

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

CRIMINAL APPEAL NO. 79 OF 2014

Mittu @ Mithu Bholi Pareda

... Appellant

Versus

State of Maharashtra

... Respondent

...

Mr. Gaurav Bhavnani, for the Appellant.

Mr. A.R. Kapadnis, A.P.P. for the Respondent-State.

...

***CORAM : REVATI MOHITE DERE &
SHARMILA U. DESHMUKH, JJ.***

***RESERVED ON : AUGUST 19, 2022
PRONOUNCED ON : SEPTEMBER 27, 2022***

ORDER (Per : SHARMILA U. DESHMUKH, J,) :

1. The Appeal takes an exception to the judgment and order dated 31.07.2013 passed by the Learned Sessions Judge in Sessions Case No.103 of 2012. By the impugned judgment and order, the Appellant has been convicted and sentenced as under:

For the offence punishable under Section 302 of the Indian Penal Code to suffer imprisonment for life.

2. Briefly stated the case of the prosecution is as under:

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The deceased - Utpal Amrendra Chaudhari, and the Appellant - Mittu @ Mithu Bholi Pareda were known to each other. The Appellant was cleaner of a truck bearing No. MH-04-CP-5410 and the Appellant and Utpal (deceased) used to sleep in the said truck itself. On 15.08.2011, there was holiday on account of independence day and the truck was parked at Oshiwara Park at Link Road site; Utpal and the Appellant were together the entire day on 15.08.2011, and were consuming liquor throughout the day and in the night also. On 16.08.2011 at about 11:30 a.m., there was a quarrel between Utpal and the Appellant on the issue of mobile phone of Utpal, which was missing. As the mobile phone could not be found, Utpal informed PW-1 -Shivprasad Vikas Biswas, PW-2- Vijay Gangaram Bhagat @ Vijay Kaliya and PW-5-Complainant-Fakre Alam Anjuman Shaikh that the Appellant has taken his phone and was not returning it. PW-2- Vijay Kaliya and PW-5-Fakre Alam Anjuman Shaikh came near the truck and PW-5 Fakre Alam Anjuman Shaikh (Fakre Alam) gave a call on the mobile phone of Utpal and the phone was heard ringing from the cabin of the truck. Appellant was asked to open the cabin of the truck, but he stated that the keys are with the driver; Utpal, Appellant and PW-2 Vijay Kaliya went to the house of the truck-driver to get the

keys, but PW-2 Vijay Kaliya and Utpal returned back as the Appellant picked up a quarrel with them on the way. Thereafter, PW-2 Vijay Kaliya and PW-5 Fakre Alam returned to the parking of auto rickshaw and Utpal went to the rear portion of the truck and slept therein. After sometime, the Appellant returned and went to the rear portion of the truck, where Utpal was already sleeping. At about 3:30 a.m. to 3:45 a.m. PW-2 Vijay Kaliya and PW-5 Fakre Alam heard shouts from the truck and rushed towards the said truck. PW-5 Fakre Alam climbed into the rear portion of the truck and saw the Appellant assaulting Utpal on his head, neck and chest with a wooden log. The Appellant, on seeing Fakre Alam, jumped from the truck and ran away; Utpal was unconscious and blood was oozing from his mouth, nose and eyes. PW-5 Fakre Alam and PW-2 Vijay Kaliya, immediately informed the incident to PW-1 – Shivprasad Vikas Biswas and also called the police. The police thereafter reached the spot and took Utpal to Cooper hospital in a police vehicle; FIR was registered by PW-5 Fakre Alam on 16.08.2011 at 8:45 a.m. *vide* CR No.384 of 2011 for the offence punishable under Section 307 of the Indian Penal Code (for short, “IPC”) against the Appellant; Utpal expired on

16.08.2011 at about 9:00 a.m. and offence of Section 307 was altered to one under Section 302 of the IPC, as against the Appellant.

3. As the offence was exclusively triable by the Court of Sessions, learned Metropolitan Magistrate committed the case to the Sessions Court, Greater Mumbai. Charge was framed against the Appellant, to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in support of its case, examined in all 10 witnesses viz (I) PW-1- Shivprasad Vikas Biswas, to prove the inquest panchnama. He has also identified Article 01- pant of Utpal (deceased) (ii) PW-2 – Vijay Gangaram Bhagat @ Vijay Kaliya, friend of Utpal, who also identified Article 02- weapon of assault i.e. wooden block (iii) PW-3- Uttam Taruni Devnath, panch to the spot panchnama and seizure panchnama (iv) PW-4 – Vasant Pandurang Gaikwad,- Police Naik, who collected blood stained clothes of Utpal (deceased) (iv) PW-5 Shaikh Fakre Alam – eye-witness and complainant (v) PW-6 Bandu Shamrao Bhosale, truck driver (vi) PW-7- Bharat Anant Shine- panch to Memorandum Panchnama of recovery of blood stained clothes at instance of Appellant (vii) PW-8- Dr. Khandu Ramu Burange, Doctor, who proved the Medico Legal Register entry of Utpal (deceased) (viii)

PW-9 Prakash Atmaram Bane – Investigating Officer (ix) PW-10– Uttam Damodar Kadlag- Police Inspector, also an Investigating Officer.

5. The case of the Appellant under Section 313 of Cr.P.C, was of denial and false implication.

6. After considering the evidence on record, the learned Sessions Judge convicted the Appellant for the offence punishable under section 302 of IPC.

7. Heard learned counsel appearing for the Appellant and the learned APP for the respondent-State. Perused the papers with the assistance of the learned Counsel appearing for the parties.

8. Learned counsel appearing for the Appellant submits that there is no direct evidence as against the Appellant to connect the Appellant with the offence; that the entire case of the prosecution rests upon the circumstance of last seen; that there is an inordinate delay in filing the FIR; that there are discrepancies in the testimonies of the eye-witnesses - PW-2 and PW-5; and, that the prosecution has failed to prove motive. The learned counsel for the Appellant, in the alternative, prays for reduction of the offence from Section 302 to

Section 304 Part-II of the IPC. Learned counsel for the Appellant further submits that the circumstances surrounding the commission of the offence must be taken into consideration, inasmuch as the Appellant and Utpal were friends; that there was no prior enmity; that at the relevant time both the Appellant and Utpal were intoxicated; and that the assault was not a premeditated assault.

9. Learned counsel for Appellant relied upon the following judgments:

- (i) **State of Rajasthan vs. Shera Ram Alias Vishnu Dutta** ¹ ;
- (ii) **Suraya Yoganand Alias Chitti vs. State of Andhra Pradesh** ² ;
- (iii) **Lavghanbhai Devjibhai Vasava Vs. State of Gujarat** ³ ;
- (iv) **Gurmukh Singh vs. State of Haryana** ⁴.

10. Learned APP supports the impugned judgment and order and submits that no interference is warranted; that the motive is clearly established, inasmuch as the mobile phone which was the cause of dispute between Utpal (deceased) and the Appellant was seized

¹ (2012) 1 SCC 602

² (2007) 15 SCC 773

³ (2018) 4 SCC 329

⁴ (2009) 15 SCC 635

from the cabin of the truck; that reduction to a lesser offence is not warranted in the facts and circumstances of the case; and, that the prosecution has established the guilt of the Appellant beyond reasonable doubt.

11. We have heard the learned Counsel appearing for the parties. With the assistance of learned Counsel for the parties we have scrutinized the evidence on record.

12. PW-1 – Shivprasad Vikas Biswas has deposed that Utpal was known to him and used to sleep in the truck parked near Oshiwara Police Station. PW-1 has further deposed that on 16.08.2011 at about 3:00 a.m., Utpal came to his room and informed him that there was quarrel between him and the Appellant, as the Appellant had taken his mobile phone; that he (PW-1) advised Utpal not to do anything and that they will look for it in the morning; that at about 3:45 a.m. he was informed by PW-2- Vijay Kaliya, that Appellant has assaulted Utpal and Utpal was injured and lying in the truck; that pursuant thereto, he went to the said truck and found Utpal lying in the truck with injuries on his chest and ear; and, that the inquest panchnama (Exh.10) was drawn up in his presence.

13. In the cross-examination of PW-1, nothing material has been elicited. Suggestion was given to PW-1 that though he had advised Utpal that dispute will be addressed in the morning, still Utpal went towards Mittu. Evidence of PW-1 reveals that there was a dispute between Appellant and Utpal (deceased) pertaining to Utpal's mobile phone.

14. PW-2 has deposed that on 15.08.2011, Utpal and the Appellant were together in the truck and had taken meal at about 7:00 p.m.; that he (PW-2) had gone to sleep in the parking of auto-rickshaw; that at night Utpal had come and informed him that his mobile was missing and it was taken by the Appellant, and, that the Appellant was not returning the phone; that thereafter, PW-5-Fakre Alam, Utpal and he came near the truck to search for the mobile phone; that PW-5 Fakre Alam called on Utpal's phone; that they heard the phone from the cabin of the truck; that the Appellant told them that he will bring keys of the cabin but he did not come; that thereafter, he and PW-5-Fakre Alam went towards the parking of auto rickshaw; that after sometime, the Appellant returned to the truck; that the Appellant and Utpal were thereafter in the same truck; that because of suspicious movements of Appellant, he and PW-5-Fakre

Alam came towards the truck and saw the Appellant getting down from the side of the truck; that when he peeped from the side of the truck, he found that blood was oozing from ear, nose and mouth of Utpal and there was piece of wooden block stained with blood; that he tried to catch the Appellant but he fled; that he went the house of the PW-1 and brought him to the spot; that thereafter, he informed the incident to Oshiwara Police Station.

15. Suggestions were given to PW-2 that there were inimical relations between the Appellant and PW-2 due to a previous quarrel; that PW-2 was not present on the spot, and was not aware about the incident, which have been denied. Pertinently, the cross examination supports the case of the prosecution pertaining to the dispute between Utpal and Appellant regarding the mobile phone of Utpal. There is no cross examination on the material deposition of PW-2 regarding finding Utpal in an injured state in the rear portion of the truck, the finding of blood stained wooden block and fleeing of the Appellant. The testimony of PW-2 in that respect stands uncontroverted.

16. PW-5 has deposed that he knew Utpal and the Appellant and has identified the Appellant, who was present in the Court. PW-5

has further deposed that the Appellant used to work as a cleaner on the truck and used to stay in the said truck; that on 16.08.2011 in the midnight at 12:30 a.m. Utpal had come to him at parking place of Auto-rickshaw and informed him that his mobile phone was missing and the Appellant is denying having taken his phone; that Utpal asked him to search for his mobile phone; that he gave a ring on the mobile phone of Utpal and found that the mobile was ringing from the cabin of the truck of the Appellant. PW-5 has further deposed that when he asked the Appellant to open the cabin, Appellant informed him that he does not have the keys; that thereafter, Utpal and PW-2-Vijay Kaliya went with the Appellant to the house of the truck-driver but the Appellant picked up a quarrel on the way and therefore, Utpal and Vijay Kaliya returned back. PW-5 has further deposed that after sometime, the Appellant returned to the said truck without keys; that at that time, Utpal had gone to sleep in the truck; that thereafter, Vijay Kaliya and he had returned to the auto-rickshaw parking place and at about 3:30 a.m. or 3:45 a.m., he heard shouts from the said truck. He further deposed that when they reached the said truck, they found that the Appellant was assaulting Utpal with a wooden block on his head, neck and chest; that they had climbed into the rear portion of the

truck and has seen the incident; that they had gone to PW-1 and narrated the incident to him; that thereafter, PW-2 had informed the police station and the police had come and taken Utpal to the hospital. PW-5 has further deposed that on the same morning at about 7:00 a.m., he had lodged the FIR with the Oshiwara Police Station.

17. In the cross examination of PW-5, suggestion was given that Utpal (deceased) was under the influence of liquor and had lost his balance and the bleeding head injury was due to the fall, which was denied. Perusal of cross examination of PW-5 reveals that the cross-examination and in particular paragraph 15 of the cross-examination supports the case of the prosecution regarding the presence of PW-2 and PW-5 at the time of the incident, the assault upon Utpal by the Appellant with the wooden block when Utpal was sleeping and the fleeing of the Appellant after the incident. For proper appreciation of the cross examination, paragraph 15 of the cross examination is reproduced herein-below:

“15. Myself and Vijay Kaliya were present together when we had heard the shouts at the parking place. I had seen through my eyes that accused was assaulted by

Art.No.2 log piece to Utpal. Utpal was lying down at that time. I had seen the accused while assaulting to Utpal and not after the assault incident was over. I had climbed on the truck and had seen that the accused was beating to Utpal. The Art.No.2 log piece was held by accused by his both the hands while assaulting to Utpal. I had seen the blood on the head of Utpal but I had not seen that the accused had assaulted to Utpal on his head. I had seen when accused had assaulted by log piece to Utpal on his neck. I had seen that the accused had assaulted by piece of log Art.No.2 on the chest of Utpal. Accused had assaulted by Art.No.2 on the left side chest of Utpal. I had climbed the truck first and then Vijay Kaliya had climbed the truck and had seen the incident. We had not tried to stop the accused because I had seen the blood. It was night and dark but in the said truck portion there was light lit. I had tried to catch accused while he was going away but Vijay Kaliya had asked me not to catch him as he had assaulted to Utpal now and then I did not attempt to catch the accused. The blood was oozing from the head, nose, ear, mouth of Utpal and it was a murder and therefore it was impossible for me to take Utpal to hospital and I had asked one or two auto rickshaw driver but after observing blood they refused to carry Utpal to hospital. The incident took place at about 3.30 am or 3.45 a.m. on 16/08/2011.”

18. Evidence of PW-5 is corroborated by the PM Report (Exh 31) which is admitted under Section 294 of Cr.P.C. Perusal of PM Report reveals the following injuries:

“External --

- | | |
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| <p>17. <i>Surface wounds and injuries- Their nature, position, dimensions (measured) and directions to be accurately stated – their probable age and causes to be noted.</i></p> <p><i>If bruises be present what is the condition of the subcutaneous tissues?</i></p> | <p><i>(i) (R-1) eye – blackened, swollen</i></p> <p><i>(ii) CLW 3 in number 1 below another separated from one another by 0.5 cm oblique above one size of 1 x 0.2 cm middle – 2.5 x 0.2 cm lower – 2 x 0.2 cm</i></p> <p><i>margin irregular, reddish, no foreseen Particles seen.</i></p> <p><i>(iii) contusion – at (rt) temporal & (rt) mastoid region upto (rt) angle of size of 16 x 11 cm with swelling seen, blue and black.”</i></p> |
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III. Internal examination

19. Head -

- | | |
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| <p><i>(i) Injuries under the scalp their nature.</i></p> | <p><i>1) Hemorrhagic contusion size of 9 x 7 cm darkened seen over (rt) temporal region.</i></p> <p><i>2) Hemorrhagic contusion size of 8 x 4 cm darkened (rt) mastaid region.</i></p> <p><i>3) Hemorrhagic contusion size of 11 x 3 cm darkened at (rt) perieto occipital region.</i></p> <p><i>4) Rt temporal muscle hemorrhages seen.</i></p> |
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(ii) Skull- Vault and base- describe fractures, their sites, dimensions, directions etc.

1) Crack structure of (rt) temporal, posterior (rt) & (rt) parietal region; semicircular, size of 14 x 1 cm.

2) Linear fracture of (rt) temporal fossa.

(iii) Brain – The appearance of its coverings, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully noted (Weight M. 3 gram F. 2.75 grams).

Meninges – Intact - Brain - congested, sedenatous SAH – Seen over (lt) temperol-parietal region. & SAH (lt) temporal parietal region.

19. PW-5 has deposed that he had witnessed the Appellant assaulting Utpal (deceased) with a wooden block. Perusal of head injuries in PM report reveals crack fracture of temporal posterior (rt) and (rt) parietal region, semicircular, size 14 x 1 cm and linear fracture of (rt) temporal fossa, which indicates assault by force on head of Utpal (deceased). PM Report shows the cause of death as “Head Injury (unnatural), however viscera preserved for chemical analysis.” The report of the Forensic Science Laboratories (FSL) does

not reveal any poison. Considering the PM Report and the FSL report, it cannot be disputed that the death of Utpal was homicidal.

20. Apart from the ocular evidence, the prosecution relies on documentary evidence i.e inquest panchanama, spot panchnama, seizure panchnama, C.A. report, arrest panchnama, memorandum of disclosure statement, memorandum panchnama and Post-Mortem Report (PM Report) .

21. Statement of Appellant under Section 313 reveals the inconsistency in the defence raised by the Appellant in the cross examination of prosecution witnesses and in his statement under Section 313. The relevant question No.183 and explanation of Appellant is hereby reproduced :

“Q.183. Why the witnesses are deposing against you ?

Ans .: Fakre Alam and Vijay Kalya had come to my truck for consuming liquor on 14.08.2011 and I had requested them to go elsewhere else the police may come there and I would land into trouble but they did not listen to me and had asked me to prepare food for them and I had no food and on informing to them, Vijay Kalya had slapped me twice, thrice. Fakre Alam and Vijay had gone to near by Chinese Restaurant and had brought knife and

threatened me and therefore I had run away therefrom and had gone to Vashi. These witnesses used to puncture the truck tyres and therefore Bandu Bhosale and the witnesses had no good relations. I had no quarrel at any time with Utpal Choudhary and the witnesses used to pick up quarrels among themselves and they have falsely implicated me in this case.”

22. Evidence of PW-5 corroborates the evidence of PW-2 in material particulars i.e. dispute between Utpal and the Appellant in respect of the mobile phone of Utpal and Utpal and the Appellant being in the same truck prior to the incident. PW-5 has deposed having witnessed the assault on Utpal by the Appellant with wooden block on his head, neck and chest, which has not been shaken in his cross-examination. Evidence of PW-2 and PW-5 is consistent, cogent and reliable and is sufficient to connect the Appellant with the offence. The motive for the offence i.e. taking of the mobile phone by the Appellant and keeping it in the cabin of the truck is clearly proved through the evidence of the PW-2 and PW-5 and the seizure panchnama. The seizure panchanama shows recovery of the mobile phone from the cabin of the truck.

23. Learned counsel for Appellant has sought to assail the impugned judgment and order on the ground that there are certain discrepancies in the evidence of PW-2 and PW-5. The learned Counsel for Appellant has submitted that the evidence of PW-1 reveals that it was only PW-2, who informed him about Utpal lying injured in the truck and not PW-5; that there are discrepancies in the evidence of PW-2 and PW-5 regarding climbing into the truck and seeing the assault. In our opinion, the said discrepancies are minor discrepancies, which do not create a doubt about the credibility of the evidence to connect the Appellant with the offence. The eye witnesses cannot be expected to give a picture perfect report of the incident and there are bound to be some minor discrepancies. Evidence of PW-2 and PW-5 is consistent in material particulars. As long as the inconsistencies do not affect the reliability of material particulars of the evidence, which brings home the guilt of the Appellant, in our opinion, much importance cannot be given to the minor discrepancies.

24. The submission of the learned Counsel for the Appellant in respect of delay in lodging the FIR cannot be accepted, as the FIR

has been lodged on 16.08.2011 at 5:40 a.m. and as such, it cannot be said that there was any delay in lodging the FIR.

25. The learned counsel for Appellant has raised an alternative plea i.e. for the reduction of the offence from Section 302 to Section 304 Part-II. The learned counsel submits that the case of the Appellant falls within Exception 1, to Section 300 of the IPC. The same is reproduced herein-below:

*“Exception 1. - **When culpable homicide is not murder.**- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:

First.- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.”

26. Evidence of PW-2 and PW-5 reveals that after the quarrel about the mobile phone, the Appellant had gone to fetch the keys of the truck and Utpal had gone to sleep in the truck. Considering the fact that Appellant had assaulted Utpal while he was asleep, it is not a case of grave and sudden provocation so as to fall within the exception I to Section 300 of IPC. As far as reliance placed by the learned counsel appearing for the Appellant, on the judgment of Apex Court in the case of **State of Rajasthan vs. Shera Ram Alias Vishnu Dutta (supra)** is concerned, the facts of that case shows that the injuries which were inflicted was the result of hurling of stone and in that particular circumstance the Apex Court has held that the prosecution has failed to prove the case beyond reasonable doubt, that such an injury was sufficient in the ordinary course of caused to death. In our opinion, the facts of the present case, are completely different, inasmuch as Utpal was assaulted with a wooden block on the head, chest and neck which was sufficient to cause injury in the ordinary

course of nature, and therefore, the citation relied by the Appellant is not applicable to the present case.

27. Learned counsel for the Appellant has also relied upon judgment of the Apex Court in the case of **Lavghanbhai Devjibhai Vasava Vs. State of Gujarat (supra)**; and **Gurmukh Singh vs. State of Haryana (supra)**, which sets out the facts which are required to be taken into consideration while deciding the question as to whether the case falls under Section 302 or Section 304 Part-II of the IPC. The judgment of the Apex Court in the case of **Lavghanbhai Devjibhai Vasava (supra)** following the judgment in the case of **Dhirendra Kumar vs State of Uttarakhand (supra)** has reproduced the parameters laid down by the Apex Court in the case of **Dhirendra Kumar (supra)** in paragraph 7, which are to be taken into consideration while deciding the question as to whether a case falls under Section 302 IPC or Section 304 IPC, as under:

- “(a) *The circumstances in which the incident took place;*
- (b) *The nature of weapon used;*
- (c) *Whether the weapon was carried or was taken from the spot;*

- (d) *Whether the assault was aimed on vital part of body;*
- (e) *The amount of the force used;*
- (f) *Whether Utpal participated in the sudden fight;*
- (g) *Whether there was previous enmity;*
- (h) *Whether there was any sudden provocation;*
- (i) *Whether the attack was in the heat of passion; and*
- (j) *Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.”*

28. Considering the evidence on record, and, applying the parameters set out in the aforesaid judgments of the Apex Court, we find that Utpal was not assaulted in the heat of passion; that the assault took place much after the quarrel between the Appellant and Utpal; that the Appellant assaulted Utpal when he was asleep; that there was an assault with force on the head, chest and neck of Utpal, which was sufficient to cause death; and, that there was no grave and sudden provocation to justify the reduction of the offence. In our opinion, the facts of the case do not warrant reduction of the offence from Section 302 to 304 Part-II.

29. Considering the aforesaid, we are of the opinion, that the prosecution has established the guilt of the Appellant beyond reasonable doubt by ocular evidence, which is duly corroborated by documentary evidence. We do not find any infirmity in the impugned judgment and order dated 31.07.2013 passed by the learned Sessions Court in Sessions Case No.103 of 2012 and accordingly, uphold the conviction and sentence imposed by the impugned judgment and order.

30. Accordingly, we pass the following order:

ORDER

The Criminal Appeal No.79 of 2014 is dismissed and disposed of accordingly.

SHARMILA U. DESHMUKH, J.

REVATI MOHITE DERE, J.