
(2009) 11 BOM CK 0159
In the Bombay High Court
Case No : Criminal Appeal No. 46 of 2009

Ahamad Ali

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 26-11-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2009) 11 BOM CK 0159

Hon'ble Judges : V.K. Tahilramani, J;N.A. Britto, J

Bench : Division Bench

Advocate : Mahesh Amonkar, for the Appellant; W. Coutinho, Public Prosecutor, for the Respondent

Judgement

V.K. Tahilramani, J.—The appellant-original accused, has challenged the Judgment and Order dated 20.2.2009, passed by the learned Sessions Judge, Panaji, in Sessions Case No. 6/2006. By the said Judgment and Order, the learned Sessions Judge, convicted the appellant-accused u/s 302 of the Indian Penal Code and sentenced him to undergo Life Imprisonment and pay a fine of Rs. 10,000/-, in default, to undergo one year Simple Imprisonment.

2. The prosecution case, briefly stated is as under: Niazuddin Sheikh (deceased) was residing at Apewal, Prior in Ponda Taluka along with his family members consisting of his wife PW.11 Shaikh Khatum Bi and his children, including daughter PW.6 , Aasmania Niazuddin Shaikh. The appellant-accused was brother-in-law of the deceased i.e. the husband of sister of deceased Niazuddin Sheikh. Niazuddin Shaikh and the accused were residing in separate portions of the same house. Niazuddin Sheikh and his family were residing in the front portion and the accused and his family were residing in the back portion of the same house. On the day of the incident i.e. on 23.11.2005, at about 10.45 p.m., a quarrel ensued between the accused and his wife. Niazuddin Sheikh questioned the accused as to why he was assaulting his wife. The accused abused Niazuddin Sheikh. The accused then told Niazuddin Sheikh "tumko dikhata hu" i.e. he would show him

and went inside his house and came out. Immediately, thereafter, the accused gave a blow on left side of chest of Niazuddin Sheikh, with a knife. This incident was witnessed by PW.6 Aasmania Shaikh, PW. 10 Noorjahan Bi, PW.11 Shaikh Khatum Bi and PW.18 Alifa Bi. Thereafter, Niazuddin Sheikh was moved to the hospital by PW.11 Shaikh Khatum Bi and others. On examination, the Doctor declared him dead. FIR was lodged by PW.11 Shaikh Khatum Bi. The dead body of Niazuddin was sent for post mortem. Post mortem was conducted by PW.14 Dr. Silvano Dias Sapeco. Dr. Sapeco found stab injury on left chest. According to him, the injury was ante mortem, was fresh at the time of death and it was necessarily fatal. After completion of investigation, charge-sheet came to be filed. In due course, the case was committed to the Court of Sessions.

3. Charge came to be framed against the accused u/s 302 IPC. He pleaded not guilty to the said charge and claimed to be tried. His defence is that Niazuddin came to his house and assaulted him and there was a scuffle between them. He, however, denies that he caused the death of Niazuddin. After going through the entire evidence, adduced by the prosecution, the learned Sessions Judge, convicted and sentenced the accused as stated in para 1 above. Hence, this appeal.

4. We have heard Mr. Amonkar, learned Counsel for the appellant-accused and Ms. Coutinho, learned Public Prosecutor for the State. We have perused the record pertaining to the present case, as well as the Judgment and Order passed by the learned Sessions Judge. After going through the same, we are of the considered view that the learned Sessions Judge was right in holding that it was the accused who caused the fatal injury to Niazuddin.

5. At the outset, it may be stated that the learned Counsel for the appellant stated that as far as the incident is concerned, he does not dispute the act of the appellant in the alleged incident, however, he submitted that the case would not fall u/s 302 of IPC but, it would fall u/s 304, Part II of IPC. Mr. Amonkar submitted that the case would be covered by fourth Exception to Section 300 IPC. He submitted that there was a sudden fight which took place between the deceased Niazuddin Sheikh and the accused and in the course of sudden fight, the deceased gave the kick to the accused, due to which the accused fell down. On receiving the kick, the appellant rushed inside his house, picked up the knife which was lying on the dining table, rushed outside the house and immediately stabbed the deceased Niazuddin Sheikh. He submitted that after giving one blow, the accused did not give any further blow to the deceased Niazuddin Sheikh. This shows that the accused has not acted in a cruel or unusual manner or took any undue advantage of the situation. He further submitted that the act was not done with any premeditation and it occurred on the spur of the moment. Thus, Mr. Amonkar submitted that the case would clearly be covered by the fourth Exception to Section 300 IPC. In support of his submission that the case of the accused would fall u/s 304, part II, he has placed reliance on various decisions of the Supreme Court, as well as of this Court.

6. Before dealing with the Judgments relied upon by the learned Counsel for the appellant, we would, briefly, like to deal with the evidence of the witnesses in this case. As the prosecution story has been taken from the examination-in-chief of PW.11 Shaikh Khatum Bi, who is an eye witnesses, we do not wish to reproduce her evidence, as that would only amount to overburdening this Judgment. Suffice to say, nothing has been elicited in the cross examination of this witness, so as to disbelieve her evidence. Evidence of other two eye witnesses, viz. PW.6 Aasmania Shaikh, and PW.10 Smt. Noorjahan Bi, is on the same lines as that of PW.11 Shaikh Khatum Bi. It may be stated here that PW.10 Smt. Noorjahan Bi is the wife of the accused. She has also supported the prosecution case. However, as far as last eye witness i.e. PW.18 Alifa Bi is concerned, she is the daughter of the accused. She has partially supported the prosecution case. In any event, evidence of three eye witnesses is on record who have withstood the cross examination, and have not been shaken in their testimony in relation to the incident and the role played by the accused. Hence, from the evidence on record, it is clear that the accused person had inflicted only one blow with a knife on the chest of the deceased Niazuddin Sheikh. Keeping this fact in our mind, we now propose to deal with the Judgments relied upon by the learned Counsel for the appellant.

7. The learned Counsel for the appellant placed reliance on the decision of the Supreme Court in the Case of Muthu Vs. State by Inspector of Police, Tamil Nadu, . Learned Counsel for the appellant pointed out that in the said case a quarrel ensued between the deceased and the accused therein on account of throwing of rubbish. In the course of quarrel, the accused picked up a knife and inflicted one blow on the chest of the deceased. In the said case, the Supreme Court, set aside the conviction u/s 302 IPC., and instead convicted the accused therein u/s 304 Part II of I.P.C. and reduced the sentence to 5 years. So also in the case of Gali Venkataiah Vs. State of Andhra Pradesh, , the accused had inflicted one knife blow on the chest of the deceased, in an incident starting with exchange of hot words, due to which quarrel ensued and it culminated in the accused inflicting one knife blow on the chest of the deceased. The Supreme Court held that the accused was entitled to benefit of Exception 4 to Section 300 I.P.C. and the conviction was altered from Section 302 - 304 part I IPC. Thereafter, reliance was placed by the learned Counsel for the appellant on another decision of the Supreme Court in the case of K. Ramakrishnan Unnithan Vs. State of Kerala, . In the said case, a single blow was given by the accused to the deceased. The blow was quite severe, as a result, the intestine of the deceased had protruded. The Supreme Court observed that scenario at the time of occurrence not showing that the accused had any intention or requisite knowledge to cause murder, and hence conviction u/s 302 IPC was converted to conviction u/s 304 Part II IPC.

8. The learned Public Prosecutor contended that the case would not be covered by Exception 4 to Section 300 and in fact, the case would fall clearly u/s 302 IPC. In support of her contention, she has placed reliance on the following decisions:

- (1) Vishal Singh v. State of Rajasthan 2009 AIR SCW 2056
- (2) Satvir v. State of Uttar Pradesh 2009 AIR SCW 1301
- (3) Santosh Bhau Humane v. State of Maharashtra 2009 All MR (Cri) 2273;
- (4) State of Rajasthan v. Dhool Singh 2004 AIR SCW 24

9. In the case of Vishal Singh (supra), the learned P.P. has placed reliance on the observations therein "For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner". The learned P.P. pointed out that in the said case also there was one injury on the chest. The said injury was similar in nature to that in the present case and she brought to our notice the evidence of PW.14 Dr. Sapeco who conducted the post mortem. Dr. Sapeco found one stab injury on left chest of 3 ? X 1 and half X 8 cms., spindle shape on left chest front and its lower border was 6 ms. from midline. Its upper border was 5 cms. from mid nipple. It had ? cms. of tailing upwards. On internal examination, it was found that the injury was directed from above downwards and outwards and had pierced pericardium, ventricles of heart, diaphragm and left lobe of liver. In Vishal Singh the Supreme Court observed that Exception 4 to Section 300 has no application to the facts of the said case. However, on perusal of the Judgment relied upon, we find that the Supreme Court has categorically observed therein that "There was no evidence of any scuffle much less sudden fight or sudden quarrel or altercation between the parties". It is in the light of the evidence which showed that there was no scuffle or sudden fight or quarrel between the parties that the Supreme Court came to the conclusion that the case would not be covered by Exception 4 to Section 300 IPC. However, in the present case, the eye witnesses have consistently stated that there was a sudden quarrel between the accused and the deceased, hence, the decision in the case of Vishal Singh (supra), can have no application to the facts of the present case.

10. Learned P.P. submitted that number of injuries is not a determinative factor, but nature of injury, weapons used and part of the body, would be a determinative factor. Learned P.P. submitted that when injury is caused on vital part of body by knife, the case would not fall u/s 304 Part II, but it would fall u/s 302 IPC. In support of her contention, she has relied on the decision in the case of Satvir (supra). We have perused the said decision. On perusal thereof, it is noticed that there was no quarrel between the accused and the deceased therein. In fact, in the said case, when the deceased and the other witness were proceeding to their Village, at that time the accused persons were hiding themselves in the sugarcane fields and when the deceased and witness came near the accused persons, the accused laid down the deceased on the ground and assaulted with knife, due to which fatal injuries were caused. In the said case, it is seen that the deceased had sustained altogether six injuries, 3 of them were stab wounds on vital parts of the body and 2 were incised wounds, on vital parts of the body.

Thus, in the said case, it is seen that 5 serious injuries were caused on vital parts of the body. Looking to the nature of the injuries and looking to the fact that there was no sudden fight, the Supreme Court held that benefit of Exception 4 Section 300 cannot be given. In the present case, the injury is only one. Moreover, the injury has been caused after a sudden fight had taken place. Hence, this decision would not apply to the facts of the present case.

11. Thereafter, the learned PP placed reliance on a decision of this Court in the case Santosh Bhau Humane (supra). She submitted that in the said case, the accused gave two blows with knife on abdomen of the deceased during sudden quarrel yet, this Court has held that the case would fall u/s 302 and not u/s 304 Part II IPC. In the said case, it is seen that two blows were inflicted by the accused person on the deceased. Both injuries were on vital parts of the body. Looking to this fact and other facts of that case, this Court held that the conviction u/s 302 cannot be altered to one u/s 304 Part II. In the present case, only one blow has been inflicted by the accused person, hence, this decision would not be of much help to the prosecution.

12. Lastly, the learned PP has placed reliance on the decision of Supreme Court in the case of Dhool Singh (supra). She submitted that in the said case also only one blow was given by the accused on vital part of the body and yet the Supreme Court held that the case would clearly fall u/s 302 IPC. On careful perusal of this decision, we have noticed that in the said case, the Supreme Court was not considering a case of Exception 4 to Section 300. In the said case there was no material to show that there was any sudden quarrel between the accused and the deceased person and hence, the said decision cannot be made applicable to the facts of the present case.

13. As main contention for the learned Counsel for the appellant is that the case is squarely covered by Exception 4 to Section 300 IPC, we may refer to Exception 4 to Section 300 IPC, which reads as under:

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

From the evidence of witnesses, it is evident that much before the assault, the accused and the deceased were quarreling with each other. Exception 4 to Section 300 IPC covers the acts done in a sudden fight. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For, if it were so, the Exception more appropriately applicable would be Exception I. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct, it would not have taken the serious

turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found.

14. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of quarrel between them. A fight is a combat between two or more persons, whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must, necessarily, depend upon the proved facts of each case.

15. No doubt, even in the heat of the moment or fit of anger one should not attack somebody since human beings are different from animals inasmuch as they have the power of self control. Nevertheless, the fact remains that in the heat of the moment and in a fit of anger people sometimes do acts which may not have been done after premeditation. Hence, the law provides that while those who commit acts in the heat of the moment or fit of anger should also be punished, their punishment should be lesser than that of premeditated offences. It is for this reason that Exceptions 1 and 4 have been inserted in Section 300 IPC.

16. In the present case, from the evidence on record, it is seen that a sudden quarrel had ensued between the accused and the deceased. In fact, the incident started with the accused having a quarrel with his wife. On hearing the quarrel, Niazuddin Sheikh, went to the house of the accused, and questioned the accused, whereupon the accused told Niazuddin that it was a quarrel between husband and wife, hence he should not interfere and he told Niazuddin to go away. When the accused told Niazuddin to go away, Niazuddin kicked the accused, due to which the accused fell down in his house. Then there was a scuffle between the two. The accused, being enraged, entered his house, picked up a knife which was lying on the table and immediately rushed towards Niazuddin and gave one blow with the knife on the chest. From the conduct of the accused, it is seen that he was in fact telling Niazuddin to go away as the dispute was between husband and wife. The accused was, in fact, avoiding an altercation with Niazuddin. However, Niazuddin, in fact, did not go away and, on the other hand, gave a kick to the accused, due to which the accused fell down. It is evident that the accused had no prior motive or intention to cause the death of the deceased, which is seen from the fact that the accused was not carrying the knife with him and it was only after the quarrel erupted between the accused and Niazuddin that the accused went inside his house, picked up the knife which

was lying on the dining table and immediately returned back with it and stabbed Niazuddin. It would also be pertinent to bear in mind that it was Niazuddin who went to the house of the accused and not the accused who went to the house of Niazuddin, armed with knife. If the knife was carried by the accused right from beginning, that may be a circumstance to indicate that there was an intention to cause death. However, when it is seen that the knife was not initially in the hands of the accused, but was picked up by him from the dining table during altercation, then it cannot be said that it is a case which falls u/s 302 IPC. Rather, in our opinion, it is only a case of culpable homicide, not amounting to murder which is covered by Exception 4 to Section 300 IPC. Considering the factual background, we are of the view that the appropriate conviction would be in terms of Section 304 Part II IPC.

17. For the reasons stated above, the appeal is partly allowed. The Judgment and Order, convicting and sentencing the appellant- accused u/s 302 IPC, is set aside. Instead the appellant is convicted u/s 304 Part II IPC and he is sentenced to undergo Rigorous Imprisonment for a period of 6 years, and to pay fine of Rs. 2,000/-, in default, to undergo six months R.I.