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Bantoo vs.state

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Court : Delhi

Decided On : Oct-11-2017

Appellant : Bantoo

Respondent : State

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: September 23, 2017 Judgment Delivered on: October 11, 2017 CRL.A. 1318/2012 BANTOO ..... Appellant Through: Mr.Chetan Lokur, Advocate. versus STATE ..... Respondent Through: Ms.Aasha Tiwari, APP for the State with Inspector Dhananjay Gupta ATO Mahendra Park CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI HONBLE MS. JUSTICE REKHA PALLI JUDGMENT1 The appellant Bantoo has preferred this appeal impugning the judgment dated 23rd July, 2012 and order on sentence dated 31st July, 2012 passed in Sessions Case No.19/2011 (case FIR No.61/2011 under Section 302 IPC PS Mahendra Park) whereby he has been convicted for committing the offence punishable under Section 302 IPC and sentenced to undergo rigorous imprisonment for life with fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment for one month.

2. In brief the prosecution case is that on the night intervening 18th/19th March, 2011 vide DD No.4A an information was received about the murder being committed at the MCD Toilet, J-Block, Jahangirpuri. SI Sandeep Kumar along with Constable Subhash CRL.A. No.1318/2012 Page 1 of 15 reached the spot and

found the complainant Smt.Bachno Devi (PW- 11), mother of the deceased present and body of Shyam Singh was lying on the first floor of the MCD Toilet. Smt.Bachno Devi reported about the incident vide complaint Ex.PW11/A stating that the deceased Shyam was her son whose right hand was polio affected and he was a smack addict for past 7-8 years. The accused Bantoo was also a smack addict. Both of them (deceased and accused) used to beg, buy smack and consume at the public toilet. On the date of occurrence also at about 10:00 PM accused Bantoo came to her house and took Shyam along with him towards MCD toilet, J-Block. Accused Bantoo was also having vegetable cutting knife. Though she tried to call her son back and also asked accused Bantoo to throw the knife, but they did not pay any heed and climbed the stairs of the toilet. The deceased Shyam and the accused Bantoo, both were in the habit of consuming smack there and also used to sleep in the toilet. As it was their daily routine, she did not suspect anything. However, after some time she heard the cries of her son and also saw accused Bantoo shouting that he had stabbed Shyam and thereafter he ran away from there. Ravi (PW-16), cousin of the deceased Shyam, chased accused Bantoo and managed to apprehend him near I-Block, MCD Public Toilet. PCR was informed. Accused Bantoo was handed over to PW-19 Ct.Narender Mann who happened to reach there while patrolling in the area. At the instance of accused Bantoo knife was also recovered from the nearby garbage near the entry gate of MCD Public Toilet at J-Block, Jahangir Puri, Delhi. The deceased Shyam CRL.A. No.1318/2012 Page 2 of 15 was taken to Babu Jagjiwan Ram Memorial Hospital where he was declared Brought Dead.

3. On the basis of the above complaint Ex.PW-11/A, FIR Ex.PW20/A was registered. After completion of the investigation, the accused Bantoo was sent to face trial for committing the offence punishable under Section 302 IPC. As he pleaded not guilty to the charge and claimed trial, prosecution examined 24 witnesses in support of his case. The appellant was also examined under Section 313 Cr.P.C. to enable him to explain the evidence appearing against him. He did not lead any evidence in his defence.

4. Mr.Chetan Lokur, learned counsel for the appellant has filed the written synopsis as well made oral submissions.

5. On behalf of the appellant, Mr.Chetan Lokur, Advocate from DHCLSC has submitted that prosecution has miserably failed to prove its case. He has referred to the scaled site plan Ex.PW2/A and the site plan Ex.PW24/C which does not prove that from the house of the deceased the staircase leading to roof of MCD Public Toilet, J-Block, Jahangirpuri, Delhi was visible. Hence the statement of PW-11 Smt.Bachno Devi, that she had seen deceased Shyam accompanied by accused Bantoo climbing the stairs of the Public Toilet could not have been relied upon to base his conviction. Since the sole witness to the last seen evidence is PW-11 Smt.Bachno Devi - mother of the deceased and her statement is not corroborated to the above extent by the site plan, the impugned judgment is liable to be set aside.

6. Mr.Chetan Lokur, Advocate has also submitted that as per PW-11 Smt.Bachno Devi after committing the murder of deceased CRL.A. No.1318/2012 Page 3 of 15 Shyam, the accused Bantoo came on the street and uttered the words maine shyam ko chakoo maar diya, saale ne mujhe smack nahi di. The place of occurrence being a thickly populated area, no independent public witness has been examined to prove that the accused Bantoo shouted openly that he had killed Shyam and even PW-16 Ravi also did not state that he had heard any such shouting before he started chasing accused Bantoo.

7. Learned counsel for the appellant has also referred to the forensic and medical evidence to contend that the case of the prosecution is not even corroborated by the medical and forensic evidence. The finger prints of the appellant were not found on the knife used for committing the murder. There is also no mention in the postmortem report Ex.PW-10/A that the deceased Shyam had consumed smack. There is also no evidence that clothes worn by the accused Bantoo at that time were having blood stains of the blood group of the deceased Shyam.

8. In the alternative, learned counsel for the appellant has submitted that even if the testimony of PW-11 is considered to be reliable, the appellant could not have been convicted under Section 302 IPC. Rather it is admitted case of the prosecution that the deceased and the accused both were smack addicts and they used to consume smack together. The weapon of offence is a vegetable cutting

knife and they were in the habit of begging and buying smack and thereafter consuming the same together in the public toilet. It was on refusal of the deceased Shyam to share the smack with the accused Bantoo that provoked the accused/appellant to cause injuries so as to CRL.A. No.1318/2012 Page 4 of 15 create fear in the mind of the deceased to make him part with the smack so that the appellant could also consume.

9. It has also been contended that even as per the statement of PW-16 Ravi, after being apprehended the appellant asked him to check whether deceased Shyam was alive which further proved that the appellant was concerned about the well being of deceased Shyam and he had no intention to commit his murder. The appellant at that time was deprived of his power of self control as he was under the influence of smack and refusal by the deceased Shyam to share the smack provoked him to use the vegetable cutting knife which he was carrying, hence the case of the accused Bantoo is covered by explanation 4 to Section 300 IPC and he may be convicted for committing offence of culpable homicide not amounting to murder.

10. Learned counsel for the State while refuting the contentions raised on behalf of the accused Bantoo submitted that the deceased Shyam was seen by his mother PW-11 going along with the accused Bantoo towards MCD Public Toilet, J-Block, Jahangirpuri and climbing the stairs. The body of the deceased Shyam was found on the roof of the MCD Public Toilet, J-Block, Jahangirpuri. It has also been contended that the weapon of the offence i.e. vegetable cutting knife was seen by PW-11 Smt.Bachno Devi in the hand of the accused Shyam and the same knife has been recovered at his behest from near the garbage where he had thrown it after committing the offence. It has been contended that it is not a case of grave and sudden provocation so as to claim any benefit under explanation 4 to Section 300 IPC. The injury No.1 has been opined to be caused by knife CRL.A. No.1318/2012 Page 5 of 15 Ex.PW-16/D and was sufficient to case death, hence the impugned judgment does not require any interference or modification.

11. We have considered the rival contentions and also examined in detail the judgment by the learned Trial Court.

12. In the present case the prosecution has relied on the statement of the mother of the deceased, Smt.Bachno Devi (PW-11) who had seen the deceased Shyam accompanying the accused Bantoo towards the J-Block, MCD Public Toilet which was a routine for them to consume smack and sleep there in the toilet itself, as well statement of Ravi (PW-16), brother of the deceased who chased the accused Bantoo immediately after the occurrence and handed him over to PW-19 Const.Narender Maan. The prosecution also relied on the opinion given by Dr.Bhim Singh (PW-10) who conducted the postmortem. As per post mortem report Ex.PW-10/A, the cause of death was due to shock as a result of excessive bleeding via Injury No.1 i.e. incised stab wound horizontally placed, left side of chest in the mid axillary line at the level of 4 intercostal space, situated 7 cm below axilla, measuring 4 cm x 1 cm x cavity deep inner angle obtuse, which was sufficient to cause death in the ordinary course of nature.

13. This is a case wherein deceased Shyam was last seen in the company of the accused Bantoo by his mother PW-11 Smt.Bachno Devi. Merely because in the scaled site plan Ex.PW-2/A and the site plan Ex.PW-24/C the house of the deceased Shyam, from where PW-11 Smt. Bachno Devi saw both of them going towards the toilet and climbing the stairs is not shown, is no ground to disbelieve her testimony to the above effect. It is also note worthy that PW-11 CRL.A. No.1318/2012 Page 6 of 15 Smt.Bachno Devi has not even been suggested during her cross- examination that from her house the staircase of MCD Public Toilet, J-Block, Jahangirpuri was not visible or she could not have seen them climbing the staircase to go to the roof of the toilet. It has also not been put to her that the accused Bantoo did not come to her house to take deceased Shyam along with him towards J-Block, MCD Public Toilet. PW-11 Smt.Bachno Devi, mother of the deceased has specifically stated that she did not pay much heed as it was a daily routine for the deceased Shyam and the accused Bantoo to beg and buy smack and then consume and sleep on the roof of that MCD Public Toilet. She came to know about the incident on hearing the accused Bantoo maine shyam ko chakoo maar diya, saale ne mujhe smack nahi di. Merely because PW-16 Ravi could not hear what the accused had uttered about the incident is no ground to disbelieve his testimony that after hearing the cries of PW-11 Bachno Devi (aunt of PW-16 Ravi), he chased accused Bantoo and managed to

apprehend him near I-Block, MCD Public Toilet. The statement of PW-19 Const.Narender Maan proved that the accused Bantoo was handed over to him by PW-16 Ravi.

14. In his statement under Section 313 Cr.P.C. though the accused Bantoo had denied the entire prosecution case, but he did not dispute that he was a smack addict, in the habit of taking smack with the deceased Shyam at the public toilet and sleep there. He claimed that he was apprehended from Subzi Mandi at about 4:00-5:00 PM when he was begging thereby only disputing the date and time of his apprehension and arrest. CRL.A. No.1318/2012 Page 7 of 15 15. The rukka in this case has been sent on 9th March, 2011 at 1.35 AM on the basis of which FIR Ex.PW20/A was recorded at 1.50 AM upto 2.40 AM. As per the MLC Ex.PW10/E, Shyam was declared Brought Dead at 3.05 AM. PW-7 Sonu - the public witness has stated that on 19th March, 2011 at about 12.00/12.30 AM on hearing the noise from the street, he came out and was informed by some public person about the murder in the Shauchalya (toilet). Thereafter he made a call to PCR from his mobile No.9289909057 to inform about the murder. PW-16 Ravi - cousin of the deceased Shyam had apprehended the accused Bantoo who told him that he was asking for smack from deceased Shyam who refused to give and out of anger he (accused Bantoo) gave two-three knife blows on the person of Shyam. The accused further told him that he had thrown the said knife at the garbage dumping site and also asked him to first check and see the condition of Shyam that he should not die. Then he took accused Bantoo near the toilet of J-Block where he came to know that Shyam had already died and by that time many public persons from the neighbourhood gathered there. He handed over the accused Bantoo to PW-19 Constable Narender Maan who was on patrolling duty in the beat area and was the first to reach the spot. The accused also disclosed that he has thrown the knife in the garbage dump near the toilet. On the basis of the disclosure statement made at the spot by accused Bantoo, the knife Ex.P1 was recovered vide memo Ex.PW16/D from the garbage dump near the toilet in the presence of public witnesses. When the knife was recovered, it was stained with blood. CRL.A. No.1318/2012 Page 8 of 15 16. PW-19 Ct.Narender Mann was posted as Beat Constable in the area of I-J Block, Jahangir Puri and was on patrolling duty on the night intervening 18/19th March, 2011. He has stated that during patrolling when

he reached MCD Toilet, J-Block, Jahangir Puri at about 12:30 AM (midnight) he saw large number of public person gathered there. On inquiry he came to know one person namely Shyam has been murdered. He also stated that in the meantime Ravi (PW-16) produced accused Bantoo and stated that Bantoo had committed murder of Shyam. Ravi also informed him that the police has been informed (by PW-7). After some time PCR van reached there and SI Sandeep along with staff from the police station also reached and further proceedings were conducted.

17. PW-15 Sh.Bagwan Dass - father of PW-16 Ravi is a witness to the arrest of the accused Bantoo vide Arrest Memo Ex.PW-15/A. Personal search of accused Bantoo was also conducted in his presence vide Memo Ex.PW-15/B.

18. The learned trial Court has convicted the appellant on the basis of circumstantial evidence that the deceased being last seen in the company of the accused before he was found dead in the MCD toilet, J-Block as well on the basis of extra-judicial confession made by him to PW-16, Ravi and also when he was heard by PW-11, Smt. Bachno Devi shouting that maine shyam ko chakoo maar diya, saale ne mujhe smack nahi di. The medical evidence i.e. post mortem report Ex.PW-10/A proved that the cause of death was due to shock as a result of excessive bleeding via Injury No.1 i.e. incised stab wound horizontally placed, left side of chest in the mid axillary line at the CRL.A. No.1318/2012 Page 9 of 15 level of 4 intercostal space, situated 7 cm below axilla, measuring 4 cm x 1 cm x cavity deep inner angle obtuse, which was sufficient to cause death in the ordinary course of nature. PW-10 Dr.Bhim Singh has also stated that on 5.5.2011 he received a request for opinion on the weapon of offence i.e. knife and after examining the said knife he had opined that the injury no.1, 2 and 3 could be caused by the said knife and the cut marks mentioned on the clothes of the deceased were corresponding with Injury No.1, 2 and 3. PW-10 Dr.Bhim Singh has proved the subsequent opinion given by him along with the sketch of the knife which is Ex.PW-10/G.

19. PW-23 Dr.Rajendra Kumar has proved the Biological Report Ex.PW23/A in respect of the exhibits sent to FSL as well as the serological report Ex.PW-23/B

showing that blood of A Group was detected on the pair of chappal Ex.P2, match box with sticks Ex.P3, polythene sheet Ex.P4, pant Ex.P7 and shirt Ex.P8 of the accused deceased. Further, the weapon of offence i.e. the knife showed positive results for human blood and the clothes of the accused Bantoo also showed the presence of human blood. The knife Ex.P-1 was stained with human blood and it was recovered immediately after the occurrence on the basis of disclosure statement made by the appellant in the presence of public witnesses, PW-11 & PW-16. On an overall consideration of the prosecution evidence and it being a case of total denial by the appellant during his examination under Section 313 Cr.P.C., the learned trial Court held him guilty under Section 302 IPC for which he was charged. CRL.A. No.1318/2012 Page 10 of 15 20. The testimony of PW-11, Smt.Bachno Devi; PW-16, Ravi and PW-15, Bhagwan Dass, (father of PW-16 Ravi) clearly established that they were witnesses to the events which immediately preceded as well to the events immediately occurred after the incident which were intrinsically connected to each other. The time of incident was around midnight which is sleeping time. But for the shouting by the appellant that he had stabbed Shyam, PW-11 would not have even come to know about the incident at that hour. Only on hearing the shouting by the accused, she came out and thereafter, on hearing her cries, PW-16 Ravi woke up and came out. He chased and overpowered the appellant/accused in the public toilet complex of I-block while he was consuming smack. PW-16 Ravi found blood stains on the clothes of accused Bantoo. Accused Bantoo informed PW-16 Ravi that he was asking for smack from Shyam who refused to give the same and out of anger, he gave two-three knife blows on the person of Shyam and that he had thrown the knife at the garbage dumping site. Accused Bantoo also asked him to first see the condition of Shyam so that he could be saved. Then PW-16 Ravi took accused Bantoo near the toilet of J- Block where he came to know that Shyam had already died.

21. The testimony of the prosecution witnesses in our opinion has been strengthened and supported by the forensic report which confirmed blood stains on the jeans/shirts of the accused as well on the knife. The post mortem report Ex.PW10/A confirmed the cause of death due to shock as a result of excessive bleeding via Injury No.1 i.e. incised stab wound horizontally placed, left side of chest in the mid axillary line at the level of 4 intercostal space, situated 7 cm

CRL.A. No.1318/2012 Page 11 of 15 below axilla, measuring 4 cm x 1 cm x cavity deep inner angle obtuse, which was sufficient to cause death in the ordinary course of nature and the injuries no.1, 2 and 3 being possible with the knife Ex.P1.

22. That brings the discussion as to what would be the appropriate conviction in above circumstances i.e. under Section 302 IPC or under Section 304 IPC. Section 300 IPC in its opening part provides that culpable homicide would be murder save the exceptions. Exception 4 to Section 300 IPC reads 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. In the decision reported as Gurmukh Singh Vs. State of 23. Haryana, 2009 (15) SCC635 while discussing the parameters as to whether the offence falls under Section 302 IPC or Section 304 IPC, the Supreme Court held as under:-

"20. In another case Pappu v. State of M.P. (2006) 7 SCC391 this Court observed as under:

".....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 acted 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 CRL.A. No.1318/2012 Page 12 of 15 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. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The

expression 'undue advantage' as used in the provision means 'unfair advantage'. that whenever It cannot be laid down as a rule of universal application is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors. one blow Considering the factual background in the case at hand it will be appropriate to convict the appellant under Section 304 Part II IPC, instead of Section 302 IPC as has been done by the trial court and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice. The appeal is allowed to the aforesaid extent."

21. In the instant case, the occurrence had taken place at the spur of the moment. Only the appellant Gurmukh Singh inflicted a single lathi blow. The other accused have not indulged in any overt act. There was no intention or pre- meditation in the mind of the appellant CRL.A. No.1318/2012 Page 13 of 15 to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature.

22. On consideration of the entire evidence including the medical evidence, we are clearly of the view that the conviction of the appellant cannot be sustained under section 302 IPC, but the appropriate section under which the appellant ought to be convicted is section 304 Part II IPC. 24. The facts of this case do not point to a calculated or premeditated incident on the part of the appellant to kill the deceased who was his companion not only in begging but also in consuming drugs. Both were drug addicts and literally the public toilet at J-block was their night shelter. This is not a case for conviction under Section 302 IPC. The appellant, however, can be said to have possessed the knowledge that his act would result in such injury on the deceased which in the normal course of nature would have resulted in his death and consequently he was guilty of committing the offence punishable under Section 304 part II IPC.

25. In the present case the evidence on record points out that the deceased and the accused both were beggars and smack addicts. They used to buy smack out of the amount received by begging and it was a routine for them to consume smack in the MCD toilet, J-Block and sleep there only. In the arrest memo the address of the appellant has not been recorded and he is referred to as a

Vagabond. Thus, it is clear that whatever he possessed, it used to be carried by him and the kitchen knife was part of that. The quarrel started as the deceased did not share the smack with the appellant and the appellant himself being CRL.A. No.1318/2012 Page 14 of 15 a smack addict, attacked the deceased to scare him and make him agree to share the smack. The quarrel had taken place at the spur of moment in a sudden fit of anger without any premeditation. This Court is conscious of the fact that the appellant inflicted three knife injuries out of which injury No.1 proved to be fatal. But even after being apprehended, as per PW-16, the appellant was concerned as to whether the Shyam was alive or not and asked him to check Shyam. After the incident, he even came out in the open and shouted in a loud voice that he had stabbed him as he was not sharing smack with him.

26. In view of the above discussion the conviction under Section 302 IPC is altered to Section 304 Part II IPC.

27. As a consequence while maintaining the sentence of fine, the sentence of imprisonment is modified and instead of life imprisonment, he shall undergo rigorous imprisonment for 10 years.

28. The appeal is allowed in above terms.

29. A copy of the order be sent through the Jail Superintendent for information and updation of the record.

30. Trial Court Record be sent back along with copy of this order. OCTOBER11 2017 hkaur CRL.A. No.1318/2012 PRATIBHA RANI (JUDGE) REKHA PALLI (JUDGE) Page 15 of 15

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