

**(1994) 02 MP CK 0030**

**In the Madhya Pradesh High Court**

**Case No : Criminal Appeal No. 71 of 1984**

Tota

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

**Date of Decision : 28-02-1994**

**Acts Referred:**

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

**Citation :** (1994) JLJ 529 : (1995) 40 MPLJ 393 : (1995) MPLJ 393

**Hon'ble Judges :** S.K. Dubey, J; Jayant Govind Chitre, J

**Bench :** Division Bench

**Advocate :** Rajeev Gupta, for the Appellant; H.D. Gupta, Dy. A.G., for the Respondent

## **Judgement**

J.G. Chitre, J.

The appellant is hereby challenging the correctness, propriety and legality of the conviction and sentence awarded to him by Third Additional Sessions Judge, Morena in the matter of S.T No. 192/82. The appellant has been convicted for an offence punishable u/s 302 of Indian Penal Code and has been sentenced to life imprisonment.

The incident, which is very short, started at about 10 P.M. or 12 midnight intervening 17-5-1981 and 18-5-1981 when deceased Chunna, Harchand and Tota were singing songs. Tota started singing some obscene song which was not liked by Chunna who asked appellant Tota not to sing such a song. Appellant did not pay any heed and continued singing the said song and challenged Chunna which provoked him.

Thereafter, there was a scuffle between those persons and it resulted in assault in which appellant gave fist blows to Chunna. The prosecution case shows that Harchand separated them, but, the episode did not end there. Again between 12 midnight and 1 A. M. appellant Tota abused Chunna and gave a stick blow on the left flank of deceased Chunna. As the prosecution case indicates, the said stick

blow caused contusions on the left flank of the chest of Chunna who died because of the rupture of the spleen which resulted in internal haemorrhage and shock.

Mangal (PW 1) lodged first information report in Raghunathpur police station of district Morena which initiated an investigation of the crime. After due investigation and submission of charge-sheet against the appellant Tota, Tota was tried before the learned Additional Sessions Judge who, after recording of the evidence, appreciating it, in view of the arguments advanced on behalf of the prosecution and defence, concluded that the prosecution evidence was fit to be accepted. He accepted it and concluded that prosecution had proved that appellant had killed deceased Chunna in the said night of incident and the appellant had committed an offence which is punishable u/s 302 of Indian Penal Code. He inflicted the sentence of life imprisonment on the appellant and that order of conviction and sentence is the subject-matter of challenge in this appeal.

The learned Advocate Shri Rajeev Gupta, amicus curiae, appointed for defending the appellant, submitted that the impugned order of conviction and sentence is not correct, proper and legal. He argued that learned Additional Sessions Judge committed an error in accepting the prosecution evidence and coming to the conclusion that appellant had killed deceased Chunna. He submitted that the learned Trial Judge committed an error in convicting the appellant for an offence punishable u/s 302 of Indian Penal Code and thereafter sentencing him to imprisonment for life.

Shri Rajeev Gupta, the learned Advocate defending the appellant, relied on the judgment of Supreme Court in the matter of Karam Singh v. State of Punjab 1994 SCC 64. Relying on this judgment of the Supreme Court, he argued that if this Court comes to a conclusion that learned Trial Judge was right in accepting the prosecution evidence and comes to a conclusion that appellant Tota had killed deceased Chunna, the offence would not come under purview of Section 302 of Indian Penal Code but it would be one falling under purview of Section 304 (Part II) of Indian Penal Code. He submitted that if the offence comes u/s 304 (Part II) of Indian Penal Code, the sentence will have to be modified suitably to the term of the sentence which the appellant has undergone.

The learned Dy. Advocate General, Shri H. D. Gupta, argued that learned Trial Judge was right in accepting the prosecution evidence because the evidence of eye-witnesses and the evidence of doctor proved the guilt of the accused beyond reasonable doubt. He tried to justify the conviction and sentence in view of Section 302 of Indian Penal Code.

So far as the prosecution evidence is concerned, we find that the evidence of eye-witnesses is not shattered at all in the cross-examination. Their evidence is consistent and inspiring the confidence. It has been corroborated by medical evidence and other evidence led by the prosecution in this case. Both Mangal (PW 1) and Amra (PW 2) stated on oath that the appellant assaulted deceased

Chunna by fist blows as well as gave a stick blow on his chest. Their evidence has been corroborated by evidence of Dr. R. K. Mishra (PW 3) who stated in his evidence that corresponding to contusions Nos. 3 and 4, there was internal damage to spleen of the deceased which was ruptured as well as the scrotum was swollen. His evidence shows that those injuries were ante mortem and fresh. The evidence of Dr. Mishra (PW 3) shows that contusions mentioned by him in post mortem examination report as injuries Nos. 3 and 4 caused rupture of the spleen resulting in collection of blood in abdomen as well as haemorrhage and shock. Appreciating the evidence of eye-witnesses and the doctor, we have no hesitation to come to the conclusion that the learned Additional Sessions Judge was right in accepting the evidence led by the prosecution against the appellant and coming to the conclusion that prosecution had proved that in the intervening night between 18-5-1981 and 19-5-1981, the appellant by assaulting Chunna, killed him.

In the matter of Karam Singh v. State of Punjab (supra), Supreme Court observed that the contusions on the chest and injuries Nos. 5 to 7 in the post mortem examination report resulted in the fracture of the ribs which caused the death of the deceased and the doctor in his evidence admitted that the fracture of the ribs could have in turn caused the rupture of the liver and the spleen. Under these circumstances, it is difficult to hold that the appellant intended to cause injuries to the liver and the spleen, which unfortunately proved to be fatal. In the said matter, Supreme Court further observed that having regard to the nature of the weapon used and the parts of the body on which blows were dealt, it is difficult to hold that the appellant intended to cause the death or intended to cause that particular injuries to the liver and the spleen. However, under the circumstances, the appellant must be attributed to have the knowledge that by dealing such blows he was likely to cause the death of the deceased in which case the offence is one punishable u/s 304 (Part II) of Indian Penal Code. With these observations, Supreme Court changed the conviction of the said appellant Karam Singh from one u/s 302 of Indian Penal Code to one u/s 304 (Part II) of Indian Penal Code.

In view of the observations of Supreme Court in the matter of Karam Singh v. State of Punjab (supra), the intention behind the act is to be assessed by examining surrounding circumstances. *Actus non facit reum nisi mens sit rea* has to be kept in mind. If the Court has to decide which offence the accused has committed from the proved facts before it, the episode which gave rise to the commission of the offence has to be seen and it has to be seen in which circumstances the fatal blow was given by the accused. So also, the nature of the weapon used has to be seen for the purpose of assessing as to what was the intention of the accused in inflicting the blow or blows which in fact resulted into the death of the deceased. After neatly assessing of the relevant circumstances only, the Court can come to conclusion as to which offence the accused has committed.

In the present matter, the evidence on record clearly shows that the incident in question was the result of the annoyance caused by the obscene song which appellant was singing and which resulted in quarrel and assault. There is nothing in the evidence to show that the stick which was used by the appellant for inflicting the blow on the left flank of the deceased was thick and by itself a dangerous weapon if used in assault for giving even a single blow. In the absence of positive evidence on this point, an inference will have to be drawn in favour of the appellant and it will have to be held that the stick which was used by the appellant for inflicting the blow on the left flank of the deceased Chunna was not thick and heavy stick which was by itself dangerous if used in the assault or for giving a single blow. The way in which the said incident started, continued and the blow of stick which was given by the appellant shows that it was not at all given for the purpose of causing the death of Chunna by it.

The evidence on record makes us to come to the conclusion that appellant did not give the stick blow on the left flank of deceased Chunna with the intention of committing his murder and by giving that blow appellant Tota was not intending to cause rupture of the spleen of deceased Chunna. Of course, keeping in view the evidence on record, it will have to be presumed that appellant was having the knowledge that by dealing such blow, he was likely to cause the death of Chunna. Thus, finally we have no doubt in our mind that the offence which was committed by the appellant is not punishable u/s 302 of Indian Penal Code but is one which is punishable u/s 304 (Part II) of Indian Penal Code.

Thus, in the result, we partly allow this appeal and modify the order of conviction from Section 302 of Indian Penal Code to Section 304 (Part II) of Indian Penal Code. We modify the sentence from life imprisonment to the term of sentence which the appellant has undergone till today. The appellant be set at liberty forthwith if not required for any enquiry, trial or proceeding. We do not disturb the other portion of the order which has been impugned in this appeal.