



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

**CRIMINAL APPEAL NO.656 OF 2024 WITH
CRIMINAL APPLICATION NO.2848 OF 2024**

Ankush Babasaheb Mandalik
Age 44 years, R/o Bawi,
Taluka Jamkhed, District Ahmednagar ... **APPELLANT**

VERSUS

The State of Maharashtra
through Police Station Officer,
Jamkhed Police Station,
District Ahmednagar

(Copy to be served on Public
Prosecutor, High Court of Judicature
of Bombay, Bench at Aurangabad) ... **RESPONDENT**

.....
Mr. D.D. Choudhari, Advocate for appellant
Mr. S.J. Salgare, A.P.P. for respondent
.....

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

DATE : 7th October, 2024.

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

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 to pay

fine of Rs.500/-, by judgment and order dated 5/7/2012, passed by learned Sessions Judge, Ahmednagar (trial Court) in Sessions Case No.272/2010. The appellant has also been convicted for the offence punishable under Section 324 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year. The appellant is, therefore, before us in this appeal.

2. In short, the case of the prosecution before the Trial Court was as follows :-

Shakuntala (deceased) had married the appellant few years before the incident dated 14/9/2010. The couple was blessed with two children. All of them would reside along with mother of the appellant. It was further the case of the prosecution that the appellant started harassing and ill-treating Shakuntala. She, therefore, along with her one of the children, went to stay at her parental house at village Bavi, Taluka Jamkhed, District Ahmednagar. The appellant would frequently visit her parent's house to get her back to his house (matrimonial home of the deceased). The deceased would

refuse to join him. She wanted to have assurance in writing from the appellant that he would treat her well.

3. On the fateful day i.e. 14/9/2010, by little past 1.00 p.m., the appellant along with his child went to the house of his in-laws to get back his wife Shakuntala (deceased). She refused to join him. He, therefore, assaulted her with knife. Shivkanya (P.W.1), brother's wife of Shakuntala had intervened in the quarrel. One of the knife blows fell on her person. She too suffered injury thereby. The appellant thereafter left the house taking both his children with him.

4. Somebody had informed the police. The police arrived. Shakuntala was shifted to the hospital. She was declared dead. On the other hand, Shivkanya (P.W.1) lodged the First Information Report (F.I.R.- Exh.35), stating therein the aforesaid facts.

5. A crime vide C.R. No.194/2010 was, therefore, registered for offences punishable under Sections 302 and 324 of the Indian Penal Code. The crime scene panchanama (Exh.31), inquest panchanama (Exh.30), autopsy on the mortal

remains of the deceased were conducted. The appellant was arrested. Pursuant to his disclosure statement, a knife came to be recovered. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, a charge sheet was filed against the appellant.

6. The Trial Court framed the Charge (Exh.4). The appellant pleaded not guilty. His defence was, the incident took place due to grave and sudden provocation given by the deceased. The Trial Court found the appellant in his examination-in-chief under Section 313 of the Cr.P.C. to have altogether disowned the prosecution case. The Trial Court found the appellant to have committed murder of his wife and voluntarily caused injury to the informant (P.W.1 Shivkanya) and, therefore, the order impugned herein was passed.

7. The prosecution, to bring home the charge, examined 5 witnesses and produced in evidence certain documents.

8. Heard the learned Advocate for the appellant. He took us through the evidence on record. According to him, the case is based on the evidence of the sole witness i.e. P.W.1 Shivkanya. According to him, she was not a witness of sterling quality. He took us through her cross-examination. According to him, although P.W.1 Shivkanya testified that the deceased had lodged a criminal case against the appellant, the same was not fortified by the documentary evidence. The other witnesses examined by the prosecution did not further the prosecution case. The appellant is behind the bars for little over 14 years. He, therefore, urged for allowing the appeal or in the alternative, convert the conviction from the offence punishable under Section 302 to Section 304 Part I of the Indian Penal Code.

9. The learned A.P.P. would, on the other hand, submit that, it is an open and shut case. Almost all the documents namely inquest panchanama, post mortem report, crime scene panchanama have been admitted by the defence. The informant (P.W.1) was an injured eye witness. Her evidence carries much weightage. Suggestions given to the witnesses in the cross-examination indicate the appellant

admitted to have committed murder of his wife. He had purchased knife from a shop of one Bora. He took the investigating officer to the said shop. A CCTV footage in that regard was produced on record. Moreover, the appellant gave a disclosure statement, pursuant to which the knife wielded by him for committing murder of his wife was seized. The learned A.P.P. therefore, urged for dismissal of the appeal.

10. Let us advert to the evidence on record and appreciate the same.

Admittedly, the appellant had married Shakuntala a few years before the fateful day. The couple was even blessed with two children, a son and a daughter. At Shakuntala's (deceased) home, her mother-in-law would reside. About four months before the incident, Shakuntala left her matrimonial home along with her one child and started residing at the house of her parents. The informant Shivkanya (P.W.1) is wife of Shakuntala's brother. At her parental house, her parents, Shivkanya and brother Baban would reside together. These are the facts not in dispute.

11. As stated above, the learned Advocate representing the appellant has admitted the crime scene panchanama (Exh.31) and the inquest panchanama (Exh.30) respectively. The crime scene panchanama indicate it to be the house of the parents-in-law of the appellant. It delineate that there were blood stains. The panchanama of seizure of clothes of the appellant and the deceased (Exhs.32 and 33) were also admitted by the defence Advocate before the Trial Court.

12. As stated above, the case is based on the sole testimony of the informant P.W.1 Shivkanya. She testified that, she was residing along with her husband and parents-in-law at Sadafule Vasti, Jamkhed, District Ahmednagar. She had two sisters-in-law. Shakuntala (deceased) was one of them. Shakuntala had married the appellant. For about four months before the incident, Shakuntala had come to her (Shakuntala's) parental house. The grievance of Shakuntala was that the appellant would harass and ill-treat her. She was, therefore, reluctant to resume marital relationship. She further testified that the appellant had many a time come to her residence to get Shakuntala back to his house. Shakuntala

wanted the appellant to give assurance in writing that he would not ill-treat her as a condition for resumption of marital relationship.

PW.1 Shivkanya further testified that on 14 September, she along with Shakuntala was present at her house. It was about 1.00 p.m. The appellant came to her house and asked Shakuntala to join him for resumption of cohabitation. Shakuntala again asked him to give in writing that he would not ill-treat her. Thereupon the appellant started beating her up. The appellant stabbed Shakuntala with knife. Shakuntala cried a loud. The appellant again assaulted on her neck. Shakuntala fell down. She (P.W.1 Shivkanya) intervened. A knife blow fell on her left thumb and cheek. She thereby suffered injuries. Her saree got torn. Shakuntala died. The neighbours gathered. The appellant left the place taking away with him his both the children and the knife as well. In response to somebody's phone call, the police arrived. Police took her to the Police Station. She lodged the F.I.R. (Exh.35) thereat. She referred to the same.

13. P.W.1 Shivkanya was subjected to a searching cross-examination. She admitted that, about 4-5 months before the incident, an accident had taken place at the village of the appellant. A bullock cart had run over the appellant's mother. She was, therefore, not keeping well. The appellant used to take his mother to various hospitals during the said period. Shakuntala and her two children would stay back home. She denied that, Shakuntala (deceased) would not take care of her mother-in-law and, therefore, there used to be quarrels between the appellant and the deceased. She denied that Shakuntala came back to her parent's house without informing the appellant. She could not state that the appellant used to quarrel with Shakuntala only on the ground of she (Shakuntala) not taking care of her mother-in-law. She denied that Shakuntala had come to her parent's house leaving behind her both the children and stayed for three weeks. She further denied that, two persons on the side of the appellant had come to convince her father-in-law and requested to send Shakuntala back to her matrimonial home. She denied that Shakuntala was not ready to resume cohabitation. She further denied that the appellant was ready to give an assurance in writing, still Shakuntala did not join him. According to her,

Shakuntala had lodged one criminal complaint against the appellant. No copy thereof has been placed on record nor did the investigating officer collect the same. On the other hand, he claimed ignorance thereof.

14. P.W.1 Shivkanya further testified that, on the given day, the appellant had come to the house of his in-laws along with his daughter. His one year old son was with Shakuntala. She denied that, Baban, brother of Shakuntala was at home. She admitted that the appellant told Shakuntala that there was problem of food and therefore, she should come back. She denied that in the meantime, Baban came and slapped on the appellant's face. She admitted that the appellant and Shakuntala abused each other. She admitted that Baban tried to rush on the person of the appellant but she controlled Baban. She pushed Baban towards the door. According to her, exchange of abuses took place for about 5 minutes. She was lame in one leg and therefore, cannot walk properly. She tried to separate both, the appellant and Shakuntala. She denied that Shakuntala rushed to beat up the appellant. She further denied that the appellant took up a knife lying there as he was annoyed by the incident. She further denied that

Shakuntala had thrown away her both the children. The appellant thereby lost his control. She further denied that, the appellant only wanted to give threat to Shakuntala so that she would resume cohabitation. She denied that no incident took place as stated by her in her examination-in-chief.

15. P.W.2 Sayyed Aslam is a witness to the disclosure statement made by the appellant that he had thrown away the knife and he would take the police and panchas to that place to take out the same. A memorandum of the appellant's statement was made. It is at Exh.37. The appellant then took the police and panchas to Tekade Vasti and asked to stop the jeep near one building of a Tailor. Then the appellant took them to an isolated place whereat grass had grown. He pointed out the place whereat he had thrown the knife. The police took out the knife from that place. It was placed in a carry bag. The panchanama of seizure (Exh.40) was drawn. Nothing helpful to the appellant could be elicited during the cross-examination of this witness.

16. P.W.4 Trimbak was a Police Station Officer on duty on the given day. It was he who recorded the F.I.R. (Exh.35) lodged by P.W.1 Shivkanya.

17. P.W.5 Dr. Sanjeev had conducted autopsy on the person of the deceased and noticed following injuries :

- (i) Incised wound over right side of neck cutting MS, vessels (carotid A) having size 15 x 3 cms. x bone deep, sharp margins;
- (ii) Incised wound over right side of neck below injury No.1, having size 18 x 3 cms. x bone deep, cutting MS, vessels, carotid A, sharp margins;
- (iii) Incised wound over left side of neck extending up to centre of neck, having size 20 x 3 cms. x bone deep, cutting MS, vessels, carotid A, cartilages, trachea and esophagus, sharp margins.
- (iv) Incised wound over upper part of abdomen to right side, having size 3 x 1 x 1 cms., sharp margins;'
- (v) Bleeding per nose present;
- (vi) Incised wound over upper part of left thigh, having size 3 x 1 x 1 cms., sharp margins.

In his view, all the injuries were ante mortem and sufficient to cause death in ordinary course of nature. The post mortem report is at Exh.45. In his opinion, the cause of death of the deceased was due to shock due to cardio

respiratory arrest due to cut throat and cutting of both the carotid arteries due to incised wounds over neck.

It is further in his evidence that he examined Shivkanya and noticed following injuries on her person :-

- (i) Abrasion over chin having size 1 x 1 cm. circular in shape;
- (ii) abrasion over left wrist joint having size 1 x 1 cm., circular;
- (iii) Abrasion over dorsum of right hand having size ½ x ½ cm., circular.

He issued injury certificate vide Exh.44. The injuries were simple in nature.

18. P.W.5 Dnyaneshwar did the investigation of the crime. His evidence discloses that he conducted inquest panchanama. He then drawn the crime scene panchanama (Exh.31). He arrested the appellant under panchanama (Exh.33). The appellant made disclosure statement, pursuant to which he seized a knife. It is further in his evidence that, he forwarded all the seized articles namely clothes of the appellant, clothes of the deceased and the knife to C.A.,

Nashik under forwarding letter (office copy at Exh.47). He placed on record C.A. reports (Exhs.48 to 50).

He further testified that, the appellant then made a statement to have purchased a knife from the shop of one Jitendra Bora. He, therefore, went to Bora's shop along with the appellant, collected CCTV footage of the particular day. It was downloaded in a CD. It was marked Exh.52.

19. In the cross-examination, he claimed ignorance as to whether Shakuntala had lodged police report against the appellant. He denied to have deliberately not recorded the statements of independent witnesses.

20. The aforesaid is the evidence in the case. The Trial Court convicted the appellant considering the nature of injuries suffered by the deceased. According to the Trial Court, the intention of the appellant is clear. The Trial Court even relied on the CCTV footage which was produced on record through a CD. It was a secondary evidence. There are no 65-B certificates. Jitendra was not examined as a witness in proof of the appellant to have purchased knife from his shop. Even

we accept the said case, there is no evidence as regards day, date and time by which the appellant had been to the said shop and really bought a knife. Be that as it may.

21. At the cost of repetition, it is stated that the crime scene panchanama has been conducted and the same is the house of the parents-in-law of the appellant. Admittedly, about 4-5 months before the incident, Shakuntala (deceased) had started residing at her parental house along with her one year old son. Her elder daughter was staying with the appellant. P.W.1 Shivkanya is the only eye witness in the case. She is admittedly wife of brother of the deceased. Meaning thereby, she is the relative of the victim and interested as well. Her cross-examination would indicate that she was not a witness of sterling quality. She admitted in her cross-examination that exactly 4-5 months before the incident i.e. when Shakuntala had started residing at her parental house, the mother of the appellant had met with an accident. A bullock cart had run over her person. She was therefore not keeping well. It was the appellant who was taking all the care of his mother. She further admitted that the appellant had been to his parental house 3-4 times during the period of 4 months only with a view

to get his wife back to his house. According to her, the deceased would refuse to join him. The deceased wanted the appellant to give assurance in writing that he would treat her well. On the given day, the appellant had come to the house of her parents-in-law taking with him his son. It appears that, the son was also a child not more than 3-4 years. He requested Shakuntala (deceased) to join him to his house. She again refused and insisted for assurance in writing. P.W.1 Shivkanya denied that Baban was at home. This is a false statement made by P.W.1 Shivkanya because in her further evidence she admitted that Baban had rushed on the person of the appellant. The same suggests that Baban wanted to assault the appellant, but it was P.W.1 Shivkanya who pushed Baban towards the door. She further testified that there was a quarrel between the appellant and the deceased. Both abused each other. It lasted for 4-5 minutes. She denied that the appellant picked up a knife from the spot and assaulted his wife because the wife attempted to beat him up and even thrown away his children. Admittedly, the appellant was alone there. Whatever his defence or happenings could only be brought on record in the cross-examination in the form of putting up his defence story. In view of Section 315 of the Cr.P.C., the appellant was

not under obligation to examine himself on oath. It is true that, whatever incriminating material is there, he need to explain the same. Since nobody was there on his side at the crime scene, and P.W.1 Shivkanya being sister-in-law of the deceased, bound to hide some facts which would help the appellant in his defence.

22. It is true that, the deceased Shakuntala met with homicidal death. It is also true that the appellant in his examination under Section 313 of the Cr.P.C. altogether disowned his involvement in the crime. Needless to mention that, in a criminal case, the appellant may take as many defences as are available to him. The defences may be inconsistent with each other.

23. In case of **Vijayee Singh & ors. Vs. State of U.P., AIR 1990 SC 1459**, the Apex Court has 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, provisos 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 of the offence charged or would be liable for a lesser offence and convict him accordingly.”

24. The aforesaid observations of the Apex Court would indicate that the accused can make out his defence by preponderance of probabilities. The defence can be made out by pointing out inherent improbabilities in the prosecution case or through certain admissions eliciting from the evidence of prosecution witnesses or examining the defence witness.

25. The admissions elicited from the cross-examination of P.W.1 Shivkanya would indicate that the appellant had not gone to the house of his in-laws to commit murder of his wife.

He had admittedly gone to get back his wife to his house. At the time while the deceased left the appellant's house and came to her parent's house, the appellant's mother met with an accident. It was the appellant who was taking all the care of his mother and he even informed the deceased Shakuntala about the same. He therefore, requested her to come back to matrimonial home along with him. He asked her to come home as there was no one to cook, as his mother was unwell.

(तू माहेरी राहत असल्यामुळे आमचे खाण्यापिण्याचे हाल होतात). He had even come with a very minor daughter who was residing with him. It is his case that the deceased threw away both the children. True, the suggestion has been denied. As such, it is a case of words against words. P.W.1 Shivkanya, however, admitted that, before the appellant assaulted the deceased, a quarrel between the appellant and the deceased took place. Both abused each other. It lasted for about 4-5 minutes. Baban, brother-in-law of the appellant rushed on the person of the appellant, necessarily, to beat him up. It was P.W.1 Shivkanya who pushed Baban towards the door. P.W.1 Shivkanya had earlier denied presence of Baban. The same suggests that P.W.1 Shivkanya was hiding some facts. True

that, intention can be proved by nature of weapon used, number of injuries and portion of body on which the injuries were inflicted. No doubt, the injuries suffered by the deceased indicate the appellant had inflicted those blows suggesting his intention to eliminate her. The same intention was developed in a spur of moment. Since admittedly he had gone to the house of in-laws to get his wife back, there was a quarreling prelude to the incident. The same has been referred to hereinabove. In our view, the case of the appellant may fall under Exception 4 of Section 300 of the Indian Penal Code, which reads thus :

“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.”

26. The appellant is behind the bars for little over 14 years. He has his age old parents to maintain besides two children. We find the evidence of P.W.1 Shivkanya to be not that of sterling quality. True, she suffered injury at the hands of the appellant, but in our view, the appellant had neither intended nor did have any knowledge that P.W.1 Shivkanya

would suffer any injury. Admittedly, the appellant had not assaulted her. She suffered injuries since she intervened in the quarrel and the blow fell on her person. We cannot attribute him with knowledge that P.W.1 Shivkanya was going to intervene in the quarrel. As such, the injury suffered by P.W.1 Shivkanya for which the appellant has been convicted for the offence punishable under Section 324 of the Indian Penal Code was accidental. It cannot be said that the appellant had caused the said injury voluntarily. The appellant, therefore, deserves to be acquitted of the offence punishable under Section 324 of the Indian Penal Code.

27. For all the aforesaid reasons, interference with the impugned order of conviction and consequential sentence is warranted. In view of the above, the appeal partly succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) Conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code by judgment and

order dated 5/7/2012, passed by learned Sessions Judge, Ahmednagar in Sessions Case No.272/2010 is hereby set aside. The appellant is acquitted of the same. Instead, the appellant is convicted for the offence punishable under Section 304 Part I of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.500/- (Rupees five hundred). The appellant appears to have served out the said sentence. Fine amount has already been paid. The appellant be set at liberty forthwith if he has already undergone the sentence of R.I. for ten years and/or on undergoing the sentence of R.I. for ten years, and if not required in any other case.

(iii) Criminal Application No.2848/2024 stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-