Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.532-533 OF 2013
(Arising out of S.L.P. (Crl.) Nos. 5099-5100 of 2012)

Khachar Dipu @ Dilipbhai Nakubhai .. Appellant

Versus

State of Gujarat ... Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. In these appeals, the appellant, original accused No. 1, has called in question the legal propriety of the judgment of conviction and order of sentence passed by the High Court of Gujarat in Criminal Appeal No. 950 of 2009 whereby the Division Bench has allowed the appeal of the State and converted the conviction under Section 304 Part-I of the Indian Penal Code (for short 'IPC') recorded by the learned trial Judge to that

of an offence punishable under Section 302 of IPC and sentenced him to undergo life imprisonment and further the defensibility of the decision of dismissal of Criminal Appeal No. 1075 of 2009 wherein the appellant had assailed the judgment and conviction and order of sentence dated 5.3.2009 passed by the learned Additional Sessions Judge, Bhavnagar in Sessions case No. 166 of 1998.

3. The factual score which led to the trial of the appellant along with two others is that three days prior to the date of occurrence, i.e., 21.5.1998, accused Nos. 1 and 2, namely, Khachar Dipu alias Dilipbhai Nakubhai and Vahtubhai Nakubhai, had a dispute regarding dumping of manure with the brother of the complainant and there were altercations which led to an inimical relationship between the parties. On the date of occurrence, when the deceased Shambhubhai, the brother of the complainant, was going to his field by cycle about 9.00 p.m. on 20.05.1998, the accused No. 1, with the intention of extinguishing the life spark of the

deceased, dashed the motor vehicle No. GJ-7-U-2385 from behind and when the deceased was thrown off from his cycle, the accused No. 1 tied him behind the motor vehicle and dragged him about 10 kilometers and threw the dead body on the Gadhada Road and destroyed the evidence. The other two accused persons abetted with the common intention to assist accused No. 1. On an FIR being lodged, the criminal law was set in motion and after investigation, the accused persons were arrested and, eventually, a charge sheet for offences under Sections 302/201 read with Section 34 of the IPC was laid before the learned Magistrate who, in turn, committed the matter to the Court of Session. The accused persons denied the charges and claimed to be tried.

4. The prosecution, in order to establish its case, examined 24 witnesses and exhibited 31 documents. The defence chose not to adduce any evidence.

5. The learned Sessions Judge, on analysis of the evidence, came to hold that the accused No. 1 was guilty of the offence punishable under Section 304

Part-I of IPC and, accordingly, sentenced him to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.500/- and, in default, to suffer further simple imprisonment of one month. As far as the other accused persons are concerned, they stood acquitted of the charges.

6. Being grieved by the aforesaid judgment, the convicted persons and the State of Gujarat preferred Criminal Appeal Nos. 950 of 2009 and 1075 of 2009 respectively. The High Court took note of the earlier quarrel that had taken place between the parties, the injuries on the dead body, the evidence of the prosecution witnesses, the material brought on record relating to the incident, and accepting the fact that the motor vehicle had dashed against the cycle ridden by the deceased and further analyzing the reasoning ascribed by the learned trial Judge, opined that the learned Sessions Judge had flawed in recording the conviction under Section 304 Part-I of IPC and not under Section 302 of IPC. The High Court opined that it was not a case of accident inasmuch as

the injuries on the whole body had effectively crushed the entire body and it could not have happened if the motor vehicle had only dashed against cycle from behind. The High Court further opined that had it been a case of negligence in driving, the accused would not have lifted the body of the deceased after dashing his vehicle against the cycle of the deceased. The Division Bench further proceeded to state that the muscle tissues found from the bumper of the motor vehicle coupled with the condition of the body of the deceased and the fact that it was left on the road with the motor vehicle at a distance of about 10 to 15 kms away from where it had dashed gave credence to the prosecution version that it was not a case of mere dashing of the motor vehicle with the cycle and the findings of the learned Sessions Judge pertaining to absence of pre-meditation to cause death was totally against normal prudence, and therefore, the findings recorded by the learned Sessions Judge were perverse and the intention to cause death was

proved by material evidence, oral as well as documentary. Considering the totality of facts and circumstances, the Division Bench concluded that the learned Sessions Judge was in error in holding that A-1 was guilty of offence under Section 304 Part-I of IPC and not under Section 302 of IPC.

7. Be it noted, the High Court chose not to interfere with the acquittal of the accused A-2 and A-3 as the allegations were not established and, accordingly, allowed the appeal preferred by the State in part. As far as the appeal preferred by the accused-appellant A-1 is concerned, it was dismissed.

8. We have heard Mr. Harshit S. Tolia, learned counsel for the appellant, and Ms. Jesal, learned counsel for the respondent in both the appeals.

9. The issues that arise for consideration in these appeals are whether the accused-appellant is entitled to a judgment of complete acquittal or the conviction and sentence as recorded by the learned trial Judge is absolutely justified in the obtaining factual matrix

which did not warrant interference by the High Court while entertaining the appeal by the State by converting the conviction under Section 304 Part-I of the IPC to Section 302 of the IPC and sentencing thereunder. To appreciate the said issues, it is necessary to refer to the post mortem report which would show the injuries on the deceased. On a perusal of the same, it appears that there were injuries on the vital parts of the body, the face was crushed and further there were marks of dragging which were found on the upper part of the body and on the back, and the private part was crushed. The High Court, in its judgment, has enumerated the injuries in seriatim which we reproduce: -

"1. Destruction of brain and skull.

2. Destruction of face and its bone (crushing)

3. Crushing of all ribs on Rt. Side and some ribs on left side.

4. CLW over left leg just below knee, above ankle joint.

5. Abrasion all over front part of chest, abdomen, leg and hand, liner mark with contaminated of road metal.

6. Fracture of all ribs with sternum

7. Fracture on Rt. Femur bone at lower end.

8. Fracture of numerous at it's upper part.

9. Abrasion over heel of Rt. Leg up to bone.

10. Abrasion over the finger of both hand.

11. Abrasion on front of abdomen at lateral side and back of abdomen. All part.

12. Abrasion all over thoracial part back side.

13. Abrasion over knee joint and middle side of Rt. Leg upto muscle deep.

14. The skull was fractured and crushed and the portion of brain was hanging out. It was also crushed. The road metal was also found therefrom. Lungs, heart, brain, all vital parts were crushed.

10. Dr. Kanjibhai, PW-16, who conducted the autopsy on the dead body, has opined that the injuries were possible in vehicular accident or if the vehicle is run over the body. He has deposed that even after death, if the body was dragged or the vehicle runs over the body, the injuries could have been caused. The cross-examination was focused to elicit from this witness about the absence of marks on the wrist part of the deceased to demolish the version of the

prosecution to the extent that the deceased was tied behind the vehicle and was dragged on the road. In fact, the said witness has categorically stated that there were marks of dragging on the body of the deceased. PW-15, Kishorebhai Chhaganal Naina, Scientific Officer, has deposed that on the rear part of the bumper of the vehicle, there were skin pieces stuck and blood masses were seen. On an examination of the cycle, he has found that the motor vehicle had collided with the cycle and thereafter, the orange colour of the front bumper of the motor vehicle was seen stuck on the back of the fan. He had taken into custody 7 articles, namely, two pieces of blood stained tar cotton thread, clothes of the deceased, skin pieces from the motor vehicle No. GJ-7-U-2385, cotton thread rubbed on the rear of the motor vehicle, the blood stained cotton thread, a coloured iron piece from the front of the motor vehicle near the bumper, and rear part of the cycle on which the orange colour of the motor vehicle was stuck. He had given suggestion for sending the same

to the Forensic Science laboratory at Junagarh. The items suggested along with several other items were sent by the Investigating Officer to the Forensic Science Laboratory and the said report was exhibited during the trial as Exhibit-44. It is revealed from the said report that the skin that was sent for examination was human skin. As regards the cotton thread, the report mentioned that blood was found. The scientific report of FSL confirms that the back side of the cycle had a colour mark of the front side of the motor vehicle. Thus, dashing of the cycle by the motor vehicle in question is established by this scientific evidence also. We have referred to the same only to highlight as there is sufficient proof that after the accident, there was dragging of the deceased by the vehicle in question. Learned trial Judge has not accepted the allegation of dragging of the deceased solely on the basis that no injuries were caused on the wrist. He has totally ignored the other evidence collected by the Investigating Officer on the site, the opinion of the doctor that the injuries were

caused by the accident and dragging of the body and the F.S.L. report. In our considered opinion, there is definite material on record to come to the conclusion that the body was dragged but it cannot be said with certainty about the distance. It is worthy to note that the dead body was found at a distance of 10 kms., but it is not necessary to establish that the accused had dragged the deceased for about 10 kms. suffice it to say that there is evidence to establish that the body was dragged for a considerable distance. Dr. Kanjibhai, PW-16, who conducted the post-mortem in his evidence, has categorically stated that on the body there were marks of dragging which was on the front part of the body and on the back. The evidence in this regard has totally gone unchallenged. The finding of the learned trial Judge is solely based on the fact that there was no mark which would indicate that the wrists were tied. It is useful to note here that the accused had not taken the plea that there was an accident. On the contrary,

he has taken the plea of complete denial of the occurrence.

11. At this juncture, we may scrutinize the oral evidence on record. Apart from the testimony of Bhimjibhai, PW-1, there is other evidence on record which can be taken aid of. It is noticeable that some of the witnesses had turned hostile during trial. The High Court has referred to the depositions of two witnesses, namely, Shantibhai Lakhmanbhai, PW-20, and Gobarbhai Bavubhai, PW-21. It is well settled in law that the evidence of the hostile witness can be relied upon by the prosecution as well as by the defence. In ***Rameshbhai Mohanbhai Koli and Others v. State of Gujarat***[1], the said principle has been reiterated stating that:-

> **"16.** It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny

[1] (2011) 11 SCC 111

thereof. (Vide *Bhagwan Singh* v. *State of Haryana*[2], *Rabindra Kumar Dey* v. *State of Orissa*[3], *Syad Akbar* v. *State of Karnataka*[4] and *Khujji* v. *State of M.P.*[5])

17. In *State of U.P.* v. *Ramesh Prasad Misra*[6] this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde* v. *State of Maharashtra*[7], *Gagan Kanojia* v. *State of Punjab*[8], *Radha Mohan Singh* v. *State of U.P.*[9], *Sarvesh Narain Shukla* v. *Daroga Singh*[10] and *Subbu Singh* v. *State*[11]."

12. On a careful scrutiny of the testimonies of the said two witnesses, it is seen that both of them have categorically deposed that the motor vehicle involved in the accident had dashed against the cycle of the deceased as a result of which he had fallen down. It is interesting to note that in cross-examination by the accused, they have not paved the path of variance in

[2] (1976) 1 SCC 389
[3] (1976) 4 SCC 233
[4] (1980) 1 SCC 30
[5] (1991) 3 SCC 627
[6] (1996) 10 SCC 360
[7] ((2002) 7 SCC 543
[8] (2006) 13 SCC 516
[9] (2006) 2 SCC 450
[10] (2007) 13 SCC 360
[11] (2009) 6 SCC 462

this regard. In our opinion, their evidence support the prosecution version that the motor vehicle had dashed against the cycle. We may note with profit that one of the witnesses has not identified the accused in court but the other witness, PW-20, Shantibhai Lakhmanbhai, has identified. That apart, as far as the identification of the accused is concerned, there is ample evidence on record to support the same. The singular purpose of referring to the testimonies of these two witnesses is that the incident did occur and the accused had dashed the vehicle against the cycle.

13. From the aforesaid evidence on record, certain aspects became clear:- namely, (i) on the fateful night at 9.00 p.m., the deceased was going on a cycle, (ii) the motor vehicle bearing registration number No. GJ-7-U-2385 belonging to the accused-appellant dashed against the cycle, (iii) number of injuries were sustained by the deceased, (iv) there was dragging of the deceased after the accident

occurred, and (v) the accused was involved in the commission of the crime.

14. The learned trial Judge had convicted the accused under Section 304 Part I of IPC as there was no previous deliberation or pre-meditation on the part of the accused and there was no evidence that the dead body was dragged upto 10 kms. The High Court, as is noticeable, accepted the prosecution version of murder, regard being had to the effective crushing of the body intentionally and dragging of the same to cause death.

15. One aspect that has to be seen is whether the High Court was justified in saying that there was intention. Such a view has been expressed on the ground that dashing of the motor vehicle and dragging was with the intention to inflict such bodily injury that was sufficient to cause death in the ordinary course of nature. To put it differently, the High Court has brought the case under Section 300 “thirdly”. In this context, we may refer with profit to the decision in

Virsa Singh v. State of Punjab[12] wherein Vivian Bose, J., speaking for a three-Judge Bench, laid down what is required for the prosecution to prove to bring the case under the said clause. It has been stated therein that first, it must be established, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved and these are purely objective investigations; thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and once these three elements are proved to be present, the enquiry proceeds further; and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Thereafter, in that case, it has been stated as follows:-

[12] AIR 1958 SC 465

> "Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."

16. In ***State of Andhra Pradesh v. Rayavarapu Punnayya and Another***[13]***,*** after referring to the rule laid down in ***Virsa Singh's case*** (supra) and ***Rajwant v. State of kerala***[14]***,*** the Court proceeded to enunciate that whenever a court is confronted with the question whether the offence is 'murder' or

[13] (1976) 4 SCC 382
[14] AIR 1966 SC 1874

'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on

whether the second or the third clause of Section 299 is applicable. If the question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, Penal Code.

17. We may hasten to clarify that in the said case, the two-Judge Bench observed that the aforestated principles are only broad guidelines and not cast-iron imperatives. In most cases, their observance would facilitate the task of the court. However, adding a word of caution, it observed that sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

18. Recently, in ***Rampal Singh v. State of Uttar Pradesh***[15], after referring to the pronouncements in ***Rayavarapu Punnayya*** (supra), ***Vineet Kumar***

[15] (2012) 8 SCC 289

Chauhan v. State of U.P.[16]***, Ajit Singh v. State of Punjab***[17], and ***Mohinder Pal Jolly v. State of Punjab***[18], the Court opined thus: -

> "The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view i.e. by applying the "principle of exclusion". This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, "culpable homicide amounting to murder". Then secondly, it may proceed to examine if the case fell in any of the Exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery."

19. Regard being had to the aforesaid enunciation of law, it is to be seen whether the opinion expressed by the High Court is correct and justified. As has been stated hereinbefore, the High Court has taken note of

[16] (2007) 14 SCC 660
[17] (2011) 9 SCC 462
[18] (1979) 3 SCC 30

the injuries and the conduct of the accused persons and opined that it is a brutal murder. At this juncture, it is apt to note that the accused had not taken the plea that there was an accident because of bad light or due to the negligence of the deceased. He has taken the plea of complete denial. Under these circumstances, the evidence of the son of the deceased, Himmatbhai Sambhubhai, PW-18, gains significance. He has deposed that there was a quarrel between the accused and the deceased relating to dumping of garbage and his father was threatened by the accused. The said evidence has gone unchallenged. Such a quarrel or altercation has its own triviality but it gets magnified when the dashing of the vehicle is proven and the nature of the injuries caused on the deceased is taken note of. That apart, there is evidence that the body was dragged. Thus, it can safely be concluded that the intention to cause bodily injury is actually found to have been proved and such injuries are sufficient in the ordinary course of nature to cause death. When

such injuries are inflicted, it will be travesty of justice to hold that it was an accident without the intention to cause death.

20. In view of the aforesaid premised reasons, we do not find any flaw in the analysis made by the High Court for reversing the conviction under Section 304 Part I of IPC recorded by the learned trial Judge to that of 302 of IPC and, accordingly, we concur with the same. The resultant effect of the same is dismissal of both the appeals which we direct.

.....J.
[K. S. Radhakrishnan]

.....J.
[Dipak Misra]

New Delhi;
April 04, 2013