
(2007) 08 AHC CK 0243
In the Allahabad High Court

Phulai, Purnamasi and Lokhan

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 16-08-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304, 323, 34

Citation : (2007) 08 AHC CK 0243

Hon'ble Judges : Shiv Shanker, J; Amar Saran, J

Bench : Division Bench

Judgement

Amar Saran, J.—This criminal appeal has been preferred by the appellants Phulai, Purnamasi and Lakhan, who have been convicted to life imprisonment u/s 304 read with Section 34 IPC and to six months R.I. u/s 323 read with Section 34 IPC by a judgment and order of the IIIrd Additional District and Sessions Judge, Gorakhpur, dated 16.8.1982. The sentences were to run concurrently. As there is a report of the C.J.M., Gorakhpur, dated 22.6.2007 that the appellant Lakhan has died about 10-12 years ago in about which Gram Pradhan has issued a certificate, hence the appeal preferred by the appellant Lakhan abates. One other accused person Vrishbhan had been acquitted by the trial court by the aforesaid judgment. We have now only to consider the appeal preferred by the appellants Phulai and Purnamasi.

2. In pursuance of an order dated 22.5.2007 passed by an earlier Division Bench, the appellant Purnamasi was produced in Court in custody, whereas Phulai had appeared in person. Purnamasi was sent back to jail and is presently in custody. An application was moved for releasing Purnamasi on bail, but on 27.7.2007 we decided to hear the appeal itself on merit and reserved our orders.

3. The prosecution case was that in the month of Chait, the informant Khedan's brother Sahadeo was taking his bullocks in front of the house of appellant Phulai. Phulai and his family members had objected to the bullocks being taken from that route. Since then Phulai and his family members had become inimical to the family of the informant. On the date of incident, i.e. 11.5.1980, the appellants

Phulai and Purnamasi, sons of Lakhan were taking their bullocks in front of the door of the informant Khedan's house. Khedan prevented them and Phulai had to go back with his bullocks. Because of this enmity at 3 p.m. on the same day Phulai, Purnamasi, Lakhan and Vrishbh in came armed with lathies and dandas and tried to forcibly take their bullocks in front of the house of Khedan. Again, the informant Khedan, his uncle (elder brother of father) Tribeni and brother Sahadeo prevented them from taking their bullocks by that route. In consequence a quarrel ensued. Then Phulai caught hold and knocked down Tribeni (sic) uncle (i.e. father's elder brother) of the informant Khedan. Purnamasi started assaulting Khedan with a lathi, and when Sahadeo- tried to save Khedan and his elder uncle Tribeni, Phulai and Purnamati started belabouring Sahadeo with lathies as well. At that time Lakhan and Vrishbhan were exhorting these accused to kill their opponents, so that the quarrel could be ended. On the alarm raised by Khedan, Phulchand, Manogi Harijan, Shayam Mohan, Tetar and Banhoo and other villagers arrived there, who witnessed the incident and intervened. When Sahadeo's condition deteriorated as a result of the assault, he was carried to the police station, but he died on the way. The report of this incident was subsequently lodged on 11.5.1980 at 7.30 p.m. at P.S. Nichlaul, by the informant Khedan. The F.I.R. (Ext. Ka-1) and Chik report were prepared by P.W. 5 Head Moharrir Subhash Chandra Tripathi. Another Head Moharrir. Indrajeet Mishra made the relevant entry in the G.D. (Ext. Ka 6) on the basis of the report at 7.30 p.m. S.I. Bans Bahadur Yadav, P.W. 6, who was posted as Second Officer, at P.S. Nichlaul started investigating the case on the report. He recorded the statements of the informant and other witnesses. As it had become late, hence inquest was performed on the dead body the next morning. After that the challan lash and other papers were prepared and the dead body was sealed and thereafter the dead body and papers were handed over to Constable Ram Karan Pandey and Constable Prem Nath Tiwari (P.W. 3) for forwarding them for post mortem. After that the Investigating Officer S.I. Bans Bahadur Yadav, P.W. 6 recorded the statements of other witnesses and proceeded to the place of incident. On the pointing out of the informant's father Vammad, he prepared the site plan (Ext. Ka-10). Thereafter, he arrested the accused Brishbhan and searched for the other accused. Two persons, informant Khedan and his unjle (elder brother of father) Tribeni, who were injured in this incident, were medically examined by P.W. 2 Dr. S. Pal Singh at P.H.C. Nichlaul. Khedan was medically examined on 12.5.1980 at 9.15 a.m. He had been brought by Constable Kamla Kant Pandey. The Doctor found a contusion 4 cm x 2 cm on the back of right forearm, 8 cm below the elbow and a contusion 3 cm x 2 cm on the right shoulder. Both the injuries were simple and caused by blunt object and the duration of injury was about one day. According to the doctor, they could have been caused on 11.5.1980. The injury report was marked as Ext. Ka-2.

4. On 14.5.1980 at 1.30 p.m. he also examined Tribeni who was aged about 65 years. He found an abrasion 3 cm x 1/4 cm on the front of left leg 10 cm below the knee and complaints of pain on the back of chest. The duration of the injuries

was about three days. The injuries were simple and caused by friction with a blunt object. They could have been caused at 3 p.m. on 11.5.1980. The injury report was marked as Ext. Ka-3. He admitted in his cross examination that both the injuries of Khedan could have been caused by falling on some hard substance on the right side. Even Tribeni could have suffered some injuries by falling on some hard substance. He conceded that there could be six hours difference on each side from the time mentioned by him in his examination. The post mortem (Ext. Ka-4) was conducted on the deceased Sahadeo on 13.5.1980 at 9 a.m. at P.H.C. Maharajganj by Dr. A.P. Singh, P.W.4. The deceased was about 20 years in age. The time of death was 1 1/2 days prior to the medical examination. He was young and good built. His eyes were closed, the cornea was soft and milky. There was blood discharge from both nostrils and mouth, rigor mortis was present in the hands and legs. The deceased had the following ante mortem injuries:

1. Lacerated wound 3" x 1/2" bone deep on left side head, 2 1/2" above the left eyebrow.

(2) Contusions with swelling 2 1/2" x 2" on right-side head, 1" above the right ear.

5. On internal examination, the frontal bone on the left side of the head and parietal bone on the right side of the head below injuries No. 1 and 2 were found fractured. There was blood on the membranes. There was blood below both the injuries. Clotted blood was present in the brain tissues below the injuries. Both chambers of the heart were empty. Small intestine and stomach was empty. There was faecal matters in the large intestine. The bladder was empty. The death could have been caused as a result of shock and haemorrhage due to above injuries, which were sufficient in the ordinary course of nature to cause death. The injuries could have been caused due to lathies. The deceased could have died on 11.5.1980 at about 7 p.m. However, he admitted in his cross examination that Sahadeo's injuries could have been caused in a scuffle (pataka pataki) by falling twice on The hard ground. There could have been variance of six hours in the estimate of time and deceased could have died on 11.5.1980 at about 3 p.m. On 12.6.1980 the I.O. P.W. 6 received the post mortem report and on 13.6.1980 he learnt that the other accused had surrendered in Court. He recorded their statements in jail after obtaining permission from the Judicial Magistrate, Maharajganj and after investigation, he submitted the charge sheet on 19.6.1980 (Ext. Ka-11).

6. The charge in this case was framed u/s 304 read with Section 34 IPC for culpable homicide not amounting to murder for causing the death of the deceased Sahadeo and also u/s 323 read with Section 34 IPC also for causing injuries to Khedan and Tribeni.

7. Apart from the aforesaid formal witnesses, whose testimonies we have described above, only one eye witness namely Kheoan P.W. 1 has been examined in this case. He stated that Phulai and Pumamasi were brothers and sons of

Lakhan and Lakhan and Brishbhrn accused were also brothers inter se. His house was located in village Sakuldiha. Sahadeo was the son of elder uncle (elder brother of father). Prior to this incident, in the month of "Chait" his brother Shahadeo was taking the bullocks in front of the house of Phulai, but Phulai and his family members stopped him and since then started nursing a grudge against the informant and his family members. On the date of incident Phulai and Purnamasi had tried to take their bullocks in front of his door. Khedan stopped them and told them that in the month of "Chait" they had not allowed his bullocks to cross their door, hence he would also not allow the appellants to take their bullocks from the front of his door. Thereupon, Phulai and Purnamasi went away with their bullocks. On the same day at about 3 p.m. Phulai, Purnamasi, Lauhan and Brishbhan again returned, thereupon Khedan and his brother Sahadeo deceased and Khedan's uncle Tribeni again stopped the accused. Then there was an exchange of hot words and the quarrel escalated. The appellant Phulai caught hold of Tribeni and knocked him down and Purnamasi started assaulting him with a lathi. When Sahadeo the deceased rushed to help, then Phulai and Purnamasi both assaulted him with their lathies. Phulai, Purnamasi and Lakhan had come to the place carrying lathies. Lakhan and Brishbhan exhorted the others to kill them and they would see to the consequences. At that time, Shyam Mohan, Phoolchand, Tetar, Banhoo etc., had come to me spot. Sahadeo had received a lacerated wound on his head as a result of the lathi blow and he fell there. The accused ran away after the assault. When Khedan and others were carrying Sahadeo to the Police Station Nichlaul, he died on the way. He stated that the witnesses were not prepared to depose and were not prepared to support their statements to the police. The appellant Phulai has denied the incident and stated that he had been falsely implicated due to enmity. The appellants Lakhan and Purnamasi denied the incident and claimed that they had been falsely implicated due to enmity. The accused have not led any evidence in defence.

8. We have heard Sri Rahul Misra, holding brief of Sri Saroj Yadav for the appellants and Sri M.L. Shukla, learned A.G.A. for the State.

9. It was contended by the learned Counsel for the appellants that only a solitary witness Khedan had come forward to support the prosecution case and the other witnesses Manogi Harijan, Shyam Mohan, Tetar and Banhoo etc., who were named in the F.I.R., have not come forward to support the prosecution case, which casts doubt on the veracity of the version set up by Khedan. On the same testimony, the accused Brishbhan was acquitted and the appellant Lakhan, (who has died) and whose appeal has abated now, was awarded imprisonment for life. Therefore, the appreciation of evidence by the Trial Court was not well considered and reliable. There are some discrepancies in the testimony of the witness especially about the earlier incident and on some other aspects. There is no explanation why the F.I.R. was lodged with delay at 7.30 p.m. On the other hand, it was contended by the learned A.G.A. that there is no reason of doubt the veracity of the statement of the injured informant Khedan P.W. 1, who was an

eye witness of this case and the incident as described by him is extremely natural and believable. The contradictions pointed to by the appellants' counsel are of minor nature. There is no significant delay in lodging the F.I.R. at 7.30 p.m. as two persons were injured and the police station was six miles away.

10. After hearing the arguments of the counsel for the parties and after perusing the record and the Judgment of the trial court, we are of the opinion that the Trial Court has not committed any error of law in convicting the appellants as aforesaid. It is well settled these days that except interested or related persons, few outsiders are interested in coming forward to give testimony in a criminal case as they are not involved in the enmity between the parties and like to keep themselves distant from both the parties involved. In this regard it has been aptly stated in paragraph 11 of Appabhai and Another Vs. State of Gujarat,

11. In the light of these principles, we may now consider the first contention urged by the learned Counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether - in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.

11. In the present case it cannot be denied that in the incident one person has lost his life and two persons, namely, the injured informant P.W. 1 Khedan and their uncle Tribeni received injuries and they were medically examined for their injuries one day and three days (sic) after the incident. No suggestion has even been made to the Doctor concerned, P.W. 2 S. Pal Singh that the injured had not received the said injuries or that a wrong report was lodged. It was only suggested that it was possible that they might have received the said injuries by falling on some hard substance. We find no substance in this suggestion for we see little reason why the witnesses would create such injuries on their persons. It is a broad daylight incident. The background of the incident as narrated by the informant Khedan in the first information report and in his testimony in court is

extremely natural, that earlier in the month of "Chait" when Sahadeo was trying to take his bullocks in front of the house of the appellants. They had not permitted him to take his bullocks there on the date of incident. When the appellants Phulai and Purnmasi were trying to take their bullocks in front of the house of the informant, the informant and his family members prevented the other side from taking their bullocks there. There was even a quarrel between the parties over this issue and hence the incident took place. There is no reason for any witness to concoct such a story and on a plain reading of the evidence, it seems to be a very natural and believable story, which shows that as a result of a minor incident, unfortunately one person lost his life and two persons received simple injuries.

12. The discrepancies pointed by the learned Counsel for the appellants namely that in the F.I.R. and in the 161 Cr.P.C. statement, it was mentioned that in the month of "Chait" was Sahadeo, who was trying to take his bullocks in front of the house of appellants Phulai and Purnmasi, which was objected to, but in his examination-in-chief in Court P.W. 1 he has stated that in the month of "Chait" it was this witness (Khedan) and not Phulai, who was trying to take his bullocks in front of the house of the appellants, which was prevented by them. This is too minor a discrepancy, which could easily have occurred on the date of cross examination on 5.2.1982 was almost two years after the incident, which had occurred on 11.5.1980 and this discrepancy could be the result of a normal lapse of memory, to which no significance could be attached. Also another minor contradiction was pointed out by the learned Counsel for the appellants that in his examination-in-chief and in F.I.R., Khedan had stated that on the date of incident in the morning Purnmasi and Phulai were trying to take their bullocks in front of their houses, which Khedan prevented them from doing. In his cross examination, he has stated that in the morning only Purnmasi (and not Phulai) was trying to take his bullocks in front of the house, which Khedan prevented. When asked to clarify, which of the two versions was correct, he stated that the version that he had given on the date of cross examination that only Purnmasi was trying to take his bullocks was correct. Then again he was cross examined as to how he had mentioned in his report that both Phulai and Purnmasi were taking their bullocks in front of the house in the morning, he stated that he could not explain why such an averment had crept into the F.I.R. Again this is too minor a contradiction to create any significant dent on the prosecution case. As admittedly the evidence in Court was recorded after two years as mentioned above, there is bound to be some failure of memory due to lapse of time. Cases are not acquitted or decided on the basis of such minor discrepancies, which have very little impact on the major issues to be determined in a criminal case, whether particular accused have committed a crime, and whether the testimony of the witness (injured in this case) could be relied upon. He was also unable to mention the time it took for the dispute had taken place, but as these are virtually illiterate witnesses, it is not of any significance that they are not able to state precisely how long the incident

lasted. There is also some discrepancy about the time when he proceeded to the police station to lodge the report and whether the sun had or had not set. We have found that these are minor points, which do not seriously affect the prosecution case do not shake the credibility of the injured witness.

13. So far as the delay in F.I.R. is concerned, a suggestion was given to the P.W. 1 that as there was a marpit and they realised that there was minor quarrel and villagers were even dissuading them from lodging the report, hence he did not even proceed to lodge the report, but subsequently, when Sahadeo died, he went to the police station and lodged the report. Both these witnesses had denied this fact, but this suggestion does appear to be quite natural and probable looking to the minor nature of injuries sustained by the two injured Khedan and Tribeni and that they may have not realised the seriousness of the incident until Sahadeo had become unconscious and lost his life as a result of lathi blows on the head. This suggestion answers why the FIR was lodged after slight delay.

14. Also no suggestion of ante timing of the F.I.R. was put to P.W. 5 Head Moharrir Subhash Chandra Tripathi, who prepared the F.I.R. A question was put to the I.O. as to why in the chik report 12.5.80 had been scored out and 11.5.80 had been overwritten on it, and he has rightly answered that only the Head Moharrir could have explained this discrepancy. But as we have mentioned above, there was no cross examination of the Head Moharrir on this point. The I.O. denied the suggestion that a wrong time of 3 o'clock had been shown and the incident had actually taken place in the morning. We do not find any basis for this suggestion nor is there any material on record to substantiate this suggestion.

15. So far as the argument of the learned Counsel for the appellants that the accused Brishbhan was acquitted, we think his case was clearly distinguishable from that of the appellants. He was described as an old man of 80 years. The Judgment of the trial Court is dated 16.8.1982, therefore, in all likelihood he must be dead now, it has also been observed that he had played an insignificant role of exhorting the accused, which the trial court has rightly regarded as a weak kind of evidence in the facts of the case, and the Court seems to have rightly observed that it was unlikely that he had taken part in the marpit. It was in those circumstances that Brishbhan was extended benefit of doubt and consequently the appellants can derive no benefit from the acquittal of accused Brishbhan. For all these reasons we are of the opinion that the trial Court has committed no illegality in recording the finding of conviction against the appellants.

16. One last question remains to be answered as to whether the sentence of imprisonment for life u/s 304 IPC which has been awarded was appropriate in the circumstances of this case. We think that this contention raised by the learned Counsel for the appellants is worthy of consideration.

17. Admittedly in this case the injured informant and only eyewitness Khedan

P.W. 1 has admitted that earlier in the month of "Chait" when the deceased Sahadeo was taking his bullocks in front of the house of the appellants, the appellants restrained him. It was for that reason that on the date of incident, the informant Khedan had prevented Pumamasi and Phulai from taking their bullocks in front of his house in the morning of the date of incident. Again at 3 p.m. on the same day, when Phulai and Purnamasi, this time assisted by Lakhan and Brishbhan were trying to take their bullocks in front of the informant's house, then informant Khedan, his deceased brother Sahadeo and Khedan's uncle Tribeni prevented the accused from taking their bullocks by that way, which had resulted in exchange of hot words between the parties and a quarrel had ensued. As a consequence of that quarrel the appellants had assaulted Khedan, Tribeni and Sahadeo, who unfortunately lost his life. We have noted that there were two extremely simple injuries on the person of Khedan and Tribeni had received only one abrasion and only Sahadeo had received two lacerated injuries on his head by lathies wielded by the appellants, which had resulted in fracture of his frontal and parietal bones causing his death. In such circumstances, the Trial Judge himself felt that it was appropriate to convict the appellants only u/s 304 IPC and not u/s 302 IPC.

18. We further think that 4 1/2 hours delay in lodging the report in the Police Station Nichlaul, which was only six miles away was probably due to the fact that the informant and others may have simply been considering the incident as one of simple marpit between the parties because of the petty dispute over taking their bullocks in front of the house of the informant and hence they may have been reluctant to lodge the report until the condition of Sahadeo became serious, whereupon they started carrying him to the police station, but he died on the way. For all these reasons, we think that the conviction of the appellants can only be recorded under the second part of Section 304 IPC as it could not be inferred that the appellants had caused injuries with the intention of causing death or causing such bodily injuries as were likely to cause death, but (sic) that their act was done with the knowledge that the injuries were likely to cause death without any intention to cause death or to cause some bodily injuries as were likely to cause death. The maximum sentences under the second part of Section 304 IPC is only ten years" R.I. Admittedly the incident in question had taken place over 27 years ago on 11.5.1980. One of the appellants Lakhan has even died 10 or 12 years back. We think that in these circumstances it would be proper to set aside the sentence of imprisonment for life awarded u/s 304 IPC and in its place to sentence the appellants (sic) to 5 years" R.I. under the second part of Section 304 read with 34 IPC. The sentence u/s 323/34 IPC of six months R.I. for causing injuries to Khedan P.W. 1 awarded by the Trial Judge is, however, maintained. The sentences are to run concurrently.

19. With these observations this appeal is partly allowed.