

Chand and Others

Vs

State of U. P.

Criminal Appeal No. 89 of 1969

(P. Jaganmohan Reddy, H. R. Khanna. J. M. Shelat JJ)

15.02.1972

JUDGMENT

JAGANMOHAN REDDY, J. -

1. This appeal by special leave is limited only to sentence and the question is whether the offences as held proved by the High Court fall under the first part of Section 304, I.P.C. of which the accused were convicted and sentenced or under Part II of the said section. Twelve accused were charged with offences of murder, voluntarily causing hurt and grievous hurt, house trespass and for rioting, of whom five were acquitted by the Additional Sessions Judge, Rampur. Seven others were convicted under Section 302, read with Section 149, I.P.C. for two offences under Section 325, read with Section 149, for three offences under Section 323 read with Section 149 as also under Section 449, and Section 147, I.P.C. Each of them was sentenced to life imprisonment, two years', 6 months', one year and two years' rigorous imprisonment, respectively, on each of the aforesaid counts. All the sentences were directed to run concurrently.

2. The incident for which the accused were convicted arose out of a dispute relating to the ownership of a vacant pieces of land situated opposite to the house of Sadi Hasan, P.W. 1 who is the father of the deceased Shaukat. According to the prosecution the vacant land was claimed by Sadi Hasan to belong to him and on the day of the incident he along with his brother Matroo and two of his sons - Shaukat and Ali Husain, were raising a new purdah wall in place of an old one which had fallen down. All the seven appellants along with the other five acquitted accused, are said to have come there armed with lathis and asked Sadi Hasan and others to stop constructing the wall because the rasta would be obstructed. Sadi Hasan replied that the land belonged to them and they would build the wall. Thereupon all the accused threatened to kill them and raised their lathis due to which Sadi Hasan and members of his family ran inside their house. But even then the appellants and their companions entered the house and started assaulting them. On hearing the alarm raised by Sadi Hasan and his relations, some others came and intervened and it is said that even Amzad, another son of Sadi Hasan and Gulshan, wife of Sadi Hasan were also assaulted by the appellants. The defence of the appellants was that except for appellants Chand and Maqsood, the remaining appellants were not present nor did they participate in the incident. Chand and Maqsood contended that the land over which Sadi Hasan was constructing a wall did not belong to him and that no purdah wall ever existed there. They further stated that there was a rasta over that land and when they objected to its being closed they were themselves assaulted by Sadi Hasan and his son Shaukat and so they had used lathis in their self-defence, that when Amzad and Ali Husain also came and started assaulting them, they wielded their lathis against them as well in self-defence, and that Smt. Gulshan also received some injuries when she intervened. They also stated that the incident took place where the wall was being constructed and not inside the house of Sadi Hasan.

3. The High Court in appeal was of the view that the medical evidence supported the prosecution case and gave a lie to the defence version; and that it was not disputed that as many as six persons received numerous injuries on the side of Sadi Hasan, one of whom was a woman, and one of them died as a result of the injuries. On the side of the appellants, Chand and Maqsood were examined by Dr. H. C. Gupta, D.W. 3. Two injuries were found on the person of Chand, one of which was a contused wound and the other a scabbed abrasion. Maqsood had three injuries, one of which was a contusion and two scabbed abrasion.

4. The evidence of the eye-witnesses was accepted by both the courts though it was held that the allegation that the old purdah wall of Sadi Hasan had been there before it had fallen down and that it was being re-built, was not established, nonetheless it was also held that the accused had not merely tried to stop Sadi Hasan and his family members from building the purdah wall, but had entered their house and beaten them but that however was not done with a view to commit murder. This is what the High Court says :

"Still, it appears very doubtful if the appellants had attacked with a view to commit murder. They had assembled only to see that the wall, which was being raised by Sadi Hasan, was not erected, and that if Sadi Hasan insisted he might be beaten. This is indicated by their having taken lathis with them. In other words, they do not seem to have intended to cause death of anyone. There was no previous enmity between the parties. Some of the appellants are very young persons. For example, Ashfaq was only twelve years old, Nanhey was fifteen years old, Chand was sixteen years old and Sukha was seventeen years old. There being no previous enmity, it would be too much to say that they intended to kill anyone. It also cannot be said that they knew that death would be of any of the victims by their assault. Consequently, it cannot be said that they had committed an offence under Section 302, I.P.C. It is, however, clear that when they wielded their lathis on the head of Shaukat, they must have had knowledge that they were causing such bodily injuries to him as were likely to cause death. Accordingly, in our opinion, the appellants must be held to have committed an offence under Section 304, Part I, I.P.C."

5. In view of this finding which cannot now be gone into, it is apparent that the High Court was in error in convicting them under Section 304, Part I, instead of under Section 304, Part II, whereunder whoever commits culpable homicide not amounting to murder without an intention to cause death, is punishable with imprisonment of either description for a term which may extend to ten years, or with fine, or with both. The findings of the High Court bring the offence of the appellants squarely under the terms of the above provision.

6. The question before us is whether and what sentence should be awarded to each of the accused. In so far as the two adult appellants who are above 21 years are concerned, namely, Nanhoo - Appellant No. 2, and Maqsood - Appellant No. 3, we think that their acts are such as would justify the maximum sentence of 10 years' rigorous imprisonment. With respect to the other appellants, namely, Appellants 1, 4, 5, 6 and 7, they are all below 21 years and one of them as already noticed by the High Court - Appellant No. 5, Ashfaq is a mere lad of 12 years. What we have to consider is whether the benefits of Probation of Offenders Act should be given to them. It, however, appears that the Central Act has not been made applicable to the State of Uttar Pradesh. On behalf of the appellants it is pointed out that there is a local Act applicable to that State, which is, the United Provinces First Offenders Probation Act, 1938. It is not denied that this Act was made applicable to Rampur State after it became a part of Uttar Pradesh. Section 4 of the said Act is as follows :

"4. Power of Court to release certain offenders on probation of good conduct. - (1) When any person is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and in the meantime to keep the peace and be of good behaviour :

Provided that the court shall not direct the release of an offender under this section unless it is satisfied that the offender, or his surety, has a fixed place of abode and regular occupation in the place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reasons to be recorded in writing, it does not consider it proper to do so.

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7. Now that the offence with which the appellants are being convicted falls under the second part of Section 304, I.P.C., such of them as are under 21 would be entitled to the benefits of the above provision. We think this is a case in which the appellants who it is admitted are the first offenders, should be released on probation. The learned Advocate for the State contends that it is not known whether any Probation Officers have been appointed for the District of Rampur and as such we should give him an opportunity to ascertain this fact and also that we should call for a report from that officer, if such a person is appointed for that District. We do not think there is any necessity to obtain this information because under the first proviso all that the court has to be satisfied is that the offender or his surety has a fixed place of abode and regular occupation in the place for which the court acts or in which the offender is likely to live during the period named for the observance of that condition. In this case it would be sufficient if we direct the District Magistrate concerned to conform with the requirements of that provision.

8. The appeal is accordingly allowed. The conviction and sentence against all the appellants under Section 304, I.P.C., Part I is altered to one under Section 304, I.P.C., Part II and the sentences passed on them are set aside. The other convictions against them are confirmed. Appellant No. 2 - Nanhoo and Appellant No. 3 - Maqsood are each sentenced to 10 years' rigorous imprisonment under Section 304, I.P.C., Part II and the sentence awarded for the other offences remain unaltered. In so far as Appellant Nos. 1, 4, 5, 6 and 7 are concerned, the sentences passed against them under the several sections of Indian Penal Code are set aside and they will be released if not already on bail as first offenders under Section 4 of the U.P. First Offenders Act, 1938 on their entering into bonds with two sureties to the satisfaction of the District Magistrate, Rampur, to receive the sentence when called upon during the period of two years and during that period to keep peace and

be of good behaviour. The District Magistrate concerned where the accused reside is directed to take the necessary bonds and sureties in compliance with the above order.

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