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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
APPEAL NO.313 OF 2015

Nazir Fakhruddin Ahmed ...Appellant
vs.
State of Maharashtra ...Respondent

Mr.Jagdish Kumar Sanjeev Hegde for the Appellant
Ms P.P.Shinde, APP for the respondent-State

CORAM : A.S.OKA, &
A.S.GADKARI, JJ.
DATE : FEBRUARY 8, 2019

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Called out for final hearing. Heard the learned counsel for the appellant. The appellant who is one of the accused out of the two accused has taken an exception to the Judgment and Order dated 31st January 2015 passed by the learned Sessions Judge, Pune. The appellant-accused No.1 has been convicted for the offence punishable under section 302 of the Indian Penal Code ("IPC") and the accused No.2 has been convicted for the offence punishable under section 323 of the IPC.

2 The first informant is P.W.No.2-Shamsunder Joshi who at the relevant time was working as a Captain in the Hote Golden Pam. He was residing with Vishnu Bhatt, Mandev Bhatt and Rameshchand. Vishnu Bhatt was working as a Waiter in the Hotel Poona Gate where the present appellant was working as a

Waiter. Deceased Lalit Mohan Joshi is the cousin of Shamsunder. The deceased was working as a Waiter in Hotel Sai Press at Yerwada, Pune.

3 On 16th August 2011 around 10.30 in the morning, when Vishnu was making a phone call to his sister, the appellant obstructed him and complained to the employer as the said Vishnu was on duty. Therefore, his employer seized the cell phone of Vishnu. On 22nd August 2011, in the afternoon around 4.20 p.m., deceased Lalit and Manoj came to the room of Vishnu for purchasing railway tickets. Manoj, deceased Lalit and Vishnu went to Bhakti Shakti Garden, Nigadi and thereafter, they went to one wine shop. They consumed beer and went to Jyoti Lunch Home for dinner. The appellant-accused came there and there was an exchange of words as well as abuses between them. When the deceased Lalit enquired with Vishnu as to why accused is abusing, he disclosed the incident of quarrel over the mobile phone. Thereafter, the deceased Lalit picked up a beer bottle and threw it towards appellant-accused. The bottle hit the wall. At that time, P.W.No.4 Sambhaji Pawar who was the owner of the hotel in which they were sitting pacified the quarrel and drove out all the four persons out of his hotel. While the deceased Lalit was going down by stair case, the accused No.2 assaulted him by kicks and fists blows to him. At that time, the appellant rushed towards Lalit and assaulted him by a beer bottle on his head. Due to fear, Lalit ran towards first floor.

He was chased by the appellant. The allegation is that the appellant thereafter assaulted the deceased Lalit and threw him down from the balcony. As a result, deceased Lalit sustained injuries and he succumbed to the injuries.

4 P.W.No.2-Shamsunder Joshi after finishing his duty at about 10.30 p.m came out of the hotel Golden Palm. At that time, Laxman Bhatt met him and informed him the fact that Lalit was lying on the ground. Both of them took him to the YCM Hospital where he was declared as dead. After carrying out investigation, charge sheet was filed. The prosecution examined P.W.No.2-Shamsunder Joshi, the first informant as well as P.W.No.3 Vishnu Bhatt and P.W.No.4 Sambhaji Pawar as eye witnesses. P.W.NO.5 PSI Jadhav and P.W.No.6 Dr.Milind Sonawane, Autopsy Surgeon were also examined. We may note here that the accused No.2 was acquitted of the offence punishable under section 302 read with section 34 of the IPC and was convicted for the offence under section 323 of the IPC.

5 The learned counsel for the appellant has taken us through the evidence of P.W. No.5. He invited our attention to the evidence of P.W.No.4-Sambhaji Pawar and pointed out that when deceased Lalit, P.W.No.3-Vishnu Bhatt and one Manoj came to his hotel for dinner, they were drunk and were not able to walk steadily. He urged that this is a case where Lalit who was drunk, fell down from the

balcony as he lost balance. He pointed out that one Manoj was with the deceased Lalit and the police had enquired with Manoj but he has not been examined as a witness. Inviting our attention to the evidence P.W.No.3-Vishnu Bhatt, he urged that in view of the statements made by him in the cross examination, the prosecution case becomes doubtful. He also invited our attention to the evidence of P.W.No.6-Dr.Milind Sonawane, Autopsy Surgeon and submitted that even the injuries noted on the person of the deceased did not support the prosecution case. His submission is that the evidence of P.W.No.3 cannot be relied upon. In this case, there is no independent evidence to show that it was the appellant who threw down the deceased Lalit. He pointed out that P.W.No.4-Sambhaji Pawar has not deposed about the deceased Lalit running towards the first floor. He would, therefore, submit that defence of the appellant that deceased Lalit who had consumed liquor fell down on his own is a plausible defence. The learned APP supported the impugned Judgment and Order.

6 We have considered the submissions. From the cross examination of P.W.No.2-Vishnu Bhatt, it appears that defence of the appellant was that on account of intoxication, Lalit himself fell down from the first floor.

7 P.W.No.2-Sambhaji Pawar is the owner of Jyoti Lunch Home where deceased Lalit, Manoj and P.W.No.3-

Vishnu visited on 22nd August 2011 at 10.00 p.m for dinner. When they started taking dinner, the appellant came there for taking dinner. He was sitting on the table besides the table of the three persons. Thereafter, they started staring at each other. The deceased Lalit thereafter stood up and brought an empty beer bottle and pelted towards Nazir, but it hit the wall. Thereafter, the deceased Lalit again picked another bottle and broke it. At that time P.W.No.4 intervened and he drove all the four persons out of his hotel. He deposed that while they were going out of the said hotel, in front of the said hotel, one boy was standing. The said boy assaulted Lalit by kicks and fists. He also deposed that out side the hotel, the appellant also assaulted deceased Lalit by a beer bottle. He saw the deceased running away. Thereafter, he came back to the hotel. He has not seen the incident which happened thereafter. In the cross examination, he stated that he noted that the deceased Lalit,Vishnu and Manoj were drunk and their speeches were not coherent.

8 P.W.No.2 Vishnu accompanied the deceased along with Manoj. In paragraph 3 of his deposition, P.W.No.2 has stated thus:

"3 On 22.8.2011 there was my holiday, Lalit Joshi and Munojchand had come to my room at about 4.4.30 p.m for purchasing railway ticket as Lalit Joshi wants to go to

Nepal. On that day we came out of the room at about 5 pm and went to Bhakti Shakti garden, Nigdi. Thereafter at about 8 pm to 8.30 pm we went to Lucky wine shop and we consumed beer. Thereafter, we went to Jyoti Lunch Home and had given order of dinner. Within short time, food was served to us. When we were sitting for dinner at that time accused Nazir came there and he was starrng to us. I asked for the same, on which he started abusing me. Lalit asked me as to why Nazir is abusing, on which the accused also started abusing him. When Lalit asked me as to ask Nazir is abusing I disclosed him that prior to 4-5 days I had quarreled with nazir. Lalit pelted the beer bottle towards Nazir, but the bottle was not hit to Nazir. Thereafter, again Lalit picked up beer bottle, in the meanwhile the hotel owner told us to go out. When we were going out of the said hotel, in front of the said hotel one boy was standing. The said boy assaulted Lalit by kicks and fists. At that time accused Nazir came there and by snatching the beer bottle from the hand of Lalit he assaulted Lalit on his head by the said bottle. Thereafter, Lalit became frightened and went upside the hotel building. Accused Nazir followed him. Hence, we also followed them. Accused Nazir assaulted Lalit and by picking up Lalit he throw Lalit down from gallary. As we

frightened, we ran away and went to the room. Myself disclosed the incident to my brother Laxman Bhatt and Laxman disclosed the incident to brother of Lalit viz Sham Joshi. Later on I came to know that Lalit was taken to YCM Hospital and died. Thereafter, we went to YCM Hospital. I was present in YCM Hospital at about 8 am on next morning. Police recorded my statement. Myself showed the spot of incident to police. Today, accused Nazir is not present before the court but I can identify him. I am unable to identify the another accused."

8 We have carefully perused the cross examination of P.W.No.3-Vishnu. There is no major omission or contradiction brought on record except the omission that deceased Lalit while going out of the hotel had broken another beer bottle outside the hotel. In the cross examination, a question was put to him that whether he made any attempt to stop quarrel or to catch anybody. His answer was for separating the quarrel, he went on the first floor but before he could reach there, Nazir (appellant) had thrown Lalit from first floor to ground floor. The witness clearly stated that he went on the first floor for separating quarrel but before he reached the spot, the appellant-Nazir threw down Lalit. The appellant had done the act of throwing Lalit from first floor to ground floor. The witness denied the suggestion that on account of intoxication, deceased Lalit

fell down on his own. The evidence of P.W.No.2 has been corroborated partly by evidence of P.W.No.4 Sambhaji who had seen the incident till the accused No.2 assaulted deceased Lalit and thereafter, appellant assaulted deceased Lalit. He stated that after he saw deceased Lalit running away, he returned to his hotel and further part was not seen by him. Even as far as the evidence of P.W.No.4 is concerned, there is hardly any omission or contradiction brought on record. Therefore, on first part of the incident, the evidence of P.W.No.2-Vishnu and Sambhaji Pawar are consistent but on the second part of the incident, for the reasons which we have recorded above, it is very difficult to disbelieve the version of Vishnu. The evidence of Vishnu establishes the fact that deceased Lalit after he was attacked firstly by the accused No.2 and thereafter by the accused No.1 outside the hotel, ran towards first floor. The appellant followed him and thereafter, threw him from the first floor to the ground floor. Even any of the exceptions to section 300 will not be attracted in this case. After the incident of the appellant assaulting him on the ground floor outside the hotel, the deceased ran and climbed the staircase for going to the first floor. There was no reason for Nazir to follow him and thereafter, to assault him and throw him down. Therefore, this is not the case where there is an absence of premeditation.

9 Therefore, we find no error when the learned

Trial Judge held that the prosecution has brought home the charge of the offence punishable under section 302 of the IPC against the appellant. We find no error in the impugned Judgment and Order.

10 Hence, we pass the following order:

. Appeal is accordingly dismissed.
Pending Criminal Application does not survive and the same is also disposed of.

(A.S.GADKARI,J.)

(A.S.OKA,J.)