

Sushil Dixit Vs. State

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Court : Delhi

Decided On : Jan-10-2007

Reported in : 2009(93)DRJ564

Judge : R.S. Sodhi and; P.K. Bhasin, JJ.

Acts : Indian Penal Code (IPC) - Sections 34, 300, 302, 304, 308 and 323; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 304 of 2004

Appellant : Sushil Dixit

Respondent : State

Advocate for Def. : Ravinder Chadha, APP and; Jagdish Prasad, Adv.

Advocate for Pet/Ap. : K.N. Jha, Adv

Judgement :

P.K. Bhasin, J.

1. The appellant along with his parents faced trial for the offence of murder of their neighbour Vishwanath Pandey. The learned Additional Sessions Judge, Karkardooma Courts, vide judgment dated 2-04-04 in Sessions case No. 86/01 convicted the appellant under Section 302 IPC while his father and mother were

held guilty only under Section 323/34 IPC.

2. The brief facts of the case are that even though the deceased Vishwanath Pandey and the appellant and his family were neighbours in Indira gali, Mandawli, Delhi but they were not on cordial terms with each other on account of throwing of garbage by the appellant and his family in front of the house of the deceased. On 23-12-2000 at about 9.15 p.m. the appellant and his parents while standing on the chajja of their house threw a garbage bag in front of the house of the deceased. The deceased and his brother Daroga Pandey (PW-1) who was also living with the deceased came out of their house on hearing the noise of something falling at their gate and they saw the garbage bag lying in front of their house. They also found the appellant and his parents standing on the projection (chajja) of their house on the first floor. The deceased asked the father of the appellant as to why they had thrown the garbage in front of his house and the father of the appellant replied that garbage had been thrown as it was his sweet will. When the deceased told him that it was not proper appellant's father said 'abhi batata hoon' and then exhorted his wife Kunta and son Sushil Dixit (the appellant herein) 'maro saalon ko'. Thereupon the appellant Sushil Dixit threw a brick on the head of deceased. Then the mother of the appellant said that earlier also they (complainant side) had fought with them and saying so she threw a brick towards Daroga Pandey but fortunately the brick did not hit him. These facts were narrated to the police by PW-1 Daroga Pandey, brother of the deceased, in his statement Ex. PW-1/A on the basis of which a case under Section 308/34 IPC was registered at Mandawli police station vide FIR No. 412/2000 in the morning of 24th December, 2000. In that statement Daroga Pandey had also claimed that the appellant and his parent had thrown bricks on him and his brother with the intention to kill since Surinder Dixit (father of the appellant) had earlier also fought with them.

3. The injured Vishwanath Pandey remained hospitalized for some days in a state of coma during which he was operated upon also for his head injury but finally succumbed to his injuries in the hospital itself on 29-12-2000. Thereafter the police converted the case into one under Section 302/34 IPC. The cause of death upon post-mortem examination of the dead body was opined by the autopsy surgeon to be 'coma resulted from head injury (extensive craniocerebral damage) which was

sufficient to cause death in ordinary course of nature.' As per the post-mortem report Ex. PW-6/A the death of Vishwanath Pandey was homicidal.

4. During the trial the prosecution had examined three eye witnesses of the incident who are PW-1 Daroga Pandey, PW-3 Bacha Singh, another neighbour of the complainant and the accused and PW-5 Arvind, a tenant of the deceased in his house in Mandawli. The appellant in his statement under Section 313 Cr.P.C. claimed that there was no dispute between his family and that of the deceased except that when on an objection by the brother of the deceased they (the accused persons) got vacated a room in their house from two tenants Sudershan and Arvind as they were bachelors they were inducted as tenants by Daroga Pandey in his house because of which, in fact, there used to be 'tu tu main main' between Daroga and Vishwanath. Regarding the injuries sustained by the deceased on the day of incident his stand was that on that day at about 6.30 or 7 p.m. he heard some commotion outside his house and when he came out he saw the deceased Vishwanath lying with some building material around him and was being massaged by Daroga and other neighbours. He learnt that building material for construction going on in the house of the deceased had fallen on him.

5. Four witnesses, all of whom were also residents of Mandawli, were examined in defense by the accused to show that the deceased had, in fact, sustained injuries due to fall of bricks and railings from the upper floor of his house where construction was going on. Out of those four witnesses(DWs-1, 2, 3 & 5) DW-3 Daya Nand and DW-5 Vishwanath only claimed that the deceased had received injuries on his head when building material had fallen on him. DWs 1 and 2 claimed that they had only come to know on enquiry that the deceased had got injured due to bricks falling on him from the upper floor of his house where construction was going on. DW-5 was examined in support of the plea of alibi taken by the parents of the appellant.

6. Relying upon the evidence of the three eye witnesses the trial Court found the appellant guilty of the offence of murder holding that it was the brick of the appellant which had caused the fatal injury on the head of the deceased and he was awarded life imprisonment and a fine of Rs. 5000/-. His parents were,

however, convicted only for causing simple injuries to the deceased. Father of the appellant was sentenced to imprisonment for the period already undergone by him and also to pay fine of Rs. 1000/- while the mother of the appellant was fined only. Both of them do not appear to have challenged their conviction. However, the appellant has challenged his conviction by preferring this appeal.

7. Challenging the correctness of the impugned judgment learned Counsel for the appellant had submitted that the evidence of the three eye witnesses is unreliable since all of them are interested witnesses and it suffers from serious infirmities which make their claim of being eye witnesses of the incident highly doubtful. It was also contended that the learned trial Judge has failed to appreciate the evidence of the defense witnesses examined to show that the deceased had got injured in the evening of 23-12-2000 around 6 p.m. due to fall of bricks on him from the first floor of his house where construction work was going on. It was also contended that in any event offence of murder is not made out at all even if the evidence of the three eye witnesses is accepted as fully reliable.

8. On the other hand, learned Additional Public Prosecutor for the State contended that the trial Trial Court has correctly analysed the evidence on record and there is no infirmity whatsoever in his conclusion that the appellant was guilty of the offence of murder and the defense version about the cause of injuries to the deceased was not true and so this appeal deserves to be dismissed.

9. In order to appreciate the rival contentions we need to go through the evidence of the three eye witnesses. We begin with the evidence of the brother of the deceased PW-1 Daroga Pandey, who is the first informant of the incident also. He has deposed that on 23.12.2000 at about 9.15 or 9.20 p.m. when he was sitting with his brother Vishwanath Pandey in the dining room, he heard noise of thud in front of his house and when they went outside the house they saw some garbage was lying in polythene. He then deposed that on asking by his brother Vishwanath Pandey from his neighbour Surinder Dikshit, his son Sushil Dikshit and his wife Kunta Devi who were standing on the roof of their house whether they had thrown that garbage Surinder Dikshit told that 'Hamari Marji Humne Pheka Hai' and saying so he exhorted 'Maro Salon Ko Jaan Sey Maar do'. He further deposed that

thereafter all three of them started throwing bricks on them. PW-1 saved himself but his brother Vishwanath Pandey received a brick blow on his head and also received other brick blows on his body. He thereafter deposed that the accused persons continued throwing bricks but he removed his brother under the balcony and then took him to Anand Hospital where he was operated. He also deposed that prior to this incident also a quarrel had taken place between them and the accused persons on the matter of garbage throwing. PW-1 further deposed that his statement Ex. PW-1/A was recorded by the police on the next day of incident at about 8.00 or 8.30 a.m. He also deposed that he could specify as to whose brick had hit his brother as all the accused persons were throwing bricks. He then deposed that on 29.12.2000 his brother expired at Anand Hospital. He deposed that police had seized the bricks pieces which were lying at the spot vide memo Ex.PW-1/D.

10. PW-3 Bachcha Singh was also a neighbour of the complainant as well as the deceased residing in house No. A-495, Indira Gali, Mandawli. He deposed that on 23.12.2000 at about 9.15 p.m. he heard the noise of 'Maro Maro' and when he came out of his house he saw Surinder Dikshit, Sushil Dikshit and Kunta Dikshit were throwing bricks from the 1st floor of their house in the gali where Vishwanath Pandey was standing. He then deposed that one brick thrown by Sushil Dikshit struck against the head of Vishwanath Pandey and he fell down on the ground. He also deposed that Daroga Pandey, brother of Vishwanath Pandey and one tenant Arvind who were also present there removed Vishwanath Pandey to hospital in a rickshaw. He also deposed that a quarrel had taken place between these two parties in his presence and he had heard 'Maro Saley ko Maro Saley ko' and on his asking Surinder Dikshit (father of the appellant) as to what was the matter and why they were quarrelling Surinder Dixit told him that he should not come in between. He also deposed that about 2-3 months prior to this incident also there was exchange of hot words between the two parties but at that time the matter was pacified mutually.

11. PW-5 Arvind was a tenant of the deceased in his house in Mandawli. He has deposed that on 23.12.2000 at about 9.00 or 9.15 p.m. when he was studying in his room on hearing the noise of commotion he came out of his room and saw that

Vishwanath Pandey was present in the gali outside his house and his neighbours Sushil Dikshit, Surinder Dikshit and Kunta Dikshit were present on the terrace of the 1st floor of their house and were abusing Vishwanath Pandey and a quarrel was going on and in the meantime Surinder Dikshit exhorted by saying 'Maro Sale ko' on which Sushil Dikshit picked up a brick from the roof and hit Vishwanath Pandey on his head because of which he fell down on the ground. Thereafter Surender Dixit, Kunta Dikshit and Sushil Dikshit started giving blow by bricks and in the meantime Daroga Pandey also came out of his house and pulled his brother but since bricks were falling there he came inside the house. He then deposed when he told all the three accused 'Mat Maro Mar Jayega' they all went inside their house and then he along with Bachcha Singh and Daroga Pandey removed injured Vishwanath Pandey to Anand Hospital where he (Vishwanath Pandey) expired on 29.12.2000 due to injuries received by him on the head.

12. This is the only prosecution evidence referred to during the course of hearing of these appeals. As noticed already, evidence of all these three witnesses has been accepted by the learned trial court. The only infirmity in the evidence of these witnesses put forth before us by the learned Counsel for the appellant was that all of them were interested witnesses and so for that reason their evidence should be discarded in toto. However, we do not find any substance in this argument of the learned counsel. As far as PW-1 Daroga Pandey is concerned he is, no doubt, brother of the deceased but that is no ground to discard his testimony. He was living in the same house in which the deceased was living and, therefore, was a natural witness to be present at the scene of occurrence which took place at night. His truthfulness is reflected from his statement that he could not say as to which particular accused had thrown the brick on the head of his brother. If he were to depose falsely he would have also claimed that it was the appellant who had thrown a brick on the head of his brother Vishwanath. Testimony of PW-1 is fully corroborated also by the evidence of other two eye-witnesses both of whom cannot be said to be interested witnesses at all. They had no axe to grind against the accused nor any motive was attributed to them in their cross-examination for deposing falsely against the accused. As far as the prosecution case that the deceased had received injuries due to bricks falling on him is concerned it is the case of the defense also that the deceased had got injured because of bricks

falling on him. No doubt, two defense witnesses(DWs 3 & 5) have deposed that the deceased had received injuries in the evening around 6.30 p.m. because of bricks etc. falling down from the first floor of his house where construction work was going on but in our view that evidence cannot be accepted because these witnesses and the appellant have come out with this version for the first time during the trial only and not at any stage prior thereto. If actually that was the reason for the injuries on the person of the deceased the defense witnesses would have definitely protested the arrest of the accused persons in this case when they were arrested on 24-12-2000. However, they do not claim to have done that. There is another reason also for not accepting the defense version. When the three eye-witnesses examined by the prosecution were cross-examined on behalf of the accused it was not even suggested to anyone of them that the bricks had fallen on the deceased from the first floor of his house where some construction work was going on. thereforee, the defense version regarding the cause of injuries sustained by the deceased is clearly an afterthought and it was rightly concluded to be so even by the trial Court. We find no fault with the analysis of the evidence of the three eye-witnesses done by the trial court and its decision to accept the same in preference to the evidence of the defense witnesses. We have ourselves also found the evidence of the three eye witnesses to be fully reliable and trustworthy. No contradictions/improvements could be elicited from them in the cross-examination. None of them could be discredited. We have, thereforee, no hesitation in accepting the finding of the learned Additional Sessions Judge that the deceased had received the fatal head injury due to the appellant throwing a brick on him.

13. As noticed already, it had also been contended by the learned Counsel for the appellant that, in any event, the offence of murder is not made out even if the evidence of the eye-witnesses is accepted. On this aspect of the matter we are in full agreement with the learned counsel. The incident took place in the night around 9.30 p.m.. The appellant and his parents had thrown bricks from the first floor of their house when the deceased and his brother were standing outside their house which was on the ground floor. It is difficult to accept that the appellant had intended to kill the deceased when he threw the brick from the first floor. The incident took place at the spur of the moment without any pre-meditation. It all

happened all of a sudden because of accused throwing garbage in front of the house of the deceased and this has been observed by the trial Court also in the impugned judgment. Accused persons had started pelting bricks from the first floor without aiming the throws at any particular part of the body of the deceased or his brother. Four bricks only out of which three were half bricks and one was partially broken having a cement plaster on it were found at the spot by the police and the same were seized. PW-1 himself has claimed that a brick was thrown towards him also but he could manage to save himself. In these circumstances it cannot be said that the appellant had intended to cause the death of the deceased or the particular head injury to the deceased which had proved fatal. There is no doubt that the head injury sustained by the deceased was found by the autopsy surgeon to be sufficient to cause death in the ordinary course of nature but the fact remains that the deceased died on 29th December while the incident took place on 23rd December. This case, therefore, does not come within the purview of clause thirdly of Section 300 IPC relied upon by the trial Court while holding the appellant guilty of murder and consequently it becomes a case of culpable homicide not amounting to murder for which punishment is provided under Section 304 IPC which, in turn has two parts prescribing different punishments even for culpable homicide not amounting to murder. The first part provides for punishment when death is caused by an act done with the intention of causing death or of causing such bodily injury as is likely to cause death. The punishment under this part can be even imprisonment for life. In the second part the punishment can be imprisonment up to ten years or with fine or with both if the act because of which death is caused was done with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. In the facts and circumstances of the present case, in our view, this case falls under Part II of Section 304 IPC since only the knowledge about the likelihood of death being caused due to some injury resulting as a result of brick falling on the head of the deceased can be attributed to the appellant.

14. We are, therefore, of the view that this appeal deserves to be allowed partly by converting the conviction of the appellant from the offence of murder to that of culpable homicide not amounting to murder punishable under Part II of Section 304 IPC and also by suitably modifying the order on sentence also.

15. In the result, we partly allow this appeal of appellant Sushil Dixit and set aside his conviction for the offence of murder and convict him for the offence punishable under Part II of Section 304 IPC.

16. Now, as far as the sentence to be imposed on the appellant is concerned we were informed during the course of hearing that the appellant had remained in jail for two years and ten months. Considering the fact that the appellant was a young boy of about twenty years at the time of incident and that he had committed the act of throwing the brick from the first floor of his house which resulted in the death of the deceased on the asking of his father we are of the view that interest of justice would be fully met if we award the sentence of imprisonment for the period already undergone by the appellant and also to pay a fine of Rs. 2000/-, in default to undergo further imprisonment for a period of one month. Criminal Appeal No. 304 of 2004 stands disposed of accordingly.