
(2018) 03 MP CK 0157

In the Madhya Pradesh High Court

Case No : CR.A. NO.1045, 1293 OF 2007

Jogi S/O Gangu Damar Bhil & Anr

APPELLANT

Vs

State Of Madhya pradesh

RESPONDENT

Date of Decision : 27-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 294, 300, 302, 304II, 323, 325, 506
Indian Evidence Act, 1872 — Section 27

Citation : (2018) 03 MP CK 0157

Hon'ble Judges : VIRENDER SINGH, J;S.C. SHARMA, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. Both these appeals have arrived out from two separate judgments dated 12/09/2007 and 09/10/2007, passed in same Sessions Trial No.287/06 of

Sessions Court, Jhabua arising out of the same Crime No.1018/06 of Police StationKakanwani, therefore, they were heard analogously and are being

decided by this common judgment.

2. In Session Trial No.287/06, the trial of all the accused persons namely, Jogi, Janu and Saklu was completed together but at the time of examination

of accused, appellant Saklu remained absent and declared absconding, therefore the judgment was passed against remaining accused Jogi and Janu.

Later, after arrest of Saklu, a separate judgment was passed against him on 09/10/2007.

3. In both the Sessions Trial, all three appellants have been held guilty for the offence under Section 302/34 of IPC for causing death of Pema Damor

and awarded life imprisonment and fine of Rs.250/- each and in default, further to undergo 3 months imprisonment. In addition to that, the appellant

Saklu has been held guilty for the offence under Sections 325 & 323 of IPC for causing grievous hurt to Ramesh and simple injury to Santa Bai and

the appellant Janu has been held guilty for the offence under Section 323 of the IPC for causing simple injury to Sanju. Appellant Saklu is awarded 3

months imprisonment and fine of Rs.100/- for the offence under Section 325 of IPC, in default 15 days additional imprisonment and fine of Rs.500/-

for the offence under Section 323 of the IPC, in default 3 months additional imprisonment. Fine of Rs.500/- and in default, 3 months imprisonment was

imposed on the appellant Janu Bhil for the offence under Section 323 of the IPC. All the jail sentences are directed to run concurrently.

4. The prosecution case in brief is that daughter of Saklu was died prior to 1 year of the incident due to some disease but Saklu was suspecting that

she was died due to witchcraft practices played by Santa Bai. He was suspecting that she is a witch. On 13/09/2006 at about 6 in the evening, when

Santa Bai and her husband Pema Bhil were lying in their courtyard, Saklu along with Jogi and Janu came there having lathis in their hands and

started abusing her. Her husband objected for the same and asked them not to do so but they suddenly assaulted him. Frightened by the sudden attack,

they ran into their house but following them, all three assailants also came inside. Saklu gave Lathi blows on Santabai, which caused injuries on her

occipital and right temporal region of head and near to right elbow. Jogi and Janu gave Lathi blows to her husband, who sustained injury on occipital

region of head, left eye, left side of skull and on back and thighs. Her brother-in-law Ramesh and nephew Sanju intervened, then Saklu gave a Lathi

blow on the back, skull and chin of Ramesh. Janu gave Lathi blows on both arms and left wrist to nephew Sanju. Her father-in-law Kunja, sister-in-

law (nanand) Sabu, sister-in-law (devrani) Mikli reached there and have seen the incident. The accused fled from the spot. After arranging

conveyance, she reached police station and filed FIR at 23:45 on the same day.

5. The police registered Crime No.100/06 under Sections 294, 323, 506, 34 of IPC against all the appellants. Pema died during investigation, therefore,

the Police added Section 302 of IPC, issued notice to the witnesses, prepared memo of corpse (Ex.P/2 & P/3), prepared spot map (Ex.P/4), arrested

the accused (Ex.P/5, P/6, P/7), interrogated them, recorded their statements under Section 27 of the Evidence Act (Ex.P/8, P/9 & P/10), recovered

and seized Lathis from their possession (Ex.P/12, P/13 & P/14), seized blood stained and plain soil from the spot (Ex.P/11) and sent these Lathis and other articles seized during investigation for FSL examination (Ex.P/15), requested the doctor for postmortem of the deceased and obtained postmortem report (Ex.P/17 & P/18). Sent the injured Saintabai, Ramesh and Sanju for treatment and received report Ex.P/19, P/20 & P/21, raised query to the doctor as to whether the injuries found on the injured can be caused by the Lathi seized from the accused persons (Ex.P/23) which was replied positive by the doctor. After completing the investigation, the Police filed charge-sheet.

6. The accused were charged under Section 302, in alternate 302/34 of IPC. Accused/appellant Saklu and Janu were also charged under Section 325

& 323 of IPC. They abjured their guilt and claimed for trial. After the trial the learned trial Court held them guilty and awarded punishment as stated

in para 3 above.

7. All the three appellants have presented these two separate appeals on various grounds stating that the judgment and order passed by the learned

trial Court is contrary to the law and facts available on record. The learned trial Court committed error in not considering the material omissions and

contradictions appeared in the statement of prosecution witnesses and also in discarding defence version. Findings of the learned trial Court are

erroneous in the eyes of law. There is no evidence of preparation, intention or pre-meditation. Learned trial Court did not consider that the prosecution

could not produce convincing evidence. Learned trial Court has drawn unwarranted inferences.Â Therefore, the judgment is neither legal nor proper

or correct, but during arguments learned counsel appearing for all the three appellants has submitted that he does not want to press merits of the

appeals. He submitted that he only wants to argue on the fact that the offence alleged and found proved against the appellants falls under Section 304

Part-II of IPC and not under Section 302/34 of IPC as held by the trial Court.

8. Learned counsel further submitted that all the parties belong to Bhil community, who are very much superstitious or believe in superstitions. There

was no old enmity of any type between the parties. The appellants were not having any deadly weapon. There was no motive or object to commit

murder. Their intention was not to kill the deceased. Saklu has not inflicted any

blow of Lathi to the deceased. Jogi and Janu were having no personal grudge against Pema or his wife. Injuries caused to Saintabai were found simple in nature. Saklu was annoyed due to death of her daughter and he was suspecting that she was died due to witchcraft practices played by the complainant Saintabai. He was suspecting that Saintabai was a witch and due to this reason, out of frustration, he went to her house to express her protest, where in a heated spur of movement, he assaulted Saintabai. His intention was not to cause death of her husband Pema Bhil, therefore, their alleged act falls under the purview of Section 304 Part-II of IPC. They may be held guilty for that offence. They have completed more than 10 years of jail sentence, therefore, they may be awarded sentence for the period already undergone.

9. Learned Public Prosecutor has opposed the prayer stating that in furtherance of the common intention of coaccused persons, appellants gave Lathi blows on vital parts of the deceased, which caused the death. Due to act of the appellants, an innocent person has lost his life. The appellants have assaulted the deceased by entering in his house which shows their intention. They were having Lathis and have used them as a weapon of assault and gave blow on the vital parts of the body of the deceased, resulting in his death, therefore, their act is very well covered under Section 302 of IPC and they are not entitled for any leniency.

10. However, learned Public Prosecutor fairly admitted that there is no evidence on record to establish that at the time of the incident, intention of the appellants was to cause death of the deceased. He further admitted that there was no old enmity between the parties and both the parties were belong to Bhil community which are very superstitious and belief in superstitions and witchcraft practices and it is a very common phenomena amongst the Bhils that in case of any mishappening or misfortune, they held witches or hellcats responsible for such mishappening or misfortune.

11. As the learned counsel for the appellants has not contested the merits of the appeal, therefore, we held that at the alleged date, time and place of the incident, the appellants beaten the deceased to death; Saklu also caused grievous injury to Ramesh, simple injury to Saintabai and appellant Janu caused simple injuries to Sanju.

12. Learned counsel for the appellants has not challenged conviction and

sentence of the appellants under Section 325 & 323 of IPC, therefore, we uphold that conviction and sentence passed by the learned trial Court.

13. In view of the submissions of the learned counsel, first we would like to consider the law laid down in this regard. In Annamalai Vs. State reported in 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.”

14. 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 non vital 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, â??

15. 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:

â??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.â??

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

â??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.....

20. 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'.

17. 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.”

18. 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.¶

19. 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-inbefore 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:-â??

20. In view of the law laid down by the Hon'ble Supreme Court, We have considered the rival contention to find out as to whether the act of the

appellants falls under the purview of Section 300 of IPC or under Section 304 Part-II of the IPC as argued by the learned counsel for the appellants.

21. This is not disputed that both the parties in these appeals belong to the Bhil community and it is a fact of common knowledge that Bhil is an under-

developed community and most of them are illiterate and they believe in superstitions. It is a common phenomena in the communityÂ dominated areas

that they practice magic and many other type of witchcrafts to achieve their object whether good or bad. They hold many superstitions responsible for

any misfortune and mishappenings in their life and sometimes they became revengeful for no other reason but for their own doubts that someone is

playing witchcrafts on them or something wrong had been happened in their family or life due to witchcrafts played by someone. Many a time, on the

basis of their suspicion, they declare some woman as a witch and even their Panchayat passes weird/hippocratic orders against them.

22. In the facts of the present case, Saklu was suspecting that his daughter was died due to witchcraft played by Saintu Bai. He went to her home to

show his anger and protest. They abused them and assaulted them only for this reason. There is nothing on record to show any old enmity and nothing

to show brutality. At the time they were not having any deadly weapons and were having only lathis which is very common in the villagers and

particularly in the Bhils. Though a lacerated wound and abrasion were found on the head of the deceased, but both were adjacent to each other as

they were on right parietal and left fronto-parietal region. Nothing is there to show that Saklu inflicted lathi or the other appellants gave any repeated

blow on any vital part of the deceased, who was husband of the complainant. As argued by the learned counsel for the appellants nothing has come in

the evidence to show that the intention, motive or object of the appellants was to kill the deceased. Saklu was angry on a petty and common issue.

Nothing serious was there. The appellants have no criminal history. No brutality appears in the incident, therefore, in our considered opinion the act of

the appellants satisfies the four requirements necessary to invoke the powers 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 assailants had not taken any undue advantage or acted in a cruel manner and therefore and it falls

under Section 304II of IPC. falls under the purview of Section 304 Part-II of the IPC instead of Section 302/34 of the IPC.

23. Consequently, the appeals are partly allowed. So far as the offence of the death of the deceased is concerned, the appellants are held guilty for the

offence under Section 304 Part-II read with Section 34 of the IPC instead of Section 302/34 of the IPC. Considering the nature of the incident, age of

the appellants and other prevailing facts and circumstances of the case, we find that the ends of justice would be subserved by awarding sentence of

imprisonment already undergone, therefore, the appellants are held guilty for the offence under Section 304 part-II of IPC and they are awarded

imprisonment for the period already undergone with fine as awarded by the learned trial Court. Rest of the charges found proved and sentences

awarded by the learned trial Court for those offences are hereby confirmed. Appellants be set at liberty forthwith, if not required in any other case.

24. The order of the trial Court regarding disposal of the property is hereby confirmed.

25. With the aforesaid modification, the appeals are partly allowed and disposed of.