

Munir Ahmad and Others

Vs

State of Rajasthan

Criminal Appeal No. 115 of 1979

(S. Natarajan, A. M. Ahmadi JJ)

11.01.1989

JUDGMENT

AHMADI, J. –

1. The appellant Munir and Ahmed and 13 others were tried before the learned Sessions Judge, Churu (Rajasthan) for the murder of the one Suduleh Khan and for causing injuries to PW 1 Suduleh Khan, son of Jasu Khan and PW 3 Yousuf Khan. The charge framed against the appellant was for commission of offences punishable under Section 148, 302 and 307/149, IPC. The learned Sessions Judge convicted the appellant under Section 304, Part I, IPC and sentenced him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 1000 in default to suffer rigorous imprisonment for one year. Seven of his companions were also convicted for causing hurt to the prosecution witnesses, but since their conviction are not challenged before us we need say no more about their participation. On appeal the High Court while maintaining the conviction of the appellant under Section 304, Part I, IPC reduced the sentence to rigorous imprisonment for seven years and fine of Rs. 100, in default RI for one month. The appellant Munir Ahmad was granted special leave by this Court's order dated March 5, 1979.

2. The brief facts are that on the afternoon of June 24, 1974 at about 1.30 p. m. while on Allahdin son of the deceased Saduleh Khan was standing beneath a 'tali' (sheesham) tree, Niyamat Khan son of Labdhi Khan approached him and enquired why he had abused his mother. On Allahdin stating that he had not used any abusive language, Niyamat an lost his temper and abused him. The deceased Saduleh Khan son of Jasu Khan, came out and enquired about the cause of quarrel. Meanwhile Niyamat Khan gave a push to Allahdin, the latter being lame, lost his balance and fell down. Mst. Haliman rushed to the help of Allahdin and reprimanded Niyamat Khan for assaulting a lame person. Niyamat Khan shouted that he would bear him. Thereupon the accused persons and Niyamat Khan son of Ahmed Ali Khan arrived at the spot armed with lethal weapons. The appellant Munir Ahmed and four others were armed with 'barchis', while the remaining accused persons were armed with 'lathis'. On seeing the appellant and his associates, including Niyamat Khan son of Ahmed Ali Khan reaching the spot armed with weapons, PW 3 Yousuf Khan, PW 4 Ibrahim Khan and Phule Phan came out of the neighbouring house of Bashir Khan where they were playing cards. PW 1 Saduleh Khan also rushed out of his house on hearing the cries of 'maro' 'maro'. The deceased Sudleh Khan was immediately surrounded and attacked. The accused Pir Bux and Gulam Kadar and alleged to have struck blows on the head of the deceased Saduleh Khan with the blunt side of the barchi. Niyamat Khan son of Ahmed Ali Khan is also alleged to have inflicted a blow on the left side of the neck of the deceased with the reverse side of the brachi. Thereafter the appellant gave blows with the sharp side of the barchi whereupon the deceased fell down. Thereafter Niyamat Khan son of Labdhi Khan struck two lathi blows, one on the parietal region and the other on the

right elbow of the deceased. PW 1 Saduleh Khan and PW 3 Yusuf Khan also received injuries during the said incident when they tried to rescue the deceased Saduleh Khan. After the assault, the assailants left the place of occurrence. PW 3 Yusuf Khan with the help of others took the two injured Saduleh Khans to the Police Station Ratangarh in a tonga where they lodged the first information report at about 2.50 p. m. The Station House Officer registered a case for the commission of offences punishable under Section 148, 307, 326 and 323 read with Section 149, IPC, and commenced the investigation. After reaching the place of occurrence he got the statement of the deceased Saduleh Khan recorded at 3.20 p. m. which came to be admitted as the first dying declaration of the deceased at Ex. P-28. Both the injured and Saduleh Khans were thereafter sent to S. M. J. Hospital, Ratangarh for treatment. Dr. P. P. Gupta, Deputy Chief Medical Officer, Ratangarh was on duty and he examined the deceased Saduleh Khan and noted the following injuries :

(1) Incised wound 12 cm x 2 cm x 1-1/2 cm. with fracture of right frontal bones :

(2) Lacerated wound 8 cm x 2 cm x 1 cm on occipital region; and

(3) Contusion 3 cm. x 2 cm. covering right upper eyelid.

3. In the opinion of Dr. Gupta injury no. 1 was of a grave nature and could be caused by a sharp edged weapon like a barchi. So far as the injuries nos. 2 and 3 are concerned, he opined that they were simple in nature and could have been caused by a blunt weapon. Radiological examination revealed fracture of right frontal, parietal bones with radiating of fracture line to right and left orbital bones.

4. On the same day he examined the injured Saduleh Khan and noted that he had two incised wounds, right contusions over different parts of the body and two lacerated wounds on the left index finger and left thumb. In the opinion of Dr. Gupta the two incised wounds were simple in nature capable of being caused by a sharp weapon, while the rest of the injuries, which too were simple in nature, could be caused by a blunt object.

5. As the condition of the deceased Saduleh Khan was deteriorating, his dying declaration was got recorded through Shri Chaman Lal Bajaj, Munsif Magistrate, Ratangarh at 4.10 p. m. which is admitted in evidence as Ex. P-9. Meanwhile on a complaint received by the Chief Medical and Health Officer, Ratangarh against Dr. Gupta, a Medical Board comprising Dr. Girish Prasad, Dr. B. N. Bhargava and Dr. Shiv Bandela was constituted to examine the injuries of deceased Saduleh Khan and his injured companion and to express an opinion regarding the nature of the weapons of assault. The three medical officers constituting the Board examined the deceased Saduleh Khan on July 3, 1974 and opined that since the duration of the injuries was about 10 days and there was surgical interference for repairing the wounds and scab formation due to oozing of blood and presence of soft tissue swelling, it was difficult to give any definite opinion regarding the nature of weapons used at the time of inflicting the injuries. The deceased Saduleh Khans succumbed to his injuries in the early hours of July 4, 1974 at 5.10 a. m. On the same day at about 9.45 p. m., Dr. Gupta undertook post-mortem examination of the dead body. On opening the scalp he found that there was haematoma extending from frontal to occipital bones and from left temporal to right temporal bones; there was sub-aponeurotic haematoma on the fracture site from right frontal and parietal region slightly extending to left frontal and parietal region and another fracture line proceeding towards left frontal and left and right parietal bones and extra-dural haematoma on right frontal-parietal region and another fracture line proceeding towards left frontal and left and right

parietal bones and extra-dural haematoma extending on frontal parietal and temporal regions. There was a cut of 3 cm x 1/5 cm on duramater of frontal region, with a laceration, 6 cm x 4 cm, of the right frontal at the right middle cranial fossa also. The post-mortem report is at Ex. P-11. Dr. Gupta opined that death was due to the fractures used by a sharp-edged weapon. The internal injuries were, in the opinion of Dr. B. N. Bhargava and Dr. V. K. Bhargava also attended the post-mortem examination. It may be mentioned that another Board comprising Dr. Shiv Kumar Nand Lal and three others was opine about the nature of weapons used in the commission of the crime. The report of the Board is to the effect that since the soft tissues of the brain, skin, etc. were preserved in formalin, the same had become firm and distorted and hence it was not possible to opine whether the injury was inflicted by a sharp or a blunt weapon.

6. The courts below relied on the evidence of five eye-witnesses, PW 1 Saduleh Khan, PW 3, Yusuf Kha, PW 4 Ibrahim Khan, PW 5 Bashir Khan and PW 6 Allahdin, the two dying declarations Exs. P-28 and P-9 and the evidence of Dr. Gupta in concluding that the fatal injury no. 1 was caused by the appellant Munir Ahmed. The defence of alibi put up by the appellant and supported by the evidence of DW 4 Satish Chander Gupta was rejected. The courts below, therefore, convicted the appellant under Section 304, Part I, IPC, and sentenced him as stated above.

7. Mr. A. N. Mulla, the learned counsel for the appellant contended that the evidence of eye-witnesses was not worthy of credence and the courts below committed a grave error in placing implicit reliance on their version regarding the incident and in drawing support from the opinion of Dr. Gupta, which was not consistent with the opinion expressed by the two Medical Boards and the oral evidence of Dr. Shiv Kumar one of the members of the Board which examined the brain matter, etc., preserved by Dr. Gupta after the post-mortem examination. We do not see any merit in this submission. In the first place it must be noted that soon after the commission of the crime, the first information report was lodged by PW 3 Yusuf Khan at 2.50 p. m. without any loss of time. In this report Ex. P-12, proved through the evidence of PW 3, it is stated that the appellant had given a blow with the sharp side of the barchi on the head of the deceased Saduleh Khan. PW 1 and PW 3 were injured during the incident and, therefore, their presence at the time of occurrence cannot be doubted. Both these witnesses have deposed that after Pir Bux and Gulam Kadar gave blows with the blunt side of their barchis, the appellant gave barchi blow by its sharp side on the head of the deceased, as a result whereof the deceased fell on the ground. Lathi blows were given to him by the other companion of the appellant after he fell down. The evidence of these two injured witnesses is corroborated by the evidence of PW 4 Ibrahim Khan, PW 5 Bashir Khan and PW 6 Allahdin son of Saduleh Khan, who was pushed while he was standing under the 'tali tree. No discrepancy is found in the evidence of these five eye-witnesses so far as the overt act attributed to the appellant is concerned. It is true that their evidence so far as injuries caused by Pir Bux and Gulam Kadar are concerned, has not been accepted for four reasons, namely : (1) there is no mention about the said two persons having inflicted injuries in the FIR; (2) the evidence in that behalf is not corroborated by medical evidence; (3) PW 4 Ibrahim Khan's evidence shows that the barchi was fitted with a nut, but the medical evidence does not show any injury caused a nut; and (4) the name of Gulam Kadar was not mentioned in the statement of PW 1 Saduleh Khan. However, so far as the appellant Munir Ahmed is concerned, the evidence of the five eye-witnesses is consistent and the same is corroborated by the FAIR, Ex. P-12 and the two dying declarations Exs. P-28 and P-9 recorded on the very same day at 3.20 p. m. and 4.10 p. m. respectively. The first dying declaration was recorded even before the injured was moved to the hospital for treatment. The FIR was lodged at 2.50 p. m., and immediately thereafter the SHO came to the scene of occurrence and arranged to have the dying declaration Ex. P-28 recorded at about 3.20 p. m. After the deceased was removed to the hospital and when Dr. Gupta found that his condition was deteriorating, arrangements were

made to call the Munsif Magistrate, Ratangarh for recording the dying declaration of the deceased. This dying declaration was recorded by PW 8, Munsif Magistrate Shri Chaman Lal Bajaj at 4.10 p. m. after consulting Dr. Gupta who opined that the patient was conscious and in a fit state to make a statement. It is true that this dying declaration ended abruptly because the condition of the patient further deteriorated, but that cannot affect the evidentiary value of the dying declaration since it is complete insofar as the appellant's role is concerned. In both these dying declarations which were recorded promptly, the deceased attributed the fatal blow to the appellant. An effort was made to nullify the probative value of the dying declaration Ex. P-9 by pointing out that the particulars regarding the name, parentage, etc. of the deceased were supplied by PW 3 Yusuf Khan. This however did not succeed as the Munsif Magistrate was not cross-examined on this point and he denied the suggestion that the dying declaration was prompted in any manner by PW 3. We are, therefore, not impressed by the submission of the learned counsel for the appellant that the evidence of the five eye-witnesses is not worthy of credence.

8. So far as the evidence of PW 2 Dr. Gupta is concerned, it must be realised that immediately after the incident both the injured were removed to the hospital and Dr. Gupta who was then on duty had treated them. There is nothing on record to show that Dr. Gupta had any reason to act in a partial or unfair manner either to the prosecution or to the defence. The injuries on the person of the deceased Saduleh Khan were seen first in point of time by Dr. Gupta and, therefore, he was competent to opine whether or not injury no. 1 was an incised wound possible by a sharp cutting weapon. The suggestion that an injury appearing to be similar to an incised wound could be caused on the forehead or scalp by a hard and blunt weapon cannot be entertained in the present case in view of the positive evidence of Dr. Gupta. Dr. Gupta also had the advantage of conducting the post-mortem examination on the dead body of Saduleh Khan. He was, therefore, in a position to opine whether or not the internal injuries corresponded to external injury no. 1 and could be caused by a sharp cutting instrument. It is true that the Chief Medical and Health Officer, Ratangarh by a sharp weapon. The report of the Medical Board shows that because of the passage of time of over 10 days and the treatment already given to the patient, it was not possible to give any definite opinion regarding the nature of the weapon of assault. The Medical Board constituted to examine the contents preserved in a sealed jar and packet by Dr. Gupta was also unable to express any positive opinion regarding the nature of the weapon of assault as the contents which were preserved in formalin had become firm and distorted when they were examined on June 15, 1975. i. e. almost a year after the crime. The negative evidence of the two Medical Boards cannot, therefore, efface the positive evidence of PW 2 Dr. Gupta. It must also be remembered that the Medical Boards were constituted not only at the behest of the accused persons but also because of a similar request made by the SHO. We do not find any cogent evidence suggesting unfairness on the part of Dr. Gupta to reject his testimony. We are, therefore, of the opinion that the evidence of the five eye-witnesses stands corroborated by the FIR, Es. P-12, and the dying declarations, Exs. P-28 and P-9, as well as the medical evidence of PW 2, Dr. Gupta.

9. It was next contended by Mr. Mulla that the courts below did not correctly appreciate the evidence regarding alibi put forward by the appellant. Our attention was drawn to the evidence of DW 4, Satish Chandra Gupta, a Jr. Engineer of Rajasthan State Electricity Board under whom the appellant was serving on the date of the incident. This witness stated that on June 24, 1974 the appellant visited his residence at Ratangarh between 1.00 and 2.00 p. m. and told him that he needed leave as someone had come to call him because there was an altercation in his mohalla resulting in injury to his brother. The witness asked him to put in a written application and sanctioned casual leave for the day. His evidence shows that on that day the appellant's duty hours were from 8.00 a. m. to 5.00 p. m. However after the witness went to his residence at about 1.00 p. m. the appellant

approached him for leave. The leave application submitted by the appellant is not on record. Both the courts below have come to conclusion that having regard to the short distance between the mohalla and the office, it is not improbable that the appellant would be at the scene of the occurrence at the time when the incident took place. The witness DW 4 has also stated that he would not be in a position to say whether the appellant was present in his mohalla at about 1.30 p. m. when the incident took place. It is possible that the appellant may have either obtained casual leave and thereafter gone to the mohalla or may have applied for casual leave after the incident to create evidence in support of alibi. We do not see any reason why in the face of direct testimony of five eye-witnesses, the mention of the name of the appellant in the FIR, as well as the dying declarations, we should doubt his presence at the scene of the occurrence.

10. Three accused persons namely, Yusuf Khan, Hanif Khan and Bhanuwari had sustained injuries. Yusuf Khan had four contusions (i) 3 cm x 2 cm on left frontal middle; (ii) 3 cm x 1 cm on left wrist back; (iii) 8 cm x 2 cm x on right side back at 12th thoracic vertebraic level; and (iv) 2 cm x 2 cm on occipital region. Hanif Khan had three injuries, namely : (i) abrasion 1/4 cm x 1/4 cm on knuckles of third and fourth metacarpal, left; (ii) abrasion 1/4 cm x 1/4 cm on the knuckles of 3rd and 4th metacarpal, left; and (iii) contusion 2 cm x 1 cm on right shoulder. Injuries to Bhanwaru Khan were (i) fracture right ulna upper 1/4th with lacerated wound 2 cm x 1/2 cm on posterior side and upper 1/4th and right forearm; (ii) fracture underneath the lacerated wound; and (iii) contusion 4 cm x 4 cm on left hand near thumb and index finger metacarpal back. It will be seen from the above that the injuries to Yusuf Khan and Hanif Khan were simple in nature and were not such as would be easily noticed by the prosecution witnesses. The injury to Bhanwaru Khan was on the right upper ulna which may have gone unnoticed by the prosecution witnesses. The prosecution witnesses were questioned on this point. PW 1 has stated that he had not seen any injury on the person of any of the accused. He denies that he was called by the police in connection with the complaint lodged by Bhanwaru Khan, a policeman attached to Ratangarh police station. He denied the suggestion that the said injury was caused by Yasin Khan. PW 2 and PW 5 have however stated that while the accused were beating the two Saduleh Khans, Yusuf Khan and Hanif Khan were injured when the sticks of the accused accidentally hit them while Bhanwaru Khan received the injury when he was hit by his companion Menuddin. The complaint, if any, filed by Bhanwaru Khan is not on record. It is quite probable that those three accused may have been injured by their own companions during the fight. The submission that the injuries caused to the deceased Saduleh Khan and PW 1 and PW 3 were in self-defence has been rightly rejected by both the courts below on the ground that in a free fight neither side has a right of private defence.

11. It was lastly submitted by Mr. Mulla that the courts below had failed to take into account the affidavit of Haliman filed by the defence which goes to show that the appellant was not involved in the incident. He submitted that Haliman being a close relative of the deceased would not ordinarily come forward to file an affidavit exonerating the appellant notwithstanding the fact that the appellant is also her close relation. Haliman was not examined as a defence witness, nor was any request made to the court at any time during the trial to examine her as a prosecution or court witness. Proof of Haliman's signature on the affidavit is not forthcoming. Besides, if the defence wanted to rely on the evidence of this witness, the proper course was to call her as a defence witness. Section 3, Evidence Act, contemplates oral evidence or documentary evidence. In the case of a living person evidence in judicial proceedings must be tendered by calling the witness to the witness stand and cannot be substituted by an affidavit unless the law permits it, e. g. Section 295 and 407(3), or the court expressly allows it. We, therefore, do not think that the failure on the part of the courts below to consider this affidavit has resulted in miscarriage of justice.

12. In view of the above, we do not see any merit in this appeal and dismiss the same.

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