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NAFF

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 637 of 2007

1. Ajay @ Mintu @ Anthoni Kerketta, S/o Clament Kermetta, aged about 21 years, r/o Village Burairangi, P.S. Bano, District Simdega (Jharkhand) at present R/o 20 Number Barau dafai, Domanhill Colliery, P.S. Chirmiri, Distt. Korea (CG)
2. Kishun Kumar @ Kishan S/o Motilal, aged about 20 years, R/o Vill. Semra, Manendragarh, Distt. Korea, C.G. At Present R/o 20 Number Barau Dafai, Domanhill Colliery, P.S. Chirmiri, Distt. Korea, C.G.

---- Appellants

Versus

- State of CG, through Police Station Chirmiri, Distt. Korea (CG)

---- Respondent

For Appellants : Shri FS Khare, Advocate.
For Respondent/State : Shri V. Goverdhan, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice R.C.S. Samant

Judgment On Board By Justice Pritinker Diwaker

16/12/2016:

This appeal arises out of the judgment of conviction and order of sentence dated 12.6.2007 passed by the First Additional Sessions Judge, Manendragarh, Distt. Korea in S.T.No.121/2006 convicting the accused/appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life and fine of Rs.500/- with default stipulation.

02. In the present case, name of the deceased is Suresh Das @ Gudda. As per prosecution case, the deceased was having affair with sister of appellant No.1 Ajay, which was not liked by him and on



13.1.2005 the accused/appellants went to the house of the deceased, took him alongwith them on the pretext of loading coal and near a brook committed his murder by causing injuries on his stomach. At the relevant time, PW-6 Munna Das, father of the deceased, was present near the said brook as he had gone there to ease himself and upon hearing the cries of his son "*Bachao, Bachao*", he rushed back to his house and after informing about the same to his another son Raju Das and his neighbour Vilson Xalxo returned to the spot along with them. On reaching the spot, they found both the appellants standing there. Further case of the prosecution is that when Raju Das enquired from appellant No.1 Ajay as to what he is doing there, both the accused/appellants ran away from the spot. Injured Suresh Das was lifted by the villagers and taken to hospital where he was declared brought dead. Information about the death was sent by Dr. RC Bavariya (PW-1) and at his instance merg intimation Ex.P/1A was recorded on 13.1.2005 at 13:25 hours. After merg intimation, FIR (Ex.P/8) was registered against the appellants on 14.1.2005 under Section 302/34 of IPC. Inquest over the dead body was performed vide Ex.P/2 and thereafter the body was sent for postmortem, which was conducted on 14.1.2005 by PW-4 Dr. AK Agrawal vide Ex.P/4 wherein he did not notice any external injury on the body of the deceased and according to him the cause of death was shock due to intra-abdominal hemorrhage resulting from laceration of liver and the death was homicidal in nature. After completion of investigation, charge sheet was filed against the accused/appellants under Section 302/34 of IPC and accordingly, charge was framed.



03. So as to hold the accused/appellants guilty, the prosecution examined as many as 13 witnesses. Statement of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellants as mentioned in para-1 of this judgment.

05. Learned counsel for the appellants submits as under:

- (i) that the accused/appellants have been falsely implicated merely on the basis of suspicion.
- (ii) that the appellants have been convicted on the basis of evidence of last seen by PW-5 Raju Das and PW-6 Munna Das but considering the fact that these witnesses are relative of the deceased, it would not be safe for this Court to act upon their evidence. This apart, evidence of last seen being a weak type of evidence can not be made the basis of conviction until and unless there is some other corroborative evidence against the accused.
- (iii) that as per postmortem report, there was no external injury on the person of the deceased and thus even admitting the case of the prosecution as it is that the appellants caused some injuries on the stomach of the deceased, at best they are liable to be convicted under Section 323 or 325 of IPC.
- (iv) that the appellants have already remained in jail for about two years and seven months and therefore, after converting their conviction



either into Section 323 or 325 of IPC, their sentence may be reduced to the period already suffered by them.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of the accused/appellants is strictly in accordance with law and there is no illegality or infirmity in it warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Dr. RC Bavariya gave information about death of the deceased to police vide Ex.P/1. PW-2 Jonson Kujur is a witness of inquest Ex.P/2 and seizure of certain articles from the place of occurrence Ex.P/3. PW-3 Rajkumar is also a witness to inquest Ex.P/2. PW-4 Dr. AK Agrawal conducted postmortem on the body of the deceased on 14.1.2005 vide Ex.P/4 and noticed no external injury on the person of the deceased. However, on internal examination he noticed blood in the stomach, rupture of liver and in his opinion, the cause of death was shock due to intra-abdominal hemorrhage resulting from laceration of liver and the death was homicidal in nature.

09. PW-5 Rajudas, brother of the deceased, has stated that the accused persons were having friendship with his brother/deceased and therefore, he knows them. On 13.1.2005 at about 10-11 pm when he was in his house, his father called him and informed that someone is beating the deceased whereupon he immediately rushed to the spot along with his father and one Vilson where they found the accused/appellant standing there and the deceased lying in the brook.

When he enquired from accused/appellant Ajay as to what he is doing there, the other accused/appellant Kishun asked Ajay to run away and thereafter, both the appellant ran away from there towards jungle. Though he chased them but could not catch them. Thereafter, he returned to the spot and took the deceased to hospital where he was declared brought dead. He has further stated that about 10-15 days prior to the incident, brother of appellant Kishun had teased his niece, on which the deceased beat brother of Kishun and on account of this animosity the accused persons killed his brother. He admits that number of persons pass through the place of occurrence.

10. PW-6 Munna Das, father of the deceased, has stated that at about 5-6 pm the deceased left his house and at about 10 pm he went towards the brook to attend the call of nature where he heard the cries of his son/deceased for help and then rushed back to his house and returned to the spot along with his son Raju Das and one Vilson. On reaching the spot, he first saw accused/appellant Ajay standing there and other accused Kishun was seen standing 5-6 ft away from there. When his son Raju asked appellant Ajay as to what he is doing there, the other appellant Kishun asked Ajay to run away from there and thereafter, both the accused persons fled from there. Though they were chased but could not be caught. He with the help of other villagers took the deceased to hospital but by that time he had expired.

11. PW-7 Irfan Khan has stated that at about 9 pm Raju Das came to his shop and asked for battery of torch and when he enquired from his as to why he is in a hurry, he replied that somebody is beating his brother near the brook and he has to go there. He states that after



about 8-10 days he came to know that it is the accused/appellants who have been arrested in connection with murder of the deceased. However, subsequently this witness has been declared hostile.

12. PW-8 Vilson Xalxo has stated that at about 10 pm he was in the house of Raju Das when father of the deceased Munna Das came there and informed them that someone is beating the deceased near the brook, on which Raju Das and he went with Munna Das to the brook and found the appellants there. However, after seeing them coming both the appellants fled from there. Thereafter, they took the deceased to hospital where he was declared dead.

13. PW-9 Santosh Kumar and PW-10 Rajesh Lakda reached the place of occurrence after the incident had taken place. PW-11 Shahid is a hearsay witness. PW-12 Vimal Das has stated that just before the incident at around 9-9.15 pm he met the accused persons who were enquiring about the deceased and thereafter at around 10-10.30 pm he came to know that the deceased was taken from the brook to hospital where he was declared dead. PW-13 Laxmikant Gayakwad, investigating officer, has supported the prosecution case.

14. Close scrutiny of the evidence makes it clear that on 13.1.2005 the accused/appellant took the deceased along with them near the brook and caused injuries on his stomach which resulted in his death. As per PW-5 Munna Das, father of the deceased, who at the relevant time was present near the spot to attend the call of nature, after hearing the cries of his son for help went to his house and came back with his son Raju Das (PW-5) and neighbour Vilson Xalxo (PW-8) to

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the spot and they all saw the appellants standing near the brook. When Raju Das asked Ajay as to what he is doing there, the other appellant Kishun asked Ajay to run away from there and then both of them ran away towards the jungle. Though the appellants were chased but could not be caught. Thereafter, the deceased was taken to hospital where he was declared brought dead. Similar is the statement of PW-5 Raju Das. Their version finds due corroboration from the evidence of independent witness PW-8 Vilson Xalxo. Defence has utterly failed to elicit anything from these witnesses to render their testimony untrustworthy or doubtful. It has also come in the evidence that the accused/appellants were having animosity against the deceased. This apart, according to the autopsy surgeon, the death was homicidal in nature and he has categorically denied the suggestion that death of the deceased may be the result of rupture of liver due to fall on hard surface. Thus on the basis of above evidence complicity of the accused/appellants in commission of the offence stands proved beyond all reasonable doubt.

15. Now the next question which arises for consideration of this Court is whether the act of the accused/appellants makes them liable for conviction under Section 302/34 of IPC or for any other offence?

16. Section 299 of IPC defines culpable homicide. It says that whoever causes death by doing an act with the intention of causing death, or with intention of causing such bodily injury as is likely to cause death, or with knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. The culpable homicide would be murder, if the act by which the death is caused is



done with the intention of causing death or when Clauses *Secondly*, *Thirdly* or *Forthly* of Section 300 are attracted. However, the culpable homicide would not amount to murder, if the act done false in either of *Exceptions* mentioned in Section 300, for which the accused would be liable for punishment under Section 304 of IPC. Therefore, 'intention' or 'knowledge' are the two important elements to bring an act within the ambit of any part of Section 304 of IPC.

17. Intention denotes that a particular consequence should ensure, however, knowledge of consequence which may result in doing of an act is quite different than intention. The intention is a factor which attracts first part of Section 304 of IPC and knowledge attracts its second part. The intention is a purposeful doing of a thing to ensure a particular result, whereas the knowledge is an awareness which attributes to be well informed that a particular result may happen by doing a thing.

18. In the matter of ***Thomas Vs. State of Kerala, 1992 Cr.L.J.581 (Krl.)(DB)***, it was held that "in order to constitute an offence of culpable homicide, a person has to cause death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death. Culpable homicide is the genus, of which murder is the species. The word "likely" means probably and it is distinguished from here "possibly". When chances of happening are even or greater than its not happening, it can be said 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."

19. In ***Abdul Waheed Khan alias Waheed and others Vs. State of A.P. (2002) 7 SCC 175***, the Supreme Court vide para-11 observed that "in the scheme of IPC culpable homicide is the genus and "murder" its species. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

20. In the case in hand, as already discussed above, though the accused/appellants beat the deceased on account of there being some previous animosity which resulted in his death, but at the same time it is also evident that no weapon was used by them and that they did not inflict any injury on the vital part of the deceased. From the facts and circumstances of the case, it appears that the appellants had neither intention to cause death of the deceased nor had the knowledge of



causing such bodily injury to the deceased which may result in his death. Thus, keeping in view the facts and circumstances of the case, the manner in which the incident occurred, in light of the above provisions of law and the judicial pronouncements, this Court is of the considered opinion that the trial Court was not justified in convicting the appellants under Section 302/34 of IPC and they can, at best, be held guilty under Section 325/34 of IPC for voluntarily causing grievous hurt to the deceased.

21. As regards the sentence, considering the fact that the incident occurred more than a decade ago, the appellants have already remained in jail for about two years and seven months; they are on bail since 2007, we are of the opinion that ends of justice would meet if they are sentenced under Section 325/34 of IPC to the period already undergone by them.

22. In the result, the appeal is allowed in part. While acquitting the appellants of the charge under Section 302/34 of IPC, they are held guilty under Section 325/34 of IPC and sentenced to the period already suffered by them. They are reported to be on bail, therefore, their bail bonds stand discharged and they need not surrender.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(R.C.S. Samant)

Judge