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

CRIMINAL APPEAL NO.301 OF 2012

Simon Augustin Saldhana
Age 42 years. Occu.Nil
R/o. Kavya Kunj Apartment,
Govindnagar, Nashik.
(At present confined at Nashik Road
Central Prison, Nashik.)

...Appellant
(Orig. Accused)

Versus

The State of Maharashtra,
At instance of Ambad Police Station, Nashik.

...Respondent
(Orig. complainant)

***WITH
CRIMINAL APPEAL NO.819 OF 2011***

The State of Maharashtra,

...Appellant
(Orig. Complainant)

Versus

Simon Augustin Saldhana
Age 40 years. Occu. Hawker,
R/o. Kavya Kunj Apartment,
Govind Nagar, Nashik.
District – Nashik.

...Respondent
(Orig. Accused)

WITH
CRIMINAL APPEAL NO. 1461 OF 2011

The State of Maharashtra,

...Appellant
(Orig. Complainant)

Versus

Simon Augustin Saldhana
Age 40 years. Occu. Hawker,
R/o. Kavya Kunj Apartment,
Govind Nagar, Nashik.
District – Nashik.

...Respondent
(Orig. Accused)

Mr.Hitesh P. Shah, for the Appellant in Criminal Appeal No.301 of 2012
and for the Respondent in Criminal Appeal Nos.819 and 1461 of 2011.

Mr. H. J. Dedia, A.P.P for the Appellant-State in Criminal Appeal Nos.819
and 1461 of 2011 and for the Respondent in Criminal Appeal No.301 of
2012.

**CORAM : SMT.V.K.TAHILRAMANI &
REVATI MOHITE DERE, JJ.**

DATE : 9th JANUARY, 2017

ORAL JUDGMENT (Per Smt. V. K. Tahilramani, J.) :

1. The appellant, original accused – Simon Augustin Saldhana has preferred Criminal Appeal No.301 of 2012, against the Judgment and Order dated 6th December, 2010, passed by the learned 3rd Additional Sessions Judge, Nashik in Sessions Case No.81 of 2006. By the said Judgment and Order, the learned Sessions Judge, convicted the appellant -

Simon Saldhana for the offence punishable under Section 304 Part-II of the Indian Penal Code (for short 'I.P.C') and sentenced him to suffer rigorous imprisonment for 7 years and fine of Rs.1,000/-, in default to suffer simple imprisonment for 2 months. The State has preferred Criminal Appeal No.1461 of 2011 for enhancement of the sentence imposed on accused – Simon Saldhana. Originally the accused – Simon Saldhana was charged for the offence under Section 302 of the I.P.C. However, he was acquitted under Section 302 of the I.P.C and instead convicted under Section 304 Part – II of the I.P.C. Hence, the State preferred Criminal Appeal No.819 of 2011 against the acquittal of accused – Simon Saldhana of the offence under Section 302 of the I.P.C. As all the appeals are directed against the very same Judgment and Order, we are dealing with all the appeals together. For the sake of convenience in all the appeals Simon Augustin Saldhana will be referred to as 'accused'.

2. The prosecution case briefly stated, is as under:-

The deceased – Deepak Kisanrao Sonawane had 3 brothers i.e. PW.1-Rajendra Kisanrao Sonawane, PW.10-Prashant Kisanrao Sonawane and Sachin Kisanrao Sonawane. They were residing in Nashik. The

accused was also residing in Nashik. The deceased – Deepak was doing the business of supply of electricity by inverter. He was doing the said business at Tibetan Market, Chaupati, Nashik. The deceased - Deepak was supplying electricity to the stalls run by various people at Tibetan Market. He was supplying electricity to about 40 stalls. For supplying electricity he was taking an amount of Rs.10/- every day from each stall owner. The amount used to be collected by Deepak and his brother – Prashant. If there was no regular business the stall owners did not pay the amount on time. The accused – Simon was having a Masala Dosa stall at Tibetan Market. On 26th March, 2006, Deepak had gone to the Tibetan Market for collecting the rent. Deepak went to the accused – Simon to ask him for money. Accused - Simon did not give him money and a quarrel took place between the deceased and the accused. Simon then told Deepak that if he wants money he should come to the house of Simon at Govind Nagar for taking the money. Accordingly, Deepak went to the house of Simon at Govind Nagar on his motorcycle. A quarrel took place between Simon and Deepak on account of giving and taking money. Simon threatened Deepak. Deepak informed this fact to his brother PW.1-Rajendra on his cell phone. Thereafter, PW.1-Rajendra and his brother Prashant went to Govind Nagar

on motorcycle. They reached the spot at about 11.00 to 11.30 p.m. On reaching the spot, they saw Deepak as well as accused – Simon lying on the spot in injured condition. Rajendra asked his brother Deepak what had happened, whereupon Deepak told him that he demanded money of electricity from Simon and then Simon attacked him with a knife. Meanwhile, the police vehicle arrived at the spot and took both the injured i.e. deceased - Deepak as well as accused - Simon to the Civil Hospital, Nashik where they were both admitted. Deepak expired a short while thereafter. PW.1-Rajendra lodged FIR, Exhibit – 42. Thereafter, investigation commenced. The dead body of Deepak was sent for postmortem. The cause of death was 'Haemorrhagic shock due to multiple stab injuries'. After completion of investigation, charge-sheet came to be filed.

3. Charge came to be framed against accused-Simon under Section 302 of the I.P.C. and under Section 135 of the Bombay Police Act. The accused pleaded not guilty to the said charge and claimed to be tried. His defence is that he was selling dosa. Deepak was providing light to the hawkers through inverters. Although, hawkers used to pay Rs.10/- daily to

Deepak for electricity, Deepak also used to take food from the hawkers free of charge and used to also collect Rs.50/- daily as hafta. If anybody refused to pay hafta or give food, Deepak terrorised the hawkers. On the day of the incident, Deepak came to the dosa cart of accused – Simon and demanded 2 dosas. Accused – Simon asked Deepak to wait. Then Deepak started abusing and threatening Simon. Deepak told Simon to close his business. Simon then closed his business and went home. A short while thereafter Deepak came to the house of Simon and started giving abuses to Simon. Deepak then picked up 2 ½ year son of Simon and he started going away. Simon followed Deepak from the first floor to the ground floor. When Simon tried to take back his son Wilson, Deepak stabbed Simon with a knife. At that time, Wilson the son of Simon was with Deepak. Then Simon inflicted knife blows upon Deepak to rescue his child from the custody of Deepak. Simon succeeded in rescuing his son from the custody of Deepak. Thereafter, both Deepak and Simon fell on the ground on account of the injuries sustained by them. Thus, the defence of accused – Simon appears to be that of private defence.

4. The learned Sessions Judge after going through the evidence

adduced in this case, acquitted Simon of the offence under Section 302 of the I.P.C and under Section 135 of the Bombay Police Act. However, the learned Sessions Judge convicted the accused – Simon under Section 304 Part-II of the I.P.C and sentenced him as stated in paragraph 1 above.

5. We have heard the learned counsel for the accused – Simon. We have also heard the learned APP in both the appeals preferred by the State. After carefully considering their submissions, Judgment and Order passed by the learned Sessions Judge and the evidence in this case, we are inclined to dismiss the appeals preferred by the State, for the reasons stated below. As far as appeal preferred by the accused against conviction and sentence is concerned, Mr.Shah stated that he is not challenging the conviction under Section 304 Part-II of I.P.C or the sentence imposed thereunder. Mr.Shah stated that accused – Simon has completed the period of imprisonment imposed under Section 304 Part-II of I.P.C and he has been released from prison. Hence, he does not wish to press Criminal Appeal No.301 of 2012 filed by the accused – Simon against his conviction and sentence. Thus, Criminal Appeal No.301 of 2012 is disposed of as not pressed.

6. We now proceed to consider the 2 appeals filed by the State i.e. Appeal against acquittal and Appeal for enhancement of sentence. To show that the accused – Simon assaulted Deepak with a knife which led to his death, the prosecution is relying on the evidence of PW.1- Rajendra Sonawane, PW.6 – ASI Ramesh Murlidhar Bidve, PW.7 – Police Constable Nivrutti Genu Salve, and PW.13- Arjun Pandurang Salunke, a watchman.

7. PW.1 – Rajendra has stated that he had 3 brothers i.e. deceased – Deepak Sonawane, PW.10-Prashant Kisanrao Sonawane and Sachin Kisanrao Sonawane. They were residing in Nashik. The accused was also residing in Nashik. The deceased – Deepak was doing the business of supply of electricity by inverter. He was doing the said business at Tibetan Market, Chaupati, Nashik. Deceased - Deepak was supplying electricity to the stalls run by various people at Tibetan Market. He was supplying electricity to about 40 stalls. For supplying electricity he was taking an amount of Rs.10/- every day from each stall owner. The amount used to be collected by Deepak and his brother – Prashant. If there was no regular business the stall owners did not pay the amount on time. The accused – Simon was having a Masala Dosa stall at Tibetan Market.

On 26th March, 2006, Deepak had gone to the Tibetan Market for collecting the rent for the electricity. Deepak went to the accused – Simon to ask him for rent. Accused - Simon did not give him money and a quarrel took place between the deceased and the accused. Simon then told Deepak that if he wants money he should come to the house of Simon at Govind Nagar for taking money. Accordingly, Deepak went to the house of Simon at Govind Nagar on his motorcycle. A quarrel took place between Simon and Deepak on account of giving and taking money. Simon threatened Deepak. Deepak informed this fact to Rajendra on his cell phone. Thereafter, Rajendra and his brother Prashant went to Govind Nagar on motorcycle. They reached the spot at about 11.00 to 11.30 p.m. On reaching the spot, they saw Deepak as well as accused – Simon lying on the spot in injured condition. Rajendra asked his brother Deepak what had happened, whereupon Deepak told him that he demanded money for electricity from Simon and then Simon attacked him with a knife. Thus, it is seen that deceased-Deepak made an oral dying declaration to PW.1 – Rajendra.

8. In addition to making an oral dying declaration to PW.1 – Rajendra, Deepak also made oral dying declaration to PW.6 – ASI Ramesh Murlidhar Bidve. PW.6 – ASI Ramesh Murlidhar Bidve has stated that on 26th March, 2006 at about 11.00 p.m. he received a call that a fight had taken place in Govind Nagar. Hence, he went to the said place. He saw Deepak lying in a pool of blood. He asked Deepak who assaulted him, Deepak replied that he was assaulted by Simon with a knife. At that time when Deepak made an oral dying declaration to PW.6 – ASI Ramesh Murlidhar Bidve, PW.7 – Police Constable Nivrutti Genu Salve, was also present. He also heard the oral dying declaration made by Deepak. The last oral dying declaration was made to PW.10 – Prashant Sonawane, who was the brother of Deepak. He has stated that when he went to the spot, at that time he saw Deepak as well as accused – Simon on the road. He asked his brother Deepak what had happened to him, whereupon Deepak told him that he was assaulted by accused – Simon with a knife. Within a short time police arrived at the spot and took Deepak and accused – Simon to the hospital.

9. Accused – Simon has taken the defence that the incident had

occurred while exercising his right of private defence. Accused-Simon examined himself as a witness. Simon in his evidence has stated that he was selling dosa. Deepak was providing light to the hawkers through inverters. Although, hawkers used to pay Rs.10/- daily to Deepak for electricity, Deepak also used to take food from the hawkers free of cost and used to also collect Rs.50/- daily as hafta. If anybody refused to pay hafta or to give free food, Deepak terrorized the hawker. On the day of the incident, Deepak came to the dosa cart of accused – Simon and demanded 2 dosas. Accused – Simon asked Deepak to wait. Then Deepak started abusing and threatening Simon. Deepak told Simon to close his business. Simon then closed his business and went home. A short while thereafter Deepak came to the house of Simon and started giving abuses to Simon. Deepak then picked up 2 ½ year son of Simon and he started going away. Simon followed Deepak from the first floor to the ground floor. Simon tried to take back his son Wilson from Deepak, at that time Deepak stabbed Simon with a knife. Wilson the son of Simon was with Deepak at that time. Then Simon inflicted blows with knife upon Deepak to rescue his child from the custody of Deepak. Simon succeeded in rescuing his son from the custody of Deepak. Thereafter, both Deepak and Simon fell on the

ground on account of the injuries sustained by them.

10. It is pertinent to note that cross examination of PW.16-Senior Police Inspector Rajaram Namdeo Pardeshi shows that C.R.No.116 of 2006 was registered by the accused – Simon against the deceased – Deepak. This FIR was under Section 307, 363, 504 and 511 of the I.P.C. r/w Section 135 of the Bombay Police Act. PW.16- P.I Pardeshi has admitted that accused – Simon lodged a report alleging therein that Deepak came to his house and assaulted him and attempted to kidnap his son and that Deepak also stabbed Simon with a knife. C.R.No.116 of 2006 was registered on the FIR lodged by the accused – Simon against the deceased – Deepak this supports the case of the accused – Simon that he was exercising the right of private defence.

11. The case of the accused – Simon that he was exercising the right of private defence is further supported by the fact that he had also received injuries in the incident and that he was found lying on the spot in injured condition by witnesses. PW.1 – Rajendra had stated in paragraph 3 of his evidence that when he reached the spot, he saw his brother – Deepak

and accused – Simon lying there in injured condition. PW.3 – Bharat Sampat Ghandat had stated that when police called him for preparing panchanama of the clothes of the accused – Simon, he saw that the accused had sustained injuries on his right hand palm as well as on his left hand. PW.10 – Prashant Kisanrao Sonawane is the brother of deceased – Deepak. He has stated that when he and his brother-Rajendra reached the spot, he saw his brother – Deepak and accused – Simon lying on the road. PW.12 – Head Constable Arjun Lahanu Barde has stated that at 11.15 p.m. PW.6 – ASI Ramesh Murlidhar Bidve informed him that a fight had taken place between 2 persons and he took the injured persons to the Civil Hospital. After some time PW.6 - ASI Bidve informed PW.12 – Head Constable Arjun Barde that he had admitted both the injured in the hospital. The evidence shows that the injuries sustained by the accused – Simon were not minor in nature but were serious enough to cause him to be admitted in the hospital. As far as injuries of Deepak are concerned, PW.14 – Dr.Bhikan Bhagu More, has stated that there was no damage to the vital organs of Deepak. PW.14 -Dr.More had admitted that the injuries sustained by Deepak are superficial injuries.

12. Thus, looking to the evidence on record, we find much merit in the defence raised by the accused – Simon that he assaulted Deepak while exercising his right to private defence. Moreover, in view of the evidence of PW.14-Dr.More coupled with the fact that the injuries of the accused were serious enough for him to be admitted in the hospital, we are of the opinion that the learned Sessions Judge has rightly acquitted the accused – Simon under Section 302 of the I.P.C. and convicted him under Section 304 Part-II of I.P.C.

13. Looking to the nature of the evidence, we are of the opinion that no case is made out for enhancement of the sentence of 7 years imposed on accused – Simon Saldhana for the offence under Section 304 Part – II of I.P.C.

14. Both the State Appeals are dismissed and the appeal filed by the accused – Simon Saldhana is disposed of as not pressed.

(REVATI MOHITE DERE, J.)

(V.K.TAHILRAMANI, J.)