2025 INSC 148

REPORTABLE

IN SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1704-1705 OF 2015

ASHOK SAXENA **APPELLANT(S)**

VERSUS

THE STATE OF UTTARAKHAND ETC. **RESPONDENT(S)**

O R D E R

1. These appeals arise from the judgment and order passed by the High Court of Uttarakhand at Nainital dated 20-01-2015 by which the appeal filed by the State of Uttar Pradesh came to be allowed and thereby the judgment and Order of acquittal passed by the Trial Court in Sessions Case No. 204 of 1994 came to be set aside.

2. Since, we intend to dispose of this appeal on a short ground we need not reproduce the facts or rather the case of the prosecution in details. We borrow the facts as stated by the High Court in its impugned judgment and order. We quote the relevant part of the High Court's judgment:-

> **"Present Govt. Appeal has been filed by the State being aggrieved against the judgment and order dated 06.11.1996 passed by learned 2nd Addl. Sessions Judge, Nainital, whereby the respondents were acquitted of the charge(s) levelled against them. Respondent Ashok Saxena was exonerated of the charge levelled against him under Section 302 IPC and the respondent no. 2 Yashpal Singh was exonerated of the charge levelled against him under Section 302 read with Section 34 IPC, giving them benefit of doubt. Respondent Yashpal Singh died during the**

pendency of the Govt. Appeal, on 24.01.2007, which fact is admitted to both the sides and therefore, this Court proceeds to discuss the appeal only against respondent no. 1 Ashok Saxena filed by the State.

2. Earlier, on a Govt. Appeal, being Govt. Appeal No. 82 of 2001 and Criminal Revision, being Criminal Revision No. 359 of 2001 filed by the revisionist, Division Bench of this Court held Ashok Saxena guilty of the offence punishable under Section 302 IPC and also held Yashpal Singh guilty of the offence punishable under Section 302 read with Section 34 IPC. They were accordingly convicted and sentenced to undergo imprisonment for life, as also to pay fine of Rs. 5,000/- each, vide order dated 14.07.2010.

3. Present respondent i.e. Ashok Saxena filed Criminal Appeal Nos. 963 -964 of 2011 before the Hon'ble Supreme Court of India and the Hon'ble Apex Court, among other things, was pleased to direct as under:

> **"In the above view of the matter, we are satisfied that the judgment/order dated 14.07.2010 rendered by the High Court in Government Appeal No. 82 of 2001 and Criminal Revision No. 359 of 2001, as against the appellant herein deserve to be set aside. The same are accordingly set aside and the matter is remanded back and restored on the file of the High Court. The High Court of Uttarakhand shall re-adjudicate the Government Appeal no. 82 of 2001 and Criminal Revision No. 359 of 2001 in accordance with law. The appellant shall enter appearance through counsel before the High Court of Uttarakhand on 19.11.2014. In case the appellant remains unrepresented, it will be open to the High Court to appoint an amicus curiae to assist it on behalf of the appellant".**

4. Thereafter, in the light of the directions of Hon'ble the Apex Court dated 15.10.2014, this Court proceeded to hear the Govt. Appeal as well as Criminal Revision afresh.

5. Whereas the State was represented by Mr. A.S. Gill, Deputy Advocate General with Mr. Milind Raj, Brief Holder for the State, the respondent Ashok Saxena by Mr. Lok Pal Singh, Advocate.

6. PW-1 Het Ram wrote a complaint (Ext. Ka-1) to SHO police station Kichha, District Nainital on 25.06.1992 enumerating the facts contained therein that the complainant is residing in Hydel Colony Kichcha; his son Joginder Singh used to go for learning typing and Surendra Singh S/o Yashpal Singh was also

learning typing there. There was an altercation between Joginder Singh and Surender Singh at the typing centre; Joginder Singh narrated the incident of altercations at his home and his nephew-Man Singh made complaint to the father of Surender Singh. Thereafter, Surender Singh did marpeet with Joginder Singh and the complainant made complaint to his superior officers in this regard. On the day of incident, when nephew of complainant, accompanied with Joginder, had gone to typing centre, in the way, accused Ashok Saxena and Yashpal Singh met them and they threatened them with dire consequences. The son and nephew of the complainant reached home and narrated the entire story to the deceased. Accused persons Ashok Saxena and Yashpal also reached there and started hurling abuses at them. When the complainant came back from his duty, the entire story was narrated to him. On this, the complainant came outside his house and asked the accused persons not to hurl abusive languages, to which both the accused got annoyed. At that time, Ashok Saxena was having knife in his hand and Yashpal Singh was armed with hockey stick and they chased the complainant and entered into his house. In the meantime, when wife of the complainant came to his rescue, Ashok Saxena gave a knife blow in the stomach of his wife and Yashpal Singh caught hold of the hands of the victim. There was candlelight in the house. The incident took place at about 7:45 p.m. The complainant tried to catch hold of the accused persons, but they fled away. On receiving knife blow, wife of complainant fell down on the floor and she was taken to hospital in a rickshaw, where doctors declared her 'brought dead'."

3. Thus, it appears from the above that the nephew of the first informant along with Joginder were learning typewriting & for that they used to attend a typing institute.

4. While both were on their way to the typing centre, the appellant herein namely Ashok Saxena and the co-accused Yashpal Singh (since deceased) met them and threatened them with dire consequences. The two boys reached home and narrated the entire episode first before the deceased and then upon arrival of Hetram in the evening, the same was conveyed to him also.

5. The aforesaid was the starting point of all the trouble for both the families.

6. It appears that the appellant herein with a knife in his hand and Yashpal Singh (since deceased) with a hockey stick in his hand trespassed into the house of the first informant with the intention to lay an assault on him. The deceased i.e. the wife of Hetram, sensing trouble tried to intervene and in the process the appellant herein is alleged to have inflicted a knife blow in the abdomen of the deceased. Of-course there are allegations that at the relevant point of time the co-accused(deceased) had caught hold of the hands of the deceased.

7. The aforesaid incident took place at about 7.45 p.m. Hetram tried to catch hold of the accused persons but they managed to make good their escape.

8. The deceased having suffered a stab serious injury in her abdomen was put in a rikshaw for being taken to the hospital. However, she was declared dead on being brought to the hospital.

9. The First Information Report (FIR) was lodged by Hetram at the Kichan Police Station, Nainital on 25.6.1992, which reads thus:-

> **"To**
> **SHO**
> **Police Station Kichan, Nainital**
> **Sir,**
>
> **It is submitted that I am living with my family in the Hydril Colony, Kichan. My son Joginder Singh goes to learn typing in Kichan since last 4-5 days and at the same shop, Yashpal Singh's**

son Surinder Singh also learns typing. Day before yesterday, my son Joginder had a heated arguments with Yashpal's son Surinder at the typing shop. When my son came home and told about this, my nephew Man Singh went and lodged complaint about this to Surinder's father at his house. On this, Surinder beat my son Joginder in the evening in the colony. I complained about this to my officers. Earlier also, I have made several similar complaints to my officers. To avoid a quarrel, in the evening my nephew went to pick up Joginder from the typing shop. On the way, they meet Ashok Saxena and Yashpal Singh both on the scooter and said that you keep complaining for no reason at all and today we shall see you. At that time, my nephew and son escaped and came home and told everything to his mother and following them Yashpal also came to his house and sat at his door and started abusing when electricity went off. I finished my duty and came home and with me, my acquaintance Chandra Shekhar Mohalla Kishanpur had also come. Then I was told the whole thing. I went out and stopped Yashpal and Ashok Saxena from abusing then both peoples stood up in anger and Ashok Saxena with a knife in his hand and Yashpal Singh with a hockey in hand ran after me. I ran inside my house. As soon as both these persons entered my house, my wife came forward to save me. Ashok Saxena stabbed my wife with a knife from the front and Yashpal, while abusing held both hands of my wife. Candles were lighted in the house. This incident took place at about quarter to 7.45 pm. I immediately tried to catch them both but could not get hold of them and they ran off. After being stabbed with knife my wife fell down on the floor. I immediately put her in a rickshaw and took her to the hospital where the doctors declared my wife as dead. Dead body of my wife is kept in the Kichan Hospital. Please oblige me by writing my report and taking necessary action."

10. On the FIR being registered the investigation started. The inquest Panchnama of the dead body of the deceased was drawn in the presence of two independent Panch witnesses. The body of the deceased was sent to the hospital for post mortem.

11. The post mortem revealed the following two injuries:-

> **"1. Cut wound 3cm x Yi cm deep till the cavity on the stomach towards the left 10 cm above the mid claride line and diagonal. On opening the wound muscles of stom-ach, walls, fragments, and left lobe of the liver was found to be cut.**

2. On internal examination right portion of the heart was full of blood and left was empty. Around $1^{1/2}$ liters blood was present in the stomach cavity. Some undigested food was present in the intestine."

12. The clothes and other articles of the deceased as well those of the accused persons were collected and sent to the Forensic Science Laboratory for chemical analysis. Statements of various witnesses were recorded by the police under Section 161 of the Criminal Procedure Code, 1973 (for short the "Cr.P.C.")

13. Upon completion of the investigation chargesheet was filed for the offence of murder.

14. The case came to be committed to the Court of Sessions under the provisions of Section 209 of the Cr.P.C. Upon committal, the case came to be registered in the Court of Additional Sessions Judge II, Nainital as Sessions Case No. 204 of 1994.

15. The Trial Court framed charge to which both the accused persons pleaded not guilty and claimed to be tried.

16. The prosecution examined the following witnesses:-

"PW 1 Hetram (Informant)
PW 2 Joginder Singh (Son of deceased)
PW 3 Surinder Singh (S.I. & I.O.)
PW 4 Dr. Anil Kumar Tiwari (conducted post mortem)"

17. The prosecution also led few pieces of documentary evidence.

18. Upon closure of the recording of the oral evidence the further statements of the appellant herein and the co-accused were recorded

under Section 313 of the Cr.P.C., to which both claimed to be innocent and said that they were falsely implicated.

19. The Trial Court upon appreciation of the oral as well as documentary evidence on record came to the conclusion that the prosecution had failed to establish its case beyond reasonable doubt and accordingly acquitted both the accused.

20. The State went in appeal before the High Court. The High Court allowed the appeal. Against the order passed by the High Court allowing the appeal filed by the State and holding the appellant herein guilty of the alleged offence, the appellant came before this Court by filing Criminal Appeal Nos. 963-964 of 2011 respectively.

This Court vide a order dated 15.10.2014 disposed of both the appeals in the following terms:-

> **"Heard learned counsel for the parties.**
>
> **It is not a matter of dispute that the appellant herein was prosecuted in furtherance of FIR S.T.No.204 of 1994 dated 25.06.1992 lodged at police station Kichan, Nainital. The Trial Court, namely, the Additional Sessions Judge-II, Nainital while proceeding against the appellant in Sessions Case No.204 of 1994 acquitted the appellant, as also, his co-accused Yashpal Singh vide judgment/order dated 06.11.1996.**
>
> **Dissatisfied with the order of acquittal dated 06.11.1996, the State of Uttarakhand preferred Government Appeal No.82 of 2001 (Old number Government Appeal No.1198 of 1997). The complainant also preferred Criminal Revision No.359 of 2001 (Old number Criminal Revision No.139 of 1997). The High Court of Uttarakhand vide its impugned judgment dated 14.07.2010 reversed the finding of the Trial Court, and ordered the conviction of the appellant, and his co-accused Yashpal Singh.**

The solitary contention raised by the learned counsel for the appellant before this Court was, that even though the appellant was served in Criminal Revision No.359 of 2001, he did not enter appearance before the High Court of Uttarakhand through counsel. His further contention was, that he was not served in the Government Appeal No.82 of 2001. It was pointed out, that his co-accused Yashpal Singh was served in Government Appeal No.82 of 2001, and that, he entered appearance before the High Court of Uttarakhand through Mr.Rakesh Thapliyal, Advocate. A xerox copy of the power of attorney executed by the aforesaid Yashpal Singh in favour of his counsel Mr.Rakesh Thapliyal is available on the record of this case (at page No.150 of the appeal paperbook). It was submitted, that the aforesaid Yashpal Singh died during the pendency of the proceedings before the High Court of Uttarakhand on 24.01.2007. The Death Certificate of the aforesaid Yashpal Singh is also available on the record of this case (at page No.90 of the appeal paperbook).

The contention of the learned counsel for the appellant was, that Mr.Rajesh Sharma, Advocate, holding the brief of Mr.Rakesh Thapliyal, Advocate, had appeared before the High Court whereupon the impugned judgment/order dated 14.07.2010 was passed. It is submitted that neither Mr.Rajesh Sharma, Advocate nor Mr.Rakesh Thapliyal, Advocate, had the right to represent the appellant herein (Ashok Saxena) before the High Court of Uttarakhand.

When confronted with the aforesaid factual position, learned counsel appearing on behalf of the State of Uttarakhand acknowledges, that there was no representation on behalf of the appellant herein when Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001 were disposed of by the High Court.

It is, therefore, apparent that the High Court proceeded against the appellant, even though he was not represented. In the above view of the matter, we are satisfied that the judgment/order dated 14.07.2010 rendered by the High Court in Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001, as against the appellant herein deserve to be set aside. The same are accordingly set aside and the matter is remanded back and restored on the file of the High Court. The High Court of Uttarakhand shall re-adjudicate the Government Appeal No.82 of 2001 and Criminal Revision No.359 of 2001 in accordance with law. The appellant shall enter appearance through counsel before the High Court of Uttarakhand on 19.11.2014. In case the appellant remains unrepresented, it will be open to the High Court to appoint an amicus curiae to assist it on behalf of the appellant.
Since the order of the High Court is set aside, no order is required on the application for bail.

The appeals stand disposed of accordingly."

21. The High Court upon considering the appeals afresh once again reiterated that the Trial Court had committed an error in acquitting the accused persons and accordingly held both the accused persons guilty.

22. At this stage, it is relevant to note that one of the co-accused Yashpal passed away while the appeal was pending before the High Court. It is only the appellant who ultimately stood convicted for the offence of murder.

23. In such circumstances, referred to above, the appellant-convict is here before this Court with the present appeals.

24. Mr. Hooda, the learned senior counsel appearing for the appellant submitted that the High Court committed a gross error in disturbing a very well-reasoned judgement of acquittal passed by the Trial Court. He would submit that once the Trial Court upon appreciation of the oral as well as documentary evidence acquits the accused of the offence like murder, then unless the High Court finds such judgement to be absolutely perverse or contrary to the evidence on record the same should not be disturbed by the appellate court even if a different view is possible.

25. The second contention before us is that the case is one of culpable homicide & not one of murder. In other words, according to him, even if the entire case of the prosecution is believed or

accepted to be true the only offence that could be said to have been committed is Section 304 of the IPC.

26. His third argument in the aforesaid context is that the appellant herein had no intention to cause any harm to the deceased. The appellant had nothing to do with the deceased. Even according to the case of the prosecution, the appellant had some grudge towards Hetram and the intention was to cause harm to Hethram, but unfortunately the deceased all of a sudden came in between and got severely injured who later succumbed. Therefore, his argument is that the case on hand is not even one of culpable homicide not amounting to murder but only knowledge could be attributed.

27. In the last the learned counsel submitted that the incident is of the year 1992. Almost 33 years have passed by. The appellant as on date is 74 years of age. He has undergone about more than five years of sentence (a little under 6 years of sentence).

28. He submitted that having regard to the oral evidence on record and the peculiar facts and circumstances, the conviction at best could be under Section 304, Part-I giving benefit of exception 4 of Section 300 of the IPC.

29. On the other hand, Mr. Sudarshan Singh Rawat, the learned counsel appearing for the State vehemently submitted that no error not to speak of any error of law could be said to have been

committed by the High Court in holding the appellant herein guilty of the offence.

30. He would submit that there are two eye-witnesses to the incident PW-1 Hetram and PW-2 Joginder Singh.

31. The oral version of both these two-eye witnesses has been correctly looked into & accepted by the High Court in holding the appellant guilty of the alleged offence.

32. He would submit that there is no good reason to disbelieve the two eye-witnesses referred to above.

33. In the last he submitted that the case on hand is one of murder and no benefit of any of the exceptions to Section 300 is available to the appellant herein.

ANALYSIS

34. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in holding the appellant herein guilty of the offence of murder.

35. We have no difficulty in answering the first submission of Mr. Hooda that the offence is not one of murder or even culpable homicide not amounting to murder as the appellant herein had no intention worth the name to cause any harm to the deceased.

36. Section 301 of the IPC is the answer to the contention of Mr.

Hooda. Section 301 of the IPC, reads thus:-

> **"301. Culpable homicide by causing death of person other than person whose death was intended.—**
>
> **If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."**

37. From the perusal of the provision of Section 301 of the IPC, it becomes manifest that Section 301 embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the Section, if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under Section 301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke Section 301 of the IPC, A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C. This Section lays down that culpable homicide may be committed by causing death of a person whom the offender neither intended nor

knew himself to be likely to kill. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it must be treated as if the real intention of the killer had been actually carried out.

38. Having noticed salutary principles on which Section 301 of the IPC is based, it would be instructive to refer to law on the point as laid down by this Court. In *Gyanendra Kumar* v. *State of U.P.*, reported in AIR 1972 SC 502 the accused was deliberately trying to shoot at a fleeing man who had criticized his father in a School Committee Meeting, but unfortunately, his own maternal uncle came in between him and the intended victim and thus got killed. This Court has held that the act of the accused was nothing but murder under Section 302 read with Section 301 of the IPC.

39. In *Hari Shankar Sharma* v. *State of Mysore* reported in 1979 UJ 659 (SC), the intention of the accused was to kill prosecution witness No. 15 by firing a shot at him, but the accused shot the fire and killed the deceased. A plea was raised before this Court that the appellant would be guilty of offence under Section 304-A or 307 of the IPC. While negativing the said plea, this Court has held as under:

> **"This appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act is directed against the judgment of the Mysore High Court convicting the appellant under Section 302 and sentencing him to imprisonment for life. Detailed facts of the case have been narrated in the judgment of the High Court and it is not**

necessary for us to reproduce the same here. The main allegation against the appellant was that he had shot the deceased Nazirunnissa and Killadher. So far as the facts are concerned both the Sessions Judge and the High Court have concurrently found that the case was fully proved. The Sessions Judge was of the opinion that the first appellant wanted to kill PW. 15, but as PW. 15 was not available at that time, Nazirunnissa come in between and she was shot, therefore the appellant could be guilty of an offence under Section 304(A) or under Section 307 IPC. This view of the learned Sessions Judge was legally erroneous as rightly pointed out by the High Court. Section 301 furnishes a complete answer to the view taken by the Sessions Judge. It is obvious that the appellant has the intention to kill PW.15 and if with this intention, he kills somebody also, he is undoubtedly guilty of committing murder. There is evidence of PWs. 13, 14 and 15 to show that A.1 fired that shot and killed the deceased. There is no escape from conclusion that the appellant committed an offence under Section 302 of the IPC. In these circumstances, the High Court was right in correcting the error of law committed by the Learned Sessions Mr. Udayarathnam, tried to bring the case of the appellant within the ambit of Section 304(a) or Section 307 but on the fact found it is not possible for us to accede to her contention. For the reasons given above, there is no merit in the appeal, which is accordingly, dismissed."

40. In *Jagpal Singh* v. *State of Punjab* reported in AIR 1991 SC 982: 1991 CrLJ 597, appellant Jagpal had shot at Surjit Kaur even though he aimed at only Kapur Singh. After applying doctrine of transfer of malice as contemplated under Section 301 of the IPC, this Court has held that Jagpal had made himself punishable under Section 302 of the IPC.

41. In *Abdul Ise Suleman* v. *State of Gujarat* reported in 1995 CrLJ 464, it was the case of the prosecution that the accused had fired freely towards the fleeing complainant party and the first shot had

injured one person whereas second shot had resulted into death of ten year old son of the complainant. It was noticed that firing was resorted to in a commercial locality. The Sessions Court had acquitted the accused, but acquittal appeal was allowed by the High Court and the appellant was convicted under Section 302 read with Section 301 and other provisions of the IPC. It was submitted before this Court that the facts and circumstances of the case and evidence led by the prosecution did not establish that the appellant had any intention to commit murder of an innocent boy aged ten years with whom there was no question of having any enmity or any occasion to take a revenge. According to the learned Counsel of the appellant, even from the evidence, it was possible to hold that such death of the boy was absolutely unintentional and at best it could be held that such firing was a rash and negligent action on the part of the appellant. It was argued by the learned Counsel of the appellant that act committed by the appellant was not murder under Section 302 read with Section 301 of the IPC as held by the High Court, but was an offence under Section 304A of the IPC. Negativing the said contention, this Court has held that gun was not fired in the air just to frighten the complainant and his companions, but the gun was fired by the appellant towards fleeing person even when by the first shot one of such person was injured. According to this Court, such firing was resorted to in a locality

where there were number of shops and provision of Section 301 of the IPC was clearly attracted in the facts and circumstances of the case. Ultimately, the conviction of the appellant under Section 302 read with Section 301 of the IPC was upheld by this Court.

42. In view of the principles laid down by this Court in above quoted decisions, it is evident that even if it is held for the sake of argument that the appellant had no intention to cause death of the deceased, it will have to be held that doctrine of transfer of malice, as contemplated under Section 301, is applicable to the facts of the present case and that the appellant would be guilty under Section 302 of the IPC.

43. We do not propose to look into the matter any further, more particularly, the evidence of the two eye-witnesses. In other words, whether the oral testimonies of the two eye-witnesses PW1 and PW4 respectively inspire any confidence.

44. We are of the view that having regard to the genesis of the occurrence, the case falls within Exception 4 to Section 300 of the IPC.

45. In the result, the appeals are partly allowed. The impugned judgement and order of the High Court is modified to the extent

that the appellant stands convicted for the offence punishable under Section 304 Part-I of the IPC.

46. Having altered the conviction from Section 302 to section 304 Part-I, we reduce the sentence to the period already undergone keeping two things in mind the year of the incident i.e. 1992 and the age of the appellant as on date, 74 years.

47. With the aforesaid these appeals stand disposed of.

.....J.
[J.B.PARDIWALA]

.....J.
[R. MAHADEVAN]

New Delhi
30th January, 2025.