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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered on: 29th November, 2019

CRL.L.P. 444/2019

STATE

.... Appellant

versus

MOHD. ISRAIL

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr.Ravi Nayak, APP for the State SI Manoj Kumar, PS
Sangam Vihar.

For the Respondent : Mr.Kanhaiya Singhal, Adv. (Amicus Curiae) with Mr.Arshid
Bashir, Adv.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J. (OPEN COURT)

1. The present leave to appeal arises out of a most unfortunate incident in which the State alleges that, a father killed his son.
2. The facts in brief as are relevant and necessary for the adjudication of the present leave to appeal, instituted on behalf of the State are that, the accused Mohd. Israil, the solitary respondent in these proceedings is married to Ms. Memul, PW-4 and out of their wedlock, they were blessed with two boys namely Mr. Mustafa, PW-2 and the deceased Mr. Munavar.
3. Mr. Mustafa, PW 2 is married to Ms. Najmi, PW 15 and the deceased Mr. Munavar was also married. However, it is an admitted

position that, his wife and children were not residing with them due to the conduct of the deceased who was a habitual drunkard and used to persistently and repeatedly assault them physically. The respondent and both his sons used to reside together. The respondent along with Mr. Mustafa, PW 2 used to run a sewing shop at the residential house, whereas, the deceased Mr. Munavar used to do embroidery work at Neb Sarai, Delhi.

4. It was the prosecution's case that on the 20.12.2014, at around 8:30 p.m., the deceased came to the house in a drunken state and started abusing his mother Ms. Memul, PW 4 and thereafter physically assaulted her as well. When the respondent-father intervened to save Ms. Memul, PW 4 the deceased abused him verbally and attacked him physically. Upon the respondent pushing the deceased, the latter fell down and he was thereafter laid on *takhat* in his room by his aged parents. But within a short period of time thereafter, the deceased once again started abusing his mother Ms. Memul PW 4 and began to bite her hand; and when at that point in time the father tried to intervene, the deceased admittedly slapped him and kicked him. It is immediately thereafter that it was alleged that the father came back from his shop, situated within the same residential premises, with a *dabia* (chopper) and inflicted eleven injuries on the deceased, as per the post-mortem report Ex.PW 5/B, consequent upon which the deceased Mr. Munavar is stated to have died on the spot.

5. In the present leave petition, it must be observed that the respondent has been convicted, for the commission of an offence punishable under Section 304-I of the Indian Penal Code (IPC) and not under Section 302 IPC as charged. It is further observed that the

respondent was sentenced to undergo rigorous imprisonment for five years, which sentence he is stated to have since undergone.

6. The present leave to appeal within the meaning of the provisions of Section 378(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as '*Cr.P.C*'), assails the impugned judgment dated 26.10.2018 and order on sentence dated 27.10.2018 *inter alia* on the ground that the respondent was only convicted and sentenced for the commission of an offence under Section 304-I IPC, whereas he should have been convicted and sentenced for an offence punishable under Section 302 IPC.

7. Insofar as the facts and circumstances of the case are concerned, they are within a narrow compass, as deposed, among other prosecution witnesses, by PW-2 Mustafa, brother of the deceased, and are elaborated hereunder, as follows:-

“xxx My younger brother Munawar aged about 34 years is doing work of embroidery at Neb Sarai and he usually remain absent from the work and return home in drunken condition and used to take quarrel with his wife, children and even used to give beatings to them. Sometimes my father accused Mohd. Isaril also used to intervene on which Munnawar used to abuse him. Munnawar's wife had left him three times due to his offending activities. On 28/12/14, at about 8 pm, I had returned to my house after offering namaz in a Masjid, situated at a distance of 2-3 minutes of walking. I found that my brother Munnawar had also returned back home and was under the influence of liquor. My mother also returned back who was residing near Masjid in a rented home. Thereafter, my brother Munnawar called my mother by using bad language/abusing her and then he called her, caught her from her hand and twisted her hand, my mother cried and raised alarm. My father also reached there from the shop who made understand Munnawar and asked him to go to bed. Meanwhile Munnawar abused my

father also and assaulted him. My father also pushed Munnawar down and then Munnawar fell down and it appeared that he had become unconscious. My father removed coat and shoe of Munnawar and then we managed to lay Munnawar down on a takhat in the house. My father went inside the shop and I alongwith my mother came in my room. After about 10 minutes Munnawar again woke up and then called my mother by using bad language and then asked her to show her hand. My mother moved her hand towards him and then Munnawar attempted to bite her hand. My mother cried and raised alarm. My father came from the shop and then again made him understand that when he had already made him sleep, then why he has woke up and started abusing and using criminal force. On which Munnawar slapped my father. My mother told me to call neighbourers who would overpower Munnawar and would take him away from there. My father went inside the shop and after sometime my father came there, keeping his hands behind and stood near the place where we used to cook food. My mother was present at the door while I was inside my room. Then my father saw here and there, while Munnawar was standing near wooden takhat facing western side. Meanwhile, my mother saw that my father accused put the head of Munnawar on takhat from one hand and then gave blow with dabiya (chopper) on his neck and then when my mother saw this, my mother raised alarm and told me that accused was killed Munnawar and then she rushed outside raising alarm and I reached there and then I saw that accused was giving blow on the neck of Munnawar with chopper (dabiya). Accused asked me to go away from there, otherwise he would kill me also. I went outside immediately to call neighbours. I returned back with neighbourers, meanwhile Munnawar was lying dead. One Sonu friend of Munnawar also reached there and made a call at No.100. Police reached there and apprehended the accused.”

8. However, it is pertinent to observe that in his cross-examination, PW-2 Mustafa clearly and unequivocally stated that:

“I had told to the police that my brother Munaver called my mother by using bad language/abusing her and then he called her and twisted her hand. I had stated to the police that at the time of occurrence I was in my room. It is correct that the accused tried to make understand the deceased Munaver not to beat his mother and the accused but despite that deceased Munaver continued to beat both mother and the accused on the day of incident. This incident continued for some time, however deceased not stopped beating his mother and the accused. It is incorrect to suggest that I had not seen the accused inflicting injuries to the deceased Munaver. **My father inflicted injuries on provocation due to continuous beating by the deceased given to his mother and his father (accused). It is incorrect to suggest that I am deposing falsely**”.

9. In this behalf, it is further pertinent to note that Mustafa, PW 2 was not re-examined by the prosecution.

10. The deposition of Ms. Memul, PW 4 the mother of the deceased is along similar lines, except that she did not venture an opinion qua the grave and sudden provocation as testified hereinabove, by the son of the respondent, Mustafa, PW-2.

11. The testimony of Ms. Najmi, PW 15, who is the sister-in-law of the deceased, is equally unequivocal with regard to the conduct of the deceased qua his wife, children, mother and other members of the family, leading upto his unfortunate death.

12. In view of the foregoing, the solitary issue that arises for consideration in the present leave petition, is whether the respondent ought to have been convicted for the commission of the offence under Section 304-I IPC as was done by the Ld. Trial Court or ought to have been convicted and sentenced for the commission of the offence under Section 302 IPC?

13. In this behalf, the learned Trial Court while dealing with the said issue, found as follows:-

“20. PW2 Mustafa also corroborated the statement of PW4 by stating that deceased had first beaten the mother and twisted her hand thereafter when she cried his father came to save her, thereafter he assaulted the father also and his father however became generous and removed coat and shoes and went to the shop. Thereafter again when deceased woke up and started abusing the mother, thereafter attempted to bite her hand, then mother cried and father came from the shop and then he started abusing the father and also slapped the father, then the mother told him to call neighbours because deceased got out of control, but his father went back and came with chopper in the hands keeping it behind, and then gave multiple blows on the neck of the deceased. This PW2 also explained the cruel behaviour of the deceased, and on that day even in the drunken state he misbehaved with mother and father not once but also second time and after first misbehaviour the father kept cool, and also taken out his coat and made him easy to lie on takhat (cot), however he again woke up and started misbehaving with his mother by biting her hand and when on her cries, father intervened he again gave abuses and slapped the father and deceased got out of control, which made his father to loose tamper and thereafter immediately came with chopper from the other room and inflicted multiple injuries on deceased. The testimony of PW2 and PW4 categorically suggest that the father has not planned the murder of the deceased, it was all in the grave and sudden provocation, mere coming back to the room with chopper by keeping it behind do not suggests that he has any prior intention to kill the deceased.

21. The ultimate act of killing has to be seen from the entire facts and circumstances. The conduct of the deceased since beginning appears to be quarrelsome. He is habitual drunkard and used to beat and maltreat the family members, therefore his wife alongwith children already left, and now on the day of incident he misbehaved and assaulted both mother and father without any mistake, however despite this father kept calm but deceased has not left his cruel habits and again physically beaten both mother and father despite their decent behavior, which made the accused to loose his tamper, and out of this sudden provocation he brought the chopper and

gave multiple injuries in one go to the deceased. The testimonies of these witnesses categorically shows that there is no pre meditation to kill on the part of the accused and entire act was committed under grave and sudden provocation as deceased became uncontrollable. There is no time gap to think. The chopper (meat cutting knife) used is normal tool in the house, lying in adjoining room and not procured from anywhere else. The relationship of father and son do not at all to be inimical to attribute any motive in killing the deceased. The entire incident happened due to sudden and grave provocation. At this stage, it is pertinent to rely upon the judgment of apex court in case titled 'Budhi Singh Vs. State of Himachal Pradesh, 2012(13) SCC 663', held that:

“The doctrine of grave and sudden provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury”. (Para 18)

“Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder ” (Para 19)

“In light of the circumstances which would help the court to gather the intention of the accused, the court also has to take into consideration the attendant circumstances.

One of the very vital factors is premeditation and intention to kill. These are the important factors which will weigh in the mind of the court while determining such an issue in light of the attendant circumstances”. (Para 23)

“ Premeditation and intention to kill are two vital circumstances amongst others which are to be considered by the court before holding the accused guilty of an offence under Section 302 or Section 304 IPC. It is not established that the accused had the intention to kill the deceased or it was a premeditated crime. Prosecution has contended that the very fact that the accused had come out with a tobru completely established the intention to kill and, thus, the offence would fall under Section 302 IPC. It cannot be disputed that the accused came out with a tobru but, at the same time, it is also clear that this is the most easily available weapon in that part of the hills and is used regularly by the communities. Beyond this factor, there is no evidence of animosity, premeditation or intention to kill. The accused did give a blow by tobru on the head of the deceased which proved fatal. This was result of the grave and sudden provocation where the father of both the deceased and the accused was being abused, assaulted and ill-treated by the deceased, who was in the drunken state”. (Para 25)

22. In that case also the injuries from the acts was caused by the brother to the brother while saving father under grave and sudden provocation. The injuries were on the vital part. There are two injuries from sharp edged part of the axe on the head. It is observed that the offence resulting under grave and sudden provocation would normally mean that a person placed in such circumstances could lose self control but only temporarily and that too, in proximity of time of provocation. The provocation could be an act or series of act done by the deceased to accused resulting in inflicting of the injury. In present case facts and circumstances, there is no doubt that accused due to grave and sudden provocation lost self

control, and in the said state inflicted multiple injuries. Furthermore, as per statement of PW4 deceased became uncontrollable, thus mother asked him to call neighbours. The mere act of committing multiple injuries in this state do not deprive the accused of exception u/s 300 IPC.

23. At this stage, it is also pertinent to refer to case titled *Ranjit Tanti Vs. State of Assam* CrI.A (J) 119/2014 dated 01.06.2018, 2018 SCC Online (Gau) 585, in that case also father killed son under grave and sudden provocation, the division bench of Gauhati High Court in para 9 & 10 held as under:

“9. In the case of *Muthu v. State*, (2009) 17 SCC 433: AIR 2008 SC 1, it has been held that when in the heat **of the moment or in a fit of anger a person does an act without premeditation that person must also be punished but his punishment should be lesser than that of premeditated offences.** The Supreme Court has observed that it is for this reason that Exceptions 1 and 4 have been inserted in Section 300 of the Indian Penal Code. Exceptions 4 to Section 300 of the Indian Penal Code clearly provides that 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 having taken undue advantage or acted in a cruel or unusual manner.

10. Apparently, **the incident took place on a sudden quarrel without any premeditation between the appellant and Mohan Tanti. The appellant somehow lost his self-control and in the hit of passion caused two injuries on the head of Mohan Tanti with an axe. It is unlikely that a father would deliberately cause death to his son, although adopted.** Having regard to the facts of the case, we are of the considered view that the act committed by the appellant would fall under Section 304 Part 1 of the Indian Penal Code and not under Section 302 of the Indian Penal Code”.

24. On overall appreciation of the evidence, it can be safely inferred that during the aforementioned incident, deceased abusively as well as physically assaulted both mother and father, and became uncontrollable, therefore in the state of anger under grave and sudden provocation, accused inflicted multiple injuries resulting the death of the

deceased. The act as committed by the accused, therefore falls in the category of offence u/s 304 Part 1 IPC and not u/s 302 IPC. The offence u/s 302 IPC not made out and accused is found guilty for offence u/s 304(1) IPC only.”

14. Having heard learned counsel appearing on behalf of the parties and perused the evidence on record, we concur in toto with the above findings arrived at by the Trial Court for the following reasons:-

- (i) It is unlikely that the Respondent caused the death of his son deliberately.
- (ii) It is nobody’s case that the relationship between the father and the son was so inimical so as to attribute any motive, for the former to kill the latter.
- (iii) As a matter of fact, the testimony of Memul, PW 4 clearly depicts how the Respondent (father), even in the face of his son’s unruly and unbecoming behavior, took off the coat of the deceased and lay him down on the *takhat*, so that the latter could sleep and rest, in his exceedingly inebriated state.
- (iv) It is also most significant that the testimony of Mohd. Mustafa, PW 2, the brother of the deceased, clearly reflected that the father had inflicted injuries on the son, on sudden and grave provocation caused, due to the continuous beating and constant verbal abuse, inflicted by the deceased on the body of his own mother Memul, PW 4, as well as the accused, his aged father.

15. In the facts and circumstances of the case and in keeping with the exposition of law as laid down by the Hon’ble Supreme Court of

India in **Budhi Singh Vs. State of Himachal Pradesh** reported as **2012(13) SCC 663** and **Ranjit Tanti Vs. State of Assam** reported as **2018 SCC (Gau) 585**, which have been followed by the Ld.Trial Court in rendering the impugned decision, we are of the considered view that, the respondent lost his self control in proximity of time to the provocation and caused the death of the deceased, without any pre-meditation or the intention to kill, and is resultantly entitled to be convicted and sentenced, only on the footing that he was guilty of having committed an offence within the meaning of the provisions of Section 304(I) IPC, as was done by the Ld. Trial Court, since the incident evidently happened, due to sudden and grave provocation caused at point in time, by the deceased, as abovestated.

16. The Apex Court in the case of **Ghurey Lal v. State of U.P.** reported in **2008 (10) SCC 450** has laid down the following principles governing the grant of leave to appeal against an order of acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- i) The trial court's conclusion with regard to the facts is palpably wrong;
- ii) The trial court's decision was based on an erroneous view of law;
- iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

- iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
 - v) The trial court's judgment was manifestly unjust and unreasonable;
 - vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.
 - vii) This list is intended to be illustrative, not exhaustive.
2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.
 3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

17. It is trite to state that the settled legal position, is that where two views are reasonably possible from the very same evidence, the prosecution cannot said to have proved its case beyond reasonable doubt [Ref: **T. Subramanian vs. State of Tamil Nadu** reported as (2006) 1 SCC 401]. It was further held that, when two views are possible, the appellate court should not reverse a judgment of acquittal, merely because another view was possible [Ref: **K. Prakashan vs. P.K. Surenderan**, reported as (2008) 1 SCC 258].

18. It is also the well settled legal position that, the presumption of innocence that obtains in favour of an accused person, is further strengthened by the order of acquittal passed in his favour by the trial court. It is further observed that, the appellate court is generally loath to interfere with the findings of fact recorded by the trial court, *a fortiori* because the latter has had an advantage of examining in the

first person the demeanor of the witnesses. Therefore, when the trial court takes a plausible view of the facts of the case, interference by the appellate court with the judgment of acquittal is neither warranted nor justified. It is only when the conclusions arrived at by the trial court are palpably wrong and against the weight of evidence or predicated on an erroneous view of law which would result in grave injustice, that the appellate court would interfere with the findings returned.

19. Resultantly, the issue struck above is decided against the State and in favour of the accused.

20. Consequently, the leave to appeal instituted on behalf of the State, is devoid of merit and is accordingly dismissed.

SIDDHARTH MRIDUL
(JUDGE)

I.S. MEHTA
(JUDGE)

NOVEMBER 29, 2019

aa/d