

CASE NO.:
Appeal (crl.) 54 of 2003

PETITIONER:
Sukhdev Singh

RESPONDENT:
Vs.
Delhi State (Govt. of NCT of Delhi)

DATE OF JUDGMENT: 01/09/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T
ARIJIT PASAYAT, J.

Appellant faced trial for alleged commission of offence punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (for short 'IPC'). Learned Additional Sessions Judge, Delhi found him guilty of the aforesaid offences and sentenced him to undergo imprisonment for life and fine of Rs.300/-, and for two years imprisonment and a fine of Rs.200/- respectively for the aforesaid offences. The matter was carried in appeal before the Delhi High Court. By the impugned judgment the High Court held that the case was not one covered by Section 302 IPC, but Section 304 Part-I IPC was attracted. Similarly, instead of Section 307 it was held that Section 308 IPC was appropriate. Sentences of 10 years and 2 years respectively were awarded.

Prosecution version as unfolded during trial is as follows:

Appellant was attached to Mangat Ram, a Municipal Councillor and Chairman, Works Committee of the municipality as a Personal Security Officer. On 14.6.1989 there was an altercation followed by scuffle between the accused-appellant and one Devender Singh (hereinafter referred to as 'the deceased'). On the date of occurrence, deceased had parked his three-wheeler scooter opposite the gate of Mangat Ram's office. He opened lid of the engine. This was objected to by the accused-appellant who asked him to take away the vehicle. The deceased ignored the objection which led to further altercations. Accused-appellant threatened the deceased that he would take the vehicle to the police station. Thereupon, the deceased retorted that he would see as to what the accused-appellant could do. On hearing this accused-appellant boarded the scooter, and asked the deceased to take the scooter to the police station at Adarsh Nagar. The deceased did not take the correct route and tried to proceed in a wrong direction. Accused-appellant asked him to stop and again a scuffle took place. During the course of scuffle, accused-appellant took out his pistol and fired at the deceased. The bullet missed the target, and instead hit the thigh of one Vijay Kumar (PW 7) who was standing nearby. The accused-appellant fired again and the bullet hit the deceased and he collapsed. The deceased and Vijay Kumar were taken to Hindu Rao Hospital. The deceased was declared to be dead, but doctor examined Vijay Kumar (PW 7) and he was admitted to the hospital. On the basis of information lodged, investigation was undertaken and charge sheet was placed. Accused claimed trial. His defence was that besides the deceased there was another person and when he asked them to remove the vehicle for security reasons, the deceased and his companion picked up quarrel with the accused-appellant and dragged him about 20 feet. Thereafter three or four drivers joined the deceased and his companion.

They assaulted him and his shirt was torn. They snatched away his pistol, and he grappled with them to recover his pistol. In this process the pistol went off. He told the incident to Mangat Ram (PW-3). The Trial Court held that the case would not fall within the Exceptions 1, 2 and 4 of Section 300 IPC and it was clearly covered under Section 302.

In appeal, the High Court came to the following conclusions (as noted in Para 18 of the judgment)

"The conclusions are obvious (a) the appellant had no enmity with the three wheeler scooter driver (b) there was an altercation and (c) it was followed by a scuffle between the two..."

Therefore, Exception 1 to Section 300 IPC was held to be applicable. Accordingly the conviction was altered and so also the sentence. The appellant as noted supra was directed to undergo sentence of 10 years under Section 304 Part-I IPC and 2 years sentence under Section 308 IPC with a fine of Rs.200/- for each count.

Said judgment is impugned in this appeal. In support of the appeal, learned counsel for the accused-appellant submitted that the High Court has not considered the case in its proper perspective. It did not consider the plea of the accused-appellant that this was a case of accident covered under Section 80 IPC. The prosecution version was not established by any witness examined and on the contrary version given by the accused-appellant was more than probable and materials on record accord with the defence version. Great emphasis was laid on the evidence of the Principal Scientific Officer ((PW 27) who stated that weapon used by the accused-appellant was semi-automatic; when trigger is pressed, the bullet is fired and the pistol is automatically reloaded; the possibility of the pistol being pressed unintentionally second time during the course of a scuffle cannot be ruled out. With reference to this evidence, it was submitted that the defence version is probalised. Reference was also made to the evidence of PW 8 who was posted in PCR as Constable. She was informed by some unknown person on telephone regarding shooting by 3 persons at Shastri Market, Azadpur, Delhi. With reference to this evidence, learned counsel submitted that 3 persons were involved in the scuffle and, therefore, the version of the accused-appellant that the deceased had snatched away the pistol is established.

Per contra learned counsel for the State submitted that the High Court's judgment is in order and needs no interference.

When it was pointed out to Learned Counsel for the appellant that the only point which appears to have been urged before the High Court is the non-applicability of Section 302, and applicability of Section 304 IPC, learned counsel for the appellant submitted that in the grounds of appeal other pleas were also taken. When it was pointed out that in paragraph 22 of the High Court's judgment it was clearly noted that no other argument was advanced, she gave an evasive reply and submitted that the High Court has not correctly reflected the arguments. To say the least this argument does not appeal to us and on the contrary surprise us. If in reality the High Court had failed to consider the argument or any other plea or wrongly recorded that no other plea was urged the course to be adopted is well known. It is not for this Court to accept the plea about non-consideration.

Even otherwise, Section 80 IPC has no application to the fact of the case. The said provision reads as follows:

"80. Accident in doing a lawful act. â\200\223 Nothing is an

offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

The section exempts the doer of an innocent or lawful act in an innocent and lawful manner from any unforeseen result that may ensue from accident or misfortune. If either of these elements is wanting the act will not be excused on the ground of accident. An accident is not the same as an occurrence, but something that happens out of the normal or ordinary course of things. An effect is said to be accidental when the act is not done with the intention of causing it, and its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done to take reasonable precautions against it. The idea of something fortuitous and unexpected is involved in the word "accident". (Per Lord Halsbury LC in *Hamilton Frazor & Co. v. Pandorf & Co.* (1887) 12 App. Cases 518)

As was observed by this Court in *Atmendra vs. State of Karnataka* (1998 (4) SCC 256), to claim the benefit of the provisions of Section 80, it has to be shown (1) that the act in question was without any criminal intention or knowledge; (2) that the act was being done in lawful manner and by lawful means; (3) that the act was being done with proper care and caution. In the said case it was observed that the evidence established that the accused unintentionally fired the gun and, therefore, the question of applying Section 80 did not arise.

In *K.M. Nanavati vs. State of Maharashtra* (AIR 1962 SC 605), it was observed that Section 80 exempts the doer of an innocent or lawful act, in an innocent or lawful manner and proper care and caution from any unforeseen evil result that may ensue from accident or misfortune. When an accused pleads an exception within the meaning of Section 80 there is a presumption against him and the burden to rebut the presumption lies on him.

The factual position shows that the accused deliberately used the gun, of course during the scuffle. The evidence of PW 3 Mangat Ram is very significant. He is an independent witness and the accused-appellant was posted as his Personal Security Officer. Immediately after the occurrence, the accused-appellant told him (as deposed by PW 3 in Court) about the incident and did not tell him that the deceased snatched away the pistol, or that he was accompanied by 3-4 persons who were scooter drivers. He specifically told him that as the deceased tried to snatch the pistol, he fired at him. But he did not tell him as to how many shots he had fired. Even if PW 7 injured resiled from his statement made during investigation there was no departure from the statement made that the person who fired the shot was the accused-appellant. The hypothetical answer given by PW 27 that the possibility about trigger being pressed unintentionally second time during the course of scuffle cannot be ruled out, does not in any manner help the accused-appellant despite the factual position in this case indicating use of the gun by the appellant. This was just a hypothetical answer to a hypothetical question. On the contrary, the evidence of PW 3 Mangat Ram clearly shows that Sukhdev Singh had not told him that the bullet went off in the process of struggle and snatching. That being the position, the inevitable conclusion as rightly held by the High Court, is that the accused-appellant is the assailant. The only other question is about the applicability of an exception to Section 300. In our view, the High Court was not justified in holding that Exception I to Section 300 of the IPC was applicable. The said exception deals with homicide committed in the heat of passion or way of sudden provocation. The test of grave and sudden provocation is whether a

reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose self-control.

In determining the question of provocation the objective test as was applied by the Privy Council in *Philips vs. R* (1969 AC 100) must be applied. The two questions which require affirmative answers are as follows:

- (1) Would the reasonable man have lost his self-control, and
- (2) would he then have retaliated as the offender did?

In the present case the gunshots cannot be said to be the result of grave and sudden provocation.

On the contrary this appears to be a case as noted above covered by Exception 4 to Section 300. Four requirements are to be satisfied to bring in application of Exception 4. They are as follows:

- (1) It was a sudden fight;
- (2) There was no premeditation;
- (3) The Act was in a heat of passion; and
- (4) The assailant had not taken any undue advantage or acted in a cruel manner.

The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the fight.

The factual scenario as presented by the prosecution and the conclusions of the High Court, noted *supra* go to show that in course of sudden quarrel, the offender fired the shots.

Therefore, though the High Court was justified in holding that Section 302 was not applicable, it was not correct in holding that Exception I applied. In fact, Exception 4 to Section 300 applied. We, therefore, alter the conviction by Section 300 Part II instead of Section 304 Part I, as was held by the High Court. Custodial sentence of 8 years would suffice. So far Section 308 IPC is concerned, we do not find any infirmity in the conclusions of the High Court to warrant interference.

The appeal is partly allowed to the extent indicated.