

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
DIVISION BENCH : Hon'ble Shri Justice Alok Verma and
Hon'ble Shri Justice Ved Prakash Sharma
Cr.A. No.1028/2013

Kailash S/o Mangilal

Vs.

The State of M.P.

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Shri Mukesh Kumawat, learned counsel for the appellatant.

Shri Milind Phadke, learned Public Prosecutor for the
respondent-State.

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J U D G M E N T

(Delivered on 6th day of March, 2017)

Per: Justice Ved Prakash Sharma

This jail appeal is directed against judgment dated 04.07.2013 passed by Sessions Judge, Dhar in S.T. No.33/2011, whereby appellatant Kailash Bhil has been convicted under Section 302 of Indian Penal Code (for short 'IPC') for committing murder of his brother Tejalal (30 years) and has been sentenced to undergo life imprisonment and to pay a fine of Rs.1000/- and in default of payment of fine, to further undergo RI for one month.

02. The prosecution story as unfolded during trial, briefly stated, is that appellatant Kailash and deceased Tejalal, who are real brothers, were having strained relations because of some dispute and differences over agricultural land. Due to this a couple of years back prior to the incident, the deceased had left his native village – Chhota Batwadia and started residing with his wife Gudibai in his in-laws' house at village

Bagda. As per prosecution, few days prior to 28.09.2010 – the date of alleged occurrence, the deceased with his wife Gudibai had visited village Bagad and at that time the appellant had scuffled with him. It is further the case of prosecution that on 28.09.2010, Motilal (P.W.3), resident of village Tikhi was going on his motorcycle with Tejalal (deceased) to drop him at his village Bagad. On way around 10.00 p.m., while passing through village – Chula Chuli, they had a brief stay near the house of Ramesh (P.W.1). Allegedly, the appellant suddenly came from the house of Ramesh (P.W.1) and pushed down Tejalal standing over there to the stony surface of the path-way and thereafter, further repeatedly slammed his head against the ground, leading to head injury and unconsciousness. Ramesh (P.W.1) and his brother Ilawar (P.W.5), both residents of village Chula Chuli, whose houses were situated nearby, also reached the spot.

03. Motilal (P.W.3) thereafter went to village Bagad and apprised Tejalal's wife Gudibai (P.W.4) and his brother-in-law – Mangilal (P.W.2) about the incident. Soon thereafter he came back to the place of occurrence with Gudibai (P.W.4) and Mangilal (P.W.2). Tejalal who was lying still unconscious on the spot, was taken by Motilal (P.W.3) and Gudibai (P.W.4) to Police Station – Badnavar. At around 2.00 a.m. in the night, Motilal lodged First Information Report (Ex.P/3) regarding this incident at Police Station Badnavar on the basis of which, a case under Section 307 of IPC was registered against the appellant. Tejalal was shifted to government hospital at

Badnavar, where Dr. M.M. Upasani (P.W.10) examined him and as per MLC Ex.P/13 found one lacerated wound measuring 2 X 1 c.m. on right parietal bone and 3 contusions - one measuring 7 X .5 c.m. on middle of right parietal bone, another measuring 8 X 5 c.m. on left parietal bone and third one measuring 3 X 2 c.m. on abdominal region. He advised for X-Ray and C.T. Scan of head and further referred Tejalal to District Hospital, Ratlam from where considering his serious condition, he was shifted to M.Y. Hospital, Indore where next day i.e. on 30.09.2010 at 1.30 a.m., he succumbed to the injuries.

04. A.S.I. Jairam (P.W.8) on receipt of intimation regarding death of Tejalal recorded '*Merg*' report (Ex.P/9) on 30.09.2010 at Police Post – M.Y. Hospital, Indore. Same day Rajkumar (P.W.12) held inquest proceedings on the dead body and vide inquest report Ex.P/1, opined that Tejalal died because of head injuries. Same day, viz. on 30.09.2010, Dr. Prashant Rajput (P.W.14) conducted autopsy on the dead body. Vide post-mortem report Ex.P/18, he found following ante-mortem injuries on the person of the deceased.

- i) Abrasion 3 X 1 c.m. on right scapular region.
- ii) Abrasion 2 X 1 c.m. on lower part of right scapula.
- iii) Abrasion 3 x 2 c.m. on the upper vertical lateral part of right thigh.
- iv) Surgically stitched wound just below right parietal region extending to right tempo-parieto-occipital region with fracture measuring 14 c.m. in length.

On internal examination, swelling and inflammation was

found in the brain membrane with sub-dural hemorrhage. As per Dr. Rajput (P.W.14), Tejalal died due to shock and excessive hemorrhage because of head injury and that the death was homicidal in nature which occurred within 24 hours of the examination.

05. The investigation ensued. On 29.09.2010 Deepak Shukla (P.W.13), the then S.H.O., Police Station – Badnawar visited the place of occurrence and prepared site map Ex.P/4. Simple and blood-stained soil was also seized by him from the spot. The appellant was arrested. The clothes worn by deceased Tejalal received from the hospital in a sealed packet alongwith simple and bloodstained soil collected from the spot, were sent for serological examination to Regional Forensic Laboratory, Indore. Dr. I.P.S. Thakur, Assistant Chemical Examiner, vide report Ex.P/14 found presence of human blood on the pant, shirt and underwear of the deceased as well as the bloodstained earth recovered from the place of occurrence.

06. After usual investigation, a charge-sheet was laid before the Competent Magistrate who in due course committed the case to the Court of Sessions. A charge for offence under Section 302 of IPC was framed by the learned trial Court against the appellant who abjured the guilt and claimed to be tried.

07. The prosecution in order to bring home the charge

examined as many as 14 witnesses including Ramesh (P.W.1), Motilal (P.W.3) and Ilawar (P.W.5), said to be the eyewitnesses. Dr. M.M. Upasani (P.W.10) is said to have conducted medico-legal of examination of Tejalal. Dr. Prashant Rajput (P.W.14) is the Autopsy Surgeon while Deepak Shukla (P.W.13) has conducted investigation. Apart this, documents Ex.P/1 to P/17 were also marked in evidence. Ex.D/1, D/2 & D/3 are respectively, the police statement of Mangilal (P.W.2), Motilal (P.W.3) and Gudibai (P.W.4).

08. The defence was of total denied. The appellant in his examination under Section 313 of the Cr.P.C. expressed ignorance regarding most of the incriminating circumstances and further denied that he had pushed down Tejalal on stony surface of the pathway and slammed his head on the ground causing injuries to him leading to his unconsciousness and death. A faint plea was also raised that Tejalal suffered injuries due to motorcycle accident and that he died because of accidental injuries, however, none was examined in defence.

09. The conviction and sentence recorded against the appellant has been challenged on the ground that Ramesh (P.W.1) and Ilawar (P.W.2), said to be eyewitnesses of the incident, have not supported the prosecution story. It is further submitted that the learned trial Court has seriously erred in recording conviction on the basis of testimony of Motilal (P.W.3) a close relative of deceased. The submissions is that the deceased sustained injury on his head due to accident of

motorcycle and that the appellant has been falsely implicated in the case because of past enmity. In alternate, it is contended that considering that Tejalal died because of singular head injury, it cannot be said that the appellant had intention to cause his death and, therefore, the learned trial Court committed serious error in recording conviction for offence under Section 302 of IPC and that even if prosecution story is accepted, then the case will fall under Section 304 of IPC.

10. Per contra, it is submitted by learned Public Prosecutor that from the evidence available on record, it is well established that appellant repeatedly slammed the head of the deceased to stony surface of the pathway causing serious head injury to him, resulting in his death, hence, intention to cause death on the part of the appellant can well be gathered, therefore, it cannot be said that the learned trial Court has committed any factual or legal error in convicting and sentencing the appellant for murder of Tejalal.

11. Heard the learned counsel for the parties and perused the record.

12. In view of the respective pleas raised at the Bar, the question arises whether the learned trial Court has committed any factual or legal error in recording conviction against the appellant for offence under Section 302 of IPC ?

13. As regards death of Tejalal, the testimony of

Autopsy Surgeon Dr. Prashant Rajput (P.W.14) is clinching and clear to the effect that apart from three abrasions respectively, on middle right scapula, lower right scapula and right thigh, he found a 14 c.m. long fracture extending from right parietal region to tempo-parieto-occipital region over the head of the deceased with inflammation in the brain membrane and sub-dural hemorrhage. Dr. Prashant Rajput (P.W.14) clearly opined that Tejalal died because of shock and excessive hemorrhage and that his death was homicidal in nature. In cross-examination, this witness has completely ruled out the possibility that the injury found on the head of the deceased could have been caused due to accident while riding the motorcycle. There is nothing to disbelieve the testimony of Dr. Prashant Rajput (P.W.14) which is free from any material anomaly, therefore, on the basis of expert opinion given by Dr. Rajput, it is well proved that Tejalal died because of head injury and that his death was homicidal in nature.

14. In the aforesaid premises, the question arises whether finding of guilt recorded against the appellant in this regard for offence u/S.302 of IPC is sustainable ?

15. As per prosecution, the incident was witnessed by Motilal (P.W.3) who was accompanying the deceased so also by Ramesh (P.W.1) and Ilawar (P.W.3) who were present on the spot as they were residing nearby the place of occurrence. Ilawar (P.W.5) has not supported the prosecution story and,

therefore, the prosecution in order to discredit has confronted him with his police statement Ex.P/5. Here, it is noticeable that Ilawar (P.W.5) is the real brother of Ramesh (P.W.1) who is co-brother of appellant. From the testimony of Ilawar (P.W.5), it well transpires that he has been reluctant to reveal the truth because while on one hand, he says that he came to know about the occurrence at the shop of Radhu Sarpanch situated in Badnawar; on the contrary in para-2, he says that he came back from Badnawar around 6 p.m. and thereafter, throughout remained at his house. The incident, allegedly, occurred around 10.00 p.m., thus, indicating that he was very much there at his house at the time of occurrence. Therefore, the testimony of Ilawar (P.W.5) cannot be made the basis to disbelieve the prosecution version.

16. As regards Motilal (P.W.3), he has clearly deposed that on the date of the incident, he on his motorcycle along with Tejalal was going to drop him to his village Bagad and that on way, he had a brief stay in village Chula Chuli and that while he was talking to Ramesh (P.W.1), appellant Kailash came there and pushed Tejalal down to the ground and thereafter, further smashed his head to the ground, resulting in head injury. This witness has further deposed that he and other persons present over there tried to rescue Tejalal, however, by that time he turned unconscious and that thereafter he went to village Bagad to inform the wife and other relatives of Tejalal about the incident. The testimony of Motilal (P.W.3) has remained intact during cross-examination. Though, a minor

anomaly is there on the point as to whether the appellant smashed the head of Tejalal repeatedly or only once, however, this witness in para-7 of the deposition explaining the same has stated that there may be a difference of narration but he had told the police during interrogation that the appellant had repeatedly slammed the head of the deceased to the ground. This witness in para-9 has clearly denied that Tejalal sustained injury due to fall from the motorcycle. Noticeably, the appellant in his examination under Section 313 of the Cr.P.C. has not stated that the deceased sustained injuries due to motorcycle accident. Further, Dr. M.M. Upasani (P.W.10), who conducted medico-legal examination as well Dr. Prashant Rajput (P.W.14) who conducted post-mortem have denied that the injuries found on the person of the deceased could have been caused due to motorcycle accident. Thus, the plea that Tejalal suffered head injury due to motorcycle accident has no legs to stand.

17. Though it is contended that Motilal (P.W.3), being a close relative of deceased – Tejalal, cannot be relied upon, however, it is noticeable that Tejalal and appellant are real brothers and Motilal (P.W.3) is related to both of them, being the son of their sister. Apart this, no motive has been attributed to Motilal (P.W.3) so as to falsely implicate the appellant in the matter. The testimony of Motilal (P.W.3) which has remained intact during cross-examination, being cogent, clear and consistent is quite trustworthy, therefore, it cannot be said that the learned trial Court committed any error

in placing reliance on his testimony.

18. As per prosecution, the incident occurred near the house of Ramesh (P.W.1), who is co-brother of the appellant. Ramesh (P.W.1) in his examination-in-chief had substantially supported the version put forth by Motilal (P.W.3) on material points deposing in para-1 that the appellant has pushed down Tejalal to the ground and thereafter, again smashed his head to the stony surface and that he himself and few other persons came to the rescue of Tejalal and also provided him with water to drink. Though during cross-examination this witness taking a 'U' turn has stated in para-5 that he did not witness the incident and came to know about the same on the next day, however, after being declared hostile on further examination in para-6 he has supported the version earlier put forth by him in para-1 of examination-in-chief. The law is well settled that the testimony of a hostile witness cannot wholly be rejected in a mechanical manner and that the Court has to see whether any part of the testimony of such a witness is worthy of reliance. If on due appreciation, the Court is of the opinion that one part of the testimony of such witness is trustworthy then there is no bar in relying upon the same. In this connection, we can usefully refer to the pronouncement of the apex Court in *Khujji @ Surendra Tiwari vs. State of M.P., AIR 1991 SC 1853 (Three-Judge Bench)*. In such premises, we have no hesitation in relying upon the version put forth by Ramesh (P.W.1) in examination-in-chief and reaffirmed in further examination that the appellant pushed

down Tejalal on ground and also slammed his head to the ground.

19. The testimony of Motilal (P.W.3) which stands corroborated by testimony of Ramesh (P.W.1), so also with the First Information Report (Ex.P/3) lodged by Motilal (P.W.3) soon after the incident and admissible under Section 157 of the Evidence Act as his previous statement, unerringly and eloquently shows that on 28.09.2010 at around 10.30 p.m., the appellant, who was having dispute with Tejalal with regard to agricultural land, pushed him down on the stony surface of the path-way and further slammed his head on the ground. The testimony of Dr. Prashant Rajput (P.W.14), who conducted autopsy on the dead body of Tejalal, further, shows that Tejalal sustained fracture in the right tempo-parieto-occipital region, measuring almost 14 c.m. in length including injury to brain leading to his death. Thus, it is proved beyond reasonable doubt that the appellant caused death of Tejalal by pushing him down on the stony surface and thereafter, slamming his head on the hard surface.

20. The learned counsel for the appellant has submitted that in the facts and circumstances of the case, the act alleged against the appellant is covered by exception 4 of Section 300 'IPC' because there is nothing to show any pre-mediation on his part and that at the most it is a case of sudden quarrel.

21. In the aforesaid premises, the question arises whether the present case comes within the category of 'murder' under Section 300 of IPC or 'culpable homicide not amounting to murder' under Section 304 'IPC' ?

22. Exception 4 to Section 300 of 'IPC' which is referred to on behalf of the appellant and is relevant in this regard runs as under:

“Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.-It is immaterial in such cases which party offers the provocation or commits the first assault.”

23. The issue with regard to applicability of exception 4 of Section 300 'IPC' was considered by the Hon'ble apex Court in *Ravindra Shalik Naik & Ors. vs. State of Maharashtra, 2009 (12) SCC 257*, wherein the law has been summarised as under:-

“6._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 acting 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.”

24. In the instant case, it has come in the testimony of Ramesh (P.W.1) that the appellant and Tejalal had a brief quarrel and thereafter, the appellant had pushed Tejalal down on the ground and slammed his head on the ground. Motilal (P.W.3) too has deposed in para-2 that the appellant after pushing down Tejalal on the ground slammed his head on the ground. In this regard, reference can also be made to the testimony of autopsy surgeon Dr. Prashant Rajput (P.W.14), who found single fracture on the right-parieto-occipital region of the deceased. Thus, the allegation that the appellant slammed the head of Tejalal again and again on the ground is not established.

25. Thus, it emerges from the evidence on record that the appellant without pre-mediation in a sudden fight and without taking undue advantage of his position or acting in a cruel or unusual manner caused injury on the head of the deceased, leading to his death, therefore, the present case is squarely covered by Exception 4 of Section 300 of IPC.

26. The learned trial Court while appreciating the evidence has not taken into consideration the aforesaid factual and legal aspects of the matter, therefore, the finding recorded

by the learned trial Court that the appellant is guilty under Section 302 of IPC for committing murder of Tejalal is not sustainable, rather it is found that the appellant is guilty of committing culpable homicide not amounting to murder which falls under Section 304 Part-1 of the IPC.

27. In view of the aforesaid, the conviction of appellant Kailash is altered from Section 302 'IPC' to Section 304 Part-I 'IPC' and instead of life imprisonment and fine, he is sentenced to Rigorous Imprisonment for 7 years with a fine of Rs.1000/-; in default of payment of fine, he will further suffer one months SI. This appeal accordingly, stands partly allowed. A copy of this judgment be sent to the trial Court for compliance.

(Alok Verma)
Judge

soumya

(Ved Prakash Sharma)
Judge