

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 13.03.2023
Decided on: 25.05.2023

+ **CRL.A. 695/2019**

VINAY KUMAR KUSHWA alias GULLU Appellant
Represented by: Mr. R. Badrinath, Advocate
versus

STATE Respondent
Represented by: Mr. Prithu Garg, APP for the State
with Inspector Birender, PS J.P.
Kalan.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA, J :-

1.0 Vide this appeal, the appellant assails the judgment dated 18.01.2019 ('**impugned judgment**' in short), whereby the appellant was convicted for murder of his wife; and order on sentence dated 29.01.2019, whereby the appellant was sentenced to life imprisonment under Section 302 of the Indian Penal Code, ('**IPC**' in short) with fine of Rs.2,000/-, in default to undergo rigorous imprisonment for two months.

2.0 Briefly stating, case of the prosecution is that on 27.08.2012, at about 5.00 am, an information was received at Police Station Chhawala from the duty constable Ajay Pal from Rao Tula Ram Memorial Hospital, ('**RTRM Hospital**') Jaffarpur, New Delhi-110073, regarding admission of one Vikas son of unknown, aged about 25 r/o VPO Ghumanhera, New Delhi, in injured

condition due to some unknown reasons, by his friend Ravinder (PW-16) vide MLC no. 3717/12 (Ex. PW-8/A) and on the basis of the said information, DD no. 5A (Ex. PW-1/A) was registered; and the same was handed over to HC Karamvir for necessary action. Patient/injured Vikas (deceased) was referred to Safdarjung Hospital for further treatment, while shifting him to Safdarjung Hospital, Vikas expired on the way; information about his death was sent to Police Station Chhawla by Ct. Ajay (duty constable) and the same was recorded vide DD no. 8A (Ex. PW-1/B). DD no. 8-A was handed over to SI Hari Singh (PW-25), who along with Ct. Ramesh and Ct. Rambir reached RTRM hospital, where HC Karamvir met him and handed over copy of DD no. 5-A as well as MLC of Vikas. Thereafter, PW-25 got preserved the dead body of Vikas in the mortuary of RTRM hospital vide his request Ex. PW-25/A and met Ravinder (PW-16) (who got admitted the injured in RTRM hospital) and made inquiries and thereafter, they came at the spot. On inspection of the spot, it was revealed that the place of incident falls within the jurisdiction of PS Jafarpur Kalan and accordingly, PW-25 handed over the relevant papers/documents to HC Devender (PW-5), duty officer of PS Jafarpur Kalan. PW-5 recorded the same vide DD no. 15-A (Ex. PW-5/A) and the documents were handed over to HC Krishan Kumar (PW-14) for necessary action vide DD no. 16-A (Ex. PW-5/B). Information in this regard was also sent to Insp. Rajesh Dahiya, SHO/IO, PS Jafarpur Kalan, (PW-27) who requisitioned District Crime Team and left for the scene of crime. PW-27 reached at the spot i.e. near a *jhuggi*/tent, construction site, gram sabha land, Forest Department, Village Ghummanhera, Delhi and found that construction of boundary wall of Forest Department was being carried out in the fields of village Ghummanhera;

there were many *jhuggi*/temporary tent structures at the site; and blood was found on the mattress/cot lying outside the tent, in which Vikas and Ravinder were living. Place of occurrence was got inspected through SI Khajjan Singh (PW-23) vide crime team inspection report Ex. PW-23/A and same was also got photographed through HC Ashok Kumar (PW-17); and seven photographs (Ex. PW-9/A and negatives Ex. PW-17/A) were taken. Inquiry from the labourers present at the spot was made and statement of Hari Ram (PW-4) was recorded by the Ins. Rajesh Dahiya (PW-27). PW-4 stated that he as well as other labourers had been residing in the temporary *jhuggies*/tents situated near under-construction boundary wall and was doing labour work with contractor Satyaprakash Gupta. In the evening of 26.08.2012 after taking dinner, he along with his family member was taking rest in the *jhuggi*. At about 8.00 pm, one Gullu/appellant, who used to reside in the adjacent *jhuggi*, came out of his *jhuggi* and started abusing. When his wife Bhuri (PW-2) objected to it, the appellant misbehaved with her. He (PW-4) tried to make him understand, but the appellant being under the influence of liquor, did not pay any heed. PW-4 then went to call other persons from the nearby tents and on his asking, Ravinder Kumar (JCB driver on site) (PW-16) and his helper Vikas/deceased came along with him and they also tried to make him understand, but to no avail. Rather, he started misbehaving and quarreling with them also. Thereafter, they all beat the appellant and he went towards the fields while extending threats to them. Then all of them went away to their respective *jhuggis* to sleep. In the mid-night at around 2.00 am, on hearing some noise, he (PW-4) came out of his *jhuggi* and found that the appellant was standing there and started quarreling with him. He called out Ravinder (PW-16) and Vikas/the deceased for help.

Then, the appellant stopped quarreling with him and instead moved to and went to the tent of Ravinder and Vikas and picked up a brick from the nearby brick-kiln, hit on the head of Vikas/deceased, who was sleeping on a cot outside the tent. He raised alarm and ran towards the appellant but the appellant ran towards the field with the brick and he could not be apprehended despite chase. On coming back, he came to know that Vikas had been taken to RTRM Hospital by other persons. On PW-4's statement an endorsement was made by PW-7, rukka Ex. PW27/A was prepared and was sent for registration of FIR through Krishan Kumar (PW-14).

2.1. During further investigation, PW-27 Ins. Rajesh Dahiya prepared the site plan (Ex. PW-27/2) at the instance of the complainant ; recorded the statements of the witnesses; lifted exhibits from the spot and sealed and seized the same vide seizure memo Ex. PW-12/A and then deposited the same in the malkhana. Efforts to apprehend/arrest the accused were made. On 29.08.2012, after establishing of the identity of the deceased, the postmortem examination was got conducted and thereafter, the body was handed over to the relatives vide handing over memo Ex. PW-20/B.

2.2 Dr. Parvinder Singh, PW-9, Junior Specialist, Department of Forensic Medicine, RTRM Hospital conducted post mortem vide report Ex. PW9/A and opined as under:

"P.M No. 183/12

Conducted by Dr.Pravindra Singh

Case FIR No. 96/12 u/s 302 IPC Dt. 27.08.2012

Date & Time 29.08.2012 At 2:15 pm

P.S Jaffarpur Kalau, New Delhi

Name: Vikas Age: approx. 24 years

Date and time of Admission: 27.08.2012 at 4:16 am

Date & Time of Death : 27.08.12 at 6:15am

Casualty No. CR No. E.No.50681

MLC No. 3717/12

...

Alleged History of assault causing head Injury. Taken to RTRM Hospital Casualty, where he got first aid and referred to RMLH/AIIMS trauma centre for further management but died on the way and declared brought dead at 6:15 am Date 27.08.12 and body preserved in the mortuary till post mortem started.

...

External Injuries :

- 1. Abraded contusion of size, 3x1 cm Situated over left side of forehead*
- 2. Abraded contusion of size 3.5x1.0cm, present over lateral aspect of left eye*
- 3. Abraded contusion of size 3x1.5cm present over below and lateral to left eye*
- 4. Swelling 9x7cm present over temporo parietal region of the skull on left side*
- 5. Lacerated wound 1.8x1.0cm situated over upper part left pinna(ear)*
- 6. Lacerated wound 1.5x0.5cm present over middle part of left ear pinna*
- 7. Multiple abraded contusions present in an area of 6x2cm over left temporal area of skull*
- 8. Abrasion, 1.5x1cm present over back of left ear temporal area of skull*

...

(6) HEAD

(a) Scalp : Effusion of blood present under the scalp over left front temporoparietal occupied area of skull with underlying fractures of left temporals parietal fractal and occipital bones (linear fracture) present

*(b) Skull Bone : **Effusion** of blood present under the **scalp** over left front temporoparietal occupied area of **skull with underlying fractures of left temporals***

(c) Haemorrhages : subdural and subarachnoid haemorrhage present over brain (entirely) clotted and free blood present at the brain base (approx. 150ml.)

(d) Meninges & Brain : : subdural and subarachnoid haemorrhage present over brain (entirely) clotted and free blood present at the brain base (approx. 150ml.)

(e) Contusions : Contusions laceration of brain substance present under fracture sites

(f) Lacerations: Contusions laceration of brain substance present under fracture sites

(g)Ventricles : Intact

Articles/ specimen preserved : photographs taken

Sealed with seals of RTRM hospital and handed over to I.O

OPINION :

1. *Death in this case is due to **cranio-cerebral damage** (head Injury), consequent to the injury described above. All the injuries are antemortem in nature and recent in duration and caused by hard blunt force impact and is sufficient to cause death in ordinary course of nature*

2. *Time since death is **two days and nine hours as per hospital record.***

2.3 After postmortem examination, sealed exhibits of the deceased were taken into possession vide seizure memo Ex. PW-21/A. Subsequently, information regarding the appellant being lodged in District Jail Jhansi, UP in case FIR no. 179/12 under Arms Act was received and he was arrested vide memo Ex. PW26/B and at his instance, site identification memo Ex.

PW24/B was prepared. Exhibits of the case were sent to FSL, Rohini. On completion of investigation, charge-sheet u/s 302 IPC was filed against appellant. After receipt of FSL result (Ex. A-1), same was filed in the Court vide supplementary charge-sheet.

3.0 In order to prove its case, prosecution examined 28 witnesses.

4.0 Learned counsel for the appellant argued that the learned ASJ failed to properly appreciate the evidence and has convicted the appellant/accused on the basis of testimony of witnesses which suffer from material discrepancies and are thus unreliable. It was submitted that so called eye-witness account of the appellant hitting brick on the deceased's head and running away from the spot with the brick in his hand, is highly doubtful. Particularly as the purported eye witness PW-16 did not give the name of the appellant in the MLC of the deceased which mentions '*came with alleged history of unknown*'.

4.1 Learned counsel further argued that admittedly, there was no quarrel between the deceased and the appellant and as such, the appellant had no reason/motive to kill the deceased. Further, there is no evidence on record to suggest that the appellant had any intention to cause the death of the deceased; alleged injury caused to the deceased could be accidental or unintentional. It was further argued that the brick allegedly used in the incident has not been recovered, which also cast doubt on the prosecution story.

5.0 On the other hand, learned Prosecutor argued that it is a fit case for conviction under Section 302 IPC. He submitted that the presence of the

appellant with other labourers near/at the spot, quarrel between the appellant and PW-4 Hari Ram and his wife PW-2 on the issue of liquor on the day of incident, is admitted by the appellant vide his response to Questions no. 3, 6 and 12 in his statement under Section 313 Cr.P.C, though the appellant stated that he was in inebriated condition. Further, the testimony of PW-16 Ravinder Kumar clearly shows that it was the appellant, who had hit on the head of Vikas with a brick; PW-16 has stood by his deposition in cross-examination. It was further argued that though some of the public witnesses did not support the prosecution case and turned hostile, their entire testimonies cannot be thrown out because of the said reason. It was further argued that after duly considering all the facts and circumstances and testimonies of the witnesses, Ld. Trial Court has rightly convicted and sentenced the appellant under Section 302 IPC.

6.0 We have duly considered the submissions made by both the sides and have perused the record.

7.0 PW-16 Ravinder Kumar, JCB driver who was working under the contractor Satya Prakash Gupta (PW-7) deposed that construction of boundary wall on a government land was going on at Village Ghummanhera. Around 70-80 jhuggis/tents were put up at the site to accommodate labour. He along with his helper Vikas/deceased was also residing in the said jhuggis. On 26.08.2012 after completion of their duties and taking meals, they were resting. At about 8 pm, he heard some noise and Hari Ram (PW-4), one of the labourers came and told him that Gullu Ram i.e., the appellant (duly identified) was quarreling with him. On which, he along with his helper/Vikas/deceased went to the tent of Hari Ram. Other labourers also

gathered there in order to resolve the matter. They saw the appellant who was drunk was quarreling with PW-2, wife of Hari Ram. They tried to make the appellant understand but he even started abusing them. On which, his helper Vikas (deceased) slapped the appellant. The appellant left but threatened to see all of them. As the incident was resolved, all of them went back to their respective tents to sleep. At about 2 am, he again heard some noise and woke up and saw that the appellant was having brick in his hand. He saw that the appellant was going towards the deceased who was sleeping on a cot outside the tent and hit him on his head with the said brick. When Hari Ram (PW-4) and other tried to apprehend him, the appellant fled away along with brick. On being hit with the brick on head, Vikas (deceased) became unconscious. They took the deceased to Jafarpur Hospital in a tractor. However during treatment, Vikas died.

7.1 PW-16 stood by his deposition in his cross examination. He stated that he knew the deceased since 2012, who was the resident of Himachal Pradesh; and that both of them were residing in the same tent. The distance between his tent and the tent of Hari Ram was about 50-55 meters and there were only two-three tents in between his and Hari Ram's tent. He also stated that no one was present in his tent when he heard the noise for the first time at about 8 pm, only Hari Ram (PW-4) came to him. He categorically denied that no altercation had taken place between the appellant and Hari Ram (PW-4) and that he (PW-4) did not come to him (PW-16). He further stated that when he went to the tent of Hari Ram at about 8 pm, he saw Ram Milan (PW-15), Puran Lal (PW-10), Lala Ram (PW-11) and some other persons were present at the time of the incident of 8 pm but he could not recollect

their names. He further stated that at 2 am, he was sleeping inside and Vikas (deceased) was sleeping outside the tent on the cot. At about 2 am, he woke up on the noise being made by Hari Ram, Ram Milan and two other persons. He denied that he had not seen the appellant hitting Vikas (deceased) and that he has falsely implicated the appellant though no quarrel had ever taken place between the appellant and Vikas (deceased). PW-16 however admitted that when he came out of the tent, he saw that Hari Ram, Ram Milan and two other persons were chasing the appellant Gunnu.

7.2 It is noteworthy that the appellant himself suggested to PW-16 in cross examination, that quarrel had actually taken place between him (PW-16) and the deceased, thus not disputing that a quarrel had taken place on that date and time with the deceased. It is also seen that the appellant has not stated so in his statement under Section 313 Cr.P.C. Rather, he took a plea of alibi (Q. 54) pleading that he was sleeping in his *jhuggi* at the time of the alleged incident and came to know about the same, next morning. Said defence was not even put to any of the prosecution witnesses. Thus evidently, the appellant took a false defence and made a false plea of alibi which add as incriminating circumstances against the appellant (*Sharad Biridhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, Ramanand @ Nandlal Bharti Versus State of Uttar Pradesh, 2022 SCC OnLine SC 1396 And Sahabuddin v. State of Assam, (2012) 13 SCC 213, respectively*).

7.3 PW-16's version that the deceased was taken to hospital is corroborated by MLC of the deceased (Ex.PW 8/A) proved by PW-8 Bikash Sinha, which records PW-16's name as that of a relative/friend of the

deceased. PW-8 deposed that on 27.08.2012, injured Vikas was admitted by Ravinder in RTRM hospital and that he had prepared the MLC.

8.0 PW-16's testimony is also corroborated by Hari Ram (PW-4) and his wife (PW-2) though these witnesses did not fully support the prosecution case. PW-4 Hari Ram deposed (on 03.02.2014) that he did not remember date, month and year of the incident but it happened about one and half year back. He and his wife were working as labourers at the site at Ghummanhera Village Najafgarh, where 300-400 labours were working. On the day of the incident at about 8 pm, while he as well his wife were inside their *jhuggi*, the appellant (duly identified) who was in inebriated condition started abusing them from outside their *jhuggi*. He came out and tried to make the appellant see reason. His wife also followed him and tried doing the same but the appellant did not stop. Thereafter, he called labourers including the JCB operator (PW-16) and his helper (deceased). They also came and tried to make the appellant understand. Other labourers took him and his wife to their *jhuggi*. On the next day at about 8 am, he came to know about the incident i.e., death of one worker. As PW-4 resiled from his previous statement, he was cross examined by the learned Prosecutor. In that cross examination, PW-4 could not recollect the date of incident and denied other facts. In his cross examination by learned defence counsel though initially, he admitted that no quarrel had taken place between him and the appellant or anybody else. He denied that the appellant was not under the influence of liquor on that day when he came to his *jhuggi* and that he had not abused his wife and no quarrel had taken place between them.

9.0 PW-2 Bhuri, wife of Hari Ram (PW-4) also deposed on the same lines about working and living at the construction site in a *jhuggi*. She also stated that (could not tell the date month or year of the incident) at about 8 pm, when she along with her daughter were inside their *jhuggi* (tent), the appellant (duly identified) who was residing in a *jhuggi* nearby came to their *jhuggi* and started abusing them. On hearing the noise, she along with her husband came out and her husband tried to make the appellant understand but he did not relent. Her husband then called another labour residing in the adjoining *jhuggi* and the operator of JCB machine (PW-16) who also intervened but the appellant did not stop abusing them. Around 200-300 persons/labourers had gathered there and they took them along. Next day, at about 8-9 am, they came to know that the JCB operator was killed by someone. She was also cross examined by the learned Prosecutor but without much success. Interestingly, in her cross examination by the learned defence counsel, she categorically denied that the appellant was not in drunken condition or had not abused them or that no quarrel had taken place on that day. Furthermore, suggestion to PW-2 that the appellant was not drunk is contrary to the appellant's own statement under Section 313 Cr.P.C where he admitted that he was in inebriated condition at that time (at the time of first incident at 8 pm) (Q. 5). He has further stated (Q6) that since he used to take liquor along with PW-4, his wife Bhuri (PW-2) was not happy and on her asking, he went away to his *jhuggi*. But no such suggestion was put either to PW-2 or PW-4 or any other witness. Same clearly shows that the appellant not only made a false plea, he also took a false defence. It is also noted that PW-2 was examined partly on 31.07.2013 and her further examination/cross

examination took place after about seven months, when she turned hostile. Possibility of her being won over cannot be ruled out.

10.0 PW-10 Puran Lal also deposed on the same lines as PW-16 as far as the first incident is concerned. He deposed that on 26.08.2012 at about 8:30 pm, the appellant who was working as a mason had a quarrel with Hari Ram (PW-4) who had called them. They had intervened and separated both of them. He also stated that at about 9:30 pm, the appellant again came at the *jhuggi* of Hari Ram and scolded his wife (PW-2). Hari Ram again called them and he along with Ravinder PW-16, the JCB operator, and his helper Vikas (deceased) went and separated both of them and found that the appellant had consumed liquor at that time. He further testified that at about 2 am on that night, he noticed the appellant in the tent of the deceased, who was sleeping on a cot; the appellant took one brick and hit the deceased on his head. On hearing the shouts, the appellant ran away from the spot along with the brick. They took the injured to hospital in a tractor but during treatment he died. The appellant suggested to PW-10 in cross examination, that he had not consumed liquor at the time of the incident, which exposes falsehood of the appellant in view of his own admission in his statement under Section 313 Cr.P.C that he was inebriated. Strangely enough, PW-10 in his cross examination, on one hand admitted that at both the times/occasions, no fight took place between any of the parties; and that at 2 am, all of them were sleeping in their tents. On the other hand, PW-10 categorically denied that the appellant did not hit the deceased with the brick on his head. He also stated that he had seen the appellant running along with the brick after the incident and denied the suggestion to the contrary.

11.0 PW-11 Lala Ram also stated that at about 7-8 pm on 26.08.2012, the appellant came in drunken condition and started quarreling with Hari Ram (PW-4) and his wife Bhuri (PW-2) who had called them and they had intervened. He further stated that at about 2:30 am, Ravinder (PW-16) shouted and on hearing his shouts, they went to the tent of Vikas (deceased) and found that he had suffered injuries on his head, and was then taken to the hospital on tractor. In his cross examination by the learned Prosecutor, PW-11 admitted that Ravinder (PW-16) and Vikas had also come to separate Hari Ram (PW-4), his wife (PW-2) and the appellant at the time of quarrel; the deceased Vikas had hit the appellant on his forehead and the appellant while leaving had threatened the deceased; and that at about 2 am, the appellant again came to the tent of Hari Ram and abused him and his wife and Hari Ram again called them. He however denied that he went again to Hari Ram's tent at that time. In his cross examination by the learned defence counsel, he categorically denied that no quarrel had taken place between the appellant and PW-4's wife Bhuri and that he has falsely named the appellant at the instance of IO. Rather, the fact that the appellant had consumed liquor has also come in his cross examination, he having stated that both the deceased and the appellant along with Ravinder (PW-16) who were friendly, had consumed liquor together on the date of the incident.

12.0 PW-15 Ram Milan also testified on similar lines though, he did not fully support the prosecution version. He stated that on 26.08.2012 at about 8 pm, the appellant (duly identified) in a drunken condition came to the *jhuggi* of Hari Ram (PW-4) and started abusing him. He heard the noise from a distance and then went to sleep after dinner. He further stated that at about

2:30am, he again woke up on hearing the noise and saw that the appellant was holding one brick and was running towards the field. He went to the tent of Ravinder (PW-16) and found the deceased lying injured. They took the injured to Jafarpur hospital on tractor. He was also cross examined by the learned Prosecutor but without much avail. In his cross examination by learned defence counsel, he categorically denied that he had not gotten up at 2:30 am and had not seen the appellant running towards the field.

13.0 PW-22 Chittar Lal turned totally hostile but stated that he had seen some police officials present there at about 8 am on 27.08.2012. In his cross examination by the learned Prosecutor, PW-22 admitted that Hari Ram (PW-4), Ravinder (PW-16), Lala Ram (PW-11), Ram Milan (PW-15), Puran Lal (PW-10) etc. were working/residing at the construction site. PW-22 was not cross examined by the learned defence counsel. Even otherwise, the appellant has not disputed that all the above witnesses were residing in *jhuggies*/tents put up at the construction site.

14.0 It is significant to note that the appellant admitted foundational facts in his statement under Section 313 Cr.P.C. He admitted that he is known by the name of Gullu. He also admitted that in the month of July 2012, a boundary wall was being constructed under the supervision of PW-7 Satya Prakash on government land at Village Ghummanhera under supervision of PW-22 (sub-contractor). He was working as a mason at the said site. About 30-40 workeres including PW-16 Ravinder Kumar, deceased Vikas, PW-10 Puran Lal, PW-11 Lala Ram and PW-22 Chittar Lal were also working there and they were residing at the site. He also stated that he used to consume liquor along with PW-4 Hari Ram and wife of Hari Ram was not happy and

on the asking of PW-4's wife, he went to his *jhuggi* and slept. He also admitted that on the date of incident, he was in inebriated condition and a quarrel had taken place between him and PW-4 Hari Ram in the evening at about 6:30 pm. He further stated that in the morning he was told that Vikas had been taken to hospital in tractor as he was not well. He further admitted that he had seen the blood at the spot at the tent of JCB driver Ravinder. He even admitted about arrival of police in the morning. He further stated that on the next day of the incident, at the time of arrival of police, he was very much present in his *jhuggi*. It is a settled position of law that admission made by an accused in his statement under Section 313 Cr.P.C can be used for proving his guilt as much as the evidence given by the prosecution witness (*Hate Singh vs. State AIR 1953 SC 468*). Further, a coordinate bench of this court in *Janki Dass vs. State, (1994) 54 DLT 99 (DB)* also noted that statement under Section 313 Cr.P.C can be taken into consideration in judging not only the innocence but also guilt of the accused and admission made in statement under Section 313 Cr.P.C can be made the basis of conviction.

15.0 In view of the testimonies of the above witnesses and admission of aforesaid facts by the appellant himself in his statement under Section 313 Cr.P.C, prosecution has been able to prove beyond reasonable doubt that on 26.08.2012 at about 8:00/8:30 pm, the appellant had quarreled with Hari Ram and his wife and during that quarrel, he was rebuked/slapped by the deceased. Pursuant to the same, the appellant assaulted the deceased with brick at about 2 am in the intervening night of 26/27.02.2012 when he would

have been in deep sleep and the assault was made on vital organ causing total eight injuries with underlying fracture.

16.0 It has come in the testimony of PW-4 Hari Ram that the appellant was not there, when the police arrived at the spot in the morning of 27.08.2012. Further, the Investigating Officer Inspector Rajesh Dahiya/PW-27 has deposed that to search for the appellant, a team of SI Satish Kumar and HC Anil was constituted and sent to Jhansi, UP at his native place i.e., Village Ranipur, Mohalla Khushipura, Tehsil Mau Ranipur, District Jhansi, UP. Later, on 21.11.2012, a telephonic information was received from Incharge, PS Sadar Bazar, Jhansi, UP that the appellant has been arrested on 18.11.2012 in Arms Act case vide FIR No. 179/12. Accordingly, on 23.11.2012, he along with staff visited District Court, Jhansi and moved an application Ex. PW27/3 for interrogation and arrest of the appellant. However, they were allowed only to interrogate the appellant. Accordingly, they interrogated the appellant and his Disclosure Statement Ex. PW26/A was recorded. On 24.11.2012, another application EX. PW27/4 was moved for production of the appellant before the court at Delhi. The appellant was produced at Dwarka Court on 29.11.2012, where he was further interrogated with the permission of the court vide application Ex. PW27/5 and after formal interrogation, the appellant was arrested vide memo, Ex. PW26/B.

16.1 PW-26, SI Praveen Kumar, has also testified that at the directions of SHO, he went to residential village of the appellant in September 2012 but he could not be found there. Thereafter, he accompanied IO PW-27 to District Court, Jhansi, UP on 23.11.2012 deposing on the same lines as PW-

27. PW-26 was not cross examined with respect to efforts made and the manner in which the appellant came to be arrested on 29.11.2012. Interestingly, to PW-27, learned counsel for the appellant himself suggested in cross examination that on 27.08.2012, the appellant could not be found despite search by his staff. Thus admittedly, the appellant went missing after the incident.

16.2 In view of the above, it has come on record that the appellant went missing after the incident and could be found only on his arrest in another case. No explanation has come forth from the appellant in this respect. Abscondence of the accused soon after the crime adds up as another incriminating circumstance against the accused (*Sahib Hussain @ Sahib Jan versus State of Rajasthan, (2013) 9 SCC 778*)

17.0 In view of the above, the appellant's averment in his statement under Section 313 Cr.P.C that he was present in his *jhuggi* when the police arrived on 27.08.2012, is evidently false to the appellant's own knowledge. More so, no such suggestion was put to PW-4 when he deposed that the appellant was not there when the police came. Such false defence is another incriminating circumstance against the appellant [*Sharad Biridhichand Sarda's case (supra)* and *Ramanand @ Nandlal Bharti's case (supra)*].

18.0 The injuries on the head besides ear and the eye suffered by the deceased caused by hard blunt force impact as per MLC and post mortem report are consistent with the testimonies of prosecution witnesses that the deceased was hit (on head) with the brick. Further, as per post mortem report all the injuries were ante mortem in nature and recent in duration and sufficient to cause death in ordinary course of nature.

19.0 Learned defence counsel argued that the appellant died after about four hours of being allegedly hit. There was no pre meditation on the part of the appellant who had picked up a brick from the spot. These facts clearly show that there was no intention on the part of the appellant to cause death. Therefore, the act of the appellant at the most amounted to culpable homicide not amounting to murder and conviction of the appellant deserves to be modified from Section 302 to 304 Part II and placed reliance upon the judgment in *Ajmal Vs. State of Kerala, 2022 SCC OnLine SC 842*. On the other hand, the learned Prosecutor argued that pursuant to earlier quarrel at about 8-8:30 pm, the appellant came prepared to assault the deceased at unearthly hour at 2 am when the deceased was sleeping and assaulted him with a brick. Same clearly shows that it was a pre mediated assault. Further, the nature of injuries caused, clearly show that the appellant was assaulted mercilessly. Therefore, the appellant has been rightly convicted under Section 302 IPC. In support, the learned Prosecutor placed reliance upon the judgment in *Kesar Singh v. State of Haryana (2008) 15 SCC 753*, *Ashok Kumar Magabhai Vankar vs. State of Gujarat, (2011) 10 SCC 604* and *State of U.P. vs. Premi and Others (2003) 9 SCC 12*.

19.1 Learned Prosecutor also submitted that even one blow with a wooden pestle in *Ashok Kumar's case (supra)* and single blow on the head with the butt of the pistol by the accused in *Premi and Others case (supra)* was held to be sufficient to attract punishment under Section 302 IPC. He also argued that as compared to wooden pestle and butt of the pistol, the brick used by the appellant in the instant case could do much more harm. He also submitted that in *Ajmal's case (supra)* as relied upon by the learned defence

counsel, during verbal altercation, the accused had picked up wooden sticks from the spot and hit the deceased; there was no pre meditation. Whereas in the instant case, the appellant hit the deceased while he was sleeping that too with a brick and eight number of injuries reflect the number of blows given by the appellant. Therefore, the appellant's plea for modification of conviction is without any merit.

19.2 As has come on record that the appellant had a quarrel with PW-4 and his wife at about 8/8:30 pm in which besides others, the deceased had also intervened and had scolded/ slapped him. Subsequently, the same night/early morning at about 2 am, the appellant assaulted the deceased with brick while he was asleep. The assault was thus evidently pre mediated. The deceased suffered total eight injuries on his forehead, eye, ear which show that the deceased was repeatedly assaulted causing cranio cerebral damage which has been opined to be sufficient to cause death in ordinary course of nature. In view of the same, judgment in *Ajmal's case (supra)* as relied upon by the appellant is not of much assistance to him, facts being distinguishable. In that case, on verbal altercation, the accused had picked up a stick of casuarina from the spot and another accused picked up brick from road side and hit the deceased with the same causing death. Whereas in the instant case, the appellant in a pre meditated manner, assaulted the deceased with brick at about 2 am (in the intervening night of 26/27.02.2012) when he was sleeping and the assault was made on vital part of the body causing total eight injuries with underlying fracture. Thus, the appellant has failed to make out any case for modification of sentence from Section 302 to Section 304 IPC.

20.0 In view of the above, the appellant has failed to demonstrate any illegality in the impugned judgment and order on sentence. We find no merit in this appeal. Appeal is accordingly dismissed.

21.0 Copy of the judgment be uploaded on the website and be sent to the Superintendent Jail for updation of record and intimation to the appellant.

(POONAM A. BAMBA)
JUDGE

(MUKTA GUPTA)
JUDGE

MAY 25, 2023/g.joshi

