

(2019) 09 MP CK 0001

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 279 Of 2010

Devendra Singh And Another

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 374
Indian Penal Code, 1860 — Section 34, 300, 302, 304

Citation : (2019) 09 MP CK 0001

Hon'ble Judges : Sheel Nagu, J;Rajeev Kumar Shrivastava, J

Bench : Division Bench

Advocate : Sushil Goswami, A.K. Jain, R.S. Bansal, Vinay Kumar

Final Decision : Allowed

Judgement

Sheel Nagu, J

CONTENT AND CONTEXT

1. Murder of one Amritlal is the subject-matter of this appeal filed by two appellants u/S. 374 Cr.P.C., challenging the impugned judgment dated 30/3/2010 passed by Sessions Judge, Gwalior (M.P.) in S.T.No.282/2009 whereby both the appellants have been convicted u/S. 302 IPC and in alternative 302/34 IPC and sentenced to life imprisonment with a fine of Rs.1,000/- and in default to suffer simple imprisonment for 2 months.

2. In nut-shell, the case set up by the prosecution in the course of trial was that during the re-marriage ceremony of niece of deceased Amritlal held on 22/4/2009 at village Gadaipura Gwalior, inter alia attended by Ramwati, wife of the deceased and Sunil PW-2 son of the deceased, alongwith two appellants herein and the 3rd acquitted accused Suresh Singh, a dispute/altercation arose between the deceased and the three accused (two appellants herein and acquitted accused Suresh Singh) about the choice of the proposed bridegroom. The arguments continued for nearly 2 hours whereafter two appellants and the

acquitted accused took the deceased to a secluded place behind the venue of the marriage ceremony. The accused and the deceased were followed by sole eye-witness PW-1 Bando alias Pohap (brother of the deceased). The said eye-witness who is also the complainant, witnessed the incident where all the three accused pushed the deceased on the ground, whereafter the acquitted accused Suresh Singh pinned the deceased down to prevent him from running away while the appellants herein assaulted the deceased on the head with stone. On the accused seeing PW-1 witnessing the assault, they ran away from the spot. When PW-1 raised hue and cry PW-2 Sunil, son of the deceased, PW-3 Dinesh (nephew of the deceased) and Atar Singh came to the spot. The deceased was taken in injured state in auto to a govt. hospital where he was declared brought dead. FIR Ex.P/1 was lodged by complainant, PW-1 in the intervening night of 22nd and 23rd April, 2009.

3. After completion of investigation charge sheet was filed against appellants before the court of competent criminal jurisdiction from where the case was committed to the Court of Sessions. The learned trial Judge framed charges for offences punishable u/S. 302 and in alternative 302/34 IPC against the appellants and acquitted accused Suresh Singh to which they pleaded not guilty and claimed trial

3.1 In support of it's case the prosecution examined as many as 8 witnesses, namely, Bando @ Pohap (eye-witness and brother of deceased), PW-2 Sunil son of the deceased, PW-3 Dinesh (nephew of the deceased), PW-4 Mukesh (one of the witnesses to the seizure of stone) PW-5 Aradhana Devis, the Investigating Officer, PW-6 Balkishan (seizure witness), PW-7 Kalli (seizure witness) and PW-8 Dr. J.N.Soni, autopsy doctor before the court.

3.2 The accused appellants u/S. 313 Cr.P.C. pleaded false implication. However, no witness was examined in defence.

3.3 After hearing the learned counsel for the rival parties and on going through the evidence on record, the trial Court, though acquitted the 3rd accused Suresh Singh but convicted and sentenced the appellants herein for the offence as mentioned above.

3.4 Feeling aggrieved against the judgment of conviction and the order of sentence as mentioned above, the appellants have come in appeal before this Court.

4. Pertinently, the trial court found death of deceased to be homicidal based on ocular evidence of the sole eye-witness PW-1 Bando @ Pohap duly supported by the postmortem report of the deceased Amritlal vide Ex.P/17 which was proved by Dr. J.N.Soni, PW-8, who opined cause of death due to cardio respiratory failure as a result of head injury.

SUBMISSION OF RIVAL PARTIES.

4.1 Learned counsel for the appellants while admitting the death of the deceased

to be homicidal, submits that there is no proof in regard to source of light and therefore possibility of the sole eye-witness PW-1 witnessing the incident which took place around 1-2 o'clock in the morning, is negligible thereby rendering the prosecution case doubtful and thus it would not be safe to sustain conviction solely on the testimony of single eye-witness PW-1 who is real brother of the deceased and thus an interested witness.

4.2 It is further submitted that the site map Ex.P/3 is not only sketchy but wanting in material aspects and thus is of no avail to the prosecution. It is also submitted that though vide seizure memo Ex.P/8 the blood stained rounded stone was seized from the spot but there is no evidence to disclose the approximate size and weight of the stone in the absence of which the possibility of the stone which was used as the weapon, being small and light in weight cannot be ruled out thereby evaporating the element of intention and reinforcing the possibility of mere intention of causing bodily injury. It is further submitted that as per prosecution case the stone so recovered had blood stains but the same was not subjected to chemical analysis. Learned counsel for the appellants has relied upon the decision of Apex Court in *Dayanand Vs. State of Haryana* reported in 2008 (15) SCC 717.

5. On the contrary, learned Public Prosecutor for the State supported the finding of conviction and submitted that even sole eye-witness whose evidence is corroborated by medical evidence and could not be discredited by defence, is good enough to sustain the impugned conviction. It is further submitted that the FIR Ex.P/1 clearly disclosed that there was a lighted bulb at the temple situated close to the place of incident and since PW-1 knew the deceased and as well as the assailants since beginning, it would not be difficult for PW-1 to have recognized the accused while assaulting the deceased.

CONSIDERATION.

6. After having heard learned counsel for the rival parties and perused the impugned findings and judgment of conviction and sentence rendered by the trial court, this court is of the considered view that the present is a fit case where the conviction u/S. 302 in the alternative 302/34 IPC deserves to be converted into one u/S. 304 part-I IPC for the reasons infra:

6.1 The sole eye-witness PW-1 Bando @ Pohap who is real brother of the deceased testified that during the marriage ceremony the dispute between the appellants, acquitted accused and the deceased took place on the issue of choice of the bridegroom which continued for a considerable period of time whereafter all the three accused took the deceased to a place slightly away from the venue of the marriage ceremony where they assaulted the deceased on the head with stone. PW-1 expressed ignorance when inquired about the omission in his previous statement of the factum of argument/altercation between the deceased and the accused. This witness further deposed that he saw the incident of assault from a distance of 100 steps. PW-1 further testified that he had seen 3 injuries

sustained by the deceased on the head out of which one each was attributed to appellants while in regard to the 3rd PW-1 disclosed that the same was sustained by the deceased due to falling on the ground This witness denies the suggestion that he was not present at the scene of the crime.

6.2 Since PW-2 & PW-3 had arrived at the scene after the incident had taken place, discussing their testimony would be an exercise in futility.

6.3 Coming to the medical evidence in shape of testimony of Dr. J.N.Soni who prepared postmortem report Ex.P/17 disclosed 4 antemortem injuries out of which 3 were lacerated injuries on the head and were skin deep while 4th one was an abrasion sustained near the left rib. The injuries were opined to be caused by hard and blunt object. The nature of injuries on the head were described to be sufficient to cause death.

6.4 The autopsy doctor has admitted that he was not shown the weapon with which injuries were caused. The fracture of skull bone was testified to be the result of cumulative effect of all the three injuries on the head. In concluding part of his testimony the autopsy doctor disclosed that if deceased was lying in a supine position on his back then the injury found on the middle of the skull cannot be caused by hitting a stone from above. The doctor also disclosed that the injuries could have been caused by lathi.

6.5 The cumulative effect of oral evidence of eye-witness PW-1 and the medical evidence in shape of statement of PW-8 Dr. J.N. Soni makes it clear that since eye-witness saw each of the two appellants causing one single blow on the head of the deceased with stone and 3rd injury on the head of the deceased is attributed by PW-1 to the act of deceased falling on the ground it can safely be concluded that each of the two appellants has inflicted single blow on the head of the deceased.

6.6 The nature of the two injuries sustained by deceased on the head which are specifically attributed to the appellants, is such which in all probability were inflicted with such force and intensity that they resulted in fracture of the skull.

6.7 Another aspect which deserves consideration is the absence of proof of the size and weight of the stone which is said to be the weapon used by the appellants to cause the fatal injury. Neither in the seizure memo nor in testimony of any of the witnesses the size and weight of the stone used in the assault are proved. In this view of the matter the possibility of the stone used by the appellants to execute the assault being small and light in weight cannot be ruled out.

6.8 So far as the contention of the defence of absence of proof of source of light is concerned, the same deserves outright rejection on the ground that FIR Ex.P/1 and as well as PW-1 have stated that there was lighted bulb in the temple situated in close proximity to the place of incident and since the deceased and assailants were well known to the sole eye-witness PW-1, the possibility of the

PW-1 being unable to recognize the appellants during the assault gets eliminated especially when there is absence of any suggestion by the defence to either of the witnesses regarding absence of source of light being a disabling factor for the sole eye-witness PW-1 to witness the incident.

6.9 More so, the argument and altercation between the deceased and the appellants is said to have continued for nearly 2 hours, whereafter the appellants took the deceased behind the venue of the marriage ceremony and caused the fatal injury. In this view of the matter, the possibility of the assault having been committed in passions stirred by the 2 hour long argument/altercation cannot be ruled out. There is nothing on record to reveal the exact time gap between the end of the 2 hour long argument/altercation and the incident and therefore the incident having taken place close on heels to the 2 hour long argument/altercation gives rise to the probable hypothesis that the heat of passion generated by the 2 hour long altercation continued to overpower the appellants till the incident took place. Thus, the incident possibly was the end result of the foundational transaction of 2 hour long argument/altercation. Thus, Exception 4 to Sec. 300 IPC appears to be attracted where murder is committed without premeditation in a sudden fight in the heat of passion and without the appellants having taken undue advantage or acted in a cruel or unusual manner.

6.10 Once it is held that Exception 4 to Sec. 300 IPC is applicable to the facts and circumstances, the intensity of element of intention gets diluted, thereby taking this case out of the purview of definition of "murder" u/S. 300 IPC and thus as a necessary consequence falling squarely within purview of culpable homicide not amounting to murder punishable u/S. 304 IPC.

7. The next question which falls for consideration is as to whether the act committed by the appellants would fall in Part-I or Part-II of Sec. 304 IPC ?

7.1 In *Laxminath Vs. State of Chhattisgarh* (AIR 2009 SC 1383), Apex court held:-

"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 recognizes 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."

7.2 Similarly in *A. Maharaja Vs. State of Tamilnadu* (2009 Cr.L.J. 315), Apex

court held :

"8. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. 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 1. 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's 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. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the 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 the verbal altercation in the beginning. A fight is a combat between two and 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. 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 expression 'undue advantage' as used in the provision means 'unfair advantage.'"

7.3 In the instant case the act of appellants to take the deceased away from the venue of the marriage ceremony to a secluded place and assaulting him with stone, though with single blow inflicted once each by the two appellants, reveals their intention of terminating life of the deceased and also their knowledge that

assault was done with such intensity where the injuries sustained reveal fracture of the skull bone reflecting that the assault was made with great force. But since only a single blow was inflicted by each appellant with no attempt to repeat the blow, the element of intention to cause death gets evaporated leaving behind only intention and knowledge to cause such bodily injury in the extended heat of passion, which is likely to cause death. The appellants can also be attributed with necessary presumptive knowledge that the injury caused by them in all probabilities can cause death. Consequently, the element of intention and as well as knowledge was present while executing the crime in question by the appellants and therefore in the considered opinion of this court it is proved beyond reasonable doubt that the appellants have committed the offence of culpable homicide without premeditation in a sudden fight and in the heat of passion, which is an offence punishable u/S. 304 Part-I IPC.

7.4 Another extenuating aspect which deserves consideration is the medical evidence vide testimony of PW-8 Dr. J.N.Soni opining cause of death to be cumulative effect of both the injuries inflicted one each by the two appellants. Pertinently there is total absence of evidence to indicate that the fracture of the skull bone could have been caused alone by only one of the two injuries on the head thereby giving rise to the possibility that the fatal injury could not be caused by only one of the two injuries. Thus since each of the appellants is attributed with only one of the two injuries on the head, the act of single blow by any of the appellants could not have caused death. However, since common object u/S. 34 IPC to cause two bodily injuries which put together were sufficient to cause death, is alleged and established the aforesaid extenuating aspect cannot bring the overt acts of appellants out of the trapping of Sec. 304 IPC.

8. In the backdrop of the facts and the evidence available on record, we are thus unable to maintain the conviction of appellants u/S. 302 IPC. The appropriate offence found proved against the appellants is u/s. 304 Part-I IPC.

8.1 So far as sentence is concerned, looking to the gamut of facts and circumstances, in the absence of any previous criminal antecedents, rigorous imprisonment of 10 years to both the appellants would suffice.

8.2 Accordingly, the present appeal stands allowed in part to the extent indicated below:-

(i) The conviction of both the appellants is altered from u/S. 302 IPC in the alternative 302/34 IPC to that u/s. 304 Part I IPC by reducing the sentence from life imprisonment to 10 years' R.I. with fine of Rs. 1,000/- with default punishment, as directed by the trial court.

(ii) If the appellants have suffered the modified sentence awarded under the judgment by this court, they be released forthwith if not required in any other criminal case.

9. Subject to above modification in conviction and sentence of the appellants, the

instant appeal stands allowed in part.

10. Let the Lower Court's Record be sent back alongwith copy of this judgment for information.