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SURENDRA SINGH @ BITTU

v.

STATE OF UTTARANCHAL

APRIL 28, 2006

B

[S.B. SINHA AND P.K. BALASUBRAMANYAN, J.J.]

Penal Code, 1860:

C *s. 304 (Part II)—Absence of intention to cause death—During exchange of hot words and scuffle, a single gun shot causing death of victim—Three accused prosecuted u/s 302/34 IPC—Trial court acquitting one of them and convicting two under s.304/34—High Court acquitting another giving him benefit of doubt and convicting appellant u/s. 302 simplicitor—Held, in view of acquittal of other two accused, genesis of occurrence cannot be said to have been proved—Appellant did not act on his own—He is said to have acted on impulse and that too upon being instigated by his brother—Appellant cannot be said to have intention to kill the deceased—Conviction u/s 302 altered to one u/s 304 (part II) with sentence of 7 years RI.*

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E *Appellant, his elder brother and another person were prosecuted for offences *inter alia*, punishable under s. 302/34 IPC. The appellant and PW-1 had adjoining agricultural lands. Prosecution case was that cattle belonging to appellant used to enter agricultural fields of PW-1. On the date of occurrence also cattle of appellant damaged crops of PW-1 whereupon his son made protests. This led to hot exchanges and a scuffle. Upon exhortation given by his elder brother the appellant was said to have fired a shot which hit the son of PW-1 on the left flank of the abdomen. PW-1 and two other co-villagers namely PW-2 and one 'K' were said to have witnessed the occurrence. However, 'K' was not examined by the prosecution. The trial court convicted the appellant and his elder brother *inter alia*, under s.302/34 IPC. On appeal, the High Court acquitted the elder brother of appellant. However, the appellant was convicted *inter alia*, under s.302 IPC simplicitor.*

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In the present appeal, the Court issued limited notice, namely, as to whether the judgment of conviction under s.302 IPC should be altered to one under s.304 IPC. It was contended for the accused-appellant that it was not a case where the accused could be said to have any intention to cause death of

the deceased. A

Allowing the appeal in part, the Court

HELD: 1.1. In view of the acquittal of the other two accused, the genesis of the occurrence cannot be said to have been proved. The appellant, according to the prosecution case itself, did not act on his own. He is said to have acted on impulse and that too upon being instigated by his brother. From the evidence of PW-1 and PW-2, it is evident that not only there had been hot exchange of words, but also a scuffle. PW-1, the father of the deceased, was not at the spot and therefore, he did not witness the occurrence. The trial judge did not fully rely upon the evidence of PW-2. Thus, there was no witness who can be said to have proved the actual genesis of the occurrence. The High Court did not believe the exhortation aspect and acquitted the brother of the appellant giving him benefit of doubt. The parties have their own agricultural lands adjoining each other. The prosecution case is that the cattle belonging to the appellant had damaged the standing crops of the deceased, but the Investigating Officer did not find any evidence in this behalf. The appellant was not apprehended at the spot. In a situation of this nature, it cannot be said that the appellant had an intention to kill the deceased. [494-D-H; 495-A-C]

Jalaram v. State of Rajasthan, (2005) 9 SCALE 505, referred to.

1.2. The conviction of the appellant is modified as falling under Fourth Exception to s.300 IPC as he has caused the death of the deceased without having any intention therefor. The appellant is found guilty of commission of an offence under s.304 (Part II) of the IPC. Keeping in view the facts and circumstances of the case, appellant is sentenced to undergo sentence of seven years' R.I. and also pay a fine of Rs. 5000- which if realised may be paid to PW-1. [496-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 501 of 2006.

From the Judgment and final Order dated 15.9.2005 of the Uttarakhand High Court at Nainital, in Criminal Appeal No. 148/2002. G

Venkateswara Rao Anumolu for the Appellant.

Avatar Singh Rawat and D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by H

A S.B. SINHA, J. Leave granted

The appellant is before us being aggrieved by and dissatisfied with a judgment and order dated 15.9.2005 passed by the High Court of Uttarakhand in Criminal Appeal No. 148/2002, whereby and whereunder an appeal preferred by him from a judgment dated 17.6.2002 of the Fast Track Court, Kashipur (Udham Singh Nagar), convicting him for an offence under Section 302 of the Indian Penal Code ('IPC', for short) was dismissed.

Having regard to the fact that a limited notice was issued in the matter, namely, as to whether the judgment of conviction under Section 302 IPC should be altered to one under Section 304 IPC, we need only notice the facts relevant to that aspect:

The parties belong to Mohali Jungle of P.S. Bazpur, District Udham Singh Nagar. They have their own agricultural lands in the said village. The appellant has his own cattle. The cattle belonging to the Appellant used to enter into the agricultural lands of the deceased, Ram Singh, which were adjoining to the agricultural lands of the accused and were separated by a bund. Ram Singh made a number of complaints thereabout to the appellant. On 14.6.2001, again the cattle allegedly damaged the crops grown in the plot of the deceased. He made a protest thereagainst whereupon hot exchanges of words ensued. There was a scuffle. Rajendra Singh, the elder brother of the accused, allegedly, exhorted that the deceased has been creating trouble and he should be killed, whereupon the appellant is said to have fired a shot from his gun, which hit him on the left flank of the abdomen.

Indisputably, P.W.1-Madan Singh, the father of the deceased and two co-villagers - P.W.2-Govind Singh and Kharak Singh witnessed the occurrence. It is not in dispute that the gun in question was not recovered. It was further not in dispute that another witness Kharak Singh, who was also said to be an eye-witness, had not been examined by the prosecution.

Along with the appellant herein, his brother Rajendra Singh, as also the accused No. 3 Trilok Singh were charge-sheeted. The learned Trial Judge acquitted Trilok Singh of all charges holding, *inter alia*, that sufficient evidence was not brought on record to implicate him. The appellant herein and Rajendra Singh were, however, convicted under Sections 302/34, 504 and 506 of the IPC. An appeal was preferred thereagainst. By reason of the impugned judgment, the High Court, however, while acquitting Rajendra Singh of the charges levelled against him, maintained the conviction of the appellant

herein under Section 302 IPC simplicitor, as also under Sections 504 and 506 A of the IPC. The appellant is, thus, before us.

In this appeal we proceed on the basis that the appellant was responsible for causing the death of the said Ram Singh. The homicidal nature of death of Ram Singh is also not in dispute. B

The principal submission of Mr. M.N. Rao, learned Senior Counsel appearing on behalf of the appellant is that it is not a case where the appellant can be said to have any intention to cause death of the said Ram Singh. C

P.W.1, the father of the deceased was not at the spot and, therefore, did not witness the occurrence. Govind Singh-P.W.2 and Kharak Singh-P.W.3 were examined by the prosecution. They allegedly have been passing through the bund of the said field at about 7.30 p.m. P.W.3 was at a distance from them. Although, in his examination-in-chief he is said to have stated that Rajendra Singh asked the appellant to kill him with a fire arm, whereupon the appellant fired a shot, but in his cross-examination he categorically stated: D

“The name of my real brother is Mohan Singh. Some scuffle with Ram Singh and accused persons took place on the bund of the field. I had not heard the sharing of abuses because I was behind.”

It is also not in dispute that only one shot was fired. P.W.2-Govind Singh had not been relied upon totally by the Trial Judge. Possibly, in view of his evidence the aforementioned Trilok Singh was acquitted. The said Govind Singh in his examination-in-chief stated that: E

“.....Minor scolding took place between Rajendra Singh and Ram Singh. This scolding took place on the question of damages caused by the cattle. Rajendra Singh said to Surendra Singh shoot him with gun, he harasses us daily. Trilok Singh was shouting from his house, don’t let him alive, kill him. Surendra Singh had shot a fire on Ram Singh.” F

His evidence has not been found to be reliable by the learned trial Judge. He noticed: G

“....Witness Govind Singh PW-2 has stated in his examination in chief that exchange of abuses took place on the question of entering of cattle in the field. He stated the fact that exchange of abuse took place between Ram Singh and Rajendra Singh and on this question no cross examination of the witness has been made. By which it should be H

A admitted that there was no such fact of causing damages by the cattle. Thus there were grudge and enmity between the parties and just due to that enmity this occurrence has been caused by the accused persons on the same day in the evening."

B The Trial Judge categorically held that Trilok Singh was not present at the spot. A site plan was prepared by P.W.4-Rakesh Chandra Thapliyal, the Investigating Officer of the spot on the basis of identification of the site by the said Govind Singh and Kharak Singh. According to the said witness, no damage of crop by the cattle was shown in the site plan. It has further been noticed by the learned Trial Judge that Govind Singh, even in his statements before the Investigating Officer, did not name Trilok Singh.

C The High Court, as noticed hereinbefore, also acquitted the brother of the appellant on whose alleged exhortation only the appellant has said to have fired the shot opining:

D "....On the other hand we find that in the instant case there was only allegation of instigation attributed to accused Rajendra Singh and he was not in the picture when the deceased first of all met the accused Surendra Singh and complained to him about the damage to his crop by the cattle of the accused. The accused Surendra Singh was at that time carrying a gun and therefore there was no need for accused E Rajendra Singh to exhort or instigate his brother accused Surendra Singh to kill the deceased by wielding the gun. Considering the evidence of P.W.1 and P.W.2 to this effect we are convinced that there was no meeting of mind of these two accused to commit the offence with which they were charged and therefore without casting any reflection on the evidence of these two eye witnesses and only by F way of abundant caution accused Rajendra Singh should have been extended benefit of doubt and acquitted of the charges leveled with the aid of section 34 I.P.C."

G The question as to whether the appellant had the motive to kill the said Ram Singh is required to be considered on the aforementioned backdrop of events.

H In view of the acquittal of Trilok Singh and Rajendra Singh, the genesis of the occurrence cannot be said to have been proved. The appellant, according to the prosecution case itself, did not act on his own. He is said to have acted on impulse and that too upon being instigated by his brother. From the

evidence of P.W.1 and P.W.2, it is evident that not only there had been hot exchange of words, but also a scuffle. The learned Trial Judge did not fully rely upon the evidence of P.W.2. Thus, there was no witness who can be said to have proved the actual genesis of the occurrence. A

The parties have their own agricultural lands adjoining each other. The prosecution case is that the cattle belonging to the appellant had damaged the standing crops of the deceased, but the Investigating Officer did not find any evidence in this behalf. Why then there had been hot exchange of words and a scuffle ensued is not known. Only one shot was fired. The Appellant was not apprehended at the spot. In a situation of this nature, therefore, we are of the opinion that it cannot be said that the appellant had an intention to kill the deceased. B
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In *Jalaram v. State of Rajasthan*, (2005) 9 SCALE 505, this Court, in a case where there had been a dispute as regard the right of way, held:

“The right of way on the agricultural land belonging to Sonaram has not been established. If there was not established right of way by way of easement or otherwise and if there had been an apprehension in the mind of the accused that there was a threat of trespass in their land, indisputably they could exercise their right of private defence. In any event, such an apprehension on the part of the Appellant and other accused persons cannot be ruled out. D
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We have noticed hereinbefore, that the only blow which was hurled by the Appellant herein was on the forehead of the deceased. The genesis of the occurrence, appears also not to have been disclosed by the prosecution. It is not the case of the prosecution that the appellant herein and other accused persons had been nurturing any grudge against the deceased or the informant from before or had any motive to commit the aforementioned offence. Any motive on the part of the Appellant and other accused persons for hiding themselves near the place of occurrence and committing the offence has not been established. It is, thus, difficult to accept that part of the prosecution case.” F
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In that view of the matter, we are of the opinion that the offence, which is established as against the appellant herein, would fall under Section 304 Part II of the IPC and not under Section 302 IPC. H

A We, therefore, modify the conviction of the Appellant as falling under Fourth Exception to Section 300 IPC being of the opinion that the appellant has caused the death of the deceased without having any intention therefor. The appellant is, therefore, found guilty of commission of an offence under Section 304 Part II of the IPC.

B We are, further, of the opinion that keeping in view the facts and circumstances of this case, interests of justice would be subserved if the appellant is sentenced to undergo sentence of seven years' Rigorous Imprisonment and also pay a fine of Rs.5000/-, in default of payment whereof, to undergo further six months' Simple Imprisonment. We direct that the fine of Rs.5000/-, if realized, may be paid to P.W.I-Madan Singh.

The appeal is allowed to the aforementioned extent.

R.P.

Appeal partly allowed.