
(2016) 08 AHC CK 0052
In the Allahabad High Court
Case No : Criminal Appeal No. 1501 of 1983

Ali Ahmad

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-08-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 299, 300, 302, 34

Citation : (2016) 96 ACrC 731 : (2016) 11 ADJ 19

Hon'ble Judges : Shashi Kant Gupta and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : O.P. Gupta, P.N. Misra, Chandra Mohan Rai, Suresh Singh, H.N. Singh and O.P. Singh, Advocates, for the Appellant; D.G.A, for the Respondent

Final Decision : Partly Allowed

Judgement

Kaushal Jayendra Thaker, J.—The appellants, two in number, were sentenced under Section 302 r/w 34 of IPC in Sessions Trial No.170 of 1983. They have challenged their conviction of life imprisonment by way of this appeal. Since 1983, they are on bail.

2. This appeal is of the year 1983. The appellants were released on bail by this Court on 29.6.1983. It is after exactly 32 years that the appeal was listed before us for hearing.

3. The facts in brief are that the deceased Rasheed Khan was the real brother of both these accused and was husband of Smt. Shahnaz Bano, who lodged the complaint. The deceased, the appellants and the complainant resided in the same house in Mohalla - Anta, P.S. - Sadar Bazar, District - Sahjahanpur. The deceased was working in a clothing factory and his working hours were during night shift which would get over at 6.00 a.m. The deceased reached home at 6.30 a.m. and the complainant complained to him that his brothers were misbehaving with her and trying to molest her. The deceased on hearing this, came down from the upper storey of his house. He scolded both the accused for

their misconduct. The accused were having Lathis with them as they had come from the field. Altercation took place between the brothers just outside the house. The younger brother of deceased Saghir and son of deceased also came to the spot. Lallan a prosecution witness, who was employed by deceased, and Nasir Ahmad - PW1 and one neighbour also came there. Nasir and Lallan told them to go inside the house and settle the matter in the house. On this the deceased and the accused started going in the house at that time both the accused gave Lathi's blow on the head of the deceased, who fell down and became unconscious. This incident occurred at 6.45 a.m. The younger brother Saghir got a rickshaw and the complainant took the deceased to police station and dictated an F.I.R., earlier it was registered as a complaint under Section 308 IPC. Entry was made in G.D. at serial No.11. The injured was sent to District Hospital Shahjahanpur. Dr. Santosh Kumar - PW7 examined him. After certain observations and treatment, after 3 days i.e. 25.1.1983, the deceased died and, therefore, offence under Section 302 IPC read with 34 IPC was added. The accused were surrendered on 8.2.1983. Charge-sheet was submitted against both the accused before concerned magisterial court, which Ext. Ka 7.

4. The case was committed to the court of sessions as it was a sessions triable case. The accused on being summoned were charged to which they pleaded not guilty and wanted to be tried.

5. At the trial, the prosecution examined Nazir Ahmad - PW1, Lallan -PW2, Smt. Shahnaaz Begum - PW3, Sajid - PW4, Dr.P.S. Varma - PW5, Jaipal Sharma, S.I. - PW6, Dr. Santosh Kumar - PW7 and Prem Kumar, LDC, Ordnance Clothing Factory, Shahjahanpur - PW8, Sajid - PW4 was son of the deceased. His deposition, however, could not be taken due to his immature age. Saghir, a brother and Smt. Natho, mother of the deceased were examined by the Court as court witnesses - CW1 and CW2. The accused did not lead any evidence in defence.

6. The prosecution even filed the following documents to prove the charges against both the accused:-

1

FIR

22.1.83

Ex.Ka.1

2

Injury Report of Rashid

22.1.83

Ex.Ka.12

3

P.M. Report

25.1.83

Ex.Ka.2

4

Site Plan with Index

23.1.83

Ex.Ka.5

7. The court even called two witnesses CW1 - Saghir and CW2 - the mother of the deceased. After the prosecution evidence was over, the accused were put to test as per Section 313 Cr.P.C. However, the reply was one of denial.

8. The learned Counsel for appellants has submitted that there are 3 aspects which are required to be seen. In this case, it is submitted that PW1 is declared hostile. PW2 Lallan in his deposition categorically said that he has not seen the incident. Evidence of PW4 is not there as he was so scared that he did not give evidence. According to the learned Counsel for the appellant there was no dying declaration though 3 days had elapsed between the period of injury and death of the deceased. No lethal weapon was used. The medical evidence reveals that there were only Lathi blows. F.I.R. at page 2 had been extensively read by him and it was submitted that the aforesaid admitted facts clearly show that there was no premeditation to kill or commit murder and, therefore, in absence of any other cogent evidence except that of the complaint, the accused are entitled to be acquitted. In the alternative, he submitted that the incident occurred on the spur of the moment and that there was no premeditation and as the death took place after 3 days, the case would fall under Section 325 of IPC and not even under Section 304 Part I or II. It was further submitted that there was no fight and there was only quarrel. The injuries on the deceased would fall under Section 325 IPC. He has heavily relied on the following decisions:

"(i) Ram Lal v. Delhi Administration, AIR 1972 SC 2462;

(ii) Parusuraman Alias Velladurai v. State of Tamil Nadu, (1992) 1 (supp.) SCC 429;

(iii) Shri Kishan and others v. State of U.P., (1972) 2 SCC 537;

(iv) State of Punjab v. Bira Singh 1994 Law Suit (SC) 1006;

(v) State of U.P. v. Kunj Lal, 2013 (11) Laws (All) 95;

(vi) Badal Murmu and others v. State of West Bengal, 2014 Law Suit (SC) 74."

9. Per contra, Sri Rajiv Gupta has submitted that the factual scenario would go to show that the brothers had beaten him. There are 4 strokes by Lathi. Shahnaz Begum had lodged the complaint and the injuries were such which demonstrated

that they had murdered the deceased.

Learned A.G.A. has further submitted that evidence of hostile witness which is corroborated by other evidence, supports the case of the prosecution and has been right relied upon by the trial court. He has relied heavily on the decision of *Attar Singh v. State of Maharashtra*, (2013) 11 SCC 719, to submit that the case would not fall even within Section 304 Part I or 304 Part II, what to say of 325 IPC as the injuries and the blows were such that it would not be possible to scale down the offence even under Section 304 Part I or II leave apart Section 325 IPC.

10. Having heard the Counsels and having gone through the records, we have thought it fit to discuss the injuries so as to appreciate whether the offence is committed, not committed and/or if committed, what is the offence committed by the accused. It would be necessary to look into the injuries, which the deceased had sustained, therefore, are reproduced herein below:-

- (i) Lacerated wound 3 c.m. x 5 c.m. x bone deep, 8 c.m. above left ear.
- (ii) Lacerated wound 5 c.m. x 5 c.m. x bone deep on top of skull, 8 c.m. above and behind left ear.
- (iii) Lacerated wound 3 c.m. x 5 c.m. x bone deep 2 c.m. lateral to injury No.2.
- (iv) Lacerated wound 3 c.m. x 3 c.m. at centre of skull 12.5 c.m. above bridge of nose.
- (v) Lacerated wound 3.5 c.m. x 1 c.m. at lower leg 9 c.m. below left knee.

The deceased was kept under observation for which X-ray was advised. Duration of injury was fresh and the injuries were caused by some blunt weapon. The injury report is Ex.Ka-12. It is important to note that the injuries were on the skull rather centre of the skull was also damaged.

11. The internal examination revealed fracture of left parietal bone in multiple pieces. Blood clots were seen between skull bones and brain surface. Membranes were lacerated. Brain was congested. The cause of death according to the doctor was coma as a result of head injury. The post-mortem report is Ex.Ka-2.

12. It is an admitted position of fact that the incident occurred on 22.1.1983. The injuries were caused by blunt object like Lathi. The deceased died after 3 days. The medical evidence shows that it is homicidal death. We do not delve further into this aspect and concur with the learned Sessions Judge that the death was a homicidal death.

13. As the Counsel has argued that the offence would fall under Section 325 or 326 of IPC, it would be relevant to discuss the said sections, which read as follows:

"325. Punishment for voluntarily causing grievous hurt. - whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to

seven years, and shall also be liable to fine."

"326. Voluntarily causing grievous hurt by dangerous weapons or means. - Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument of shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

He has relied on the decision of this Court in the case of Netra Pal v. State of U.P. was under Section 308. It would not apply to the facts of this case. The decision in the case of Sheo Raj Singh will also not apply as it appears that the incident occurred on the spur of the moment. In this case injuries were on the skull causing fractures whereas in Devram's case it was only a lacerated wound on the skull, therefore, the said decision would not apply to the facts of this case. The decision of Gujarat High Court in Criminal Appeal No. 748 of 2004 dated 19/08.2015 will not apply to the facts of this case. The injury in this case cannot be said to be grievous heart and therefore it cannot be believed that the accused had no knowledge that death would occur, thus, going through the factual scenario, we do not think that the case would fall within Section 325 or 326 of IPC.

14. Recently the Apex Court in the case of Prabhakar Vithal Gholve v. State of Maharashtra, AIR 2016 SC 2292, in similar facts has held as follows:-

"6. Taking an overall broad view of the facts noticed above, it is abundantly clear that the occurrence originated on account of some minor grievance against a lady that she did not convey a telephonic message to the appellant. The appellant thereafter came back to his house. For reasons which are not very clear, the juvenile offender Balu went to the house of the prosecution party and allegedly committed assault for which he was overpowered. On his cries, the appellant and four others rushed with sticks. The appellant, as per medical evidence, sustained two injuries by hard and blunt substance and some persons of the prosecution party also received injuries on account of assault by the accused persons. The appellant as well as juvenile offender Balu used stick to cause injuries on the head of the deceased who died due to such assault. It is evident, as noticed earlier, that there was no motive, alleged or proved, for the occurrence of assault upon the deceased. In the given facts and scenario, it can be safely inferred that there was no intention on the part of the accused persons to cause death. However, the injuries on head did prove fatal and knowledge of such effect of the injuries can be fastened against the appellant.

7. In the facts and circumstances noted above, there appears merit in the

submission advanced by learned counsel for the appellant that in view of Exception 1 or Exception 4 in Section 300 of the IPC the case made out against the appellant is that of culpable homicide not amounting to murder. It would be natural for the family members of juvenile offender Balu on hearing his cries, to rush for his help and when injury on the appellant has also been proved there is sufficient material to infer the reasonable possibility of a grave and sudden provocation. The assault on the deceased, in absence of intention to cause death could be on account of sudden fight without premeditation, in the heat of passion and upon a sudden quarrel. We therefore feel persuaded to and do set aside the conviction of the appellant under Section 302 IPC and substitute the same with conviction under Section 304 Part I of the IPC."

15. In the scheme of the IPC culpable homicide is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognise three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

16. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299

Section 300

A person commits culpable homicide if the act by which the death is caused is done -

Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

INTENTION

(a) With the intention of causing death; or

(1) with the intention of causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or

(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

KNOWLEDGE (c) with the knowledge that the act is likely to cause death.

KNOWLEDGE (4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Clause (b) of section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to section 300.

17. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause(b) of Section 299 and clause(3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The

words "bodily injury..." sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the internal bodily injury or injuries sufficient to cause death in the ordinary course of nature.

18. In the facts and circumstances of the case, we are of the opinion that the accused can be said to have committed the offence under section 304 Part I of the IPC and benefit of doubt can be given to the accused for the offence punishable under section 302 of IPC. On consideration of the evidence of the witness as also medical evidence including the post mortem report, it is clear that there was no preplan or any premeditation on the part of the accused and the incident occurred on a very trivial issue. It has come on record that the accused and the deceased were brothers and it could not be said that the accused had taken any undue advantage or acted in a cruel manner. Therefore, we find that the accused had no intention to kill their brother. Therefore, to that extent the conviction has to be altered and the impugned judgment and order passed by the learned trial Judge is required to be modified to the aforesaid extent.

19. Therefore, the death was caused by the act of accused is proved and this case would also fall within the parameters fixed by the Apex Court in *State v. Sanjeev Nanda*, AIR 2012 SC 3104. As far as the death of Rasheed Khan is concerned, as narrated above, the injury was on the vital part of the body with the weapon used by accused. Considering the principle laid down by the Apex Court in *Budhi Lal v. State of Uttarakhand*, AIR 2009 SC 87, the accused cannot be said to have committed the offence of murder but is culpable homicide not amounting to murder. In the cited case, the Apex Court has discussed the distinction between bodily injury likely to cause death and bodily injury sufficient to cause death.

20. The ingredients which are required are that there should be no motive. We are of the opinion that the culpable homicide is there, but it would fall within the provisions of section 304 Part-II of IPC, as submitted by the learned advocate for the appellant. The judgments cited by the learned Counsel for the State have persuaded us to hold that the offence does not fall within provisions of Section 325 of IPC as submitted by the Counsel for the appellant. The provisions of Section 304 as reproduced herein above would permit us to hold that the accused had knowledge but no intention to cause death and, therefore, the thin distinction between 304 Part-I and Part-II of IPC will have to be appreciated. In facts of this case the injuries on head would at least show that the accused had knowledge that if the deceased was hit on the head which was the delicate part of the body it may cause death but it cannot be said that they had the intention to do away with their real brother as they were staying together, there was no major dispute between them. Considering factual scenario and the manner of

assault, we are of the considered view that the appropriate conviction shall be under section 304 Part-II of IPC, and to that extent, the appeal requires to be partly allowed.

21. Thus, going through the totality of the facts and circumstances, we are unable to accept the submissions of learned Counsel for the appellant that it would be a case that would fall under Section 325 of IPC.

22. The appeal is partly allowed. The record and proceedings be sent to the trial court forthwith.

23. We feel that a sentence of 5 years rigorous imprisonment and the fine of Rs. 5,000/- (Five Thousand) on both accused would be adequate as 33 years have elapsed and in default of payment of fine would undergo 3 months simple imprisonment. The fine when realised be paid to the widow of Rasheed Khan the deceased in view of the latest decision of the Apex Court in Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770.

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25. The accused are on bail since 1983. They shall surrender within a period of 6 weeks from today to undergo their remaining punishment. The amount of additional fine/compensation be also deposited within 6 weeks from today.