SUPREME COURT OF INDIA

Augustine Saldanha

Vs.

State of Karnataka

Crl.A.Nos.854 with 1734 of 1996

(Doraiswamy Raju and A. Pasayat, JJ.)

26.08.2003

JUDGEMENT

ARIJIT PASAYAT, J.:-

1. These two appeals relate to the common judgment of Karnataka High Court whereby the judgment of acquittal passed by the trial Court was set aside. Augustine Saldanha-appellant in Criminal Appeal No. 854/1996 was held guilty of offence punishable under Section 302 of Indian Penal Code, 1860 (in short 'IPC') and sentenced to undergo imprisonment for life. Rocky Saldanha-appellant in Criminal Appeal No. 1734/1996 was found guilty for offences punishable under Section 324, IPC and sentenced to undergo imprisonment for one year. They were also sentenced to pay fine of Rs. 5,000/- and Rs. 1,000/- respectively with default stipulation of six months SI and one months SI respectively. Accusations which, formed foundation of prosecution version are essentially as follows :

On 17-5-1989 Paul Saldanha (hereinafter referred to as 'the deceased') and Felix Saldanha (P.W. 1) were returning to their houses after viewing a movie. When they reached near the house of the appellants, accused Augustine and Rocky along with Henry Saldanha (acquitted) assaulted the deceased. They were armed with sticks. As a result of the assaults the deceased breathed his last

while P.W. 1 suffered grievous injuries. The incident took place between 10.00 to 10.30 p.m. On next day morning around 5.15, P.W. 8 ASI of Mulki Police Station received information from an unknown person of Kumeri that two bodies were lying at Shadguri of Aiala village. Though he could not ask the name and address of the informant, he made entries in the General Diary and proceeded to the spot along with other police personnel. At the spot he found dead body of the deceased and P.W. 1 in injured condition. They were taken to hospital and complaint (Exhibit P-1) was recorded. P.W. 8 registered the FIR after coming to the police station, and dispatched the same to the Magistrate at Mulki which was received at about 11.15 a.m. Investigation was undertaken on the basis of the report of P.W. 1, and after completion thereof charge-sheet was placed. It needs to be noted that on the basis of information given by the accused while in custody recoveries were made. In the complaint (Exhibit P-1) the informant P.W. 1 had stated that he could see assailants by focusing a torch. He had lost consciousness temporarily, but when he was in sense, could hear that P.Ws. 3 and 4 i.e. two taxi drivers were asked by the accused to shift him and deceased to different places; but they refused to do so. In Court, apart from the evidence of P.W. 1 the evidence of P.Ws. 3 and 4 were also tendered and pressed into service to substantiate the accusations. The Additional Sessions Judge of Dakshina Kannada, Mangalore found the evidence of P.W. 1 to be not believable and directed acquittal, and the circumstances which weighed with him are as follows :

Credibility of the report (Exhibit P-1) was doubted because the injury sustained by P.W. 1 was so serious that he was given treatment in the emergency room and it was highly improbable that he would have been in a position to give statement (Exhibit P-1). While P.W. 8 stated that he had recorded the complaint, handwriting therein was similar to those in which Exhibits P-8 to P-10 (Panchnamas) were written. Prosecution version was also doubted because P.W. 2 stated at one place that P.W. 1 had been taken out of the hospital at the time of spot inspection, he stated subsequently that P.W. 1 was not taken out. The evidence of P.W. 1 was also discarded on the ground that there were exaggerations and improvements and there was no specific mention about identification by torch and moonlight in Exhibit P-1 as was stated in Court. Only in the first information report, it was mentioned that witness was holding a torch. He also found that the recovery of the torch from the spot was doubtful. It was also noted that the torch was broken and P.W. 1 did not say as to how the torch was broken. The trial Court doubted the version of P.W. 1 because no explanation was given as to how his shirt was torn and this indicated that there was some violence. The trial Court noted that P.W. 1 did not specifically say as to why P.Ws. 3 and 4 declined to take the dead body of deceased and P.W. 1 to a different place, though PWs. 3 and 4 give details in Court. Another circumstance to doubt the version of P.W. 1 was that there were several injuries on the body of the deceased, and the P.W. 1, while P.W. 1 stated that one blow each was given to the deceased and to him, With these findings the trial Court found the accused persons not guilty and they were acquitted. In appeal, the High Court found that each of the reasons given by the trial Court suffered from vulnerability. The High Court found that evidence of P.W. 1 was credible and cogent. So far as injuries on the deceased and P.W. 1 are concerned, it was noted that doctor had stated that several injuries were possible because of one blow. In case of P.W. 1 one injury related to complaint of pain on the leg. When P.W. 1 had stated specifically about the torch in Exhibit P-1, the mere fact that there was non-mention of moonlight was not good enough to discard the evidence as unreliable. Similarly, even if torch was broken it was not necessary for P.W. 1 to explain how it was broken. Evidence was that he had fallen down after receiving the blow on the head. It was also noticed that P.W. 2 doctor's evidence did not affect the credibility of prosecution evidence that P.W. 1 was taken to the spot, in view of what had been indicated by the doctor in his evidence and as borne out by documents. Merely because P.W. 1 had not indicated in Exhibit P-1 as to why PWs. 3 and 4 did not

want to take deceased and P.W. 1 in their respective taxies that cannot be considered to be a vital omission. In fact evidence of P.Ws. 3 and 4 clearly establish the role of accused persons and the veracity of prosecution version. With these findings accused Augustine Saldanha was convicted and sentenced by Additional Sessions Judge under Section 302 IPC as aforesaid. Similarly, considering the nature of the injuries sustained by P.W. 1, accused Rocky Saldanha was sentenced to undergo one year imprisonment as noted above for offences punishable under Section 324, IPC.

2. In support of the appeal learned counsel has submitted that the trial Court had correctly appreciated the evidence and the High Court was not justified in reversing the findings. It was quite improbable that P.W. 1 identified the accused persons in the dark night. The injuries found on the body of the deceased and P.W. 1 do not tally with the version as stated by P.W. 1 in his evidence.

3. The evidence of P.W. 1 and P.W. 8 suffers from many infirmities. For example, as to how P.W. 1 who was in unconscious condition could be able to give a report without any medical aid, is not explained. Residually, it was argued that one blow was given in the dark night and it would rule out application of Section 302, IPC.

4. In response, learned counsel for the State submitted that the High Court has analysed the evidence in detail and found the acquittal not justified. The circumstances which weighed the trial Court are not germane and the High Court has rightly held that the conclusions were erroneous. The analysis made by the High Court suffers from no infirmity and the conclusions are, therefore, in order. Minor and trifle circumstances were magnified by the trial Court as rightly observed by the High Court.

5. We find that the High Court has analysed the evidence in great detail, and concluded that trial Court's conclusions were fallacious and based on magnification of trifle and unimportant materials, which in no way affected credibility of prosecution version. We find no deficiency in view taken by High Court.

6. The High Court was, therefore, justified in holding that Augustine Saldanha and Rocky Saldanha were responsible for the death and injury to the deceased and P.W. 1 respectively.

7. The only other point which needs to be considered is whether Section 302 IPC has been rightly made applicable.

8. This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and "murder" its specie. All "murder" is "culpable

homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

9. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299 Section 300

A person commits culpable homicide if the act by which the death is caused is done- Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done-

INTENTION

(a) with the intention of causing death; or (1) with the intention of causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

KNOWLEDGE

* * *

(c) with the knowledge that the act is likely to cause death. (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

10. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

11. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury..... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

12. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant and another v. State of Kerala (AIR 1966 SC 1874) is an apt illustration of this point. 1966 Cri LJ 1509

13. In Virsa Singh v. State of Punjab (AIR 1958 SC 465), Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry

proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. 1958 Cri LJ 818

14. The ingredients of clause "Thirdly" of Section 300, IPC were brought out by the illustratious Judge in his terse language as follows :

"To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

15. The learned Judge explained the third ingredient in the following words (at page 468) :

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree

of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

16. These observations of Vivian Bose, J. have become locus classious. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300, I. P. C., culpable homicide is murder, if both the following conditions are satisfied : i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted. AIR 1958 SC 465 : 1958 Cri LJ 818

17. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point. AIR 1958 SC 465 : 1958 Cri LJ 818

18. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

19. The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

20. The position was illuminatingly highlighted by this Court in State of Andhra Pradesh v. Rayavarapu Punnayya and another (1976 (4) SCC 382) and recently in Abdul Waheed Khan alias Waheed and others v. State of Andhra Pradesh (JT 2002 (6) SC 274). AIR 1977 SC 45 : 1977 Cri LJ 1

AIR 2002 SC 2961 : 2002 AIR SCW 3463

21. Undisputedly the incident took place in a dark night when visibility was poor but identification was possible because the victims of the assailants were known to each other. Therefore, there is nothing wrong in PW 1 identifying the accused persons. The fact remains that in the dark night obviously one cannot move without a torch or some other lighted object. In fact, in Exhibit P-1 also there is mention of a torch.

22. It needs to be noted that only one blow was given in the dark night. Though it cannot be said as a rule of universal application that whenever one blow is given application of Section 302, I. P. C. will be ruled out and that even a single blow delivered with a heavy or dangerous weapon on a vital part of the body would make the offence a murder. On the peculiar facts found in the present case, we feel that clause 'Thirdly' of Section 3000 cannot be applied. The blow was said to have been delivered with a stick and in pitch dark night of time in the forest surroundings of the area where it occurred. It could not reasonably be stated with any certainty that the accused chose that vital part of the body to inflict the injury and that the blow was aimed without any of such specific intention could have landed on the head due to so many other circumstances, than due to any positive intention also. We, therefore, alter the conviction of appellant Augustine Saldanha from Section 302, I. P. C. to Section 304, Part II. Custodial sentence of eight years would meet ends of justice. His appeal is accordingly allowed to the indicated extent. So far as appellant Rocky Saldanha is concerned, in view of the detailed analysis made by the High Court, we do not find any scope for interference with his conviction or the sentence imposed. His appeal is dismissed. The accused persons who are on bail, are directed to surrender to custody to serve remainder of their sentences.

Order accordingly.