
(2009) 08 AHC CK 0339
In the Allahabad High Court
Case No : Criminal Appeal No. 570 of 2006

Daya Ram and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 11-08-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 307, 504

Citation : (2009) 08 AHC CK 0339

Hon'ble Judges : D.R. Azad, J; Amar Saran, J

Bench : Division Bench

Advocate : Kamal Krishna, Sharad Kumar Srivastava and Jagdish Singh Sengar, for the Appellant; A.G.A., for the Respondent

Judgement

Amar Saran and D.R. Azad, JJ.—Heard Shri J. S. Sengar, learned Counsel for the Appellant-Raj Kumar alias Pappu, learned Additional Government Advocate for the State and perused the record of the case.

2. A prayer for bail has been made by the Appellant Raj Kumar alias Pappu in this criminal appeal which has been filed against the judgment and order dated 30.1.2006, passed by the Additional Session Judge, Court No. 3, Fatehpur convicting and sentencing the Appellant-Raj Kumar alias Pappu inter alia to life imprisonment u/s 302, I.P.C. and a fine.

3. The prosecution case as disclosed in the F.I.R. lodged on 22.7.2000 by the informant Shailendra Kumar Patel, P.W. 1 was that at about 9.00 a.m. when the informant, his father Ram Khelawan, the deceased, his mother Smt. Kamlesh and grand-father Siya Ram were sitting and talking at their door where a lantern was burning, his grand-father (grand uncle), the co-accused Daya Ram armed with a lathi, Daya Ram's elder son Raj Kumar, the Appellant herein, carrying the licensed gun of his father, his younger son Raj Karan alias Nankau armed with a pistol arrived there. They began questioning and blaming the informant and others as to why they had flooded their field by cutting the canal causing all their paddy to perish. When the informant stopped them from accusing them, then the

co-accused Daya Ram exhorted that they should be killed and not spared. Then all the three accused persons rushed forward to attack them. When the informant's father Ram Khelawan came in front and asked them why they were determined to assault his son, what harm had he done to them, Daya Ram exhorted that first Ram Khelawan should be murdered. Then Appellant, Raj Kumar alias Pappu fired with the licensed gun on Ram Khelawan, the father of the informant and Raj Karan alias Nankau fired on the informant with his country made pistol, which missed him. However, his father was injured by the fire of Raj Kumar. The incident was witnessed by his mother, Smt. Kamlesh, and his grandfather Siya Ram. Some other persons also arrived there at that time raising an alarm. Then the three accused persons ran away carrying their arms. He brought his father in an injured condition to the police station Malwa and lodged the report there initially u/s 307/504, I.P.C. The deceased, who was then injured was sent for medical treatment to the hospital where he was declared dead. After completing the formalities of inquest and post-mortem etc., the case was converted to one u/s 302/307/504, I.P.C.

4. The first submission raised by the learned Counsel for the Appellant was that as the deceased has received only an injury on his leg and the doctor had not given any opinion that the injury was sufficient in the ordinary course of nature to cause death, at the highest only a case u/s 304, Part II, I.P.C., and no case u/s 302, I.P.C. was disclosed. As the Appellant had remained in jail for about 4 years after his conviction, the appeal was likely to become infructuous unless he was granted bail as the maximum sentence he was likely to be awarded would be seven years. In support of his contention, learned Counsel for the Appellant has placed reliance on the decision of the Apex Court in *Jawahar Lal v. State of Punjab* 1983 SCC (Cri) 805.

5. Learned Additional Government Advocate countered this contention by pointing out that the injury received by the deceased Ram Khelawan had struck the lower portion of the stomach. The said firearm injury was 12 cm. x 8 cm. x 4 cm. on the right inguinal region 3 cms. medial to the right superior iliac spine. The right pelvis was fractured and the urinary bladder was ruptured.

6. The case of *Jawahar Lal v. State of Punjab* (supra) was distinguishable as it was a case where a solitary blow with a knife had been given on the chest of the deceased by the accused, an immature boy of 19 years following a trivial quarrel and the deceased was not a party to the quarrel. No attempt was made to give a second blow and it was sought to be inferred that the particular injury could not be attributed to the accused. Hence, the conviction has been converted from one under Sections 302, I.P.C. to 304, Part II, I.P.C. The accused was not said to have any malice against the deceased.

7. Contrary to this, in a recent decision of the Apex Court in *Bavisetti Kameswara Rao @ Babai Vs. State of A.P.* rep. by its Public Prosecutor High Court of A.P., Hyderabad, where after a verbal altercation with the deceased, the accused, a motor mechanic had picked up a screwdriver and pierced the abdomen of the

deceased with it damaging his liver and spleen and causing his death. It was observed by the Apex Court that the accused could be said to have intended the injury sufficient to cause the death. The use of a screwdriver, which was a tool of a mechanic, could not be said to be innocuous and the accused was held liable for murder. The mere fact that a solitary injury was inflicted, was not sufficient in itself to decide the nature of the offence, which would depend on the other attendant circumstances, viz. whether (i) the act was pre-meditated, (ii) the nature of the weapon used, (iii) and the nature of the assault on the deceased. It was further noted that the verbal altercation between the unarmed deceased and the accused, could not be described as a sudden fight without pre-meditation, because evidence revealed that there was a previous altercation and the accused was seething with anger to take revenge.

8. Reliance was also placed in Bavisetti Kameshwara Rao alias Babai's case on the decisions in State of Karnataka Vs. Vedanayagam, and Virsa Singh Vs. The State of Punjab,

The observations of Justice Vivian Bose in Virsa Singh's case were approved, which state that it is wrong to link the intent with the seriousness of the injury as that is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap. The question was not whether the accused intended to inflict a serious or a trivial injury, but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the Appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, was neither here nor there. The question was not whether he intended to kill or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it, will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

9. In Jagrup Singh Vs. State of Haryana, it was held that merely because a solitary blow was given on the head with a heavy log of wood or an iron rod or even a lathi, so as to cause a fracture of a skull, it would not necessarily reduce the offence to culpable homicide not amounting to murder punishable u/s 304, Part II, I.P.C. The whole thing depends upon the intention to cause death which could be covered by either clause firstly or clause thirdly of Section 300, I.P.C. The nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death.

Reference as also made to the case of Tholan Vs. State of Tamil Nadu,

10. In the present case, the accused persons had come to the house of the

deceased and the informant carrying firearms and lathi for protesting against the informant's cutting the canal so as to flood their field, which must have caused grave annoyance to them. On some verbal protest raised by the accused and on intervention by the deceased, the co-accused Daya Ram exhorted to kill the witnesses and deceased, whereupon the Appellant Raj Kumar alias Pappu had fired with his licensed gun injuring the deceased on the lower part of the abdomen, which had damaged the urinary bladder and pelvic bone. It could not be held that the attendant circumstances, the weapons carried for assaulting the unarmed side of the deceased in their home, suggested that it was a sudden quarrel where the deceased and the witnesses had been fired upon after a sudden altercation and quarrel, but it seems, that the circumstances were more suggestive of the fact that the Appellants had arrived at the deceased's place fully armed to teach them a lesson, and to protest against the prosecution side cutting the canal and flooding their field and the Appellant and co-accused wanted to take a revenge for that act.

11. So far as the contention that there is no categorical opinion of the doctor that the injuries were sufficient in the ordinary course of nature to cause death, it may be mentioned that in State of Rajasthan Vs. Dhool Singh, the acquittal by the High Court on the ground that the doctor had opined that the cause of death was excess bleeding and heart failure, was set aside by the Apex Court on the ground that there was no reason for holding that the injury was not sufficient in the ordinary course of nature to cause death. Even if the doctor had stated that if the Appellant was given better treatment, he could have survived, the Apex Court observed that fact still would not take the case out from the purview of Section 300, I.P.C. and the High Court itself could assess whether the injury was sufficient in the ordinary course of nature to cause death.

12. It was next argued by the learned Counsel for the Appellant that someone had fired on the deceased from outside in the darkness because there was no blackening and tattooing on the injury and the Appellant and co-accused had been falsely implicated. The evidence of the two eye-witnesses, examined, P.W. 1 Shailendra Kumar Patel, the complainant and P.W. 2 Smt. Kamlesh, wife of the deceased were described as only partly reliable. The witnesses were partisan and there was no reason for the witnesses to sit outside their door with the lantern burning which would have attracted insects in the rainy weather. There was no reason, it was urged, why the deceased was not rushed to the hospital straight away and was first taken to the police station. The evidence of P.W. 2 Smt. Kamlesh was unreliable as she claimed to have witnessed the incident from under her ghunghat P.W. 2, Smt. Kamlesh could not give clear evidence as to whether the family members had gone to attend the terahi ceremony of her relation. She could not remember whether P.W. 1, Shailendra Kumar Patel attended the terahi or not and she could not tell at what time they had returned. Testimony of P.W. 2, Smt. Kamlesh was also doubtful because at one point in her cross-examination she has blurted out that Raj Karan had fired the fatal shot on the deceased, whereas the prosecution case was that Raj Karan had only fired on

the injured, which fire had missed.

13. According to the learned A.G.A. there was no reason for the false implication of the Appellants. If the crime was committed by some other person, as the Appellants were close relations of the deceased and the witnesses and there was no reason for nominating the Appellants if someone else had fired on the deceased from outside. As held by the Apex Court in *Karnail Singh and Others Vs. State of Punjab*, and *State of Uttar Pradesh Vs. Sughar Singh and Others*, that where there is direct evidence of an eye-witness that the accused committed the murder by firing a gun some inconsistency relating to distance based on medical opinion offered would be of no significance whatsoever. Also whether a lantern would be kept alight merely because it was the rainy season, and whether Smt. Kamlesh could see from under her ghonghat or not are conjectural arguments. Nothing much would turn on the testimony of P.W. 2, Smt. Kamlesh about her confusion with regard to the terahi ceremony of Gulab's father and the time when P.W. 1, Shailendra Kumar Patel had returned from the feast. At any rate these arguments of detail can properly be considered at the time of hearing of the appeal, at the present juncture the Court has only to see whether the prosecution allegations disclose a prima facie case against the accused. In this connection as held in *Anwari Begum Vs. Sher Mohammad and Another*, and reiterated in a large number of decisions of the Apex Court that "prima facie satisfaction of the Court in support of the charge" is one of the important factors to be taken into account when considering the prayer for bail in a criminal appeal against conviction. The nature of the accusation and the severity of the punishment in the case of conviction and the nature of supporting evidence being another important factor.

14. Learned A.G.A. further submitted that simply because at one point in her cross-examination, P.W. 2 Smt. Kamlesh, a female witness, perhaps due to a slip of tongue stated that Raj Karan and not Raj Kumar had fired on the deceased, it cannot detract from the otherwise clear and consistent case of the prosecution in the F.I.R., examination-in-chief and cross-examination of both the eye-witnesses, who have clearly deposed that it was the fire of the Appellant Raj Kumar alias Pappu, which struck the deceased and not the fire of Raj Karan. No clarification was even sought by the accused from Smt. Kamlesh in this regard.

15. Moreover, the argument of denial is contrary to the argument that was frontally advanced that the Appellants may have committed the crime, but there were exonerating circumstances for converting the matter from one u/s 302, I.P.C. to one u/s 304, Part II, I.P.C., but for reasons mentioned hereinabove, which argument did not find favour with us at this stage.

16. In view of what has been indicated hereinabove, we find no ground to release the Appellant Raj Kumar alias Pappu on bail. His prayer for bail is refused.

17. We may mention that a somewhat detailed order refusing the Appellant's prayer for bail has been passed in this case because of the extended arguments

raised by learned Counsel for the Appellant, who sought further opportunity to raise arguments even after the order was pronounced.

18. However, the hearing of the appeal is expedited. Office is directed to prepare the paper-book, if possible within three months, after getting the poorly legible portions of the evidence and other relevant documents typed out and list the appeal for hearing immediately thereafter.