

Devendra Nath Srivastava vs State Of U.P on 6 April, 2017

Equivalent citations: AIR 2017 SUPREME COURT 1812, AIR 2017 SC (CRIMINAL) 1297, 2017 CRILR(SC&MP) 349, (2017) 3 ALLCRILR 1034, (2017) 4 SCALE 261, (2017) 2 CGLJ 314, (2017) 2 CURCRIR 135, (2017) 2 ALLCRIR 1219, (2017) 2 CRILR(RAJ) 349, (2017) 1 UC 746, (2017) 3 BOMCR(CRI) 504, (2017) 2 DLT(CRL) 282, (2017) 99 ALLCRIC 656, 2017 CALCRILR 3 57, (2017) 2 PAT LJR 363, 2017 CRILR(SC MAH GUJ) 349, (2017) 2 CRIMES 144, (2017) 67 OCR 651, (2017) 2 RECCRIR 510, 2017 (5) SCC 769, (2017) 2 JLJR 244, (2017) 173 ALLINDCAS 59 (SC), (2017) 5 MH LJ (CRI) 317, 2017 (3) SCC (CRI) 455, 2017 (4) KCCR SN 477 (SC)

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Bench: Prafulla C. Pant, N.V. Ramana

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 87 OF 2008

Devendra Nath Srivastava

... Appellant

Versus

State of U.P.

...Respondent

WITH

CRIMINAL APPEAL NOS. 88-90 OF 2008

Preeti Srivastava

... Appellant

Versus

Devendra Nath Srivastava and Anr.

...Respondents

J U D G M E N T

Prafulla C. Pant, J.

1. These appeals are directed against judgment and order dated 24.08.2007, passed by the High Court of Judicature at Allahabad, Lucknow Bench, in Criminal Appeal No. 201 of 2007 whereby said Court has disposed of Capital Reference No. 2 of 2007 along with criminal appeals filed by appellant Devendra Nath Srivastava arising out of judgment and order dated 18.01.2007 passed by Additional Sessions Judge/Special Judge (E.C. Act) Gonda, relating to conviction of the appellant under Section 302 of Indian Penal Code (for short "IPC") in Sessions Trial No. 258 of 2005. By the impugned order passed by the High Court, conviction of the appellant under Section 302 IPC has been set aside, instead he is convicted under Section 304 Part I IPC, and sentenced to rigorous imprisonment for ten years and to pay fine of ₹10,000/-, in default to undergo further six months rigorous imprisonment

2. Prosecution story, in brief, is that appellant Devendra Nath Srivastava got married to Madhu Srivastava (deceased) on 04.03.1994. The couple had four children. On 12.05.2005 at about 7.30 p.m., complainant Shailender Kumar Srivastava, who is nephew of the appellant, heard cries of the appellant's children and rushed to the house of his uncle (appellant), where he saw the appellant assaulting his wife with brick. On seeing PW-6 and others coming from the neighbourhood, the appellant ran away. The appellant's wife (Madhu Srivastava) was taken by PW-6 Shailender Kumar Srivastava to District Hospital after arranging an ambulance. However, the doctors declared her brought dead.

3. A First Information Report (Ex. A-9) was got lodged by PW-6 at Police Station Kotwali City Gonda on the very day at about 21.45 hours. Crime No. 169 of 2005 was registered based on the said F.I.R. The Investigating Officer, after interrogating the complainant, went to the spot and got sealed the dead body of the deceased and prepared the inquest Report (Ex. A-1). On 13.05.2005 PW-7 Dr. Rajkumar conducted autopsy, and opined that the deceased had died of asphyxia on account of ante mortem injuries. In all, nine ante mortem injuries were recorded in the post mortem examination report (Ex. A-10). Meanwhile, the appellant was arrested, and on his pointing out recovery of the brick used in the crime was made. The blood-stained shirt and pants of the appellant were also taken into possession by the police in respect of which memo (Ex. A-13) was prepared. After completion of investigation, a charge sheet was submitted by Investigating Officer Rajender Prasad

Singh (PW-8) against the appellant for his trial.

4. It appears that the case was committed to the court of Sessions for trial. On 10.08.2005 learned Sessions Judge, Gonda framed charge in respect of offence punishable under Section 302 IPC against the appellant-accused Devendra Nath Srivastava to which the accused pleaded not guilty and claimed to be tried. On this, prosecution got examined PW-1 Vijay Kumar Chaurasia, PW-2 Rampher Jaiswal, PW-3 Sadhna Srivastava, PW-4 Virender Singh, PW-5 Preeti Srivastava, PW-6 Shailender Kumar Srivastava (informant), PW-7 Dr. Rajkumar and PW-8 Incharge Inspector Rajender Prasad Singh (Investigating Officer).

5. The prosecution evidence was put to the accused under Section 313 of Criminal Procedure Code (Cr.P.C.), in response to which he pleaded that at the time of incident he had gone to his native village to give medicines to his mother. Thereafter, on behalf of the defence DW-1 Shyam Rang and DW-2 Chandermukhi were got examined. The trial court in its wisdom got summoned court witness Adesh Kumar Srivastava (CW-

1), the eldest son of the deceased who was minor. His statement was recorded on 16.11.2006. Thereafter, this additional evidence was also put to the accused under Section 313 Cr.P.C.

6. After hearing the parties, the trial court found that the charge in respect of offence punishable under Section 302 is proved against the accused, and convicted him accordingly. The parties were heard also on sentence and the trial court awarded death sentence to the convict, and submitted the record to the High Court vide judgment and order dated 18.01.2007, for affirmation of the sentence.

7. Aggrieved by the judgment and order of the trial court the convict preferred appeal (Criminal Appeal No. 201 of 2007) to the High Court. He further got submitted another appeal (Criminal Appeal No. 237 of 2007) from jail. Both these appeals were clubbed together with the Reference made by the Court of Sessions, and disposed of together by the High Court vide common judgment and order dated 24.08.2007, impugned before us. The High Court held that the incident had taken place after altercations between the deceased and the accused, who was drunk, and the homicidal death is caused by the appellant, and the act is covered under Section 304 Part I IPC, and not under Section 302 IPC. Accordingly, the High Court set aside the conviction and sentence under Section 302 IPC recorded by the trial court and convicted the appellant under Section 304 Part I IPC and sentenced him to undergo ten years rigorous imprisonment and to pay fine of ₹10,000/- , in default to undergo further six months rigorous imprisonment.

8. Convict Devendra Nath Srivastava and victim's sister Preeti Srivastava moved this Court through separate Special Leave Petitions challenging the order passed by the High Court. Criminal Appeal No. 87 of 2008 has arisen out of the Special Leave Petition filed by the convict, and Criminal Appeal Nos. 88-90 of 2008 have arisen out of the Special Leave Petitions filed by Preeti Srivastava, sister of the deceased.

9. We have heard learned counsel for the parties at length and perused the record of the case.

10. Before further discussion, we think it just and proper to mention the ante mortem injuries recorded by PW-7 Dr. Rajkumar in the autopsy report (Ex. A-10). The same are reproduced as under: -

“(1) Lacerated wound 5 cm x 4 cm x bone deep on back of left ear. Clotted blood seen in the wound.

(2) Multiple red contusion in area of 10 cm x 8 cm on left side of face.

(3) Lacerated wound 3 cm x 1 cm x bone deep just below the left mandible and 2.5 cm on left to the chin. Clotted blood seen in the wound.

(4) Lacerated wound 1.5 cm x .5 cm x bone deep on the chin surrounded by red contusion in the area of 4 cm x 3 cm.

(5) Lacerated wound 2 cm x 1 cm x muscle deep on right side of forehead adjacent to the right eyebrow. Blood clots seen in the wound.

(6) Incised wound 6 cm x 1 cm x muscle deep on left side of neck 7 cm below the left ear.

(7) Red contusion 5 cm x 3 cm across the trachea on the front of neck.

(8) Red contusion with abrasion in the area of 13 cm x 5 cm along right collar bone.

(9) Red contusion with abrasion 3 cm x 2 cm on top of left shoulder joint.” PW-7 Dr. Raj Kumar has stated that on internal examination both upper and lower jaws’ bones found broken and some portions of upper and lower teeth were also found broken. He further found hyoid bone fractured and both lungs blocked. These observations are also made in the autopsy report. It has been opined by the said Medical Officer that Madhu Srivastava (deceased) died of strangulation with the above mentioned ante mortem injuries.

11. The medical evidence, discussed above, clearly establishes that Madhu Srivastava (wife of the appellant Devendra Nath Srivastava) has died homicidal death. Now, we have to examine whether the appellant has caused the death of his wife, as suggested by the prosecution, or not.

12. On perusal of the evidence on record, it is clear that PW-1 Vijay Kumar Chaurasia, PW-2 Rampher Jaiswal, PW-3 Sadhna Srivastava, PW-4 Virender Singh and PW-6 Shailender Kumar Srivastava have turned hostile to prosecution, but on careful scrutiny of their evidence there is no difficulty in finding the ring of truth in the prosecution story. PW-1 Vijay Kumar Chaurasia though states in his examination-in- chief that before the incident he had no acquaintance with the appellant, but has proved the inquest report (Ex. A-1) in the cross- examination stating that he witnessed the inquest proceedings. PW-2 Rampher Jaiswal in his examination-in-chief, denies his

presence at the time of the incident, but in cross-examination this witness has proved that the brick, allegedly used in the crime, was recovered on pointing out of the accused Devendra Nath Srivastava. He proved his signatures in the recovery memo. PW-6 Shailender Kumar Srivastava has stated that he is the nephew of the deceased and the accused, but he does not know how his aunt (Madhu Srivastava) died. He has further stated that the accused and the deceased had strained relations. In the cross-examination he admits that he gave written report (Ext. A-

26) to the police, soon after the incident on 12.05.2005. He further stated that he took Madhu Srivastava (in injured condition) to the hospital at about 8.50 p.m. where she was declared brought dead.

13. PW-5 Preeti Srivastava, sister of the deceased, has stated that the deceased was married to appellant Devendra Nath Srivastava. She further stated that the appellant was Field Inspector with Khadi Gramodyog Board. She further disclosed that she used to live at a distance of some 1-1.5 kilometers away from the house of the appellant and his family. She further told that there were four children born out of the wedlock between the deceased and the appellant. She further stated that the appellant used to torture the deceased after taking alcohol. She has proved the letters Exs. A-2, A-3, A-4 and A-5 written by the deceased to her father complaining about the ill- treatment meted out to her by the appellant. In all these letters, it is specifically mentioned by the deceased that the appellant was a drunkard and used to beat her after getting drunk. PW-5 Preeti Srivastava has further stated that there had been litigation between the deceased and the appellant, but it terminated with compromise entered between the parties in 2003 (Ex. A-8).

14. PW-8 Inspector Rajendra Prasad Singh, the Investigating Officer, has stated that during interrogation he recovered brick (Ex. I) on pointing out of the accused. He has further stated that the blood stained pantaloons and the shirt of the accused were taken into possession, and memo (Ex. A-13) was prepared, and sent for chemical analysis along with other blood stained articles including the blood stained piece of floor collected from the spot as also the clothes of the deceased (Ex. 2, 3, and 4). Forensic Science Laboratory report dated 14.10.2005 (Ex. A-27) shows that in the blood stained clothes of the accused contained human blood. It further discloses that human blood was also found in the piece of cement floor and the clothes of the deceased.

15. Statement of CW-1 Adesh Kumar Srivastava, eight years old eldest son of the appellant and the deceased, does not support prosecution but it can be easily gathered that after he lost his mother, he does not want to lose his father. At one stage he says his mother fell on a brick, and then discloses that she had fallen from the staircase. At the end, he states that at the time of the incident he was playing at the boundary of the house.

16. Though the defence witnesses DW-1 Shyam Rang and DW-2 Chandermukhi have attempted to say that Devendra Nath Srivastava (appellant) had gone to village on the day of the incident to give medicines to his mother, but there is nothing to corroborate on the record if any medicine is purchased from any chemist by the appellant. It is also not clear as to what was the ailment of his mother, and since when she was unwell. In our opinion, the trial court and the High Court have rightly disbelieved these two witnesses.

17. On re-appreciation of entire evidence and having considered the submissions of learned counsel for the parties, we agree with the view taken by the High Court that it is clearly established from the evidence on record that the appellant caused homicidal death of his wife, after quarrel between the two. It is established on the record that the appellant was a drunkard. The First Information Report was lodged by none other than the appellant's own nephew, immediately after the incident. There is no version put forward by the appellant as to how his wife died homicidal death in his house. Considering the facts and circumstances of the case, it appears that the appellant acted in a fit of anger. It is nobody's case that the appellant had any concubine. Rather statement of PW-5 Preeti Srivastava shows that suit for restitution of conjugal rights, filed by the appellant, was decided in terms of compromise, and they started living together with their children.

18. As to whether the act on the part of the appellant constitutes the offence punishable under Section 302 IPC or Section 304 Part I IPC, we are of the view that the incident has occurred after quarrel between the appellant and the deceased which is not a planned act. It is also established that the appellant was a drunkard. In our opinion, in the facts and circumstances of the case, the view taken by the High Court, that the appellant has committed offence punishable under Section 304 Part I IPC, requires no interference.

19. In *State of Andhra Pradesh v. Rauavarapu Punneyya & another* [(1977) 1 Supreme Court Reports 601 at 606][1], this Court, explaining the scheme of Penal Code relating to culpable homicide, has laid down the law as under:-

“In the scheme of the Penal Code, “culpable homicide” is genus and “murder” its specie. Every “murder” is “culpable homicide” but not vice-versa. Speaking generally, “culpable homicide” sans “special characteristics of murder”, is “culpable homicide not amounting to murder”. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, “culpable homicide of the first degree”. This is the greatest form of culpable homicide, which is defined in Section 300 as “murder”. The second may be termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.”

20. In the same case, i.e. *State of Andhra Pradesh v. Rauavarapu Punneyya & another* (supra), this Court has further observed at page 608 as under: -

“.....whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between

the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

21. In view of the above discussion of facts and law, we are in agreement with the conviction and sentence recorded against the appellant by the High Court. Therefore, the appeals are dismissed.

.....J. [N.V. Ramana]J. [Prafulla C. Pant] New Delhi;

April 6, 2017.

[1] (1976) 4 SCC 382