
(2020) 08 MP CK 0071

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 400 Of 1998

Abdul Razzak

APPELLANT

Vs

State Of M.P.

RESPONDENT

Date of Decision : 18-08-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 374(2)

Indian Penal Code, 1860 — Section 285, 299, 304, 304A, 304I, 304II, 337, 338

Citation : (2020) 08 MP CK 0071

Hon'ble Judges : Rajendra Kumar Srivastava, J

Bench : Single Bench

Advocate : A.Tiwari, R. D. Singh

Final Decision : Disposed Of

Judgement

1. This criminal appeal u/s 374(2) Cr.P.C. has been filed by the appellant being aggrieved by the judgment dated 22.01.1998 passed by learned First

Additional Sessions Judge, Sehore in Session Trial No. 97/1994 whereby the Sessions Judge convicted the appellant for the offence punishable u/s

304-II of IPC (5 counts) and sentenced to undergo RI for 5 years with fine of Rs. 5,000/- in each count. Default stipulation has also been imposed by

the trial Court.

2. As per prosecution case, on 30.03.1993 at Village Magaspur, on the occasion of marriage of a girl, at about 9 to 10 PM when all the villagers and

children were gathered for welcoming the Baratis, the accused was playing fire breathing and was pouring kerosene on the dung cake (Kanda) with

cane. The villager asked him not to do so but he did not prevent himself due to which the cane caught fired and the accused threw the same onto the

children standing over there. Resultantly, Pappu, Guddu Sharma, Shama,

Shaheed, Shahid, Shahrukh, Salman, Aslam, Ravi, Shahnaz, Sitara, Sahid S/o Hareen Bagas, Tajju, Shamim, Bhuri, Raees, Babu and Naushad Khan were scorched in the fire. During treatment, Guddu, Bhuri Bee, Pappu, Raees and Shahid Khan died.

3. On the information, the police has registered the FIR vide Exb. P/16 under Sections 285, 337, 338 and 304-A of I.P.C. against the

appellant/accused. The injured were sent for medical examination and their medical reports are annexed in the case as Exb. P/3 to P/15. The police

has seized the cane and other articles vide Exb. P/18. Post mortem report of the deceased children namely Pappu, Raees, Bhuri, Guddu and Shahid

were exhibited vide Exb. P/48 to P/52. The Police has filed the charge-sheet for the same offence as mentioned in the FIR. The learned Chief Judicial

Magistrate has framed the charge of Section 304-II of I.P.C. and committed the case to the Sessions Court for trial. The appellant abjured his guilt

and pleaded innocence, hence, the learned trial Court proceeded with the trial and in furtherance to it, the trial Court examined 18 prosecution and 2

defence witnesses as well as recorded the statement of accused under Section 313 Cr.P.C. The Court found him guilty for the offence as aforesaid.

4. The learned counsel for the appellant submits that the learned Trial Court erred in passing the judgment of conviction whereas no evidence is

available on record against him. The learned trial Court overlooked the fact that the police recorded the statements under Section 161 Cr.P.C of

witnesses namely Noor Khan (PW-1), Badru Khan (PW-3), Sheikh Ulla (PW-5), Raees Khan (PW-7),[^] Shahzad (PW-8), Babu Khan (PW-9),

Hameed Ulla (PW-12) after lapse of long period. He further submits that the witnesses Saeed Khan (PW2), Halim Khan (PW-13) have not supported

the prosecution case. Badru Khan (PW-3) has stated in his Court statement that he saw the accused while setting the fire on dung cake and throwing

it onto the children but he also stated that Noor Khan and Sattar Khan were also giving the kerosene to children for playing fire breathing. Hence, it is

clear that the accused did not commit any offence. Moreover, Badru Khan has given his police statement after a period of more than 70 days of

incident whereas he was very much available in the village. He further submits that the marriage in which the incident occurred, was of daughter of

Noor Khan (PW-1) who has turned hostile, he stated that he know how the fire

took place, whereas if the accused committed any wrong, Noor Khan should have known about the same. He also submits that Shahid (PW-4) stated that the accused was setting the fire to illuminate but accidentally, the cane caught the fire and due to fear the accused threw the same onto the children, resultantly they were scorched. The accused never did the same intentionally or negligently. Sheikh Ulla (PW-5) has also not supported the prosecution case. Tajju Khan (PW-6) stated that the accused was setting the fire only to illuminate. Raees Khan (PW-7) was unable to say how the cane caught the fire. Further, according to Dr. M.K. Jain (PW-10) who performed the medical examination of injured children, they would have been burnt at about 3 to 4 PM whereas according to prosecution the incident was occurred in the night at about 9 to 10 PM, hence, the case of prosecution is not reliable. He also submits that some irregularity is also found on the part of performance of S.H.O i.e. R.P. Birthare (PW-11) on the point of registering the FIR as he did not file the Rojnamcha in this regard. Further, Charan Singh (PW-14) who was the investigation officer of the case, has not conducted fair investigation and recorded the statements of witnesses after the period of 2 to 4 months of incident. As an alternative argument, the counsel for the appellant submits that for the sake of argument, if it is assumed that the accused committed any offence, then looking to the facts and circumstances of the case, same shall come under the purview of offence of Section 304-A IPC and not 304-II IPC. In support of his contention, he relied on the judgment of the Hon'ble Apex Court in the case of Rupinder Singh Sandhu Vs. State of Punjab, reported in 2018 Cr.L.J 2935. With the aforesaid submissions, he prays for allowing this appeal.

5. On the other hand, learned Panel Lawyer for the State opposes the arguments made by learned counsel for the appellant submitting that the learned trial Court has rightly appreciated the evidence available on record. The learned trial Court did not make any error while passing the judgment of conviction against the present appellant. The witnesses of the case are duly stable with their version and there is no reason to disbelieve them. The prosecution has proved its case beyond any reasonable doubt. He submits that in the present case five innocent children were died due to act of the appellant. The appellant had complete knowledge of the risk contained in his act. With the aforesaid submissions, he prays for dismissal of this appeal.

6. Heard both the parties and perused the record.

7. On perusal of record, it appears that the allegation which is found proved against the appellant is that he threw the burning cane of kerosene onto

the children that led to the death of 5 children. According to appellant counsel, even if the evidence are taken into consideration, no offence more than

304-A IPC is made out against the appellant. Therefore, before adverting to the facts of the case, I would prefer to consider the legal aspect first. In

this regard, provision of Section 299 of IPC wherein offence of the culpable homicide is defined, be read first, which is quoted as under:

â??299 Culpable homicide.â?"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 homicideâ?"

8. Further, the punishment for the offence of culpable homicide not amounting to murder has been prescribed under Section 304 of IPC which also

read as under:

â??304. Punishment for culpable homicide not amounting to murder.â?"Whoever commits culpable homicide not amounting to murder shall be punished with

[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the

death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description

for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention

to cause death, or to cause such bodily injury as is likely to cause death.â?"

9. Further, under Section 304-A of the IPC, the provision of punishment is also provided for causing death by negligence. Same is quoted as under:

â??304A. Causing death by negligence.â?" Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide,

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.â?"

10. After careful reading of the above said provisions, the following ingredients must be satisfied before convicting the person under Section 304 of

IPC :

(I) The death of the person must have been caused.

(II) Such death must have been caused by the act of the accused by causing bodily injury.

(III) There must be an intention on the part of the accused to cause the death or to cause such bodily injury which is likely to cause death.

(IV) There must be knowledge on the part of the accused that the bodily injury is such that it is likely to cause death.

11. The first part of the section is generally referred to as "Section 304, Part I", whereas the second part as "Section 304, Part II". The first

part applies where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause such bodily injury as is likely

to cause death whereas Part II of the said section, comes into effect when death is caused by doing an act with 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. In the case of *Alistair Anthony Pareira Vs.*

State of Maharashtra, reported in 2012(2) SCC 648, the Hon'ble Apex Court has held that as regards punishment for section 304-II IPC, the prosecution

has to prove the death of person in question, that such death was caused by the act of the accused and that he knew that such act of his was likely to

cause death.

12. Further, section 304-A of IPC deals with homicidal death by rash or negligent act. It covers those cases where death is caused without

"intention" or "knowledge". It applies to acts which are rash or negligent and are directly the cause of death of another person. In the

case of *Sushil Ansal v. State*, (2014) 6 SCC 173, the Hon'ble Apex Court has held as under:-

"80. We may now advert to the second and an equally, if not, more important dimension of the offence punishable under Section 304-A IPC viz. that the act of

the accused must be the proximate, immediate or efficient cause of the death of the victim without the intervention of any other person's negligence. This aspect of

the legal requirement is also settled by a long line of decisions of the courts in this country. We may at the outset refer to a Division Bench decision of the High

Court of Bombay in *Emperor v. Omkar Rampratap* [(1902) 4 Bom LR 679] where Sir Lawrence Jenkins speaking for the Court summed up the legal position in

the following words:

to impose criminal liability under Section 304-A of the Penal Code, 1860, it is necessary that the act should have been the direct result of a rash and negligent act of the accused and that act must be proximate and efficient cause without the intervention of another negligence. It must have been the causa causans; it is not enough that it may have been the causa sine qua non.

the above statement of law was accepted by this Court in *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra*, AIR 1965 SC 1616. We shall refer to

the facts of this case a little later especially because Mr Jethmalani, learned counsel for the appellant Sushil Ansal, placed heavy reliance upon the view this Court has taken in the fact situation of that case.

81. Suffice it to say that this Court has in *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra*, AIR 1965 SC 1616] accepted in unequivocal terms the correctness of the proposition that criminal liability under Section 304-A IPC shall arise only if the prosecution proves that the death of

the victim was the result of a rash or negligent act of the accused and that such act was the proximate and efficient cause without the intervention of another

person's negligence. A subsequent decision of this Court in *Suleman Rahiman Mulani v. State of Maharashtra* [*Suleman Rahiman Mulani v. State of Maharashtra*, AIR 1968 SC 829 : 1968 Cri LJ 1013] has once again approved the view taken in *Omkar Rampratap* case [(1902) 4 Bom LR 679] that the act of the accused must

be proved to be the causa causans and not simply a causa sine qua non for the death of the victim in a case under Section 304-A IPC. To the same effect are the

decisions of this Court in *Rustom Sherior Irani v. State of Maharashtra* [*Rustom Sherior Irani v. State of Maharashtra*, 1969 ACJ 70 (SC)], *Bhalchandra v. State*

of Maharashtra [*Bhalchandra v. State of Maharashtra*, AIR 1968 SC 1319 : (1968) 3 SCR 766 : 1968 Cri LJ 1501] , *Kishan Chand v. State of Haryana* [(1970) 3

SCC 904], *S.N. Hussain v. State of A.P.* [*S.N. Hussain v. State of A.P.*, (1972) 3 SCC 18 : 1972 SCC (Cri) 254], *Ambalal D. Bhatt v. State of Gujarat* [(1972) 3

525 : 1972 SCC (Cri) 618] and *Jacob Mathew case* [*Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] .

82. To sum up: for an offence under Section 304-A to be proved it is not only necessary to establish that the accused was either rash or grossly negligent but

also

that such rashness or gross negligence was the causa causans that resulted in the death of the victim.

83. As to what is meant by causa causans we may gainfully refer to Black's Law Dictionary (5th Edn.) which defines that expression as under:

â??Causa causans.â??The immediate cause; the last link in the chain of causation.â??

The Advance Law Lexicon edited by Justice Chandrachud, former Chief Justice of India defines causa causans as follows:

â??Causa causans.â??The immediate cause as opposed to a remote cause; the last link in the chain of causation; the real effective cause of damage.â??

84. The expression â??proximate causeâ?? is defined in the 5th Edn. Of Black's Law Dictionary as under:

â??Proximate cause.â??That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which the

result would not have occurred. *Wisniewski v. Great Atlantic & Pacific Tea Co.* [226 Pa Super 574 : 323 A2d 744 (1974)] , A2d at p. 748. That which is nearest in

the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation. The proximate cause

of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury

and without which the accident could not have happened, if the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the

wrongful act. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission

played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.â??

13. Now under the light of above said provisions and principle, this Court shall examine the facts of the present case.

14. On perusal of the case, it appears that the incident was occurred on

30.03.1993 on the occasion of Marriage of Noor Khan's daughter. The allegation against the appellant was that he was playing fire breathing and suddenly the fire caught with the cane of kerosene, thereafter he threw the same onto the children, resultantly some children were injured and 5 died during treatment. Dr. D.S. Badkul (PW-17) and Dr. C.S. Jain (PW-18) have performed the post mortem of deceased children vide Ex.P-48 to P-52, they stated that all of them have burn injuries and cause of death is cardio respiratory failure as a result of burn and its complications. Hence, no dispute is found with regard to finding of the trial Court regarding nature of death.

15. Now the questions which remain to be adjudicated are that whether the appellant has committed such act which resulted into death of 5 children, if the answer is found affirmative, then, his act would come under the purview of Section 304-II of IPC or 304- A IPC. Hence, keeping in mind the above discussed principle, I further proceed to examine the merits of the case.

16. On perusal of statement of Noor Khan (PW-1), it is apparent that the marriage ceremony of his daughter was being performed in his house where the incident was found to be occurred but he has turned hostile and stated in his cross examination that he did not see anyone setting the fire. Further, Saeed Khan (PW-2) uncle of injured Salma and Aslam, has also turned hostile, he deposed almost same facts as that of PW-1. Further, Najru Khan (PW-3) has stated that the accused was setting fire to dung cake and also having a cane through which he was pouring oil. He further stated that Noor Khan (PW-1) and Sattar were also giving oil to the children for fire breathing and in the incident, eight children were burnt. He admitted the fact that the dung cake was being burnt for illuminating purpose and the accused threw the cane onto the children.

17. Further, the trial Court has recorded the statement of injured child Shahid who was the eye witness of the case. He stated that the accused was setting fire to dung cake for illuminating and fire caught the Addi, then the accused extinguished the fire but when the fire caught the cane, he threw the same onto the children who were standing there. The villagers were enjoying fire breathing play of accused. Some persons asked him not to do so.

In his cross examination, he stated that Noorkhan had given the oil cane to accused. Further, Tajju (PW-6), Raees (PW-7), Babu Khan (PW-9) and

Haleem (PW-13) are the other eye witnesses of the case. On perusal of their statements, I found almost same version and they were stable. They

stated that the accused was setting fire to dung cake and when suddenly the fire broke out, he threw the same onto the children. Haleem said that

once the accused extinguished the fire of cane but in the second time he threw it onto the children. According to Raees, accused fled away from the spot after the incident.

18. Charan Singh (PW-4) has investigated the case and he deposed in the Court that he seized the cane, dung cake and other articles from the spot.

He recorded the statements of witnesses on 20.05.1993, 30.05.1993, 19.07.1993 and 30.07.1993. In respect of delay in recording the statement, he explained the reason of the witnesses being out of station.

19. The learned Counsel also raised the point of delay in recording the statements of witnesses under section 161 Cr.P.C. In this regard, it is well

settled principle of law that if the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution

version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, the

delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case. Herein, the investigation officer Charan Singh (PW-14)

has duly explained the delay in recording the statements saying that the witnesses were not found present when he went to village for the same

purpose. Apart from that, the statement of injured eye witness Shahid (PW-4) is sufficient to held that the incident caused by the appellant/accused.

20 The Honâ??ble Supreme Court in the case of Central Bureau of Investigation Vs. Sakru Mahagu Binjewar and Others reported in 2019 SCC

OnLine SC 855 held as under:-

â??30.The delay of some hours in registration of the FIR has also been convincingly explained by the complainantâ??Bhaiyyalal Sudam Bhotmange (PW-17)

and Siddharth Gajbhiye (PW-18). Where the prosecution has satisfactorily explained the cause of delay in the registration of FIR, there is no rhyme or reason for

a court to look at the prosecution case with suspicious eyes. The plea of so-called delay in recording the statements of the witnesses, is to be merely noticed and

rejected. It has come on record that the investigation was not carried out properly by the local police, therefore, the State Government handed over the case to the

State CID. No effective progress could be made by the State CID also, hence the investigation was entrusted to CBI. It is thereafter that the statements of several witnesses including under Section 164 of the Code were recorded. The long drawn process has caused no prejudice to the respondents-accused.â??

Therefore, it is evident that the delay recording the statement of witnesses cannot by itself be a ground for disbelieving the prosecution evidence.

21. The defence has also examined two defence witnesses Shafeeq (DW-1) and Shareef (DW-2) in trial. Shafeeq stated that the accused was not

present on the spot when the incident occurred and the members of barat were setting the fire but in his cross examination, he admitted his relation

with the accused and told that he did not inform the police about non presence of the accused. Shareef (DW-2) is brother of Shafeeq and he narrated

almost same version as that of Shafeeq.

22. The statements of defence witnesses are not found reliable as they did not inform the police about the above said fact while investigation,

moreover, the appellant did not take any plea of his non presence on the spot. There are family relation of between the defence witnesses and

accused. Hence, the trial Court has rightly discarded their evidence.

23. After examining the evidence led by the prosecution, I found that the accused was setting fire to dung cake for illuminating while welcoming the

Barat, he was also playing fire breathing to entertain the people. The children were also there. Thereafter, suddenly the fire caught with the oil cane

and broken out then the accused threw it onto the children which resulted into injuries to all of them and death of 5 children. To bring the case under

section 304-II IPC, death should be caused by doing an act with 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. The statement of injured witness Sahid is very important piece of evidence, according to him, the

accused has extinguished the fire once but when it again broke out suddenly, he threw it onto the children. He said that the fire breathing play is

usually done in Moharram festival which shows that the villagers were familiar to this danger play. Herein, it seems that due to sudden fire on the oil

cane, the appellant threw it onto the children, certainly, he should have avoided himself to play with fire specially in the presence of children but it can

be said that he had no knowledge about the result of his act. He did not take precautions while playing such type of act and did the act negligently.

24. However, action of the appellant cannot be considered as falling within the ambit of Section 304-II of IPC because at the time when he was

playing fire breathing, he could not possibility have knowledge that an accident would be occurred which would result in death. The appellant would

not have foreseen such incident and death of children was due to accident. The same would, therefore, be an act which would fall within the ambit of

Section 304-A of IPC. As such appellant would be liable for committing offence of causing death by negligence under Section 304-A of IPC.

25. In view of forgoing discussion, I found that the accused is liable to be punished for the offence of Section 304-A IPC instead of 304-II IPC.

26. Therefore, the impugned judgment is modified and the appellant is convicted for commission of the offence under Section 304-A of IPC instead of

Section 304-II of IPC in 5 counts and sentence to undergo R.I. for 2 years with fine of rupees 2,000/-in each count. On default of payment of fine

amount, he shall further undergo R.I. For 2 months in each count. All the sentence shall run concurrently. The appellant is on bail, his bail bond be

forfeited and he is directed to surrender himself before the trial Court. If he fails to do so, the trial Court is free to proceed in accordance with the law.

The deposited fine amount, if any, shall be adjusted.

27. Accordingly, this appeal is disposed of.