

Madhya Pradesh High Court

Bhoora Ahirwar vs Police Station Mohangarh The ... on 13 May, 2022

Author: Sujoy Paul

IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR  
BEFORE

HON'BLE SHRI JUSTICE SUJOY PAUL  
&  
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

CRIMINAL APPEAL No. 159 of 2014

Between:-

Bhoora Ahirwar, Aged about 27 years,  
S/o Shri Pukkhan Ahirwar, Occupation-Labourer  
Resident of Madkhera, Police Station Mohangarh,  
District Tikamgarh, M.P.

(By Shri R.S. Patel, Advocate)

AND

The State Of Madhya Pradesh Th. P.S.  
Mohangarh, District Tikamgarh, (Madhya  
Pradesh)

(By Shri Yogesh Dhande, Government Advocate)

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Reserved on : 05.05.2022  
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This appeal coming on for hearing this day, Hon'ble Shri Justice Dwarka  
Dhish Bansal, passed the following:

JUDGMENT

Appellant has preferred the present appeal being aggrieved by the impugned judgment dated 07.12.2013 passed by the Sessions Judge, Tikamgarh in S.T. No.258/2012 whereby appellant has been convicted for commission of offence under Section 302 of the IPC and has been sentenced to undergo imprisonment for life along with fine of Rs.1,000/- with default stipulation.

2. As per the prosecution story, at about 08.30 P.M. on 23.10.2012, a first information report (Ex.P-20) was lodged to the effect that 8-9 days ago, complainant/deceased Jassu sold the land of his house to Asharam of his village whereas accused Bhoora Ahirwar intended to purchase the land, whereupon, he was having enmity. At about 8.30 P.M., deceased Jassu was going for listening Bhajan and on the way, accused Bhoora was lying on the bed (Charpai). As the way was narrow, therefore, he asked the accused to give the way but he started abusing and did not give the way to the deceased. Upon stopping by deceased Jassu, accused Bhoora stood up and assaulted the deceased with lathi on the left side of the head, resultantly, deceased fell down then appellant also caused Lathi blow on thigh of the left leg and right hand. The incident was seen by Rakesh Ahirwar (PW-1) and Ramswaroop Ahirwar (PW-3). In the meantime, son of the deceased Kailash (PW-6) reached on the spot. The incident was reported to the police by deceased himself whereupon the police of police station Mohangarh registered the case under Section 302 of the IPC. After investigation, challan was filed and the case was committed to the Court of Sessions Judge, Tikamgarh.

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3. Learned Court framed the charges under Section 302 of the IPC against the accused/appellant, who abjured his guilt and contended that he has not committed any offence and he has been falsely implicated in the case.

4. The prosecution examined total 17 witnesses whereas the appellant/accused examined Nandram (DW-1) and Batibai Ahirwar (DW-2) in defence.

5. The finding of the learned Trial Court has been assailed on the ground that only upon a minor dispute of non giving of way, the incident took place. There was no motive of the accused person to kill the deceased Jassu and the appellant/accused was not having any intention to kill the deceased. The injuries are said to have been caused by using a Bamboo lathi (Stick) and the prosecution has failed to prove the guilt of the appellant/accused beyond reasonable doubt. Learned counsel for the appellant submits that even if the whole prosecution story is believed to be true then also no offence under Section 302 of the IPC is made out and at the most offence under Section 304 Part-II of the IPC would be made out against the appellant because the incident occurred suddenly without any premeditation. Learned counsel for the appellant further submits that in the aforesaid circumstances, the case of the appellant falls within the exception 4 to Section 300 of the IPC.

6. It has been submitted by learned counsel for the appellant that the learned Court below has passed its judgment of conviction against the appellant only upon the statements of Rakesh Ahirwar

(PW-1), Ramswaroop Ahirwar (PW-

3), Kailash Ahirwar (PW-6), Dr. D.S. Bhadoriya (PW-14), Dr. V.K. Ahirwar (PW-

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16) and Chaturiya Bai (PW-17) but their testimonies are full of contradictions, omissions and improvements but ignoring the said aspect, learned Court below has convicted the appellant and accordingly submits that the impugned judgment of conviction and sentence is not sustainable. He further submits that there was no previous enmity of the accused with the deceased. Story of dispute about land has been developed later on. The dying declaration (Ex.P/1) recorded at 22:40 on 23.10.2012 is not reliable because the person, who recorded it, has not mentioned anything about the mental ability/fitness of the deceased. He further submits that in such circumstances, the appellant can be convicted for commission of offence punishable under Section 304 Part-II of the I.P.C. and contended that looking to the period of sentence already suffered by the appellant, conviction and sentence be modified. Learned counsel for the appellant further submits that as per the report dated 07.10.2020, appellant has undergone actual jail sentence of near about 10 years.

7. Learned counsel for the appellant has also placed reliance on a judgment of the Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra (2013) 6 SCC 770 wherein from paragraphs-10 to 27, 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 of IPC or Section 304 Part-II of IPC. Learned counsel for the appellant further placed reliance upon the judgment in the cases of Surain Singh Vs. State of Punjab, (2017) 5 SCC 796; Hafiz Vs. State of U.P., (2005) 12 SCC 599; Mahesh Vs. State of M.P., AIR 1996 SC 3513 and Bhagwanlal and others Vs. State of M.P., 2017 (2) M.P.L.J. (Cri.) 457.

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8. Learned Govt Advocate appearing for the respondent/State has argued in support of the impugned judgment and stated that the finding of conviction and sentence of the learned Trial Court is based on legal evidence and is in accordance with law. No interference is required in the impugned judgment, hence, the appeal be dismissed. He placed reliance on the judgment of Hon'ble the Apex Court in the case of Vinod Kumar Vs Amritpal @ Chhotu and others, AIR 2022 SC 244.

9. We have heard learned counsel for the parties and perused the record.

10. It is true that the prosecution has examined 17 witnesses and the learned trial Court has based its judgment on the evidence of Rakesh Ahirwar (PW-1), Ram Swaroop Ahirwar (PW-3), Kailash Ahirwar (PW-6) and Chaturia Bai (PW-17) but perusal of their testimonies do not prove that there was any premeditation to commit murder. None of the said witnesses has said anything about pre-existing dispute over the sale of land to Asharam, whereas Kailash (PW-

6) and Chaturia (PW-17), who are respectively son and wife of the deceased, were supposed to know the real dispute between the two.

11. From bare perusal of impugned judgment, it is clear that the learned Court below has not cared to consider evidence of the aforesaid four witnesses from the angle of pre-existing dispute over the land which was required just with a view to test the requisite ingredient about the premeditation, but the learned Court below has failed to consider this aspect of the matter and has also not recorded any finding regarding the premeditation. On the contrary from the testimonies of the said witnesses as well as from the findings of the learned Court below, it is Cr.A.No.159/2014 clear that the incident took place due to sudden quarrel for not giving the way and certainly the act was done in heat of passion. Further, there appears only one injury on the head of the deceased with the use of bamboo lathi, which has been seized by seizure memo (Ex.P/7) and there are major contradictions in the testimony of the aforesaid witnesses.

12. From the statement of aforesaid witnesses, it is established that the incident took place suddenly in heat of passion and without any premeditation as the accused/appellant got annoyed due to dispute arose upon asking of the deceased to give the way as the accused was lying on the bed (charpai) on the way and as a result of hot talks between the rival parties, accused appellant assaulted the deceased with lathi on the left side of the head, left thigh and right hand.

13. In view of the aforesaid discussion, we come to the conclusion that the appellant was the author of the injuries caused to the deceased but, now the question is as to whether the appellant can be held guilty under Section 302 of IPC.

14. The Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra (2013) 6 SCC 770 considered various previous decisions and 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 of IPC or Section 304 Part-I or Part-II of IPC. The relevant paragraphs are 13, 14 and 27 which are as under:-

"13. In *Surinder Kumar v. Union Territory, Chandigarh* (1989) 2 SCC 217, this Court held that if on a sudden quarrel a person Cr.A.No.159/2014 in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception provided he has not acted cruelly. This Court held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

7... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation;

(iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.

14. We may also refer to the decision of this Court in Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528, wherein this Court held that in a heat of passion there must be no time for the passions to cool down and that the parties had in that case Cr.A.No.159/2014 before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC. Whether or not the fight was sudden, was declared by the Court to be decided in the facts and circumstances of each case. The following passage from the decision is apposite:

10...The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight: (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300. IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or Cr.A.No.159/2014 acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

11....After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution that the accused appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 IPC is clearly applicable.

27. Coming back to the case at hand, we are of the opinion that the nature of the simple injury inflicted by the accused, the part of the body on which it was inflicted, the weapon used to inflict the

same and the circumstances in which the injury was inflicted do not suggest that the appellant had the intention to kill the deceased. All that can be said is that the appellant had the knowledge that the injury inflicted by him was likely to cause the death of the deceased. The case would, therefore, more appropriately fall under Section 304 Part II of the IPC.

15. Taking into consideration the aforesaid principle, Hon'ble Apex Court in the case of Ankush Shivaji Gaikwad (supra) allowed the appeal by converting the sentence to under Section 304 Part-II and reduced the sentence for a period of 5 years. Similarly, in the case of Hafiz (supra), learned High Court had Cr.A.No.159/2014 reduced the sentence of accused Hafiz to 7 years, which was upheld by Hon'ble Apex Court. Further, in the case of Bhagwanlal (supra), the Division Bench of this Court reduced the sentence of accused to 3 years instead of life imprisonment under Section 302 IPC.

16. Bare perusal of the judgment cited by the learned counsel for the State in the case of Vinod Kumar (Supra) shows that the facts of the case in hand are quite distinguishable because in the case of Vinod Kumar (supra), the deceased was murdered brutally certainly with premeditation.

17. In view of the aforesaid discussion and the law discussed above and in the existing facts and circumstances, it cannot be said with all certainty that the accused had intention to cause death of the deceased or to cause such bodily injury, which was sufficient to cause death in ordinary course of nature. In the circumstances, the appellant can be convicted for commission of culpable homicide not amounting to murder under Section 304 Part-II of IPC.

18. In the result, we allow this appeal but, only to the extent that instead of Section 302 of IPC, the appellant shall stand convicted for the offence of culpable homicide not amounting to murder punishable under Section 304 Part-II of IPC. Consequently, his sentence is hereby reduced to the sentence already undergone.

19. As per the custody report dated 07.10.2020, the appellant has suffered total sentence of 7 years 11 months and 5 days, therefore, it is clear that as on today the appellant is in custody for near about 10 years and the ends of justice Cr.A.No.159/2014 would be sub-served by sentencing the appellant to the period already undergone by him in jail. Hence, he is sentenced to the period already undergone by him in jail. Resultantly, he is directed to be released forthwith if not required to be detained in any other case.

20. A copy of this judgment be sent immediately to the learned Trial Court and the Jail Authorities concerned for information and necessary compliance.

(SUJOY PAUL)  
JUDGE

(DWARKA DHISH BANSAL)  
JUDGE

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