

(2014) 02 AHC CK 0240
In the Allahabad High Court

Case No : Government Appeal Nos. 635, 743 of 1982 and 3061 of 1981

State of U.P.

APPELLANT

Vs

Asrar Khan

RESPONDENT

Date of Decision : 06-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 326

Citation : (2014) 2 ACR 1263 : (2014) 85 ALLCC 140

Hon'ble Judges : Rakesh Tiwari, J; Kalimullah Khan, J

Bench : Division Bench

Advocate : Apul Mishra, Advocate for the Appellant; A.C. Chaturvedi and S.S. Tiwari, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—We have heard Ms. Usha Kiran, learned A.G.A. for the appellant-State, and Sri Apul Mishra, appointed as Amicus Curiae to argue the case as Counsel of his choice appointed by the respondent-accused are not appearing. Perused the record. Government appeals No. 743 of 1982 has been filed for the relief to set aside the acquittal of accused-respondent for the offence u/s 302 I.P.C. and sentence him in accordance with law and Government appeal No. 635 of 1982 has been filed for the relief to suitably enhance the sentence awarded to accused-respondent whereas the criminal appeal No. 3161 of 1981 has been filed by the appellant-Asrar to set aside the judgment and order dated 19.12.1981 by which he has been convicted and sentenced.

2. Since all the connected appeals arise out from the same judgment dated 19.12.1981 passed by the Sessions Court in S.T. No. 82 of 1981, they are entwined by same facts and law, hence are being heard together and decided by this judgment.

3. The impugned judgment and order has been assailed on the grounds; that the Court below erred in holding that no offence u/s 302 I.P.C. was made out against

the accused person though it had accepted the prosecution story which was proved from the testimony of the eye-witnesses Mohammad Masood Khan, Masroor Khan, and Sajjad Khan and dying declaration (Ext. Ka-9) recorded by the Magistrate; that it is established from the medical evidence that the injuries sustained by the deceased Juned Khan were sufficient in ordinary course of nature to cause his death yet the learned Sessions Judge committed an error in not convicting the accused-respondent u/s 302 I.P.C. hence acquittal of accused-respondent is contrary to the weight of evidence on record and has resulted in miscarriage of justice.

4. The facts culled out from the record are that the charge against the respondent-accused, Asrar Khan was framed to the effect that he on 28th December 1980 at about 3.15 P.M. in Mohalla-Bazaria Himmat Khan near Bhurji-Ka-Bhar, Rampur City, committed the murder of Juned Khan by intentionally and knowingly causing injuries to him with knife which were sufficient to cause his death. At the trial the respondent-accused pleaded not guilty and claimed to be tried.

5. It appears that a written report was filed on 28.12.1980 by Mohd. Masood Khan son of Mohd. Shah Khan R/O Pila Talab, P.S.-Ganj, District-Rampur, stating that on 28.12.1980 at about 15.40 P.M. when he reached near Bhurji Ka Bhar, Rampur, he saw that Asrar Khan son of Gulam Mohd. Khan, R/o. Village-Jiyarat Halkewali, P.S.-Kotwali and Juned Khan son of Gulam Mohd. Khan, R/o. Mohalla-Jhanda Bade Peer Saheb, P.S.-Ganj, District-Rampur, were quarrelling. He heard respondent-accused, Asrar Khan saying to Juned Khan that "SALE BADA DADA BANTA HAI MAI TUMAHARI DADAGIRI ABHI NIKALE DETA HUN" who took out a knife and struck a number of blows with it on Juned Khan who fell down in the drain. When Sajjad Khan and Masroor Khan R/o. Mohalla-Jhanda Bade Peer Saheb, P.S.-Ganj, District-Rampur along with others challenged the accused-respondent Asrar Khan he ran away leaving behind the knife used by him and that the informant had come to the police station with injured Juned Khan for lodging the FIR.

6. After preparation of check report, FIR was lodged and Juned Khan who was aged about 20 years, was got medically examined on 28.12.1980 at about 4.00 P.M. As per doctor's report, he had sustained the following injuries on his body:

1. One incised wound 1 c.m. x 1/2 c.m. x skin deep on the front of forehead 6 c.m. above left eye brow, 1 c.m. away the mid line.
2. One incised wound 2.2 c.m. x 1/4 c.m. x skin deep on right palm 1/2 c.m. proximal to index & middle finger. Transverse in direction.
3. One incised wound 10 c.m. x 5 c.m. x not probed on the left side of chest over the lower coastal margins.

7. The Investigating Officer prepared recovery memo of blood stained plain damper (Ex. Ka-11) as well as blood stained cloths (Ex. Ka-12). A dying

declaration is said to have been given by injured Juned Khan before Smt. Deepika Duggal who was posted as Executive Magistrate at Rampur at the relevant time in the Court. For ready reference, it is extracted and reads thus:

8. Thereafter, injured Juned Khan was referred to higher medical institution for further treatment after noting his injuries in MLPC Register. He died thereafter about 2 days, and his post mortem was conducted at All India Institute of Medical Sciences, New Delhi on 3.1.1981 at 11.10 A.M. The general observation of the body of the deceased Juned Khan son of Gulam Mohammad Khan showed that he was about 29 years of age, rigour mortis had passed away all over body, eye and mouth were closed, post-mortem showed lucidity and putrefactive signs, stained blood vessels, greenish, discoloration, exudation from nose and mouth moving over the body, peeling of cuticle, loosening of hair thorax and abdomen burst, separation of sutures of skull.

9. The doctor found the following ante mortem injuries on the person of the deceased Juned Khan:

1. Stitch wound over left side of the chest, obliquely placed over the 9 inter costal span measuring 19.5 c.m. long, 17 c.m. below post auxiliary fold. 15 c.m. lateral to middle of chest.

2. Stitch wound left side of the chest, horizontally placed over 7 I.C.S. measuring 11 c.m. long. 14 c.m. left to mid line.

3. Surgical drainage over left side of the abdomen with drainage (corrugated rubber) in site 1.5 c.m. long 6 c.m. above iliac crest, 12 c.m. left to umbilicus.

4. Stitch wound over left side of forehead. 1 c.m. long. 6 c.m. above left eyebrow, 1 c.m. left to mid line.

5. Stitch wound, palmar aspect of Rt. hand, transversely placed. 2.5 c.m. long, over 1/2 c.m. proximal to index finger and middle finger.

6. Stitch wound left side of chest. 1 c.m. long. 2.5 c.m. below injury No. I. 18 c.m. left to mid line.

7. Venesection wound over Rt. side of the leg 2 c.m. long. 2.5 c.m. above medial malleolus.

8. There was inflamed and narcotising skin over the left lateral aspect of the chest and abdomen with multiple blabs covering 30 x 15 c.m. in area.

10. Stitch wound and inferior margin of left lower lobe 5 c.m. long were seen. Pleura adherent to firm plaques of narcotising tissue were also seen over the wing surface and left lung was found consolidated. Thin layer of pus was present in pleural cavity (left). Stitch wound over left dome of diaphragm 7 c.m. long was also observed.

11. In peritoneal cavity the peritonitis were found present. About 150 cc of thick pus had collected over left cavity of abdomen, stomach was found empty, stitch

wound over greater curvature as shown in diagram below 5 c.m. long, greater momentum was inflamed with narcotising tissues present weighting 200 gm. and large intestine, vermiform, mesenteries were inflamed.

12. After the post mortem, the dead body of the deceased was handed over to the police constable, viscera, clothes and articles were preserved for forensic tests. In the opinion of the doctor, death was caused due to peritonitis with consolidation of lung, injuries were ante mortem in nature which had been caused about 4 days before the death.

13. In support of its case, the prosecution examined as many as 9 witnesses, namely Dr. S.C. Gupta (P.W. 1), who had initially attended injured Juned Khan and had drawn up the injury report, Dr. L. Tripathi (P.W. 7), who had conducted post mortem examination of the body of the deceased at AIIMS, New Delhi, Mohammad Masood Khan (P.W. 2), Masroor Khan (P.W. 3), Sajjad Khan (P.W. 6) as witnesses of fact, constable Devraj Singh (P.W. 4), Head Constable-Prahlad Singh (P.W. 5) and S.I. Begraj Singh (P.W. 9) were examined as formal witnesses. Smt. Deepika Duggal (P.W. 8) the then Executive Magistrate posted at Rampur, who had taken the dying declaration of Juned Khan (since deceased) was also examined and proved the dying declaration of the deceased as Ex. Ka-9. Respondent-accused examined himself on 30.11.1981.

14. After hearing learned Counsel for the parties as well as on consideration of records and evidences relying upon the dying declaration, the learned Sessions Judge held that the prosecution had fully established the guilt of accused, Asrar Khan as under:

that the dying declaration made before Smt. Duggal, sufficiently clinches the issue and establishes that while he was going to the market there was some hot talk between him and Asrar in front of the cycle shop of the uncle of accused and when Juned was returning from the market he was attacked by Asrar accused with a churri. The dying declaration clearly shows that in the earlier incident there had been harsh talk and hot exchange between the two and the matter was then patched up by others. It is not unnatural that in the context of that earlier incident Asrar may have attacked Juned with churri when Juned was returning back as is alleged by Juned in his dying declaration, and when the sharp edged of that knife got broken on being gripped by the injured with the remaining portion the accused may have attacked on his head because of which the injured may have fallen in the drain as is alleged in the dying declaration. There were only three incised wounds, one in the chest, one in the head and one in the right palm. All these three are fully explained by the dying declaration of Juned. The absence of cycle at the spot is explained by the evidence of Masroor that he had taken it to the house of the deceased. The fact that the broken blade of knife could not be found at the spot is not of much importance because such a small piece may have even fallen in the drain on the side of the road. I am therefore of the opinion that considering all these facts and circumstances, the fact that the accused Asrar attacked and injured the deceased with a knife is fully

established.

15. On the question of quantum of punishment, the Sessions Court held thus:

The maximum sentence u/s 326 I.P.C. can be life imprisonment or imprisonment up to ten years. But the accused is also a young man of near about 20 years of age. The incident took place in a sudden quarrel. The State Counsel does not urge that there is any prior criminal history of the accused. Hence the case does not call for maximum punishment, and a sentence of six years R.I. with a fine of Rs. 200/- or in default further R.I. for three months shall meet the ends of justice. Accused Asrar is accordingly sentenced to undergo Six years R.I. and to pay a fine of Rs. 200/- u/s 326 I.P.C. In case of default in payment of fine he shall undergo further R.I. for three months.

16. Learned A.G.A., appearing for the appellant-State of U.P. has submitted that the incident is said to have taken place on 28.12.1980 which resulted death of injured Juned Khan; that perusal of post mortem report shows that the deceased was alive for two days after he had received injuries by hands of the accused. It is vehemently argued on behalf of the State that since there is contradiction in the dying declaration given by Juned Khan (since deceased) before the Investigating Officer and the Executive Magistrate, hence the Sessions Court has committed an error apparent on face of record in recording conviction on the basis of the said dying declaration.

17. Per contra, Sri Apul Mishra, appearing for the accused-respondent has stated that it is apparent that the alleged dying declaration given before the I.O. does not pass the test as laid down u/s 115 of U.P. Police Regulations. As it is not in accordance with law and the procedure prescribed for taking dying declaration, therefore, it will not have sanctity of a dying declaration. In this regard, section 115 of U.P. Police Regulations is quoted below:

115. The officer investigating a case in which a person has been so seriously injured that he is likely to die before he can reach a dispensary where his dying declaration can be recorded, should himself record the declaration at once in the presence of two respectable witnesses, obtaining the signature or mark of the declarant and witnesses at the foot of the declaration.

18. He then submits that condition of Juned was not so serious that he was likely to die before he could reach a dispensary, where his dying declaration could be recorded. In fact this is supported by material on record that Juned died in hospital after 2 days of the incident. It is also argued that said dying declaration before the I.O. does not show presence of two respectable persons and mark of the declarant hence it is not with credence. Since the alleged dying declaration before the I.O. can at best be taken only as statement u/s 161 Cr.P.C., it would be misconceived to say that there is contradiction between the dying declaration given before the I.O. and the Executive Magistrate and in such a case, there would be only one dying declaration given by the deceased before the Magistrate.

19. It is stated that perusal of post mortem report and injuries described in detail by the doctor at AIIMS, New Delhi shows that something had intervened between the time of injuries and death of Juned Khan that is to say that his death was also attributed to the pus formation in the injuries found by the doctor. Learned A.G.A. has also referred to the post mortem report stating that only one injury could have been fatal, but it alone was not fatal.

20. Admittedly, Juned Khan (since deceased) had received medical attention after lodging of FIR and referred to higher institution for treatment where he died after more than two days of the incident in which formation of pus was more than a factor which had attributed to his death, therefore, it cannot be said that Juned Khan died only because of the injuries received by him in the incident of 28.12.1980.

21. In the circumstances, we are of the view that the reasons given by the Court below holding accused-respondent to be guilty of the offence u/s 326 I.P.C. are cogent and well reasoned. The view taken by it appears to be a possible view. No illegality or infirmity in the order impugned could be shown by learned A.G.A. There is no ground for holding that the order and judgment impugned in these appeals is perverse. We, therefore, concur the reason and findings recorded by the Court below and uphold the judgment and order impugned in these appeals.

22. The appeal is, accordingly, dismissed. As a result the connected appeals are also dismissed. Sri Apul Mishra Advocate, appointed as Amicus Curiae, in this case would get Rs. 2,100/- as his remuneration fee and it should be paid to him within a month.