
Devendra Singh Tomar Vs State Of Madhya Pradesh

CRIMINAL APPEAL NO.396 OF 2008

Court: Madhya Pradesh High Court (Jabalpur Bench)

Date of Decision: March 6, 2018

Acts Referred:

Indian Penal Code, 1860 " Section 300, 302, 304 part I, 307#Arms Act, 1959 " Section 30

Hon'ble Judges: J.P. GUPTA, J

Bench: Single Bench

Advocate: Ajay Tamrakar, Sourabh Shrivastava

Final Decision: Partly Allowed

Judgement

The appellant has preferred the present appeal being aggrieved by the judgment dated 22.1.2008 passed by 10th Addl. Sessions Judge, (Fast Track),

Bhopal, in S.T.No.140/2007 whereby the appellant has been convicted for the offence under Sections 302 of the I.P.C. for committing murder of Dilip

and sentenced to undergo life imprisonment along with fine of Rs.500/-; in default of payment of fine, additional six months R.I.

2. According to the prosecution story, on 4.3.2007 at Police Station Jahangirabad, Bhopal, on the occasion of Holi festival deceased Dilip, Deepak,

PW3 and Ramesh, PW4 along with others were coming from one side and appellant accused was crossing them. The appellant was carrying a

double barrel gun. While crossing, shoulder of deceased Dilip @ Dabhu dashed the appellant accused on which accused abused him and threatened

him that he belongs to Bhind which is known as a notorious place and thereafter appellant fired gun shot at deceased due to which he sustained

gunshot injury at right side of the chest. The deceased fell down and the appellant ran away. On hearing the fire sound, Pappu Vilas, Dinesh

Yadav, Rajesh Yadav came on the spot, they lifted the deceased and brought him to the Hospital on a police van. Information of the incident was

immediately given at Police Station Jahangirabad by Deepak, PW3, on which Crime No.196/2007 was registered against the accused for the offence

under section 307 of the I.P.C. In the hospital injured Dilip was declared as brought dead. The police summoned the witnesses and

prepared Panchnama of dead body of the deceased vide Ex.P/6. The dead body was sent for examination to the Govt. College, Bhopal, where

examination was done by Dr.C.S.Jain, PW10, who prepared the post mortem report, Ex.P/12 and found gunshot injury on the right side of chest of the

deceased and the cause of death was excessive bleeding and shock caused by gunshot injury. During investigation, statements of the witnesses were

recorded. Spot map, Ex.P/7 was prepared. During investigation, empty cartridge and blood stained and simple soil were seized from the spot vide

Ex.P/2. The accused was arrested. Seized articles were sent to the FSL for chemical examination. As per the FSL report, the cartridge recovered

from the spot was fired by the gun recovered from the appellant accused. After completion of investigation, the police filed a charge sheet against

the appellant / accused for offence under sections 302 of the IPC and 30 of the Arms Act before the J.M.F.C. Bhopal, District Bhopal and on

committal, the case was received by Sessions Judge, Bhopal, and the case was tried by 10th Additional Sessions Judge, Fast Track, Bhopal.

3. The learned trial Court framed the charge for the offence under Section 302 I.P.C. against the appellant. However, the appellant / accused

abjured the guilt and pleaded for trial. His defence was that he was innocent and has been falsely implicated. However, no evidence has been

adduced on behalf of the appellant.

4. Learned trial court, after the trial of the case, on the basis of testimony of eyewitnesses Ramesh, PW4, Deepak, PW3 and Dinesh, PW6 and

considering the corroboration of the evidence of the aforesaid witnesses with medical expert Dr.C.S.Jain, PW10 and evidence of Investigating Officer

Shri S.M.Zaidi, PW9, and Premlal Mishra, PW1 and Ganesh PW2 with regard to recovery of gun and cartridge and the FSL report, Ex.P/11 found the

appellant guilty of the offence under Section 302 of the IPC and sentenced him, as mentioned above.

5. Being aggrieved by the aforesaid judgment of conviction and order of sentence, appellant has filed this appeal on the ground that the finding of the

learned trial court is contrary to law. The testimonies of the witnesses are not reliable as they have not made any efforts to save the deceased.

Their conduct is unnatural, therefore, they cannot be relied. Apart from it, the appellant cannot be convicted for commission of murder. The facts

of the case show that appellant can be convicted for causing culpable homicide not amounting to murder punishable under section 304 part I of the

I.P.C. The appellant is in custody since 4.3.2007 hence, he be released considering the period of imprisonment undergone by him. Therefore, the

appellant's conviction be converted accordingly.

6. On the other hand, learned Govt. Advocate appearing for the respondent / State has argued in support of the judgment and stated that the finding of

conviction and sentence of the learned trial court is based on sound evidence and does not require any interference. Hence, prayed that the appeal be

dismissed.

7. Having considered the rival contentions of the parties and on perusal of the record, it is evident that in this case it is not controversial that death of

deceased Dilip was taken place due to gunshot injury caused on the right side of the chest on 4.3.2007, the nature of death was homicidal and this fact

has been proved by Dr.C.S.Jain, PW10, corroborating the post mortem report, Ex.P/12.Ã, Hence, in view of this Court it is held that the prosecution

has established beyond reasonable doubt that on 4.3.2007 Dilip died on account of gunshot injury on the right side of the chest.Ã, The nature of death

was homicidal.

8. Deepak Yadav, PW3 and Dinesh Yadav, PW6 have categorically stated that on 4.3.2007 they and the deceased after celebrating Holi festival

were returning to their houses.Ã, At that time, appellant accused, who was carrying double barrel gun, was passing through and from the front

deceased Dilip and Ramesh Yadav, PW4, were coming.Ã, When Dilip crossed the appellant, at that time shoulder of the deceased dashed the

appellant as a result of which accused abused the deceased by using filthy language and showing his anger shouted that he belongs to Bhind, which is

known as notorious place and then out of anger he fired gunshot at the deceased due to which he sustained gunshot injury on the right side of the

chest.Ã, As a result the deceased fell down and the accused fled away.Ã, The same statement has been given by Ramesh, PW4.Ã, Thereafter, they

took the deceased to Hamidia Hospital at Police Van where the doctor declared him as brought dead.Ã, Deepak, PW3 has also stated that he rushed

at Police Station Jahangirabad and lodged the FIR, Ex.P/3.

9. Investigating Officer, S.M.Zaidi, PW9 has stated that on 4.3.2007 as Incharge Police Station, Jahangirabad he recorded FIR, Ex.P/3, prepared spot

map, Ex.P/4 and started investigation. He reached the spot where he found one used cartridge of 12 bore gun, which was seized vide seizure memo,

Ex.P/5.Ã, Deepak Yadav, PW3 and Ramesh Yadav, PW4 have also stated that the aforesaid proceedings were taken place before them and they

had signed on the seizure memo, Ex.P/5.Ã, I.O. S.M.Zaidi, PW9, has further stated that on the same day he arrested the appellant accused and

prepared arrest memo, Ex.P/1, and also seized a 12 bore gun (which was licensed gun of the appellant) with two live cartridges and seizure memo,

Ex.P/2 was prepared.Ã, Premlal, PW1 and Ganesh Kashyap, PW2 have also stated that the accused was arrested and a gun was seized from him by

the police and arrest memo, Ex.P/1 and seizure memo, Ex.P/2 was prepared before them.Ã, I.O. S.M.Zaidi, PW9 has also stated that the seized gun

and the cartridge were sent to the FSL and the FSL report is Ex.P/11.Ã, As per the FSL report, the cartridge seized from the spot was fired from the

licenced gun of the accused.Ã, The aforesaid evidence of the prosecution has remained unimpeachable.Ã, Deepak, PW3 Ramesh, PW4 and Dinesh,

PW6 are natural and independent witnesses.Ã, As per their depositions, they were returning to their houses after celebrating Holi festival and were

present at the spot with the deceased and they have no grouse with the appellant. Their statements have been corroborated with the evidence of

medical expert and the report of FSL, therefore, there is no iota of material to see the prosecution story with doubt.Ã, Hence, in view of the aforesaid

discussion, we are of the considered opinion that the learned trial court has not committed any error in arriving at the conclusion that the appellant was

the person who caused gunshot injury which led to the death of the deceased.Ã, Hence, the aforesaid finding of the court below is affirmed.

10. Now, the question that arises for consideration is whether the appellant has committed the murder of the deceased or culpable homicide not

amounting to murder.

11. On behalf of the appellant it is submitted that the incident was taken place suddenly in a heat of passion without any premeditation. Appellant

accused was working as a Security Guard as per the arrest memo, therefore, he was carrying a 12 bore gun. There was no previous enmity with the

deceased.Ã, Suddenly, shoulder of the deceased dashed against the appellant due to which he became furious and losing control over himself fired

gunshot at the deceased from his 12 bore gun.Ã, However, he did not fire for the second time.Ã, Hence, he did not take undue advantage of the

situation, therefore, his case would at the most fall under section 304 Part I of the I.P.C.Ã, Therefore, the appellant should be punished under section

304 Part I of the I.P.C. in place of section 302 of the I.P.C.Ã, Reliance has been placed upon the judgment of the Apex Court in the case of

Pulicherla Nagaraju Vs. State of A.P (2006) 11 SCC 444, in which the Apex Court has examined the issue as to what relevant factors should be kept

in consideration while deciding the question as to whether the case in hand falls under section 302 or section 304 Part I or Part II of IPC. The relevant

para is 29, which is as under:-

29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls

under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance

of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed,

jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be

criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting

to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are

not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder

punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among

other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii)

whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of

sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether

there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause

for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in

a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not

exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.

Be that as it may.Ã¢â¬â€œ

12. Further reliance has been placed upon the judgment of the Apex Court in the case of State of Rajasthan Vs. Daud Khan, reported in (2016)2 SCC

607 wherein it is held as under :-

21. The High Court, however, felt that a case of murder punishable under Section 302 of the IPC was not made out since Daud Khan had fired only

one bullet and did not take undue advantage of the situation and therefore only a case of intention to cause bodily harm that was likely to cause death

was made out, punishable under the first part of Section 304 of the IPC. Accordingly, Daud Khan was convicted of that offence and sentenced to 7

(seven) years rigorous imprisonment with fine.

The Supreme Court has affirmed the said finding.

13. Having considered the aforesaid contention advanced by learned counsel for the appellant and keeping in view the aforesaid enunciation of law, in

view of this Court the facts and circumstances of the case show that the appellant fired gunshot on the deceased suddenly without premeditation and

in the heat of passion and some sort of provocation, therefore, it cannot be said that he had taken undue advantage or acted in a cruel or unusual

manner, therefore, his case would fall under exception 4 of section 300 of the I.P.C.Ã¢â¬â€œ In the circumstances, the appellant cannot be convicted for

commission of murder of the deceased, hence, his conviction under section 302 of the I.P.C. cannot be upheld and instead he ought to have been

convicted for commission of the offence under section 304 Part 1 of the I.P.C.

14. In view of the aforesaid discussion, the conviction of the appellant under section 302 of the I.P.C. is set aside and instead he is convicted for the

offence under section 304 Part I of the I.P.C.

15. So far as the sentence is concerned, for the offence under section 304 Part I I.P.C. the appellant is sentenced to suffer R.I. for ten years along

with fine of Rs.500/-, in default of payment of fine, 2 months further R.I. The appellant is in custody from the date of incident, i.e. 4.3.2007.

Hence, the appellant has already suffered around 11 years imprisonment, hence he be released forthwith, if not required in any other offence.

16. In the result, this appeal is allowed. A copy of this judgment be sent to the trial court and the jail authorities concerned for information and

necessary action.

17. We express our words of gratitude for the valuable assistance rendered by the Amicus Curiae.