

Court No. - 44

Case :- CRIMINAL APPEAL No. - 890 of 2002

Appellant :- Javed

Respondent :- State of U.P.

Counsel for Appellant :- Brij Bhushan Paul, Manvendra Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker,J.

Hon'ble Ajai Tyagi,J.

1. Heard Sri Manvendra Singh, learned counsel for the appellant and Sri Vikas Goswami, learned Counsel for the State.

2. This appeal has been preferred against the judgment and order dated 06.02.2002, passed by the learned Additional District and Sessions Judge (Fast Track Court No.2), Fatehpur, in Session Trial No.121 of 1997 (State of UP vs. Javed) under Section 302 IPC, whereby the appellant was convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.5,000/- and in to further go three years rigorous imprisonment.

3. Accused Javed has been convicted by the trial court for commission of offence under Section 302 IPC. During the pendency of this appeal, he was enlarged on bail as he spent six years in jail. Recently on his non appearing before the Court, Javed was arrested and he has been lodged in jail since 23.09.2019 in compliance of the order dated 13.09.2019. Though during pendency of this appeal, he requested for recalling that order. After 15.10.2019, the Office never listed this matter. It is only after Hon'ble the Chief Justice directed to list all bail matters that this has been listed.

4. The brief facts of the case given rise to this appeal are that a first information report was lodged at Police Station Kotwali, District Fatehpur on 04.11.1996 on the basis of written report submitted by the

informant Mohd. Maksood Khan. The averments of FIR are that on 04.11.1996, a lady relative of the informant came to his house and made some inquiry with regard to the divorce of Rafat. There was some altercation with the accused Javed and he was scolded by his father, mother and relative. During this altercation, Javed uttered bad words regarding *Quran Sharif*. Father of the informant told that a person who does not believe in *Quran* is called *Kafir* (person who has no respect for religion). Javed threatened the father of the informant. The informant and his father were going to their house at about 02 P.M. and when they reached in front of the shop of J.K. Tailors, Javed came there with country-made pistol and fired at the father of the informant who fell there. Javed ran away intimidating the informant. Informant took his father to the hospital but he died on the way.

5. The FIR which culminated into charge-sheet. The charge-sheet was submitted under Section 302 IPC read with Sections 504 and 506 IPC for the offence alleged to have been committed on 04.11.1996. The accused on being summoned from the jail, did not accept the charges and wanted to be tried.

6. To bring home the charges, following witnesses were examined by the prosecution:

1	Mohd. Maqsood Khan	PW1
2.	Smt. Saida Begum	PW2
3.	Najni Begum	PW3
4.	Dr. S.K. Tiwari	PW4
5.	Shiv Ji Chaube	PW5
6.	Vidhya Sagar Tripathi	PW6
7.	K.B. Singh	PW7
8.	Dr. A.K. Shukla	PW8

7. Apart from oral evidence, following documentary evidence were produced by prosecution and proved by leading the evidence:

1.	Written Report	Ex. Ka1
2.	FIR u/s 302 IPC	Ex. Ka3
3.	FIR u/s 25 Arms Act	Ex. Ka5
4.	Recovery-memo of weapon	Ex. Ka12
5.	Recovery-memo of earth and EC	Ex. Ka17
6.	Postmortem report	Ex. Ka2
7.	Inquest report	Ex. Ka7
8.	Charge-sheet u/s 302 IPC	Ex. Ka18
9.	Charge-sheet u/s 25 Arms Act	Ex. Ka14
10.	Prosecution sanction	Ex. Ka15
11.	Site-plan of case u/s 302 IPC	Ex. Ka16
12.	Site-plan of case u/s 25 Arms Act	Ex. Ka13

8. Accused-appellant was examined under Section 313 Cr.P.C. and evidence led by prosecution against him, was put to him. Accused stated that false evidence has been led against him and no witness was examined by him in defence.

9. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. The motive alleged in the FIR is false and it is fabricated to strengthen the prosecution case only. He is innocent. It is vehemently submitted by learned counsel that P.W.1 is son of the deceased and P.W.2 is wife of the deceased. Both are related and interested witnesses. No independent witness is produced by the prosecution. It is next submitted by learned counsel that accused was not arrested on the spot. With regard to the recovery of country-made pistol from the possession of the appellant, learned counsel submitted that the recovery of country-made pistol is planted. No recovery is made from the possession of the appellant. It is further submitted that no independent witness of recovery is produced before the trial court. Learned trial court has not appreciated the evidence on record in right perspective.

10. In alternative, learned counsel for the appellant made prayer that keeping in view the peculiar circumstance of this case, if prosecution is believed then also the offence of the appellant does not fall under Section 302 IPC and it cannot travel beyond the scope of Section 304 (Part-I) of IPC because the fire was opened by the appellant on sudden and grave provocation on the part of the deceased. There was no pre-meditation in the crime and the appellant was provoked by the deceased by calling him *Kafir* which was the matter of religion and only a single fire was made by the appellant.

11. *Per contra*, learned AGA submitted that appellant is named in FIR as single accused. It is next submitted that the FIR is lodged promptly without delay and there was no reason with the informant to implicate the accused falsely. Learned AGA further submitted that appellant is the single accused in this case and no person would implicate any person falsely while leaving the real assailant scot free. There is no previous enmity between informant and the appellant, hence informant had no reason for false implication. Learned AGA further submitted that weapon used in the crime is recovered on the pointing out of the appellant. Hence, learned trial court has not committed any error in convicting the appellant.

12. It is correct to say that P.W.1 is the son of the deceased and P.W.2 is the wife of the deceased. They are related witnesses but testimony of related/interested witness cannot be brushed aside only on that ground but their evidence should be scrutinized very carefully and cautiously and if after careful scrutiny of the evidence of the interested or related witness, it is found cogent, credible and trustworthy. Court can safely act upon it.

13. Medical evidence is on record in the form of post-mortem report. Following ante-mortem injuries are shown in the post-mortem report.

(1) Multiple (more than 15) pellet injuries in an area of 17X11 c.m. of chest above nipple, some cavity deep, some muscle deep and some skin deep. Blackening and tattooing was present.

(2) Lacerated wound size 4X3 c.m. on the base of right thumb. Pellet marks on small and ring finger of right hand. Thumb was fractured.

14. Above ante-mortem injuries shown in the post-mortem report, corroborate the version of P.W.1 and P.W.2 that the appellant fired on the chest of the deceased. Hence, there is discrepancy between ocular and medical evidence.

15. The finding of fact regarding the presence of witnesses at the spot of occurrence cannot be faulted with. Death of the deceased was a homicidal death. Hence, we have no doubt on the findings recorded by learned trial court holding the appellant guilty. We are of the considered view that the appellant was rightly convicted by learned trial court but we differ with the trial court in convicting the appellant under Section 302 IPC. Peculiar facts and circumstance of this case take us to consider the vexed issue as to whether the offence committed by the appellant, falls within the purview of Section 302 IPC or Section 304 of IPC. It would be relevant to refer Section 299 of the IPC which reads as under:-

"299.Culpable Homicide-Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

16. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of

approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300 IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions, culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) 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;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

17. We have no doubt in our mind that the son in his haste and fury as he was called *Kafir* (meaning thereby the person who does not believe in religion) by father, got infuriated and in that haste, fire one gunshot. The case would fall within Section 304 Part I though the incident occurred later on provocation was in the first incident which

had taken place as narrated in the FIR. We held the accused guilty for commission of offence as the local-made firearm was also recovered at his behest from the place which was only known to him.

18. In that view of the matter, we concur with the learned counsel for the appellant to reduce the sentence. The incident had occurred because of his father calling him a *Kafir* cannot be said that it was a premeditated murder. On the contrary, the learned judge has given benefit of doubt to him as far as Section 25 of the Arms Act is concerned but held him guilty in Section 302 IPC.

19. On overall scrutiny of the facts and circumstances of the case coupled with the opinion of the medical officer and considering the principle laid down by the Hon'ble Apex Court in the case of *Tuka Ram and others vs. State of Maharashtra* [(2011) 4 SCC 250] and in the case of *BN Kavadakar and another vs. State of Karnataka* [1994 Supp (1) 304], we are of the considered opinion that the offence would be punishable under Section 304 (Part-I) IPC.

20. From the upshot of the aforesaid discussions it appears that the death caused by the accused persons was not pre-meditated. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

21. The alternative prayer made by the learned counsel for appellant is accepted. The accused-appellant is held guilty under Section 304 (Part-I) of IPC. In our view, sentence of seven years rigorous imprisonment would serve the ends of justice. The appeal is liable to be allowed in part. Appellant is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC.

22. Hence, the conviction and sentence awarded to the appellant for

(8)

the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced for seven years rigorous imprisonment and fine of Rs.5,000/-. The appellant shall undergo further simple imprisonment for three months in case of default of fine.

23. Accordingly, the appeal is **partly allowed**, as modified above.

(Ajai Tyagi, J.)

(Dr. Kaushal Jayendra Thaker, J.)

Order Date :- 2.8.2022
Vivek Kr.