

SUPREME COURT OF INDIA

Murlidhar Shivram Patekar

Vs.

State of Maharashtra

Crl.A.No.111 of 2008

(Dipak Misra and V.Gopala Gowda JJ.)

25.09.2014

JUDGMENT

V. GOPALA GOWDA, J.

1. This appeal is filed by the appellants against the judgment and order dated 20.01.2004 passed in Criminal Appeal No. 255 of 1999 by the High Court of Judicature at Bombay, Bench at Aurangabad, whereby the High Court upheld the Trial CourtTMs decision of convicting the appellants under Section 302 of the Indian Penal Code (in short IPC) on the charge of murder of one Asaram and sentencing them to life imprisonment along with a fine of Rs.1,000/- and in default of payment of fine, to undergo further simple imprisonment for one year. The present appeal is filed by the appellants praying to set aside the impugned judgment and order of the High Court, urging various grounds.

2. The necessary relevant facts are briefly stated hereunder:

The accused-appellant Nos. 1 and 2 are husband and wife respectively, who are the residents of Village Motigavan in Jalgaon District in Maharashtra. They have been charged with the murder of one Asaram, as a result of a scuffle that took place between the accused and the deceased. An FIR was originally lodged by Madhav Gore, the complainant, who had witnessed the incident. Initially, the crime was registered under Section 307 read with Section 34 of IPC. However,

after the death of Asaram, the crime was registered under Section 302 read with Section 34 of IPC. The Trial Court found both the accused guilty of the offence of murder and sentenced them to suffer life imprisonment.

3. Aggrieved by the judgment and order of the Trial Court, the appellants filed an appeal before the High Court of Bombay, pleading provocation on the part of the deceased and lack of evidence and prayed for reversal of the conviction and sentence. The High Court dismissed the appeal and upheld the verdict of the Trial Court. Hence, the present appeal.

4. It has been contended by the learned counsel on behalf of the appellants that on 27.08.1993 at about 6.00 p.m. when it was raining, Asaram entered the house of the appellants and raped appellant No.2, in the absence of her husband-appellant No. 1 and children. On 28.08.1993, when the accused/appellants were proceeding to report the incident at the police station, Asaram allegedly tried to prevent them from doing the same and as a result a scuffle broke between the accused No.1 and the deceased-Asaram. In the scuffle, the wife, accused/appellant No. 2 noticed that Asaram had over-powered her husband-appellant No.1, she therefore caught hold of the genitals of Asaram and tried to rescue appellant No.1. Thereafter, Asaram took out a knife from his pocket and made an attempt to stab appellant No.1. It is further contended by the learned counsel, that the deceased- Asaram during the course of the scuffle, fell on the knife, thus causing injuries to himself. The accused No.1 removed the knife and proceeded towards the police station where he produced the knife before the P.S.I. Andhale (P.W.8) and also lodged an F.I.R against the deceased-Asaram for committing rape on his wife-appellant No. 2 under Section 376 of the IPC.

5. In justification of failure to lodge a complaint on the very same day, it is contended by the learned counsel on behalf of the accused-appellants that it was raining heavily on the date of occurrence of the crime; therefore, they could not approach any villagers or the police station.

6. On the other hand, it has been contended by the prosecution that the accused-appellant No.2, noticing that the deceased Asaram had over powered the accused-appellant No.1, caught hold of his genitals and facilitated accused-appellant No. 1 to give blows with knife. The incidence was witnessed originally by the complainant, Madhav Gore who died during the pendency of the trial as well as Kishan Mohite

(PW-2), Pandurang (PW-3) and Prahlad Mohite (PW-4). The deceased was taken to the hospital at Jalna in a tractor. A seizure Panchanama was made. The Head-Constable Babula Labhange (PW-7), while proceeding towards the said village met the injured and recorded his dying declaration at about 10.45 a.m. on the same day. The doctor at Jalna hospital directed that the deceased be taken to the Government Medical College Hospital at Aurangabad as he was in serious condition. The deceased was therefore, brought by the police to the Ghati Hospital at Aurangabad, where, the doctor on examination of the injured, declared him dead.

It is further contended by the prosecution that Madhav, the complainant filed his complaint which came to be registered as F.I.R for an offence punishable under Section 307 read with Section 34 of IPC, which after the death of the deceased Asaram was converted to Section 302 read with Section 34 of the IPC. The blood stained clothes of the deceased were sent for chemical analysis along with the weapon (knife) and the blood samples of the accused and the deceased. The body was sent for post mortem to Dr. Anil Digambarrao Jinturkar (PW-5) on 28.08.1993. The accused came to be arrested on the very same day and charge-sheet was filed on completion of the investigation.

7. The Judicial Magistrate, 1ST Class committed the case to the Sessions Court at Jalna on 19.02.1994. Charges were framed against both the accused under Section 302 read with Section 34 of the IPC, which the accused consequently denied and claimed to be tried. In addition to 3 eye witnesses, panch witness-Fakir Mohite PW-1, was examined to prove spot punchnama.

8. Dr. Anil Jinturkar (PW-5), in his disposition has stated before the Trial Court that the injuries had been caused within 6 to 12 hours before the post mortem and in his cross examination, he specifically denied the suggestion that injuries 1 and 2 were possible by means of fall over the knife or during the scuffle. It was contended that this evidence clearly supports the findings recorded by the Trial Court that Asaram died homicidal death on account of the injuries sustained by him by means of a sharp weapon like a knife. The cause of death as described by the doctor was hemorrhagic shock due to stab injury over the chest and abdomen involving liver and lung.

It is further contended by the prosecution that during the cross examination of PW-3, he has stated that there was no rain during the night of the incident

(alleged rape). He also denied that Asaram had taken out the knife and assaulted the accused no.1. The evidence of PW-4 and PW-5 further supported the description of the incident as narrated by PW-3.

9. Further, as contended by the prosecution that the High Court has rightly held that the defence plea raised by the accused no.1 has been falsified by the ocular evidence of PW-2, PW-3 and PW-4. The evidence of the three eyewitnesses is not impaired in any manner and the accused no.2 had contradicted her statement made in the complaint. The accused-appellant No. 2 by holding the genitals of the deceased had virtually disarmed him, giving accused-appellant No. 1 the opportunity to catch hold of his collar and inflict him with blows with the knife. Hence, it was a premeditated act to attack the deceased. The High Court has further held that the requirements in the Exception 4 of Section 300 IPC are not attracted in the present case as held by this Court in the case of Surinder Kumar v. Union Territory of Chandigarh[1]. The High Court further held that the common intention of the accused was shared and developed by them right in their house. The possession of the deadly weapon by accused no. 1 and the injuries inflicted on the deceased that were caused on his vital parts were attributed to accused no.1.

10. On the basis of the aforesaid rival legal contentions, evidence of the prosecution witnesses on record and the reasoning taken by the courts below, the following points would arise for consideration of this Court:

1. Whether the death of Asaram was homicidal in the light of the evidence produced by Prosecution Witnesses?
2. Whether the appellants in furtherance of their common intention, to take revenge of the alleged rape on accused No. 2, murdered Asaram and whether the accused are entitled to the benefit under Exception 4 of Section 300, IPC?
3. What order?

Answer to Point No.1:

11. The prosecution has relied on the evidence of PW-5, Dr. Jinturkar, who examined and conducted the post-mortem of AsaramTMs body. In his deposition before the Trial

Court, PW-5 stated as under:

External Injuries:

An elliptical obliquely placed stab wound over the chest and right side, anteriorly in the 8th intercostals space, at midclavicular line, it was 2 x 0.75 x lung deep, it was directed medially and upwards, torn tags of under lying pleura were found to be protruding out of the wound, there was oozing of dark reddish colour blood through the wound, margins clean cut, inverted, surrounding skin shows blood stains.

An elliptical obliquely placed stab wound over the chest and right hypochohorium of the abdomen just about $\frac{1}{2}$ below and lateral to the injury No.1 and in the 9th intercostal space, it was 2 x 0.75 x liver deep, directed medially downwards in slightly oblique manner, underlying tissue and dark reddish blood oozing out of the wound substance. Margins clean cut inverted, bevelling noticed at life margin of wound, dried blood stains seen over the skin in vicinity.

I.V. injections sites seen at cubital fosse.

INTERNAL INJURIES On internal examination I found congestion of meanings, brain was pale.

The thorasix wall on the right side showed corresponding elliptical stab wound at all layers beneath injury no. 1 and no. 2 of col. No.17. Pleura shows clean cut elliptical stab below injury no. 1 and 2 as described in col. No.17, with collection of 310 ml. of reddish fluid blood in the right plural cavity, trachea contains reddish blood.

Right lung shows collapsed appearance and an oblique stab wound of 2 x 0.75 in size at its lower lobe, dark adherent blood clots seen at this site, involved tissue was friable.

Left lung was pale in appearance, pericardium showed petechial hemorrhage.

The Heart was contracted and right side contained scanty blood and left side was empty.

He further stated that the walls showed corresponding stab injury at all layers beneath injury No.2 of col. No.17. Peritoneum was cut obliquely at right hypochondrium, measuring 2 x 0.75 in dimension, Peritoneal cavity contained about 450 ml of dark reddish blood and plenty of blood clots. Liver showed clean cut through stab injury of size 2 x 0.75 at its super lateral aspect of right lobe of liver. The right lung was also damaged. He further stated that these injuries were possible by means of a knife and they were sufficient in ordinary course of nature to cause death.

He has further stated that these injuries would have been caused within 6 to 12 hours before the post mortem. According to him the cause of death was haemorrhagic shock due to stab injuries on chest and abdomen involving liver and right lung and accordingly he issued post-mortem notes at Exh.32. he also issued provisional death certificate at Exh.33.

Further, PW-5 has categorically denied the suggestions that injuries 1 and 2 were possible by means of fall over the knife or in scuffle or self inflicted. In BlackTMs Law Dictionary, Abridged 6th Edition, 1991 at page 819, it is stated that:

Preponderance of evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; i.e. evidence which as a whole shows that the fact sought to be proved is more probable than not. Thus, it is stated that the medical evidence acts as a check upon the testimony of eye witnesses and also as independent evidence in so far as it establishes facts, example, nature and grievousness of the injuries suffered by the deceased. Therefore, the above mentioned findings of PW-5 clearly supports the findings recorded by the Trial Court that the death of Asaram was homicidal on account of the injuries sustained by him by means of a sharp weapon like knife on 28.08.1993.

Answer to Point Nos.2 & 3 :

12. Now we have to examine whether the appellant in furtherance of their common intention, to take revenge of the alleged rape on accused No. 2, murdered Asaram. For this purpose the prosecution has relied on the following evidence:

Direct evidence of PW-2 Kisan, PW-3 Pandurang and PW-4 prahlad.

Dying declaration of the deceased Asaram at Exb.40 Evidence of Accused No.2 and circumstantial evidence on record.

BlackTMs Law Dictionary, Abridged 6th Edition, 1991 at page 819 further states that:

A person, who deposes before the Court a fact which he states he saw, must either speak truly or must have invented the story. Test of Proof is the test of probabilities upon which a prudent man may base his opinion. Adverting to the ocular evidence of PW-2, who along with complainant Madhavrao was sitting in front of their drawing room, heard the shout of deceased Asaram and rushed to the said place of incidence and found that the accused no.2 had caught hold of the genitals of the deceased while accused no. 1 had caught hold of the collar of the deceased. PW-2 further disclosed that the accused no.1 had a knife in his hand and he inflicted 2 knife blows into the chest and stomach of Asaram, who fell on the ground and the accused no. 1 and 2, went away.

The testimony of PW-2 is fully corroborated with the testimonies of PW- 3, which was further corroborated by the testimony of PW-4, who had also stated the same version as deposed by PW-2 and PW-3.

13. Thus, the evidence on record led by the prosecution eyewitnesses is sufficient to show that the accused nos. 1 and 2 are the persons, who caused injuries on the vital parts of the body of the deceased.

14. After hearing the learned counsel for both the parties and carefully examining the ocular evidence on record, we would like to bring certain relevant facts into light that were deposed by the above mentioned witnesses in their testimony and cross examination, which the High Court and the Trial Court have failed to notice the same.

The fact that all the above witnesses saw the incidence of scuffle is not disputed; however they entered the scene only after they heard the shout of Asaram. What transpired prior to that, between the accused and the deceased has not been corroborated by anyone save the accused no. 2. None of the witnesses seem to know the cause of the scuffle and neither were they able to hear the altercation that was going on between them.

Further, all the witnesses saw accused no.1 inflicting injury to deceased-Asaram by way of a knife that was later produced as the murder weapon. However, none of the witnesses have stated anywhere that the knife belonged to the accused no. 1, therefore, the question that who had actually possessed the knife first is still unknown.

15. Further, the evidence of PW-4 cannot be completely relied upon. This is because of the fact that in his cross examination he has clearly stated that the incident was already over by the time he reached the said place where the scuffle had taken place. The facts and circumstances must be reasonable and proximate and not conjectural and remote and the prosecution has failed to satisfy this Court beyond any reasonable doubt the reason and intent of the accused that resulted in the death of Asaram.

16. Now, we move on to the aspect of dying declaration. The evidence of the deceased at Exb.39 which was reduced to writing by PW-8 at Exb.40, who has recorded the statement of Asaram at 10.45 a.m., stated that on enquiring about the assault, Asaram had stated that the accused assaulted him under the pretext that he had entered their house. Asaram had further stated that the accused assaulted him in the morning at about 8 a.m. There is no infirmity in recording the statement of the said dying declaration as it was recorded on the way when the injured was being taken to the police station and from there to the hospital.

17. Now we come to the evidence of accused no. 2, the wife, which was outrightly disregarded by the High Court as well as the Trial Court. In her deposition, she has clearly stated that the deceased Asaram had entered her house and had pressed her neck and put a knife over her chest rendering her defenceless and making it impossible for her to raise her voice and thereby he committed rape. She further stated that the incident took place when her husband and children were not at home. She has also stated that when her husband reached home after a while she disclosed the

incident of rape to him. However, they could not approach the police station or the Sarpanch on the very same night as it was raining but proceeded towards the police station the next morning at 8.00 a.m. She further stated that Asaram, who was sitting with the other prosecution witnesses, rushed towards them and prevented them from proceeding further. Thereby, the deceased started assaulting the accused. She has further stated that the deceased had over powered her husband and none of the prosecution witnesses came to their rescue. Then she caught hold of the testicles of Asaram and her husband snatched the knife from the hand of the deceased who had pierced himself in the stomach during the scuffle with the knife. Her husband thereby proceeded towards the police station and narrated the incidence of the scuffle and lodged a complaint of rape against the deceased.

18. Further, on the question of not raising the voice by the accused no. 2, in our opinion, it is understandable under this situation that the accused no.2 could have been in a state of shock and scared and hence would not have been in a position to reveal the incident of the rape to anyone. Thus, the contention made by the prosecution that the delay in lodging the complaint or revealing the same to the Sarpanch was premeditated on the part of the accused cannot be accepted by us on the fact and circumstances of the case. Even for the sake of argument, if we consider that the delay in lodging the complaint was a premeditated plan on the part of the accused, then the accused would not have delayed confronting the deceased until 8.00 a.m. the next morning. Premeditation calls for construction of a plan to execute a certain act. If the accused had planned on confronting and eventually committing the act of murder against the deceased, then they would not have executed the same in their own neighbourhood, in the presence of a number of witnesses. Hence, we are of the opinion that there was no premeditation on the part of the accused and the scuffle took place due to sudden provocation on the part of the deceased. This is further corroborated by the fact that the accused themselves reached the police station and lodged a complaint against the deceased and confessed to the scuffle, thereby submitting the knife (the murder weapon) at the police station.

19. The question however still remains as to the nature of the offence committed by the accused and whether it falls under Exception 4 of Section 300, IPC.

In the case of Surinder Kumar (*supra*), this Court has held as under:-

7. To invoke this Exception four requirements must be satisfied, namely,

(i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) The assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly. (emphasis supplied) Further in the case of *Arumugam v. State*,^[2] in support of the proposition of law that under what circumstances Exception 4 to Section 300, IPC can be invoked if death is caused, it has been explained as under:-

18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offenderTMs 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 ~fightTM occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. 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 had 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 advantageTM as used in the provision means ~unfair advantageTM. Further in the case of *Satish Narayan Sawant v. State of Goa*,^[3] this Court has held as under:

24. Section 300 IPC further provides for the Exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II.

28. Records clearly establish that there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the appellant also received an injury which was simple in nature and that there was heated exchange of words and scuffle between the parties before the actual incident of stabbing took place. There is, therefore, provocation and the incident happened at the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case under Section 302 IPC but it is a case falling under Section 304 Part II IPC. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it cannot be said that the appellants/accused had any intention of causing the death of the deceased when they committed the act in question. The incident took place out of grave and sudden provocation and hence the accused are entitled to the benefit of Section 300 Exception 4 of IPC.

Thus, in entirety, considering the factual scenario of the case on hand, the legal evidence on record and in the background of legal principles laid down by this Court in the cases referred to supra, the inevitable conclusion is that the act of the accused-appellants was not a cruel act and the accused did not take undue advantage of the deceased. The scuffle took place in the heat of passion and all the requirements under Section 300 Exception 4, IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300, IPC is attracted to the

fact situations and both the appellants are equally entitled to this benefit.

20. Thus, considering the factual background and the legal position set out above, the inevitable conclusion is that the appropriate conviction of the appellants would be under Section 304 Part II IPC instead of Section 302 IPC. Hence, the sentence of imprisonment for 10 years would meet the ends of justice.

21. The appeal is disposed of in the above said terms.

[2] (1989) 2 SCC 217

[3]

[4] (2008) 15 SCC 590, at page 595