

ARVIND KUMAR

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v.

STATE OF NCT, DELHI

(Criminal Appeal No. 2390 of 2010)

JULY 17, 2023

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[ABHAY S. OKA AND RAJESH BINDAL, JJ.]

Penal Code, 1860 : s. 304A – Causing death by negligence – Scuffle between the victim-constable and the appellant-police guard – Semi Automatic Fire (SAF)-carbine of the appellant got entangled in the chain of the appellant's belt resulting in accidental firing of five rounds of bullets from the SAF of the appellant – Bullets hit the victim in his neck leading to his death – Case of the appellant that he was requested by the sub-inspector to ask the victim to desist from continuing with his conversation on the telephone – Conviction of the appellant u/s. 302 and sentenced to life by the courts below – On appeal, held: Failure to prove the existence of the motive as such the prosecution case regarding intentional firing by the appellant cannot be accepted – Also two eyewitnesses completely supports the defence of the appellant of accidental firing – Furthermore, the interpretation of the statement of the appellant made after the incident whereby he blamed the sub-inspector, and the response of the sub-inspector to the appellant's statement, is a possible interpretation that is consistent with normal human conduct – Version of the prosecution witnesses about the appellant and the sub-inspector making such statement does not inspire confidence – Prosecution also failed to prove that the appellant had either any intention of causing the death of the victim or the intention of causing such bodily injury to the victim which was likely to cause his death – Thus, not a case of culpable homicide as defined u/s. 299 – However, failure on the part of the appellant who was holding a sophisticated automatic weapon to ensure that the change lever was always kept in a safety position – Gross negligence on the part of the appellant led to a loss of human life – Thus, the appellant guilty of committing a lesser offence punishable u/s. 304A and his conviction u/s. 302 set aside – Evidence Act – s. 6.

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A **CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2390 of 2010.**

From the Judgment and Order dated 02.07.2010 of the High Court of Delhi at New Delhi in CRLA No. 605 of 2009.

B S. Nagamuthu, Sr. Adv., Ms. Prerna Mehta, Adv. for the Appellant.

Jayant K. Sud, ASG, Shreekant Neelappa Terdal, Mukul Singh, Rajesh Singh Chauhan, P. V. Yogeswaran, Rajan Kr. Chourasia, S. K. Singhania, Dr. N. Visakamurthy, Advs. for the Respondent.

The Judgment of the Court was delivered by

C **ABHAY S. OKA, J.**

FACTUAL ASPECTS

1. By this appeal, the appellant-accused has taken an exception to the order of his conviction passed by the Sessions Court for the offence punishable under Section 302 of the Indian Penal Code (for short, “IPC”). The learned Sessions Judge held that the case of the appellant-accused was covered by “thirdly” in Section 300 of IPC. The learned Sessions Judge held that the appellant-accused has failed to bring the case within the protective umbrella of the exception 4 to Section 300 of IPC. By the impugned judgment of the High Court, the conviction of the appellant has been confirmed. The Trial Court sentenced the appellant to undergo a life sentence. By the time the appellant was released on bail by this Court by the order dated 27th November 2017, the appellant had undergone incarceration for a period of about 8 years and 11 months.

2. The case of the prosecution is that one Shashi Bala (PW-12) who was a Sub-inspector of Police was posted as a Duty Officer in I.P. Estate Police Station, Delhi on 28th December 1994. One constable Mohd. Rashid (the deceased) was on duty as “Munshi-Roznamacha”. At about 5.45 pm, the deceased came to the reporting room and started talking on the official telephone of the Police Station. After noticing that the deceased was talking on the phone for about 5 to 7 minutes, Shashi Bala (PW-12) advised him not to keep the official telephone engaged as the Police Station may receive some urgent calls. The case of the prosecution is that the deceased did not pay heed to the advice of PW-12. The appellant was posted as a guard at the Police Station. The appellant was carrying a Semi-Automatic Fire (SAF) – carbine. PW-12 Shashi Bala,

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around 5.55 pm, requested the appellant to ask the deceased to desist from continuing with his conversation on the telephone. Therefore, the appellant entered the duty room where the deceased was sitting and talking on the phone. The appellant put his hand on the shoulder of the deceased and advised him to end the call. The initial case of the prosecution was that the deceased playfully pushed the appellant while holding the SAF carbine of the appellant. The appellant tried to extricate his SAF. During the scuffle, SAF got entangled in the chain attached to the appellant's belt which led to the accidental firing of five rounds from the said automatic weapon. The deceased got five rounds of bullets in his neck. The police personnel present rushed the deceased to a hospital where he was declared dead.

3. Initially, based on a statement of Shashi Bala (PW-12), an offence under Section 304A was registered against the appellant. On the next day of the incident, the father of the deceased submitted a complaint to the Deputy Commissioner of Police and to the Commissioner of Police, Delhi. Based on the said complaints, the investigation was transferred to the Crime Branch. According to the prosecution, the opinion of the expert ruled out any possibility of accidental fire from SAF carbine. It was also revealed by the father of the deceased that prior to the incident, the deceased had caught the accused and Shashi Bala in objectionable condition. Therefore, Shashi Bala and the appellant got annoyed and they threatened to kill the deceased. On the basis of the investigation carried out by the Crime Branch, Section 302 of IPC was applied while filing the chargesheet.

4. We must record here that the High Court has disbelieved the prosecution's case about the existence of motive. The prosecution's case was that the deceased had seen the appellant and PW-12 in a compromising position and therefore, they held a grudge against the deceased. After considering the evidence of PW-3, PW-18 and PW-22 on the alleged motive of the crime, the High Court came to the conclusion that motive was not established. The High Court relied upon the testimony of PW-13 Karim Baksh who stated that he heard the cry of the deceased "Mujhe Bachao" and sound of the firing of SAF. The witness stated that when he saw the deceased lying on the chair with bullet injuries, the appellant was telling PW-12 Shashi Bala in Hindi "Madam aapne yeh kya karva diya, Mere to bache barbad ho jayenge". According to the witness, Shashi Bala responded by telling the accused that: "tum phikr

- A mat karo may bhi tumhare saath hu, court tak tumhara saath dungi”. The Court applied the doctrine of *res gestae* covered by Section 6 of the Indian Evidence Act 1872 (for short, “the Evidence Act”).

RIVAL SUBMISSIONS

- B 5. The learned senior counsel appearing for the appellant has taken us through the notes of evidence of the relevant witnesses. He submitted that taking the prosecution case as correct, in the scuffle between the deceased and the appellant, the SAF got entangled in the chain of the appellant’s belt which resulted in the accidental firing of bullets from the SAF. He submitted that once the motive is discarded, the prosecution’s case based on circumstantial evidence must fail. He urged that no offence was committed by the appellant in view of Section 80 of IPC as the death was as a result of purely an accident.

- D 6. In the alternative, he submitted that at the highest, the second part of Section 304 of IPC was applicable. He submitted that the Courts below have committed an error by invoking Section 302.

7. Learned counsel for the State supported the impugned judgments. Learned counsel pointed out that the reports of the ballistic expert and ocular evidence clearly show that the appellant certainly had knowledge that the use of SAF carbine may cause death.

CONSIDERATION OF THE SUBMISSIONS

- F 8. There is no dispute that the deceased was the victim of five bullets fired from the SAF carbine held by the appellant and that the bullet injuries caused his death. The Trial Court and the High Court held that the defence of accidental firing cannot be accepted and that the act of firing bullets by the appellant was intentional. The Court rejected the defence of the accident pleaded by the appellant by taking recourse to Section 80 of IPC.

- G 9. The motive alleged by the prosecution was that the deceased had seen PW-12 Shashi Bala (Sub-Inspector) and the appellant in a compromising position. The allegation is that as the deceased had seen both in a compromising position, PW-12 and the appellant were annoyed with him and thus, threatened to kill him. It is not necessary for us to go into the issue of the existence of motive as the High Court in paragraph 34 of the impugned judgment has recorded a finding after considering

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the testimony of PW-3 Nazir Ahmed, PW-18 Sub-Inspector Ram Singh and PW-22 Shaukat Ali, the father of the deceased that the case of the prosecution regarding the existence of motive does not inspire confidence. Therefore, we will have to proceed on the footing that the motive was not proved. Therefore, the failure to prove the existence of the motive is one of the circumstances which makes the prosecution case regarding intentional firing by the appellant not worthy of acceptance.

10. There are two witnesses who claim that they were eyewitnesses to the incident. PW-12 Shashi Bala is one such witness who stated in her examination-in-chief that:-

“On 28.12.94 I was posted as DO in PS I.P. Estate with duty hours from 12.00 noon to 6.00 p.m. On that day deceased ct.Md.Rashid was also discharging duty as Roznamcha Munshi till 8.00 p.m. At about 5.45 p.m. deceased came to my office i.e reporting room and started making phone call while sitting chair lying in front of me leaving a table which was lying between in two tables. He continued the phone call for nearly 5/7 minutes. I asked the deceased not to continue the talks and make the telephone engaged as some urgent call may be recd. in the PS. But the deceased did not take it seriously but he continued making the phone call. **At about 5.55 p.m. I asked Santri Ct.Arvind i.e accused present in the court today to restrained the deceased from talking the phone call for such a long period. Accd. asked the deceased to leave the telephone by putting his hand on the shoulder. Taking it as a joke deceased caught hold the SAF of accused and accd. tried to take back his SAF. During this scuffle the SAF of the accused got entangled in the chain tied with the belt of accused and during this course the fire is opened from accused which hit the deceased on his neck and chest and blood started coming out from his wound.** I got sent the decd. to JPS hospital who was declared dead by the concerned Doctor.”

(emphasis added)

In the examination-in-chief, she stated that the father of the deceased after one month of the incident threatened to kill her as she was not willing to change her version. It is pertinent to note that PW-12 Shashi Bala was not declared as a hostile witness.

- A 11. The only other witness apart from PW-12 who claims to be an eyewitness is PW-25 Satbir Singh Sherawat. He was not a member of the police force, but he was a part of CISF and was posted on internal security duty at the police station. His version is also important to be noted which reads thus:
- B “I was present at PS I.P. Estate at about 6 p.m. I saw that one constable posted there at PS I.P. Estate and was sitting on chair at Control Room in front of Duty Officer and he was making call from the telephone kept in control room and I was waiting to make a call from the said phone for giving my O.K report. I kept
- C on waiting in the gallery on the door of the control room and **in the meantime the duty officer asked the said constable not to leave the busy so long, as it was an official phone. He did not pay any heed to the request of the said duty officer. The duty officer requested the Santri to ask the said constable to leave the phone for other person. The Santri also went**
- D **there and requested the said constable for leaving the said phone but he did not pay any heed to his request also. The Santri caught him by his right arm as he was holding the receiver of the phone by his left hand and he casually pushed the Santri. The Santri again requested him to leave the phone and in response the said constable making the call**
- E **caught the SAF of the Santri and while making fun with each other, pushed him and at that time accidental fire took place from the said SAF and five rounds from the said SAF hit the person making the phone call. WSI Shashi Bala was also present there and she had also requested the constable**
- F **making the phone not to touch the SAF as it was dangerous, prior to the incident. The Santri at that time was the accused present in the Court whose name was known as Arvind (present in the Court today, correctly identified by the witness).** A public person was also present there but I do not
- G know his name. I did not know the name of the constable who was making the call after the bullet hit him at his chest and he was badly injured in the incident and after hearing the noise of the bullet all the staff of the PS gathered there. The SAF was kept on the table after the incident and I was not aware as to how many rounds were there in the magazine of the same and the same
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were not taking out in my present. No conversation took place between the accused and WSI Shashi Bala in my presence.” A

(emphasis added)

We may note here that even this witness was not declared as hostile.

12. Thus, the version of PW-12 and PW-25 who were claiming to be the eyewitnesses completely supports the defence of the appellant of accidental firing and in any case, they have not deposed that the appellant intentionally fired bullets at the deceased. PW-22, the father of the deceased, who was not an eyewitness, deposed in support of the case that the appellant intentionally opened fire. But his testimony on motive has been disbelieved by the High Court. Moreover, admittedly, his second statement in which the aforesaid allegation was made, was recorded three to four months after the incident. In his earlier statement recorded by the police after the incident, this version was not found as can be seen from his cross-examination.

13. There are four reports/opinions of the ballistic expert on record. Two reports mention that the bullets were shot at a close distance about which there is no dispute. Pursuant to the queries made by the investigating officer, a second report dated 18th August 1995 was submitted by the ballistic expert, Smt. Asha Dhir. Clauses 4 and 5 of the said report read thus:

“4. The 9 mm carbine marked A under reference received in the laboratory having change lever in ‘A’ (i.e. auto) position, it could fire if the firearm would have been cocked and the trigger was pressed and could go on firing as long as having trigger remain pressed.

5. The firearm under reference can be cocked by entangling with the chain, provided, if the change lever is not at ‘S’ (safety) position. If the trigger is pressed in cocked condition, it will fire.”

(emphasis added)

There is also an opinion dated 22nd December 1995 of the same expert which records that the possibility of simultaneously cocking and pressing the trigger of SAF after entangling with a chain is ruled out. If this opinion is read with the opinion dated 18th August 1995, it is apparent

- A that if the change lever is not in safety position, the firearm can be cocked by entangling with a chain.

14. Going by the evidence of prosecution witnesses, it will have to be held that the SAF got entangled with the chain attached to the belt of the appellant. Considering the opinion of the expert, it is obvious that
B when the incident occurred, the change lever was not kept in a safety position by the appellant and therefore, SAF got cocked which resulted in the firing of five bullets. The appellant must take the blame for not taking the elementary precaution of keeping the change lever in the safety position.

- C 15. Having carefully perused the statement of the appellant recorded under Section 313 of CrPC, the case of the prosecution that he intentionally opened fire by aiming at the deceased was not put to the appellant.

16. What remains is the statement attributed to the appellant and
D the response of PW-12 to the appellant's statement. These statements were read in evidence in view of Section 6 of the Evidence Act. According to the prosecution witness PW-13-Karim Baksh, after the firing was heard, the appellant was heard telling PW-12 that "Madam aapne yeh kya karva diya, Mere to bache barbad ho jayenge". Reply of Shashi Bala was: "tum phikr mat karo may bhi tumhare saath hu, court tak
E tumhara saath dunga". The only other witness who deposed about such statements is PW-5 Zahir Ahmed. According to him, he heard the appellant telling PW-12 "Madam, apne isko marva diya ab mera kya hoga". Both the witnesses have stated that they heard the cry "Mujhe bachao". Surprisingly, PW-25, who claims to have seen the incident has
F not deposed about any such statements made by the appellant, PW-12 and the deceased. PW-5 claims to have attended the funeral of the deceased. He admitted that as per the instructions of the father of the deceased, he met an inspector of the Crime Branch two months after the incident when his statement was recorded. Till that time, he did not report anything to the police about what he heard. PW-13 stated that
G PW-6, PW-17 and certain other persons were present when he heard the accused making aforesaid statements. Both PW-6 and PW-17 did not support the prosecution. The others who were present according to PW-13 were not examined by the prosecution. Therefore, the version of the prosecution about the appellant and PW-12 making such statements
H does not inspire confidence.

17. We will also examine the effect of such statements assuming that the same were really made. These statements were allegedly made immediately after the incident. The statements do have a connection with the incident. The statements were allegedly made spontaneously. Therefore, the Courts have treated the statements as relevant by invoking the doctrine of *res gestae* incorporated in Section 6 of the Indian Evidence Act. We have held that the theory of the prosecution that the appellant fired intentionally has not been established. The appellant was instructed by PW-12 to go to the deceased and to prevent him from continuing the use of the telephone. Therefore, he went near the deceased. It is the reaction or the action of the deceased which resulted in the SAF getting entangled with the chain attached to the appellant's belt; which led to the accidental fire from SAF. Therefore, the accused spontaneously reacted by telling PW-12 what she has got done from him. While implementing the direction issued by PW-12, the accidental fire took place and that is how the appellant became responsible for the death. It is in this context that the reaction of the appellant has to be understood. By those words, he has blamed the PW-12. The statement attributed to PW-12 means that she would support the appellant before the Court by telling the truth. If the theory of accidental firing is accepted, the interpretation of the aforesaid statements as made by us becomes a possible interpretation which is consistent with normal human conduct.

18. Section 6 of the Evidence Act and illustration (a) below Section 6 read thus:

“6. Relevancy of facts forming part of same transaction.—
Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

- (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.
- (b)
- (c)

A (d)”

B PW-5 and PW-13 have attributed the aforesaid statements mentioned in paragraph 16 above to the appellant and PW-12 Shashi Bala which were immediately made after the incident of firing. The alleged statements are certainly connected with the fact in issue, namely, the alleged act of the appellant of killing the deceased. Therefore, assuming that the statements attributed to the appellant and PW-12 were in fact made, the conduct of the appellant of making the said statement becomes relevant in view of Section 6. Section 5 of the Evidence Act provides that evidence may be given in a proceeding of the existence or non-existence of every fact in issue and of such other facts which are declared to be relevant under the provisions of Chapter II of the Evidence Act, 1872. Section 6 is applicable to facts which are not in issue. Such facts become relevant only when the same satisfy the tests laid down in Section 6. Hence, the statement of an accused to which Section 6 is applicable cannot be treated as a confession of guilt. The statement becomes relevant which can be read in evidence as it shows the conduct of the appellant immediately after the incident. In any case, in the facts of the case, we have held that the version of the two witnesses who have deposed about the appellant making such statement does not inspire confidence.

E 19. The prosecution has failed to prove that the appellant had either any intention of causing the death of the deceased or the intention of causing such bodily injury to the deceased which was likely to cause his death. Assuming that when the appellant approached the deceased to stop him from using the telephone, he was aware that the change lever was not in a safety position, it is not possible to attribute knowledge to him that by his failure to keep SAF in the safety position, he was likely to cause the death of the deceased. The knowledge of the possibility of the deceased who was himself a policeman pulling SAF carbine cannot be attributed to the appellant. In fact, the appellant could not have imagined that the deceased would do anything like this. Thus, by no stretch of the imagination, it is a case of culpable homicide as defined under Section 299 of IPC as the existence of none of the three ingredients incorporated therein was proved by the prosecution.

H 20. However, there is a failure on the part of the appellant who was holding a sophisticated automatic weapon to ensure that the change lever was always kept in a safety position. This was the minimum care

that he was expected to take while he approached the deceased. Thus, A
there is gross negligence on the part of the appellant which led to a loss
of human life. Due to his rash and negligent act, the deceased lost his
life. Therefore, the appellant is guilty of a lesser offence punishable
under Section 304A of IPC for which the maximum sentence is
imprisonment for two years. The appellant has undergone a sentence of B
more than eight years.

21. Hence, the appeal is partly allowed. The conviction of the
appellant under Section 302 of the IPC is set aside and he is held guilty
of committing the offence punishable under Section 304A of IPC. The
appellant has undergone the maximum sentence prescribed for the said C
offence. Hence, his detention in prison is no longer required. Hence, his
bail bonds are cancelled.

Nidhi Jain
(Assisted by : Tamana, LCRA)

Appeal partly allowed.