

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 364 OF 2015

Nilesh Ramdhan Gavai

.Appellant

Vs.

The State of Maharashtra

.Respondent

Ld. Adv. Dr. Yug Chaudhari, for Appellant.

Ld. Adv. A. R. Kapadnis, APP for the State.

**CORAM : SUNIL. B. SHUKRE AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 10 MARCH, 2023

PRONOUNCED ON : 20 MARCH, 2023

JUDGMENT:- (PER- ABHAY S. WAGHWASE, J)

. By way of instant Appeal, the Appellant-Original Accused, is assailing the judgment and order passed by learned Additional Sessions Judge, Pune dated 24th November, 2014 in Sessions Case No. 363 of 2013, by which Appellant stood convicted for commission of offence under Section 302 of the Indian Penal Code, 1860 [for short “**IPC**”] and sentenced to suffer life imprisonment.

Brief facts before Ld. Sessions Court:-

2. The deceased-Laxman i.e. brother of complainant was working in Everest Consultancy Services, Vadgaon and he was residing in separate premises, but in the same building where brother/Complainant resided. Accused, and one Satish were friends of deceased-Laxman and they always shared each other's company.

On 26.12.2012, deceased Laxman and complainant returned from their office. That time around 9 p.m. accused and other friend Satish were already present near there building and they were chatting. Laxman assured to join them after some time and went to his apartment. The complainant-brother also went to his room. Around 10.00 p.m. complainant heard commotion and so he rushed to the spot and there he saw accused Nilesh sitting on the chest of his brother Laxman and hitting with him with cement paver block on his head. When complainant went near them, accused ran away. Complainant shifted his brother initially to Sassoon Hospital and thereafter in KEM hospital. Complainant set law into motion by filing F.I.R. On 29.12.2012, while undergoing treatment, Laxman succumbed to the injuries and therefore crime was converted to Section 302 of IPC and accused was duly indicted for murder.

Investigation was entrusted to PW-6, who was then posted at Haveli Police Station, and after completing the same, he charge-sheeted accused.

Case being exclusively triable by Court of Sessions, it came to be assigned to the file of learned Additional Sessions Judge, who framed charges and undertook trial during which prosecution examined six witnesses and also relied on documentary evidence. After appreciating the evidence and on hearing both sides, learned trial Court reached to the finding that prosecution established the charge and thereby convicted and sentenced accused to suffer life imprisonment.

SUBMISSIONS

On behalf of Appellant -

3. Learned counsel for Appellant, while criticizing the impugned judgment pointed out that by no means case in hand was of Section 302 of IPC. Narrating the sequence of the events, he would submit that from the testimony of PW-1 and 2, it is abundantly clear that accused and deceased were good friends. Accused had come to chat with deceased. There was admittedly no previous enmity or quarrel, nor there were any issues amongst them. Resultantly, there was no motive also. According

to him, this is also evident from cross of very complainant. Consequently, it is his submissions as there was no motive and pre-mediation, it is not at all a case of murder. Hence, he would submit that conviction ought not to have been recorded by learned Additional Sessions Judge for under Section 302.

4. It is next submitted that whatever incident took place was at the spur of the moment and probably there was sudden quarrel. Even deceased died after two days of occurrence and therefore according to him, by no stretch of imagination, case would fall or attract charge under Section 302.

5. Learned counsel took us through the evidence of PW-2 and submitted that evidence of this witness is also full of material, omissions and contradictions. Taking us through the medial expert evidence, he submitted that there was no bleeding injury nor fracture to the skull and therefore when autopsy doctor had, on examination, opined about deceased suffering simple injuries, conviction of Section 302 is absolutely unwarranted.

6. However, he fairly conceded that case in hand at the most, would attract Section 304 part I of IPC and would not travel beyond it. According to him, case squarely falls in the exception 4 of Section 300 of IPC.

In support of above submissions, learned counsel seeks reliance on Harish Kumar vs. State of Delhi Administration, reportedly AIR 1993 Supreme Court 973 and Udiya vs. State of Madhya Pradesh (2019) 15 Supreme Court Cases 65.

Respondent-State:-

7. While resisting above submissions, learned counsel for Respondent-State pointed out that deceased had suffered six injuries on head. There were repeated blows and the episode was seen by complainant brother and an independent witness. Their evidence has remained unshaken.

That, Autopsy-doctor has also attributed death due to head injury. Therefore, according to him there is clear ocular account supported by medical evidence and thus prosecution had brought home the charge, more particularly of murder. It is his submission that learned Trial Court has correctly appreciated the evidence and has applied settled legal position in arriving to

the guilt and as such he prays that the findings and reasons reached at by learned Trial Court, need not be disturbed or interfered with.

ANALYSIS AND CONCLUSION

8. Taking into consideration above submissions, it seems that, the principle objection and ground raised before us by learned counsel for Appellant is that case and evidence does not attract charge of murder i.e. Section 302 of IPC. However, according to him it is a case which would fall under exception 4 of Section 300 of IPC. Therefore, it is his submission that case is not of Section 302 of IPC, rather it is a case at the most attracting charge under Section 304 part I of IPC.

9. It is thus clear that here there is no serious challenge to the homicidal death. Now it is to be seen whether as put-forth by learned counsel for Appellant, it is at all a case of culpable homicide not amounting to murder.

10. There are series of judgments dealing with cases which would fall under 302 of IPC and which would fall under culpable homicide not amounting to murder attracting 304 part I or part II. Few landmark judgments which could be named are as

under:

Dhirajbhai Gorakhbhai Nayak v. State of Gujarat (2003) 9 SCC 322; Pulicheria Nagaraju v. State of Andhra Pradesh (2006) 11 SCC 444; Hukum Chand v. State of Haryana (2) 8 SCC 421; Khushal Laxman Waghmare v. State of Maharashtra (2015) 1 SCC (Cri.) 100; Sompal Singh & Anr. v. State of Uttar Pradesh (2014) 3 SCC (Cri.) 225.

Very recently law on this point is succinctly dealt in the case of *Arjun and Anr v. State of Chhattisgarh (2017) 2 SCC (Cri) 53; State of Rajasthan v. Leela Ram (2019) 4 SCC (Cri) 528.*

11. In *Pulicheria Nagaraju (supra)*, the Hon'ble Apex Court in paragraph 29 of its judgment held and observed as under:

“29 . 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. In fact, 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.”

12. Bearing in mind above settled legal requirements, if we scan the evidence of prosecution, more particularly evidence of PW-1 and 2, whose testimonies are only found to be relevant here, it is emerging that, on said fateful night, complainant and his deceased brother Laxman had reached their house from

work. Complainant brother testified about accused to be already present near their house alongwith one Satish. He speaks about his brother Laxman, accused and Satish to be good friends and to be always in each other's company.

He testified that on that night after reaching home deceased himself told accused and said Satish that he will join them in short while and thereafter complainant went to his own room and his brother also went to his house. According to him, around 10.00 p.m. on hearing commotion, he rushed to the spot and claims to have seen assault at the hands of accused on the head of his brother by means of cement paver block.

13. The above chronology narrated by complainant in his substantive evidence, goes to show that, as rightly pointed out by learned counsel for the Appellant, accused had come there unarmed and had merely come for talks. Complainant brother speaks of accused and deceased to be good friends. He admits in cross that there was no enmity or quarrel between accused and deceased. Such answers suggests that accused and deceased were on cordial terms. Therefore, there is no question of any enmity or sinister motive entertained by accused.

14. There is no dispute that accused-Appellant assaulted deceased with a cement paver block, but it was already lying there and it was picked and put to use. What preceded the actual episode of hitting has not come on record. Unfortunately, said Satish, a common friend of both accused and deceased is not examined by prosecution. He would have been best witness to throw light as to what actually happened before episode of hitting at the instance of accused.

Therefore, very genesis of the occurrence is not before the Court. However, it seems that inspite of being good friends, something did happen, but at the spur of the moment during which accused picked up paver block lying at the spot and hit it on the head of deceased.

15. No doubt prosecution is right in pointing out that, there were several blows on the head but sight cannot be lost of the fact that incident had taken place all of sudden and accused had not come armed or with any ill-intentions. Admittedly, there is no motive or pre-mediation.

16. Learned counsel for the Appellant would strenuously submit that **Exception 4** of Section 300 of IPC comes into play in

the case in hand. Exception 4 of Section 300 of IPC reads as under:

Section 300 xxx

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.

17. Thus, **Exception 4** of Section 300 of IPC covers act which are done in sudden fight, heat of passion or in sudden rage of anger. This exception can be invoked if death is caused **firstly** without pre-mediation. **Secondly**, in sudden fight. **Thirdly**, without the offender taking undue advantage or acts in cruel and unusual manner and **fourthly**, the incident result into death.

18. Taking into consideration the sequence of events that took place in the said episode of night of 27.12.2012, we are in complete agreement with the submissions of learned counsel for the Appellant that, case does fall under exception 4 of Section 300 of IPC, as here accused and deceased were good friends and they had gathered for talks. Brother has admitted that there was no previous enmity or previous quarrel. It is during the chat, there seems to be sudden quarrel resulting into assault.

Therefore, in our considered opinion, case in hand did not

warrant conviction under Section 302 of IPC as is done by Ld. Trial Court. In our opinion, learned trial Court seems to have lost sight of the above settled legal position and has erred by returning the guilt for offence under Section 302.

Consequently, intervention at the hands of this Court is called for and we accordingly proceed to pass following order:-

ORDER

- (i) Criminal Appeal No. 364 of 2015 is partly allowed;
- (ii) Impugned judgment and order dated 24.11.2014 passed by learned Additional Sessions Judge, Pune in Sessions Case No. 363 of 2013 recording Conviction of Appellant under Section 302 is set aside;
- (iii) Instead Appellant is held guilty for commission of offence under Section 304 part I of IPC;
- (iv) Appellant-Original Accused is accordingly sentenced to suffer 10 years Rigorous Imprisonment and to pay fine of Rs.1,000/- and in default of payment of fine, to suffer Simple Imprisonment for three months.

19. Criminal Appeal is disposed of accordingly.

Digitally
signed by
GANESH
SUBHASH
LOKHANDE
Date:
2023.03.20
18:31:58
+0530

(ABHAY S. WAGHWASE, J.)

(SUNIL. B. SHUKRE, J.)