CASE NO.:
Appeal (crl.) 905 of 1995

PETITIONER:
STATE OF KARNATAKA

RESPONDENT:
MOHAMED NAZEER @ BABU

DATE OF JUDGMENT: 24/01/2003

BENCH:
S.N. VARIAVA & D.M. DHARMADHIKARI

JUDGMENT:
JUDGMENT

2003 (1) SCR 555

The Judgment of the Court was delivered

VARIAVA, J. This appeal is against the judgment dated 8th December, 1992. Briefly stated the facts are as follows:

The Respondent was charged for having committed an offence under Section 302 of the Indian Penal Code. The case of the prosecution was that on 13th of March, 1987, the Respondent went to the house of the deceased Amiruddin at about 8.30 pm. The Respondent caught hold of the banian of the said Amiruddin, lifted him up, hit him on the right check and back portion of the neck. On hearing the commotion two neighbours (PW.6 and PW.7) came. The Respondent then stated to Amiruddin that he would not leave him alive and kicked him with the right knee on his private part. Amiruddin fell down saying, "O' God, I am dying", and he died there. The prosecution case is that the Respondent tried to run away but was stopped by the neighbours who caught hold of him and thereafter when the police came they handed over the Respondent to the police.

During trial evidence was led of the wife of the deceased Amiruddin, who was examined as PW.l. Evidence was also led of the daughter of the deceased who was examined as PW.5. Both of them narrated all the above facts. The two neighbours who came to the house, on hearing the commotion, were also examined as PW. 6 and PW. 7. These persons were eye-witnesses to the incident. They confirmed the case that they saw the Respondent giving the deceased a kick on his private parts with the right knee saying that he would not leave him alive. The testimony of PWs. 1,S,6&7 were not shaken in cross-examination.

The Doctor, who carried out the post-mortem has been examined as PW.2. The Doctor deposed that it was found that the left side scrotum was swollen and the muscles in this region were distorted. He deposed that in the left testis was found to be bluish in colour specially more so on the lower and upper pole. The Doctor opined that all the injuries were ante-mortem in nature and that the cause of the death was due to neurogenic shock as a result of the injury on the testicles and the scrotum. The Doctor deposed that such injury can be caused if a kick is given by the right knee on the testis. The Doctor deposed that such an injury is sufficient in the normal course immediate death.

The trial Court accepted the evidence of the eye-witnesses and the Doctor. The trial Court concluded that the persecution had proved his case beyond a reasonable doubt. The trial Court, however, without assigning any reason whatsoever, then held as follows:

"I am of opinion that the offence, bearing in mind the facts of the case

does not come u/s. 302 1PC but comes u/s 304-II 1PC. The accused has committed an act by which the death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death. The act of the accused comes under culpable homicide not amounting to murder. The accused has not used any weapon. So I have come to the conclusion that the offence u/s. 304 (Part-II) I.P.C. has been committed by the accused."

At this stage it is to be noted that the Trial Court has held that the prosecution has proved his case beyond a reasonable doubt. The Trial Court has also held, as set out above, that the accused has committed an act by which death was caused, with the intention of causing death or by causing bodily injury as is likely to cause death. We have not been able to fathom on what basis the trial Court then concluded that the offence was one under Section 304 (Part-II). We can only surmise that the trial Court convicted the Respondent under Section 304 (Part-II), IPC, out of misplaced sympathy, so that it could sentence the Respondent to undergo RI only for five years and pay a fine of Rs. 3,000. Surprisingly the State never went in Appeal against this sentence.

The Respondent filed an Appeal to the High Court. The High Court did not interfere with the conviction of the accused, however, the High Court then goes on to hold as follows:

"It may be noticed that there is absolutely no evidence that the accused aimed the particular blow, given by the knee, at that particular part of the body of the deceased."

To be remembered that the High Court is not disbelieving PWs 1,5,6,&7. Their evidence is categoric that Respondent stated that "he would not leave him alive" and then kicked him in the private part. The normal deposition of witnesses would be that a blow or kick was on a particular part of the body. One has never come across nor can it be expected of the witnesses to state that the blow or kick was aimed at the private parts or a particular part and that it then landed on that part. Thus the above extracted observations of the High Court appear to be absolutely meaningless. As regards the evidence of Respondent’s statement the High Court holds as follows:

The learned High Court Government Pleader, contended that there was evidence of several witnesses, to the effect that he would finish of the deceased. The very fact that the learned Sessions Judge has not convicted the accused for an offence under Section 302 IPC, and that the State has not challenged the acquittal of the accused in respect of the said offence shows that the case that the accused had the intention to commit the murder of the deceased has not been accepted and that has become final. Therefore, there is no scope for the State still to canvas that by the evidence of several eye-witnesses it has to be held that the accused had the intention of committing the murder of the deceased.

The High Court has fallen in error here also. As set out hereinabove the trial Court holds that the Respondent had intention to cause death. The High Court should have noticed that trial Court had unnecessarily, thereafter, changed the offences into one of a lesser nature. The High Court is also not disbelieving the evidence. It, therefore, should not have concluded that there was no intention to cause death. Even otherwise, the High Court should have noticed that the conviction under Section 304 Part-II IPC would be only if there was no intention to kill. The High Court erred in not noticing that the statement and the kick at the private part showed that the Respondent had knowledge that it was likely to cause death or to cause such bodily injury as is likely to cause death.

The High Court then goes on to hold as follows:-

"Having regard to the nature of the injuries caused and also the fact that

the evidence tendered by the eye-witnesses has not been accepted regarding the intention to cause the death or the intention to cause bodily injury as is likely to cause the death, and the fact that no injury, external or internal has been caused by the particular kick, and the death, in fact resulted only on account of neurogenic shock, it cannot also be said that the accused committed an act with the knowledge that likely to cause such death. Therefore, it is clear that the case of the accused does not fit into section 299 of the IPC. Once that is so, there is no scope to hold that the accused is guilty for the offences under Section 304 Part II IPC.

Having regard to the fact that no grievous hurt has been caused, it is clear that the only offence for which the accused could be convicted under the circumstances is the one under Section 323 IPC."

On this reasoning, the High Court sets aside the conviction under Section 304-II, and convicts the accused under Section 323. The High Court has released the Respondent after admoishing him under Section 3 of the Probation of Offenders Act, 1958. Hence this Appeal by the State.

As has been set out hereinabove, he evidence of eye-witnesses, namely, PWs I,S,6,&7 establishes beyond a reasonable doubt that the Respondent came to the house of the deceased Amiruddin, caught hold of the deceased by his banian, lifted him up, hit him on the cheek and thereafter on the back of the neck. The evidence establishes that when he saw neighbours coming he stated to Amiruddin that he would not leave him alive and then kicked Amiruddin with the right on the private part. This resulted in the death of Amiruddin. The evidence of the Doctor has also not been dis-believed. The evidence of the Doctor clearly show that the death was caused due to neurogenic shock resulting from injury to the testicles and scrotum. Thus the death is directly due to the injury caused by the Respondent to the deceased. The injury was such that it was sufficient in the normal course to cause death. The injury resulted in death. The High Court was in error in stating that there was no injury. The High Court noted that death resulted from neurogenic shock but failed to note that the neurogenic shock was a result of the injury to the testicles and scrotum. The High Court omitted to note that such injury could be caused by a kick and was sufficient in normal course to cause immediate death. This was not a case where in a fit of anger or in a scuffle some act had taken place. We fail to understand how under such circumstances the High Court can conclude that the conviction can only be under Section 323 IPC. The injury caused was not even a simple injury. Section 323 would be wholly inapplicable. This was a case where the conviction should have been under Section 302 IPC. In any event, this was a case where the High Court would never have interfered with the conviction under Section 304 (Part-II) IPC.

Ms. Kiran Suri relied upon the case in State of Karnataka v. Shivalingaiah alias Handigidda, reported in [1988] Supp SCC 533. In this case, there was an altercation between two parties and in the course of the altercation, the Respondent squeezed the testicles of the deceased, who then fell down unconscious and died. The evidence of the Doctor was that the death was as a result of cardiac arrest resulting from shock due to injuries to the testicles. It is on those facts that this Court held that there was no evidence of intention to commit a murder. It was on those facts that it was held that neither Section 302 nor 304-II IPC would apply. To be noted however that this Court convicted the accused under Section 325 IPC. In our view, the facts of that case are entirely different from the present case and thus the ratio laid therein can be of no assistance to the Respondent.

Reliance was also placed upon the case of Commandant, 20th Battalion, ITB Police v. Sanjay Binjola, reported in [2001] 5 SCC 317, where it has been held that as the offence was of a very trivial nature, benefit of Probation of Offenders Act, 1958 could be granted to the accused. In the present case, as stated above, the offence is not trivial. The Respondent had gone to the house of the deceased in the evening and inflicted the injury which caused death. This is not a fit case where any such benefit can be given to

the Respondent. As stated hereinabove, the trial Court has, in our view, already been too lenient. However, as the State has chosen not to file any appeal against the judgment of the trial Court, we do not propose to interfere with the conviction and sentence as imposed by the trial Court.

In this view of the matter, we set aside the impugned judgment and restore that of the trial Court. The bail bonds of the accused shall stand cancelled. He shall be taken into custody forthwith. The amount of fine as imposed by the trial Court, if recovered, be paid to P.W.I. The Appeal stands disposed of accordingly.