

(2007) 07 CAL CK 0028
In the Calcutta High Court
Case No : C.R.A. No. 17 of 1996

Sheikh Habal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 26-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 304, 34

Citation : (2007) 3 CALLT 342 : (2007) CriLJ 3971

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Y.J. Dastoor and M. Mitra, for the Appellant; R.R. Biswas and P. Satpathi, for the Respondent

Judgement

Girish Chandra Gupta, J.—The accused Sk. Habal, Sk. Kalo, Sk. Aijamal and Sheikh Bodir all sons of late Sk. Golam of Budhpur within Khoirashol Police Station in the district of Birbhum were charge-sheeted by the police for offence u/s 304 read with Section 34 of Indian Penal Code on the basis of a first information report dated 11th October, 1992 lodged by Sheikh Kalu son of late Sk. Khodaband. The accused persons were however charged by the Ld. Trial Court u/s 302 read with Section 34 of Indian Penal Code and were ultimately convicted and sentenced with life imprisonment and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for six months by an order dated 20th December, 1995. The accused persons have now come up in appeal.

2. The case of the prosecution appears to be that on 11th October, 1992 at about 4 p.m. an altercation, followed by assault upon Sheikh Dilip, took place owing to grazing of cows in the paddy fields belonging to the accused persons. The deceased Sheikh Rustom, uncle of Sheikh Dilip intervened whereupon Sk. Aijamal assaulted Sk. Rustom on his head by a rod and Sk. Kalo hit Sk. Rustom with a boulder on the side of his left ear and on chest. By that time the accused Habal and Bodir had also joined the two accused persons, in the process Rustom

fell down and succumbed to his injury almost instantaneously.

3. The case of the defence as appearing from the suggestions given to the witnesses for the prosecution as also from the answer given by Sk. Habol in his examination u/s 313 of Cr. P.C. appears to be that after the altercation over the grazing of cows in the paddy fields of the accused persons Dilip instigated his family members including Rustom whereupon the house of the accused persons was attacked and bleeding injury was inflicted upon Habol. Habol had to be admitted in the hospital at Nakrakunda. He had eight stitches on his head. A counter-case was started which was registered as PS Case No. 37 of 1992 in which a charge-sheet has been filed.

4. The learned trial Court in the instant case being satisfied with the evidence of eyewitnesses namely the prosecution witnesses Nos. 1-7 reached the conclusion that the accused persons were responsible for causing death of the deceased Sk. Rustom. The accused persons were, therefore, convicted for the offence punishable u/s 302 read with Section 34 of the Indian Penal Code and on that basis were awarded rigorous imprisonment for life and also to pay fine of Rs. 1000/- each, in default, to suffer rigorous imprisonment for six months.

5. It further appears that considering long pendency of the appeal and non-preparation of the paper book owing to misplacement of the records an order suspending operation of the sentence was passed on 20th September, 2006 directing release of the convicts on bail. It further appears that the appellants have already undergone imprisonment for about 11 years and 9 months.

6. Mr. Dastoor, learned Advocate appearing for the appellants has advanced following submissions:

(a) That the learned trial Judge has erred in not disposing of the counter-case along with the case in hand. He in this regard relied on the judgment in the case of Sudhir and Others etc. Vs. State of M.P. etc., wherein the earlier views expressed in the judgment in the case of Nathi Lal v. State of U.P. reported in 1990 SCC 145, were approved.

(b) Relying on the judgment in the case of Mohar Rai and Bharath Rai Vs. The State of Bihar, he submitted that the prosecution version shall be deemed highly improbable where the accused had been injured and such injury had not been properly explained by the prosecution.

(c) Relying on the judgment in the case of Lakshmi Singh and Others Vs. State of Bihar, he submitted that omission to send bloodstained earth for chemical examination by the investigating agency would further weaken the case of the prosecution.

(d) He submitted that each of the prosecution witnesses deposed that 10-15 villagers were there at the time of the incident but not one such villager was examined by the prosecution. The prosecution contented itself by examining merely the relatives of the deceased.

(e) He submitted that as against Sk. Habol and Sk. Bodir there is no case. He commented adversely upon the examination; u/s 313 of the Cr. P.C. saying that the examination under the aforesaid provisions was made perfunctorily.

(f) Relying on the evidence of the doctor examined by the defence he submitted that there is evidence to show that Habol was seriously injured.

(g) Finally he submitted that at the highest this can be a case where punishment could have been inflicted upon the accused persons under Part-II of Section 304 of the Indian Penal Code and the learned trial Judge erred in punishing the accused persons u/s 302 of the Indian Penal Code.

7. Mr. Satpathi, learned Advocate appearing for the State submitted that:

(a) from the totality of the evidence adduced by the prosecution particularly through the eye-witnesses it would appear that the four accused persons participated in the assault committed upon the deceased Rustom. He in this regard drew our attention to the evidence of P.W. 3 Dilip who was also injured in the process.

(b) Secondly he submitted that given every benefit to the accused persons as regards the case and the counter-case and even assuming that there was a fight which was free for all, the case can by no means come within Part II of Section 304 of the Indian Penal Code. The injury inflicted by the boulder was, homicidal in nature as would appear from the evidence of the doctor P.W. 12 and therefore at the highest the case may come within Part-I of Section 304 of the Indian Penal Code.

(c) Rest of the submissions of Mr. Dastoor were disputed by Mr. Satpathi.

8. We have perused the evidence on record and have considered the submissions made by the learned Counsel appearing for the parties. The following points in our considered opinion arise for a decision.

(I) Whether a common intention on the part of the accused persons for the commission of the crime has been proved?

(II) Whether the accused persons were responsible for causing the death of the victim Rustom?:

(III) Whether the case comes within any Exception of the Section 300 of the Indian Penal Code ?

(IV) Whether the accused persons should have been punished under Part I or Part II of Section 304 of the Indian Penal Code ?

9. We shall endeavour to answer the issues in the order they have been framed.

10. It is true that in the first information report lodged by the P.W. 1 no overt act was attributed to Habol and Bodir in causing death of the victim-Rustom. The P.W. 1 however in his evidence before the Court deposed that besides Aijamal

and Kalo, Habol and Bodir assaulted the victim with lathi. In his examination-in-chief he also deposed that the accused persons also assaulted Dilip. In cross-examination he however admitted that except for Aijamal no other accused persons assaulted the victim Rustom with lathi.

11. Dilip in his evidence has deposed that Aijamal assaulted the victim with lathi. The victim fell down. Kalo then assaulted the victim with a boulder. Sk. Habol and Sk. Bodir thereafter continued to assault both Dilip and the victim-Rustom. The evidence of Dilip has been corroborated by P.W. 2, P.W. 4, P.W. 5, RW. 6 and P.W. 7. It is, therefore, not possible to answer the first question except in the affirmative.

12. We already have noticed that the evidence of all the eye-witnesses namely P.Ws. 1 to 7 is that Aijamal hit the victim with a lathi on his head. The victim fell down. At that point of time Sk. Kalo hit the victim with a boulder from above his head. P.W. 12 Doctor has deposed as also indicated in his post-mortem report that the injury inflicted by the boulder was sufficient to cause death. The offending boulder was marked material Exhibit "1" through P.W. 1.

13. It is true that the blood stained earth seized by the police was not sent for chemical examination. But that cannot in our considered opinion denude the worth of the evidence of the eye-witnesses whose evidence has remained largely unshaken in the cross-examination implicating the accused persons in causing death of the victim-Rustom.

14. Mr. Dastoor submitted that during inquest only one injury was found. That however is not a correct reading of the inquest report. The inquest report reveals, two injuries one on the head and one on the side of the left ear. Considering the totality of the evidence we are inclined to answer the Second issue in the affirmative.

15. 4th Exception engrafted to Section 300 of the Indian Penal Code reads as follows:

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 offenders having taken advantage or acted in a cruel or unusual manner.

16. It is an admitted fact that a quarrel had cropped up over grazing of the cows in the paddy fields belonging to the accused persons. The case of the prosecution is that the victim protested against assault of Dilip. The case of the defence is that the victim accompanied by the prosecution witnesses attacked their house. The defence has been able to prove that the accused Habol did, in fact, receive a bleeding injury. In the facts of the case possibility of provocation cannot be ruled out. We, therefore, are inclined to hold that the case in hand does come under the 4th Exception engrafted to Section 300 of the Indian Penal Code set out hereinabove. The third issue is accordingly answered.

17. The accused persons in our opinion should have been punished under Part-I of Section 304, considering the fact that the injury inflicted by the boulder was homicidal according to the evidence of the doctor, the P.W. 12, as rightly contended by Mr. Satpathi, learned Advocate for the State. The fourth issue is accordingly answered.

18. Considering the facts and circumstances of the case and further considering that the appellants have already undergone imprisonment for 11 years we reduce the sentence imposed upon them to that already undergone by them and direct that they should be set at liberty forthwith if they are in jail. In case they are already on bail, they are discharged from the bail bond.

19. The appeal is thus disposed of

20. Lower Court Record with copy of this judgment to go down forthwith to the learned trial Court for information and necessary action.

21. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Advocates for the parties on compliance of all formalities.

Kishore Kumar Prasad, J.

22. I agree.