SUPREME COURT OF INDIA

Gopal

Vs.

State of Maharashtra

Crl.A.No.1428 of 2007

(Dr. Arijit Pasayat and Lokeshwar Singh Panta JJ.)

12.10.2007

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of the Division Bench of the Bombay High Court, Aurangabad Bench, upholding the conviction of the appellant for offences punishable under Section 302 of the Indian Penal Code, 1860 (in short the IPC).

3. Background facts in a nutshell are as follows:

Paridharinath Vaidya (P.W.7), P. S. I. attached to M.1.D.C. Police Station, Jalgaon, recorded the complaint of Sumanbai (P.W. 1) on l5th June, 2002. On the basis of the said complaint, an offence vide crime No.136 of 2002, under Section 302 of Indian Penal Code, 1860 (in short IPC), was registered. Inquest Panchanama came to be drawn in the presence of Sunanda (P.W.2) of the dead body of Devkabai (hereinafter referred to as deceased). The dead body was thereafter referred for post-mortem examination and post- mortem was conducted by Dr. Chaudhari (P.W.6). According to Dr. Chaudhari, the cause of death was shock due to head injury. P. S. 1. Pandharinath Vaidya, thereafter, drew the scene of the offence Panchanama in the presence of Sanjay (P.W.3) and seized from the scene of the offence a wooden log, control soil and blood mixed soil. He thereafter, recorded the statements of the two minor sons of deceased Devkabai viz. Rahul (P.W.4) and Sunil (P.W.5). Clothes of deceased Devkabai came to be seized by Panchanama. The Appellant was arrested and arrest Panchanama was drawn. The clothes, which were on the person of the appellant, also came to be seized and the same are Article Nos.5 and 6. The seized property was referred to the Chemical Analyzer at Aurangabad vide requisition. Further to the completion of investigation, a charge sheet against the appellant, came to be filed.

4. Prosecution version was as follows:

Rahul (P.W.4) son of the appellant and deceased Devkabai, stated that the appellant was unemployed and was addicted to liquor and would pick up quarrels with deceased Devkabai often. On the day of

the incident Rahul (P.W.1) was sleeping on a clot alongwith his younger brother Sunil (P.W.5). They were awakened on hearing the noise of quarrel between the appellant and Devkabai. According to him, at that time, his mother was cooking and was preparing bread. The appellant dealt a blow of wooden log on her head, as a result she sustained bleeding injuries. He accordingly went running to call his maternal aunt Sumanbai (P.W.1). He narrated the incident to her and along with her immediately rushed back to the house. On seeing Sumanbai (P.W.1), the appellant fled from the house. Near to the scene of the offence the wooden log Article-3 was lying. He noticed two bleeding injuries on the head of his mother Devkabai. Devkabai was shifted to the hospital by Sumanbai (P.W.1) and Sunanda (P.W.2). Devkabai succumbed to her injuries in the hospital.

5. On the case being committed to the Court of Sessions, trial Judge framed a charge against the Appellant for offence punishable under Section 302 of Indian Penal Code. The Appellant denied the guilt and claimed to be tried. Prosecution, in its effort to substantiate the charge, examined eight witnesses. The trial Judge accepted the evidence of the eye witnesses viz. Rahul (P.W. 4) and Sunil (P.W. 5) and convicted and sentenced the accused as afore stated.

6. Before the High Court the accused appellant contented that the evidence of PWs. 4 & 5, who were the child witnesses, could not be accepted. In any event offence is not covered under Section 302 IPC. This plea was resisted by the State by supporting the judgment of conviction as recorded by the trial court. As noted above, the appeal was dismissed.

7. The stands taken before the High Court were reiterated. According to the appellant prosecution version, accepted in toto, goes to show that the assault was made in course of sudden quarrel and by a piece of wood blow was given and, therefore, the Section 302 IPC has no application, and Exception 4 to Section 300 IPC applies.

8. Learned counsel for the State supported the judgment of the High Court.

9. For bringing in operation of Exception 4 to Section 300 IPC 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.

10. 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 mens sober reasons 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 offenders 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 or 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. These aspects have been highlighted in Dhirajbhai Gorakhbhai Nayak v. State of Gujrat [2003 (5) Supreme 223]. When the factual scenario is considered in the legal principles indicated above, the inevitable conclusion is that Exception 4 to Section 300 IPC has application to the facts of the case.

11. In the light of the principles set out above the conviction is to be made under Section 304 Part I IPC and not Section 302 IPC. The conviction is accordingly altered. Custodial sentence of ten years would meet the ends of justice. The appeal stands partly allowed.