

SRI JUSTICE C. PRAVEEN KUMAR

AND

HON'BLE SRI JUSTICE N. BALAYOGI

CRIMINAL APPEAL No.1473 OF 2011

JUDGMENT : (per Hon'ble Sri Justice C.Praveen Kumar)

1) The sole accused in Sessions Case No.76 of 2010 on the file of the VI Additional District and Sessions Judge (Fast Track Court), Markapur, is the appellant herein. He was tried for an offence punishable under Section 302 IPC, for causing the death of one Indravath Chandra Naik (hereinafter referred to as "the deceased") by released an arrow with a bow on 03.08.2008 at about 9.30 p.m. By its judgment, dated 12.10.2011, the Sessions Judge, convicted the accused and sentenced the accused to suffer "imprisonment for life" and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for a period of six months.

2) The facts as culled out from the evidence of the prosecution witnesses are as under:

i) PW.13 is the wife of the deceased. PW.14 is the father of PW.13. The marriage of PW.13 with the deceased took place about five years prior to the date of incident. On the date of incident, while PW.13 was inside the house along with her daughter, she heard the accused uttering abusive words in an intoxicated condition. Her husband (deceased) went out and admonished the accused for the abuses uttered by him. On such admonition, the accused picked up his bow and released an arrow

which pierced into the chest of the deceased on right side, leading to the instantaneous death of the deceased.

ii) The evidence on record further discloses that on the very same day at about 11.30 p.m. a report was lodged with PW15-the Sub-Inspector of Police. Ex.P14 is the report. Basing on the report given, a case in Crime No.48 of 2008 came to be registered under Section 302 IPC. Ex.P16 is the First Information Report. PW.15 examined and recorded the statement of PW.13. Later, PW.15 visited the scene of offence, conducted scene of offence panchanama and also prepared a rough sketch of the scene in the presence of PWs.4 and 5. Ex.P15 is the rough sketch and Ex.P4 is the scene observation report. He also got photographed the scene of offence.

iii) Thereafter, on 04.08.2008 he conducted inquest over the dead body of the deceased in the presence of PWs.4 to 6. Ex.P5 is the inquest report. During inquest, he examined PW.13 and other blood relatives of the deceased. Later, the dead body was sent for postmortem examination.

v) PW16-the Civil Assistant Surgeon, Government Area Hospital, Markapur, conducted autopsy over the dead body of deceased and issued Ex.P17-the postmortem certificate. According to him, the cause of death was “due to injury to the vital organs:.

vi) On 09.08.2008, PW.17-the Inspector of Police, took up further investigation in this case. He verified the investigation done by PW.15 and found it to be on correct lines. He examined

PWs.14, 11, 12 and recorded their statements. On 11.08.2008 he arrested the accused at Sundaraiah Colony. On interrogation, the accused is said to have confessed about the commission of offence. PW.17 recorded the confessional statement of the accused in the presence of PWs.7 and 9. Ex.P18 is the confession statement. Pursuant to the said confession, he seized M.O.5. After completing the investigation, he filed the charge sheet, which was taken on file as P.R.C.No.52 of 2008 on the file of the Additional Judicial Magistrate of First Class, Markapur, who inturn committed the case to Sessions Division under Section 209 of Cr.P.C. which came to be numbered as S.C.No.76 of 2010.

3) On appearance, charge under Section 302 IPC was framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

4) To substantiate their case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P19 and MOs.1 to 5. After the closure of prosecution evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him, in the evidence of the prosecution witnesses, to which he denied. No oral or documentary evidence was adduced on his behalf.

5) After considering the oral and documentary evidence on record, the trial Court believed the evidence of PW.1 and convicted the accused in the manner referred to above. Challenging the same, the present appeal is filed.

6) Out of seventeen witnesses examined by the prosecution, PWs.1 to 7, 10 and 11 did not support the case of the prosecution and were treated hostile.

7) Learned counsel for the appellant mainly submits that in the absence of any legal evidence on record, the conviction imposed by the trial Court is illegal and improper. He would further contend that from the cross-examination of PW.13, it is clear that she has not seen the incident and by the time she came out of the house her husband was dead.

8) On the otherhand, learned Public Prosecutor would contend that the admissions made in the cross-examination of PW.13 cannot be looked into for the reason that her chief-examination was on 06.06.2011 and the cross-examination was on 10.08.2011. During the interregnum, the witness has been managed to speak in favour of the accused.

9) It is not in dispute that the entire case rests on the evidence of PW.13. As per the evidence of PW.13, on the date of incident while she was inside the house, she heard the accused uttering abusive words in an intoxicated condition. When the accused was admonished by the deceased, the accused is said to have picked up his bow and then released an arrow, leading to instantaneous death. However, in the cross-examination, which was conducted on 10.08.2011, PW.13 admits that at the time of occurrence she was inside the house and when she came out of the house, her husband was lying dead and she does not know who

killed her husband. She cannot say whether accused is responsible for the death of her husband. However, the same is sought to be disputed by the Public Prosecutor contending that the same has to be eschewed.

10) An identical issue came up for consideration before the Apex Court in [Khujji @ Surender Tiwari vs. State of M.P.](#)¹ In that case, examination-in-chief of the witness was recorded on 16.11.76, when he identified all the assailants by name. His cross-examination commenced on 15.12.76. In that cross-examination, he stated that since the accused had their backs towards him, therefore, he could not see their faces. On the basis of that statement, it was submitted that evidence regarding identity of the accused was rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification of such a wavering witness. In the said case the Apex Court took a clear view that in a case where the cross-examination of the witness takes place after some gap and the witness takes an undue advantage of the time gap and turns hostile in his cross-examination, then the statement given by such witness in his examination-in- chief will be believed and not the one given in his cross-examination.

11) Therefore, from the evidence of PW.13, it is clear that at the time of incident the accused was in drunken condition and it is also come on record that there was a quarrel between the accused and the deceased prior to the incident and when the

¹ 1991 Cri.L.J. 2653 (1)

deceased is said to have admonished the accused, he picked up a bow and then released an arrow.

12) In *Santosh v. State of Maharashtra*² the Apex Court while referring to the judgment of the Apex Court in *Kalu Ram v. State of Rajasthan*³ reiterated the principle that the element of inebriation, when it is present in a case, may be taken into consideration as it considerably alters the power of thinking. It was further held that where the intention to kill is present, the act amounts to murder and where such intention is not present, the act amounts to culpable homicide not amounting to murder and that in order to determine whether the offender had the intention or not, each case must be decided on its own facts and circumstances.

13) The ratio that could be culled out from the foregoing judgments is that mere drunkenness cannot be pleaded as a ground for acquittal of the charge of murder. It is only in cases, where the drunkenness was such that the offender was incapable of forming an intention and having a knowledge that his act was likely to cause death, that drunkenness may be taken as a defence and depending upon the facts and circumstances of each case, the Court will have to take a decision.

14) In the instant case, the prosecution failed to establish any enmity between both the accused and deceased. No evidence is produced to show that there are any disputes or enmity between

² (2015) 7 SCC 641

³ (2000) 10 SCC 324

the accused and deceased. On the date of incident, the accused who was in drunken condition was uttering abusive words against the deceased in front of the house of the deceased. At that point of time, the deceased is said to have come out of the house and admonished the accused, pursuant to which there was some altercation and in the process the accused picked up a bow and released an arrow which pierced into the chest of the deceased. Under those circumstances, it cannot be said that there was any motive or intention to kill the deceased.

15) Exception 4 to [Section 300](#) I.P.C, is in the following terms :

"Exception 4.- 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 offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault."

16) The requirements of this exception are : (a) without premeditation in a sudden fight; (b) in the heat of passion upon a sudden quarrel; (c) the offender has not taken undue advantage; and (d) the offender has not acted in a cruel or unusual manner.

17) As seen from the evidence on record, the incident happened in a spur of movement and it appears that without any intention or motive and in the heat of passion the accused picked up his bow and released an arrow. Hence, the case against the accused would definitely fall under Exception-4 to Section 300 IPC.

18) In *Khanjan Pal v. State of Uttar Pradesh*⁴ the Apex Court held as under:

“The evidence clearly established that the whole incident was a sudden development and that the appellant had acted at the spur of the moment and without any pre-meditation. There had been no ill-will or enmity between the two. A casual remark made by the appellant provoked the deceased and the altercation ensued which culminated in the stabbing with knife. The appellant used the knife only once and did not act in any cruel manner. It was in the sudden quarrel in heat of passion that the appellant inflicted the injury on the deceased without any intention to cause death but having knowledge that such act was likely to cause the death of the deceased. In such circumstances, the act of the appellant falls under Exception 4 to [Section 300, I.P.C.](#), and the appellant is liable to be convicted only under [Section 304](#) Part-II, [I.P.C.](#) We accordingly alter the conviction to one under [Section 304](#), Part-II, [I.P.C.](#)”

19) In *Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat*⁵, the Apex Court held as under:

“When accused had no pre-meditation to kill deceased or cause any bodily harm or injury to deceased, everything happened on spur of moment, possibility of accused losing self control on some provocative utterances of deceased cannot be ruled out and in such case the accused is liable to be convicted under Sec.304 Part II instead of Section 302 of IPC.”

20) In view of the judgments referred to above and having regard to the manner in which the incident in question took place, we are

⁴ (1990) 4 SCC 53

⁵ 2011(2) ALD (Cri.) 238 (SC)

of the opinion that the case of the appellant/ accused falls squarely under Section 304 Part-II of IPC. Hence, the conviction under Section 302 IPC is altered to Section 304 Part-II IPC. For the altered conviction, the appellant is sentenced to imprisonment for the period already undergone by him. Consequently, the appellant/ accused shall be set at liberty forthwith, if he is not required in connection with any other case.

21) Accordingly, the Criminal Appeal is allowed in part. As a sequel to it, miscellaneous petitions, if any, pending shall stand closed.

29.11.2017
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JUSTICE C. PRAVEEN KUMAR

JUSTICE N. BALAYOGI