

(2016) 06 BOM CK 0197
In the Bombay High Court
Case No : Criminal Appeal No. 45 of 2014

Shri. Ulhas Kauthankar

APPELLANT

Vs

State Of Goa

RESPONDENT

Date of Decision : 09-06-2016

Acts Referred:

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

Citation : (2017) ALLMRCri 169 : (2016) 5 MhLJCrI 286

Hon'ble Judges : Shri F. M. Reis and Nutan D. Sardessai, JJ.

Bench : Division Bench

Advocate : Mr. G. Teles, Advocate, for the Appellant; Shri S. R. Rivankar, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Nutan D. Sardessai, J. - We have heard Shri G. Teles, learned Advocate for the appellant who took us through the judgment under challenge and submitted that it was a clear case where the impugned judgment warranted an interference and the conviction passed against the appellant under Section 302 of Indian Penal Code was required to be interfered with. It was his contention that at the highest and without prejudice, the conviction had to be altered to that under Section 304(ii) Indian Penal Code as no intention to commit the offence of murder was proved against him. Shri S. R. Rivankar, learned Public Prosecutor on behalf of the State submitted that there was no reason to interference with the judgment under challenge and the conviction had to be upheld. Shri G. Teles, learned Advocate for the appellant placed reliance in the Division Bench judgments of this Court in Subhash Samal v. State of Goa (Criminal Appeal No. 5/2011) and Suresh Behra v. State (Criminal Appeal No. 3/2010).

2. The question which arises for consideration in the backdrop of the material on record is whether the learned Additional Sessions Judge had properly appreciated the material on record to hold that the offence of culpable homicide amounting to murder had been committed by the appellant and or whether it was a fit case in

the circumstances of the case to warrant interference with the judgment under the challenge.

3. Shri G. Teles, took us through the impugned judgment and the evidence on record to buttress his case that the incident had occurred on the spur of moment while exercising the right to self-defence and there was no basis for the learned Trial Judge to hold that he had not exercised the right of self-defence. We would consider the evidence and decide the appeal appropriately. There were in all 10 witnesses examined by the State in support of its case to bring home the guilt of the accused in respect of the offence punishable under Section 302 of Indian Penal Code four being eye witnesses to the incident of assault, one being the medical officer, the Investigating officer and 3 other witnesses.

4. The charge against the appellant was that on 22.11.2009 the appellant had picked up a knife available at the gada nearby and stabbed the deceased with it in the chest, abdomen and other parts of the body causing his death.

5. The State had examined Krishan Pw1 the Draughtsman who had drawn the sketch of the scene of offence being a place by the road side with houses at a distance of 10 to 15 metres. Nothing substantially turns on his testimony which was an outcome of his task to draw the sketch about 5 days after the incident of assault. The second witness examined by the State was the pancha Uday Pw2 to the inquest panchanama which referred to the cut injuries shown to him on the right side of the chest, right side abdomen and scratch injuries on the elbow and the back of the fingers of the right hand apart from the injuries on the knees and the lower part of the leg. His uncontroverted testimony supported the prosecution case on the injuries being inflicted on the specific area of the body which proved to be fatal.

6. Uday Pw2 was also a pancha to the inquest panchanama conducted on the body of the deceased apart from the attachment panchanama of the clothes of the deceased but nothing substantially turned from his testimony qua the appellant. Jayesh Pw3 was the pancha to the arrest panchanama of the appellant who referred to the injuries found on his face and abdomen and a statement came forth that the appellant was assaulted by the public on the same morning. His unrebutted testimony supported the State Case inasmuch as it belied the case of the accused in defence that the injuries on his person were caused in the course of exercise of his right of self-defence while inflicting injuries on the person of the deceased. It is another matter that the appellant had taken a plea in his statement recorded under Section 313 of Cr.P.C. that he was badly assaulted by the deceased with fist blows, kicks and wooden danda and in self-defence he had stabbed the deceased but had not examined any witness to prove his case in self - Defence.

Laxman Pw4 had learnt from Purshottam on the morning of 22.11.2009 around 08.30 hours that his uncle Naresh was injured by the appellant, that he was lying near the gada of Ramesh and he had to be taken to the hospital. He had

proceeded to the spot in his van and shifted the injured in a bleeding condition to the PHC Bicholim. His testimony too was unrebutted at the instance of the appellant which confirms that Naresh, since deceased, had sustained bleeding injuries on the morning of 22.11.2009 as a case of assault and shifted immediately to the PHC Bicholim.

7. Dr. Naik Pw5 had occasion to examine the appellant who was brought to the PHC Bicholim with an alleged history of assault by the public and of alcohol consumption. He had found that his vitals were stable, there was smell of alcohol from the mouth and a right black eye. Besides he had found multiple small bruises on the forehead, a bruise on the left scapular region, multiple small bruises over the inter scapular region, whiplash injury on the left thigh region and two abrasions over the left ala of the nose. He had certified that the injuries were caused by a hard and blunt object, simple in nature and of more than 6 hours duration at the time of his examination. It was brought out during the cross examination that whiplash injury on the thigh could be caused by a stick and other injuries with fist blows and kicks. It is therefore, to be seen whether these injuries have been established to have been caused in the course of the exercise of self-defence by the appellant when he was allegedly assaulted by Naresh, since deceased.

8. Rauji PW6, the brother of the deceased Naresh had stated that the appellant had started abusing Naresh in filthy words and also threatened that he would teach him a lesson. He had intervened in the matter but the appellant had not listened and continued to give bad words to Naresh whereupon he had asked him the reason for giving abuses. Since however, the appellant had continued abusing, Naresh had pushed him caught hold of his face and in the meantime the appellant had stabbed him with a knife on his face, stomach and chest due to which he had collapsed near the gada. He had thereafter taken him to the PHC, Bicholim where he was declared dead.

9. The testimony of Rauji Pw6 had also borne out that the appellant used to abuse the wife of the deceased and her daughter and pass vulgar comments and for which the deceased had warned the appellant not to interfere with them few days prior to the incident resulting in strained relation between them. His testimony had also borne out that the knife was lying at the spot after the incident of assault and which was thereafter duly attached by the police. His cross examination had borne out that the deceased had only caught hold of the jaw of the appellant as he was giving bad words and there was no reference to any assault by the deceased on the appellant. At the same time it is material to record that the appellant had picked up the knife which was lying on the showcase of the gada used for cutting bananas and it was not as if he had carried the knife/weapon of assault and used it to inflict the fatal injuries on the person of Naresh.

10. Ramesh Pw7, the owner of the gada had disclosed that he had opened his gada at 07.30 hours and after some time he had seen the appellant giving bad

words to the deceased. When he returned to his gada at 07.45 hours he had noticed the deceased and the appellant were pushing each other and when the appellant reached near his gada, he picked up the knife from the counter and stabbed Naresh on the stomach and his chest who fell on the ground and thereafter he was shifted to the hospital. He had categorically denied the case of the appellant that the deceased had assaulted the appellant with kicks, fist blows and danda and that in exercise of the right of self-defence, the appellant had picked up the knife and stabbed Naresh with it. From his testimony too which is that of a natural witness and an eye-witness, the State had established that the appellant had inflicted knife injury on the person of Naresh which proved to be fatal.

11. Bhimarathi Pw8 had indicated in her testimony that she was helping Naresh on the morning of 22.11.2009 when she saw the appellant coming towards them and giving bad words in Konkani to Naresh. On questioning as to why he was giving abuses to them, he sat on the compound wall close to the gada of Ramesh and again started abusing Naresh who had questioned the appellant and caught hold of his face. At that time and in the course of the arguments between them, the appellant had removed one knife which was on the counter of the gada of Ramesh and stabbed Naresh on his stomach and then on the chest due to which Naresh had collapsed. There was previous enmity between Naresh, since deceased, and the appellant on account of the abuses and vulgar remarks made by the appellant to the daughter of the Naresh. Her unrebutted testimony too corroborates the version of the other 2 eyewitnesses that the appellant was instrumental in picking up the knife from the counter on the gada of Ramesh and stabbing Naresh with it.

12. Sandeep Pw9 too had given a similar version about the knife injuries inflicted by the appellant on the stomach and chest of the Naresh after picking up the knife from the counter of the gada of Ramesh. Their relations were strained on account of the persistent abuses given by the appellant and vulgar words used by him to the daughter of the deceased. He too had categorically denied the defence plea that the deceased had given kicks, fist blows and assaulted the appellant with the danda and only then there was provocation to assault him with knife readily available at hand.

13. The evidence of Police Inspector Harish Madkaikar, PW10 had wrapped up the said case against the appellant on the various facets of the investigation with no rebuttal of his testimony. Therefore, from the material on record although an attempt was made on behalf of the appellant to push forth a case of self-defence, he had failed to prove it even through the cross examination of the eye witnesses examined by the prosecution in support of its case against him. Rather it had consistently come on record through the evidence of the eye witnesses that the deceased had caught the mouth of the appellant to prevent him from continuing his abuses and in the melee, the appellant had picked up the knife available on the counter of the gada of Ramesh and inflicted injuries on the person of Naresh

i.e. on the right side of his chest, abdomen and other parts of the body, two of which proved to be fatal.

14. The learned Additional Sessions Judge on an assessment of the evidence on record had clearly come to a finding that the death of Naresh was homicidal on account of the stab injuries inflicted on his right chest and left abdomen in particular. The learned Additional Sessions Judge had therefore, rightly held that the prosecution had established its case against the appellant of culpable homicide under Section 299 IPC. The moot question here is whether the offence of murder as provided for under Section 300 Indian Penal Code was at all made out against the appellant.

15. Admittedly it was not the case of the State that the appellant had come armed with the knife and the inflicted fatal injuries on the person of Naresh, since deceased. Rather the prosecution case had opened up on the basis that there was use of abuses by the appellant and bad words to the deceased and his family and that the extent of the abuses had continued which had prompted the deceased to catch hold of the mouth of the appellant and in the whole process, the appellant who was also shown to be under the influence of alcohol was angered and took assistance of the knife readily available on the counter of gada of Ramesh and inflicted the injuries on the person of Naresh, since deceased. It is not as if the appellant had an intention to cause the death or cause such bodily injuries as was likely to cause the death of Naresh as to attract the offence of culpable homicide amounting to murder.

16. The entire transaction took place on the spur of the moment and the ready availability of a knife provided the means to the appellant to inflict injuries on the person of Naresh who had caught hold of his mouth to prevent him from abusing his family further and resulting in fatal injuries to the deceased. It had also been established from the uncontroverted testimony of Dr. Naik Pw5 that the appellant was under the influence of alcohol at the time of his examination apart from being found with the injuries on his person. The appellant was therefore deprived of the power of self control on account of the consumption of alcohol and besides the act of resistance offered by the deceased to his tirade of hurling abuses to the deceased and his family members.

17. The learned Additional Sessions Judge however, committed an error in concluding that the appellant had intentionally caused the death of the deceased as to hold him guilty of the commission of the offence of culpable homicide amounting to murder punishable under Section 302 of the Indian Penal Code It was submitted in the course of arguments by Shri G. Teles, learned Advocate for the appellant while arguing in the alternative for the reduced punishment that the appellant was young, married and had wife and children dependent on him and therefore, considering all these circumstances, and the mitigating factors the sentence had to be scaled down assuming that this Court did not find it a fit case to reverse the judgment under challenge in to. Besides he had also undergone some years of imprisonment in custody totalling 7 years.

18. In Subhash Samal (supra), this Court held while dealing with the appeal under conviction under Section 302 Indian Penal Code came to a clear finding that though the appellant had inflicted injuries on the vital parts of the body i.e. neck, therefore had to be imputed with the knowledge that an injury inflicted by him with the knife on the neck would be so imminently dangerous that it would in all probability cause death. The injury inflicted by him was in the heat of passion by way of a reaction to the deceased who had tried to catch hold of his month. Therefore, in our opinion, first exception to Section 300 IPC would be attracted to the case and it must be held that death of Naresh caused by the appellant was not murder but culpable homicide not amounting to murder. Hence, conviction of the appellant under Section 302 Indian Penal Code cannot at all be sustained and hence he is convicted under Section 304(ii) Indian Penal Code Therefore, his conviction is altered from that under Section 302 IPC to that under Section 304(ii) Indian Penal Code.

19. Suresh Behra (supra), challenged in appeal the judgment and order convicting him for the offence punishable under Section 302 IPC and punishing him with life imprisonment with fine and in default imprisonment on failure to pay the fine. In the brief facts of the case a fight had ensued between the deceased and the appellant when other inmates of the room left and went away leaving them together. The appellant was stated to have assaulted the deceased with a hammer and thereafter gone to the room of Pw9 and told him that he had hit the deceased with hammer and in turn asked Pw9 to inform Pw5. Pw9 had noticed blood stains on his clothes and also on his face. The appellant was noticed at around 04.00 hours near junction at four roads at Davorlim coming on foot by the Police Constable and as he was not able to answer properly, he was brought to the Maina Curtorim Police station and handed over to the Police Sub Inspector. In the meantime Ban Bihari Das had gone to the Maina Curtorim Police Station and lodged a complaint and offence was accordingly registered under Section 302 of IPC against the appellant.

20. In Suresh Behra (supra), this Court considered all the evidence on record, examined the plea taken by the appellant in defence in his statement recorded under Section 313 of Criminal Procedure Code and held in their opinion that the case based on the circumstantial evidence was amply proved against the appellant being the author of the crime and the question therefore left at large for consideration was whether the offence of murder or the offence of culpable homicide not amounting to murder was committed by him. This Court found from the evidence on record that on the night of the incident everybody was in the room and was in high spirits and therefore there was a sudden quarrel between the appellant and the deceased over playing music of V.C.D. which turned into a fight in which the deceased smashed the T.V. and V.C.D. of the appellant damaged all these articles, apparently prized possessions which gave a sudden provocation to him and in the course of which he had possibly picked up the hammer lying in the room and assaulted the deceased and therefore there was no intention on his part to cause the death of the deceased nor he intended to

cause such bodily injuries as would result in death.

21. In Suresh Behra (supra), Their Lordships observed that the assault had taken place without premeditation, in a sudden fight, in the heat of passion, in an inebriated state and upon a sudden quarrel and there was nothing to indicate that the appellant had taken undue advantage and acted in an unusual manner and therefore concluded that the fourth exception to Section 300 Indian Penal Code was attracted to the case and the offence was of culpable homicide not amounting to murder punishable under Section 304(ii) Indian Penal Code. In those set of circumstances, this Court held that the conviction of the appellant could not be sustained under Section 302 Indian Penal Code and as a substantial number of blows were given on the head, the appropriate punishment to the appellant would be rigorous imprisonment for a period of 10 years while maintaining the fine of Rs.5000/- awarded by the trial Court with in default imprisonment. The impugned judgment to that extent is not justified, perverse and therefore warranting interference in appeal. The next question would be the extent of sentence to be awarded to the appellant. The appellant has been in custody since the time of his arrest and as per the submission of Shri G. Teles, learned Advocate for the appellant, he has undergone imprisonment for about 7 years. In our opinion and the circumstances of the case, sentence of imprisonment of 10 years would be appropriate in the circumstances. Therefore, we pass the following:-

ORDER

The appeal is partly allowed whereby the conviction of the appellant under Section 302 of Indian Penal Code is quashed and set aside and the appellant is held guilty of the commission of the offence of culpable homicide not amounting to murder punishable under Section 304(ii) of Indian Penal Code. He is sentenced to undergo imprisonment for a term of 10 years while retaining the fine amount against him of Rs.10,000/- (Rupees ten thousand only) and in default to undergo simple imprisonment of 6 months. The appellant would be entitled to a set-off in terms of Section 428 Criminal Procedure Code. The fine amount on being recovered shall be paid to the widow of the deceased in terms of Section 357(1) of Criminal Procedure Code.

22. Appeal stands disposed off accordingly.