

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 151 OF 2023
WITH
INTERIM APPLICATION NO. 3177 OF 2023
WITH
INTERIM APPLICATION NO. 560 OF 2024
IN
CRIMINAL APPEAL NO. 151 OF 2023

Avinash Somnath Phulpagare,]
Age : 31 years, Occupation : Service,]
R/o: Kasewadi, Bhavani Peth,]
Masoba Mandir, Pune-4]
(Presently lodged in Nasik Road Central Prison)] ... Appellant/
Applicant

Versus

The State of Maharashtra]
(At the instance of Mankhurd Police Station,] ... Respondent
Mumbai)

Mr. Kishor Walanju, appointed Advocate for the Appellant.

Ms. Supriya Kak, A.P.P., for the Respondent-State.

CORAM : SARANG V. KOTWAL &
SANDESH D. PATIL, JJ.

DATE : 02nd APRIL, 2026.

JUDGMENT : [PER SARANG V. KOTWAL, J.]

1. The Appellant has challenged the Judgment and Order dated 20/04/2017 passed by the Additional Sessions Judge, City Civil & Sessions Court, Mumbai in Sessions Case No.513 of 2016. The Appellant was convicted as follows:

(i) The Appellant was convicted for offence punishable under Section 302 of Indian Penal Code (IPC) and was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.25,000/- and in default of payment of fine to undergo rigorous imprisonment for one year.

(ii) The Appellant was also convicted for commission of offence punishable under Section 201 of IPC and was sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer rigorous imprisonment for 15 days.

Both the sentences were directed to run

concurrently. The Appellant was granted set-off under Section 428 of Code of Criminal Procedure (**Cr.P.C.**) as he was in jail from 20/03/2016 till the date of the judgment i.e. 20/04/2017.

2. Heard Mr. Kishor Walanju, learned Counsel for the Appellant and Ms. Supriya Kak, learned A.P.P, for the Respondent-State.

3. The Prosecution case in brief is as follows:

The deceased in this case was an eight year old girl Tanisha. Her mother was married to one Machchindra Bhole. She had three children including the victim. She had two sons and one daughter. Her elder son was twelve years of age, the younger son was six years of age and the victim Tanisha was eight years of age. There was some marital dispute between Tanisha's mother and father-Machchindra. They got separated. Tanisha's mother started residing with the Appellant along with her three children. It is the case of the

Prosecution that on 29/03/2015 at about 1:25 p.m. the victim Tanisha was sleeping. The Appellant got angry as she did not wake up early. He gave blows with a wooden strip (which is described as wooden plank in the Prosecution's case). She fell unconscious. The Appellant and Tanisha's mother took her to a doctor but she could not survive. On the next day, Tanisha's real father Machchindra lodged F.I.R. with Mankhurd Police Station vide C.R. No.88 of 2015. Tanisha's mother as well as the Appellant were shown as the Accused in the investigation. The Appellant had absconded. In the meantime, the investigation was completed and the chargesheet was filed. Tanisha's mother faced the trial vide Sessions Case No. 569 of 2015 before the Court of Session at Mumbai. She was acquitted on 21/03/2016. The Appellant came to be arrested on 20/03/2016 and he faced his trial separately vide Sessions Case No.513 of 2016.

4. During trial, the Prosecution made an application vide Exhibit-7 requesting to adopt the evidence recorded in the trial against Tanisha's mother in Sessions Case No.569 of 2015. That application was allowed. The same evidence was adopted in the trial

against the Appellant. In addition, further examination in chief of various witnesses were recorded. The Appellant was given opportunity to cross-examine all the witnesses. There was no objection from the Appellant for adopting the examination-in-chief recorded in the earlier trial i.e. Sessions Case No.569 of 2015. The Prosecution examined eleven witnesses including the child witness Roshan who was twelve years of age, the Medical Officers, Panchas and the Investigating Officer. The main evidence was in the nature of direct evidence given by the eye-witness PW-2-Roshan Bhole. The learned Judge relied on his evidence as well as on the evidence of recovery of a wooden plank at the instance of the Appellant after his arrest. The defence of the Appellant was of total denial. Based on the Prosecution's evidence, the learned Judge convicted and sentenced the Appellant as mentioned earlier.

5. As mentioned earlier PW-2-Roshan Bhole is the main witness in this case. PW-2 deposed that, he was residing with his mother, brother, his sister i.e. the victim, and grandmother. He knew the

Appellant. When the victim Tanisha died, the Appellant was residing with them since about one year. He deposed that Arya alias Avinash i.e. the present Appellant assaulted Tanisha with a wooden plank. PW-2 was at home at that time. His mother and brother were also in the house. It was a Sunday. He deposed that Tanisha woke up late and therefore, the Appellant assaulted her on her back, chest and thigh. Tanisha fell unconscious. PW-2's mother tried to give her water but Tanisha did not wake up. PW-2's mother took Tanisha to the hospital. The Appellant also went with them but Tanisha did not survive. PW-2 had stated those facts to his grandmother. After that, the police recorded his statement. PW-2 identified the Appellant. He also identified the wooden plank produced in the Court as Article-1. PW-2 added that the Appellant had assaulted Tanisha on her head, back, chest and thigh. PW-2 made this addition when he was examined again in the trial against the Appellant. He had not stated that the Appellant had assaulted the victim on her head when PW-2 was examined in Sessions Case No.569 of 2015.

In the cross-examination, PW-2 stated that after the incident his father came from the village in the evening. He did not know whether his father went to the police station on that day. PW-2 had gone to the police station two days after the incident with his mother. At that time, his father was not with him. PW-2 did not know whether his father had gone to the police station or not. PW-2 had not told his father about the incident. PW-2's mother also used to beat Tanisha. PW-2 denied the suggestion that he was deposing false on the say of his father.

6. PW-4-Machhindra Babasaheb Bhole was the first informant and father of the deceased. PW-4 deposed that he was married in the year 2004 to Tanisha's mother Usha. They had three children named Roshan, Tanisha and Reitesh. At the time of incident, Roshan was twelve years old, Tanisha was eight years old and Reitesh was six years old. PW-4 and his wife had been separated since two years before the incident and his wife was residing with the Appellant. PW-4 had sold his room and had gone to stay in the village. He wanted

his wife to come to the village but she refused and continued staying in Mumbai. PW-4 used to visit Mumbai and used to meet the children. At that time, his children used to tell him that the Appellant used to assault and beat them. On the day of the incident, PW-4 was in his village. PW-4 got a phone call from his grandmother that Tanisha was admitted to the hospital. He reached Mumbai in the evening. PW-4 went to the hospital. On the next day i.e. on 30/03/2015, PW-4 again went to the hospital at about 9:00 a.m. He saw the dead body. PW-4 saw the marks of assault on her forehead, back and abdomen. The dead body was brought home. Roshan i.e. PW-2 told PW-4 that the Appellant had beaten Tanisha with a stick and a wooden plank. Therefore, he went to the police station and lodged report against his wife Usha and the present Appellant. PW-4's statement recorded as F.I.R. was produced on record in the trial Court at Exhibit-18.

In the cross-examination, PW-4 could not explain as to why his police statement did not mention the fact that the Appellant used

to beat his children. This was an important omission. PW-4 had gone to the police station on 30/03/2015 at about 5:00 p.m. to 5:30 p.m. He had gone alone to the police station. PW-4 also could not explain as to why his police statement did not mention that there were marks of assault on the back and abdomen of Tanisha. The F.I.R. produced at Exhibit-18 mentions that the information was received at the police station at 2:30 p.m. on 29/03/2015 and the F.I.R. was registered at 4:30 p.m. on 30/03/2015.

7. PW-1-Shashikala Mahadev Gaikwad was the grandmother of the deceased and PW-2. PW-1 deposed about the separation of her daughter Usha and PW-4 since about four years prior to the incident. PW-1 stated that PW-4 was addicted to liquor. The Appellant was having a love affair with Usha, he started residing with PW-1, Usha and her children. Initially, he behaved properly but then started beating the children. He also used to assault Usha. On 30/03/2015, PW-1 came back home at about 4:30 p.m. (though the incident is dated 29/03/2015, in her deposition PW-1 refers to 30/03/2015).

Roshan and Reitesh told her that his mother-Usha had taken Tanisha to the hospital. PW-1 went to Shatabdi hospital and met Usha who told her that while having breakfast, Tanisha choked and died subsequently. PW-1 returned home, at that time, Roshan told her that the Appellant had assaulted Tanisha with wooden plank and kicks and fists and had also threatened them. After that, the Appellant and Usha took Tanisha to the hospital. PW-1 identified the Appellant in the Court.

In the cross-examination, PW-1 deposed that police had made inquiry with her on the day of incident. She used to go to work at 7:30 a.m. and used to return at 4:00 p.m. PW-1 admitted that she did not know what had happened on the date of incident in between 7:30 a.m. to 4:00 p.m.

8. PW-5-Sarjerao Jagannath Patil, PSI, had registered the F.I.R. On 29/03/2015 at about 2:00 p.m., the intimation about Tanisha's death was received from Shatabdi hospital. He went there. Tanisha's

mother showed the dead body and informed PW-5 that while eating snacks, Tanisha fell down and had received head injury. PW-5 prepared inquest panchanama. PW-5 made inquiries in the vicinity where Tanisha was residing. He referred to some incident that had taken place eight days prior to the main incident. However, this is not to his personal knowledge and therefore, that part of evidence cannot be taken into consideration. PW-5 further deposed that somebody had informed PW-4 about the incident. He suspected that PW-4's daughter's death was not natural. Therefore, he lodged his F.I.R. It was registered as C.R. No. 88 of 2015. PW-5 then went to the spot of incident and conducted the spot panchanama. Nothing was seized during the spot panchanama. The F.I.R. was registered against Usha and the Appellant. Usha was made an accused because she had tried to conceal the facts. PW-5 arrested Usha. The Appellant was not found. Then the investigation was transferred to some other Officer.

In the cross-examination, PW-5 admitted that he had not recovered the wooden plank from the spot of incident.

9. PW-7-Dr. Supriya Jalinder Suryavanshi was working with Aayush Nursing Home at Deonar Circle. PW-7 deposed that, on 29/03/2015 at about 10:30 a.m., one lady and one man had brought Tanisha to the clinic. The couple told her that Tanisha had fallen down inside the house. There was swelling on Tanisha's forehead and there was bleeding from nose. Tanisha was unconscious. Since PW-7 did not have ICU, she advised them to take Tanisha to some other hospital. PW-7 was cross-examined on behalf of Usha in Sessions Case No.569 of 2015 but nothing much turns on that cross-examination.

10. PW-3-Dr. Narendrakumar Gangaram Shinde was an important witness in this case. He had conducted the postmortem examination. PW-3 deposed that he conducted the postmortem on the dead body of Tanisha at around 11:45 a.m. on 30/03/2015. PW-3 found the following injuries:

- (i) Abrasion -3cm. in front of left ear and over left side face 5x3 cm.
- (ii) Abrasion over marbrium sternum, 2 x 1 cm.

- (iii) Abrasion over left elbow joint 1 x 0.5 cm.
- (iv) Abrasion 2 cm above left eyebrow 3 x 2 cm.
- (v) Abrasion over 9 cm below right knee joint middle 2 x 1 cm.

There was contusion on left frontal area of the size 3.5 x 2 cm. On internal examination, PW-3 noticed sub dural hematoma and sub archnoid bleeding. But there was no skull fracture. According to PW-7, the cause of death was hemorrhagic shock due to head injury. The viscera was preserved for Histopathological examination. PW-3 produced the postmortem notes at Exhibit-13. After receipt of Histopathological Report, PW-3 confirmed his opinion about cause of death mentioned earlier. PW-3 deposed that the injuries were possible by wooden plank but the police had not shown him the wooden plank during investigation. He was shown it in the Court as Article-1. According to him, death was possible by using that wooden plank. PW-3 deposed that the injuries noted in the postmortem notes were possible if a person fell down from height.

11. PW-6-Rajan Govind Chavhan, PI, was one of the

Investigating Officers. PW-6 had recorded statements of some of the witnesses including the statement of Dr. Supriya Suryawanshi. He had caused statement of Roshan being recorded under Section 164 of Cr.P.C.

12. PW-8-Sarita Nilkanth Musale, PSI had recorded PW-2-Roshan's statement on 30/03/2015.

In the cross-examination, PW-8 deposed that PW-2-Roshan had come to the police station with his grandmother but she had not made any inquiries with the grandmother.

13. PW-10-Smt. Janabai Amrut Bhujbal was a panch for inquest panchanama. The spot panchanama was admitted by the defence. It is produced on record at Exhibit-12. No incriminating articles were seized at the time of conducting the spot panchanama.

14. PW-9-Umesh Ramakant Chalke was a panch witness. He was

called to Mankhurd Police Station on 26/03/2016. The Appellant had given his memorandum statement showing his willingness to show the place where he had kept the wooden plank. That memorandum statement is produced on record at Exhibit-9. Pursuant to the statement, the wooden plank was recovered from the room occupied by one lady by the surname Gaikwad. The wooden plank was kept concealed behind a wooden cupboard. That panchanama was produced on record at Exhibit-9A. The wooden plank was produced in the Court as Article-1.

In the cross-examination, PW-9 admitted that the Police did not record statement of the same Gaikwad who had opened the door of the room from where the wooden plank was recovered. The Police did not make any inquiries regarding the ownership of the room. He admitted that the wooden plank was a common place article which could be seen anywhere on the road or in the dustbin.

15. PW-11-Avinash Kashinath Jagtap, API was the Investigating

Officer. Gunda Squad had arrested the Appellant from Pune. They informed PW-11 attached to Mankhurd Police Station. PW-11 went to Kashiwadi Police Station in Pune on 20/03/2016 and arrested the Appellant. PW-11 supervised seizure of wooden plank at the instance of the Appellant.

In the cross-examination, PW-11 admitted that he did not record statement of any police officer from Kashiwadi Police Station. PW-11 had not recorded statement of Shashikala Gaikwad.

16. This in short is the evidence led by the Prosecution.

Submissions of Mr. Kishor Walanju, learned Counsel appearing for the Appellant :

17. Learned Counsel for the Appellant submitted that the Prosecution has failed to prove its case beyond reasonable doubt. The only evidence on which the Prosecution is relying heavily, is the evidence of PW-2, however, he is a child witness and was under the control of his father and therefore he was a tutored witness. PW-2's

mother was arrested in this case, therefore, he had to depend on his father. The Appellant was absconding. There was no one else who could have supported him. Therefore, PW-2 had given evidence against the Appellant. Learned Counsel further submitted that the evidence of PW-2 is very cryptic and cannot form basis of conviction. The description given by PW-2 does not match the medical evidence. He submitted that PW-2 had not given details of the incident.

18. Learned Counsel further submitted that recovery of wooden plank after more than a year cannot be incriminating. The room from where it was recovered was not exclusively occupied by the Appellant. The article was not sent for CA examination and there is nothing to connect that particular wooden plank with the alleged incident. He submitted that thus, there is no reliable direct evidence or even circumstantial evidence. Learned Counsel for the Appellant, in the alternative submitted that, if the evidence of PW-2 is to be believed even then the offence would not fall within the meaning of Section 300 of IPC. There was no motive for the Appellant to have

committed murder of the deceased. There was no intention to cause death. If the Appellant wanted to commit murder of the deceased, he had ample opportunity and even had the alleged murder weapon with him and therefore, nothing could have prevented him from inflicting more blows on other vital parts and even inflicting more blows on the head. On the contrary, the evidence shows that the Appellant had helped Usha to take Tanisha to PW-7-Dr. Supriya Suryawanshi for treatment. Though unfortunately, Tanisha died; even otherwise, it cannot be said that the Appellant had assaulted her with the intention of causing such bodily injury where the death was imminent. He therefore submitted that it would be a much lesser offence and not the offence punishable under Section 302 of IPC.

Submissions of Ms. Supriya Kak, learned A.P.P. for the Respondent-State :

19. Learned A.P.P. on the other hand relied on the evidence of PW-2-Roshan to contend that he was a natural witness, his presence at the spot is not doubted. She also relied on the evidence of PW-1 i.e. the grandmother of the deceased who was also residing in the same

house. Though at the time of incident, she was not in the house, but she was informed about the incident and the role played by the Appellant after she had returned home. Learned A.P.P. submitted that there was no delay in lodging the F.I.R. The father of the deceased had reached Mumbai only in the evening and on the next day after looking at the dead body, he got suspicious and then had lodged the F.I.R. She submitted that the evidence of the Doctor conducting the postmortem examination shows that the deceased had died due to hemorrhage in the brain which is directly attributable to the act of the Appellant. She further submitted that the circumstance that the Appellant was absconding for about a year is also an incriminating circumstance.

Reasons and Conclusion :

20. We have considered these submissions. We have scrutinized the evidence of PW-2 minutely. We find that PW-2 is a natural witness whose presence in the house at the time of the incident cannot be doubted. PW-2 has given evidence in clear terms. There is not even a suggestion that PW-2 was not in the house when the incident had

taken place. PW-2's evidence that the Appellant was residing with them is corroborated by the evidence of PW-1 and PW-4. PW-2's mother Usha was tried separately and therefore her evidence is not available as she herself was an accused but otherwise PW-2's evidence about their residing together is sufficiently brought on record. We do not find any infirmity in his evidence. PW-2 was twelve years of age and therefore, was able to understand the situation. Therefore, we are of the opinion that PW-2's evidence can be safely relied on.

21. As far as the fact that the Appellant was absconding is concerned, he was a natural suspect and therefore there was nothing unusual that he was absconding for over a year. Therefore, only a limited advantage can be claimed by the Prosecution from this evidence. This circumstance cannot form the basis of the conviction in the present case. As far as the recovery of the wooden plank is concerned, it was also effected after more than a year from the incident. It was effected from a room which was occupied by one Gaikwad. Her statement is not recorded, and she is not examined.

The room was not in the exclusive possession of the Appellant. There is no further connecting piece of evidence in the form of a CA Report as far as that wooden plank is concerned. Therefore, the circumstance of recovery of wooden plank at the instance of the Appellant does not help the prosecution case. Having said this, as mentioned earlier, the evidence of PW-2 is trustworthy, he is the only reliable witness. His evidence is supported by the medical evidence led by PW-3-Dr. Narendrakumar Shinde.

22. From the evidence we do not see how the Prosecution has proved the offence under Section 201 of IPC. Therefore, the conviction recorded under Section 201 and the sentence under that Section is required to be set aside.

23. The next question is whether it would amount to the offence punishable under Section 302 of IPC as defined under Section 300 of IPC or whether it would be a lesser offence. In that context, we find force in the submissions of the learned Counsel for the Appellant. The evidence shows that after the incident, the Appellant and Tanisha's

mother Usha had taken Tanisha to a doctor. They tried to give her medical treatment but by then it was too late and Tanisha had succumbed to her injuries. If the Appellant had intention to commit murder of the deceased, nothing could have stopped him because he had opportunity and weapon with him but except for the injury causing hemorrhage no other injury was inflicted on a vital organ. PW-3-Dr. Narendrakumar Shinde, medical officer has accepted that if the child fell from some height that head injury was possible. In this context, it is necessary to see the nature of injuries. It must also be noted that, at the first instance, when PW-2's evidence was recorded, he had not stated that the Appellant had given a blow on the head. It was only subsequently in the trial against the Appellant that he improved on his first deposition and added that the Appellant had given blow on the head as well. Even otherwise, the blow on the head was not forceful. There was no injury to the skull. There was internal hemorrhage but looking at her tender age, that hemorrhage was serious.

24. Section 300 of IPC reads thus:

300. Murder.

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

25. It was necessary for the Prosecution to have proved that the Appellant had caused death with the intention of causing death or with the intention of causing such bodily injury as the Appellant knew to be likely to cause death or it was done with the intention of causing bodily injury and the bodily injury intended to be inflicted was

sufficient in the ordinary course of nature to cause death or if the Appellant knew that it was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death.

26. In the present case, from the circumstances referred to hereinabove, it is clear that the Appellant had no motive to commit murder or even to cause such bodily injury which was likely to cause death. Atleast from the circumstances and the evidence on record, it cannot be said that he had intention as is required in any of the circumstances mentioned under Section 300 of IPC. Therefore, from the record of this case it can be seen that the Prosecution has proved that the Appellant had knowledge that his act was likely to cause death which would be culpable homicide not amounting to murder. The injury had not caused damage to the skull. PW-3-Doctor has admitted that the head injury was possible by a fall. The Appellant had immediately accompanied Usha to take Tanisha to a Doctor. PW-2 had not stated in the first trial that the Appellant had given a blow

on the head. Therefore, the Prosecution has not proved beyond reasonable doubt that the Appellant had caused the head injury by giving a blow on the head. Hence, the offence would fall within the second part of Section 304 of IPC. Section 304 of IPC reads thus:

304 Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;
or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

As discussed earlier, there was no intention on the Appellant's part but the circumstances show that he can be attributed the requisite knowledge which would attract punishment for culpable homicide not amounting to murder and therefore, in our opinion, the Appellant's act is covered by second part of Section 304 of IPC which

is punishable with imprisonment extending upto 10 years or with fine or with both.

27. We have considered the question of quantum of sentence. The learned Counsel for the Appellant submitted that leniency be shown to the Appellant and the learned A.P.P. emphasized that the victim was only eight years of age and her life was taken away without any reason. We have considered these submissions. We agree with the submissions of learned A.P.P. that a girl of eight years of age has lost her life due to the act committed by the Appellant and therefore, we are inclined to impose maximum punishment prescribed for the offence punishable under Section 304 Part II of IPC. That would be rigorous imprisonment for 10 years. We see no reason to reduce the fine imposed on the Appellant and the in-default sentence imposed on the Appellant for non-payment of the fine. With the above reasons, following order is passed.

ORDER

- (i) The Criminal Appeal No.151 of 2023 is partly allowed.

- (ii) The conviction and sentence under Section 302 of IPC recorded by the Additional Sessions Judge, Greater Bombay in Session Case No.513 of 2016 is set aside; instead, the Appellant is convicted for commission of offence punishable under Section 304 Part-II and is sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.25,000/- and in default of payment of fine to undergo rigorous imprisonment for further 1 year.

- (iii) The conviction and sentence recorded for commission of offence punishable under Section 201 of IPC by the impugned Judgment and Order dated 20/04/2017 is set aside.

- (iv) The Appellant is granted set off under Section 428 of Cr.P.C.
- (v) The Appeal No.151 of 2023 is disposed of in the aforesaid terms.
- (vi) With disposal of the Appeal, the connected Interim Application Nos.3177 of 2023 and 560 of 2024 are also disposed of.

(SANDESH D. PATIL, J.)

(SARANG V. KOTWAL, J.)