

**HIGH COURT OF JUDICATURE AT ALLAHABAD
(LUCKNOW)**

Neutral Citation No. - 2023:AHC-LKO:65234-DB

Reserved on :- 11.08.2023
Pronounced on :- 10.10.2023

Court No.-9

Case :- CRIMINAL APPEAL No. - 428 of 2013

Appellant :- Jagdamba Prasad

Respondent :- The State Of U.P.

Counsel for Appellant :- Shadab Waheed, Avadhesh Kumar Shukla, Rajendra Prasa Mishra, Ravi Kant Pandey

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per :- Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Sri Rajendra Prasad Mishra, learned counsel for the appellant, Sri Umesh Chandra Verma, learned A.G.A. for the State and perused the entire record available before us.

2. Under challenge in this criminal appeal is the impugned judgment and order dated 07.03.2013 passed by the learned Additional Sessions Judge, Court No.10, Gonda in Sessions Trial No.148 of 2011 titled as State vs. Jagdamba Prasad and another arising out of Crime No.38 of 2001, under Sections 302, 307 and 504 of the Indian

Penal Code¹, Police Station Motiganj, District Gonda whereby the appellant, Jagdamba Prasad has been convicted and sentenced to undergo life imprisonment with a fine of Rs.10,000/- for the offence under Section 302 I.P.C. and in default of payment of fine, he has further been directed to undergo six months' additional rigorous imprisonment. He has also been convicted and sentenced to undergo one year's rigorous imprisonment for the offence under Section 504 I.P.C.

3. The case of the prosecution in nutshell is that a written report was submitted by the first informant, Shesh Ram Verma at Police Station, Motiganj District Gonda stating therein that the first informant, Shesh Ram Verma and his elder brother, Maya Ram were invited to a feast where the nephew of former Gram Pradhan, namely, Ram Chabi was also present. Mata Prasad, the present Gram Pradhan and father of the present appellant, namely, Sadhu Verma were also present in the feast where some altercation took place between the present appellant, Jagdamba Prasad and Ram Chabi. The present appellant, due to aforesaid altercation, tried to kill Ram Chabi by opening fire at Ram Chabi, however, Maya Ram got killed, who had come up to intervene. The co-accused, Sadhu Verma, the father of the present appellant, is stated to have exhorted. The deceased was shot in his abdomen, who fell on the ground. The appellant, on being scolded by the villagers who were present at the spot, fled away and while fleeing away, he threw his licensed gun at the spot.

¹ hereinafter referred to as "I.P.C."

4. The inquest proceeding started on 05.03.2001 at 12:40 PM and got concluded on 05.03.2001 at 14:00 PM. The inquest report has been duly proved by P.W.-2, Mangali Prasad as Ex. Ka-3.

5. According to postmortem report of the deceased, Ex. Ka-5, which has been proved by P.W.-5, Dr. D.M. Saxena, there was one firearm wound of entry 6 cm x 5 cm thoraco abdominal cavity deep (cruciform in shape) on the left side of chest & abdomen, about 6.5 cm below left nipple part. The omentum protruding out of the wound. Blackening & scorching were also found present. The cause of death of the deceased, Maya Ram, according to postmortem report, Ex. Ka-5, is reported to be shock and haemorrhage as a result of antemortem firearm injury.

6. On the basis of aforesaid written report, Ex. Ka-1 submitted by the first informant, Shesh Ram Verma, the first information report, Ex. Ka-7 came to be lodged against the appellant on 04.03.2001 for the offence under Sections 307, 504 I.P.C.

7. The Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure². He visited the place of occurrence and prepared a site plan thereof Ex. Ka-6.

8. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-4

² hereinafter referred to as "Cr.P.C."

against the present appellant and the co-accused, Sadhu for the offence under Sections 302, 307 and 504 I.P.C. However, the co-accused, Sadhu has been acquitted of the charges under Sections 302/34, 307/34 and 504 I.P.C. by means of judgment and order dated 06.03.2013.

9. Charges for the offences under Sections 302/34, 307/34 and 504 I.P.C. were framed against the present accused/ appellant and the co-accused, Sadhu, who denied the charges and claimed to be tried.

10. In order to bring home guilt of the appellant, the prosecution has examined the first informant, Shesh Ram Verma as P.W.-1, Mangali Prasad as P.W.-2, Ram Chabi as P.W.-3, S.I. Munni Lal as P.W.-4, Dr. D.M. Saxena as P.W.-5, Incharge Inspector, Gopal Krishan Gupta as P.W.-6, Constable Bhatnagar Singh as P.W.-7, S.I. Chakra Dhar Pandey as P.W.-8, Constable Vishnu Narayan Awasthi as P.W.-9.

11. The appellant in his statement recorded under Section 313 Cr.P.C. has stated the prosecution story to be false. He has also stated to have been falsely implicated in this case and he claimed to be innocent.

12. D.W.-1, Ramjan Ali has been examined from the side of defence.

13. The learned trial court, after appreciating evidence on record adduced by the prosecution and by the

accused, convicted and sentenced the appellant as stated herein above.

14. In such circumstances referred to above, the accused-appellant is before this Court with the present appeal.

15. The only argument of learned counsel for the appellant canvassed before us is that the case of the prosecution, if the same is taken to be true, does not travel beyond culpable homicide as the same falls within the third part of Section 299 of I.P.C., the accused-appellant could only be said to have knowledge that he is likely by his act to cause death and not the intention to kill the deceased.

16. Per contra, learned A.G.A. for the State has submitted that the accused/ appellant rightly came to be convicted vide impugned judgment and order dated 07.03.2013, which is well discussed and reasoned. The appellant was named in the first information report, who shot the deceased dead. The prosecution has proved its case on the basis of reliable prosecution evidence, therefore, interference by this Court is not warranted. He, accordingly, prays for dismissal of the instant criminal appeal.

17. Having heard learned counsel for the appellant, learned A.G.A. for the State and upon perusal of record, we find that the alleged incident is stated to have occurred on 04.03.2001 at about 09:00 PM, regarding which, a first

information report, Ex. Ka-7 was lodged on 04.03.2001 at about 22:15 Hrs. The distance between the place of occurrence and the police station is stated to be four kilometers towards north. The first informant, P.W.-1, Shesh Ram Verma has proved the written report, Ex. Ka-1 and the first information report, Ex. Ka-7 has been proved by P.W.-7, Constable Bhatnagar Singh. Thus, we find that a prompt first information report came to be lodged in respect of the incident-in-question, which rules out possibility of false implication of the accused/ appellant. According to the written report, Ex. Ka-1, the deceased is stated to have been shot dead by the present accused/ appellant by his licensed gun. According to the prosecution story, the accused/ appellant shot the deceased, Mayaram dead while he was trying to offer his good offices during the altercation, which took place between Ram Chabi and the present accused/ appellant, Jagdamba. The present accused/ appellant opened fire at Ram Chabi in order to kill him, however, the deceased was killed who came up to intervene during the altercation between the appellant and Ram Chabi.

18. The postmortem report, Ex. Ka-5 has been proved by P.W.-5, Dr. D.M. Saxena. According to which, there was one firearm wound of entry 6 cm x 5 cm thoraco abdominal cavity deep (cruciform in shape) on the left side of chest & abdomen, about 6.5 cm below left nipple part. The omentum protruding out of the wound. Blackening & scorching were also found present. The cause of death of

the deceased is reported to be shock and haemorrhage as a result of antemortem firearm injury.

19. P.W.-1, Shesh Ram Verma is the first informant, who is also an eye witness of the incident. In his testimony, he has supported the prosecution case in its entirety. He has stated that on the date of incident, the deceased was killed by the present accused/ appellant, who shot the deceased dead by his licensed gun. He has also proved the written report Ex. Ka-1 and the recovery memo, Ex. Ka-2 in respect of recovery of SBBL gun, which was recovered from the spot.

20. The P.W.-2, Mangali Prasad and P.W.-3, Ram Chabi are also stated to be the eye witnesses, who in their testimonies, have stated that they saw this incident wherein the accused-appellant killed the deceased by opening fire from his licensed gun.

21. The learned trial court has found the testimonies of aforesaid witnesses of fact to be wholly reliable and natural. Upon close scrutiny of their testimonies, we also find that even in detailed cross-examination of the aforesaid witnesses, namely, P.W.-1, Shesh Ram Verma, P.W.-2, Mangali Prasad and P.W.-3, Ram Chabi, no such discrepancy has surfaced, which may shake the credibility of the testimonies of aforesaid eye witnesses. The investigating officer, P.W.-6, Incharge Inspector, Gopal Krishna Gupta has proved the site plan, Ex. Ka-6, which is consistent with the place of occurrence described by the witnesses of facts. P.W.-4, S.I. Munni Lal has proved the

charge sheet as Ex. Ka-4. Therefore, in the light of consistent and reliable testimonies of P.W.-1, Shesh Ram Verma, P.W.-2, Mangali Prasad and P.W.-3, Ram Chabi, we are of the considered view that the finding of learned trial court to the effect that on 04.03.2001 at about 09:00 PM, the accused/ appellant shot the deceased, Mayaram dead by using his firearm causing homicidal death of the deceased to be based on proper appreciation of testimonies of prosecution witnesses, which, in our considered view, do not suffer from any infirmity.

22. Insofar as applicability of Section 304 Part II I.P.C. in the facts of the present case is concerned, Hon'ble the Supreme Court in **Anbazhagan vs. State Represented by the Inspector of Police**³ in paragraph No.66 has summed up the principle regarding applicability of Section 304 Part I and II I.P.C. as under:-

"66. Few important principles of law discernible from the aforesaid discussion may be summed up thus:—

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate: 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused.

³ **2023 SCC OnLine SC 857**

The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of

the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) Section 304 of the IPC will apply to the following classes of cases : (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC."

23. What is meant by intention has also been elucidated by Hon'ble the Supreme Court in **Anbazhagan's case (supra)** in paragraph No.21 in following words:-

"21. Intention, which is a state of mind, can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are proved. The intention may be proved by res gestae, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case. There are various relevant circumstances from which the intention can be gathered. Some relevant considerations are the following:—

- 1. The nature of the weapon used.*
- 2. The place where the injuries were inflicted.*
- 3. The nature of the injuries caused.*
- 4. The opportunity available which the accused gets."*

24. Now adverting to the case at hand in the light of aforesaid principle, we find that according to prosecution story, the appellant had fired at the deceased only once. Keeping in view the postmortem report of the deceased, Ex. Ka-5, which has been proved by P.W.-5, Dr. D.M. Saxena, we find the sole antemortem firearm injury sufficient in ordinary course of nature to cause death of the deceased. A bare perusal of first information report itself reveals that the appellant was carrying his own licensed gun, which is an usual practice for any person who hold a valid license to carry his arms with him. It is also the case of prosecution that when the appellant reached at the place of occurrence, an altercation took place between him and P.W.-3, Ram Chabi whereupon the appellant, according to the prosecution, in order to kill the

first informant, opened fire, which hit the deceased in his abdomen causing death of the deceased, Mayaram. In our considered opinion, had the appellant been intending to kill the first informant as stated in the first information report by the first informant himself, in that case, the appellant would have reloaded his gun and would have attempted to shot at the first informant also, which is not the case of prosecution. The injury is not on such vital part like skull etc.; rather according to prosecution story, the appellant on being scolded by other persons, who were present on the spot, threw his gun at the spot and fled away from the place of occurrence. It is also the case of prosecution that before the appellant shot the deceased dead, an altercation had taken place between him and P.W.-3, Ram Chabi. The altercation was verbal and not physical. There is nothing on record to show that the act of opening fire by the appellant was premeditated.

25. We have also been able to notice that there is nothing on record to show that once the injured fell down after receiving the gun shot injury rendering him helpless, any undue advantage of the deceased being helpless was taken by the appellant. All the aforesaid facts go to show that the incident-in-question took place in the heat of passion upon a sudden quarrel. That being so exception IV to Section 300 I.P.C. is clearly applicable in this case and accordingly the appellant deserved to be convicted under Section 304 Part II I.P.C.

26. For the aforesaid reasons, the present criminal appeal is **partly allowed**. The conviction of the appellant and sentence awarded to him under Section 302 I.P.C. is altered to one under Section 304 Part II I.P.C., for which, the appellant is awarded ten years' rigorous imprisonment. He shall also be liable to pay fine of Rs.10,000/- and in default of payment of fine, he shall undergo six months' additional rigorous imprisonment. His conviction and sentence for the offence under Section 504 I.P.C. awarded by the learned trial court is affirmed. All the sentences shall run concurrently.

27. In case, the appellant, Jagdamba Prasad has already served out the sentence awarded to him for the offence under Sections 304 Part-II and 504 I.P.C., he shall be released forthwith, if he is not wanted in any other case.

28. The appellant is directed to file a personal bond and two sureties in the like amount to the satisfaction of the court concerned in compliance with Section 437-A Cr.P.C. within eight weeks from today.

29. Let the record of lower court along with a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

(Ajai Kumar Srivastava-I, J.)

(Rajan Roy, J.)

Order Date :- 10.10.2023

cks/-