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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.754 OF 2012.**

Digambar Vishwanath Pandhare	]	
age about 32 years,	]	<u>Appellant</u>
r/at Rajawadi, Bhim Nagar, Tansa Pipe Line	]	Original
Vidyavihar East	]	Accused
Mumbai - 400 077	]	No.1

V/s.

The State of Maharashtra	]	<u>Respondent</u>
at the instance of Tilak Nagar	]	Original
Police Station	]	Complainant

**ALONGWITH
CRIMINAL APPEAL NO.364 OF 2014.**

Kashinath @ Pintya Virendra Yadav	]	
age about 31 years,	]	<u>Appellant</u>
r/at Anand Nagar, RoomNo.85, Vikhroli	]	Original
Parkside,Ghatkopar,	]	Accused
Mumbai	]	No.2

V/s.

The State of Maharashtra	]	<u>Respondent</u>
at the instance of Tilak Nagar	]	Original
Police Station	]	Complainant.

Dr. Yug Mohit Chaudhary a/w Zeba Sikora for the Appellant. In Criminal Appeal No.364 of 2014.

Mr. Shreeram Shirsat, for the appellant in Criminal Appeal No.754 of 2012.

Mrs. G. P. Mulekar, APP in both appeals.

CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATE : 27TH SEPTEMBER, 2017.

ORAL JUDGMENT : [Per: Dr. Shalini Phansalkar-Joshi, J.]

1. These two separate appeals are preferred by original accused Nos. 1 and 2 being aggrieved by the judgment and order dated 7th March, 2012 in Sessions Case No.98 of 2010, of Additional Sessions Judge, Mumbai, at : Sewri, thereby convicting them for the offence punishable under Section 302 read with 34 of the Indian Penal and sentencing them to undergo imprisonment for life.

2. For the sake of convenience, appellants are referred to in these appeals also, by their original nomenclature as accused Nos. 1 & 2.

3. Brief facts of the appeals can be stated as follows :-

P.W.1 Dattaram Ovale, was working as Supervisor in the business of Vasant Rajbhor and Ramesh Rajbhor. They were

dealing in the business of preparing sheds of canvas. The required material for preparing the said sheds like, the bamboos, iron rods, thin rope etc. was stored in the godown behind Ram Temple, Rajawadi, Ghatkopar. Accused Nos. 1 and 2 were working in the said godown as watchmen alongwith original accused No.3 Ganesh, who is acquitted by the trial Court .P.W.3 Suresh, P.W.8 Rajesh and the deceased Bipin were working in the said godown as labourers under P.W.1 Dattaram.

4. The incident giving rise to the case took place on 23.10.2009. On that day at about 7.30 p.m. P.W.1 Dattaram brought the truck loaded with bamboos to the godown from Godrej Company. The labourers in the godown including P.W.3 Suresh and deceased Bipin unloaded the bamboos in the godown. Thereafter P.W.1 Dattaram gave Rs.350/- to the deceased and accused No.3 Ganesh for preparing meals and told them that he would be going to the office of his employer. At about 8.30 p.m., he returned to the godown and saw that there was some skirmish going on between the deceased and accused No.3. At that time acquitted accused No.3 Ganesh was under the influence of alcohol. P.W. 1 Dattaram told deceased Bipin and accused No.3 Ganesh to take meals instead of skirmishing. However, they were not in a

mood to listen. So he slapped Ganesh; deceased also gave a fist-blow to Ganesh, as a result of which Ganesh sustained bleeding injury to his nose. Accused No.1 came there and again there was skirmishing between the deceased and accused No.1. In that skirmishing, deceased assaulted accused No.1 by bamboo. P.W.1 Dattaram intervened and then told accused No.2 Pintya to take him to his house in the his rickshaw. P.W.1 Dattaram reached in his house at about 12.00' O clock in the night. Thereafter, at about 1.45 a.m., P.W.3 Suresh informed P.W.1 Dattaram on mobile phone that accused Nos. 1 and 2 were assaulting the deceased. Then alongwith his friend Nitin, on his motorcycle, P. W.1 Dattaram went to the house of his brother Mahadeo Ovale. P.W.3 Suresh, P.W.8 Rajesh and one Dinesh were at the house of his brother. There, they told him that accused Nos. 1 and 2 were assaulting the deceased. Hence alongwith them, he went to the godown and found the deceased lying there in injured condition.

5. On enquiry, the deceased told P.W. 1 Dattaram that accused Nos. 1 to 3 had assaulted him and they should not be left free. There, P.W. 1 Dattaram found accused No.2 sleeping on the heap of bamboos. P. W. 1 Dattaram, then took the deceased to Rajawadi Hospital in the auto rickshaw. They reached there at

about 3.45 a.m. While P.W.1 Dattaram was getting the case papers prepared, in order to admit the deceased in the hospital, deceased succumbed to the injuries. On the same night complaint (Exh.33) was lodged by P.W.3 Suresh and on his complaint C.R. No.221 of 2009 came to be registered at Tilaknagar Police Station.

6. P. W.4 PSI Kadam, then went to Rajawadi Hospital and conducted inquest panchnama (Exh.15) and sent the dead body for postmortem. P.W.2 Dr. Bagul, found as many as 35 injuries on the body of the deceased and opined that the cause of death was cumulative effect of all these injuries. P.W.4 PSI Kadam, then seized the blood stained clothes of the deceased which were produced by P.W.3 Suresh, under panchnama (Exh.14) and recorded his statement. P.W.3 Suresh also showed the spot of incident and accordingly scene of offence panchnama was made vide Exh.36. From the spot, two bamboo sticks with blood stains thereon were seized under the spot panchnama. Accused Nos. 1 & 2 were arrested on the same day. Their blood stained clothes were seized under panchnama (Exh.34).

7. Further investigation of the case was taken over by P.W. 5 PI Bade. He has sent seized articles to Chemical Analyzer.

The Chemical Analyzer's report is produced at Exh.39. Further to completion of investigation, chargesheet was filed in the Court against all the three accused.

8. On committal of the case to the Sessions Court, the trial Court framed charge against accused vide Exh.2. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed trial, raising the defence of denial and false implication.

9. In support of its case, prosecution examined in all 8 witnesses and on appreciation of their evidence, trial Court was pleased to convict the accused Nos. 1 & 2 for the offence punishable under Section 302 read with 34 of the Indian Penal Code and acquit accused No.3 Ganesh on benefit of doubt.

10. In these appeals we have heard learned counsels Mr. Yug Mohit Choudhary and Mr. Shreeram Shirsat, who have challenged the impugned judgment of the trial Court. We have also heard learned APP Mrs. G.P. Mulekar, who has supported the same.

11. According to learned counsels for both the appellants, the evidence on record, in the present case, is not consistent, reliable and cogent, proving the guilt of the accused beyond reasonable doubt. It is submitted that there are glaring discrepancies in the information of the incident noted in the E.P.R. and F.I.R. In the E.P.R., case of accidental injuries is made out; whereas the case now which is tried to be put up is that of homicidal death.

12. In the alternate, it is submitted that the prosecution case, even if held to be proved, it clearly falls under Exception 4 to section 300 of IPC, therefore the accused can at the most be liable for conviction under Part I or Part II of Section 304 of IPC.

13. Per contra, learned APP has pointed out the extent and nature of the injuries found on the dead body of the deceased to rule out the plea of the defence that the offence is falling under section 304 Part I or II of IPC.

14. In the light of these rival submissions, when we proceed to appreciate the evidence on record, we find that there is evidence of two eye witnesses namely P.W.3 Suresh and P.W./8

Rajesh, proving the incident of the assault on the deceased at the hands of accused Nos. 1 and 2. The evidence of P.W.1 Dattaram, clearly goes to prove that accused were very much present in the godown alongwith the deceased when he left the godown. Even the work of unloading truck, filled with bamboos which he has brought to the godown at 7.30 p.m. was also complete. He has witnessed some skirmishes between the deceased and the accused Nos.1 and 3, when he had come to godown again at 8.30 p.m. Thereafter he has left to his house. In the same night at about 1.45 a.m., P.W. 3 Suresh informed him about accused Nos. 1 and 2 assaulting the deceased. Therefore, he came to the godown and then from there he took the deceased in injured condition to the hospital. At that time also, he noted the presence of accused persons at the godown.

15. In this backdrop, if we see the evidence of P.W.3 Suresh, it goes to prove that on that night, they were present in the godown, deceased cooked the food for them. Then P.W.3 Sanjay and P.W.8 Rajesh took the meals and went to sleep in the cabin of the truck. At about 1.30 a.m. P.W.3 Sanjay and P.W.8 Rajesh woke up on hearing the abuses and saw that accused Nos . 1 and 2 were abusing the deceased and deceased was also abusing

them. Then accused Nos. 1 and 2 took out two bamboos from the heap of the bamboos. They started beating deceased on his back, buttocks and head. P.W.3 Sanjay and P.W.5 Rajesh were frightened. They alighted from the truck. Then all of them went on the road near Ram Mandir. P.W. 3 Sanjay informed about this incident to P.W.1 Dattaram on his mobile phone. Thereafter, P.W.1 Dattaram came with his friend on the motorcycle and then injured was taken to the hospital. Then police came to the hospital and recorded his complaint.

16. This evidence of P.W.3 Suresh is getting complete support and corroboration from the evidence of P.W.8 Rajesh, who has also deposed that after the meal was taken, he and Sanjay slept in the cabin of the truck. At about 1.30 a.m. they heard sound of quarrel. Hence they woke up and found the accused Nos. 1 and 2 giving abuses to deceased. The deceased was also giving abuses to them. Thereafter accused Nos. 1 and 2 picked up bamboos lying nearby and started assaulting the deceased with force on head, back and limbs etc. The deceased fell down and starting shouting. According to his evidence, they could not rush to the rescue of the deceased as accused Nos. 1 and 2 had bamboos in their hands, therefore, they left that place out of fear.

P.W.3 Suresh thereafter made a phone call to P.W.1 Dattaram on his mobile, then P.W.1 Dattaram came and deceased was taken to the hospital in injured condition.

17. Both these witnesses are cross examined at length. However, nothing worthwhile is elicited in their cross-examination to disbelieve them in any way. Neither their presence at the time of incident can be disputed nor any enmity is alleged on their part against accused so as to attract the defence of false implication. Their evidence is also supported and corroborated from the evidence of P.W.1 Dattaram, who has rushed to the spot and was informed about the incident.

18. If at all, any further corroboration is necessary to this ocular evidence, then it is also coming from the F.I.R. Exh.33 which is lodged immediately after the incident and on the same night the offence was registered.

19. Further corroboration to this evidence is coming from medical evidence of P.W.2 Dr. Bagul, who has conducted postmortem and found as many as 35 injuries all over the body of the deceased and with internal damage and according him the

cause of the death was cumulative effect of all these injuries.

20. In our considered opinion, this ocular and medical evidence is more than sufficient to prove the guilt of the accused. Though the prosecution has placed reliance on the oral dying declaration of the deceased made to P.W.1 Dattaram, implicating these accused, for the sake of argument, even if that dying declaration is excluded from the consideration as it implicates accused No.3 also; whereas the evidence of two eye witnesses namely P.W.3 Suresh and P.W.8 Rajesh does not implicate accused No. 3, hence trial Court had also not placed reliance on it, in our considered opinion, it does not make any difference to the credibility of the prosecution case. We are even not considering the other circumstantial evidence like the seizure of the clothes of deceased and accused alongwith the Chemical Analyzer's report which is "*inconclusive*" as to the results of the blood grouping. Therefore, even if this circumstantial evidence is not considered, the ocular and medical evidence, in our opinion, is more than sufficient to prove that it was accused Nos. 1 and 2 who had assaulted the deceased mercilessly, which has resulted into his death.

21. Much submission is however, advanced by learned counsel for accused, on the point that in the E.P.R., it is stated that the cause of injuries was accidental. According to learned counsel for accused, if it was P.W.1 Dattaram who has taken the deceased to the hospital and if he was already having knowledge, either on the basis of the information given to him by P.W.3 Suresh or on the basis of oral dying declaration made by the deceased, that it was accused, who had assaulted the deceased, then there is no explanation as to how in the E.P.R., the cause of injuries is attributed to the accident.

22. According to learned counsel for the appellant, E.P.R. contains the information, given first in point of time, hence it should be relied upon than the information given in the F.I.R. To substantiate this submission, learned counsel for accused No.1 has relied upon the judgment of Apex Court, in the case of *Akoijam Ranbir Singh -vs- The Government of Manipur, (1976) 3 SCC 465*, and *Din Dayal -vs- Raj Kumar Alias Raju and others 1998 SCC (Cri), 892*. We find that the facts of both these decisions are different from the facts of the present case. In the former decision, the trial Court has acquitted the accused

giving them the benefit of doubt and one of the grounds for extending such benefit was that in the F.I.R. the name of the accused was not disclosed, though the evidence on record showed that said name was already disclosed to the informant. In the background, it was observed by the Apex Court that :-

“The Sessions Judge, cannot, therefore, be said to be unreasonable in taking the view that if the name of the appellant had really been disclosed and informant knew it, he would have mentioned it to Ibotan Singh and it would have been reflected in the F.I.R.”

23. Thus the view was already taken by the Sessions Court in the said case in the conspectus of the facts of the said case and the Apex Court found that such view cannot be called as unreasonable, in the backdrop of facts of that case.

24. In the second decision also, while rejecting an appeal against acquittal, the Apex Court did find any reason for interference as one of the circumstances on which High Court has relied upon while acquitting the appellant was that witness Din Dayal had accompanied the deceased to the hospital, but after reaching there he did not disclose the name of the accused to the

Police Constable who was on duty though he disclosed the other facts regarding the incident.

25. In the present case, if one considers the evidence of P.W.1 Dattaram, who has taken the deceased to the Hospital, it reveals that after reaching to Rajawadi Hospital, while he was getting the case papers prepared, deceased succumbed to the injuries. He has denied the suggestion that P.W.3 Suresh and P.W.8 Rajesh had taken the deceased to the hospital. According to him, his friend Nitin was with him. P.W.3 Suresh had also not stated that he had accompanied P.W.1 Dattaram to the hospital, neither P.W.8 had stated so.

26. Therefore, it is not clear as to who has given the information to the E.P.R Constable. The accused has not got the said E.P.R. produced on record and proved it by issuing summons to the defence witness. In such situation, it cannot be positively concluded that the information reflected in the E.P.R. was given by P.W.1 Dattaram and not by his friend Nitin

27. Moreover, even assuming that the E.P.R. mentions the cause of injuries as accidental, having regard to the nature and

extent of injuries which were found on the dead body, it can hardly be accepted that it was a case of accidental death, especially in the light of the evidence of two eye witnesses, whose evidence is not at all shaken in any way. The next submission that, these injuries can be possible due to fall of heap of bamboos from the truck, also needs to be rejected outrightly because in the first place the evidence of P.W.1 Dattaram proves that the entire truck of the bamboos was unloaded at 7.30 p.m. only. Moreover, the spot panchnama which was conducted immediately after the incident goes to prove that all the bamboos were well arranged and not at all scattered anywhere.

28. Secondly and most importantly, if the injuries were accidental due to falling of bamboos, then injuries would have been on one side of the body. However, in this case, the injuries are found all over the body and the nature of injuries does not in any way suggest or prove that they can be accidental. Therefore, this contention needs to be rejected altogether.

29. This brings us to the alternate plea which is tried to be put up by learned counsel for accused that this case falls under Exception 4 to Section 300 of IPC. According to learned counsel

for the appellant/accused, there is evidence of P.W.1 Dattaram proving that he had seen skirmishes between accused No.3 and deceased, when he had gone to godown at 8.30 p.m. He tried to intervene, but it was of no use. He had earlier seen the deceased giving fist-blows to accused Nos. 1 and 3. The deceased had assaulted the accused No.1 by giving blow, P. W. Dattaram had then intervened.

30. It is submitted that, even according to evidence of P.W.3 Suresh, at the time of incident at about 1.30 a.m. he woke up on hearing exchange of abuses between the deceased and accused Nos. 1 and 2. P.W.8 Rajesh has also deposed about accused Nos. 1 and 2 giving abuses to deceased and deceased also abusing them, at the time of incident.

31. Thus, according to learned counsel for the accused, here in the case admittedly there was no enmity between the deceased and accused. The cause of the incident also appears to be a sudden fight in the heat of passion upon a sudden quarrel. The accused persons also cannot be said to have taken any undue advantage or acted in cruel or unusual manner. It is urged that assault was made by bamboos and the only intention appears to

be of giving thrashing to the deceased. If the intention was to kill him, then accused could have used the iron rods which were very much lying there. According to learned counsel for accused, merely because there are number of injuries, the benefit of Exception 4 to section 300 cannot be denied to the accused. It is urged that out of 35 injuries, only two injuries are on vital part of the body and there is no evidence that any internal damage was caused to the deceased on account of those injuries.

32. To substantiate this submission, learned counsel for the accused has relied upon the judgment of Apex Court in case of ***Sita Ram and others -vs- State of U.P. A.I.R. 1993 SC 350***, especially paragraph No.4 thereof, wherein it was noted that the Doctor who has conducted postmortem found 28 injuries, out of which only first three were lacerated injuries on the head and four other wounds on the face. However, the Doctor had not found any internal damage. Doctor also did not state that the injuries were cumulatively sufficient in the ordinary course of nature to cause death. There was no injury on any vital organ and hence it was held that it shows that common object of unlawful assembly was only to belabour the deceased. In these facts, hence benefit of Exception 4 to section 300 was extended and the conviction of

the accused was reduced to section 304 part II of IPC.

33. Learned counsel for accused No.2 has then relied upon the judgment of Apex Court in case of ***Adu Ram -vs- Mukna and ors, 2004 Cri. L.J.4674***, wherein though there were 34 injuries including fracture injuries, the conviction was reduced to the one under Section 304 part I of IPC.

34. Learned counsel for accused No.2 has also relied upon the judgment of Apex Court in case of ***Sukhbir Singh -vs- State of Haryana, AIR (SC) 2002-01168***, to submit that all vital injuries resulting into death cannot be termed as cruel or unusual for the purpose of not availing the benefit of Exception 4 of section 300.

35. Further he has relied upon the decision of Apex Court in case of ***Harendar Singh -vs- State of Delhi 2016 SCC Online Del. 1368***; wherein it was held that the intention to cause death can be gathered from the combination of circumstances and not necessarily from the extent and the number of injuries.

36. In our considered opinion though it may be true that

number of injuries may not always be a decisive factor, but in the instant case when assault is made by bamboos that too by two persons and it was not one or two blow but as good as 35 blows, which has resulted into equal number of injuries and all over the body, some of which were on the head and they had resulted into internal damage also as can be seen from the medical evidence of P.W.2 Dr. Bagul, it becomes difficult to accept that accused had not acted in cruel or unusual manner. If the intention of the accused was only to give thrashing or it was merely out of anger in a sudden passion, then after inflicting few blows, they would have stopped. However, finding the deceased unable to defend himself, both the accused have inflicted several blows on him. The assault was such that P.W.3 Suresh and P.W.8 Rajesh, though were witnessing the assault, could not even dare to intervene out of fear, As deposed by P.W.3 Suresh they were frightened and went to call P.W.1 Dattaram. Hence, in our considered opinion, in this case, the accused cannot be entitled to get benefit of exception 4 to section 300 of IPC.

37. Thus, having gone through the entire evidence and from the facts and circumstances on record, we are more than satisfied that the judgment of trial Court convicting the accused

for the offence punishable under Section 302 read with 34 of the Indian Penal Code needs to be confirmed as no other view of the matter can be taken. Hence both the appeals hold no merit, therefore, stand dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K.TAHILRAMANI, J.]