

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.2 of 2015**

Birkwdao @ Vikram
@ Vicky Narzary,
S/o. Jateen Narzary,
Aged 27 years, male,
Indian National,
Native of village-Banugaon,
Po-Puthimari, District-
Kokrajhar, Assam.
Presently undergoing sentence
at Central Jail Aguada .. Appellant
(Original Accused)

V/s.

State
(Through P.P., High Court
of Bombay at Panaji-Goa) .. Respondent

Mr. Rajneesh Naik, Advocate for the Appellant.

Mr. Mahesh Amonkar, Additional Public Prosecutor for the Respondent.

**CORAM: C. V. BHADANG &
PRITHVIRAJ K. CHAVAN, JJ.**

DATE : 30th June, 2017.

J U D G M E N T : (C. V. Bhadang, J.)

By this appeal, the appellant/ accused is challenging the judgment and order dated 27/11/2014, passed by the learned Sessions Judge, Panaji in Sessions Case No.18/2011. By the

impugned judgment, the learned Sessions Judge has convicted the appellant for the offence punishable under Section 302 of Indian Penal Code (IPC, for short) and sentenced him to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default, to undergo Simple Imprisonment for six months.

2. The brief facts, necessary for the disposal of the appeal, may be stated thus :

The appellant / accused and the deceased Mr. Tupeshwar Das @ Tapas were friends. The deceased was working as a Watchman and was staying at Orda. According to the prosecution, deceased had developed a love relationship with a girl by name Fwisali, daughter of Shankar Brahma from Assam. It appears that after some time, there was a break up between the deceased and Fwisali and in the meantime, the appellant used to have telephonic conversation with Fwisali. It is the material prosecution case that on or about the date of incident, the appellant had brought Fwisali to Goa. At the instance of the deceased, Fwisali was taken to the room of the deceased at Orda. It further appears from the prosecution case that on the day of incident i.e. 25/03/2011, the deceased and the appellant had gone

to Market, in which they purchased some eatables and liquor. The deceased also called one of his friends by name Ronjoy to join them in the evening. It has come on record that in the evening on 25/03/2011, the deceased, the appellant and Ronjoy had drinks at the room of the deceased, after which, they had food, which was cooked by Fwisali. At around midnight, Fwisali went to bed on a cot in the room while the appellant and the deceased were sleeping on the mat on the floor. Ronjoy had already left the room. It is the material case that, in the night (intervening between 25th and 26th March, 2011), the deceased tried to molest/ rape Fwisali. The appellant tried to prevent the deceased from doing so, in which the appellant was brushed aside by the deceased.

3. As per the defence raised by the appellant, the appellant was apprehending that the deceased was in an attempt to commit rape on Fwisali. Further, according to the appellant, a scuffle ensued between him and the deceased, in which the deceased sustained injuries, to which he subsequently succumbed.

4. Before the learned Sessions Judge, the prosecution examined as many as 10 witnesses and produced the contemporary record of the investigation. The appellant neither

entered into witness box nor examined any defence witness.

5. The learned Sessions Judge came to the conclusion that Tapas died a homicidal death and it was the appellant, who with the intention of causing death of Tapas, had assaulted him by means of a chopper/ coita. In this view of the matter, the learned Sessions Judge convicted the appellant for the offence punishable under Section 302 of IPC and the appellant was sentenced accordingly.

6. The perusal of the record shows that the prosecution had mainly relied upon the confessional statement of the appellant, recorded by the Special Judicial Magistrate under Section 164 of Cr.P.C. and discovery of the weapon of the offence at the instance of the appellant.

7. We have heard Shri Rajneesh Naik, the learned Counsel for the appellant and Shri Amonkar, the learned Additional Public Prosecutor for the respondent/ State. With the assistance of the learned Counsel for the parties, we have gone through the evidence and the impugned judgment.

8. The learned Counsel for the appellant has restricted the challenge only for the purpose of modification of the conviction to one under Section 304 Part II of IPC. In other words, it is submitted that having regard to the circumstances in which the incident had occurred, the offence cannot amount to murder under Section 300 of IPC. It is submitted that at the highest, the offence can be of Culpable Homicide, not amounting to murder, in which at the most, the appellant can be attributed with knowledge that the act was likely to cause death of the deceased. The learned Counsel has taken us through the confessional statement and the evidence of PW2, in order to demonstrate the circumstances, in which the incident had occurred. From the evidence of PW2, the learned Counsel has made an attempt to demonstrate, the condition, in which the dead body was found, which is indicative of an attempt to commit rape on Fwisali.

9. It is submitted by the learned Counsel for the appellant that the offence under Section 304 Part II is punishable with imprisonment, which may extend to 10 years or fine or with both. It is submitted that the appellant is in custody from 27/03/2011 and has thus, suffered more than six years of imprisonment. It is submitted that the appellant is young and in the absence of any

criminal antecedents, he may be released on the period already undergone.

10. Shri Amonkar, the learned Additional Public Prosecutor, in all fairness, states that the confessional statement would indeed show that there was no premeditation on the part of the appellant and it may be on account of grave and sudden provocation on account of the act of the deceased, that the incident might have occurred. The learned Additional Public Prosecutor thus, submitted that this Court may pass appropriate order.

11. We have given anxious consideration to the rival circumstances and the submissions made. As noticed earlier, the main plank, on which the prosecution is relying, is the confessional statement of the appellant, which reads thus :

"I am residing at above address since 15th March, 2011. Before this I used to stay near Volley ball Ground, Orda Candolim. I used to stay alone in the room. While staying there I developed friendship with one Mr. Tupeshwar Das @ Tapas who was staying at under renovation bungalow and was deployed as a watchman of the bungalow. I used to

visit Tapas on number of occasions at his place at the bungalow and used to have food with him daily, during which he had informed me that he is in love with one girl from Assam and he was speaking with girl on phone. Tapas disclosed her name as Fwisali Brahma sometimes Tapas used to ask me to talk with Fwisali and after some days Tapas gave me Fwisali's phone number. I then started talking with Fwisali developed a friendship with her. By then he had left her, three months prior to the incident.

After few months I left the room next to Tapas bungalow, I got a job in Panjim and used to stay in Mercedes- Staff accommodation. I booked a room in Aradi Candolim, so I could get Fwisali to stay with me. In the month of March while I was talking with Fwisali she told me that she wanted to come to Goa. Accordingly I went to Assam and met Fwisali and brought her to Goa and took her to my room at Aradi Candolim. Further Tapas insisted me to bring her to his place as he wanted to meet her. Accordingly, I took Fwisali to Tapas's place in the afternoon about 12 noon. After meeting Tapas and after spending some time, Tapas told me that both of us will go to the market to buy vegetables and chicken. As such we left Fwisali at Tapas's place and went to the market and while purchasing Tapas gave a call to his friend from his mobile phone and told him to meet him in Candolim market. Here in Candolim market Tapas introduced me to his friend Ronjoy and further

told Ronjoy that I have brought his ex-girl friend from Assam and presently she is at his place in Orda and then forced Ronjoy to come to his place at Orda. Tapas then purchased two quarters of liquor and then we all three proceeded to Tapas's room at Orda. On the way Tapas also purchased some soft drinks.

After reaching at the room Tapas and Fwisali started cooking and after the food was prepared we all three had drinks. Tapas then told Fwisali to serve food for all of us. After having food at about 23.15 hrs, Ronjoy left to his room. We then sat for some time and were chatting with each other. Tapas put the mattress on the floor and told me that both of us shall sleep on the mattress and let Fwisali sleep on the bed. Accordingly, I and Tapas slept on the mattress and Fwisali slept on the bed. Tapas was under the influence of alcohol and behaving abnormally. After some time while Fwisali was sleeping Tapas tried to hug her to which she got up screaming for help. I told Tapas to control himself but he did not listen to me and further after sometime I saw that he was on top of her trying to rape her and she was screaming for help, so I assaulted Tapas with Koita on his neck and thereafter, I left the room along with Fwisali and came to my room at Aradi Candolim. When we left he was not dead and was alive. Fwisali told me that she was scared to stay here in Goa due to the present incident and to be left at her cousin

brother's house in Belgaum, Karnataka. Accordingly I thought it is wise to leave her with her relatives for safety. And we went to Belgaum. I left her in Belgaum and returned back to Goa. I came to know Tapas was dead once the police had arrested me. I never thought that Tapas might have died as I had hit him only to protect the girl and not to kill."

12. In the statement under Section 313 of Cr.P.C., in answer to the second last question, the appellant had given the following answer :

"The deceased tried to rape Fwisali. He caught my left hand and threw me aside when I protested then there was a scuffle between he and deceased when he got injured. No intention to kill the deceased who was my friend."

13. Thus, if we read the confessional statement along with the defence as set out in the statement under Section 313 of Cr.P.C., there is a reasonable probability of there being a scuffle between the appellant and the deceased. It has come on record that in the night intervening between 25th and 26th March, 2011, the appellant, deceased and Fwisali were staying in the room of the appellant in which Fwisali was said to be sleeping on the cot, while the appellant and the deceased were sleeping on a mat on

the floor. In the night, the deceased tried to molest Fwisali and in an attempt to prevent the deceased from doing so, that the incident had occurred.

14. It may be worthwhile to notice the evidence of PW2, Sachidanand Calangutkar, who is a Panch. The relevant part of the evidence in which the witness has described the condition of the dead body and the clothes, may be reproduced thus :

“Sea Green colour lungi which was on the body was stained with semen stains near the penis area. There was a brown colour underwear below the lungi. The lungi as well as the underwear was removed. The underwear was also stained with semen discharge. I say that there was an injury mark on the right calf which appeared to be a bite mark. The lungi and the underwear were placed in a polythene bag and the said bag was put in an envelope which was packed and sealed in our presence and it was marked as Exh.III. The said envelope was signed by us.”

15. We are thus satisfied that on the day of the incident, it was the deceased, who had made an attempt to molest/ rape Fwisali and the appellant in an attempt to prevent the deceased from doing so, had assaulted the deceased. The question is what offence the appellant can be found guilty of ?

16. Exception 1 to Section 300 of IPC would make it explicit that Culpable Homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person, who gave the provocation or causes death of any other person by mistake or accident. The aforesaid exception is subject to the following provisos :

“First - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly,- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence.”

The present case would not fall under any of the provisos appended to Exception 1 to Section 300.

17. In this regard, exception 4 to Section 300 can also be referred to. Under the said exception, Culpable Homicide is not murder, if it is committed without premeditation in a sudden fight

in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel and unusual manner. From the perusal of the evidence, we find that there was absolutely no premeditation or an intention, which can be attributed to the appellant to cause the death of the deceased. In all probability, the incident occurred in the wake of grave and sudden provocation, which was offered by the deceased by his attempt to molest/ rape Fwisali.

18. PW6 Dr. Siddharth Banaulikar had conducted Autopsy on the dead body of Tapas. P. M. report is at Exhibit 77. The evidence of PW6 and P.M. report disclose that there were six injuries found on the dead body of Tapas, out of which, injury no.4 is an old healing incised wound while injury no.5 is an abrasion. Injury no.6 appears to be multiple postmortem ante bite marks. Thus, We are left with injury nos. 1 to 3. It has come in the evidence of PW6, Dr. Siddharth that the cause of death was craniocerebral damage vide injury no.1, which was "necessarily fatal and fresh at the time of death". Thus, according to PW6, it is only injury No.1, which is described as "incised looking wound" with underlying depressed fracture of left temporal bone, which is found to be the injury, leading to the death of Tapas. We, thus,

find that the appellant had dealt with a single blow and that too in a heat of passion and without premeditation. Thus, in our considered view, the appellant can only be attributed with knowledge that the act is likely to cause death of Tapas. We do not find that the appellant can be attributed with the intention to cause death or the intention to cause such bodily injury as is likely to cause death. In such circumstances, in our considered view, the offence, which can be said to be proved against the appellant, would be one under Section 304 Part II of IPC and the conviction needs to be accordingly modified.

19. The next question is about the sentence. Indisputably, the appellant was aged about 27 years on the date of the incident. The deceased was in fact a friend of the appellant and the incident had occurred on the spur of moment without any premeditation and on account of grave and sudden provocation, which was offered by the act of the deceased. The appellant has served more than 6 years of the imprisonment. The offence punishable under Section 304 Part II is punishable with imprisonment, which may extend to 10 years OR fine or both. In our considered view, looking to the overall circumstances and the age of the appellant and in the absence of any other aggravating circumstance about

the existence of criminal antecedents, we find that the sentence already suffered by the appellant, would be adequate sentence.

20. In the result, the following order is passed :

- (i) The appeal is partly allowed.
- (ii) The impugned judgment of conviction is hereby modified. The appellant is found guilty of offence punishable under Section 304 Part II of IPC.
- (iii) The appellant is sentenced to imprisonment for the period already undergone.
- (iv) The appellant shall be set at liberty forthwith, if not required in connection with any other offence.
- (v) The order regarding muddemal property, as passed by the learned Sessions Judge, is hereby maintained.

PRITHVIRAJ K. CHAVAN, J. **C. V. BHADANG, J.**
SMA