

In Chamber

Case :- CRIMINAL APPEAL No. - 393 of 1983

Appellant :- Rajendra @Rajendra Prasad And Others

Respondent :- State

Counsel for Appellant :- R.R. Singh, Amar Saran, Mahesh Prasad Yadav, Pramod Kumar Vishwakarma, R.B. Sahai, R.S. Chauhan, Saroj Kumar Yadav, Satya Prakash Srivastava, Shailesh Kumar Shukla

Counsel for Respondent :- D.G.A., A.G.A., S.P. Singh

Hon'ble Siddhartha Varma, J.

Hon'ble Vinod Diwakar, J.

(Per : Vinod Diwakar, J.)

1. As per the version of the first information report dated 5.7.1979, certain children of the family of the first informant – Budhiram, had taken out their cattle for grazing and there they had an altercation with the children of the family of Kishun Chauhan who was living in the neighbourhood. When the altercation occurred between the children and certain noises were made because of that from the village of the Chauhans, Rajendra, Surendra & Mahendra sons of Sukhai Chauhan; Kishun son of Ramnath, Fauji & Ramchandra sons of Kishun; Bahadur and Tejas sons of Raghunandan came on the spot. It has been stated in the first information report that Rajendra was carrying a Ballam; Surendra and Mahendra were carrying lathies; Kishun was also having a lathi; Fauji and Ramchandra were having Ballam; Subedar, Bahadur and Tejas were carrying lathis.

2. As per the F.I.R. version apprehending that there would be a scuffle between the children who were grazing the cattle with the grownup persons. Balram, Sarvjeet and Shrinath who were the relatives of the first informant reached the spot. Again there was a fight between the two sides and Balram, Ramcharan and Shrinath were grievously beaten and they fell down. In the first information report, it has been stated that when alarms were raised, Barsati son of Ram Adhar, Hariram son of Samodh and Beni Ram son of Ajour reached there on the spot and with their help the lives of Balram, Ram Charan and Srinath were saved. They were put on cots and efforts were made to take them to the Thana. In fact Balram had died. Upon the first information report being lodged, investigation ensued and the police took the plane soil and the soil having blood in its custody and prepared the relevant recovery memos. The injury on the injured were examined and of the deceased a post mortem examination was done.

3. On 5.7.1979 itself at 9:20pm, the panchayatnama was also prepared. Upon completion of the investigation when the police submitted its report, the Court of IIIrd Additional Sessions Judge, Jaunpur, on 9.3.1981 took cognizance of the matter and charged the accused persons, namely, (1) Rajendra @ Rajendra Prasad, (2) Fauji alias Faujdar, (3) Ram Chander, (4) Surendra, (5) Mahendra (6) Subedar, (7) Ram Kishun, (8) Bahadur and (9) Teras for being guilty under Sections 147, 148, 302/149 IPC and also they were who charged under Section 307/149 of the IPC.

4. The accused persons denied the charges and, therefore, the trial commenced.

5. From the side of the prosecution as many as 12 prosecution witnesses were produced. During trial Bahadur had died and, therefore, the statements of the remaining accused were recorded under Section 313 Cr.P.C.

6. Learned counsel for the appellants Sri M.P. Yadav assisted by Sri P.K. Vishwakarma has argued that if all the evidence as was brought forth is perused, it becomes evident that the incident occurred because of the fact that children from the side of the first informant who had gone to graze their cattle, and the children from the side of the accused persons who had also gone to graze their cattle, an altercation had occurred and when calls for help were raised by the children from both the sides, elder persons from the side of the accused and the informants had assembled at the place of incident and in the heat of the moment the entire incident had occurred.

7. Learned counsel for the appellants submitted that the Thana was only 800 meter away from the place of incident but the informant's side took almost two hours to take the injured to the police station and not to any hospital and therefore Balram, because of this delay, died in the route of the police station.

8. Learned counsel for the appellants, therefore, submitted that if the entire evidence of the prosecution is to be believed and all the defence is

to be disregarded, then at the best, the case could not travel beyond the offence under Section 304 Part – II of the I.P.C.

9. The depositions of P.W. - 1 Budhiram, P.W. - 2 Barsatiram Yadav and P.W. - 3 Shrinath, the injured, all go to show that the incident had occurred on account of the fact that at the relevant point of time tempers were running high and, therefore, altercation had occurred and because of the fact that the accused side were carrying lathies and ballams which normally, in the villages, people carry after the marpeet, Balram died.

10. Learned counsel for the appellants has relied upon a judgement reported in **2013 AIR SCW 3153 (Ankush Shivaji Gaikwad v. State of Maharashtra)** and in that judgement he has specifically relied upon paragraphs no. 8, 9 and 24 and they are being reproduced here as under:-

“8. On behalf of the appellant it was contended that the appellant’s case fell within Exception 4 to Section 300 of the I.P.C. which reads as under:

“**Exception 4.**— Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

9. It was argued that the incident in question took place on a sudden fight without any premeditation and the act of the appellant hitting the deceased was committed in the heat of passion upon a sudden quarrel without the appellant having taken undue advantage or acting in a cruel or unusual manner. There is, in our opinion, considerable merit in that contention. We say so for three distinct reasons. Firstly, because even according to the prosecution version, there was no premeditation in the commission of the crime. There is not even a suggestion that the appellant had any enmity or motive to commit any offence against the deceased, leave alone a serious offence like murder. The prosecution case, as seen earlier, is that the deceased and his wife were guarding their Jaggery crop in their field at around 10 p.m. when their dog started barking at the appellant and his two companions who were walking

along a mud path by the side of the field nearby. It was the barking of the dog that provoked the appellant to beat the dog with the rod that he was carrying apparently to protect himself against being harmed by any stray dog or animal. The deceased took objection to the beating of the dog without in the least anticipating that the same would escalate into a serious incident in the heat of the moment. The exchange of hot words in the quarrel over the barking of the dog led to a sudden fight which in turn culminated in the deceased being hit with the rod unfortunately on a vital part like the head. Secondly, because the weapon used was not lethal nor was the deceased given a second blow once he had collapsed to the ground. The prosecution case is that no sooner the deceased fell to the ground on account of the blow on the head, the appellant and his companions took to their heels – a circumstance that shows that the appellant had not acted in an unusual or cruel manner in the prevailing situation so as to deprive him of the benefit of Exception 4. Thirdly, because during the exchange of hot words between the deceased and the appellant all that was said by the appellant was that if the deceased did not keep quiet even he would be beaten like a dog. The use of these words also clearly shows that the intention of the appellant and his companions was at best to belabour him and not to kill him as such. The cumulative effect of all these circumstances, in our opinion, should entitle the appellant to the benefit of Exception 4 to Section 300 of the I.P.C.

24. Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the same and the circumstances in which the injury was inflicted do not suggest that the appellant had the intention to kill the deceased. All that can be said is that the appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall under Section 304 Part II of the IPC.

He also relied upon a judgement of Supreme Court reported in **2018 (4) SCC 329 : (Lavghanbhai Devjibhai Vasava vs. State of Gujarat)** and submitted that if, the circumstances in which the incident took place, the nature of weapons used, preparedness of the parties, assaults on the vital parts of the bodies, the amount of force used, the preparedness before the incident occurred, the existence of any previous enmity and whether there was a sudden provocation, is seen then it becomes clear that the event had

happened in the heat of passion and there was no preplan on behalf of the accused persons to commit the crime of murder.

11. Since the learned counsel for the appellants relied upon paragraphs no. 7 and 8 of the judgement reported in **2018 (4) SCC 329 : (Lavghanbhai Devjibhai Vasava vs. State of Gujarat)**, the same are being reproduced here as under:-

7. This Court in *Dhirendra Kumar v. State of Uttarakhand* [*Dhirendra Kumar v. State of Uttarakhand*, 2015 SCC OnLine SC 163] has laid down the parameters which are to be taken into consideration while deciding the question as to whether a case falls under Section 302 IPC or Section 304 IPC, which are the following:

- (a) The circumstances in which the incident took place;
- (b) The nature of weapon used;
- (c) Whether the weapon was carried or was taken from the spot;
- (d) Whether the assault was aimed on vital part of body;
- (e) The amount of the force used.
- (f) Whether the deceased participated in the sudden fight;
- (g) Whether there was any previous enmity;
- (h) Whether there was any sudden provocation.
- (i) Whether the attack was in the heat of passion; and
- (j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

8. Keeping in view the aforesaid factors it becomes evident that the case of the appellant would fall under Section 304 IPC as the incident took place due to a sudden altercation which was a result of delay in preparing lunch by the deceased. The appellant picked up a wooden object and hit the deceased. The medical evidence shows that not much force was used in inflicting the blow to the deceased. The prosecution has not set up any case suggesting that relationship between the husband and wife was not cordial, otherwise. Manifestly, the incident took place due to sudden provocation and in a heat of passion the appellant had struck a blow on his wife, without taking any undue advantage. We are, therefore, of the opinion that it was an offence

which would be covered by Section 304 (Part II) IPC and not Section 302 IPC.”

12. Learned counsel for the informant and the learned AGA Ms. Archana Singh assisted by Ms. Mayuri Mehrotra have argued that whatever be the case, Balram died because of the fact that the force used was more than the force which was required to be used for the dissipation of the crowd and, therefore, the Trial Court rightly convicted the appellants for the offence of murder and punished the accused under Section 302 IPC.

13. Having heard the learned counsel for the parties, we are of the view that even though the offence had occurred and Balram had died while two others, namely, Shrinath and Ramcharan were injured, the incident definitely happened in the heat of the moment. The children of the two sides had gone to graze their cattle and people from both sides had assembled to help the children of their side when a hue and cry was raised. The incident thereafter had occurred and the incident happened in the heat of the moment.

14. Definitely, the Court finds that there was no premeditation and there was only a sudden fight in the heat of passion and, therefore, the side of the informant suffered. If we see section 300 IPC, which defines murder, we find that under the explanation 4, an act which happens in the heat of passion is excepted under the “exception”.

300. Murder. – Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or –

Secondly.-If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly.-If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly.-If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. – When culpable homicide is not murder. – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos: –

First. – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. – That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation:- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

15. We also find that the judgements as were cited by the learned counsel for the appellants reported in **2018 AIR SCW 3153** and **2018 4 SCC 329** apply to the case in hand on all fours.

16. Definitely circumstances in which the incident took place, the nature of weapons which were used, the injuries which had occurred and the provocation etc. which were there go to show that the appellants had not gone there in a planned manner to kill Balram. The court maintains the culpability of the appellants and the conviction is altered to an offence under Section 304 (Part II) of IPC. The appellants are now no longer to be convicted under Section 302 IPC.

17. The incident is of the year 1979 and the judgement of the Trial Court is of 18.2.1983 and the appellants, namely, appellant no. 2 Mahendra, appellant no. 5 Fauji alias Faujdar, appellant no. 6 Ramchander and appellant no.8 Teras who are alive, are now to be convicted under Section 304 (Part II) IPC.

18. The appeal with regard to other appellants, namely, appellant no. 1 Rajendra @ Rajendra Prasad, appellant no. 3 Surendra, appellant no. 4 Ram Kishun and appellant no. 7 Subedar, has already abated on 27.01.2021.

19. With regard to sentence, the Court finds that the appellants have suffered much and they have undergone the trauma of being convicted persons for almost 41 years and, therefore, we consider that the punishment of imposing a fine of Rs. 5000/- on each of the alive appellants would be sufficient punishment for them. The appellant no. 2 Mahendra, appellant no. 5 Faujdar and appellant no. 6 Ram Chandra who are now convicted under Section 304 (Part II) I.P.C. shall be punished with a fine of Rs. 5,000/-. This fine will have to be paid by the appellants within a period of two months from the date of judgment. Bail bonds and sureties be discharged.

20. With the above observations, the appeal stands partly allowed.

Order Date :- 15.5.2024

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(Vinod Diwakar,J.) (Siddhartha Varma,J.)