

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.701 OF 2015
WITH
CRIMINAL APPLICATION NO.294 OF 2015
IN
CRIMINAL APPEAL NO.701 OF 2015**

Sonu @ Avdhesh Vijaykant Upadhyay,
Age 19 Years, Occu.:- Services,
Residing at Samarvani, Vadfalia,
Dadra and Nagar Haveli,
Permanent Address :
Village Ramsemari, Post Kakrahawa Bazar,
Thana Mohana, Balak Banpur,
Dist. Siddharath Nagar, 272206. ... **Appellant/Applicant**
V/s.
The State
(at the instances of Silvassa Police Station) ... **Respondent**

.....
Mrs.Nasreen S.K.Ayubi, Appointed Advocate for the
Appellant/Applicant.

Mr.H.S.Venegaonkar, Advocate for the Respondent/Silvassa Police
Station.

....

CORAM : A.M.BADAR J.

DATED : 13th DECEMBER 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging
the Judgment and Order dated 13/11/2014 passed by the learned

Sessions Judge, Dadra and Nagar Haveli, Silvassa in Sessions Case No.1 of 2013 thereby convicting the appellant/accused of the offence punishable under Section 304(II) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.4,000/- and in default to under further rigorous imprisonment for six months. The appellant/accused is acquitted of the offences punishable under Sections 302 and 506(II) of the Indian Penal Code.

2 Facts in brief leading to the prosecution and resultant conviction of the appellant/accused can be summarized thus :

(a) Appellant/accused Sonu @ Avdhesh along with Madhur Pandey (since deceased), P.W.No.1 Gijesh Upadhyay, P.W.No.5 Ismail Ansari, P.W.No.6 Kamlesh Rajbhar as well as few others used to work in the factories situated at Masat Industrial Estate. They used to reside in the rooms of Jitu Mohan Patel's Chawl at Samarvarni, Vad faliya, Dadra Nagar Haveli. Appellant/accused Sonu @ Avdhesh and Madhur Pandey (since deceased) were sharing the room with P.W.No.5 Ismail Ansari, P.W.No.6 Kamlesh Rajbhar and Arjun. Next to their room in Room No.4 Brijesh Pandey, Varun, Arvind and Satish Shukla used to reside. 16/05/2012 being a Wednesday was a weekly off for all workers of the Industrial Estate. They had just received their salaries. As such, appellant/accused Sonu @ Avdhesh, Madhur Pandey

(since deceased), P.W.No.1 Gijesh Upadhyay, P.W.No.5 Ismail Ansari and P.W.No.6 Kamlesh Rajbhar went to Silvassa. In the evening, they decided to have a party. They cooked *matan* and brought a bottle of liquor. By attaching V.C.D. to the television set outside the room, they all started having fun by indulging in wining and dinning. Thereafter, they started dancing in the corridor of chawl. During the course of that programme, after having liquor, there was some quarrel between appellant/accused Sonu @ Avdhesh and Madhur Pandey (since deceased). Appellant/accused Sonu @ Avdhesh then gave blows of wooden log on head of Madhur Pandey. When P.W.No.5 Ismail Ansari and P.W.No.6 Kamlesh Rajbhar attempted to intervene, the appellant/accused informed them that he is having a knife. Madhur Pandey fell down because of the blows inflicted by the appellant/accused. While he was lying outside the room, the others slept. On the next day morning i.e. in the morning of 17/05/2012, it was found that Madhur Pandey was lying unconscious. Hence, co-workers residing there sprinkled water on him and ambulance was summoned. P.W.No.1 Gijesh Upadhyay as well as the appellant/accused, Shailesh and Brihaspati Pandey then took injured Madhur Pandey to Vinoba Bhave Civil Hospital. He was admitted there in the Intensive Care Unit.

(b) On getting intimation about the incident, police also visited

the hospital. P.W.No.1 Gijesh Upadhyay then lodged the report of the incident on 17/05/2012 itself and accordingly, Crime No.128 of 2012 for the offence punishable under Section 307 of the Indian Penal Code came to be registered with the Police Station, Silvassa.

- (c) During the course of medical treatment, Madhur Pandey (since deceased) succumbed to injury on 19/05/2012. The dead body was sent for autopsy. Routine investigation followed. During the course of investigation, the spot was inspected and a wooden log came to be seized vide panchanama (Exhibit 33) in presence of panch witness P.W.No.3Jitu Patel.
- (d) On completion of investigation, the appellant/accused came to be charge-sheeted for the offences punishable under Sections 302 and 506(II) of the Indian Penal Code. The charge for the offences punishable under Sections 302 and 506(II) of the Indian Penal Code was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.
- (e) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all eight witnesses. First Informant Gijesh Upadhyay is examined as P.W.No.1. The

report filed him is at Exhibit 26. Autopsy Surgeon Dr.Anilkumar Parmar is examined as P.W.No.2. Mr.Jitu Patel, a panch witness to the spot panchanama is examined as P.W.No.3. Spot panchanama is at Exh.33. Mr.Parmeshwar Gupta, a panch witness to the inquest panchanama is examined as P.W.No.4. Inquest panchanama is at Exhibit 35. Eye-witness Ismail Ansari, who himself has witnessed the incident is examined as P.W.No.5. Another eye-witness Kamlesh Rajbhar is examined as P.W.No.6. Mr.Gajubhai Patel, Police Constable is examined as P.W.No.7. Investigating Officer Mr.Bharat Purohit, PSI is examined as P.W.No.8.

- (f) Defence of the appellant/accused was that of total denial. He however, did not enter in the defence. According to the defence version, there was some dispute between the appellant/accused and the prosecution witnesses in respect of some land in the village. That is how, he is involved in the false case. According to the defence theory, the deceased had suffered a fall on stone after consuming liquor and that is how he died.
- (g) After hearing the parties, the learned trial Court by the impugned Judgment and Order was pleased to convict the appellant/accused of offence punishable under Section 304(II) of the Indian Penal Code. He is sentenced accordingly as indicated in the opening paragraph of this Judgment.

3 I heard Mrs.Nasreen S.K.Ayubi, the learned Advocate appointed to represent the appellant/accused at the cost of the State. She vehemently argued that evidence of the prosecution is not sufficient to bring home the guilt to the appellant/accused. Eye-witnesses are not reliable. P.W.No.5 Ismail Ansari has categorically admitted in his cross-examination that after consuming the liquor, Madhur Pandey (since deceased) had suffered a fall on the stone. Hence, in the submission of the learned Advocate for the appellant/accused, death of Madhur Pandey (since deceased) was accidental. The appellant/accused, as such, is entitled for benefit of doubt.

4 As against this, the learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence.

5 I have carefully considered the rival submissions and also perused the oral as well as documentary evidence adduced by the prosecution.

6 The appellant/accused is convicted of the offence punishable under Section 304(II) of the Indian Penal Code by the learned trial Court by holding that the incident in question took place on a spur of moment without any intention on the part of the appellant/accused to commit murder of deceased Madhur Pandey. Therefore, let us examine whether evidence of the

prosecution is sufficient to demonstrate that deceased Madhur Pandey died homicidal death and the appellant/accused is author of the fatal blows given on head of deceased Madhur Pandey.

7 P.W.No.2 Dr.Anilkumar Parmar had conducted autopsy on dead body of Madhur Pandey on 19/05/2012. Upon examination of the dead body, this Medical Officer of the State found that it was having lacerated wound on right parietal region of size 1 x 1 c.m. apart from abrasion and swelling on the said region. P.W.No.2 Dr.Anilkumar Parmar also found swelling as well as blackening around the right of eye up to the frontal region and lateral to the right eye of the deceased. Upon internal examination, he found that there was heamotoma on frontal region up to the lateral to the right eye and right parietal region of the deceased apart from fracture of right parietal bone. P.W.No.2 Dr.Anilkumar Parmar opined that cause of death was cardio respiratory arrest due to hemorrhagic shock due to sub-arachnoid hemorrhage resulting from the head injury. He further opined that the injury found on the dead body was possible by the wooden log seized by the Investigating Officer. He denied the suggestion that the injury as found on the dead body is possible if a person fall on hard and blunt object with force while running. It is thus seen that death of Madhur Pandey was not a natural death, but one will have to ascertain whether death is homicidal death or accidental death as claimed by the defence.

8 Perusal of evidence of P.W.No.1 Gijesh Upadhyay, P.W.No.5 Ismail Ansari and P.W.No.6 Kamlesh Rajbhar unerringly points out that they along with appellant/accused Sonu @ Avdhesh, deceased Madhur Pandey were staying together in the chawl of Jitu Mohan Patel. Other co-workers were also residing there. Evidence of all these witnesses established a fact that 16/05/2012 being Wednesday was a holiday for all of them and they had decided to have a party in the evening of that day. Similarly, evidence of these witnesses establishes a fact that accordingly, non-vegetarian food was cooked. Liquor was purchased. They all indulged in a booze sessions and had non-vegetarian food. Consistent evidence of these witnesses further shows that in the night intervening 16/05/2012 and 17/05/2012 some of the members of the party started dancing by putting on the television while few decided to take rest. This part of evidence of these witnesses went virtually unchallenged.

9 Now, let us examine what took place in the dancing sessions after having few drinks by the prosecution witnesses, appellant/accused Sonu @ Avdhesh, deceased Madhur Pandey and other resident workers of Jitu Patel's chawl. As per version of P.W.No.1 Gijesh Upadhyay, at about 1.00 a.m. of 17/05/2012, he slept in front of the room and others were dancing. As per his version, because of some dispute, the appellant/accused assaulted Madhur Pandey by giving two blows on his head by a wooden log.

When P.W.No.6 Kamlesh Rajbhar and P.W.No.5 Ismail Ansari attempted to rescue Madhur Pandey (since deceased), appellant/accused Sonu @ Avdhesh threatened them that if they came near, he will assault them with the help of knife. Then he again slept. When he wake up in the morning, he found Madhur Pandey lying in an unconscious condition with blood oozing from his head. Therefore, by summoning the ambulance, P.W.No.1 Gijesh Upadhyay as well as the appellant/accused took Madhur Pandey to the hospital. P.W.No.1 Gijesh Upadhyay has categorically deposed that he had witnessed the incident in the light of night bulb. He lodged the report (Exhibit 26) on 17/05/2012 itself.

10 Cross-examination of P.W.No.1 Gijesh Upadhyay reflects that deceased Madhur Pandey had consumed more liquor. He denied the suggestion that during the course of dancing, because of pushing him deceased Madhur Pandey fell down and got injured. It was suggested to this witness that he himself had pushed the deceased and had lodged false report to save himself. He denied that suggestion. From cross-examination of this witness, it is elicited that he was at a distance of 30 feet from the spot of the incident. He did not lodge report immediately, but he slept from 1.00 a.m. to 5.45 a.m. i.e. after happening of the incident. P.W.No.1 Gijesh Upadhyay was sharing the room with the appellant/accused as well as the deceased. As such, it was but

natural for him to be present on the spot of the incident at the time of the incident, which took place just in front of the room where they all were residing. After consuming liquor and after having non-vegetarian food, it was not expected of this witness to rush to the police station after 1.00 a.m. when Madhur Pandey suffered blows of wooden log at the hands of the appellant/accused. At any rate, the conduct of sleeping by P.W.No.1 Gijesh Upadhyay cannot be said to be an abnormal conduct throwing shadow of doubt on his version. His presence on the scene of occurrence is not disputed. Similarly, it is not pointed out as to why this witness is deposing a lie.

11 P.W.No.6 Kamlesh Rajbhar, who was also a roommate of the appellant/accused and the deceased, has stated while in the witness box that after having drinks and non-vegetarian good, they all were dancing in front of their room and at about 12.15 a.m. of 17/05/2012 some of the residents went to sleep, whereas he himself, P.W.No.5 Ismail Ansari, Vijay, Madhur Pandey (since deceased) and appellant/accused Sonu @ Avdresh continued dancing. As per version of this witness, at about 1.00 a.m., there was scuffle between the appellant/accused and Madhur Pandey (since deceased). Then, appellant/accused gave two blows of a wooden log on head of Madhur Pandey (since deceased). P.W.No.6 Kamlesh Rajbhar further deposed that the appellant/accused threatened them by uttering that he is having a

knife with him. Madhur Pandey (since deceased) fell down and, thereafter, all went to sleep. His cross-examination reveals that as he was frightened, he did not approach police. He did not wake up in that night to see condition of deceased Madhur Pandey. He denied the suggestion that he had not joined the dance sessions. From cross-examination of this witness, it is brought on record that the incident took place just adjacent to their room.

12 Conduct of P.W.No.6 Kamlesh Rajbhar is a natural conduct of a normal human being. The blows were by a wooden log. All of them had liquor and then they had consumed non-vegetarian food. Therefore, only because this witness did not lodge report in the midnight, it cannot be said that he is not the witness of truth. He has no reason to falsely implicate the appellant/accused.

13 So far as P.W.No.5 Ismail Ansari is concerned, he has stated that after dancing for some time, some of the residents went for sleeping, whereas he himself, appellant/accused Sonu @ Avdresh, P.W.No.6 Kamlesh Rajbhar and Madhur Pandey (since deceased) continued dancing. Then, there was quarrel between the appellant/accused and Madhur Pandey (since deceased). As stated by P.W.No.5 Ismail Ansari, the appellant/accused took a wooden log and gave blows thereof on head of Madhur Pandey (since deceased). He has also spoken about threat given by the appellant/accused to them. P.W.No.5 Ismail Ansari further stated

that when Madhur Pandey (since deceased) was lying on the floor, he went to sleep and in the morning, he saw appellant/accused and Giresh were sprinkling water on face of Madhur Pandey (since deceased).

14 In cross-examination, P.W.No.5 Ismail Ansari has stated that they were dancing up to 12.15 a.m. of 17/05/2012 and in the morning, they found Madhur Pandey (since deceased) lying unconscious. It is elicited from this witness that the incident took place due to consumption of liquor. He admitted that after drinking liquor, Madhur Pandey (since deceased) suffered a fall on stone.

15 Admission of P.W.No.5 Ismail Ansari to the suggestion that after drinking liquor, deceased Madhur Pandey had suffered a fall on the stone cannot be given any overbearing importance because the incident in question took place in the corridor of rooms in the chawl. There was no question of having stones in the corridor of the chawl. Hence, this material elicited from the halfhearted cross-examination of P.W.No.5 Ismail Ansari is of no use to the defence.

16 In the light of forgoing discussion it is evident that the appellant/accused gave blows of wooden log on the head of Madhur Pandey (since deceased) in the night intervening 16/05/2012 and 17/05/2012 causing his death on 19/05/2012.

17 The incident in question took place in the wet party organized by the residents of the chawl. It is clear that members of that party had consumed liquor. During the course of dancing in the corridor of the chawl, suddenly a quarrel erupted during the course of which the appellant/accused assaulted the deceased by means of wooden log. Quarrel is a bilateral phenomenon. In the course of that sudden fight, without taking any undue advantage and without acting in cruel or unusual manner, the appellant/accused gave two blows of wooden log on head of the deceased. This aspect is clear from evidence of autopsy surgeon P.W.No.2 Dr.Anilkumar Parmar. External injury on the deceased was in the form of lacerated wound on the right parietal region of size 1 x 1 c.m., which resulted in fracture of the right parietal bone. Thus, it is seen that the act was without requisite intention, but certainly with the knowledge that it may cause death. The learned trial Court, as such, rightly convicted the appellant/accused for the offence punishable under Section 304 Part II of the Indian Penal Code.

18 It is well settled that it is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing Court are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with

the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

19 Perusal of the sentencing trend in past for the offence punishable under Section 304(II) of the Indian Penal Code shows that sentence of 10 years of rigorous imprisonment is too harsh considering the facts and circumstances of the case. In the matter of **Shivappa Buddappa Kolkar alias Buddappagol vs. State of Karnataka**¹, modifying the conviction of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Honourable Supreme Court had imposed sentence of imprisonment for a period of five years apart from fine of Rs.7,000/- on the appellant/accused. In the matter of **Padmakar s/o. Dadarao Thorat vs. The State of Maharashtra**² Division Bench of this court by modifying the conviction of the appellant/accused from the offence punishable under Section 302 of the Indian Penal Code to the offence punishable under Section 304(II) of the Indian Penal Code, had sentenced the appellant/accused therein for rigorous imprisonment for 5 years apart from payment of fine of Rs.500/-. Similarly, in the matter of **Manke Ram vs. State of Haryana**³ by altering the conviction of

1 AIR 2004 SUPREME COURT 5047

2 2015 ALL MR (Cri) 2628

3 2003 CRI.L.J. 2328

the appellant/accused therein from the offence punishable under Section 302 of the Indian Penal Code to the one punishable under Section 304(II) of the Indian Penal Code, the Honourable Supreme Court was pleased to award sentence of 5 years of rigorous imprisonment apart from fine of Rs.2,000/- on the appellant/accused therein.

20 In this view of the matter, it is clear that punishment of seven years of rigorous imprisonment imposed by the learned trial Court on the appellant/accused is disproportionate and excessive. It needs to be scaled down to the rigorous imprisonment for five years. Therefore, the Order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The conviction of the appellant/accused of the offence punishable under Section 304 Part II of the Indian Penal Code is maintained. However, sentence of rigorous imprisonment for seven years imposed on him by the learned trial Court is scaled down to the rigorous imprisonment for five years. Rest of the impugned Order is maintained.
- (iii) The Appeal is disposed of accordingly.
- (iv) In view of disposal of the appeal, Criminal Application bearing No.294 of 2015 therein also stands disposed of.

(A.M.BADAR J.)