

(2023) 11 SC CK 0030

Supreme Court Of India

Case No: Criminal Appeal No. 2791 Of 2023

Nanhe

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision: Nov. 21, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 86, 301, 302, 304, 304II, 308
- Arms Act, 1959 - Section 25

Hon'ble Judges: Abhay S. Oka, J; Pankaj Mithal, J

Bench: Division Bench

Advocate: Adolf Mathew, Sakshi Kakkar, Karthik R

Final Decision: Dismissed

Judgement

Pankaj Mithal, J

1. Heard learned counsel appearing for the parties.

2. In an incident which took place on 30.05.2007 at about 3:30 p.m. in the market area, one Mahendra was injured and one Saddam Hussain, son of the informant, Mohd. Ali was killed. Two cases, one crime No.169/2007 under Section 304 and 308 IPC and another case crime No.170/2007 under Section 25 of Arms Act, 1959 were registered against the accused Nanhe.

3. Both the cases were clubbed and were tried as Sessions Trial Nos. 1097 of 2007 and 1212 of 2007 by Special Judge, S.C./S.T.(P.A.) Act,1989. The trial court vide judgment and order dated 14.05.2010 held the accused Nanhe to be guilty of an offence under Section 302 IPC and sentenced him to life imprisonment with fine of Rs.5000/- and in the event of default in payment of fine to undergo additional one year of

imprisonment. The trial court also held the accused to be guilty for an offence under Section 25 of the Arms Act and imposed punishment of two years of rigorous imprisonment with fine of Rs.1000/-.

4. The judgment and order of conviction and sentencing the accused was affirmed by the High Court vide its judgment and order dated 31.01.2019 passed in criminal appeal No.4474 of 2010. It may be worth noting that a single appeal was filed by the accused against his conviction in both the cases.

5. The aforesaid judgment and order of the High Court has been assailed by the accused/convict by means of the present appeal.

6. The submission of learned counsel for the appellant is that there was no intention of the appellant to kill the deceased. His death was accidental. His intention could have been only to kill Mahendra and not the deceased Saddam Hussain. The appellant at the relevant time was heavily intoxicated and as such was not in a position to even know what he was doing. The case would therefore, fall under Part II of Section 304 IPC and not under Section 302 IPC.

7. The informant, Mohd. Ali lodged a written FIR at police station Moosajhag, district-Badaun on 30.05.2007 stating that on the said date at about 3:30 p.m. he was going from home to the shop of Sant Ram for purchasing some domestic items along with his son, Saddam Hussain (deceased). When he reached the shop, he saw Mahendra and Nanhe (appellant) quarrelling with each other. Sant Ram, who is none other than the brother of Mahendra intervened and asked Nanhe (appellant) to leave the place. On this, Nanhe (appellant) left but after walking 15 to 20 steps from there, he turned around and with his country made pistol fired a shot which piercing the neck of the deceased hit the head of Mahendra. Nanhe (appellant) was caught on the spot. Saddam was taken to the district hospital where he died.

8. There is no dispute to the fact that Saddam Hussain died of a fire arm shot received in his neck and that the same was fired from the country made pistol possessed by the appellant Nanhe. The weapon of offence and the cartridges were recovered from him. It is also an admitted position as established from the evidence on record that the single shot fired from the said country made pistol after hitting and piercing the deceased in his neck had finally hit Mahendra in his head with whom he was having an altercation a few minutes earlier.

9. On the basis of the evidence of the eye witnesses though one of them had turned hostile, the trial court as well as the High Court came to a definite conclusion that the appellant is guilty of an offence under Section 302 IPC.

10. The only aspect which requires consideration by us is whether the said offence is liable to be reduced to culpable homicide not amounting to murder falling under

second part of Section 304 IPC in view of the fact that the appellant had no intention to kill the deceased as he had fired with the intention to settle his score with Mahendra with whom he had entered into a harsh argument. The other aspect which needs consideration is as to what would be the impact of the intoxication of the appellant at the time of the incident.

11. In context with the argument that the appellant had no intention to kill the deceased and that he was accidentally killed though in fact he had fired the shot upon Mahendra with whom he had a quarrel/altercation a little earlier, it is relevant to refer to Section 301 of IPC which reads as under: -

"301.Culpable homicide by causing death of person other than person whose death was intended. -If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender of the person whose death he intended or knew himself to be likely to cause."

12. The aforesaid provision is based up on the 'Doctrine of Transfer of Malice or Transmigration of Motive' which provides that where there is 'mens rea' of committing an offence, it can be transferred to another. To illustrate the said doctrine, an example could be given of a person who had intention to kill a person but by mistake kills another person, then he would still be held guilty of committing murder even in the absence of intention to kill that particular person. In simpler words, if a person has an intention to commit an offence or cause a death of any person but kills one whose death he never intended to cause, he would still be guilty of causing death.

13. In Shankarlal Kacharabhai & Ors vs. The State of Gujarat AIR 1965 SC 1260, this court while discussing the scope of Section 301 IPC held as under:

"It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the section if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under S.301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke S.301 of the Indian Penal Code A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C."

14. In a similar case where also, the victim was accidentally shot though the firing was intended to cause injuries to some other person, this Court in Rajbir Singh vs. State of

U.P. and Anr. (2006) 4 SCC 51 held that the approach of the High Court in setting aside the order passed by the Special Judge solely on the ground that the firing was not aimed at the victim and that he was accidentally injured is completely in ignorance of the provision of Section 301 IPC. The Supreme Court observed as under: -

“We have heard learned counsel for the appellant (complainant), learned counsel for Akhilesh Chauhan (respondent no.2) and have perused records. The only reason given by the High Court for setting aside the order passed by the learned Special Judge framing charges against respondent no.2 is that the firing was not aimed at Pooja Balmiki but she accidentally received the injuries as she was passing through that way and was hit. The High Court completely ignored the provisions of Section 301 IPC.”

The aforesaid provision clearly shows that if the killing took place in the course of doing an act which a person intends or knows to be likely to cause death, it ought to be treated as if the real intention of the killer had been actually carried out.

The fact that there was no intention to cause injury to Pooja Balmiki and she was accidentally hit can make no difference as according to the version of the prosecution, the accused intended to cause injuries by firearm to Hoti Lal and in attempting to carry out the same, also caused injuries to her. The reasons given by the High Court for quashing the charges are, therefore, wholly erroneous in law and cannot be sustained.”

15. In another case of similar nature i.e. Jagpal Singh vs. State of Punjab AIR 1991 SC 982, this Court held that under the ‘Doctrine of Transfer of Malice or Transmigration of Motive’ as per Section 301 IPC, the accused has made himself punishable under Section 302 IPC (simplicitor) as he accidentally shot a particular person, though, in fact he might have intended to kill another person and may have aimed the shot at that another person only.

16. A composite reading and understanding of the aforesaid provision of Section 301 IPC, “Doctrine of Transfer of Malice or Transmigration of Motive’ and above cases on the subject, it is quite implicit that the appellant herein is guilty of committing an offence of culpable homicide amounting to murder punishable under section 302 IPC and that the intention to kill some other person is not material in as much as he had the intention of committing the aforesaid offence though accidentally he might have killed another person.

17. In so far as the impact of intoxication and causing death while in the state of intoxication is concerned, a reference to Section 86 of IPC is relevant which provides for the offence caused by a person under intoxication and incapable of understanding the nature of his act. The said provision absolves the accused of committing an offence by

reason of intoxication and incapability of knowing the nature of his act. However, for applying the said provision, it has to be noticed that such intoxication has to be administered to him against his will or without his knowledge which means that it should not be a voluntary intoxication.

18. The aforesaid provision for the sake of convenience is reproduced herein below: -

“86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.”

19. In applying the above provision, the following twin conditions have to be satisfied. The first that the accused was administered a thing which intoxicated him without his knowledge or against his will. Secondly, the intoxication has to be of the level which incapacitated him of knowing the nature of the act committed or likely to be committed by him.

20. The above provision of Section 86 IPC had come up for consideration before this Court in the case of *Basdev vs. State of Pepsu* AIR 1956 SC 488 and it was held that where no evidence was led to show that the accused was incapacitated to form requisite intention due to the influence of the drink, the killing of a person would be an offence of murder. In short, the ratio is that not only the accused be intoxicated but also the level of his intoxication be such as to render him incapable of knowing and understanding what he is doing or likely to do. Therefore, evidence to prove his incapacity to understand the nature of his action is mandatory to reduce the criminality of the accused.

21. In a celebrated case *The King vs. Meade* (1909) 1 K.B. 895 it was opined that a person charged with a crime of violence may show or rebut the presumption that he intended the natural consequences of his acts, that he was drunk and that he was incapable of knowing what he was doing was dangerous. The law was thus summed up as under:

(i) The insanity, whether due to drunkenness or otherwise is a defence in a crime;

(ii) The evidence of drunkenness which renders the accused incapable of forming any opinion or intention ought to be considered with the surrounding facts and circumstances so as to come to the conclusion whether or not he had intention to do the said act; and

(iii) The drunkenness of the accused must be sufficient to render him incapacitated to form any intention to commit the crime.

22. In the case at hand, though the informant, Mohd. Ali, PW1 in his deposition/cross-examination has accepted that at the time of the incident, the appellant, Nanhe was drunk and was in a state of intoxication, and even the SI, PW6 was of the opinion that the accused was heavily intoxicated and he was unable to speak but the fact remains that in even in such a situation he was able to walk properly and had gone 15 to 20 steps away from the place of quarrel after it was settled to return and fire. This sufficiently proves that he was mentally alert and was not incapacitated from knowing what he is doing and what would be its consequences. Once the killing was complete, the public had thrashed and beaten him mercilessly and, therefore, when the SI PW6 examined him, he could not speak. The inability to speak in such a situation would not be sufficient indication that the level of intoxication was so high that he was unable to understand and take a conscious decision.

23. In view of the above statements of the witnesses, it stands duly established that the appellant had fired the shot in the state of intoxication which resulted in the killing of Saddam Hussain but there is no evidence to prove that on account of the intoxication, he was incapacitated to know and understand his actions.

24. The facts as narrated above would clearly reflect that the incident had taken place on account of a quarrel between the appellant and Mahendra with which the deceased Saddam Hussain had no connection. In the firing which probably took place as a result of the above quarrel, the target was Mahendra, but unfortunately, Saddam was killed. The aforesaid killing of the Saddam was apparently not intentional and was rather by way of an accident.

25. It may be true that the deceased may have been killed accidentally by the appellant in the state of intoxication but there is no iota of evidence to establish that due to intoxication he was incapable of knowing the nature of his act or that the act which he was doing or likely to do was so dangerous so as to cause death of any person. Thus, in the absence of such evidence, coupled with the fact that it is not the case of the appellant that he was administered intoxication without his knowledge or against his will, the provision of Section 86 IPC would not be applicable and he would not be entitled to reduction of sentence from 302 IPC to one falling under Part-II of Section 304 IPC.

26. In view of the aforesaid facts and circumstances, we find no illegality in the impugned judgment and order of the High Court in confirming the conviction and punishing the appellant under Section 302 IPC.

27. The appeal is devoid of merit and is accordingly dismissed with no order as to cost. However, the appellant is at liberty to apply for remission in accordance with remission policy of the State in vogue and in the event such power is invoked, the State is expected to consider it on its own merit most expeditiously.