

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

CRIMINAL APPEAL NO. 38 OF 2022

Manohar s/o Kondiba Waghmare,
Age : 31 years, Occu. Nil,
R/o. Ukhalad, Tq. & Dist. Parbhani,
At present C/o Bandu Meghaji Bapule,
13, Tadiwala Road, Private Road,
Near Ganpati Mandir, Galli No. 27,
Room No. 17, Pune.

...Appellant

Versus

The State of Maharashtra

...Respondent

.....
Shri. Rahul A. Tambe – Advocate for the Appellant
Shri. S. J. Salgare – APP for the Respondent/State
.....

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

DATE OF RESERVING THE JUDGMENT : 20TH JANUARY, 2025
DATE OF PRONOUNCING THE JUDGMENT : 31ST JANUARY, 2025

JUDGMENT [*Per* : Neeraj P. Dhote, J.] : -

1. By the present Appeal under Section 374(2) of the Code of Criminal Procedure, the Appellant has challenged his conviction for the offence punishable under Section 302 of the Indian Penal Code [hereinafter referred to 'IPC'] and the consequent sentence to suffer imprisonment for life and fine of Rs.5,000/-, in default, to undergo Rigorous Imprisonment for six months, recorded by the learned Additional Sessions Judge, Parbhani, in Sessions Case No. 130/2017, vide Judgment and Order dated 03.11.2020.

2. The Prosecution case, as revealed from the Police Report, is as under : -

2.1. The Appellant and acquitted Accused No.2, who was the wife of Ashroba (hereinafter referred to as 'Deceased'), were having illicit relations. They were residing in the same village, namely, Ukhalad, Tq. & Dist. Parbhani. The Deceased had gone to Nanded for some work. He returned in the village by 10:00 pm. Accused No. 2 was not at home. The Deceased went in search of Accused No.2. As the Deceased did not return till midnight, his brother Kailash Mallahari Waghmare gave phone call on the mobile of Deceased. He heard the ring tone of Deceased's mobile. He saw the Deceased lying in front of the house of the Appellant with injuries on the body. The mobile was in the pocket of Deceased. The brother of Deceased informed the village Sarpanch, who in turn informed the Police. The Police came on the spot. Deceased's brother lodged report with the Police Station, Tadkalas, against the Appellant and the acquitted Accused and Crime bearing No.165/2017 for the offence punishable under Section 302 r/w 34 of the IPC, came to be registered.

2.2. Police prepared the Inquest, conducted Spot Panchanama and referred the dead body for *post mortem*. The statement of the witnesses were recorded. The Appellant and the acquitted Accused came to be arrested. During the course of investigation, the knife came to be seized at the instance of the Appellant pursuant to the disclosure

statement. The clothes of the Appellant came to be seized. The call records of the mobile phone of the Appellant, acquitted Accused, Deceased and Informant were called from the Service Provider. The *post mortem* report was collected. The articles seized during the investigation were referred for Chemical Analysis [for the sake of brevity "CA"]. The CA reports were received. The relevant documents were collected. On completion of the investigation, the Appellant and the acquitted Accused came to be charge-sheeted.

2.3. On committal, the learned Trial Court framed the Charge against the Appellant and the acquitted Accused for the offence punishable under Section 302 r/w 34 of the IPC, at Exh.08. They denied the Charge and claimed to be tried. To establish the Charge, the Prosecution examined in all thirteen (13) witnesses and brought on record the relevant documents. After the Prosecution filed evidence closure pursis, the statement of the Appellant and the acquitted accused came to be recorded under Section 313(1)(b) of the Cr.P.C. After hearing both the sides and appreciating the evidence on record, the Appellant came to be convicted as referred to above in paragraph no. 1, and Accused No. 2 came to be acquitted by the learned Trial Court.

3. It is submitted by the learned Advocate for the Appellant that, the case is based on circumstantial evidence. There was no evidence to show that the Appellant was present at his house at the

relevant time. The blood on the spot of incident and the injuries on the Appellant show that scuffle took place. There were no calls in the CDR to corroborate the version of Informant that he made a phone call on the phone of the deceased. The discovery and seizure of knife at the instance of the Appellant were delayed. Though the Homicidal death is not in dispute, the evidence available on record fall short of establishing the Charge of Murder against the Appellant. In the alternative, he submitted that, even if the evidence on record is accepted as it is, it would be Culpable Homicide not amounting to Murder within the ambit of Section 304 Part-II of IPC. The Appeal be allowed by setting aside the impugned Judgment and Order. In support of his submissions, he relied upon the Judgments in;

- [i] Dasari Siva Prasad Reddy v. Public Prosecutor, High Court of A.P, AIR 2004 SC 4383
- [ii] Shantabai and Ors. v. State of Maharashtra, AIR 2008 SC 1571
- [iii] Nagendra Sah versus State of Bihar, (2021) 10 SCC 725
- [iv] Surendra Kumar and another Versus State of Uttar Pradesh, (2021) 20 SCC 430.
- [v] Jagannath s/o. Damaji Pol Vs. State of Maharashtra, 2009 ALL MR (Cri) 2231.

4. It is submitted by the learned APP that as there were illicit relations between the Appellant and the acquitted Accused, the Appellant had the Motive to commit the Crime. The dead body was found in front of the house of the Appellant. The place of incident was the house of the Appellant. Human blood was found on the walls of the

Appellant's house and the articles. The Appellant gave history of assault to the Medical Officer while receiving the treatment for his injuries. The Appellant gave false explanation that he fell down from the motorcycle. The CDRs brought on record shows several calls between the Appellant and the acquitted Accused. The circumstantial evidence brought on record established the Charge of Murder against the Appellant. The learned Trial Court properly appreciated the evidence on record and rightly convicted the Appellant and the Appeal be dismissed.

5. Heard both the sides. Scrutinized the evidence on record. The case is based on circumstantial evidence. The law in respect of circumstantial evidence is well settled right from the Judgment in **Sharad Birdhichand Sarda v State of Maharashtra, (1984) 4 SCC 116,** wherein following principles have been laid down.

(1) *The circumstances from which the conclusion of guilt is to be drawn should be fully established.*

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

- (2) *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) *The circumstances should be of a conclusive nature and tendency,*
- (4) *They should exclude every possible hypothesis except the one to be proved, and*
- (5) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

6. In the case on hand, the circumstances relied upon by the Prosecution in support of the Charge, are;

- (i) Homicidal death of Ashroba Mallahari Waghmare.
- (ii) The house of the Appellant as the place of incident.
- (iii) Injuries on the Appellant.
- (iv) Seizure of knife at the instance of the Appellant.
- (v) Human blood on the clothes of the Appellant.
- (vi) Motive.

[I] **HOMICIDAL DEATH** : -

7. There is no dispute that the Informant's brother Ashroba Mallahari Waghmare met with a homicidal death. The evidence of PW1 – Kailash Mallahari Waghmare shows that Deceased was his brother. On 12.09.2017, the deceased had gone to Nanded for some work and he returned home by 10:00 pm. Deceased inquired about his wife, who was not at home. The Deceased went in search of his wife and as he did

not return till midnight, PW1 – Kailash Mallahari Waghmare gave a phone call on the mobile phone of Deceased. On hearing the ring tone of the mobile phone of the Deceased near the house of the Appellant, he went there and saw the Deceased lying in an injured condition. He informed the Sarpanch of the village, who informed the Police. The Police arrived on the spot. He lodged report with the Police against the Appellant and the acquitted Accused. The cross-examination shows that the said evidence was not seriously disputed. Though certain improvements are brought in the cross-examination, it is settled position under the law that the Report / FIR is not an encyclopedia.

8. The evidence of PW2 – Santosh Ramkishan Gore shows that he was a Public Servant. As per directions of his superior, he went to the spot of incident with another Panch Abdul Nadim. The said spot was in village Ukhalad. Spot was shown by PW1 – Kailash Mallahari Waghmare. There were blood stains on the spot. The Police collected the samples and prepared Spot Panchanama at Exh.39. Though cross-examined, nothing came on record to disbelieve his testimony.

9. The evidence of PW3 – Syed Akram Aga Miya Patel shows that, he was the resident of the same village where the incident took place. He was the husband of Sarpanch. PW1 – Kailash Mallahari Waghmare came to his house at 1:30 am with others and informed him

that Deceased was murdered. He informed the Police. The Police arrived. Deceased was lying dead in front of the house of the Appellant in the veranda. The evidence shows that, as he did not further supported the case of Prosecution, he was cross-examined by the learned APP. He denied in the cross-examination of the defence that the Appellant reached the village when he was present on the spot. It has come that the Appellant did not meet him on the day of the incident.

10. The evidence of PW4 – Chewlabai Laxman Gaikwad shows that she was also the resident of same village where the incident took place. PW1 – Kailash Mallahari Waghmare came to her home and informed about the incident. She also came on the spot and saw Deceased lying dead in front of the door of the Appellant's house. Her cross-examination shows that her house was at a distance of 1.00 km from the house of the Appellant, and the houses of the Deceased and the Appellant were adjacent to each other.

11. The evidence of PW5 – Shankar Manikrao Takras shows that he was Police Naik. On 16.09.2017, he was directed by his superiors to reach the spot of incident. Accordingly, he reached the said spot around 4:50 am. As per the directions of superior, he carried/secured the spot of incident. The cross-examination shows that there was no serious dispute with his evidence.

12. PW10 – Sugriv Narsingrao Waghmare was the cousin brother of the deceased. In the midnight, PW1 – Kailash Mallahari Waghmare and his wife came to him and informed about the incident. They all went to the house of the Sarpanch and from there to the spot of incident. He saw Deceased lying in front of the house of the Appellant. There was no cross-examination by the defence.

13. The evidence of PW13 – Mahesh Balasaheb Landge shows that on 12.09.2017, he was attached to the Police Station, Tadkalas, as the Assistant Police Inspector. On receiving the information about the incident, while he was on patrolling duty he went to the village Ukhalad and went on the spot of the incident. He sent the dead body for *post mortem* to the Government Hospital. On this aspect, there is no challenge to his evidence.

14. There is evidence of PW7 – Dr. Rahul Pandurangrao Ranveer, who was a Medical Officer at the Civil Hospital, Parbhani at the relevant time. On 13.09.2017, he received the dead body of Ashroba for *post mortem*. He performed the *post mortem* and found the following injuries.

[i] *Abrasion on right nose having size 3 x 1 cm at lateral side.*

[ii] *Bruishes on right corner of right eye.*

[iii] *Incised wound on right chest lateral to sternum. It was deep upto 11 cm. Its width was 1 cm and length 2 cm. On pressing blood was coming out from the said wound.*

- [iv] *Incised wound on posterior superior iliac and rest having measurement 2 cm in length, 1 cm width and 3 to 4 cm deep.*
- [v] *Right lung pura was ruptured. There was contusion to the 3rd and 4th ribs.*

14.1. The further evidence of PW7 – Dr. Rahul Pandurangrao Ranveer shows that, he mentioned the injuries in the *post mortem* report. The cause of death was ‘*Cardio respiratory arrest due to haemorrhagic shock due to rupture of right lung due to penetrating injury*’ The *post mortem* report and the injuries on the dead body are not seriously challenged, as seen from the cross-examination. The *post mortem* report is brought on record at Exh.71.

15. From the above referred evidence on record, it is established by the Prosecution that, Ashroba, brother of PW1 – Kailash Mallahari Waghmare, was found lying dead. The incident took place in the night of 12.09.2017. The injuries and the cause of death are proved through medical evidence, which is corroborated by the *post mortem* report. The Inquest at Exh.103 is admitted by the Appellant. The Homicidal death of Informant’s brother Ashroba is thus clearly established.

**[II] THE HOUSE OF THE APPELLANT AS
THE PLACE OF INCIDENT :-**

16. The evidence of PW1 – Kailash Mallahari Waghmare, PW2 – Santosh Ramkishan Gore and PW4 – Chewlabai Laxman Gaikwad shows

that the dead body was lying in front of the house of the Appellant. PW2 – Santosh Ramkishan Gore was the spot panch. The Spot Panchanama at Exh.39 is brought on record in his evidence. His evidence corroborates the prosecution case that the spot of incident was in front of the house of the Appellant. The evidence of spot panch shows that there were blood stains on the walls of the house. The Spot Panchanama at Exh.39 shows the sketch of the spot of the incident. The spot is shown inside the shed in front of the Appellant's house. It corroborates the testimony of the panch witnesses regarding the presence of blood stains inside the Appellant's house. There is consistent evidence of the said witnesses that the spot of incident was in front of the Appellant's house. The evidence of Investigating Officer PW11-Shankar Pandurang Tale corroborates the evidence of the said witnesses that the spot of the incident was the house of the Appellant. What can be seen in the cross-examination of the witnesses is that there is no serious dispute in respect of the spot of the incident. Nothing has come in the cross-examination of the witnesses examined by the Prosecution to discard their testimony that the spot of incident was the house of the Appellant.

[III] INJURIES ON THE APPELLANT : -

17. Prosecution examined PW12 - Dr. Mohd. Jafer Iqbal, who was a Medical Officer in Civil Hospital at Parbhani. He was on

emergency duty from 9 pm of 12.09.2017 till 9 am of 13.09.2017. The Appellant came to him for a medical examination at 4:00 a.m. He examined the Appellant and found the following injuries on his person.

- [i] Contused lacerated wound of size 3.5 x 0.5 cm. bone deep injury present over occipital area of head.*
- [ii] Lacerated wound of size 4.00 x 0.5 cm. bone deep injury over left parietal area.*
- [iii] Incised wound of size 3.00 x 0.5 cm x subcutaneous deep [only up to skin and not entered in muscle) on upper 1/3rd of left arm of anterio lateral aspect.*
- [iv] Contusion of size 1.5 x 1 cm. at left zygomatic area (below eye) of face.*
- [v] Contused abrasion of size 4.00 x 1 cm. at left Lumber [left side of the stomach middle area).*

18. The further evidence of PW12 – Dr. Mohammad Jafer Iqbal shows that all the said injuries were simple and caused by hard and blunt object, except third incised injury. All injuries were within 24 hours. The Appellant was advised CT-Brain. The Appellant left the hospital before the investigation and treatment. The history was given as Scuffling. He identified the Injury Certificate at Exh.101, as that of the Appellant. He deposed that injury nos. 1, 2, 4 and 5 may be possible by brick, and injury no. 3 may be possible by knife, if scuffling takes place. The MLC certificate at Exh.102 is brought on record. His evidence shows that at the time of evidence, he brought original papers with him.

19. The cross-examination of PW12 – Dr. Mohammad Jafer Iqbal shows that stitches were required to the injury on the head. Except for the suggestion that all the injuries may be possible in a motor accident, the tenor of cross-examination shows that, the evidence of this Medical Officer that he attended the Appellant for the aforesaid injuries, and the issuance of the Medical Certificate and the MLC letter was not challenged.

20. The evidence of PW13 – Mahesh Balasaheb Landge, the Investigating Officer, shows that he collected the Injury Certificate of the Appellant by issuing letter at Exh.117. From the medical evidence available on record, it is conclusively established that the Appellant visited the Civil Hospital, Parbhani in the intervening night of 12.09.2017 and 13.09.2017, for injuries suffered by him.

[IV] DISCOVERY / RECOVERY OF KNIFE AT THE INSTANCE OF THE APPELLANT: -

21. For this circumstance, the relevant evidence is that of PW11 – Shankar Pandurang Tale and PW13 – Mahesh Balasaheb Landge, the Investigating Officer. The evidence on record goes to show that the Appellant was arrested on 13.09.2017, at 20:41 hrs. The evidence of these two witnesses show that, on 22.09.2017, at 13:00 hrs, the Appellant made disclosure to show the place where the knife was

hidden. The memorandum of his statement came to be prepared at Exh.93. The Appellant led them to one agricultural land within the vicinity of village Ukhalad. The evidence of PW13 – Mahesh Balasaheb Landge, the Investigating Officer, shows that the said land belonged to one Syed Shahanoor Miya. According to PW11 – Shankar Pandurang Tale, the Appellant showed the weapon and according to PW13 – Mahesh Balasaheb Landge, the Investigating Officer, they found the knife. On this aspect, there is variance in the evidence of these witnesses. According to them, the said knife came to be seized under the panchanama at Exh.94. None of these witnesses deposed of blood stains on the knife, though the CA report at Exh.122 show human blood on the article 'Knife'. Further, the evidence on record clearly shows that the discovery/recovery of knife at the instance of the Appellant is after nine (9) days from his arrest. This delay in discovery/recovery creates reasonable doubt about the evidence of discovery. The evidence on record goes to show that the Appellant had gone to the hospital in the night/early hours of 13.09.2017 for treatment to his injuries and he was arrested in the late evening of 13.09.2017. Whether, during that time, the Appellant went to the agricultural field of another person and concealed the knife, coupled with the delay in discovery/recovery, is the aspect which requires the circumstance of discovery/recovery of the weapon at the instance of the Appellant, to be seen with doubt. This circumstance, therefore, is not conclusively established.

[V] **HUMAN BLOOD ON THE CLOTHES OF THE APPELLANT** : -

22. The evidence of PW6 – Trimbak Ramrao Khandare shows that on 13.09.2017, he was called to the Tadkalas Police Station as the Panch. The accused was present in the Police Station with bandage on his forehead. The mobile and white colour shirt with checks, white handkerchief and black colour pant were seized from the Appellant. The said clothes were stained with blood. The said articles came to be seized under the Panchanama at Exh.58. Though cross-examined, the said evidence of this witness remained unshaken. The CA report at Exh.122 shows human blood on the clothes of the Appellant which were seized during the course of the investigation. With this evidence on record, it has conclusively established by the Prosecution that after the arrest, the blood stained clothes of the Appellant were seized.

[VI] **MOTIVE**

23. Though Prosecution witnesses in their evidence deposed that the Appellant and the acquitted Accused had illicit relations, their evidence do not show that they witnessed the illicit relations. If we see the cross-examination of PW1 – Kailash Mallahari Waghmare done on behalf of the acquitted Accused, it has come that illicit relations between the Accused were going on since two to three years. This cross-examination will not bind the Appellant as he was represented by

another Advocate and this witness was separately cross-examined on behalf of the Appellant. In the cross-examination done on behalf of the Appellant, it has come that he came to know of the relations between the accused three to four months before the incident. This cannot be termed as admission on behalf of the Appellant.

24. In absence of positive admissible evidence establishing illicit relations between the Appellant and the acquitted Accused, it is not possible to hold that the Appellant had the Motive to commit the Crime. This circumstance is not conclusively proved by the Prosecution.

FURTHER DISCUSSION :-

25. In **Dasari Siva Prasad Reddy** (supra), the case was regarding the death of wife by strangulation. The case was based on last seen evidence. According to the neighbour, he saw the accused entering the house during the night time and quarreling with the deceased. The said neighbour was living 4-5 houses away from the house of the accused and it was not possible for him to observe the quarrel from his house. There was no other evidence to establish presence of accused in house on crucial night. It was held that, the fact that accused could not establish by cogent evidence that on that night he remained at his parents house in another village, does not lead to necessary inference that he was in his own house. The accused was given benefit of doubt by the Trial Court and the said finding was not interfered with.

26. In **Shantabai** (supra), the case of murder was based on circumstantial evidence. The wife of the accused was alleged to have illicit relations with the deceased from 10 to 15 years. The evidence of selective and interrogated witnesses, was not found reliable as other residents of same village did not utter a word in that regard. Fact that, dead body of deceased found in open space in front of their house, which was a public road, was not sufficient to connect the accused with commission of the offence. The evidence to prove prosecution version, that accused left their house after committing death of deceased was not found believable. Prosecution failed to establish that accused used the recovered weapon of offence. The blood group on seized clothes of accused did not tally with the blood, which was found on the clothes of deceased and on sample of soil, axe, stones, handles, etc. It was held that the chain of circumstance was not complete. Accused was held entitled for acquittal.

27. In **Nagendra Sah** (supra), it was held that, there was nothing to show that the relationship between the Appellant and the deceased was strained in any manner. The other members of family of the Appellant were present in the house where the incident took place. The facts established did not rule out existence of any other hypothesis. When chain is not complete, falsity of defence is no ground to convict

the accused. Only on the basis of *post mortem* report, Appellant could not have been convicted. No explanation was brought on record by the Prosecution for delay in registering FIR. The circumstances established by the Prosecution did not lead to only one possible inference regarding guilt of the accused. Guilt of Appellant was not established beyond reasonable doubt and hence, conviction of Appellant was reversed.

28. In **Surendra Kumar** (supra), it was held that, the burden to prove the guilt is always on the Prosecution and cannot be shifted to accused by virtue of Section 106 of the Indian Evidence Act, unless first the foundational facts warranting such shifting of the burden of proof are established by the Prosecution.

29. In **Jagannath Pol** (supra), it was held that, falsity of defence or failure to offer reasonable explanation cannot be used as a circumstance against the accused in absence of other circumstantial evidence pointing to the involvement of the accused in the Crime. Falsity of the defence or failure to give reasonable explanation cannot be substituted as proof, particularly where prosecution has failed to establish the offence against the accused beyond reasonable doubt.

30. It would not be out of place to make reference of the Judgment of the Hon'ble Supreme Court of India in ***Anbazhagan Vs. The State represented by the Inspector of Police***, AIR 2023 SC 3660 /

MANU/SC/0782/2023, wherein the Hon'ble Supreme Court of India explained the fine distinction between the terms 'Intent' and 'Knowledge' and reiterated the important principles of law to be considered when the Court is confronted with the question, what offence the Accused could be said to have committed. The provisions of Section 299 (Culpable Homicide) and Section 300 (Murder) are considered.

31. It would be relevant to refer the paragraph no. 33 in **Vijayee Singh and Ors. Vs. State of U.P.**, AIR 1990 SC 1459, by three (3) Judges Bench of the Hon'ble Supreme Court of India, which reads as under : -

33. 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 Section 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, as stated above, 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 Section 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.

32. Coming to the case on hand, the Prosecution conclusively established, the homicidal death of the Informant's brother in the night of 12.09.2017, the spot of homicidal death as the house/in front of the house of the Appellant, the injuries on the Appellant and human blood on the clothes of the Appellant. It is clear from the proved circumstances that the deceased had gone to the house of the Appellant. The evidence of Medical Officer, who examined the Appellant for his injuries in the intervening night of 12th and 13th September, 2017 shows that, the history of scuffle was given at the time of his medical examination. This shows that, the incident had preceded with quarrel. It is not known as to who was the aggressor and, therefore, the genesis and origin of the incident has not come on record or not brought before the Court. The attack was not calculated one. There is no evidence as to whether the deceased had gone to the house of the Appellant with the knife or the Knife was at the place of scuffle. As to how the occurrence originated, there is no clear evidence. The medical evidence shows that injury no. 3 on the Appellant was possible by knife in scuffle and the other injuries may be possible by brick. The evidence of PW10 – Sugriv Narsingrao Waghmare shows that, he was the cousin brother of the Deceased and he was residing half kilometer away from the house of the Deceased and during the night time, the Informant and his wife came to him and woke

him up and informed him that Ashroba was killed. His further evidence shows that, as he did not support the prosecution, suggestion was given by the learned APP that, *the Appellant called him and stated that the deceased hit brick on his head*. This shows that, according to the Prosecution, the Deceased also assaulted the Appellant and the Appellant sought help of the said witness. The evidence of Medical Officer, who performed the *post mortem* do not show that the Deceased was indiscriminately assaulted. The *post mortem* report shows that out of four (4) injuries, two (2) were incised wounds, one was abrasion and one was bruise. From the said injuries and cause of death, it is seen that Injury No. (iii) proved fatal.

33. In the light of the above discussion and re-appreciation of the evidence on record, the case would fall under exception 4 of Section 300 of IPC, which reads as under : -

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.

Thus, the conviction of the Appellant recorded by the learned Trial Court for the offence punishable under Section 302 of the IPC requires interference and needs to be converted to Section 304 Part-II of the IPC. The Appellant is behind the bars for a period of 6

years and 17 days [excluding the period of Bail during Corona period]. The punishment in the nature of imprisonment for the period already undergone with fine of Rs.5,000/-, in default, to suffer imprisonment for six months, would be appropriate. An endorsement on the impugned Judgment and Order shows that Rs.5,000/- fine amount is deposited by the Appellant pursuant to the impugned Judgment and Order. In this view of the matter, we proceed to pass the following order: -

ORDER

- [i] The Appeal is partly allowed.
- [ii] The conviction of the Appellant recorded by the learned Additional Sessions Judge, Parbhani, vide Judgment and Order dated 03.11.2020 in Sessions Case No.130/2017, for the offence punishable under Section 302 of the IPC and consequent sentence, is hereby quashed and set aside. **Instead**, the Appellant is convicted for the offence punishable under Section 304 Part-II of the IPC and sentenced to suffer imprisonment already undergone i.e. 6 years and 17 days, with fine of Rs.5000/- [Rupees Five Thousand], in default, to suffer imprisonment for six months.
- [iii] The Appellant be set at liberty, if not required in any other case.
- [iv] Record & Proceeding be sent back to the learned Trial Court.

[NEERAJ P DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE