

(2000) 09 BOM CK 0083
In the Bombay High Court
Case No : Criminal Appeal No. 564 of 1996

Subhash Dnyanoba Salvi

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 21-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235
Evidence Act, 1872 — Section 105, 45, 9
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2001) ALLMR(Cri) 10 : (2001) 5 BomCR 152

Hon'ble Judges : Vishnu Sahai, J;D.S. Zoting, J

Bench : Division Bench

Advocate : S.R. Chitnis, C. and R.S. Chitnis, for the Appellant; V.R. Bhosale, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Vishnu Sahai, J.—Four persons namely Laxmibai Dnyanoba Salvi, Shobha Subhash Salvi, Balu Trimbak Uchale @ Jadhav and Subhash Dnyanoba Salvi were charged for the offences punishable u/s 302 I.P.C., in the alternative u/s 302 read with section 34 I.P.C., 323 I.P.C. in the alternative 323 read with section 34 I.P.C. and 504 read with section 34 I.P.C. by the Additional Sessions Judge. Pune in Sessions Case No. 8/1994. Through his judgment dated 27-8-1996, the learned Judge acquitted Balu Trimbak Uchale @ Jadhav for all the offences : acquitted Laxmibai Dnyanoba Salvi and Shobha Subhash Salvi for the offences punishable under sections 323 and 302 I.P.C. ; and acquitted Subhash Dnyanoba Salvi for the offence punishable under sections 323 and 504 read with section 34 I.P.C. He however, convicted Laxmibai Dnyanoba Salvi and Shobha Subhash Salvi for the offence u/s 504 I.P.C. and sentenced them to S.I., till rising of the Court and to pay a fine of Rs. 100/each in default to suffer 5 days R.I. and Subhash Dnyanoba Salvi for the offence u/s 302 I.P.C. and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 10,000/- in default to suffer R.I. for two years.

The appellant-Subhash Salvi has impugned the said conviction and sentence by preferring the present appeal.

2. In short, the prosecution case runs as under :

The appellant- Subhash Dnyanoba Salvi is the son of Laxmibai Salvi and the husband of Shobha Salvi. It appears from the evidence that Balu Trimbak Uchale is his associate. Subhash Salvi and the said three persons were neighbours of the informant- Sukhdeo Chavan P.W. 1, his wife Rangubai Chavan P.W. 2 and their neighbours Ahilyabai Salvi P.W. 3 and Dhondiba Salvi P.W. 2. At the time of the incident all of them resided in village Kanhur- Mesai within the limits of police station Talegaon Dhamdhere in District Pune.

On 1-6-1991 at about 7.30 p.m. someone threw broken glass bottles near the house of Ahilyabai P.W. 3 who lived at a distance of about 50 feet from the house of Sukhdeo Chavan P.W. 1. Irked by this, Ahilyabai started hurling abuses, whereupon the appellant-Subhash Salvi and his mother Laxmibai Salvi came and returned the abuses. Sukhdeo Chavan too came and told the appellant that since Ahilyabai was a woman, he should not abuse her, whereupon the appellant told him that he should not interfere. Balu Uchale came there and pacified the appellant. Thereafter, the three of them left.

Same day, at about 10.45 p.m. when the informant-Sukhdeo Chavan and his son Balu Chavan were on the ota (raised platform) of their house and Sukhdeo Chavan's wife Rangubai Chavan was cleaning the utensils, Laxmibai Salvi and Shobha Salvi came in the Court- yard of Sukhdeo Chavan and started abusing Rangubai. Thereafter, the appellant- Subhash Salvi and the acquitted accused Balu Uchale also came there. Balu caught hold of Sukhdeo Chavan and asked the appellant to assault his son Balu Chavan whereupon the appellant assaulted Balu Chavan with a sword on his neck resulting in his falling down. In the meantime, Rangubai came and caught hold of the sword which appellant Subhash was holding. The appellant kicked Rangubai on her knee as a result of which she left the sword which she was holding. Thereafter, the appellant and others ran away. Ahilyabai Salvi P.W. 3, Dhondiba Salvi P.W. 5, Hira Salvi, Maruti Salvi and Talvale Sir also reached the place of the incident.

Talvale Sir arranged for a truck and carried Balu Chavan, who was in a precariously injured condition and Sukhdeo Chavan on the same to the dispensary of Dr. J.A. Borade P.W. 7 in Pabal Taluka Shirur which they reached on 2-6-1991 at 12.30 a.m. Dr. Borade examined Balu Chavan in the truck itself and found that he had received a bleeding injury on his neck and finding his condition to be precarious, advised that Balu Chavan be taken to Primary Health Centre, Talegaon Dhamdhere.

On the advice of Dr. Borade, Sukhdeo Chavan took Balu Chavan to Primary Health Centre, Talegaon Dhamdhere where the doctor pronounced him dead.

3. The evidence of Sukhdeo Chavan P.W. 1 shows that after his son was

pronounced dead, at Talegaon Dhamdhere Primary Health Centre, which time was about 4 a.m., he went to Talegaon-Dhamdhere Police Station and lodged his F.I.R.

4. The evidence of P.S.I. Bajirao Bhosale P.W. 8 shows that on 2-6-1991 at about 5.30 a.m. Sukhdeo Chavan lodged his F.I.R. (Exhibit 37) whereupon he registered C.R. No. 46 of 1991 u/s 302 I.P.C. against the appellant, Laxmibai Salvi, Shobha Salvi and Balu Jadhav.

5. The evidence of P.S.I. Bhosale also shows that after registering the case on the basis of Sukhdeo Chavan F.I.R., he sent for two panchas and proceeded with them to Primary Health Centre, Dhamdhere where he performed the inquest on the corpse. He thereafter visited the place of the incident which was shown to him by Sukhdeo Chavan. From there, he recovered plain earth, earth having blood stains and at a distance of about 25 feet from the place of the incident, he recovered pieces of broken bottle and one empty bottle of Khajurao beer.

The said seizures were made under panchanamas. Thereafter, he recorded the statements of Rangubai and nine others and arrested the appellant and three co-accused persons.

6. During the course of interrogation, the appellant expressed his willingness to get the sword recovered. Consequently, P.S.I. Bhosale sent for two panchas, out of whom Sunil Tambe has been examined as P.W. 6 and recorded willingness of the appellant in a panchanama Exhibit 44. He thereafter in a jeep, along with panchas, some police personnel and the appellant proceeded to village Kanhur Mesai. The appellant asked the jeep to be stopped near his village. He thereafter, led to his one room house where in the south east corner, there was firewood and therefrom he took out a sword which was stained with blood. The said seizure was made under a panchanama. Thereafter, P.S.I. Bhosale seized the pant belonging to the appellant but, since the public panch of the recovery of the pant Balasahab Daravade P.W. 10 stated in his cross examination that the writing of the panchanama had already started when he had reached the police station and the pant was already wrapped and kept on a table. We are not giving any credence to this recovery of pant and hence not dealing with it in detail.

The seized articles were sent by P.S.I. Bhosale to the Chemical Analyst.

After completing the investigation, P.S.I. Bhosale submitted the charge sheet on 28-1-1991.

7. Going backwards, the autopsy on the corpse of the deceased Balu Chavan was conducted by Dr. Dongre who at the time of the incident was attached to Primary Health Centre, Talegaon Dhamdhere. Since at the time of recording of the evidence. Dr. Dongre had retired and was not traceable, the post mortem report was proved by Dr. Madhukar Bhandari, P.W. 9 a friend of Dr. Dongre, who had worked with Dr. Dongre in the same district and was well -acquainted with his hand writing and signature.

In his substantive evidence, Dr. Bhandari P.W. 9 stated that the post mortem report Exhibit 55 is in the hand writing of and bears the signature of Dr. Dongre.

A perusal of the post mortem report shows that the deceased Balu Chavan had sustained a transverse incised wound over back and neck at the level of second cervical vertebra, and nearly half of the neck was cut off. All the edges were clear cut and veins were cut.

On internal examination, damage to the spinal cord was found as also a cut at the level of the second vertebrae. The cause of death spelt out in the post mortem report is shock and haemorrhage as a result of injuries to vital parts like spine and spinal cord and injuries to major blood vessels of neck.

In his statement in the trial Court, Dr. Bhandari stated that the said injuries were sufficient in the ordinary course of nature to cause death and could be caused by a sword.

8. The case was committed to the Court of Sessions in the usual manner where the appellant and others were charged on the counts mentioned in para 1 above to which charges they pleaded not guilty and claimed to be tried.

During trial in all prosecution examined 10 witnesses. Four of them namely Sukhdeo Chavan, Rangubai Chavan, Ahilyabai Salvi and Dhondiba Salvi, P.Ws. 1, 2, 3, and 5 respectively were examined as eye - witnesses of the incident.

At the conclusion of the trial, the appellant filed his written statement Exhibit 57-B wherein he stated that on the night of the incident, while his wife shobha and his mother Laxmibai were returning home, the informant Sukhdeo Chavan, his son and Rangubai who were saying that their arrogance would be taken care of stopped them near the ota of their house and started abusing them. Hearing their shouts the appellant came running from his house. At that juncture, Sukhdeo and others threw bottles towards them and started pushing them. When the appellant came near Shobha and Laxmibai, Balu took out a sword, tried to push Shobha and assault her. The appellant snatched the sword from Balu's hand who was trying to assault Shobha and in order to defend, Shobha encircled his sword resulting in Balu getting injured. Thereafter, the appellant and others came home. Shobha who at that time was carrying a pregnancy of 8 months fell sick for 2/3 days.

The learned trial Judge rejected the defence of the appellant and convicted and sentenced him in the manner stated in para 1 above.

Hence this appeal.

9. We have heard learned Counsel for the parties and perused the entire evidence of record. We are constrained to observe that we do not find any merit in this appeal.

10. The area of controversy in this appeal lies in a very narrow ambit namely whether the prosecution version as unfolded by the four eye - witnesses is true

or that furnished by the appellant in his written statement is true on the anvil of preponderance of probabilities within the terms of section 105 of the Indian Evidence Act.

11. We have reflected over the said question and in our view, the prosecution version is correct and the appellant has failed to discharged the burden in terms of section 105 of the Indian Evidence Act.

12. As we have seen above, the evidence adduced by the prosecution against the appellant comprises of four eye-witnesses namely Sukhdeo Chavan, his wife Rangubai Chavan and his neighbours Ahilyabai Salvi Dhondiba Salvi, P.Ws. 1, 2, 3 and 5 respectively.

In our view, it would be proper to take the statement of Sukhdeo Chavan and Rangubai Chavan together.

In para 2, we have set out the prosecution story exhaustively on the basis of the recitals contained in their examination-in-chief and consequently, we would like to mention what has broadly emerged from their evidence. Their evidence shows that on 1-6-1999, someone threw a glass bottle in front of the house of Ahilyabai P.W. 3 resulting in Ahilyabai hurling abuses whereupon the appellant and his mother Laxmibai reprimanded her for abusing and a quarrel ensued between them, but the situation was pacified by co-accused Balu. Their evidence also shows that same day at about 10.45 p.m. co-accused Laxmibai and Shobha came to their Court yard and started abusing Rangubai. Their evidence further shows that in the meantime, the appellant and co-accused Balu and the deceased Balu Chavan came. The deceased Balu reprimanded Laxmibai and Shobha for abusing their mother whereupon co-accused Balu caught hold of Rangubai (sic Sukhdeo) and instigated the appellant who was armed with a sword to assault the deceased Balu Chavan. On that the appellant inflicted a blow with a sword on the neck of Balu Chavan who fell down as a result thereof. Thereafter, Rangubai tried to snatch the sword from the hands of the appellant but, the latter kicked her. Then the appellant and others are said to have run away.

We have examined the statements of Sukhdeo Chavan P.W. 1 and Rangubai Chavan P.W. 2 and find them to be implicitly truthful witnesses. The account furnished by them is corroborated by the circumstance that the post mortem report shows a transverse incised wound on the neck of the deceased.

They were also natural witnesses of the incident in as much as the incident took place at their house.

13. We now take up the evidence of Ahilyabai Salvi P.W. 3 and Dhondiba Salvi P.W. 5. These witnesses lived in the immediate proximity of the place of the incident and hence were natural witnesses of the incident.

The statement of Ahilyabai Salvi shows that at the time of the incident, while she was at distance of about 30 to 40 feet from the house of Rangubai she saw the

appellant inflicting a sword blow on the informant's son Balu.

The evidence of Dhondiba Salvi P.W. 5. shows that at the time of the incident, when he was about to go to bed he heard the quarrel which was going between Laxmibai and Shobha on one side and Rangubai on the other and came out from the house. When he was standing near the compound wall of his house, he saw the appellant assaulting Balu Chavan with a sword who received bleeding injury on his neck and fell down as a consequence thereof.

We have gone through the evidence of Ahilyabai and Dhondiba and find them to be truthful witnesses.

In the first place, it needs to be pointed out that there are natural witnesses of the incident, since they lived in the immediate vicinity of the place of the incident.

In the second place, we make no bones in observing that their statement to the effect that the appellant assaulted the deceased Balu with a sword is corroborated by the presence of a transverse incised wound on the neck of Balu.

In the third place, it should be remembered that the veracity of their account is established by the circumstance that since they were not present at the place of the incident from the inception of the incident but, were at their houses and understandably it must have taken them sometime to collect themselves they could not have seen the whole incident. It is pertinent to mention that they have not deposed about the whole incident.

Fourthly, it should be remembered that both of them are independent witnesses who had no rancour or ill will against the appellant and in the absence of the same, unless they would have seen the appellant inflicting a lethal sword blow on the person of the deceased Balu Chavan, they would not have falsely deposed about it.

14. It is pertinent to mention that the prosecution case that the deceased was assaulted by a sword is also probablised by the circumstance that in the presence of the public panch Sunil Tambe P.W. 6, P.S.I. Bhosale P.W. 8 recovered a blood stained sword on the pointing out of the appellant. We have earlier referred to the details regarding this recovery and we do not want to over burden our judgment by repeating them. As is evident from para 6, the said sword had been concealed by the appellant inside the fire wood in his house. It needs to be mentioned that it was sent to the Chemical Analyst who found on it, blood of O group, namely the blood group of the deceased. It is pertinent to mention that both Sunil Tambe and P.S.I. Bhosale were subjected to extensive cross-examination but, nothing could be extracted therefrom which could shake their credibility on the recovery of the sword, on the pointing out of the appellant. In our view, since they had no ill will against the appellant, they would not have falsely deposed about this recovery unless the same was effected on the pointing out of the appellant, as alleged by the prosecution.

15. From the aforesaid discussion, it is crystal clear that the involvement of the

appellant in the incident is established beyond all shadow of doubt. There can be no manner of doubt that the offence committed by the appellant would fall squarely within the ambit of Clause Firstly and Thirdly of section 300 I.P.C. the breach of which is punishable u/s 302 I.P.C; under which count, the appellant has been found guilty by the learned trial Judge.

Clause Firstly and Thirdly of section 300 read 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

Secondly.....

Thirdly : 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

Fourthly.....

A perusal of Clause Firstly would show that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death. In the instant case, the evidence of the informant Sukhdeo Chavan and his wife Rangubai clearly shows that the appellant assaulted their son Balu Chavan (deceased) with a sword on neck. This assault was a sequel to the incident which had taken place three hours earlier (referred to in para 2). The blow inflicted by the appellant was so lethal that Balu Chavan succumbed to his injury within a few hours. In our view, on the said facts, the act of the appellant would squarely fall within the ambit of Clause Firstly of section 300 I.P.C.

We do not even have an iota of doubt that the appellant's act would also squarely fall within the ambit of Clause Thirdly of section 300 I.P.C.

A perusal of the said clause shows that two requisites have to be satisfied for its application :

(a) there should be intention to inflict the injury actually inflicted in contra-distinction to its being accidental or unintentional :

(b) the injury inflicted should be sufficient in the ordinary course of nature to cause death.

The evidence of Sukhdeo Chavan P.W. 1 and Rangubai Chavan P.W. 2 clearly shows that pre-requisite (a) is satisfied. Their evidence is that the appellant intentionally inflicted a sword blow on the neck of their son Balu Chavan.

Pre-requisite (b) is also satisfied because, evidence of Dr. Bhandari P.W. 9, who proved the autopsy report, shows that the ante mortem injury suffered by the deceased were sufficient in the ordinary course of nature to cause death. We have earlier extracted that injury and set out the extreme internal damage which accompanied it. We have not even an element of doubt that the opinion of Dr.

Bhandari is correct.

16. For the said reasons, in our view, the learned trial Judge acted correctly in convicting and sentencing the appellant for the offence u/s 302 I.P.C. In our view, since Sukhdeo Chavan and Rangubai Chavan had lost their grown-up son Balu Chavan, who per the post mortem report was about 22 years and was the candle of light of their future, the trial Court was justified in imposing a fine of Rs. 10,000/- on the appellant, apart from sentencing him to undergo imprisonment for life.

17. We have no hesitation in concluding that the version furnished by the appellant in his written statement, the burden of proving which was on him, has not been proved by a preponderance of probabilities enjoined by law.

Section 105 of the Indian Evidence Act, reads thus :---

Burden of proving that case of accused comes within exceptions :

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code (XIV of 1860) or within any Special Exception or proviso contained, in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances."

It is true that u/s 105 of the Indian Evidence Act, the defence has to only show that preponderance of probabilities that its case may be true. However, in our view, even on the said touch-stone, the appellant has not discharged the burden. We have earlier referred to the written statement of the appellant. In short, the appellant's case as contained in his written statement is that on the night in question, his wife Laxmibai and Shobha were returning home and when they had reached near the ota of complainant's house, the complainant - Sukhdeo Chavan, his wife Rangubai and their son stopped them, there and started abusing them. Hearing their shouts, the appellant reached. At that juncture, they threw broken bottles towards the appellant and others. Balu Chavan with a sword tried to assault the appellant's wife Shobha who was eight months pregnant. Hence, in order to save Shobha and Laxmibai, the appellant snatched the sword from Balu Chavan and in trying to save them, while he encircling it Balu Chavan got injured.

For three reasons, we find this defence to be unacceptable.

Firstly, although the incident took place in June, 1991, it saw the light of the day for the first time five years later i.e. in July, 1996 when the informant and other eye witnesses were examined in the trial Court and the said defence was suggested to them in cross- examination.

In our view, had this defence been true, the appellant would not have maintained an ominous silence for over five years and would have cried hoarse from the beginning. It is pertinent to mention that the appellant was arrested on the date

of the incident itself and in our view, had this defence been true, the appellant at the time of his arrest itself, would have lodged his F.I.R. or disclosed this version to P.S.I. Bhosale, the Investigating Officer.

Secondly, the appellant's written statement shows that while he was trying to snatch the sword, the deceased Balu Chavan was resisting. In such a situation, in our view there should have been injuries on the palm or hands of the appellant and Balu Chavan. Absence of these injuries is a circumstance which shows that this version is a tissue of lies.

Thirdly, a perusal of the written statement of the appellant shows that in order to save his wife and mother, he encircled the sword and the deceased received injuries. If the injury of the deceased would have been caused in such a manner, it would have been a superficial injury and not accompanied by massive internal damage as is the case here. The injury suffered by the deceased shows that the sword blow was inflicted on him with brutal force.

Earlier, we have extracted the injury suffered by the deceased and we have no doubt in our minds that it was the result of a forceful sword blow being intentionally inflicted on his neck and could not have been suffered in the manner set forth in the written statement of the appellant.

18. Before parting with the judgment, we would be failing in our fairness, if we do not refer to some of the submissions canvassed by Mr. S.R. Chitnis, learned Counsel for the appellant.

Mr. Chitnis strenuously urged that since co-accused Balu Uchale @ Jadhav who has been assigned by the eye - witnesses the specific overt act of catching hold of the informant - Sukhdeo Chavan and or instigating the appellant to assault the deceased, has been acquitted by the trial Court and the State of Maharashtra has not preferred an appeal against his acquittal, the evidence of the eye - witnesses vis-a-vis the appellant should also be rejected.

For two reasons, we do not find any merit in this submission.

Firstly because, in our view, the acquittal of co-accused Balu Uchale by the trial Court was erroneous. A perusal of the impugned judgment shows that the learned trial Judge mainly preferred to acquit him because, since he had pacified the parties in the incident which had taken place three hours earlier, it was improbable that he would have exhorted the appellant to assault the deceased.

In our view, the inference drawn by the learned trial Judge was not correct. From the evidence, it appears that Balu was a man of the appellant and we see no difficulty or improbability of his participation in the main incident. In our view, the trial Court erred in acquitting him.

It is a matter of profound regret that the State has not preferred an appeal against his acquittal u/s 378(1) Cr.P.C. But, the default of the State does not mean that the appellant has also to be acquitted. It should be borne in mind that

if a co-accused has been erroneously acquitted by the trial Court, the benefit of his acquittal would not accrue to the convicted accused. Our view is fortified by observations contained in the judgment of the Supreme Court rendered in the case of Brathi alias Sukhdev Singh Vs. State of Punjab, . They were quoted with the approval by the Supreme Court in the case of Golla Pullanna and another Vs. State of Andhra Pradesh, and read thus :---

"In the matter of appreciation of the evidence the powers of the Appellate Court are wide as that of the trial Court. It has full power to review the whole evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the Appellate Court to indirectly or incidentally find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted although it could not interfere with such acquittal in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. Where the evidence examined by the Appellate Court unmistakably proves that the appellant was guilty u/s 34 having shared a common intention with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the Appellate Court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding."

Secondly, the principle "FALSUS OMNIBUS" is not applicable to our country. It is only where truth and falsehood are so inextricably mixed and are incapable of separation, would then a consequence of acquittal of a co-accused person, mean that a co-accused cannot be convicted. In our view, the case of co-accused Balu is *per se* separable from that of the appellant. The former only instigated. The latter assaulted the deceased with a sword on the neck and this is corroborated by the medical evidence and presence of blood of O group, the blood group of the deceased on sword.

Mr. Chitnis next urged that Constable Lokhande who accompanied the informant and Rangubai to the police station and to whom the informant had described the incident was a witness whose evidence was essential to the unfolding of the narrative and his non-examination by the prosecution was fatal. In this connection, Mr. Chitnis cited the decision of the Supreme Court reported in Mohan Lal and Others Vs. State of Rajasthan, . We have gone through the said decision and we fail to understand as to how it helps him. In our view, Lokhande was not a witness whose evidence was essential to the unfolding of the narrative. We feel that all the material witnesses have been examined by the prosecution in the instant case.

Mr. Chitnis when he canvassed the said submission was perhaps oblivious of the provisions contained in section 134 of the Indian Evidence Act which read thus :

"No particular number of witnesses shall in any case be required for the proof of any fact."

Mr. Chitnis then urged that Rangubai's evidence does not inspire confidence because, she stated that both she and the appellant were holding the sword and were pushing each other. He contended that if this was so Rangubai must have received injuries on her palm. We regret that we cannot accede to this submission. Rangubai has stated that she was holding the sword at his bottom. In such a situation it was not imperative for her to have sustained injuries. It may even be that she might have suffered some trivial scratches which she did not think it necessary to get medically examined.

At any rate, merely on this ground Rangubai's evidence cannot be discarded.

It is pertinent to mention that the incident had taken place at her house and she was a very natural witness of the same.

It also needs to be pointed out that even in the written statement filed by the appellant he has admitted the presence of Rangubai.

Mr. Chitnis, thereafter contended that since the deceased was a intervenor and during a sudden quarrel, the appellant had inflicted a single blow on him, the offence at the highest would fall u/s 304 (Part 1) I.P.C. and not u/s 302 I.P.C. We regret that we cannot accede to this submission. Earlier, we have given reasons as to why in our view, the appellant has been rightly held guilty by the trial Judge for the offence u/s 302 I.P.C. We do not want to over burden our judgment by retiring them again.

Mr. Chitnis finally emphatically contended that the circumstance that pieces of glass bottle and one glass bottle were recovered at a distance of about 25 feet in front of the house of the informant shows that the defence version is true. He urged that the said recovery is only compatible with the version contained in the written statement of the appellant and is incompatible with the prosecution version. We regret that we do not find any merit in this submission also. The evidence on record is that three hours before the incident, a bottle was hurled outside the house of Ahilyabai. The evidence also is that the house of Ahilyabai is situated at a distance of 50 feet from the house of the informant. In our view it may be that the bottle recovered was possibly the bottle which was hurled at Ahilyabai's house. So far as recovery of broken pieces of glass is concerned, it might be that someone else may have thrown them and hence, they were lying there. At any rate, in our view, merely on this circumstance, the version contained in the written statement of the appellant which has been discarded by us for reasons enumerated earlier would not become acceptable.

It should be borne in mind that courts have construed section 105 of the Indian Evidence Act to mean that defence has to establish its case by a preponderance of probabilities and by this solitary circumstance, it cannot be said that the appellant has discharged the burden cast on him by the said provision.

19. For the said reasons, we confirm the conviction and sentence of the appellant for the offence u/s 302 I.P.C. and dismiss the appeal. The appellant is in jail and shall serve out his sentence.

Appeal dismissed.