

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**Criminal Appeal No.D-36-DB of 2004
Date of Decision: 21.8.2017**

Surender Kumar

..Appellant

Vs.

State of Haryana

..Respondent

**CORAM: HON'BLE MR.JUSTICE T.P.S.MANN
HON'BLE MR.JUSTICE MAHABIR SINGH SINDHU**

Present: Mr. Sudhir Sharma, Advocate with
Mr. R.K.Rana, Advocate for the appellant.
Mr.Praveen Bhadu, AAG Haryana.

Mahabir Singh Sindhu, J.

1. The sole convict/appellant Surender Kumar has filed the present appeal against the impugned judgment of conviction and order of sentence dated 27.11.2003 and 1.12.2003 respectively, passed by learned Additional Sessions, Judge, Sonapat, whereby he stood convicted under Section 302 IPC and sentenced to life imprisonment alongwith fine of Rs.5,000/- with default clause to further undergo rigorous imprisonment for six months.

2. The brief facts of the case are that on the basis of statement dated 4.10.2001 (Ex.PB) made by Ram Kishan (since deceased), FIR No.117 dated 4.10.2001, under Section 325 IPC was registered at Police Station Baroda, District Sonapat and the english translation of statement reads as under:

“Stated that I am resident of above address. I am an agriculturist. On 3.10.2001, I had gone in the fields of Badwala to guard the paddy crop. After some time,

Surender s/o Jai Dhan, caste Jat r/o Jagsi came with his buffaloes and he left the buffaloes for grazing in my paddy crop. I asked him to remove the buffaloes from my paddy crop; but he did not do so and after some altercation, he removed his buffaloes and went towards the village. I also sat under the mango tree for taking rest. After some time, at about 2 o'clock, Surender Kumar while holding an axe in his hand came there and stated that he would teach me a lesson for removing the buffaloes from the paddy crop and he attacked me from reverse side of the axe causing injuries on the left shoulder, left elbow, head on left side and left leg. Then I made a noise 'Mar Diya Mar Diya'. My son Satbir came running to me. On seeing him, Surender fled away from the spot with his axe."

3. Ultimately, on 10.10.2001, complainant-Ram Kishan died and thereafter offence was converted to Section 302 IPC.

4. Thereafter, the police investigated the matter and submitted report under Section 173 Cr.P.C. against the convict-appellant under Section 302 IPC. The case was committed to the Court of learned Sessions Judge by Judicial Magistrate Ist Class, Gohana on 2.2.2002 as the offence under Section 302 IPC is exclusively triable by the court of Sessions.

5. After taking into consideration the material available on record, learned trial Court framed charges against the accused-appellant under Section 302 IPC on 19.2.2002 to which he pleaded

not guilty and claimed trial.

6. The prosecution examined as many as 12 witnesses. After tendering in evidence documents Ex.PA to Ex.PM, prosecution closed its evidence.

7. While making statement under Section 313 Cr.P.C., the appellant has stated that he inflicted injuries on the person of the deceased in his self defence.

8. In defence, the appellant has examined DW1 Jai Dhan, the father of the appellant and DW2 Dr.Ashok Kumar Gupta, Medical Officer, CHC Gohana.

9. After consideration of the entire material available on record, the learned trial court convicted the appellant under Section 302 IPC and awarded life imprisonment.

10. Heard both learned counsel for the appellant as well as learned State counsel and gone through the case file carefully.

11. It is argued by learned counsel for the appellant that the so-called eye witness PW5 Satbir s/o Ram Kishan (deceased) is only a planted witness and in fact, he was not present at the time of occurrence as his deposition is clearly indicative of the fact that he came later on. It is further argued that as a matter of fact, it was Ram Kishan, deceased, who was the aggressor and not the appellant and first of all, the injuries were caused to the appellant and in his self defence, he has inflicted injuries to Ram Kishan (deceased) on 3.10.2001, who died on 10.10.2001 i.e. after a period of 7 days and as such, offence under Section 302 IPC is not at all made out. It is

further argued that as per the case of the prosecution itself, the injuries were allegedly caused to the deceased from the blunt side of the axe and had there been any intention on the part of the appellant, he could have inflicted injuries from the sharp-edged side of the axe. Thus, there was no intention at all to commit the murder of the deceased Ram Kishan. Lastly, it is argued that the occurrence was at the spur of the moment and there was no pre-meditation and as such, charge of murder against the appellant is legally unsustainable.

12. On the other hand, learned State counsel has vehemently opposed the prayer made by the counsel for the appellant and argued that the appellant has caused as many as 7 injuries with an axe and the statement Ex.PB made by injured Ram Kishan is to be treated as a dying declaration and as such, the present case does not require any interference by this court and the appeal deserves to be dismissed.

13. PW9 Dr.Karambir, Medical Officer, CHC Gohana had medicolegally examined Ram Kishan (deceased) on 3.10.2001 and found following seven injuries on the body of the deceased.

“1. A contusion mark over the left thigh in upper 2/3rd region oblique placed with bleeding spot in the centre size 3 x 2 cms. Advised x-ray left thigh, and ortho surgeon's opinion.

2. A lacerated wound over the left thigh antero laterally in size measuring 4 x 2 cms with active bleeding present. Mobility of the bone was present. Advised x-ray left thigh.

3. A contusion mark over the left arm upper 2/3rd region, size 4 x 2 cms with oblique placed mobility of the bone present. Advised x-ray left arm and ortho surgeon's opinion.

4. A contusion mark over the left shoulder size 2 x 1 cms. Advised x-ray left shoulder.
5. A lacerated wound over the left thigh just above the knee joint size 1 x 0.75 cms. Advised x-ray left thigh.
6. A lacerated wound over the left side of the skull size 2 x 1 cms oblique placed just behind the ear. Active bleeding present. Advised x-ray skull.
7. Complaining of pain right side of the chest slight bluish coloration in the area 2.1 cms antero and inferior part seen. Advised x-ray chest.”

On 3.10.2001, at 5.25 p.m, PW9 had sent ruqa Ex.PG/1 to SHO PP Butana and police came there at 8.20 p.m. On the same day i.e. 3.10.2001, police had moved application Ex.PH seeking his opinion as to whether injured Ram Kishan was fit for making statement or not. This witness opined that injured Ram Kishan was unfit to make statement. Then on 4.10.2001, police moved another application regarding the fitness of the injured Ram Kishan for making statement and PW9, vide his opinion Ex.PH/3 opined that Ram Kishan was fit to make statement. Then on 4.10.2001, statement of Ram Kishan was recorded and he remained under treatment upto 8.10.2001. Thereafter, on 8.10.2001 Ram Kishan was referred to PGIMS Rohtak vide his endorsement Ex.PH/4. This witness declared injuries No.1,2,3,4 and 5 to be grievous in nature; whereas injury No.6 was declared simple. No opinion was given about injury No.7 and the same was reserved awaiting the report of surgeon and orthopaedic Surgeon. X-ray report is Ex.PH/5 and opinion is Ex.PH/6. This witness has specifically stated that injuries on the person of the

injured Ram Kishan are possible with the blunt side of the axe (Ex.P1). He has specifically stated that injury No.1 was sufficient to cause death. He has further stated that injuries No.3, 4 and 5 were sufficient to cause death individually and cumulatively. He has also deposed that he cannot say as to whether injury No.7 was sufficient to cause death independently or not without the opinion of the surgeon and orthopaedic surgeon.

14. PW10 Dr.V.K.Thapar, Medical Officer had conducted the post mortem examination on the dead body of Ram Kishan on 11.10.2001 at 3.35 p.m. and found the following seven injuries:

- “1.Stitched wound 2 cm with two stitches present just behind the left ear underlying tissues on dissection were found ecchymosed.
2. Bluish red contusion 3 cm x 2 cm thigh on its upper 2/3rd on dissection. Muscles were ecchymosed with fracture shaft femur found and trochanter.
3. 2 cms x 1 cm bluish red coloured contusion over the left shoulder on dissection underlying soft tissues were ecchymosed.
4. Bluish red coloured contusion on left arm 4 cms obliquely placed on upper 1/3rd fracture shaft of humerus with ecchymosis of tissues on dissection found.
5. Lacerated wound on the left wrist present on the anetro lateral aspect on opening underlying tissues were ecchymosed.
6. Lacerated wound on the thigh 1 cm x 1 cm x 3 cm above the knee joint underlying tissues were ecchymosed. Fracture at lower end of femur found.
7. Contusion 2 cm x 1 cm on the right side of chest in 4th

intercostal space in anterior axillary line underlying tissues were ecchymosed.”

As per the opinion of PW10 Dr.V.K.Thapar, cause of death in this case was injuries described above which were ante mortem in nature and sufficient to cause death in the ordinary course of nature. He has also deposed that the time elapsed between injury and death was as per record and between death and post mortem was within 6 to 36 hours.

15. PW11 ASI Ishwar Chand, who received ruqa Ex.PG/1 on 3.10.2001, visited CHC Gohana and moved an application Ex.PH for seeking opinion of the doctor about the fitness of injured Ram Kishan for making statement but the doctor vide his opinion Ex.PH/1, opined that patient was unfit for making statement. On 4.10.2001, this witness has again gone to CHC Gohana and moved an application Ex.PH/2 for seeking opinion of the doctor about the fitness of the injured Ram Kishan for making statement and vide opinion Ex.PH/3, doctor declared injured Ram Kishan fit to make statement. Consequently, PW11 ASI Ishwar Chand recorded the statement Ex.PB of Ram Kishan injured. He made the endorsement Ex.PB/2 on the statement and sent the same to police station Baroda for registration of formal FIR Ex.PB/1. On 4.10.2001, he visited the place of occurrence and prepared site plan Ex.PK. He also recorded the statement of PW5 Satbir Singh.

16. PW12 Dr.Amit Mittal, who has conducted x-ray examination of injured Ram Kishan on 8.10.2001, found fracture in

left thigh and left pelvis of left femur bone. In x-ray of left arm, he found fracture of left humerus and in x-ray of abdomen, he found dilated outloops. X-ray report is Ex.PM.

17. DW2 Dr.Ashok Kumar Gupta found the following six injuries on the person of Surender Kumar appellant.

1. "5 x 1 cm x 0.5 cm incised wound on the right upper arm on lateral side obliquely placed in its middle. Reddish coloured clotted blood was present. Advised x-ray right upper arm AP and lateral views.
2. 2 x 1 cm abrasion on left supra scapular region reddish brown clotted blood was present.
3. 2 x 1 cm abrasion on the left shoulder. Reddish clotted blood was present.
4. 1 x 0.3 x 0.3 cm lacerated wound on the right frontal parietal region of scalp 10 cms from the right pinna. Clotted blood reddish brown in colour present. Advised X-ray of scalp.
5. Diffused swelling on the left hand and index and middle fingers. Part was tender. Advised X-ray left hand AP and lateral views.
6. Patient complained pain in upper incisor teeth."

Injury No.1 was stated to be caused with sharp-edged weapon and rest of the injuries were caused with blunt weapon within 24 hours of examination. Certified copy of MLR is Ex.D1 and x-ray report is Ex.D2. This witness has specifically stated that no fracture was found in the part x-rayed. He has further stated during cross examination that appellant was admitted by Mahabir Singh on 4.10.2001 at 10.15 A.M. and in the MLR, no history has been mentioned as to how the injuries were suffered by the appellant. This witness has further

stated that he cannot give any reason as to why the history of assault of appellant was not given in the MLR.

18. There is no denial by the appellant regarding the occurrence having taken place on 3.10.2001 and the only explanation is that he caused injuries to Ram Kishan (deceased) in his self defence. So far as place of occurrence is concerned i.e. within the field of Ram Kishan (deceased), it is apparently clear from the site plan Ex.PK. The place of occurrence is shown as place Mark A, which is in the fields of Ram Kishan. Therefore, the appellant has trespassed into the fields of Ram Kishan (deceased) and when he raised an objection, instead of mending himself, the appellant has attacked the injured with an axe and causing 7 injuries. The FSL report is Ex.P1 and traces of blood were detected on axe although those were too small for serological test.

19. There is another site plan Ex.PA which was prepared by PW1 Nafe Singh, Halqa Patwari after visiting the spot and as per *Aks Shajra*. A perusal of site plan Ex.PA reveals that Mark A is the place where mango tree was standing. This was the place where occurrence has taken place and the appellant caused injuries to Ram Kishan (deceased). PW5 Satbir has deposed that on 3.10.2001 at about 2 p.m. when he reached near the fields with the meal for his father Ram Kishan, he heard the noise of '*mar diya mar diya*' and after reaching there, he saw that accused gave axe blows from its reverse side on left leg and left side of his head near the ear and thereafter, he ran away from the spot alongwith axe. He has further

stated that he called his brother Dharambir from the village alongwith tractor and took his father to CHC Gohana. On the way to Hospital, his father told him that he tried to get ousted the buffaloes of the accused-appellant from his paddy fields in the morning and due to that reason, he has inflicted injuries upon him. This witness has also stated that mango tree is in their fields and is at a distance of one acre from the passage leading to their fields. He has also denied the suggestion that mango tree is in the middle of the next killa number from the passage and is on the *dolh (boundary)*. Recovery of axe Ex.P1 is duly proved by the prosecution and the same was kept concealed by the appellant under a *kikar* tree, which was recovered in pursuance of disclosure statement Ex.PE made by the appellant in the presence of PW Dhanpat and Dharambir. Thus, the information which led to the recovery of axe, is admissible under Section 27 of the Evidence Act. FSL report Ex.P1 also proved some blood on the axe. Thus, it can be safely concluded that axe has been used for committing the offence by the appellant.

20. So far as injuries on the part of the appellant is concerned, all the injuries were simple in nature and no legal action has been taken by the appellant on the basis thereof. Neither the appellant reported the matter to police; nor any private complaint was filed on the basis thereof.

21. Two different doctors have clearly opined that Ram Kishan died due to injuries suffered by him, which were ante mortem in nature and were sufficient to cause death in the ordinary course of

nature. The most important aspect of the matter is that the present case was initiated on the basis of statement Ex.PB made by Ram Kishan, who was injured at that time and was fit for making statement and ultimately died on 10.10.2001, as a result of the injuries suffered by him. Consequently, the same can be duly considered as dying declaration within the meaning of Section 32 of Evidence Act and which is sufficient to conclude that the appellant has caused injuries.

22. Moreover, there is other corresponding evidence in this case. Although, initially FIR was registered under Section 325 IPC but in view of the medical report and death of Ram Kishan, it was converted to Section 302 IPC. So far as the intention part is concerned that is worth considerable in view of the fact that the axe was not used from its sharp-edged side. Therefore, this Court is inclined to agree that there was no intention of the appellant to commit the murder of the deceased; but it is conclusively proved that he has caused injuries to Ram Kishan (since deceased) not with the intention to cause such bodily injuries as was likely to cause death but had the knowledge that the injuries were likely to cause death.

23. Consequently, this appeal is allowed partly to the extent that conviction of the appellant is converted from Section 302 IPC to Section 304 Part-II IPC and he is sentenced to undergo rigorous imprisonment for a period of 10 years with a fine of Rs.5,000/- with the stipulation that in case of non-deposit of fine, he shall further undergo rigorous imprisonment for a period of 6 months. Bail bonds of the accused-appellant (who is on bail) stand cancelled. He shall

surrender immediately to serve the remaining part of the sentence. If he fails to surrender, learned Chief Judicial Magistrate, Sonapat shall take coercive steps to secure his presence and send him to jail to undergo the remaining part of the sentence. Consequently, the appellant shall be taken into custody immediately to serve the remaining part of the sentence.

24. The appeal stands disposed of accordingly.

(T.P.S.Mann)
Judge

(Mahabir Singh Sindhu)
Judge

21.8.2017
Meenu

Whether speaking/reasoned:	Yes/No
Whether reportable :	Yes/No