

[A.F.R.]
Reserved On : 21.9.2022
Delivered on 30.9.2022

Court No. - 44

Case :- CRIMINAL APPEAL No. - 2455 of 2017

Appellant :- Shailesh And 3 Others

Respondent :- State of U.P.

Counsel for Appellant :- Siya Ram Pandey, Thakur Prasad
Dubey, Vijay Singh Sengar

Counsel for Respondent :- G.A., Amit Kumar Chaudhary, Ashish
Kumar, Prashant Kumar Tripathi, Tapan Kumar Mishra

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Nalin Kumar Srivastava, J.

(Per Dr. Kaushal Jayendra Thaker, J.)

1. Heard Heard Sri Siya Ram Pandey, learned counsel for appellants and Sri Vikas Goswami, learned counsel for State.
2. This appeal has been preferred by the accused-appellants against the judgment and order dated 4.5.2017, passed by learned Sessions Judge, Hapur in Sessions Trial No.71 of 2016 (State of Uttar Pradesh Vs. Shailesh and others) arising out of Case Crime No.328 of 2015 convicting the accused – appellants under Sections 302 read with 34 of Indian Penal Code, 1860 (in brevity 'IPC'), Police Station Gardhmukteshwar, District Hapur and sentenced the accused-appellants to undergo imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of one month.
3. The facts of the present case are that on 31.7.2015, while the informant and his father Babu Ram(deceased) were returning home after closing their tea shop, they were intercepted by accused – appellant-Raju, who asked them to pay Rs.150/-for the grocery items

which were purchased by the deceased earlier. The accused- appellant Raju was told that the amount will be paid the next day, hearing which he got annoyed and abused the complainant-Sanjay, son of the deceased and his father (deceased). At this stage, while the complainant-Sanjay and the deceased were proceeding on their way, the accused- appellants surrounded them. The accused- appellants then started beating and kicking the deceased, till he breath his last. After killing the deceased, the accused- appellants fled away. Pursuant to this an FIR, Case Crime No.202 of 2015 was registered by the complainant-Sanjay against the accused- appellants, under Section 302 read with Section 34 of IPC. Consequently, the accused- appellants were arrested.

4. On trial, the trial court vide order dated 4.5.2015 found the accused – appellants guilty under Section 302 read with Section 34 of IPC and sentenced them to imprisonment of life and a fine of Rs.5000/- each.

5. After investigation, the charge-sheet u/s 302 I.P.C. against the accused persons Shailesh, Mahadev, Kuldeep and Raju was filed. The cognizance was taken on the charge-sheet by the concerned Magistrate and the case was committed to the court of session under section 302/34 I.P.C. The charge against the accused; Shailesh, Mahadev, Kuldeep and Raju was ordered to framed, to which the accused persons pleaded not guilty and wanted to be tried. The prosecution was directed to produce the complete evidence in support of their statement.

6. On being summoned, the accused-appellants pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 9 witnesses who are as follows:

1	Deposition of Sanjay@ Kalwa	29.4.2016 25.10.2016	PW1
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2	Deposition of Sumit	7.6.2016	PW2
3	Deposition of Yad Ram	11.8.2016	PW3
4	Deposition of Dr. Gajendra Singh	29.11.2016	PW4
5	Deposition of Jitendra Kardam	29.11.2016	PW5
6	Deposition of Rajendra Singh	30.11.2016	PW6
7	Deposition of Arvind Kumar Nirwal	30.11.2016	PW7
8	Deposition of Peetam Pal Singh	16.12.2016	PW8
9	Deposition of Yatesh Kumar Puniya	20.1.2017	PW9

7. In support of ocular version following documents were filed and proved:-

1	F.I.R.	31.7.2015	Ex.Ka.4
2	General Diary	31.7.2015	
3	Written report	31.7.2015	Ex.Ka.1
4	Postmortum report	1.8.2015	Ex.Ka.2
5	Panchayatnama	31.7.2015	Ex.Ka.5
6	Final Form / Report	1.9.2015	Ex.Ka.9
	General diary		Ex.Ka.3
	Site plan		Ex.Ka.5A

8. Learned counsel for the appellants has submitted that no offence as alleged has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the death of the deceased was due to petty dispute which had arisen and there is a single blow. P.W.-1 the informant Sanjay @ Kalwa was got examined on behalf of the prosecution who has proved the *tehrir* Ex.Ka-1 and supported the prosecution case. P.W.-2 namely is Sumit, the brother of informant who has been got

examined. This witness too, has supported the prosecution case. P.W.-3 Yaad Ram has been examined. He has corroborated the evidence of PW-1 and PW-2.

9. P.W.-09 sub-inspector Yatesh Kumar Puniya has been examined who is also the investigating officer of this case. He too has conducted the investigation of the case who recorded the statements of sub-inspector Arvind Kumar Nirwal, C/- Manoj Kumar and C/- Kardam, who all got the post-mortem conducted and of the FIR scribe namely C/- Rajendra Singh and Dr. Gajendra Singh who conducted the post-mortem. After investigation, charge-sheet was forwarded against the accused. He has verified his signature present on the charge-sheet. Charge-sheet has been marked as Ext. ka-09.

10. After completion of the prosecution evidence, the statements of the accused persons u/s. 313 Cr.P.C. were recorded, wherein denying the prosecution version, they have stated that the witnesses have given wrong and false statements due to enmity, and all of the accused persons have also stated that the complainant has developed enmity with them and their family and therefore they have been falsely implicated in the aforesaid case, and that they didn't commit any offence and they were not present at the spot and that they are innocent. The accused persons claimed to adduce the evidence in defence, but even after providing adequate time, no evidence in defence was produced by the accused persons.

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13. After completion of the prosecution evidence, the statements of the accused persons u/s. 313 Cr.P.C. were recorded, wherein denying the prosecution version, they have stated that the witnesses have given wrong and false statements due to enmity, and all of the accused persons have also stated that the complainant has developed enmity with them and their family and therefore they have been falsely implicated in the aforesaid case, and that they didn't commit any offence and they were not present at the spot and that they are innocent. The accused persons claimed to adduce the evidence in defence, but even after providing adequate time, no evidence in defence was produced by the accused persons.

14. Learned counsel for the appellant has relied on the decisions of Apex Court in **(a) Nishan Singh Vs. State of Punjab, 1994 0 Supreme (SC)273 (b) Manjeet Singh Vs. State of Himachal Pradesh, 2014 LawSuit(SC) 341 (c) Rajju son of Jagveer Singh Vs. State of Uttar Pradesh, 1992 0 Supreme(All) 546 (d) Pinkoo @ Jitendra Vs. State of U.P., 2022 0 Supreme (All) 166 (e) VencilPushpraj Vs. State of Rajasthan, 1990 0 Supreme (SC) 662 (f) Kala Singh @ Gurnam Singh Vs. State of Punjab, 2021 LawSuit(SC) 536 (g) Ramesh Alias Dapinder Singh Vs. State of Himachala Pradesh, 2021 0 Supreme (SC) 152 and (h) Virender**

Vs. State of Haryana, 2019 LawSuit(SC) 2024 so as to contend that the decision of imprisonment for life is bad and life could not be till the last breath and the conviction under Section 302 read with Section 34 of IPC is not made out and the accused are entitled to be acquitted. However, at the outset it is mentioned that on shifting their decisions as they lay down law about lesser sentence precisely under Section 304 read with Section 34 of IPC

15. Learned counsel for the appellants after submitting for clean acquittal submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellants by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than five years.

16. Sri Vikas Goswami, learned counsel appearing on behalf of State submits that presence of all the accused is proved as per the evidence of PW- 1 and 2 and there is no denial of presence of the accused. Learned counsel further submits that Section 302 read with Section 34 of IPC is made out against all the accused – appellants.

17. As learned counsel for the appellant is not pressing this appeal on its merit, but prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 5 years.

18. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants as far as death of deceased is concerned.

19. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the

case, the conviction of the appellant under **Section 302 read with Section 34** of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read 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.”

20. 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 Section 299 and 300 of 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 is 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
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(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.

21. The deceased was aged 65 years. The postmortem of the deceased was conducted.

22. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in (2011) 4 SCC 250 and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

23. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence

committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

24. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tinsil on the clothes of the deceased. Since

the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. *There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."*

16. *In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.*

17. *The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants – original accused under section 452 of Indian Penal Code is upheld. The appellants – original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants – original accused. R & P to be sent back to the trial court forthwith."*

25. In latest decision in **Khokan@ Khokhan Vishwas Vs. State of Chattisgarh, 2021 LawSuit (SC) 80** on which the court relies wherein the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and sentenced under Section 304 of IPC. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim,

propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

26. The factual scenario as it emerges would go to show that the incident occurred when the accused along with the deceased conveyed that he would pay on the next day that infuriated the accused and therefore they beat the deceased. The incident occurred out of a quarrel.

27. As narrated herein above the decision of commission of offence under Section 302 IPC cannot be concurred by us in view of the As narrated herein above as on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors (supra)** and we are fortified in our view by the judgment of Apex Court in the case of **B.N. Kavatakar and Another (supra)** and therefore , we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC and not under Section 302 of IPC or Section 304 Part -II of IPC.

28. In **Mohd. Giasuddin Vs. State of AP**, [AIR 1977 SC 1926], explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social

behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

29. 'Proper Sentence' was explained in ***Deo Narain Mandal vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

30. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak***, [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh***, [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh***, [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana***, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances

are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

31. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

32. Since the learned counsel for the appellant has later not pressed the appeal on merit, however, after perusal of entire evidence on

record and judgment of the trial court, we consider that the appeal is required to be partly allowed.

33. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

34. We are unable to agree with the submission of learned learned A.G.A. as far as it relates to the finding of the court below that the death was a premeditated murder and falls within provisions of Section 300 of IPC and the sentence under Section 302 IPC is just and proper. The reason for the same is that the deceased did not die and insistence death had it been a premeditated murder, the injuries on the body would have caused his immediate death. We are unable to subscribe the submission of Sri Pandey that the matter would fall under Section 323 of IPC. The evidence is so clinching that we cannot accept the submission that the accused- appellants have not caused the death though it is the matter of fact that no weapons and instrument is used. There is a strong motive to do away that the deceased was 65 years of age. P.W.-1 the informant Sanjay @ Kalwa was got examined on behalf of the prosecution who has proved the *tehrir* Ex.Ka-1 and supported the prosecution case. P.W.-2 namely is Sumit, the brother of informant who has been got examined. This witness too, has supported the prosecution case. P.W.-3 Yaad Ram has been examined. He has corroborated the evidence of PW-1 and PW-2.

35. While perusing the FIR and other fact, it cannot be said that there was no common intention. All the accused had an unison after the incident come to the place of offence and assaulted the deceased though the incident occurred due to petty dispute which had arisen and there is a single blow.

36. We are in agreement with the submission of Sri Vikas Goswami, learned AGA that the presence of all the accused is proved as per the evidence of PW- 1 and 2 and there is no denial of presence of the accused. Section 302 read with Section 34 of IPC is made out.

37. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

Punishment:

38. The main accused- Kuldeep has died during the pendency of this litigation.

39. The accused is in jail since 4.5.2017. The Apex Court in such cases has converted the conviction under Section 302 read with Section 34 of I.P.C. to Section 304 Part I of I.P.C. which will come to the aid of the accused.

40. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is partly allowed.

41. Appellant-accused is in jail since 4.5.2017. On completion of seven years of incarceration with remission is over for all the offences and if fine is not deposited, the default sentence would start after the

period of seven years. The accused- appellants shall be released on completion of said period, if not required in any other case. The accused-appellants would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

42. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

Order Date :- 30.9.2022

Mukesh