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

CRIMINAL APPEAL NO. 249 OF 2012

Ajay Hanumanprasad Sharma

..Appellant

Vs

The State of Maharashtra through
Inspector in charge, Sakinaka Police
Station.

..Respondent

Dr. Yug Mohit Chaudhary a/w Ms. Ragini Ahuja for Appellant.
Ms. M.H. Mhatre, A.P.P. for Respondent-State.

**CORAM : A.S. OKA &
A.S.GADKARI, J.J.**

**Reserved On: 11th January 2019.
Pronounced On: 5th February 2019.**

JUDGMENT (Per Shri A.S. Gadkari, J.):-

1] The conviction of the Appellant under section 302 of Indian Penal Code and sentence of life imprisonment imposed upon him by the learned Additional Sessions Judge, Sewree in Sessions Case No.731 of 2010 by its Judgment and Order dated 1st February 2012 is questioned by impugning the same.

2] Heard Dr. Y.M Chaudhary, the learned counsel for the Appellant and Ms. M.H. Mhatre, the learned APP for the State. Perused the entire record.

3] The prosecution case in brief is that, the first informant Rajesh Sharma (PW No.1), his friend Dilip Yadav (PW No.5) and the appellant were taking education in Yogiraj Shrikrishna High School, Safedpul, Mumbai. The friend of Dilip Yadav namely Munna @ Rashid @ Nawab (deceased) was also knowing the appellant being friend of Dilip Yadav. That on 8.8.2010 at about 22.30 (10.30 p.m.) the appellant came in front of the house of Rajesh Sharma (PW No.1) and created ruckus and threatened him that, he will beat Rajesh on or before 15th day of the said month. The informant pacified him and thereafter the appellant went away from the said place. The informant Rajesh Sharma (PW No.1) thereafter intimated the said fact to his friends namely Dilip Yadav (PW No.5), Rupesh Morya (PW No.2) and Munna @ Rashid (deceased).

On 9.8.2010 at about 9.00 p.m the appellant met Munna @ Rashid, when Munna @ Rashid asked the appellant as to, why the appellant is giving threats to Rajesh Sharma (PW No.1) of beating and further told that, if the appellant beats Rajesh Sharma (PW No.1), he

would beat appellant. That on 10.8.2010 at about 9.00 p.m, the informant Rajesh Sharma (PW No.1) met his friends Rupesh Morya(PW No.2) and Dilip Yadav (PW No.5) and Munna @ Rashid (deceased). At that time, Munna (deceased) told them that, they will go to the house of the appellant and inform to his father, the fact of giving threats by the appellant to Rajesh Sharma (PW No.1). When they were proceeding towards the house of the appellant at about 11.00 p.m, they met Dharmendra Yadav who was immediate neighbour of the appellant. The aforesaid persons met Dharmendra Yadav near his house and expressed their grievance about the appellant extending threats of beating to Rajesh Sharma (PW No.1) and requested Dharmendra Yadav to explain the said fact to the appellant. Dharmendra Yadav told the said persons that, they may leave the place and he will explain the said fact to the appellant. Dhamendra told that, he will try to give understanding to the appellant. It is the further prosecution case that, at that time the appellant came out of his house with a sharp-edged knife in his hand and inflicted it on the chest of Munna @ Rashid and also stabbed on the left hand wrist of Munna. When the informant and his friend 'Rupesh Morya (PW No.2) tried to rescue Munna @ Rashid, the appellant also assaulted Rupesh Morya on his head. The said three persons

thereafter took Munna @ Rashid to Rajawadi Hospital where he was declared dead before admission. The first information report is lodged by Rajesh Sharma (PW No.1) on 11.8.2010.

4] After completion of investigation, the police submitted chargesheet in the Court of Metropolitan Magistrate. The concerned Metropolitan Magistrate committed the said case to the Court of Sessions as contemplated under section 209 of Cr. P.C.

After committal of the case, the learned Additional Sessions Judge, Greater Mumbai framed charge below Exhibit-4 under sections 302 and 324 of Indian Penal Code. The said charge was read over and explained to the appellant to which he denied and claimed to be tried. The prosecution examined in all six witnesses in support of its case. The learned Trial Court after recording evidence of the said witnesses and after hearing the parties to the said case was pleased to convict the appellant under sections 302 and 324 of Indian Penal Code by its Judgment and Order dated 1st February 2012.

5] Dr. Y.M. Chaudhary, the learned counsel for the appellant on instructions from the appellant, at the outset submitted that, the appellant is not disputing the incident in question and in fact is admitting the same.

However, he submitted that, the appellant is adopting a plea of private defence. He submitted that, in view of earlier threats extended by Munna @ Rashid (deceased) on behalf of Rajesh Sharma (PW No.1) of beating, when the appellant saw Rajesh Sharma (PW No.1), Rupesh Morya (PW No.2), Dilip Yadav (PW No.5) along with Munna @ Rashid near his house, the appellant got panicked and it created reasonable apprehension in the mind of the appellant that, the said persons may cause grievous hurt to him and with a view to protect himself as a natural consequence, the appellant came out of his house with a kitchen knife in his hand and assaulted Munna @ Rashid . In support of his contention, he relied on the following decisions of the Apex Court:-

- (i) Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Ors.
Singh Reported in (2001) 6 SCC 145.
- (ii) Darshan Singh Reported in (2001) 6 SCC 145.
Vs. State of P Vs. State of Punjab & Anr.
Reported in (2010) 2 SCC 333.
- (iii) Arjun Vs. Sate of Maharashtra
Reported in (2012) 5 SCC 530.
- (iv) Raj Singh Vs. State of Haryana & Ors. with connected matters.
Reported in (2015) 6 SCC 268.

He further submitted that, Munna @ Rashid was an elderly person than Rajesh Sharma (PW No.1), Dilip Yadav (PW No.5) and the appellant. As per his instructions deceased was a hooligan in the said area. He submitted that the act of the applicant would therefore fall within the purview of Exception 2 to Section 300 of Indian Penal Code and therefore the appellant at the most may be convicted under section 304(I) of Indian Penal Code and not under section 302 of Indian Penal Code. He therefore prayed that the appeal may be allowed by quashing and setting aside the impugned Judgment and Order dated 1st February 2012.

Per contra, the learned APP vehemently opposed the appeal and supported the impugned Judgment and Order on all its counts and prayed that the present appeal may be dismissed.

6] Rajesh Sharma (PW No.1) though has been cited as an eye-witness to the incident, resiled from his statement/information report given to the police and therefore he was declared hostile by the prosecution. Another eye-witness Dilip Yadav (PW No.5) has also been declared hostile by the prosecution. Nothing beneficial has been elicited from the cross-examination of the said two witnesses.

7] The material witness in the present crime is Rupesh Morya (PW No.2). In his testimony, he has stated that, the appellant was his college mate. That on 10.8.2010 he along with Munna @ Rashid (deceased), Rajesh Sharma (PW No.1) and Dilip Yadav (PW No.5) at about 10.30 p.m. were proceeding from the lane in front of the house of the appellant. They met Dharmendra Yadav. Rajesh Sharma (PW No.1) told Dharmendra that, the appellant threatened him and was quarreling with him and therefore he should tell the appellant not to do the same. That the house of Dharmendra Yadav is just adjoining to the house of the appellant. That the appellant came out of his house holding a knife in his hand and stabbed Munna @ Rashid with it in his chest and inflicted another blow over the left hand. Munna @ Rashid fell down due to injuries. Rupesh Morya (PW No.2) went and caught hold of the appellant and tried to dissuade him from assaulting Munna @ Rashid, when the appellant gave one blow of knife over his left side of head. Rupesh Morya (PW No.2) received bleeding injury and fell down. The appellant ran away from the spot.

The injury received by Rupesh Morya (PW No.2) has been duly corroborated by the medical certificate (Exh.17) issued by the Municipal Corporation Hospital. The column No.17 of the Postmortem notes of

Munna @ Rashid (Exh.16) also corroborates the version of the witness namely Rupesh Morya (PW No.2) with respect to injuries received by Munna @ Rashid (deceased).

The panch-witness to the recovery panchanama of the knife (Article-1) at the behest of the appellant namely Rajulla Khan (PW No.3) has been declared hostile by the prosecution. However, the said recovery panchanama is duly proved by Shri S.G. Rajput, the Investigating Officer (PW No.6).

8] It is to be noted here that, though the statement of Dharmendra Yadav dated 11.8.2010 has been recorded and he was cited as a prosecution witness at Serial No.6 in the list of witnesses to be examined in the final report, has not been examined by the prosecution at the time of trial. It is the settled position of law, that if the prosecution had deliberately avoided to examine an important witness and has failed to prove on record the absolute truth revealed during the course of investigation, the Court can draw adverse inference in that behalf. A reliance can be placed on a decision of the Supreme Court in the case of *Balbir Vs. State of Haryana & Anr. reported in (2000) 1 SCC 285*.

9] As noted herein above, Rupesh Morya (PW No.2) in his testimony has stated that, when he along with Munna @ Rashid (deceased) and Dilip Yadav (PW No.5) were proceeding to their house from the lane in front of the house of the appellant, they met Dharmendra Yadav. That Rajesh Sharma (PW No.1) told Dharmendra that the appellant was threatening and quarreling with him and hence he would tell the appellant not to do so. He has further stated that, the house of Dharmendra is just adjoining to the house of the appellant. Though an omission to the extent that, Rajesh Sharma (PW No.1) told Dharmendra to dissuade the appellant has been brought on record the testimony of Rupesh Morya (PW No.2) in his examination-in-chief has not been shaken. It is thus clear that on their way to the house on 10.8.2010 at about 10.30 p.m, Rajesh Sharma (PW No.1), Rupesh Morya (PW No.2), Dilip Yadav (PW No.5) alongwith Munna @ Rashid met Dharmendra Yadav near his house which was just adjoining to the house of the appellant.

10] At this stage it is to be noted here that, on 8.8.2010 at about 10.30 p.m the appellant had a quarrel with Rajesh Sharma (PW No.1), upon which on 9.8.2010 at about 9.00 p.m. Munna @ Rashid had threatened the appellant with severe consequences, if he would assault

Rajesh Sharma (PW No.1). In this background, on 10.8.2010 at about 10.30 p.m. when the appellant saw Munna @ Rashid, Rajesh Sharma (PW No.1), Rupesh Morya (PW No.2) and Dilip Yadav (PW No.5) near his house a strong apprehension of assault and/or causing grievous hurt by the said four persons arisen in the mind of the appellant and therefore he came out of his house with a knife in his hand and assaulted Munna @ Rashid with it. As per the submission of the learned counsel for the appellant, Munna @ Rashid was a known hooligan in the vicinity and therefore also it further created apprehension in the mind of the appellant of receiving grievous hurt at the hands of Munna @ Rashid. The age of the applicant at the relevant time was only 19 years. His reaction has to be judged in the context of his young age.

The Supreme Court in the case of Darshan Singh Vs. State of Punjab & Anr (supra) has held as under:

“31. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-

defence is only right to defend oneself and not to retaliate. It is not a right to take revenge.”

11] In the absence of examination of Dharmendra Yadav, an irresistible inference can be drawn that, the deceased Munna @ Rashid along with the said three witnesses had been to the house of the appellant in furtherance of threat extended by deceased. It therefore created strong apprehension in the mind of the appellant of causing grievous hurt and/or assault and with a view to defend himself, he assaulted munna @ Rashid (deceased) with a knife.

In the absence of examination of Dharmendra Yadav by the prosecution, the theory put up by the prosecution that, the deceased along with the said three witnesses met Dharmendra Yadav and requested him to dissuade the appellant from assaulting Rajesh Sharma (PW No.1) cannot be believed and the contention of the appellant therefore needs to be accepted, that in view of threats extended by Munna @ Rashid on the earlier night of severe consequences, Munna @ Rashid along with other three witnesses had been to his house at the odd hours of night to assault him and therefore causing strong apprehension in the mind of the appellant of receiving grievous hurt/injury at the hands of Munna @ Rashid, he

exercised the right of private defence and assaulted Munna @ Rashid with the knife.

12] After perusing the entire evidence available on record, it appears to us that while exercising his right of private defence, the appellant has caused death of Munna @ Rashid and therefore the act of the appellant would fall within the ambit of Exception 2 of Section 300 of the Indian Penal Code and the offence committed by the appellant would fall within the purview of Section 304(I) and not 302 of the Indian Penal Code.

13] We therefore partly allow the present appeal and modify the impugned Judgment and Order dated 1st February 2012 passed by the learned Additional Sessions Judge, Greater Mumbai at Sewree and convict the appellant under section 304(I) of the Indian Penal Code and sentence him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.5000/-, in default of payment of fine to further suffer rigorous imprisonment for six months.

As far as the conviction under section 324 of Indian Penal Code is concerned, the same maintained.

Both sentences shall run concurrently. It is needless to mention

that, the appellant is entitled for set off as contemplated under section 428 of Cr. P.C.

14] Criminal Appeal is partly allowed in the aforesaid terms.

(A.S.GADKARI, J.)

(A.S. OKA, J.)