

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

CRIMINAL APPEAL NO. 910 OF 2010

Santosh Kailashnath Yadav & Anr.	... Appellants
Vs.	
The State of Maharashtra	... Respondent

....

Mr. Jagdish Shetty, for the Appellants
Ms. R.M. Gadhavi, APP for the Respondent State

...

CORAM : A.A. SAYED &

SARANG V. KOTWAL, JJ.

DATED : 21 AUGUST 2017

JUDGMENT (per A.A. SAYED, J.):

1 This Appeal is directed against the judgment and order dated 6 October, 2010 passed by the Additional Sessions Judge, Greater Bombay, Borivali Division, Dindoshi Court Mumbai. By the impugned judgment and order the Appellants (Orig. Accused Nos.1 and 2) were convicted for the offence under Section 302 IPC and they were sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 500/- each, in default of which to suffer further simple imprisonment for three months. The Appellant No.1 (Orig. Accused No. 1) is also convicted for the offence under

Section 323 of IPC and he was directed to suffer rigorous imprisonment for three months and pay a fine of Rs. 200/- in default of which to suffer simple imprisonment for fifteen days. The Appellant No. 2 (Orig. Accused No. 2) was acquitted for the offence under Section 323 IPC.

2. The case of the prosecution is as follows:

(i) Mrs. Sarita (PW3) had three sons, namely (1) Abhishek (deceased victim), (2) Ashutosh and (3) Avaneesh (PW1). On 11 October, 2009 Ashutosh was at home on account of his weekly holiday. His brother Avaneesh (PW1) had torn some blank papers from Ashutosh's book whereupon Ashutosh scolded Avaneesh. On hearing the voice of Ashutosh, the Appellant No. 2 (who was a neighbour) came to their house and threatened Ashutosh. Ashutosh asked the Appellant No. 2 why getting involved in their household matter and told him to go out of the house. In the meantime the Appellant No. 1 (who was also a neighbour) came there and started abusing Ashutosh. The Appellant No. 1 caught hold of the neck of Avaneesh resulting into nail injury. Thereafter people from the locality assembled there and the Appellants went away.

(ii) On the next day i.e. 12 October, 2009, Ashutosh went to attend his duty at Ambernath and deceased Abhishek was sleeping in his house as he was unwell. At about 10:30 a.m., Avaneesh (PW1) went to Hindu Hotel to read the newspaper. The Appellant No. 1 came there and said to him that he was speaking a lot last night and what has he to say now. Avaneesh (PW1) asked him why he is talking about yesterday's quarrel. The Appellant No. 1 thereafter slapped Avaneesh (PW1). One Krushna who is neighbour of Avaneesh came there and requested to Appellant No. 1 not to quarrel. In the meantime PW3 Sarita, the mother of Avaneesh (PW1) and deceased Abhishek came there and started taking Avaneesh (PW1) and deceased Abhishek to their house.

(iii) When they reached near Durgamata Temple, the Appellant No.1 obstructed them. At that time the Appellant No.2 also appeared on the spot and gave a kick blow on the stomach of deceased Abhishek. The Appellant No. 1 gave a fist blow on the left side rib of deceased Abhishek who fell down and was in pain. Both the Appellants continued to beat deceased Abhishek with fist and kicks and went away. PW3 Sarita, PW1 Avaneesh and Krushna took deceased Abhishek home and called a Doctor. The

Doctor advised them to take deceased Abhishek to the Hospital immediately. Deceased Abhishek was taken to Bhagwati hospital where he was declared dead before admission. PW1 Avaneesh reported the incident to the police who registered an offence under sections 302, 323 r/w 34 IPC.

3. During the course of investigation, inquest of the body of the deceased Abhishek was carried out and sent for postmortem examination. The police prepared spot panchnama and recorded the statements. The Appellants were arrested. After completion of investigation, charge-sheet was filed against both the Appellants. The case was committed to Court of the Sessions and the Sessions Court framed charge against both the Appellants. The Appellants pleaded not guilty and claimed to be tried. Their defence was that of denial and false implication. The prosecution examined seven witnesses. After hearing the parties the Session Court convicted and sentenced the Appellants as indicated in paragraph 1 above.

4 We have heard the learned Counsel for the Appellants and the learned APP of the Respondent State. With their assistance we have perused the depositions of the witnesses.

5. PW1 Avaneesh has deposed as follows - that deceased Abhishek was his brother. He was studying in the First Year in Sanskar College, Malad and his elder brother Ashutosh was serving in a factory at Ambarnath and his father was serving in Bank of Maharashtra, Malad (East) Branch. On 11 October, 2009 he, his parents and his brothers Ashutosh and deceased Abhishek were present in the house. Ashutosh was in the house because he had a weekly holiday. He had torn some blank papers from the note book of Ashutosh. Therefore, Ashutosh scolded him. When his brother Ashutosh was scolding him, the Appellant No. 2 – Sunil Rajbhar came to his house and told him to keep aside and he will see Ashutosh. Ashutosh asked Appellant No. 2 - Sunil Rajbhar as to why he was interfering in their household matter and also asked the Appellant No. 2 – Sunil Rajbhar to go out of house. In the meantime, Appellant No. 1 – Santosh Yadav also came there and started abusing Ashutosh by using swear words on mother and father. Thereupon he asked the Appellant No. 1 - Santosh Yadav as to why he was abusing. The Appellant No. 1 - Santosh Yadav caught his neck from the front side and he sustained nail injury. The people from the locality assembled there and asked the Appellants to go away. The Appellants thereafter went away.

Though his brother Ashutosh was talking about lodging of a complaint to the police, the sister of Appellant No.1 – Santosh Yadav came there and asked them not to make a complaint and said that hence forthwith no such incident will occur. On the next day i.e. 12 October, 2009 at about 6.00 a.m. his elder brother Ashutosh went to Ambarnath to attend his duty. Deceased Abhishek was sleeping because he was not feeling well. At about 10.30 a.m., he went to Hindu Hotel to read newspaper. The Appellant No. 1 - Santosh Yadav came there and said to him that he was speaking a lot last night and what has he to say now. He therefore asked the Appellant No.1 – Santosh Yadav why he was talking about last night. The Appellant No.1 then gave a slap on his cheek. One Krushna came there and he asked Appellant No.1 – Santosh Yadav why he was picking up a quarrel. After talking, Krushna took aside Appellant No.1 – Santosh Yadav. In the meantime, his mother Sarita (PW-3) came there alongwith deceased Abhishek. She asked him what he was doing there and told him to go to the house. His mother and deceased Abhishek started to proceed towards the house and reached upto Durga Mata Temple. The Appellant No.1 – Santosh Yadav came there and obstructed deceased Abhishek. Then Appellant No.2 – Sunil

Rajbhar also came there and gave kick blow on the stomach of deceased Abhishek. The Appellant No. 1 – Santosh Yadav gave a fist blow on the left side rib of deceased Abhishek. Deceased Abhishek fell on ground with pain. Both the Appellants however continued beating deceased Abhishek with fist and kicks. The Appellants then ran away. Thereafter, he, his mother and Krushna took deceased Abhishek to their house. Deceased Abhishek was in heavy pain. He therefore called Doctor Mr. Sandeep Salalkar to see deceased Abhishek. After examining deceased Abhishek, the Doctor advised to take him to Hospital forthwith. Thereupon, Krushna, one Guddu and one Rinku took deceased Abhishek to Bhagwati Hospital by auto-rickshaw. Deceased Abhishek was examined by the Doctor at Bhagwati Hospital and he was declared dead before admission. He, therefore, informed the police. The police took down his report in Bhagwati hospital itself. The police carried out inquest over dead body of the deceased Abhishek in his presence. He, thereafter, showed the spot of incident to the police and the police prepared the panchnama.

6. The prosecution examined PW2 Krushna who is an eyewitness. The prosecution has also examined PW3 Sarita, who is the mother of deceased Abhishek and also an eye witness.

They have deposed on the same lines as that of PW1 Avaneesh. PW7 Dr. Kiran Kalyankar, the Medical Officer attached to Bhagwati Hospital who conducted the postmortem on the body of deceased Abhishek was also examined. He has deposed that he found the following injuries on the body of deceased Abhishek:

- “(i) Contusion over left side of chest antero lateral aspect, 6 cm left to left nipple and 10 cm below anterior axillary angle, oblique, size – 4 cm X 2 reddish coloured.
- (ii) Contusion over left hand palmar aspect, thinar region oblique size 5 cm X 4 cm, reddish coloured;
On cut section blood infiltration seen.
- (iii) Contusion over right hand palmar aspect-thinar region oblique size – 5cm X 4 cm reddish coloured.
On cut section blood infiltration seen.

The above injuries were antemortem injuries.

On internal examination the following injuries were found:

- (i) Brain was pale
- (ii) Contusion of intercostals muscle antero lateral aspect between 8th and 9th intercoastal space, vertically oblique size 5 cm X 2 cm.
- (iii) Both lungs were pale.
- (iv) 2000 cc blood with clots seen in abdominal cavity.
- (v) Spleen, Liver, Kidney and Pancreas were pale. The evidence of rupture of spleen was there. The said rupture of spleen was at hilum and medial surface. There was contusion of hilum ligamentis seen, pale.”

He has further deposed that in his opinion, the cause of death was Haemorrhage and shock due to traumatic rupture of spleen in a case of Hepatosplino-magaly in an alleged history of assault. He

has deposed that the injury found on spleen was sufficient to casue death in ordinary course of nature and the injury on spleen can be caused by fist and kick blows. He has stated in his cross-examination that in this case rupture of spleen is not caused due to fall because there were absence of associated injuries like abrasions due to fall.

7. It is seen that the incident had occurred on 12 October 2009 after a minor altercation had taken place on the previous day between the brothers of deceased Abhishek i.e. Ashutosh and PW1 Avaneesh on the one hand, and Appellants on the other. PW1 Avaneesh, PW2 Krushna and PW3 Sarita who is the mother of the deceased, are eyewitnesses to the incident. We find that the evidence of the said three eyewitness is cogent and reliable. There is nothing brought forth in the cross-examination to disbelieve the witnesses or dislodge the case of the prosecution. Having said that, it is required to be noted that the Appellants beat up deceased Abhishek with fists and kicks. There were no weapons used by the Appellants. The evidence of PW7 Doctor who conducted the cross-examination clearly discloses that the death of deceased Abhishek was due to haemorrhage and rupture of spleen.

8. In **Karam Singh Vs. State of Punjab, 1994 SCC (Cri) 64,**

the Supreme Court in somewhat similar case observed as follows:

“The doctor PW 2, who conducted the postmortem found ten injuries. Some of them were abrasions. A lacerated wound was also found on the head but there was no corresponding internal injury. The contusions on the chest and injury Nos. 5 to 7 resulted in the fracture of the ribs which caused his death. The doctor in his evidence has admitted that the fracture of the ribs could have in turn caused the rupture of the liver and the spleen. Under these circumstances it is difficult to hold that the appellant intended to cause the injuries to the liver and the spleen which unfortunately proved to be fatal. Having regard to the nature of the weapon used and the parts of the body on which blows were dealt, it is difficult to hold that he intended to cause the death or intended to cause that particular injuries to the liver and the spleen. However, under the circumstances he must be attributed to have the knowledge that by dealing such blows he was likely to cause the death of the deceased in which case the offence is one punishable under Section 304 Part II IPC. In the result the conviction under Section 302 IPC and the sentence of life imprisonment awarded against the appellant by the High Court are set aside. Instead the appellant is convicted under Section 304 Part II IPC and sentenced to five years rigorous imprisonment. Subject to above modification the appeal is dismissed.”

9. In our view, considering the facts and circumstances of the present case and the evidence on record, it would be reasonable to infer that in beating up the deceased Abhishek with blows of fists and kicks, which unfortunately resulted in rupture of the spleen which led to his death, the Appellants at the highest can be attributed to have knowledge that they were likely to cause the death of

the deceased in which case the offence is one punishable under Section 304 Part II IPC and it cannot be said that there was intention on their part to murder him, which would be an offence under section 302 IPC. As stated earlier, the Appellants beat up deceased Abhishek with fists and kicks only and there were no weapons used by them. Following the aforementioned decision of the Supreme Court **Karam Singh's** case, we set aside the conviction and sentence of the Appellants under section 302 IPC. Instead the Appellants shall stand convicted under section 304 Part II IPC. We are informed that the Appellants are in custody from 12 October 2009 and have now been in custody for more than 7 years and 10 months. In the circumstances, the Appellants are sentenced to suffer rigorous imprisonment for the period already undergone by them. We are told that the Appellants have paid the fine as directed by the Sessions Court.

10. In the result, the Appeal is partly allowed and the impugned order of the Sessions Court shall stand modified in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(A.A. SAYED, J.)