

GAHC010155182019



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

Case No. : CrI.A./327/2019

SRI TANKESWAR SARMA
S/O- LATE BHADRESWAR SARMA, R/O- SARUTHEKERABARI, P.O. AND P.S.
MANGALDAI, DIST.- DARRANG, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE P.P., ASSAM.

2:SRI UMESH SARMA
S/O- MANIK DEB SARMA
R/O- SARUTHEKERABARI
P.O. AND P.S. MANGALDAI
DIST.- DARRANG
ASSAM

Advocate for the Petitioner : MR. D HAZARIKA

Advocate for the Respondent : MR. M PHUKAN, ADDL. PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MIR ALFAZ ALI

JUDGMENT & ORDER

09.04.2021

(Mir Alfaz Ali, J.)

Learned counsel Mr. Samiron Sarma, appearing for the appellant and Mr. M. Phukan, Additional

Public Prosecutor, Assam were heard.

2. This appeal is directed against the judgment and order dated 30.05.2019 rendered by the learned Sessions Judge, Darrang, Mangaldai, in Sessions Case No. 45(DM)/2015. By the said judgment, learned Sessions Judge convicted the appellant under Sections 302/307 IPC and Section 27(1) of the Arms Act and sentenced him to undergo rigorous imprisonment for life and fine of Rs.10,000/- with default stipulation under Section 302 IPC; imprisonment for 10 (ten) years and to pay fine of Rs.5,000/- with default stipulation under Section 307 IPC and rigorous imprisonment for 3 (three) years and to pay fine of Rs.2,000/- with default stipulation under Section 27(1) of the Arms Act.

(3) Prosecution case, in a nutshell, is that at about 8 a.m., on 14.10.2011, the accused Tankeswar Sarma shot his uncle Panchanan Sarma with a pistol in front of his house and the victim died instantaneously. When the son of the victim came forward, the accused shot at him too, and thereby caused grievous injury. Nephew of the deceased, lodged an FIR, on the basis of which, Officer-in-charge of the Mangaldai Police Station registered Mangaldai P.S. Case No. 713/2011 under Sections 302/307 IPC read with Section 25(1)(A) of the Arms Act and upon completion of the investigation, laid charge sheet against the appellant.

(4) Basing on the charge sheet and the materials produced therewith, learned Sessions Judge framed charges against the appellant under Sections 302/307 IPC and Section 27(1) of the Arms Act, to which the appellant pleaded not guilty. Prosecution examined 14 (fourteen) witnesses in order to bring home the charges against the appellant. Upon completion of the prosecution evidence, the accused was examined under Section 313 CrPC, wherein, he had taken the plea of innocence and examined a witness in his defence.

(5) The informant Umesh Sarma, who lodged the FIR has been examined as PW-1. He deposed in Court that when he was coming home, he had noticed deceased Panchanan Sarma lying dead on the road in front of the house of the appellant Tankeswar Sarma. According to him, he came to know from the members of the family of Panchanan Sarma that the deceased Panchanan Sarma was shot dead by the accused Tankeswar. He also stated to have seen PW-2 Satish Sarma at the place of occurrence and on being asked by him, Satish Sarma told that his father (deceased) was killed by Tankeswar Sarma. During cross-examination, this witness stated that there was long standing land dispute between the accused and the deceased. He also stated that accused Tankeswar Sarma used to reside most of the time at Guwahati.

(6) PW-2 Satish Sarma is the son of the deceased Panchanan Sarma. He stated in his deposition that the accused had retired from the service of Air Force and they had land dispute with him for long time. On 14.10.2011, at about 7.30 A.M., accused Tankeswar Sarma shot his father with his pistol on the road in front of their house. He also stated that at the time of occurrence Tankeswar Sarma and his father were standing face to face at a distance of 10 ft. and the bullet hit the chest of his father. When his father fell down receiving the bullet injury, he raised alarm whereupon, Tankeswar Sarma shot at him and consequently he sustained injury on his abdomen. Hearing alarm raised by him, his wife Uttara Devi (PW-12) came to the place of occurrence followed by other people. During cross-examination, he deposed that there was no fencing in between his house and that of the appellant and the house of the accused is situated on the western side of their house. He further stated in his cross-examination that in the morning when he saw Tankeswar Sarma, he had charged him (deceased) for cutting their crops and also stated that he would lodge a complaint before the village headman, whereupon Tankeswar Sarma had shown him his pistol and threatened to kill him. He further stated that when Tankeswar Sarma came out to the road the deceased also came out to the road and he (PW-2) tried to bring him back. He also stated that when his father was shot by the appellant he did not come forward to help his father.

(7) PW-3 Reba Kanta Sarma is the elder brother of the accused. According to him, having heard that his uncle Panchanan Sarma was shot dead, he rushed to the house of Panchanan Sarma and had seen Panchanan Sarma lying dead in front the house of Tankeswar Sarma. This witness was however, declared hostile by the prosecution. It was elicited during his cross-examination by the defence that he did not see any person near the body of the deceased. According to him Police arrived at the place of occurrence after half-an-hour.

(8) PW-4 Bolo Ram Sarma deposed that he was told by the village headman that Panchanan Sarma died and he accompanied the village headman to the house of Panchanan. According to him, Police seized four nos. of empty cartridges vide Exhibit-2 Seizure List and he put his signature in the Seizure List as witness. He also stated that at the time of obtaining his signature in the Exhibit-2, Police did not show him the seized articles.

(9) PW-5 Bhupen Sarma and PW-6 Uttam Kumar Sarma were witnesses to the Inquest Report. Both of them have proved their signature in the inquest report (Exhibit-3). However, PW-6 stated that though, his signature was taken in the Exhibit-3, the same was not prepared in his presence. PW-5 further stated that Police seized a pistol and a magazine from the

accused vide Exhibit-4.

(10) PW 7 Sarat Chandra Sarma was also a witness to the seizure of pistol and empty cartridges of used bullet.

(11) PW-8 Madhab Sarma stated that about 3/4 years ago he had seen the deceased Panchanan Sarma lying on the road near the house of Tankeswar Sarma. He also stated to have seen bullet injury on the body of Panchanan Sarma.

(12) PW-9 Deben Ch. Gohain was the armourer, who examined the arms and ammunition seized in the instant case. According to him, one 17.65 mm pistol and four nos. of 7.65 mm empty cartridges were sent to him for examination. He examined the pistol and the empty cartridges and found the same to be factory made firearms. He also deposed that the pistol was serviceable at the time of examination.

(13) PW-10 Dr. Deep Kr. Deka deposed that injured Satish Sarma was examined in Gauhati Medical College Hospital at about 12.15 p.m. on 14.10.2011 and during examination it was found that there was an entry wound near umbilicus which looks like gun shoot entry wound. There was also an exit wound on the flank and a small fracture over the right iliac crest. According to Doctor, the nature of injury was grievous. During cross-examination he stated that he did not examine the injured clinically and he only furnished the the Medico Legal Report.

(14) PW-11 Dr. Jitendra Kumar Saharia, who conducted the post mortem examination on the body of the deceased found the following injuries:

“A. 1): A through injury at the left chest at 7th inter costal space. Size ½ x ½ cm into chest deep.

A. 2) : An everted margin injury seen over the left back at inter costal space scapular back. Size: 1 x 1 cm into chest deep.

B. 3) : An injury seen on actero lateral aspect of right thigh at its middle part. Size ½ cm x ½ cm

4) : An injury seen on posterior aspect of right gluteal region. Margin is everted. Size: 1cm x 1 cm into deep to the thigh muscle.”

In the opinion of the Doctor, cause of death was due to shock and hemorrhage as a result of firearm injuries. In the opinion of the Doctor gunshot injuries sustained by the

deceased was sufficient to cause death of a person instantaneously.

(15) PW-12 Uttara Devi is the wife of Satish Sarma (PW-2) and daughter-in-law of the deceased. She deposed that the occurrence took place on the path abutting their courtyard. According to her, three days before the occurrence accused had cut their paddy and used the same as cattle feed. She also stated that on the day of incident having seen the accused washing his face at the tube-well, her husband (PW-2) told him that a complaint had been lodged before the village people against him for cutting the paddy and asked him to be present in the village meeting, whereupon, the accused came out with his pistol and started shouting at her father-in-law (deceased) by calling him dog and challenged him to come out of the house. He also threatened to kill him by his pistol. According to her, the deceased was already in the courtyard and he (deceased) had asked the accused, as to what had happened and why was he making noise. The accused then suddenly shot at him (deceased) from a close range and receiving the bullet injury her father-in-law died at the spot. She further stated that the accused fired several round of bullet aiming her father-in-law Panchanan Sarma. She further stated that when her husband Satish Sarma (PW-2) raised alarm, the accused also shot him and consequently he sustained injury. As she raised hue and cry, the neighboring people came and arranged a vehicle to shift the injured to hospital. It was elicited during her cross examination that earlier she lodged an FIR against the accused for insulting her.

(16) PW-13 and PW-14 were the Investigating Officers. Their testimonies were more or less formal in nature. According to the PW-13, he took charge of the investigation after the earlier Investigating Officer retired. Having taken charge of the investigation he had sent the arms and ammunition for forensic examination. He also collected the medical report of the injured as well as the post mortem report. PW-14 stated that before lodging the formal FIR, a GD entry was made on the basis of verbal information given by one Bhupen Sarma and he proceeded to the place of occurrence on the basis of the said GD entry. He also stated to have seized four nos. of empty cartridges from the place of occurrence. PW-14 also stated that during visit to the place of occurrence, he had found the house of the accused and that of the deceased in the same boundary.

(17) The accused examined one Tomizul Rahman as DW-1. He deposed that he heard of a quarrel between the accused and the deceased. According to him, on the day of occurrence at about 7 to 7.30 A.M. he came to the house of the accused for purchasing four nos. of bamboos. He also stated to have noticed the accused proceeding to the Police Station.

According to him, when the accused was going to Police Station, the victim Panchanan Sarma (deceased) and Satish Sarma (PW-2) armed with spade and axe respectively, accosted the accused and a scuffle ensued amongst them and in course of the scuffle accidentally a bullet came out of the pistol. He also stated that having heard the sound of pistol he had left the place out of fear.

(18) Taking note of the above evidence learned Sessions Judge convicted the appellant under Sections 307/302 IPC and Section 27 (1) of the Arms Act and awarded sentence as indicated above.

(19) Learned counsel for the appellant Mr. S. Sarma submitted that the deceased was the aggressor and when the appellant tried to ward off an attack on him made by the deceased and Satish Sarma, a scuffle ensued between them and in course of the scuffle accidentally the bullet got fired and as such, the appellant is entitled to the benefit of the general exception under Section 80 of the IPC. Mr. Sarma further submitted that the injuries having been inflicted in course of sudden fight and scuffle without any intention and premeditation, the appellant could not have been convicted under Section 302 IPC; at the best, he could have been held liable for an offence of culpable homicide not amounting to murder under Section 304 IPC.

(20) *Per-contra*, supporting the impugned judgment learned Additional Public Prosecutor, Assam, Mr. Phukan submitted that prosecution has brought on record overwhelming evidence to establish the charge against the accused and as such, the impugned judgment calls for no interference. Mr. Phukan further submitted that multiple bullets were fired and as such the plea of accidental release of bullet is not tenable.

(21) We have considered the submission made by the learned counsel for both the sides and also meticulously gone through the evidence and materials brought on record.

(22) The fact that deceased Panchanan Sarma died due to the injuries caused by firearm and PW-2 Satish Sarma sustained a bullet injury are not in dispute. However, the contention of the learned counsel for the appellant Mr. Sarma is that the injuries were caused by accidental firing and as such the appellant is entitled to the benefit of general exception under Section 80 of the Indian Penal Code. In fact, the appellant took the plea of accidental firing during his examination under Section 313 CrPC, while responding to the Question No. 3 put to him. He stated as follows:

“The truth is that in the morning on the day of occurrence Satish Sarma and Panchanan Sarma entered my house and intended to kill me with spade and dao. When I was going to the PS to give information of the matter, they confronted me on the road and when they tried to grab my pistol, the pistol got fired in the ensuing scuffle and unfortunately they sustained injuries.”

(23) In order to substantiate the plea of accidental firing the accused has examined one Tomizur Rahman as defence witness (DW-1). The DW-1 stated to have seen scuffle between the accused and the deceased. He also stated that in course of the scuffle, accidentally the bullets got released from the pistol and having heard the sound of firing, he had left the place out of fear. During cross-examination he admitted that he did not tell anyone about the incident nor did he inform the Police. The accused in his examination under Section 313 CrPC, though, stated that before the deceased and PW-5 accosted him on the road when he was proceeding to the Police Station, leading to the scuffle and accidental firing, the deceased and PW-2 entered into his house being armed with axe and spade with the intention to kill him. We find no material on record to show that any injury was caused to the accused by means of axe or the spade. Even those articles were not seized by Police.

(24) From the medical evidence, more particularly, the testimony of the PW-10, Dr. Deep Kumar Deka as well as the injury report (Exhibit-7) it is evident that Satish Sarma (the son of the deceased) sustained bullet injury on his abdomen and these testimonies remained unimpeached. PW-11, Dr. Jitendra Kumar Saharia, who conducted the post mortem examination has found four injuries on the body of the victim, of which Injury Nos. 1 and 2 were entry and exit wound caused by bullet. So far as the Injury Nos. 3 and 4 are concerned, it is not clear, whether those injuries were caused by bullet or not, inasmuch as, the Doctor has not stated clearly that those injuries were caused by bullet. During cross-examination also nothing could be elicited as to the cause of those two injuries. Be that as it may, the oral testimony of PW-2 that he sustained a bullet injury at the abdomen and the post mortem report (Exhibit-8) reflecting bullet injuries on the chest of the deceased, coupled with the testimony of the doctors, PW-10 and PW-11 leaves no room for doubt that at least two bullets were fired which caused injury to the deceased and PW-2. The PW-14 deposed that he seized a pistol from the possession of the accused and recovered four empty cartridges from the place of occurrence. The PW-9 stated that he has examined the 7.6 mm pistol bearing registration number 127278 and four nos. of empty cartridges. According to this witness, arms and ammunitions examined by him were factory made. The PW-12 also stated that accused fired multiple round of bullet. Thus, the testimony of the PW-11, PW-12 and PW-14 also

demonstrates that multiple bullets were fired by the accused. Though from the injury sustained by the deceased and the PW-2 it cannot be said for certain, that all the injuries were caused by bullets, but what has been conclusively proved by the medical evidence and the oral testimony of PW-2, PW-12 and PW-14 is that multiple bullets were fired and at least one bullet hit the PW-2 and another hit the deceased. The testimony of the PW-14 regarding seizure of four cartridges from the place of occurrence and the testimony of the PW-12 to the effect that multiple bullets were fired as well as the medical evidence adduced by the prosecution remained unimpeached. Therefore, it is hardly believable that multiple bullets got fired accidentally in course of scuffle. Admittedly, the appellant is a responsible retired Air Force personnel. Though, the pistol held by him was licensed one, he was supposed to keep it under lock. Be that as it may, in view of the candid evidence adduced by the prosecution, as indicated above the plea of accidental firing taken by the accused and the testimony of the DW-1 to that effect hardly inspire confidence, for the simple reason that multiple shot could not be accidental and as such, the plea of accidental firing also suffers from the vice of the inherent improbabilities. It is the settled position that the burden to prove any general exception is upon the accused; which can be discharged by him either by adducing defence evidence or from the evidence and materials adduced by the prosecution. The standard of proof is also not higher than that of the preponderance of probability. However, from the evidence and materials alluded hereinbefore, we find that the appellant has not been able to establish the plea of general exception under Section 80 IPC even in the touchstone of probability and as such the plea of general exception in our considered opinion had fallen through.

(25) Let us now consider the alternative submission made by the learned defence counsel. Mr. Sarma, learned counsel for the appellant contended that the appellant did not have any intention to cause death and the bullet injuries were inflicted in course of quarrel and scuffle in the heat of passion and as such, the appellant at the best may be liable for lesser punishment under Section 304 Part-II IPC. In support of his submission Mr. Sarma has placed reliance on the following decision:

- (i) Manjeet Singh v. State of H.P. reported in (2014) 5 SCC 697; and
- (ii) Rajender Singh v. State of Haryana, reported in (2014) 15 SCC 507.

(26) Learned counsel for the appellant referring to the oral testimony of PW-1 submitted that it was the deceased and PW-2 who were the aggressor, inasmuch as, the occurrence took

place in front of the house of the accused. The PW-1 stated in his evidence that while returning home he had seen the deceased Panchanan Sarma lying dead in front of the house of the accused Tankeswar Sarma. PW-2 deposed that Tankeswar Sarma shot Panchanan Sarma on the road just in front of their home. He also stated in cross examination that there was no fencing in between their house and that of the accused. It is also in the evidence of the Investigating Officer (PW-14) that house of the deceased and that of the accused were in the same boundary. Evidently, both the accused and deceased are relations belonging to the same family. Therefore, from the testimony of PW-1 & PW-2 and that of the Investigating Officer (PW-14) it is clearly discernible that residential house of both the parties were located in the same compound having a common frontage. Therefore, the fact, that the occurrence took place in front of the house of the appellant or the body of the deceased was found lying in front of the house of the appellant does not necessarily raise an inference that the deceased was the aggressor,

(27) The PW-2 deposed in unambiguous term that they had land dispute with the appellant. During cross-examination this witness also stated that on the day of occurrence, in the morning, when he had seen the appellant Tankeswar Sarma, he charged him of cutting their crops and also told that he would lodge a complaint with the village headman, whereupon, the appellant had shown him the pistol and threatened to kill him. He further stated that when the appellant Tankeswar Sarma came out to the road, his father (deceased) also came to the road but he tried to take his father back. The oral testimony of PW-12 also assumes significance herein, inasmuch as, she also stated in her evidence that when the appellant was washing his face at the tube well, in the morning, her husband told the appellant that he had lodged a complaint with the village people for cutting their paddy by the appellant and also asked the appellant to attend the village meeting. According to her, upon saying so by the PW-2, the accused came out with his pistol and started shouting at the deceased by calling him dog and also challenged him to come out of the house. He also threatened to kill him by shooting with his pistol. She further stated that when her father-in-law (deceased), who was already in the courtyard, challenged the accused as to why he was making the noise, the accused suddenly fired several rounds of bullet from a close range causing injury to the deceased. Thus, the testimony of the PW-2 and PW-12 clearly demonstrates that incidents of firing was preceded by a hot exchange and quarrel between the accused and the deceased.

(28) Admittedly, both the parties belonged to the same family and reside in the same

campus and their relation was also not cordial due to property dispute. What is evident from the testimony of the PW-2 and PW-12 is that when the appellant was washing his face in the morning, the PW-2 (son of the deceased) initiated the quarrel by challenging the appellant to lodge complaint before the villagers for cutting their paddy, whereupon the appellant came out with the pistol and challenged the deceased to come out and also hurled abuses at him (deceased) and the deceased also came out and challenged him by saying as to why was he shouting and creating noise. From the testimony of the PW-12, it is also discernible that at the beginning when the PW-2 challenged the appellant for the previous incidence of cutting paddy, the appellant did not have the armed with him and in course of the exchange of words he came out with the pistol. From the above evidence, it has been established that the accused, who was a retired Air Force personnel having a licensed pistol shot the deceased in the heat of passion in course of sudden quarrel and as such it is difficult to say that the act of the appellant causing death of the deceased was pre-meditated. When evidently the appellant inflicted the injury causing death of the deceased without any pre-meditation and in the heat of passion during sudden quarrel, the appellant could not have been held liable for offence of murder. However, the facts and circumstances under which the appellant inflicted the injury causing death of the deceased, he shall be liable for committing an offence of culpable homicide not amounting to murder under Section 304 IPC.

(29) In *Rajender Singh v. State of Haryana* (supra) in a similar facts situation the Apex Court converted a conviction under Section 302 IPC to 304 IPC, held as under:

“19. Consequently, we are convinced that since the death of Suraj Mal and Shri Ram had occurred due to the firing resorted to as part of his self-defence, the same would amount to culpable homicide not amounting to murder, which was committed without any premeditation in a sudden fight in the heat of passion upon a sudden quarrel and that the offender did not take undue advantage or acted in a cruel or unusual manner, which would normally fall under Exception 4 of Section 300 IPC. Consequently, at best, conviction of the appellant can only be under Part II of Section 304 IPC for which he could have been inflicted with a punishment of ten years. For the very same reason, the conviction imposed under Section 27 of the Arms Act cannot also be sustained. It is stated that the appellant is suffering the sentence in jail and has so far suffered eleven years. The conviction is modified into one under Section 304 Part II and the sentence already suffered by the appellant is held to be more than sufficient.”

(30) In *Manjeet Singh v. State of Himachal Pradesh* (supra), the Apex Court had converted a conviction under Section 302 IPC to one under Section 304 IPC observed as under:

“25. The question now requires determining is as to what is the nature of offence that the accused has committed. The evidence produced against the accused does not show that the accused had any motive to cause death of the deceased or have intended to cause such bodily injuries which were sufficient in the ordinary course of nature to cause the death of the deceased. Evidence on record also does not establish that the injuries caused on the body of the deceased must in all probability cause his death or likely to cause his death. On the spur of the moment, during the heat of exchange of words accused caused injuries on the body of the deceased which caused his death. Therefore, the ingredients of the murder as defined in [Section 300, IPC](#), have not been established against the accused. In our opinion, the accused was guilty of culpable homicide not amounting to murder under [Section 304, IPC](#), and considering the fact that the accused had no intention to either cause the death of the deceased or cause such bodily injury as is likely to cause death of the deceased, it would be sufficient to impose on accused a sentence of seven years rigorous imprisonment and to impose on him a fine of Rs.5,000/- and in default of payment of fine, a further imprisonment of six months.”

(31) Thus having regard to the facts, that the appellant inflicted the injury in the heat of passion in course of sudden quarrel and scuffle without any pre-meditation, we set aside the conviction and sentence of the appellant under Section 302 IPC, instead, convict him under Section 304 Part-1 IPC and sentence him to rigorous imprisonment for 7 (seven) years.

(32) We also modify and alter the conviction and sentence of the appellant under Section 307 IP to 308 IPC i.e. attempt to commit culpable homicide not amounting to murder, reason being that a person can be convicted under Section 307 IPC only when all the ingredients of murder exist, except the fact of death. To put it differently, in order to convict a person for attempt to murder under Section 307 IPC, it must be proved that he has done some act with such intention or knowledge, that if by the act done death would have been caused, he would have been guilty of murder. In the present case we have already noticed that in the fact situation of the case, the accused could not have been held liable for offence of murder. Therefore, necessarily conviction under Section 307 IPC also shall not be sustainable. Accordingly, we direct the appellant to undergo rigorous imprisonment for 3 (three) years under Section 308 IPC. Sentence of fine and default sentence of punishment awarded by the learned trial Court remain unaltered.

(33) With the modification and alteration in the conviction and sentence to the extent indicated above, the appeal stands partly allowed.

(34) Send down the record of the trial Court.

JUDGE

JUDGE

Comparing Assistant