

(2011) 02 BOM CK 0164
In the Bombay High Court
Case No : Criminal Appeal No. 996 of 2004

Hasan Mohamed Kadar Badshah	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 307

Citation : (2012) BomCR(Cri) 285

Hon'ble Judges : A.R. Joshi, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Nitin Sejpal and Pooja Bhojne, for the Appellant; H.J. Dedhia, APP, for the Respondent

Judgement

A.R. Joshi, J.—Heard rival submissions on earlier date on the present criminal appeal preferred by the sole Appellant-accused challenging his conviction for the offence punishable u/s 302 of the Indian Penal Code (IPC).

2. By the order dated 2.7.2004, learned Additional Sessions Judge, Greater Mumbai, convicted the Appellant-accused for the offence punishable u/s 302 of the Indian Penal Code in Sessions Case No. 256 of 2000. Imprisonment for life and fine of Rs. 2,000/-, in default of payment of fine rigorous imprisonment (R.I.) for three months was awarded against the Appellant-accused.

3. Prior to discussing the only submission mentioned in the present appeal as to alter the conviction from the offence punishable u/s 302 of the I.P.C. to the offence u/s 304 Part II of the I.P.C., the case of the prosecution, in appeal-996-04 brief, and certain admitted position can be narrated, as under:

4. Daughter of present Appellant-accused married with the deceased and they had one issue out of the wedlock. Parties reside in the Chitta Camp slum area, in hutments. Due to some family disturbances, the wife of the deceased had started residing with her father, the present Appellant-accused. The marital discord between her and the deceased was not of great magnitude and as such deceased

used to visit her at the house of the Appellant-accused i.e. the house of his father-in-law. Sometime in the evening of 8.12.1999 the deceased attended the house of his in-laws, apparently for taking away his wife and minor child back to his house. There was sort of altercation and hot exchange of words. At that time, being enraged by the conduct of the deceased, as to attempting to take away his wife with minor child, or otherwise threatening to give Talaq, the Appellant-accused took out a kitchen knife and assaulted his son-in-law appeal-996-04 inflicting two blows on his chest and one on the back of the thigh. Apparently, this incident was witnessed by PW No. 1, friend of the deceased and PW No. 7, one Smt Kadarbee Nasir, neighbour of the Appellant. Due to assault, victim sustained severe bleeding injuries. He was taken to Sion Hospital by his friend PW No. 1, who was then on the spot. Apparently, the Appellant-accused left the place after the assault.

5. According to the case of the prosecution, F.I.R. (Exh.8) was lodged by PW No. 1, friend of the deceased, when the deceased was under treatment, then in severely injured condition at Sion Hospital. Initially, offence was registered u/s 307 of the Indian Penal Code. During treatment, in short time, victim succumbed to the injuries. As such, offence was altered to 302 of the Indian Penal Code. Inquest panchnama was drawn. Scene of offence panchnama was also drawn after visiting the house of the Appellant-accused. On the next day, the Appellant-accused was appeal-996-04 put under arrest and his blood stained clothes were taken charge of. On the same day of the arrest, the Appellant-accused volunteered to give statement to produce the knife and as such memorandum panchnama and subsequent discovery panchnama were conducted and one kitchen knife was recovered at the instance of the Appellant-accused.

6. Dead body of the victim was sent for postmortem. Clothes of the victim were taken charge of. Articles seized during the investigation, i.e. the clothes of victim and the Appellant-accused and one kitchen knife seized at the instance of the Appellant-accused and also the blood sample of the Appellant-accused were sent for chemical analysis. After completion of investigation charge-sheet was filed against the Appellant-accused. During the pendency of the Sessions Case, the Appellant-accused was on bail. After his conviction vide judgment and order dated 2.7.2004 he was taken in custody and since then he is in jail till date.

7. In order to ascertain the scope of the present appeal, in view of the only argument advanced on behalf of the Appellant for altering the charge from 302 to 304 Part II of I.P.C. Certain admitted position can be narrated, thus:

(a) The deceased and the Appellant-accused were related to each other, inasmuch as the deceased was son-in-law of the Appellant.

(b) The incident of assault on victim occurred at the place of residence of the Appellant when victim visited his house for taking away his wife, daughter of the Appellant.

(c) There was altercation and hot exchange of words and it was a sudden fight

between two, father-in-law and son-in-law.

(d) In a fit of anger, the Appellant accused brought kitchen knife and stabbed the victim two blows on his chest and one blow on the back of the thigh.

8. Bearing in mind the above admitted position, the only argument advanced on behalf of the Appellant-accused is to be scrutinized. It is submitted by learned Counsel Shri Sejpal for the Appellant that the facts and circumstances of the case will not attract the provisions of Section 300 punishable u/s 302 of the I.P.C. and at the most it can be taken as culpable homicide not amounting to murder, coming under the exception 4 to Section 300 of the I.P.C. To fortify this argument, it is further submitted that on all probabilities considering the specific relation between the parties as to father-in-law and son-in-law, the Appellant would never intend to kill his son-in-law and make his own daughter a widow. It is further argued that at the most a knowledge may be attributed to the Appellant as to the assault inflicted by him on the deceased would likely to cause death or to cause such bodily injury as is likely to cause death. It is further argued that though such knowledge can be attributed to the Appellant, there was no intention to cause death.

9. In support of the above submissions ratio propounded by the following authority was taken shelter of on behalf of the Appellant-accused.

Surinder Kumar Vs. Union Territory, Chandigarh,

The observations of the Apex Court in the above authority contained in paragraph Nos. 6 and 7 can be reproduced with advantage.

6) Exception 4 to Section 300 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.

7) To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight ; (ii) there was no premeditation ; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly....

10. Bearing in mind the observations of the Apex Court in paragraph No. 7)

above, in our considered view, it is a case where ingredients of Exception 4 are squarely attracted.

11. Counter to the above argument, learned A.P.P. placed reliance on the ratio propounded in the case of Ramvir and Ors. v. State of Uttar Pradesh, reported in (2009) 15 appeal -1996 4 SCC 254. It is submitted on behalf of the State that the injury caused by the Appellant to the deceased on his chest clearly establish his intention and knowledge to kill the deceased. We have gone through the above cited authority. It must be said that the facts of the present matter at hand can be distinguished from the facts of the said case before the Apex Court, inasmuch as there was premeditated assault on the victim in that matter by three persons and the knife blow inflicted by one accused had pierced through the chest and also the lungs. Insofar the present matter is concerned, definitely there was no premeditation as victim himself attended the house of the Appellant and tried to take away his wife, daughter of the Appellant, and gave threat of giving Talaq, if she was not allowed to accompany him. Secondly, in the present matter, there was a sudden fight when there was hot exchange of words and in a heat of passion, as fortified by PW 1, the Appellant took out a kitchen apeal-996-04 knife and stabbed the victim. Thirdly, it cannot be said that the Appellant had taken undue advantage and acted in cruel or unusual manner. While observing this, we are aware of the factual position that the victim was taken to the hospital alone by PW No. 1, his friend, the first informant. This aspect was much emphasized by the learned A.P.P. for furthering the argument that had the Appellant not intended to kill his son-in-law, he would have remained on the spot and would have assisted in taking the victim to the hospital. This argument needs to be discussed in the light of the argument advanced on behalf of the Appellant as under.

12. On the above aspects, it is argued on behalf of the Appellant-accused that the conduct of the accused was quite natural after the assault considering that in the fit of rage he had assaulted his son-in-law and as such out of fear he did not remain on the spot. In other words, it is argued that the conduct apeal-996-04 of the Appellant-accused cannot be taken as an unusual or abnormal so as to consider it as cruel or unusual way. It is further argued that such conduct of the Appellant-accused cannot be construed to arrive at the finding that he had taken undue advantage of the situation and acted in a cruel manner. On this aspect, it must be taken into account that the Appellant-accused was not absconding and was immediately arrested and taken into custody by the police. In our considered view, considering the above factual position, the argument advanced by the learned A.P.P. cannot be accepted.

13. In view of the above discussion, at the cost of repetition, it is said that the present matter comes under Exception - 4 to Section 300 of the I.P.C. and as such the offence is required to be altered from Section 302 to punishable u/s 304 Part II of the I.P.C.

14. It is common ground that during the pendency of Sessions case, the

Appellant accused was on bail and after conviction he was taken in custody on 2.7.2004. Considering his custody till today and considering the alteration of charge from offence u/s 302 to offence u/s 304 Part II, following punishment would meet the ends of justice. Hence, order.

ORDER:

(a) Present appeal is partly allowed. Conviction of the Appellant-accused for the offence punishable u/s 302 of the Indian Penal Code is altered to the conviction u/s 304 Part II of the I.P.C. and instead sentencing for life imprisonment, he is sentenced to suffer R.I. for 10 (Ten) years.

(b) Set off be given to the Appellant/accused for the period he is in custody since his arrest.

(c) The sentence of fine Rs. 2,000/-and in default R.I. for three months awarded by the Sessions Court is maintained.

(d) Appeal is accordingly disposed of.