

KUNWAR PAL
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 1643 of 2013)

OCTOBER 8, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Penal Code, 1860 – s. 304 (Part II) – Prosecution and conviction of accused u/s. 304 by courts below – On appeal, held: The Intention of the accused to kill the deceased not proved beyond reasonable doubt – However, it can be held that he had knowledge that his act was likely to cause death – Hence his conviction altered to one u/s. 304 (Part II) – Sentence of life imprisonment reduced to 7 years.

Appellant-accused was prosecuted for killing one person. The prosecution case was that the appellant-accused alongwith three others, had gone with 3 double barrel guns to a marriage ceremony. Due to negligent firing, a cartridge hit the deceased and resulted in his death. PW-2 (the nephew of the deceased) lodged FIR. Trial court convicted the appellant u/s. 304 IPC and sentence him to life imprisonment and imposed fine of Rs.1000/- with default clause. High Court confirmed the conviction and sentence. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. From the evidence on record, it is difficult to accept that the shot which killed the deceased came from the gun of the appellant only. This assumes importance because admittedly there were three other persons in the ceremony, who were firing their guns. It is not possible therefore to attribute the act of killing to the appellant, or attributing any intention to cause the

A death of the deceased. The High Court in its judgment
has found intention to kill only with the observation that
the DBBL gun was carried to the ceremony with a view
to create wild disorder (pandemonium) and to do some
harm to some people. This observation is not sufficient
B to attribute the intention to kill a particular person. This
observation is also made in disregard of the practice in
this part of the country to use guns while celebrating
marriages in some communities. Therefore, it cannot be
said that in the instant case, the gun was carried to the
C marriage ceremony only to kill someone. [Para 9] [244-G-
H; 245-A-D]

2. Thus the intention of the appellant to kill the
deceased has not been proved beyond a reasonable
doubt and the appellant is entitled to the benefit of doubt.
D Therefore, the sentence under Section 304 (Part I) of the
IPC, which requires that the act by which death is caused,
must be done with the intention of causing death or with
the intention of causing such bodily injury as is likely to
cause death is not sustainable. Though it is not possible
E to attribute intention, it is equally not possible to hold that
the act was done without the knowledge that it is likely
to cause death. [Para 10] [245-E-G]

3. The appellant is guilty of committing the act which
F caused the death of the deceased since the act was done
with the knowledge that it is likely to cause death within
the meaning of Section 304 (Part II) of the IPC. However,
the sentence imposed upon the appellant is reduced to
a period of 7 (seven) years without making any alteration
G in the fine amount imposed by the trial court and
confirmed by the High Court. [Para 13] [246-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1643 of 2013.

From the Judgment & Order dated 06.12.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 198 of 2005.

Jayant Bhushan, Gyanendra Kr. Mishra, Pawash Piyush, Gyan Prakash Srivastava for the Appellant.

Rajiv Nanda for the Respondent.

The Judgment of the Court was delivered by

S.A. BOBDE, J.1. The appellant has approached this Court challenging the concurrent finding of the Trial Court and the High Court convicting and sentencing him to rigorous life imprisonment under Section 304 of the Indian Penal Code, 1860 [for short 'IPC'] and imposing a fine of Rs. 1,000/-, in default, to undergo further imprisonment for one year.

2. According to the prosecution the appellant is guilty of the said offence for having caused the death of one Ramayan Prasad, who was present in the marriage ceremony of one Kaushalya, daughter of Shyam Sunder. The incident took place on 22.05.1998 in the courtyard (aangan) inside the house of Shyam Sunder, father of the bride, where around 30 people were present to attend the ceremony while about 60 people were outside the house having snacks. The appellant was sitting at one side of the courtyard in the verandah on a trunk box. Four persons, namely, Hanuman Prasad, Ram Sewak, Mangal Singh and the appellant –Kunwar Pal, had brought double barrel guns, ostensibly for celebration. Ramayan Prasad prohibited them from firing but they did not listen. Due to negligent firing a cartridge hit the neck of the deceased, who fell down. The deceased was taken to Gadarpur Government Hospital in a Tractor Trolley where a doctor declared him dead. Ram Sewak ran away from the spot leaving behind his double barrel gun. Mangal Singh ran away with his double barrel gun. Hanuman Prasad and the appellant did not run away.

3. A first information report (FIR) was lodged on the same

A day i.e. on 22.05.1998 by one Kamlesh Kumar nephew of Ramayan Prasad, the deceased. In the FIR the informant alleged that three persons had brought guns and though prohibited they fired their gun. Due to negligent firing a cartridge hit the neck of the Ramayan Prasad, who fell down. The person who fired and the other instigators were caught by the villagers, who beat them. He named the appellant – Kunwar Pal. He further stated that from one barrel of the gun one empty cartridge was found and from the other barrel a live cartridge was found. He further stated that Ram Sewak and Mangal Singh, who were Barati, had fired from their guns and ran away. Ram Sewak left behind his gun at the spot.

4. After conclusion of the investigation, a charge sheet was filed naming the appellant and one Hanuman Prasad under Section 304 read with Section 120-B IPC.

5. The learned trial Judge recorded the evidence and heard the matter and convicted the appellant as aforesaid on the basis of the statements recorded from PW-1, PW-2, PW-4, PW-5 and PW-6. The High Court dismissed the appeal carried by the appellant and confirmed the finding of the learned Trial Judge.

6. Shri Jayant Bhushan, learned senior counsel, appearing for the appellant submitted that the impugned judgment as well as the judgment of the Trial Court is erroneous and illegal. According to the learned counsel no attempt was made by the prosecution to co-relate the fatal shot, which killed Ramayan Prasad with the gun of the appellant. No Ballistic Expert was consulted. According to the learned counsel this was crucial since even according to the prosecution 3 people had been firing from their gun and there was absolutely no motive for the appellant to kill Ramayan Prasad. Assuming without admitting that the appellant was guilty no reasons whatsoever have been recorded by the High Court for coming to the conclusion that the appellant is liable to be convicted and sentenced under Part I of Section 304 of the IPC instead of Part II of that section.

Without prejudice it is submitted assuming that the appellant is responsible for causing the death of the deceased it can only be attributed to a rash and negligent act within the meaning of Section 304A of the IPC. On the other hand, learned counsel for the prosecution supported the conviction and sentence. According to the learned counsel it is established that the appellant was carrying a gun and had fired it. There was no reason for him to carry a gun to a celebration of a marriage and it has been rightly found that he did so only with the intention of killing.

7. We have heard the learned counsel for the parties and perused the record. The prosecution has mainly relied on the FIR and the deposition of PW-2, who is the nephew of the deceased and PW-1, who was the priest called for performing the marriage rites. A perusal of the evidence of PW-2, who also lodged the FIR, shows that at least 3 persons were firing from 3 guns. Though they were prohibited by his uncle, they continued firing. One shot hit the neck of his uncle. Ram Sewak ran away leaving his gun. Mangal Singh ran away with his gun. He identified the gun used by the appellant. He also stated that one empty and one live cartridge were found in the barrels of gun of Ram Kunwar. He stated that his uncle, the deceased, was sitting facing the east and he was sitting facing the west. From this evidence, it is not at all clear that he saw the appellant or anyone else firing. He does not say he saw. It is difficult to read the deposition of this witness to mean that he saw the appellant firing at his uncle or anyone else in particular. The witness does not state where the other persons, who were also firing, were located and in which direction they were firing.

8. PW-1, the priest, states that he was invited to perform the marriage rituals of the daughter of Shyam Sunder and the incident took place in the courtyard where the wedding rituals were to be performed. He deposed that he heard firing and in two-three minutes a shot from Kunwar Pal hit the right side of neck of the deceased. This happened though Ramayan Prasad

A had asked the gun toting guests not to fire. According to this witness, the appellant was instigated by Ram Sewak and Hanuman Prasad to fire. Thereafter accused Ram Sewak and Hanuman Prasad were caught with a gun on the spot. It is difficult from the evidence of this witness to infer the veracity of his claim that it was the cartridge of Kunwar Pal that hit the deceased. He does not say whether all those firing from their gun were in his field of vision and whether he was watching each person. At another place he said that he was waiting for the bride when he "heard" the sound of fire. He did not say he saw the firing. PW-6, the investigating officer, deposed that he identified the live cartridge and empty cartridge shown to him and that he obtained the statement of FIR writer, namely, Rishi Pal Singh and complainant Kamlesh Kumar. He deposed that on the day of the incident he recorded the statement of accused persons, appellant- Kunwar Pal and Hanuman Prasad. He inspected the place of incident and prepared a site plan. He stated that he investigated the matter against Ram Sewak and Mangal Singh, who had run away. He said that he does not know from whom he enquired nor their details were mentioned in the case diary. He said that he had not taken the guns of Ram Sewak and Mangal Singh in his possession. He said that gun of the accused person was sent to the Ballistic Expert but he does not remember the report. Then he said that he does not remember whether the guns were sent or not to the Ballistic Expert. It is apparent from the deposition that the investigation was slipshod and careless. Why, without investigation about the notice of the others, the I.O. only chose to proceed against the appellant is not known. Why a ballistic report was not obtained is not known.

G 9. From the evidence on record, we find much substance in the submissions made on behalf of the appellant. It is difficult to accept that the shot which killed the deceased came from the gun of the appellant only. This assumes importance because admittedly there were three other persons in the ceremony, who were firing their gun. It is not possible therefore

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to attribute the act of killing to the appellant, leave alone attributing any intention to import causing the death of the deceased. The High Court in its judgment has found intention to kill only with the observation that "a person, who goes to holy ceremony along with DBBL gun, which is used for killing animals, must be said to be going there with the intention to create ruckus and to kill someone in the holy ceremony. What for the DBBL gun was taken to the marriage ceremony then? The obvious inference was that the same was carried to the ceremony with a view to create wild disorder (pandemonium) and to do some harm to some people." This observation is not sufficient to attribute the intention to kill a particular person. It is also made in disregard of the practice in this part of the country to use guns while celebrating marriages in some communities. We must say at once that we do not mean to approve of this practice in any way. It is not possible to agree with the High Court that in the instant case the gun was carried to the marriage ceremony only to kill someone.

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10. In these circumstances, we find that the intention of the appellant to kill the deceased, if any, has not been proved beyond a reasonable doubt and in any case the appellant is entitled to the benefit of doubt which is prominent in this case. It is not possible therefore to sustain the sentence under Section 304 Part I of the IPC, which requires that the act by which death is caused, must be done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. Though it is not possible to attribute intention it is equally not possible to hold that the act was done without the knowledge that it is likely to cause death. Everybody, who carries a gun with live cartridges and even others know that firing a gun and that too in the presence of several people is an act, is likely to cause death, as indeed it did. Guns must be carried with a sense of responsibility and caution and are not meant to be used in such places like marriage ceremonies.

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11. It was argued by Shri Jayant Bhushan, learned senior

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A counsel that the appellant might at the most, be guilty of doing a rash and negligent act not amounting to culpable homicide under section 304A. Section 304A reads as follows:

B “304A. **Causing death by negligence** - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

C 12. It is not possible to accept this submission since, for an act to be construed as an act not amounting to culpable homicide it is necessary that the act be done without the knowledge that the act is likely to cause death. Section 299 of the IPC reads as under:

D “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.”

E 13. In the present case, we are of the view that the appellant is guilty of committing the act which caused the death of the deceased since the act was done with the knowledge that it is likely to cause death within the meaning of Section 304 Part II of the IPC. In the circumstances, the appeal is allowed in part, F however, we reduce the sentence imposed upon the appellant to a period of 7 (seven) years without making any alteration in the fine amount imposed by the trial court and confirmed by the High Court.

K.K.T.

Appeal partly allowed.