

**(2014) 06 BOM CK 0203**

**Bombay High Court**

**Case No:** Criminal Appeal No. 708 of 2007

Rajesh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision:** June 19, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 201, 300, 302, 302, 303

**Citation:** (2015) ALLMR(Cri) 516 : (2015) 3 BomCR(Cri) 505

**Hon'ble Judges:** P.V. Hardas, J; Anuja Prabhudesai, J

**Bench:** Division Bench

**Advocate:** A.P. Mundargi, Sr. Counsel and Kuldeep S. Patil, Advocates for the Appellant;  
U.V. Kejriwal, A.P.P, Advocates for the Respondent

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### **Judgement**

P.V. Hardas, J.

The appellant, who stands convicted for offence punishable under Sections 302, 201 and 404 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs. 10,000/-, in default of which to undergo further RI for one month, RI for three years and to pay a fine of Rs. 5000/-, in default of which to undergo further RI for fifteen days and RI for six months and to pay a fine of Rs. 1000/-, in default of which to undergo further RI for seven days, with a direction that all the substantive sentences shall run concurrently, by the II Ad-hoc Additional Sessions Judge, Thane, by judgment dated 16/06/2007, in Sessions Case No. 241 of 2005, by this appeal questions the correctness of his conviction and sentence. Facts in brief as are necessary for decision of this appeal may be stated thus:-

PW 9 - Police Constable Dattu Janate, who, on 4/1/2005, was attached to the Kapurbavadi Police Station and on the night of 4/1/2005, he, along with PI Patil and driver Bhalerao were on patrolling duty within the jurisdiction of the Kapurbavadi Police Station. They returned to Kapurbavadi Police Station after patrolling at about

3 a.m. on the morning of 5/1/2005. Again at 3.15 a.m. PW 9 - Police Constable Janate, driver Bhalerao and PSI Sondkar went on patrolling duty from Majiwada to Ghodbunder Road. They reached the Kapurbavadi Check Post and noticed two rickshaw drivers and the accused, who was a police constable near the Shani Mandir on the road, an altercation was going on between two rickshaw drivers and the accused, who was standing there. After the jeep in which PW 9 - Police Constable Janate was travelling had stopped, one rickshaw driver came near the jeep and informed PSI Sondkar that the rickshaw fare of Rs. 50/- was not paid by the passenger. The passenger paid Rs. 50/- to the rickshaw driver and PSI Sondkar then told PW 9 - Constable Janate to bring the rickshaw drivers to the police station if the dispute was not settled. PSI Sondkar further informed PW 9 - Constable Janate to inform the accused to bring the rickshaw drivers and the passenger to the police station. Accordingly, PW 9 - Constable Janate alighted from the jeep and informed the accused about the instructions issued by PSI Sondkar. After informing the accused, PW 9 - Constable Janate sat in the jeep and went for patrolling duty.

PW 7 - PSI Sondkar, who, on 4/1/2005, was attached to the Kapurbavadi Police Station, had gone on patrolling duty along with Police Constable Khilare. At about 3 a.m. when he was returned to the police station from the Kasheli bridge, he was informed by the jeep driver Bhalerao that there was a message from the control room to verify whether all the Beer bars were closed. PSI Sondkar was also called to the police station. At about 3.15 a.m. PW 7 - PSI Sondkar, driver Bhalerao and PW 9 - Constable Janate went in a police jeep for patrolling. When they had reached the Kapurbavadi Circle at about 3.30 a.m., they noticed 2/3 auto-rickshaw drivers and the accused were standing on the road and an altercation was going between them. PSI Sondkar, therefore, asked PW 9 - Constable Janate to confirm as to what was going on. Janate returned and informed PW 7 - PSI Sondkar that there was a dispute regarding auto-rickshaw fare and that the dispute had been settled. PSI Sondkar, therefore, asked Janate and the appellant to take the rickshaw drivers to the police station, if the dispute was not settled. PSI Sondkar returned back to the police station at about 4.45 a.m. and inquired with ASI Kokare whether accused had come to the police station along with the rickshaw drivers. ASI Kokare informed PSI Sondkar that no report had been lodged till then and that the accused had also not arrived at the police station. PSI Sondkar then took charge from ASI Kokare at about 5 a.m. and by that time the accused had come to the police station. According to PSI Sondkar, the accused confessed that he had assaulted one person.

PW 8 - API Pratap Bhosale, who, on 5/1/2005, was attached to the Kapurbavadi Police Station as a PSI, was leaving the police station on 5/1/2005 at about 5 a.m. after his duty. PW 7 - PSI Sondkar inquired from him whether PW 8 - PSI Bhosale had the mobile phone number of the appellant as he had not come to the police station. Accordingly, PW 8 - PSI Bhosale, contacted the appellant on his mobile hand-set and inquired about his location. The appellant informed PSI Bhosale that he was behind Rajdhani Hotel. The appellant was, therefore, instructed to come to the police

station immediately. The appellant had informed PW 8 - PSI Bhosale that he had assaulted one person. The appellant then came to the police station and telephoned PW 8 - PSI Bhosale on his mobile phone. On receiving the call, PW 8 - PSI Bhosale returned back to the police station. The appellant had come to the police station accompanied by the auto-rickshaw driver and the appellant confessed that he had assaulted one person behind Rajdhani Hotel. PW 8 - PSI Bhosale, therefore, asked the accused to show him the spot where the incident had taken place. Appellant and the rickshaw driver went in the auto-rickshaw, while PSI Bhosale followed them on his motorcycle. The appellant pointed the spot of the incident which was behind Rajdhani Hotel. The appellant led PW 8 - PSI Bhosale to the terrace of the building and noticed one person lying on the terrace. PW 8 - PSI Bhosale, therefore, brought the accused to the police station and informed PSI Sondkar and PI Patil.

PW 12 - API Hireman, who, on 5/1/2005, was attached to the Crime Branch, Thane, was present in his flat and at about 7.15 a.m. his maid servant Durgabai accompanied by her grandson PW 1 - Ritesh came and informed PW 12 - API Hireman that one person was lying on the terrace of her house and that person had been assaulted by a policeman. PW 12 - API Hireman, therefore, went to the terrace of the house of Durgabai and noticed one person lying in a pool of blood. On touching the said person, he noticed that the said person had died. He immediately informed Vartaknagar Police Station as well as the Crime Branch, Thane on his mobile phone. PW 23 - PI Lokare from Vartaknagar Police Station along with the police officers then reached the scene of the incident.

PW 23 - PI Lokare, who, on 5/1/2005, was attached to the Vartaknagar Police Station was informed about a dead body lying in a pool of blood in the Mali Chawl near paper product company at Vartaknagar. This information was conveyed to him by PSI Pawar who informed him that he had received a telephone from PW 12 - API Hireman. PW 23 - PI Lokare, accordingly, proceeded to the scene of the incident and when he reached the scene of the incident, he noticed PSI Pawar was present along with the police staff. Information was accordingly conveyed to the Assistant Commissioner of Police of Wagale Division and the DCP of Zone-I. ACP and the DCP both arrived at the scene of the incident. The persons who were present there could not identify the dead body. Statement of PW 1 - Ritesh Patel was recorded at Exh. 8. On the basis of the said report of PW 1 - Ritesh, an offence vide Crime No. I-3/2005 under Section 302 read with Section 34 of the IPC was registered. The scene of the incident panchanama and the inquest panchanama were drawn by PSI Pawar at Exh. 59 and Exh. 20 respectively. PW 23 - PI Lokare recorded the statements of witnesses and the dead body was referred to the Civil Hospital, Thane for postmortem examination. PW 1 - Ritesh had disclosed the registration number of the auto-rickshaw and ultimately the driver of the auto-rickshaw was traced and was brought to the Police Out-post of Vartaknagar. Statement of the auto-rickshaw driver - PW 2 - Tarashankar was recorded. The police squads were dispatched for tracing the whereabouts of the appellant. Information was accordingly conveyed to

the Senior P.I. of the Kapurbavadi Police Station about registration of the offence under Section 302 of IPC. Accordingly, Senior Inspector produced the appellant along with the report.

PW 22 - PSI Nivrutti Kshirsagar, who was also attached to the Vartaknagar Police Station arrested the accused, who had been produced by the police officers of the Kapurbavadi Police Station along with the report at Exh. 73. The articles found on the person of the accused were seized under seizure panchanama at Exh. 74. During custodial interrogation, the appellant expressed his willingness to point out the place where his clothes had been concealed. Accordingly, a memorandum at Exh. 34 was drawn. The appellant led the police and the panchas to Savarkarnagar and from his house, produced the clothes, which were came to be seized under seizure memo at Exh. 35. Clothes were found to be blood stained.

Since the appellant had sustained injuries, he was referred for medical examination and was examined by PW 11 - Dr. Dharamvir Chawala. PW 11 - Dr. Chawala noticed the following external injuries:-

- (1) Abrasion 1/4 x 1/4 inch over the dorsal aspect of proximal interphalangeal joint of the ring finger right.
- (2) Abrasion 1/4 x 1/4 inch over the dorsal aspect of proximal interphalangeal joint on the little finger right.

According to PW 11 - Dr. Chawala, the injuries could have been caused by blunt object and were simple in nature. He has further opined that the injuries were possible during the scuffle. He had issued the injury certificate, which is at Exh. 46.

On 5/1/2005, the dead body of deceased was identified by PW 3 - Nandish and others. Brother of deceased PW 10 - Shrikant was contacted at Mysore, who, on coming to Thane, identified the clothes of the deceased. The clothes of the deceased were seized under the seizure memo in the presence of panchas. On 8/1/2005, during custodial interrogation, the appellant expressed his willingness to point out the place where a wallet of the deceased had been thrown. Accordingly a memorandum was drawn and in the presence of the panchas, the appellant produced the wallet of the deceased which was seized under a panchanama. The seized articles were thereafter referred to the C.A. under requisition at Exh. 80. A test identification parade was conducted by PW 16 - Namdeo Kirdat. A currency note of Rs. 500/- with the visiting card of deceased pasted on the currency note was produced by PW 2 - Tarashankar which was seized under seizure memo at Exh. 64. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

Postmortem on the dead body of deceased Prashant was performed by PW 18 - Dr. Sunil Budhlani. PW 18 - Dr. Budhlani noticed the following external and internal injuries:-

- (1) C.L.W. of shaped "C" over the medial end of right eye brow extending from forehead to nasal bridge and from nasal bridge to lower eye lid measuring 5 c.m. x 3 c.m. x 2 c.m. C.L.W. is bone deep exposing the frontal bone and nasal bones.
- (2) C.L.W. of "V" shaped over the nasal bridge extending from one side of nose to other, measuring 4 c.m. x 2 c.m. x 1 c.m. C.L.W. is bone deep exposing the nasal bone.
- (3) C.L.W. of size 2 c.m. x 1 c.m. bone deep over the lateral end of upper right eye brow, bone deep of curve shape.
- (4) C.L.W. of size 2 c.m. x 2 c.m. over the right angle of mouth on the upper lip. This is muscle deep.
- (5) C.L.W. over the root of the nose extending from forehead along the root of nose to the infraorbital region on the left side. Vertical in direction and measuring 4 c.m. x 2 c.m. x 1 c.m.
- (6) C.L.W. of "L" shaped over the medial edge of left eye brow, measuring 2 c.m. x 2 c.m. x 1 c.m. bone deep.
- (7) C.L.W. over the left upper eye lid, horizontal in direction, 3 c.m. x 1 c.m. x 1 c.m.
- (8) C.L.W. over the left infraorbital region, horizontal in direction, 3 c.m. x 1 c.m. x 1 c.m., bone deep.
- (9) C.L.W. over the left lateral end of the upper eye lid, measuring 2 c.m. x 1 c.m. x 1 c.m., muscle deep.
- (10) Fracture of the nasal bones and frontal process of both maxillary bones causing deformity of the nose and causing movement of the nose and whole of nasal framework.
- (11) Contusion and hematoma over the left side of forehead. Spherical in shape of size 5 c.m. x 5 c.m. x 3 c.m.
- (12) Contusion and hematoma over the left zygomatic area extending over the left molar bones, spherical in size measuring 3 c.m. x 3 c.m. x 2 c.m.
- (13) Fracture of the left maxillary bone at the infraorbital region medial aspect slightly displaced causing a stepladder deformity at the infraorbital region medial aspect.
- (14) Hematoma over the right pinna with swelling and blackening of pinna of spherical shape measuring 3 c.m. x 3 c.m. x 3 c.m.
- (15) Multiple contusions over the right maxillary and neck region of various sizes, 3 c.m. x 3 c.m., 2 c.m. x 1 c.m., and 1 c.m. x 1 c.m.

- (16) Multiple contusions and black marks over the back numbering 5 of sizes 2 c.m. x 2 c.m., 3 c.m. x 3 c.m., 2 c.m. x 2 c.m., 3 c.m. x 1 c.m., 4 c.m. x 2 c.m.
- (17) Multiple contusions over the chest and abdomen measuring 3 c.m. x 3 c.m., 2 x 2 c.m., 1 x 1 c.m., 1 x 1 c.m., 2 x 2 c.m., 4 x 1 c.m. in sizes.
- (18) Hematoma over the left temporal region extending in the occipital region. This hematoma measuring 10 c.m. x 8 c.m. x 2 c.m. under the scalp.
- (19) C.L.W. over the mid occipital region 2 x 2 x 1 c.m. bone deep, horizontal in direction.
- (20) Abrasion at the mid palmar cause on the left palm with peeling of the skin measuring 2 x 1 x 1 c.m.
- (21) Abrasion over the right knee measuring 2 x 2 x 1 c.m. skin deep.
- (22) Intracerebral haemorrhage present in the frontal left temporal and left occipital region.
- (23) There is blood in the inter-ventricular area also.

He opined that all the injuries were ante mortem and deceased had died due to intracranial haemorrhage due to facial injuries. He further opined that the facial injuries were possible if the deceased was kicked by a person wearing shoes. He has further opined that the injuries were sufficient in ordinary course of nature to cause death. The postmortem report is at Exh. 62.

2. On committal of the case to Court of Sessions, trial court vide Exh. 3 framed charged against the appellant for offence punishable under Sections 302, 201 and 404 of the IPC. The appellant denied his guilt and claimed to be tried. Prosecution, in support of its case, examined 23 witnesses. The defence of the appellant was of denial. The trial Judge, upon appreciation of the evidence of the prosecution, convicted and sentenced the appellant as afore-stated.

3. In order to effectively deal with the submissions advanced before us by Mr. A.P. Mundargi, learned Senior Counsel for the appellant and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

4. Prosecution has examined PW 2 - Tarashankar, the auto-rickshaw driver, who is an eye witness to the incident. PW 2 - Tarashankar deposes that he was driving an auto-rickshaw belonging to one Yadav. 4/1/2005 at about 9 p.m. he had taken the brother of his friend in his auto-rickshaw and had reached him near the Thane Railway Station. He thereafter returned back in the auto-rickshaw at Manorama nagar and had parked his auto-rickshaw at the Kapurbavadi Check Post. He had thereafter taken one passenger from the Sun City Bar in his auto-rickshaw and had reached him to Kalwa. From there he again returned back and parked his auto-rickshaw at the Kapurbavadi Check Post. He had noticed the rickshaw of his

friend near the Shani Temple and had also noticed that an altercation was going on between his friend and one passenger. A police mobile van arrived there and the police, who were present in the mobile van told the passenger to pay the rickshaw fare. The passenger had accordingly paid the auto-rickshaw driver and the police mobile van as well as the auto-rickshaw went away. The appellant/accused was present there and there was some conversation between the appellant and the passenger for about five minutes. The accused told PW 2 - Tarashankar to take the rickshaw to the Kapurbavadi Police Station and the appellant was accompanied by the said passenger. While he was taking a turn for proceeding towards the Kapurbavadi Police Station, the appellant told Tarashankar not to take the rickshaw towards the police station but to take the rickshaw to one side of the road. Accordingly, Tarashankar had parked the rickshaw near the mosque. The appellant thereafter gave 2 to 3 blows to the passenger. The passenger alighted from the auto-rickshaw and ran towards the lane near the paper product company. The appellant told Tarashankar to start the auto-rickshaw and to chase that passenger. Accordingly Tarashankar and the appellant then began chasing the passenger who had fled from the auto-rickshaw and went to one single storied building behind the Rajdhani Hotel. The said passenger went to the of the said building. The appellant alighted from the auto-rickshaw and proceeded towards the building in order to catch the passenger. The appellant also went to the terrace of that building. Tarashankar waited near the auto-rickshaw for five minutes and thereafter also went to terrace and noticed the appellant kicking the passenger. While the appellant was assaulting, the passenger was saying "sorry sir". The people residing in the building had also rushed to the terrace and had asked the accused as to why he was assaulting that person. The appellant informed them that he was a policeman and that the passenger was a thief from Bhandup. The appellant had also shown his identity card. The residents of the building, therefore, asked the appellant to take that person and the appellant informed them that he had called for a vehicle. The appellant and PW 2 - Tarashankar then returned back to the auto-rickshaw and the appellant told Tarashankar to take the auto-rickshaw towards Kapurbavadi Police Station. Tarashankar drove the auto-rickshaw towards the Kapurbavadi Police Station. The appellant entered the police station and had telephoned someone. Within five minutes, one police officer arrived at the Kapurbavadi Police Station on his motorcycle. The appellant had not worn his uniform but was wearing a black pant and red colored checks shirt. The appellant then sat in the auto-rickshaw, while the police officer on the motorcycle followed them to the scene of the incident. The police officer from Kapurbavadi Police Station then went to the terrace. The appellant thereafter returned back tot he Kapurbavadi Police Station in the auto-rickshaw. The appellant inquired from Tarashankar the fare of the auto-rickshaw. The appellant, however, disclosed that he needed to go home and the appellant had given him one currency note of 500. The appellant also informed Tarashankar that he should not wait there, but should go home. Tarashankar, therefore, took the auto-rickshaw to the Kapurbavadi Check Post. Tarashankar

further deposes that the currency note along with the visiting card which the accused had given him were seized by the police. He has admitted that his statement was recorded by the Magistrate and had also participated in the test identification parade and had identified the accused.

5. In cross-examination, he has admitted that the passenger who had disputed the fare with the auto-rickshaw driver was under the influence of liquor at that time and was heavily drunk. He has further admitted that the dispute between the passenger (deceased) and the auto-rickshaw driver was going on for five minutes. Though, this witness has been cross-examined at length, the evidence of this witness remains intact and no dent of any sort is made to the testimony of this witness. It, therefore, clearly emerges from the evidence of this witness that the appellant while taking the deceased to Kapurbavadi Police Station had asked Tarashankar to stop the auto-rickshaw and thereafter had assaulted the deceased. The deceased had fled from the auto-rickshaw to the terrace of the building and the appellant had followed the deceased in the auto-rickshaw and had ultimately gone to the terrace and had assaulted the deceased. The appellant, it seems, had kicked the deceased.

6. Prosecution has examined PW 1 - Ritesh, who deposes that on 4/1/2005 he had returned home at about 9.30 p.m. and after taking his dinner was sleeping in the house. At about 4 to 4.30 a.m., a dog started barking and on hearing the barking of the dog, PW 1 - Ritesh was awakened. His grandfather and his maternal uncle then went to the terrace and after they had come from the terrace, Ritesh had heard the sound of assault. He, therefore, went to the terrace and had noticed one person lying on the terrace while another person was kicking him on his face. One more person was standing near the assailant. Ritesh, therefore, asked the assailant as to why he was assaulting and the assailant informed Ritesh that he was a policeman and was discharging his duty. Ritesh came down from the terrace and after about 5 to 10 minutes, the assailant and the other person also came to the ground floor. Grandfather of Ritesh told those persons that they should remove the person whom they had assaulted. The grandfather of Ritesh was informed that a vehicle was called for. The assailant had also shown his identity card to grandfather of Ritesh. Ritesh had identified the appellant as the same assailant. According to Ritesh after about 10 to 15 minutes, the assailant and the other person again went to the terrace accompanied by a third person, who had come on a motorcycle. After some time the three persons came down from the terrace and went away. Ritesh along with his grandmother, therefore, went to the house of police officer Hireman and his grandmother disclosed the entire incident. Ritesh, his grandmother and police officer Hireman again proceeded to the terrace and had noticed the person lying on the terrace. Police Officer Hireman had accordingly informed the Police Chowky and statement of Ritesh came to be recorded at Exh. 8. Ritesh claims that he had identified the assailant in the test identification parade.



7. In cross-examination, he has admitted as correct that the police had shown him the rickshaw driver and the accused in the police station. He has then corrected himself that the appellant was not shown to him in the police station. He has admitted that 5 to 6 persons were shown to him in the police station, but not the appellant. He again stated that along with 2 to 3 persons, the appellant was also shown to him in the police station. He has admitted as correct that at about 4 to 4.30 a.m. he had heard some noise from the terrace. He has also admitted as correct that after hearing the noise, he had gone to the terrace. He has admitted that he had noticed one unknown person lying on the terrace. He has admitted as correct that he had questioned the two unknown persons as to why they were assaulting the third person. He has also admitted as correct that the unknown person informed that they were policemen and Ritesh should leave the terrace. He has admitted that the statement of his grandfather was recorded.

8. Mr. Mundargi, learned Senior Counsel for the appellant, has urged before us that in the light of the variance in the testimony of PW 1 - Ritesh and PW 2 - Tarashankar, the appellant is entitled to be given the benefit of doubt and deserves to be acquitted. The learned APP has urged before us for dismissal of the appeal on the ground that the variance in the testimony of these two witnesses is extremely marginal and is on unimportant aspect of the prosecution case.

9. The evidence of PW 2 - Tarashankar clearly establishes that the appellant and the deceased were travelling in the auto-rickshaw and after the appellant had assaulted the deceased, the deceased fled from the auto-rickshaw and went to the terrace of the building behind the Rajdhani Hotel. The appellant chased the deceased and also went to the terrace. In the presence of PW 2 - Tarashankar, the appellant had kicked the deceased. Evidence of PW 1 - Ritesh also establishes the presence of PW 2 - Tarashankar at the scene of the incident i.e. on the terrace and also establishes that the appellant had kicked the deceased. Though there is a slight variance in the evidence of the testimony of these two witnesses, the variance, according to us, is on a very trivial aspect of the prosecution case. The variance is not to the extent as would entitle the court to reject the testimony of these two witnesses. Though the eye witnesses have been subjected to a lengthy and a searching cross-examination, the eye witnesses have emerged as truthful witnesses at the close of their cross-examination. The appellant has not been able to shatter the testimony of these two witnesses, nor create any doubt about their presence at the scene of the incident. According to us, therefore, implicit reliance can be placed on the testimony of these two witnesses.

10. The ocular account of these two witnesses is further corroborated and fortified by the seizure of the clothes of the appellant, which were found stained with blood of "O" group, which matched the blood group of deceased. The C.A. reports at Exhs. 77 to 79 establish that the blood group of the accused was determined as "B" group, while the blood group of deceased was determined as "O" group. The appellant had

not offered any explanation regarding the finding of blood of "O" group on his clothes and his shoes. The appellant was found to have sustained injury and this is deposed to by PW 11 - Dr. Chawala. The wallet of the deceased was recovered at the behest of the appellant as well as a 500 rupee currency note with the visiting card of the deceased was seized from PW 2 - Tarashankar, which had been given to him by the appellant. Thus according to us the prosecution has been able to establish that it was the appellant who had assaulted the deceased and the appellant had removed the wallet of the deceased. However, there is no evidence in support of the charge for an offence punishable under Section 201 of the IPC. It does not appear that the appellant had caused the disappearance of any evidence in order to screen the real offender. The appellant, in our opinion, therefore, would be entitled to be given the benefit of doubt in so far as offence punishable under Section 201 of the IPC.

11. Mr. Mundargi, learned Senior Counsel for the appellant has then urged before us that since the identification parade is vitiated, the identification of the appellant for the first time in court would not be a confidence inspiring identification as the incident had occurred at about 4 a.m.

12. The police officers, namely, PW 9 - Police Constable Janate, PW 8 - PSI Bhosale and PW 7 - PSI Sonkar have all deposed about presence of the appellant near the Kapurbavadi Check Post where a dispute between a passenger and the auto-rickshaw driver was going on. PW 2 - Tarashankar had accompanied the accused and was in his company for a considerable length of time. PW 2 - Tarashankar, therefore, had an adequate opportunity of observing the appellant. Similarly, PW 1 - Ritesh had seen the appellant and had talked with him and though the incident had occurred at about 4 to 4.30 in the morning, yet in the light of the fact that the witnesses had adequate opportunity of seeing the accused, identification of the appellant for the first time in the court would not be vitiated. The identity of the appellant, therefore, in our opinion, has been firmly established.

13. Mr. Mundargi, learned Senior Counsel for the appellant has then urged before us that admittedly the deceased was not known and was not acquainted with the appellant. The appellant had no motive nor was there any enmity between the appellant and the deceased. The deceased was in an inebriated condition and was heavily drunk. The learned counsel for the appellant, therefore, submits that the appellant had no intention to commit murder of deceased Prashant. The appellant, therefore, according to the learned Senior Counsel for the appellant, would be liable to be convicted for an offence punishable under Section 304 Part II of the IPC.

14. The deceased was intoxicated and was heavily drunk. It is undisputed that the appellant had no motive and was also not acquainted with the deceased. Since the appellant was not acquainted with the deceased, there is no question of the appellant having any inimical relation or any enmity. The appellant had also no motive to commit the murder of deceased. It appears that appellant was taking the deceased in the auto-rickshaw to the Kapurbavadi Police Station. While in the

auto-rickshaw something had transpired due to which the appellant gave 2 to 3 fist blows to the deceased. The deceased thereafter escaped from the clutches of the appellant and fled to the building. The appellant, it appears, was angered on account of the deceased fleeing from his custody and chased him and thereafter indiscriminately kicked him, though unjustifiable. The evidence of the prosecution does not indicate that the appellant had intended to commit murder of deceased Prashant. As pointed out by us above, there was no enmity and consequently the appellant had no motive to kill the deceased. Since the appellant had no motive to kill deceased and since there was no enmity between them, the appellant had indiscriminately kicked the deceased. There is no evidence on record to indicate that the appellant had kicked the deceased intentionally with a view to cause injuries which were sufficient in ordinary course of nature to cause death. In other words, the assault was not with an intention of causing an injury which would result in the death of the deceased nor was the assault with an intention of causing any particular injury which was likely to cause death of deceased. Though the injuries have been opined to be sufficient in ordinary course of nature to cause death, according to us, in the peculiar facts of the present case, Clause thirdly of Section 300 would not be applicable. There was no intention to cause any particular injury. There was also no intention to cause any injury which would sufficient in ordinary course of nature to cause death. The appellant obviously had no intention to commit murder of deceased. The appellant was angered because the deceased had fled from the auto-rickshaw and though the anger of the appellant was unjustified, yet the appellant had assaulted the deceased i.e. kicked the deceased indiscriminately. The assault possibly was with an intention to teach the deceased a lesson for having fled from the auto-rickshaw. Thus, according to us, the offence would be one punishable under Section 304 Part II of the IPC as knowledge can be attributed to the appellant that by assaulting the deceased he was likely to cause his death but without any intention of causing the death of deceased or with causing such bodily injury as was likely to cause death of the deceased.

15. For the aforesaid reasons, therefore, according to us, the conviction of the appellant for offence punishable under Section 302 of the IPC is unsustainable and the conviction deserves to be altered from Section 302 to 304 Part II of the IPC.

16. According to us, sentence of RI for eight years for an offence punishable under Section 304 Part II of IPC with enhancement of fine to Rs. 20,000/- would meet the ends of justice. Since the appellant had removed the wallet belonging to the deceased and had also removed a currency note of Rs. 500/- from the wallet and thereafter had thrown the wallet, an offence punishable under Section 404 of IPC stands proved against the appellant. The conviction and sentence of the appellant for offence punishable under Section 404 of IPC needs no interference. As pointed out by us above, the conviction of the appellant for offence punishable under Section 201 of the IPC is not established. Accordingly, Criminal Appeal is partly allowed and the conviction and sentence of the appellant for the offence punishable

under Section 302 of the Indian Penal Code is set aside, as well as the conviction and sentence of the appellant for offence punishable under Section 201 of the Indian Penal Code is set aside and he is acquitted of the offence punishable under Section 201 of the Indian Penal Code.

Fine, if any, paid by the appellant in respect of the conviction under Section 201 of the Indian Penal Code be refunded to the appellant.

The conviction and sentence of the appellant for the offence punishable under Section 302 of the Indian Penal Code is modified and the appellant is convicted for the offence punishable under Section 304(ii) of Indian Penal Code and sentenced to suffer rigorous imprisonment for 8 years and to pay a fine of Rs. 20,000/-, i.d. of which to undergo rigorous imprisonment for one year. From the amount of fine of Rs. 20,000/-, an amount of Rs. 15,000/- be paid to P.W. 10 - Shrikant Tadakwadi Chikkakempegowada as compensation.

The conviction and sentence of the appellant for offence punishable under Section 404 of I.P.C. is maintained.

All substantive sentences to run concurrently and the appellant would be entitled for set off admissible under Section 428 of Criminal Procedure Code. Since the appellant has undergone his substantive sentence, the appellant be released forthwith, if not required in any other case.

Appeal is thus partly allowed as indicated above.