

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.96 OF 2017

Dablu Baldev Das,
Age 22 years, Occupation : Cook,
Residing at 251, Mangalwar Peth,
Pune and also having address
at Sector No.8, Sigaon, Faridabad,
Haryana.

(Presently languishing in the
custody of the Yerawada Central
Prison, Pune).

... **Appellant**

V/s.

The State of Maharashtra,
Through the Sahkarnagar Police,
Station, Pune.

... **Respondent**

.....

Mr.Satyavrat Joshi, Advocate for the Appellants.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 24st JANUARY 2019.

ORAL JUDGMENT :

1 By this appeal, the applicant/accused No.2 is
challenging the Judgment and Order dated 29/04/2016 passed by
the learned Additional Sessions Judge, Pune in Sessions Case

No.550 of 2007 thereby convicting the appellant/accused No.2 of the offence punishable under Section 307 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for seven years apart from imposition of fine of Rs.5,000/- and in default to further undergo rigorous imprisonment for six months.

2 Facts in brief leading to the prosecution and resultant conviction of the appellant/accused No.2 can be summarized thus :

- (a) P.W.No.3 Anil Das is the victim of the crime in question. Appellant/accused No.2 Dablu Baldev Das, so also co-accused Rajkumar, Sanjay and Munna were residing near house of P.W.No.3 Anil Das at their native place. They all started working at Pune for earning their livelihood. As such, appellant/accused No.2 Dablu Baldev Das, injured P.W.No.3 Anil Das and other co-accused, who were subsequently acquitted were known to each other.
- (b) The incident in question took place in the night hours of 21/12/2006 in the open land in Kondhwa area of Pune. At about 7.00 p.m. of 21/12/2006 injured P.W.No.3 Anil Das went to the shop of his friend Arun Das. All accused persons including appellant/accused No.2 Dablu Baldev Das were present there. Appellant/accused No.2 Dablu Baldev Das

informed all of them that he has purchased new rickshaw and he wants to throw a party. Upon being invited by the appellant/accused No.2 Dablu Baldev Das, three co-accused so also injured P.W.No.3 Anil Das went to the open land at Kondhwa area of Pune by rickshaw of appellant/accused No.2 Dablu Baldev Das. On the way, they purchased a bottle of wine. They all sat in the open land for having a party. All accused persons then drank liquor. Subsequently, they assaulted injured P.W.No.3 Anil Das by means of fist and kick blows. Thereafter, appellant/accused No.2 Dablu Baldev Das went to the rickshaw, took out a knife and assaulted injured appellant/accused No.2 Dablu Baldev Das. The accused persons then left the injured on the spot and went away.

- (c) In the morning hours of 22/12/2006, P.W.No.4 Madan Salunke, who was residing in the vicinity of the spot of the incident was informed by the persons in the locality that one person is lying in the injured condition. P.W.No.4 Madan Salunke, then went to the spot of the incident and saw P.W.No.3 Anil Das in the injured condition. He, accordingly, informed police about this fact.
- (d) P.W.No.1 Hindurao Kamble was the Duty Officer posted at Bibwewadi Out Post of Sahkarnagar Police Station. He was informed by the Police Inspector of Sahkarnagar Police

Station about the fact that P.W.No.1 Hindurao Kamble is lying injured in the open land at Kondhwa. Accordingly, P.W.No.1 Hindurao Kamble, ASI went to the spot of the incident and found P.W.No.3 Anil Das lying in the injured condition. Upon being asked, P.W.No.3 Anil Das had informed P.W.No.1 Hindurao Kamble that his uncle and son of his uncle had stabbed him. Accordingly, P.W.No.1 Hindurao Kamble submitted his report (Exhibit 30) and lodged the FIR (Exhibit 31) on 22/12/2006 against the accused persons.

- (e) Routine investigation followed. The spot of the incident came to be inspected in presence of panch witness P.W.No.2 Balasaheb @ Pramod Oswal. From the spot of the incident, a knife, one bottle of liquor, one can of beer, a plastic glass, a stone as well as soil and grass came to be seized. All these articles were found to be stained with blood. The injured was treated at the Sassoon Hospital by P.W.No.5 Dr.Abhilasha Handu. His injury certificate came to be collected.
- (f) On completion of routine investigation, appellant/accused No.2 Dablu Baldev Das along with co-accused came to be charge-sheeted.
- (g) The learned trial Court framed the charge for the offence punishable under Section 307 read with Section 34 of the

Indian Penal Code against the accused persons. They pleaded not guilty and claimed trial.

- (f) In order to bring home the guilt to appellant/accused No.2 Dablu Baldev Das as well as the co-accused, the prosecution has examined in all six witnesses. First Informant Hindurao Kamble, ASI is examined as the P.W.No.1. The FIR lodged by him is at Exhibit 31. Panch witness Balasaheb @ Pramod Oswal is examined as the P.W.No.2. The spot panchanama is at Exhibit 42. Injured Anil Das is examined as the P.W.No.3. Madan Salunke is examined as the P.W.No.4. Dr.Abhilasha Handu of the Sassoon Hospital is examined as the P.W.No.5. Investigating Officer Pradip Kakade, API is examined as the P.W.No.6.
- (g) The defence of the appellant/accused No.2 Dablu Baldev Das was that of total denial.
- (h) After hearing the parties, the learned trial Court was pleased to acquit the accused Nos.1,3 and 4 and to convict appellant/accused No.2 Dablu Baldev Das and sentenced him as indicated in the opening paragraph of this Judgment.

3 I heard Shri.Joshi, the learned Counsel appearing for appellant/accused No.2 Dablu Baldev Das. He argued that injured

P.W.No.3 Anil Das had not even identified the knife allegedly seized from the spot of the incident as a weapon of offence. My attention was drawn to the evidence of P.W.No.1 Hindurao Kamble, who had spoken about smell of liquor while carrying the injured to the Hospital. With this, it is argued that the incident in question in every probability took place after the injured had consumed lot of liquor and, as such, his testimony that he was assaulted by appellant/accused No.2 Dablu Baldev Das cannot be termed as reliable and trustworthy. Evidence of the injured is suffering from exaggeration and is not reflected the intention required for bringing home the guilt for the offence punishable under Section 307 of the Indian Penal Code.

4 As against this, the learned Additional Public Prosecutor drew my attention to the evidence of injured P.W.No.3 Anil Das and argued that by cross-examining the injured, the defence has brought on record presence of injured in company of appellant/accused No.2 Dablu Baldev Das at the time of the incident. Even it is brought on record by the defence that the accused persons assaulted the injured for a period of about ten to fifteen minutes. With this, the learned Additional Public Prosecutor argued that the prosecution has proved the guilt of appellant/accused No.2 Dablu Baldev Das by adducing cogent and trustworthy evidence including that of P.W.No.5 Dr.Abhilasha Handu.

5 I have considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

6 Undisputedly, in the case in hand, P.W.No.3 Anil Das is an injured witness. His evidence that he suffered wounds in the incident in question, is gaining corroboration from the evidence of P.W.No.1 Hindurao Kamble of the Sassoon Hospital, Pune, who had medically examined him on the very next day of the incident i.e. on 22/12/2006. Evidence of P.W.No.5 Dr.Abhilasha Handu shows that injured P.W.No.3 Anil Das was having a stab wound on his abdomen. As such, evidence of injured P.W.No.3 Anil Das assumes great importance while inferring the guilt of appellant/accused No.2 Dablu Baldev Das in the crime in question. He being an injured witness, his evidence stands on a higher pedestal and if found trustworthy, the same can be relied upon for basing conviction. As per version of P.W.No.3 Anil Das, appellant/accused No.2 Dablu Baldev Das is known to him as he is resident of his native place. This witness deposed that on 21/12/2006, he went to the shop of Arun Das in the evening hours, where he met the accused persons. Then, appellant/accused No.2 Dablu Baldev Das invited him to join them for a party on occasion of purchase of a new rickshaw by him. P.W.No.3 Anil Das testified that then he joined company of accused persons. Together, they went in the rickshaw to the wine

shop, purchased one wine bottle and then went to a open land near Kondhwa area of Pune. As per version of P.W.No.3 Anil Das all accused persons consumed liquor at that place and then they started abusing him. He was then assaulted by means of fist and kick blows by the accused persons. Then, appellant/accused No.2 Dablu Baldev Das went near the rickshaw and took out a knife and assaulted him on his neck, hand and abdomen. He became unconscious and regain consciousness in the next morning.

7 From cross-examination of this witness, it is brought on record that the injured witness P.W.No.3 Anil Das joined company of the accused persons for a party and after reaching the spot of the incident with the accused persons, he was there with them. They reached at the spot at about 11.00 p.m. and after about half an hour, the quarrel starts. He was assaulted for the period of ten to fifteen minutes. P.W.No.3 Anil Das denied that he also consumed liquor and was heavily drunk at the time of the incident. He volunteered that he is a teetotaler. It is thus clear that from cross-examination of the injured witness, the defence has brought on record presence of appellant/accused No.2 Dablu Baldev Das on the scene of the occurrence with the injured. Consumption of liquor on the scene of occurrence is also established from cross-examination of the injured witness. Assault by the accused persons to the injured was also brought from cross-examination of the injured. In the light of this material on record,

I see no reason to disbelieve the version of P.W.No.3 Anil Das to the effect that it was appellant/accused No.2 Dablu Baldev Das, who had assaulted him by means of knife. Evidence of the injured is gaining corroboration from the situation prevalent on the scene of occurrence. P.W.No.2 Balasaheb @ Pramod Oswal is a panch witness to the spot panchanama effected on 22/12/2006. It is seen from this proved document that on the scene of occurrence an empty bottle of Macdonald whiskey, empty beer can, plastic glass and knife were found. All these articles were stained with blood. The blood was found spilled on the spot of the incident also.

8 P.W.No.4 Madan Salunke, who used to reside in the vicinity of the spot has also deposed about the fact of finding of P.W.No.3 Anil Das in an injured condition on the spot of the incident in the morning hours of 22/12/2006. Thus, evidence of injured P.W.No.3 Anil Das stands corroborated by voluminous evidence on record. It is established by the prosecution by this evidence that the injured was assaulted by appellant/accused No.2 Dablu Baldev Das in the night hours of 21/12/2006.

9 Now, let us examine whether this was an attempt to murder P.W.No.3 Anil Das or whether this act of appellant/accused No.2 Dablu Baldev Das constitutes some other offence. This will have to be determined on the basis of

surrounding circumstances. Culpable homicide is a genus and murder is its species. The Indian Penal Code practically recognizes three degrees of culpable homicide. Culpable homicide of the first degree is the gravest form which is defined as 'murder' and is made punishable under Section 302 of the IPC. The second may be termed as 'culpable homicide of second degree', which is made punishable under first part of Section 304 of the IPC. The last degree of culpable homicide is 'culpable homicide of third degree' which is made punishable under second part of Section 304 of the IPC. For making out the offence of murder punishable under Section 302 of the IPC, the prosecution is firstly required to establish that a bodily injury is present on the victim. Secondly, the prosecution is required to establish nature and size of the injury on the victim. Then the prosecution is enjoined to prove that there was intention to inflict the particular injury, by adducing clear and cogent evidence for clarifying that such an injury was not accidental or unintentional. Possibility of injury of other kind intended by the appellant/accused is required to be ruled out. Lastly, the prosecution has to establish that the injury so caused was sufficient to cause death in the ordinary course of nature. If all these factors are established, then only the offence defined under Section 300 of the IPC and punishable under Section 302 of IPC is made out. The offence punishable under Section 307 of the IPC is made out when the accused have intended to commit murder and in pursuance of that intention

does any overt act towards commission of murder. In order to establish the offence punishable under Section 307 of the IPC, the prosecution is required to establish the intention or knowledge of committing murder and doing of an act towards it. Thus, Section 307 of the IPC contemplates intention or knowledge and not the consequence of the actual act done for the purpose of carrying out the intention.

10 In the case in hand, examination-in-chief of P.W.No.3 Anil Das is not containing any explanation for assault on him by the accused persons including appellant/accused No.2 Dablu Baldev Das. On the contrary, in his examination-in-chief, the injured has plainly stated that he was invited by appellant/accused No.2 Dablu Baldev Das for a party on occasion of purchase of rickshaw by appellant/accused No.2 Dablu Baldev Das. Appellant/accused No.2 Dablu Baldev Das had even purchased a bottle of whiskey for that party and they all had a party at the scene of occurrence. Injured P.W.No.3 Anil Das claimed to be a teetotaler and denied the suggestion of he was heavily drunk at the time of the incident. However, he has belied by P.W.No.1 Hindurao Kamble, ASI, who had taken him to the hospital from the spot of the incident. As per version of P.W.No.1 Hindurao Kamble, when he was taking the injured to the hospital, the injured was smelling liquor. This version of P.W.No.1 Hindurao Kamble shows that even in the morning hours of the next day and

particularly at about 9.00 a.m. of 22/12/2006, injured P.W.No.3 Anil Das was smelling liquor. Thus, it is clear that at the time of the incident in question, injured P.W.No.3 Anil Das had consumed lot of liquor. Though he has not stated any reason for assault on him, cross-examination of injured P.W.No.3 Anil Das shows that the incident of assault on him was proceeded by quarrel. In cross-examination, he has candidly accepted the fact that after about half an hour of reaching the spot of the incident, the quarrel started. The injured, as such, has suppressed the details of assault on him. However, he was assaulted after there was quarrel between the accused persons and P.W.No.3 Anil Das. Quarrel is a bilateral phenomenon. The injured as well as appellant/accused No.2 Dablu Baldev Das had quarreled after having a booze session. During course of that quarrel, all of a sudden, appellant/accused No.2 Dablu Baldev Das had assaulted the injured by means of a knife. Though the injured has stated that the appellant/accused No.2 Dablu Baldev Das had given repeated blows to him on his neck, hand and abdomen, evidence of P.W.No.5 Dr.Abhilasha Handu shows that there was only one stab injury on hypochondriac region of P.W.No.3 Anil Das. In the wake of this evidence, it cannot be said that appellant/accused No.2 Dablu Baldev Das had intended to commit murder of injured P.W.No.3 Anil Das. Even otherwise, as per Exception 4 of Section 300 of the Indian Penal Code, culpable homicide is not murder if it is committed without premeditation in sudden fight in the heat of

passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. The learned trial Court has not considered these aspects of the case and concluded that the prosecution has proved that appellant/accused No.2 Dablu Baldev Das had attempted to commit murder of injured P.W.No.3 Anil Das. In the result, conviction of the appellant/accused No.2 Dablu Baldev Das of the offence punishable under Section 307 of the Indian Penal Code is not justified and the said conviction so also resultant sentence on that count needs to be quashed and set aside.

11 Now, let us examine which offence is committed by appellant/accused No.2 Dablu Baldev Das by giving a blow of knife on abdomen of injured P.W.No.3 Anil Das. As per evidence of P.W.No.5 Dr.Abhilasha Handu, injured P.W.No.3 Anil Das has suffered stab injury in the right hypochondriac region which resulted in multiple transverse incised wounds over anterior abdominal wall. Resultantly, the injured was required to undergo the surgery. He was kept as indoor patient with the Sassoon Hospital, Pune for about thirteen days. It is, thus, clear that the injured P.W.No.3 Anil Das had suffered grievous hurt at the hands of appellant/accused No.2 Dablu Baldev Das. The wound caused to the injured P.W.No.3 Anil Das had certainly endangered life of the injured P.W.No.3 Anil Das and had caused him to suffer severe bodily pain for a period of more than twenty days, as he was

required to undergo surgery for mending the wound. Therefore, the offence punishable under Section 326 of the Indian Penal Code is seen to have been committed by appellant/accused No.2 Dablu Baldev Das, for which he is liable to be punished accordingly. In my considered opinion, appellant/accused No.2 Dablu Baldev Das needs to be sentenced to suffer rigorous imprisonment for five years for this proved offence apart from imposition of some fine and default sentence.

12 In the result, the following Order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) Conviction of the appellant/accused No.2 Dablu Baldev Das of the offence punishable under Section 307 of the Indian Penal Code and the resultant sentence imposed on him on that count is set aside.
- (iii) Instead, appellant/accused No.2 Dablu Baldev Das is convicted of the offence punishable under Section 326 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for five years apart from direction to pay fine of Rs.5,000/- and in default to undergo further simple imprisonment for six months.

(iv) The Appeal is accordingly disposed of.

(A.M.BADAR J.)