

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.180 OF 2006

1. Husain Kasim Shaikh,] Age – 58 yrs., Occ.-Rickshaw Driver] 2. Sikandar Husain Shaikh,] Age – 28 yrs., Occ.-Rickshaw Driver,] Nos.1 and 2 R/at : Industrial Estate] Near Vehicle Depot, Gultekdi, Pune.] (Both are presently in custody at] Yerwada Central Prison, Pune.)]	... Appellants/ (Orig. Accused Nos.1 & 2)
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Versus

State of Maharashtra] (Inspector of Police, Swargate Police] Station, Pune.)]	... Respondent
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Mr. Uday P. Warunjikar a/w Mr. Sachidanand D. Tandel for Appellants/Original Accused Nos.1 and 2.
 Smt. V. R. Bhonsale, APP for State/Respondent.

<u>CORAM</u>	<u>:-</u>	<u>SMT. V. K. TAHILRAMANI AND</u>
		<u>SMT. I. K. JAIN, JJ.</u>
<u>DATE</u>	<u>:-</u>	<u>FEBRUARY 16, 2015</u>

ORAL JUDGMENT (PER SMT. V. K. TAHILRAMANI, J.) :-

1. The Appellants/original accused nos.1 and 2 have preferred this appeal against the Judgment and Order dated 12/01/2006 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.457 of 2002. By the said Judgment and Order, the learned Sessions Judge convicted

both the Appellants under Section 302 read with 34 of Indian Penal Code and sentenced each of them to R.I. for life and fine of Rs.500; in default R.I. for two months.

2. The prosecution case briefly stated is as under :

Deceased Dipak Singh was the son of PW 1 Ishwarsingh and brother of PW 2 Krishnasingh. PW 3 Shantakaur was the wife of Dipak Singh. Dipak Singh was residing with his wife Shantakaur and his children at Dias Plot, Gultekdi, in Pune. The house of PW 1 Ishwarsingh was adjacent to the house of Dipak Singh. The house of PW 2 Krishnasingh was also adjacent to the house of Dipak Singh. Dipak Singh had been involved in a case under the MCOC Act. He was released on 07/06/2002. The deceased was involved in several other cases which were of robbery, rape, attempt to commit murder and extortion. Appellant No.1 Husain was doing the business of gambling (*Matka*). It is the prosecution case that Dipak Singh wanted to start his *Matka* business in Dias Plot and he was insisting that Husain should close his *Matka* business. The incident occurred on 15/07/2002 at

about 3.00 or 3.15 p.m. PW 1 Ishwarsingh was standing on the road in Dias Plot. At that time, Appellant No.1 Husain and original accused no.4 came to the spot. Ishwarsingh knew the Appellant as well as the other person as they were both residing near his house since many years. Appellant No.1 Husain told Ishwarsingh to call Dipak Singh as he wanted to talk to him about *Matka* business. Ishwarsingh then went to the house of Dipak Singh and called him. Dipak Singh asked Husain what work he had with him. Thereupon Husain told him that he wanted to speak with him and Dipak Singh should accompany him. Dipak Singh then told that they should go ahead and he would follow. Thereafter Dipak Singh accompanied by his wife PW 3 Shantakaur, his father PW 1 Ishwarsingh, his brother PW 2 Krishnasingh and Dipak Singh's son went along with Dipak Singh to Gultekdi. At the spot, they found both the Appellants along with original accused nos.3, 4, 5 and 6. Appellant No.1 Husain and Dipak Singh had some discussion relating to *Matka* business. Then a quarrel arose. The Appellant no.1 Husain assaulted Dipak Singh with a koyta on the head, appellant no.2 Sikandar also assaulted

Dipaksingh with a weapon. The other persons also assaulted Dipaksingh. PW 2 Krishnasingh intervened asking them why they were assaulting Dipaksingh. Original accused no.3 Shakil assaulted Krishnasingh on the head with a pipe. Krishnasingh then shouted that they should all run away otherwise the accused would kill them. Hence, except Shantakaur, they all ran away from the spot. Police vehicle came to the spot. The police lifted Dipaksingh and put him in the vehicle and took him to Sasoon Hospital. In the hospital, Dipaksingh was declared dead on arrival. PW 1 Ishwarsingh lodged F.I.R. (Ex.48). The F.I.R. was lodged against the appellants and five other accused. After lodging of F.I.R., investigation commenced. After completion of investigation, charge-sheet came to be filed.

3. Charge came to be framed against the Appellants/original accused nos.1 and 2 and 5 other accused under Sections 120-B, 143, 147, 148 and 302 of IPC read with 149 of IPC. In the alternative, charge was also framed under Section 302 read with 34 of IPC.

Charge was also framed against all the 7 accused under Section 324 read with 149 of IPC; in the alternative 324 read with 34 of IPC. Charge was also framed against all the 7 accused under Section 37 (i) of the Bombay Police Act punishable under Section 135 of the Bombay Police Act. All the accused pleaded not guilty to the said charge and claimed to be tried. Their defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Additional Sessions Judge acquitted original accused nos.3 to 7 of all the charges. However, the learned Sessions Judge convicted and sentenced both the Appellants as stated in para 1 above, hence, this appeal.

4. We have heard the learned Advocate for the Appellants and the learned APP for the State. We have carefully considered their submissions, the Judgment and Order passed by the learned Additional Sessions Judge and the evidence in this case. After carefully considering the same, for the below-mentioned reasons, we are of

the opinion that both the Appellants assaulted Dipak Singh and caused his death.

5. The conviction of the Appellants is mainly based on the evidence of 3 eye witnesses i.e. PW 1 Ishwarsingh, PW 2 Krishnasingh and PW 3 Shantakaur. PW 1 Ishwarsingh was the father of Dipak Singh. PW 2 Krishnasingh was the brother of Dipak Singh. PW 3 Shantakaur was the wife of Dipak Singh. The evidence of PW 1 Ishwarsingh shows that Dipak Singh had been involved in a case under the MCOC Act. He was released on 07/06/2002. The deceased was involved in several other cases which were of robbery, rape, attempt to commit murder and extortion. PW 1 Ishwarsingh has further stated that the Appellant No.1 Husain was doing business of gambling (*Matka*). The incident occurred on 15/07/2002 at about 3.00 or 3.15 p.m. PW 1 Ishwarsingh was standing on the road in Dias Plot. At that time, Appellant No.1 Husain and original accused no.4 Salim came to the spot. Ishwarsingh knew the Appellant as well as the other person as they were both residing near his house since many years. Appellant

No.1 Husain told Ishwarsingh to call Dipaksingh as he wanted to talk to him about *Matka* business. Ishwarsingh then went to the house of Dipaksingh and called him. Dipaksingh asked Husain what work he had with him. Thereupon Husain told him that he wanted to speak with him and Dipaksingh should accompany him. Dipaksingh then told that they should go ahead and he would follow. Thereafter Dipaksingh accompanied by his wife PW 3 Shantakaur, his father PW 1 Ishwarsingh, his brother PW 2 Krishnasingh and Dipaksingh's son went along with Dipaksingh to Gultekdi. At the spot, they found both the Appellants along with original accused nos.3 to 6. Appellant No.1 Husain and Dipaksingh had some discussion relating to *Matka* business. Then a quarrel arose. Then Appellant no.1 Husain assaulted Dipaksingh with a koyta on the head, appellant no.2 Sikandar assaulted Dipaksingh with an iron pipe. The other persons also assaulted Dipaksingh. PW 2 Krishnasingh intervened asking them why they were assaulting Dipaksingh. Original accused no.3 Shakil assaulted Krishnasingh on the head with a pipe. Krishnasingh then shouted that they should all run

away otherwise the accused would kill them. Hence, except Shantakaur, they all ran away from the spot. Police vehicle came to the spot. The police lifted Dipaksingh and put him in the vehicle and took him to Sasoon Hospital. In the hospital, Dipaksingh was declared dead on arrival. PW 1 Ishwarsingh lodged F.I.R. (Ex.48). The F.I.R. was lodged against the appellants and five other accused.

6. PW 2 Krishnasingh was the brother of Dipaksingh. He also accompanied his brother Dipaksingh along with others when his brother Dipaksingh was called by Appellant No.1 Husain. PW 2 Krishnasingh has stated that Dipaksingh was his real brother. Dipaksingh used to live in the house adjacent to his house. On 15/07/2002 at about 3.00 p.m., he was in the house. At that time, Appellant No.1 Husain and one Salim came to their house. They said that they wanted to discuss something about *Matka* business run by Appellant No.1 Husain at Gultekdi which Dipaksingh had decided to close down. Accordingly he and Dipaksingh went to the spot. At that time, his father PW 1 Ishwarsingh, PW 3 Shantakaur,

wife of Dipak Singh and Dipak Singh's son Shakti Singh followed them. When they reached the spot, they found that both the Appellants along with some 10 to 12 persons were at the spot. Dipak Singh and Appellant No.1 Husain started having some discussion. While they were discussing, Appellant No.1 Husain took out a koyta and assaulted Dipak Singh on the head. The other accused also assaulted Dipak Singh. Sikandar also assaulted Dipak Singh. Then PW 2 Krishnasingh went to Dipak Singh's rescue. Original accused no.3 Shakil assaulted him on the head with a pipe.

7. The last eye witness is PW 3 Shantakaur. Shantakaur was the wife of Dipak Singh. Shantakaur has stated that on 15/07/2002 at about 3.00 p.m. she was in the house. Her husband and her son Shakti Singh were also in the house. Her father-in-law Ishwarsingh came in the house and told them to come out. Hence they all came out of the house. They saw Appellant No.1 Husain and one Salim had come there. They called her husband Dipak Singh and told him to accompany them. Dipak Singh went with them and

they all followed Dipaksingh. When they went to the spot, they saw Dipaksingh was having a talk with Appellant No.1 Husain. Exchange of words took place between Appellant No.1 Husain and Dipaksingh. At that time, Appellant No.1 Husain took out a koyta and assaulted Dipaksingh on the head. Appellant No.2 Sikandar also assaulted Dipaksingh.

8. Nothing has been elicited in the cross-examination of any of these 3 eye witnesses so as to cause us to disbelieve their testimony. In addition to the evidence of these 3 eye witnesses, so far as Appellant No.2 is concerned, the prosecution is relying on the circumstance of recovery of iron pipe at his instance. PW 5 Vinod is the panch witness who has deposed about the recovery of iron pipe at the instance of Appellant No.2 Sikandar. This iron pipe was sent to the C.A. As per the C.A. report Ex.100 (1), the iron pipe was stained with blood of 'B' group. The pant, banian and shirt worn by the deceased at the time of the incident were also seized and sent to C.A. As per the C.A. report Ex.100 (1), the clothes of the deceased were stained with blood of

'B' group. Moreover, C.A. report Ex.100 shows that the blood group of the deceased was 'B'. Thus, finding of blood of 'B' group on the iron pipe recovered at the instance of Appellant No.2 is a strong incriminating circumstance against him.

9. Mr. Warunjikar, learned Advocate for Appellants, submitted that even if it is accepted that the acts of the Appellants of assaulting Dipaksingh with a koyta and an iron pipe resulted in his death, the case would not fall under Section 302 of IPC but it would fall under Section 304 Part II of IPC or at the most 304 Part I of IPC. He pointed out that the evidence on record shows that a quarrel was going on between the accused and Dipaksingh which has been deposed about by PW 1 Ishwarsingh who is the father of Dipaksingh and PW 3 Shantakaur who was the wife of Dipaksingh. Mr. Warunjikar drew our attention to the evidence of PW 1 Ishwarsingh wherein Ishwarsingh has stated that after they reached the spot, accused and Dipaksingh had some discussion between them about *Matka*. Then a quarrel arose between Dipaksingh and the accused.

Then accused Husain took out a koyta and assaulted Dipaksingh on the head and accused Sikandar assaulted Dipaksingh on the head with a pipe. Thus, Mr. Warunjikar submitted that the evidence of PW 1 Ishwarsingh clearly shows that the incident took place when a sudden quarrel arose between the accused and the deceased. Mr. Warunjikar also drew our attention to the evidence of PW 3 Shantakaur. She has stated that when they reached the spot, Dipaksingh was having a talk with the accused. There was exchange of words between the accused and Dipaksingh. Then accused Husain assaulted Dipaksingh on the head with a koyta and accused Sikandar also assaulted Dipaksingh. Mr. Warunjikar submitted that in view of the fact that the evidence on record clearly shows that the incident occurred during a sudden quarrel between the accused and the deceased, the case would be covered by Exception 4 of Section 300 of IPC i.e. assault by accused during a sudden quarrel in the heat of passion.

10. It is to be noted that the word 'fight' occurring in

Exception 4 to Section 300 of IPC is not defined in IPC. It takes two or more persons to make a fight. Heat of passion requires that there must be no time for passion to cool down. In this case, the evidence shows that the parties had worked themselves into a fury on account of verbal altercation between them.

11. However, we are not prepared to accede to the submission of Mr. Warunjikar that the case would fall under Section 304 Part II of IPC. In our view, the case would fall under Section 304 Part I of IPC because we are of the opinion that the accused did not just have the knowledge that their acts were likely to cause death but, in fact, the accused intended to cause the death of Dipaksingh. We say so on the basis of the weapons used, the part of the body where the injuries were inflicted, the force used while assaulting and the nature of injuries. The injuries, as seen from the medical evidence, are serious and grievous in nature, hence, we are of the opinion that the case cannot fall under Section 304 Part II of IPC.

12. Considering the evidence on record, we are of the view that Exception 4 to Section 300 of IPC applies to the facts of the case and the appropriate conviction would be under Section 304 Part I of IPC. Hence conviction under Section 302 of IPC is set aside. Instead, both the Appellants are convicted under Section 304 Part I of IPC. As far as Appellant No.1 Husain's case is concerned, he is on bail. As of today, he is about 67 years of age. Moreover, orders of this Court dated 29/02/2008 passed in Application No.45 of 2008 (for bail) in the present Appeal shows that he is a patient of paralysis and heart disease as well as hypertension due to which he is unable to walk. The order of this Court dated 29/02/2008 shows that the Jail Superintendent has filed an affidavit stating that under these circumstances, it is not possible for the jail authorities to maintain the upkeep and treat the Appellant No.1 in jail looking to the medical facilities available to them and their resources. Thus, looking to the medical condition of Appellant No.1, for the offence punishable under Section 304 Part I of IPC, he is sentenced to the period of imprisonment undergone by him which is over 3

years. Appellant No.2 is in jail. He is also sentenced to the imprisonment undergone by him which is about 10 years. Appellant No.2 be released forthwith, if not required in any other case. Bail bonds of Appellant No.1 stand cancelled.

13. Appeal is disposed of in above terms.

(SMT. I. K. JAIN, J.)

(SMT. V. K. TAHILRAMANI, J)