

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

CRIMINAL APPEAL NO. 955 OF 2022

Balwan Jodharam,
Age: 34 years, Occu. Driver,
R/o. Pichopa, Kalan (15),
Tq. & Dist. Charkhi Dadari (H.S.)

...Appellant
[Orig. Accused]

Versus

The State of Maharashtra

...Respondent

.....
Mr. Sudarshan J. Salunke – Advocate for the Appellant
Mr. Govind A. Kulkarni – APP for respondent/State
.....

**CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.**

DATE OF RESERVING THE JUDGMENT : 08.07.2024
DATE OF PRONOUNCING THE JUDGMENT : 06.08.2024

JUDGMENT [Per : Neeraj P. Dhote, J.] : -

1. By this Criminal Appeal filed under Section 374[2] of the Code of Criminal Procedure [hereinafter referred to 'Cr.P.C.'], the Appellant has challenged the Judgment and Order dated 20.12.2021 passed by the learned Additional Sessions Judge, Hingoli, in Sessions Trial No. 51/2018, convicting him for the offence punishable under Section 302 of the Indian Penal Code (hereinafter for the sake of brevity referred to as "IPC") and sentencing to suffer imprisonment for life and to pay fine of Rs.3,000/- [Rupees Three Thousand], in default to pay the fine, suffer imprisonment for six months.

2. The Prosecution's case in nutshell, is as follows : -

2.1. ASI attached to Akhada Balapur Police Station, Dist.Hingoli, received information on 19.07.2018, around 05:00 p.m., that one person was lying dead in one container halted at Sher-E-Punjab Dhaba, which was within the jurisdiction of Mouje Jaroda Pati. The said information was provided by the owner of Dhaba. The police reached the said spot. The inquest was drawn. The body was referred to Akhada Balapur Rural Hospital for *post mortem*. The Medical Officer opined provisional cause of death as '*Haemorrhagic shock due to chest injury*'. The A.D.R. No.30/18 came to be registered under Section 174 of the Cr.P.C. The police conducted an inquiry and recorded statements of the persons working at the puncture shop and greasing & servicing workshop situated in front of the Dhaba. It was revealed from the said persons that on 19.07.2018, around 04:00 p.m., they heard thud, so they both proceeded towards the container. They noticed quarrel between two persons. One of them abused them and asked them to leave. The said person who threatened them, lifted the person who was lying on the ground and put him in the container. The person who put the injured in the container left the spot in another container.

2.2. It was revealed from the owner of the container in which the body was lying, that the another container also belonged to him.

The necessary documents were called from the owner of the container through electronic medium. It was revealed that the assaulter was the driver of the container who left the spot. P.W.1 - Police Officer Nagnath S. Deepak lodged report bearing No. 210/2018 with Akhada Balapur Police Station, Dist. Hingoli, for the offence punishable under Section 302 of the Indian Penal Code and set the criminal law in motion.

3. The statements of witnesses were recorded. The accused came to be arrested. Articles which were seized during the course of investigation were sent for chemical analysis. The statements of witnesses came to be recorded under Section 164 of the Cr.PC. The mobile phone of the deceased came to be seized, call details of the mobile phone of the accused and the deceased were collected. On completion of investigation, the Appellant came to be Charge-sheeted.

3.1. The learned trial Court framed the Charge against the Appellant for the offence punishable under Section 302 of the Indian Penal Code, vide Exh. 04, to which the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the prosecution examined in all Eleven (11) witnesses and brought on record the documentary evidence. On completion of prosecution's evidence, the learned trial Court recorded the statement of Appellant under Section 313(1)(b) of the Cr.PC. The Appellant denied the Charge and evidence of

prosecution. On appreciating the evidence on record and hearing both the sides, the learned trial Court passed the impugned Judgment and Order.

4. It is submitted by learned advocate for the Appellant that the prosecution failed to prove the Charge with cogent evidence. The injuries found on the person of deceased were not imminently fatal. Even if the evidence available on record is taken as it is, it fall short of intention on the part of Appellant to commit Murder. At the most the crime would fall under Section 325 of the IPC. He submitted that the conviction for the offence punishable under Section 302 IPC be quashed and set aside. In support of his submissions, he relied on the judgment of the Hon'ble Supreme Court of India in the case of **Shri Kishan and others v State of U.P., AIR 1972 SC 2056.**

5. The learned APP submitted that the case is based on the testimony of eye-witnesses. Considering the nature of assault and the injuries on the deceased, the intention to commit Murder was writ large. There was sufficient evidence on record to prove the Charge and the learned trial Court has rightly appreciated the evidence and convicted the Appellant and no interference is warranted. In support of his submissions, he relied upon the judgment of the Hon'ble Supreme Court of India in the case of **Prasad Pradhan & Anr. versus The State of Chhattisgarh** in Criminal Appeal No. 2025 of 2022 on 24.01.2023.

6. Scrutiny of the evidence on record show that, P.W.2 - Vithal Chandu Bhise and P.W.5 – Sahebrao Manikrao Maske were examined as the eye-witnesses to the incident, P.W.7 - Sarjitsingh Jagtarsingh Sandhu was the owner of Dhaba in front of which the incident had taken place, P.W.8 -Rameshchandar Dhulichand Bhalotiya was the transporter and owner of container, P.W.3 – Gautam Ramrao Bahatare was running the Pan Shop near the Dhaba, P.W.1 – Nagnath Shankarrao Dipak was the Police Officer, who reached the spot of incident after receiving the information, P.W.6 – Rajeshwar Suryakant Vyawahare was the Photographer, who clicked the photographs, P.W.10 - Dr. Sangram Bhivaji Narote was the Medical Officer, who conducted the *post mortem*, P.W.9 – Kanha @ Radheshyam Narayan Kokare before whom one mobile was seized, P.W.4 – Rani Balwansing Tawar, wife of deceased and P.W.11 – Tanaji Digambar Cherle, who conducted the investigation.

7. The evidence of P.W.8 - Rameshchandar Dhulichand Bhalotiya show that he was the Transporter at Badoda in Gujarat State. He owned many containers. Containers No. GJ-06-AZ-1728 and GJ-14-W-2827 belonged to him. The appellant and the deceased were working as the driver with his transport company. The deceased was working with him since fifteen (15) days prior to the incident. The deceased was introduced to him by the Appellant. On 18.07.2018,

Container No.GJ-06-AZ-1728 was engaged for transportation from Hyderabad to Indore, which was being driven by the Appellant and Container No.GJ-14-W-2827 was engaged for transportation from Hyderabad to Ahmedabad, which was being driven by the deceased. The deceased was addicted to liquor. Deceased changed the route and brought the container, which was being driven by him, on the route of container which was being driven by the Appellant.

8. His further evidence show that on 28.07.2018, he was informed by one driver – Ramnivas that the container which was being driven by the deceased was halted at Sher-e-Punjab Dhaba and driver was lying dead. These aspects are the omissions in his previous statement, however, they are not material so as to affect his above referred testimony. It is established from the evidence of this witness that the Appellant and deceased were knowing each other and it was the Appellant at whose instance the deceased got the employment as the driver in the Transport Company of this witness.

9. The evidence of PW.3 – Gautam Ramrao Bahatare show that he was having Pan Stall near Sher-e-Punjab dhaba, which was given on rent to one person. On 20.07.2018, he went to his said shop where he learnt from P.W.5 – Sahebrao Manikrao Maske about quarrel between two drivers of the containers (Relevant under Section 6 of the Evidence

Act) and he saw the driver in a dead condition inside the Container bearing No.GJ-14-W-2827. The police arrived and removed the dead body from the container, which was taken to the hospital. Not knowing the container numbers by this witness is natural. The attempt in the cross-examination to show that, his evidence that he learnt from PW5 – Sahebrao Manikrao Maske about the quarrel between two drivers of the containers was the omission failed, as the same was not put to PW.11 – Tanaji Digambar Cherle, Investigating Officer, who recorded his statement.

10. The evidence of P.W.7 - Sarjitsingh Jagtarsingh Sandhu show that he was running Hotel / Dhaba by name Sher-e-Punjab near the spot of incident. On 20.07.2018, when he was at the Dhaba, the container bearing No. GJ-14-W-2827 was parked adjacent to the said Dhaba. P.W.3 – Gautam Ramrao Bahatare had gone near the said container and since it was halted for a long time, he came to him and they both went near the said container. He opened the cabin door and went inside. He found the deceased therein. The cell phone number of container owner was written on the container and so he gave a call on the said number and informed as to what he saw inside the cabin. Thereafter, he informed Akhada Balapur Police. Police came on the spot. His statement [Exh.56] was recorded. He identified the printed report of unnatural death bearing his signature registered by the concerned

Police Station. Nothing has come in the cross-examination to discard his testimony.

11. There is medical evidence on record in the nature of testimony of the Medical Officer - Dr. Sangram Bhivaji Narote, who is examined as P.W.10. His evidence show that, on 20.07.2018, he was working as a Medical Officer at Rural Hospital, Akhada Balapur, Dist.Hingoli. On that day, he received the dead body of Balwan Havasingh. He noted the following aspects and injuries while performing the *post mortem* : -

- i) *The condition of the dead body was moderately nourished and it was cold body.*
- ii) *Noticed rigor mortis slightly present over upper and lower limbs.*
- iii) *No sign of decomposition. Post-mortem lividity present over buttock and back region.*
- iv) *Eyes were semi opened. Pupils were dilated and fixed. The mouth was semi opened. The tongue was inside mouth. Teeth were intact.*
- v) *No injuries to external genitals. No indication of purging.*
- vi) *Both upper limbs were flexed at the elbow and slightly pronated. Both lower limbs were flexed at knees and supine.*

External Injuries : -

- i) *Contused abrasion situated over left chest ad-measuring 6 c.m. x 2 c.m., 3 c.m. x 2 c.m., 2 c.m. x 1 c.m.*
- ii) *Contused abrasion situated over mid sternal region admeasuring 6 c.m. x 1 c.m.*
- iii) *Compound fractures of 6th, 7th, 8th and 9th ribs on the left side.*

- iv) *Palpation compound fractures to left ribs 6th, 7th, 8th and 9th.*
- ix) *The injuries noted in column No.17 and 18 were ante mortem.*

Internal Injuries : -

- (i) *Skull vault was intact and brain matter was congested.*
- (ii) *Upon examination of thorax region, found compound fracture left 6th, 7th, 8th and 9th ribs. Found blood in plural cavity (haemo thorax). The right lung was congested and the left lung was found contusion over middle and lower lobes. The right chamber of the heart was empty and the left chamber of the heart found 200 ml blood around. He did not notice any clots in left chamber of the heart.*
- (iii) *The abdomen was haemoperitoneum. The mouth was semi opened and the tongue was inside mouth and the teeth were intact. He noticed semi solid, semi liquid food particles in the stomach. The small intestines were empty. The large intestines were empty with gases. The liver and gal bladder were congested. The pancreas and suprarenals were congested. The spleen was congested. The kidneys were congested. The bladder was empty.*

11.1. The Medical Officer opined that the injuries noted in column No. 17 and and 18 were *ante mortem* and the cause of death as '*Haemorrhagic shock due to chest injury*'. He prepared *post mortem* report at Exh. 67. He opined that the injuries mentioned in column nos.17 and 18 were possible in case of assault by fist and by putting down a person on the hard surface after lifting. He opined that, there might be forceful fist blow. He further opined that, the death of the person is possible in case of forceful fist blow and lifting a person and putting down on the hard surface. The evidence further show that he could not opine whether the death was homicidal or suicidal.

11.2. His cross-examination show that, he further opined that the injuries mentioned in column nos. 17 and 18 were possible by fall from the cabin of the truck. It is further brought in the cross-examination that the death was possible in case a person falls from the cabin of the truck, and upon sustaining the above referred injuries the death was possible.

11.3. Though the Medical Officer opined the possibilities of death as referred above and he could not give clear opinion whether the death was homicidal or suicidal, the injuries are proved.

12. Now coming to the evidence of the eye-witnesses, what is seen is that P.W.2's elder brother was having the shop for removing puncture of the tyres, in front of said dhaba. He occasionally used to go to the said shop to help his brother. On 19.07.2018, he had been to the said shop and he was there for whole day as his brother went home. In the cross-examination, the clarification for his presence at the shop on the said day is brought on record. It show that, on that day he had taken leave from his school by submitting an application to Mane Sir of the School and on that day he was shown absent in the school. Thus, from the said evidence in the cross-examination, the presence of this witness at the puncture shop cannot be doubted. The evidence of P.W.5 show

that he was engaged in the work of applying grease to the trucks which halted at the said Dhaba. He corroborates the testimony of P.W.2 that P.W.2's brother was running a puncture shop and P.W.2 used to work there to clean the filters of the truck.

13. The scrutiny of the evidence of P.W.2 and P.W.5 show that, on 19.07.2018 when they were chatting, they heard sound from nearby containers/trucks. They went near the container/truck. They saw the Appellant assaulting the deceased with fist blows. Though P.W.5's evidence show that the Appellant sat on the driving seat and started the vehicle and gave dash to the deceased who was on the ground, P.W.2 nowhere deposed about the dash by the vehicle to the deceased. The common thread in their evidence is that the Appellant was assaulting the deceased with fist blows and when they reached near the spot of incident, the Appellant abused them and asked them to leave and the Appellant put the deceased in the cabin of container. The evidence of P.W.5 show that after the Appellant abused them and asked them to go, they ran away at some distance and witnessed the incident from that spot. Their evidence show that, thereafter, they both left for their respective houses.

14. The evidence of P.W.2 show that, on the next day the Police Officer (P.W.1 – Nagnath S. Dipak) came at the Dhaba and made inquiry.

During inquiry, P.W.1 showed one photo from the Aadhaar Card, which was identified by P.W.2 as that of the Appellant. Whatever omissions are brought in paragraph no. 7 of the evidence of P.W.2, they are from his statement recorded under Section 164 of the Cr.P.C. His evidence do not show that there were omissions/material omissions in his previous statement under Section 161 Cr.P.C. recorded by the Police.

15. The evidence of P.W.5 show that, on the next day, out of two trucks standing on the previous day, only one truck was seen and the other one was not seen. One more truck of the same transport company had come there. When they went near the truck which was standing from the previous day, they saw the person who was assaulted, lying dead in the cabin. His further evidence show that, Dhaba Operator informed the Police. The Police came and made inquiry. He identified the Appellant as the assaulter from the photo shown by the Police. His statement was recorded by the Police.

16. Whatever omissions are shown in paragraph nos. 10 and 11 of the evidence of P.W.5, they do not affect the core of his evidence. What can be seen from the cross-examination of P.W.5 is that, question was put to him as to which colour clothes were worn by the accused at the time of incident and he responded that, at the time of incident, the accused was wearing white colour under-pant and T-shirt. There is no denial to the said aspect in the further cross-examination. The said

version in the cross-examination fortifies his testimony that he witnessed the incident. He not only witnessed the incident but was able to watch it closely so as to register the same in his mind.

17. From the cross-examination of P.W.2 and P.W.5, it is tried to suggest that they did not report the incident to anyone in their village or the Police Patil of their village and, therefore, they cannot be said to be the eye-witness to the incident. The said evidence will not affect their evidence for the reason that their evidence go to show that on the very next day they informed the police about the incident. They denied the suggestions put to them that they did not witness the incident. Both these witnesses identified the Appellant as the same person who assaulted the deceased on the fateful day. The incident is of 19.07.2018 and the testimony of P.W.2 was recorded on 30.11.2019 and that of P.W.5 on 7.01.2020, which show that they deposed after a period of one (1) year four (4) months and one (1) year seven (7) months, respectively. What is seen from the evidence of P.W.5 is that, the incident was of 05:00 p.m. or so. The evidence of both the above witnesses show that they had closely watched the incident. The place of incident, as is clear from the evidence on record, was in front of Dhaba where the trucks are parked. The working places of P.W.5 and P.W.2 were on the said spot i.e. near *Dhaba*. Their reaching the spot of incident after hearing the sound was natural. Nothing has come in their cross-examination to doubt their testimony in respect of witnessing the incident.

18. In the cross-examination of PW.5 it has come that the Investigating Officer met him in the court, day before and two (2) days before the day when he deposed before the trial Court and since two (2) to three (3) days before, he had seen the accused in the court, cannot be the reason to discard his testimony regarding the identification of the Appellant. Though it has come that, he identified the Appellant in the court as he had seen him for two (2) to three (3) times in the court, he immediately volunteered that he had seen the Appellant while assaulting.

19. It is true that there is no evidence that during the course of investigation the Investigating Officer arranged for the Test Identification Parade (T.I.P), however, it is the settled position in law that T.I.P is for the investigation purpose and not the substantive evidence. Thus, the identification aspect cannot be discarded for want of T.I.P. The identification in the court is the substantiate piece of evidence. The evidence discussed above establishes that PW.2 and PW.5 had the opportunity to witness the incident from such distance, that they could very well identify the assaulter at the later point of time. We see no infirmity in the evidence of these two (2) eye witnesses. We find their testimony natural and acceptable. From the evidence on record, the prosecution has successfully established the identity of the Appellant as the assaulter.

20. Then there is evidence of wife of deceased - Rani Balwansing Tawar, who is examined as P.W.4. She deposed that her husband was working as a driver of the truck belonging to Rameshchandra Bhalotiya (P.W.8) since prior to 20 (twenty) days from the incident. On 19.07.2018, around 03:00 p.m., her husband called on her mobile phone and informed that he was in Maharashtra. Between 07:30 p.m. and 08:00 p.m., she received a phone call from mobile number 9755380284 and her husband's friend spoke to her in improper manner. She disconnected the call. Again she received two to three calls from the said mobile number, however, she did not respond to the same. She received two vulgar messages from the said friend of her husband. Thereafter, she received a call from the mobile number of her husband and twice heard moaning of her husband. Thereafter, she received a call from the mobile number of her husband and she again heard moaning of her husband.

21. Her further evidence show that, on the next day i.e. 20.07.2018, between 07:00 p.m. and 07:30 p.m., she received a call from the transporter (P.W.8) and he informed her the news of her husband's death. She deposed of receiving the dead body of her husband on 22.07.2018 and performance of funeral. The police inquired with her and recorded her statement. Her mobile came to be seized. Her evidence show that she never saw the accused and, therefore, did

not identify the accused/appellant while giving her testimony. The only omission in her previous statement is in respect of, 'her husband's friend Balwan'. Her further evidence go to show that she had preferred Claim Petition under the Motor Vehicles Act before the concerned Court at Parbhani, though she denied the said fact therein.

22. As regards the phone calls to wife of deceased are concerned, the prosecution brought on record the CDRs of mobile numbers of the deceased's wife, deceased and of the Appellant in the evidence of P.W.11 - Tanaji Digambar Cherle, who investigated the Crime. The said CDRs though exhibited by the learned trial Court cannot be taken into consideration and relied upon because the prosecution has not examined the Nodal Officer from the service providers of the mobile numbers. It is needless to state that for want of evidence of the concerned Nodal Officer and certificate under Section 65-B of the Indian Evidence Act, the CDRs/phone calls details cannot be relied.

23. The above discussed evidence establishes that the Appellant and the deceased were working as driver with the transport company of P.W.8 - Rameshchandar Dhulichand Bhalotiya. The deceased was introduced in the employment by the Appellant. The Appellant assaulted the deceased when the containers driven by both of them were halted at

the dhaba of PW.7 - Sarjitsingh Jagtarsingh Sandhu. The testimony of eye-witnesses finds corroboration from the medical evidence, which proved the injuries on deceased. The evidence of eye-witnesses as discussed above, establishes assault by fist blows and banging of deceased against the surface. The conjoint reading of the evidence of the eye-witnesses and the Medical Officer firmly establishes that the injuries and the cause of death was the result of assault on deceased by the Appellant. The cross-examination of the witnesses examined by the prosecution could not create any dent in the testimony of the witnesses. The medical evidence established that the injuries caused to the deceased by the Appellant proved fatal.

24. Now coming to the authorities cited by both the sides, in the Judgment relied upon by the learned APP the issue was whether the appellants therein were guilty of the offence of murder, punishable under Section 302, or whether they were criminally liable under the less severe Section 304, IPC. The relevant paragraphs are reproduced as follows : -

16. *In State Of Andhra Pradesh v. Rayavarapu Punnayya & Anr.* another oft-cited judgment, this court observed as follows:

“Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him

is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the “intention to cause death” is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

In clause (3) of Section 300, instead of the words “likely to cause death” occurring in the corresponding clause (b) of Section 299, the words “sufficient in the ordinary course of nature” have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of

Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word “likely” in clause (b) of Section 299 conveys the sense of “probable” as distinguished from a mere possibility. The words “bodily injury ... sufficient in the ordinary course of nature to cause death” mean that death will be the “most probable” result of the injury, having regard to the ordinary course of nature. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant v. State of Kerala [AIR 1966 SC 1874: 1966 Supp SCR 230: 1966 Cri LJ 1509.] is an apt illustration of this point.”

. *The court then quoted the decision in Virsa Singh (supra), and held that:-*

. *“Thus according to the rule laid down in Virsa Singh's case (supra) even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to S. 300 clearly brings out this point. Clause (c) of S. 299 and clause (4) of S. 300 both require knowledge of the probability of the causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that cl. (4) of S. 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general--as distinguished from a particular person or persons---being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed*

by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid."

. A later decision, Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh¹⁰ considered these aspects and held that :-

"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances;

- (i) nature of the weapon used;*
- (ii) whether the weapon was carried by the accused or was picked up from the spot;*
- (iii) whether the blow is aimed at a vital part of the body;*
- (iv) the amount of force employed in causing injury;*
- (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight;*

- (vi) *whether the incident occurs by chance or whether there was any premeditation;*
- (vii) *whether there was any prior enmity or whether the deceased was a stranger;*
- (viii) *whether there was any grave and sudden provocation, and if so, the cause for such provocation;*
- (ix) *whether it was in the heat of passion;*
- (x) *whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;*
- (xi) *whether the accused dealt a single blow or several blows.*

. *The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”*

25. Perusal of the Judgment relied upon by the learned advocate for the Appellant show that in the said case there was no previous enmity between the accused and the deceased and the occurrence was the offshoot of a trifling incident. In the said case, the Hon’ble Apex Court altered the conviction to the offence punishable under Section 325 r/w 34 of the Indian Penal Code.

26. Coming to the case in hand, the evidence on record established that no weapon was used by the Appellant while assaulting the deceased. The assault was by fist blows and dash by the container. There is no evidence that the deceased was run over by the container. There is no evidence to show that there was any previous enmity between the Appellant and the deceased. The evidence further show

that after the assault the deceased was put in the cabin of truck. These circumstances do not show that the Appellant had any intention to kill the deceased. Culpable homicide is defined under Section 299 and Murder is defined under Section 300 of the IPC. The proved circumstances or the evidence on record, fall short of intention on the part of the Appellant to cause the death. However, the manner of assault attributes the knowledge to the Appellant that the deceased was likely to die by the act of assault. In view of above discussion, in our considered view, the offence would fall under Section 304 Part-II of the IPC. Therefore, the conviction and sentence need alteration. Hence, we pass the following order:-

ORDER

- (i) Criminal Appeal No. 955 of 2022 is hereby partly allowed.
- (ii) The conviction recorded by the learned Additional Sessions Judge, Hingoli, vide Judgment and Order dated 20.12.2021 passed in Sessions Trial No. 51/2018, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code is hereby converted to Section 304 Part II of the Indian Penal Code and the Appellant is sentenced to suffer imprisonment for Seven (7) years with fine and default sentence for non-payment of fine, as imposed by the learned trial Court.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde