

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 2 OF 2018

Shri. Prakash Nair,
Presently undergoing sentence
at Central Jail, Aguada, Goa.

.... Appellant

Versus

State of Goa,
Through Public Prosecutor,
Panaji, Goa.

.... Respondent

Mr. Kaif Noorani, Advocate for the Appellant under Legal Aid Scheme.

Mr. S.R. Rivankar, Public Prosecutor for the Respondent-State.

***Coram : M.S. Sonak &
Prithviraj K. Chavan, JJ.***

Date : 05th March, 2019

ORAL JUDGMENT : (Per M.S. Sonak, J.)

Heard Mr. Kaif Noorani, learned Counsel appointed under the Legal Aid Scheme for the appellant and Mr. S. R. Rivankar for the Respondent-State.

2. This appeal is directed against judgment and order dated

04.06.2007 and 06.06.2007 made by Additional Sessions Judge, North Goa, in Sessions Case No. 5/2007, convicting the appellant under Section 302 of IPC, and sentencing him to undergo life imprisonment and payment of fine of ₹ 1,000/-, or in default, simple imprisonment for a period of six months. The appellant has also been convicted under Section 201 of IPC and sentenced to undergo imprisonment of five years and fine of ₹ 500/-, or in default, simple imprisonment for a period of three months. In terms of Section 31 (1) Cr.P.C., both sentences of imprisonment, were ordered to run concurrently.

3. The charge framed against the appellant was that on 11.06.2006 at around 10.50 p.m., at Kumbharwada, Mercas, the appellant murdered one Salam, by intentionally causing his death and thereby committing the offence of murder punishable under Section 302 of IPC. The appellant was also charged with causing the evidence to disappear, by dragging and dumping the dead body of Salam into the Temple pond nearby, thereby committing an offence punishable under Section 201 of IPC. The appellant pleaded “not guilty” and was therefore tried. The Prosecution examined 18 witnesses. Thereafter, the statement of the appellant under Section 313 Cr.P.C. came to be recorded. The appellant neither examined himself nor any defence witnesses.

4. Mr. Noorani, learned Counsel for the appellant, submits that the testimony of the so-called eye witness Divakar Gawda (PW12), is entirely unreliable and was incorrectly relied upon by the learned Sessions Judge. He submits that, from his deposition it is evident that, PW12 was not even in a position to see the alleged incident. He refers to the sketch of the scene of offence in order to elaborate this aspect. Mr. Noorani submits that a statement of PW12 was recorded under Section 164 Cr.P.C. before the Executive Magistrate. He submits that there are contradictions between the statement under Section 164 Cr.P.C., and the deposition of PW12 before the Sessions Court. He submits that if the testimony of PW12 is discarded, then, there is absolutely no evidence on record to link the appellant with the alleged crime.

5. Mr. Noorani submits that the so-called recovery of the weapon by the Police, was a total sham. He submits that the weapon was allegedly recovered from the Temple complex, which was already under the full control of the police authorities from the date previous to the alleged recovery. He submits that when the site was already in control of the police much prior to the alleged recovery, such recovery can hardly be referred to any recovery, as contemplated by Section 27 of the Evidence Act.

6. Mr. Noorani, in the alternate submits that, this is clearly not a case of culpable homicide amounting to murder. He submits that at the highest, this is a case which comes under Section 304 Part II of IPC. He submits that the evidence in the present case, at the highest, establishes that the culpable homicide was committed without pre-mediation in the sudden fight, in the heat of the passion upon a sudden quarrel, and without the appellant having taken any undue advantage or acted in a cruel or unusual manner. He points out that in the present case, the deceased Salam had himself come to the appellant's house, started a fight with the appellant, and even gone to the extent of catching hold the neck of the appellant. Mr. Noorani submits that the appellant has undergone imprisonment for almost over 13 years and therefore, this is a fit case to convert the conviction from that under Section 302 of IPC, to Section 304 Part II of IPC and thereafter order the release of the appellant.

7. Mr. Rivankar, learned Public Prosecutor defends the impugned judgment and order on the basis of the reasoning therein. He points out that the eye witness PW12 has deposed to seeing the appellant actually committing the murder. He points out that the testimony of PW12 has not at all been tainted in the cross-examination. He points out that even PW5 has deposed to the scuffle between the appellant and Salam, and has provided the motive for the

murder. On this basis, Mr. Rivankar submits that there is really no case made out to interfere with the conviction and the sentence.

8. In response to the alternate contention of Mr. Noorani, Mr. Rivankar submits that in the present case, the appellant stabbed the deceased twice with a knife. Therefore, it is evident that the act by which the appellant caused the death of Salam, was done with the intention of causing death, or of causing such bodily injury, as is likely to cause death. He therefore, without prejudice, submits that at the highest, the case would fall under Section 304 Part I and not Section 304 Part II, as urged by Mr. Noorani.

9. The rival contentions now fall for our determination.

10. In this case, there is absolutely no dispute that the death of Salam was homicidal. The ocular evidence, as also the medical evidence, makes this position clear. There was never any serious challenge to this position, though, at one stage, there was a suggestion that the death of Salam might be suicidal. However, according to us, there is ample evidence on record to establish that the death of Salam in the present case, was clearly homicidal.

11. The star witness for the Prosecution, according to us, is

PW12. In the first place, he has deposed that he knew the appellant, as the appellant was working as a room boy at the same hotel at which PW12 was working. He has also deposed that even after the appellant left his job as a room boy, he used to come to the hotel to take tourists staying at the hotel, for sight-seeing. There was absolutely no challenge to this part of the testimony of PW12. The testimony of Sheela (PW5), who used to stay with the appellant, also corroborates this aspect.

12. Secondly, PW12 was a natural witness and has explained in detail as to how he came to see the appellant stabbing Salam in the stomach. PW12 has deposed that, he in fact shouted at the appellant and told him to leave Salam or not to kill him. PW12 has then deposed that the appellant came running towards PW12, and PW12 ran in the compound of the neighboring house, and even told the neighbor as to what was happening.

13. There is absolutely no dent to the testimony of PW12 in the course of cross-examination. Only denials were put to PW12 and according to us, such denials are not at all sufficient to discard the testimony of PW12. The testimony of PW12, according to us, is both cogent as well as reliable. We do not agree with Mr. Noorani that from the locations deposed to by PW12, this witness was not in a

position to see the incident. There is evidence on record that the incident took place on the night of Buddha Pournima. There is no cross-examination on the aspect of the light being insufficient. Besides, as noted earlier, PW12 knew the appellant, and the appellant after stabbing Salam, actually rushed on PW12, when PW12 told him to stop beating Salam. According to us, there are no serious inconsistencies with the statement of PW12 recorded under Section 164 Cr.P.C., and his deposition before the Sessions Court. The minor discrepancies pointed out by Mr. Noorani, are not at all sufficient to discard the testimony of PW12 in the present case.

14. PW5 has also, to a certain extent, corroborated the testimony of PW12. The testimony of PW12 finds corroboration in the medical evidence of Dr. Sapeco (PW8) as well.

15. Therefore, according to us, there is no doubt that it was the appellant, who stabbed Salam and later on, dragged him and threw his body into the Temple pond. The medical evidence suggests that Salam died on account of drowning, as well as the impact of the stab injuries, which, were fatal in the ordinary course.

16. The only question which remains to be considered, is whether, the evidence on record, suggests that this was a case of

culpable homicide not amounting to murder, and if so, whether, the appellant is required to be convicted under any of the parts of Section 304 of IPC and not under Section 302 of IPC.

17. In order to decide the aforesaid issue, reference is necessary to the testimony of Sheela (PW5). She has deposed that from around May 2006, she was staying in the rented room alongwith the appellant while she was working as a maid servant with one family at St. Cruz. She has deposed that she knew Salam who was residing in another rented room in the same building and that Salam was a labourer from Kerela.

18. As regards the incident of 11.06.2006, PW5 has deposed as follows:

“ On 11.6.2006, at around 10.00 p.m., at night, after my dinner, I was sitting in our rented room. At that time, Prakash Nair returned from his work and entered the room. After about 15 minutes, the said Salam came inside our room and started talking with Prakash in Malyalam which language I do not understand. They both started fighting with each other with fist blows inside the room. Then Salam caught hold of the neck of Prakash. I ran to inform one Diwakar Gauda, who was working in the international Hotel at Merces, which was close to our

room. I could not meet Diwakar and then went to Mercedes market to make a phone call to Police. But all the shops were closed at around 10.30 to 11.00 p.m. I then came back to our room and I did not see Prakash nor Salam around.

The reason for the fight was as Prakash was having a doubt that I was having an affair with the said Salam.”

19. In the course of cross-examination, PW5 has deposed that when the appellant and Salam were fighting, she could hear her name being mentioned by the appellant during the fight, and from that, she understood that the fight was over her. She has clearly deposed that the appellant used to doubt that she was having an affair with Salam. She has deposed that on 11.06.2006, the appellant and Salam fought with each other with fist blows inside the appellant's room, in the presence of PW5. She has also deposed that Salam, in fact, caught hold of the appellant's neck and then, PW5 ran to inform Diwakar Gawda, (PW12), who was working in the International Hotel at Mercedes, which was close to the room in which they were staying. She has then deposed that despite efforts, she could not make a phone call to the police to inform them about what was happening, and by the time she returned, she saw neither the appellant nor Salam.

20. According to us, this is a case which would fall under Section 300 of the IPC, which provides that culpable homicide is not murder if it is committed without premeditation, in a sudden fight, in heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. The explanation to this provision states that it is immaterial in such cases, which party offers the provocation or commits the first assault.

21. From the evidence on record, it is apparent that this was not some case of premeditation. In this case, it is not as if the appellant went to the room of the deceased Salam, but rather, the evidence indicates that it is Salam who came to the appellant's room and started fighting with the appellant. PW5 has deposed to the appellant and Salam fighting with each other with fist blows inside the room. PW5 has deposed that it is the deceased Salam who caught the neck of the appellant. This aspect is well corroborated by the medical evidence of Dr. Sapeco (PW8). Obviously, this scared PW5 who ran out of the room to seek help of PW12, and because she could not meet PW12, she even attempted to make phone calls to the police. According to the testimony of PW12, it appears that the fight in the room spilled over to the road, and it is here that the appellant stabbed the deceased Salam in the stomach. The appellant, perhaps thinking that Salam has succumbed to the injuries, then, dragged and

dumped him in the nearby Temple pond. All this indicates that the crime was committed without premeditation, in a sudden fight, in a heat of passion, upon a sudden quarrel. From the nature of injuries upon Salam, we cannot say that the appellant in the present case, has taken any undue advantage or acted in a cruel or unusual manner. Such matters can never be weighed in a golden scale. The surrounding circumstances have to be taken into account. Therefore, according to us, this is a case of culpable homicide not amounting to murder, and accordingly, the conviction under Section 302 of IPC warrants interference.

22. Again, from the nature of injuries on deceased Salam, we cannot agree with Mr. Noorani that this was a case where the act, by which the death was caused, was without any intention to cause death, or to cause such bodily injury, as is likely to cause death. The appellant inflicted two stab wounds on the stomach of the deceased. Therefore, this is a case which would come under Part I and Part II of Section 304 of IPC, as urged by Mr. Noorani. This is punishable with imprisonment for life, or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

23. Taking into consideration the aforesaid, there is really no

necessity to go into the issue of recoveries under Section 27 of the Evidence Act. However, on the authority of ***Surendra Singh B. Sand others Vs. The State of Maharashtra, 1986 1 Crimes 94***, cited by Mr. Noorani, we agree with the principle that where the premises are already in control of the police much before discovery, such discovery, would not entail any benefit under Section 27 of the Evidence Act.

24. Mr. Noorani also relied upon the ruling in ***Shri. Basant Mahato Vs. State (Through Ponda Police Station), judgment and order dated 18.08.2017 in Cr. Appeal No. 22 of 2015*** in which, one of us, (Prithviraj K. Chavan, J.) was a party, in support of his alternate contention. According to us, this ruling is quite relevant, and on the basis of the same, it would only be appropriate if the conviction of the appellant under Section 302 of IPC is substituted with conviction under Section 304 Part I of IPC, in the facts and circumstances of this case.

25. For all the aforesaid reasons, we partly allow this appeal by maintaining the conviction under Section 201 IPC, but substituting the conviction under Section 302 of IPC, with conviction under Section 304 Part I of IPC.

26. As submitted by Mr. Kaif Noorani, the petitioner is in prison since the date of his arrest on 13.06.2006. There is already an order that his period of detention since the date of his arrest on 13.06.2006, shall be set off against the sentence of imprisonment, in accordance with Section 428 Cr.P.C. There is also a direction that the sentences under Sections 201 of IPC and 302 of IPC to run concurrently. This means that the petitioner has suffered imprisonment of almost 13 years by now.

27. According to us, looking into the background of the appellant, and the circumstances in which the crime was committed, the ends of justice will be met, if the appellant is sentenced to suffer imprisonment for the period already undergone, and to pay fine of ₹ 1,500/- and in default, to suffer simple imprisonment for a period of one month.

28. After the arguments concluded in this matter on 05.03.2019, we had pronounced the operative portion of the order and therefore, we now reiterate the same.

29. Accordingly, we dispose of this appeal with the following order :-

(A) The appeal is partly allowed.

(B) The conviction under Section 201 of IPC is maintained. However, the conviction under Section 302 of IPC is set aside and instead, the appellant is convicted under Section 304 Part I of IPC.

(C) The appellant is sentenced to suffer imprisonment for the period already undergone and to pay a fine of ₹ 1,500/- and in default, to suffer simple imprisonment for a period of one month.

(D) The appellant shall be set at liberty on deposit of the fine (if not already deposited) and is not required in connection with any other offence;

(E) The order as regards the disposal of the muddemal property is maintained.

30. We record our appreciation at the efforts put in this matter by Mr. Kaif Noorani, who appears under the Legal Aid Scheme on behalf of the appellant.

(Prithviraj K. Chavan, J.)

(M.S. Sonak, J.)

*Dv**