

GAHC010277912019



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

Case No. : CRL.A(J)/86/2019

ASHIM BARUAH
BISWANATH CHARIALI, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY PP, ASSAM.

2:NAREN BARUAH
S/O- LATE GUNESWAR BARUAH

VILL- JORABARI

P.S.- GINGIA

DIST- BISWANATH
ASSAM

Advocate for the Petitioner : MR N J DAS, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. N.J. Das, Amicus Curiae.

For the respondents : Ms. S. Jahan,
Addl. Public Prosecutor, Assam.
Mr. S. Sinha for resp. No. 2.

Date of hearing : 26.07.2023.

Date of Judgment : 26.07.2023.

JUDGMENT AND ORDER (ORAL)

(M. Zothankhuma, Judge)

Heard Mr. N. J. Das, learned Amicus Curiae. Also heard Ms. S. Jahan, learned Addl. Public Prosecutor and Mr. S. Sinha for the informant, respondent No. 2.

2. This appeal has been preferred against the Judgment dated 07.05.2019 passed by the Court of Addl. Sessions Judge, FTC, Biswanath Chariali in Sessions Case No. 156/2017, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5000/-, in default, to undergo Rigorous Imprisonment for two months, for having caused the death of the deceased, who was a 45 year old lady, by hitting her with an axe.

3. The prosecution case in brief is that Prosecution Witness No. 1, who is the brother-in-law of the deceased and the first cousin of the appellant, had submitted an FIR dated 17.02.2017, to the effect that at around 11:15 pm on

16.02.2017, the appellant had hacked Lakhi Barua on her head with an axe and as a result of which, she was taken to Biswanath Chariali Civil Hospital where she died. In pursuant to the FIR, Gingia PS Case No. 74/2017 under Section 302 IPC was registered. After completion of the investigation, the Investigating Officer submitted the charge sheet, on finding a prima facie case under Section 302 IPC against the appellant. Charge under Section 302 IPC was framed against the appellant, to which the appellant pleaded not guilty and claimed to be tried.

4. During trial, 21 prosecution witnesses and 1 defence witness, i.e. the appellant himself, were examined by the learned Trial Court. The appellant was also examined under Section 313 CrPC. The learned Trial Court thereafter came to a finding that though the appellant had taken the stand in his evidence that he had unintentionally killed the deceased by hitting her with an axe on her neck, the same had been done intentionally. Thus, the learned Trial Court came to a finding that the appellant was guilty of the offence under Section 302 IPC and convicted him accordingly.

5. The learned Amicus Curiae, at the outset, submits that there is no denial with the fact that the deceased had died due to being hit by the axe, which was held by the appellant. However, the said act had not been done intentionally. He submits that the son of the deceased had died some 14/15 days back in an accident, where the son was a pillion rider in the bike driven by the appellant. In view of the above, the deceased used to abuse and provoke the appellant regularly. On the fateful day, when the appellant was cutting firewood with an axe, the deceased shoved him from behind and while turning, the appellant's

axe hit the neck of the deceased which led to her death. He submits that there being no intention on the part of the appellant to kill the deceased and as there was a continuous grave and sudden provocation by the deceased against the appellant, the unintentional act of the appellant in causing the death of the deceased would attract Exception 1 to Section 300 IPC. As such, the learned Trial Court had erred in convicting the appellant under Section 302 IPC. He submits that the appellant could have, at best been convicted under Section 304 Part-I IPC and not under Section 302 IPC. In support of his submission that the appellant could not be convicted under Section 302 IPC, but under Section 304 Part-I IPC, he has relied upon the judgment of the Supreme Court in the case of *Dauvaram Nirmalkar Vs. State of Chhattisgarh*, AIR 2022 SC 3620.

6. Ms. S. Jahan, learned Addl. Public Prosecutor submits that there is no infirmity with the decision of the learned Trial Court in convicting the appellant under Section 302 IPC, as the evidence on record does not suggest that the act of the appellant in hitting the deceased with an axe was unintentional. She submits that the act of provocation and loss of self-control must be actual and reasonable. She further submits that for attracting the defence of provocation under Exception 1 to Section 300 of the IPC, this Court will have to see whether there was an intervening period, for passions to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given and the retaliation should be proportionate to the provocation.

She further submits that as the retaliation on the part of the appellant cannot be said to be proportionate to the provocation by the deceased,

Exception 1 to Section 300 of the IPC is not attracted to the facts of this case. She accordingly submits that the impugned Judgment should not be interfered with.

7. Mr. K. Sinha, learned counsel for the informant also reiterates the submission made by the learned Addl. Public Prosecutor.

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

9. The Trial Court record shows that 21 prosecution witnesses and the appellant were examined by the learned Trial Court. Out of the 21 prosecution witnesses, there were 4 eye witnesses i.e. PW-2, PW-3, PW-8 and PW-16. PW-19 and PW-20 are both Investigating Officers (I.Os), while PW-21 is the Doctor, who conducted the Post Mortem examination over the dead body. The evidence of all the other prosecution witness, barring PW-2, PW-3, PW-8 and PW-16 are heresay evidence.

10. The Post-Mortem Report of the deceased shows the injuries on the body with regard to "wounds-position and character" and "cranium and spinal canal" amongst others, are as follows:-

"I-EXTRANAL Appearance

1. Condition of subject stout emaciated, decomposed etc:

Average built, eyes & mouth closed, bleeding through nostrils and Rt ear, dislocated Rt mandibular joint. Rigor mortis found sluggish. One I-V canula

found over left (illegible) vein.

2. Wounds-position, and character:

Lacerated wound (2x1) cm over Rt maxilla c# maxilla. Lacerated wound of size (2x3) cm over both lateral aspect of the frontal bone above the eye balls, all wounds were found stitched."

“II- CRANIUM AND SPINAL CANAL

1. Scalp, Skull, Vertebrae: Scalp – Lacerated wound over the bilateral

aspect of the frontal line and Rt

maxilla.

Skull-# frontal bone (illegible)#

Rt Maxilla.

2. Membrane: Ruptured under the # site.

3. *Brain and spinal cord* : *Brains – Haemorrhage*

Spinal cord – Congested”

11. The opinion of the Doctor with regard to the cause of death of the deceased was due to cerebro vascular accident, as a result of the head injuries, which was caused by a heavy blunt object.

12. The question that has to be decided is as to whether the appellant's case would come under Exception 1 to Section 300 of the IPC. In this regard, the Supreme Court has held in the case of *K.M. Nanavati Vs. State of Maharashtra*, reported in *1962 Supp (1) SCR 567*, that the conditions which have to be

satisfied for Exception 1 to Section 300 of the IPC to be invoked are (a) the deceased must have given provocation to the accused; (b) the provocation must be grave; (c) the provocation must be sudden; (d) the offender, by the reason of the said provocation, should have been deprived of his power of self-control; (e) the offender should have killed the deceased during the continuance of the deprivation of power of self-control; and (f) the offender must have caused the death of the person who gave the provocation or the death of any other person by mistake or accident.

It further held for determining whether or not the provocation had temporarily deprived the offender from the power of self-control, the test to be applied is that of a reasonable man and not that of an unusually excitable and pugnacious individual.

13. In the case of *Dauvaram Nirmalkar (Supra)*, the Supreme Court has held that the question of loss of self-control by grave and sudden provocation is a question of fact and the law attaches great importance to two things when the defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. It also held that the retaliation should be proportionate to the provocation. The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation.

14. On considering the law laid down by the Supreme Court with regard to the condition required for attracting Exception 1 to Section 300 of the IPC, with reference to the present case, we would have to see whether the appellant had time to reflect and cool down from the provocation and whether the provocation was enough to bring about a loss of self-control in the fact situation. Further, we would have to see whether the retaliation was proportionate to the provocation.

15. The evidence of the appellant as DW-1 is to the effect that the son of the deceased had died in a bike accident where the son was the pillion rider, while the bike was being driven by the appellant (DW-1). The deceased, who was the aunty of the appellant used to abuse him over the said issue regularly. Further, the son of the deceased had died 14/15 days prior to the death of the deceased. On the day of occurrence, the appellant was splitting firewood with an axe, whereupon he was shoved from behind by the deceased, as a result of which the axe, which he was holding hit the deceased in her neck. The appellant in his evidence stated that he did not kill the deceased intentionally.

16. The import of the evidence given by the appellant suggests that the deceased blamed the appellant for the death of her son. Due to the death of the son of the deceased, the deceased kept abusing the appellant and reminding him of the said incident regularly. In terms of the evidence of the appellant as DW-1, the appellant had unintentionally killed the deceased on being shoved from behind by the deceased. Thus, in terms of the evidence of DW-1, there is nothing to show that there was any retaliation on the part of the appellant on being shoved by the deceased, even if it is assumed that the act of being

shoved by the deceased was a provocation. As the appellant in his evidence has not taken a stand that his unintentional act of hitting the neck of the deceased with an axe was not in retaliation due to a provocation, then the appellant cannot take the defence of having loss self-control by being shoved from behind by the deceased. The reason being that a shove cannot be said to be a provocation.

In view of the evidence of DW-1, it is not possible for us to accept the stand taken by the appellant that he was provoked into retaliating, due to being shoved by the deceased.

On the other hand, assuming that the appellant had been provoked by the deceased, which led to his retaliation and unintended killing of the deceased, the hitting of the deceased with an axe in the neck two times, cannot be said to be proportionate to the provocation, i.e. shoving of the appellant from behind by the deceased, who is a 45 year old lady.

17. The stand of the appellant i.e. the act was unintentional, does not seem to be supported by the evidence adduced by PW-2. The evidence of PW-2 is to the effect that she saw the appellant assaulting the deceased with an axe and as a result of which the deceased fell to the ground. While taking the injured deceased into the house, the appellant threatened PW-2 that he would kill her and all her family members. In her cross-examination, PW-2 also states that the appellant had given two blows with the axe on the head of the deceased.

18. The evidence of PW-9 is that he was sitting with the deceased outside their house. At 10:55 am, the deceased went to her house, telling PW-9 that she was

going to prepare food. Thereafter, PW-9 went inside her house. On hearing a hue and cry from outside, she came out of her house and saw the appellant standing with an axe in his hand and the deceased lying on the ground. PW-9 further states that he did not go close to them, as the appellant armed with an axe was threatening to kill PW-9.

19. The evidence of PW-20 (Investigating Officer) is that when he arrived at the place of occurrence along with the DSP, he found the appellant armed with an axe, shouting that he would assault someone.

20. The above testimonies of the prosecution witnesses does not indicate that the appellant's action of hitting the deceased with an axe was unintentional. Further, for a 32 year old appellant to hit a 45 year old woman two times with an axe, does not appear to be unintentional. As held by the Supreme Court in ***Dauvaram Nirmalkar*** (supra), the retaliation should be proportionate to the provocation. However, the alleged abuse by the deceased, a 45 year old lady and the retaliatory act on the appellant, cannot in our mind, be said to be proportion, especially when the appellant hit the deceased twice on her head/neck with the axe.

21. In view of the reasons stated above, we are of the view that the evidence recorded by the learned Trial Court does not attract Exception 1 to Section 300 IPC. We accordingly do not find any ground to interfere with the impugned judgment and order. The appeal is accordingly dismissed. Send back the LCR.

22. In appreciation of the assistance provided by Mr. N.J Das, the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant