
(2007) 08 GAU CK 0040
In the Gauhati High Court

Md. Isub Ali

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 09-08-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 325
Probation of Offenders Act, 1958 — Section 3

Citation : (2008) CriLJ 100 : (2007) 3 GLT 962

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Judgement

U.B. Saha, J.—Md. Isub Ali, who is an old man in his late sixty's the appellant herein, his wife Esha Bibi and their minor son namely, Nayan Miah being found guilty of murder of Negjan Bibi, the wife and son were convicted for the offence punishable u/s 352, IPC read with Section 34, IPC and Md. Isub Ali was convicted u/s 304, Part II, IPC read with Sections 352 and Section 34, IPC. The wife and son of Isub Ali were released for good conduct in exercise of power conferred upon the Trial Court u/s 3 of the Probation of Offenders Act (for short offenders' Act) after admonition, keeping in mind the fact that the son was under age of 18 years and wife being a woman and the said offence committed by them on the heat of passion. But Md. Isub Ali was not released under the provisions of offenders Act though he prayed for and he was sentenced to suffer R.I. for 5 years and to pay a fine of Rs. 5000/- and in default to suffer further R.I. for one year. It was also ordered that if the fine money is realised Rs. 4000/- should be paid to the husband of the deceased as compensation. Feeling aggrieved by the aforesaid judgment of conviction and sentence dated 7-4-2001 passed by the learned Addl. Sessions Judge, North Tripura, Kailashahar, in case number Sessions Trial 33 (NT/K)/99, the appellant has preferred the instant appeal.

2. I have heard Mr. P.K. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned Counsel appearing for the appellant and also Mr. R.C. Debnath, learned PP i/c Tripura.

3. Sifting out the unnecessary details the prosecution story in brief is as follows:

On 7-2-99 while the younger brother of the complainant Mominul Islam, P.W. 4 was returning home on a bicycle at about 10 a.m. saw a small boy namely, Litan Ali relieving on the road which runs towards their house. Then he told Litan to do the same going into their house. Accordingly the said boy went towards his house. Within a short while P.W. 4, when Mominul Islam reached their house, suddenly the accused Esha Bibi started rebuking the Mominul Islam using filthy language standing inside her own homestead. After hearing the filthy language of Esha Bibi the elder brother of Mominul P.W. 1, the informant Aminul Islam came from their house and asked Esha Bibi why she was rebuking his brother Mominul. At that moment the accused appellant Isub Ali and another accused Nayan Miah came to the side of the accused Esha Bibi and all of them at a time started rebuking the complainant/informant and his brother Mominul using filthy language like "son of swine" and simultaneously started to throw some brickbats towards the informant as well as Mominul. Hearing the noise/quarrel, the deceased Nekjan Bibi, mother of Mominul and Aminul came out from their house and asked both of her sons to come back in their house and while she reached near to them suddenly the accused appellant Isub Ali threw a piece of brickbat to her which hit on her head and due to that she received severe injury and fell down on the earth and became unconscious. Instantly she was taken to RGM Hospital, Kailashahar via Kailashahar Police Station wherein, the medical officer, after examining Nekjan Bibi declared her as dead.

4. The informant Aminul Islam, P.W. 1 son of the deceased Nekjan Bibi lodged complaint to the O/S Kailashahar P.S. on 7-2-99 at about 1305 hrs. narrating the incident orally which was reduced into writing by the O/C Kailashahar, P.S. A Police Case being No. 10/99 u/s 302/34, IPC has been registered.

5. On receipt of the FIR police started investigation and on completion of the Investigation, charge sheet was submitted against the appellant Isub Ali and his wife Esha Bibi and son Nayan Miah for trial u/s 302 read with Section 34, IPC. On receiving the charge-sheet filed by the Investigating Authority the learned CJM, North Tripura, Kailashahar, took cognizance of the offence and the accused persons were released on bail and also committed the case to the learned Sessions Judge, North Tripura, Kailashahar for trial.

6. In the course of trial, the learned Sessions Judge framed charge u/s 302 read with Section 34, IPC and thereafter transferred the aforesaid sessions case to the Court of Addl. Sessions Judge, North Tripura, Kailashahar. In the said Court, the prosecution examined as many as 12 witnesses including the eldest son of the deceased, Aminul Islam, daughter Khusba Begum, Mominul Islam and her husband Mullah Mamud Ali along with others including official witnesses. The defence of the accused persons including the appellant, as would appear from the record was of complete denial. The appellant also did not adduce any evidence in his defence and on conclusion of the trial, the learned Addl. Sessions Judge passed the impugned judgment convicting and sentencing the accused

persons including the appellant, as stated hereinabove.

7. Mr. Biswas, learned Counsel appearing for the appellant, Isub Ali submits that the learned trial Court failed to properly appreciate the evidence of the witnesses as on record and came to a wrong finding and convicted the appellant u/s 304, Part II read with Sections 352 and 34, IPC sentencing him to suffer RI for 5 years and to pay a fine of Rs. 5000/- in default for further RI for one year.

8. Mr. Biswas, attacked the impugned judgment mainly on the following grounds that:

(1) the learned trial Court did not consider the fact that there was no intention on the part of the appellant to kill the deceased Nekjan Bibi while he was throwing brickbat towards her and it was also not known to him that the said brickbat will fall on her head to injure her and such injury would cause death of deceased Negjan Bibi; therefore, the offence, if any committed by the appellant should have come within the purview of Section 325 of the IPC and not u/s 304, Part II read with Sections 352 and 34, IPC;

(2) though the appellant prayed for the benefit of provisions of offenders Act, the learned Trial Court did not provide the same, while the other two accused after admonition were provided the benefit of Section 3 of the provisions of offenders Act.

9. In support of his aforesaid grounds, Mr. Biswas contends that the evidence on record are general in nature, where there is not even a whisper that the appellant threw the brickbat with an intention to kill the deceased Negjan Bibi, rather the evidence disclosed that there was a prior quarrel before the incident between the family members of the appellant as well as the deceased and throwing of brickbat was a result of the said quarrel, not with any prior motive either for assaulting or for killing the deceased Negjan Bibi. He also submits that the appellant did not commit culpable homicide not amounting to murder, which will be evident from the record and evidence of the prosecution witness as there was no intention on the part of the appellant to cause death by throwing brickbat to Negjan Bibi (since deceased) or he had no knowledge that throwing of such brickbat to the deceased would cause her death, which is the sine qua non for an offence, i.e. culpable homicide not amounting to murder. He further submits that at best the offence committed by the appellant comes within the parameter of Section 325, IPC and regarding non-release of the appellant on probation, Mr. Biswas further submits that the learned Trial Court failed to properly consider that the appellant is a poor cultivator and also he had no previous record of any criminal activity and he is not a hard core offender. Rather, the offence committed is his first offence due to sudden provocation from the side of the deceased family. Mr. Biswas, finally urges that if the aforesaid two grounds taken by him are not acceptable to this Court, then the Court may consider for reducing the sentence as it would meet the ends of justice since the appellant has already suffered 7 months two days during trial and after conviction.

10. In support of his aforesaid contention, Mr. Biswas also cites the decision in the case of Mohinder Singh Vs. State (Delhi Administration), wherein the Apex Court modified the conviction of the appellant from 304, Pt. II to 325, IPC and reduced the sentence from 10 years R.I. and fine to the period of sentence already suffered. He also relies the case of Rajinder v. State of Haryana 2006 AIR SCW 2987 : 2006 Cri LJ 2926 to show what ingredients are required for an offence u/s 299, i.e. culpable homicide and for an offence u/s 300 i.e. murder and also to show the distinction between culpable homicide and murder.

11. Mr. R.C. Debnath, learned Addl. PP i/c strenuously resists the prayer of learned Counsel for the appellant at the time of defending the judgment of the learned Trial Court and submits that it was known to the appellant that causing bodily injury is as likely to cause death of the deceased and appellant is not entitled to get the benefit of exception (4) of Section 300, IPC. According to him, benefit of exception (4) can be invoked if the death is caused in a sudden fight:

(1) in a sudden fight;

(2) without pre-admonition;

(3) without offenders having taken undue advantage or get any criminal or unusual manner; and

(4) fight must have been with the person killed.

12. In the instant case though the eldest son of the deceased namely, Aminul requested the wife of the appellant Esha Bibi not to throw brickbats and the deceased Negjan Bibi also tried to take back her sons from the place of occurrence to avoid the situation, then also the appellant continued brick bating to the deceased to cause bodily injury to her which was likely to cause her death and the evidence on record does not support the contention of the learned Counsel for the appellant so far the offence committed u/s 325, IPC.

13. In support of his contention, Mr. Debnath, learned PP i/c relies upon the case of Ramkishan Shelke Vs. The State of Maharashtra, . Mr. Debnath, finally submits that the learned trial Court very rightly released the other two accused persons on probation as they were not directly involved with the culpable homicide not amounting to murder of the deceased. The brickbat thrown by them was only to injure the deceased but no such acts of those accused caused death to the deceased, and not only that both accused were woman and children respectively, therefore, the acts of those accused cannot be compared with the act of the present appellant so far penal offence is concerned and for the aforesaid reasons the appeal is liable to be dismissed. However, so far the reduction of sentence is concerned Mr. Debnath left the matter to the Court. Mr. Debnath, also mainly relies and referred to the evidence of P.W. Nos. 1, 3, 4, 5, 6 and 11.

14. P.W. 1, Aminul Islam alias Dulal All in his deposition stated that he was the informant of the instant case and he lodged the complaint. The deceased Negjan Bibi was his mother. She was murdered by the accused Isub Ali, Nay an Miya and

Esha Bibi on 7-2-1999 at about 10-30 a.m. in their village at Sonapur. At the time of occurrence he was in his house. While he was in his house he heard sound of scolding of Esha Bibi to somebody near his house. Then he came out from the house and found Esha Bibi rebuking his younger brother Maminul alia Surek Ali. Then he asked her why she did so. In reply she told him that his brother gave dash by a bicycle to her so. Then he requested her not to scold, but she became furious and started to rebuke more. In the meantime the other accused Ishab Ali and Nayan Miah came to the place where accused Esha Bibi was standing and they instantly started brick bating to their house. Instantly he raised alarm and hearing his cry his mother came out from the house and requested him to enter into their house and while she was proceeding towards him suddenly the accused Ishab Ali threw a piece of bricks which hit on the head of his mother and she instantly receiving serious head injury and became senseless. In the meantime hearing their cry so many neighbours rushed to the PO and himself with the help of some neighbours gave some first aid to his injured mother. Within a few minutes his mother was taken to the Kailashahar P.S. with the help of a auto rickshaw wherefrom his mother was sent to Kailashahar hospital as his mother's condition was serious. At the time of proceeding to Kailashar P.S. he sent his father to give information about the incident to any out post. After reaching hospital a medical officer examined his mother and declared her dead. However, at about 1 p.m. he again came to Kailashar P.S. leaving the dead body in the hospital and lodged a complaint with the O.C. of the P.S. who reduced the complaint into writing. The contents of the complaint were read over to him by the said O.C. and having satisfied he put signature on it.

15. In his cross-examination he stated that the house of the accused is situated adjacent to his house and there was bamboo fencing between the two houses. He stated that there was some dispute between the two families on some petty affairs. At the time of lodging complaint he did not mention the name of any witness including his sister and aunt, he deposed. While the accused were throwing brick pieces towards them, to save himself he came back about a distance of 10/12 cubits from that bamboo fencing. There was no talking in between his mother and the accused at the time of occurrence. On receiving injury his mother fell down inside their homestead. He could not say there were any stocks of bricks inside the homestead of the accused.

16. Kushba Begum, P.W. 3, in her deposition stated that the informant Aminul Islam is her brother. Negjam Bibi is her mother, who died on 7-2-1999 by the stroke of a brickbat by the accused Ishab Ali. While she was at home on 7-2-1999 at about 10.30 a.m. she heard that Ishab Ali and Esha Bibi were rebuking her brother Aminur and Maminur Islam. Hearing the noise she came out from the house and saw that accused Ishab Ali, Niyan Miah and Esha Bibi were throwing pieces of brickbats towards her said brothers. At that time she also saw her mother went there to take her said two brothers to their house and at the same time the accused Ishab Ali suddenly threw a piece of bricks towards

her mother which hit on her head as a result she received severe head injury and fell down on the earth. After giving some first aid to her, the injured mother was taken to hospital where the injured was examined by medical officer who declared the injured dead.

17. In her cross Kushba Begum, P.W. 3 stated that after hearing noise her mother came out from their house. She could not say when her mother came out from their house. But when she came out from her house she saw her mother was coming back with her brothers towards their house. She also stated there was a dispute in between the two families relating to a road.

18. Maminul Islam. P.W. 4 in his deposition stated that he is also known as Sork Ali. The informant Aminur Islam is his elder brother, Negjam Bibi is his mother. She is now dead. She died on 7-2-1999. She died receiving a stroke of a piece of a brick on her head thrown by the accused Ishab Ali on the same date at about 10/10-30. On the date of occurrence at about 10 a.m. while he was returning home by a bicycle he saw a small boy namely Litan Ali relieving on the road which was running towards their house. Then he told the boy to do the same in their house. Accordingly he went towards their house. Within a few minutes when he reached in their house suddenly the accused Esha Bibi started rebuking him using some filthy language standing inside their homestead. Within a few minutes his brother Aminul Islam came out from the house and asked Esha Bibi why she was rebuking him. In the meantime other accused Ishab Ali, Nayan Miah came to the side of accused Esha Bibi and all the accused at a time started to rebuke him and his brother using filthy language like "son of swine" and they simultaneously started to throw some bricks and bats towards himself and his brother. Hearing the noise his mother Negjan Bibi came out from their house and told them to come back home and when she was near them suddenly the accused Ishab Ali threw a piece of bricks towards his mother and it hit on her head. Consequently receiving severe head injury she fell down and became senseless. Instantly he noticed a big trauma on her skull. Instantly she was taken to their Bharanda and poured water to regain her sense but ultimately no sense regained. Within a few minutes his mother was taken to Kailashar hospital via Kailashahar PS wherein the medical officer who declared his mother examined her dead.

19. In his cross, Maminul Islam, P.W. 4 stated that before departure of his mother from his house the accused started to throw the brickbats from their homestead. At the time of occurrence they raised alarm only.

20. Ishub Ali, P.W. 5 deposed that he know the informant Aminul Islam and his mother Negjan Bibi. She died about two years ago. On the date of occurrence at about 9.30/10 a.m. himself along with Apil Ali, Urjan Ali (now dead) were going to participate in a village baithak by the side of the accused Ishab Ali. Hearing noise in the house of accused Ishab Ali instantly they rushed there and witnessed there that the accused Ishab Ali, his son Nayan Miah and his wife Esha Bibi were standing in their homestead and they were rebuking the informant Aminul Islam

and his brother Manimur Islam who were standing inside their homestead. In the meantime he saw mother of the informant come out from her house and she instructed the informant and Maminum to come back inside the house and when she came out from the house at that time the accused Ishab Ali threw a piece of brick towards the mother of the informant which struck on her head and instantly she receiving head injury fell down. Immediately they entered into the homestead of informant and took Negjam Bibi with the help of other in the Bharanda of their house. At that time noticed a big trauma over the skull of Negjam Bibi and she was senseless. In the meantime father of the informant came to their house and they advised him to report the incident to the P.S. The injured was sent to the Kailashahar hospital with the help of Autorickshaw. On the same date subsequently he was reported that Negjam Bibi died.

21. In his cross, Ishub Ali, P.W. 5 stated that while Negjam Bibi came to a place inside their homestead about a distance of 5/ 6 cubits from the boundary fencing she received the stroke of the bricks on her head and fell down.

22. Abdul Khalek, P.W. 6 deposed that while he was passing on the road running by the side of house of accused Ishub Ali heard noise in the house of the said accused and noticed Ishub Ali, Nayan Amiah and Esha Bibi throwing some pieces of stone towards the informant Aminul Islam and Maminu Islam who were standing at that time inside their homestead. Suddenly their mother Negjam Bibi while coming out from her house to take back her said two sons into their house the accused Ishub Ali threw a piece of brick/stone towards her which hit on her head and instantly she receiving injuries fell down. Instantly he entered into their homestead and took her by some person in their Baranda where she was given nursing. Thereafter she was taken to Kailashahar hospital. On the same date subsequently he was reported that Negjam Bibi died.

23. Dr. Sunirmal Nath, P.W. 11 deposed that on 7-2-1999 at about 3 p.m. he conducted P.M. Examination on the dead body of one Negjam Bibi in the R.G.M. Hospital, Kailashahar. During P.M. examination of the said dead body he found one haematoma over vault of the skull-4" in length (2). Depressed fracture of both the parietal bones on anterior part (3), Laceration of the membranes (4) Haematoma on the brain substance. After conclusion of the examination he opined that cause of death was due to shock following head injury. Time of death was less than 24 hours prior to P.M. Examination.

24. To appreciate the argument of learned Counsel for the parties, it will be proper for the Court, firstly to consider the difference between "intention" and "knowledge". "Knowledge" means acquaintance with fact or truth or mental impression or belief; and "Intention" means to do a certain thing, purpose, design; contemplating in result.

25. The expression "causing death" in Section 299, means putting an end to a human life, and all the three intentions mentioned in the section must be directed either deliberately to putting an end to a human life or to some act

which, to the knowledge of the accused, is likely to eventuate in the putting an end to a human life. The knowledge must have reference to the particular circumstances in which an accused is placed. The intention of the accused must be judged not in the light of actual circumstances, but in light of what he supposed to be the circumstances. A man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body. See AIR 1920 Madras 862 : 1919 (20) Cri LJ 404.

26. In the case of Rajinder 2006 Cri LJ 2926 (supra) the Apex Court discussed about culpable homicide and murder as well as distinction between the aforesaid two offences. In para 16 of the said report the Apex Court held thus:

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 Sections 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 Subject to certain culpable homicide if exceptions culpable the act by which the homicide is murder death is caused is if the act by which done- the death is caused is done-	
Intention	
(a) With the inten-	(1) with the inten- tion of causing tion of causing death; or death; or (b) with the inten- (2) With the inten- tion of causing such tion of causing such bodily injury as is bodily injury as the likely to cause offender knows to death; or be likely to cause
(c) with the knowl-	the death of the edge of that the act person to whom the is likely to cause harm is caused; or death. (3) with the inten- tion of causing bodily injury to any person and the bodily injury in- tended to be in- flicted is sufficient in the ordinary course of nature to cause death; or
Knowledge	
(c) with the knowl-	(4) with the knowl- edge that the act is edge that the act is likely to cause death. so imminently dan- gerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for in- curring the risk of causing death of such injury as is mentioned above.
27. In Mohinder Singh 1985 Cri LJ 1903 (supra) the Apex Court after considering the fact involved in that case, altered the conviction of the appellant of the said case from Section 304, Part II. IPC to Section 325, IPC as the facts so given in	

that case was of a general type and it was difficult to correlate the blow given by the appellant with the internal injury which, according to the medical evidence led to death-. For the aforesaid facts their Lordships altered the conviction and modified the sentence from 10 years to 4 years, which has already been suffered.

28. According to this Court in the instant case also it is very difficult to gather from the evidence whether prior intention of the accused appellant was there or not regarding the result of his acts of brickbating to the deceased Negjan Bibi.

29. From the submission of learned Counsel for the parties as well as from the evidence on record and the laws laid down by various Courts including the Apex Court, this Court is of opinion that on the available facts, it can be held that the appellant was not aware about the cause of his act and there might not be any intention to kill the deceased but it was very much within his knowledge that throwing brickbat on the vital part of a person like head is likely to cause death of a person including the deceased which he did in the instant case. Therefore, according to this Court he committed an offence u/s 304, Part II, IPC. Hence, so far conviction is concerned, no interference by this Court is called for. Accordingly, conviction u/s 304, Part II read with Section 34, IPC is hereby confirmed.

30. Now coming to the sentence in question, considering the old age of the appellant and the fact that he is on bail after suffering detention for more than 7 months, and he is at his senile age of late sixty"s and his family condition that at this stage, if he is again sent to jail to suffer sentence as imposed by the trial Court, then the family members who were released by the trial Court on probation of offenders" Act, will also suffer as he is only earning member in the family, the same was recorded by the learned trial Court in para 17 of the judgment, this Court is of the considered view that the present appellant, required some sort of lenient punishment for the offence committed in view of the aforesaid reasons and it would be proper for this Court to deal his case leniently by reducing the sentence passed by the learned trial Court and modify to the extent as indicated above for the purpose of achieving social justice. Conviction is nothing but proof of offence committed by a person or otherwise the proof of guilt and sentence is the punishment. According to this Court, so far conviction is concerned the Court should not compromise with that but regarding sentence, Court has to consider many aspects at the time of exercising its discretion that it has to protect society and stamp out criminal proclivity as the same is the object of law at the time of imposing the sentence. The Court has also to keep in mind that in what circumstances the accused committed the offence, what was his age at the time of offence and what is his age ultimately when he is going to suffer the sentence and social background of his family i.e. whether anybody is dependent on him or not and whether the crime committed by him was planned one or occurred due to certain situation that arose at that moment. In the instant case, it appears from record, particularly the judgment impugned, that at the time of commission of offence u/s 304, Part II, the

appellant was at the senile age of late sixty"s. But by this time another seven years have already been passed and he is stepping to the age of seventy"s. Therefore, the prayer for reduction of sentence is required to be considered with some human touch by this Court.

31. Considering the fact that the appellant had no earlier record of crime and was not a habitual offender, and since he has already suffered for 7 months, as opined supra, it would meet the ends of justice if the remaining period of sentence is reduced by way of imposing a fine of. Rs. 15,000/-in default, the appellant shall suffer R.I. for three years and to undergo the same, he shall surrender to his bail bond. If the fine money is deposited, the bail bond shall stand discharged and the fine money so realized, may be remitted to the husband of the victim, Negjam Bibi namely, Mullah Md. Ali as compensation. If the husband of the deceased is no more by this time, the said amount may be remitted to an orphan home at Kailashahar, North Tripura. However, in the event the petitioner fails to deposit the aforesaid fine within the period of three months, the learned trial Court shall take necessary steps.

32. The appeal is allowed to the extent as indicated above.