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**(2012) 03 BOM CK 0183**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 87 of 2010**

Shri Rajesh @ Maratha Patil

APPELLANT

Vs

State of Goa

RESPONDENT

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**Date of Decision :** 29-03-2012

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302, 304

**Citation :** (2012) 03 BOM CK 0183

**Hon'ble Judges :** U.V. Bakre, J;S.C. Dharmadhikari, J

**Bench :** Division Bench

**Advocate :** Mahesh Amonkar, for the Appellant; C. A. Ferreira, Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

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## Judgement

U.V. Bakre, J.—This appeal is filed by the accused, in Sessions Case No. 5 of 2006, who has been convicted and sentenced of the offence punishable u/s 302 of Indian Penal Code( I.P.C., for short) to undergo life imprisonment and to pay fine of Rs. 5,000/-, in default to undergo rigorous imprisonment for a period of two months. The case of the prosecution, in short, is as follows : The accused and the deceased(Sana Shaikh) were labourers working in the wholesale fish market at Margao. There was enmity between the accused and the deceased since prior to the incident. On 01/11/2005, in the evening time, at about 7.00 p.m., on the occasion of Deepawali, crackers were brought by Manik and Sana in front of Suzie Bar and were burst. Thereafter, Manik and Sana entered the Bar when the accused started abusing them. Then, there was altercation between the accused and the deceased and abuses were exchanged. At about 10.15 p.m. to 10.30 p.m., in front of Rebello's Hospital, there was a fight between the accused and the deceased. At about 00.15 hours on 02/11/2005, at the said Wholesale Fish Market, Margao, the accused stabbed the deceased namely Sana Shaikh with a broken glass bottle of cold drink known as "Slice", on the left side of the neck and also assaulted him with plastic pipe and thereby committed his

murder.

2. The prosecution examined altogether 19 witnesses in order to prove the charge. PW1, Sandeep Malkarnekar acted as one of the panch witnesses for panchanama of arrest-cum-attachment, which is at Exhibit 11 under which the accused was arrested and his clothes were attached. PW2, Abdul Sattar Shaikh is the brother of the deceased and who lodged the complaint (Exhibit 13) at Margao Town Police Station, upon which the offence under Crime No. 304 of 2005 u/s 302 of I.P.C. came to be registered against the accused. PW3, Gaus Shaikh, PW4, Mehboob Hangal, PW5, Imtiaz Shaikh, PW6, Mugut sab Pallikotti, PW9, Sarvar Badshah are all fish loaders (labourers) who as well as PW7, Khajasab Valli and PW8, Shaikh Shah Vali, both Security Guards at the Wholesale Fish Market, Margao are eye witnesses. PW10, Dr. Siddharth Banaulikar, the Assistant Lecturer from the Department of Forensic Laboratory, Goa Medical College, Bambolim conducted the Autopsy examination over the dead body of the deceased, the report of which is at Exhibit 29. PW11, Eddy Tavares acted as one of the panch witnesses for the panchanama of scene of offence and sketch which are at Exhibit 61. PW12, Suzie Rodrigues is the owner of Bar by name "Suzie Bar" which is at the said Wholesale Fish Market at Margao. PW13, Dr. R.K. Jain, Senior Scientific Officer, working at Central Forensic Science Laboratory, Hyderabad examined the exhibits which were attached during investigation. PW14, Anwar Khan is a Rickshaw Driver, who acted as one of the pancha witnesses for the Inquest Panchanama which is at Exhibit 49. PW15, Pravin Naik is the photographer who, at the request of the police, took out photographs at the scene of offence. PW16, Kamlakant Pradhan, is a waiter in the hotel situated in the said market and he is also partly an eye witness. PW17, S. Sathyan is the Senior Scientific Expert working with Central Forensic Science Laboratory, Hyderabad and he also examined the exhibits which were attached during investigation. PW18, S.B. Faria is the Special Judicial Magistrate for Salcete, Quepem and Sanguem. Lastly, PW19, Santosh Desai was then working as Police Inspector at Margao Police Station and he conducted the investigation.

3. The case of the accused was that he has been falsely implicated in the case and in fact the deceased and his friends who have come as eyewitnesses had attempted to assault him and he acted in private defence. The accused did not examine any witness.

4. Upon the assessment of the entire evidence on record, the learned Additional Sessions Judge-3, South Goa(Trial Judge) found that the evidence of the eyewitnesses was wholly reliable and there was no reason to doubt the veracity of the testimonies of the said eye witnesses. The learned Trial Judge held that the evidence on record proves beyond reasonable doubt that the deceased died due to the injury caused by the accused with the broken bottle. Vide the judgment and order dated 6/16-4-2009, the trial judge, therefore, held the accused guilty of the offence of murder and the accused came to be sentenced as already stated earlier. The said judgment/order and sentence is impugned in

this Appeal.

5. Shri M. Amonkar, learned Counsel for the accused, at the outset, made it clear that the accused is not disputing his conviction but he is disputing the offence for which he has been convicted. According to the learned Counsel for the accused, Section 302 of I.P.C. is not applicable to the facts and circumstances of the case and what is applicable is Section 304, Part II of I.P.C. He read out the evidence of PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-12 and PW- 16 and contended that the incident had started after crackers were fired and there was altercation between the accused and the deceased. He pointed that the fight started at about 7.00 p.m. near Suzuie Bar, which ended near the Rebello Hospital. According to the learned Counsel for the accused, there was no pre-planning and no premeditation. He argued that the accused and the deceased were otherwise friends being fish loaders, working at the same place and there was no reason for the accused to kill the deceased. He argued that if the accused had the intention to kill the deceased, then he would not have hit the bottle on the shoulder near the neck but would have pierced the same into the chest or into the stomach. According to him, the deceased provoked the accused due to which the incident occurred and therefore Section 304, Part II of I.P.C. should be applied.

6. Per contra, Mr. C. A. Ferreira, learned Public Prosecutor, for the Respondent, vehemently argued that this is a case of murder only. He pointed out from the evidence on the record that previously also there were fights between the accused and the deceased and on 02/11/2005 the last fight took place before which the accused had declared his intention to kill the deceased. The learned Public Prosecutor contended that if the accused had no intention to kill then he had no reason to first break the bottle and then assault the deceased with broken bottle and hit the sharp end on the vital part i.e. neck of the deceased. He invited our attention to the evidence on record which reveals that the pieces of the same bottle were recovered from the scene of offence and as per the report of the Central Forensic Science Laboratory, Hyderabad, they were of the same broken bottle by which the accused had assaulted the deceased. The learned Public Prosecutor further argued that the conduct of the accused in picking up the plastic pipe, after losing the first weapon that is the broken bottle, and after hitting the same on the head of the deceased, since the pipe also broke, picking up a stone in order to hit it on the deceased, itself showed that the accused had intention to kill the deceased. The learned Public Prosecutor therefore submitted that no interference is called for with the impugned judgment, order and sentence.

7. Perused the record and proceedings, in the light of the arguments advanced by both the parties.

8. Even for determination of the point whether the act of the accused in causing death of the deceased amounts to murder or to culpable homicide not amounting to murder, it becomes necessary to go through the evidence on record.

9. PW10, Dr. Siddharth Banaulikar, conducted the post mortem examination on the dead body of Sana Shaikh on 02/11/2005. He noticed following external injuries :

1) there was a semi-circular lacerated puncture wound 6x3x4.5 cms over the mid outer aspect of the left side of the neck with lower margin lying at 149 cms above the left heel. It was horizontally, obliquely placed and the lower end was at a distance of 5 cms from the sterno clavicular joint and the lateral upper end was at 7 cms from the mastoid region. The edges of the laceration were irregular, contused and the margins of the lacerations were abraded. On dissection, the laceration had cut through the skin, subcutaneous tissues and muscles and was directed medially downward and forward with complete laceration of both the jugular vessels. There was extravasation of the blood all along the track of the wound. The above described laceration was present over the mid outer part of the neck, left side, and was caused by broken soft drink bottle (blunt) and the injury was ante mortem in nature.

2) Abrasion, brownish in colour, 1x1/2 cm, over the outer part of back of the left elbow and was caused by blunt weapon and ante mortem in nature.

3) Abrasion with scab formation, 1x1/2 cm, over the left side of the lower lip, caused by a blunt weapon and ante mortem in nature.

10. The cause of death as certified by PW-10, Dr. Siddharth Banaulikar, is due to haemorrhage and shock vide injury no.1 on the neck caused by blunt, penetrating and cutting weapon which was necessarily fatal and fresh at the time of death. The memorandum of Autopsy is at Exhibit 29.

11. The evidence of PW-10, Dr. Siddharth Banaulikar, also reveals that the accused was examined by him on 03/11/2005 and had following injuries on his person:

1) abrasion, reddish brown, with scab of 1.5 x 1cm, on the left side mid back of chest, 15 cms from midline at the level of spine of T-5 vertebra.

2) Abrasion, brownish red in colour with scab of 1.25 x 0.1 cms, 1.5 cms medial to the injury no.1 at T-5 level.

3) Abrasion, brownish red in colour with the scab of 0.4 x 0.3 cms, over the back of left shoulder, 9 cms from the midline, at the level of spine of T-2 vertebra.

4) Bruise, bluish in colour 2 x 1.5 cms, over the back of right shoulder, 15 cms from midline at the level of spine of T-1 vertebra.

5) Abrasion, brownish red in colour, with scab of 0.6 x 0.1 cms over the right forearm, 10 cms above the wrist joint outer aspect.

12. PW10 has stated that none of the injuries noticed by him on the person of the accused was bleeding. The history of using a broken bottle to inflict the injuries on the deceased was disclosed by the accused himself. PW10 was shown

the broken bottle of soft drink "slice" (M.O.16) and he has stated that this broken bottle can cause the injury no.1 on the neck of the deceased. PW10 has specifically stated that even if the injured was provided with immediate medical attention, he would still not have survived the injuries. PW 10 has stated in his cross-examination that it is possible that the injuries on the deceased and on the accused person could have been caused during the same time. Both the Jugular vessels of the neck were completely lacerated. Jugular veins are large veins of the neck which carry blood from the head. The nature of the injury caused on the neck of the deceased was fatal, with the intention to cause death.

13. PW7, Khajasab Ali is the star witness of the prosecution. He was working as a security guard for Om Sai Security Service and on the day of incident, he was on duty at wholesale fish market, Margao. He has deposed as follows :-

At around 9.30 p.m., 3 boys came there. Those boys were working as fish loaders in that market and they used to sleep in the said market. All three of them slept in the shed in the market. After about half a hour two more boys came there. Both of them went in the canteen in the fish market and drank water. Both of them then came to the circle and slept there. After about ten minutes one person came there, went to the canteen and took water. This person was wearing white shirt with strips and blue short pant. The water which he had taken was emptied by him on his head and asked for more water. This time he drank the water. He then kept the jug in the window of the canteen and came forward for about two steps. He then took a round around the shed and brought one plastic pipe having length of one metre. He kept that pipe in front of the shed and he stood near there. Then he said "SANA KO ANE DO, USKO MAREGA". After about ten minutes one more boy came there. Before this person could come, the first person who had kept the pipe had entered the shed. He brought one empty soft drink bottle from inside the shed broke it and kept one part of it in his hand. He broke it by hitting it against the border of shed. Holding the said broken bottle in his hand, he then stood outside the shed. At that time, he was holding the bottle in his hand which was placed on his back. The boy who had come abused the person standing with broken bottle in the hand in bad words saying "TERI MAKI CHUT". Thereafter the said person went around the person who was standing by holding broken bottle. Thereafter, he went little ahead and again came back. He then went near the person who was standing with bottle in hand asking him whether he would assault him and pushed that person. Upon this, said person hit him with broken glass bottle on the left shoulder of the said person. The person who was assaulted then shouted saying "GAVSHA BACHAO, BACHAO" then he entered the shed. All the three boys who were sleeping in the shed woke up. On account of assault with broken bottle, the person assaulted received bleeding injuries on his left shoulder. The blood oozing from the wound fell on the shirt of the injured. The 3 boys sleeping in the shed came out of the shed. The injured person also came after those three boys. Those 3 boys went towards the circle and even the injured came near the circle. The person who had assaulted the injured then attempted to stab the injured with the broken

bottle. However the boys sleeping in the shed woke up and one of them kicked the hand of the said person upon which broken bottle fell down. One of the boys removed that bottle and threw it aside. At that time, the injured was standing near the circle. The said other person then went towards the shed and took one plastic pipe, went around the shed, came at the back side of the injured and hit that pipe on the head of the injured. The plastic pipe broke into pieces. Some of the pieces fell at the back side of the circle. Upon hitting of the pipe injured fell down. The other person then removed one stone to hit on the injured, but two of the boys who were there removed the stone from the hands of that person. 4 boys then caught hold of the person who has assaulted the injured and 2 boys went to inform to the brother of the injured. Thereafter, I came to know that the name of the injured was Sana. The injured was wearing grey colour long pant and green colour t-shirt. The person who had assaulted the injured had also blood stains on his clothes and on his hands.

The two boys then came with the brother of the injured. By that time, the injured had become motionless. The injured had fallen in front of the circle. His legs were facing the circle. Blood had fallen on the ground over there. The brother of the injured went along with one more boy to inform the police, I identify the accused as the person who had assaulted the injured.

14. Prior to identifying the accused in the Court, as the assailant, PW7 had identified the accused person in the Test Identification Parade conducted by PW 18, S.B. Faria, who is the Special Judicial Magistrate. The evidence of PW 18 duly proves that the Test Identification Parade was conducted by taking all the care and precaution and in accordance with the prescribed procedure and the same cannot be doubted.

15. PW 7 is an independent witness who has no reason to falsely implicate the accused. He has stood firmly to the test of cross-examination. PW 7 is wholly reliable. The sole testimony of PW 7 is sufficient to prove that the accused assaulted the deceased with the broken bottle and caused his death.

16. PW 12, Suzie Rodrigues, the owner of "Suzie Bar" has deposed that on 1/11/2005 at about 7.00 p.m. the deceased Sana and his friends had come to the bar and Sana and Manik started lighting crackers outside the bar on the road. She has stated that at that time the accused said "Tumche Poixe Kabar Zale Zalear, bhik magonk Vossat." According to PW 12, thereafter there was fight between the accused and Sana. PW 6, Mugut Sab Pallikotti, who was also present in the Suzie Bar, at about 7.00 p.m., on the day of incident, has stated that when he was playing Carom in the Suzie Bar, the accused and Sana were fighting and pushing each other, outside the Bar and that this fight was on account of bursting of crackers.

17. The evidence of PW 4, Mehboob Hangal reveals that at about 10.15 p.m. to 10.30 p.m., he and others had seen the accused and the deceased fighting with each other at the back side of Gada of Nagesh and which is on the front side of

Rebello's Hospital. PW 4 and others separated the accused and the deceased from one another.

18. The evidence of PW 3 reveals that on the day of incident, after midnight, the accused had called PW 3, Gaus Shaikh outside the "Suzie Bar" and had told him that Sana had abused him in the name of his mother and sister and that he would kill Sana and PW 3 should not interfere.

19. The evidence of PW 7 Khajasab shows that before the main incident, the accused cooled himself by first emptying a jug of water on his head and then drinking lot of water. The evidence of PW-7 further reveals that the accused said "SANA KO ANE DO, USKO MAREGA" and then made preparation to kill Sana by picking up a bottle and breaking it at one end and then waiting for Sana to come there.

20. The evidence of PW3 - Gaus Shaikh, PW4 - Mehboob Hangal, PW5 - Imtiaz Shaikh, PW6 - Mugut Sab Pallikotti, PW8- Shaikh Shah Vali, and PW9 - Sarvar Badshah reveals that after midnight, they had heard the shouts of the deceased saying "Gausha bachao, bachao" and all had seen the accused carrying the broken glass bottle of "Maza" in his hand and the deceased holding right side of his neck with his hands and bleeding from the neck. All the above witnesses had also seen the deceased running away and near the circle. The accused again was attempting to assault the deceased with broken bottle, when PW4 - Mehboob Hangal kicked on the hand of the accused due to which the bottle fell down from the hand of the accused. It is seen from the evidence of the above witnesses that PW3 removed the bottle from the ground and threw it away. In spite of the above, accused did not stop and he picked up plastic pipe and assaulted the accused on his head due to which the pipe broke in pieces and only the piece of the same remained in the hand of the accused. It is further revealed from the evidence of the above witnesses that the accused threw the piece of pipe and picked up one stone to assault the deceased but since PW5 and PW8 removed the said stone from the hands of the accused, he could not assault the deceased with that stone. The evidence further reveals that the accused then attempted to run away but he was caught and handed over to the police.

21. The arrest-cum-attachment panchanama, in respect of the accused, is at Exhibit 11, which has been duly proved by PW 1, Sandeep Malkarnekar. This panchanama was drawn between 06.15 hours to 07.30 hours on 02/11/2005. There were blood stains on the full sleeves shirt worn by the accused. Three of the buttons of the shirt were missing. There was blood on the palms of the accused.

22. PW11 - Eddy Tavares acted as one of the pancha witnesses in the panchanama of the scene of offence/sketch (Exhibit 61) and he has stated that the security guard showed to him the pole on which the bottle was hit. PW11 has stated that he saw pieces of bottle near the said pole and several pieces of glass bottle were collected from that spot. PW 11 has identified those pieces of glass

which were marked as M.O.11. It is further seen from the evidence of PW-11 and the panchanama that the broken bottle of cold drink "Slice" was also found at the scene which was full of blood and the same was also attached. Pieces of plastic pipe were found in the circle on the cemented floor, which were attached. The rubble stone was found on the left side of the dead body, which was also attached. Pools of blood were seen at the places where the deceased was assaulted. The panchanama of the scene of offence is duly proved by PW 11.

23. As per the report of the Central Forensic Science Laboratory, (C. F. S. L.) Hyderabad (Exhibit 55), duly proved by the Senior Scientific Expert from the Central Forensic Science Laboratory, Mr. S. Sathyan (PW 17), the shirt of the accused attached at the time of his arrest had human blood. As per the report of the C. F. S. L. Hyderabad (Exhibit 56), duly proved by Mr. S. Sathyan (PW 17), the said pieces of the glass, attached from near the iron pole, were of the broken bottle which was also attached from the scene and sent to the Central Forensic Science Laboratory, Hyderabad. As per the report of C.F.S.L., Hyderabad (Exhibit 60), also proved by PW 17, human blood was detected on the stained cotton on which the blood from the palm of the accused was collected during his arrest.

24. The contention of the learned counsel for the accused that there was fight between the accused and the deceased, at the time of assault with broken bottle, does not appear to be true. A minute scrutiny of the evidence on record clearly reflects that the said mutual fight was much before the main incident of assault with the broken bottle. The main incident took place at about 00.15 hours on 02/11/2005 and at this time the accused alone was assaulting the deceased and the deceased was saving himself. Every time the accused had a weapon with him whereas the deceased was helpless. Merely because a few minor and simple injuries were sustained by the accused, it cannot be said that the deceased had assaulted the accused. The accused might have sustained those injuries during the previous fight between him and the deceased on 01/11/2005, at 7.00.p.m. outside the Suzie Bar and at about 10.15.p.m. to 10.30 p.m. in front of Rebello's Hospital or while assaulting the deceased with the broken bottle or with the pipe, or he might have even sustained those simple injuries on account of assault by people who had caught him and prevented from running away.

25. The evidence on record very clearly reveals that the accused had preplanned to kill the deceased. As already pointed out earlier, prior to the main incident of fatal assault by the accused against the deceased, almost throughout the said evening, there was altercation and physical fight between the accused and the deceased. At about 7.00 p.m. the deceased and his friends came to the bar of PW12 - Suzie Rodrigues and the deceased and Manik started lighting crackers near that bar and after they entered the Bar, the accused had abused them. There was a fight between the accused and the deceased. During the said fight, the accused had threatened to kill the deceased and had also threatened the eye witnesses telling them not to intervene in their fight. The evidence of PW 7 reveals that after the accused arrived in the fish market at around 10.30 p.m. he

emptied the jug of water on his head and then drank water and then went around the shed and brought plastic pipe and at that time the accused was saying to himself "SANA KO ANE DO, USKO MAREGA". The evidence reveals that thereafter the accused brought the bottle of "Slice", broke it by hitting against the iron pole, stood outside the shed and started abusing the deceased and then assaulted the deceased with the said bottle, from the sharp end.

26. There is no substance in the argument of the learned advocate for the accused that the assault was not on vital part of the body. The assault was with the broken bottle and it was not on shoulder but on the neck which is the vital part of the body. It should be kept in mind that the accused did not leave the deceased after the said broken bottle was removed from his hands. The accused picked up the plastic pipe and hit it on the head of the deceased. When the plastic pipe broke, he threw away the piece of the pipe which was in his hand and then picked up a stone to assault the deceased. This conduct of the accused, undoubtedly, shows the intention of the accused to finish the deceased.

27. The evidence on record, beyond reasonable doubt, establishes that the accused had made preparations to kill the deceased and with the sole intention of killing the deceased he had assaulted him with broken glass bottle and with the plastic pipe and lastly wanted to assault him with a stone. We are unable to subscribe to the view of the learned advocate for the accused that the case falls u/s 304, Part II of the I.P.C. We are of the firm view that in the peculiar circumstances of the present case, the act of the accused falls u/s 302 of I.P.C. Therefore, the impugned judgment and order holding the accused guilty of murder cannot be faulted with and this is a right conclusion based upon correct appreciation of evidence on record. The conviction and sentence being in accordance with the settled principles of criminal jurisprudence, no interference is called for. In the result, the appeal is dismissed.