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(2003) 11 AHC CK 0203

Allahabad High Court

Case No: Criminal Appeal No. 1317 of 1981

Jamil and Others (In Jail)	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision: Nov. 25, 2003

Acts Referred:

- Penal Code, 1860 (IPC) - Section 300, 301, 302, 304, 323

Citation: (2004) 1 ACR 322

Hon'ble Judges: Onkareshwar Bhatt, J; M.C. Jain, J

Bench: Division Bench

Advocate: Mohammad Islam, N.I. Jafri and Rajesh Pathik, for the Appellant; A.G.A., for the Respondent

Final Decision: Partly Allowed

Judgement

Onkareshwar Bhatt, J.
Three brothers, namely, Appellants Jamil, Zaheer, Shakeel and their cousin Appellant Qutubuddin have preferred this appeal against judgment and order dated 30.5.1981, passed in Sessions Trial No. 16 of 1980 by the then II Addl. District and Sessions Judge, Budaun. Jamil has been convicted under Sections 302 and 323 read with Section 34, I.P.C. and the remaining three under Sections 302 and 323 both read with Section 34, I.P.C. Each of them has been sentenced to life imprisonment and six months rigorous imprisonment for the two offences respectively.

2. Sri Mohammad Islam, learned Counsel for the Appellants and the learned A.G.A. for the State have been heard and record of the case has been carefully perused.

3. According to the prosecution case, informant Rafiuddin P.W. 1 had his field in village Dhanawali, police station Bisauli, district Budaun. The field was ready for sowing wheat crop. The field of accused persons was towards south of the field of the informant which

they had taken on "bataee" from one Bhagwan Singh D.W. 1 and in between four fields intervened. There was a tube well of Tulasi Ram towards north of the field of informant. From the tube well of Tulasi Ram water was being carried by the Appellants in their field. Nali was passing through the western ridge of the field and also through the field of Rafiuddin. At about noon, on 20.11.1978 P.W. 2 Babu son of Rafiuddin asked the Appellants not to carry water from the field because it would damage his field. The Appellants paid no heed and started abusing Babu. On further protest made by Babu, the Appellants cut the nali in his field. Babu was all alone, hence, he came back to his house. About an hour before the sunset Rafiuddin returned from Chandauli where he had gone in the morning for purchasing house hold articles. Rafiuddin sat on his chabutara when Babu narrated the incident over the flow of water in the field which happened in the noon. The Appellants whose house was in front of the house of the informant started abusing Babu and the informant asked the Appellants not to hurl abuses. Whereafter all the four Appellants started assaulting Rafiuddin. Babu due to fear retreated and stood near the door of his house. Appellant Jamil was armed with pharsa, Appellants Zaheer and Qutubuddin with lathis and Appellant Shakeel with spear. Rafiuddin sustained injuries. In the meanwhile, Smt. Niazan, mother of the informant, intervened to save the informant. The blow of pharsa hit her on the head. The occurrence was seen by P.W. 3 Tulsi Ram also who was passing in front of the house of the informant on his way to Government tube well No. 36 which was the only way to reach the above tube well. Since, police station was at a distance of about 12 miles and due to the fact that night had intervened, the informant did not go to the police station instantly. In the morning he went to the police station Bisauli and lodged the first information report on 21.11.1978 at 8.30 a.m. Sub-Inspector Harphool Singh P.W. 7 was present at the police station who took up the investigation of the case. Both the injured, Rafiuddin and Niazan were sent to Bisauli hospital. Rafiuddin was medically examined by Dr. H. S. Rawat, P.W. 9 on 21.11.1978 at 9.15 a.m. On the person of Rafiuddin following injuries were found by the doctor:

(1) Lacerated wound 2 cm. ? 1/4 cm. skin deep on left side of top of head 10 cm. above middle of left eye brow extending antero-posteriorly. Blood clot present.

(2) Lacerated wound 4 cm. ? 1/2 cm. ? 1/4 cm. on posterior aspect of left fore arm on middle. 11-1/2 cm. below the left elbow joint extending downward laterally. Clotted blood present.

(3) Abrasion 2-1/4 cm. ? 1-1/2 cm. on the left side of back 12 cm. above the left superior iliac crest.

4. The injuries were simple in nature and in the opinion of the doctor they could have been caused by lathis at the date and time alleged by the prosecution. It was also the opinion of the doctor that these injuries could not have been self inflicted. The condition of Niazan was precarious, hence, she was sent to Budaun hospital. However, on 23.11.1978 at about 6.05 p.m. Niazan died in the hospital. On 24.11.1978 at 2 p.m. Dr. V. P. Kulshrestha P.W. 4 performed postmortem, on the dead body of the deceased. The

deceased was about 70 years of age. The doctor found incised wound 17 cm. ? 4 cm. ? bone cut deep on top of skull 2 cm. behind hair margin. The wound was stitched and pus present in the wound. The brain material was also cut partially. There was fracture of frontal and left parietal bones. There was damage in the membrane also. In the opinion of the doctor, the injuries could have been caused by pharsa and the blow was given by great force.

5. The Appellants took up the defence that they had been falsely implicated in the case due to enmity. It was suggested to the informant that informant and his deceased mother had been assaulted inside the house by some thieves during the night.

6. The fact that the Appellants had carried water through the field of the informant at noon time has been stated by Babu P.W. 2, son of the informant. The informant Rafiuddin stated that they could have carried the water to their field which they had taken on bataee from Bhagwan Singh without damaging his field. The informant Rafiuddin stated that in the following morning he also saw that there was water in his field and half of the field was wet. The mere fact that Investigating Officer had not seen the field of Rafiuddin was only a lapse on his part which did not adversely effect the prosecution case. The trial court rightly disbelieved the testimony of Bhagwan Singh D.W. 1 that he had not given the field on bataee to the Appellants. After return of Rafiuddin informant at about 4.30 p.m. his son Babu narrated the incident which had taken place at noon time. The factum of assault on Rafiuddin and his mother Niazan by the Appellants has been stated by Rafiuddin. Rafiuddin is an injured witness and bears a hallmark of his presence. Babu being son of Rafiuddin was also a natural witness and the incident is alleged to have taken place in front of his house at the chabutara. Blood stained earth was also recovered by the Investigating Officer from the chabutara. The statement of Rafiuddin finds complete corroboration from the statement of Tulsi Ram who was passing in front of the house of Rafiuddin and was going to Government tube well. The way to the Government tube well was the only way which was in front of the house of informant Rafiuddin. The trial court has rightly found that the testimony of injured witness Rafiuddin finds complete corroboration from the statement of his son Babu P.W. 2 and Tulsi Ram P.W. 3. Minor omissions in their testimony are of no significance. The statement of D.W. 2 Gaffar has also rightly been discarded on the point of enmity subsisting in between the Appellants and the complainant or with P.W. 3 Tulsi Ram. The testimony of eye-witnesses finds corroboration from the medical evidence also. Dr. H. S. Rawat P.W. 9 examined the injuries of Rafiuddin who had two lacerated wounds and one abrasion on his body. The doctor had opined that the injuries were not self-suffered. The injuries of Rafiuddin indicate that lathi, a blunt weapon, was used in assault on Rafiuddin. The testimony of Dr. V. P. Kulshrestha proves the fact that the injury of the deceased could have been caused by a heavy sharp edged weapon. The Appellant Jamil, according to prosecution, was armed with pharsa which is a heavy cutting weapon.

7. The mere fact that pharsa was aimed at Rafiuddin but it actually hit his mother Niazan will make no difference in view of the provisions of Section 301, I.P.C. which provides as

follows:

Culpable homicide by causing death of person other than person whose death was intended.--If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

8. Prior to the actual assault on Rafiuddin and his mother abuses were being exchanged in between the Appellants and Rafiuddin. Tulsi Ram has stated that there was verbal altercation and hurling of abuses also. During investigation the prosecution case was that Rafiuddin was complaining about the cutting of nali and was abusing the Appellants. Since the assault on Rafiuddin and his mother was preceded by verbal altercation and hurling of abuses it goes to show that Rafiuddin and his mother were assaulted in the heat of passion as a sequel of sudden quarrel. The facts also show that injuries to Rafiuddin and his mother were caused without premeditation in a sudden fight. It has come in evidence that the Appellant Shakeel wielded spear which did not hit either Rafiuddin or his mother. The injuries of Rafiuddin were found simple in nature. It appears that the Appellants had common intention to cause hurt to Rafiuddin. Pharsa was wielded only once by Appellant Jamil which proved fatal to the victim Niazan. Niazan was about 70 years of age. The facts of the case show that fight was not pre-planned or premeditated. It was an unpremeditated assault in which death of Niazan was caused and it was committed in the heat of passion upon sudden quarrel. The present case, therefore, comes within Exception-4 of Section 300, I.P.C. Since common intention of the Appellants was to cause hurt to Rafiuddin, the act of wielding of pharsa by Appellant Jamil would be his individual act for which he alone is liable. The wielding of pharsa on the head of deceased was an act of causing such bodily injury as was likely to cause her death. We are of the view that Appellant Jamil alone is guilty u/s 304 Part I, I.P.C. since he caused bodily injury to the deceased as was likely to cause her death. The other Appellants cannot be held guilty alongwith Jamil because two of them caused hurt by lathis to Rafiuddin and spear of Shakeel, though wielded, did not cause any injury either to Rafiuddin or his mother Niazan. Zaheer, Shakeel and Qutubuddin have, therefore, been rightly held guilty u/s 323/34, I.P.C.

9. In view of the above discussion, the appeal is partly allowed. Appellant Jamil alone is held guilty u/s 304 Part I, I.P.C. and is sentenced to undergo rigorous imprisonment for seven years. The conviction of Appellants, Zaheer, Shakeel and Qutubuddin u/s 302/34, I.P.C. is set aside. However, their conviction and sentence u/s 323/34, I.P.C. is maintained.

10. Judgment be certified to the court below. Chief Judicial Magistrate, Badaun, is directed to get the four Appellants lodged in jail for serving out the sentences awarded to them. He shall report compliance within two months.