

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

Criminal Appeal No. 1264 of 2011

District : Nashik

Vicky @ Gautam Kisan Sore,
Age : 19 years,
Occupation : Student,
R/o. Flower Line, P.65,
Room No.4, Artillery Centre,
Nashik Road,
District Nashik
(At present lodged at Nashik
Road Central Prison, Nashik)

.. Appellant
(Original accused
no.01)

versus

The State of Maharashtra
(vide its C.R. No.511 of 2009,
registered at Nashik Road
Police Station, Nashik)

.. Respondent.

.....

*Mr. Nitin Pradhan, Senior Advocate, instructed by
Ms. S.D. Khot & Mr. Rohan Samant, Advocates, for
the appellant.*

*Mr. Arfan Sait, Addl. Public Prosecutor, for
the respondent - State.*

.....

With

Criminal Appeal No. 1364 of 2011

District : Nashik

Kalu @ Kailas Nandlal Kanojiya,
Age : 19 years,

Occupation : - ,
R/o. Divyakranti Apartment,
Flat No.1, Lonkar Malla,
Jai Bhavani Road,
Nashik Road, Nashik
(At present lodged at Nashik
Road Central Prison, Nashik)

.. Appellant
(Original accused
no.02)

versus

The State of Maharashtra
(vide its C.R. No.511 of 2009,
registered at Nashik Road
Police Station, Nashik)

.. Respondent.

.....

*Mr. Nitin Pradhan, Senior Advocate, instructed by
Ms. S.D. Khot & Mr. Rohan Samant, Advocates, for
the appellant.*

*Mr. Arfan Sait, Addl. Public Prosecutor, for
the respondent - State.*

.....

With

Criminal Appeal No. 1404 of 2011

District : Nashik

Babu @ Rohit Sohan @ Rajesh
Kanojiya,
Age : 18 years,
Occupation : Nil,
R/o. Fernandeswadi Zopadpatti,
Near Sunita Kirana General Stores,
Jai Bhavani Road, Nashik Road,
Nashik.
(At present lodged at Nashik
Road Central Prison, Nashik)

.. Appellant
(Original accused
no.03)

versus

The State of Maharashtra
(vide its C.R. No.511 of 2009,
registered at Nashik Road
Police Station, Nashik)

.. Respondent.

.....

*Mr. M.U. Rajput, Advocate, instructed by
Mr. Uday P. Warunjikar, Advocate, for the appellant.*

*Mr. Arfan Sait, Addl. Public Prosecutor, for
the respondent - State.*

.....

**CORAM : Smt. V.K. TAHILRAMANI &
A.M. BADAR, JJ.**

DATE : 15TH DECEMBER 2016

JUDGMENT (Per A.M. Badar, J.) :

01. By these three appeals, appellants / original accused nos.01 to 03 are challenging the judgment and order dated 07th September 2011, passed by the learned Addl. Sessions Judge, Nashik, in Sessions Case No. 202 of 2009, thereby convicting appellants / accused of offences punishable under Sections 302, 201, 506, read with Section 34 of the Indian Penal Code. For the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, appellants / accused are sentenced to suffer imprisonment for life and to pay fine of Rs. 1,000/-, in default of payment of fine, to suffer rigorous imprisonment for one year by each of them. For the

offence punishable under Section 201 read with Section 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 500/-, in default of payment of fine, to suffer further rigorous imprisonment for six months by each of them. For the offence punishable under Section 506 read with Section 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 500/-, in default of payment of fine, to suffer further rigorous imprisonment for six months by each of them. The learned Addl. Sessions Judge had further directed that substantive sentences shall run concurrently. Appellants / accused were however acquitted of the offence punishable under Section 120B of the Indian Penal Code.

02. Background facts, in nutshell, are thus :-

(a) All appellants / accused and Amit Manichand Kharaliya (since deceased) were friends. They along with other friends used to play cricket at 'Kusti Ground'. They had purchased a cricket bat by contributing money. The incident in question took place on 06.08.2009. On that day, after playing cricket, deceased Amit Kharaliya came back to his house at about 05.30 p.m. After taking meals, he

again went out of the house by telling his mother that he would come back within 10 minutes. However, Amit did not return home even till next day i.e. 07.08.2009. His family members searched him but could not get any clue. Therefore, his father PW 04 Manichand Kharaliya lodged missing report [Exhibit 33] with Nashik Road Police Station on that day. Ultimately at about 09.30 a.m. of 10.08.2009, PW 4 Manichand Kharaliya came to know about emission of foul smell of dead body from behind Dhobighat Godown in Flower Lane. He accompanied by his brother PW 05 Sandeep Kharaliya then went to that place along with other persons. Behind Dhobighat Godown of Artillery Centre, they found dead body of Amit in decomposed condition. Police were summoned to the spot. Panchanama of the spot was conducted. Inquest notes were taken and post mortem examination on dead body of Amit Kharaliya was conducted on the spot itself.

(b) On 10.08.2009 itself, PW 04 Manichand Kharaliya requested PW 03 Tarun Bed - friend of deceased Amit Kharaliya to tell him as to what happened to Amit. According to the prosecution case, then PW 03 Tarun Bed told PW 04 Manichand Kharaliya that he heard all appellants / accused chitchatting about commission of murder of Amit by them and necessity of shifting dead body of Amit to some other place as PW 2 Sajan @ Atul Kharat had seen them committing the murder as well as

location of dead body of Amit. On getting this information, PW 4 Manichand Kharaliya immediately went to Police Station, Nashik Road and lodged report [Exhibit 34] on 10.08.2009 itself. This has resulted in registration of Crime No. 511/2009 for offences punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code against appellants / accused at Nashik Road Police Station.

(c) According to the prosecution case, then PW 02 Sajan @ Atul Kharat also disclosed the fact of commission of murder of Amit Kharaliya by appellants / accused to PW 04 Manichand Kharaliya on 10.08.2009 itself but after lodging the FIR.

(d) Routine investigation followed. Statements of witnesses came to be recorded. On the basis of confessional statement of appellant / accused no.03 Babu @ Rohit Kanojiya, a piece of broken cricket bat stained with blood came to be seized. Seized articles were sent for chemical analysis and on completion of investigation, charge-sheet for offences punishable under Sections 302, 201, 506, read with Section 34 of the IPC and under Section 120B of the IPC came to be filed against appellants / accused, in the Court of Judicial Magistrate (F.C.), Nashik Road, Nashik.

03. On committal of the case, after due trial thereof, appellants / accused came to be convicted and sentenced as indicated in opening para of this judgment. The learned Addl. Sessions Judge, Nashik, was pleased to held that guilt of appellants / accused for offences alleged against them is established by the prosecution through evidence of eye witnesses PW 02 Sajan @ Atul Kharat. It is held that evidence of PW 02 Sajan @ Atul Kharat is corroborated by evidence of PW 01 Nilesh @ Johny Sore and PW 03 Tarun Bed. By the impugned judgment, it is held by the learned trial Court that PW 01 Nilesh @ Johny Sore had seen all appellants / accused lastly in company of deceased Amit Kharaliya and PW 03 Tarun Bed had heard their extra judicial confession in respect of murder of Amit Kharaliya. Evidence of all these three witnesses was found to be trustworthy and gaining corroboration from evidence of PW 04 Manichand Kharaliya and discovery of a piece of bat at the instance of appellant / accused no.03 Babu @ Rohit Kanojiya. Same was therefore accepted by the learned trial Court for recording the guilt.

04. We have heard Shri Nitin Pradhan, the learned Senior Advocate as well as Shri M.U. Rajput, the learned Advocate appearing for appellants / accused. Shri Nitin Pradhan, the learned Senior Advocate has vehemently argued that evidence of PW 02

Sajan @ Atul Kharat is wholly unsatisfactory. This witness has falsely deposed against appellants / accused and his evidence is totally unreliable. According to the learned Senior Advocate, evidence of PW 02 Sajan @ Atul Kharat shows that it was appellant / accused no.01 Vicky @ Gautam Sore who rescued deceased Amit Kharaliya during the initial assault. Evidence of PW 02 Sajan @ Rajesh Kharat is improbable as he claimed to have seen all appellants / accused hitting deceased Amit Kharaliya by means of a cricket bat turn by turn. Entire evidence of prosecution is not disclosing the reason for this assault. No motive is coming on record through the evidence of prosecution. The learned Senior Advocate further argued that evidence of PW 02 Sajan @ Atul Kharat as well as other evidence adduced by the prosecution does not show that there was any premeditation on part of appellants / accused nor any intention is demonstrated by the prosecution. The learned Senior Advocate criticized evidence of PW 02 Sajan @ Atul Kharat as well as that of PW 03 Tarun Bed by contending that conduct of both these witnesses is totally unnatural. The learned Senior Advocate further argued that the dead body was in highly decomposed state and, therefore, there is no proper identification of the dead body. In the alternative, the learned Senior Advocate argued that by no stretch

of imagination it can be said that the offence is falling under the penal provisions of Section 302 of the IPC. At the most, it can be said that there was a sudden fight without premeditation and, therefore, the offence even if is assumed to be proved, cannot travel beyond Part II of Section 304 of the IPC. The learned Senior Advocate in support of his contention that the offence if held to be proved would fall under Part-II of Section 304 of the IPC, has placed reliance on following judgments of the Hon'ble Apex Court :-

- (a) ***Pappu Vs. State of Madhya Pradesh***
[(2006) 7 Supreme Court Cases 391].
- (b) ***Sellappan Vs. State of Tamilnadu***
[(2007) 15 Supreme Court Cases 327].
- (c) ***Gurmukh Singh Vs. State of Haryana***
[(2009) 15 Supreme Court Cases 635].
- (d) ***Gudu Ram Vs. State of Himachal Pradesh***
[(2013) 11 Supreme Court Cases 546].

05. Shri Rajput, the learned Advocate appearing for appellant / accused no.03 Babu @ Rohit Kanojiya argued that the role of this appellant is smaller than the role attributed to other accused persons. The learned Advcate further argued that PW 02 Sajan @ Atul Khart has not disclosed the incident immediately but rather his belated disclosure to PW 04 Manichand Kharaliya shows that he is a got up witness. It is

further argued that as no blood was found on clothes of appellants / accused though the deceased was bleeding, case of the prosecution becomes suspect.

06. The learned Addl. Public Prosecutor supported the impugned judgment and order by contending that the learned trial Court has properly appreciated evidence of prosecution witnesses and rightly convicted appellants / accused by the impugned judgment and order.

07. We have carefully considered the rival submissions and also perused record and proceedings including deposition of witnesses. We are unable to uphold contentions of the learned Senior Advocate appearing for appellants / accused in Criminal Appeal Nos. 1264 of 2011 and 1364 of 2011 as well as that of the learned Advocate appearing for the appellant / accused in Criminal Appeal No. 1404 of 2011 for the reasons stated in following paras.

08. It is tried to submit that there is no proper identification of the dead body and therefore the same cannot be said to be that of Amit Kharaliya. The defence has not disputed material documents such as spot Panchanama and sketch map of the spot [Exhibits 21 and 22], inquest Panchanama [Exhibit 23], advance certificate of cause of death [Exhibit

24], certificate of cause of death [Exhibit 25], post mortem examination report [Exhibit 26]. The dead body as seen from spot Panchanama [Exhibit 21] was found lying behind Dhobighat Godown of Artillery Centre at Nashik Road in the thicket. It was found in decomposed state as seen from the inquest Panchanama. However, there is clear and cogent evidence of identification of dead body by PW 04 Manichand Kharaliya and PW 05 Sandeep Kharaliya who are none else but father and uncle of deceased Amit Kharaliya. It is seen from their evidence as well as contemporaneous undisputed documents as such inquest Panchanama and spot Panchanama that clothes on dead body were intact. There is nothing in cross-examination of PW 04 Manichand Kharaliya and PW 05 Sandeep Kharaliya to infer that the dead body found behind Dhobighat Godown on 10.08.2009 was not that of deceased Amit Kharaliya or that the face was unrecognizable.

09. The post mortem examination on dead body was conducted on the spot itself by summoning PW 06 Dr. Arun Satdive, Medical Officer with Civil Hospital, Nashik. Evidence of this autopsy Surgeon shows that dead body of Amit Kharaliya was having following *ante mortem* injuries on it :-

- (1) Depressed fracture of left temporo parietal bone extending from left

upper orbital margin to left mastoid process.

- (2) Fracture of left mandible at angle.
- (3) Fracture of right tibia fibula at juncture of upper 2/3rd and lower 1/3rd.
- (4) Contusion over right thigh over 1/3rd region to upper half region of right leg.
- (5) Fracture of right tibia fibula lower end. These above injuries were ante mortem.
- (6) Crush injury to scalp extending to left orbit to occipital region.
- (7) Depressed fracture of left temporo parietal bone extending from left upper orbital margin to left mastoid process.

Evidence of PW 06 Dr. Arun Satdive corroborated by contemporaneous record i.e. report of post mortem examination at Exhibit 26 and certificates of cause of death at Exhibits 24 and 25 goes to show that Amit Kharaliya died because of head injury with haemorrhagic shock. Even from cross-examination of this witness, it has come on record that types of fracture seen on dead body of Amit Kharaliya were not possible because of a fall while running. Cross examination of this autopsy Surgeon further shows that the death might be prior to 03 or 04 days. It

is elicited from cross examination of the autopsy Surgeon that injuries found on dead body of Amit Kharaliya are possible by any hard and blunt object. With this evidence, the inescapable conclusion which follows is that of homicidal death of Amit Kharaliya.

10. Now, let us examine whether appellants / accused are responsible for the homicidal death of Amit Kharaliya and whether they are guilty of the offence punishable under Section 302 read with Section 34 of the IPC along with other proved offences. PW 02 Sajjan @ Atul Kharat is the sole eye witness to the alleged incident of murder of Amit Kharaliya by appellants / accused. PW 01 Nilesh @ Johnny Sore claims to have seen PW 02 Sajjan @ Atul Kharat chasing appellant / accused no.02 Kalu @ Kailash Kanojiya by holding a stone in his hand from the playground where they used to play cricket and then Amit Kharaliya (deceased) and rest of accused namely appellant / accused no.01 Vicky @ Gautam Sore and appellant / accused no.03 Babu @ Rohit Kanojiya following them. Congruous evidence of PW 01 Nilesh @ Johnny Sore and PW 02 Sajjan @ Atul Kharat shows that on 06.08.2009 at about 06.15 p.m., PW 01 Nilesh @ Johnny Sore and his friends were playing a game named 'Galdhai' by putting money on the stake. At that time, PW 02 Sajjan @ Atul Kharat and appellants / accused also came there. Evidence of PW 01 Nilesh @

Johny Sore and PW 02 Sajan @ Atul Kharat shows that then Sajan @ Atul Kharat declared that he will win the game in a single attempt. This became the cause of a tiff between PW 02 Sajan @ Atul Kharat and appellant / accused no.02 Kalu @ Kailash Kanojiya. Then appellant / accused no.02 Kalu @ Kailash Kanojiya snatched the cricket bat from hands of PW 02 Sajan @ Atul Kharat and gave a light blow thereof on head of PW 02 Sajan @ Atul Kharat. PW 01 Nilesh @ Johny Sore and PW 02 Sajan @ Atul Kharat in unison further deposed that thereafter PW 02 Sajan @ Atul Kharat picked up a stone and started chasing appellant / accused no.02 Kalu @ Kailash Kanojiya who by that time started running towards the godown. Amit Kharaliya (deceased), appellant / accused no.01 Vicky @ Gautam Sore and appellant / accused no.03 Babu @ Rohit Kanojiya followed them. It is thus clear from this evidence that at about the time of the incident, all appellants / accused and PW 02 Sajan @ Atul Kharat as well as Amit Kharaliya (deceased) were together and they went towards the godown of Dhobighat.

11. What happened thereafter is coming on record from evidence of PW 02 Sajan @ Atul Kharat. It is in his evidence that they all including appellants / accused and deceased Amit Kharaliya then went near the passage of Dhobighat. At that place, appellant /

accused no.01 Vicky @ Gautam Sore asked all of them as to who want to smoke a cigarette. Deceased Amit Kharaliya expressed his willingness. At that time, as per version of PW 02 Sajan @ Atul Kharat, appellant / accused no.03 Babu @ Rohit Kanojiya caught hold of neck of Amit Kharaliya but appellant / accused no.01 Vicky @ Gautam Sore rescued Amit Kharaliya. Then appellant / accused no.03 Babu @ Rohit Kanojiya again caught Amit Kharaliya by his collar and thereafter appellant / accused no.02 Kalu @ Kailash Kanojiya hit Amit Kharaliya by means of a cricket bat and that blow landed on back side of head of Amit Kharaliya. Because of that stroke, Amit Kharaliya had suffered a fall. PW 02 Sajan @ Atul Kharat further testified that all appellants then started assaulting Amit Kharaliya one by one by that cricket bat and blood started oozing from nose and mouth of Amit Kharaliya. The cricket bat was then broken into two pieces. As per version of PW 02 Sajan @ Atul Kharat, appellant / accused no.01 Vicky @ Gautam Sore then checked whether Amit Kharaliya is dead or alive by putting his hand at nose of Amit Kharaliya and pronounced that Amit Kharaliya is dead. Thereafter dead body of Amit Kharaliya was thrown in the bushes. As per version of Sajan @ Atul Kharat, he was threatened by all appellants that if the incident is disclosed to anybody, they will kill him

like Amit Kharaliya. PW 02 Sajan @ Atul Kharat has stated that appellant / accused no.01 Vicky @ Gautam Sore put a knife on his neck and threatened that if the incident is disclosed to anybody, then he will also get the same treatment like that of Amit Kharaliya. Therefore, he did not disclose the incident to anybody. PW 02 Sajan @ Atul Kharat further deposed that PW 03 Tarun Bed came to know about this incident and after PW 03 Tarun Bed disclosed the incident to father of deceased Amit Kharaliya, he also disclosed the incident to father of deceased Amit Kharaliya. This witness identified the piece of broken cricket bat [Article "A"]. In cross examination, this witness has admitted that he had not disclosed the incident to anybody till 10.08.2009. His cross examination shows that appellants / accused did not meet him till dead body of Amit Kharaliya was traced out. He admitted that he gave information about the incident to Police on 10.08.2009.

12. Evidence of this witness is criticized because of his belated disclosure of the same by putting a question mark on his conduct. Post-event conduct of a witness cannot be put in a straight jacket formula. It varies from a person to person. In the case in hand, PW 02 Sajan @ Atul Kharat is a teen aged boy. His evidence shows that deceased Amit

Kharaliya so also appellants / accused were his friends and they used to play cricket together at *Kusti Ground* of Nashik Road along with other friends. His evidence that all appellants / accused threatened him with dire consequences if the incident is disclosed, is not shattered in the cross examination. No doubt, this witness has attempted to put embellishment by further stating that appellant / accused no.01 Vicky @ Gautam Sore put a knife on his neck for threatening him. This part of his testimony has come by way of omission but rest of his version is consistent and trustworthy. PW 02 Sajan @ Atul Kharat is not describing the reason for assaulting Amit Kharaliya by appellants but that may not be within knowledge of PW 02 Sajan @ Atul Kharat. If ultimate eye witness account of PW 02 Sajan @ Atul Kharat is found to be trustworthy, then absence of motive would not damage the prosecution case. We do not find anything to disbelieve the version of PW 02 Sajan @ Atul Kharat as the same is gaining corroboration from other evidence adduced by the prosecution which we propose to discuss in subsequent paras.

13. During course of investigation, statement of PW 02 Sajan @ Atul Kharat came to be recorded under Section 164 of the Code of Criminal Procedure, 1973, by the Judicial Magistrate (F.C.), Nashik, and the

same is at Exhibit 30. Evidence of PW 02 Sajan @ Atul Kharat is consistent with his previous statement recorded by the learned Judicial Magistrate (F.C.), Nashik.

14. PW 03 Tarun Bed is friend of all appellants / accused. His evidence shows that on 07.08.2009 i.e. on the next day of the incident, appellant / accused no.01 Vicky @ Gautam Sore and appellant / accused no.02 Kalu @ Kailash Kanojiya came to his house at about 08.00 p.m. and stayed there till 11.00 p.m. Then appellant / accused no.02 Kalu @ Kailash Kanojiya left whereas appellant / accused no.01 Vicky @ Gautam Sore slept at his house. On next date i.e. on 08.08.2009, while appellant / accused no.01 Vicky @ Gautam Sore was still in his house, appellant / accused no.02 Kalu @ Kailash Kanojiya and appellant / accused no.03 Babu @ Rohit Kanojiya also came to his house. While PW 03 Tarun Bed was cleaning his house. PW 03 Tarun Bed further deposed that when he was cleaning his house, he heard all appellants talking to each other about murder of Amit Kharaliya committed by them. PW 03 Tarun Bed deposed that all appellants were chitchatting that as PW 02 Sajan @ Atul Kharat had seen them committing murder of Amit Kharaliya, they need to shift dead body of Amit Kharaliya to some other place. This witness further stated that on 10.08.2009, funeral of

Amit Kharaliya was conducted and thereafter PW 04 Manichand Kharaliya made enquiry from him and at that time he disclosed the talks of appellants / accused heard by him to PW 04 Manichand Kharaliya. As per version of PW 03 Tarun Bed, earlier he did not disclose what was heard by him, as appellants / accused had threatened to kill him on making such disclosure. From cross examination of this witness, it is brought on record that till finding of dead body of Amit Kharaliya, he had not disclosed the incident to anybody and he had not gone to the place where dead body of Amit Kharaliya was found. He visited that place at the time of post mortem examination but did not disclose what he heard to Police at that point of time. At this juncture, it needs to be stated that PW 03 Tarun Bed was barely 18 years old boy at the time incident in question. His evidence shows that he was threatened by appellants / accused and under threats of appellants / accused, he kept mum till father of the deceased made enquiries from him. We do not see anything unnatural in this conduct of PW 03 Tarun Bed in not disclosing the incident of extra judicial confession of appellants heard by him to anybody. In our opinion, the learned trial Court rightly accepted evidence of this witness. Evidence of PW 03 Tarun Bed as such corroborates the version of PW 02 Sajan @ Atul Kharat

which shows that appellants / accused had murdered Amit Kharaliya in evening hours of 06.08.2009.

15. Evidence of PW 02 Sajan @ Atul Kharat is gaining corroboration from evidence of PW 01 Nilesh @ Johny Sore as this witness had seen all appellants as well as PW 02 Sajan @ Atul Kharat and deceased Amit Kharaliya running towards Dhobighat Godown at the time of the incident. Immediately thereafter Amit Kharaliya went missing and subsequently his dead body was found in decomposed condition nearby that place.

16. PW 04 Manichand Kharaliya - father of deceased Amit has duly proved previous statement of PW 02 Sajan @ Atul Kharat. Evidence of PW 04 Manichand Kharaliya shows that his son Amit went missing from 06.08.2009 leading to filing of missing report at Exhibit 33 by him on 07.08.2009 and then lodging of the FIR on 10.08.2009 after disclosure by PW 03 Tarun Bed regarding murder of his son Amit by appellants. As per version of PW 04 Manichand Kharaliya, when he was returning from the Police Station after lodging the report, PW 02 Sajan @ Atul Kharat met him and disclosed him that appellants / accused had assaulted Amit by means of a cricket bat causing his death. This former statement of PW 02 Sajan @ Atul Kharat made to PW 04 Manichand Kharaliya and proved by PW 04 Manichand Kharaliya corroborates the testimony of PW 02 Sajan @ Atul Kharat.

17. Evidence of PW 06 Dr. Arun Satdive - autopsy Surgeon shows nature and extent injuries found on dead body of Amit Kharaliya. There was depressed fracture of left temporo parietal bone, fracture of left mandible, crush injury to scalp, fracture of tibia fibula apart from contusions on dead body of Amit Kharaliya. These injuries found on dead body of Amit Kharaliya corroborates version of PW 02 Sajan @ Atul Kharat and do show that there were successive blows by hard and blunt object on deceased Amit Kharaliya. Evidence of PW 02 Sajan @ Atul Kharat to the extent that all appellants / accused gave successive blows of cricket bat on deceased Amit Kharaliya as such is sufficiently corroborated by this evidence.

18. We also found that evidence of sole eye witness PW 02 Sajan @ Atul Kharat is corroborated by discovery of weapon of offence at the instance of appellant / accused no.03 Babu @ Rohit Kanojiya. Evidence of PW 07 Nitin Bed and that of PW 10 Ashok Bhagat - Investigation Officer shows that after arrest, appellant / accused no.03 Babu @ Rohit Kanojiya made a disclosure statement in presence of two Pancha witnesses on 14.08.2009 and a piece of broken cricket bat stained with blood came to be recovered at his instance. The disclosure statement and recovery Panchanamas at Exhibits 44 and 45

respectively proves recovery of blood stained part of a cricket bat at the instance of appellant / accused no.03 Babu @ Rohit Kanojiya. The same was identified as a weapon of offence by PW 02 Sajan @ Atul Kharat. This recovered piece of cricket bat was subjected to the chemical analysis and the Chemical Analyser's report at Exhibit 63 shows that the same was stained with human blood. Thus, forensic evidence collected by the prosecution also supports version of PW 02 Sajan @ Atul Kharat regarding murderous assault by appellants / accused on deceased Amit Kharaliya in the evening hours of 06.08.2009. The cumulative effect of all this evidence adduced by the prosecution unerringly points out that all appellants / accused had caused homicidal death of Amit Kharaliya on 06.08.2009 by giving successive blows of cricket bat to him.

19. Now, let us consider whether the offence would fall under Section 302 of the IPC or under Section 304 thereof. In the matter of **Pappu Vs. State of M.P.** (*supra*), the Hon'ble Apex Court was pleased to examine the difference between Exceptions 1 and 4 to Section 300 of the Indian Penal Code. Para 13 of the said judgment is relevant and reads thus :-

“ The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of

prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a

sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

20. In the matter of **Sellappan Vs. State of Tamilnadu** (*supra*), after considering several judgments including that in the matter of **Virsa Singh Vs. State of Punjab** (AIR 1958 SC 465), the Hon'ble Apex Court has explained the distinction between murder and culpable homicide not amounting to murder. It is held therein that this distinction is fine but real and if

overlooked, may result in miscarriage of justice. The Hon'ble Apex Court has clarified that the word 'likely' in Clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words 'bodily injury ... sufficient in the ordinary course of nature to death' means that death will be the 'most probable' result of the injury having regard to the ordinary course of nature.

21. In the matter of **Gurmukh Singh Vs. State of Haryana** (*supra*), the Hon'ble Apex Court has stated the factors which needs to be considered for imposing sentence on accused persons; whereas in the matter of **Gudu Ram Vs. State of Himachal Pradesh** (*supra*), it is held that knowledge of the consequences of actions can certainly be attributed to delve into the mind of the attacker to decode his intentions.

22. In the case in hand, evidence of PW 02 Sajan @ Atul Kharat goes to show that all appellants / accused have dealt with several successive blows of cricket bat on deceased Amit Kharaliya. Part of the body prominently chosen for giving blows was head of the deceased. Evidence on record does not show that the incident took place in a sudden quarrel. Rather there is no iota of evidence on record to show that there was a sudden fight between all appellants /

accused on one side and deceased Amit Kharaliya on the other side. On the contrary, evidence on record suggest that chase of appellant / accused no.02 Kalu @ Kailash Kanojiya by PW 02 Sajan @ Atul Kharat ended at the back side of the godown and there all appellants / accused assaulted Amit Kharaliya by means of a cricket bat without there being any dispute or fight between appellants / accused on one side and deceased Amit Kharaliya on the other side. There is no evidence of any provocation by the deceased to appellants / accused. Evidence of autopsy Surgeon PW 06 Dr. Arun Satdive shows extensive damage caused by appellants / accused by assaulting deceased Amit Kharaliya by means of a cricket bat. There was crush injury to scalp apart from depressed fracture of left temporo parietal bone extending from left upper orbital margin to left mastoid process. Fracture injuries were also found to tibia and fibula of the dead body of Amit Kharaliya. Evidence of PW 06 Dr. Arun Satdive shows nature of injuries suffered by the deceased. Successive blows by appellants / accused to the deceased reflects their intention and such blows cannot be said to be unintentional or for causing some other injury to deceased Amit Kharaliya. Evidence of PW 02 Sajan @ Atul Kharat shows that after giving repeated blows to Amit Kharaliya after

his fall by all appellants / accused, appellant / accused no.01 Vicky @ Gautam Sore had put his hand on nose of Amit Kharaliya to check whether he is alive or dead and then appellant / accused no.01 Vicky @ Gautam Sore pronounced Amit Kharaliya to be dead. All this goes to show that the case is not falling under any of the Exceptions to Section 300 of the IPC which defines offence of murder. Appellants / accused have certainly caused death of Amit Kharaliya by assaulting him with an intention and knowledge of causing his death. As such we hold that the learned trial Court has rightly convicted appellants / accused for the offence punishable under Section 302 read with Section 34 of the IPC and that the case is not falling under either Part-I or Part-II of Section 304 of the IPC.

23. Evidence of prosecution shows that after ascertaining whether Amit Kharaliya is dead or alive and after finding him to be dead, all appellants / accused threw his dead body in a grass and covered that dead body by putting grass on it. They had threatened PW 02 Sajan @ Atul Kharat as well as PW 03 Tarun Bed not to disclose the incident and their talks to anybody. As such, appellants / accused were rightly convicted for offences punishable under Section 201 read with Section 34 of the IPC and

Section 506 read with Section 34 of the IPC by the learned trial Court. We see no reason to interfere with the impugned judgment and order of conviction.

24. Appeals as such are devoid of merit and same are, therefore, dismissed.

(A.M. BADAR)
JUDGE

(Smt. V.K. TAHILRAMANI)
JUDGE

.....