

REPORTABLE

IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1249 OF 2013
(@SPECIAL LEAVE PETITION (CRL) No.4928 of 2011)

STATE OF ORISSA

... APPELLANT

VERSUS

KHAGA @ KHAGESWAR NAIK & ORS.

...RESPONDENTS

J U D G M E N T

CHANDRAMAULI KR. PRASAD, J.

State of Orissa, aggrieved by the judgment and order dated 1st September, 2009 passed in Criminal Appeal No.274 of 1997 whereby the Division Bench of the High Court has altered the conviction of the respondents from Section 302/34 to Section 304 Part II of the Indian Penal Code (hereinafter to be referred to as 'the IPC'), has preferred this Special Leave Petition.

Leave granted.

In the present appeal, as we are concerned with the nature of the offence said to have been committed by the respondents (hereinafter to be referred to as 'the convicts'), we shall refer to only those facts which are necessary for decision on the said issue. Occurrence in the present case had taken place in Raghunathpali, a hamlet within the district of Sambalpur in the State of Orissa. As usual, on 11th October, 1995 Mohini Naik and her father, Tikeshwar Naik were sleeping at their home in separate rooms adjoining each other. When the entire village was fast asleep, the convicts came to their house at 11.00 P.M. and knocked the door in which Mohini, the rustic villager was sleeping. She was asked to open the door of her room. She could recognize the convict Khageswar from his voice and on enquiry as to who was knocking the door, Khageswar disclosed his name. She opened the door and saw the three convicts standing at the door. Two of them i.e. Khageswar and Kampa entered into her room and molested her. She raised alarm whereupon her father, Tikeshwar woke up and arrived at the spot and abused

the convicts in obscene language. All the three convicts caught hold of her father, assaulted him by kicks and blows and dragged him towards the orchard. He was followed by his daughter, Mohini, the informant of the case. She was threatened that if she will come out, they will kill her. Mohini saw her father being assaulted from a distance by Khageswar and Dusasan. While Tikeswar was abusing the convicts, Khageswar brought one 'budia' from his house and gave blows to him. Similarly, convict Dusasan brought a 'lathi' from his home and assaulted her father. Ultimately, Mohini could see the dead body of her father lying in 'Nala' at about 3.00 P.M. on 12th October, 1995.

Police after usual investigation submitted the charge-sheet and the convicts were ultimately committed to the Court of Session to face the trial. The convicts were charged for commission of the offences under Sections 457, 354, 506, 302 and 201/34 of the IPC. They pleaded not guilty and claimed to be

tried. Their defence is false implication but no defence witness has been examined.

The trial court on appreciation of evidence came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt against the convicts and accordingly, it convicted them for offences under Sections 457, 354, 506, 302, 201/34 of the IPC. On appeal, the High Court accepted the case of the prosecution but held that the allegations proved construed an offence under Section 304 Part-II of the IPC. Accordingly, while maintaining the conviction of the respondents under Sections 457, 354, 506 and 201/34 of the IPC, the High Court altered their conviction from Section 302/34 of the IPC to that of Section 304 Part II of the IPC and sentenced them to undergo rigorous imprisonment for a period of eight years for offence under Section 304, Part II of the IPC. While doing so, the High Court observed as follows:

" 17. We, however, find that the prosecution has failed to

establish that the accused persons had any prior motive or pre-meditation to kill deceased Tikeswar and admittedly, the prosecution has not been able to establish that there was any enmity between deceased Tikeswar or his daughter Mohini (P.W.4) with the accused persons. It appears, the accused persons who had gone to the house of P.W.4 to commit sexual act, on being abused by Tikeswar in obscene language, got provoked and attacked Tikeswar in a fit of anger and on the spur of the moment, without any prior planning or design. The act of the accused persons appears to be more by way of sudden retaliation in the heat of passion, on being abused by deceased Tikeswar in obscene language and was not pre-planned or intentional. Accordingly, we feel, the interest of justice would be best served, if the conviction of the accused persons under Section 302/34 IPC is modified and reduced to one under Section 304 Part II IPC. The conviction of the accused persons under Sections 457/354/506/201/34 IPC needs no interference."

This is how the appellant- State of Orissa is before us and challenges the alteration of conviction from Section 302/34 to that of Section 304 Part II of the IPC.

Mr. Radha Shyam Jena, learned counsel appearing on behalf of the appellant submits that the allegations proved clearly make out a case of murder punishable under Section 302 of the IPC and the High Court erred in altering the same to Section 304 Part II of the IPC. Mrs. Rachana Joshi Issar, learned counsel appearing on behalf of the respondents supports the judgment of the High Court and contends that the offence having been committed without pre-meditation in a heat of passion, Exception 4 to Section 300 of the IPC is clearly attracted and hence the allegation proved is culpable homicide not amounting to murder. Accordingly, she submits that the order of the High Court does not call for any interference.

The rival submission necessitates examination of Exception 4 to Section 300 of the IPC, same reads as follows:

" 300. Murder.-

xx

xx

xx

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.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault."

From a plain reading of the aforesaid exception it is evident that it shall be attracted only if the death is caused (i) without premeditation, (ii) in a sudden fight and (iii) in a heat of passion upon a sudden quarrel. If all these ingredients are satisfied, the exception will come into play only when the Court comes to the conclusion that the offender had not taken undue advantage or acted in a cruel or unusual manner. Above all, this section would be attracted when the fight had taken place with the person killed.

The aforesaid view finds support from a judgment of this Court in **Pappu vs. State of M.P. (2006) 7 SCC 391** in which it has been held as follows:

"13..... 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 defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the 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...."

In this background when we consider the facts of the present case, we have no manner of doubt that Exception 4 to Section 300 of the IPC is not at all attracted. In the case in hand, the convicts had entered the room of the daughter of the deceased in midnight, molested her and the poor father, perhaps because of his age, could not do anything other than to abuse the convicts. He gave choicest abuses but did not fight with the convicts. Verbal abuses are not fight as it is well settled that at least two persons are needed to fight. Therefore, this ingredient is not satisfied.

Then, can it be said that the crime has been committed in a heat of passion? If time is taken to cool down, then the crime cannot be said to have been committed in a heat of passion. It is the specific case of the prosecution, which in fact, has also been accepted by the High Court that "when her father Tikeswar abused them, the accused Khageswar being annoyed brought a budia from his house, which is nearby, and dealt blows to her father and accused

Dusasan brought a lathi and assaulted her father." This clearly shows that both the convicts had sufficient time to cool down and therefore, it cannot be said that the crime was committed in a heat of passion.

So far as the convict, Kampa @ Sricharan Naik is concerned, he is convicted with the aid of Section 34 of the IPC. All of them have come together and participated in the crime which goes to show that these convicts shared the common intention.

In the face of what we have observed above, it is clear that the High Court erred in holding that the offence for which the convicts can be held guilty shall be Section 304 Part II of the IPC.

In the result, we allow this appeal, set aside that portion of the judgment of the High Court whereby it had altered the conviction of the respondents from Section 302/34 of the IPC to that of Section 304/34 of the IPC and restore that of the

trial court. The respondents, if have not already undergone the sentence awarded by the trial court, shall forthwith be taken into custody to serve out the remainder of the sentence.

.....J
[R.M.LODHA]

.....J
[CHANDRAMAULI KR. PRASAD]

NEW DELHI
AUGUST 23, 2013.



JUDGMENT