

# SUPREME COURT OF INDIA

Atul Thakur

Vs.

State of Himachal Pradesh

Crl.A.No.522-523 of 2016

(Dipak Misra,CJI., A.M.Khanwilkar and Dr.D.Y.Chandrachud,JJ.,)

19.01.2018

## JUDGMENT

### **A.M. Khanwilkar,J.,**

1. These appeals have been filed against the judgment and order dated 1st April, 2016 passed by the High Court of Himachal Pradesh, Shimla in Criminal Appeal Nos.75 & 227 of 2015, modifying the order of conviction and sentence passed by the Sessions Judge (Forests), Shimla, dated 31st December, 2014 in Sessions Trial No.39-S/7 of 2012 thereby convicting the appellant under Section 302 of the Indian Penal Code (IPC) and sentencing him to imprisonment for life along with fine.

2. Shorn of details, the appellant along with three others were tried for offence punishable under Sections 302, 201 read with Section 34 of IPC by the Sessions Judge (Forests), Shimla. The case of the prosecution is that a telephone message was received at Police Station, West Shimla at around 4.45 A.M. on 28.07.2011, informing that a quarrel had taken place near Tunnel 103, from where one Hunny was brought to IGMC Hospital (Shimla) in seriously injured condition. On reaching the hospital, the SHO Shakuntala Sharma was informed that the injured had succumbed to the injuries. She then recorded the statement of Rajinder Singh under Section 154 of the Code of Criminal Procedure. In his statement, Rajinder Singh disclosed that he had two children. His daughter Pooja was doing computer course and his younger son Hitesh Thakur, 22 years of age, was also doing computer course from Lakhar Bazar. He stated that Hitesh had left home on 27.07.2011 after taking meal, on his motorcycle bearing registration No.HP-63-3235, for attending computer course. He had then informed his sister Pooja on her mobile that he was going with his friend Akhilesh and would not be returning during the night. He requested his sister to inform their mother. At about 3 a.m. on 28.07.2011 one Atul Thakur (appellant herein) telephonically informed him that his son Hitesh was brought to IGMC Hospital, Shimla as he was not feeling well and asked him to come to the hospital. On receiving that telephonic information he rushed to the hospital and found that his son was lying dead in wounded condition. At that time, the appellant was also present there.

3. After recording the statement, investigation proceeded and four accused, who had visited the house of Mukesh Thakur (Accused No.2) where a drink party was arranged during the night of 27.07.2011 and 28.07.2011, were sent for trial for the stated offence. The Trial Court after analysing the evidence acquitted the other three accused but found the appellant guilty of the offence punishable under Section 304, Part-II and sentenced him to rigorous imprisonment for five years and to pay fine of Rs. 10,000/-, in default to undergo further imprisonment for one year vide judgment dated 31st December, 2014.

4. Against the said decision, the appellant filed an appeal before the High Court, being Criminal Appeal No.75 of 2015. The complainant also filed an appeal before the High Court, being Criminal Appeal No.227 of 2015 against the acquittal of three accused as well as for enhancement of sentence of the appellant. Both the appeals came to be disposed of by common judgment dated 1st April, 2016. The High Court upheld the finding of fact regarding the involvement of the appellant in the commission of crime. However, it reversed the finding and conclusion recorded by the Trial Court regarding the nature of offence. It concluded that taking an overall view of the matter, the appellant was guilty of offence punishable under Section 302 of IPC for the murder of Hitesh Thakur and not under Section 304 Part-II, as held by the Trial Court. At the same time, the High Court affirmed the order of acquittal in favour of the other accused who were tried along with the appellant. In the present appeals, the aforementioned decision of the High Court has been assailed only by the original accused No.1.

5. Mr. Aditya Dhawan, learned counsel appearing for the appellant, made a fervent effort to persuade this Court that there is an obvious contradiction between the evidence of the eye-witnesses which should enure to the benefit of the appellant. According to him, the appellant deserves to be acquitted as in the case of co-accused, as the genesis of the offence is doubtful. Further, the involvement of the appellant in the commission of crime has not been proved beyond reasonable doubt. He took us through the evidence of the prosecution witnesses and also of the defence witness (DW1) who was examined at the instance of the appellant. He submits that in any case, the fact situation established by the prosecution, even if taken as it is, does not warrant a finding of commission of offence of murder of Hitesh Thakur. At best it is a case of culpable homicide not amounting to murder, covered by the Exception under Section 300 of IPC and, thus, punishable under second part of Section 304 of IPC. The Trial Court had justly invoked that offence and sentenced the appellant to undergo five years rigorous imprisonment which the appellant has already undergone. He, therefore, submits that this appeal be allowed and the appellant be set free by reviving the order of the Sessions Court and setting aside the impugned judgment and order of the High Court. He submits that the appellant has already undergone sentence for a period of 7 years 3 months 24 days as on 24 th November, 2017 including remission period of one year 2 months and 6 days.

6. Learned counsel for the respondents, however, has opposed these appeals. According to the respondents, the finding of guilt recorded by the two Courts below is supported by the evidence on record which has established the involvement of the appellant in the commission of crime beyond doubt. The finding of guilt so recorded by the Trial Court and affirmed by

the High Court does not warrant any interference. Similarly, the finding recorded by the High Court reversing the opinion of the Trial Court to convict the appellant under Section 302 of IPC is also unexceptionable. The High Court justly noted that it was a case of murder of Hitesh Thakur which is punishable under Section 302 of IPC and not under Section 304 Part-II, in which case the appellant will have to suffer the sentence period of life imprisonment. The respondents would submit that the appeals are devoid of merit and ought to be dismissed.

7. We have carefully considered the oral evidence adduced by the prosecution, in particular the evidence of PW-11 and PW-12 who were the eye-witnesses to the incident during which Hitesh Thakur was assaulted by the appellant with knife causing serious bodily injuries to which he finally succumbed. In addition to the said oral evidence, the other circumstances also point towards the complicity of the appellant in the commission of crime such as recovery of the knife at his instance and the nature of injuries suffered by the deceased attributable to the assault by the same knife by the appellant. We find that the Trial Court has justly analysed the evidence to record a finding about the complicity of the appellant in the commission of crime. That has been affirmed by the High Court after reappraisal of the relevant evidence. We are in agreement with the view so taken by the two Courts below. In other words, we are inclined to uphold the concurrent finding recorded by the Courts below that the appellant caused six injuries to deceased Hitesh Thakur by attacking him with a knife on the night of 27.07.2011 in the presence of their friends (including PW-11 and PW-12) who had gathered at the house of Mukesh Thakur for celebrating a drink party arranged at the behest of Hitesh Thakur. Further, Hitesh Thakur succumbed to the injuries caused by the appellant. Thus, it is a case of homicidal death.

8. Notably, the evidence on record plainly establishes that a sudden fight took place between the appellant and Hitesh Thakur and in the heat of passion, the appellant assaulted Hitesh Thakur causing serious bodily injuries. There is no shred of evidence, much less even a remote suggestion that the appellant had assaulted Hitesh Thakur with an intention to cause his death. Though the High Court found the appellant guilty, it has not held that the bodily injuries caused by the appellant were with an intention to cause the death of Hitesh Thakur. The High Court overturned the finding recorded by the Trial Court regarding the nature of offence, principally on the ground that the appellant gave repeated knife blows to Hitesh Thakur and Hitesh Thakur could not defend himself as he was unarmed. Thus, the appellant was found guilty of offence punishable under Section 302 of IPC.

9. In other words, the controversy in these appeals boils down to the nature of offence and the sentence to be awarded in that behalf. As aforesaid, the evidence on record, as held by two Courts below and with which finding we are in full agreement, is that the appellant gave six knife blows to Hitesh Thakur on the fateful night to which he succumbed. Thus, it is a case of homicidal death. However, there is no evidence that the injuries inflicted by the appellant were with an intention to cause the murder of Hitesh Thakur. On the other hand, the evidence clearly establishes that the appellant assaulted Hitesh Thakur without any premeditation. The whole incident took place suddenly and, in the heat of passion a sudden quarrel started as Hitesh Thakur, while smoking, blew smoke on the face of the appellant.

Resultantly, the appellant got enraged. He told him that he was senior in age and thus should not smoke in his presence much less blow the smoke towards him. Then a sudden physical fight started between them, in which the appellant, in heat of passion, gave six knife blows to Hitesh Thakur on different parts of his body.

10. The evidence of PW-11 and PW-12 (eye-witnesses) would establish that the appellant and others including deceased Hitesh Thakur had gathered at the spot for a drink party arranged at the instance of Hitesh Thakur. They had consumed drinks when the incident took place. Soon after assaulting Hitesh Thakur by knife, when the appellant realised that Hitesh has been badly injured, he offered him water and took him to the hospital along with his other friends. He was in the hospital till Hitesh Thakur succumbed to the injuries. He had also informed the father of Hitesh on telephone and called him to the hospital. Further, when Hitesh was taken to the hospital, the doctors did not provide him immediate treatment but insisted on calling his father. This can be culled out from the evidence of PW-11 and PW-12, who were eye-witnesses and also present throughout and until the last rites of Hitesh Thakur were performed.

11. Taking into account the events as unfolded, it leaves no manner of doubt that the appellant had no intention to cause the death of Hitesh Thakur. The incident happened without any premeditation in a sudden fight between Hitesh Thakur and the appellant and in heat of passion the appellant inflicted six knife blows on Hitesh Thakur. On the contrary, after realising his mistake, he immediately offered water to Hitesh Thakur and also took him to hospital and stayed there till his last rites were performed. PW-2 father of deceased Hitesh Thakur also corroborates the position that the appellant had contacted him to inform that Hitesh had been brought to the hospital in serious condition.

12. Taking overall view of the matter, the facts of the present case warrant invocation of Exception 4 to Section 300 of IPC. For, it is a case of culpable homicide not amounting to murder inasmuch as the incident happened on account of sudden fight between the friends who had gathered for a drink party arranged at the behest of Hitesh Thakur. There was no pre-mediation and the act done by the appellant was in the heat of passion without the appellant taking any undue advantage or acted in a cruel manner. The number of wounds caused by the appellant, it is a well established position, by itself cannot be a decisive factor. The High Court committed manifest error in being influenced by the said fact. What is relevant is that the occurrence was sudden and not premeditated and the offender acted in the heat of passion. The evidence supports the case of the appellant in this behalf. The fact that the appellant used weapon such as knife, is also not a decisive factor to attract Section 302 of IPC. Neither the use of a knife in the commission of offence nor the factum of multiple injuries given by the appellant would deny the appellant of the benefit of Exception 4.

13. Dealing with a somewhat similar situation, in the case of *Surain Singh Vs. State of Punjab*<sup>1</sup>, this Court has restated the settled legal position about the purport of Exception 4 to Section 300 of IPC. Even in that case, the accused had repeatedly assaulted the deceased with a Kirpan and caused injuries resulting into death. After restating the legal position, the Court converted the offence to one under Section 304 Part-II instead of Section 302 IPC.

Following the same legal principle and keeping in mind the factual position as unfolded, the view taken by the Trial Court of convicting the appellant for offence punishable under Section 304 Part-II, is unexceptionable. The Trial Court had observed thus:

“60. The evidence placed on record by the prosecution, reveals that deceased Hitesh and the accused were having cordial relations since long, knowing to each other and were good friends. A party was organized by the deceased in the room of accused Mukesh and deceased himself invited all the accused to attend the party. In this party, large quantity of alcohol was consumed by them and suddenly an altercation took place between deceased Hitesh and accused Atul Thakur as a result of which accused Atul stabbed Hitesh, which resulted into his death

61. There is no doubt that Hitesh met a homicidal death on the night intervening 27/28.07/2011 at IGMC, Shimla consequent to stab injury inflicted by accused Atul Thakur. The question which arises for consideration is whether this action of the accused which caused the death of Hitesh would amount to murder or culpable homicide not amounting to murder. It is an admitted fact that there was no enmity between the deceased and this accused rather they were having cordial relations. The fact that there was a physical fight between the deceased and the accused Atul, cannot be denied because it has come in the evidence of PW-11 Himanshu, PW-12 Manoj Bansal and PW-1 Ashutosh that a physical fight has taken place between them. In these circumstances, this Court will have to examine the prosecution evidence whether the accused Atul had taken an undue advantage or acted in a cruel or inimical manner so as to deprive him of the benefit of exception 4 of Section 300. In fact, the prosecution could not prove any motive for killing the deceased by the accused. The drinking session in the room of the accused Mukesh Thakur was by mutual consent. From these circumstances, it can be held that the incident in question took place in a sudden fight in the heat of passion. The next question which arises for consideration is whether the accused Atul did take an undue advantage of the said fight or acted in a cruel or inimical manner. Keeping in view the fact that both the deceased and accused had consumed considerable amount of alcohol which is established from the evidence of the prosecution witnesses, it cannot be altogether ruled out that the stab injuries inflicted were not with an intention of taking undue advantage by the accused Atul. It is probable that in an inebriated condition the accused inflicted the injuries because of the physical fight between them. Moreover, keeping in view the nature of the injuries noticed by Dr. Sandeep Kaushik in the MLC Ext. PW-18/A, it is difficult to accept the accused Atul Thakur intended to cause the death of Hitesh or that the injuries were so dangerous that they would in all probability, cause death. Nevertheless, the injuries were quite serious, the accused can surely be credited with the knowledge that if an injury is caused with a knife on the chest or abdomen of a person then this act is likely to cause the death of the victim.

62. Having considered the material on record this Court is of the opinion that the accused Atul Thakur can only be found guilty of an offence punishable under Section 304 Part II, Indian Penal Code.”

14. As aforesaid, the High Court overturned this finding of the Trial Court on the question of nature of offence, by mainly observing that the appellant had caused repeated blows with a weapon like knife, causing six serious injuries to Hitesh Thakur to which he succumbed. We are of the opinion that neither the factum of use of knife by the appellant during the assault nor the multiple blows (six) given by the appellant can be the sole basis to deny the appellant of the benefit available under Exception 4 to Section 300 of IPC. The Court is obliged to take an overall view of the matter on the basis of the established facts. This principle is restated in Surain Singh’ s case (supra).

15. The next question is whether the appellant is right in his persuasive argument to restore and revive the decision of the Trial Court on the quantum of sentence. The Trial Court awarded the sentence of rigorous imprisonment for five years only for offence under Section 304 Part-II of IPC and fine of Rs.10,000/- and in default, to undergo rigorous imprisonment for a further period of one year. For that no special reason has been recorded by the Trial Court. Considering the nature of offence and the trivial reason for which the appellant got enraged and assaulted Hitesh Thakur, that too by a knife and also gave multiple blows, does not warrant a light punishment. We would, however, accept the argument of the respondents that in the fact situation of the present case, the sentence period should not be less than 10 years imprisonment with fine. That would meet the ends of justice.

16. Accordingly, we partly allow these Criminal Appeal Nos.75 and 227 of 2015 filed by original accused No.1 Atul Thakur. We modify the impugned judgment of the High Court against the appellant in respect of nature of offence and instead restore the order of the Trial Court in that behalf. The appellant is held guilty for an offence punishable under Section 304 Part-II of IPC and is sentenced to undergo rigorous imprisonment for a period of 10 (Ten) years with fine of Rs.10,000/- (Rupees Ten Thousand), in default to undergo further imprisonment for one year. Needless to mention that the appellant shall be entitled to set off under Section 428 of the Code of Criminal Procedure.

17. These appeals are disposed of in the aforementioned terms.