

DHIRENDRA KUMAR @ DHIROO

A

v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 1848 of 2008)

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FEBRUARY 26, 2015

[DIPAK MISRA AND ADARSH KUMAR GOEL, JJ.]

Penal Code, 1860: s.302 – Murder by hitting with stone on head – Conviction u/s.302 by courts below – Held: Evidence of witnesses with regard to earlier incident of altercation between deceased and the accused-appellant furnishing motive to the accused – There was previous enmity – Evidence of eye witnesses supporting the prosecution case and found reliable – It was not case of sudden fight or sudden provocation or in the heat of passion– There was enough evidence to prove that appellant was responsible for causing death of the deceased – The injuries on the accused did not establish free fight – Nature of injuries on the deceased suggested intention to cause death or fatal injury on the vital part of the body with full force sufficient to cause death – View taken by courts below a possible view – No interference called for.

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Constitution of India, 1950: Article 136 – Scope of.

Dismissing the appeal, the Court

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HELD: 1. Re-appreciation of evidence is not called for in an appeal under Article 136 of the Constitution in absence of patent illegality or perversity merely

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A because a different view could also be taken. In the
instant case, both the courts below found the evidence
of PW 3 and PW 4 to be reliable. Evidence of PW 7
widow of the deceased was also believed with regard
to the earlier incident furnishing motive to the accused.
B PW 2 also corroborated the version given by the eye
witnesses by stating that he had seen the accused and
deceased together just before the occurrence. The
defence version of the accused was not found to be
reliable. The view taken by the courts below was
C certainly a possible view for accepting the evidence led
by the prosecution in support of its version. Thus, there
was no reason to reject the prosecution version. There
was enough evidence to prove that the accused
appellant was responsible for causing the death of the
D deceased. [Para 9] [908-C-F]

2. The nature of injuries suffered by the deceased
did not show that the injury was suffered accidentally.
There were multiple wounds and the face was
E disfigured. The bones are pulverized. The brain matter
was flowing out from all wounds. Seen in the light of
previous motive, the accused can be said to have
caused the death by acting in a cruel manner. In a plea
of sudden fight, the burden to show that the case falls
F under Exception 4 to Section 300 I.P.C. is on the
accused. No doubt even without leading positive, the
plea can be substantiated from the material on record.
In the present case, there was nothing on record to
G establish free fight. Plea of the accused was of false
implication. The circumstances taken as a whole would
lead to only possible inference that the accused has
inflicted the fatal injury with a view to cause death. The
injuries on the head were caused with full force. There
H was prior enmity. It was not a case of any sudden

quarrel or sudden provocation or in the heat of passion. A
[Paras 12 and 13] [909-G-H; 910-A-C]

3. Question whether a case fell under Section 302 B
or 304 has to be decided from case to case depending
on factors like the circumstances in which the incident
takes place, the nature of weapon used and whether
weapon was carried or was taken from the spot and
whether the assault was aimed on vital part of the body;
the amount of force used; whether the deceased C
participated in the sudden fight; whether there was any
previous enmity; whether there was any sudden
provocation; whether the attack was in the heat of
passion; whether the person inflicting the injury took
any undue advantage or acted in a cruel or unusual
manner. The list of circumstances is not exhaustive and D
there may be several other circumstances with
reference to individual cases. Applying these tests to
the instant case, the defence on behalf of the appellant
is not acceptable. It was a case of previous enmity and E
the nature of injury suggested intention to cause death
or a fatal injury on a vital part of the body with full force
sufficient to cause death. In these circumstances, there
was no ground to interfere. [Para 15] [910-G-H; 911-A-
C]

Ankush Shivaji Gaikwad vs. State of Maharashtra 2013 F
(6) SCC 770: 2013 (8) SCR 863 – relied on.

Case Law Reference

2013 (8) SCR 863 relied on. Para 7 G

CRIMINAL APPELLATE JURISDICTION: Criminal
Appeal No. 1848 of 2008.

From the Judgment and Order dated 17.11.2007 of the
High Court of Uttarakhand at Nainital in Crl. Appeal No. 158 H

A of 2007.

Hema Sahu, Rajendra Sahu, C. L. Sahu for the Appellant.

B Jatinder Kumar Bhatia for the Respondent.

The Judgment of the Court was delivered by

ADARSH KUMAR GOEL J. 1 This appeal has been preferred against the judgment and order dated 17th November, 2007 passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No.158 of 2007 upholding the conviction of the appellant under Section 302 of the Indian Penal Code and sentence to undergo life imprisonment.

D 2. Case of the prosecution is that the appellant caused the death of Surat Singh deceased with a stone at 8.30 P.M. on 1st April, 1983 at Village Jantanwala. On 2nd April, 1983 at 9.05 A.M., Mani Ram father of the deceased (who died during pendency of proceedings before the trial Court) E lodged FIR to the effect that on 28th March, 1983, the deceased had gone to the house of the accused to celebrate holi. In the night, the accused came to the house of the complainant to assault the deceased alleging that he had knocked the door of his aunt Kumari Sunita in the night F with evil intention when she was alone in her house. With the intervention of Mani Ram and PW 7 Raj Kumari, wife of the deceased, the accused was prevented from dragging the deceased out of the house but the accused left the house with a threat. On 1st April, 1983 when the deceased G went to the nearby Dehradun city, he did not return home at the night. In the morning PW2 Lal Singh told him that the deceased was seen with the accused at 7.30 P.M. in the night. Further, Lakhi Ram PW 4 and Bahadur Singh H PW 3 told him that the accused was seen beating the

deceased with a stone at 8.30 P.M. One Jagdish Singh told A
him that he had seen the dead body near the bank of the
river near the field of Ratan Singh.

3. After registering the FIR, the investigation was B
conducted by SO Rajpal Singh PW 11. Post mortem was
conducted by Dr. I.F. Nath PW6. After completing the
investigation, the accused was sent up for trial.

4. The prosecution examined as many as 12 witnesses. C
The accused in his statement under 313 Cr.P.C. took the
plea that he was falsely implicated as he was member of
Yuvak Gram Kalyan Samiti and he had made complaint to
the District Magistrate against illegal distillation of liquor
which made the police inimical to him. He had also made D
a complaint against illegal dealings of the contractors in
selling Government cement which had made contractors
inimical to him. He examined his brother, DW 1 Vijendra
Kumar Sharma in support of his version.

5. After considering the evidence on record, the trial E
Court convicted and sentenced the appellant which has
been affirmed by the High Court.

6. We have heard learned counsel for the parties.

7. Main contention urged on behalf of the appellant is F
that the evidence of Bahadur Singh PW 3 and Lakhi Ram
PW 4 as eye witnesses is not reliable as if they had seen
the occurrence as claimed, they could not have kept quiet
in the night. It was further submitted that the alleged motive G
was far fetched and could not be believed. It was finally
submitted that the case was covered by Exception 4 to
Section 300 as it was a case of sudden fight in which both
the parties threw stone at each other and thus the case falls
under Section 304 Part II. Reliance has been placed on H

A judgment of this Court in **Ankush Shivaji Gaikwad vs. State of Maharashtra**¹.

8. We have given due consideration to the rival submissions and perused the record.

B 9. As far as reliability of evidence on record is
concerned, we are of the view that re-appreciation of
evidence is not called for in an appeal under Article 136 of
the Constitution in absence of patent illegality or perversity
merely because a different view could also be taken. In
C the present case, both the courts below have found the
evidence of PW 3 Bahadur Singh and PW 4 Lakhi Ram to
be reliable. Evidence of PW 7 Raj Kumari widow of the
deceased has also been believed with regard to the earlier
D incident furnishing motive to the accused. PW 2 Lal Singh
has also corroborated the version given by the eye
witnesses by stating that he had seen the accused and
deceased together just before the occurrence. The defence
version of the accused has not been found to be reliable.
E The view taken by the courts below is certainly a possible
view for accepting the evidence led by the prosecution in
support of its version. We thus do not find any reason to
reject the prosecution version. There is enough evidence
to prove that the accused appellant was responsible for
F causing the death of the deceased.

10. Only other question which remains to be considered
is the nature of offence. Learned counsel for the appellant
submitted that the accused also received injuries which
G showed the case to be of free fight. The injuries found on
the person of the accused by PW 1 Dr. D.M. Kala are as
follows :

"1. Abraded contusion 3 x 2.5 cm. just above right eyebrow. A

2. Abraded contusion 8 cm. x 2.5 cm. on right side of face inusilry the area just below and lateral to right eye.

3. Abrasion 4 cm. x 1 cm., on right side of face 2 cms. From right angle of mouth. B

In the opinion of Medical Officer, the injuries were caused by hard blunt object or friction about one day before Injury No.1 and 2 was kept under observation while Injury No.3 was simple." C

11. On the other hand, the injury noticed on the body of the deceased is as follows :

"1. The face and head is flattened from side to side. There are multiple irregular lacerated wounds all over. The face is disfigured and right eye could not be made out. All the bones of skull, base of skull and mandible are pulverized and the brain matter is seen flowing out from all the wounds. D E

In the opinion of Medical Officer, the death of the deceased was caused due to shock and hemorrhage as a result of ante mortem injury. The doctor has also opined that the injury may be caused by stone in between 8:00 to 9:00 p.m. on 01.04.1983." F

12. The nature of injuries suffered by the deceased does not show that the injury was suffered accidentally. There are multiple wounds and the face is disfigured. The bones are pulverized. The brain matter was flowing out from all wounds. Seen in the light of previous motive, the accused can be said to have caused the death by acting in a cruel manner. In a plea of sudden fight, the burden to H

A show that the case falls under Exception 4 to Section 300 I.P.C. is on the accused. No doubt even without leading positive, the plea can be substantiated from the material on record.

B 13. In the present case, there is nothing on record to establish free fight. Plea of the accused is of false implication. From the circumstances taken as a whole, only possible inference is that the accused has inflicted the fatal injury with a view to cause death. The injuries on the head
C have been caused with full force. There is prior enmity. It was not a case of any sudden quarrel or sudden provocation or in the heat of passion.

14. Judgment in *Ankush* does not advance the case
D of the appellant. In the said case, the accused were walking near the field of the deceased when a dog barked at them. The accused hit the dog with an iron pipe and on objection being raised by the deceased there was exchange of hot words which led to a scuffle in the course of which one of
E the accused hit the deceased with iron pipe which he was already carrying. Thus, it was a case of a sudden fight on account of barking of the dog belonging to the deceased. There was no previous enmity. Barking of the dog triggered the incident and intervention of the deceased led to a
F quarrel culminating into the fatal injury on a vital part.

15. Question whether a case falls under Section 302 or 304 has to be decided from case to case depending on factors like the circumstances in which the incident takes
G place, the nature of weapon used and whether weapon was carried or was taken from the spot and whether the assault was aimed on vital part of the body; the amount of force used; whether the deceased participated in the sudden fight; whether there was any previous enmity; whether there was
H any sudden provocation; whether the attack was in the heat

of passion; whether the person inflicting the injury took any A
undue advantage or acted in a cruel or unusual manner.
The list of circumstances is not exhaustive and there may
be several other circumstances with reference to individual
cases. Applying these tests to the present case, we are
unable to accept the defence on behalf of the appellant. It B
was a case of previous enmity and the nature of injury
suggests intention to cause death or a fatal injury on a vital
part of the body with full force sufficient to cause death. In
these circumstances, we do not find any ground to interfere. C

The appeal is accordingly dismissed.

Devika Gujral

Appeal dismissed.