A.F.R.

Court No. - 49

Case :- CRIMINAL APPEAL No. - 3969 of 2013

Appellant :- Mohd. Imran
Respondent :- State of U.P.
Counsel for Appellant :- Lav Srivastava,Imtiyaz Ali,Santosh Kumar Tiwari,Shujauddin,V.P. Srivastava
Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Gautam Chowdhary,J.

1. Heard Sri Santosh Kumar Tiwari, learned counsel for appellant and Sri N.K. Srivastava, learned A.G.A. for the State.

2. This appeal has arisen from the judgement and order dated 08.08.2013 passed by learned Additional Sessions Judge, Saharanpur in S.T. No. 507 of 2011, State of U.P. v. Imran (Crime No.28/11) under Section 302 I.P.C., Police Station Thakurdwara,, District Moradabad for life imprisonment and fine of Rs. 20,000, in default of payment of fine one year further R.I. We place reliance in the case decided by us titled **Sharaft Vs. State of U.P. being Criminal Appeal No. 1237 of 2013 decided on 20.01.2021**. The facts are practically identical with the facts due to quarrel the brother stifling his sister and she met with her death. Can judgement be based on personal thought of a Judge and can conviction be based on what is known as moral conviction. Despite the fact that all the witnesses have turned hostile. The brother of the deceased has been sentenced for 302 IPC giving it a picture of honour killing.

3. The factual scenario as it unfurls from the record and the F.I.R are that the accused caused death of the deceased on 09.02.2011 at 9.30 p.m. when Usman Ali (who is father of the accused and also of deceased) had lodged the F.I.R. conveying to the Police that her daughter Shahista Parween was done to death by her brother Imran by stifling her neck by knife in glave and sudden provocation.

4. It is submitted by Shri Santosh Kumar Tiwari that the prosecution started against the accused who is brother of the deceased for commission of offence under Section 304 of Indian Penal Code and the charge sheet was laid against him for commission of offence under Section 302 I.P.C. The accused was committed to the court of session as the case was triable exclusively by the court of sessions.

5. It is admitted position of fact that the accused is in jail since 10.02.2011 and might have been in jail even during the period of investigation before he was enlarged on bail.

6. The prosecution examined several witnesses so as to bring home the charge framed against the accused as enumerated:

1.	Deposition of Usman, informant	09.08.2011	PW1
2.	Deposition of Mohd. Rizwan	09.08.2011	PW2
3.	Deposition of Mohd. Umar	30.09.2011	PW3
4.	Deposition of Dr. Abdul Qadir Ansari	01.11.2011	PW4
5.	Deposition of Mohd. Hanif	22.11.2011	PW5
6.	Deposition of Shamsad Ali	16.05.2012	PW6
7.	Deposition of Genda Lal	19.11.2012	PW7

8.	Deposition of Rajiv Kumar Gautam	11.01.2013	PW8
9.	Deposition of Vinod Kumar Singh	14.02.2013	P.W. 9
10.	Deposition of Rohtash Singh	09.04.2013	P.W. 10

7. In support of ocular version following documents were filed:

1	First Information Report	09.02.2011	Ex.Ka.3
2	Written Report	09.02.2011	Ex.Ka.1
3	Recovery Memo of of Pant & Jacket	10.02.11	Ex. Ka.13
4	Recovery memo of Blood Stained & Plain Earth and Blood Stained Knife	12.01.2012	Ex. Ka.6
5	P.M. Report	09.02.2011	Ex.Ka.6
6.	Report of Vidhi Vigyan Prayogshala	12.01.2011	Ex. Ka. 16
7.	Panchayatnama	09.02.2011	Ex. Ka. 7
8.	Charge-Sheet (Mool)	29.02.2011	Ex. Ka. 15

8. The following judgments of the Supreme Court are cited by the learned counsel for the appellant so as to contend that offence under Section 302 I.P.C. is not made out against the accused. **(i) Suresh @ Kala v. State NCT of Delhi, Criminal Appeal No.1284 of 2019; decided on 27.8.2019 (ii) Nandlal v. State of Maharashtra, (2019) 5 SCC 224 (iii) Surain Singh v. State of Punjab, (2017) 5 SCC 796 (iv) Deepak v. State of Uttar Pradesh, (2018) 8 SCC 228 (v) Budhi Singh v. State of Himachal Pradesh,**

(2012) 13 SCC 663 (vi) Atul Thakur v. State of Himachal Pradesh and others, (2018) 2 SCC 496.

9. The learned Advocate Sri Santosh Kumar Tiwari counsel for the appellant has taken us through the record and has contended that this is a case of clean acquittal. The father of the deceased who is father of the accused also has lodged the F.I.R. Despite the fact that no witnesses have supported the case of prosecution. The learned Judge has recorded the finding of section 302 I.P.C. and has convicted the accused for life. It is further submitted that the brother can never had intention to murdering his sister honour issues that she was requested not to meet the person namely Hanif coming to the home. He has relied on the decisions in **Budhi Singh Vs. State of H.P. Crl. Appeal No. 1801 of 2009 decided on 13.12.2012, Muthu Vs. State of Inspector of Police, Tamilnadu, Crl. Appeal NO. 1511 of 2007 decided on 2.11.2007 and Stalin Vs. State, Crl. Appeal No. 577 of 2020** and has requested that if this court is not convinced and it is a case of acquittal, this court may follow the judgement which is a mirror judgement of this Bench dated 20.01.2021 in case of Sharafat (Supra) where also two brothers were held to have injured their sister who died. In our case also it is submitted that the conviction be altered.

10. Learned counsel for the appellant has contended that if this Court come to the conclusion that the case is made out against the accused and they are not to be accorded benefit of doubt, he presses into service the provisions of Section 304 of I.P.C. According to learned counsel, the learned Judge could not have framed fresh charge after some of the witnesses had turned hostile.

11. As against this Sri N.K. Srivastava, learned A.G.A. appearing for the State has has vehemently objected and has contended that it is a case of honour killing where the brother did not like his sister who have a love affair with Hanif and has submitted that the conviction can not be modified as all the prosecution witnesses who have turned hostile have in the beginning supported the prosecution. It was accused and accused alone who had committed the offence.

12. We are convinced that it is a case of moral conviction.The accused is in jail since 10.02.2011 which is exactly ten years without remission. The witnesses have not supported the case of prosecution. Same and except the Doctor and the police officials. P.W. 1, P.W. 2, P.W. 3, P.W. 5 and P.W. 6 Shamshad Ali, who had taken the body. P.W. 7 is Genda Lal who is clerk, P.W. 8 is Rajiv Kumar Gautam who is Ist I.O, P.W. 9 Vinod Kumar Singh, who is IInd I.O. and P.W. 10 is Rohtash Singh, who is constable.

13. Learned counsel for the State has also taken us through the record and has contended that the vital part of the body was attacked by the appellant No.1 may be the deceased was sister but he was having knowledge and his intention was also there, otherwise he would not have inflicted blow on the vital part of the body by the instrument which was recovered as his behest.

14. As such we are convinced that the evidence was very scanty and oral testimony on the record of the trial Judge was not so on which conviction could be returned leave apart under Section 302 I.P.C., but it appears that the

learned Judge has convicted the accused on the basis of his own ideology and on the basis of the hostile witnesses

15. Recently the Apex Court **State of Gujarat Vs. B.L. Dave in Criminal Appeal No. 99 of 2021 dated 02.02.2021** has held that if the court wants to acquit and wants to take different view then taken by the learned trial Judge the court must discuss the evidence of each and every witness. In our case witnesses of facts have turned hostile. The learned Judge has convicted the accused on the evidence of the police authority which could not have been done in the submission of learned counsel for the appellant. [As ten years have already elapsed]. Death has occurred which is homicidal death. The pathology lab and the evidence of P.W. 8,9 and 10 and that of the medical evidence would permit us to hold that it was a homicidal death. The learned Judge goes to rely on the judgement in the case of honour killing and this is not a case of honour killing. In our case can it be said that there was a honour killings. The answer is a sympatrically no. The FIR goes to show that it was given in haste as the father felt bad. The deceased was 19 years of age was learning computer. The accusing according to father testimony before he turn hostile was not liked by the appellant herein and even if go by the cross examination he has not supported his version in F.I.R. P.W. 2 also has turned hostile but he had not seen who had inflicted knife injuries on his sister. P.W. 3 who is independent witness has also not supported the case of the prosecution, as we have also discuss the evidence of P.W. 4 that the death was homicidal death. We do not go further on the said aspect. There were four injuries which may be inflicted by a knife. P.W. 5 has also not supported the prosecution witness who has on the

contrary stated that he does not know who has committed the act of causing injuries to Shahista Parveen. We have already said that it was a homicidal death. Witnesses 7,8 and 9 are of police personnel. The evidence of the police witnesses have been made a basis of convicting the accused. The learned Judge has mis-led himself to convict under section 302 IPC. The factual data show that there was quarrel between brother and sister and the brother had done her to death. The FIR was lodged by the father which has been proved by learned Judge according to the police officials.

16. We have not discussed the evidence of each witness in detail as most of them have turned hostile being family members. It was a moral conviction by the learned Session Judge, the informant Usman, who is the father of the deceased Shahista Parveen. The incident occurred about seven months from the date of his deposition before Court on 9.8.2011 his turning hostile.

17. The post mortem report has been proved by the evidence of the Doctor Abdul Qadir Ansari, P.W. 4 goes to show that there were anti mortem injuries which was a incised wound 15.08 X 7.0 C.M. deep to conical bone wise cut neck muscles with cut trachea is to death was because of sudden cardiac arrest die to shock and hymrage haemorrhage. This fact itself proves that the death was homicidal and not of suicidal death.

18. It is submitted by counsel for the appellant that this is a case of no evidence, however, the accused is in jail since more than ten years. The learned Judge had relied on which could not have been made the basis for conviction in fact the

conviction of the accused should not have been recorded, but as the learned counsel contended that it is not a case for conviction under Section 302 Indian Penal Code but case for lesser sentence.

19. This takes us to the issue of whether the offence would be punishable under Section 299 300 Indian Penal Code or Section 304 I.P.C.

20. Considering the evidence of these witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant and admission on part of accused. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

> *"**299. Culpable homicide:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

21. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute

abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

22. It is very clear from the F.I.R. though unsupported by the prosecution and other witnesses of facts that there was a heated discussion and during the quarrel one of the accused had tried to see that the deceased remained in the four corners of the home.

23. The accused is the brother of deceased, he is in jail **for a period of more than 10 years**. It is a matter of fact as it is transpires from the F.I.R. and as we have held that it is homicidal death but not murder. We hold the accused guilty for Section 304(1) Indian Penal Code.

24. While going through the record, we are convinced that the accused brother had no intention of doing away of his sister but in hit of the moment the incident has occurred. Learned Judge instead of writing philosophy, if he did not think it was a case of acquittal but could have punished under Section 304 part I or II of I.P.C. which was attracted in the facts of this case.

25. The concept of honour killing is invoked by learned Judge in the facts of the case and it would be not possible to concur as us a case of no evidence. Despite that the accused is in jail for more than 10 years without remission. The factual scenario even if it is believed could not have permitted the Judge to convict the accused for 302 IPC where no evidence was there on record. Most of the family members have turn hostile but the learned Judge has convict the accused on the basis that he had done with her death which was opinion as based on ideology of the learned Judge. It is not a case on record that the appellant did not want the deceased to fall love in a lower caste. Even

if we read operative portion it is very clear that there a quarrel between brother and the sister. According to the learned trial Judge the brother acted in gruesome manner and that is why punished him with life imprisonment with a fine of Rs. 20,000/-. The learned Judge has heavenly relied upon **Bhagwan Das Vs. State of New Delhi 2011 Crl.LJ 2903** just because the accused did not examine any witness. The learned Judge has relied reliance and has convicted on the statement under section 161 Cr.P.C. of the witnesses. With this preclude we decide the appeal. Similar is case before us and reliance can be placed on the case of Sharafat (Supra).

26. The accused is in jail for more than 10 years. He is sentenced to undergo nine years R.I. with fine of Rs. 500/- and, in case of default in payment of fine, further to undergo three months imprisonment. He is ordered to be set free if not required in any other case.

27. Accordingly, the appeal is allowed.

28. Record and proceedings be sent back to the trial court.

29. This court is thankful to Shri Santosh Kumar Tripathi, learned counsel for the appellant and learned AGA Sri N.K. Srivastava for ably assisting this Court in getting this old matter disposed off.

Order Date :- 12.2.2021
RPD