

Abdul Hamid and Others

Vs

State of U.P.

Criminal Appeal No. 581 of 1979

(S.R. Pandian, K. Jayachandra Reddy JJ)

30.10.1990

JUDGMENT

K. JAYACHANDRA REDDY J

1. This appeal is directed against the judgment of the High Court of Allahabad confirming the convictions and sentences awarded to the four appellants by the trial court. These four appellants along with two others were tried for offences punishable under S. 302 read with S. 149, S. 324 read with S. 149, S. 325 read with S. 149 and S. 323 read with S. 149, I.P.C. The trial Court convicted the four appellants herein under S.302 read with S. 149 and sentenced each of them to undergo imprisonment for life. They are also convicted under Ss. 147, 148 and S. 324 read with S. 149, I.P.C. The trial Court acquitted the other two accused. The convicted accused as well as State preferred appeals. The High Court while dismissing the appeal by the State converted the conviction of the other four namely appellants herein to one under S. 304, Part II read with S. 149 and sentenced each of them to undergo rigorous imprisonment for a period of five years. The other minor convictions and sentences were confirmed and thus partly allowed the appeal. Being aggrieved by the same they have preferred this appeal.

2. Learned counsel for the appellants .contended that the High Court had rejected the substratum of the prosecution case and that the appellants are entitled to a complete acquittal even on the findings of the High Court.

3. The prosecution case is that Middu, one of the acquitted accused, was married to one Smt. Hajra. The relations between wife and the husband were strained and Smt. Hajra was living separately from her husband and she filed an application for maintenance which was pending on the date of the incident. The deceased one Abdul Majid and another were doing pairavi on behalf of Smt. Hajra, All the parties including the accused belong to the same village. On 15-12-1971 at about 9 P.M. the deceased, P.W. 1 and some other persons were sitting under the thatch of P. W. 1 in his Baithak. At that time all the four appellants came there. Abdul H amid, the first appellant was armed with a Tabal, a cutting weapon and others were armed with lathis. Middu was armed with a Gandasa. All these persons started beating the deceased who received severe injuries and died subsequently. They also caused injuries to P.Ws. 3, 6 and others. According to the prosecution these accused wanted to take revenge against the deceased and P.W. 1 who were helping Smt. Hajra. P.W. 1 went to the Police Station and gave a report on 16-12-71 at about 12. 10 P.M. i.e. more than 12 hours after the incident. P.W. 12, Sub-Inspector registered the crime and took up the investigation. He sent the injured for medical examination. P.W. 5 the Doctor found on the injured deceased an abrasion and a

lacerated wound on the head. On P.W. 3 he found one incised lacerated wound and two abrasions. On P.W. 6 he found two lacerated wounds, one incised, three contusions and three abrasions. The deceased succumbed to his injuries in the Hospital. The inquest was held and the dead body was sent for post-mortem. Another Doctor P.W. II conducted the post-mortem. He noted a stitched wound near the right ear and an abrasion on the back and one contusion on the left side of the head. On internal examination he found radial fracture of left parietal and temporal bones and it was opined that the death was due to skull injuries. After completion of the investigation the charge-sheet was laid.

4. The third appellant herein also gave a report to- the Police 15 minutes before the report lodged by P.W. 1. It was stated therein that the deceased was keeping Smt. Hajra forcefully to have illicit relations with her. The matter was referred to the panchayat and it was decided that Smt. Harja should be restored to her lawfully wedded husband Middu on the day of the occurrence at 9 p.m. Around about that time P. W. 3 came out and raised instigating cries on hearing which the deceased and five others came with lathis and other weapons and attacked the accused, in the course of which the four appellants and others received injuries. P.W. 2, the Doctor examined these four injured appellants-accused also. On 2nd and 3rd appellants he found incised wounds and on the remaining two contusions. The prosecuties examined for eye-witnesses. The accused pleaded not guilty. The trial Court accepted the evidence of the eye-witnesses and convicted the four appellants only because their presence is established by the injuries found on them. The learned trial Judge also found that there was only one injury on the head of the deceased and it was inflicted by one member of the unlawful assembly and therefore they are liable under Section 302 read with Section 149. In the appeal, the High Court gave several findings in favour of the defence. However, observing that there could have been a free fight and that the injuries on the accused are trivial as compared to the injuries found on the deceased and other witnesses, it held that therefore conviction should at least be under Section 304, Part II.

5. After giving our careful consideration to the findings we are of the view that the appellants ought to have been acquitted completely. Admittedly there was enmity and the first information report was given to the police 12 hours after the occurrence that too after the accused had given a report and the High Court also found that this delay was not satisfactorily explained. A further finding in this regard is "that being so it cannot be ruled out that the version of the incident as stated in the first information report and supported by the prosecution witnesses is not free from doubt." According to the prosecution, as many as six persons caused injuries to the deceased, four of them with sticks and the other two with Tabal and Gandasa but the Doctor found only one abrasion and one lacerated injury. The High Court having noted, the injuries on the accused observed:

"From the evidence on record and particularly from the facts that as many as four persons from the side of the accused were also injured in the incident, it is quite likely that a free fight occurred between the parties on account of the above dispute and during the course of the said fight, the complainant's party was worsed."

Then without any further discussion as to the part played by each of the accused, the High Court convicted all the four appellants under Section 304, Part II simpliciter. We have already noted that the trial Court convicted these four appellants under Section 302 read with Section 149, I.P.C. but the trial Court has not adverted to the question as to what was the object of the unlawful assembly.

6. What emerges from these findings is that there was a fight during which both the appellants and the deceased and some others received injuries and both the parties gave separate reports. There are

only two noticeable injuries on the deceased, one of them being a minor abrasion. Then there remains the only lacerated injury on the head which resulted in the fracture. Both the Courts have not given any finding as to which of the appellants inflicted that injury on the head. There is a general statement by the witnesses that they also used lathis and that the accused also sustained injuries. The witnesses only deposed to that extent regarding the injuries on the accused. The High Court perhaps having regard to the fact that both sides were injured gave a finding that it was a free fight and convicted the four appellants because of their presence at the scene of occurrence.

7. It can thus be seen that the substratum of the prosecution case has not been accepted. As to the genesis of the occurrence there is no finding. Having given a finding that it was a free fight we are unable to see as to how the High Court could convict each of the appellants under Section 304, Part II simpliciter though there was only one lacerated injury on the deceased. A person would not be guilty of a crime merely because he was present unless his complicity in the crime can be inferred by some act or the other or by way of constructive liability. If it was a case of free fight then different considerations would arise. In *Gajanand v. State*, 1954 Cri LJ 1746 : (AIR 1954 SC 695) it is observed "A free fight is one where both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such event is wholly immaterial and depends upon the tactics adopted by the rival commandos". If that is the nature of the fight, in the instant case, then the witnesses have completely given a different and distorted version. At any rate there is absolutely no scope to convict any of the appellants under Section 304, Part II simpliciter as there is absolutely no material as to which one of them caused the single injury on the head of the deceased. Nor can they be convicted under Section 304, Part II read with Section 149 as it is not possible to hold that they were members of an unlawful assembly. Further the number is less than five. In any event the High Court has doubted the prosecution version as a whole. Thus there are any number of infirmities in the prosecution case. For all these reasons, the convictions and sentences passed against the appellants are set aside. The appeal is therefore allowed.

Appeal allowed.

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