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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1221 OF 2007

Punjab Bhika Rathod

Residing at Giva, Post Yerand,
Vashi 07254,
(Presently in custody at Thane Central
Prison, Thane)

**..Appellant.
(Orig. Accused)**

Vs.

State of Maharashtra

(at the instance of Charkop Police Station)

..Respondent.

Ms. Rebecca Gonsalvez, for the Appellant.

Mr. H.J. Dedhia, APP for State.

**CORAM: Smt. V.K. Tahilramani, Acting C.J. &
A.S. Gadkari, J.**

Reserved On: 6th October 2015.

Pronounced On: 8th October 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellant has challenged the judgment and order dated 10th February 2006 passed by the 2nd Ad-Hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.402 of 2005 thereby convicting him under Section 302 of the Indian Penal Code and sentenced him to suffer

imprisonment for life and to pay a fine of Rs.5000/-, and in default of payment of fine to suffer further R.I. for six months.

2 The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The complainant Motiram D. Zhate (PW-1), PW-2-Dilip D. Pawar, PW-5-Ankush B. Chavan, PW-6 Gajanan S. Chavan and the deceased Santosh Javle were labourers and were working on the construction site of a petrol pump near Industrial Training School, opposite Military Cadet Boys hostel, Kandivali (W), Mumbai. PW-9 Shashi Suvarna was the construction site supervisor of the said site. That as all the said labourers were from outside Mumbai, they were staying at the construction site itself. The said workers were preparing their food and also sleeping at the construction site itself.

(ii) That on 13.2.2005 as usual after the duty hours, the labourers prepared their food and had their dinner at about 9.00 p.m. At that time the appellant came from outside after consuming the liquor. All the labourers had their dinner thereafter. That after the dinner, the appellant and the deceased Santosh Javle went to the telephone booth for giving a phone call. The appellant gave a phone call to his native place through STD booth of PW-7 Bilal Shaikh. After the telephone call, the appellant demanded

money from the deceased Santosh for making payment of the telephone phone bill. The deceased Santosh expressed his inability to make the said payment by saying that he was not having that amount. That the appellant got angry due to that and there was a quarrel between them. Thereafter the deceased Santosh returned to the site and all the labourers except the appellant went to sleep. Subsequently, the appellant also came and slept there. That in the intervening night of 13.2.2005 and 14.2.2005 at about 1.00 a.m., the co-workers heard shouts of deceased Santosh and all of them awoke and enquired to the deceased Santosh as to what had happened. At that time, Santosh told them that the appellant had given him a blow with iron hammer on his abdomen. As it was mid-night, the co-workers i.e. PW-1 Motiram D. Zhate, PW-2-Dilip D. Pawar, PW-5-Ankush B. Chavan, and PW-6 Gajanan S. Chavan asked the deceased Santosh to bear the pain till morning so that they would take him to the hospital. Thereafter the said labourers and Santosh slept in that night.

(iii) On the next day morning i.e. 14.2.2005 the workers informed the site supervisor PW-9 Shashi Suvarna about the said fact and Santosh was taken to the Bhagawati hospital at Borivali. PW-10 Dr. Abhijeet Padhye examined him and found the condition of Santosh as unconscious and drowsy. The victim Santosh had given history of assault by the

appellant by a stick on his abdomen at night. That after examination, PW-10 Dr. Abhijeet Padhye found something serious in the abdomen of Santosh and he carried out surgery on Santosh.

(iv) In the meanwhile, somebody from Bhagawati Hospital informed the police about the said incident. PW-11 Shri Bhagaram Choudhari, PS.I. then attached to Charkop police station came to the hospital. After operation, the injured Santosh was not in a position to talk and therefore statement of one of the labourers i.e. PW-1 Motiram Zhate was recorded. The said statement was treated as the first information report. An offence bearing crime no.25 of 2005 under Section 325 of the Indian Penal Code came to be recorded. That the victim Santosh succumbed to the injury on 16.2.2005 in the morning. The offence under Section 302 of the Indian Penal Code was added to C.R. No.25 of 2005. The investigation was conducted by PW-12 Police Inspector Shri Fernandis. After completing the investigation, PW-12 Shri Fernandis submitted chargesheet against the appellant in the Court of Metropolitan Magistrate, 24th Court, Borivali, Mumbai for the offence punishable under Section 302 of the Indian Penal Code. The said case came to be committed to the Court of Sessions as contemplated under Section 209 of Cr. P.C.

(v) The learned Trial Court framed charge below Exhibit 4 under Section 302 of the Indian Penal Code. The said charge was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

3 The prosecution in support of its case examined in all 12 witnesses. The learned Trial Court after recording the evidence of the prosecution witnesses and after hearing the parties to the said case was pleased to convict the appellant as stated hereinabove.

4 Heard Ms. Rebecca Gonsalvez, the learned Counsel for the appellant and Mr. H.J. Dedhia, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

5 In the present case, PW-1 Motiram D. Zhate, PW-2-Dilip D. Pawar, PW-5-Ankush B. Chavan, and PW-6 Gajanan S. Chavan are the co-workers who in the night of 13.2.2005 were sleeping along with deceased Santosh Javle on the construction site near Military Cadet Hostel, Kandivali. These witnesses have stated about the fact that in the night of 13.2.2005 after the dinner at about 9.00 p.m., the appellant and deceased Santosh went to the telephone booth for giving a phone call. That after half an hour, Santosh (deceased) returned and informed that a quarrel took place between him and the appellant on account of payment of telephone bill.

Thereafter they all slept. In the night at about 1.30 a.m. (i.e. on 14.2.2005 at about 1.30 a.m.) the said labourers woke up after hearing hue and cry of Santosh (deceased). On enquiry Santosh told them that the appellant gave a blow with hammer on his stomach. PW-1 gave water to him for drinking. The appellant who was sleeping nearby did not wake up. As it was midnight they slept alongwith Santosh. On the next day at about 10.00 a.m. the appellant and other witnesses took Santosh (deceased) to the hospital. PW-1 went to Charkop police station for giving information to the police. He lodged the report with the said police station. That Santosh expired in the hospital on third day. In addition to what has been stated by PW Nos.1,2 and 6, PW-5 Ankush Chavan has stated that when he was about to go to bed, the appellant brought the hammer from material room at the site. He asked him the purpose of brining the hammer. The appellant informed him that it was brought to fix mosquito net and the appellant kept the said hammer by side.

It is to be noted here that though PW-6 Gajanan Chavan has been examined on two aspects i.e. an oral dying declaration given by Santosh about assault and PW-6 being an eye-witness to the actual incident, PW-6 has supported the prosecution case in part i.e. upto the oral dying declaration and he did not support the prosecution case on the aspect

of actual incident and therefore the learned APP without declaring PW-6 as hostile, had sought permission from the learned Trial Court to cross-examine the said witness on the second aspect. Thus, it is to be noted that PW Nos.1,2,5 and 6 have been examined by the prosecution to prove the oral dying declaration given by deceased Santosh to the witnesses in the intervening night of 13.2.2005 and 14.2.2005 between 1.00 to 1.30 a.m.

6 The prosecution has further examined PW-9 Mr. Shashi I. Suvarna, the site supervisor on the said construction site. This witness has stated that after the information received from the workers from site, he went there and enquired with the appellant as to why he did so. The appellant replied that under the influence of alcohol he injured Santosh with hammer. At that relevant time, injured Santosh was in the hospital and was taken in the operation theater. This is the alleged extra judicial confession relied upon by the prosecution in addition to the oral dying declaration stated by PW Nos.1,2,5 and 6. The prosecution has proved the discovery of hammer at the instance of the appellant by examining PW-3 Anand Sadashivam a panch to the recovery panchanama which is at Exhibit 12-B.

7 PW-10 Dr. Abhijeet Padhye, in February 2005 was attached to Bhagwati Hospital, Borivali as Surgical Registrar. This witness has

deposed that on 14.2.2005 at about 10.45 a.m. the patient by name Santosh Javle was brought by one Dilip Pawar (PW-2). The said patient Santosh was conscious, but drowsy. The history was stated as assault at 2.30 a.m. on 14.2.2005 by sticks on abdomen and that no vomiting, no loss of consciousness, no hamemetemesis . He found no evidence of fracture anywhere on the body. Since he found that the patient was having perforative peritonitis/hemoperitoneum, he decided to carry out surgery and carried out the said surgery between 12.30 p.m. to 2.30 p.m. on the same day with the consent of person by name Dilp Pawar (PW-2) who brought the patient. During operation after opening abdomen, he found following things:

“2 ltrs. of blood aspirated from right and left paracolic gutter, pelvis.

Multiple lacerations over superior surface of liver:-

Largest- 7 x 2 cms.

Smallest- 3 x 2 cms.

Small Laceration- 3 x 2 cms. In Gall Bladder (G.B.) Fossa.

Rest organs- Normal.

Hemostasis- Achieved using spongesterom (Abjel)

Drain in Morrison pouch

Layers- closed.”

Santosh was deteriorated within a period of 24 hours after the operation. The said patient developed Acute Respiratory Distress Syndrome (A.R.D.S.) for which the patient was given ventilatory support on 15.2.2005 at 11.00 a.m. That despite taking precautions, the said patient could not respond and died on 16.2.2005 at 9.15 a.m. This witness has produced all the medical papers pertaining to the deceased Santosh which are at Exhibit 32 collectively. PW-10 has further deposed that injuries were on vital part of the body, which was grievous one and was sufficient to cause death.

It is to noted here that in the medico legal papers produced by PW-10 Dr. Abhijeet Padhye, in the Column of History given by the patient, it has been mentioned that the patient has given history that he was allegedly hit by sticks on the abdomen at about 2.30 a.m. on 14.2.2005. It has further been mentioned that the patient was conscious and drowsy. The said history was given by the patient Santosh (deceased) himself. At page 119 of the paper-book, the history narrated by the Doctor on 14.2.2005 which was given by the deceased (self) as history of assault by unknown object at 2.30 a.m. The O.P.D. Papers which are at Exhibit 32 also discloses that the patient has given alleged history of assault by stick.

9 PW-11 PSI Shri Shri Bhagaram Choudhari who conducted initial investigation in the present crime in his testimony has deposed that he received information about the assault on Santosh Jayle as he was assaulted by unknown person. He has further deposed that he made enquiry with co-workers, but nobody gave details about assault on injured person.

10 The learned Counsel for the appellant submitted that the appellant did not assault the deceased Santosh with an intention to cause such an injury which would cause his death instantaneously. She submitted that though the prosecution witnesses nos.1,2,5 and 6 have stated about oral dying declaration given by deceased Santosh, wherein the history of assault by the appellant with hammer has been described, the deceased Santosh when admitted in the hospital has himself given the history in OPD papers and to PW-10 Dr. Padhye, as assault by stick on his abdomen. She further submitted that in the present case, the appellant has alleged to have given only one single blow on the body of deceased Santosh at about 1.00 a.m. on 14.2.2005, the deceased was thereafter alive and was taken to the hospital at about 10.00 a.m. on 14.2.2005. That deceased Santosh was operated by PW-10 and thereafter on 16.2.2005 Santosh (deceased) expired

in the hospital. The learned Counsel for the appellant further submitted that, if the appellant really wanted to kill the deceased, he would have given blow with alleged hammer on the head of the deceased and thus it shows that the appellant did not have any intention to kill the deceased. In support of her contention, she relied upon the two decisions of the Supreme Court namely **(1) *Giani Ram Vs. State of Haryana and Others reported in AIR 1995 SC 2452* and (2) *Gokul Parashram Patil Vs. State of Maharashtra reported in AIR 1981 SC 1441***. She therefore contended that the present case would not fall within the purview of Section 302 of the Indian Penal Code, but would at the most fall under Section 304-II of the Indian Penal Code.

11 After taking into consideration the entire evidence available on record, we are in agreement with the submissions advanced by the learned Counsel for the appellant. It is to be noted here that there is material discrepancy about the weapon which was used by the appellant in the present crime. The history given by deceased Santosh himself to the doctor when he was admitted to the hospital, discloses that he was assaulted by stick on his abdomen. PW Nos.1,2,5 and 6 are stating that the deceased Santosh told them in the intervening night that, he was assaulted by the appellant with hammer on his abdomen.

12 Thus, the present case is of a single blow on the stomach of the deceased. Therefore, the question is whether the particular injury which was found to be sufficient in ordinary course of nature to cause death, in the present case was the injury intended by the appellant ? The answer to the said question is no. Solitary blow as even stated by the deceased to the doctor given by the appellant on his abdomen. The said injury caused to the deceased even though as per evidence of PW-10 Dr. Padhye was sufficient in ordinary course of nature to cause death, in our opinion the same could not be said to have been intended, to cause the death of Santosh by the appellant and therefore the appellant could not be held guilty for an offence punishable under Section 302 of the Indian Penal Code and on the other hand according to us be guilty of a lesser offence falling under Section 304-II of the Indian Penal Code.

13 In view of the above, the conviction and sentence of the appellant under Section 302 of the Indian Penal Code is set aside and instead, the appellant is convicted under Section 304-II of the Indian Penal Code. The appellant to undergo R.I. for 10 years and to pay fine of Rs.2000/-, in default of payment of fine to suffer further R.I. for two months. The appellant is entitled for set off as per the provisions of Section

428 of Cr. P.C.

14 The Appeal is partly allowed in the aforesaid terms.

(A.S. GADKARI,J.)

(ACTING CHIEF JUSTICE)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment.**