
(2011) 09 DEL CK 0395

In the Delhi High Court

Case No : Criminal A. 535 of 2011 and Criminal M. (Bail) 705 of 2011

Rameshwar Prasad and Another

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2012) 1 JCC 564

Hon'ble Judges : S. Ravindra Bhat, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Vivek Sood, for the Appellant; Sanjay Lao, APP., for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The present appeal is directed against the judgment dated 17.01.2011 convicting the Appellants for the offences punishable under Sections-302/323/34, Indian Penal Code as well as the order dated 28.01.2011 sentencing them to undergo life imprisonment along with fine.

2. The prosecution's case is that on 2.11.2008 in the late evening around 10/10:30-10:45 pm, in front of plot No. 18/38, Gali No. 5, Anand Parbat Industrial Area, the present Appellants and one Darshan (the third co-accused, who is not a party to the present appeal) had inflicted injuries on Shanker (hereafter referred to as deceased) with iron rod "saria". In this case, the FIR was registered at PS Sarai Rohilla on an intimation received about the attack, by the police. The prosecution relied principally on the eye witnesses testimonies of PW-3 and 4 i.e. the brother and wife of the deceased, who died without recovering from the coma, caused as a result of the injuries suffered by him, on 04.11.2008. The prosecution also relied upon the testimony of PW-5, in support of its case about the recovery of sarias, the murder weapons in this case. After the arrest of the accused, the charge-sheet was initially filed under Section-304 read with 323/34, Indian Penal Code. The Trial Court after considering the materials on record, framed charges under Sections-302/323/34, Indian Penal

Code. The accused pleaded not guilty and claimed trial. After due consideration of the material on record, which included, the testimonies of the witnesses and the material exhibits, the Trial Court concluded that the prosecution had established the guilt of the accused for the offences they were charged with, beyond reasonable doubt and handed down the impugned judgment and order.

3. It is urged by the Appellant's counsel Mr. Vivek Sood that the impugned judgment is unsustainable in law. He submitted that the prosecution mainstay which found favour with the Trial Court was the eye witnesses' testimonies. According to counsel, the testimonies could not have been blindly relied upon since they were given by the deceased's relatives. Learned Counsel submitted that there were contradictions in the prosecution's story besides this circumstance. Crucially, it was argued that there was no public witness regarding the recoveries as well as arrest of the Appellants which undermined the entire prosecution story. It was urged that the motive put forward i.e. the previous quarrel resulting in the death of Shanker was too trivial and could not be established by anyone except the interested relative witnesses PW-3 and 4. It was urged next that the two sarias recovered as per the evidence of PW-3 was even contradicted by the depositions of PW-5 who clearly mentioned that the former (PW-3) was not present when the recovery was made. Learned Counsel also relied upon the testimony of the doctor PW-9 and pointed out that there was only one saria blow and that according to the medical evidence, the other injuries which were not fatal were most probably result of the fist blow.

4. It was alternatively urged by the Learned Counsel without prejudice to his other submissions that even if the prosecution's story were to be believed and the Trial Court's findings on the facts were to be sustained, the conviction under Section-302, Indian Penal Code, in the present case, was not justified. It was urged that the evidence, including the testimony of PW-9, reveal that even though there were four injuries on the deceased, the solitary injury on the head was the result of the single iron rod blow. Not all of the Appellants could have been responsible for this. Counsel urged that in the case of such proven facts, the Court ought to have taken recourse to the exceptions under Section-300 and concluded that the Appellants were guilty for the offences punishable under Section-304, Part-I, Indian Penal Code, since at best, what was proven, was the infliction of the injury which could have caused death in the ordinary course of nature. It was further emphasized that PW-9 as well as the postmortem report Ex. PW-6/A do not mention that the injuries were the cause of death or that they would have ordinarily resulted in the death of the deceased. On the other hand, the cause of death was cardiac arrest which could have been the result of the injuries.

5. Learned Counsel pressed into service the decision of the Supreme Court reported as *Kalegura Padma Rao and Another Vs. The State of A.P., rep. by the Public Prosecutor, ; Gurdev Raj Vs. The State of Punjab, and Kandaswamy Vs. State of Tamil Nadu, .* It was submitted that in all these cases, the injuries

inflicted by the accused was far graver in nature as compared to the proven facts of this case despite which the Supreme Court, on an application of the previously settled principles, altered the conviction from one under Section-302, Indian Penal Code to Section-304 Part-I, Indian Penal Code.

6. Learned APP urged that the appeals have no merit and have to be rejected. It was submitted that the testimonies of the eye witnesses i.e. PW-3 and 4 cannot be discarded merely because they were relatives. Learned Counsel further argued that the testimony of PW-3 has to be given due weight because he was an injured eye witness. He also relied upon the MLC of PW-3 Uma Shanker marked as Ex. PW-12/B which reveals that the witness had suffered injuries in the nature of lacerated wounds. It was argued that the Appellants had not cross-examined this witness or PW-5 to bring out any motive for false implication. Counsel urged that even otherwise where ocular testimonies exist as to the nature of the offence, motive is of no significance.

7. Commenting on the Appellants' arguments with regard to the recoveries, it was urged that discrepancies between the testimonies of PW-3 and PW-5 only show that the prosecution had not falsely implicated any of the accused. Even if the recoveries were to be doubted, the depositions of the eye witnesses i.e. PW-3 and 4 were sufficiently damaging to incriminate the accused. Having regard to these circumstances and the fact that the Appellants had inflicted a blow on the vital part of the body with a dangerous weapon i.e. iron rod, submitted the Learned Counsel, the conviction recorded by the Trial Court as well as the sentence were, in the circumstances of the case, justified. According to the learned APP, judgment does not call for any interference.

8. We have considered the submissions as well as the materials on record; we have also carefully gone through the original records of the Trial Court, summoned by the Court for hearing the present appeal.

9. So far as the argument of Mr. Vivek Sood, Learned Counsel for the Appellants concerning the testimonies of PW-3 and 4 is concerned, while there is no doubt that these witnesses were related to the deceased Shanker, that itself, is not a disabling circumstance. There can be, of course, situations, where the depositions of relatives of the deceased or a victim requires close scrutiny. At the same time, it has been repeatedly held by the Courts that when an eye witness who is also a relative of the deceased, joins the investigation and deposes during the trial, the Court has to be alive of the fact that he would be anxious to ensure that justice is done and the real culprit is brought to book. In other words, he would be anxious to ensure that the person guilty of the offence is actually implicated and would not go out of the way to falsely implicate or involve anyone else. We also notice that PW-3 Uma Shanker was injured during the attack. This circumstance, to our mind, strengthens the probability of his presence and his testimony being genuine and truthful. The prosecution has been able to show the nature of injuries by producing Ex. PW-12/B, the MLC of this witness.

10. PW-3 stated that the deceased and his family -including him -used to sleep near one Chadha's factory. During Diwali in 2008, one of the Appellants i.e. Rameshwar with others were bursting crackers. This was apparently objected to by the deceased Shanker. However, he did not pick up any quarrel since the occasion was a festive one i.e. Diwali. He deposed that on 02.11.2008 at about 10:30 PM, he along with Shanker and his family was about to go to bed. Shanker came out to attend the call of nature and at that time, PW-3 noticed the Appellants and Darshan in the gali. The Appellants Rameshwar and Mukesh were apparently carrying saris. They gave blows to Shanker. Darshan, according to PW-3, was giving him fist blows. The witness claimed to have rushed to the spot to save his brother; upon which, Mukesh gave him saria blow on the left arm and Rameshwar and Darshan kicked him and gave fist blows. Apparently, at that time, Sunita, the deceased's wife (who also deposed as PW-4), reached the spot and raised an alarm. On hearing this, the accused fled the spot. PW-4 has also deposed in much the same fashion and corroborates the version given by PW-3. We noticed that despite cross examination of these two witnesses, their testimonies and versions remain more or less unshaken as regards the previous evening's incident, the attack on Shanker as well as the identity of the assailants.

11. The Doctors, who recorded the MLC and also conducted the post mortem are PWs-6, 9 and 12. The testimony of PW-12 lists out the following injuries upon Shanker:

- (i) Lacerated wound 3 cm below the right eye.
- (ii) Lacerated wound 4 cm over the right occipital region.
- (iii) Abrasions were found 1x1 cm over the ulnar aspect of the right distal 1/3 fore arm.
- (iv) Abrasion 3 cm over the left upper chest.
- (v) Abrasion 1x1 cm over the lateral aspect of left elbow.

12. The medical evidence also is that except the injury No. 2, i.e., "lacerated wound 4 cm over the right occipital region" which was caused by the iron rod, the other injuries were possibly caused by kicks and fist blows. According to PW-6, the cause of death was craniocerebral damage consequent upon blunt force impact to the head. PW-9 stated that cause of death was the impact of saria which led to the cardio arrest.

13. Having regard to the entire conspectus of the facts and the limited jurisdiction of the High Court in interfering with the findings of the Trial Court, we are of the opinion that the testimonies of the PW-3 and PW-4 are credible and trustworthy as regards the incident prior to the fatal attack, the sequence of events which occurred on 2.11.2008, which ultimately culminated in the death of Shanker. However, this by itself is not dispositive of the appeal, since we are also of the opinion that the alternative argument put forward by the Appellant's counsel is substantial and requires some consideration.

14. Section-300, Indian Penal Code mandates that all culpable homicide is deemed to be murder; it, however, carves out certain exceptions. Exceptions-3 and 4 have been pressed into service in this case by the Appellants who relied upon the judgment of the Supreme Court that conviction under Section-302 Indian Penal Code was not warranted.

14. Section-300, Indian Penal Code, Exceptions-3 and 4, which specifically spell out situations that qualify for a lesser criminal responsibility, read as follows:

Exception 3. -Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. -Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

16. It is interesting to observe that all the judgments cited on behalf of the Appellants, rely upon the celebrated Virsa Singh Vs. The State of Punjab, , which, in a sense catalogue the guidelines which Courts in fact have to observe while scrutinizing whether an assault which leads to the death of the victim would be murder or culpable homicide. In Kalegura Padma Rao's case (supra), assault had its genesis in a quarrel which had occurred in the late evening hours of 2.7.2003. On 03.07.2003, the accused attacked the victim. The victim was chased, caught and beaten indiscriminately with iron rods; there were 16 accused. The Court, however, converted the conviction from Section-302 Indian Penal Code to Section-304 Part-I read with 149, Indian Penal Code. The relevant discussion of the facts as well as the law applicable in the case is extracted below:

3. The factual position in a nutshell is as follows:

PW-1 is the wife, PW-2 is the father, PW-3 is the mother, PW-4 is the brother and PW-5 is the sister-in-law of Pogula Jasan (hereinafter referred to as the "deceased"). The accused, deceased and the material witnesses are residents of Neerukulla village. The deceased purchased an Auto and was plying the same between Sulthanabad and Neerukulla. On 02.07.2003 at about 9.00 P.M., the deceased returned to his house from Sulthanabad and informed PWs.1 to 3 that when he requested A-1 and A-2 to travel in his Auto as per the serial number, they refused to travel in his Auto and beat him.

4. On 03.07.2003 morning, PW-1 and the deceased went to the house of the Sarpanch and told him about the incident. The Sarpanch called A-1 and enquired from him as to why he had assaulted the deceased. A-1 admitted his guilt in the presence of PWs.9 and 10. On the same day at about 6.00 P.M., A-1 to A-16 came

to the house of the deceased and attacked him. A-1 beat the deceased with a stick. The deceased ran into the house and bolted the door. In the meantime, when PW-2 intervened to rescue the deceased, A-1 beat him with a stick. A-3 broke the doors and all the accused entered the house and beat the deceased. Some of the accused were armed with iron rods and axes. They beat the deceased indiscriminately. Then the deceased ran out from the house. The accused chased and beat him indiscriminately. Finally, the deceased fell down near the Gram Panchayat office on receipt of the injuries. Later, the deceased was taken in an Auto to the Government Hospital, Sulthanabad. On the advice of the Doctor, the persons who carried the deceased to the hospital went to the Police Station and gave Ex. P-1 report. On the basis of Ex. P-1, the police registered a crime for the offences punishable under Sections 147, 148, 448, 307, 327 read with 149 of I.P.C. Thereafter, the deceased and PW-2, who received injuries, were referred to the Government Hospital, Karimnagar. The deceased, while undergoing treatment, succumbed to the injuries. The Inspector of Police took up investigation, prepared the rough sketch, observed the scene of offence, held inquest over the dead body of the deceased, seized M. Os.1 and 2 and later sent the dead body for postmortem examination. The accused were arrested and weapons were recovered. After completion of the investigation, the police laid the charge sheet. The accused denied the charges and claimed for trial.

In *Virsa Singh v. State of Punjab* 13 Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following facts before it can bring a case u/s 300 "Thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

17. The ingredients of clause "thirdly" of Section 300 Indian Penal Code were brought out by the illustrious Judge in his terse language as follows: (*Virsa Singh* case 13 AIR p.467, para 12)

12. To put it shortly, the prosecution must prove the following facts before it can bring a case u/s 300 "Thirdly";

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular

bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

11. If the evidence on record is considered on the touchstone principles set out above the inevitable conclusion is that the proper conviction would be u/s 304 Part I Indian Penal Code instead of Section 302 Indian Penal Code. The conviction of the Appellants is accordingly altered from Section 302 read with Section 149 to 304 Part I read with Section 149 Indian Penal Code. Custodial sentence of 10 years would meet the ends of justice. The findings of the guilt in respect of other offences and the sentences imposed do not warrant interference. The sentence shall run concurrently.

17. The next decision relied upon by the Appellant is Gurdev Raj's case (supra). Here too, the Appellant had used an iron rod and administered several blows on the head of the victim who later died. The Supreme Court applying the guidelines in Virsa Singh's case, converted the conviction from Section-302, Indian Penal Code to Section-304, Part-I, Indian Penal Code. Similarly, in Kandaswamy's case (supra), the accused had rained indiscriminate blows with an Aruval (sharp, sickle like weapon) on the deceased. Here too, the conviction under Section-302 was altered to one under Section-304, Part-I, Indian Penal Code.

18. We noticed that in this case, the facts proved, point to the existence of a single fatal blow on the deceased's occipital region. Although, there is mention of two sarias by the witnesses, it is also established that one of the accused rained blows on PW-3, the injured eye witness; his MLC is on record as Ex. PW-12/B. In the circumstances, there is reasonable probability -having regard to the testimony of PW-12 -that except the fatal blow, the other injuries were the result of the fist blows. The deceased was a recipient of one saria blow.

19. Having regard to these conspectus of facts, we are of the opinion that alternative submission made on behalf of the Appellants is merited and they have to receive the benefit of conviction for a lesser offence under Section-304, Part-I, Indian Penal Code. We also noticed that prosecution had initially charged them with this offence.

20. The Appellants have undergone nearly 2 years and 10 months imprisonment. We are of the opinion that having regard to the circumstances, ends of justice would be fulfilled if they are sentenced to undergo 8 years Rigorous Imprisonment; they shall be entitled to the benefit of remission as well as the period undergone in accordance with law.

21. The Criminal Appeal No. 535/2011 is allowed partly to the above extent.