

SUPREME COURT OF INDIA

Naimuddin

Vs.

State of West Bengal

Crl.A.No.816 of 2002

(Dalveer Bhandari and Dr. Mukundakam Sharma JJ.)

06.11.2009

JUDGMENT

DALVEER BHANDARI, J.

1. This appeal is directed against the judgment of the Calcutta High Court dated 15.3.2002, by which the conviction of the appellants Naimuddin and Muslim Mian was confirmed by the High Court under section 302 read with section 34 of the Indian Penal Code (for short 'IPC').

2. Eight accused were tried by the Sessions Court under sections 148, 323/149 and 302/149 IPC. The learned Sessions Judge acquitted all the other accused except the appellants Naimuddin and Muslim Mian. Both of them were convicted under section 302 read with section 34 IPC and sentenced to life imprisonment and to pay fine of Rs.5,000/- each and in default to further suffer rigorous imprisonment for two years.

3. It may be pertinent to mention here that Muslim Mian died during the pendency of the appeal and the appeal against him stands abated. In this appeal, we are, therefore, concerned with the appellant Naimuddin only.

4. Brief facts which are necessary to dispose of the appeal are recapitulated as under:

5. The informant P.W.1, Abdul Razzak came to Gajole Police Station on 27.2.1983 and lodged a First Information Report (for short, the F.I.R.) alleging that he along with his cousin Toffazal Hossain had bastu under Dag No. 510 measuring 14 decimals. His cousin, Toffazal, without the prior consent of the informant entered into an agreement with one Muslim Mian and Ali Asgar for sale of 7 decimals of land out of the aforesaid property and when the informant came to know all

about it, he asked his cousin to sell the said portion of land to him. At first, his cousin agreed to sell the portion of land to him but later on, at the instance of Muslim Mian, he refused to sell that portion of land to him. Thereafter, the informant Abdul Razzak raised fencing on the portion of land which was in his possession, His cousin raised his claim over such portion of land and for this the informant protested to such claim.

6. On 27.2.1983, at about 11.00 a.m., the accused along with others started demolishing the fencing of the land in possession of the informant, to which the informant along with some others protested. It was protested by the victim Munshi Basiruddin and his two sons. The victim, Munshi Basiruddin died on the spot being hit by the bricks thrown by the accused-appellants Naimuddin and Muslim Mian. It was also incorporated in the FIR that two sons of the victim also sustained injuries by the bricks thrown by the other accused persons. The accused fled away from the spot and the informant P.W.1 Abdul Razzak went to the police station and lodged the FIR.

7. On the basis of the FIR, Sub Inspector Animesh Mazumdar P.W.13 started investigating the case and endorsed the same to K. S. Das, P.W.14, who at the relevant time was attached to Gajole Police Station for the purpose of investigation. P.W.14 examined the witnesses and recorded their statements. He tried to apprehend the accused persons, named in the FIR. P.W.14 obtained the post-mortem report and on completion of the investigation submitted a charge- sheet.

8. The learned Sessions Judge charged eight accused persons under sections 148, 323 read with 149 and 302 read with 149 IPC. The learned Sessions Judge acquitted all other accused of all charges, but convicted the appellants Naimuddin and Muslim Mian under section 302 read with 34 IPC on a specific finding that both these accused participated in the commission of the offence, namely, in launching assault on the victim by bricks which caused the instantaneous death of the victim on the spot. The High Court upheld the conviction and sentence of the appellants.

9. The respondent-State in order to establish the prosecution case examined 14 witnesses. As far as the appellant is concerned, the allegation against him is of killing the deceased by throwing bricks on him. Dr. J. Mandal, P.W.11, who conducted the post-mortem on the dead body of Munshi Basiruddin aged about 78 years and found the following injuries:

"1. One large haematoma on right side neck with

1" lacerated injury on the top of haematoma.

2. = " lacerated injury behind the left ear.

3. Fracture with dislocation of vertebral column on neck.

4. Fractured skull from frontal to occipital region."

10. The doctor opined that the injuries may be caused by a hard and blunt substance like brick and that the injuries were sufficient to cause death in the ordinary course of nature and in normal circumstances. The doctor opined that injury no. 1 cannot lead to immediate death and this injury may be caused by a fall on some hard substance. He further opined that injury no. 2 may have been inflicted from behind or by side way fall and that this injury may not cause death immediately. Injury no. 3 may be caused by forceful torsion twisting of the neck by a powerful man or by a blow with a hard and blunt substance. Injury no. 4 on the skull could be effected by hard and blunt substance and this injury would be caused by forceful hit.

11. In the instant case, the incident had taken place at 11.00 a.m. on 27.2.1983. The FIR was lodged on the same day at about 15.05 hrs. P.Ws. 1, 4, 5, 6, 8, 9 & 10 are alleged to be the eye witnesses. According to the appellant, P.W.6 was the only independent witness. Out of the eight accused tried by the Sessions Court, six accused were acquitted of all charges. The learned Sessions Judge, however, convicted the appellants Naimuddin and Muslim Mian under sections 302 read with 34 IPC. There was no appeal filed by the State in the High Court against the acquittal of the remaining six accused originally charged.

12. The Trial Court, while convicting the appellant and Muslim Mian and acquitting the other six

accused, observed that there is no evidence that these accused went to the place of occurrence. It is clear from the evidence of P.W.1 that the accused party was unarmed. The appellant had no weapon with him.

13. Mr. S.B. Sanyal, learned senior counsel appearing for the appellant submitted that according to the testimony of Tafijuddin, P.W.6, the accused party was at a distance of 5-7 cubits which is equivalent to about 8-11 feet. When the accused were unarmed and had only thrown palm size bricks, then neither the intention nor the knowledge to commit murder can be attributed to him.

14. It may be pertinent to mention that different witnesses have mentioned different distances from which the bricks were thrown. According to Tafazzal Hoque, P.W.8, who is the son of the deceased, the appellant was standing at a distance of 10-15 cubits which is equivalent to approximately 22 feet from the place of the incident. According to the appellant, when bricks are thrown from such a distance, neither the intention nor the knowledge to commit murder can be attributed to the appellant.

15. The witnesses have not only named the appellant, but also enumerated the specific role of hitting the deceased by bricks.

16. The short question which falls for consideration of this Court is whether the injuries sustained by the deceased could be caused by the bricks. According to the opinion of the doctor, except injury no. 3, the other injuries could be caused by bricks.

17. Mr. Sanyal learned counsel for the appellant submitted that the appellant was unarmed is not disputed. According to him, merely throwing palm size bricks on the deceased should not lead to the definite conclusion that the appellant had intention to kill the deceased, therefore, according to him, appellant's conviction under section 302/149 IPC is not sustainable.

18. Mr. Sanyal further submitted that the conviction of the appellant also cannot be recorded even under section 304 Part-II IPC because even the knowledge to commit murder cannot be attributed to him in the facts and circumstances of this case.

19. We have heard the learned counsel for the parties at length. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under sections 302/149 IPC. However, we do not agree with the second submission of Mr. Sanyal that the appellant also cannot be convicted under section 304 Part II/149 IPC. In our considered view,

when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under sections 302/149 IPC is set aside and the appellant is convicted under sections 304 Part-II/149 IPC and sentenced to five years imprisonment.

20. Consequently, the appeal is partly allowed and disposed of.