Torab S.K. Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: July 23, 2014

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 294
Penal Code, 1860 (IPC) â€" Section 147, 148, 149, 302, 304

Hon'ble Judges: Tapash Mookherjee, J; Nishita Mhatre, J

Bench: Division Bench

Advocate: Sekhar Kumar Basu, Ranadeb Sengupta, Rajib Lochan Chakraborty, Rajdeep Majumder, Sourav Chatterjee and Karan Sharma, Advocate for the Appellant; Manjit Singh, learned Public Prosecutor and Pawan Kumar Gupta, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

Nishita Mhatre, J.
This appeal is directed against the judgment and order of the Additional Sessions Judge, Jangipur, Murshidabad in

Sessions Serial No. 64 of 2001. The appellants have all been convicted u/s 302 read with Section 34 and Section 148 of the IPC. They have been

sentenced to suffer life imprisonment and a fine of Rs. 10,000/- each in default of which rigorous imprisonment for 2 years for the offence

punishable u/s 302 of the IPC. They have also been sentenced rigorous imprisonment for 2 years and fine of Rs. 10,000/- in default of which,

rigorous imprisonment for 1 year for the offence punishable u/s 148 of the IPC.

2. On 29th July, 1981 at about 6:30 a.m. the complainant Ajabul Sk. after being shaved by a barber, Bhulu Pramanik, left the latter''s house. He

walked about 30/40 hands away when he saw Riasat Sk. proceeding to Bhulu Pramanik''s house for a haircut. He saw the appellants, who were

led by Habibur Rahaman, appellant No. 2, armed with sharp edged instruments like Heso and Kati. Habibur Rahaman incited and instigated the

others to kill Riasat Sk. Nureman, appellant No. 3 dealt a blow on the lower limbs of Riasat who collapsed there. Torab Sk., appellant No. 1 then

assaulted him on his left heel. Nurul and Hasimuddin, appellant Nos. 3 and 4 also dealt blows on the lower part of Riasat''s legs. The complainant

cried out and some people ran towards the place of occurrence. On being threatened by the appellants all the people including the complainant and

Bhulu fled away from that place. The villagers went to the place of occurrence later and found Riasat Sk. lying on the ground, bleeding, and with

many more injuries. Riasat expired about 10 to 15 minutes later. According to the prosecution, the motive for the crime was that Riasat Sk. and

the appellants had a long standing dispute over the ownership of a field. The FIR was lodged by the complainant at Suti Police Station on 29th

July, 1981. An inquest was conducted by the Investigating Officer who found that there were injuries on the left hand and left leg of the victim. The

post mortem examination was conducted on the victim. The autopsy report indicates that the death was due to the effect of injuries as described

ante mortem and homicidal in nature.

3. The case was committed to the Sessions Court for trial. The charge was framed against the appellants alleging that they had committed the

offences punishable u/s 148 of the IPC and Section 302 read with Section 34 of the IPC.

4. PW 1 is the complainant. He has spoken of the incident which occurred about 23 to 24 years prior to the date on which he deposed in Court.

He has stated that while Bhulu Pramanik, the barber, was dressing the hair of Riasat Sk., the 5 appellants appeared armed with Heso, Kati etc., all

sharp edged weapons. This is contrary to what he stated in his complaint where he mentioned that he saw Riasat proceeding towards the barber''s

house. The witness has then described the assault. He has embellished his version in the complaint by stating that Habibur instigated the others by

exhorting them to ""finish them all"". He has also stated that a Kati was recovered from the house of Torab Sk., and that he had signed the seizure list

after this recovery was made. He has contradicted himself in the cross-examination with regard to the place where he saw Riasat for the first time

on 29th July, 1981. He has reiterated that the accused assaulted Riasat on his limbs only and that Nureman had caught hold of Riasat''s hair,

making him lie flat on the ground. The discrepancies and contradictions in the evidence of PW 1 are not so significant for his evidence to be

discarded in its entirety.

5. PW 2 is the witness to the seizure of articles from the scene of offence, such as, blood-stained earth, a blood-stained wrapper, clotted blood

and garments of Riasat which were also blood-stained. He has stated that the body of the victim was placed on the road between the houses of

Bhulu Pramanik and Kanai Choudhury.

6. PW 3 is the father of PW 1. He has largely corroborated the story of PW 1. However, he has stated that he saw Bhulu Pramanik dressing the

hair of Riasat on the road near Bhulu''s house. He has further stated that he saw the accused persons arrive at the spot. On the directions of

Habibur Rahaman, the others and Nureman dragged Riasat while Torab assaulted him with a Kati and then Hasimuddin injured him with a Heso.

He has narrated that Nurul and Nureman also assaulted the victim with the aforesaid weapons. He has spoken about the accused fleeing away

after the people around raised an alarm and that Riasat died within a few minutes. This witness has, in his cross-examination, contradicted himself

and said that he saw Riasat lying on the western verandah of Bhulu Pramanik"s house, injured and bleeding profusely. He has further mentioned

that the victim was assaulted on the lower part of his body and on one hand. According to this witness, the police arrived in the evening and

conducted the inquest.

7. PW 4 is a villager who also claims to have seen Riasat while he was having a haircut. He has stated that the 5 accused persons surrounded the

victim and that Habibur instructed the others to kill Riasat. He has spoken of Nureman clutching Riasat"s hair and pulling him down while the other

four persons assaulted him with sharp edged weapons. He has mentioned the names of some persons who were present and raised a hue and cry

when Riasat was assaulted. After which the accused fled away. From the cross-examination it appears that this witness has contradicted himself

and has denied having mentioned to the IO that he had seen Riasat with Bhulu or that the accused Nureman had dropped the victim down by

catching hold of his hair or that the other accused assaulted Riasat with a Heso and Kati. The witness has reiterated the fact that the injuries

sustained by the victim were all on the lower part of his body and one on his left hand. Thus, PWs. 1, 3 and 4 appeared to be eye-witnesses to the

incident. They have largely corroborated each other"s version of the incident.

8. PW 5 is witness to the inquest report and the seizure list which is exhibited at Ext. 3/1 namely all the blood-stained earth etc. In his cross-

examination he has stated that the body of the victim was lying in front of Bhulu"s house and that the Police arrived at 5 p.m. to conduct the

inquest.

9. PW 6 is a witness to the seizure of a blood-stained Heso which was about 11/2 feet in length and recovered from Torab"s room. PW 7 is the

Constable who took the dead body of the victim to the Morgue. PW 8 has spoken about receiving the compliant from PW 1 and transcribing it

himself pursuant to which a case was started against the accused under Sections 147, 148, 149 and 302 of the IPC.

10. PW 9 is the Investigating Officer of the case who conducted the inquest. He has spoken about preparing the sketch-map and the seizure of the

blood-stained earth and hair and clothes stained with blood. He has further stated that these articles were sent to the Forensic Science Laboratory

for examination. The Investigating Officer has produced the post mortem report and has mentioned that the Doctor who conducted the post

mortem had expired. The Investigating Officer has further stated in his cross-examination that when the inquest was held, Bhulu Pramanik and

others were not available to be cited as witnesses.

11. PW 10 is the Medical Officer who was posted in Jangipur S.D. Hospital in 1981. He has stated that the post mortem examination report was

prepared by Dr. Shankar Prasana Chatterjee who had expired. The injuries sustained by the victim have been described by him. He has identified

the signature of Dr. Chatterjee on the post mortem report. In his cross-examination he has candidly stated that he had no personal knowledge

about the post mortem examination.

12. Mr. Sekhar Basu, learned Counsel appearing for the appellants, has submitted that there was a substantial change in the narration of the

incident in the testimonies of the witnesses recorded in Court and the complaint filed by PW 1. The learned Counsel has pointed out that from the

post mortem report it is evident that all the injuries sustained by the victim were on the non-vital parts of the body and that there was no evidence

that such injuries could have caused the death of the victim. The learned Counsel then submitted that none of the witnesses have ascribed any role

to Habibur who is 79 years old, except the use of abusive words, which were not the allegations made in the complaint. The learned Counsel then

submitted that besides PW 1 none of the so called eye witnesses have mentioned the abuses or exhortations of Habibur Rahaman. He also pointed

out that there was no evidence to link the Heso which was recovered from Torab"s house to the commission of the crime. The learned Counsel

submitted that the charge framed is defective as it alleges that offences punishable under both Section 302 read with 34 and Section 148 read with

34 IPC have been committed, thus causing them prejudice and consequently their conviction for both those offences is illegal and bad in law. The

learned Counsel has relied on several judgments which we will presently advert to.

13. Mr. Manjit Singh, the learned Public Prosecutor, submitted that the exhortations of Habibur incited the others to commit the crime as he had

shouted ""de sesh kore"" which means ""finish him off"". He further submitted that although the Doctor who was examined in Court as PW 10 has not

opined as to whether the injuries sustained by the victim were sufficient to cause death in the ordinary course of nature, the Court can always

examine the nature of injuries for itself and decide whether they resulted in the death of the victim.

14. It appears from the evidence on record that Habibur who is 79 years of age has not inflicted any blow on the victim. All the eyewitnesses have

mentioned the names of other accused who assaulted the victim with sharp edged weapons. However, the witnesses have insisted in their depiction

of the incident that the others assaulted the victim on the instigation and incitement of Habibur. The words used by Habibur, according to PW 1,

roughly translated from Bengali are ""finish him"". In the case of Parshuram Singh Vs. State of Bihar, the Court held that a person cannot be

convicted merely on the basis of the statement made by him at the scene of offence. There must be other surrounding circumstances to instill the

confidence that he did make such an exhortation. Thus, mere use of words of incitement and instigation cannot lead to a conviction unless there is

material to indicate that, but for the use of these words, the accused would not have committed the crime. There must be sufficient evidence on

record which unmistakably proves that the accused had a common intention to participate in the crime or had any common intention to murder the

deceased. In the present case there is no doubt that Habibur had instigated the others to attack the victim and that they had acted as per his

directions.

15. The main focus of the argument on behalf of the accused is that the victim sustained injuries on his limbs which are non-vital parts of his body

which could never have led to the death of the victim. They could not be considered to be fatal injuries. The injuries sustained by the victim are as

follows:

1. One incised wound 4"" X 4"" X 3"" on left ankle posteriorly. It cuts all muscles, vessels, Tibia and Fibula.

2. One incised wound 6"" X 3"" X bone deep on left knee posteriorly. It cuts all muscles and vessels.

3. One incised wound 5"" X 2"" X bone deep on right leg, middle part, posteriorly.

4. One incised wound 4"" X 2"" X muscle deep on right thigh posteriorly.

5. One incised wound 4"" X 2"" X muscle deep on left thigh posteriorly.

6. One incised wound 3"" X 1/2"" X skin deep on left hand.

16. The post mortem report suggests that ""the death was due to effect of injuries as described ante mortem and homicidal in nature."" As mentioned

earlier the Doctor who conducted the post mortem examination had expired before he could be examined at the trial. Therefore, another Doctor,

PW 10, who was familiar with his hand writing and signature, was examined to prove the post mortem report. However, the opinion of the earlier

Doctor is not admissible evidence. Furthermore, the Doctor who was examined has not been asked his opinion as to whether the injuries sustained

by the victim could cause death in the normal course. It has been argued by Mr. Singh that it is for the Court to form an opinion as to whether such

injuries can in fact lead to the death of a victim in the ordinary course of nature.

17. In Chilamakur Nagireddy and Others Vs. State of Andhra Pradesh, a similar situation arose where the Doctor had not said that the injuries

caused by the accused were fatal or sufficient in the ordinary course of nature to cause the death of the victim. The Counsel for the State argued

that the Court could appreciate the nature of injuries for itself. However, the Supreme Court declined to do so and opined that in the absence of

the specific and definite opinion of the Doctor it was not safe to form an opinion as to whether the injuries caused by the accused with a spear

were such that one could say with certainty that they were also fatal by themselves. The conviction of the accused u/s 302 of the IPC was not

sustained and instead he was convicted u/s 326 of the IPC.

18. In State of Jammu and Kashmir v. Hazara Singh and another reported in AIR 1981 SC 451 the Doctor who conducted the post mortem

examination had not stated in his report that the injuries found on the abdomen of the victim were likely or sufficient to cause the death of the

victim. The Medical Officer, who conducted the autopsy, could not be examined. No other medical expert was examined to ascertain his opinion

as to whether, on the basis of the data available from the post mortem report, the abdominal injuries were sufficient or likely to cause death. The

Supreme Court, therefore, was of the view that in such a state of the evidence, all that could be said was that the abdominal wounds found on the

body of the deceased were grievous injuries.

19. Similarly, in the case of Bawa Singh Vs. State of Punjab, the injuries sustained by the victim were, one on his chest and abdomen and the other

on his back near the first lumber vertebrae close, to the mid line. No medical expert had opined whether such injuries individually could cause

death in the ordinary course of nature. The Medical Officer who conducted the post mortem examination of the deceased found that the death was

due to the shock and haemorrhage resulting both from injuries collectively. In these circumstances, the Supreme Court opined that, having regard

to the medical opinion, it was necessary to scale down the offence from one u/s 302 of the IPC to one punishable u/s 304 Part II of the IPC.

20. Again in the case of Ram Jattan and others Vs. State of U.P., the Supreme Court was concerned with a case where multiple injuries were

caused on the non-vital organs of the victim. There was no indication in the medical evidence that any of the injuries was sufficient in the ordinary

course of nature to cause death of the victim. The Court observed that in the absence of proof by the prosecution in an objective manner, that the

injuries sustained were sufficient to cause death in the ordinary course of nature, the same cannot be inferred with, unless the injuries are so patent.

The same view has been taken by the Supreme Court in the case of Narayan Raghunath Phadke Vs. State of Maharashtra,

21. In the case of Para Seenaiah and Another Vs. State of Andhra Pradesh and Another, the Doctor who had conducted the autopsy had noticed

the injuries as a fracture of the lower end of both the tibia and fibula on both sides with bruising in the surrounding soft tissue and a fracture of the

lower end of the left forearm bones with bruising in the left soft tissue. However the Court found that the prosecution had failed to establish that the

death eventually occurred due to the injuries sustained by the victim. The Court was of the view that as the injuries sustained were on the non-vital

organs of the body they could not have caused death. The Court upheld the decision of the Trial Court to reduce the offence to Section 326 from

Section 302 of the IPC.

22. Mr. Singh has pointed out the judgments in the case of Brij Bhukhan and Others Vs. The State of Uttar Pradesh, in support of his submission

that it was open for the Court to consider the nature of the injuries sustained by the deceased in order to ascertain whether the assailants intended

to cause the death of the victim. The Court has held in this judgment that even if none of the injuries by themselves was sufficient in the ordinary

course of nature to cause death of the victim, cumulatively they were certainly sufficient in the ordinary course of nature to cause his death, which

took place soon after the assault. The learned Counsel has also relied on the judgment of the Division Bench of this Court in the case of Sadre

Alam Mullick Vs. State, In this case the Doctor who had prepared the post mortem report was not available to be examined before the Court at

the trial. In these circumstances, the post mortem report was admitted into evidence with the consent of the defence in consonance with the

provisions of Section 294 of the Cr. P.C. The Court held that the contents of the report must be admitted into the evidence when the report is

produced u/s 294 of the Cr. P.C. In the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., the post mortem report which

was on record indicated that 45 injuries were inflicted on the victim. This included the fracture of 5 ribs on the left side towards the sternal end, the

fracture of some of the fingers and extravasation of blood on the remaining injuries included a few lacerated wounds, contusions and aberrations.

There was one minor incised wound on the left pinna. The right lung was congested. The Doctor opined that the death was as a result of multiple

injuries and injuries on vital organs and it was homicidal in nature. The Supreme Court opined that the Trial Court had drawn a fallacious

conclusion regarding the death of the victim, on the premise that the Public Prosecutor had not elicited information from the Doctor as to whether

the injuries were sufficient in the ordinary course of nature to cause death. The Court was of the opinion that it would have been advantageous to

the Court if such a question had been asked to the Doctor. But a mere omission to put that question was not enough for the Court to reach an

incorrect conclusion. The Court observed that the Sessions Judge, who would have been an experienced Judicial Officer, should have looked into

the injuries described and himself deduced whether those injuries were sufficient in the ordinary course of nature to cause death. This Court had

confirmed the judgment of the Trial Court.

23. Taking a conspectus of the aforesaid decisions, in our opinion, it would not be proper for us to decide for ourselves considering the nature of

injuries sustained by the victim, whether they could have caused death in the normal course of nature. It would be dangerous for us to guess as to

whether this was possible as we are not medical experts. Moreover, by doing so and applying our own assessment, as rightly argued by Mr. Basu,

the appellants would have no right of cross-examination of any Doctor on this point. When the prosecution has failed to ascertain the opinion of the

Doctor, who proved the post mortem report, as to whether the injuries sustained by the victim could cause death in the normal course, it would be

unsafe for us to infer that the death was indeed caused by these injuries. Moreover all the injuries sustained by the victim are on the non-vital parts

of his body. The injuries on the left ankle, left knee and on the thigh appeared to be muscle deep; the vessels, Tibia and Fibula have been cut. The

testimony of the eye-witnesses proves that the victim was bleeding profusely due to the injuries. The ocular evidence also establishes the fact that

appellants attacked the victim by injuring him on the non-vital parts of his body.

24. There can be no doubt that the appellants all had a common intention to inflict injuries on the victim. They accosted the deceased together

when they were armed with sharp edged instruments and acted on the instigation and incitement by Habibur. However the evidence on record

does not prove that they had any intention to murder the deceased. If they did have such a purpose, they would have inflicted injuries on the vital

parts of the victim''s body. We, therefore, do not find that the trial Court was right in convicting the appellants u/s 302 read with Section 34 of the

IPC on the basis of the evidence on record. The impugned judgment of the trial Court is set aside.

25. Considering the nature of the injuries sustained by the victim and the instruments used by the appellants to inflict them, there can be no doubt

that appellants are guilty of causing grievous hurt by dangerous means. The appellants are convicted u/s 326 read with Section 34 of the IPC. They

are sentenced to suffer rigorous imprisonment for seven years and a fine of Rs. 2,000/-. In default of payment of the fine, the appellants shall

undergo further rigorous imprisonment for three months. The conviction and sentence imposed by the trial Court in respect of the offence

punishable u/s 148 of the IPC is confirmed. Both the sentences are to run concurrently. The period of detention already undergone by the

appellants shall be set off against the substantive sentence imposed.

26. The appeal is disposed of accordingly.

27. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all

formalities.