

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.93 OF 2012

1. Dhirajkumar Amarnath Giri.	]	
Aged 26 years, Occ. - Service,	]	
Residing at - Nagubai Patil Chawl,	]	
Dombivali (East).	]	
 2. Suraj Amarnath Giri.	]	
Aged 24 years, Occ. - Service,	]	
Residing at - Ajadegaon, Chawl No.6,	]	
Room No.5, Dombivali (East).	]	
(At present in Khalapur Jail).	]	... Appellants /
		Orig.Accd.Nos.3 & 4

Versus

The State of Maharashtra.	]	
(At the instance of Manpada Police Station,	]	
Dombivali (East)).	]	... Respondent

ALONG WITH

CRIMINAL APPEAL NO.822 OF 2018

Mr. Raju Vasant Sarfare.	]	
Residing at - Giril Patil Chawl,	]	
Dombivali (East), District Thane.	]	
(At present in Open Jail Paithan, Aurangabad)]		... Appellants /
		Orig.Accd.No.1

Versus

The State of Maharashtra.	]	
(At the instance of Manpada Police Station)	]	... Respondent

Mr. Jehangir M. Khajotia a/w Mr. Prashant Kale for Appellants in Criminal Appeal No.93 of 2012.

Dr. Yug M. Chaudhry a/w Mr. Dashrath Gaikwad for Appellant in Criminal Appeal No.822 of 2018.

Mrs. S. S. Kaushik APP for State in both Appeals.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 29th JUNE, 2018**

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

1] Being aggrieved by the judgment and order dated 21st December 2011 passed by the learned Additional Sessions Judge, Kalyan in Sessions Case No.02 of 2008, thereby convicting accused for the offence punishable under Section 302, 324, 326 r/w 34 of the Indian Penal Code ("IPC" for short), the Appellants have approached this Court. Since the original Accused No.2 has died during pendency of the Appeal, the Appeal filed by him being Criminal Appeal No.232 of 2012 has already been disposed of as abated. The Criminal Appeal No.822 of 2018 is filed on behalf of the Accused No.1, whereas the Criminal Appeal No.93 of 2012 is filed by the original Accused Nos.3 and 4. For the sake of convenience, the Accused would be referred in the present judgment as they were

arrayed before the learned Trial Court.

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

That on 20th September 2007 in the midnight at around 12.30 hours, PW-1 - Shamu his friend, PW-5 – Ajay and deceased Pramod were sitting at Bajarangbali Mitra Mandal Board. Accused No.1 – Raju, Accused No.2 – Mahesh and three more persons came to the shop of one Joshi Kaka. There was altercation between those persons and owner of the shop namely Joshi Kaka on account of Gutkha. It is further the prosecution case that there was also altercation between those persons and PW-1 – Shamu and PW-5 – Ajay.

3] It is the prosecution case that shortly thereafter Accused No.1 – Raju, Accused No.3 – Mahesh and other three persons came there holding cricket stumps and assaulted to PW-1 – Shamu, PW-5 – Ajay and deceased Pramod on the head, legs after abusing them. After assaulting, the accused persons ran away. Thereafter PW-9 – Satish, friend of PW-1 – Shamu, took injured PW-1 - Shamu and

PW-5 – Ajay and Pramod in auto rickshaw firstly to the Mamta Hospital. Pramod died in Mamta Hospital on account of bleeding and injuries to the head and face. PW-1 – Shamu and PW-5 – Ajay were referred to the AIMS Hospital, Dombivali. On the basis of the oral report of PW-1 – Shamu, an FIR came to be registered vide Crime No.I-243 of 2007. At the conclusion of the investigation, the Investigation Officer filed charge-sheet in the Court of learned JMFC, Kalyan. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions Judge. The learned Trial Judge framed the charges for the offence punishable under Section 302, 307 r/w 34 of the IPC. 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 as aforesaid, however, acquitted the Appellants for the offence punishable under Section 307 of the IPC.

4] Mr. Dr. Yug M. Chaudhary, learned counsel appearing on behalf of the Appellant/Accused No.1 submits that the evidence on which the learned Trial Judge has convicted the Accused No.1 for the offence punishable under Section 302 of the IPC cannot be

said to be reliable and as such, conviction under Section 302 of the IPC is not tenable. In the alternate, he submits that the prosecution has utterly failed to prove that the case would come under Section 302 of the IPC. He submits that even if conviction is maintained, the same needs to be altered to the lesser offence.

5] Mr. Jehangir M. Khajotia, learned counsel appearing on behalf of Accused Nos.3 and 4 submits that there is no evidence at all in so far as the Accused Nos.3 and 4 are concerned. He submits that the conviction against these accused is only on the basis of conjectures and surmises and therefore not sustainable.

6] Mrs. S. S. Kaushik, learned APP on the contrary submits that the learned Trial Judge on the basis of correct appreciation of evidence has convicted the Appellants and as such, there is no merit.

7] With the assistance of the learned APP and the learned counsel for the Appellants, we have scrutinized the evidence on record. PW-1 – Shamu is the First Informant and an eye witness. He states in his evidence that on 19th September 2007, he alongwith

deceased Pramod and PW-5 -Ajay were talking near Bajrangbali Board in Rohidasnagar in the midnight at about 12 or 12.30. He states that Accused No.3 – Dhirajkumar came there for purchasing Gutkha. The shop owner Joshi Kaka did not give him Gutkha. Therefore Accused No.3 – Dhirajkumar abused Joshi Kaka. This witness alongwith PW-5 – Ajay went to Accused No.3 - Dhirajkumar for convincing for not abusing Joshi Kaka, but he abused them also. Accused No.3 – Dhirajkumar abused PW-5 - Ajay. Thereafter PW-5 – Ajay slapped Accused No.3 – Dhirajkumar. They all left the place by abusing them.

8] He further states that after half an hour Accused No.1 – Raju, Accused No.-2 - Mahesh and three others came there. Accused No.1– Raju and Accused No.2 – Mahesh, firstly assaulted this witness on head and legs by stumps. Thereafter they assaulted PW-6 – Sushil and deceased Pramod by means of stumps on the head, face, hands and legs. He fell down. Thereafter they were also beating them. They shouted as 'save, save'. Kusnalkar, Sandeep Shinde, Ajit Pawar and one more person, whose name he does not remember sitting in a temple came running. However, did not come

forward after seeing stumps in the hands of Accused No.1- Raju, Accused No.2 – Mahesh and three others. Thereafter Accused No.1- Raju, Accused No.2 – Mahesh and three others left the place. He states that, PW-9 – Satish Shetty brought rickshaw and took them to the Mamta Hospital. Thereafter this witness and PW-5 – Ajay were transferred AIMS Hospital, Domibvali. The Police came there. He came to know about the death of Pramod. Though this witness was cross-examined at length, nothing damaging has come on record in so far as main incident of assault is concerned.

9] The next eye witness is PW-5 – Ajay. His version is almost similar as that PW-1 – Shamu. He states that when he himself, PW-1 Shamu and deceased Pramod were at the Board of Bajrang Bali Mitra Mandal, five persons came to the shop of Joshi Kaka. They asked Gutkha to Joshi Kaka. Joshi Kaka told those five persons, that he was not keeping Gutkha. The five persons started to abuse Joshi Kaka. They went towards the five persons to pacify them. The five persons started to abuse them. In spite of trying to tell those five persons not to abuse, they continued to abuse. This witness slapped one of the five persons abusing them.

10] He states that those five persons came there after 10 to 15 minutes holding pipes and stumps. They started to assault this witness, PW-1 – Shamu and Pramod on the head, hands and legs by means of iron pipes and stump. He states that Accused No.1 – Raju while assaulting deceased Pramod was saying that he was doing Dadagiri in their area. One boy like Nepali, PW-2 – Mahesh was also there. He states that when PW-9 – Satish came there, five persons left the place. He states that he was taken in the AIMS Hospital. He was hospitalized for 3 to 4 days. Police came after 2/3 days of the incident for recording statement. It would be worthwhile to refer to the examination in chief of this witness :-

“3] The police had pointed out us the five unknown persons in the hospital who assaulted us. I identified them in the hospital. I also came to know their names at that time. Today, I can identify the person to whom I slapped. I also can identify today the persons who assaulted me, P.W-1 Shamu and deceased Pramod. The accused Dhirajkumar before the court is the person to whom I slapped. (The witness pointed out the accused Dhirajkumar sitting in the court hall alongwith other persons and accused.)”

We find that in view of this examination-in-chief, it is not even necessary to go to his cross-examination. Undisputedly, there is no identification parade.

11] It could thus be seen that taking the evidence of PW-1 Shamu at its face value, only implicates Accused No.1 – Raju and Accused No.2 – Mahesh. No doubt that in so far as the evidence of PW-1 - Shamu is concerned, in so far as earlier altercation is concerned, he implicates Accused No.3 – Dhirajkumar. However in so far as actual attack of the assault is concerned, he states that Accused No.1 – Raju, Accused No.2 – Mahesh and three others had come there. It could be seen that in so far as PW-5 – Ajay is concerned, in view of what is brought in his examination-in-chief itself, whereby he has admitted that police had pointed out to them five unknown persons, who had assaulted them and he has identified them in the hospital and that he came to know about their names at that time, no credence could be given to his evidence.

12] We are therefore of the considered view that since in the testimony of PW-1 – Shamu that he has only named Accused No.1 – Raju and Accused No.2 – Mahesh, there is no material to establish

BGP.

complicity of Accused No.3 – Dhirajkumar and Accused No.4 – Suraj in the crime in question. We are therefore of the considered view that the conviction of Accused No.3 – Dhirajkumar and Accused No.4 – Suraj would not be sustainable.

13] From the medical evidence, we do not find that any interference is warranted with the finding of the learned Trial Judge that in view of the injuries sustained by the PW-1 – Shamu and PW-5 – Ajay, case for conviction under Section 307 would not be made out and the conviction is only warranted under Section 326 and 324 of the IPC.

14] In view of the aforesaid testimony of the eye witnesses, we find that no interference is warranted to the finding of the learned Trial Judge that it is the Accused No.1 – Raju, who is the author of the offence, due to which the deceased has died. However, the only question that requires to be considered is as to whether the offence under Section 302 of the IPC needs to be altered to a lesser offence.

15] From the postmortem report, it is seen that the cause of

death of the deceased Pramod is “Neuro hemorrhagic shock due to fracture skull and brain injury with bleeding.” It is further to be noted that even according to the prosecution witness, the weapons used in the crime were cricket stumps and iron pipes. It will be relevant to refer to the following observations of Their Lordships in the case of **Sukhbir Singh Vs. State of Haryana** reported in **AIR 2002 SC 1168** :-

“18. In the instant case, concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant and others had pre-meditated. As noticed earlier, occurrence took place when Sukhbir Singh got mud splashes on account of sweeping of the street by Ram Niwas and a quarrel ensued. The deceased gave slaps to the appellant for no fault of his. The quarrel appeared to be sudden on account of heat of passion. The accused went home and came armed in the company of others though without telling them his intention to commit the ultimate crime of murder. The time gap between the quarrel and the fight is stated to be few minutes only. According to Gulab Singh (P.W. 10) when Sukhbir Singh was passing in the street and some mud got splashed on his clothes, he abused Ram Niwas. They both grappled

with each other whereupon Lachhman (deceased) intervened and separated them. Accused-Sukhbir had abused Lachhman who gave him two slaps. The said accused thereafter went to his home after stating that he would teach him a lesson for the slaps which had been given to him. After some time he, along with other accused persons, came at the spot and the fight took place. His own house is at a different place. There is a street in between his house and the house of Lachhman (deceased). On the northern side of his house, the house of the appellant is situated. Similarly Ram Niwas (P. W. 11) has stated that after the quarrel the accused went towards his house and within a few minutes he came back with other accused persons. It is, therefore, probable that there was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was “sudden” within the meaning of Exception 4 of S. 300, I.P.C.”

16] We are of the view that the aforesaid observations of the Hon'ble Apex Court would be applicable to the facts in the present case. Admittedly, there is no enmity between the Appellants at one hand and the deceased PW-1 – Shamu and PW-5 – Ajay on the other hand. Due to some quarrel taking place between Joshi Kaka and Accused, the deceased and PW-1 – Shamu as well as PW-5 – Ajay

intervened the altercation. PW-5 - Ajay slapped the Accused No.1 – Raju. Accused No.1 – Raju with other accused went and thereafter came back armed with cricket stumps and iron pipes and assaulted deceased, PW-1 – Shamu and PW-5 – Ajay. It could thus be seen that possibility of the accused in the grave and sudden provocation due to slap by PW-5 -Ajay bringing the weapons and assaulting PW-5 – Ajay and other two i.e. PW-1 Shamu and deceased Pramod and unfortunately Pramod succumbing to the injuries, cannot be ruled out. There is nothing on record to show that accused has premeditated to commit the murder of the deceased. In that view of the matter, we are of the considered view that the Accused No.1 - Raju is entitled to benefit of exception of Section 300. His conviction under Section 302 of the IPC is entitled to be converted to Part II of Section 304 of the IPC.

17] In the result, we pass the following order :-

ORDER

- (A) (i) Criminal Appeal No.93 of 2012 is allowed.
- (ii) The Judgment and Order of conviction and sentence insofar as the Appellants / accused nos.3 and 4

are concerned, is set aside.

(iii) The Appellants are acquitted of the charges charged with.

(iv) The Appellants are on bail. Their bail bonds shall stand discharged.

- (B)
- (i) Criminal Appeal No.822 of 2018 is partly allowed.
 - (ii) The order of conviction under Section 302 of the IPC is altered to the one under Part II of Section 304 of the IPC. The Appellant / accused no.1 is sentenced to suffer R.I. for seven years for the same.
 - (iii) The order of conviction under Section 326 of the IPC awarded thereunder is maintained.
 - (iv) The Appellant / accused no.1 has already served the sentence for much more period than what is awarded. The Appellant / accused no.1 is directed to be set at liberty forthwith if not required in any other case.

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]