SUPREME COURT OF INDIA

Nankaunoo

Vs.

State of U.P.

Crl.A.No.46 of 2016

(T.S.Thakur,CJI., A.K.Sikri and R.F.Nariman,JJ.)

19.01.2016

JUDGMENT

R.Banumathi J.

(Arising out of SLP (Crl.) No.7437 of 2013)

1. Leave granted.

2. This appeal arises out of the judgment dated 16.05.2013 passed by the High Court of Judicature at Allahabad, Lucknow Bench in Criminal Appeal No.775 of 1981, whereby the High Court affirmed the conviction of the appellant-accused under Section 302 IPC and also sentence of imprisonment for life imposed on him.

3. Briefly stated case of the prosecution is as under:- Deceased- Chhedi Lal was running a barber shop in Kurari Khurd Market. On 18.02.1981, the appellant visited the shop of Chhedi Lal and asked for a haircut. An altercation took place between the two when appellant insisted the deceased for haircut claiming preference over other customers; but the deceased-Chhedi La! declined his demand. The appellant felt insulted and left the barber shop threatening the deceased. At around 5.00 p.m., deceased-Chhedi Lal closed the shop and went back home. Later at 6.00 p.m., the deceased went towards the canal lying in the western side of the village abadi to answer the nature's call. When the deceased reached near the eastern mend of the grove of Ishwari, the appellant emerged from the northern side carrying a pistol in his hand and threatened the deceased as he had insulted the appellant in the market and that he would not spare him alive. The deceased fled towards the west to save himself and appellant fired from his pistol which hit the deceased on his left thigh and he had fallen down. The incident was witnessed by Janoo-PW2, Udan-PW3 and Muneshwar. Also father of the deceased namely Kishore-PWl and his son-Ram Pal saw the incident when they were returning from their field. On the alarm raised by the deceased and the witnesses, the appellant fled away from the scene. The deceased was taken on a cot to his house and on the narration of incident by Kishore-the father of the deceased, the complaint was written by Shiv Pujan Singh. Thereafter, deceased was taken to Police Station-Achal Ganj, where FIR

(Ex. Ka-1) bearing Crime No.37/81 dated 18.02.1981 was registered against the appellant under Section 307 IPC. SI-Ravinder Prasad Yadav (PW-6) recorded the statement of Chhedi La! who was lying injured on the kharkhara outside the Police Station and the deceased was sent to Acha! Ganj Hospital from where he was referred to District Hospital Unnao; but the deceased died on the way to the hospital. FIR was altered from Section 307 IPC to Section 302 IPC and further investigation was taken up. After inquest by the police, post mortem was conducted by Dr. J.N. Bajpai (PW-4) at District Hospital Unnao on 19.02.1981 at 3.30 p.m. PW-4-Dr. Bajpai noted a gunshot would of entry %" x V2" on the back and inner part of left thigh and six gunshot wounds of exit each 1/3" x 1/ 3" in size in front and middle left thigh. Dr. J. N. Bajpai (PW-4) opined that the death was due to shock and hemorrhage due to injuries of firearm. After completion of investigation, chargesheet was filed against the appellant under Section 302 IPC. After committal of the case to the Sessions Court, charge was framed against the appellant under Section 302 IPC.

4. To bring home the guilt of the accused-appellant, prosecution has examined in all eight witnesses and exhibited the material object on record. The incriminating evidence and circumstances were put to the appellant under Section 313 Cr.P.C. and the accused denied all of them and pleaded that he was falsely implicated. Upon consideration of the evidence, the Sessions Judge, Unnao found the appellant guilty of the offence under Section 302 IPC and sentenced him to undergo imprisonment for life. Being aggrieved, the appellant preferred appeal before the High Court which was dismissed by the impugned judgment.

5. Learned counsel for the appellant Mr. Kapil Arora submitted that the prosecution could not have relied on the testimony of PWs 1, 2 and 3 as PW-1-Kishore, father of the deceased, is an interested witness and PWs 2 and 3 are the inimical interested witnesses and the trial court was not right in basing the conviction of the appellant on the testimony PWs 1 to 3 and the High Court erred in confirming the conviction. It was further contended that the courts below failed to take note of the fact that the alleged weapon of murder 'countrymade pistol' was never recovered by the investigating officer and in the absence of clear connection of the weapon used for crime and resultant injury, the prosecution cannot be said to have proved its case beyond reasonable doubt.

6. Per contra, learned counsel for the respondent-State Ms. Pragati Neekhra submitted that witnesses have consistently deposed that the appellant threatened the deceased that he would not be spared alive and thereafter fired shot from his loaded pistol and medical evidence amply corroborates the version of the eye witnesses and the courts below rightly convicted the appellant under Section 302 IPC.

7. We have carefully considered the rival contentions and perused the impugned judgment and the material on record.

8. PW-1 Kishore, PW-2 Janoo and PW-3 Udan have given consistent version about the occurrence that the appellant fired at the deceased-Chhedi Lal with 'countrymade pistol' which he was carrying in his hand. Despite the searching cross-examination, nothing substantial was elicited from the witnesses to discredit their testimony. In the context of

unimpeachable oral evidence coupled with the medical evidence that deceased-Chhedi Lal met with homicidal death due to gunshot injuries, trial court rightly held that the appellant was responsible for the death of Chhedi Lal. High Court rightly agreed with the finding of the trial court that PWs 1 to 3 were reliable witnesses. Having heard the learned counsel for the parties and on going through the record, we do not find any reason to disbelieve the evidence of eye witnesses-PWs 2 and 3.

9. Learned counsel for the appellant contended that the courts below failed to take note of the fact that the alleged weapon 'countrymade pistol' was never recovered by the investigating officer and in the absence of any clear connection between the weapon used for crime and ballistic report and resultant injury, the prosecution cannot be said to have established the guilt of the appellant. In the light of unimpeachable oral evidence which is amply corroborated by the medical evidence, non-recovery of 'countrymade pistol' does not materially affect the case of the prosecution. In a case of this nature, any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise, it would shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice.

10. Learned counsel for the appellant then contended that the gunshot injury was on the lower part of the left thigh which is a non-vital organ and it cannot be said that the appellant intended to cause the death of the deceased and therefore the conviction of the appellant under Section 302 IPC is not sustainable. In the light of the above contention, the question falling for consideration is whether the conviction of the appellant under Section 302 IPC is sustainable.

11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering the clause thirdly of Section 300 IPC and reiterating the principles in Virsa Singh's case, in *Jai Prakash v. State (Delhi Administration)*[1]*, para (12),*
this Court held as under:-

> "12. Referring to these observations, Division Bench of this Court in *Jagrup Singh case*[2], observed thus: (SCC p. 620, para 7)
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> "These observations of Vivian Bose, J. have become locus classicus. The test laid down in Virsa Singh case, AIR 1958 SC 465 for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of the rule of law."
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> The Division Bench also further held that the decision in *Virsa Singh case*[3] has throughout been followed as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove (1) that the body injury is present,

(2) that the injury is sufficient in the ordinary course of nature to cause death, (3) that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words Clause Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury. The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

12. The emphasis in clause three of Section 300 IPC is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature. When the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place.

13. Keeping in view the above principles, when we examine the facts of the present case, the deceased sustained gunshot wound of entry 1-1/2" x 1-1/2" on the back and inner part of left thigh, six gunshot wounds of exit each 1/3" x 1/3" in size in front and middle left thigh. Due to the occurrence in the morning at the barber shop of the deceased, the appellant emerged from the northern side of the grove carrying pistol in his hand and fired at the deceased. The weapon used and the manner in which attack was made and the injury was inflicted due to premeditation clearly establish that the appellant intended to cause the injury. Once it is established that the accused intentionally inflicted the injury, then the offence would be murder, if it is sufficient in the ordinary course of nature to cause the death. We find substance in the contention of the learned counsel for the appellant the injury was on the

inner part of left thigh, which is the non-vital organ. Having regard to the facts and circumstances of the case that the gunshot injury was caused in the inner part of left thigh, the sufficiency of injury to cause death must be proved and cannot be inferred from the fact that death has taken place. But the prosecution has not elicited from the doctors that the gunshot injury on the inner part of left thigh caused rupture of any important blood vessel and that it was sufficient in the ordinary course of nature to cause the death. Keeping in view the situs and nature of injury and in the absence of evidence elicited from the doctor that the said injury was sufficient in the ordinary course of nature to cause death, we are of the view that it is a fit case where the conviction of the appellant under Section 302 IPC should be under Section 304 Part 1 IPC.

14. In the result, the conviction of the appellant under Section 302 IPC is modified as conviction under Section 304 Part 1 IPC and the appellant is sentenced to undergo ten years rigorous imprisonment and the appeal is partly allowed.

Judgment Referred.

[1]*(1991) 2 SCC 0032*
[2]*(1981) 3 SCC 0616*
[3]*AIR 1958 SC 0465*