

In the High Court of Punjab and Haryana at Chandigarh.

Criminal Appeal-D No.1213-DB of 2010

Date of Decision:- August 18, 2017

Prem Masih

.....Appellant

Versus

State of Punjab

.....Respondent

CORAM: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Gurvinder Singh Gill

Present : Ms. Sonika Kapadia, Advocate for the appellant.

Ms. Anju Arora, Additional Advocate General, Punjab.

Gurvinder Singh Gill, J.

1. Prem Masih has filed the present appeal challenging his conviction under Section 302 of Indian Penal Code, 1860 (for short 'IPC') as recorded vide judgment dated 19.08.2010 passed by the Sessions Judge, Gurdaspur. The trial Court vide order dated 19.08.2010 sentenced the accused to undergo life imprisonment and also imposed a fine of ₹5,000/- and in default of payment of fine to further undergo R.I. for one year for offence under Section 302 IPC.
2. FIR No.17 (Ex.PA/2) dated 28.03.2009 under Section 302 of IPC, was lodged at Police Station Fatehgarh Churian, District Gurdaspur on the basis of statement (Ex.PA) of Tarsem Masih, recorded by Sub Inspector Inderjit Singh.

The translated gist of the statement (Ex.PA) reads as follows:

“I am resident of above mentioned address. I am a labourer. We are three brothers. I am eldest and younger to me is Prem Masih and youngest is Anayat Masih aged 45 years who is deaf and dumb since birth. My younger brother used to reside with Prem Masih. Yesterday i.e. on 27.03.2009 my brother Prem Masih quarreled with my younger brother Anayat Masih without any reason. When I came to know about the same, I went to the house of Prem Masih and reasoned out with him. However, he did not like my reasoning out with him and went out of the house saying that he would either kill him or end his own life. Yesterday at about 8 p.m. I again went to the house of Prem Masih. At that time Prem Masih was not at home. I and my brother Anayat Masih slept on separate cots in the courtyard as I apprehended that Prem Masih would again quarrel with Anayat Masih after returning home. Rani wife of Prem Masih slept in the room along with her children. At about 11 p.m. Prem Masih came home while raising a noise. At that time, an electric bulb was glowing outside the room. Prem Singh immediately on coming, picked up the wooden '*Phaura*' (wooden scraper used for collecting cow dung from floor) lying near the cattle and gave a blow with the same to my brother Anayat Masih who was sleeping on the cot, on the left side of his head. I immediately woke up and then Prem Masih gave another blow from wooden '*Phaura*' to Anayat Masih on the left side of his head. The head of Anayat Masih was badly crushed. Upon my raising alarm Rani wife of Prem Masih came out of the room and Prem Masih ran away with '*Phaura*' by scaling the wall. I attended to my brother Anayat Masih but he had died. The motive is that Prem Masih used to ask Anayat Masih to put fodder to the cattle but Anayat Masih did not listen to him and due to which my brothers usually quarreled with each other. Being dark we did not go to the police station to lodge the report. Now after leaving my sister-in-law Rani wife of Prem Masih to guard the dead body of Anayat Masih, I was going to

police station to lodge report when you met me. I have heard my statement which is correct. Action be taken.”

3. The police conducted the investigation including inquest proceedings, preparing rough site-plan of the place of occurrence, recording of statements of witnesses under Section 161 of Cr.P.C. etc. Post mortem examination of dead body of Anayat Masih was got conducted. The accused was arrested in the evening on 28.03.2009 itself. The accused made a disclosure statement Ex.PG stating therein that he had kept concealed the '*phaura*' in the bushes grown in the cremation ground of his village and that he could get the same recovered. Pursuant to his disclosure statement, the accused led police party to the disclosed place and got the '*Phaura*' recovered which was taken into possession vide recovery memo Ex.PH.
4. Upon conclusion of investigation, the police filed the report under Section 173 Cr.P.C. in the Court of learned Judicial Magistrate 1st Class, Batala on 13.06.2009, who on finding that the facts prima-facie disclosed commission of offence under Section 302 IPC which is exclusively triable by the Court of Sessions, committed the case to the Court of Sessions vide order dated 24.07.2009.
5. The learned Sessions Judge, Gurdaspur upon finding sufficient grounds to presume that the accused had committed an offence punishable under Section 302 IPC, framed charges against the accused on 10.09.2009 to which the accused pleaded not guilty and claimed trial.
6. The prosecution in order to establish its case examined as many as 8 witnesses.

PW-1 Tarsem Masih, complainant deposed that he is eldest of three brothers and that his youngest brother Anayat Masih was deaf and dumb and used to reside with his brother Prem Masih. He stated that on the day of occurrence Prem Masih hit Anayat Masih with a '*Phaura*' and upon hearing noise he and the wife of accused came to the spot and accused gave another blow with the help of '*Phaura*' on the head of Anayat Masih who died instantaneously. PW-2 Rani wife of accused Prem Masih deposed that accused is her husband and Anayat Masih brother of accused who is deaf and dumb was residing with them. About 9 months ago accused and deceased had a minor scuffle and Tarsem Masih intervened and separated them and slept in their house. She further deposed that at 11 p.m. accused attacked the deceased with a '*Phaura*' and gave three blows and Anayat Masih died instantaneously. PW-3 MHC Kamaljit Singh is formal official witness who tendered his affidavit as Ex.PB in evidence. PW-4 Dr. Sanjiv Sharma who had conducted post mortem examination on the dead body of Anayat Masih proved the post mortem report as Ex.PD and described the injuries found on the dead body of Anayat Masih as follows:

1. L.W. (5cm x 2cm) on the left side of forehead with under lying depressed skull bone fracture i.e. left temporal and frontal bone, brain matter admixed with blood coming through the L.W. under lying the fracture collection of blood and ton megenigas were seen, brain matter admixed with blood coming through the fractured bones.
7. PW-4 Dr. Sanjiv Sharma opined that the cause of death was due to head injury, sufficient to cause death in the ordinary course of nature. PW-5 Sub Inspector

Bakhtawar Singh deposed that on 28.03.2009 he was member of police party headed by Inderjit Singh and in his presence the Investigating Officer had lifted the blood stained earth from the place of occurrence and had put the same in plastic container and sealed the same. He also deposed regarding arrest of the accused and as regards his making a disclosure statement Ex.PG, upon his interrogation, leading to recovery of '*Phaura*' at the instance of the accused, which was taken into possession vide recovery memo Ex.PH. PW-6 HC Sukhwinder Singh is formal official witness who tendered his affidavit Ex.PK in evidence. PW-7 HC Gurmukh Singh deposed that he had taken photographs of the place of occurrence and of the dead body and proved the photographs as Ex.P-1 to Ex.P-5. PW-8 Sub Inspector Inderjit Singh, who is Investigating Officer in the present case stated in detail as regards the entire investigation conducted by him right from the lodging of the FIR upto the filing of the challan.

8. Upon conclusion of the prosecution evidence, statement of the accused was recorded in terms of Section 313 Cr.P.C. wherein entire incriminating evidence against him was put to him to enable him to explain the same but the accused pleaded false implication and deposed that the police had forced his wife and brother to make a false statement against him by telling them that in case they do not make a statement, he would initiate criminal proceedings against them. No evidence was however led by the accused in his defence.
9. The trial Court upon appraisal of evidence on record held that the prosecution has been able to substantiate the charges against the accused and accordingly convicted the accused vide impugned judgment. The accused being aggrieved

by the same has filed the present appeal.

10. Learned counsel for the appellant while assailing the impugned judgment has submitted that there are various contradictions in statement Ex.PA of complainant Tarsem Masih and the statement made by him in the Court. The learned counsel has submitted that during the course of cross-examination, complainant (PW-1) Tarsem Masih has virtually stated that he had not witnessed the occurrence. The learned counsel has further submitted that the falsity of the witness would be established from the fact that while he has stated that he caught the accused at the spot but the accused is shown to be arrested on the next day of occurrence. The learned counsel has further submitted that the testimony of PW-2 can also not be relied upon in view of the improvements in the case of prosecution. It has been pointed out that while in the statement of the complainant(Ex.PA), i.e. the first version, he had stated that Rani was sleeping inside the room and came out after the injuries had been inflicted but Rani while in the witness box as PW-2 stated that she had witnessed the occurrence.
11. The learned counsel for appellant has further submitted that the medical evidence and the ocular version put forth by the witnesses are inconsistent inasmuch as while PW-1 has stated that the accused inflicted two injuries and PW-2 has stated that the accused gave three blows to the deceased but as per the post-mortem report only one injury was found on the dead body of Anayat Masih. The learned counsel has submitted that in view of the aforesaid infirmities in the case of prosecution, the impugned judgment cannot sustain and has thus prayed for acceptance of the appeal and acquittal of the appellant.

12. On the other hand, the learned counsel representing the State has submitted that minor variations in the testimonies of the witnesses are bound to be there even in case of the most truthful witnesses. The prosecution case cannot be doubted merely on the ground of minor variations and that the present case is such where the credibility of the witness cannot be doubted as they are closely related to the accused himself inasmuch as while PW-1 is real brother of the accused, the other witnesses PW-2 Rani is wife of the accused himself and in the absence of any motive for false implication their testimony cannot be discarded. The learned counsel appearing for the State has thus submitted that the impugned judgment is a well reasoned judgment and that the same does not suffer from any infirmity. The learned counsel has thus prayed for dismissal of the appeal.
13. We have considered the rival submissions addressed before this Court and with the assistance of learned counsel, have also perused the record of the case.
14. The first and foremost question before this Court is as to whether the medical evidence supports the case of the prosecution. As per PW-4 Dr. Sanjiv Sharma the following injury was found on the dead body of Anayat Masih:

“1. L.W. (5cm x 2cm) on the left side of forehead with under lying depressed skull bone fracture i.e. left temporal and frontal bone, brain matter admixed with blood coming through the L.W. under lying the fracture collection of blood and ton megenigas were seen, brain matter admixed with blood coming through the fractured bones.”

15. A perusal of above referred description of injury shows that it is a lacerated wound. The weapon of offence allegedly used for causing the aforesaid injury is a wooden '*Phaura*'. A '*Phaura*' is a wooden scraper used for collecting cow-dung and is blunt edged. In case an injury is inflicted with '*Phaura*' with great force the same would be in the nature of a lacerated wound or a crush injury, as in the present case. PW-4 Dr. Sanjiv Sharma has opined that the cause of death in the present case was as a result of the injury found on the head which was sufficient to cause death.
16. Though, there is slight inconsistency in the statements of PW-1 and PW-2 regarding the number of blows inflicted but the existence of the injury on the head which proved fatal cannot be denied in view of the testimony of Dr. Sanjiv Sharma (PW-4). During the course of cross-examination of PW-4, nothing could be elicited so as to doubt the veracity of his statement or his opinion. The existence of only one injury on the head could also be due to the fact that both the blows might have hit the deceased at the same place on head as has also been stated in Ex.PA. As such, it cannot be said that the medical evidence led by the prosecution is not in tune with the ocular version.
17. As regards the eye-witnesses, the testimony of PW-1 is sought to be assailed on the ground that during the course of his cross-examination he has stated that on the day of occurrence he was present in his house. A perusal of the entire cross-examination reveals that the accused was perhaps referring to the first part of the occurrence which had taken place at 9 p.m. when the accused and deceased had quarreled. The cross-examination of PW-1 is reproduced below for the sake of ready reference:

“The first occurrence took place at or around 9 p.m. I have not informed any respectable of the village about the first occurrence. Before the occurrence no dispute ever took place between the accused and deceased. Three houses intervene my house and that of the accused. On the day of occurrence I was present in my house. I can not recollect that I have stated before the police that after the first occurrence I had slept in the courtyard of the house of the accused apprehending another attack by the accused on the deceased. Attention of witness is drawn towards his statement Ex.PA wherein it is so recorded. My wife and children were also sleeping in my house during the fateful night. I did not see the accused inflicting the first blow of fault. Light was on at the time of the occurrence. When I came to the spot none from the village had come there. My thumb impressions were obtained by the police after writing the story. Statement Ex.PA was not read over to me.”

18. During cross-examination, PW-1 has stated that he did not see the accused inflicting the first blow to the accused. However, he has not stated anything as regard the second blow which, in his examination-in-chief is stated to have been inflicted by the accused on the head of the deceased.
19. The statement of PW-2 Rani is also sought to be assailed by learned counsel for the appellant on the ground that the complainant in his statement Ex.PA has not stated that she had witnessed the occurrence and had stated therein that she was attracted to the spot after he raised alarm. We do find that while in Ex.PA it is specifically stated that Rani had come out of the room when PW-1 Tarsem Masih raised an alarm but PW-2 Rani while in the witness box has stated that she had witnessed the occurrence.
20. Despite the above pointed infirmities in the case of the prosecution this Court

cannot lose sight of the fact that PW-2 Rani is none else but wife of the appellant. She had no motive to depose falsely against her husband. No suggestion regarding any kind of motive for deposing falsely was given to her during her cross-examination. So much so, there is no suggestion even to the effect that she has stated falsely. Normally a brother or a wife of accused would try to save the accused and even if they had witnessed the occurrence they would either not come forward to depose against the real brother or husband or would state falsely to save him. PW-2 Rani, being the wife of the accused, is the most natural witness to be present at home. The accused in his statement recorded under Section 313 Cr.P.C. has simply stated that he has been falsely implicated and that the police has forced his wife and brother to depose falsely against him. The accused has not even raised any plea of *alibi*. His presence in his home at that hour of the day is not being disputed. The real brother had died in the house of the accused where he was residing. Heavy burden lies on the accused to explain the circumstances under which his real brother who was residing with him died as a result of injury on his head in his home. In this context, a reference may be made to provisions of section 106 of Indian Evidence Act 1872, which is in the nature of an exception to general rule enshrined in section 101 of Indian Evidence Act, which mandates that the burden of proof lies on the person who asserts the existence of such fact. Section 106 in The Indian Evidence Act, 1872 is reproduced below for the sake of ready reference:

106. Burden of proving fact especially within knowledge.-

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

21. In a judgment reported as (2012) 1 SCC 10 Prithipal Singh v. State of Punjab, the Hon'ble Apex Court has held that if a fact is especially in the knowledge of any person, then burden of proving that fact is upon him and that it would be impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. It was further held therein that Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, offers any explanation which might drive the court to draw a different inference. Thus it was held that section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.
22. The Hon'ble Apex Court, in a case reported as (2016) 12 SCC 665 Harijan Bhala Teja v. State of Gujarat in somewhat identical circumstances where the dead-body had been found in the house of the accused affirmed the judgment of the High Court reversing acquittal of accused. The relevant extract from cited judgment is reproduced below for the sake of ready reference:

“ Section 106 of the Evidence Act, 1872 provides that when any fact is special within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time

of her death, it is for him to show as to in what manner she died, particularly when the prosecution has successfully proved that she died homicidal death.”

23. In the above cited case, the accused had not come out with any satisfactory explanation regarding death of his wife. The Hon'ble Supreme Court upheld the conviction of husband of the deceased despite the fact that there was no direct evidence to connect the accused with the crime. In the present case, the accused has not come out with any explanation at all to clarify the circumstances under which his real brother was found dead as a result of head injury in his house, where he was residing. There being no doubt regarding the presence of the accused in his house and the case of prosecution being further strengthened by the factum of recovery of 'Phaura' at the instance of the accused in pursuance of his disclosure statement Ex.PG, we do not find any reason to interfere with the findings of the learned trial Court to the effect that the accused had inflicted blow with the help of 'phaura' on the head of deceased which proved fatal.
24. During the course of arguments, the learned counsel for accused has submitted that even if it is held that the accused had given a blow with wooden 'phaura', still it is a case which could at best attract an offence under section 304 Part-1 IPC and that no offence under section 302 IPC can be said to be made out as it is a case of single injury with blunt weapon without any intention on the part of the accused to kill the deceased. The learned counsel has stressed that though the witnesses have stated that the accused caused more than one injury but the said assertion is belied from medical evidence as the post-mortem report shows that only single injury was found on the dead body. On the other hand, learned

State counsel has submitted that the intention of the accused to kill the deceased is borne out from the facts of the case and that the mere fact that only one injury was found on dead body would not take the act out of mischief of section 302 IPC.

25. The finding that the accused inflicted the fatal blow having been affirmed, the question that survives is as to whether the offence falls under Section 302 IPC or 304 Part-1 IPC. In order to answer the same, it is the intention of the accused and the weapon with which injury was caused apart from other factors which have to be borne in mind. Intention and knowledge are a man's state of mind and direct evidence thereof is not available unless the accused confesses about the same. Thus, it is from the surrounding circumstances that intention of accused has to be gathered. In other words, these are matters for inference from all the circumstances of the case such as the motive, the preparations made; the declarations of the offender; the weapon used; the persistence of the assault, and the nature of the injuries actually inflicted as also their location.
26. The Hon'ble Apex Court in a case reported as (2006) 11 Supreme Court Cases 444 Pulicherla Nagaraju alias Nagaraja Reddy vs. State of A.P., enumerated various factors to be taken into consideration while deciding the question of 'intention'. The Hon'ble Apex Court observed as under :-

" Therefore, the court should proceed to decide the pivotal question of intention with care and caution as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters – plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy

or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. Infact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other circumstances :-

- (i) nature of the weapon used;*
- (ii) whether the weapon was carried by the accused or was picked up from the spot;*
- (iii) whether the blow is aimed at a vital part of the body;*
- (iv) the amount of force employed in causing injury;*
- (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight;*
- (vi) whether the incident occurs by chance or whether there was any premeditation;*
- (vii) whether there was any prior enmity or whether the deceased was a stranger;*
- (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation;*
- (ix) whether it was in the heat of passion;*
- (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;*
- (xi) whether the accused dealt a single blow or several blows.*

The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may. ..."

27. In another case reported as (2010) 9 SCC 799 Singapagu Anjaiah vs. State of A.P., the Hon'ble Supreme Court held that no body can enter into the mind of the accused and his intention has to be gathered from the weapon used, the part of body chosen for the assault and the nature of injuries caused. The present case is such where the complainant in the first version as recorded in the FIR has alleged that the accused gave two blows with a wooden '*phaura*' on the head of the deceased. When he stepped in the witness box he stated in cross-examination that in his presence only one blow was given. PW-2 Rani, as per FIR had not witnessed the occurrence but when she stepped in witness box she stated that three blows were given by accused to deceased with the help of '*phaura*' in her presence. As per the Post-Mortem Report, only one injury was found on the dead body, which is in the shape of a lacerated wound on the left occipital region. The weapon of offence i.e. a '*phaura*' was picked up by the accused from the spot of occurrence which was lying near the cattle. A '*phaura*' is a common implement used in rural household for collecting cow-dung from ground. It is blunt edged and made of wood. The facts do not suggest any kind of pre-planning on part of the accused. There is no motive strong enough to prompt the accused to plan murder of deceased.
28. In this backdrop and keeping in view the fact that the weapon of offence is a blunt edged weapon i.e. a wooden '*phaura*' commonly found in rural household and the fact that a single injury is found to have been inflicted by accused and thereafter no other blow with the '*phaura*' was inflicted or attempted to be inflicted by him, it cannot be said that the accused had an intention to cause death or to inflict such bodily injury to the deceased likely to cause death.

29. In this context, a reference may be made to a judgment reported as 2009(14) SCC 532, Indrasan v. State of U.P. wherein in a case of single blow by accused on head of deceased with stick, which proved fatal, conviction under section 302 IPC was altered to 304 Part I IPC and sentence was reduced to R.I for ten years. The relevant extract reads as follows:

11. When on the very next day morning i.e. 14.10.1979, the accused-appellant saw the face of the deceased he simply picked up his lathi and with that gave one blow on the head of the deceased. The said blow was so forceful that as a consequence of which the deceased died within an hour and before he could be taken to the hospital. There is a direct nexus between the blow of lathi and death of the deceased which is immediately caused after giving the blow.

12. We, therefore, are of the considered opinion that although it is a case of culpable homicide not amounting to murder, but considering the nature of the injuries which was caused on a vital part of the body, we are of the considered view that there was intention on the part of the accused-appellant to cause death of the deceased.

13. We, therefore, alter the conviction of the appellant from Section 302 Indian Penal Code to Section 304 Part I Indian Penal Code.

30. In view of our aforesaid discussions and in the light of the judgment referred to above, we are of the opinion that the facts established on record do not make out a case under section 302 IPC, but certainly make out a case under section 304 Part-I IPC. Consequently, the conviction of the appellant Prem Masih is altered from Section 302 IPC to Section 304 Part-1 of IPC and he is sentenced to undergo rigorous imprisonment for 10 years. The sentence of fine as

imposed by the Trial Court shall, however, remain the same.

31. The appeal stands partly allowed with the aforesaid alteration in conviction and consequent modification in sentence.

(Rajesh Bindal)
Judge

(Gurvinder Singh Gill)
Judge

August 18, 2017
mohan

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