



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

CRIMINAL APPEAL NO.280 OF 2020

Shaikh Amjad s/o Shaikh Ahmed
Alias Babu, Age 26 years, Occ. Labour,
R/o Achanak Nagar, Peth, Beed,
District Beed.

... APPELLANT

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 : 1st February, 2024

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

The challenge in this appeal is to a judgment and order of conviction and sentence dated 22/1/2020, passed by learned Additional Sessions Judge, Beed in Sessions Case No.97/2017. By the impugned judgment and order, the appellant has been convicted for the offences punishable under Sections 302 and 307 of the Indian Penal Code and therefore, sentenced to suffer imprisonment for life and rigorous imprisonment for 7 years

respectively and fine with default stipulation. The substantive sentences have been directed to run concurrently.

2. Mother and sister of the appellant were also prosecuted along with him for the same offences, both of them have been acquitted. The State did not prefer any appeal against the acquittal.

FACTS :-

3. P.W.1 Akhil lodged the F.I.R. (Exh.44). He had 5 brothers and equal number of sisters. Jalil (deceased) was one of his brothers. Dilshad Begum (since acquitted) was Jalil's wife. The couple was blessed with four children.

4. The incident took place near Hotel, "Gathade" at Gandhinagar, Beed. P.W.1 Akhil was on his way from Gandhinagar. It was 3.15 p.m. He saw his brother Jalil (deceased), the appellant, his sister Dilshad Begum and their mother Shafiya. It is further his case that the deceased was telling his wife Dilshad that she had illicit relations with many persons and so, he did not have faith in her. Thereupon, the appellant, his sister Dilshad and their mother Shafiya started abusing Jalil. Both Dilshad and Shafiya caught hold of Jalil. The appellant fished out a knife (Khanjir) and assaulted on the chest of Jalil. Jalil fell in the nearby guttar. His brother Faim

intervened. The appellant assaulted Faim too with knife. The informant rushed towards them. One Shakil Khan, Shaikh Rani, Shaikh Khaja, Shaikh Guddu, residing in the neighbourhood intervened. Thereafter the appellant, his sister and their mother ran away.

5. Jalil was rushed to Civil Hospital, Beed. He was declared dead on admission. Faim was admitted to the hospital. He fortunately survived.

6. Based on the F.I.R. (Exh.44), a crime vide C.R. No.94/2017 was registered. Upon completion of the investigation, a charge sheet was laid. A case was committed to the Court of Sessions, Beed. It was assigned to the Court of Additional Sessions Judge (Trial Court) for trial according to law. The trial Court framed the Charge (Exh.29). The appellant and the co-accused (acquitted) pleaded not guilty. Their defence was of false implication.

7. The prosecution examined 10 witnesses and produced in evidence certain documents in the nature of post mortem report (Exh.62), injury certificate (Exh.69/C), Inquest (Exh.50), scene of offence panchanama (Exh.48) etc.

8. On appreciation of the evidence in the case, the trial Court convicted the appellant under Sections 302 and 307 of the Indian Penal code and consequently sentenced to the terms as stated above. The appellant is therefore before us in appeal.

9. Learned counsel for the appellant would submit that the evidence on record and the manner in which the incident took place, conviction of the appellant for the offences punishable under Sections 302 and 307 of the Indian Penal Code needs to be altered to one under Sections 304 and 308 of the Indian Penal Code. According to him, the case falls within the exceptions (1) and (4) of Section 300 of the Indian Penal Code. He produced on record certain documents in appeal. The learned A.P.P., on instructions, did not dispute those documents. The documents are in the nature of injury certificate of the appellant and the documents suggesting the deceased to have criminal antecedents. A proposal for his externment was moved along before the incident. It was dropped post incident. According to learned counsel, the deceased would harass and ill-treat his wife Dilshadbi (sister of the appellant). He had even assaulted his mother. According to him, the informant (P.W.1) and injured P.W.2 Fahim admitted in their evidence that the deceased and Faim were giving understanding to the appellant and Dilshadbi about her extra-marital relationship. According to learned counsel, making such allegations with a history of ill-treatment to

Dilshadbi gave the appellant grave and sudden provocation. According to him, both the P.W.1 Akhil and P.W.2 Faim were interested witnesses. They suppressed the genesis of the prosecution case. The appellant was assaulted in the very incident. Our attention has been adverted to certain documents in that regard to ultimately urge for partly allowing the appeal.

10. The learned A.P.P. would, on the other hand, submit that, the prosecution was under no obligation to explain simple/superficial injuries on the person of the accused. According to him, the deceased and his brother Faim making allegations about extra-marital relations of Dilshad might have caused provocation to her and not to the appellant. The learned A.P.P. relied on the following authorities :

(1) Amar Malla Vs. State of Tripura [2002 AIR (SC) 3052]

The next submission of Shri Misra is that in the alleged occurrence accused Amar Malla, Milan Malla and Prafulla Debnath had also received injuries and the prosecution has failed to explain the same. From the nature of injuries said to have been received by these accused persons it would appear that the same were simple and minor ones. It is well settled that merely because the prosecution has failed to explain injuries on the accused persons, ipso facto the same cannot be taken to be a ground for throwing out

the prosecution case, especially when the same has been supported by eye witnesses, including injured ones as well, and their evidence is corroborated by medical evidence as well as objective finding of the investigating officer.

(2) Sucha Singh & anr. Vs. State of Punjab [2003 AIR (SC) 3617]

Injuries on accused persons have not been explained – Held, non-explanation of injuries by prosecution will not affect prosecution case where injuries sustained by accused are minor and superficial or where evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs effect of omission on part of prosecution to explain injuries.

11. Considered the submissions advanced. Perused the evidence on record. The appellant admittedly assaulted Faim (P.W.5) and Jalil with a knife (Khanjir) on 26/3/2017 at Gandhinagar, Beed. P.W.7 Dr. Deepali had examined Faim on 26/3/2017. She found following 3 injuries on his person.

Stab Injury :-

(1) Incised wound at right chest near right nipple oblique in nature. Size 5 x 2 x deep in nature. Age of injury is within 24 hours, caused by sharp weapon. Nature of the injury is

grievous in nature.

- (2) Incised wound at left arm transverse in nature. Size 8 x 3 x deep in nature. Age of injury is within 24 hours, caused by sharp weapon. Nature of the injury is simple in nature.
- (3) Incised wound over abdomen transverse in nature. Size 4 x 0.1 x 0.1 cm. Age of injury is within 24 hours, caused by sharp weapon. Nature of injury is simple in nature.

12. The injury certificate (Exh.69) indicates Faim to have suffered one grievous and two simple injuries. P.W.6 Dr. Santosh conducted post mortem on the dead body of Jalil. He noticed following injuries on the person of deceased :

- (1) C.L.W. over left side of chest, below nipple obliquely placed, size 6 x 4 cm., depth about 6 cm bone deep, reddish, brown colour.
- (2) C.L.W. over back of the right shoulder size 6 x 3 cm., muscle deep brown in nature.
- (3) C.L.W. over left lumbar (loin) region size 3 x 3 cm., spine deep reaching up to spinal cord.
- (4) C.L.W. over left elbow anteriorly size 4 x 1 cm, muscle deep.
- (5) C.L.W. over left palm size 3 x 1 cm skin deep.

The post mortem report (Exh.62) indicates Jalil died of

haemorrhagic shock due to internal multiple injuries.

13. Admittedly, the appellant is the author of the injuries of both Faim and Jalil. The question is, whether in the facts and circumstances of the case, it is an offence of culpable homicide not amounting to murder and attempt to commit culpable homicide.

14. Section 300 of the Indian Penal Code reads :

300. Murder.— Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or —

2ndly.— If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.— If it is done with the 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.— If the person committing the act knows that it 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 aforesaid.

Exception 1.— When culpable homicide is not murder.—

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of

the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.— That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.— That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.— That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.— Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 4.— 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's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.— It is immaterial in such cases which party offers the provocation or commits the first assault.

15. In case of **Dauvaram Nirmalkar Vs. State of Chhattisgarh (2022 LiveLaw (SC) 650**, the Apex Court observed :-

“10. Interpreting Exception 1 to the Section 300 in K.M. Nanavati v. State of Maharashtra, (1962 Supp (1) SCR 567, this Court has held that the conditions which have to be satisfied for the exception to be

invoked are (a) the deceased must have given provocation to the accused; (b) the provocation must be grave; (c) the provocation must be sudden; (d) the offender, by the reason of the said provocation, should have been deprived of his power of self-control; (e) the offender should have killed the deceased during the continuance of the deprivation of power of self-control; and (f) the offender must have caused the death of the person who gave the provocation or the death of any other person by mistake or accident. For determining whether or not the provocation had temporarily deprived the offender from the power of self-control, the test to be applied is that of a reasonable man and not that of an unusually excitable and pugnacious individual. Further, it must be considered whether there was sufficient interval and time to allow the passion to cool. K.M. Nanavati (*supra*) succinctly observes:

“84. Is there any standard of a reasonable man for the application of the doctrine of “grave and sudden” provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

85. The Indian law, relevant to the present

enquiry, may be stated thus: (1) The test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.”

11. K.M. Nanavati (supra), has held that the mental background created by the previous act(s) of the deceased may be taken into consideration in ascertaining whether the subsequent act caused sudden and grave provocation for committing the offence. There can be sustained and continuous provocations over a period of time, albeit in such cases Exception 1 to Section 300 of the IPC applies when preceding the offence, there was a last act, word or gesture in the series of incidents comprising of that conduct, amounting to sudden provocation sufficient for reactive loss of self-control. K.M. Nanavati (supra) quotes the definition of ‘provocation’ given by Goddard, C.J.; in R. v. Duffy, (1949) 1 All E.R. 932, as :

“...some act or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment

not master of his own mind... Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person had the time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation...”.

12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation. (R V.Duffy). The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances. While examining these questions, we should not be short-sighted, and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the

punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control. The cumulative or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by Ashworth (1975 Criminal LR 558-559) in the following words:

“The significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties.” Exception 1 to Section 300 recognises that when a reasonable person is tormented continuously, he may, at one point of time, erupt and reach a break point whereby losing self-control, going astray and committing the offence. However, sustained provocation principle does not do away with the requirement of immediate or the final provocative act, words or gesture, which should be verifiable. Further, this defence would

not be available if there is evidence of reflection or planning as they mirror exercise of calculation and premeditation.

14. Following the view expressed in K.M. Nanavati (supra), this Court in Budhi Singh v. State of Himachal Pradesh (2012) 13 SCC 663, observed that in the test for application of Exception 1 to Section 300 of the IPC, the primary obligation of the court is to examine the circumstances from the point of view of a person of reasonable prudence, if there was such grave and sudden provocation, as to reasonably conclude that a person placed in such circumstances can temporarily lose self-control and commit the offence in the proximity to the time of provocation. A significant observation in Budhi Singh (supra) is that the provocation may be an act or series of acts done by the deceased to the accused resulting in inflicting of the injury. The idea behind this exception is to exclude the acts of violence which are premeditated, and not to deny consideration of circumstances such as prior animosity between the deceased and the accused, arising as a result of incidents in the past and subsequently resulting in sudden and grave provocation. In support of the aforesaid proposition and to convert the conviction from Section 302 to Section 304 Part I of the IPC in Budhi Singh (supra), the Court also relied upon Rampal Singh v. State of Uttar Pradesh (2012) 8 SCC 289.

15. For clarity, it must be stated that the prosecution must prove the guilt of the accused, that is, it must establish all ingredients of the offence with which the accused is charged, but this burden should not be mixed with the burden on the accused of proving that the case falls within an exception. However, to discharge this burden the accused may rely upon the case of the prosecution and the evidence adduced by the prosecution in the court. It is in this context we would refer to the case of the prosecution, which is that the deceased was addicted to alcohol and used to constantly torment, abuse and

threaten the appellant. On the night of the occurrence, the deceased had consumed alcohol and had told the appellant to leave the house and if not, he would kill the appellant. There was sudden loss of self-control on account of a 'slow burn' reaction followed by the final and immediate provocation. There was temporary loss of self-control as the appellant had tried to kill himself by holding live electrical wires. Therefore, we hold that the acts of provocation on the basis of which the appellant caused the death of his brother, Dashrath Nirmalkar, were both sudden and grave and that there was loss of self-control."

16. In case of **Vijayee Singh and others Vs. State of U.P. (AIR 1990 SC 1459)**, the Apex Court, a Bench of Honourable three Judges of the Supreme Court observed :

"The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by S. 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under S. 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisions contained in the Penal Code or

in any law defining the offence, the Court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal for the offence charged or would be liable for a lesser offence and convict him accordingly.

The phrase “burden of proof” is not defined in the Act. In respect of criminal cases, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt.

The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence in criminal cases. S. 105 places ‘burden of proof’ on the accused in the first part and in the second part we find a presumption which the Court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the Section as a whole in the ‘burden of proof’ and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross-examinations, probabilities and circumstances, if any, introduced by

the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a preponderance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the existence of such an exception than the rest of the enquiry does not arise in spite of a mere plea being raised. But if the accused succeeds in creating a reasonable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under S. 105 gets discharged and he would be entitled to an acquittal."

17. Let us now advert to the factual matrix to appreciate the same in the light of the aforesaid legal position.

The F.I.R. (Exh.44) records :-

"आज दि. 26/3/2017 रोजी 03.00 ते 0.15 च्या सुमारास मी गांधी नगर येथून कामा निमित्त जात असतांना मला माझा भाऊ जलील उर्फ जल्लू व फईम हे गाताडे हॉटेलच्या बाजूला नाईकवाडेच्या दुकाना समोर गांधी नगर येथे दिसले तसेच जल्लू याचा मेहुणा शेख आमजद शेख अहेमद उर्फ बाबू व जल्लूची पत्नी दिलशाद बेगम भ्र. सय्यद जलील व शेख आमजद शेख अहेमद उर्फ बाबू व जलील उर्फ जल्लू याची सासू शेख शफीया शेख अहेमद उर्फ बाबू असे होते. त्या वेळी जलील उर्फ जल्लू हा त्याच्या बायकोला म्हणत होता की तुझे अनेक लोकांसोबत अनैतिक संबंध आहेत. तुला मी भरपूर लोकांसोबत बघितले आहे. तुझ्यावरचा विश्वास उठला आहे असे म्हणताच जलील उर्फ जल्लू याची पत्नी दिलशाद बेगम व जल्लू याची सासू शेख शफीया यांनी जलील यास शिवीगाळ करून जीवे मारण्याच्या धमक्या दिल्या व तुला जीवे मारून टाकू अशी धमकी देत होत्या तेवढ्यात जलील याचा हात त्याची सासू शफीया बेगम व पत्नी दिलशाद बेगम यांनी धरले असता तेवढ्यात जलील उर्फ जल्लू याचा मेहुणा शेख आमजद शेख बाबू उर्फ अहेमद याने त्याचे कामरपट्टीला अडकविलेला सुरा (खजीर) काढून माझा भाऊ जलील उर्फ जल्लू याचे छातीत मारला असता तो खाली नालीत पडला त्यावेळी माझा भाऊ फईम हा

सोडविण्यासाठी गेला असता त्याचे छातीत पण आमजद याने सुरा (खंजीर) मारला असता तेवढ्यात मी पण पळत तेथे गेलो असता मी व शकील खान शेरखान, शेख राणी शेख खाजा आणि शेख गुड्डू शेख शेख रज्जाक तसेच तेथील गल्लीतील लोक हे आले व त्यांनी भांडणाची सोडवा सोडावं केली असता जलील उर्फ जल्लू यास नालीत पडला असल्यामुळे त्यास नालीतून मी व राणी हिने बाहेर काढले व त्यास शेख गुड्डू याचे रिक्शात बसवून सरकारी दवाखाना बीड येथे नेले असता डॉक्टरांनी जल्लू उर्फ जलील यास तपासून मयत झाला असले बाबत घोषित केले व भाऊ फईम उर्फ पमु यास सरकारी दवाखान्यात शारिक करून घेतले असून त्याचेवर उपचार चालू आहे.”

18. While in the examination-in-chief, P.W.1 Akhil testified :

“ . . . At that time, my brother Jalil told to his wife Dilshad begum that she has illicit relationship and therefore, he did not trust her. Then Sk. Amjad, Dilshad Begum and Shafiya Begum started abusing my brother. They also threatened to kill my brother. Then Dilshad Begum and Shafiya Begum hold hands of my brother Jalil. Sk. Amjad has took out knife (Khanjir) from his waist and given blow on the chest of Jalil. Due to that, Jalil fell down in the Nali. Then my brother Faim went to rescue him. At that time Sk. Amjad has given blow of big knife at his chest, left hand, stomach and above left side of waist. Then, I myself went there running.”

19. P.W.4 Faim, in examination-in-chief testified :

“... At about 2.45 p.m. I came to Gandhi Nagar. I went opposite Nawab Bhai hotel where Jallu was present. At that time Amjad Shaikh, Dilshad Begum and Shaikh Shafiya, came there. Shaikh Shafiya is the mother of Amjad Shaikh. Jallu and I myself were giving understanding to Amjad that, his sister Dilshad is having illicit relationship. Then Amjad Shaikh came to assault us. At that time, Dilshad and Shaikh Shafiya were instigating Amjad to stab. Amjad took out Khanjir kept at his waist and given blow at left

side chest of Jallu. When I went to rescue, Sk. Amjad given blow of knife on my left side arm and right side chest and abdomen. . . .”

20. There is one more witness who claimed to have had seen the incident, i.e. P.W.3 Shakil. He, however, did not intervene. According to him, there were two incidents. The incident of assault took place after the appellant went to his place and came back with a knife. We are, however, not inclined to rely on the testimony of P.W.3 Shakil in view of the testimony of P.W.1 Akhil (informant) and P.W.4 Faim, an injured witness.

21. Close scrutiny of the aforesaid evidence indicates both these witness appear to have implicated Dilshad Begum and her mother, who have been acquitted and the State has not preferred appeal against their acquittal. The evidence of both these witnesses and the averments in the F.I.R. indicate that the appellant was present along with his mother Dilshad Begum. It was a public place – a road at Gandhinagar area. Both, the deceased and Faim were telling Dilshad Begum that she (Dilshad Begum) had extra marital relationship. The averments in the F.I.R. indicate that the deceased even attributed her with such kind of relationship with many persons. The appellant is none other than real brother of Dilshad Begum. Being the real brother, naturally got provoked with such allegations to have been levelled against his real sister. There

is on record a copy of the F.I.R. lodged by Dilshad Begum against her deceased husband. It has been alleged therein that he would harass and ill-treat her physically. He had similarly treated his mother-in-law as well. The F.I.R. is dated 25/3/2017, that is lodged just a day before the incident in question. The said F.I.R. was lodged by Dilshad Begum. It has been alleged therein that, the deceased came home drunk. He assaulted her and her mother as well. The appellant must be presumed to have been in the know of the deceased to have been physically ill-treating his sister Dilshad Begum for long. The arrest panchanama of the appellant has been adverted to. It bears the appellant's photographs to indicate his head to have been bandaged. The appellant's injury certificate is also on record to indicate him to have suffered following injuries :

- (1) Abrasion 2 x 1 cm. age of injury within 24 hours, by hard and blunt weapon, simple in nature.
- (2) C.L.W. on left frontal area 3 x 2 x 0.5 cm., age of injury within 24 hours, by hard and blunt weapon, simple in nature.
- (3) C.L.W. on right temporal region, 3 x 2 x 0.5 cm., age of injury within 24 hours, by hard and blunt weapon, simple in nature.

22. Medical screening report of the appellant prepared at the time of his admission to the prison has also been placed on record. Clause No.9 and 10 thereof records :-

९	आरोपी कारागृहात दाखल करण्यापूर्वी त्यास त्रास आहे काय ?	आरोपीच्या दोन्ही पायास मार लागल्याने त्रास आहे
१०	आरोपीच्या शरीरावर मार लागलेला आहे काय ?	आरोपीच्या डोक्यात जुन्या मारलेल्या, पाठीवर व पोटावर जुन्या माराचे वण व आरोपीच्या दोन्ही पायास तळव्यावर मार लागलेला आहे

His MLC has also been placed on record, wherein it has been recorded as stitched wound. There is evidence to indicate the appellant was armed with brick. There is also evidence to infer an assault on appellant just before or during the incident.

23. It is true that the prosecution is under no obligation to explain superficial injuries on the person of the accused. Here is, however, a case wherein the deceased would harass and ill-treat his wife Dilshad Begum for long. She had lodged F.I.R. against him a day before the incident in question. The F.I.R. records the deceased to have had assaulted Dilshad Begum and even the mother of the appellant. The appellant must be presumed to have this incident on his mind. Moreover, both the deceased and Faim were telling Dilshad Begum in the presence of appellant that she has extra-marital relationship. Admittedly, she has four children fathered by the deceased. The F.I.R. records that the deceased had alleged in the presence of the appellant that Dilshad Begum had illicit relationship with many persons. The appellant being real

brother of Dilshad Begum, must have been provoked by such allegations levelled by both, the deceased and injured Faim. Both the informant and Faim appear to be economical with truth. They did not state about the scuffle to have been preceded. The injuries on the person of the appellant indicate the deceased and even Faim might have beat him up. In our view, the incident is fall-out of a grave and sudden provocation given by the deceased and P.W.4 Faim to the appellant and, therefore, the case would fall within Exception (1) to Section 300 of the Indian Penal Code. We are, therefore, inclined to allow the appeal partly, converting the appellant's conviction and sentence from the offences under Sections 302 and 307 of the Indian Penal Code to Section 304 Part I and 308 of the Indian Penal Code. In the result, the appeal partly succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The judgment and order of conviction and sentence dated 22/1/2020, passed by learned Additional Sessions Judge, Beed in Sessions Case No.97/2017, convicting the appellant for the offence punishable under Sections 302 and 307 of the Indian Penal Code is altered to Section 304 Part-I and Section 308 of the Indian Penal Code.
- (iii) For offence punishable under Section 304 Part-I of the Indian

Penal Code, the appellant is sentenced to suffer rigorous imprisonment for 9 years and to pay fine of Rs.1000/- (Rupees one thousand), in default to undergo R.I. for one year.

- (iv) For offence punishable under Section 308 of the Indian Penal Code, the appellant is sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.500/- (Rupees five hundred), in default to undergo R.I. for six months.
- (v) Both the substantive sentences shall run concurrently.
- (vi) The Criminal Appeal stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-