

(2019) 09 CAL CK 0007
In the Calcutta High Court
Case No : Criminal Appeal (CRA) No. 81 Of 2009
Ranjan KarmakarVs State Of West Bengal

Date of Decision : 03-09-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 299, 300, 302, 304
Arms Act, 1959 — Section 25, 27

Citation : (2019) 09 CAL CK 0007

Hon'ble Judges : Thottathil B. Radhakrishnan, CJ;Arijit Banerjee, J

Bench : Division Bench

Advocate : Souvik Mitter, Avishek Sinha, Saswata Gopal Mukherjee, Kakali Chatterjee

Final Decision : Disposed Off

Judgement

Arijit Banerjee, J

(1) This is an appeal against the judgment and order dated 11 July, 2008 passed by the Additional Sessions Judge, 2nd Court, Hooghly in ST No. 11(6)03/SC No. 63/99. The case was initiated against three accused persons namely, Black Cow @ Ranjan Karmakar, the present appellant, Ashim Majumdar and Upen Sarkar. They were charged with offences allegedly, committed u/s. 302 read with Section 34 of the Indian Penal Code (IPC) and under Sections 25/27 of the Arms Act. The learned Trial Judge found the appellant guilty of the charge punishable under Section 302 IPC. The other two accused persons were found not guilty of the charges brought against them and were acquitted.

(2) The victim was one Birendra Nath Ghosh @ Biltey. The written complaint was filed by the brother of Biltey, viz. Abhoy Ghosh. The prosecution case on the basis of such written complaint is that Biltey and his friend Ram Krishna Giri were travelling on a scooter from Kaylaghat (near Jhautala Kalibari, Shibpur) towards Tribeni. Biltey was driving the scooter and Ram Krishna was riding pillion. When they were on Shibpur Main Road one person amongst 10/11 youths called Biltey by his name. Biltey stopped the scooter and got down from it. The appellant and the other two accused persons namely, Ashim and Upen started talking to Biltey.

At that time, the appellant opened fire at Biltey who fell down on the road in bleeding condition. The three accused persons and 7/8 other youths fled by a motor operated boat (Bhutbhuti) towards Kalyani. Biltey was taken to Chinsurah Hospital immediately where he was declared 'brought dead' by the doctor who attended to Biltey in the emergency department.

(3) The prosecution examined nineteen (19) witnesses, out of whom PW5, PW6, and PW13 are eye-witnesses. We have perused the entire evidence on record and we are of the considered view that the decision in this case would turn on evaluation/assessment of the evidence of the said three eye-witnesses.

(4) PW5, Krishna Das deposed that he owns a Darma Shop at Kaylaghat which is also known as Jhautala Kalibari. At the time of occurrence of the incident he was working in that shop. He saw Biltey and another person whom he did not know proceeding on a scooter. Then the appellant called Biltey and caused him to stop. Then the appellant told Biltey that he would fire at him. At this, Biltey said 'Ja Ja' which would mean 'I dare you to do whatever you can'. At that point of time, the appellant fired at Biltey. With the bullet wound Biltey started running away but fell on the ground after 35 to 40 feet. Later he heard that Biltey expired on the way to the hospital.

(5) PW6, a neighbour of Biltey deposed that he was riding a bicycle at the place of occurrence. He noticed that the appellant stopped Biltey who was riding a motorcycle. Suddenly, the appellant took out his weapon from the waist and fired at Biltey who fell down. Biltey's brother, Abhoy Ghosh was informed. He came and took Biltey on his lap. He shifted Biltey to the hospital and PW6 and others also followed him.

(6) PW13, Ram Krishna Giri was the friend of Biltey who was riding pillion on the scooter at the time when the incident occurred. He deposed that on the date of the incident i.e. 9 March, 1996 at about 4.45 P.M. he and Biltey were travelling towards Tribeni on Biltey's scooter. When they reached Kaylaghat, the appellant called Biltey. Biltey stopped the scooter and leaving the same in the possession of PW13, he walked towards the appellant to talk to him. Then the appellant brought out a pistol and opened fire on Biltey. On hearing the sound of firing, PW6 along with a few others started moving towards the appellant who warned them not to proceed as otherwise he would open fire on them. Since they were bare handed, out of fear, they did not proceed further. The appellant then fled along with 3/4 other persons by a bhutbhuti. PW13 further stated that the appellant "had some anti-social activities" which was not liked by Biltey and for that reason "they had some hot discussion and thus a trouble was created in between them". In cross-examination PW13 stated that there was a time gap of about 3 to 5 minutes between the stoppage of the scooter by Biltey and he being fired at by the appellant. It also comes out from the evidence of PW13 that there was some sort of conversation between the appellant and Biltey.

(7) The appellant has been convicted of having murdered Biltey. He has been

handed down a punishment of imprisonment for life under Section 302 IPC.

(8) Section 299 IPC defines culpable homicide.

"299. Culpable homicide.-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

(9) Section 300 IPC provides that except in the cases mentioned in the exceptions to that Section, culpable homicide is murder if:

- i. The act by which the death is caused is done with the intention of causing death; or
- ii. It is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
- iii. It is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- iv. The person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

(10) Exception 1 to Section 300 IPC provides that culpable homicide is not murder if the offender was deprived of the power of self-control by grave and sudden provocation causing the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The said exception is subject to two provisos which are not presently germane for us. However, the Explanation to the said Exception states that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. The other Exception which is relevant for us is Exception 4 which provides that 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. The Explanation to this Exception says that it is immaterial in such cases which party offers the provocation or commits the first assault.

(11) We have heard learned counsel for the appellant as also learned counsel for the State.

(12) Learned counsel for the appellant emphatically submitted that the intention on the part of the appellant to murder Biltey was lacking. It was not a premeditated act on the part of the appellant. The firing took place in the heat of the moment pursuant to a verbal altercation between the appellant and the victim. He also submitted that the victim provoked the appellant by saying in a

demeaning manner that the appellant could do whatever he wanted to and the victim did not care. The appellant's learned counsel also relied on Exception 4 to Section 300 which we have adverted to above.

(13) Learned counsel for the State, however, urged that the appellant committed the act of firing knowing that it was imminently dangerous and in all probability would cause death or such bodily injury as is likely to cause death and fired at Biltey without any excuse for incurring the risk of causing death or such injury as is likely to cause death. Hence, the appellant's act amounted to murder under the fourth limb of Section 300 IPC.

(14) We have carefully considered the rival contentions of the parties.

(15) The first three limbs of Section 300 clearly contemplate intention on the part of the accused to cause death of the victim. On an analysis and assessment of the evidence on record we are of the view that it cannot be said beyond reasonable doubt that the appellant had such intention. On a preponderance of probabilities on the basis of the evidence on record the possibility of the appellant being provoked by the victim cannot be ruled out. It appears from the evidence of PW13 that there was a verbal exchange between the appellant and the victim for about 3 to 5 minutes after the victim alighted from the scooter and went to the appellant. Only thereafter the appellant shot the victim. What the contents of the conversation between the appellants and the victim were could not be said by any of the three witnesses. That is why we say that provocation for committing the offending act in the heat of the moment cannot be ruled out. Had the appellant stopped the victim's scooter with the intent of killing him, he could have done so at once without entering into a dialogue with the victim. In the facts of the case we are not inclined to come to the conclusion that there was a premeditated plan on the part of the appellant to kill the victim. Only one gunshot was fired on the victim. If the avowed intent of the appellant was to kill the victim, he would have, going by the normal human conduct, fired more than once at the victim. The appellant did not do so. The victim ran 35 to 40 feet before collapsing. The appellant had ample opportunity of finishing him off by firing more than one shot. It does not appear to us that it was a pre-planned act on the part of the appellant to shoot the victim with the intent of killing him. We are inclined to give the appellant the benefit of doubt of the mitigating factor of provocation or the incident having taken place in the heat of the moment.

(16) By no means we are condoning the act of the appellant of firing at the victim. It was definitely an irresponsible and rash act on his part. Even if it was done under provocation or in the heat of the moment, such an act is not acceptable and is culpable and deprecable. We strongly deprecate such an act on the part of the appellant. However, as we have noted above, we do not find the intent to kill on the part of the appellant in the facts and circumstances of the case and on an appreciation of the evidence on record.

(17) Further, when a person has a plan to kill someone, it is normal human

conduct that he would execute such plan inasmuch as surreptitious, secretive and clandestine a manner as is possible so as to eliminate the possibility of having an eye-witness to such an act. A person who nurtures the intention to kill somebody, would normally not give effect to such intention in broad daylight in front of more than one eye-witnesses which would enhance the chances of his prosecution, inculcation and conviction. This is also another reason which persuades us to take the view that the prosecution has not been able to make out the case of their being intention on the part of the appellant to cause death of the victim which would attract conviction under Section 302 IPC.

(18) We are not inclined to accept the argument put forth by learned counsel for the State that the offending act on the part of the appellant amounts to murder under the fourth limb of Section 300 IPC. When a person opens fire on another person in the heat of the moment, it is highly unlikely that the consequence of such an act plays in his mind. In such a situation, the offender would not normally weigh the pros and cons or the consequences of the act of shooting and then commit the act. It would ordinarily be an impulsive act done in a fit of rage which would momentarily eclipse the normal logical thought process of the offender.

(19) In view of the aforesaid, we are of the considered opinion that a case of murder has not been made out by the prosecution and to that extent we are not in agreement with the learned Trial Judge. The essential ingredient of intent to kill, has not been established. However, all the ingredients of an offence punishable under Section 304 IPC are present in the facts of the case. Accordingly, we deem it fit and proper to alter the charge against the appellant to one under Section 304 IPC i.e. culpable homicide not amounting to murder and reduce the sentence of the appellant to 10 years of rigorous imprisonment. We, however, uphold the sentence passed by the learned Trial Judge imposing fine of Rs. 5000 on the appellant and in default to suffer rigorous imprisonment for further six months for the offence under Section 304 IPC.

(20) In the result the appeal is allowed in part altering the conviction and reducing the sentence of the appellant to ten years of rigorous imprisonment with fine of Rs. 5000/- and in default to suffer rigorous imprisonment for further period of six months. If the appellant has already undergone sentence as indicated by us, he will be released forthwith if he is not required to be in custody in connection with any other case.

(21) The appeal is accordingly disposed of.

(22) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.