
(2009) 05 RAJ CK 0101
In the Rajasthan High Court

State	Vs	APPELLANT
Kunj Bihari Lal and Others		
 Bharti Ram Vs State		RESPONDENT

Date of Decision : 22-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 378
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 05 RAJ CK 0101

Hon'ble Judges : Deo Narayan Thanvi, J;A.M. Kapadia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.M. Kapadia, J.—Ten accused persons, viz., Bharti Ram, Satya Narayan alias Satya Prakash, Kunjbiharilal, Premdas, Nathu Singh, Birdha Ram, Mohanlal, Shyamlal, Pratap Singh and Bhanwarlal (accused A-1 to A-10 respectively, for short) were charged and tried by the learned Sessions Judge, Jodhpur, in Sessions Case No. 109 of 1982 for the offence u/s 302, 302/149, 147, 323 of the Indian Penal Code ("IPC", for short), on the accusation that on 06.07.1982 at 10:30 PM, they formed an unlawful assembly armed with weapon lathi with a view to take revenge in connection with some dispute about the cycle stand between deceased Bora Ram, and accused A-1 Bharti Ram and A-2 Satya Narayan assaulted Bora Ram Choudhary, Babu Ram and Sardar Jaspal Singh by giving lathi blows while the remaining accused gave lathi blows to them, as a result of the same Bora Ram died.

2. At the end of trial, accused A-1 Bharti Ram and A-2 Satya Prakash were found guilty of the offences u/s 147, 302/149 and 323 IPC for committing murder of Bora Ram Choudhary and causing injuries to Babu Ram and Sardar Jaspal Singh and both of them were sentenced to imprisonment for life and fine of Rs. 200, in default of payment of fine further six months" rigorous imprisonment for the offence u/s 302/149 IPC, one year's rigorous imprisonment for the offence u/s 147 IPC and six months" rigorous imprisonment for the offence u/s 323 IPC.

So far as remaining accused A-3 to A-10 are concerned, they were not found guilty and therefore they were acquitted of the offences with which they were charged.

3. Aggrieved by the impugned judgment and order, accused A-1 Bharti Ram filed D.B. Criminal Appeal No. 323 of 1985 and accused A-2 Satya Prakash filed D.B. Criminal Appeal No. 322 of 1985 with the aid of Section 374 of the Code of Criminal Procedure ("Code", for short) challenging conviction and sentence recorded against them whereas the State of Rajasthan has filed D.B. Criminal Appeal No. 139 of 1986 with the aid of Section 378 of the Code against remaining 8 accused i.e. A-3 to A-10, challenging their acquittal of all the offences with which they were charged.

4. The prosecution case, as disclosed from the FIR and unfolded during trial is that on 06.07.1982, at about 10:30 PM, Babu Ram along with Sardar Jaspal Singh and deceased Bora Ram took dinner at Ram Hotel, 12th Road Circle, Jodhpur and their motorcycle was lying outside the hotel. When these three persons came outside the hotel after having dinner and tried to leave the place on their motorcycle, A-1 Bharti Ram and A-2 Satya Narayan came there and asked these persons to stop motorcycle and gave lathi blows to Babu Ram and Sardar Jaspal Singh, who could not leave the place and just at that time, remaining eight accused came on the spot armed with lathis, who were hiding themselves behind a standing truck. The first blow is said to have been given by Bharti Ram but the deceased Bora Ram kept standing and he did not fall down but after his falling down on the ground, Satya Narayan and Bhanwara Ram gave lathi blows on his head while deceased Bora Ram was lying down on the ground and other accused persons also caused simple injuries. On information to the police by Babu Ram, ASI Jaffar Ali reached on the spot and taken deceased Bora Ram to MG Hospital, Jodhpur, where he succumbed to injuries in early morning but no dying declaration of the deceased could be recorded and the statement of Babu Ram recorded in the hospital, which became the basis of FIR registered in this case.

5. On the basis of aforesaid report, police registered FIR No. 121/82 against ten accused persons for the offence u/s 147, 148, 149, 307, 323, 341, 34 of the IPC and started investigation.

6. On completion of investigation incriminating evidence was found against all the accused persons i.e. A-1 to A-10, therefore, the police filed chargesheet against them in the Court of Judicial Magistrate No. 5, Jodhpur. The offence u/s 302 IPC being exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions Judge, Jodhpur.

7. The learned Sessions Judge, Jodhpur ("trial Court" for short), who conducted the case, framed charge against accused persons, which were read over and explained to the accused to which they pleaded innocence and claimed trial, therefore, they were put to trial in Sessions Case No. 109 of 1982.

8. To prove the culpability of the accused, the prosecution has examined as many as 16 witnesses and relied upon number of documents.

9. After recording of the evidence of the prosecution witnesses was over, the trial Court recorded further statements of the accused as required u/s 313 of the Code. In their further statements, all the accused denied the allegations leveled against them and stated that they are innocent persons and have been falsely implicated in this case. They led no evidence in defence.

10. After hearing arguments, the trial Court convicted accused A-1 and 2 but acquitted accused A-3 to A-10, to which a reference has been made in earlier paragraph of the judgment.

11. It is relevant to mention here that accused A-2 Satya Prakash, who filed D.B. Criminal Appeal No. 322 of 1985, died on 23.08.1989 during the pendency of his appeal, therefore, his appeal abated and was dismissed by the order of this Court on 03.08.1999.

12. During the course of arguments, Mr. M.K. Garg & Mr. S.D. Purohit, learned Counsel for accused A-1 Bharti Ram, who has filed D.B. Criminal Appeal No. 323 of 1985 do not dispute the factum of murder of Bora Ram Choudhary having taken place, however, according to them, the fatal blows on the head of deceased Bora Ram were given by accused A-2, Satya Prakash, who died during the pendency of appeal and the main role attributed to accused A-1 Bharti Ram is in respect of giving only one blow on the head of deceased and there was no intention on the part of accused A-1 to commit murder because had there been an intention on his part then he would have inflicted one blow after another but on the head he gave only single blow, therefore, according to them, as regards accused A-1 Bharti Ram, it is not a case of murder punishable u/s 302 but it is a case of a case of culpable homicide not amounting to murder punishable u/s 304 Part II IPC. Learned Counsel submit that accused A-1 has served imprisonment for more than two years and thereafter he was released on bail, therefore, custodial sentence suffered by him may be treated as substantive sentence for the offence committed by him and he may be set at liberty. He, thus, prayed to allow his appeal in part by altering his conviction and sentence and pass appropriate orders in this regard.

13. Mr. S.S. Sharma, learned Public Prosecutor submits that so far as D.B. Criminal Appeal No. 323 of 1985 filed by accused A-1 Bharti Ram is concerned, the learned trial Court has rightly convicted accused A-1 for the offence u/s 302 and it is not a case of culpable homicide not amounting to murder as submitted by the learned Counsel for accused A-1. He, therefore, urged to dismiss the appeal filed by accused A-1.

As regards, D.B. Criminal Appeal No. 139 of 1986 filed by the State against acquittal recorded in favour of accused A-3 to A-10 is concerned, according to the learned Public Prosecutor, the acquittal of accused A-3 to A-10 is not based on sound appreciation of evidence as they by forming unlawful assembly came at

the place of incident and there is overtact on their part, therefore, they are guilty of the offence u/s 302 read with Section 149 of IPC and they may be convicted for the offence u/s 302 read with Section 149 IPC and sentenced to imprisonment for life. He, therefore, urged to allow the appeal filed by the State.

14. Mr. P.N. Mohnani and Mr. Sandeep Mehta, learned Counsel appearing for original accused No. 3 to 10 in D.B. Criminal Appeal No. 139 of 1986, have supported the judgment of acquittal recorded in favour of them and submitted that the learned trial Judge has rightly come to the conclusion that there was no proper light on the scene of occurrence, therefore, it was impossible for the witnesses to identify the eight accused. They, therefore, urged to dismiss the appeal.

15. We have considered the submissions advanced by learned Counsel for the parties. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned Counsel for the parties with reference to broad and reasonable probabilities of the case. While dealing with the case, this Court has examined the entire evidence on record and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence for the offence u/s 302 IPC against accused A-1 and the order of acquittal recorded in favour of accused A-3 to A-10.

16. Since counsel for accused A-1 have not disputed the factum of incident, therefore, we have to decide whether the act committed by accused A-1 is offence of murder or culpable homicide not amounting to murder.

17. In this connection, we advert to the evidence of three witnesses viz., PW1 Babu Ram, PW2 Sardar Jaspal Singh and PW7 Mana Ram. The trial Court has not believed evidence of PW3 Mana Ram. On re-appraisal of evidence of injured eye witness PW1 Babu Ram, it is seen that he has stated that first of all he received injury on his hand and elbow and PW2 Sardar Jaspal Singh also received simple injury caused by A-1 Bharti Ram and A-2 Satya Narayan and when A-1 Bharti Ram inflicted an injury on the head of deceased Bora Ram, he remained standing, but A-1 Satya Narayan and A-10 Bhanwar Lal gave blows on his head when he was lying down. PW2 Sardar Jaspal Singh has stated that accused A-2 Satya Narayan caused the second head injury on the head of deceased and accused A-10 Bhanwar Lal caused third injury on the head of the deceased. Similarly, PW7 Mana Ram has stated that A-2 Satya Narayan caused injury by lathi on the head of deceased Bora Ram in the middle, and A-10 Bhanwarlal also caused head injury to deceased Bora Ram.

18. So far as medical evidence is concerned, according to PW9 Dr. S.P. Joshi, injuries No. 1, 2, 3 and 4 were on the head [occipital region] and there was a subdural hematoma. In his opinion, the cause of death was injury No. 2 which was grievous in nature. He has also stated that injuries No. 10, 18, 19, 20, 21,

22, 23 and 25 were not possible by lathies and injuries No. 1, 3, 4 and 5 were simple in nature.

19. On re-appreciation of evidence and more particularly the evidence of PW1 Babu Ram and PW2 Sardar Jaspal Singh, it is seen that accused A-2 Satya Prakash inflicted two injuries on the head of deceased whereas accused A-1 Bharti Ram caused only one injury on the head of deceased. The alleged incident took place with regard to a dispute about cycle stand at Kalpataru Cinema and criminal case between PW1 Babu Ram and accused A-9 Pratap Singh was pending, therefore, the act of accused A-1 who caused only one injury on the head of deceased, and since the fatal blows were given by accused A-2 Satya Prakash, it has to be held that there was no intention on his part to commit murder of Bora Ram. At the most knowledge can be attributed that by this act the deceased could die, therefore the act committed by accused A-1 Bharti Ram is not murder but culpable homicide not amounting to murder falling within Exception 4 of Section 300 IPC which in terms stipulates that 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 manner.

20. Similar question arose before the Hon''ble Supreme Court in the case of Nasiruddin Khan and Ors. v. State of Bihar 2008 AIR SCW 5398. In the said case before the Hon''ble Supreme Court, the dispute was over agriculture land leading to incident on refusal by informant to stop fixing poles in the field. The accused brought spears and lathis and assaulted brothers of the informant. Appellant caused head injury with spear to one brother and other accused persons assaulted other brothers with lathies. The accused alleged suffering injuries in the incident raising plea of self defence and the injuries on accused were found to be superficial. Therefore, the plea of self defence was held to be not tenable. In that case, Hon''ble Supreme Court justified conviction of the accused u/s 304 Part II recorded by trial Court and affirmed by High Court.

21. The principle, laid down by the Hon''ble Supreme Court in the above referred judgment, is squarely applicable to the facts of present case also. It is a case of single blow by accused A-1 Bharti Ram as there is evidence to the effect that he gave first blow and thereafter second blow was given by accused A-2 Satya Prakash and the third blow was given by accused A-10 Bhanwarlal when the deceased fell down. Therefore, the manner in which the incident has taken place on the trifle dispute in connection with cycle stand in which A-1 Bharti Ram has given blow by lathi, it cannot be said that he had the intention to cause death of deceased. At the most, at the time of inflicting injury, accused A-1 had the knowledge that his act is likely to cause death but he had no intention to cause death. PW7 Mana Ram, who is also claiming to be the eye witness has stated that A-2 Satya Narayan caused injury by lathi on the head of deceased Bora Ram in the middle and A-10 Bhanwar Lal also caused head injury to deceased Bora Ram. Out of the four injuries, sustained on the head by deceased, injury No. 2,

which was grievous in nature and proved fatal, was assigned to accused A-2 Satya Narayan. Therefore, according to us, the instant case against accused A-1 Bharti Ram falls within exception 4 of Section 300 IPC punishable u/s Part II of Section 304 IPC.

22. Now this takes us to examine as to what sentence should be awarded to accused A-1 Bharti Ram. The incident is of 1982 and accused served the total period of sentence for more than two years and thereafter he was released on bail vide order dated 21.01.1986. Therefore, looking to the circumstances and the incident is of 1982, we deem it expedient that the custodial sentence suffered by accused A-1 Bharti Ram would meet the ends of justice.

23. Now this takes us to examine D.B. Criminal Appeal No. 139 of 1986 filed by State challenging acquittal of accused A-3 to A-10. The learned Public Prosecutor Mr. S.S. Sharma has submitted that during the pendency of appeal, out of the 8 accused respondents, Birdha Ram original accused A-6 expired on 23.08.2000, therefore, the appeal against him requires to be abated. In this connection, the learned Public Prosecutor has submitted a copy of Death Certificate issued by the Registrar, Births and Deaths Registration, Municipal Corporation, Jodhpur on 11.09.2007 to which learned Counsel for the respondents also agree and accordingly the appeal against him does not survive and stands abated.

24. Now, we have to examine the appeal filed by the State challenging acquittal of accused A-3 to A-5 and A-7 to A-10. In this connection, on perusal of evidence and more particularly the impugned judgment and order, it is seen that the trial Court has found that at the place of incident there was no light, therefore, witnesses could not identify accused A-3 to A-10. PW11 Punjraj Singh, a prosecution witness, has also deposed like this, so there was no possibility of identifying these seven accused persons and therefore their presence was not believed and the trial Court has acquitted all of them. On re-appreciation of the evidence, we also found that the trial Court has recorded a finding that there was no proper light, therefore, it was difficult for the witnesses to identify accused A-3 to A-5 and A-7 to A-10, and therefore, their presence was doubtful and therefore they were rightly acquitted by the trial Court.

25. It is settled principle of criminal jurisprudence that in an appeal against acquittal, the High Court should attach greater weight to appreciation of evidence by the trial Judge who had the occasion to watch the demeanour of the witnesses (See: Anokh singh Vs. State of Punjab,

26. In view of the above principle enunciated by Supreme Court, in our considered opinion, the trial Court in the instant case has rightly recorded acquittal of accused A-3 to A-10 and we do not find any merit in D.B. Criminal Appeal No. 139 of 1986 filed by the State against the order of acquittal recorded in their favour.

27. For the forgoing reasons, D.B. Criminal appeal No. 323 of 1985 filed by accused A-1 Bharti Ram is partly allowed and while maintaining his conviction

and sentence for the offence u/s 147 and 323 IPC, recorded against him vide judgment dated 23.09.1985, we alter his conviction for the offence u/s 302/149 to Section 304 Pt II/149 IPC and sentence him to the period already undergone by him which is more than two years with a fine of Rs. 1,000/-, and in default to undergo six months" simple imprisonment. He shall deposit the fine within a period of four weeks, failing which he shall undergo the sentence in default of payment of fine, for which warrant of arrest shall be issued by the concerned trial Court.

28. Criminal Appeal No. 133 of 1986 filed by the State challenging the order of acquittal against accused A-6 Birdha Ram, who has died, stands abated whereas the appeal filed against remaining accused A-3 to A-5 and A-7 to A-10 fails and accordingly it is dismissed.