within short time the Accused came to the spot along with his son. He was armed with knife. The son of the Accused who was juvenile caught hold of complainant's father and Appellant gave a blow of knife on chest and stomach of his father. The assault resulted in injuries. The Accused and his son ran away from the spot. The injured fell on the ground. He became unconscious. The complainant rushed towards his house and informed about the incident to his mother and sister. All of them went to the spot. The complainant's mother and sister went to the house of Accused to question him about the assault. The injured was taken to the hospital. The doctors examined him and declared as dead. Crime was registered vide C.R. No.69 of 2012. The Accused/Appellant was arrested. Investigation proceeded. The co-accused was found to be juvenile. His case papers were forwarded to Juvenile Justice Board. During the investigation knife was recovered from the Appellant. On completing investigation, charge-sheet was filed.

3. Vide Order dated 27th December, 2012, charge was

framed against the Appellant/Accused for an offence under Section 302 of IPC.

4. The prosecution examined 13 witnesses. PW-1 Kailas Karbhari Kolhe did not support the prosecution case. He was declared hostile. PW-2 Rajendra Prakash Jadhav is the eye witness to the incident. He is the son of the deceased. PW-3 Sopan Vishnu Ahire did not support the prosecution case. He was declared hostile. PW-4 Vijay Vitthal Pawar is the Panch witness with regards to recovery of stone with blood stains from the spot. PW-5 Shravan Tukaram Mokale is the Panch witness for recovery of clothes of the deceased. PW-6 Uttam Dattatraya Patil acted as Panch witness for recovery of knife. He did not support the prosecution case. He admitted his signature. PW-7 Sanjay Shreepat Kolhe acted as Panch witness for recovery of shirt of deceased. PW-8 Uttam Baburao Bachhav acted as Panch witness for taking the knife for opinion to the Medical Officer. PW-9 Hemant Sampatrao Mandlik is the Medical Officer. PW-10 Manoj Babanrao Gadekar is the Medical Officer. PW-11 Ganesh Murlidhar Bagul is the Panch witness for recovery of knife. PW-12 M. Ramkumar was attached to Malegaon Camp Police Station. He is the Investigating Officer. PW-13 Ananat Manohar Samant was working as J.M.F.C. He had recorded the

statement of witness under Section 164 of Cr.P.C.

5. The learned Sessions Judge on the basis of the evidence adduced by the prosecution held that the Accused is liable to be convicted for the offence under Section 302 of IPC and the Appellant was sentenced to suffer imprisonment for life.

6. Learned Advocate Mr. Veerdhaval Kakade appearing for the Appellant submitted that the prosecution case suffers from serious infirmities. The prosecution has failed to establish its case beyond reasonable doubt. The prosecution is relying upon the evidence of PW-2 who lodged the complaint. He is interested witness. He is the son of deceased. His evidence suffers from doubt. There is reason to believe that he was not present at the scene of offence and had no occasion to witness the incident. His evidence is concocted. The conduct of the said witness would indicate that his evidence is fabricated. He did not take any steps to intervene in the quarrel. The other eye witnesses have not supported the prosecution case. The evidence of the witnesses would indicate that relationship between the deceased and Accused was cordial. He had no reason to assault the deceased. The incident was not premeditated. The evidence of witnesses indicate that the incident had occurred at the spur of moment. There was no previous enmity.

According to prosecution there was quarrel between the Appellant and the deceased. During the quarrel the Accused had allegedly brought the knife and assaulted the deceased. The manner in which the incident had occurred the medical evidence on record and the evidence of witnesses would indicate that the Accused had no intention to commit murder. Assuming that the prosecution has established that the Accused was instrumental in killing the deceased, it cannot be said that the Accused is liable to be punished for offence under Section 302 of IPC. At the most it could be said that the Accused may had a knowledge that assault may result in death but he had no intention to commit murder. The Appellant could be convicted for offence under Section 304 Part-II of IPC. The Appellant is in custody for a period of 11 and half years.

7. Learned Advocate for the Appellant has relied upon the following decisions:

- i. Bivash Chandra Debnath Alias Bivas And Others V/s. State of West Bengal¹.*
- ii. Sukhbir Singh V/s. State of Haryana².*
- iii. Devendra Nath Srivastava V/s. State of Uttar Pradesh³*

¹ (2015) 11 SCC 283

² (2002) 3 SCC 327

³ (2017) 5 SCC 769

8. Learned APP submitted that there is no reason to disbelieve findings of the trial Court. There is sufficient evidence to convict the Appellant. The evidence of PW-2 who is the eye witness to the incident cannot be discarded, merely on the ground that the witness was related to the deceased. His evidence inspires confidence. Although some of the witnesses have not supported the prosecution case, there is sufficient evidence adduced by the prosecution which establishes the charge under Section 302 of IPC. At the time of incident the Accused went to his house and brought the knife and gave fatal blows on the deceased. The death has resulted on account of the injuries suffered by the deceased. It is proved that the Accused has assaulted the deceased. The injuries were sufficient to cause death. The evidence of Medical Officer who conducted the postmortem indicate that the injuries were sufficient to cause death. The manner in which the incident had occurred shows that there was intention to commit murder and the Accused is rightly convicted for an offence under Section 302 of IPC. There is evidence of recovery of clothes of the deceased and the knife used in assaulting the victim. The charge under Section 302 of IPC has been proved against Appellant.

9. We have scrutinized the evidence on record. The first

witness examined by the prosecution has not supported the prosecution case and he was declared hostile. PW-2 Rajendra Jadhav is the eye witness to the incident. He has supported the prosecution case. He is the son of the deceased. However, merely on the ground that the witness is related to the deceased, his evidence cannot be discarded. It is required to be seen whether his evidence inspires confidence. Caution has to be exercised while accepting such evidence. His evidence discloses that there was quarrel between his father and the Accused. He stated that the Accused had assaulted the deceased with knife. There was quarrel between the deceased and the Accused and immediately thereafter, the Accused went to his house and brought the knife and assaulted the deceased. His evidence establishes that during quarrel the deceased was assaulted by Accused with knife. He was cross-examined but his evidence could not be demolished. The quarrel has apparently occurred at the spur of moment and immediately after the quarrel the Accused went to his house and brought the knife. PW-3 has not supported the prosecution case. The PW-4 acted as Panch witness for recovery of stone containing blood stains. Clothes of the Accused were recovered.

10. PW-5 is the Panch witness for Panchanama to seizure of

clothes of deceased. Police had shown him clothes of deceased. In cross-examination he stated that, Police constable had brought blood stained pant and shirt of deceased. He had no personal knowledge about clothes which deceased was wearing. PW-6 Mr. Uttam Patil as Panch witness for recovery of knife from Accused. He was informed that the Accused is in jail. He do not know the Accused who is present in the Court. He denied that Accused made any statement before him and any weapon was recovered. In the cross-examination conducted by prosecution, he agreed that statement shown to him was made by Accused. He admitted his signature on Panchanama. PW-7 Sanjay Kolhe is the panch witness relating to Panchanama of seizure of shirt from Accused. He supported prosecution case. Panchanama was proved in evidence. PW-8 Uttam Bacchav acted as Panch. He accompanied Police with a packet in sealed condition to Sub-District hospital. It was knife. It was shown to Medical Officer to get opinion whether with the help of said knife injuries can be caused. The Medical Officer answered in affirmative. His cross-examination could not disturb his version.

11. The question which falls for consideration is whether charge under Section 302 of IPC is made out. The factual matrix as indicated above disclose that the incident had occurred at the spur

of moment. There was no enmity between the deceased and the Accused. The incident of assault had occurred immediately after the quarrel. PW-2 in his evidence stated that his father was having good relation with the Accused.

12. PW-9 Hemant Sampatrao Mandlik was attached to Sub-District Hospital, Chandwad. He alongwith Dr. Gadekar conducted the postmortem of the dead body of deceased Prakash Yashwant Jadhav. According to him on examining the body externally he noticed stab injury at right hypochondrium region, stab injury over 9th rib, left side, stab injury on left border of sternum, CLW on left upper thigh and abrasion on left forearm. On opening the body, he noticed fracture to 9th rib, stab injury over right hypochondrium 4 cm X 4 cm, stab injury to small intestine and liver. According to him death of the deceased was caused due to shock and hemorrhage due to multiple stab injuries. Injuries Nos.1 to 4 are possible by knife. He stated that because of deep injuries sustained by the patient he may die. He acted as Assistant to Chief Medical Officer Dr.Gadekar. If a person falls on sharp edged articles lying on the ground, the injuries mentioned by him in Column No.17 can be possible. We have perused the postmortem report which refers to the aforesaid injuries and the opinion of cause of death. PW-10

Manoj Babanrao Gadekar has deposed that he was attached to Sub-District Hospital, Chandwad. He gave opinion that injuries mentioned in the postmortem report would be possible by the knife shown to him.

13. The prosecution has established that the Appellant/Accused has assaulted the deceased. Considering the evidence of witnesses, the cause of assault, nature of injuries, cause of death, motive, nature of assault, nature of crime, we are of the opinion that although the death has resulted in the assault attributed to the Appellant, the offence would not be covered under Section 302 of IPC. The Appellant can be convicted under Section 304(1) of IPC.

14. Section 304(1) of IPC reads as under :

“Punishable for culpable homicide not amounting to murder.

- Whoever commits culpable homicide not amounting to murder, shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;”

15. In the case of *Bivash Chandra Debnath Alias Bivas And Others (supra)*, it is observed that there was sudden fight between the Accused and the deceased and there was no premeditation on the part of the Accused to commit the murder. It was a fit case to

hold that the offence committed by the Accused is not punishable under Section 302 of IPC but under Section 304 Part-II.

16. In the case of *Pulicherla Nagaraju @ Nagaraja Reddy V/s. State of A.P.*⁴, it was observed that the Court should proceed to decide pivotal question of intention, with care and caution, as that will decide whether the case falls under Sections 302 or 304 Part-I or 304 Part-II of IPC. Usual motives like revenge, greed, jealousy or suspicion may be absent in some cases where the assault takes place in cases such as plucking of fruit, string of cattle, quarrel of children, utterance of a rude word or objectionable glance which lead to altercations and clashes culminating in death. There may be no intention. There may be no premeditation. There may not be criminality. It is for the Courts to ensure that the cases of murder punishable under Section 302 of IPC or not converted into offences punishable under Section 304 Part-I/II of IPC or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302 of IPC. The intention to cause death can be gathered generally from a combination a few or several circumstances such as (i) nature of weapon use, (ii) whether the weapon was carried by the Accused or was picked up from the spot, (iii) whether the blow is aimed at vital part of the body, (iv) the

4 (2006) 11 SCC 444

amount of force employed in causing injury, (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight, (vi) whether the incident occurs by chance or whether there was premeditation, (vii) whether there was any prior enmity or whether the deceased was as stranger, (viii) whether there was any grave and sudden provocation and if so, the cause of for such provocation, (ix) whether it was hit of passion, (x) whether the person inflicting the injury has taken undue advantage or as acted in a cruel and unusual manner, (xi) whether the accused dealt a single blow or several blows.

17. In the case of *Devendra Nath Srivastava (supra)*, the High Court had convicted the Accused for the offence under Section 304 Part-I of IPC by setting aside the conviction under Section 302 of IPC. The deceased had suffered lacerated wounds, contusions, incised wounds etc. The Apex Court confirmed the view of the High Court. It was observed that the Accused was a drunkard. The Accused acted at a fit of anger. Whether the act on the part of the Accused constitutes the offence under Section 302 of IPC or Section 304 Part-I of IPC is the question and the facts disclose that the incident had occurred after quarrel between the Appellant and deceased which is not a planned act. The Appellant

was a drunkard. The facts and circumstances of the case would show that the Appellant had committed offence punishable under Section 304 Part-I of IPC.

18. In the case of *State of A.P V/s. Rayavarupu Punnayya*⁵, the Apex Court explained the scheme of Penal Code relating to culpable homicide and observed as follows :

“12. In the scheme of the Penal Code, “culpable homicide” is genus and “murder” its specie. All “murder” is “culpable homicide” but not vice versa. Speaking generally, “culpable homicide” sans “special characteristics of murder”, is “culpable homicide not amounting to murder”. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, “culpable homicide” of the first degree”. This is the greatest form of culpable homicide, which is defined in Section 300 as “murder”. The *second* may be termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.”

“21.... whenever a court is confronted with the question whether the offence is “murder” or culpable “homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accuse and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the

5 (1976) 4 SCC 382

prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the *first* or *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to “murder”, punishable under the first part of Section 304, of the Penal Code.”

19. In the case of *Sukhbir Singh (Supra)*, the Accused were charged for the offences under Sections 302 and 307 of IPC. They were convicted for the said offences. There was quarrel between both the sides, thereafter, the Accused came to the spot. They were armed with weapons. The injured/deceased were assaulted. It was observed that to avail the benefit of exception 4, the defence is required to probabalize that the offence was committed without premeditation in a sudden fight, in the hit of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and an account of total deprivation of self-control but on account of hit of passion, the offence was committed which normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. The fight is not per se palliating circumstance and

only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the Accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the Accused may be held entitled to the benefit of this exception. While analyzing the facts of the said case it was observed that there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the Accused had premeditated. There was quarrel between the parties. It was sudden on account of hit of passion. The Accused went home and came armed with the company of others though without telling him his intention to commit the crime of murder. The time gap between the quarrel and the fight is of few minutes. The Accused had gone home stating that he would teach the victim a lesson he came back with the other Accused. There was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was sudden within the meaning of exception 4 of Section 300 of IPC. The injuries cannot be termed to be in cruel and unusual manner. In the absence of existence of common object the Accused committed the offence of culpable homicide without premeditation in a sudden fight in the hit of

passion upon a sudden quarrel and did not act in cruel or unusual manner. The finding of the Courts below holding the Appellant guilty of offence under Section 302 of IPC was set aside and Accused was convicted for offence under Section 304 Part-I of IPC.

20. The evidence of only eye witness to the incident who supported the prosecution case (PW-2) refers to quarrel going on between deceased and the Appellant. After the quarrel the Accused allegedly went home and came back with knife and assaulted the deceased. There was no enmity. The incident is sudden. The Accused did not act in a cruel manner. Hence, the conviction under Section 302 of IPC is required to be set aside by altering the same to the conviction under Section 304 Part-I of IPC. The Appellant has been in custody for a substantial period of time. The sentence to undergo imprisonment of 10 years.

ORDER

- i. Criminal Appeal No.1046 of 2014 is partly allowed;
- ii. The Judgment and Order dated 10th December, 2014 passed by Learned Additional Sessions Judge, Niphad in Sessions Case No.57 of 2012 convicting the Appellant for an offence under Section 302 of IPC is set aside and the

Appellant is convicted for an offence 304 Part-I of IPC and sentenced to suffer imprisonment for 10 years.

iii. The Appellant has undergone the sentence of 10 years and he shall be released forthwith unless required in any other case.

iv. Appeal is disposed off.

(N. R. BORKAR, J.)

(PRAKASH D. NAIK, J.)