

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 804 OF 2015

Santosh Kantilal Kharva	]	
Adult, age about 39 years, Indian Inhabitant	]	
Residing at Municipal Colony,	]	
Chawl No. H-15, Room No.3, Barve Nagar,	]	
Bhatwadi, Ghatkopar (W.), Mumbai- 400 086	]	
At present Nashik Jail	]	... Appellant
V/s.		
The State of Maharashtra	]	
(At the instance of Ghatkopar Police Station,	]	
vide C.R. No. 223/2011)		... Respondent

Mr.Vaibhav A. Sugdare, Appointed Advocate for Appellant.
Mr.J.P. Yagnik, A.P.P. for Respondent-State.

**CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

DATE : 5th January 2024.

JUDGMENT (Per : A. S. Gadkari, J.)

1) Appellant, original accused No.1 has questioned the correctness of Judgment and Order dated 19th December 2014, passed by the learned Special Judge (CBI), Greater Mumbai, in Sessions Case No. 666 of 2011, convicting him under Section 302 read with Section 149 and under Section 147 of the Indian Penal Code (for short, "I.P.C.") and is sentenced to suffer

imprisonment for life and to pay a total fine of Rs.2,500/-, in default of payment of fine to further suffer imprisonment of specified period.

1.1) By the impugned Judgment and Order, the learned Judge of the trial Court was pleased to acquit original accused Nos.2 to 5 from the same said offences charged against them.

2) Heard Mr. Sugdare, learned Advocate appointed by the Legal Services Committee to represent and espouse the cause of Appellant and Mr.Yagnik, learned A.P.P. for Respondent-State. Perused entire record.

3) It is the prosecution case that, on 10th June 2011 after having dinner at about 9.15 p.m., the informant (PW-1) left his house and went towards the open space of Shivneri Seva Mandal, Bhatwadi, Ghatkopar, Mumbai, which was situated near his house where his friends used to gather and sit at the said place. Mangesh Ghadge (deceased) was standing near a Paan (betel leaf) shop and was smoking cigarette. The informant took Gutkha and at the request of Mangesh accompanied him to go downside of the said hillock. They were proceeding to Bhatwadi Market road situated at Barve Nagar, Ghatkopar. They reached in front of the gate of school No.1. At that place 20 to 25 boys were sitting and many of them were consuming liquor. The boys namely Dharma, Munna, Santosh, Roshan etc. were also standing there. Dharma and Munna were residing in the area of informant (PW-1). Appellant and Roshan were residing in Municipal Colony at Barve Nagar.

3.1) At that time, the Appellant called Mangesh (deceased) towards him and asked him “क्या रे हमारे लडके उपर आते है। तो बहुत टांग आडाता है।” i.e. why he is causing hindrance/problem to his boys, when they come up. Upon which one boy who was aged about 32 years and was standing beside Appellant also asked Mangesh “क्या रे बहुत शाना बनता है।” i.e. why he is trying to be over smart. Mangesh asked Appellant to give understanding to the said other boy. At that relevant time, a third person who was aged about 30 years and was associated with the Appellant gave a slap on the neck of Mangesh. Appellant thereafter assaulted Mangesh (deceased) with hands/fists and gave one or two blows to him. Upon witnessing the said act the informant (PW-1) went at the said place and saw that Mangesh had caught hold of the collar of Appellant. When the informant tried to intervene and pacify the said quarrel, the two friends of Appellant scuffled with him and pushed him by hands. It is alleged that, at that time Appellant took out a sharp edged iron weapon which was concealed on the backside of his waist and assaulted Mangesh (deceased) on his stomach. The informant saw Mangesh (deceased) bent downwards and the Appellant along with his associates took Mangesh at a side while assaulting him. Some of the accomplices of Appellant took the informant to other side and assaulted him with kick & fists blows and tiles. Upon hearing the said melee, Munna and Dharma came at the scene of offence and rescued the informant (PW-1). After the informant was rescued, he along with Dharma and Munna saw Mangesh had suffered injuries on his

stomach, chest, back and was lying motionless at the said place.

3.2) In the meantime, Rakesh Bodekar (PW-2), Ajay Jankar (PW-12), Vijay Jankar and other persons came at the scene of offence and took Mangesh to Rajawadi Hospital. Mangesh was admitted to I.C.U.. Mangesh succumbed to injuries while undergoing treatment. The informant was treated by Dr. Samir Rambhia (PW-13) at Rajawadi Hospital.

3.3) The autopsy on the dead body of Mangesh (deceased) was conducted by Dr. Amit Chavan (PW-8) on 11th June 2011 at about 6.15 a.m.. Upon external examination, he found the following injuries.

- (i) *Contusion on left side of nose 1.5 x 0.5 cm red in colour.*
- (ii) *Incised wound preset over left side of neck 2 cm above medial end of clavicle 13 cm below chin, oblique in shape of size 2.5 x 0.5 cm x muscle deep. On dissection :- internal hemorrhage with sternocledomatoide muscle fiber cut red in colour.*
- (iii) *Abrasion on size 0.5 x 0.5 cm red brown in colour in center of neck 3 cm above injury no.2.*
- (iv) *Abrasion at mide clavicular region of size 1 x 0.5 cm red brown in colour.*
- (v) *Abrasion at left anterior chest wall 3 cm below medial end of clavicle [Dr. shows it as the joint of clavicle bone in front central region below neck] of size 3x0.5 cm red brown in colour.*
- (vi) *Incised wound present at left anterior chestwall of size 3x1 cm, 6 cm from left nipple and 3 cm from medline. Horizontal muscle deep reddish in colour. Upon dissection : internal hemorrhage present red in colour.*
- (vii) *Incise wound present at left side of abdomen 3 cm from*

- umbilicus, 9 cm from left anterior superior iliac spine of size 1.5 x 0.5 x skin deep reddish in colour.*
- (viii) *Incise stab wound present at right anterolateral chest wall region of size 3x1 cm. It is below 8 cm from right nipple, 23 cm from shoulder tip. Vertical reddish in colour. On dissection : underneath skin subcutaneous tissue muscle with sharp cut, 9th rib fracture with internal hemorrhage sharp cut incise wound of size 2x0.5 cm. Anterolateral surface of liver present.*
- (ix) *Incised stab wound present at right posterior axillary line of size 2.5 x 1 cm. It is 16 cm from midline of back, 15 cm from lower end of scapula reddish in colour. On dissection, underneath skin, subcutaneous tissue cut with sharp cut, cut incise wound of size 2x0.5 cm present at anterolateral surface of liver with internal hemorrhage.*
- (x) *Incise wound at right side of the back infrascapular region 3cm from medline. It was below lower end of scapula of size 2x1 cm x muscle deep reddish in colour. Horizontal.*
- (xi) *Incised wound on right side of abdomen of size 2 x 1 cm x muscle deep reddish oblique, 13 cm below right nipple, 9 cm from midline.*
- (xii) *Incised wound on right side lower abdomen of size 2 x 1 cm x muscle deep reddish. It was 5 cm from anterior superior iliac spine region and 7 cm from umbilicus.*
- (xiii) *4 abrasions present at right side of neck of size 0.5 x 0.5 cm, 2nd abrasion was 1 x 0.5 cm, 3rd abrasion was 1.5 x 0.5 cm, 4th abrasion 1.5 x 1 cm, red brown in colour.*
- (xiv) *Abrasion present over right shoulder near lateral end of right clavical of size 1.5 x 1 cm red brown in colour.*
- (xv) *Abrasion at right knee joint region of size 2.5 x 1.5 cm red brown in colour.*
- (xvi) *Abrasion at right foot just below right ankle joint of size 0.5 x*

0.5 cm red brown in colour.

(xvii) Abrasion at left grater toe 0.5 x 0.5 cm red brown in colour.

(xviii) Abrasion at left leg medially above left ankle joint 2.5 x 1.5 cm red brown in colour.

(xix) Abrasion at left knee joint of size 1.5 x 1 cm red brown in colour.

(xx) Abrasion at right shoulder posteriorly of size 6x3 cm red brown in colour.

3.4) Upon internal examination, PW-8 found the following corresponding injuries.

(i) Underscalp contusion present at right perital region 5 x 2 cm red in colour bone deep.

(ii) Underscalp contusion present on left perital region 6 x 3 cm red in colour bone deep.

(iii) Under scalp contusion present that left perito occipital region 3 x 2 cm red in colour bone deep.

3.5) Upon internal examination of Thorax, PW-8 found the following injuries.

(i) Internal contusion present on left posterior chest-wall of size 5 x 4 cm red in colour.

(ii) Internal contusion present at right interior chest-wall of size 4 x 3 cm red in colour.

3.6) PW-8 accordingly prepared 'Postmortem Notes' (Exh.63).

Dr.Chavan (PW-8) has opined that, injury Nos.8 & 9 are enough and sufficient in ordinary course of nature to cause death. That, injury Nos.3, 6, 7, 8, 9, 10, 11 & 12 were possible by sharp weapon like the knife (Article-A).

3.7) After receipt of Chemical Analyser's Report and completion of

investigation, Smt. Mamata D'souza (PW-11) submitted chargesheet in the Court of Metropolitan Magistrate, 49th Court, Vikroli, Mumbai for the offences punishable under Sections 302, 323, 324, 504, 143, 146, 147 & 149 of I.P.C.. The learned Magistrate after complying with the necessary provisions of Section 207 of Criminal Procedure Code committed the said case to the Court of Sessions, as the offence punishable under Section 302 of I.P.C. is exclusively triable by the Court of Sessions.

3.8) The Trial Court framed charge below Exh.8. The said charge was read over and explained to the accused persons in Marathi vernacular or in a language with which they were familiar of. The accused persons pleaded not guilty to the charges and claimed to be tried. The defence of accused persons was of total denial and false implication.

3.9) The prosecution in support of its case examined in all 13 witnesses. After recording of the evidence of witnesses, the statements of accused persons were recorded under Section 313 of Cr.P.C. below Exhibit Nos.94, 95, 96, 97 & 98 respectively. The accused persons did not examine any witness in defence of their case.

3.10) The learned Judge of the trial Court after hearing the learned Advocates for the Appellant and other accused persons was pleased to acquit accused Nos. 2 to 5 from all the charges framed against them. However, has convicted the Appellant under Section 302 read with 149 of I.P.C. and under Section 147 of I.P.C., as noted herein above.

4) Mr. Sugdare, learned Advocate for the Appellant submitted that, the Appellant is the sole convict in the present case and therefore the application of Section 149 of I.P.C. read with Section 302 of I.P.C., while convicting him is legally not tenable. That, there is a grave error committed by the learned trial Court in convicting the Appellant under Section 149 read with Section 302 of I.P.C.. He submitted that, a minute perusal of evidence on record clearly indicates that, the prelude to the commission of the alleged offence was a scuffle which was ensued between the Appellant on one side and the deceased Mangesh on the other side due to the bickering between them. The deceased had also manhandled the Appellant, which caused infuriation to the Appellant leading in committing the said crime. He submitted that, the act of the Appellant therefore falls within the purview of Exception 4 of Section 300 of I.P.C. and the benefit of the same be given to the Appellant. He therefore prayed that, the Appeal may be allowed by quashing and setting aside the impugned Judgment and Order.

5) Per contra Mr.Yagnik, learned A.P.P. for the State vehemently opposed the Appeal and submitted that, there is sufficient evidence available on record to sustain the conviction of Appellant under Section 302 of I.P.C.. However, it was very difficult for the him to substantiate the impugned Judgment on the point of applicability of Section 149 of I.P.C. to the sole convict. He submitted that, there are three eye witnesses namely PW-1, PW-4 & PW-12 to the present crime and after taking into consideration their

evidence, the trial Court has rightly convicted the Appellant under Section 302 of I.P.C.. He therefore submitted that, there are no merits in the Appeal and it may be dismissed.

6) Perusal of record indicates that, though the prosecution has examined in all 13 witnesses in support of its case, the evidence of Arun Sakpal (PW-1), informant, Dharmesh Lavande (PW-4) and Ajay Jankar (PW-12), who are the eye witnesses to the incident, is most relevant for deciding present Appeal.

6.1) It be noted here that, the learned Advocate for the Appellant has not seriously disputed the fact of various recoveries i.e. recovery of weapon, recovery of blood stained clothes at the instance of Appellant etc. and therefore to have brevity herein we are not discussing the said aspects.

7) Arun Sakpal (PW-1) in his testimony has stated that, he was knowing deceased Mangesh. He also knew all the accused including the Appellant. PW-1 and deceased were staying on the hill area whereas the accused persons were residing in the colony at the lower level of the said hill i.e. Municipal Colony.

The incident in question took place on 10th June 2011. On that day, he took dinner and at about 9.15 p.m. he left his house and went to the open space belonging to Shivneri Seva Mandal, which was near his house. He noticed number of boys of his Mandal were sitting there including Rakesh Bodekar (PW-2), Sumeet Kadam, Ajit and others. He noticed that, Mangesh

(deceased) was standing near a Pan shop and was smoking cigarette. PW-1 then went near the said Paan shop for having Gutkha. At the request of Mangesh, he accompanied him to go to the lower side of the said hill i.e. towards the market area. When they were getting down from the said road, they noticed that 20 to 25 boys were drinking liquor in the open space. He noticed the Appellant and other accused were there. When both of them were getting down, the Appellant called Mangesh (deceased) and enquired with him as to why the deceased was causing hindrance in the way of his boys when they came up. The another boy who was with Appellant questioned Mangesh as to why he was acting over smart. Mangesh (deceased) requested Santosh to direct the other boy to keep quite. During the said altercation, one of the boys who was accompanying Appellant slapped on the neck of Mangesh. Appellant then caught hold of Mangesh and gave two fist blows. Mangesh (deceased) had also caught the collar of Appellant and a scuffle ensued. PW-1 tried to intervene to pacify the said scuffle. During the said scuffle, Appellant removed one weapon like *gupti* (sword stick) and stabbed Mangesh in his stomach, due to which Mangesh bent down. At that time, other accused persons came at the scene of offence and started assaulting Mangesh with fist, kick blows and stones. They dragged Mangesh to one side. They also assaulted PW-1 with fist and kick blows. At that time, the boys from his Mandal came there and rescued them from the clutches of Appellant and other accused persons. As the boys from

the group of PW-1 came at the scene of offence, all the accused persons ran away. As the PW-1 had sustained bleeding injury, he was admitted to I.C.U.. He subsequently came to know that, Mangesh was no more.

7.1) The admissions given by the PW-1 in his examination-in-chief are not shaken in his elaborate cross-examination.

8) Dharmesh Lavande (PW-4) has deposed that, on the day of incident, at about 9.30 p.m., he reached to his locality i.e. where he used to reside. At Barve Nagar stop, Nitin Kadam met him and while talking they reached upto Bhatwadi School No.1. The Appellant was sitting on the motorcycle and he was talking with him. At that time, deceased came from the ground along with his two friends, one of which was Raju. Mangesh (deceased) was having a glass in his hand and he was under the influence of liquor. He was abusing the Appellant and Appellant also abused him. There was a gate in between them. Deceased crossed the gate and reached towards Appellant and both of them again started abusing each other. PW-4 along with his friends separated them and asked the friends of Mangesh (deceased) to take him to his house. Accordingly, friends of deceased took him towards his house. However, PW-4 and his friends remained there only. After five minutes, Arun Sakpal (PW-1) came at the said place running and asked who was the Appellant (Santosh) and slapped him. On that spot, the number of other boys were present. PW-1 caught hold of collar of Appellant and a scuffle took place between them. During the said scuffle, they reached near

the tree. Mangesh (deceased) also arrived at the said place.

8.1) Hereinafter PW-4 resiled from his statement recorded under Section 161 of Cr.P.C. and deposed that, he was unable to state as to who beat whom. That, within two minutes, the mob dispersed and PW-4 noticed that, Mangesh (deceased) was lying on the ground. Mangesh had sustained injury on his neck and blood was oozing from it. He noticed only one injury on the person of deceased. PW-4 along with other persons took deceased to Rajawadi Hospital from an auto-rickshaw. The doctors declared him dead prior to admission. PW-1 also arrived at the hospital subsequently. As PW-1 was injured, he was also admitted in the hospital.

8.2) It is to be noted here that, the PW-4 resiled from his statement recorded under Section 161 of Cr.P.C. and therefore the learned A.P.P. declared him hostile and sought permission of the trial Court to cross examine him. In his elaborated cross examination by the learned A.P.P., nothing beneficial to the prosecution has been brought on record and the material admissions given by him in his examination-in-chief had gone unchallenged. It is to be further noted here that, though the prosecution has declared PW-4 as a hostile witness, he has supported the case of the prosecution to a large extent and the relevant depositions extracted from his testimony are noted herein above for the sake of brevity.

9) Ajay Jankar (PW-12) has deposed that, on 10th June 2011, after he had his dinner at about 10.30 p.m., he went near the ground in front of

his house, which is at the distance of about two minutes. Within a short time, he heard noise of quarrel in the ground. He went there and saw that, the Appellant and other accused persons were assaulting Mangesh (deceased). A sharp edged knife was in the hand of Appellant and the Appellant was assaulting Mangesh with it on his stomach. Thereafter, the Appellant and other accused persons left the place. Mangesh fell down in the pool of blood and thereafter the Appellant and other accused persons left the spot. PW-12, PW-1, Vijay Jankar and PW-2 took Mangesh to Rajawadi Hospital. PW-12 has deposed that, he did not see who had assaulted PW-1.

10) The aforementioned extracts from the depositions of the eye witnesses are the admitted facts on record and no contrary version to it is deposed by any other witness. As noted earlier, these three witnesses are the most crucial and star witnesses of the prosecution.

11) To bring a case within Exception 4 to Section 300 of IPC, all the ingredients mentioned in it must be found. It is to be noted that the word 'fight' occurring in Exception 4 to Section 300 of I.P.C. is not defined in the I.P.C.. It takes two to make a fight. To invoke Exception 4 to Section 300 of I.P.C., four requirements must be satisfied viz.:-

- (I) It was a sudden fight;
- (II) There was no premeditation;
- (III) The act was done in the heat of passion and
- (IV) The assailant had not taken undue advantage or acted in a cruel or unusual manner.

The cause of the quarrel is not relevant nor is it relevant as to who offered the provocation or started to assault first, but what is important is that the occurrence must have been sudden and not premeditated and the offender must not have acted in a fit of anger and must not have taken any undue advantage or acted in a cruel or unusual manner. When during the course of a sudden quarrel, a person in the heat of moment, attacks the other person and causes injury, one of which proves to be fatal, the accused would be entitled to the benefit of this exception.

12) The Hon'ble Supreme Court in the case of *Sukhbir Singh Vs. State of Haryana, reported in (2002) 3 SCC 327*, while analyzing the provisions of Exception 4 of Section 300 read with Section 304(II) of I.P.C. has held that, to avail the benefit of Exception 4 the defence is required to probabalise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the Courts that a fight is not *per se* palliating circumstance and only

unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception.

13) After applying the principles as enunciated by the Hon'ble Supreme Court and noted herein above, the testimony of PW-1 clearly indicates that, there was a scuffle which ensued after initial altercation between the Appellant and Mangesh (deceased) and Mangesh had also caught collar of the Appellant during the said scuffle. It appears to us that, it was the igniting point where the Appellant lost his control and assaulted deceased in the heat of passion. PW-4 has also deposed that, the deceased under the influence of liquor was abusing the Appellant. That, both of them were abusing each other. Therefore according to us the act committed by the Appellant squarely falls within the purview of Exception 4 Section 300 of I.P.C. and the offence committed by him would attract Section 304 (Part-II) of I.P.C..

14) After taking into consideration the entire evidence on record, this Court is of the view that the act committed by the Appellant falls within the purview of Exception 4 of Section 300 and therefore the Appellant is guilty of commission of offence punishable under Section 304 (Part-II) of the

I.P.C..

14.1) Hence, the following Order.

- (a) Appeal is partly allowed.
- (b) The impugned Judgment and Order dated 19th December 2014 is quashed and set-aside and instead the Appellant is held guilty for commission of crime under Section 304 (Part-II) of I.P.C. and is sentenced to suffer rigorous imprisonment for a period of ten years and to pay a fine of Rs.25,000/-, in default of payment of fine to further undergo rigorous imprisonment for one year.
- (c) Appellant is acquitted from the offences punishable under Sections 147 and 149 of I.P.C..
- (d) Record indicates that, the Appellant was arrested on 12th June 2011 and is in jail till today. Appellant thus has undergone entire sentence including in default sentence till today and therefore is entitled to be released from jail forthwith, if not required in any other case.

14.2) As per record, the Appellant is lodged in Nashik road Central Prison, Nashik and therefore the learned A.P.P. is directed to communicate the copy of present Judgment to the Superintendent, Nashik Road Central Prison, Nashik.

15) All the concerned to act on the basis of an authenticated copy of this Judgment.

16) Before parting with the Judgment, we would like to place on record our appreciation for the efforts put in by Mr. Vaibhav A. Sugdare, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellant, as he was thoroughly prepared and rendered proper assistance to the Court.

(SHYAM C. CHANDAK, J.)

(A.S. GADKARI, J.)

OMKAR
SHIVAHAR
KUMBHAKARN

Digitally signed
by OMKAR
SHIVAHAR
KUMBHAKARN
Date:
2024.01.15
19:03:53 +0530