SUPREME COURT OF INDIA

Kulesh Mondal

Vs.

The State of West Bengal

Crl.A.No.1172 of 2007

(Dr. Arijit Pasayat and D.K. Jain JJ.)

07.09.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Calcutta High Court upholding the conviction for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of imprisonment of life awarded by learned Additional Sessions Judge, 2nd Court, Malda in Sessions Trial No.51/2001.

3. Background facts in a nutshell are as follows:

On 13.2.1994 round about 2.30 p.m. a young girl called Bharati Mondal was returning home, carrying a bundle of 'Khari' on her head. As the 'Khari' struck on the body of the appellant Kulesh Mondal, the accused Naresh Mondal (acquitted by the High Court) and his brother appellant-Kulesh Mondal hurled filthy languages at her. Shocked by such behaviour of the accused, the informant Naren Mondal raised his strong protest. There ensued bickering amongst them. It was followed by hurling of brickbats at the informant.

While such things had been going on, one Chakku Mondal (hereinafter referred to as the deceased) was passing along the road. He came to the spot to enquire as to what had been going on there. Finding him there, the accused Naresh Mondal dragged him to the place of occurrence and his brother appellant Kulesh Mondal delivered a fatal blow on his neck with a 'Hasua'. The injured Chakku Mondal having sustained severe injury on his neck, efforts were made to shift him to the hospital. Unfortunately, the injured succumbed to his injury before his arrival in the hospital.

With the informant Naren Mondal reporting the incident with the local P.S. Manikchak P.S. Case No.10/1994 dated 13/02/1994 under Sections 341/323/302/34 IPC was registered against Kulesh Mondal and others. Following the inquest over the dead body, the Investigating officer sent the dead body to the Malda Sadar Hospital for post mortem examination. The investigation proceeded in it usual way with the Investigating officer preparing a sketch map of the place of occurrence. He also seized blood stained earth, control earth, few pieces of broken tiles and brickbats, some dry woods and prepared seizure list in presence of the witnesses.

Subsequently, the blood stained wearing apparels of the victim were also seized. Despite raids being conducted, to apprehend the culprits, the accused persons evaded arrest for a long time. Eventua1ly, they were arrested one after another. The arrest of principal accused Kulesh Mondal could be made only on 18.6.1994. The Investigating Officer, in the meantime, examined the available witnesses. The statement of Bharati Mondal recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.') was collected.

Collection of the post mortem report was also made. On completion of investigation, charge sheet was submitted.

Following the commitment of the case, the learned Additional Sessions Judge framed charges under Sections 3O2/34, 323/34 and 337/34 IPC against the appellant and others. The accused persons having pleaded innocence, the prosecution examined 14 witnesses to bring home the charges.

Amongst the notable witnesses were the eyewitnesses of the occurrence, the witnesses of the seizure of the incriminating articles, the doctor conducting the post mortem examination and the officer who investigated the case. The learned Judicial Magistrate recording the statement of Bharati Mondal was also examined as a prosecution witness. Placing strong reliance on the statements of the eyewitnesses and the supportive post mortem report, learned Additional Sessions Judge convicted the appellant Kulesh Mondal and his brother Naresh Mondal for commission of offence punishable under Section 302 read with Section 34 IPC. The trial court found the evidence to be credible and cogent and, therefore, found the two accused persons guilty of offences punishable under Section 302 read with Section 34 IPC. They were sentenced to rigorous imprisonment for life and fine of Rs.5000/- each, in default, rigorous imprisonment for six months. Both the accused persons were, however, acquitted of the charges under Section 323/34 and 337/34 IPC. The four other accused persons namely Radhik Mondal, Anil Mondal, Uttam Mondal and Dipen Mondal were acquitted, as the materials against them were not found sufficient enough.

Aggrieved by the conviction and sentence under Section 302/34 IPC, both the convicted accused persons jointly preferred an appeal before the High Court.

4. Before the High Court primary stand was that evidence of relatives should not have been believed, no material evidence was there to convict accused Naresh Mondal and in any event Section 302 had no application. High Court did not find any substance in any of the pleas and dismissed the appeal.

5. In support of the present appeal learned counsel for the appellant submitted that the evidence of so-called eye- witnesses cannot be believed as they are related to the deceased. In any event only single blow was given in the course of quarrel and, therefore, Section 302 IPC has no application.

6. Learned counsel for the State on the other hand supported the order.

7. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC 364) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration.

If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule.

If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

8. Again in Masalti and Ors. v. The State of U.P. (AIR 1965 SC 202) this Court observed: (p. 209-210 para 14):

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

9. To the same effect is the decision in State of Punjab v.

Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186).

10. The residuary plea relates to the applicability of Exception 4 of Section 300 IPC, as it is contended that the incident took place in course of a sudden quarrel.

11. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

12. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do.

There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation.

In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have

originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

13. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v.

State of Rajasthan (AIR 1993 SC 2426) it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

14. Considering the background facts in the light of the principle set out above, the inevitable conclusion is that Exception 4 to Section 300 IPC is applicable and the offence is relatable to Section 304 Part I and not Section 302 IPC. That being, so the conviction is altered. Custodial sentence of 10 years would meet the ends of justice.

15. The appeal is allowed to the aforesaid extent.