

GAHC010020252020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./54/2020

SRI MANJIT SARKAR @ BABU SARKAR

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. G. Phukan Advocate.

For the respondent no.1 : Ms. S. Jahan Additional PP, Assam.

Date of hearing : 28.02.2023

Date of judgment : 02.03.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. G. Phukan, learned Counsel for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State.

2. This appeal has been filed against the Judgment & Order dated 22.11.2019 passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 143 (NL)/2017, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with a fine of Rs. 5,000/-, in default, to undergo rigorous imprisonment for 6 (six) months.

3. The Prosecution case in brief is that one Munindra Chabukdhora, who is PW-2 had filed an FIR dated 20.05.2016 before the In-charge, Simaluguri Police Outpost under Bihpuria Police Station, stating that around 4 p.m. on 20.05.2016, Sri Manjit Sarkar @ Babu Sarkar had called his elder brother Utpal Chabukdhora to the house of Sri Letu Lohar (PW-3). Thereafter liquor was provided to his elder brother and Manjit Sarkar (appellant) killed his elder brother by stabbing the deceased with a knife.

4. Pursuant to the FIR dated 20.05.2016, Bihpuria P.S. Case No.328/2016 under Section 302 IPC was registered and investigation was held. After investigation was complete, the I.O. submitted a charge-sheet on finding that a *prima facie* case under Section 302 had been made out against the appellant.

5. Charge was framed under Section 302 IPC against the appellant, to which the appellant pleaded not guilty and claimed trial.

6. During trial, 9 (nine) Prosecution witnesses were examined by the learned Trial Court. Thereafter examination of the appellant was done under Section 313 Cr.P.C and consequent to the above, the impugned Judgment and Order has been passed by the learned Trial Court.

7. The learned counsel for the appellant submits that the perusal of the evidence shows that there were 2 (two) eye witnesses to the crime. He submits that though the evidence points out to the fact that the appellant had taken the life of the deceased by stabbing him on his neck, the said act was not done intentionally and neither was it done with premeditation. He submits that the evidence recorded by the learned Trial court shows that the deceased and the appellant were friends and that on the date of incident, the two friends had gone to the house of PW-3 with liquor and green mangos. PW-3 laid out chairs in his courtyard for the appellant and the deceased. PW-3 then joined the appellant and the deceased. However, due to a quarrel that had ensued between the appellant and the deceased, during the heat of the moment, appellant stabbed the deceased on his neck which led to his death. The learned counsel for the appellant thus submits that as the present case attracts Exception-4 to Section 300 IPC, the appellant could not have been convicted under Section 302 IPC. He submits that the appellant should have been convicted under Part-II of Section 304 IPC.

8. Ms. S. Jahan, learned Additional Public Prosecutor fairly submits that the evidence of the Prosecution witnesses and especially PW-3, in whose courtyard the appellant and the deceased were drinking, goes to show that the appellant and the deceased were friends. She also submits that the evidence of the mother of the deceased, i.e. PW-6, also shows that the deceased and the

appellant were friends and that there was no enmity between them. She also submits that there is nothing to show that the act of the appellant had been done with any premeditation and as such, there could be some substance in the submission made by the learned counsel for the appellant, to the effect that Section 302 IPC would not be attracted in this case.

9. We have heard the learned counsels for the parties.

10. As can be seen from the evidence adduced by the prosecution witnesses, the appellant and the deceased had carried country made liquor in a steel jar to the house of PW-3. PW-3 thereafter laid out chairs in the courtyard of his house and also brought out a knife, salt and chilli, to enable the appellant and the deceased have their drinks and eat the green mangos that they had brought along with them. PW-3 also joined the appellant and the deceased. However, from the statement of the eyewitness PW-3, a quarrel ensued and thereafter the appellant stabbed the deceased in his neck, due to which the deceased died, as is confirmed from the opinion of the Doctor (PW-7), in his evidence, where he states that the cause of death was due to haemorrhage shock as a result of the perforation of brachiocephalic artery which is ante-mortem in nature. The description of the injury and opinion of PW-7 is reproduced below:

“MORE DETAILED DESCRIPTION OF INJURY OR DISEASE :

A stab and penetrating wound found in the right infraclavicular area close to the neck. Blood came out through the wound. Skin look pale and tongue look papery white. A perforation is found in the brachiocephalic artery and mediastinum is full of blood.

OPINION :

In my opinion, the cause of death is due to haemorrhage shock as a result of the perforation of brachiocephalic artery which is antemortem in

nature.

Ex.3 is the post mortem examination report and Ext.3(1) is my signature in it. Ext.3(2) is the signature of Superintendent, North Lakhimpur Civil Hospital and Ext.3(3) is the signature of Joint Director of Health Services, Lakhimpur in Ext.3.”

11. The evidence of PW-1, who is the daughter of PW-3 is to the effect that the appellant and the deceased came to their house with some green mangos and alcohol. Her father, PW-3, thereafter provided chairs. PW-1 then went to watch television inside the house. Hearing a commotion in the courtyard, she came out from the house and saw the appellant stab the neck of the deceased with a knife. Though her father tried to stop the assault, the appellant attempted to inflict harm upon her father, due to which her father (PW-3) ran away. She then saw the deceased succumb to his injuries, after which she went to the house of the deceased and narrated the incident to the mother of the deceased.

12. The evidence of PW-2, who is the younger brother of the deceased and who was the informant, is to the effect that his elder brother had made a dying declaration to him, to the effect that the appellant had stabbed him with a knife on his neck. The evidence of PW-6, who is the mother of the deceased is to the effect that PW-1 informed her that the appellant had stabbed the deceased. PW-6 thereafter went to the place of occurrence and as her son asked her for water, she poured some water into the mouth of her son. PW-6 also stated that the deceased had told her that the appellant had stabbed him with a dagger. PW-6 also states that the appellant and the deceased were classmates and that the appellant used to come to her house off and on. She also states that the

deceased was a painter and the appellant used to help her son in his painting work. She also stated that the appellant and her son (deceased) used to drink alcohol together. The evidence of PW-8, who is the Investigating Officer of the case, is that he had seized the knife which was used for the offence and which was clotted with blood. He also seized the steel jar which had contained the liquor that was taken by the appellant and the deceased to the house of PW-3.

13. On considering all the above statements made by the prosecution witnesses, which has not been shaken during cross-examination, we find that while the appellant had caused the death of the deceased by stabbing him on his neck, there was no premeditation on the part of the appellant in taking the life of the deceased. The only question that has to be decided is whether the act of the appellant would come within any of the Exceptions provided under Section 300 IPC. Though there is some discrepancy as to whether any oral dying declaration could have been made by the deceased, regard being had to the evidence of PW-1, who states that after the deceased succumbed, she went to the house of the deceased and narrated the incident, the act of the appellant stabbing the deceased was seen by PW-1 and PW-3

14. Section 302 IPC provides the punishment for a person who commits murder, i.e. if culpable homicide has been done with the intention of causing death or causing such bodily injury as the offender knows is likely to cause death or sufficient to cause death or is likely to cause death.

Exception 4 to Section 300 IPC states that 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. In the case of ***Gurmail Singh and Another vs. State of Uttar Pradesh and Another***, reported in ***(2022) 10 SCC 684***, the Apex Court has held that in order to make culpable homicide as murder, the act by which death is caused should fall not only under any one or more of clauses Firstly to Fourthly under Section 300 IPC but they should also not fall under any of the five Exceptions to Section 300 IPC.

15. Section 304 IPC provides for punishment for culpable homicide, not amounting to murder. For conviction under Section 304 Part-I IPC, the prosecution has to prove that the death was caused with the intention of causing death on the part of the offender. However, with regard to Section 304 Part-II IPC, prosecution has to prove that the death of the person was done with a knowledge that his act would like to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

16. The evidence on record shows that the appellant and the deceased were friends for a very long time and they used to take alcohol together. On the day of the incident they had gone to the house of PW-3, where they drank liquor. There is nothing in the evidence to show that there was any enmity between the appellant and the deceased. As such, there is nothing to show that there was any reason for the appellant to have premeditated the murder of the deceased.

17. The evidence of PW-3 who sat with the appellant and the deceased, while they were drinking liquor, is to the effect that an altercation had taken place between the accused and the deceased, in the course of which the

appellant took the knife, which was used for cutting the mangos and stabbed the neck of the deceased. On considering the fact that there was nothing prior to the said altercation to show that there was any reason for the appellant to have stabbed the deceased, we are of the view that due to the quarrel that had ensued and in the heat of passion and under the influence of alcohol, the appellant stabbed the deceased. As such, we are of the view that the action of the appellant falls under Exception 4 of Section 300 IPC.

18. Though the appellant, in his answers given to the questions during his examination under Section 313 Cr.P.C, has denied stabbing the deceased, in respect to Question No.31, i.e. "Have you anything more to say?", the appellant has answered that "I had not committed murder of Utpal Chabukdhora with my conscious knowledge". Further, during the sentence hearing, the appellant has stated that if he had caused the death of the deceased, it was not his intention to cause his death, as at the time of occurrence he and the deceased were under the influence of alcohol.

Section 85 of the IPC states that nothing is an offence which is done by a person who, at the time of doing it, is by reason of intoxication, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, provided that the thing which intoxicated him was administered to him without any knowledge or against his will. Though the appellant cannot take the plea that he was incapable of judgment by reason of intoxication, as the liquor was drunk with his own consent, the fact remains that there is nothing to show that the appellant had any intention or motive to kill the deceased. However, keeping in view the fact that the appellant had stabbed the neck of the deceased with a knife, we are of the view that the appellant's action

has been done with the knowledge that the same was likely to cause death or such bodily injury, as is like to cause the death of the deceased. In that view of the matter, we are of the view that the appellant is guilty of the offence under Part-II of Section 304 IPC.

19. Accordingly, the conviction of the appellant for the offence of murder is hereby altered to that of culpable homicide not amounting to murder as provided under Section 299 IPC read with Exception 4 of Section 300 IPC.

20. The appellant is accordingly convicted and sentenced under Part-II of Section 304 IPC, to undergo rigorous imprisonment for a period of 7 (seven) years with the fine imposed by the learned Trial Court. The period of imprisonment already undergone by the appellant from the date of his arrest till date, shall be counted towards imprisonment stipulated in the sentence passed hereinabove. The conviction of the appellant under Section 302 IPC is set aside. The criminal appeal stands partly allowed in the above terms. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant