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[A.F.R.]

Court No. - 37

Case :- JAIL APPEAL No. - 315 of 2013

Appellant :- Prakash

Respondent :- State of U.P.

Counsel for Appellant :- Form Jail, Shweta Pandey, Sweta Pandey
A.C.

Counsel for Respondent :- A.G.A.

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Ajai Tyagi, J.

(Oral judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred by the appellant-Prakash against the judgment and order dated 16.2.2008, passed by Additional Sessions Judge, Court No.9, Kanpur Dehat, in Session Trial No.87 of 2007 (*State vs. Prakash*) arising out of Case Crime No.678 of 2006 under Section 302, 323, 324 IPC, Police Station-Ghatampur, District-Kanpur Nagar, whereby the accused was convicted and awarded sentence under Section 302 IPC for life imprisonment and fine of Rs.10,000/-. He was directed to undergo further imprisonment for one year, in case of default of fine. The appellant was further convicted and sentenced under Section 323 IPC for six months RI and further convicted and sentenced under Section 324 IPC for one year RI. All sentences were directed to run concurrently.

2. The facts giving rise to this appeal are that complainant-Ram Khelawan submitted written-report at Police Station-Ghatampur, District-Kanpur Nagar, stating therein that on 18.12.2006, his elder brother Prakash was going to the brick-kiln of Jawahar with his wife Phoolkali (aged about 40 years)

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and children. He was milching his buffalo. At about 10:40 in the morning, he heard the noise of screaming from the side of field of *pradhan* Ramesh Yadav. On hearing the screaming, he and his cousin (brother), Shiv Raj s/o Bheekku, ran towards that direction and saw that Prakash was attacking on his own wife-Phoolkali with spade. They anyhow saved both the children, during which, Shiv Raj and daughter of Prakash, namely, Goldi (aged about 6 years), also sustained injuries. So many people of village gathered on the spot, but Prakash fled way. He brought injured Phoolkali for treatment, but she died.

3. A case crime bearing No.678 of 2006 was registered at police station under Sections 302 and 323 IPC. Investigation was taken up by SI-Badam Singh. Investigating Officer recorded statements of witnesses, prepared site-plan, collected plain and blood-stained earth. Inquest report was also prepared. Postmortem was conducted on the body of deceased by Dr.Autar Singh and postmortem report was prepared. In the postmortem, cause of death was ascertained as excess bleeding from antemortem injuries. Injured Shiv Raj and Kumari Goldi were also medically examined and their injury reports were also prepared by Dr.Vinod Kumar Mishra. During the course of investigation, the Investigating Officer arrested the accused-Prakash and on his pointing out made recovery of spade, which was said to be used in commission of crime. After completing the investigation, charge-sheet was submitted against accused appellant-Prakash under Sections 302, 324 and 323 IPC. The case being exclusively triable by court of session was committed to the court of session for trial.

4. Learned trial court framed charges against appellant

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under Sections 302, 324 and 323 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.

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

1	Ram Khilawan	PW1
2.	Shiv Raj	PW2
3.	Waheed Ahmad	PW3
4.	Dr.Vinod Kumar Misra	PW4
5.	Dr.Autar Singh	PW5
6.	Silta	PW6
7.	Mola	PW7
8.	Badan Singh	PW8
9.	Raj Kumar	PW9

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

1.	F.I.R.	Ex. Ka2
2.	Written report	Ex. Ka1
3.	Recovery-memo of blood-stained and plain-earth	Ex. Ka9
4.	Recovery-memo of spade	Ex. Ka10
5.	Injury report	Ex. Ka4
6.	Injury report	Ex. Ka5
7.	Postmortem report	Ex. Ka6
8.	Panchayatnama	Ex. Ka11
9.	Charge-sheet Mool	Ex. Ka16
10.	Site-plan with Index	Ex. Ka7
11.	Site-plan with Index	Ex. Ka18

7. 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. Accused did not examine any witness in his defence.

8. We have heard Ms. Shweta Pandey, learned Amicus Curiae appearing for the appellant, learned AGA for the State and perused the record.

9. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. He is innocent. It is strongly argued that all the prosecution witnesses of fact have turned hostile. No witness has supported the prosecution case. It is also submitted that antemortem injuries, shown in postmortem report, were not sufficient to cause death of the deceased. It is next submitted that appellant was not arrested on the spot and prosecution could not establish any motive to commit the crime by appellant. Deceased was wife of appellant and nothing is brought forward by prosecution as to why the appellant would have killed his own wife. Motive is absolutely silent. She also argued that false recovery of spade is made by Investigating Officer to strengthen the prosecution case and recovered spade is in fact planted by the police. Appellant is languishing in jail for more than 14 years.

10. *Per contra*, learned AGA submitted that appellant is named in FIR as single accused and it is very important to note that the FIR of this case was lodged by appellant's real younger brother. It is next submitted that first information report was lodged very promptly nearly about two hours after the occurrence. Therefore, there was no reason for false implication of the appellant. It is also very important to note that first information report is lodged by younger brother of accused and there is nothing on record that there was any sort of enmity

between these two brothers. Learned AGA further submitted that the spade, which was used in commission of crime, was recovered by Investigating Officer on the pointing out of the appellant. It is also argued that antemortem injuries found in postmortem, could be inflicted to the deceased with the weapon/instrument like spade, if it is used from reverse-side. In this way, medical evidence also corroborates the prosecution version. Lastly, it is submitted by learned AGA that no doubt, witnesses of fact have turned hostile, but they have become hostile due to being close relative, i.e., brother and daughter etc., therefore, to save the accused from punishment, witnesses have turned hostile, but learned trial court has rightly appreciated the evidence on record and convicted the accused.

11. It is contended by the defence that prosecution could not establish the motive of crime, but this is the case of direct evidence and in case of direct evidence, motive loses importance. Hence, absence of motive does not affect the prosecution case adversely.

12. Perusal of the record shows that in this case, prosecution has produced three witnesses of fact, namely, Ram Khelawan, who is complainant and eye-witness of the occurrence (PW1), Shiv Raj, injured (PW2) and Silta, the daughter of the accused (PW3). All these three witnesses have turned hostile. In such a situation, heavy duty has been cast upon us to scrutinize the evidence of PW1, PW2 and PW3. It is settled law that testimony of hostile witnesses cannot be thrown away merely on the ground of being hostile. The testimony of hostile witnesses can be relied on to the extent, it supports the prosecution case.

13. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** [(1999) 8 SCC 624] has held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

14. In ***Ramesh Harijan vs. State of UP*** [(2012) 5 SCC 777], Hon'ble Supreme Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

15. In ***State of UP vs. Ramesh Prasad Mishra and another*** [1996 AIR (Supreme Court) 2766], Hon'ble Apex Court held that evidence of a hostile witnesses would not totally rejected if spoken in favour of the prosecution or the accused, but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

16. We have scrutinized the evidence of hostile witnesses very meticulously and have also gone through the findings recorded by learned Trial Judge.

17. First information report was very promptly lodged at police station just after two hours of incident, in which the complainant named appellant-Prakash and he was single accused named in the FIR. There is no reason to falsely implicate the appellant by his real brother. Ram Khelawan (PW1) although has turned hostile, but in examination-in-chief, he has stated that written-report was written by Raj Kumar, but he had written it on his dictation. Although, he has further stated that it was not read over to him, but this statement cannot be believed in the light of evidence of scribe. The scribe of first information report Raj Kumar has been produced as PW9. He has stated in his examination-in-chief that report of occurrence was written by him on the dictation of Ram Khelawan and he had written verbatim whatever was dictated by him. In his cross-examination, PW9 has stated that he had written above report at police chauki on the dictation of police-inspector. Learned trial court has very well scrutinized the factum of writing of first information report and came to the conclusion that it is clear that first information report was written by Raj Kumar on the dictation of complainant-Ram Khelawan (PW1). At the cost of repetition, it is very pertinent to mention that there is no reason on record for false implication of accused-appellant by his real brother. More importantly, appellant is named in the FIR as single accused. Hence, it transpires that PW1 was the eye-witness of the incident. That is why he has named his brother Prakash in the FIR and at the time of

deposition before learned trial court, he turned hostile to save him.

18. Shiv Raj (PW2) is cousin of complainant. It is said that on hearing the screaming, he also ran towards the place of occurrence. His presence is also proved on the spot because he sustained injuries as it is said in the first information report that Shiv Raj sustained injuries while trying to save the deceased. Medical examination of injuries of this witness was conducted by Dr. Vinod Kumar Mishra (PW4). He has stated in his statement that there was lacerated wound of size 2.0 cm x 0.8 cm, which was muscle deep on the left side of skull. The doctor has opined that this injury could be inflicted by hard and blunt object. Injury report of this witness is proved as Ex.ka5. Although, Shiv Raj (PW2) has also turned hostile, but injury sustained by him shows that he was present at the place of occurrence and as stated in the FIR, he sustained injury while trying to save the deceased from the clutches of accused-appellant. The same case goes with the daughter of appellant, namely, Kumari Goldi. Unfortunately, Kumari Goldi died before she could depose. In this way, the injuries of above injured persons established the fact that the incident, as alleged in the FIR, took place and while trying to save the deceased from the attack of appellant, they sustained injuries. Although, Shiv Raj (PW2) has stated that he got injury by falling, but this statement cannot be believed in view of the above circumstances. Learned trial court has rightly opined that a person can tell a lie, but not the circumstances.

19. We are convinced that learned trial court has rightly held that inquest report was prepared and *punch* gave opinion that

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deceased Phoolkali died due to inflicting the injuries with spade by Prakash. Complainant-Ram Khelawan has also signed the inquest report and Bhola has also signed, who is the witness of recovery of spade. This witness, namely, Bhola is produced as PW7 and has stated that police called him at police chauki and sought his thumb impression on a plain paper. He has denied recovery of spade in his presence, but in this way, however, he has admitted his thumb impression on recovery memo. Learned trial court has very rightly appreciated the fact that there is no signature or thumb impression of accused-Prakash on inquest report. It shows that accused appellant was not present at the time of preparation of inquest report of the deceased while deceased was his wife. His real brother Ram Khelawan, the complainant and Bhola (PW7), etc., were present, but accused was not present; meaning thereby that he had fled away from there. It is very strong circumstance against the appellant.

20. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused is in jail for the last more than 14 years.

21. In *State of Uttar Pradesh vs. Mohd. Iqram and another*, [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

22. Considering the evidence of these witnesses and also considering the medical evidence including postmortem report, there is no doubt left in our mind about the guilt of the present appellants. 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 IPC 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 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."

23. 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 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
(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.

24. In the case in hand, the postmortem of deceased-Phoolkali was conducted by Dr.Autar Singh, who has produced before trial court as PW5. According to postmortem report, the deceased sustained following antemortem injuries:

(a) contusion on back at level of T-6 to T-12 about 15 cm x 9 cm.

(b) contusion on the right-side of back at level of T-10 to T-2 about 5 cm x 4 cm.

(c) abrasion on post aspect of right thigh near right knee joint about 2 cm x 1 cm.

25. In the internal-examination on the body of the deceased, the spinal cord and ribs were found fractured. Right lung and liver also found injured. The doctor opined that deceased died due to excess bleeding from antemortem injuries. Therefore, it is established that deceased died due to excess bleeding of internal injuries sustained by her. Having analyzed the antemortem injuries, we have reached to the conclusion that appellant used the spade to attack the deceased from reverse-side because deceased sustained two injuries of contusion. There is no injury of incised wound. Hence, spade was used from reverse side, which shows that appellant was not having any intention to kill the deceased, but certainly he had knowledge that his act was likely to cause death.

26. 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 Kavadar 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.

27. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not intended and the injuries were though sufficient in the ordinary course of nature to have caused death, the accused had no intention to cause death, therefore, the instant case false under the Exceptions 1 and 4 to Section 300 IPC.

28. In the light of the foregoing discussions, the appeal is

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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 along with other offences punishable under Sections 323 and 324 IPC.

29. Hence, the conviction and sentence awarded to the appellant for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 14 years rigorous imprisonment and fine of Rs.5,000/-. The appellant shall undergo further simple imprisonment for one year in case of default of fine. Sentence awarded under Sections 323 & 324 IPC shall remain intact. All the Sentences shall run concurrently.

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

(Ajai Tyagi, J.) *(Dr. Kaushal Jayendra Thaker, J.)*

Order Date :- 27.10.2021
LN Tripathi