

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.235 OF 2008**

|                        |   |                     |
|------------------------|---|---------------------|
| Jahir Mahammed Shaikh, | ] |                     |
| Age : 24 Yrs.,         | ] |                     |
| R/o. 626, Gurwar Peth, | ] | .... Appellant /    |
| District Satara        | ] | (Org. Accused No.1) |

***Versus***

|                      |   |                 |
|----------------------|---|-----------------|
| State of Maharashtra | ] | .... Respondent |
|----------------------|---|-----------------|

***ALONG WITH***

**CRIMINAL APPEAL NO.68 OF 2008**

|                         |   |                     |
|-------------------------|---|---------------------|
| Mustaq Abdul Gani Khan  | ] |                     |
| Age : 26 Yrs.,          | ] |                     |
| R/o. 628, Guruwar Peth, | ] | .... Appellant /    |
| District Satara         | ] | (Org. Accused No.2) |

***Versus***

|                                     |   |                 |
|-------------------------------------|---|-----------------|
| The State of Maharashtra,           | ] |                 |
| Through City Police Station, Satara | ] | .... Respondent |

***AND***

**CRIMINAL APPEAL NO.136 OF 2008**

|                      |   |                     |
|----------------------|---|---------------------|
| Iqbal Papa Zende     | ] |                     |
| Age : 29 Yrs.,       | ] |                     |
| R/o. Mangalwar Peth, | ] | .... Appellant /    |
| District Satara      | ] | (Org. Accused No.4) |

***Versus***

|                                     |   |                 |
|-------------------------------------|---|-----------------|
| The State of Maharashtra,           | ] |                 |
| Through City Police Station, Satara | ] | .... Respondent |

Ms. Apeksha Vora, Appointed Advocate,  
for the Appellant in Criminal Appeal  
No.235 of 2008.

Mr. S.P. Kadam for the Appellant in  
Criminal Appeal No.68 of 2008.

Mr. R.R. Mahagaonkar for the Appellant  
in Criminal Appeal No.136 of 2008.

Mr. A.S. Shitole, A.P.P., for the  
Respondent-State in all the Criminal  
Appeals.

**CORAM : SMT. V.K. TAHILRAMANI &  
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

**DATE : 7<sup>TH</sup> JULY, 2015.**

**ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]**

1. Original Accused No.1, 2 and 4 have preferred these separate Appeals challenging the Judgment dated 14<sup>th</sup> December, 2007 in Sessions Case No.117 of 2006 delivered by the Ad-Hoc Additional Sessions Judge-4, Satara. By the impugned Judgment, they have been convicted for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced to suffer R.I. for life and to pay fine of Rs.2,000/- each, in default to suffer further R.I. for 6 months, and for the offence punishable under Section 323 r/w. 34 of the IPC and sentenced to suffer S.I. till rising of the Court and to pay fine of Rs.100/- each, in default to suffer further S.I. for 10 days.

2. Brief facts of the Appeals can be stated as follows :-

On 27<sup>th</sup> November, 2005, at about 10 pm, PW-1 Vidyadhar Kanhere had gone to Hotel Cindrella Inn for dinner along with his friend Kumar Sawant. Kumar Sawant phoned PW-3 Mahendra Jadhav and called him also there for discussion of Balaji trip. Kumar Sawant informed PW-3 Mahendra on phone that Kishor Kadam was also coming for dinner. After arrival of PW-3 Mahendra and deceased, PW-1 Vidyadhar ordered dinner. As half an hour was required for complying with the order of dinner, they were taking cold drink.

3. At about 10:30 pm, 7 boys came in the hotel and sat on the nearby table, drinking liquor and beer. One of them, who is later identified as Accused No.4 Iqbal, demanded charger to PW-1 Vidyadhar and on that count, altercations ensued between those boys and PW-1 Vidyadhar and his friends. To avoid the quarrel, PW-1 Vidyadhar and his friends decided to leave that place. Hence, they cancelled the order of dinner, paid the charges of cold drink and started going out of the hotel. While they were leaving the table, again there were altercations between deceased and those boys. When they reached at the door of the

hotel, acquitted Accused No.3 Bandu Rajmane and Original Accused No.4 Iqbal Zende came there and again there was hot exchange of words between them and deceased. Out of those boys, the boy wearing blue jerkine, who is later identified as Accused No.1 Jahir Shaikh, and another boy wearing cream colour shirt, later identified as Accused No.2 Mustaq, came there. Accused No.1 caught leg of Kumar Sawant and fell him down. PW-3 Mahendra intervened. Accused No.1 Jahir pushed PW-3 Mahendra. Again there was scuffle between Accused No.1 Jahir and the deceased. During that scuffle, both fell down. Accused No.1 Jahir sustained injury on his eye and he and Accused No.4 Iqbal started beating the deceased. They also rushed towards PW-1 Vidyadhar and PW-3 Mahendra. To escape from the assault, deceased started running towards Ajinkya Vasahat. Thereupon, Accused Nos.1 and 2 followed him. Accused No.1 assaulted the deceased with stone on his head. After the assault, all the boys, including these three Accused, ran away from the spot.

4. When PW-1 Vidyadhar and PW-3 Mahendra reached on the spot, they found deceased lying there, having sustained bleeding injury on his head. PW-3 Mahendra called Kumar Sawant on his

phone and three of them then took deceased to Samarth Hospital. As the condition of the deceased was critical, he was advised to be taken to Girija Hospital. However, there he succumbed to the injury at about 2 am to 2:15 am. PW-3 Mahendra then went to the Police Station and lodged the report of the incident.

5. On his complaint (Exhibit-39), PW-9 Head Constable Suresh Jadhav, who was on night duty at Satara City Police Station, registered C.R. No.451 of 2005 against the Accused and handed over further investigation of the case to PW-12 PI Sampatrao Jagdale. On the receipt of investigation of the case, PW-12 PI Jagdale went to Girija Hospital and made the Inquest Panchanama on the dead body vide Exhibit-37. Then he visited the spot of incident and drew the Scene of Offence Panchanama vide Exhibit-44 in the presence of the Panch PW-5 Nandkumar Sonawane. From the spot, he collected the blood stains with cotton swab. On the same day, he recorded the statements of some witnesses and sent letter to Tahasildar for conducting Test Identification Parade of the Accused, who were arrested till then. Accordingly, PW-11 Executive Magistrate Vaishali Rajmane

conducted Test Identification Parade of the Accused on 3<sup>rd</sup> December, 2005, in which PW-1 Vidyadhar and PW-3 Mahendra identified Accused Nos.1 to 4 and PW-4 Prashant Jadhav, the Manager of Hotel Cindrella Inn, identified Accused Nos.1 and 2. Accordingly, she prepared the Memorandum of Test Identification Parade vide Exhibit-77.

6. On 2<sup>nd</sup> December, 2005, PW-12 PI Jagdale sent all seized muddemal articles to Chemical Analyzer vide requisition (Exhibit-59). C.A. Reports are produced in the case at Exhibits "67" and "80". Further to completion of investigation of the case, PW-12 PI Jagdale filed Charge-Sheet in the Court against the Accused.

7. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-16 for the offences punishable under Sections 302, 323, 504 and 506 r/w. 34 of the IPC. Accused pleaded not guilty and claimed trial.

8. In support of its case, Prosecution examined in all 12 witnesses and on appreciation of their evidence, Trial Court was pleased to hold the guilt of Accused Nos.1, 2 and 4 to be proved for the offences punishable under Sections 302 and 323 r/w. 34

of the IPC and convicted and sentenced them, as aforesaid, while acquitted Accused No.3 Chandrashekhar @ Banda of both the charges.

9. This Judgment of the Trial Court is challenged in these Appeals by learned Counsel for the Appellants, whereas supported by learned A.P.P. for the Respondent/State. In our considered opinion, before adverting to the submissions advanced by them, it would be useful to refer to the evidence on record.

10. To prove homicidal death of deceased Kishor, Prosecution has examined PW-7 Dr. Vikas Babar, who has conducted autopsy on the dead body in Civil Hospital at Satara. On external examination, he has noticed following injuries :-

- (i) *Contusion 4 cm x 3 cm present over left side of forehead, reddish blue in colour.*
- (ii) *C.L.W. present over scalp on left parietal region measuring about 5 cm x 1.5 cm x brain deep and brain tissue was coming out through the wound.*

- (iii) *C.L.W. 1 cm x 1 cm x skin deep mid anterior aspect of left arm.*
  - (iv) *Contusion about 8 cm x 5 cm over medial aspect of left arm reddish blue.*
  - (v) *Abrasion measuring about 3 cm x 3 cm over left leg just below lateral to the left knee.*
11. On internal examination, he has noticed following injuries :-
- (i) *C.L.W. present over scalp on left parietal region measuring about 5 cm x 1.5 cm x brain deep.*
  - (ii) *Fracture to left parietal bone starting about 5 cm behind left frontal eminence running upto left parietal eminence.*
  - (iii) *Fracture left parietal bone, about 3 cm running vertically downward.*
  - (iv) *Dura was torn at left parietal fracture region.*
  - (v) *Subdural haematoma about 5 cm x 4 cm at left parietal region.*

(vi) *Multiple lacerations present over left parietal lobe, brain tissue coming out through the wound.*

(vii) *Sub-arachnoid hemorrhage present in left parietal region.*

12. According to him, all these injuries were antemortem in nature and the cause of the death was *“fracture of skull with lacerations of brain and intra-cranial hemorrhage”*. He has further opined that the injuries found on the dead body are possible due to blow of Article No.4 - the stone. In his cross-examination it is brought on record that Injury Nos.1, 2, 3, 4 and 5 were simple in nature and are possible in the fighting. As per his opinion, Injury No.(ii), the fracture and the C.L.W. over the scalp, which resulted into the fracture of left parietal bone, proved to be fatal one and the said injury cannot be possible due to fall, as suggested by the Defence.

13. To prove the involvement of the Accused in this offence, the Prosecution has placed reliance on the evidence of two eye witnesses, namely, PW-1 Vidyadhar and PW-3 Mahendra and to

some extent on the evidence of PW-4 Prashant, the Manager of Hotel Cindrella Inn.

14. The evidence of PW-1 Vidyadhar and PW-3 Mahendra is, more or less, identical in nature. The incident happened when they were in Hotel Cindrella Inn at about 10 pm, along with one Kumar Sawant and the deceased. While they were waiting for dinner to be served, on nearby table 7 boys, including the present Accused Nos.1, 2 and 4, came and sat there. As per their evidence, Accused No.4 Iqbal demanded charger to PW-1 Vidyadhar and on that count the altercations started between them. It is the evidence of PW-1 Vidyadhar and PW-3 Mahendra that, to avoid further altercations and quarrel, they decided to leave the hotel. Hence they cancelled the order of dinner, paid the bill of cold drinks and started leaving the table. At that time, again the altercations ensued. Deceased told Accused No.4 Iqbal to keep quiet and saying so, they came out of the hotel. Accused Nos.1, 2 and 4 followed them and at the door of hotel, again there was scuffle between the two parties. Accused No.1 rushed towards deceased. In that scuffle, both of them fell down. Accused No.2 rushed towards PW-1 Vidyadhar and gave him 2 -

3 slaps. When deceased started running from the spot towards Ajinkya Colony, Accused Nos.1 and 2 chased him. PW-1 Vidyadhar and PW-3 Mahendra followed them. Accused No.1 assaulted deceased by stone. Then all the Accused ran away from the spot. Deceased fell there with bleeding injury on his head. Thereafter he was taken to the hospital, where he was declared dead.

15. Though these two witnesses are cross-examined at length by learned Defence Counsel, nothing worthwhile is elicited in their cross-examination to disbelieve them. Their evidence is also getting complete support and corroboration from the F.I.R. (Exhibit-39), which is lodged immediately after the incident, giving all the details therein.

16. There is also corroborating evidence of PW-4 Prashant, who, at the relevant time, was on duty in Hotel Cindrella Inn as a Manager. He has deposed about the quarrel that started between these two parties, which resulted into fighting and then in the said fighting, deceased succumbed to the injuries sustained by him. No doubt, he has not identified the Accused in the Court, but his evidence proves the occurrence of the incident in the

hotel, as deposed to by PW-1 Vidyadhar and PW-3 Mahendra.

17. This ocular account of the incident is also getting further support from the recovery of the weapon of assault, the stone, from the spot of incident. PW-5 Nandkumar Sonawane is the Panch to the Scene of Offence Panchanama (Exhibit-44). He has deposed that the spot of incident was near the garbage box. There they found blood stains on the Tar Road and also one stone with blood smeared thereon. The said stone (Muddemal Article No.4) was seized under Panchanama (Exhibit-44).

18. This ocular account of the eye witnesses, supported with the other corroborating evidence, thus, goes to prove the occurrence of the incident and involvement of the Accused therein. Though the evidence of PW-11 Executive Magistrate Vaishali Rajmane reveals that these witnesses have identified the Accused in the Test Identification Parade held by her on 3<sup>rd</sup> December, 2005, as the Trial Court has disbelieved the evidence relating to Test Identification Parade in view of the manner in which Test Identification Parade was conducted, that evidence is excluded from consideration. Even then, the involvement of the Accused in the incident is sufficiently proved from the very

defence taken by the Accused and also from the medical evidence on record. Evidence of PW-7 Dr. Vikas Babar, to whom the Accused were sent for medical examination after their arrest, on 28<sup>th</sup> November, 2005, reveals that on examination of Accused No.1 Jahir, he found following injuries :-

(i) *Abrasion present over right malar eminence 2 cm x 1 cm, no swelling, no crepitus.*

(ii) *Abrasion present over right knee 1 cm x 0.5 cm, no swelling, no crepitus. Moments normal.*

19. According to him, these injuries are possible in fighting. He has produced on record the Medical Certificate of Accused No.1 Jahir at Exhibit-50.

20. The evidence on record also proves that in respect of the same incident, Accused No.1 Jahir has lodged cross-complaint against prosecution witnesses and it was registered as N.C. vide Exhibit-62 for the offences punishable under Sections 323, 504 and 506 r/w. 34 of the IPC.

21. In the light of this evidence on record, the real question for

consideration is as to the nature of the offence, which can be held proved against the Accused. Whether in the facts and circumstances of the case, the Appellants have been rightly convicted by the Trial Court for the capital offence and, if not, whether the act attributed to them would constitute a lesser offence, like, culpable homicide not amounting to murder, punishable under Section 304 Part I or II of the IPC.

22. As per learned Counsel for Accused No.1 Jahir, in the backdrop of the evidence led by prosecution witnesses themselves, it was a case of sudden fight. An altercation was ensued on a trifle count of demand of charger, which has ultimately resulted into the fighting and death of deceased. There was no previous enmity between Accused and deceased and there was no motive also for them to assault the deceased. Accused had also not taken any undue advantage or acted in a cruel or inhuman manner. Therefore, even if the involvement of the Accused is proved in the offence, at the most Accused No.1 Jahir alone can be held liable and that too for the offence of culpable homicide not amounting to murder, punishable under Section 304 Part II of the IPC.

23. As regards Accused No.2 Mustaq and Accused No.4 Iqbal, the submission advanced is that their involvement is neither proved nor their identification is properly established. The role attributed to them is also not specified and hence they cannot be held liable for any of the offences. It is urged that the fatal assault by stone is made by Accused No.1 Jahir alone. The quarrel is not ensued on account of Accused No.2 Mustaq. He has not assaulted anyone in the incident. Even if it is the evidence of PW-1 Vidyadhar that Accused No.2 Mustaq has held the hands of the deceased when Accused No.1 Jahir assaulted the deceased with stone, holding of hands of the deceased does not amount to sharing of common intention and, therefore, he cannot be held guilty of any of the offences.

24. So far as Accused No.4 Iqbal is concerned, it is further urged that except for demanding charger, no other role is attributed to him. He is also not identified by PW-4 Prashant in evidence before the Court. According to learned Counsel for the Accused, Trial Court has acquitted Accused No.3 Chandrashekhar @ Banda, though his presence and identification was proved. The same benefit should have been extended to Accused No.2

Mustaq and Accused No.4 Iqbal also, as evidence relating to Test Identification Parade is disbelieved by the Trial Court.

25. As against it, submission of learned A.P.P. is to the effect that the evidence of eye witnesses goes to prove the presence and identification of all the 3 Accused, even if evidence relating to Test Identification Parade is disbelieved. Further, according to learned A.P.P., the intention to kill the deceased can be gathered from the facts of the present case, as Accused No.1 Jahir and Accused No.2 Mustaq followed the deceased, chased him even when he ran from the spot and then Accused No.2 Mustaq held the hands of the deceased and Accused No.1 Jahir assaulted the deceased with stone. Therefore, in the opinion of learned A.P.P., the incident in the instant case has not occurred in a sudden fight in the heat of passion and hence benefit of Exception 4 to Section 300 of IPC cannot be extended to the Accused.

26. To substantiate her submission that the case falls under Exception 4 to Section 300 of the IPC, learned Counsel for Accused No.1 Jahir has relied on the Judgment of the Supreme Court in ***Ankush Shivaji Gaikwad Vs. State of Maharashtra, 2013 CRI. L. J. 3044***, which summarizes the law on the subject

and the facts therein are also to some extent akin to the facts of the present case. The facts of this authority reveals that initially there was only a verbal altercation between the Accused and the deceased on account of Accused beating dog of the deceased. The said altercation culminated into scuffle, in which Accused hit the deceased with iron rod, which he was carrying. No previous enmity between Accused and deceased was alleged and hence it was held that Accused is entitled to the benefit of Exception 4 to Section 300 of the IPC.

27. While holding so, the Apex Court relied on its earlier decision in ***Surinder Kumar Vs. Union Territory, Chandigarh, AIR 1989 SC 1094***, wherein it was held that,

*“If on a sudden quarrel, a person in the heat of the moment picks up a weapon, which is handy, and causes injuries, out of which only one proves fatal, he would be entitled to the benefit of the Exception, provided he has not acted cruelly.”*

28. It was further held in the said authority that,

*“The number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a heat of anger.*

*Thus, to bring the case under Exception 4 to Section 300 of IPC, four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant, nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor.”*

29. In the instant case also, if one considers the facts of the present case, admittedly, there was no previous enmity between the deceased and the Accused. As a matter of fact, they were

not knowing each other also. The cause of the occurrence was also a trifle one, like, Accused No.4 Iqbal demanding charger to PW-1 Vidyadhar and on his refusal to give it, the quarrel ensued resulting into the altercations. Thus, according to Prosecution version also, there was no premeditation in the commission of the crime. The incident took place in a sudden fight, without any anticipation. The exchange of words in the quarrel led to the sudden fight, which, in turn, culminated in the deceased being hit with the stone. Weapon used was, thus, not lethal, nor it was carried by Accused No.1 Jahir with him. Whichever weapon was handy at that time, that is the stone which was lying there, he has picked it in the heat of moment and caused injuries, out of which only one injury proved fatal. Accused No.1 Jahir has also not taken any undue advantage of repeating the blows or assaulting the deceased further. He had not given a second blow. Once the deceased collapsed to the ground, the Accused immediately took their heels. Thus circumstances show that Accused No.1 Jahir had not acted in an unusual or cruel manner in the prevailing situation so as to deprive him of Exception 4 to Section 300 of the IPC.

30. As regards submission of learned A.P.P. that Accused No.1 Jahir and Accused No.2 Mustaq had chased the deceased and then assaulted him and, therefore, the incident of assault cannot be called as an outcome of provocation or sudden fight, learned Counsel for Accused No.1 Jahir has relied upon **V. Sreedharan Vs. State of Kerala, AIR 1992 SC 754**, wherein it is held that, when whole incident, which culminated into the assault is a continuous sequence, provocation cannot be held to be discontinued merely because Accused chased the deceased to some extent and then gave fatal blow. In this reported authority also, the Accused was chased the deceased upto the distance of 81 ft., away from the house and then the dagger blow was given. Even then, it was held that as the whole incident beginning from the kitchen and ending on the road was one continuous sequence, provocation cannot be discontinued.

31. In the instant case also, as the whole incident of deceased running away from the hotel and Accused following him was one continuous sequence, it has to be held that provocation was not discontinued and hence on that count, the benefit of Exception 4 to Section 300 of the IPC cannot be withheld from the Accused.

32. Now the question that remains is '*whether the case falls under Section 304 Part I or Part II of the IPC?*'. In our opinion, having regard to the entire gamut of facts, circumstances and evidence on record, considering the fact that Accused No.1 Jahir had neither motive, nor any enmity with deceased and hence no intention to cause his death, the present case cannot come within the ambit of Part I of Section 304 of the IPC. However, as he can be imputed with sufficient knowledge that assault on head by stone is likely to result into the death, he is required to be held guilty for the offence punishable under Section 304 Part II of the IPC.

33. As regards Accused No.4 Iqbal, no role is attributed to him at all in the assault on the deceased. Similarly, as regards Accused No.2 Mustaq, only PW-3 Mahendra has deposed that Accused No.2 has held the hands of the deceased. PW-1 Jairam has not stated anything to that effect. Therefore, benefit of doubt can be extended to Accused No.2 Mustaq and Accused No.4 Jahir.

34. To sum up, therefore, it has to be held that Prosecution has succeeded in proving its case against Accused No.1 Jahir alone

beyond reasonable doubt for the offence punishable under Section 304 Part II of the IPC.

35. Consequently, Criminal Appeal No.235 of 2008 filed by Accused No.1 Jahir is allowed partly. The conviction of Accused No.1 Jahir for the offences punishable under Sections 302 and 323 r/w. 34 of the IPC stands quashed and set aside. He is convicted for the offence punishable under Section 304 Part II of the IPC and sentenced to suffer R.I. for ten years, which he has already undergone in Jail. The fine imposed upon him and the default sentence awarded to him by the Trial Court shall, however, remain unaltered.

36. Criminal Appeal No.68 of 2008 preferred by Accused No.2 Mustaq and Criminal Appeal No.136 of 2008 preferred by Accused No.4 Iqbal are allowed. Their conviction for the offences punishable under Sections 302 and 323 r/w. 34 of the IPC is quashed and set aside. They are acquitted of both the offences. Their Bail Bonds stand cancelled. Fine amount, if any, paid by them be refunded to them.

**[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]**