

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 582 OF 2015

WITH

CRIMINAL BAIL APPLICATION NO. 327 OF 2018

IN

CRIMINAL APPEAL NO. 582 OF 2015

Sagar Bhagwan Dhembre, C/16999

Age : 26 Yrs, Occu.: Convict,

presently lodged at Yerwada Central

Prison, Pune - 411 006.

.. Appellant

Versus

State of Maharashtra

(At the instance of Warje Malwadi

Police Station, Pune In C.R. No.310/2012) .. Respondent

.....

- Mr. Harshad Bhadhbade for the Appellant.
- Mr. S.S. Hulke, APP for the Respondent - State.

.....

CORAM : S.S. SHINDE &
MILIND N. JADHAV, JJ.

RESERVED ON : DECEMBER 22, 2021.

PRONOUNCED ON : FEBRUARY 04, 2022.

(Through Video Conferencing)

JUDGMENT: (PER MILIND N. JADHAV, J.)

1. The learned Additional Sessions Judge, Pune, by judgment and order dated 07.03.2015, has convicted Shri. Sagar Bhagwan Dembre (**originally Accused No. 1**, hereinafter referred to as “**the Appellant**”) of the offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short, “**IPC**”). The learned Sessions Judge has sentenced the Appellant to suffer

imprisonment for life, to pay a fine of Rs. 5,000.00, and in default thereof, to undergo rigorous imprisonment for one year. The Appellant is in appeal against the said judgment and order convicting him in Sessions Case No. 173 of 2015. The Trial Court has concluded that the guilt of the Appellant has been proved beyond reasonable doubt on the basis of the evidence on record, despite minor shortcomings in the Prosecution's case.

2. Before we advert to the submissions made by the respective advocates and to the reappraisal of the evidence on record, it will be apposite to refer to the relevant facts of the incident briefly.

2.1. On 29.10.2012, at about 3:50 PM, Shri. Harshal Avinash Joshi (hereinafter referred to as **"the deceased"**), Shri. Sunny Paigude (P.W. 5) and Shri. Amit R. Saude (P.W. 6) were sitting in an open area behind More Petrol Pump, Kothrud, Pune, and were consuming liquor. Around the same time, the Appellant along with Shri. Rohan Vilas Waghchaure (originally Accused No. 2) and Ramesh Kamble (a minor, originally Accused No. 3) arrived at the same spot and also started consuming liquor. According to the prosecution, the Appellant stared at the deceased with anger, for which the deceased questioned him, leading to an altercation between the Appellant and the deceased as well as their respective friends. The Appellant and his friends then

chased the deceased, who was running towards the nearby Netrakiran Society. They caught hold of the deceased in front of the house of one Shri. Sambhaji Shirke (P.W. 7). At that spot, the Appellant and his friends started beating and kicking the deceased, causing the deceased to start shouting. The Appellant then picked up a brick lying nearby and hit the deceased on his head with it. Several persons residing in the vicinity arrived at the spot while the Appellant and his friends had run away.

2.2. At about 4:30 PM on the same date, Shri. Amit Saude (P.W. 6, friend of the deceased) made a phone call to Shri. Avinash Joshi (father of the deceased) and informed him that the deceased was admitted to the Intensive Care Unit (ICU) of Shashwat Hospital located at Dhanukar Colony, Kothrud, Pune, for treatment of the injuries sustained during the incident. The deceased was in an unconscious state while in the ICU.

2.3. Thereafter, Shri Avinash Joshi approached the Warje Malwadi Police Station and lodged a complaint against the Appellant and his two friends for injuring the deceased. The police authorities recorded the statement of the deceased's two friends i.e., Shri. Sunny Paigude (P.W. 5) and Shri. Amit Saude (P.W. 6) under Section 164 of the Code of Criminal Procedure, 1973 (for short, "CrPC"). Shri. Sunny

Paigude identified the spot of the incident and a spot panchanama was drawn up.

2.4. The Appellant and the Accused No. 2 were arrested on 29.10.2012 itself. The minor Accused No. 3 was arrested on 30.10.2012. After these arrests were made, the two friends of the deceased i.e., Shri. Sunny Paigude (P.W. 5) and Shri. Amit Saude (P.W. 6) were summoned to the Police Station on 30.10.2012 itself. There, they identified the Appellant, Accused No. 2 and Accused no 3 as the same persons who had assaulted and beaten up the deceased on 29.10.2012.

2.5. On 30.10.2012, the blood-stained shirt of the deceased, which he was wearing at the time of the incident, was seized under panchanama. On the same date, the blood-stained shirt of the Appellant was produced by his mother and was also seized. The seized items were then sent for chemical analysis.

2.6. Between 29.10.2012 and 17.11.2012, Shri. Shivdas Gaikwad (P.W. 14), the Investigating Officer, made several visits to the Shashwat Hospital to record the statement of the deceased but could not do so owing to his unconscious state.

2.7. On 17.11.2012, at about 10:30 AM, the deceased succumbed to his injuries while at Shashwat Hospital. Thereafter, an inquest panchanama was drawn up by the police authorities in the presence of Shri. Avinash Joshi. The body of the deceased was then sent for autopsy. The viscera of the deceased were preserved and sent for chemical analysis. Dr. S. D. Punpale (P.W. 12) certified that the death of the deceased was caused due to the injuries on his head.

2.8. Based on the complaint lodged earlier by Shri. Avinash Joshi, the Police Station registered C.R. No. 310 of 2012, initially for offences punishable under Section 323, 326 and 504 read with Section 34 IPC. A chargesheet against the Appellant and the Accused No. 2 was filed in the Court of the Judicial Magistrate, First Class, Pune. Accused No. 3, being a minor, was prosecuted separately before the Juvenile Justice Court. As the offence was punishable under Section 302 IPC and exclusively triable by the Court of Sessions, the learned Judicial Magistrate committed the case to the Court of Sessions, Pune, under the provisions of Section 209 of the CrPC. Charges were framed against the Appellant and the Accused No. 2 and were read out and explained to them in vernacular language. Both denied their complicity in the offence by a total denial, stating that a false case was made out against them.

2.9. This Court released the Accused No. 2 on bail by an order dated 03.05.2013 passed in Criminal Bail Application No. 564 of 2013. However, the application of the Appellant for bail was rejected by this Court vide order dated 01.09.2014 passed in Criminal Bail Application No. 1444 of 2014. By the same order, the trial of the Appellant was directed to be expedited.

2.10. By order dated 29.12.2014, the trial of the Appellant was separated from the trial of the Accused No. 2. Charges (marked as Exhibit 20) were framed against the Appellant and were read out and explained to him in vernacular language. The Appellant denied his complicity in the offence by a total denial.

3. The Prosecution examined in all sixteen witnesses in support of its case. No defence witnesses were produced before the Trial Court. The statement of the Appellant was recorded under Section 313 of the CrPC. The Trial Court, after recording evidence and hearing the parties, was pleased to pass the impugned judgment and order dated 07.03.2015, convicting the Appellant of the offences punishable under Section 302 read with Section 34 IPC.

4. Shri. Harshad Badhbade, learned advocate appearing on behalf of the Appellant, submits that the impugned judgment and

order suffers from grave infirmity as it has been passed without considering the evidence on record in its proper perspective, in contravention to settled principles of appreciation of evidence in a criminal trial, and is based on conjectures and surmises. As such, he prays for the impugned judgment and order to be set aside. He submits that:

- i. the case of the Prosecution is based entirely on circumstantial evidence as there is no eyewitness to the incident;
- ii. Shri. Avinash Joshi (P.W. 4), who lodged the complaint with Police Station, is an interested witness as he is the father of the deceased and is in any case not an eyewitness to the incident;
- iii. the evidence given by Shri. Sunny Paigude (P.W. 5), Shri. Amit Saude (P.W. 6) and Shri. Sambhaji Shirke (P.W. 7), based upon which the Trial Court has convicted the Appellant, is fraught with inconsistencies;
- iv. it is clear from the evidence given by the friends of the deceased present at the time of the incident i.e., Shri. Sunny Paigude (P.W. 5) and Shri. Amit Saude (P.W. 6) that it was the deceased who first provoked and quarreled with the Appellant;

- v. the deceased was inebriated while he was running away towards the nearby housing society, because of which he tripped and fell down on the brick that eventually caused his death;
- vi. the death of the deceased was a mere accident;
- vii. the Appellant has been falsely implicated in the offence solely because of the altercation preceding the deceased's accident;
- viii. the evidence given by Shri. Sunny Paigude (P.W. 5) and Shri. Amit Saude (P.W. 6) shows that though they were with the deceased at the time of incident, they have sustained no injuries; they have not even had themselves treated for any injuries at any hospital. Even the police have not conducted any investigation in this regard. On the other hand, the same witnesses also deposed that there was a physical altercation between them and the Appellant along with his friends. Based on this, Shri. Harshad Badhbade points out that there are inconsistencies in the evidence given by the key prosecution witnesses;
- ix. the Appellant had no motive to kill the deceased as the altercation came about at the provocation of the deceased;

- x. the commission of the act, even if proved beyond reasonable doubt, was without premeditation or preparation and was committed only in the heat of the moment.

5. *PER CONTRA*, Shri. S. S. Hulke, Assistant Public Prosecutor appearing on behalf of the Respondent-State, supports the impugned judgment and order and submits that the same has been delivered correctly after appreciating the various facts and circumstances on record. He submits that in the present case, there are three eyewitnesses to the incident i.e., Shri. Sunny Paigude (P.W. 5), Shri. Amit Saude (P.W. 6) (the two friends of the deceased), and Shri. Sambhaji Shirke (P.W. 7) (owner of the house in front of which the Appellant hit the deceased with a brick). He submits that the evidence given by these eyewitnesses, who were present at the spot of the incident, cannot be disbelieved. He submits that their testimony has not been shattered in cross-examination and that their depositions are consistent with each other. Based on the evidence given by these witnesses, Shri. S. S. Hulke submits that the Prosecution's case against the Appellant has been proved beyond reasonable doubt.

6. We shall now examine, compare, and consider the sufficiency and consistency of the evidence given by each of the three witnesses based upon which the Trial Court has come to its conclusion.

6.1. Shri. Sunny Paigude (P.W. 5), a friend of the deceased present with him at the time of the incident, has deposed as under:

- i. That when the Appellant and his friends started abusing and beating the deceased, Shri Amit Saude (P.W. 6) and himself, he moved away to one side as he is physically handicapped;
- ii. That the Appellant, Accused No. 2 and Accused No. 3 chased the deceased as he ran towards the nearby Netrakiran Society;
- iii. That the Appellant picked up a brick and hit the deceased on the head with it, after which the deceased shouted loudly and blood started oozing out from his head;
- iv. That after hitting the deceased with the brick, the Appellant shouted out that the blow of the brick would not be enough for the deceased and a sickle should be brought to deal with the deceased;
- v. That the deceased fell to the ground after he was hit by the Appellant with the brick and several persons gathered around, including Shri. Amit Saude (P.W. 6) and himself;
- vi. That the Appellant, Accused No. 2 and Accused No. 3 ran away thereafter;

- vii. That Shri. Amit Saude (P.W. 6) immediately called a friend from his cellphone who arrived at the spot and took the deceased (who was injured at the time) to Kawade Hospital on his motorcycle;
- viii. That he and one Pasalkar (another friend of this witness) followed Shri. Amit Saude (P.W. 6) and his friend to Kawade Hospital;
- ix. That owing to the deceased's critical condition, it was advised to shift him from Kawade Hospital to Shashwat Hospital at Gandhi Bhavan;
- x. That Shri. Amit Saude (P.W. 6) and his friend thereafter shifted the deceased to Shaswat Hospital by autorickshaw while he and his friend Pasalkar followed them on the motorcycle;
- xi. That he informed Shri. Avinash Joshi (father of the deceased) about the incident via a phone call, who arrived at Shashwat Hospital after some time;
- xii. That he identified the Appellant, Accused No. 2 and Accused No. 3 on the following day (i.e., 30.10.2012) at the Uttam Nagar Police Station after they were arrested, where his statement was also recorded;

- xiii. That he accompanied the Investigating Officer to the spot of the incident for the conducting of spot panchanama, which he has signed;
- xiv. In his cross-examination, he has given vivid details of the entire incident and more importantly described the reasons as to why he was not able to intervene in the physical altercation between the Appellant and the deceased. He states that he maintained a distance of twenty feet from the spot of the incident in an attempt to save himself as he was also being kicked and beaten below the neck along with Shri. Amit Saude (P.W. 6). He also states that he was trailing behind the deceased and the Appellant where they started running as he is physically handicapped.

6.2. Shri. Amit Saude (P.W. 6), in his deposition, has outlined the sequence of events in the same manner as Shri. Sunny Paigude (P.W. 5). In his lengthy cross-examination, all attempts were made by the Defence to shatter the evidence given by him. However, it can be seen from the cross-examination that the Defence has not been successful in doing so. The deposition of P.W. 6 is consistent with and corroborates the deposition of Shri. Sunny Paigude (P.W. 5). This witness has provided every minute detail of the incident in his

answers, including details as to the proximity of the eyewitnesses from the spot of the incident and the time of the incident. Paragraph 6 of the cross-examination of P.W. 6 is relevant and reads thus:

"6) We had not received the beatings after Harshal's lying on the spot. When the incident of giving hand blows and kick blows was in progress for 5-10 minutes nobody had come to rescue us. When Harshal had run away from the spot, he was caught hold of and beaten for about 5 minutes that time. At that time I might be at the distance of about 20ft from Harshal. It took about 2 minutes for me to reach near Harshal when he fell on the ground. I had not tried to apprehend the assailants. The assailants had run towards Saraswatinagar. I had not asked any other persons present at the spot to apprehend the assailants. So also those persons present there on their own had not chased the assailants to apprehend them."

6.3. Shri. Sambhaji Shirke (P.W. 7) is an independent eyewitness to the incident and is not connected with the Appellant and the deceased but is the owner of the house in front of which the Appellant has been said to have hit the deceased on the head with a brick. He has deposed as under:

- i. That he heard a lot of noise and commotion outside his house and rushed out to see what was happening;
- ii. That he saw two to three boys beating and kicking one boy;
- iii. That one of the three boys thereafter lifted a brick and hit it on the head of the boy that he was kicking;
- iv. That some persons gathered at the spot by which time the assailants had run away;

- v. In his cross-examination, he has confirmed the duration of the incident and stated that after the incident was over, he returned to his house and was resting on his bed as he was unwell at the time;
- vi. That after the incident, he did not inform the police or inquire about the incident;
- vii. Throughout his deposition, he has categorically maintained that he is an eyewitness to the actual incident when the deceased was being beaten.

7. We shall now scrutinize the minor inconsistencies in the Prosecution's case that have been pointed out to us by the Defence. The medico-legal certificate (marked as Exhibit 64) that has been issued by Dr. Karve (P.W. 11) states that the assault was committed by an unknown person. The Defence has tried to utilize this statement to assert the possibility of the assault on the deceased not having occurred in the first place. However, we find that the identity of the assailant has been sufficiently established by the Prosecution based on the direct evidence given by the eyewitnesses. As such, the said statement in the medico-legal certificate cannot exonerate the assailant who has been identified to be the Appellant.

8. The evidence given by each of the three eyewitnesses i.e., Shri. Sunny Paigude (P.W. 5), Shri. Amit Saude (P.W. 6) and Shri Sambhaji Shirke (P.W. 7) is consistent with each other. The chain of causation of the actual incident is thus established beyond reasonable doubt. In Paragraphs 44 to 52 of the impugned judgment and order, the Trial Court has gone into the evidence given by P.W. 5, P.W.6 and P.W. 7 in detail. The findings of the Trial Court conform with our reappraisal of the evidence on record. The inconsistencies in the Prosecution's case that are pointed out to us by the counsel for the Appellant are minor.

9. However, there is another important consideration which cannot be lost sight of. This consideration pertains to the very offence that the Appellant has been convicted of and sentenced for by the Trial Court.

9.1. Before we state our observations and findings on the above, it will be apposite to refer to the relevant provisions of the IPC. Sections 299 and 300 IPC define the offences of culpable homicide and murder respectively and read thus:

“299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

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.

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.

Exception 2.—Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

9.2. Sections 302 and 304 IPC prescribe the punishment for the offence of murder and that of culpable homicide not amounting to

murder respectively and read thus:

“302. Punishment for murder.—Whoever commits murder shall be punished with death or 1[imprisonment for life], and shall also be liable to fine.”

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with 1[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.”
[emphasis supplied]”

9.3. The Trial Court has convicted and sentenced the Appellant for the offence of murder (as defined in Section 300 IPC) under Section 302 IPC. This conviction and sentence passed by the Trial Court calls for reconsideration in view of the following:

9.3.1. Exception 4 to Section 300 IPC outlines a situation where culpable homicide does not amount to murder. There are three requirements for this exception to apply: (i) the act of killing is committed without premeditation; (ii) the act of killing is committed in a sudden fight in the heat of passion upon a sudden quarrel; and, (iii) the offender should not have taken undue advantage or acted in a cruel or unusual manner.

9.3.2. In our considered opinion, the three requirements for Exception 4 of Section 300 IPC to be applicable have been satisfied in the present case:

- i. No evidence has been brought on record to prove that there was any premeditation, or preparation, or an intention harbored by the Appellant to commit the act of killing the deceased;
- ii. The evidence given by eyewitnesses prove that the incident occurred because of a sudden altercation which, in turn, was caused due to the provocation by the deceased. The Appellant hit the deceased on his head with the brick in the spur of the moment owing to the intense altercation between the Appellant and the deceased;
- iii. Because the deceased and the Appellant were both inebriated and the quarrel between them was sudden and heated, it cannot be reasonably said that the Appellant has acted in an unusual manner.

9.4. On the basis of the above, we may state that though the Appellant had absolute knowledge that his act of hitting the deceased on the head with a brick would be likely to cause the death of the deceased, he had no intention to do so. Such an act does not travel

beyond the offence of culpable homicide (as defined in Section 299 IPC) not amounting to murder. The punishment for culpable homicide not amounting to murder has been prescribed under Part II of Section 304 IPC. The facts alluded to hereinabove alongwith our observations come within the ambit of Part II of Section 304 IPC. As such, the Trial Court erred in convicting and sentencing the Appellant for the offence of murder under Section 302 IPC.

10. In view of the above discussion and findings, we are of the firm opinion that the Appellant, in a heat of passion, acted in a manner that he knew is likely to cause the death of the deceased but without the intention to kill him. In view of the same, the conviction of the Appellant for the offence of murder is hereby altered to that of culpable homicide not amounting to murder as defined under Section 299 IPC read with Exception 4 of Section 300 IPC. The Appellant, under Part II of Section 304, is hereby sentenced to undergo imprisonment for a period of ten years and to pay a fine of Rs.20,000.00, and in default thereof, to undergo imprisonment for an additional period of six months.

11. The duration of imprisonment that the Appellant has already undergone i.e., from the date of his arrest (29 October, 2012) till date, shall be counted towards the period of imprisonment stipulated in the

sentence passed hereinabove. The Appellant shall be released on the completion of the sentence unless required in any other case / cases.

12. Criminal Appeal stands partly allowed in the above terms. In view thereof, no orders are passed as to Criminal Bail Application No. 327 of 2018 and the same stands dismissed.

[MILIND N. JADHAV, J.]

[S.S. SHINDE, J.]