

Bharwad Bhikha Natha and Seven Others

Vs

State of Gujarat

Criminal Appeal Nos. 37 and 38 of 1975

(A. C. Gupta, P. N. Shinghal JJ )

03.05.1977

JUDGMENT

GUPTA, J. –

1. These are two appeals by special leave, one is by eight accused persons against the order of conviction and sentences passed, in respect of seven of them on charges under Sections 323 and 447 of the Indian Penal Code and Section 162(2) of the Gujarat Panchayats Act, and as regards one of them under Section 304 Part II of the Indian Penal Code; the other appeal is by the State of Gujarat against the acquittal of the seven accused in respect of the charge under Section 302/149 of the Indian Penal Code and the acquittal of the eight accused of the charge under Section 302. The Judgment of the High Court appealed from also disposed of two appeals from the Judgment of the Sessions Judge, Ahmedabad (Rural) at Narol, one by the accused against their conviction and the other by the State against their acquittal in respect of some of the charges. It appears that in village Lambha in Ahmedabad District a dispute had been going on between the agriculturists and the shepherds; the allegation against the shepherds was that they were damaging the standing crop in the fields by grazing their cattle therein. Because of this dispute between the two parties the village panchayat appointed three watchmen to guard the standing crop. Kalukhan who died as a result of an occurrence which is the genesis of these appeals, was one of the watchmen, the two others were Hasanbhai, who is the complainant in the case, and Magan Boghabhai. The incident took place in the morning of December 14, 1971. Hasanbhai and Magan saw the first seven appellants before us and several others grazing their cattle in the field of one Bhulabhai Aminchand (PW 15). These two watchmen informed Kalukhan of what they had seen and all the three started towards Bhulabhai Aminchand's field. On way they met PW 14 Khodabhai and appellant 8 Matambhai Punabhai who is said to be the chief of the shepherds. Appellant 8 was accused 13 in the trial Court : hereinafter we will refer to the appellants by their serial numbers as accused in the trial Court. Khodabhai requested accused 13 to accompany the watchmen to Bhulabhai's field and persuade the shepherds to call away the cattle. Accused 13 proceeded to the field on a bicycle followed by the three watchmen on foot. Of the watchmen Kalukhan was armed with a stick and the other two had dharias. Reaching the field Kalukhan told the shepherds that if they did not take out their cattle from the field he would send them to the cattle pound and when the shepherds did not pay any heed to his warning, he proceeded to take the cattle to the cattle pound as he had said. It was then that the assault started. All the accused other than accused 13 beat up Kalukhan and Hasan with sticks which they carried. It is alleged that accused 13 snatched away the dharia in Magan's hand and hit Kalukhan thrice on the head with it. When the assault was going on, PW 5 Baldevbhai Ranchhodbhai came on the scene carrying a gun. As the situation was taking a serious turn PW 5 shouted to the accused to stop the quarrel and warned them that unless they stopped fighting he would fire. At this, accused 2 and 5 rushed towards him and PW 5 raised his gun to protect himself

from the lathi blows aimed at him. The blows fell on the gun which dropped on the ground and broke into two. On being assaulted Kalukhan fell down. The accused then left the place.

2. The defence of some of the accused was that Bhulabhai Aminchand had permitted them to graze their cattle in his field. The trial Court relying on the evidence of PW 4 Hasanbhai, which the Sessions Judge found was corroborated by the evidence of PW 5 Baldevbhai and PW 14 Khodabhai, held accused 1, 2, 4, 5, 8, 11, 12 and 13 guilty of having committed offences punishable under Section 447 of the Indian Penal Code and Section 162(2) of the Gujarat Panchavats Act and sentenced them to suffer rigorous imprisonment for three months for each of the offences. They were also convicted of offences punishable under Section 323 of the Indian Penal Code, accused 1 and 4 for voluntarily causing hurt to Kalukhan, and accused 2, 4, 5, 8, 11 and 12 for causing hurt to Hasan, and each of them was sentenced to undergo rigorous imprisonment for three months. Accused 13 was found guilty of having committed an offence punishable under Section 325 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for two years and a fine of Rs. 1,000, in default to suffer rigorous imprisonment for further six months. He was also convicted under Section 447 of the Indian Penal Code. The substantive sentences in all the cases were ordered to run concurrently.

3. From the decision of the trial Court two appeals were preferred to the High Court, the accused appealing against their conviction and the State against the acquittal of accused 13 of the charge under Section 302 of the Indian Penal Code and the remaining accused of the charge under Section 302 read with Section 149. The High Court in agreement with the trial Court accepted the prosecution case that the crop on Bhulabhai's field was damaged by the accused by grazing their cattle therein on the date of the incident and that the defence the Bhulabhai had permitted them to graze cattle in his field was not true. The High Court also held that PW 4 Hasan and PW 5 Baldevbhai were eye witnesses to the incident. Relying on these two witnesses the High Court held that the Sessions Judge had taken a correct view of the situation in holding that the accused were the aggressors and affirmed the conviction and the sentences passed on accused 1, 2, 4, 5, 8, 11 and 12. So far as these accused are concerned, we find no reason to differ from the concurrent findings of fact of the two courts on which their conviction rests. Appeal 37 of 1975 is therefore dismissed.

4. Appeal 38 of 1975 is by the State against the acquittal of accused 13 and the other accused persons respectively of the charges under Section 302 and Section 302/149. First we will take up for consideration the acquittal of the accused of the charge under Section 302/149 of the Indian Penal Code. The High Court affirmed the order of acquittal passed by the Sessions Judge because the account of assault as given by Hasanbhai in the complaint and as appearing from the evidence of Hasan and PW 5 Baldevbhai Ranchhodbhai differs so that it is not possible to follow the sequence in which it had taken place. Undoubtedly the shepherds were members of an unlawful assembly whose common object was to commit cattle trespass in Bhulabhai Aminchand's field. They had all sticks in their hands which they used against Hasan and Kalukhan to prevent the cattle being impounded. Thus they were also members of an unlawful assembly whose common object was to prevent by force the watchmen carrying out their duty. The extent of force they were prepared to use can be inferred from the manner of assault. Here the sequence in which accused 13 and the other accused took part in the assault on Kalukhan becomes relevant. Mr. Patel appearing for the appellant, State of Gujarat, submitted that it was difficult for the witnesses to recount the occurrence in its correct sequence in every detail. That may be so, but this difficulty does not make an inference as to the common object easier. It is true that both PW 5 and PW 4, Hasan have said that accused 13 snatched away the dharia from Magan's hand, but from this we do not think it is possible to hold that the other accused knew that accused 13 was likely to use it in the way he did. They may have

reasonably thought that the dharia was snatched away from Magan to prevent him from using the dharia against them. Both PW 4 and PW 5 have admitted that none of the stick blows given by the accused was aimed at Kalukhan's head which strengthens such an inference. In these circumstances the exact sequence in which the assault on Kalukhan took place becomes important. In our view, therefore, both the trial Court and the High Court were right in acquitting these accused of the charge under Section 302/149 of the Indian Penal Code.

5. Before we proceed to consider the case of accused 13, it would be necessary to refer to the medical evidence. Kalukhan died at 8 p.m. on the day of the incident in V. S. Hospital, Ahmedabad. Dr. Jyotiben Narhar (PW 1) who performed the post mortem examination of the dead body of Kalukhan found among other injuries four sutured wounds on the scalp. According to her these could have been caused by "sharp cutting instrument and hard and blunt substance". In her opinion "the cumulative effect of these injuries would necessarily be death". Dr. Naik (PW 11) who examined Kalukhan when he was admitted to his ward in the hospital found among other injuries (i) curved contused lacerated wound about 2 1/2" X 1/2" bone deep over left side of frontal region at the level of hair line, (ii) curved contused lacerated wound 3" X 1/2" bone deep on right parietal region, (iii) irregular contused lacerated wound above the right eyebrow 1" X 1/4" bone deep. According to him the curved injuries could have been caused by a dharia or by any such sharp instrument. The other injury on the head, in his opinion, could have been caused by the reverse side of the dharia. Dr. Shah (PW 2) who had first examined Kalukhan before he was admitted to the hospital mentioned in his certificates (Ex. 21) multiple contused lacerated wounds on the head of Kalukhan. It may be stated here that the cap which Kalukhan was wearing at the time of the incident is one of the material exhibits in the case; it is described as blood-stained. In view of the evidence of PW 5 and PW 4, who have said that accused 13 inflicted dharia blows on Kalukhan's head and Kalukhan was wearing a cap at the time, and in view of Dr. Naik's definite opinion that the injuries on Kalukhan's head could have been caused by dharia, even if the wounds were contused lacerated wounds, there is nothing in the medical evidence which is inconsistent with the evidence of the two eyewitnesses, as the High Court has held. The High Court found that the dharia blows must have been inflicted with great force because they resulted in the scalp being fractured. The High Court further found that even if accused 13 did not intend to cause Kalukhan's death, he must have known that by his act he was likely to cause his death. Having considered the evidence for ourselves we are also of the same opinion. But after recording all these findings the High Court came to the conclusion that the offence fell under Section 304 Part II of the Indian Penal Code and not under Section 325 as the Sessions Judge had held. We have no doubt that the Sessions Judge was wrong, but we also do not see how on the findings reached by the High Court this could be a case under Section 304 Part II. On the evidence it is not possible to come to any other conclusion than that accused 13 intended to cause such injury which was sufficient in the ordinary course of nature to cause death. That being so, the case falls squarely under the third clause of Section 300, Indian Penal Code. Therefore, though we agree with the findings recorded by the High Court, we are unable to concur in the conclusion reached by the High Court that the offence was covered under Section 304 Part II; in our opinion the only conclusion possible on these findings is that accused 13 was guilty of an offence punishable under Section 302 of the Indian Penal Code.

6. In the result, we dismiss appeal 37 of 1975, we allow appeal 38 of 1975 partly, alter the conviction of accused 13 Bharwad Matam Puna (respondent 8) from one under Section 304 Part II of the Indian Penal Code to one under Section 302 of the Indian Penal Code and sentence him to rigorous imprisonment for life. The order of conviction and the sentences as regards the other accused persons are maintained.

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