



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

CRIMINAL APPEAL NO.580 OF 2019

Baburao s/o Yogaji Chotmal
Age 43 years, Occ. Agriculture,
R/o Issapur (Ramna), Taluka
and District Hingoli

... APPELLANT

VERSUS

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

... RESPONDENT

.....
Mr. S.J. Salunke, Advocate for appellant
Mr. G.A. Kulkarni, A.P.P. for respondent
.....

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

Date of reserving judgment : 4th July, 2024

Date of pronouncing judgment : 9th July, 2024

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

The challenge in this appeal is to a judgment and order of conviction and consequential sentence, dated 23/4/2019, passed by the Court of learned Additional Sessions Judge, Hingoli in Sessions Trial, No.19/2016. Vide impugned

judgment and order, the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and therefore, sentenced to suffer imprisonment for life and fine with default stipulation.

2. The facts in brief giving rise to the present appeal are as follows :-

The appellant, one Vitthal and Baban were three brothers. Raju (deceased) was a son of Baban. Smt. Sayabai, the mother of the trio – appellant, Vitthal and Baban, was suffering from leprosy. She was, therefore, kept separately in a house constructed on the field. Smt. Sayabai was being looked after by family of Baban. The family had 6 acres of agricultural land. 3 acres thereof was standing in the name of Sayabai. The remaining was in the name of Baban.

The house of the appellant was just near the house of Baban. On 10/12/2015, by little past 8.30 p.m., the appellant started abusing Kalawatibai, wife of his brother Baban. The reason for hurling abuses was that, Smt. Sayabai was not being taken care of properly. She was not fed well.

Even earthen pot was not filled with water, which was to be provided as a drinking water for Sayabai. Raju (deceased) had returned home from work by 7.30 p.m. After taking dinner, he went out in the village and returned by 9.30 p.m. The appellant had continued hurling abuses. Raju, therefore, took him to his (appellant's) residence to reason with him. The appellant made Raju fall down. The appellant then inflicted a knife blow on the neck of Raju and then gave second blow on his stomach. The incident was witnessed by wife of Raju, his mother and even sister as well. Mother Kalawatibai intervened. As a result, she suffered a knife injury to her palm. The relations and the neighbours rushed Raju to the hospital. Unfortunately, Raju breathed his last within an hour.

3. Ashwini, widow of Raju approached the Police Station and lodged First Information Report (F.I.R. - Exh.55) against the appellant. Crime vide C.R. No.92/2015 came to be registered at Basamba Police Station, District Hingoli for the offences punishable under Sections 302, 323, 504 of the Indian Penal Code.

4. During investigation, crime scene panchanama

(Exh.46) was drawn. Inquest panchanama (Exh.36) and autopsy (Exh.82) were conducted on the mortal remains of the deceased Raju. Clothes from the dead body of deceased Raju, stained with blood, came to be seized. The appellant came to be arrested vide arrest panchanama (Exh.26). The appellant made disclosure statement, pursuant to which a knife was seized. All the seized articles were sent to Forensic Science Laboratory, Aurangabad for analysis. Statements of persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, charge sheet was filed before the Court of learned Judicial Magistrate, First Class, Court No.3, Hingoli, who in turn, committed the case to the Court of Sessions, Hingoli.

5. The learned Additional Sessions Judge, Hingoli framed the Charge (Exh.7). The appellant pleaded not guilty. His defence was of false implication. The appellant placed on record his side of the story, in writing (Exh.85). According to him, relations between him and the deceased Raju were friendly. He has two brothers, namely Baban and Vitthal. Sayabai was their mother. They have ancestral land. It was in possession of Baban, father of deceased Raju. Kalawatibai,

wife of Baban was opposed to effect partition of family property. Since mother Sayabai was suffering from leprosy, she was staying alone in a house on the field. He would request Kalawatibai to take proper care of Sayabai. Due to consistent requests by the appellant to take care of Sayabai and give his share in the family property, Kalawatibai was annoyed with him.

6. Raju had gone to Hingoli on the fateful day. Appellant took dinner with his family members and then was watching Television programme. By 9.00 p.m., he heard a noise from outside. He, therefore, rushed out. He, Kalawatibai, Ashwini, brother Vitthal and others rushed there. They noticed Raju lying in a pool of blood in front of the house of Vitthal. Raju had suffered two injuries. He was shifted to the house of Vitthal. Then all of them including the appellant rushed him to the hospital. He was present at Civil Hospital, Hingoli until post mortem examination. The police brought him to the Police Station and arrested him falsely at the instance of say of Kalawatibai and her brother Vasanta.

7. The prosecution examined 12 witnesses and

produced in evidence certain documents.

8. The Trial Court, on appreciation of the evidence in the case, convicted and consequently sentenced the appellant as stated above.

9. Heard. Learned counsel for the appellant did not dispute involvement of the appellant in mounting assault on the deceased. According to him, it would be at the most an offence of culpable homicide not amounting to murder. He would further submit that, even if it is considered to be worst case for the appellant, he would at the most be convicted for the offence punishable under Part I or II of Section 304 of the Indian Penal Code. He took us through the evidence on record to submit that, there were thick and friendly relations between the appellant and Raju. They used to dine together. The appellant was initially driver by profession. Raju was unemployed. At the instance of appellant, Raju learnt driving. The appellant even secured Raju job of a driver. He would further submit that, while the incident took place, Raju was not there. The appellant was annoyed since his mother Sayabai was not being taken care of. The entire 6 acres of land was in

possession of Baban (father of deceased Raju). 3 out of 6 acres of land stood in the name of Sayabai. It was the responsibility of Raju's mother Kalawatibai to take proper care of her mother-in-law (Sayabai). Since Sayabai was a leprosy patient, she was kept in isolation, in a house on the field. She was not properly fed. Even a provision for her drinking water was not made. An earthen pot meant for storing drinking water for her had never been filled. While the appellant was annoyed with this, he had a quarrel with Kalawatibai. In the meanwhile, Raju returned. A quarrel between the two took place. Since the appellant was annoyed and lost control, he assaulted Raju. The assault was without premeditation. The incident took place in a spur of moment. The appellant did not act in a cruel manner. In short, according to learned Advocate, the case would fall within Exception (4) to Section 300 of the Indian Penal Code. In support of his contentions, he relied on the following authorities :

- (1) Surinder Kumar Vs. Union Territory, Chandigarh
(1989) 2 SCC 217
- (2) Rambir Vs. State (NCT of Delhi)
(2019) 6 SCC 122
- (3) Mangesh Vs. State of Maharashtra
(2011) 2 SCC 123

- (4) Ravishankar Tandon Vs. State of Chhatgishgarh
2024 CRI.L.J. 2039
- (5) Darshan Singh Vs. State of Punjab
2024 CRI.L.J. 1601

10. Based on the aforesaid submissions and the authorities relied on, learned Advocate would submit for converting the conviction of the appellant from the offence of Section 302 to Section 304 Part II of the Indian Penal Code. According to him, the appellant is behind the bars for about 9 years. He be set free imposing a sentence already undergone.

11. The learned A.P.P. would, on the other hand, submit that, to bring the case within clause IV of Section 300 of the Indian Penal Code, the ingredients thereof need to be made out. Burden to bring the case within Exception necessarily lies on the appellant. He then took us through the medical evidence on record to suggest that the appellant had mounted the first assault on the neck and cut over right side of neck carotid vessels through and through. The same indicates the appellant's intention to kill Raju. From reading of the entire prosecution evidence, no case of scuffle or even quarrel between the appellant and the deceased could be made out.

He relied on the judgment of the Apex Court in case of **Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh (2006 AIR (SC) 3010)**, to ultimately urge for dismissal of the appeal.

12. Considered the submissions advanced. Perused the evidence on record. In view of the submissions made by learned Advocate for the appellant, a limited question falls for consideration in this appeal is, whether the offence in question is a murder or culpable homicide not amounting to murder, under Part I or Part II of Section 304 of the Indian Penal Code.

13. Let us, therefore, advert to the relevant evidence on record and appreciate the same. Baburao (appellant), Baban and Vitthal are the three brothers. The trio were residing separately. Their mother Sayabai was alive. She was suffering from leprosy. She was, therefore, residing alone in a house constructed on the field. There was ancestral agricultural land admeasuring 6 acres. 3 out of 6 acres of land stood in the name of Sayabai. Baban had undertaken responsibility to maintain his mother Sayabai. Since Sayabai was not being maintained properly, the appellant was said to

have been annoyed.

14. Admittedly the incident took place little past 9.30 p.m. on 10/12/2015. Within an hour, Raju breathed his last.

15. P.W.12 Dr. Swati was a Medical Officer, Civil Hospital, Hingoli. She conducted autopsy on the mortal remains of Raju. She noticed following two injuries on the person of Raju.

(1) Incisional penetrating stab wound on the right side of neck of size 4 x 2 x 6 cm. which was obliquely placed and wedge shaped. Its upper end was 8.5 cm. from right styloid process and lower end was 6 cm. from medial end of clavicle and 9 cm. medially from acromion process of right scapula. This stab injury was directed downwards medially cutting skin, superficial fascia, platysma, sub-cutaneous tissue, cutting the carotid vessels through and through, cut over carotid vessels of 2 cm. obliquely placed and said injury was grievous in nature.

(2) Incised wound on left side of abdomen of size 4 x 2 x 1

cm., wedge shaped, muscle deep, not penetrating into cavity, simple in nature, upper end 13 cm. from left nipple, lower end 19 cm. from left illiac crest.

16. The report of post mortem conducted by P.W.12 Swati is at Exh.82. In her opinion, Raju died of stab injury over right side of neck cutting carotid vessels through and through.

17. During cross-examination, it has been brought on record that, depth of the stab wound is always more than length and width of the wound. She, however, denied depth of the stab injury is always more than length of weapon. She admitted that, there is distinction between profused bleeding and blood flow. It was suggested on behalf of the defence that due to Injury No.1, there was profused bleeding.

18. In view of Section 105 of the Evidence Act, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is

upon him, and the Court shall presume the absence of such circumstances. It is reiterated that, before the Trial Court very many defences were raised. The appellant disowned or denied to have been involved in the crime. He claimed to have been falsely implicated. Before this Court, submission as regards a case to have been covered by one of the exception to Section 300 of the Indian Penal Code has been averred. We are conscious of the legal position that even no express defence is raised in that regard and from the prosecution case itself, the defence of the appellant is made out, he may be entitled thereto. It is not necessary for him to lead positive evidence.

19. In the case at hand, the F.I.R. (Exh.55) was lodged by Ashwini, widow of the deceased. The report lodged by her was recorded by P.W.11 Sudhakar, Assistant Police Inspector present at the Police Station at the relevant time. It is in his evidence that, he recorded the F.I.R. lodged by Ashwini (P.W.1) as per her narration. It is at Exh.51. Unfortunately, P.W.1 Ashwini did not stand by the prosecution. According to her, police simply obtained her signature below the report, she did not narrate the contents of F.I.R. In her cross-examination,

she admitted that, appellant and others put Raju on cot and thereby clothes on their person were blood stained. Learned A.P.P., in-charge of the case subjected her to a searching cross-examination. She did not give in to any of the questions put to her by learned A.P.P.

20. P.W.2 Ashok is a panch witness to a disclosure statement and consequential recovery of a knife and blood stained clothes, pursuant to the disclosure statement made by the appellant. The same also would be of little consequence since P.W.10 Sudhakar, a witness to the crime scene testified that, blood and knife were lying on the floor, how come then a knife came to be recovered pursuant to the disclosure statement. Be that as it may. Although number of witnesses were examined, close reading thereof indicate that, P.W.5, 6 and 8) did not stand by the prosecution. In view of the issue involved in this appeal, we are least concerned with those witnesses not to have supporting the prosecution.

21. The case is based on eye witness account. First eye witness is the mother of deceased Raju. She is P.W.3 Kalawatibai. It is in her evidence that, she had two daughters

and a son – Raju. Anuradha and Archana were her daughters. Anuradha was married. Ashwini (P.W.1) was Raju's wife. She had two brothers-in-law, Vitthal and Baburao. All of them reside separately. The house of Baburao (appellant) was in the nearby of her residence. While Vitthal's house was at some distance away. The family had 6 acres of agricultural land. 3 out of 6 acres of land stood in the name of Sayabai, her mother-in-law. Sayabai was a leprosy patient. She was, therefore, residing in a house on the agricultural field. It is further in her evidence that, treatment to her mother-in-law was being extended. The appellant was abusing them in filthy language. The appellant was telling them that they did not keep water in big earthen pot and did not provide medical treatment to Sayabai. It was also the grievance of the appellant that she (Kalawatibai) did not make any arrangement for her. Raju (deceased) was a driver on a private vehicle.

22. It is in her evidence that, the incident took place on 10 December 2015. By 7.00 p.m. Raju came home. He took dinner and went in the village. Her husband Baban, after taking dinner, went for sleeping in the field. By 9.00 p.m., appellant started abusing in filthy language. In the meantime,

Raju returned home. He tried to give appellant understanding. He took appellant to his (appellant's) residence. The appellant made him fall on bed and assaulted on his neck with a knife and then on abdomen. Raju bled profusely. As she intervened, she too suffered injury with knife. Exh.43 is her injury certificate. Raju was, therefore, brought in the courtyard. He, however, fell down due to giddiness. Brother-in-law Vitthal and others gathered. Raju was rushed to the hospital. He died within an hour. She referred to her statement recorded under Section 164 of the Cr.P.C. It is at Exh.19. The same reinforces her evidence before the Court.

23. Our attention was drawn to her cross-examination, wherein she testified that Raju returned home by 9.15 p.m. She admitted that, the appellant's house is just in front of her house while Vitthal's residence is somewhat away. She went on to admit that, the appellant and Raju used to live as friends. Non-vegetarian food was not cooked or eaten at her residence. Raju and appellant, therefore, used to take non-vegetarian food at his appellant's residence. Since Raju was uneducated, he learnt driving and secured a Driver's job. We do not propose to refer to her further cross-examination which

relates to suggesting the appellant's altogether non-involvement in the crime. She admitted to have not seen as to how Baban fallen Raju down on the cot. It was suggested to her that a cot on which Raju was lying was on east-west direction. It is further in her evidence that, Baburao had penetrated knife in the neck of Raju. Her evidence further indicates that, Baban was left handed. She, however, could not state with which hand Baban assaulted. Considering the nature of injury suffered by deceased, we must state that, the assault must have been made with a knife in left hand.

24. On the same lines is the evidence of P.W.4 Archana, sister of deceased Raju. We, therefore, do not refer to the same in extenso. Her evidence indicates that, the incident took place little past 9.30 p.m. on 10 December. She reiterated what has been stated by P.W.3 Kalawatibai about the appellant to have hurled abuses on account of his mother Sayabai to have not been properly looked after. It is further in her evidence that, Raju, after taking dinner, had gone to the village. He returned home. He asked the appellant that he shall not abuse in filthy language. Raju gave appellant understanding. Thereupon the appellant questioned him, “कू

काय मला समजूत घालतो". Raju had taken the appellant to his residence. The appellant made him fall on bed and gave two blows with a knife. One blow on neck and the other on stomach. Raju came out of the house. He fell on the ground. She too referred to her statement recorded under Section 164 of Cr.P.C. (Exh.22). The same reinforces her evidence before the Court.

25. Our attention was drawn to certain evidence appearing in her cross-examination. It was brought on record that, the appellant had joined the others to rush Raju to the hospital.

26. Considering the submissions made by learned Advocate for the appellant, it is now an admitted fact that, due to assault made by the appellant, Raju died. It is true that, while the incident took place, Raju was not there. The appellant had every reason to pick up quarrel with his sister-in-law, wife of his real brother Baban since his mother Sayabai was allegedly not being properly taken care by Kalawatibai (P.W.3). The evidence on record also indicates that, both the appellant and Raju were thick friends. The learned Advocate

for the appellant, therefore, may have reason to contend that the appellant did not intend to eliminate Raju. According to him, the case falls within Exception (4) to Section 300 of the Indian Penal Code. We, therefore, need to advert to Section 300 of the Indian Penal Code first and then its relevant exception. 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 (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 having taken undue advantage or acted in a cruel or unusual manner.”

27. To bring the case within Exception 4, following facts need to be proved.

- (i) There must be a sudden fight;
- (ii) There was no premeditation;
- (iii) The act was committed in a heat of passion; and
- (iv) The offender had not taken any undue advantage or acted in a cruel or unusual manner.

28. Intention to commit murder can be gathered from the following facts :-

Nature of injury caused,

Kind of weapon used,

Vital part of the body on which the assault is made.

29. The first blow with an assault was made on the neck of deceased Raju. The appellant did not stop at that. He gave second blow on the abdomen with knife. We reiterate, the deceased died of stab injury over right side of neck cutting carotid vessels through and through. As per the suggestion given on behalf of the appellant itself, there was a profused

bleeding. Raju died within an hour of the incident. The appellant joining others to take the deceased in the hospital would in no way be considered that he did not intend to eliminate Raju, considering the nature of assault. Close reading of the evidence on record indicates that there was neither quarrel nor scuffle between the two i.e. appellant and Raju. The appellant was abusing Raju's mother Kalawatibai for about half an hour. When Raju returned home, he tried to reason with the appellant and take him to his (appellant's) residence, wherein the appellant mounted the attack. The crime scene panchanama indicates that, it is the residence of the appellant. Although the evidence on record may indicate the appellant to have had not premeditated an assault, all the ingredients of Exception (4) have not been made out.

30. We have carefully gone through the authorities relied on by learned Advocate for the appellant. There can be no two views over what has been observed therein. It is reiterated that, criminal case is to be decided on the facts and circumstances of each case. In paragraph No.7 of the judgment in case of Surinder Kumar (supra), it has been observed :-

“7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. In the present case, the deceased and PW 2 had entered the room occupied by Sikander Lal and his family members and had demanded vacant possession of the kitchen. When they found that the appellant was disinclined to handover possession of the kitchen, PW 2 quarrelled and uttered filthy abuses in the presence of the appellant's sister. On the appellant asking him to desist he threatened to lock up the kitchen by removing the utensils, etc., and that led to a heated argument between the appellant on the one side and PW 2 and his deceased brother on the other. In the course of this heated argument it is the appellant's case that PW 2 took out a knife from his pant pocket. This part of the appellant's case seems to be probable having regard to the antecedents of PW 2. It is on record that PW 2 was convicted at Narnaul on two occasions under Section 411, IPC and his name was registered as a bad character at the local police station. It was presumably because of this reason that he had shifted from Narnaul to Chandigarh a couple of years back and had started to live in the premises rented by PW 4. When the appellant found that PW 2

had taken out a pen knife from his pocket he went into the adjoining kitchen and returned with a knife. From the simple injury caused to PW 2 it would appear that PW 2 was not an easy target. That is why the learned Sessions Judge rejected the case that Amrit Lal had held PW 2 to facilitate an attack on him by the appellant. It further seems that thereafter a scuffle must have ensued on Nitya Nand intervening to help his brother PW 2 in which two minor injuries were suffered by the deceased on the left arm before the fatal blow was inflicted on the left flank at the level of the 5th rib about 2" below the nipple- It may incidentally be mentioned that the Trial Court came to the conclusion that the injury found on the neck of PW 2 was a self-inflicted wound and had therefore acquitted the appellant of the charge under Section 307, IPC, against which no appeal was carried. We have, however, proceeded to examine this matter on the premise that PW 2 sustained the injury in the course of the incident. From the above facts, it clearly emerges that after PW 2 and his deceased brother entered the room of the appellant and uttered filthy abuses in the presence of the latter's sister, tempers ran high and on PW 2 taking out a pen knife the appellant picked up the knife from the kitchen, ran towards PW 2 and inflicted a simple injury on his neck. It would be reasonable to inter that the deceased must have intervened on the side of his brother PW 2 and in the course of the scuffle he received injuries, one of which proved fatal. Taking an overall view of the incident we are inclined to think that the appellant was entitled to the benefit of the exception relied upon. The High Court refused to grant him that benefit on the ground that he had acted in a cruel manner but we do not think that merely because three injuries were caused to the deceased it could be said that he had acted in a cruel and unusual manner. Under these circumstances, we think it proper to convict the accused under Section 304, Part I, IPC and direct him to suffer rigorous imprisonment for 7 years. In the result, this appeal partly succeeds. The order of conviction and sentence

passed under Section 302, IPC is set aside and the fine, if paid, is directed to be refunded. The appellant is convicted under Section 304 Part I, IPC and is directed to suffer rigorous imprisonment for 7 years.”

31. We have perused the facts of the said case to find that there was a scuffle. When P.W.2 in the said case took out a pen knife, the appellant Surinder Kumar picked up knife from the kitchen and ran towards P.W.2 and inflicted a simple injury on his neck. The one who died had intervened on the side of his brother – P.W.2 and in the course of the scuffle he had suffered injuries, one of which proved fatal. This makes all the difference.

32. Same is the case in respect of judgment in case of Rambir (supra), wherein a reference to the judgment of the Apex Court in case of Surinder Kumar (supra) has been made. Paragraph No.17 of the said judgment indicates that, the incident had occurred in a sudden fight.

33. We have also perused the judgment in the case of Mangesh (supra). In paragraph No.14 of the judgment, it has been observed that, the appellant therein had lost self-control and in the hit of passion the appellant caused injury to the deceased.

34. At the cost of repetition, it is reiterated that, each case is to be considered on its own facts, however, taking a holistic view of the matter. On appreciation of the evidence in the case, we found that all the four ingredients of Exception (4) have not been made out. It is reiterated that, there was neither a scuffle nor even a quarrel between the appellant and the deceased. The injury No.1 suffered by Raju is self-speaking to indicate the appellant to have inflicted the same with an intention to eliminate Raju. It needs no mention that, intention to kill can be developed within a shortest of time. Same is the case hereat. It does not get covered by Exception (4) of Section 300 of the Indian Penal Code. We find no reason to interfere with the impugned order of conviction and consequential sentence.

35. In the result, the appeal fails. It is dismissed.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-