



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

CRIMINAL APPEAL NO.262 OF 2019

- 1) Shivaji s/o Bhojwant Shinde,
Age 48 years, Occu. Agri.,
R/o Halda, Tq. Kandhar,
District Nanded
- 2) Nagesh s/o Maroti Gadhave,
Age 25 years, Occu. Agri.,
R/o Gadhavewadi, Tq. Mukhed,
District Nanded.

... APPELLANTS

VERSUS

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad

... RESPONDENT

.....
Mr. N.S. Ghanekar, Advocate for appellants
Mr. S.D. Ghayal, Addl. P.P. for respondent
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 24th January, 2024

Date of pronouncing judgment : 30th January, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The challenge in this appeal is to an order of conviction and consequential sentence, dated 26/2/2019, passed by learned Sessions Judge, Nanded in Sessions Case, No.45/2015. Vide order impugned herein, the appellants have been convicted for

offences punishable under Sections 302 and 307 r/w Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and rigorous imprisonment for ten years respectively and fine with default stipulations. The substantive sentences have been directed to run concurrently. The appellants are, therefore, in appeal.

FACTS :-

2. Appellant No.2 (A/2) is a nephew (sister's son) of appellant No.1. P.W.3 Nandabai was the mother of Santoshi (deceased). Santoshi had married appellant No.1 (A/1) a year before the fateful day i.e. 9/12/2014. The couple was blessed with a baby girl. A/1 was previously married. There is nothing to suggest as to whether his first marriage was subsisting or dissolved with a decree of divorce.

3. Since A/1 was not treating Santoshi well, she had returned to her mother's house and was residing with her. Madhukar Deshmukh (P.W.5), brother of P.W.3 Nandabai and two others had been to her house (P.W.3). They requested her to ensure Santoshi join A/1 to resume cohabitation. P.W.3 Nandabai, therefore, asked them to call A/1 to her residence. He (A/1), therefore, came to her residence by 4.00 p.m. on 9th December. A meeting was held over the issue of resumption of cohabitation by Santoshi. After the meeting was over, both Madhukar (P.W.5) and

his two friends went out of the house for smoking cigarette. A/1 requested P.W.3 Nandabai to allow him to meet Santoshi in a bedroom. Both Santoshi and A/1 entered the bedroom. P.W.3 Nandabai heard screams of Santoshi. She (P.W.3), therefore, entered the bedroom to see A/1 to have been assaulting Santoshi with a sharp weapon. He had cut Santoshi's neck. A/1 assaulted P.W.3 Nandabai with the very weapon when she intervened to rescue her daughter. P.W.3 Nandabai fell down. Thereafter A/2 entered the bedroom and threw chilly powder on the person of P.W.3 Nandabai. She raised hue and cry. Both the appellants and one unknown boy thereafter ran away. Both P.W.3 Nandabai and her daughter Santoshi were rushed to Government Hospital. P.W.3 Nandabai lodged F.I.R. (Exh.46). Santoshi succumbed to the injuries. Crime vide C.R. No.174/2014 came to be registered.

4. P.W.15 Rajaram did the investigation of the crime. Inquest panchanama (Exh.43), scene of offence panchanama (Exh.44), panchanama relating to seizure of clothes on the person of the deceased (Exh.41) were drawn. Autopsy was conducted on the dead body of Santoshi. Statements of witnesses came to be recorded. Upon completion of the investigation, both the appellants were proceeded against by filing a charge sheet in the Court of 2nd Judicial Magistrate, First Class, Nanded. The learned Magistrate committed the case to the Court of Sessions, Nanded.

5. The learned Sessions Judge (Trial Court) framed the charge (Exh.10). The appellants pleaded not guilty. Their defence was of false implication. The prosecution examined 16 witnesses and produced in evidence certain documents to bring home the charge. On appreciation of the evidence in the case, the learned Sessions Judge convicted and consequently sentenced the appellants as stated above.

6. Heard. Learned counsel for the appellants would submit that, the material eye witnesses did not stand by the prosecution. P.W.3 Nandabai, one of the victims was an interested witness. There is nothing to indicate both the appellants to have had come together to the house of P.W.3 Nandabai. There is also nothing to indicate A/2 had played any role while A/1 mounted assault on both P.W.3 Nandabai and deceased Santoshi. What has been alleged against A/2 is that he threw chilly powder. Although particles of chilly powder were found on the bed sheet, the C.A./ report as regards clothes on the person of P.W.3 Nandabai indicates no such particles were found thereon. It is not the case of the prosecution that as a result of alleged spray of chilly powder P.W.3 Nandabai suffered any injury. Learned counsel, therefore, urged for allowing the appeal.

7. The learned A.P.P. would, on the other hand, submit that, it is a brutal murder and bid on the life of P.W.3 Nandabai. A/2 had participated in the assault. In view of Section 34 of the Indian Penal Code, A/2 would also be liable to suffer conviction for the offences for which A/1 has been convicted. Learned A.P.P. took us through the evidence on record to ultimately submit that no interference is warranted with the impugned judgment and order. He, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Let us appreciate the evidence. P.W.3 Nandabai, mother of the deceased Santoshi testified that, A/1 had married Santoshi a year before the incident. The couple was blessed with a child. Since A/1 used to ill-treat Santoshi, she (Santoshi) had returned to her (P.W.3 Nandabai) residence about two months before 9/12/2014.

It is further in her evidence that, it was 9/12/2014 her son Sachin and deceased Santoshi were home along with her. One Dipak (P.W.7) and Manisha (P.W.12) were also there. Her brother Madhukar (P.W.5) and his two friends Madhukar Wadje and Vishwambhar Wadje came to her residence to request her to send Santoshi back to her matrimonial home. She, therefore, asked them to call A/1 to her home. A/1 accordingly came. It was about 4.00 p.m. A discussion over the issue of resumption of cohabitation

was held in the drawing room. A/1 assured to take Santoshi back to his house. Thereafter, both Madhukar (P.W.5) and his two friends Madhukar Wadje and Vishwambhar Wadje went out of the house for smoking. A/1 asked P.W.3 Nandabai to allow him to meet Santoshi in the bedroom. Both A/1 and Santoshi entered the bedroom. In a short while, P.W.3 Nandabai heard cries of Santoshi. She, therefore, entered the bedroom to see A/1 assaulting Santoshi with a sharp weapon. Since she intervened to rescue her daughter, A/1 assaulted her as well with the very weapon. As a result, she fell down. A/2 then came inside the bedroom and threw chilly powder on her person. P.W.3 Nandabai raised cries. Thereupon, both the appellants and one unknown boy ran away. Both Santoshi and P.W.3 Nandabai were rushed to the hospital. Santoshi succumbed to the injuries. P.W.3 Nandabai lodged the F.I.R. (Exh.46).

9. P.W.3 Nandabai was subjected to a searching cross-examination. Suggestions in the nature of disputing involvement of the appellants in the crime in question were put to P.W.3 Nandabai in her cross-examination. She did not give in to any of the questions. It has, however, come on record during her cross-examination that A/1 was previously married. Jayshree was his first wife. The couple had two children. There is, however, no evidence to suggest whether the marriage of A/1 with Jayshree was subsisting or dissolved with a decree of divorce. It has also been

brought on record that, P.W.3 Nandabai's husband was working as a Porter. One Shankar Mehtre (P.W.2) was engaged by her as a Driver for her car. It was suggested to her that she had illicit relationship with him.

10. P.W.11 Dr. Maroti Lathkar examined P.W.3 Nandabai. He noticed following injuries on her persons.

- (1) Incised wound size 3.5 x 1.5 x 0.5 cm. on left ear pinna along with prelobular region, grievous in nature.
- (2) Incised wound size 8 x 3 x 5 on right upper chest region, simple in nature.

M.L.C. of P.W.3 Nandabai is at Exh.74.

11. P.W.10 Dr. Maroti Dake conducted autopsy on the mortal remains of Santoshi. He found 22 chop and incised injuries on her person. He also noticed corresponding internal injuries. In his opinion, Santoshi died of haemorrhagic shock due to chop injuries to neck (Post mortem report Exh.69).

12. P.W.3 Nandabai is an eye witness. She was a victim of assault as well. Her evidence, therefore, carries much importance. The scene of offence panchanama was drawn within hours of the

registration of the crime. The F.I.R. was lodged immediately. The scene of offence panchanama (Exh.44) has been proved by the evidence of P.W.2 Shankar, panch witness and P.W.14 Satish, investigating officer. The scene of offence is the bedroom in the residential premises of P.W.3 Nandabai. A dead body of Santoshi was noticed lying in a pool of blood. The bed sheet and other articles were seized from the crime scene. The scene of offence panchanama indicates the sachet containing chilly powder was seized from the scene of offence. The C.A. report of the bed sheet (Exh.69-A) indicates particles of chilly powder were found thereon. Blood plots were also collected. Clothes on the person of P.W.3 Nandabai were also seized.

13. P.W.1 Suresh was witness to the seizure of clothes of P.W.3 Nandabai, under panchanama (Exh.41).

14. Although many more witness were examined by the prosecution, most of them did not stand by. Evidence of some others is not much relevant. A passing reference to the evidence of those witnesses is therefore made. P.W.4 Chandrakant is a Police Constable who snapped photographs of the dead body. P.W.5 Madhukar, real brother of P.W.3 Nandabai (victim) did not support the prosecution. According to him, the incident took place two hours after he left residence of P.W.3 Nandabai along with his

friends. P.W.6 Dr. Vitthal was examined to show that A/1 was medically screened by him to find a superficial injury to his left thumb. Evidence of this witness has, however, not been relied on before us. P.W.7 Dipak, who was allegedly present and witnessed the incident, did not support the prosecution. Same is the case about the evidence of P.W.12 Manisha, a maid engaged by P.W.3 Nandabai. P.W.8 Munir and P.W.9 Madhukar Gadamwar, witnesses to a disclosure statement made by A/1, pursuant to which the knife came to be recovered, did not support the prosecution.

15. Evidence of P.W.14 Satish, real brother of deceased Santoshi, indicates that he returned home after his school was over. According to him, the incident had already occurred. He learnt about the incident from P.W.12 Manisha.

16. Although independent witnesses and even panchas did not stand by the prosecution, the case is based on eye witness account of a victim (P.W.3 Nandabai). A crime scene panchanama reinforces her case. There is nothing for us to disbelieve the testimony of P.W.3 Nandabai. Based on her evidence, the prosecution did prove A/1 to have committed murder of Santoshi and even made a bid on the life of P.W.3 Nandabai. The trial Court has rightly convicted him and consequently sentenced with appropriate quantum of sentence. We find no reason to interfere

therewith.

17. The question is, whether, conviction and consequential sentence of A/2 in the facts and circumstances, calls for interference. Neither the F.I.R. nor the oral evidence of P.W.3 Nandabai indicate A/2 had accompanied A/1 to her residence. The assault was mounted by appellant No.1 alone on the deceased Santoshi in the bedroom. When P.W.3 Nandabai entered the bedroom, the A/1 turned to her and gave two blows with a sharp weapon. As such, there is no evidence to indicate A/2 to have participated to mount an attack on both the victims along with A/1.

18. Section 34 of the Indian Penal Code reads thus :

“34. Acts done by several persons in furtherance of common intention.—

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

19. As already stated above, there is no evidence to suggest both the appellants to have had come together. There is also nothing to suggest that there was prior concert of mind or prearranged plan. There is nothing to indicate A/2 knew A/1 to have been armed with a knife. Even the evidence of P.W.3

Nandabai is silent to suggest that while a discussion was held over the issue of resumption of cohabitation by Santoshi, A/2 was present. A/2 entered the bedroom only after both the deceased and P.W.3 Nandabai had already been assaulted. As per the evidence of P.W.3 Nandabai, thereafter A/2 threw chilly powder on her person. It is not her case that, she suffered any injury thereby. There is no evidence to suggest that the chilly powder thrown by A/2 really fell on her person since the C.A. report (Exh.69-A) in that regard indicates that no particles of chilly powder were found on the clothes of P.W.3 Nandabai. In our view, the act of A/2 throwing chilly powder towards P.W.3 Nandabai but not falling on her person and she not suffering any injury thereby, would at the most be an offence of attempt to voluntarily cause hurt, punishable under Section 324 r/w 511 of the Indian Penal Code.

20. We have perused the charge. A/2 has not been specifically charged with his overt-act of throwing chilly powder. We have, therefore, no option but to acquit him. In the result, the appeal partly succeeds in terms of the following order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) Criminal Appeal of appellant No.1 Shivaji s/o Bhojwant Shinde is dismissed.

- (iii) Criminal Appeal of appellant No.2 Nagesh s/o Maroti Gadhave is allowed. Conviction and consequential sentence of the appellant No.2 vide judgment and order dated 26/2/2019, passed by learned Sessions Judge, Nanded in Sessions Case, No.45/2015 is hereby set aside. The appellant No.2 Nagesh s/o Maroti Gadhave is acquitted of the offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code. Fine amount, if paid, be refunded to appellant No.2.
- (iv) The Criminal Appeal stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-