

Additional Sessions Judge, Nashik in Sessions Case No.197 of 2011. Both these appeals were, therefore, heard together and are being disposed of by this common Judgment.

2] By the impugned Judgment, the appellants (original accused Nos.1 and 2) in Criminal Appeal No.520/2012 and the appellants (original accused Nos.3 and 4) in Criminal Appeal No.360/2012 have been convicted for the offence punishable under Section 302 r/w 149 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.5000/- each, in default of payment of fine, to suffer R.I. for 1 year. The appellants/accused have been further convicted for the offences punishable under sections 143, 147, 148, 323, 324 r/w 149 of the Indian Penal Code and sentenced to suffer imprisonment ranging from 6 months to one year. The trial Court, however, acquitted the appellants/accused of the offences punishable under Sections 201, 504, 506 of the Indian Penal Code.

3] It is the case of the prosecution that deceased Akash Tankankhar, PW 2 Ashish Lohakare, PW 4 Ajay Ingale and PW 11 Jitu Tore were friends. The incident took place on 19th June, 2011. On the day of the incident at about 10.30 p.m., they all came to Baba Hotel for dinner. The present appellants/accused and one juvenile offender also came there for dinner. It is alleged that the deceased Akash teasingly gave call to accused No.4 as battery. Accused No.4 came near the deceased and started abusing him. The deceased told him not to abuse. In the meantime, Accused No.1 also came there. He too started abusing the deceased and pushed him. The hotel owner came there and asked them to go out.

4] It is alleged that at about 11.30 p.m. to 12.00 a.m. the present appellants/accused assaulted the deceased while they were standing in front of the Baba Hotel. It is alleged that accused No.1 initially assaulted PW 2 Ashish by chopper and then to the deceased Akash with chopper on his stomach. The deceased Akash, therefore,

to save himself ran towards Padma Hotel. It is alleged that all the accused ran behind him. It is alleged that the deceased Akash was ultimately found lying in dead condition in the premises of Padma Hotel. PW 2 Ashish then lodged the complaint in relation to the incident.

5] On the basis of complaint of PW 2, crime vide CR No. 196/2011 was registered for the offences punishable under Section 302, 143, 147, 148, 149, 323, 324, 504 and 506 of the Indian Penal Code. On completion of investigation the charge-sheet was filed against appellants/accused.

6] The accused were charged and tried for the above stated offences. As stated earlier, the trial Court convicted the appellants/accused for the offence punishable under Section 302 r/w 149 of the Indian Penal Code and Sections 143, 147, 148, 323, 324 read with 149 of the Indian Penal Code. The trial Court, however, acquitted the accused of the offences punishable under Sections 201, 504, 506 r/w 149 of the Indian Penal Code.

7] We have heard the learned counsel for appellants/accused and the learned APP for the State.

8] The trial Court has convicted the appellants/accused on the basis of evidence of following eye witnesses :

- i] PW 2 Ashish Lohakare
- ii] PW 4 Ajay Ingale and
- iii] PW 11 Jitu Tore

9] According to PW 2 Ashish Lohakare on 19th June, 2011, he alongwith PW 4, PW 7, PW 11 and the deceased came to Baba Hotel for dinner. PW 4 gave call to accused No.4 as he was known to him and the deceased Akash. The accused No.4 at that time was there in the hotel with other accused. PW 2 has stated that altercation took place between the accused No.4 and PW 4. He has stated that accused No.1 also came there.

They then started abusing the deceased Akash. The Hotel owner told them to go out. They all came out of the hotel. The accused No.4 came behind them to talk and at that time accused No.3 was with him. PW 2 has stated that accused No.1 followed them and he assaulted him by chopper on his left cheek and left buttock. PW 2 has stated that the accused No.1, then assaulted the deceased Akash on his stomach by chopper. The deceased Akash, therefore, ran towards C.B.S. Accused Nos.3 and 4 came to his rescue. He, then ran towards Chowk Mandae. PW 11 Jitu Tore came following him and he took him to Rajebahadur Hospital. Thereafter, he took him to Sarkarwada Police Station. While they were at Sarkarwada Police Station, they came to know that Akash has expired. PW 2 has stated that he then lodged the complaint with Sarkarwada Police Station.

10] PW 2 Ashish Lohakare is an injured witness. It is well settled that the testimony of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

11] PW 2 has been cross-examined at length. However, there are no major contradictions in his evidence. On the contrary, he appears to be a truthful witness for the reason that PW 2 has in his examination-in-chief itself stated that accused Nos.3 and 4 came to his rescue while he was being assaulted. It is unlikely that PW 2 would spare the real assailants and in absence of any previous enmity, would falsely implicate the accused in a case of such a serious nature. The evidence of PW 2 is also corroborated by the evidence of PW 4 Ajay Ingale and PW 11 Jitu Tore.

12] PW 4 Ajay Ingale has stated in his evidence that on 19th June, 2011, he, PW 2, PW 7, PW 11 and the deceased came to Baba Hotel at about 11.30 p.m. for dinner. They placed an order for dinner. In the mean time, accused came there in the hotel. The deceased gave call to accused No.4 as battery. The accused No.4 thus started abusing him. Accused No.1 came following accused No.4 and they started abusing the deceased. The hotel owner came there and he pacified them. PW 4 has stated that then they came out of the hotel. The accused came following them. The

accused No.1 then assaulted PW 2 on left cheek and left buttock by chopper. PW 4 has stated that accused No.1 then assaulted the deceased Akash by chopper on his stomach. The deceased Akash ran towards C.B.S. All the accused ran behind him. They searched for Akash and ultimately they came towards Padma Hotel and saw crowd there. They saw that Akash was lying in dead condition in the premises of Padma Hotel.

13] Similarly PW 11 Jitu Tore has stated in his evidence that on 19th June, 2011 he, PW 2, PW 4, PW 7 and the deceased Akash came to Baba Hotel for dinner. The accused were there. The deceased and PW 4 gave call to accused No.4. Accused No.4 came near the deceased and started abusing him. Accused No.1 came following accused No.4 and he also started abusing the deceased and pushed him. The hotel owner came there and asked them to go out. They came out of the hotel. PW 11 has stated that when they were standing, in front of the hotel, accused came out of the hotel. Accused No.1 went towards PW 2 and assaulted him by chopper. He has further stated that accused No.1, then assaulted the deceased by chopper on his stomach. The deceased then ran towards Padma Hotel and accused ran behind him. PW 11 has stated that as PW 2 was injured, he took him to Raje Bahadur Hospital. After 5-10 minutes, he received phone call of PW 4 and he informed him that Akash is no more.

14] Evidence of PW 4 and PW 11 also needs to be accepted in absence of any reason for them to falsely implicate the accused in such a serious case. It is, however, submitted on behalf of the appellants/ accused that considering the facts and circumstances of the case benefit of exception 4 to Section 300 of the Indian Penal Code needs to be extended to the appellants/accused.

15] From the evidence on record it is apparent that accused No.4 got annoyed as he was teasingly called as 'Battery' and started abusing the deceased. The altercation then took place between accused No.4 and the deceased, which ultimately resulted in the assault. The incident, therefore, does not appear to be premeditated. PW 15 Dr.Deepak Rajput who conducted postmortem on the dead body of the deceased has admitted that there was only one injury on

the person of the deceased.

16] Considering the above facts and circumstances of the case, we are of the view that requirements of Exception 4 to Section 300 of the Indian Penal Code in the present case are satisfied. The trial Court, was, therefore, not justified in convicting the appellants/accused for the offence punishable under Section 302 of the Indian Penal Code.

17] The trial Court was also not justified in convicting the accused Nos.3 and 4 with the aid of Section 149 of the Indian Penal Code, inspite of unequivocal admission of PW 2 that accused Nos.2 and 3 came to their rescue, while they were being assaulted. The accused Nos.3 and 4 therefore will have to be acquitted and the accused Nos.1 and 2 deserves to be convicted for the offence punishable under Section 304(I) of the Indian Penal Code. Hence, the following order :

ORDER

- i] Criminal Appeal No.520/2012 is partly allowed.
- ii] The conviction of the appellant/accused Nos.1 and 2 for offence punishable under Section 302 read with 149 of the Indian Penal Code and for the offences punishable under Sections 143,147, 148, 323 and 324 read with 149 of the Indian Penal Code vide Judgment and order dated 29th February, 2012 is quashed and set aside.
- iii] The conviction of the appellants/accused Nos.1 and 2 is altered to an offence punishable under Section 304(I) read with 34 of Indian Penal Code and they are sentenced to rigorous imprisonment for ten years, and fine of Rs.5000/- each. In default of payment of fine to suffer R.I. for one year.

iv] The appellant/accused No.1 is in Jail. Set off be granted to him for the period of detention undergone by him till date.

v] The accused No.2 is on bail. He shall surrender before the concerned Sessions Court within 8 weeks from today, who in turn shall commit the accused No.2 to jail to serve the remaining sentence.

vi] Criminal Appeal No.360/2012 is allowed.

vii] Judgment and order dated 29th February, 2012 passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.197 of 2011 with regard to accused Nos.3 and 4 is quashed and set aside.

viii] The appellants/accused Nos.3 and 4 are acquitted of the offence punishable under Section 302 r/w 149 of the Indian Penal Code and 143, 147, 148, 323, 324 read with 149 of the Indian Penal Code.

[N.R.BORKAR, J]

[SMT.SADHANA S. JADHAV, J]