SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Parween @ Chander Prakash Vs. State

Parween @ Chander Prakash Vs. State

SooperKanoon Citation : sooperkanoon.com/42639

Court : Delhi

Decided On : Feb-03-2015

Judge : G. S. Sistani

Appellant : Parween @ Chander Prakash

Respondent : State

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 1005/2013 % Judgment dated 03 February, 2015 PARWEEN @ CHANDER PRAKASH ..... Appellant Through: Mr.Harit Chhabra, Advocate versus STATE Through: ..... Respondent Mr.Sunil Sharma, APP for the State CORAM : HONBLE MR. JUSTICE G. S. SISTANI HONBLE MS. JUSTICE SANGITA DHINGRA SEHGAL G.S. SISTANI, J.

(ORAL) 1. Present appeal has been filed by the appellant under Section 374 of the Code of Criminal Procedure read with Section 482 of the Code of Criminal Procedure for setting aside the judgment dated 12.7.2013 and order on sentence dated 16.7.2013 passed by learned Additional Sessions Judge, Rohini Courts, Delhi, in case FIR No.1674/06 registered under Sections 302/397/34 IPC at Police Station Sultan Puri, by which the appellant has been convicted to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code with fine of Rs.5,000/- and in default of payment of fine to undergo further simple imprisonment for six months. The appellant was further directed to

undergo Rigorous Imprisonment for the period of seven years with fine of Rs.3,000/- for the offence punishable under Section 397 of the Indian Penal Code and in default of payment of fine Simple Imprisonment for three months. It was directed that both the sentences would run concurrently and benefit of section 428 was given to the appellant.

2. The case of the prosecution, as noticed by the trial court in its judgment dated 12.7.2013, is as under:

1. night Briefly stated the case of the prosecution is that on the intervening 18/19.10.2006, PW-26 Ins.Ravinder Singhw was patrolling in the area of PS Sultan Puri and while patrolling, he was informed by the duty officer that DD No.7-B dated 19.10.2006 had been registered regarding apprehension of one thief at P-II Sultan Puri. Accordingly, PW-26 Ins. Ravinder Singh reached there and found PW-10 ASI Ranbir, PW-12 Ct. Biri Singh and accused Krishan present there and came to know that accused Krishan along with his other co-associate had inflicted injuries on the person of one lady namely Pinky and that accused Krishan had been apprehended at the spot and that the injured lady had already been removed to Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi by her husband/PW-3 Deepak Kumar. PW-26 Ins. Ravinder Singh went to Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi, along with his staff and accused Krishan, leaving PW-21 Ct. Joginder at the spot. The PW-8 HC Raj Kumar and PW-13 Ct. Ravinder were also called to the hospital and accused Krishan was handed over to them with directions to get his medical examination conducted. The PW-26 Ins. Ravinder Singh also met PW-3 Deepak, husband of injured Pinky in the hospital, however, he did not give any statement then as he was busy in treatment of his wife. At about 3:15/3:20 A.M. the concerned doctor declared Smt. Pinky dead. Thereafter, Ex.PW-3/A i.e. statement of PW-3 Deepak Kumar was recorded, wherein he stated that he was residing with his family in rented accommodation at P-II/1484, Sultan Puri, Delhi and was working in a factory. He had married Pinki (since deceased), two years prior to the incident. On the night of the incident, complainant was watching film on television along with his parents, sister Sadhana and cousin (maternal brother) Vijay in the room, while his wife was sleeping on a bed on the roof of the room. At about 12.30/12.45 mid night, the complainant

heard his wife screaming and he came out of the room and saw that two boys had climbed roof of the house. One of the said boys had closed the mouth of his wife, while the other gave a forceful blow with a brick on the head of his wife. In the meantime, Vijay, cousin brother of the complainant also came out. As the complainant was liming the ladder, kept for going to the roof, to save his wife, both the boys started coming down from the said ladder. The first boy pushed complainant backwards and managed to escape by climbing down the ladder, however, complainant managed to apprehend the other boy, who had given blow with a brick on his wifes head, while he was attempting to escape. In the meantime, public persons also collected at the spot and gave beatings to accused Krishan, as his name was revealed later on. Complainant took his wife to Sanjay Gandhi Memorial Hospital and while doing so, he observed that the artificial ear-rings, which his wife had been wearing, were missing. The complainant further started that accused Krishan told that name of his co-accused was Parveen. The complainant prayed that necessary action be taken against the accused persons. The PW-26 Ins. Ravinder Singh prepared rukka Ex. PW-26/A on the basis of the said complaint and sent it to PS for registration of the case through PW-12 Ct. Biri Singh.

3. Counsel for the appellant submits that the trial court has erred in convicting the appellant herein, as there are material contradictions in the testimony of the witnesses. The impugned judgment is based on surmises and conjectures; and the prosecution has been miserably failed to prove the chain of events and circumstances against the appellant herein. It is also the case of the appellant that the trial court has failed to appreciate that the so called material witnesses PW-3 and PW-6 are relatives of the deceased and being interested witnesses their testimonies cannot be believed. It is also submitted that the prosecution has failed to join any independent witness in the recovery proceedings, although it was a thickly populated area and public persons were present. It is also submitted that the testimony of the witnesses do not inspire confidence. The weapon of offence has not been proved; moreover, the appellant was not visible at the place where the alleged crime took place, as it was Winter season and was dark at night. The case against the appellant has been fabricated and he has been wrongly implicated.

4. It has also been submitted that there were five other persons in the house whose evidence was not recorded; the recovery made at the instance of the appellant is not trustworthy and reliable. Counsel for the appellant also submits that although the co-accused had named the appellant herein, but the prosecution has failed to establish that he is the correct Parween, as it is submitted that some other Parween may have committed the crime with the co-accused.

5. Learned APP for the State submits that the prosecution has been able to establish it case beyond any shadow of doubt; and the appellant was named by the co-accused; he was correctly identified by the two witnesses. It is not the case of the appellant that there was any enmity between him and the witnesses, neither any suggestion to this effect was put during the cross examination.

6. As far as the submissions made by counsel for the appellant that the identity of the appellant has not been established, learned APP for the State submits that this submission is without any force, as no such suggestion was put during cross-examination and it is merely an afterthought.

7. Learned APP for the State also submits that the appellant had refused the TIP; the ear rings were recovered based on the disclosure statement made by him and based on the ocular evidence of the two witnesses. Hence, the appellant has been rightly convicted.

8. Before the rival submissions of counsel for the parties can be considered, we may notice that an alternate argument has been raised by counsel for the appellant that even otherwise at best a case under Section 304 Part-I of IPC would be made out against the appellant, as the present appellant did not inflict any injury on the victim, and the role attributed to him is that he closed the mouth of the victim; and no conspiracy has been proved.

9. As per the evidence of PW-3 (the husband of the deceased), he was residing on the first of the house at house No.PII/484, Sultanpuri, Delhi; he was married to the deceased; on the fateful night of 18.10.2006 he along with his parents, sister and cousin brother, Vijay were watching T.V. while his wife had gone on the roof to sleep. Between 12:30 and 12:45 at night he heard noise of his wife, upon which he

immediately came out of the room with Vijay and saw two boys present in the roof; one of them had gagged the mouth of his wife and the other was holding the brick in his hand with which he had hit on the head of the victim. PW-3 has also testified that he and his cousin (Vijay) went to save her; one of the assailants ran away from the roof through the stairs; the person, who had hit his wife with the brick was apprehended and beaten up by the neighbours and he disclosed his name as Krishan. This witness identified Krishan in the court. This witness removed his wife to Sanjay Gandhi Memorial Hospital in a TSR; he noticed that his wifes ear rings were missing; at the hospital his wife was declared brought dead. The person who was apprehended disclosed the name of the other boy as Parween, the appellant hearing. PW-3, identified the appellant in the court as the person, who had gagged the mouth of his wife. He also identified the ear rings of his wife and also the blood stained clothes of his wife, the gadda and the brick used for the commission of offence.

10. During cross examination PW-3 has deposed that there was an electric bulb on the side of the roof and the light was coming from the said bulb; also during cross-examination this witness has detailed that when he was climbing the stairs first of all, the appellant herein (Parween) came down from the stair and pushed him and escaped and behind him accused Krishan was coming down from the stair, who was apprehended by him and his cousin (Vijay).

11. PW-6, Vijay Kumar, the cousin of PW-3 has also testified on the lines of PW-3. He testified that about 12:30 to 12:45 at night he heard cries of Pinki, after which her husband (PW-3) went towards roof; he followed him; they saw two boys present on the roof; one of the boys had gagged the mouth of the victim and the other boy had brick in his hand and he had hit Pinki with it. He identified the boy, who had hit with brick and also identified the appellant herein as the person, who had gagged the mouth of the victim. He also testified that the accused, Krishna was apprehended at the spot; and several persons of the locality were gathered and Krishna was beaten by the public.

12. We may notice that during the cross-examination this witness (PW-6) has testified that it was dark in the night and he had not noticed any electric bulb or

any light near the roof or near about the roof. PW-5, Harpal Singh, who was one of the neighbours has testified that he had heard noise in the night intervening 18-19.10.2006; he reached the house of Deepak, (PW-3), where Deepak and his cousin had caught hold a person, whose name was later on revealed as Krishan. This witness has testified that he had made a PCR call from his mobile No.9891162402. This witness had made some improvements in his examination-in-chief with respect to his role, while apprehending Krishan; and during cross-examination he testified that he had heard noise of Chor Chor. He denied the suggestion that there was darkness at the spot of the incident. PW-7 (Dr.Brijesh Singh), who was posted at Sanjay Gandhi Memorial has testified that on 19.10.2006 at about 1:35 a.m. patient was brought to the hospital by her husband with alleged history of physical assault (hit by blunt object). He found lacerated bone over left temporoparietal region extending upto occipital region (size 14 cm x 1 cm) and thereafter he referred the patient to surgical department for opinion. This witness has proved the MLC Ex. PW-7/A. PW-7 could not specify the exact weapon with which the injury was caused, however testified that it was a blunt weapon.

13. PW-2, Dr. V.K. Jha (MO Sanjay Gandhi Memorial Hospital) conducted the post mortem on the dead body and he testified that on external examination he found (i) a sutured wound over left temporoparietal region of deceased which was 17 cm in length and (ii) bruised left eye. This witness has also testified that on internal examination, he noticed that (i) Head - Scalp tissues had sub scalp haemotoma on left front temporoparietal region and (ii) there was a fracture of left temporal occipital bone with subdural hemorrhage and subarachnoid hemorrhage over left front temporoparietal region. This witness has also testified that he opined that the cause of death of deceased was coma as a result of head injury inflicted by other party and that the said head injury was sufficient to cause death in ordinary course of nature and that all injuries were ante mortem in nature.

14. PW-10 ASI Ranbir Singh deposed that on 19.10.2006 on receipt of DD No.7B regarding apprehension of theft, he along with PW-12 (Ct. Biri Singh) reached the spot and came to know that no incident of apprehension of theft had happened.

15. PW-26 (Inspector Ranvir Singh) has inter alia testified that on 26.10.2006 the accused Krishan was taken out from the lock-up of the Police Station; he led the police party comprising of PW-26, PW-14 (Constable Satbir), PW-22 (Constable Pawan Kumar) to Mangol puri in search of Parween (appellant herein); they got him arrested vide arrest memo Ex.PW-14/B; his person search was conducted vide personal search memo Ex.14/C; body inspection vide Ex.PW-26/E. This witness has also testified that during the course of interrogation the appellant made a disclosure statement Ex.PW-14/A; the appellant was kept in muffled face; he led the police party to his house and got recovered two ear rings which were kept under mattress; the ear rings were taken into possession vide seizure memo Ex.-14/D. This witness has also testified that the appellant had refused to participate in TIP proceedings.

16. DW-1, Smt.Rekha one of the neighbours of the appellant has testified that on 19.10.2006 at about 5:00 a.m. four police officials came in civil dress and enquired from her about the house of Parween; the police officials went to the house of the present appellant (Parween), wherein he was found sleeping; the police officials arrested the appellant (Parween)..

17. DW-2, Anand, another neighbour has also testified that on 19.10.2006 at about 5:00 a.m. he had heard some noise; he found four police officials and DW-1 present; those officials taken away, the Parween; however during the cross-examination, this witness has testified that he was not a summoned witness and DW-1, Rekha had told him about the fact that the Parween had been taken away by the police officials.

18. We find that the evidence of PW-3 and PW-6 to be trustworthy, reliable and consistent in terms of the date and time of the incident. It is proved that the family was watching television and the victim had gone to sleep on the roof; it is consistent that both the witnesses had seen two boys and the witnesses have identified the present appellant, as the person, who had gagged the mouth and the other boy, Krishan, who had hit the deceased with the brick. Testimony of both these witnesses is consistent with regard to how one (the appellant herein) had slipped out and the other was apprehended and was given beating by the

neighbours. The evidence finds corroboration from the testimony of PW-5, who was a neighbor and the one who had informed the police through his own cell phone.

19. Counsel for the appellant has urged that it was unclear as to whether the appellant was the same Parween, who was named by the co-accused. This argument is firstly an afterthought, as no suggestion was put to any of the witnesses, moreover, this argument is without any force, as based on the disclosure statement of the present appellant the ear-rings of the victim, which were robbed, were recovered.

20. There is no force in the submissions made by counsel for the appellant that there are material contradictions with regard to the evidence of PW-3, the husband of the deceased and PW-6, Vijay (cousin of the husband of the deceased). No material contradiction has been pointed out to us either. There is also no force in the submission of counsel for the appellant that the testimony of PW-3 and PW-6 should be discarded, as they are interested witnesses, as it has been repeatedly held that the evidence of interested witnesses can be relied upon, provided they are trustworthy and reliable, but with caution.

21. It would be worthwhile to reproduce herein the observations of this Court in Crl.A.No.470/2003, Harish Vs. The State, reported at 2008 (147) DLT608 2008 (2) AD (Delhi) 405 particularly paragraphs 41 and 42, where the law laid down by the Apex Court with regard to admissibility of testimony of partisan/interested witness has been relied upon:

41. It has been consistently held by the Apex Court that Courts must be cautious and careful while weighing such evidence given by witnesses who are partisan or interested, but such evidence should not be mechanically discarded. It will be useful to refer to the judgment of Masalte Vs. State of Uttar Pradesh, reported at AIR1965 Supreme Court 202, relevant portion of which is reproduced below:

14. Mr.Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely

members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses; Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to, failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

42. Similar view has also been expressed in the case of State of Punjab Vs. Karnail Singh, reported at AIR2003 Supreme Court 3613:8. We may also observe that the ground that the witnesses being close relatives and consequently being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh and others v. The State of Punjab (AIR 1953 SC364 in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J.

it was observed:- We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - Rajasthan', (AIR 1952 SC54at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of

counsel.

9. Again in Masalti and others v. The State of U.P. (AIR 1965 SC202 this Court observed : (pp. 209-210 para 14):

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses..... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

10. To the same effect is the decision in State of Punjab v. Jagbir Singh, (AIR 1973 SC2407 and Lehna v. State of Haryana, (2002 (3) SCC76. As observed by this Court in State of Rajasthan V. Smt. Kalki and another, (AIR 1981 SC1390, normal discrepancies in evidence are those who are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those who are not normal, and not expected of a normal person. Courts have to lable the category to which a discrepancy may be categorized. While normal discrepancies do so. These aspects were highlighted in Krishna Mochi and others v. State of Bihar etc. (JT2002(4) SC186.

22. Another argument which has been raised by counsel for the appellant is that the recovery cannot be relied upon, as no independent witness was involved at the time of recovery. We may notice that PW-26 has specifically testified that during his cross-examination that he had asked pubic witnesses to join investigation at the time of recovery of ear-rings at the instance of the appellant, but none had agreed and in fact whoever were called by him left the place without disclosing their names and addresses.

23. In the case of Kalpnath Rai Vs. State reported at AIR1998(SC) 201, wherein it was observed:

There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during the raid would cast an added duty on the court to adopt greater care while scrutinizing the evidence of the police officers. If the evidence of the police officer is found acceptable, it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined.

24. To say that the appellant was identified for the first time in the court and thus it cannot be said that he was duly identified as the person, who was present at the spot is also not acceptable, as the appellant himself had refused to participate in the TIP proceedings and thus the identification of the appellant for the first time in the court can be relied upon. [See Munna Vs. State reported at AIR 2003 SC2805
25. Section 304 of the Indian Penal Code, reads as under:

304. Punishment for culpable homicide not amounting to murder.-Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life]., or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

26. In Rajendra Singh Vs. State of Bihar, reported at AIR 2000 SC1779it has been held that :

In order to bring the case within Exception 4 to Section 300 of Indian Penal Code all the following conditions have to be fulfilled, namely, (1) The act must be committed without premeditation in a sudden fight in the heat of passion; (2) when there was a sudden quarrel; (3) without the offender taking undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual conduct or exchanging of blows on each other. When the

deceased was armed and did not cause any injury to the accused even following a sudden quarrel and the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted - In Kikar Singh Vs. State of Rajasthan AIR 1993 SC2426 it was held that :

If the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

14. Considering the background facts in the light of the principle set out above, the inevitable conclusion is that Exception 4 to Section 300 IPC is applicable and the offence is relatable to Section 304 Part I and not Section 302 IPC. That being, so the conviction is altered. Custodial sentence of 10 years would meet the ends of justice.

15. The appeal is allowed to the aforesaid extent.

27. In the case of Litta Singh & Anr. Vs. State of Rajasthan reported at 2013 Crl.L.J.

3321, a case where the injuries had been caused with use of lathi and sickle. It was held that the accused was liable to be convicted under Section 304 Part-II IPC and not for murder. The court took into account based on the testimony of the witnesses that the accused persons did not intend to cause death and also when the persons reached the place the accused persons ran away. Paragraphs 18 to 21 of the judgments are reproduced below:

18. It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused

persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.

19. In the case of Gurdip Singh & Anr. vs. State of Punjab, (1987) 2 SCC14 this Court came across a similar type of incident, where the prosecution case was that one Maya Bai had two sons and two brothers. She was the mother of accused Nos. 1 and 2 and sister of accused Nos. 3 and 4. The deceased was one Kishore Singh. The accused suspected that Mayabai had illicit relations with the deceased. Hence one day when the deceased was returning from village and when he reached the field of Kashmiri Lal, the accused came out of the wheat field. The first appellant had a kirpan and the second appellant had kappa. It was alleged that the four accused took deceased on wheat field and threw him on the ground. One of the acquitted accused Jit Singh caught hold of arms of the deceased and the two appellants caused injuries with the weapons in their hands. There was an alarm created by Lachhman Singh, PW-3, which had attracted PW-4 and Mohinder Singh. When they reached the spot, the accused ran away with their weapons. The deceased had seven injuries on his body. Injury No.7 was fatal according to the doctor, who examined him. It was argued that the prosecution had not come forward with true case as to how the incident happened. The trial Judge found two accused Jit Singh and Teja Singh not guilty, since the case against them was not proved beyond the reasonable doubt. The appellants were convicted because they had weapons with them unlike the acquitted accused. This Court on consideration of the entire evidence did not interfere with the findings that the appellants were responsible for the death of the deceased by attacking him with the weapons in their hands, but on reappraisal of the entire evidence, the Court found it difficult to agree with the trial court that the appellants were guilty of the offence under Section 302 IPC. Hence, converting the offence under Section 304 Part I, this Court observed:

6. The trial Judge was not wholly justified in observing that there was no evidence about the so-called illicit relationship between Maya Bai and Kishore Singh, the deceased. The materials available create considerable doubt in our mind as to whether the appellants really intended to kill Kishore Singh or whether his misconduct pushed them to wreak revenge against the deceased and in this

pursuit attacked him. We are not unmindful of the fact that the 7th injury noted in the post-mortem certificate is in the ordinary course sufficient to cause the death of the deceased. But we are not fully satisfied that the appellants intended to kill the deceased. The correct approach on the evidence and other circumstances in this case, would according to us, be to find the accused guilty under Section 304 Part I, and to sentence them under that section.

20. After analyzing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.

21. In the facts and circumstances of the case, in our considered opinion, the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the appellants knew that such bodily injury was likely to cause death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC.

28. In the case of Vineet Kumar Chauhan Vs. State of Uttar Pradesh, reported at (2009) 1 SCC (Crl.) 915, wherein the Supreme Court held that the appellant was guilty of culpable homicide not amounting to murder. The Supreme Court took into account that there was no enmity between the parties nor that the appellant had pre-meditated the crime of murder. The Supreme Court also took into account that the appellant would have had knowledge that use of revolver was likely to cause death. The appellant was held guilty of culpable homicide not amounting to murder under Section 304 Part II IPC and sentenced to five years rigorous imprisonment. Paragraphs 17 and 18 of the judgments read as under:

17. Reverting to the facts in hand, as noted above, it stands proved that there being a direct causal connection between the hitting of the bullet, fired by the appellant, to the deceased and her death, the death of the deceased was caused

by the appellant. However, having regard to the circumstances, briefly enumerated above, particularly the manner in which the appellant fired the shots, in our view, the appellant could not be attributed the mens rea requisite for bringing the case under clause (3) of Section 300 IPC. Concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant had pre-meditated the crime of murder. We are inclined to think that having faced some sort of hostile attitude from the family of the deceased over the cable connection, a sudden quarrel took place between the appellant and the son of the deceased, on account of heat of passion, the appellant went home; took out his father s revolver and started firing indiscriminately, and unfortunately one of the bullets hit the deceased on her chin. At the most, it can be said that he had the knowledge that the use of revolver was likely to cause death and, as such, the present case would fall within the third clause of Section 299 IPC. Thus, in our opinion, the offence committed by the appellant was only culpable homicide not amounting to murder. Under these circumstances, we are inclined to bring down the offence from first degree murder to culpable homicide not amounting to murder, punishable under the second part of Section 304 IPC.

18. Consequently, we partly allow the appeal; set aside the conviction of the appellant under Section 302 IPC and instead convict him under Section 304 Part II IPC. The sentence of rigorous imprisonment for five years would meet the ends of justice.

29. In the case of Naimuddin Vs. State of West Bengal reported at 2009 [4]. JCC3058 the Apex Court in appeal convicted the appellant under Section 304 Part-II and conviction under section 302 IPC was set aside. Relevant portion of the judgment reads as under:

19. We have heard the learned counsel for the parties at length. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under sections 302/149 IPC. However, we do not agree with the second submission of Mr. Sanyal that the appellant also cannot be convicted under section 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78

years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under sections 302/149 IPC is set aside and the appellant is convicted under sections 304 Part-II/149 imprisonment.

30. IPC and sentenced to five years In the case of Gudu Ram Vs. State of Himachal Pradesh reported at 2013 Crl.L.J.

481, the accused had hit the deceased on the head by a wooden bat. The conviction of the appellant under Section 302 IPC was set aside by the Apex Court and the appellant was convicted for the offence under second part of Section 304 IPC. Relevant paragraphs of the judgment are reproduced below:

35. The next question to be considered is whether the appellant had the intention to kill Dalip Singh. Here we have some difficulty in accepting the understanding of the events as narrated by the Trial Court and the High Court.

39. However, the nature and number of injuries and their location (the skull) as well as the weapon used (a small wooden cricket bat) lead us to conclude that to a reasonable person, an attack of the nature launched by the appellant on Dalip Singh could cause his death. While it may be difficult to delve into the mind of the attacker to decode his intentions, knowledge of the consequences of his actions can certainly be attributed to him.

40. Accordingly, we are of the opinion that the appellant had knowledge that his actions are likely to cause the death of Dalip Singh. He would, therefore, be guilty of culpable homicide not amounting to murder and liable to be sentenced under the second part of Section 304 of the IPC. Conclusion :

41. Under the circumstances, we partly allow this appeal and set aside the conviction of the appellant for the murder of Dalip Singh but convict him of an offence punishable under the second part of Section 304 of the IPC.

42. We have been informed that the appellant has already undergone over eight years of actual imprisonment and almost eleven years including remissions earned. Under the circumstances, we sentence him to imprisonment for the period already undergone.

31. Applying the law laid down by the Apex Court to the facts of this case and having regard to the evidence of the witnesses, it is firmly established that the prime objective of the appellant was to committee theft and in the process ear rings of the deceased were removed and only when victim made a noise the appellant gagged her mouth and the co-accused hit a brick on her head thus it cannot be said that the act committed is with premeditation. It is also not the case of the prosecution that the accused had carried brick to hit the deceased on her head. Thus, it can be said that when the deceased made a noise the present appellant gagged her mouth to silence her.

32. In the light of the above circumstances, we are of the view that the submissions of counsel for the appellant are without any merit, however, we are inclined to accept the alternate argument of counsel for the appellant and hold that the present appellant is liable to be convicted under Section 304 Part-I IPC and not under section 302 IPC, having regard to the above factors. The order of sentence is modified to the period already undergone, which is about 8 years and two months. Accordingly, the appeal is partly allowed. G. S. SISTANI, J SANGITA DHINGRA SEHGAL, J February 03, 2015 msr /ssn

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com