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ABDUL NAWAZ

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 801 of 2012)

B

MAY 10, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

PENAL CODE, 1860:

C *s. 300, Exception 4 and s. 304(Part-I) – Scuffle between accused and Head Constable of police in order to release the dinghy from the police – Accused causing head injury to Head Constable and pushing him into the sea – Dead body of victim recovered from the sea – Held: Pushing a person*

D *into the sea with ableeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of s. 300 and secondly s. 304(Part-I) — The act of the accused is more appropriately punishable*

E *u/s 304 (Part-I) instead of s. 302 as invoked by the courts below – Conviction u/s 302 set aside – Instead accused convicted u/s 304 (Part-I) and sentenced to 8 years RI – Evidence – Minor discrepancies in evidence and recording FIR – Effect of.*

F **The appellant and 16 others were prosecuted for commission of offences punishable u/ss 302/392/411/201/ 120B/341/109 IPC. The prosecution case was that at about 23.50 hrs on 19.3.2008, when the policemen PWs 1 and 3 were on patrol duty, they noticed that in two**

G **dinghies tied to a ferry boat stationed at the jetty, diesel was being illegally removed from the ferry boat. On seeing the policemen, the miscreants escaped in one of the dinghies. When some more police personnel reached**

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the scene, the Engineer, the Master and the Lskar of the ferry boat were caught. Head Constable 'S' and PW1 boarded the dinghy left behind by the miscreants. Meanwhile, the other dinghy that had earlier fled away, returned to the spot with four persons on board including the appellant. They got into a scuffle with Head Constable 'S' to secure the release of the dinghy. The appellant picked up a *dao* that was lying in the dinghy, inflicted a blow on the head of 'S' and pushed him into the sea and escaped in the dinghy. The dead body of 'S' was recovered from the sea by the Coast Guard Divers on 20.3.2008. The trial court convicted the appellant u/s 302 IPC and sentenced him to imprisonment for life. A-1 to A-3 were convicted and sentenced u/s 332/34. The remaining accused charged with commission of offences punishable u/ss 392/409/411 were, however, acquitted. The High Court allowed the appeals of A-1 to A-3 and dismissed the appeal of the appellant.

In the instant appeal, it was, *inter alia*, contended for the appellant that the prosecution case was primarily based on the evidence of PWs 1 and 2; that the evidence of PW 1 was not worthy of credit and could not, therefore, be relied upon; that PW 2 was not an eye-witness and had not corroborated the version given by PW 1; that there was no evidence to prove that the injury stated to have been inflicted by the appellant was in the ordinary course of nature sufficient to cause the death; that even according to the prosecution case itself, there was a sudden fight between the deceased and the appellant and his companions bringing the case under Exception 4 to s. 300 IPC.

Partly allowing the appeal, the Court

HELD: 1.1. The trial court considered the evidence on record carefully and came to the conclusion that the

A return of the appellant to recover the second dinghy, a scuffle taking place between the appellant and the deceased Head Constable on board the second dinghy, and the deceased being hit with a *'dao'* by the appellant and being pushed into the sea was proved by the B evidence on record. [para 9] [568-F-H]

1.2. In appeal, the High Court re-appraised the evidence adduced by the prosecution and affirmed the findings recorded by the trial court as regards the presence and return of the appellant to recover the C second dinghy left behind by the miscreants, the assault on the deceased with a *'dao'* and his being pushed into the sea. The High Court found that the depositions of PWs1 and 2 to the extent they proved the above facts were cogent and consistent hence acceptable. There D does not seem to be any palpable error in the approach adopted by the High Court. The discrepancies indicated in the recording of the FIR, or the offence under which it was registered are not of much significance and do not affect the substratum of the prosecution case. [para 10 E and 12] [569-A-B; 570-D-E]

Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 (3) SCR 280 =(1983) 3 SCC 217 – referred to.

1.3. This Court accordingly affirms the findings of the F two courts below to the extent that the appellant was indeed one of the four persons who returned to the place of occurrence to recover the second dinghy that had been left behind by them and finding the deceased-Head Constable inside the dinghy assaulted him in the course G of a scuffle, pushed him into the sea and eventually took away the dinghy with the help of his companions. [para 12] [570-E-F]

2.1. The prosecution case clearly is that the appellant

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and his companions had returned to the place of occurrence only to recover the second dinghy which they had left behind while they had escaped from the spot in the other dinghy. It is not the case of the prosecution that there was any pre-mediation to commit the murder of the deceased. It is also common ground that the appellant was not armed with any weapon. The weapon allegedly used by him to assault the deceased was even according to the prosecution case lying in the said dinghy. The nature of the injury inflicted upon the victim has not been proved to be sufficient in the ordinary course of nature to cause death. The blow given by the appellant to the deceased had not caused any fracture on the skull. [para 15] [571-F-H; 572-A]

2.2. It cannot be ignored that the deceased had sustained a head injury and was bleeding. Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of s. 300 and secondly 304 (Part I) of the IPC. [para 16] [572-E-F]

2.3. The appellant having assaulted the deceased with a *'dao'* and having thereby disabled him sufficiently ought to have known that pushing him into the sea was likely to cause his death. Pushing the deceased into the sea was in the circumstances itself tantamount to inflicting an injury which was likely to cause the death of the deceased. In the case at hand he was assaulted with a sharp edged weapon on the head and was bleeding. The injury on the head and the push into the sea have, therefore, to be construed as one single act which the appellant ought to have known was likely to cause death of the deceased. Even so, Exception 4 to s. 300 of the IPC would come to the rescue of appellant inasmuch as the act of the appellant even when tantamount to commission

A **of culpable homicide will not amount to murder as the same was committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of a sudden quarrel without the offender taking undue advantage or acting in a cruel or unusual manner. The** B **act of the appellant is more appropriately punishable u/s 304 (Part I) instead of s. 302 IPC invoked by the courts below. [para 16] [572-G-H; 573-A-F]**

2.4. The conviction of the appellant for the offence of C **murder u/s 302 IPC, is set aside. He is convicted of culpable homicide not amounting to murder punishable u/s 304(I) of the IPC and sentenced to undergo imprisonment for a period of eight years. [para 17] [573-F-G]**

D *Chinnathaman v. State* **2007 (14) SCC 690;** *Muthu v. State* **2007 (11) SCR 911 = 2009 (17) SCC 433,** *Arumugam v. State* **2008 (14) SCR 309 = 2008 (15) SCC 590;** *Ajit Singh v. State of Punjab* **2011 (12) SCR 375 = 2011 (9) SCC 462; and** *Elavarasan v. State* **2011 (10) SCR 1147 = 2011 (7)** E **SCC 110 – cited.**

Case Law Reference:

	1983 (3) SCR 280	**referred to**	**para 12**
F	**2007 (14) SCC 690**	**cited**	**para 14**
	2007 (11) SCR 911	**cited**	**para 14**
	2008 (14) SCR 309	**cited**	**para 14**
	2011 (12) SCR 375	**cited**	**para 14**
G	**2011 (10) SCR 1147**	**cited**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 801 of 2012.

H From the Judgment & Order dated 30.08.2010 of the High

Court at Calcutta (Circuit Bench at Port Blair) in C. R. A. No. 5 of 2010.

Jaspal Singh, Rauf Rahim, Y. Bansal for the Appellant.

Ashok Bhan, Asha G. Nair, Sadhna Sandhu, CK Sharma, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal by special leave arises out of a judgment and order dated 30th August, 2010 passed by the High Court of Calcutta whereby Criminal Appeal No.5 of 2010 filed by the appellant assailing his conviction under Section 302 of the IPC and sentence of life imprisonment with a fine of Rs.50,000/- and a default sentence of rigorous imprisonment for two years has been dismissed.

3. Two policemen deployed on patrol duty examined at the trial as PWs 1 & 3 reached Chatham Jetty at about 23.50 hrs. on the 19th of March, 2008. While at the Jetty they started smelling diesel odour and suspecting that something fishy was going on, parked their motor cycle to take a walk in the surrounding area. Soon they noticed that two dinghies were tied to M.V. Pillokunji, a vehicle ferry boat stationed at the jetty. In one of these dinghies there were 20 drums besides a man present on the dinghy while in the other there were three to four men and 14 drums, which were being filled with diesel using a plastic pipeline drawn from the vessel mentioned above. The suspects jumped in to one of the two dinghies and escaped, when they saw the approaching policemen that included Head Constable Sunil Kumar (PW-2) and Constable K.Vijay Rao (PW-5). The police party, it appears, tried to contact police station Chatham and the Control Room. While they were doing so the Engineer, Master and the Laskar of the said vessel attempted to snatch the VHF set from them. The police party, therefore, caught hold of these persons as they appeared to

A be in league with the miscreants, who had escaped. Soon thereafter arrived Constable Amit Talukdar (PW-4) and the deceased Head Constable Shri Shaji from Police Station, Chatham. After hearing the version from the patrolling constables and the PCR van personnel who too had arrived on B the spot the deceased informed the SHO, Chatham police station and requested him to reach the spot. In the meantime, the deceased and PW-1 boarded the dinghy that had been left behind by the miscreants leaving the three crew members of the vessel under the vigil of the remaining members of the police C party. PW-1 who accompanied the deceased on to the dinghy firmly tied the rope of the dinghy but while both of them were still in the dinghy, the other dinghy that had earlier fled away returned to the spot with four persons on board. The prosecution case is that the appellant and one Abdul Gaffar were among D those who entered the dinghy and got into a scuffle with the deceased to secure the release of the dinghy. In the course of the scuffle the appellant is alleged to have picked up a *dao* (sharp edged weapon lying in the dinghy) and inflicted an injury on the head of the deceased. The appellant is then alleged to have pushed the deceased into the sea. The rope of the dinghy E was cut by the miscreants to escape in the dinghy towards Bambooflat.

4. A search for the deceased was launched by the SHO after he arrived on the spot which proved futile. His dead body F was eventually recovered from the sea by the Coast Guard Divers on 20th March, 2008 at about 6.15 hours. The inquest was followed by the post-mortem examination of the dead body conducted by Dr. Subrata Saha. Statements of witnesses were recorded in the course of investigation and the *dao* recovered G culminating in the filing of a charge-sheet against as many as seventeen persons for offences punishable under Sections 302/392/411/201/120B/341/109 IPC. The case was, in due course, committed for trial to the court of Sessions Judge, Andaman & Nicobar Islands at Port Blair before whom the H accused pleaded not guilty and claimed a trial.

5. At the trial, the prosecution examined as many as 66 witnesses apart from placing reliance upon an equal number of documents marked at the trial apart from material exhibits. The accused did not examine any witnesses but produced a few documents in support of their defence.

6. The Trial Court eventually convicted the appellant for an offence of murder punishable under Section 302, IPC and sentenced him to undergo imprisonment for life. A-1 to A-3 were also similarly convicted but only for offences punishable under Sections 332/34 of the IPC. The remaining accused persons charged with commission of offences punishable under Sections 392/409/411 of the IPC were, however, acquitted.

7. Aggrieved by the conviction and sentence awarded to them, A-1 to A-3 and the appellant herein preferred appeals before the High Court of Calcutta, Circuit Bench at Port Blair. By the impugned judgment under appeal before us, the High Court has while allowing three of the appeals filed by the other convicts, dismissed that filed by the appellant herein thereby upholding his conviction and the sentence of life imprisonment awarded to him.

8. We have heard Mr. Jaspal Singh, learned senior counsel for the appellant and Mr. Ashok Bhan, learned senior counsel appearing for the respondent-State who have taken us through the judgments under appeal and the relevant portions of the evidence adduced at the trial. It was contended by Mr. Jaspal Singh that the prosecution case rests primarily on the depositions of PWs 1 & 2 as the remaining police witnesses were admittedly at some distance from the place of occurrence. Out of these witnesses PW-1, according to Mr. Jaspal Singh, was not worthy of credit and could not, therefore, be relied upon. A draft FIR was, according to the learned counsel, prepared by PW65-the investigating officer which PW1 is said to have signed without even reading the same. This implied that the version given in the FIR was not that of the witness, but of the person who had drafted the same. It was further contended that

A although the FIR was recorded at 1:30 a.m., the body of the deceased was recovered only at about 5:40 a.m. In the intervening period it was not known whether the deceased was alive or dead. The FIR purportedly registered at about 1:30 a.m. all the same alleged the commission of an offence under B Section 302 IPC. This, according to Mr. Singh, indicated that the FIR was actually registered much after the recovery of the body. Mr. Jaspal Singh, further, contended that PW-2 was not an eye-witness and had not corroborated the version given by PW-1. He had instead improved his own version given in the C statement under Section 161 Cr.P.C. He further contended that the name of the appellant had been introduced subsequently as the contemporaneous documents showed that the name of the assailant was not known.

9. The Trial Court has viewed the occurrence in two distinct D sequences. The first sequence comprises the police party's arrival on the spot and discovering the process of removal of diesel from the bigger vessel into the dinghies carrying drums with the help of a pipe and a pump and the escape of the four persons from the place after the police went near the spot. The E second sequence comprises three crew members of the vessel being detained by the police party, the arrival of the deceased head Constable Shaji from police station-Chatham, the deceased entering the second dinghy left behind by the miscreants, the return of the four persons including the F appellant to the place of occurrence, a scuffle ensuing in which the deceased was hit on the head and pushed into the sea. The Trial Court considered the evidence on record carefully in the context of the above two sequences and came to the conclusion that the return of the appellant to recover the second G dinghy, a scuffle taking place between the appellant and the deceased Head Constable-Shaji on board the second dinghy, and the deceased being hit with a *dao* by the appellant and being pushed into the sea was proved by the evidence on record.

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10. In appeal, the High Court re-appraised the evidence adduced by the prosecution and affirmed the findings recorded by the Trial Court as regards the presence and return of Nawaz to recover the second dinghy left behind by the miscreants, the assault on the deceased with a *dao* and his being pushed into the sea. The High Court found that the depositions of PWs1 and 2 to the extent they proved the above facts was cogent and consistent hence acceptable. The High Court observed:

> "From the above versions of the prosecution witnesses, it seems to be clear that the victim had been assaulted by a dao and then pushed into the sea water and it was thereafter that PW-2, for sending message, left for the PCR van. It is in the evidence of PWs 1 and 2 that they noticed Nawaz to be the assailant of the victim. While PW-1 was categorical that Nawaz pushed the victim into the sea water, PW-2 did not specifically say who pushed the victim into the sea water but having regard to the sequence of events sighted by him which support the version of PW-1, it would not be unreasonable to conclude based on the version of PW-1 that it was Nawaz who had also pushed the victim into the sea water.
>
> Number of similarities appear from a reading of the respective versions of PWs 1 and 2, viz. that PW-2 and other staff who were on the vehicle approaching the jetty were stopped by PW-1; that there were 20 drums on one dinghy and 14 drums on the other; that through green coloured pipe, diesel was being supplied to the drums from the said vessel; that the victim picked up the mobile phone lying in the detained dinghy; that PW-1 had come over to the said vessel for tying the dinghy; that both recognized Nawaz as the person who picked up the dao from the dinghy and hit the victim. These are some evidence tendered by PWs 1 and 2 which are absolutely mutually consistent. That apart, the other witnesses present at the spot (though had not recognized Nawaz or been informed

A about the identity of the assailant), had heard that the victim was assaulted with a dao."

11. Relying upon the decision of this Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217*, B the High Court held that minor discrepancies in the depositions of witnesses which did not go to the root of the matter cannot result in the entire prosecution case being thrown out.

12. We do not see any palpable error in the approach adopted by the High Court in appreciating the evidence C adduced by the prosecution. The deposition of PWs 1 & 2 regarding the presence of the appellant at the place of occurrence, his getting into a scuffle with the deceased in an attempt to recover the dinghy and the assault on the deceased, who was then pushed into the sea is, in our opinion, D satisfactorily proved. The discrepancies indicated by Mr. Jaspal Singh in the recording of the FIR, or the offence under which it was registered are not of much significance and do not, in our view, affect the substratum of the prosecution case. We accordingly affirm the findings of the two Courts below to the E extent that the appellant was indeed one of the four persons who returned to the place of occurrence to recover the second dinghy that had been left behind by them and finding the deceased-Head Constable Shaji inside the dinghy assaulted him in the course of a scuffle and eventually took away the F dinghy with the help of his companions, after the deceased was assaulted and pushed into the sea.

13. That brings us to the second limb of Mr. Jaspal Singh's contention in support of the appeal. It was contended by him that the evidence on record established that the appellant had G not come armed to the place of occurrence. The *dao* allegedly used by him for assaulting the deceased was even according to the prosecution lying within the dinghy. That the appellant had not repeated the act and the intensity of the *dao* blow was not severe enough inasmuch as it had not caused any fracture on H the skull of the deceased.

14. It was further argued that there was no evidence medical or otherwise to prove that the injury inflicted by the appellant was in the ordinary course of nature sufficient to cause death. As a matter of fact, the injury had not itself caused the death, as according to the trial Court, the victim had died of drowning. It was urged that while according to PW-1 the deceased was pushed into the sea that version had not been supported by PW2. To top it all the prosecution case itself suggested that there was a sudden fight between the deceased and the appellant and his companions and it was in the course of the said fight that an injury was sustained causing the death of the deceased thereby bringing the case under exception 4 to Section 300 of the IPC. Relying upon the decisions of this Court in *Chinnathaman v. State [2007 (14) SCC 690], Muthu v. State [2009 (17) SCC 433], Arumugam v. State [2008 (15) SCC 590]* and *Ajit Singh v. State of Punjab [2011 (9) SCC 462]* and judgment of this Court in *Elavarasan v. State [2011 (7) SCC 110]* it was contended that the conviction of the appellant under Section 302 of the IPC was erroneous in the facts and circumstances of the case and that the evidence at best made out a case punishable under Section 304 Part II of the IPC, and in the worst case scenario, one punishable under Section 304 Part I.

15. The contention urged by Mr. Jaspal Singh is not wholly without merit to be lightly brushed aside. The prosecution case clearly is that the appellant and his companions had returned to the place of occurrence only to recover the second dinghy which they had left behind while they had escaped from the spot in the other dinghy. It is not the case of the prosecution that there was any pre-mediation to commit the murder of the deceased. It is also common ground that the appellant was not armed with any weapon. The weapon allegedly used by him to assault the deceased was even according to the prosecution case lying in the said dinghy. The nature of the injury inflicted upon the victim has not been proved to be sufficient in the ordinary course of nature to cause death. The blow given by the appellant to the

A deceased had not caused any fracture on the skull. The two courts below have, all the same, accepted the prosecution story that after the deceased was given a *dao* blow, the appellant pushed him into the sea. That finding has been affirmed by us in the earlier part of this judgment. The question, however, is B whether this act of pushing the deceased into the sea after he was given a blow on the head, no matter the blow was not proved to be severe enough to cause death by itself, would be suggestive of an intention to kill. According to Mr. Jaspal Singh the answer is in the negative. That is so because, the main C purpose of the appellant returning to the place of occurrence was not to kill any one, but only to have the dinghy back. The obstruction caused in the accomplishment of that object could be removed by pushing the deceased who was resisting the attempt made by the appellant into the sea. The fact that the D deceased was pushed into the sea, should not, therefore, be seen as indication of an intention to kill the deceased.

16. The appellant was interested only in having the dinghy back. That could be done only by removing the obstruction caused by the deceased who was resisting the attempt. E Pushing the deceased into the sea could be one way of removing the obstruction not necessarily by killing the deceased. Having said that we cannot ignore the fact that the deceased had sustained a head injury and was bleeding. Pushing a person into the sea, with a bleeding head injury may F not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of Sections 300 & secondly 304 Part I of the IPC.

G The appellant having assaulted the deceased with a *dao* and having thereby disabled him sufficiently ought to have known that pushing him into the sea was likely to cause his death. Pushing the deceased into the sea was in the circumstances itself tantamount to inflicting an injury which was likely to cause the death of the deceased. The High Court has gone into the H

question whether the deceased knew or did not know swimming. But that issue may have assumed importance if the deceased was not disabled by the assault on a vital part of his body. In the case at hand he was assaulted with a sharp edged weapon on the head and was bleeding. His ability to swim, assuming he knew how to swim, was not, therefore, of any use to him. The injury on the head and the push into the sea have, therefore, to be construed as one single act which the appellant ought to have known was likely to cause death of the deceased. Even so exception 4 to Section 300 of the IPC would come to the rescue of appellant inasmuch as the act of the appellant even when tantamount to commission of culpable homicide will not amount to murder as the same was committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of a sudden quarrel without the offender taking undue advantage or acting in a cruel or unusual manner. The prosecution evidence sufficiently suggests that a scuffle had indeed taken place on the dinghy where the appellant and his companions were trying to recover the dinghy while the deceased was preventing them from doing so. In the course of this sudden fight and in the heat of passion the appellant assaulted the deceased and pushed him into the sea eventually resulting in his death. The act of the appellant is more appropriately punishable under Section 304 (I) of the IPC instead of Section 302 of the Code invoked by the Courts below. The appeal must to that extent succeed.

17. In the result, we allow this appeal in part and to the extent that while setting aside the conviction of the appellant for the offence of murder under Section 302 of the IPC, we convict him for culpable homicide not amounting to murder punishable under Section 304 (I) of the IPC and sentence him to undergo imprisonment for a period of eight years. Sentence of fine and imprisonment in default of payment of fine is, however, affirmed.

R.P. Appeal partly allowed.