
(1987) 01 RAJ CK 0068
In the Rajasthan High Court
Case No : Criminal Appeal No. 337 of 1982

Haneef Khan and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 28-01-1987

Acts Referred:

Penal Code, 1860 (IPC) — Section 140, 149, 302, 325, 326

Citation : (1987) 1 WLN 462

Hon'ble Judges : Shyam Sunder Byas, J; Ashok Kumar Mathur, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ashok Kumar Mathur, J.—This is an appeal by the appellants against the judgment dated 21-8-1982 of the Sessions Judge, Jodhpur where by the Sessions Judge, Jodhpur has convicted the accused appellants Haneef Khan, Kherdeen and Momdeen u/s 302 read with Section 34 I.P.C. and sentenced them to life imprisonment and a fine of Rs. 1,000/- and in default of payment of fine to further undergo two years rigorous imprisonment.

2. The facts giving rise to this case are that a First Information Report Ex. P 1 was filed by PW 5 Shekhu Khan at police station Kherapa on 9-8-1981 at 8.30 a.m. It was submitted by him that he along with his father Ali Khan, brother Babukhan PW. 8 and their Hali Rewatiya PW. 7 went along with their sheep for grazing on 8-8-1981 at about 5-6 p.m. When they were grazing their sheep in village Dhanari Kalan, accused Haneef Khan, Kherdeen Momdeen and Kutabiya came there armed with Dhariya and Lathis. They challenged them and ran after him and his father. He ran away but the accused could over-power his father Ali Khan at a short distance. There after, they beat him with Dhariya and Lathis. On the basis of this information a case was registered against the accused persons and investigation was taken up by PW 17 Ram Singh, SHO, Kherapa. The site, was inspected, the dead body of the deceased, was sent for necessary post mortem and site inspection memo was also prepared. The deceased was

examined and he was found to have received a number of injuries including sharp edged injuries. Thereafter, the accused Haneef Khan, Kherdeen and Momdeen Were arrested and at the information given by Kherdeen a Dhariya was recovered Likewise at the instance of Haneef Khan a Dhariya was recovered and at the instance of Momdeen a Lathi was recovered. Accused Kutabiya has absconded and he is still absconding.

3. After the close of investigation, the accused persons were sent for trial. The prosecution examined 19 witnesses and got a large number of documents exhibited. The learned Sessions Judge after the close of the trial convicted the accused persons u/s 302 read with Section 34 I.P.C. and sentenced them to life imprisonment as aforesaid. As accused Kutabiya remained absconding therefore no trial so far as accused Kutabiya is concerned could be complete.

4. In the present case, the case mainly depended on the testimony of eye-witnesses Shekhu Khan PW 6, Babu Khan PW 8 and Rewatiya PW 7 who is said to be their Hali but as he does not know the assailants therefore his testimony is not of any consequence. Deva Ram PW 5 who is also said to be an eye-witness has turned hostile. Another witness Nathuram has not been examined: Therefore, we are left with the testimony of Shekhu Khan PW 6 and Babu Khan PW 8, PW. 6 Shekhu Khan has deposed that when he along with his father, brother and Hali Rewatiya were grazing their sheep in village; Dhanari Kala at about 5 to 6 p.m. all the four accused persons, Haneef Khan, Kherdeen armed with Dhariya and Kutabiya armed with Lathis came there. They came and challenged them. All of them ran away to save their lives but his father could not run fast and he was over taken by them and he was at a distance of 40 to 50 Pawandas. It is alleged that Haneef Khan and Kherdeen gave Dhariya blows to his father. His father immediately fell down as a result of the Dhariya Mows and thereafter Momdeen and Kutubiya gave him beating with lathis: While this belabouring was going on he concealed himself. Rewatiya and Babu Khan also concealed themselves behind the flock of sheep. Afterwards all the four persons ran away from that place. After that he along with his brother and Rewatiya reached near his father and they found that his father has already died He left Babu Khan and Rewatiya with the dead body of his father and he went to the house of Ghabru Khan PW. 2. Thereafter, he along with Ghabaru Khan went to Jodha Ram Sarpanch, PW 1. He wrote out the report and took it to police station. Shekhu Khan has further deposed that the accused persons had enmity with his family. It is alleged that the accused Haneef Khan's brother Ibrahim had s 6me illicit relation with his distant grand mother. People tried to persuade Ibrahim but he continued his relations with his grand mother. Thereafter Ibrahim was murdered by some person and in that murder case his brother Sheru and uncle Hussain were also roped in. Therefore, it is alleged that the family of the accused Haneef Khan had an active animosity with his family. Similar is the testimony of PW. 8 Babu Khan. He has supported the testimony of Shekhu Khan PW 6. The prosecution has also led the evidence of PW. 10 Fateh Mohammed to show that the accused persons met the witness and made enquiries about the whereabouts

of the deceased.

5. Mr. Garg, learned Counsel for the appellants strenuously urged that the testimony of Shekhu Khan PW. 6 and Babu Khan PW 8 is unreliable one, because they are interested witnesses. It is submitted by the learned Counsel that Shekhu Khan and Babu Khan both are sons of the deceased Ali Khan. Therefore, they are some how interested to rope in the accused persons. Learned Counsel submits that they have not witnessed the incident and because of the relations they went to wrongly rope in the accused persons. Learned Counsel further submits that the independent witnesses like Deva Ram PW 5 has turned hostile and Nathu Ram who is said to be one of the eye-witnesses has not been examined by the prosecution.

6. We have bestowed our best of consideration to the testimony of both these witnesses and after going through the testimony of these two witnesses we find that the criticism of the learned Counsel of the testimony of these witnesses is not tenable. Shekhu Khan appears to be most natural witness and his presence at the scene of occurrence cannot be doubted. He along with his brother and father went for grazing their sheep and there the incident has taken place around 5 to 6 p.m. Thereafter he rushed to the house of Ghabaru Khan and he along with Ghabaru Khan went to PW 1 Jodha Ram Sarpanch and there the First Information Report was got written. After that the First Information Report was filed at police station Kherapa in the early morning on 9-8-1981 at 8.30 a.m. In that the names of all the 4 accused persons find mention PW 2 Ghabaru Khan and PW. 1 Jodha Ram Sarpanch have supported the testimony of PW 6 Shekhu Khan that he came in the evening and got the First Information Report written through PW 1 Jodha Ram Sarpanch and the same was delivered in the next morning at police station Kherapa. Learned Counsel submits that he is the son of the deceased Ali Khan therefore his testimony should be examined closely. He has tried to point out some contradictions and omissions to discredit the testimony of Shekhu Khan. But after going through the testimony of PW 6 Shekhu Khan PW 2 Ghabaru Khan and PW 1 Jodha Ram Sarpanch we are of the opinion that the version given by Shekhu Khan right from the beginning in the First Information Report is consistent and that stands amply supported by the testimony of PW. 1 Jodha Ram and PW 2 Ghabaru Khan. The relations cannot be a sole ground for disbelieving the testimony of the witnesses. In the normal course the near relation will rarely exclude the real culprit. Since this witness has seen the whole incident from a distance of 40 to 50 Pawandas in the day light at about 5 to 6 p.m. Therefore, we are of the view that this witness is reliable witness. Similar is the testimony of PW 8 Babu Khan. He is the second son of the deceased and he has amply supported the testimony of PW 6 Shekhu Khan his elder brother. Thus, we are of the view that the testimony of both these witnesses is reliable and it is safe to rely on the testimony of these witnesses for conviction of the accused persons.

7. Next, Mr. Garg, learned Counsel or the appellants has argued that even if the

testimony of these two witnesses is taken to be reliable and trust worthy still the accused persons cannot be convicted u/s 302 read with Section 34 I.P.C. Learned Counsel submits that no common intention can be inferred in the facts and circumstances of the present case. Learned Counsel submits that in fact Haneef Khan and Kherdeen who are said to be armed with Dhariya a and each one of them gave one blow with Dhariya as a result of which deceased fell down and thereafter Momdeen and Kutabiya gave the lathis blows on the person of the deceased. Learned Counsel further submits that the Doctor has opined that the cause of death is a result of brain injury. Learned Counsel submits that the head injury which has been caused to. the deceased is not an incised one i.e. both the accused persons are not responsible for causing fatal blows. Thus, the learned Counsel submits that Section 34 in the facts and circumstances of the present case is not attracted, in this connection, learned Counsel has invited our attention to Bhajan Singh and Ors. v. The State of Punjab 1978 SCC 515. In Bhajan Singh's case 1978 SCC 515 their Lordships of the Suprema Court after reviewing the facts came to the conclusion that the common object of the unlawful assembly was to cause a grievous hurt and their Lordships converted the conviction of the accused from u/s 302/149 I.P.C. to that of u/s 326 I.P.C. read with Section 149 I.P.C. It was observed as under in the aforesaid case:

In the background of the incident, it is clear that due to the anxiety of the accused to harvest the wheat crop the occurrence took place. Taking into account all the circumstances we find the common object of the unlawful assembly was to cause a grievous hurt.

But that is not the case here. In Mohinder Singh and Another Vs. State of Delhi, only one accused was convicted u/s 302 where as the other was convicted u/s 325, I.P.C. In Mohinder Singh and Another Vs. State of Delhi, while the accused U caused a fatal blow and the injuries caused by accused M were not such as to cause death of the deceased, as he caused the injuries from the blunt side. Therefore, it was inferred that if M had the same intention then he could have used the axe from the sharp side instead of from the reverse side. Thus, the conviction of the accused was converted into u/s 325 I.P.C.

8. In Gafoor and Ors. v. The State of Rajasthan 1983 Cri. LR 599 also all the 8 accused appellants were found to be guilty of causing grievous hurt. Therefore, their conviction u/s 302/140 I.P.C. was converted into u/s 325/ 149 I.P.C. But in the present case the situation is different. Here all the accused persons came armed with Dhariyas and Lathis and belaboured the deceased and left the place. Another feature is that accused Kherdeen and Haneef Khan gave Dhariya blows each as a result of which the deceased fell down and thereafter the remaining two accused persons namely Momdeen and Kutabiya gave lathis blows. The deceased received as many as 14 injuries on the various parts of his body. The injuries received by the deceased are as under:

(1) Lacerated wound 13 x 4 c.m. bone deep on the left side of temporoparietal region, transverse in nature just above left ear;

- (2) Lacerated wound 5 1/2 c.m. x 2 c.m. bone deep on the right side of the forehead just near the hair line, vertical in nature;
- (3) The right helix of ear was out (amputated);
- (4) Incised wound 7 cm. x 3 c.m. muscle deep on the left side of neck just below the ear lobule;
- (5) Incised wound 5 c.m. x 2 cm. muscle deep just behind the left lobule of the ear;
- (6) Lacerated wound 5-1/2 cm. x 2-1/2 c.m. bone deep, placed just behind injury No. 1, vertical in nature;
- (7) Lacerated wound 4 c.m, x 2-1/2 cm. bone deep on the left side of chin. There was fracture of left Mandible;
- (8) Lacerated wound 4-1/2 cm x 2 cm. muscle deep on the right upper lip at the angle of mouth;
- (9) Bruise 2 cm. x 1 cm. at the route of nose. There was fracture of nasal bone;
- (10) Three abrasions parallel in nature each measuring about 2 cm. x 1 cm. over left gluteal region;
- (11) Abrasion 2 cm. x 1 cm. on the anterior aspect of right leg middle 1/3rd;
- (12) Bruise 10 cm. x 2 p.m. on the right side of the chest-oblique in nature below the nipple. There was fracture of 5th, 6th and 7th rib-anteriorly;
- (13) Bruise 10 cm. x 2 cm. on the left side of chest lower portion-oblique in nature. There was fracture of 4th, 5th, 6th, 7th, 8th and 9th rib-anteriorly;
- (14) Abrasion 3 cm. x 0.5 cm. on the anterior aspect of penis.

Injuries No. 3, 4 and 5 were caused by sharp edged weapon and the rest of the injuries were caused by blunt object." In the opinion of the doctor the cause of death was a result of brain injury. The important feature is that when the deceased was paralysed by two successive blows with Dhariya given by Kherdeen and Haneef Khan he fell down. Thereafter no blow was given by Kherdeen and Haneef Khan. Therefore, learned Counsel submits that they can at best be said to be guilty u/s 325 I.P.C. as the injuries caused by Kherdeen and Haneef Khan are not responsible for the death of the deceased. I am afraid, the contention of the learned Counsel cannot be accepted. The common intention in the present case is apparent that the accused came there and all of them gave blows on the deceased by sharp edged weapon and paralysed him. Thereafter the lathi blows were hammered by the remaining two accused persons. After the beating was over the accused persons left together. Simply because the blows given by Haneef Khan and Kherdeen did not prove to be fatal is no ground to say that the accused persons had no common intention. The common intention has to be gathered from the bundle of facts and it cannot be decided by taking one or two

facts independently. If taking the totality of the whole circumstances that all the accused came there and the first attack was led by Haneef Khan and Kherdeen with Dhariya which paralysed the deceased and as a result of which he fell down on the ground thereafter Momdeen and Kutabiya belaboured him by lathis. Thereafter the accused left together. These facts amply establish that the accused persons had a common intention to murder the deceased, and in pursuance of that they have murdered the deceased AM Khan. Therefore, Section 34 I.P.C. in the facts and circumstances of the present case is attracted beyond doubt.

9. Thus, in the result, we find that the accused persons have been rightly convicted and sentenced to life imprisonment. The conviction and sentence of the accused appellants are upheld but there will be no fine. The appeal is dismissed.