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

**CRIMINAL APPEAL NO. 301 OF 2014
ALONGWITH
CRIMINAL APPLICATION NO. 856 OF 2018
AND
CRIMINAL APPLICATION NO.1286 OF 2017
IN
CRIMINAL APPEAL NO.301 OF 2014**

Rijwan @ Rijju Raisuddin Ansari)
Aged about 23 years, Occupation: Nil)
An adult Indian Inhabitant, residing at)
Rajiv Nagar, Lane No.2 and 4, Room)
No.2, Saint Dayaneshwar Nagar,)
Bandra (East), Mumbai)
In Aurther Road Jail at present.) Appellant.

V/s

The State of Maharashtra)
Through Kherwadi Police Station) Respondent.

Mr. Aniket Vagal, Advocate for the Appellant
Mr. H. J. Dedhia, APP for the Respondent/State.

**CORAM: B. R. GAVAI &
SARANG V. KOTWAL, JJ.**

DATE: 4th July, 2018

ORAL JUDGMENT: (Per B.R. Gavai, J.)

1] Appeal is taken up for final hearing.

2] Appellant has approached this Court, being aggrieved by the Judgment and Order passed by the learned Additional Sessions Judge, Greater Mumbai dated 30/01/2014 in Sessions Case No.753 of 2012, thereby convicting the Appellant under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and pay fine of Rs 10,000/- and in default thereof to suffer further rigorous imprisonment for one year.

3] The prosecution story, in brief, as could be gathered from the material placed on record is thus :

4] The first informant Vijay Dadu Gawali (P.W.1) was serving as Police Constable in Bandra Kurla Complex Police Station on 13/08/2012. When he was on duty, he learnt from PSI Shinde (P.W.9) that, a dead body was floating in the water of river Mithi, to the west side of the dispensary of Dr. Kulkarni at Bharat Nagar. Thereafter, he himself, PI Nigudkar, PSI Shinde, Police Naik Khevi and Police Constable Magar, went to the place of incident. With the

help of Fire Brigade, they removed dead body from the river. In the inquest panchanama, a deep injury was found on the forehead of the deceased as also an injury was found on the back side of the head of the deceased. Postmortem was conducted at Sion Hospital. A cell phone came to be recovered from the body of the deceased. From the cell phone which was recovered from the body of the deceased, police contacted brother of the deceased viz Shamsheer Babu Mansuri, from whom they came to know the name of the deceased as Mohammed Azad Babu Mansuri.

5] During investigation, police came to know that the deceased alongwith the accused and two friends viz Shaharukh and Rifeel had gone to the bank of river Mithi to smoke ganja. At that time, quarrel took place between the deceased and the accused Rizwan. It further transpired in the investigation that during the said quarrel, accused pushed deceased in the river and thereafter assaulted him by stone. On the basis of the said information, an oral report was lodged by Vijay Dadu Gawali (P.W.1) on the basis of which, initially, C.R. No.00/2012 came to be registered for the offence punishable under

section 302 and 201 of the Indian Penal Code. Since the crime had taken place within the jurisdiction of Kherwadi Police Station, C.R. No.133/2012 for the aforesaid offence came to be registered. After completion of the investigation, charge-sheet came to be filed in the Court of Metropolitan Magistrate 32nd Court, Bandra Mumbai. Since the case was exclusively triable by the learned Sessions Judge, it came to be committed to the learned Sessions Judge. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned Trial Judge passed an order of conviction and sentence as aforesaid.

6] Mr. Vagal, learned Counsel appearing on behalf of the Appellant, submitted that the learned Trial Judge has grossly erred in passing the order of conviction. He submitted that statements of witnesses are recorded belatedly after two days. He therefore submitted that the conviction based on the evidence of such witnesses would not be permissible. He submitted that the order of conviction which is passed is not sustainable. In the alternative, he submitted that, in any case, order of conviction under Section 302 of IPC would

not be sustainable. He submitted that, conviction, if upheld, would have to be altered to the lesser offence.

7] Mr. Dedhia, the learned APP, submitted that no interference is warranted in the present appeal. He submitted that, though statements came to be recorded belatedly, the witnesses were threatened by the accused.

8] The prosecution case mainly rests on the evidence of Mohd. Hussain Rafiq Ashrafi (P.W.2). He states that, on 11/08/2012 at about 7.30 to 8.00 P.M., he had gone to bank of river Mithi to smoke ganja. At that time, one Ajgar, Shahrook, Dehli (deceased) and Rizwan were present. They all went there together. Thereafter, they started smoking ganja with Chillim. Thereafter, at around 10.00 P.M to 11.00 P.M, there was quarrel between Dehli and Rizwan. They separated them. After separating the quarrel, they again started smoking ganja with Chillim. In the meanwhile, the accused left the place. Thereafter, after 2-3 hours, the accused again returned to them. Thereafter, again, there was quarrel between the accused and

the deceased. They again separated the said quarrel. Thereafter, all of them sat there. Dehli sat on a wall adjacent to bank of river Mithi. Thereafter, accused Rizwan pushed Dehli in river Mithi. As such Dehli fell in river Mithi. He further states that, before the accused Rizwan pushed Dehli in river Mithi, Rifil also joined them. Thereafter, they caught hold of Rizwan and asked him not to do so. The accused asked them not to catch hold of him, otherwise he would kill them. Thereafter, they got frightened and ran away from the spot. The statement of this witness is recorded after two days. However, he has given an explanation that he was frightened due to threats given by the accused and as such, he did not inform the police immediately. In spite of searching cross-examination, nothing damaging, insofar as main incident is concerned, has come on record.

9] We, therefore, do not find any error in the finding of the learned Trial Judge that it is the Appellant who is an author of the crime. However, the question that arises is as to whether the conviction of the Appellant should be maintained under Section 302 of the Indian Penal Code or it should be altered to a lesser offence.

10] Perusal of evidence of Mohd. Hussain Rafiq Ashrafi (P.W.2), would reveal that all of them were smoking ganja. While so doing, there was quarrel between the deceased and the Appellant. During that quarrel, when the deceased was sitting on a parapet wall of river Mithi, the Appellant pushed him. It could thus be seen that, though the Appellant might have knowledge that by doing so, deceased may succumb to death, there is nothing on record to show that, there was an intention on his part to cause death of the deceased. There is nothing on record to show that, there was premeditation or the Appellant had come with any weapons with an intention to kill the deceased.

11] In that view of the matter, we are inclined to partly allow the appeal.

12] In the result, the following order is passed:-

ORDER

(i) Appeal is partly allowed.

(ii) The Order of conviction and sentence is altered to the one under Part-II of Section 304 of IPC. Appellant is directed to suffer rigorous imprisonment for five years for the said offence.

(iii) Since the Appellant has already undergone imprisonment of more than five years, he is directed to be released forthwith, unless required in any other case.

(iv) Since the appeal is partly allowed and disposed of, nothing survives in the Criminal Applications taken out therein and they are also disposed of.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)