
(2019) 01 MP CK 0052
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 1389 Of 2008

Irfana @ Hira

APPELLANT

Vs

State Of M.P. through P.S. Barwaha, District Khargone

RESPONDENT

Date of Decision : 31-01-2019

Acts Referred:

Arms Act, 1959 — Section 25, 25(1)(b), 27
Indian Penal Code, 1860 — Section 34, 300, 302, 304I, 304II

Citation : (2019) 01 MP CK 0052

Hon'ble Judges : Prakash Shrivastava, J; Vivek Rusia, J

Bench : Division Bench

Advocate : Vivek Singh, Vivek Patwa

Final Decision : Partly Allowed

Judgement

The appellant has filed the present appeal being aggrieved by judgment dated 15.11.2008 passed by Additional Sessions Judge, Barwaha, District West Nimar in S.T. No.28/2008, whereby she has been convicted u/s. 302 of IPC and u/s. 25 read with Section 27 of Arms Act and sentenced to undergo life imprisonment and to pay a fine of Rs.100/-; 3 years & 7 years' imprisonment with fine of Rs.100-100/- respectively with default stipulation.

2. As per prosecution story, complainant lodged the FIR on 20.12.2007 that she came to her maternal house at Barwaha and her deceased brother viz. Sheikh Mukhitiyar used to live in the nearby house. At nearabout 4.30 pm. of 20.12.2007 upon hearing the sound of gun fire, she reached to the house of Sheikh Mukhitiyar and saw that the accused who is wife of Sheikh Mukhitiyar was coming out of the house with a 12 bore gun in her hand and told that today she has fired the gunshot on her husband. She immediately rushed inside the house and saw that Sheikh Mukhitiyar was lying with a gunshot injury on his back. She along with Mohd. Shakir took the injured to the hospital where he was declared dead. A criminal case was registered under Crime No.465/2007 for the offence u/s. 302 of IPC and taken up for investigation. Statement of witnesses were

recorded and after completing the usual investigation, challan for the charges u/s. 302 of IPC and u/s. 25(1)(b) read with Section 27 of Arms Act was filed before the competent Court.

3. The appellant accused pleaded that the complainant viz. Shabnam with an intention to grab the property of her husband, has falsely implicated her in this case. She abjured the guilt and pleaded for trial.

4. In order to prove the charges against appellant, the prosecution examined as many as 18 witnesses. After appreciating the evidence, learned trial Court vide impugned judgment dated 15.11.2008 has recorded the finding that the deceased died due to the gunshot injury. As there is no eye-witness to the incident, learned trial Court on the basis of circumstantial evidence supported by the statements of complainant has recorded the findings of conviction u/s. 302 of IPC and u/s. 25 read with Section 27 of the Arms Act and sentenced the appellant, as stated above.

5. Being aggrieved by the aforesaid judgment, the appellant has preferred the present appeal.

6. Shri Vivek Singh, learned counsel appearing for the appellant submitted that the appellant was falsely implicated by the complainant - Shabnam. All the other witnesses have turned hostile and the statement of the complainant has not been supported by any other witnesses. There is no eye-witness in the case. There is omission and contradiction in the statement of complainant. The prosecution has failed to prove the motive behind the said murder. As per the statement of father of the deceased, his son and daughter-in-law used to live happily and there was no dispute between them. From the ballistic report it has not been found proved that when the gun was used. The deceased Sheikh Mukhitiyar was having valid license of the said gun, hence, the appellant is entitled for acquittal. In alternate, he submitted that at the most, appellant ought to have been convicted u/s. 304 Part II of IPC as the incident might have been held due to sudden provocation.

7. On the other hand, Shri Vivek Patwa, learned Govt. Advocate appearing for the respondent/State, has argued in support of the impugned judgment of conviction by submitting that the complainant saw the accused coming out from the house with a gun and she herself confessed that she has murdered her husband. The complainant immediately rushed inside the house and saw that Sheikh Mukhitiyar was lying with a gunshot injury on his back. The Doctor had given a definite opinion that the deceased died because of gunshot injury and as per ballistic report, the 12 bore gun was found in working condition and Nitrite was also found which has clearly established that the gun was used in the said incident. The accused has failed to establish that the complainant has falsely implicated her for the purposes of grabbing the property of the deceased, hence, no case for interference is made out and the appeal is liable to be dismissed.

8. We have heard the rival submissions of learned counsel appearing for the

parties and perused the record.

9. So far as cause of death of deceased is concerned, as per the evidence of Dr. M.S. Sulya (P.W.9), who conducted autopsy on the body of deceased that he died due to the gunshot injury. Since, there is no challenge to the said finding recorded by the trial Court, hence there is no need to reappreciate the same. Thus, the finding recorded by the learned trial Court in respect of cause of death of the deceased is hereby upheld.

10. The entire prosecution story is based on the statement of complainant - Shabnam (P.W.13) and according to her statement, after hearing the sound of gun fire, she immediately came out and saw that the appellant coming out of her house with a gun and said that today she has killed her brother, then she did not enter inside the house, but called the neighbours and the appellant pointed the gun towards them. Thereafter, they all went inside the house and by that time, Sheikh Mukhitiyar has died. They took the deceased to the hospital in hand-cart. In cross-examination, the complainant admitted that the marriage of Sheikh Mukhitiyar with the complainant took place 8-10 years back and they have three children and before the incident, Sheikh Mukhitiyar sent his children to the house of their grand mother. Sheikh Mukhitiyar was having enmity with number of persons. He was in the job at Petrol Pump where someone has died from his gun. After the incident, Mohd. Manjur, Sabir, Saiyed Gulab, Sakhawat and Asmat came there and thereafter, the accused ran away.

11. P.W.1 - Mohd. Ali turned hostile because he has said that he is not aware as to how Sheikh Mukhitiyar has died. Likewise, P.W.2 - Shabir; P.W.3 - Saiyed; P.W.4 - Sakhawat Ali have also been turned hostile and did not support the prosecution story. P.W.8 - Shabir S/o. Sadik has denied to the extent that he does not know the complainant as well as deceased hence, he has also been declared hostile. P.W.12 - Babu Shikari, the father of the deceased, has only confirmed that he heard the sound of gunshot and told Shabnam to see as to what happened. Thereafter, she informed that the appellant told her that she has killed Sheikh Mukhitiyar, but he has admitted that his son and daughter-in-law used to live happily, thus he was also declared as hostile. P.W.14 - Maksood Ali has also been declared as hostile as he has shown ignorance as to who has fired gunshot upon Sheikh Mukhitiyar. P.W.15 - Mastaan has also been turned hostile. The prosecution examined Ferzanabi as P.W.17 who is wife of elder brother of the deceased, who also heard the sound of gunshot and came out from the house and saw that the accused was carrying a gun and she herself confessed that she has killed her husband, but she is not confident about her statement as in the cross-examination, she has admitted that she did not see the incident. To some extent, P.W.17 has supported the complainant - Shabnam (P.W.1). All other witnesses have turned hostile. But, the prosecution has also failed to prove the motive behind the said murder and even the aforesaid two witnesses have not disclosed as to why the appellant has killed her husband. The father of the deceased - Babu Shikari (P.W.12) has deposed that the accused and his son used

to live happily and all other witnesses examined by the prosecution who are resident of same locality, have not stated about any dispute between the husband and wife. Therefore, at the most, it can be a case of sudden provocation and out of which, the accused has fired gunshot towards her husband from his own gun and due to which, he died.

12. In view of the submissions of the appellant, first we have a look at the law laid down in the field. In *Annamalai Vs. State* : 2016 CRI.L.J. 2727, the Division Bench of Madras High Court has considered the mitigating circumstances and has held in para-13 of the judgement as under:-

"Now turning to the punishment, the accused is the sole bread winner of the family. He has got three brothers. He has got a big family to take care. He has no bad antecedents. After the occurrence also, it is not reported that he was involved in any other crime. Further, there are lot of chances for reformation. So far as the aggravating circumstances are concerned, there was no premeditation for the accused to commit the murder of the deceased. Having regard to these mitigating as well as aggravating circumstances, we are of the view that sentencing the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- would meet the ends of justice."

13. In *Chand Khan Vs. State of M.P.* reported in 2006(3) M.P.L.J. 549, the Division Bench of this Court has also converted the conviction of the appellant in attaining facts and circumstances of the case. Para -10 & 11 of the judgment are relevant which reads thus:-

"10. If the present case is considered in the light of the aforesaid decisions of the Supreme Court, it would show that the appellants caused single injury on the head of the deceased by farsa, which is a sharp edged weapon, but unfortunately Aziz Khan (PW-11) and Ishaq Khan (PW-13) have stated that he gave lathi blow on the head of the deceased. Even after considering this contradictory evidence it has to be taken into consideration that it is a case of single farsa blow inflicted by only appellant Chandkhan and appellant Naseem inflicted only lathi blow on the nonvital part of the body and in the absence of this evidence that the injury no.(i) was sufficient to cause death in the ordinary course of nature and also looking to the various other circumstances like that the accused as well as the deceased are close relatives and the deceased was a person of criminal background and the incident started because of the abuses made first by the deceased himself, we find that the case will not fall within the purview of section 300, Indian Penal Code but it will fall under section 304 Part II, culpable homicide not amounting to murder.

11. consequently, appeal is partly allowed. Conviction of appellants under section 302/34 Indian Penal Code, is set aside and instead they are convicted under section 304 part II, Indian Penal Code, "

14. The Hon'ble Supreme Court has held in *Gurpal Singh v. State of Punjab*, AIR 2017 SC 471. Para 10 of the judgement reads thus:

"10. However, in the singular facts of the case and noticing in particular, the progression of events culminating in the tragic incident, we are inclined to reduce the sentence awarded to him. Incidentally, the occurrence is of the year 2004 and meanwhile twelve years have elapsed. Further, having regard to the root cause of the incident and the events that sequentially unfolded thereafter, we are of the comprehension that the appellant was overpowered by an uncontrollable fit of anger so much so that he was deprived of his power of self-control and being drawn in a web of action reflexes, fired at the deceased and the injured, who were within his sight. The facts do not commend to conclude that the appellant had the intention of eliminating any one of those fired at, though he had the knowledge of the likely fatal consequences thereof. Be that as it may, on an overall consideration of the fact situation and also the time lag in between, we are of the view that the conviction of the appellant ought to be moderated to one under Sections 304 Part 1 IPC and 307 IPC. Further, considering the facts of the case in particular, according to us, it would meet the ends of justice, if the sentence for the offences is reduced to the period already undergone. We order accordingly."

15. The Hon'ble Supreme Court held in *Arjun and Anr. Vs. State of Chhattisgarh*, AIR 2017 SC 1150 that :

"19. The point falling for consideration is whether the conviction of the appellants under Section 302 IPC is sustainable. As discussed earlier, the evidence clearly establishes that while Ayodhya Prasad and other witnesses were cutting the trees, there was exchange of words which resulted in altercation and during the said altercation, the appellants attacked the deceased. Thus, the incident occurred due to a sudden fight which, in our view, falls under exception (4) of Section 300 IPC.

20. To invoke this exception (4), the requirements that are to be fulfilled have been laid down by this Court in *Surinder Kumar v. Union Territory of Chandigarh* (1989) 2 SCC 217 : (AIR 1989 SC 1094, Para 6), it has been explained as under:

"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....."

21. Further in the case of *Arumugam v. State*, Represented by Inspector of Police,

Tamil Nadu, (2008) 15 SCC 590 : (AIR 2009 SC 331, Para 15), in support of the proposition of law that under what circumstances exception (4) to Section 300 IPC can be invoked if death is caused, it has been explained as under:

"9.

"18. 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 Penal Code, 1860. 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 had 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'."

16. The Hon'ble Supreme Court has laid down in *Prabhakar Vithal Gholve v. State of Maharashtra*, AIR 2016 SC 2292 that if assault on deceased could be said to be on account of sudden fight without pre-meditation, in heat of passion and upon a sudden quarrel, Conviction of the appellant cannot be sustained under S. 302 and altered to one under Section 304 part-I of IPC. Relevant para 7 of the judgement reads thus:

"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 pre-meditation, 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. The certificate of imprisonment available on record discloses that the appellant has by now undergone more than 12 years of actual imprisonment. The aforesaid period, in our estimate is sufficient to meet the ends of justice. Hence the sentence of

imprisonment for life is reduced to imprisonment for the period already undergone by the appellant. In view of such modification in the sentence, the appellant is directed to be released from custody forthwith if not required to be kept in custody in connection with any other criminal case. The appeal stands allowed to the aforesaid extent."

17. In *Sikandar Ali Vs. State of Maharashtra*, AIR 2017 SC 2614, the Court altered the conviction u/s 302 IPC to one u/s 304 part-2 IPC in the following circumstances:

"7. We have no doubt about the complicity of all the accused in the homicide of Sarfraj. A-1 attacked the deceased with the knife and caused injury on his neck which resulted in his death. The other accused assisted him in committing the crime by holding the hands of the deceased. However, the only question that falls for our consideration is whether the accused are liable to be punished for an offence under Section 302 IPC. After considering the submissions made by the counsel for the Appellants and scrutinising the material on record, we are of the opinion that the accused are not liable to be convicted under Section 302 IPC. We are convinced that there was neither prior concert nor common intention to commit a murder. During the course of their business activity the accused reached the dhaba where the deceased was present. An altercation took place during the discussion they were having behind the dhaba. That led to a sudden fight during which A-1 attacked the deceased with a knife. Exception 4 to Section 300 is applicable to the facts of this case. As we are convinced that the accused are responsible for the death of Sarfraj, we are of the opinion that they are liable for conviction under Section 304 part II of the IPC. We are informed that A-1 has undergone a sentence of seven years and that A-2 to A-4 have undergone four years of imprisonment. We modify the judgment of the High Court converting the conviction of the accused from Section 302 to Section 304 part II of the IPC sentencing them to the period already undergone. They shall be released forthwith."

18. The Hon'ble Apex Court laid down in *Madhavan and Ors. Vs. State of Tamil Nadu*, AIR 2017 SC 3847 that:

"8. Notably, the High Court has not considered the issue of quantum of sentence at all, but mechanically proceeded to affirm the sentence awarded by the Trial Court. From the factual position, which has emerged from the record, it is noticed that there was a preexisting property dispute between the two families. The incident in question happened all of a sudden without any premeditation after PW1 questioned the appellants about their behaviour. It was a free fight between the two family members. Both sides suffered injuries during the altercation. The fatal injury caused to Periyasamy was by the use of thadi (wooden log) which was easily available on the spot. The appellants, on their own, immediately reported the matter to the local police alleging that the complainant party was the aggressor. No antecedent or involvement in any other criminal case has been reported against the appellants. Taking oral view of the

matter, therefore, we find force in the argument of the appellants that the quantum of sentence is excessive.

9. We may usefully refer to the decision of this Court (one of us, Justice Dipak Misra speaking for the Court) in the case of *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545 : (AIR 2013 SC 3048) enunciated the necessity to adhere to the principle of proportionality in sentencing policy. In paragraphs 18 and 19 of the said decision, the Court observed thus:

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated here-in-before and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A Court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty

of Court in such situations becomes a complex one. The same has to be performed with due reverence for Rule of the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion."

10. Considering the above and keeping in mind the facts of the present case, the nature of the crime, subsequent conduct of the appellants, the nature of weapon used and all other attending circumstances and the relevant facts including that no subsequent untoward incident has been reported against the appellants and the mitigating circumstances, we are inclined to modify the sentence period in the following terms:-"

19. In view of the foregoing discussion, this appeal stands partly allowed and the impugned judgment is modified. The appellant is convicted for the offence u/s. 304 Part II of IPC instead of Section 302 of IPC and sentenced to undergo 10 years' jail sentence and to pay a fine of Rs.2,000/- (Two Thousand). As the appellant has already completed the jail sentence of 10 years, she be released forthwith subject to payment of enhanced fine amount.