

GAHC010065662018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Crl. A (J) 34 of 2018

Nirmal Tanti
Nagaon

.....Appellant

Versus

The State Of Assam
Rep. By P.P., Assam

.....Respondent

For the appellant : Mr. A Dhar, Amicus Curiae

For the respondent : Ms. B Bhuyan, Addl. PP

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 02.03.2023

Date of judgment : 10.03.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. A Dhar, learned Amicus Curiae and Ms. B. Bhuyan, learned Addl. Public Prosecutor.

2. This appeal has put challenge the judgment & order dated 21.12.2017 passed by the Court of the Addl. Sessions Judge-1, Nagaon, in Sessions Case No. 22(N)/2017, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 2,000/, in default to undergo further rigorous imprisonment for 4 months, vide sentence Order dated 22.12.2017. The learned Amicus Curiae submits that it is not disputed that the appellant had struck the back of the head of the deceased with an axe on 14.01.2017, which caused the death of the deceased. He, however, submits that the case of the appellant attracts Exception-1 to Section 300 IPC and accordingly, the conviction of the appellant has to be altered to Section 304 Part-II IPC.

3. Ms. B Bhuyan, the learned Addl. Public Prosecutor also submits that on considering the evidence adduced in the Trial Court, the action of the appellant may attract Exception-1 to Section 300 IPC. She further submits that the factors to be considered in determining whether culpable homicide amounts to murder is culled out in various judgments of the Apex Court, which is reflected in the case of ***State of Uttarakhand vs. Sachendra Singh Rawat***, reported in ***(2022) 4 SCC 227***.

4. We have heard the learned counsels for the parties.

5. The prosecution case in brief is that an FIR dated 14.01.2017 had been submitted by the father of the deceased (PW-1) to the In-Charge of Puranigudam P.P, Nagaon, stating that his deceased son and his son's friend, Shri. Dip Ruta went to collect firewood from Balijuri Tea Estate. The appellant, who was the Chowkidar of the Tea Estate confronted them and after snatching

an axe from them, he killed his son by giving a blow to the back of the head of the deceased with the axe.

6. PW-1, who is the father of deceased, in his cross-examination has stated that he was not a garden worker and that his house was outside the Tea garden area. He also stated that in order to collect firewood from the garden, permission of the garden authority is required. PW-1 further states that his deceased son and PW-2 did not take permission from the garden authorities to collect firewood from the garden on the date of the incident.

7. The evidence of the friend of the deceased, who is PW-2, is to the effect that they had gone into the tea garden for collecting wood. After loading the firewood on their cycles, they met the appellant, who took away the axe from the cycle of the deceased and moved away. The deceased asked the appellant, who was the Chowkidar of the Tea garden, to return the same. However, the appellant hit the deceased on the back of the head with the axe. In his cross-examination, PW-2 states that they did not submit any application at the Tea garden office, seeking permission to collect wood from the Tea garden. He also deposed that he knew the appellant before the occurrence of the incident. In his cross-examination, PW-2 has denied the suggestion that prior to the occurrence of the incident, they had earlier stolen firewood from the garden or that they had been warned by the garden authorities. He also denied the suggestion that the appellant had resisted them and that they had assaulted him.

8. PW-3, who is the Driver of the Manager of the Lungsung Tea Estate states that he knows nothing about the occurrence of the crime.

9. The evidence of the Doctor, PW-4, is to the effect that there was a deep cut injury in the occipital area (backside) of the head and that the skull of the occipital bone was fractured. In the opinion of PW-4, the cause of death was due to shock and haemorrhage as a result of the major head injury sustained by the deceased.

10. The evidence of PW-5 is to the effect that the deceased and one of his neighbour had gone to the Balijuri Tea Estate to collect firewood. While they were returning from the garden, the Chowkidar (appellant) stopped them and asked them why they had collected firewood from the tea garden. When they tried to flee, the appellant apprehended them. Then the appellant hit the deceased on the back of the head with the case. What is discernable from the evidence recorded is that the appellant, who was the Chowkidar of the Tea Estate, had apprehended and stopped the deceased and PW-2 from stealing firewood from the tea garden. The appellant had thereafter taken away the axe of the deceased and as the appellant was not willing to return the axe to the deceased, it is the case of the appellant that the deceased and the PW-2 tried to assault the appellant. Subsequent to the above events, the appellant struck the back of the head of the deceased with the axe, which resulted in the death of the deceased.

11. The evidence of PW-6, who is the Senior Assistant Manager of the Tea garden, is to the effect that the appellant surrendered himself before the police with the axe.

12. The evidence of PW-7 is to the effect that he knew the appellant, the deceased and the informant. In his evidence, he says that the Police made inquest on the dead body of the deceased in front of the old bungalow of the

Manager of the Tea Estate and that he was present at that time. He identified the inquest report and his signature, which were exhibited as Ext.-5 and Ext.-5(1) respectively.

13. The evidence of PW-8, who is Investigating Officer of the case, is that after investigation he found a prima facie case under Section 302 IPC against appellant and accordingly, he submitted the charge-sheet.

The evidence of the PW-8 however does not give any indication as to why the appellant had hit the back of the head of the deceased with an axe.

14. On considering the evidence adduced by the learned Trial Court, there is no denial with the fact that the appellant had caused the death of the deceased, by hitting the back of the deceased with an axe, which had been taken from the cycle of the deceased. The only question that requires to be decided is as to whether Exceptions 1 to 5 to Section 300 IPC would be attracted in the facts of the case.

15. In his cross-examination under Section 313 Cr.PC, the appellant in relation to question No. 1 has stated in the vernacular language that when he stopped the deceased and his friend while carrying firewood on their cycles, they approached him with the intention of assaulting him. He states that he retreated and thereafter he did not remember what happened. He then handed over the axe to the Tea Garden authorities. However, the English translation of his answer to the question under Section 313 Cr.P.C, as recorded in the Paper Book is slightly different. In any event, the vernacular version being in the language spoken by the appellant in the Court, the same would have to be considered to

be the correct version. The appellant's explanation gives rise to an inference that due to grave and sudden provocation on the part of the deceased and his friend, who were trying to assault him, he reacted and on being deprived of the power of self control, he unintentionally caused the death of the deceased.

16. In the case of ***Gurmail Singh & Another VS State of Uttar Pradesh & Another***, reported in ***(2022) 10 SCC 684***, the Apex Court has held that in order to make culpable homicide as murder, the act by which death is caused should fall not only under any one or more of the clauses Firstly to Fourthly under Section 300, IPC but they should also not falls under any of the five Exceptions to Section 300, IPC. As such, in order to make the present case culpable homicide not amounting to murder, we have to see whether the case falls under any of the Exceptions 1 to 5 to Section 300 IPC.

17. As can be seen from the recorded evidence and the submissions made by the learned counsels for the parties, the deceased and PW-2 had gone into the tea garden area on their cycles with axes and without obtaining permission from the Tea Garden authorities for collecting firewood. On the way back, after collecting the firewood, they were stopped by the appellant, who was the Chowkidar of the tea garden. The appellant had then taken away the axe of the deceased and had moved away. When the deceased asked the appellant to return his axe, the same was refused. The explanation given by the appellant, in his examination under Section 313 Cr.P.C to the question, that he had killed the deceased when the deceased and PW-2 had gone to collect firewood in the tea garden, the appellant stated that when he stopped the deceased and his friend from carrying firewood on their cycles, they approached him with the intention of assaulting him. He retreated and thereafter he did not remember what happened.

18. Exception 1 to Section 300 IPC provides that culpable homicide is not murder, if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

19. In the case of ***State of Uttarakhand (supra)***, the Apex Court has reflected the earlier judgments of the Apex Court with regard to how the intention to cause death can be gathered from a combination of a few or several circumstances, i.e.:-

“(i) nature of the weapon used;

(ii) whether the weapon was carried by the accused or was picked up from the spot;

(iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury;

(v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight;

(vi) whether the incident occurs by chance or whether there was any premeditation;

(vii) whether there was any prior enmity or whether the deceased was a stranger;

(viii) whether there was any grave and sudden provocation and if so, the cause for such provocation;

(ix) whether it was in the heat of passion;

(x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(xi) whether the accused dealt a single blow or several blows.

20. In the present case, it is clear that there was no premeditation on the part of the appellant to kill the deceased. The appellant being the Chowkidar of the tea garden, it was his duty to ensure that the property of the tea garden was secure. On the other hand, the evidence of PW-1, i.e. father of the deceased, is

to the effect that his son and his son's friend had unauthorisedly gone to the tea garden to collect firewood. There is also nothing in the evidence of the witnesses, to show that the deceased and his son's friend were employed in the tea garden. The appellant, as the Chowkidar, had apprehended the deceased and his friend, while they were attempting to take out firewood from the tea garden, without obtaining permission for the same.

21. In the case of ***Gurmukh Singh vs. State of Haryana***, reported in ***(2009) 15 SCC 635***, the Apex Court has given some factors, which are required to be taken into consideration before awarding appropriate sentence to the accused, which are illustrative in character and not exhaustive. The factors are:-

- a) Motive or previous enmity;***
- b) Whether the incident had taken place on the spur of the moment;***
- c) The intention/knowledge of the accused while inflicting the blow or injury;***
- d) Whether the death ensued instantaneously or the victim died after several days;***
- e) The gravity, dimension and nature of injury;***
- f) The age and general health condition of the accused;***
- g) Whether the injury was caused without pre-meditation in a sudden fight;***
- h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;***
- i) The criminal background and adverse history of the accused;***
- j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;***
- k) Number of other criminal cases pending against the accused;***
- l) Incident occurred within the family members or close relations;***
- m) The conduct and behaviour of the accused after the incident.***

22. In view of the fact that there were two young persons against the

appellant, who was the Chowkidar nearing 50 years of age, we are of the view that explanation given by the appellant, that the two young persons tried to assault the appellant to recover their axe is quite plausible. We are also of the view that to safeguard himself due to the action of the deceased in approaching, the appellant with the intention to assault him, amounted to grave and sudden provocation, which deprived the appellant of his power of self-control, thereby making him react. Though it is difficult to come to a positive finding as to whether the appellant had the intention to kill the deceased, we are of the view that the appellant had the knowledge that his action was likely to cause death or cause such bodily injury as is likely to cause death. Further the act of gathering firewood and the attempt to take the same out of the tea garden amounts to stealing property. The appellant nearing 50 years of age and holding the job of Chowkidar, it was his duty to ensure that tea garden property was not stolen. Though the appellant had killed the deceased, there was no premeditation or intention to kill the deceased, as he had taken the axe from the cycle of the deceased and moved away. Further, the appellant had given himself up before the Police along with the axe. Also there is no criminal background against the appellant. On considering all the above factors, this Court is of the view that the act of killing the deceased by the appellant does not amount to murder.

23. In view of the above reasons, we are of the view that Exception 1 to Section 300 IPC is attracted to the facts of the case. Accordingly, the appellant is convicted under Part-II of Section 304 IPC and he is sentenced to undergo rigorous imprisonment for a period of 7 (seven) years, with the fine imposed by the learned Trial Court.

24. The appeal is partly allowed. The conviction under Section 302 IPC is

converted to Section 304 Part-II IPC. The conviction under Section 302 IPC is set aside. The period already undergone by the appellant shall be set off from the period of imprisonment imposed on him. Send back the LCR.

25. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant