SUPREME COURT OF INDIA

Badal Murmu

Vs.

State of W.B.

Crl.A.No.1502 of 2004

(Ranjana Prakash Desai and Madan B. Lokur JJ.)

05.02.2014

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. There are eleven appellants. All of them were tried by the Additional Sessions Judge, Burdwan for offences punishable under Section 148 and Section 302 read with Section 149 of the IPC. They were convicted for offences punishable under Section 148 and Section 302 read with Section 149 of the IPC and sentenced to undergo imprisonment for life for causing death of one Jhore Soren ("deceased-Jhore Soren"). The appellants' appeal was dismissed by the High Court. Hence, the present appeal.

2. The prosecution story could be shortly stated:

> The appellants and the prosecution witnesses belong to Santhal Community of village Mobarakpur. In March, 1989, deceased-Jhore Soren killed the hen of one Bhagbat. This created a furore in Santhal community. A Salish was called and the deceased was asked to give one hen and two handies of country liquor to Bhagbat as a penalty by the Salishman. Deceased-Jhore Soren complied with Salishman's order. On 14/4/1989, when deceased-Jhore Soren and PW-7 Kanka were discussing the same incident, appellant-Bhagbat overheard it and showed his displeasure to PW-7 Kanka. When PW-7 Kanka protested, the appellants Bhagbat, Ragai and Sambhu caused bleeding injuries to him. PW-7 Kanka went to a doctor and got himself examined. On the next day, in the morning, deceased-Jhore Soren and PW-7

Kanka were called to the courtyard of one Saheb Hasda on the pretext that a meeting was to be held over the previous day's incident. When deceased-Jhore Soren and PW-7 Kanka came to the courtyard of Saheb Hasda, they were tied with a rope against one bamboo pole and one Kul tree respectively by the appellants. The appellants were armed with lathis, tangies (sharp cutting weapons) etc. They started assaulting deceased-Jhore Soren and PW-7 Kanka with lathis. PW-7 Kanka managed to escape. The appellants continued to beat deceased Jhore Soren. He was beaten to death. Two wives of deceased-Jhore Soren, who had followed him to the courtyard of Saheb Hasda, saw the incident. The women who had assembled there also assaulted the wives, mother and sister of deceased-Jhore Soren. PW-1 Nilmoni, the first wife of deceased-Jhore Soren rushed to Memari Police Station and gave her statement. In her statement, she named all the appellants as persons, who assaulted her husband – deceased-Jhore Soren with lathis. On the basis of her statement, investigation was started and upon completion of the investigation, the appellants came to be charged as aforesaid.

3. The prosecution examined 10 witnesses. The accused denied the prosecution case. Prosecution case found favour with the trial court which convicted and sentenced the appellants as aforesaid. Their conviction and sentence was confirmed by the High Court.

4. Ms. Makhija, learned amicus, who on our request is appearing for the appellants, submitted that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, the appellants deserve to be acquitted. She submitted that, in any case, if this Court comes to a conclusion that the appellants are guilty, then it should hold them guilty of culpable homicide not amounting to murder because there was no intention to kill the deceased. Counsel submitted that the appellants have admittedly used lathis and, therefore, Section 304 Part II of the IPC is clearly attracted to this case. In this connection, counsel relied on Kirti Mahto & Ors. v. State of Bihar[1]. Counsel submitted that the injuries are not on the vital part of the deceased's body. They are superficial in nature. This also indicates that there was no intention to kill the deceased. In this connection, counsel relied on Molu & Ors. v. State of Haryana[2]. Counsel submitted that the appellants are poor tribals; they are in jail for a considerably long time and, hence, they may be sentenced to the period already undergone by resorting to Section 304 Part II of the IPC.

5. Mr. Anip Sachthey, learned counsel for the State, on the other hand, submitted that the ocular evidence establishes the prosecution case. Counsel submitted that it

is true that the appellants used lathis but even if the common object was to inflict injuries, the appellants who were members of the unlawful assembly knew that the murder was likely to be committed in prosecution of common object and since death was caused, every member of the unlawful assembly must be held guilty of murder. In support of this submissions, counsel relied on Munivel v. State of Tamil Nadu[3] and Alister Anthony Pareira v. State of Maharashtra[4]. Counsel submitted that the appellants persistently assaulted deceased-Jhore Soren and caused grievous injuries to him which resulted in his death. The intention to commit murder is clear and, hence, they are guilty of murder. In this connection, he relied on Kashmiri Lal & Ors. v. State of Punjab[5]. Counsel submitted that the appeal be dismissed.

6. PW-1 Nilmoni, the first wife of deceased-Jhore Soren narrated the entire incident after describing the previous incident about the stealing of the hen by her husband and the penalty imposed by the Salishman. She stated how PW-7 Kanka was tied to a Kull tree and beaten up; how PW-7 Kanka fled away and how deceased-Jhore Soren was beaten to death by using lathis by the appellants after tying him to a bamboo pole. She did not, however, describe the exact role of each of the appellants. She did not state who assaulted where. PW-3 Rabi Soren is the sister of deceased-Jhore Soren. Her evidence is on similar lines. PW-6 Sumi Soren, the second wife of deceased-Jhore Soren also corroborated PW-1 Nilmoni so far as the assault on deceased-Jhore Soren is concerned. PW-7 Kanka, the injured witness described the events that preceded the incident and stated how he and deceased-Jhore Soren were tied to trees; how appellants – Badal, Sambhu, Ragai, Bhagbat and Phangu assaulted deceased-Jhore Soren with lathis; how appellant Sombha was guarding the place with a tangi and how the other appellants encouraged them. He stated that he somehow managed to escape and got himself examined by the doctor. His evidence indicates that out of fear he ran away and did not inform anyone about the incident. PW-9 Dr. Prodip Kumar, who did the post-mortem of deceased-Jhore Soren stated that the death was caused due to the injuries described by him and that the injuries could be caused by a blunt object like lathi. The evidence of PW- 1 Nilmoni, PW-3 Rabi Soren, PW-6 Sumi Soren and PW-7 Kanka is truthful and has rightly been relied upon. They are rustic witnesses and have candidly stated all that they had seen. Pertinently, PW-7 Kanka did not hesitate to name his brother as one of the assailants. No doubt, these witnesses are related to deceased-Jhore Soren, but the tenor of their evidence is such that it is not possible to say that they have falsely involved the appellants. Their evidence has a ring of truth. The prosecution has, therefore, proved that the appellants assaulted deceased-Jhore Soren with lathis which resulted in his death.

7. Now the question is which offence was committed by the appellants. The cause of this entire episode is very trivial. Appellant-Bhagbat's hen was stolen by deceased-Jhore Soren. This dispute was settled. Penalty was paid. Yet, the appellants called deceased-Jhore Soren to Saheb Hasda's courtyard. Deceased-Jhore Soren went there with PW-7 Kanka. They were tied to the trees and beaten up. It is argued that these facts show that the appellants shared common object to kill deceased-Jhore Soren and in prosecution of the common object, they killed deceased-Jhore Soren. In our opinion, the attendant circumstances do not indicate that the appellants shared any common object to kill deceased-Jhore Soren. It appears that they were not happy with the penalty imposed by the Salishman. Therefore, they called him to Saheb Hasda's courtyard and beat him with lathis. If they wanted to kill him, they would have used some sharp cutting weapons. In fact, the evidence on record shows that some of the appellants had tangies in their hand. PW-1 Nilmoni stated that some of them had tangies but they did not use them. Really, if the appellants wanted to kill deceased-Jhore Soren, the easiest way to achieve their object would have been to use the tangies and assault him. It appears to us that what started as an exercise to teach a lesson to deceased-Jhore Soren by beating him with lathis, took an ugly turn. In a frenzy lathi blows were dealt with force. It is true that the doctor noticed fourteen injuries on the deceased. Most of them were bruises and abrasions. It is true that there were also two rib fractures and haemotoma under the scalp. But the doctor has stated that all the injuries led to the death of deceased-Jhore Soren. It is not, therefore, known as to which is the fatal injury. Moreover, none of the eye-witnesses have stated who caused which injury. No individual role is ascribed to any of the appellants. The eye-witnesses have made an omnibus statement that the appellants assaulted the deceased with lathis.

8. In this connection, we may usefully refer to the judgment of this Court in Sukhdev Singh v. State of Punjab[6]. In that case, the appellant therein was convicted under Section 302 of the IPC and sentenced to life imprisonment. The question arose as to what was the nature of the offence committed by him. He had given one blow to the deceased. Thereafter, the deceased had fallen down. That blow, according to the prosecution, was sufficient to cause death in the ordinary course of nature. This Court accepted the testimony of PW-3, PW-4 and PW-5 as to the participation of the appellant therein in the crime. But, it rejected their evidence giving specific overt act to each of the accused because according to the prosecution, the victim was surrounded by all the four accused, each one was armed with weapons and they attacked the deceased simultaneously. This Court

observed that it was therefore difficult to say that fatal injury was caused by the appellant therein. This Court observed that the evidence of the witnesses on that aspect has to be considered with a pinch of salt. Under the circumstances, the sentence of the appellant under Section 302 of the IPC was set aside and he was sentenced under Section 304 Part II of the IPC. In this case also all the accused are stated to have assaulted the deceased simultaneously. No individual role is ascribed to anyone. The doctor has not stated which injury was fatal. It is difficult therefore to say that all the appellants are guilty of murder.

9. In Sarman & Ors. v. State of Madhya Pradesh[7], there were seventeen injuries on the deceased. The appellants therein were armed with lathis. They were charged for offences punishable under Sections 147 and 302 of the IPC. Some injuries were described as incised wounds. Injury No.15 had resulted in a depressed fracture of parietal bone. Like the present case, the doctor in a general way, stated that the cause of death was "multiple injuries". He specifically stated that injury No.15 individually was sufficient to cause death of the deceased. It must be noted that no such assertion is made by the doctor in this case. The prosecution case, in general, was that all of them were found with lathis. Nobody had stated which of them had caused injury No.15 which unfortunately resulted in the death of the deceased. This Court observed that in these circumstances the question that arises was whether all the accused were responsible for the death of the deceased. This Court noted that if anyone of the appellants had exceeded the common object and acted on his own, it would be his individual act but, unfortunately, no witness had come forward to say which of the accused had caused which injury. This Court noted that in those circumstances, it was difficult to award punishment under Section 302 read with Section 149 of the IPC. This Court noticed that although the post-mortem report stated that all the injuries might have caused the death of the deceased inasmuch as the accused inflicted injuries with lathis and particularly when they were simple, and on non-vital parts, it cannot be said that their object was to kill the deceased. They may merely have knowledge that the blows given were likely to cause death. This Court, in those circumstances, set aside the conviction of the appellants for the offences punishable under section 302 read with Section 149 of the IPC and instead convicted them for offence punishable under Section 304 Part II read with Section 149 of the IPC.

10. As earlier noted by us, in this case none of the eye witnesses have given specific role to any of the appellants. They have not stated which appellants gave which blow and on which part of the deceased's body. They have not stated which injury was caused by which accused. The doctor has not stated which injury was

fatal. Undoubtedly, the deceased had suffered two fractures and haemotoma under the scalp, but nobody has said that any particular appellant caused these injuries. It bears repetition to state that though sharp cutting weapons i.e. tangies were available, the appellants did not use them. In the peculiar facts of this case, therefore, it is not possible to hold that the appellants shared common object to murder the deceased and in prosecution of that common object they caused his death. It would not be possible to sustain their conviction for offence punishable under Section 302 read with Section 149 of the IPC. It would be just and proper to resort to Section 304 Part II of the IPC and treat the sentence already undergone by them as sentence for the said offence.

11. Before parting we must note certain special features of this case, which distinguish it from other cases. It is an unusual case where a trivial incident led to a murder. The appellants as well as the material witnesses belong to Santhal community. They are tribals. They come from a very poor strata of the society and appear to be untouched by the effect of urbanization. They live in their own world. They are economically so weak that possession of a hen is very important to them. The deceased-Jhore Soren stole a hen, killed it and made a feast out of it. This angered the community and the village panchayat penalized deceased- Jhore Soren. He was ordered to give a hen to appellant Bhagbat and, in addition, he had to give two handies of liquor. Though, there can be no justification for the appellants' actions, their anger and reaction to the theft of hen must be viewed against the background of their economic and social status. Moreover, we are informed that the appellants are in jail for almost 14 years. Apart from the legal angle, this, in our view, is a case where justice must be tempered with mercy. In the peculiar circumstances of the case, in our opinion, convicting the appellants for culpable homicide not amounting to murder and sentencing them for the period already undergone by them by resorting to Section 304 Part II of the IPC will meet the ends of justice.

12. In the circumstances, the conviction of the appellants for offences punishable under Section 302 read with Section 149 of the IPC is quashed and set aside. Instead, they are convicted for culpable homicide not amounting to murder and the sentence already undergone by them is directed to be treated as sentence imposed on them under Section 304 Part II of the IPC. The impugned order is modified to the above extent. The appellants are in jail. They are directed to be released forthwith unless they are otherwise required in any other case. The appeal is disposed of.

[1] 1994 Supp. (2) SCC 569
[2] AIR 1976 SC 2499
[3] (2006) 9 SCC 394
[4] (2012) 2 SCC 648
[5] AIR 1997 SC 393.
[6] AIR 1992 SC 755
[7] 1993 Supp. (2) SCC 356