SUPREME COURT OF INDIA

Siri Kishan

Vs.

The State of Haryana

Crl.A.No.848 of 2009

(Dr. Arijit Pasayat J.)

27.04.2009

JUDGEMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. These three appeals relate to the judgment of a Division Bench of the Punjab and Haryana High Court dealing with Criminal Appeal No. 366-SB of 1999, Criminal Appeal No.557-DB A of 1999 and Criminal Revision No.788 of 1999. The first Criminal appeal was filed by the present appellants. The second criminal appeal was filed by the State of Haryana and the third i.e. Criminal Revision Petition was filed by the complainant Gulam Bashir.

3. Background facts in a nutshell are as follows:

4. Originally there were 11 accused persons and they were the appellants in Criminal Appeal No.366-SB of 1999. They were convicted for offences punishable under Sections 148, 302 Part II read with Sections 149, 325 read with Sections 149, 324 read with Section 149 and 323 read with Section 149 of the Indian Penal Code, 1860 (in short the `IPC'). They were convicted in the following manner:

Name Convic Sentence Amoun Sentenc of tion awarded t of e Convi recorde Fine awarde ct d impose d in Under d default Section of payme nt of fine 1.Dali 304 Five Rs.700/ Four p Part II years RI months Singh IPC Each - RI 2.Mir read Singh with 149 IPC 3.Pars 325 Three Rs.300/ Two hadi IPC years RI - each months read each RI with 149 Two IPC years RI each 324 IPC Six read months with RI each 149 IPC Two years RI 323 each IPC read with 149 IPC 148 IPC 1.Siri 304 Seven Rs.100 Six Krish Part II years RI 0/- months an IPC each RI 2.Sam read ey with Singh 149 IPC

3. 325 Three Rs.300/ Two Dhara IPC years RI - each months m read each RI Singh with 149 IPC

4. 324 Three Hari IPC years RI Singh read each with 149 IPC

5. 323 Six Indraj IPC months alias read RI each Inder with pal 149 IPC 6.Kan 148 Two war IPC years RI Singh each 7.Sohr ab 8.

Mam man

5. State of Haryana also filed the appeal dissatisfied with the acquittal of all the accused for the main charge of Section 302 read with Section 149 IPC. Complainant also filed the separate Revision Petition with similar prayer and for grant of compensation.

6. Background facts, as projected by the prosecution during trial, are essentially as follows:

The instant case was registered on the basis of statement Ex.P.A. of Gulam Rasool complainant. His real brother Habib is described hereinafter as deceased in this case, who according to the allegations on 1.8.1988 had gone to the school building in the village for filing nomination papers for election of Sarpanch. Complainant Gulam Rasool was accompanying him. Habib was to contest the election of Sarpanch. At about 11 A.M. when they came out of the said school building, accused Samey Singh and Dharam Singh armed with Pharsa each and remaining accused present there had lathies in their hands. When complainant and Habib came out of the school, Samey Singh accused gave a lalkara saying that they should be killed (in village parlance, it is stated, `Inhe Maar Lo'). Thereafter, Samey Singh accused gave Pharsa blow on the head of Gulam Rasool and Siri Kishan gave a lathi blow on the head of Habib. Accused Sohrab also gave a lathi blow on the back of Gulam Rasool touching his neck. Accused Mamman also gave a lathi blow on his back. It, is then alleged that when Jan Mohammad son of Sultan, Suleman and another Jan Mohammad son of Shakurmal reached there on hearing the noise and tried to intervene in order to rescue the complainant party, accused Indraj and Kanwar Singh gave lathi blows to Habib who was already lying down. The blow inflicted by Kanwar Singh hit the waist of Habib whereas lathi blow given by accused Indraj hit him on his back. Dharam Singh, Dalip Singh, Indraj and Kanwar Singh accused had hit Jan Mohamniad son of Shakurmal on right side of head, right forearm, right hand, right shoulder and the right arm. Jan Mohammad son of Sultan, Gulam Rasool, his brother Habib, Jan Mohammad son of Shakurmal and Shakurmal had sustained inuries in this occurrence and they were removed to hospital. A ruqa was sent to Police Station Tauru, from where Om Parkash, SI, SHO (PW11) reached the hospital and recorded statement Ex.PA of Gulam Rasool, on the basis of which formal FIR Ex. PA/2 was recorded. Gulam Rasool and Habib were referred to General Hospital, Gurgaon and from there to Safdarjang Hospital, New Delhi, where Habib succumbed to the injuries on 2.8.1988. Initially, the case was registered under Sections 148, 149, 324 323 506 IPC and after the death of Habib Section 302 IPC was added.

During the investigation the accused persons were arrested on different dates and weapons of offence were recovered from them, which were taken into possession.

After the completion of the investigation, all the accused were challaned.

It is worth mentioning here that since Siri Kishan accused was serving in Indian Army, proceedings were initiated against him after obtaining sanction from the concerned Commanding Officer. This was the reason that a supplementary challan was filed qua him and ultimately all the accused were tried together. Charge under Sections 148, 302, 323, 325, 324 and 323 read with Section 149 IPC were framed against all the 11 accused.

The prosecution in order to substantiate its case examined Gulam Rasool, complainant as PW1 who had given the detailed description of the entire occurrence as already narrated by him in his initial statement Ex.PA.

PW2 is Suleman son of Jayudin the other injured witness. He also corroborated the testimony of Gulam Rasool on all material aspects describing the specific role of each of the accused.

PW 3 is Mul Chand Punia, the Draftsman had prepared the scaled Plan Ex.PB of the place of occurrence. PW 4 is Ram Chander who while posted as Sub Inspector in Police Station City Gurgaon had moved an application on 2.8.1988 for obtaining the medical opinion on Habib injured with respect to his fitness to make statement.

Dr. S.P. Singh (PW 5) who was posted in the General Hospital, Gurgaon, on 1.8.1988 examined Hubib Suleman, Gulam Rasool, Jan Mohammad son of Sultan and Jan Mohammad son of Shakur Mal. The said witness also was cross examined to show that on 3.8.1988 he had examined accused Prasadi Lal under the Court orders and found some injuries.

Dr. B.B. Aggarwal (PW 6) had radiologically examined Jan Mohammad son of Shakur Mal, Suleman and found one fracture one injury each. Dr. S.K. Verma (PW10) had conducted autopsy on the dead body of Habib. The plea taken by the accused, as is evident from their statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short the `Code'), was of false implication. However, accused Prasadi Lal stated that a large crowd had collected at the spot at the time of occurrence and many persons out of the crowd had started throwing stones on the complainant party as a result of which they had received injuries. He had further stated that the accused had been falsely implicated on account of party fraction in the village. Seven witnesses were examined to further the defence version.

The trial court, as noted above, on consideration of the evidence found the accused persons guilty and convicted and sentenced them. Primary stand of the accused persons before the High Court in the appeal filed by them was that Indraj had not filed nomination papers at the time of occurrence and the finding of the trial court that Indraj had already filed nomination is not correct. It was also pointed out that the ocular testimony stands falsified by the medical evidence and in any event the case being one of free fight at the most each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In any event Sections 148 and 149 had no application.

It is pointed out that accused No.1 was serving in the army and had been falsely implicated.

In the revision filed before the High Court, the complainant adopted the stand of the State and also in addition prayed for compensation.

By the impugned judgment the High Court disposed of the Criminal appeal and the Revision dismissing each one of them.

7. In support of appeal filed by the accused the stand taken before the High Court has been reiterated. It is pointed out that accused Nos.5 and 9 have already died. It is stated that the PWs 1 & 2 were stated to be injured witnesses, but their evidence does not inspire confidence. Additionally, this being a case of free fight, Sections 148 and 149 IPC have no application. The background for the instant case has been twisted. Undisputedly, no nomination was filed by Indraj and, therefore, the question of that being the starting point of the prosecution's case is highly unreliable. The partisan approach of the investigating agency is clear from the fact that no action was taken even though some of the accused persons have suffered injuries. In any event it is submitted that custodial sentence of ten years given for the offence relatable to Section 300 Part II is harsh.

8. Learned counsel for the State in support of the appeal submitted that the High Court after having found the accused persons guilty, should have convicted them for offence punishable under Section

302 read with Section 149 IPC. Not only did they inflict injuries on the deceased and the witnesses, but also were armed with deadly weapons, and it showed their clear intention.

9. Leaned counsel for the informant made similar statements.

10. It shall first be desirable to examine the question relating to non-explanation of injuries on the accused.

11. One of the pleas is that the prosecution has not explained the injuries on the accused. Issue is if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In Mohar Rai and Bharath Rai v. The State of Bihar (1968 (3) SCR 525), it was observed:

"...In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

12. In another important case Lakshmi Singh and Ors. v. State of Bihar (1976 (4) SCC 394), after referring to the ratio laid down in Mohar Rai's case (supra), this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow:

(1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants."

It was further observed that:

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

13. In Mohar Rai's case (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh's case (supra) it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the

mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case.

These aspects were highlighted by this Court in Vijayee Singh and Ors. v. State of U.P. (AIR 1990 SC 1459).

14. Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in Ramlagan Singh v. State of Bihar (AIR 1972 SC 2593) prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare krishna Singh and Ors. v. State of Bihar (AIR 1988 SC 863), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted.

15. These aspects were highlighted in Sucha Singh and Anr. v. State of Punjab (2003 (7) SCC 643).

16. So far as the individual acts are concerned, according to the prosecution version, A1 had inflicted injury on the head of the deceased, A2 had inflicted injury on PW1, A3 had inflicted injury on one Jan Mohammad, who was not examined as a witness. Similar was the position so far as A4 is concerned. A5 who has died inflicted injury on the deceased. A6 had inflicted injuries on Jan Mohammad and PW2. A7 had given a lathi blow to the deceased. A8 had inflicted blow on Jung Mohammad, and the deceased A9 as noted above has expired. A10 had inflicted injuries on PW1 and A1 to A11 have been convicted with the aid of Section 149. The evidence of PW 1 is clear, categorical and he was one of the eye witnesses. Similar is the position vis-a-vis PW 2.

17. The High Court has noted that from the side of the complainant which includes deceased also, five persons have received in total as many as 15 injuries. The main injury on the head of the deceased has been attributed to A1. Similarly, Gulam Rasul, Jan Mohammad son of Sultan and another Jan Mohammad, have also received wounds on the head. Injury on the head of Gulam Rasul was an incised wound caused by a Farsa. Jan Mohammad son of Sultan had received an incised wound on his head. The other Jan Mohammad had received lacerated wound on the head. The other injuries on the persons of all the other injured persons are in the shape of bruises or lacerated injuries most of which have been caused by lathies.

18. The prosecution evidence clearly shows that the common object of the unlawful assembly was to commit the murder of Habib and it was not just an assembly at a particular point of time where the accused persons had assembled with Farsa and lathis in order to cause injury on the complainant including Habib-deceased who had gone for filing nomination papers for the Panchayat election.

19. The High Court found that the purpose of the unlawful assembly was to stop Habib, his brother Gulam Rasul and their supporter from either contesting the election or supporting the persons who filed the nomination. They were all present near the gate of the school where the nomination papers were to be filed. Both the trial court and High Court have on analyses of the evidence come to hold that all the accused persons had formed an unlawful assembly armed with weapons which were likely to cause death and, therefore, conviction under Section 148 IPC and application of Section 149 IPC does not suffer from any infirmity.

20. According to informant the appropriate conviction would be under Section 302 IPC.

21. 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 IPC. The following comparative table will be helpful in appreciating the points distinction between the two offences.

Section 299 Section 300 A person commits culpable Subject to certain exceptions homicide if the act by which the culpable homicide is murder if the death is caused is done - act by which the death is caused is done - INTENTION (a) with the intention of causing (1) with the intention of causing death; or death; or (b) with the intention of causing (2) with the intention of causing such bodily injury as is likely to such bodily injuries as the offender cause death; or 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 (4) with the knowledge that the act act is likely to cause death. 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.

22. Clause (b) of Section 299 IPC corresponds with Clauses (2) and (3) of Section 300 IPC. 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 of Clause (2) is borne out by illustration (b) appended to Section 300 IPC.

23. Clause (b) of Section 299 IPC does not postulate any such knowledge on the part of the offender. Instances of cases of falling under Clause (2) of Section 300 IPC 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 IPC, instead of the words 'likely to cause death' occurring in the corresponding Clause (b) of Section 299 IPC, 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 IPC and Clause (3) of Section 300 IPC 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 of the lowest degree. The word 'likely' in Clause (b) of Section 299 IPC 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.

24. 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 Anr. v. State of Kerala (AIR 1966 SC 1874) is an apt illustration of this point.

25. 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 acts before it can bring a case under Section 300 IPC, "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 proceeded further, and fourthly it must be proved that the injury of the type just described made up 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.

26. The ingredient of clause "Thirdly" of Section 300 IPC were brought out by the illustrious Judge in his terse language as follows:

"12. To put it shortly, 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 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."

27. 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 nor 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."

28. These observations of Vivian Bose, J. have come locus classicus. 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 IPC, 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 the injury that was intended to be inflicted.

29. 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 IPC clearly brings out this point.

30. Clause (c) and Clause (4) of Section 300 IPC 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 IPC 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.

31.In the background facts, it is clear that the conviction as done is appropriate. The sentences awarded do not suffer from any infirmity.

32. All the appeals are without merit, deserve dismissal, which we direct.