

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

CRIMINAL APPEAL NO.18 OF 2012

Afsarali @ Bintu Ashiqali Qureshi ... Appellant

versus

The State of Maharashtra ... Respondent

**WITH
CRIMINAL APPEAL NO.302 OF 2012**

Mohd. Ashpaq Mohd. Ibrahim Siddique ... Appellant

versus

The State of Maharashtra ... Respondent

.....

- Mr.Murtuza Nazmi i/b. A.A. Siddiquie & Associates, for the Appellant in Appeal No.18/12.
- Dr.Yug Chaudhari, Advocate for the Appellant in Appeal No.302/12.
- Mr.Y.M. Nakhwa, APP for the State/Respondent.

**CORAM : A.A. SAYED &
SARANG V. KOTWAL, JJ.
RESERVED ON : 18th AUGUST, 2017
PRONOUNCED ON : 29th AUGUST, 2017**

JUDGMENT (PER : SARANG V. KOTWAL, J.) :

1. Both these appeals are arising out of same sessions case and the same judgment is impugned before this Court. Therefore both these appeals are decided and disposed off by this common judgment.
2. The Appellant in Criminal Appeal No.302/12 was the original accused No.1 and the Appellant in Criminal Appeal No.18/12 was the original accused No.2 in Sessions Case No.409/10 on the file of Ad-Hoc Additional Sessions Judge, Court No.2, Sewree, Mumbai. By the impugned judgment and order dated 28/11/2011 the learned trial Judge was pleased to convict both the Appellants u/s 302 r/w 34 of the Indian Penal Code and both of them were sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000/- each and in default to suffer rigorous imprisonment for six months.
3. Both the Appellants faced the charge u/s 302 r/w 34 of IPC for commission of murder of one Mushtaq Samsher Ali at

about 09.15 p.m. on 10/03/2010 at Pan stall near Kamla Raman Nagar Zopadpatti, Opp. Mohamadia Masjid, Bainganwadi, Govandi, Mumbai.

4. The FIR in the present case was lodged by one Mofidunisha Shamsher Ali Ansari, who was the mother of the deceased. According to her, she was residing at Bainganwadi with her five sons. The deceased Mushtaq was working in a Paan shop located near their residence. According to her, on 31/12/2009, both these Appellants had come to the Paan Shop and Mushtaq demanded the outstanding dues from them and that time there was a quarrel between the Appellants and Mushtaq. After that on 10/03/2010 at about 09.15 p.m. when she was standing near a mosque, her son Mushtaq was present in the Paan shop and at that time both the Appellants came there. Accused No.2 Afsarali @ Bintu Ashiqali Qureshi was having a cricket stump in his hand and the accused No.1 Mohd. Ashpaq Mohd. Ibrahim Siddique was carrying a stick. The accused No.2 assaulted Mushtaq on back of his neck due to

which Mushtaq fell down and thereafter accused No.1 Ashpaq assaulted him with stick/Bamboo. Thereafter both the accused ran away from the spot. Mushtaq was removed to Shatabdi Hospital and he was declared dead there. The police recorded her statement and treated it as the FIR. The FIR was lodged at Shivaji Nagar Police Station vide C.R.No.79/10 at 11.05 p.m. Thereafter investigation was carried out. Statements of the witnesses were recorded. Different panchanamas were carried out. Accused No.1 Ashpaq was arrested on 11/03/200 and accused No.2 Afsarali was arrested on 12/03/2010. According to the prosecution case, on 13/03/2010 at the instance of accused No.1, wooden Bamboo was recovered and seized, and at the instance of accused No.2 cricket stump was recovered and seized. The articles were sent for chemical analysis. Investigation was completed and the charg-sheet was filed and thereafter the case was committed to the Court of Sessions.

5. We have heard learned counsel Dr. Yug Chaudhari for the Appellant in Appeal No.302/12, learned counsel Mr.Murtuza

Nazmi for the Appellant in Appeal No.18/12 and the learned APP for the State.

6. During the trial, the prosecution examined nine witnesses. P.W.1 Smt. Mofidunisha Shamsheer Ali Ansari was the mother of the deceased. P.W.2 Mohd. Mansur Ali Mustakali Ansari was the elder son of the deceased and P.W.6 Mohd. Siraj Mohd. Jalil Shaikh was an independent witness. These three witnesses were examined as the eyewitnesses to the incident. Besides them P.W.3 Mohd. Ilyas Shaikh was examined as the Pancha for inquest panchanama. P.W.4 Shaikh Sharif Mohd. Hanif was a Pancha for recovery of cricket stump at the instance of accused No.2 Afsarali. P.W.5 Ashfaq Ahamad Zakiullah Khan was the Pancha for the spot panchanama. P.W.7 Amir Nasir Khan was the Pancha for the recovery of stick at the instance of accused No.1 Ashfaq. P.W.8 Dr. Baban Shavkha Tadvani was the Doctor who had conducted the post-mortem and P.W.9 Subhash Bhimrao Kshirsagar was examined as the investigating officer.

7. P.W.1 Smt. Mofidunisha deposed about the incident as narrated hereinabove. Her evidence was criticized on behalf of the Appellants on the ground that she was an interested witness being the mother of the deceased and she was not consistent with her version in the FIR. She had stated in her cross-examination that she was standing near Multania Masjid, whereas in the FIR she has mentioned that she was standing near Mohamadia Masjid. We find that this aspect is hardly of any importance. Firstly because the said contradiction is not proved by the defence and she was not confronted with the same. Secondly, the map shows the presence of mosques and other evidence shows that both these mosques were located in the same area and it was possible to observe the incident clearly from both the mosques. In this case since P.W.1 has deposed in her cross-examination that she was standing near Multania Masjid, even from that place it was possible to see the incident. Her evidence is further criticized on the ground that the incident dated 31/12/2009 was a minor incident and looking at the gap between the two incidents, the alleged motive was not strong

enough for commission of murder. While there is some force in this submission; when there is direct evidence of eyewitness, motive pales in comparison. Her evidence further shows that she was knowing both the accused and she had immediately named them in the FIR which was lodged soon after the incident. It was submitted that since it was a crowded locality and crowd gathered after the incident, it was not possible for her to see the incident. According to her, she was standing near the Multania Masjid, which was about 150 ft away and from there it was not difficult to see the incident clearly. Therefore we do not find any force in this submission that she could not have seen the incident. We find that her evidence is reliable. She is a natural witness and her cross-examination has not yielded anything in favour of the Appellants/Accused.

8. The prosecution thereafter relied on the evidence of P.W.2 Mohd. Mansur Ali Mustakali Ansari, who is the elder son of the deceased. This witness was a minor at the time of incident. During his cross-examination, the Court found that he

was able to understand the Court proceeding and therefore he was administered oath. He has also deposed that the incident took place near their Paan Shop. He has stated that the accused No.1 assaulted on the backside of the head of the deceased and after he fell down, both the Appellant assaulted the deceased on the back. He has further deposed that at that point his grandmother i.e. P.W.1 raised shouts and people gathered there and the Appellants/Accused ran away. The Appellants have tried to capitalize on two statements made by him in his deposition. This witness has stated that the incident occurred at about 11.15 p.m. to 11.30 p.m. The record and the evidence shows that the incident had taken place at 09.30 p.m. and it could not have taken place at 11.15 p.m. We find that his evidence was recorded on 28/02/2011 i.e. after nearly a year of incident. This witness was a minor at that time and therefore this discrepancy in time will not go to such an extent so as to lead us to discard his evidence in totality. The Appellants have also pointed out that according to him P.W.1 was standing in front of Mohamadia Masjid, thereby indicating that P.W.1's version that

she was standing near Multania Masjid, was contrary. Here again, this discrepancy is hardly of any importance as P.W.1's own version would carry more weightage. So far as the main incident is concerned, there is no discrepancy between P.W.2 and P.W.1. On behalf of Appellants it was further submitted that P.W.1 had stated that adjoining tailoring shop was open when the incident took place, whereas P.W.2 has stated that the said tailoring shop was closed through out the day. Here again, this version does not go to the root of the matter and the tailoring shop is not significant in the context of the present case. Moreover, the defence has not clearly brought on record as to whether both these witnesses were referring to the same tailoring shop and as to whether there was only one tailoring shop in the vicinity.

9. The prosecution has further examined P.W.6 Mohd. Siraj Mohd. Jalil Shaikh as an eyewitness. According to him when he was chitchatting with his friend Mohd. Akil Shaikh, he saw crowd having gathered near the Paan Shop. He further saw

that Mushtaq was lying down by the side of Paan Shop and he further saw that the accused No.2 Afsarali was beating Mushtaq on his backside of neck with the help of cricket stump. This witness has deposed that the accused No.1 was armed with Bamboo and was standing there and thereafter both the accused left the place. He further deposed that the mother and son of Mushtaq came there and Mushtaq was removed to the hospital. On behalf of the Appellants it is submitted that his evidence runs contrary to the evidence of P.W.1 and P.W.2, as he has stated that the blow on the back of the neck was given by the accused No.2 'after' he had fallen down. Mr.Chaudhari, the learned counsel for the Appellant/Accused No.1 Ashpaq has submitted that this witness has not attributed any role of assault to the accused No.1 Ashpaq and that this witness was not declared hostile. Therefore according to Mr.Chaudhari, the prosecution was bound by his evidence and when there were two contrary versions, the benefit should be given to the accused and in particular to the accused No.1. In this behalf he has relied on the judgment of Honourable Supreme Court in the case of *Mukhtar*

Ahmed Ansari vs. State (N.C.T. of Delhi), reported in 2005 Cri.L.J. 2569 and in the case of *Sukhram vs. State of Madhya Pradesh, reported in AIR 1989 Supreme Court 772*. According to him, both these judgments lay down the ratio that when the witness does not support the prosecution and yet when he is not declared hostile, then the accused can rely on that evidence and his version supports the defence.

We are unable to accept this submission. It is true that this witness i.e. P.W.6 has not attributed any role to the accused No.1. However, this witness had not seen the entire incident. He has narrated the incident after the crowd had gathered and he describes it from the point when the deceased had already fallen on the ground. His statement was recorded after two days. He has stated that after the deceased had fallen down, the accused No.2 gave a blow on the backside of the neck.

10. P.W.6 does not appear to be a wholly reliable witness except to the fact that both the accused were carrying weapons,

one of them was assaulting deceased and both of them left together. Testing his evidence against the evidence of other witnesses P.W.1 and P.W.2 we are inclined to rely on the evidence of P.W.1 and P.W.2. Therefore even on ignoring the evidence given by P.W.6 we find it safe to rely on the evidence of P.W.1 and P.W.2 to reach to the conclusion that the incident of assault on the deceased had taken place near the Paan Shop at 09.30 p.m. and that the accused No.1 was carrying the Bamboo and accused No.2 was carrying stump and both of them assaulted the deceased as described by P.W.1.

11. The prosecution has relied on the evidence of recovery in the form of P.W.4 Shaikh Sharif Mohd. Hanif and P.W.7 Amir Nasir Khan. A stump was recovered at the instance of the accused No.2 and a stick was recovered at the instance of accused No.1. We do not find any infirmity in the evidence of recovery. Though there are C.A. reports on record in this case, presence or absence of blood on the weapons is not of much importance as it is not the prosecution case that any bleeding

injury was caused to the deceased.

12. The learned counsel for the both the Appellants next submitted that even assuming the incident had taken place in the manner in which the P.W.1 and P.W.2 have described, still the offence would not fall within the definition of 'murder' as provided u/s 300 of the IPC. The definition of murder under the the Indian Penal Code is thus;

“Murder -

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

Secondly – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly – If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly – If the person committing the act knows that it is so imminently dangerous that it must, in all probability,

cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

Thereafter the list of exceptions is given.

13. Mr.Chaudhary submitted that the act of Appellants would not fall in either of the four categories mentioned therein. He submitted that there was no intention on the part of the Appellants to cause death or to cause such bodily injury which the Appellants knew to be likely to cause death or the injury which was sufficient in the ordinary course of nature to cause death or that the act of the Appellants was so imminently dangerous that it must, in all probability, cause death or such bodily injury as was likely to cause death. In support of this submission both the counsels relied on the evidence of P.W.8 Dr.Baban Shavkha Tadvi, who had conducted post-mortem. According to him following injuries were found;

- (1) Contused abrasion (C.A.) over the posterior hair

line left side of neck 3 cm below left ear lobul size 5 cm x 1 cm x reddish black in colour.

- (2) Imprint contusion of lathi over the left side infra scapular region vertically oblique size 14 cm x 2 cm, 8 cm left to mid line.
- (3) Imprint contusion of lathi over the infrascapular region horizontally precess intrasection injury No.2. It is present 18 cm below shoulder line starting from posterior axillary line, size 11 x 2 cm.
- (4) Imprint contusion of lathi over the back 2 cm left to midline 21 cm below the shoulder line size 5 cm x 2 cm.
- (5) Imprint contusion of lathi over the back lumbar region, 10 cm above posterior superior iliac spine horizontally placed 3 cm left to midline, size 6 cm x 3 cm.
- (6) Imprint contusion of lathi over the back lumbar region, 6 cm above injury No.5, 2 cm right to midline, size 8 cm x 2 cm.
- (7) Contused abrasion over the right side back, 3 cm right to midline x 5 cm above posterior superior iliac spine, size 2 cm, 1 cm, reddish in colour.
- (8) Contused abrasion over the left upper lateral quadrant of gluteal area, reddish bluish in colour, horizontally placed, size 8 cm x 5 cm.
- (9) Contused abrasion over the right hand dorsum, size

2 cm x 2 cm.

On internal examination following injuries were found;

- (1) Injuries under the scalp – Hematoma noted over right parieto occipital area, reddish in colour.
- (2) Brain – Subarachnoid haemorrhage noted over both cerebral hemisphere.
- (3) Walls of the thorax – Left side ribs No.4,5,6,7,8 and 9 fractured posterior laterally, with contusion and haemorrhage surrounding respective intercostal muscle.
- (4) Left side pleura ruptured 300 ml of blood with clots in thoracic cavity.
- (5) Right lungs intact pale.
- (6) Left lungs shows contusion over the lower lobe and lower part of the apical lobe.

14. In paragraph No.3 of his deposition the Doctor has opined that the injury Nos.1 to 4 described in internal injuries were dangerous to cause death of the patient and the final cause of death was “due to head injury with polytrauma in a case of assault (unnatural).”

15. The learned counsel further submitted that the Appellants were armed with stump and a Bamboo stick and were not carrying weapons like knife or sword. They had not assaulted on any vital part. There was no blow on the head though it was true that one blow was given near neck. All the blows were given on the back and not on any vital parts of the body. This shows that there was no intention to cause death.

16. While it is true that 6 ribs were fractured, these internal injuries were attributed to only four external injuries which means that four blows on the back had caused fracture of 6 ribs. There was Subarachnoid haemorrhage over both cerebral hemisphere. However, there was no cogent evidence to connect this sub arachnoid haemorrhage to a particular external injury. At least Doctor has not given any clear opinion on that. The closest injury to the head was the first external injury that was contused abrasion over the posterior hair line left side of neck. Similarly, there was heamotoma noticed over right parito occipital area under the scalp. Here again, there does not appear

to be any occurrence of external injury because the first external injury was on the left side. More particularly, the Doctor has not opined that any of the injuries was sufficient in the ordinary course of nature to cause death.

17. In this connection there is one more aspect which needs to be considered. The C.A. report shows that the deceased blood contained 80 miligram of Ethyl Alcohol per 100 mililitre. That means he was intoxicated at the time of incident. In this connection Mr.Chaudhari has relied on the discussion in Modi's Medical Jurisprudence and Toxicology, 22nd Edition, page No.413, wherein it is mentioned that;

“A massive rapidly fatal traumatic basal subarachnoid hemorrhage may occur from a blow to the side of the upper neck due to a rupture of the vertebral artery at the base of the skull or its passage through the first cervical vertebra. Subarachnoid hemorrhage is aggravated by alcoholic intoxication.”

18. Therefore Mr.Chaudhari submitted that by no stretch of imagination any intention can be attributed to either of the

Appellants to infer that they intended to cause this particular injury, which would cause subarachnoid hemorrhage.

19. In this connection both these Appellants have relied on few judgments.

The first judgment in this connection is of Division Bench of this Court in the case of ***Dayaram @ Jayaram Parshuram vs. State of Maharashtra, reported in 1996 (2) Mh.L.J. 1056***, wherein it is held in paragraph No.10 that;

“10. We regret that we are unable to accede to the submission canvassed by Mr. Borulkar for the four reasons mentioned hereinafter. We firstly find that unlike the case before the Apex Court wherein the medical evidence was to the effect that the injury was sufficient in the ordinary course of nature to cause death there is no such evidence in the case before us. Mr. Borulkar urged that even in the absence of medical evidence to such an effect, there was nothing which could preclude the Court from inferring that the injuries were sufficient to cause death in the ordinary course of nature. There can be no quarrel

with the proposition that in an exceptional case, in the interest of justice, the Court can reach its own conclusion on the issue of sufficiency of injuries to cause death, in the ordinary course of nature. But this should be done rarely and within permissible limits, for two reasons :

(i) It is well settled that the burden is on the prosecution to lead evidence in respect of the offence for which the charge has been framed against the accused. Since the charge in this case was framed against the appellant under section 302, Indian Penal Code it was ordinarily the duty of the prosecution to have asked the Autopsy Surgeon Dr. Bahubali Nagaonkar (P.W.9) in his examination-in-chief whether the injuries were sufficient in the ordinary course of nature to cause his death. That obligation the prosecution has failed to discharge;

(ii) Secondly it is the medical expert (autopsy surgeon) who is qualified on account of his expert knowledge to know whether the injuries are sufficient to cause death in the ordinary course of nature in a given case. Unless the injuries per se appear to be fatal, as was in the decision reported in 1995 (1) SCC

326 (supra), it would be hazardous for the Court to assume the task of an expert for that may result in injustice. In the instant case a perusal of the injuries does not per se lead to the inference that they were sufficient in the ordinary course of nature to cause death. After all the only internal damage found was lacerations in the right lung. Their extent has not been indicated in the post-mortem report. No other vital organ was damaged. Hence we cannot conclude with certainty as to whether the injuries were sufficient to cause death in the ordinary course of nature. If there is a doubt about the sufficiency of injuries to cause death in the ordinary course of nature the benefit of that doubt has got to go to the appellant.

It would be appropriate to point out that the decision of the Apex Court reported in AIR 1957 SC 474, Brijbhukan & others v. State of U.P. & others, wherein their Lordships have laid down the principle that even in the absence of medical evidence to the effect that the injuries were sufficient to cause death in the ordinary course of nature nothing precludes the Court from reaching that conclusion if injuries so warrant, only applies to those cases where injuries are

per se capable of causing death in the ordinary course of nature.”

20. Mr.Chaudhari further relied on the judgment in the case of ***Sita Ram and Others vs. State of U.P. reported in AIR 1993 Supreme Court 350***, and has invited our attention to paragraph No.4 of the said judgment, wherein it was observed that when the Doctor did not say that the injuries cumulatively were sufficient in the ordinary course of nature to cause death and that when there is no injury on any of the vital organs, then it is not safe to convict the Appellants u/s 302 r/w 149 of the IPC.

21. The learned counsel Mr.Murtuza Nazmi has relied on the judgment of the Hon'ble Supreme Court in the case of ***Rudrappa Ramappa Jainpur and Others vs. State of Karnataka, reported in (2004) 7 Supreme Court Cases 422***. In paragraph No.21 of the said judgment the Hon'ble Supreme Court has observed that when the Doctor has opined that death was due to cumulatively effect of the injuries suffered by the

deceased and when the Doctor had not stated that any one of the injuries was sufficient in the ordinary course to cause death, then the accused can be held guilty for lesser offence and not for the offence u/s 302 of IPC.

22. We have given careful consideration to these submissions and we agree with these submissions made on behalf of the Appellants. We find that the Doctor i.e. Medical Officer has not clearly opined that any particular injury was sufficient in the ordinary course of nature to cause death coupled with the fact that we cannot record a finding that both the Appellants assaulted with the intention to cause such bodily injury which was so imminently dangerous that in all probabilities death would be caused. The act of the Appellants does not fall within the definition of section 300 of IPC. We find that though the Appellants were carrying stump and Bamboo stick there was one blow on the neck and all other blows were given on the back. There was no attempt to give more blows on the head or on any of the vital parts, particularly when the

Appellants were in a position to assault in any manner they wished, because the deceased was unarmed and alone. At the same time, we must observe that one blow was in fact was given on the back of the neck. Therefore knowledge to that extent can be attributed to both the Appellants. Since both the Appellants had come together armed with weapons and had left together and had assaulted together the deceased after he had fallen down, we are satisfied that they shared a common intention. We are of the opinion that both of them committed the said act with the knowledge that it was likely to cause death, but without there being intention to cause death or to cause such bodily injury as was likely to cause death. Therefore their act falls within the second part of section 304 of IPC. The Appellant in Appeal No.302/12 was arrested on 11/03/2010 and the Appellant in Appeal No.18/12 was arrested on 12/03/2010. Since then both of them are in custody. Therefore we are inclined to reduce their sentence. Though they were entitled for set of u/s 428 of Cr.P.C. the learned trial Judge had not specifically mentioned in his operative part that they were

entitled for such set off. Hence we are reducing the sentence of the Appellants to 8 years of rigorous imprisonment. They are entitled to the set off u/s 428 of Cr.P.C. Hence the following order:

ORDER

1. Both the Appeals are partly allowed.
2. The conviction of the Appellants in both the Appeals u/s 302 r/w 34 of the Indian Penal Code and the sentence directing them to suffer imprisonment for life are set aside.
3. The Appellants in both the Appeals are convicted for the offence punishable u/s 304 part II r/w 34 of the Indian Penal Code and the Appellants are sentenced to suffer rigorous imprisonment for eight years and to pay a fine of Rs.10,000/- each and in default of payment of fine to suffer rigorous imprisonment for three months each.
4. The Appellants in both the Appeals are entitled for the set off for the period for which they were in custody during the investigation and trial u/s 428 of the Code of Criminal Procedure, 1973.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)