

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.611 OF 2014

Rajkumar Chotalal Rajput @ Chela
age 56 yrs, Occ. Nil,
R/o Second Pool, Nehru Nagar,
Jabalpur, Madhya Pradesh. ..Appellant..
(orig. accused)

Versus

The State of Maharashtra,
Through Police Inspector,
Kotwali Police Station,
Ahmednagar,
District Ahmednagar. ..Respondent..

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Advocate for Appellant : Mr. Girish V Wani
APP for Respondent : Mr. R D. Sanap

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CORAM : V.K. JADHAV & SHRIKANT D. KULKARNI, JJ.

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Reserved on : 09.9.2021
Pronounced on : 21.09.2021
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JUDGMENT :- (Per V. K. JADHAV, J.)

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Ahmednagar dated 28.4.2014 in Sessions Case No.199 of 2013 convicting thereby the appellant/accused for the offence punishable under section 302 of the Indian Penal Code and sentencing to suffer imprisonment for life and to pay fine of

Rs.1,000/-, in default to undergo S.I. for a further period of three months.

2. Brief facts of the prosecution case, are as follows :-

a] PW-1 complainant Kanna Babu Madrasi is original resident of Jabalpur (M.P.). PW 1 Kanna Madrasi was doing the business of selling roots alongwith his family members. All of them were wandering from one place to another place for selling roots. On 2.4.2013 PW 1 Kanna Madrasi had been to Ahmednagar from Jabalpur alongwith one Omprakash Begel, Jawed Shaikh and Kaliya Madrasi. PW 1 Kanna Madrasi alongwith his friends and family members was camping on the foot path in front of Ahmednagar Railway Station near one school compound. On 3.4.2013 his brother Raja Madrasi also came from Jabalpur to Ahmednagar and he has also started staying alongwith them on the foot path. The appellant/accused Rajkumar Rajput, who was also resident of Jabalpur also came to Ahmednagar. The appellant/accused was also camping with PW 1 Kanna Madrasi. Left hand of the appellant/accused was amputated and he was earning his livelihood by begging.

b] The incident had taken place on 4.4.2013 at about 8.30 p.m. On that day, in the morning, the appellant/accused Rajkumar Rajput had gone for begging in Ahmednagar City and brother of complainant deceased Raja Madrasi alongwith his friend had gone for collecting the roots. At about 4.00 p.m. deceased Raja Madrasi alongwith Omprakash Bagel, PW 1 Kanna Madrasi as well as Javed Shaikh returned back. The appellant/accused Rajkumar Rajput also returned at about 6.00 p.m. PW 1 Kanna Madrasi then collected Rs.15/- from each of his friends and brother for preparing meals and then went towards the Railway Station. Deceased Raja Madrasi was talking with appellant/accused Rajkumar Rajput. However, quarrel had taken place between deceased Raja Madrasi and the appellant/accused Rajkumar Rajput. Both of them started giving abuses to each other. PW 1 Kanna Madrasi then asked them to calm down, but both were not listening. As per the prosecution story, deceased Raja Madrasi picked up one cement block lying on the foot path and thrown the same at accused Rajkumar Rajput. In consequence of which, the appellant/accused

Rajkumar Rajput sustained injury. The appellant/accused Rajkumar Rajput then picked up another cement block from the foot path and assaulted deceased Raja Madrasi by means of the same. The appellant/accused Rajkumar Rajput had given 2 to 3 blows of cement block on back side of head of deceased Raja Madrasi. In consequence of which, deceased Raja Madrasi sustained severe bleeding injuries on the head and he fell down on the foot path itself. Someone present near the foot path informed to the Kotwali Police Station and police accordingly came to the spot. They immediately shifted deceased Raja Madrasi to the Civil Hospital, but he died in the Civil Hospital. PW 1 Kanna Madrasi has lodged the report about the incident exhibit 11. On the basis of his report, crime bearing no.125 of 2013 came to be registered against the appellant/accused Rajkumar Rajput for the offence punishable under sections 302, 504 of the Indian Penal Code. Thereafter, the Police of Kotwali Police Station went to the spot of the occurrence located on the foot path in front of Ahmednagar Railway Station and drawn the spot panchnama exhibit 53 in presence of the panch

witnesses. Police also collected sample of blood from the spot. PW 13 PI Abhiman Pawar effected arrest of the appellant/accused and sent him for medical examination. The appellant/accused has also lodged the complaint exhibit 36 against the deceased Raja Madrasi. PW 13 PI Pawar had sent the appellant/accused Rajkumar Rajput for his medical examination. PW 13 PI Pawar has also seized one plastic gunny bag stained with blood, one cement paving block stained with blood. Spot panchnama is at exhibit 53. He has also prepared inquest panchnama of the dead body vide exhibit 17. PW 13 P.I. Pawar has recorded statements of the witnesses. He has also produced the witnesses before the Magistrate to record the statements under section 164 of the Cr.P.C. He has also collected postmortem report, medical certificate of the appellant/accused and sent all the Muddemal Articles to Chemical Analyzer. He has also collected N.C. report registered on the basis of the complaint given by appellant/accused against the deceased. CA report exhibit 62 to 65 were received. PW 13 PI Pawar

has thereafter submitted charge-sheet against the appellant/accused.

3. The learned Sessions Judge, Ahmednagar has framed the charge against the appellant/accused vide exhibit 4 for the offence punishable under sections 302, 504 of the Indian Penal Code. The contents of the charge were read over and explained to the accused in Hindi. The appellant/accused pleaded not guilty to the charge and claimed to be tried.

4. Prosecution has examined in all 13 witnesses to substantiate the charges levelled against the appellant/accused. The defence of the accused is of denial and false implication. After completion of the prosecution evidence, the statement of the accused under section 313 of the Cr.P.C. came to be recorded.

5. By judgment and order dated 28.4.2014 the learned Sessions Judge, Ahmednagar in Sessions case No.199 of 2013 has convicted the appellant/accused for the offence punishable under section 302 of the Indian Penal Code, which is as follows :-

- 1- Accused Rajkumar Rajput is hereby convicted of the offence of murder punishable under section 302 of Indian Penal Code and is sentenced to suffer Imprisonment for life and to pay fine of Rs.1,000/- (Rs. One Thousand only), in default of payment of fine to undergo simple imprisonment for further period of three months.
 - 2- Accused Rajkumar Rajput is hereby acquitted of the offence punishable under section 504 of the Indian Penal Code.
 - 3- Muddemal property namely clothes, cement block seized in the offence (article 1 to 10) being worthless be destroyed after the period of appeal is over.
6. Learned counsel for the appellant/accused submits that PW 1 Kanna Madrasi has admitted in his cross-examination that when he returned to the spot, the incident was already over. The appellant/accused was caught hold by the hotel owners and therefore he believed that the appellant/accused might have committed murder of deceased Raja Madrasi by giving blows of tiles. Learned counsel submits that PW 2 Omprakash Bagel, PW 3 Shaikh Javed Shaikh Abdul, PW 4 Kaliya @ Raju Madrasi and PW 6 Sumit Jain have not supported the prosecution case at all. They were subjected to cross-examination at length by the learned

APP before the trial court, however, their evidence is not worth to be considered.

7. Learned counsel submits that the prosecution has examined PW 12 Madhav Chinde as eye witness to the incident. He is a got up and chance witness. His presence on the spot at the time of the alleged incident is also doubtful. PW 12 Madhav Chinde was not knowing the accused prior to the incident nor the deceased. PW 12 Madhav has identified the appellant/accused for the first time in the Court. The Investigating Officer has not conducted any identification parade. Thus, his evidence identifying the appellant/accused for the first time before the Court is a weak type of evidence. He is not a trust worthy and reliable witness.

8. Learned counsel submits that, so far as the witnesses turned hostile as referred above, during the course of the investigation, their statements under section 164 of Cr.P.C. came to be recorded before the Special Executive Magistrate. Consequently, prosecution has examined PW 8 Bhaskar Bhos, the Special

Executive Magistrate to prove their statements. Accordingly, the trial court has exhibited statements of the hostile witnesses recorded under section 164 of the Cr.P.C. by the Special Executive Magistrate PW 8 Bhaskar Bhos. Learned counsel submits that, the statements recorded under section 164 of Cr.P.C is not a substantive evidence and can be utilized only to corroborate or contradict the witness vis-a-vis statement made in the Court. Learned counsel submits that PW 2 Omprakash Bagel, PW 3 Shaikh Javed Shaikh Abdul, PW 4 Kaliya @ Raju Madrasi and PW 6 Sumit Jain have not supported the prosecution case and in view of the same, their respective statements recorded under section 164 of Cr.P.C. before the Special Executive Magistrate cannot be the basis for conviction. Learned counsel submits that entire approach of the trial court is incorrect, improper and illegal.

9. Learned counsel for the appellant/accused, in order to substantiate his contentions, placed reliance on the following judgment :-

1. Audumbar Digambar Jagdane and another Vs. State of Maharashtra reported in 1998 ALL MR Cri 1363.

2. Baij Nath Sah Vs. State of Bihar reported in (2010) 6 Supreme Court Cases 736

10. Learned APP appearing for the respondent-State submits that PW 1 Kanna Madrasi was near the spot at the time of the alleged incident and immediately he rushed to the spot. He had gone about 10 minutes by walk away from the spot. Even if he has not witnessed the incident, however, he is a reliable and trust worthy witness. His evidence can be believed to the extent he has deposed before the Court. The appellant/accused was caught hold by the surrounding hotel owners on the spot itself. Deceased was lying in injured condition on the foot path itself. Those cement blocks were collected there and used as a 'Chulha' for preparing the meals. The appellant/accused had used said cement block and assaulted the deceased. Learned APP submits that the prosecution has proved homicidal death of deceased Raja Madrasi through PW 7 Dr. Gorakhnath Gaikwad. Deceased Raja Madrasi died due to intracranial hemorrhage due to head injury. Postmortem report exhibit 23 is duly proved by the

prosecution. Learned APP submits that the prosecution has examined PW 12 Madhav Chinde, who is an eye witness to the incident. His presence on the spot was natural. He is dealing in the business of travels and as such his presence near the railway station is natural. Though he has identified the appellant/accused before the court, however, he has well described the appellant/accused whose left hand was amputated. PW 12 Madhav Chinde has deposed that the appellant/accused, having only one hand and other was amputated, assaulted the deceased by means of cement block. Learned APP submits that spot panchnama exhibit 53, CA reports exhibit 62, 63, 64 and 65 fully corroborates the prosecution case. Learned APP submits that the appellant/accused Rajkumar Rajput himself has lodged the complaint against the deceased Raja Madrasi, wherein he has admitted the alleged incident. On the basis of his report, N.C. came to be registered against deceased Raja Madrasi and said N.C. report is marked as exhibit 36. The appellant/accused has also sustained injury in the said quarrel and he was sent for his medical examination. Prosecution has examined PW

11 Dr. Mrs Supriya Jagtap. His Medico legal certificate is marked at exhibit 49. The appellant/accused has sustained three injuries. Learned APP submits that the prosecution has proved the case against the appellant/accused beyond reasonable doubt and the appellant/accused is thus liable to be convicted.

11. Learned APP, in order to substantiate his contentions, placed reliance on a judgment in case of Saraswati Ganpat Landge Vs. State of Maharashtra in criminal appeal no.40 of 2015 dated 19.1.2021.

12. We have carefully considered the submissions advanced by the learned counsel for the appellant-accused and the learned APP for the respondent-State. With their able assistance, we have perused the grounds taken in the appeal, annexures thereto, the record and proceeding and the case laws cited by the respective parties.

13. So far as homicidal death in this case is concerned, the learned counsel for the appellant/accused has not seriously disputed the same.

Prosecution has also examined PW 7 Dr. Gorakhnath Gaikwad, who has conducted postmortem examination on the dead body of the deceased Raja Madrasi. PW 7 Dr. Gaikwad has noted seven injuries on the person of the deceased Raja Madrasi, however, except injury nos. 2 and 3, other injuries are in the form of contused abrasions. Injury nos.2 and 3 are important which are reproduced herein below :-

2. Contused lacerated wound on top of vortex part L shape, size 4x1cmxskin deep.
3. Contused lacerated wound on the occipital head lower part mid line size 5x1xcm skin deep.

14. PW 7 Dr. Gaikwad in column no.19 has observed three internal injuries. Those are as follows :-

1. Manangies hemorrhage right frontal post parital and lower occipital region.
2. Subdural hematoma right frontal and parital region size 5x7 cm.
3. Subdural hematoma lower right occipital region size 7 cm.
4. Intra-cerebral hemorrhage right lower occipital size 5x2 cm.
5. Vertical hemorrhage, brain edema.

According to Dr. Gaikwad injuries in column no.19 are corresponding to injury nos.2 and 3 in column no.17. In his considered opinion, the cause of death was

due to cardio-respiratory arrest due to intracranial hemorrhage due to head injury. Postmortem report is marked at exh.23 which bears the signature of PW 7 Dr. Gaikwad. He has also admitted that said injuries are possible if the blow is given with the help of parking block article 3. Though PW 7 Dr. Gaikwad had admitted in his cross-examination that head injuries noted by him in the postmortem report can be caused if a person falls down on hard surface, however, considering the injuries on the person of deceased Raja Madrasi and corresponding internal injuries, we are of the opinion that prosecution has proved beyond doubt homicidal death of deceased Raja Madrasi.

15. PW 1 Kanna Madrasi, who happened to be real brother of deceased Raja Madrasi has deposed that quarrel was going on between the accused and his brother Raja and the reason of the quarrel was payment of food. He saw that accused Rajkumar piked up pieces of tiles and hit the same on back side of head of deceased Raja Madrasi for three times. Deceased Raja Madrasi failed down in the pool of blood. His clothes

were soaked with blood. He has also deposed that when he reached to the spot deceased Raja was unmoved. However, in paragraph no.2 of his cross examination, he has stated that he had gone about 10 minutes by walk away from the spot. Spot is crowded place and many shops and stalls are situated around. He has further explained that there had been a swelling on his leg and he was unable to walk fastly. PW 1 Kanna Madrasi further admitted in his cross-examination that when he was returned to the spot, the incident was already over. Accused was hold by the hotel owners and, therefore, he felt that he might have killed the deceased Raja by the tiles. He further admitted that he himself and his brother were present for cooking on the spot and other witnesses Kaliya, Omprakash and Shaikh Javed had gone to the else places to bring something.

16. It appears that PW 1 Kanna Madrasi, PW 3 Shaikh Javed and PW 4 Kaliya Madrasi had come from Jabalpur State of M.P. at Ahmednagar. The appellant/accused had also joined them on the next day at Ahmednagar. His left hand was amputated and,

therefore, he was earning his livelihood by begging. Deceased Raja Madrasi had also come on the next day and joined PW 1 Kanna Madrasi and his associates for selling the roots. PW 2 Omprakash Bagal, PW 3 Shaikh Javed, PW 4 Kaliya though not supported the prosecution case, however, they have admitted that they were residing together in front of the railway station at Ahmednagar. They had been to Ahmednagar for selling 'Kand' (roots). They have also deposed that at the time of the incident, on the foot path, altercations were going on between the appellant/accused Rajkumar and deceased Raja Madrasi and it was also inviting the attention of the pedestrians and fear of assault. Even though these witnesses have turned hostile, to the extent as above, their evidence can be believed.

17. It is thus clear that on 4.4.2013 in between 8 to 8.30 pm incident had taken place in front of the Railway Station on foot path. PW 1 Kanna Madrasi and his associates had arranged the fire place with the help of cement blocks and they were preparing meals. Even

they had collected the amount Rs.15/- each for preparing meals.

18. Learned counsel for the appellant/accused has rightly submitted that the trial court has erred in law in accepting the statements of those hostile witnesses recorded under section 164 of the Cr.P.C. by the Special Executive Magistrate PW 8 Bhaskar Bose. Learned counsel Mr. Wani has thus rightly placed his reliance on a case *Baij Nath Sah Vs. State of Bihar* reported in (2010) 6 Supreme Court Cases 736 where in paragraph no.6, the Supreme Court has made following observations.

6. We have heard the learned counsel for the parties and have gone through the record. We see from the judgments of the Courts below that the only material that has been used against the appellant is the statement under Sec.164 of the Cr.P.C. This Court in Ram Kishan Singh vs. Harmit Kaur and Another ((1972) 3 SCC 280) has held that a statement of 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-a-vis. statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more.

19. In the instant case, though the prosecution has proved the statements of those hostile witnesses recorded under section 164 of the Cr.P.C. by examining PW 8 Bhaskar Bhikaji Bhos, Special Executive

Magistrate, however, said statements recorded under section 164 of Cr.P.C. marked at exhibits 13, 15 and exhibit 19 of the witnesses, PW 2 Omprakash Bagel, PW 3 Shaikh Javed and PW 4 Kaliya respectively cannot be read as a substantive piece of evidence. However, as observed in the foregoing paragraphs, their evidence to some extent, if it appears cogent, trust worthy and reliable can be considered.

20. PW 12 Madhav Chinde is an eye witness to the incident. On 4.4.2013 at about 8 p.m he was sitting in one hotel near footpath near the railway station. He had witnessed that one person who has only one hand assaulted the other person by means of cement block. He has witnessed that accused assaulted injured person by cement block thrice and injured has received bleeding head injury. He has identified the appellant/accused before the Court. Though PW 12 Madhav Chinde has identified the appellant/accused for the first time before the Court and it is rather a weak type of evidence, however, he has deposed that the appellant/accused is a person having only one hand.

We find no other reason to disbelieve his version and we accept him as an eye witness to the incident. His presence on the spot at the relevant time also appears to be natural. He is dealing with the business of travels. Though he is not having any office near the railway station, however, he being the travels agent, his presence near the railway station appears to be natural.

21. We have carefully gone through the contents of the spot panchnama exhibit 53. It appears that, at the time of drawing spot panchnama on the spot, the I.O. has seized one plastic gunny bag having blood stains, one cement paving block having blood stains from the spot alongwith some other articles. Investigating officer has also seized the clothes on the person of the deceased as well as clothes on the person of the accused. Though, result of the blood group of those blood stains are inconclusive, however, human blood was found on the clothes of accused and other articles seized from the spot.

22. Prosecution has examined PW 9 PHC Sanjay Kale. He has deposed that on 4.4.2013 at about 12.20 p.m.

the appellant/accused had come to the police station and lodged NC report. Said report is marked at exh.36. Said report exh.36 since confessional report, cannot be considered in toto, however, to some extent, said report exh.36 can be considered. The appellant/accused has stated in the said report about the quarrel between him and the deceased Raja Madrasi on account of collection of the amount for preparing the meals and to the extent that incident had taken place on foot path where both of them had used cement blocks against each other during the course of the quarrel. It appears that the appellant/accused has also sustained injury in the said quarrel and he was subjected to medical examination and prosecution has examined PW 11 Dr. Supriya Jagtap. On 5.4.2013 she has examined the appellant/accused produced before her by the Kotwali Police Station. She has noted following injuries on the person of the accused.

1. CLW of 0.5 cm x 0.5 cm over right eye brow, swelling abrasions.
2. Abrasion over right knee 0.5 x 0.5 cm redness.
3. Blunt trauma over L.S. Spine.

She has also stated in her cross examination that the appellant/accused Rajkumar is only having right hand. Left hand was amputated. Said MLC is marked at exhibit 49.

23. Thus, on the basis of the prosecution evidence and the discussion above, it is clear that the incident had taken place on 4.4.2013 in between 8.00 to 8.30 p.m on foot path in front of railway Station, Ahmednagar. In the said quarrel, the appellant/accused hit cement block on the back side of head of the deceased Raja Madrasi and deceased Raja Madrasi accordingly sustained bleeding injuries on his head. However, as it appears from the prosecution evidence, the incident had taken place without any premeditation, in a sudden fight, in the hit of passion, upon a sudden quarrel. The appellant/accused Rajkumar Rajput, deceased Raja Madrasi, PW 1 Kanna Madrasi and their associates had camped on foot path and they had come there from Jabalpur state of M.P. for selling roots. The appellant/accused, since hailing from the same area also joined them. He was earning his livelihood by

begging since his left hand was amputated. It appears from the prosecution evidence that the quarrel had taken place on account of the collection of amount of Rs.15/- each which is quite a meager amount for preparing meals. On the basis of the report exhibit 36 lodged by the appellant/accused, N.C. case was registered against deceased Raja Madrasi. Though confessional FIR is not admissible in evidence, however, the contents thereof to the extent as mitigating circumstances can be considered. It appears that deceased Raja Madrasi had initially thrown cement blocks on the person of the appellant/accused and in consequence thereof, the appellant/accused had sustained injuries as per the medico-legal-certificate exhibit 49. It thus appears that without any premeditation, the appellant/accused also assaulted the deceased with the help of cement block collected by the said group for arranging 'Chulha' and in the hit of anger inflicted injuries on the backside of the head of the deceased Raja Madrasi by using said cement block. We do not think that the appellant/accused had taken undue advantage or acted in cruel or unusual manner.

We have arrived at this conclusion for the reason that it has come in the evidence of PW 1 Kanna Madrasi that the appellant/accused was without left hand and his brother deceased Raja Madrasi was sturdy and stout. In our opinion, the appellant/accused had committed offence of culpable homicide not amounting to murder. There was no intention to commit the murder. However, considering the size of the cement block and since three successive blows were given on the back side of the head of deceased, having knowledge that death was likely to be caused on the part of the appellant/accused cannot be ruled out. In view of the same, the case squarely falls under section 304 (II) of the Indian Penal Code. In the interest of justice and considering the physical deformity of the appellant/accused, we are of the opinion that the alteration of the conviction of the appellant/accused from Section 302 of the Indian Penal Code to Section 304 (II) of the Indian Penal Code and sentencing the appellant/accused to the imprisonment which he has already undergone would meet the ends of justice. The appellant/accused came to be arrested in connection with the present crime on 5.4.2013 and

since then he is in jail. During the pendency of this appeal, the appellant/accused was not released on bail. Hence, following order.

ORDER

- i. Criminal appeal is hereby partly allowed.
- ii. The judgment and order of conviction passed by the Additional Sessions Judge, Ahmednagar dated 28.4.2014 in Sessions Case No.199 of 2013 thereby convicting the appellant/accused Rajkumar Chotalal Rajput @ Chela for the offence punishable under section 302 of Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rs one thousand only), in default of payment of fine to undergo imprisonment for a further period of three months is hereby altered and;
instead
- iii. The appellant/accused Rajkumar Chotalal Rajput @ Chela is convicted for the offence punishable under section 304 (II) of the Indian Penal Code and sentenced to suffer the imprisonment, which he has already undergone.
- iv. The appellant/accused Rajkumar Chotalal Rajput @ Chela shall execute a P.B. of

Rs.15,000/- (Rs. Fifteen Thousand) with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.

- v. Criminal appeal is accordingly disposed off.

(SHRIKANT D. KULKARNI, J.) (V.K. JADHAV, J.)

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