

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI
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CRIMINAL APPEAL NOS.1529 OF 2008 AND 401 OF 2010

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COMMON JUDGMENT
(per Hon'ble Sri Justice Sanjay Kumar)

These cross appeals are directed against the judgment dated 06.12.2008 passed by the learned Sessions Judge, Ongole, in Sessions Case No.222 of 2008, convicting the accused for the lesser offence under Section 304 Part-I IPC instead of Section 302 IPC and sentencing him to undergo rigorous imprisonment for a period of eight years and pay a fine of Rs.200/- and in default thereof, to undergo simple imprisonment for a period of one month.

Criminal Appeal No.1529 of 2008 was filed by the accused aggrieved by the conviction and sentence, while the State preferred Criminal Appeal No.401 of 2010 aggrieved by the acquittal of the accused in relation to the offence punishable under Section 302 IPC.

By order dated 18.12.2008 passed in Criminal Appeal No.1529 of 2008, this Court granted interim suspension of the sentence of imprisonment pending the appeal and the accused was directed to be released on bail on executing a bond for Rs.10,000/- with two sureties for a like sum each to the satisfaction of the Principal Sessions Judge, Kandukur.

The case of the prosecution was that Yenamalamanda Chinnakotaiah - the deceased, Yenamalamanda Pedda Kondaiah (L.W.2) and Yenamalamanda Subba Rao - the accused, were brothers. Their father died long ago and an extent of Ac.8.70 cents wet land in Sy.No.300 of Machavaram Village, Prakasam District, was divided amongst them, leaving Ac.1.20 cents which was uncultivable. The said extent was also made suitable for cultivation by the deceased and the accused and disputes arose between them. While so, on 21.11.2007 at about 4.00 P.M., when the accused wanted to dig a bore-well on the said land, the deceased came there and asked him to stop the work. Upon that, the accused picked up a quarrel with the deceased and attacked him with an axe, causing bleeding

injuries on the right side of the neck, right cheek just below the ear, right forehead and also the right elbow joint. The deceased fell down and died instantaneously. P.W.1, the wife of the deceased, presented Ex.P.1 report to the Sub-Inspector of Police (P.W.10) who registered the case as Crime No.92 of 2007 on the file of Kandukur Rural Police Station. Upon due investigation, the police laid a charge-sheet against the accused and upon committal to the Sessions Court, a charge was framed against the accused attracting Section 302 IPC.

The prosecution examined P.Ws.1 to 11 and marked Exs.P.1 to P.20 in evidence. Case properties were marked as M.Os.1 to 7. The accused did not lead any oral evidence but marked in evidence Ex.D.1, a portion of the Section 161 Cr.P.C. statement of P.W.2.

Upon consideration of the evidence, oral and documentary, the learned Sessions Judge was of the opinion that there was no preplan or premeditation and as the attack was due to a sudden quarrel, no offence punishable under Section 302 IPC was made out. The learned Sessions Judge accordingly convicted the accused under Section 304 Part-I IPC and sentenced him.

Heard the learned Public Prosecutor and Sri N.Ravi Prasad, learned counsel for the accused.

Though it was not brought out in the evidence that the accused exercised his right of private defence against the deceased, the specific plea taken by his counsel before the learned Sessions Judge was to this effect. In the grounds of appeal filed before us also, the same ground is pressed into service. In the light thereof, we accept the submission of the learned Public Prosecutor that the accused cannot now seek to make out a case of complete innocence. Sri N.Ravi Prasad, learned counsel, would contend that this was a case where the accused resorted to violence only in exercise of his right of private defence and the learned Sessions Judge erred in bringing the case under Section 304 Part-I. According to the learned counsel, the provision which would have application is Section 304 Part-II IPC, as no intention can be imputed to the accused of wanting to kill the deceased, his own brother.

In so far as the State's appeal is concerned, it is not the prosecution's case that this was a premeditated or planned killing. The altercation between the brothers led to this sudden attack. The question is whether the act of causing the death of the deceased qualified as an offence punishable under Section 302 IPC.

P.Ws.1, 2, 3 and 4 gave evidence of personally witnessing the incident on 21.11.2007 at about 4.00 P.M. Even if the evidence of P.W.1, the wife of the deceased, is ignored, the essential testimony of the other witnesses remained unshaken during cross-examination. Significantly, P.W.4 had no relation whatsoever with the accused or the deceased. His evidence is therefore trustworthy. P.W.4 stated that he had come to the field on the said day at around 3.30 P.M along with P.W.2, P.W.3 and M.Sankaraiah (L.W.6) for digging the bore-well of the accused. The deceased was stated to have come there and objected to the digging of the bore-well owing to the dispute which was yet to be settled. Thereupon, the accused was stated to have picked up the axe (M.O.7) and hacked the deceased on the right side of his neck below the ear, near the elbow, and also on the fore-arm. The accused was stated to have fled away therefrom along with the axe immediately and the deceased fell to the ground.

P.W.9, the Medical Officer, Government Area Hospital, Kandukur, who conducted the autopsy on the body of the deceased, affirmed that he found four external injuries and that Ex.P.15 was his post-mortem report. He confirmed that the injuries described in Ex.P.15 could be caused by the use of the axe (M.O.7). He further confirmed that the said injuries were sufficient to cause death of a human-being in the ordinary course of nature. Ex.P.15 detailed the external injuries on the body of the deceased as under:

- '1. A lacerated wound (stab injury) over upper side of right side of neck. 7.5 cm x 2.5 cm x 5 cm size. Edges:- Lower edge sharp, upper edge ragged and shallow. Colour – pink and black. Duration-12 – 24 hrs. Muscles cut and lacerated. Blood vessels ruptured.
2. V shaped lacerated wound below right ear 6 cm x 3 cm x 4 cm piercing into mouth. Edges – ragged. Colour pink and black. Muscles cut and lacerated.
3. A lacerated wound on right side of middle of right fore arm 2.5 cm x 0.5 cm x 0.5 cm. Edges ragged. Colour – pink.

4. A lacerated wound on right side of right elbow 8 cm x 7 cm x 3 cm. No bony injury. Edges ragged. Muscles cut and lacerated.'

The prosecution proved beyond a shadow of doubt that at the time of the incident the deceased was not armed with any weapon. The altercation that took place between him and the accused was with regard to the digging of the bore-well by the accused in the disputed land. The uninterested testimony of P.W.4 proved that the deceased had objected to the digging of the bore-well by the accused and thereupon, the accused picked up the axe and attacked him. P.W.4's evidence does not indicate any sort of aggression on the part of the deceased while raising an objection warranting the use of the right of private defence by the accused. All the more so, when the deceased was not even armed and there is no indication of his even advancing upon the accused threateningly. There is also no proof of adequate provocation warranting infliction of as many as four injuries with the axe. Two of the said injuries were serious injuries, one being on the side of the neck and the other below the ear piercing into the mouth, cutting through muscles.

Sri N.Ravi Prasad, learned counsel, would contend that as the attack took place in the heat of moment owing to a sudden fight between the brothers, no intention can be imputed to the accused to kill the deceased. However, the act of inflicting multiple injuries cannot be ignored. The accused repeatedly attacked the deceased and thereby caused him four separate injuries. Therefore, this was not a case of the accused merely having knowledge that the injury would be sufficient to cause the death of the deceased. His intention to cause such injuries was apparent. Sri N.Ravi Prasad, learned counsel, would however contend that Exception 4 to Section 300 IPC is applicable to the case on hand. This exception reads as under:

'Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.'

CHANDIGARH^[1], the Supreme Court held that the number of wounds caused during the occurrence would not be the decisive factor to ascertain applicability of the exception.

It is not in dispute that the attack by the accused in the present case was neither planned nor premeditated. It happened on the spur of the moment when there was an altercation between the brothers. There may not have been sufficient provocation to warrant the retaliation by the accused in the way that he did, but that does not dilute the inescapable fact the attack was during a sudden fight and in the heat of the moment. We therefore agree with Sri N.Ravi Prasad, learned counsel, that Exception 4 applies and that the offence does not qualify as ‘murder’ under Section 300 IPC.

As the offence amounted to culpable homicide, the next issue is whether it falls under Part I or Part II of Section 304 IPC.

In **ALISTER ANTHONY PAREIRA V/s. STATE OF MAHARASHTRA**^[2], the Supreme Court drew a distinction between the two parts of Section 304 IPC in the following terms:

“For punishment under Section 304 Part I, the prosecution must prove the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death....”

Again, in **KASAM ABDULLA HAFIZ V. STATE OF MAHARASHTRA**^[3], the Supreme Court observed as under on this issue:

“....Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the 1st Part of Section 304 IPC. The guilty intention of the accused to cause such bodily injury as is likely to cause death is apparent from the fact that he did attempt a second blow though did not succeed in the same and it somehow missed. In that view of the matter we are of the considered opinion that the High Court has rightly convicted the appellant under Section 304 Part I IPC....”

This being the legal position and given the irrefutable fact that the accused inflicted as many as four injuries on the deceased, there can be no doubt as to his intention. Once that is so, it is not Section 304 Part-II that would stand attracted but Section 304 Part-I.

The decision in ***ANKUSH SHIVAJI GAIKWAD V/s. STATE OF MAHARASHTRA***^[4], a case relating to Section 304 IPC Part II, relied upon by Sri N.Ravi Prasad, learned counsel, is distinguishable on facts as that was a case where exchange of hot words in a quarrel resulted in an attack with an iron pipe, which is not a lethal weapon, and only one blow was delivered. The facts in the case on hand being different, this judgment is of no avail to the accused.

On the above analysis, we are of the opinion that this was a case of culpable homicide falling under Exception 4 to Section 300 IPC attracting Section 304 Part I IPC, as rightly opined by the learned Sessions Judge.

The conviction of the accused under Section 304 Part-I IPC and the sentence imposed upon him by the learned Sessions Judge are accordingly confirmed. In consequence, the judgment under appeal in Sessions Case No.222 of 2008 passed by the learned Sessions Judge, Ongole, is also confirmed. Both the appeals are dismissed. Necessary steps shall be taken by the learned Sessions Judge, Ongole, for committing the accused to the prison for serving out the remaining sentence in terms of the judgment in Sessions Case No.222 of 2008 on the file of the learned Sessions Judge, Ongole. The bail bond and sureties furnished pursuant to the order dated 18.12.2008 passed in Criminal Appeal No.1529 of 2008 shall stand cancelled after incarceration of the accused.

SANJAY KUMAR, J

M.SEETHARAMA MURTI, J

22nd JULY, 2016

PGS/Svv

[\[1\]](#) (1989) 2 SCC 217

[\[2\]](#) (2012) 2 SCC 648

[\[3\]](#) (1998) 1 SCC 526

[\[4\]](#) (2013) 6 SCC 770