

Protul Pathak and anr. Vs. State of Assam

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Court : Guwahati

Decided On : Aug-09-2007

Judge : B.D. Agarwal, J.

Appellant : Protul Pathak and anr.

Respondent : State of Assam

Judgement :

B.D. Agarwal, J.

1. The appellant No. 1, Shri Protul Pathak has been convicted under Section 307 of the Indian Penal Code vide judgment and order dated 31.03.1998 passed by the learned Session Judge, North Lakhimpur (Assam) in Sessions Case No. 28 (NL) of 1997. By the same judgment, the appellant No. 2, Kumud Bora, has also been convicted under Section 448 of the Indian Penal Code. Being aggrieved with this judgment and convictions, both the convicts have preferred this common appeal. It may be mentioned here that once the appeal was disposed of by this Court vide judgment and order dated 01.03.2006, confirming the convictions. Against that order, the appellant No. 1 preferred criminal appeal being C.A. No. 685 of 2007 before the Hon'ble Supreme Court of India. While disposing of the appeal on 04.5.2007, the Hon'ble Supreme Court has remitted back the appeal for rehearing on the ground that on earlier occasion the appellant was not represented by any lawyer. This is how this judgment.

2. I have heard Mr. J.M. Choudhury, learned Senior counsel assisted by his juniors for the appellants. The State was represented by Mr. B.S. Sinha, learned Addl. P.P.

3. Shorn of the details the factual matrix of the case are as follows:

The appellants and the informant hails from the same village. Both the parties are not only known to each other but it appears from the record that there was also lurking enmity between them. At about 9.00 p.m. on 19.9.1995 while the injured, Shri Puspa Bora was about to take supper, his wife noticed three persons sitting on the halfwall of the compound. Suddenly, the appellant No. 1 entered the dwelling house of the injured almost after thrusting his wife and pointed his gun towards the injured. Since the injured (PW2) was at a catching distance, he got up and raised the barrel of the gun. At this point of time, the appellant No. 1 fired a shot, which missed the exact target and hit bamboo wall of the room, but only after grazing the head of P.W. 2. Thereafter, P.W.-2 struggled with the appellant No. 1 to snatch the gun. In the meanwhile, appellant No. 2 also trespassed in the room and dealt a dao blow on the abdomen of the PW-2. For some reasons, PW-2 did not sustain much injury on his abdomen.

4. On the next morning, the brother of the injured lodged a written FIR. It was registered as Narainpur PS Case No. 315 of 1995 Under Section 457/307/326/34 of the Indian Penal Code. In the meanwhile, PW-2 got himself examined at a Government hospital. The police investigating officer (PW-8) also visited the site of offence, seized empty cartridge of the bullet, blood stained shirt of the injured and also drew a rough sketch map of the scene. Seizure list has been marked as Exhibit-2, whereas the sketch map has been marked as Exhibit-6 (sic Exhibit-7). After collecting medical report and recording of statements of witnesses, charge-sheet was submitted only against the appellants herein.

5. After commitment of the case, the accused were, however, tried only Under Section 307 read with Section 34 of the Indian Penal Code. Altogether 8 (eight) witnesses were examined to establish the offence. They included the informant, the injured, the injured's wife, medical officer, victim's daughter, two independent witnesses and the investigating officer. The defence was of total denial and no

evidence in defence was also proffered. Relying upon the prosecution version, the appellant No. 1 has been convicted Under Section 307 IPC, whereas the appellant No. 2 has been convicted Under Section 448 IPC.

6. Mr. J.M. Choudhury, learned senior counsel mainly argued that even if it is presumed that there was any incident of firing, the appellant No. 1 had no intention to commit murder of PW-2. According to the learned Counsel for the appellants, the bullet might have suddenly come out of the gun and as such, it was not appropriate on the part of the trial court to draw an inference of attempted murder. Learned Counsel for the appellants also took a dig at certain procedural irregularities, mentionably, non-forwarding of the seized articles to any forensic expert to ascertain if those articles indicate any incident of firing etc. At the end of the argument, the learned Counsel also submitted that at best, the appellant No. 1 can only be convicted for the offence of house trespass. Apart from the merit of the case, it was also pleaded that the appellant No. 1 was a juvenile at the relevant time and as such, the said accused ought to have been tried as per the procedures of juvenile law.

7. Per contra, Shri B.S. Sinha, learned Addl. Public Prosecutor submitted that neither the appellants entered the dwelling house of the injured in a routine manner nor they behaved normally. According to the learned PP, the appellants had certainly entered the room at odd hours, armed with lethal weapons like gun and dao and despite their attack the PW-2 could survive. In other words, it was contended by the learned PP that the inference of attempt to murder can not only be drawn from the conduct of the appellants but there was also overt act on their part. Learned PP stoutly denied that the appellant was a juvenile one at the relevant time. In addition to these submissions, the learned PP also brought one aspect to my notice that while the appellant No. 2 was apprehended immediately after lodging of the FIR, the appellant No. 1 was absconding and only surrendered in the court on 10.10.98 i.e. after absconding for nearly three weeks.

8. Before entering into the rival contentions of both the sides, it would be apposite to examine the ingredients of law which bring the offence within the ambit of the offence of attempt to murder.

9. Offence of 'attempt to murder' has been defined under Section 307 of the Indian Penal Code, 1860. The provision of law is reproduced below:

307. Attempt to murder--Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned.

9.1. Section 299 defines Culpable homicide and Section 300 IPC lays down conditions for declaring culpable homicide as 'murder'. The offence of 'attempt to murder' is also in the family of offences of homicides and it has direct nexus with the generic offence. It is just short of committing culpable homicide. In the offence of homicide the offender accomplishes his intention, whereas all failed attempts of homicide come within the purview of 'attempt to murder'. In this way to bring the offence of attempted murder the prosecution is required to establish the same ingredients of law applicable to 'murder', except the fact that the targeted person met his/her death. In my considered opinion, any kind of preparation with an evil motive to accomplish the act of murder with certain manifest overt act would attract the rigour of Section 307 IPC.

10. In the case of *Om Prakash v. State of Punjab* : [1962]2SCR254 , the Hon'ble Supreme Court has lucidly examined the offence of attempt to murder and the law has been laid down in the following terms:

On a parity of reasoning, a person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does not an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit offence of murder means that the persons concerned has the intention to do certain act with the necessary intention or knowledge mentioned in Section 300.

16. It may, however, be mentioned that in cases of attempt to commit murder by fire arm, the act of amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires and something happens to prevent the shot taking effect, the offence under Section 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder.

11. The offence of attempted murder was also examined at length by the Hon'ble Supreme Court in the case of State of Maharashtra v. Kashirao reported in 2003 Cril.

LJ 4464. Their Lordships have held that in an offence under Section 307, all the ingredients of murder are present except the death of the victim. Their Lordships have further held that for the application of Section 307, it is not necessary that the injury capable of causing death should have been actually inflicted. With these principles of law. Their Lordships held that to bring home the offence within the parameters of Section 307, the following ingredients are required to be proved:

(i) That the death of a human being was attempted;

(ii) That such death was attempted to be caused by, or in consequence of the act of the accused;

(iii) That such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as; (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

12. Similarly, in the case of State of Maharashtra v. Balrambama Patil : 1983 CriLJ331 , the Hon'ble Supreme Court has reiterated that it is not necessary that bodily injury capable of causing death should have been inflicted. The relevant

principles of law enunciated by the Apex Court can be fruitfully extracted below:

To justify a conviction under this Section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act execution thereof.

12.1 In the above case, conviction Under Section 307 IPC was restored by the Hon'ble Supreme Court despite the fact that the injured had sustained an injury in the nature of simple hurt.

13. The above principles of law relating to offence of attempt to murder have been reiterated by the Apex Court yet in the case of *Lachman Singh v. State of Haryana* : 2006 CriLJ4041 in the following words:

13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between the act the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and the

circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

14. Coming to the case at hand, I find that the injured (PW-2) has given a tell-tale version of the incident as to how he saved himself from the fatal assault. PW-2 has deposed that the appellant No. 1 suddenly entered the room and pointed his gun towards him. Since the distance between him and the said appellant was only of four feet, he stood up and raised the mouth of the barrel. At this point of time, the appellant Protul Pathak fired at him. Thereafter, PW-2 deposes, he struggled with Protul Pathak to snatch the arm. In the meanwhile, appellant No. 2 also barged into the room and assaulted him with a dao. Thereafter, both the appellants fled away.

15. The above story has been graphically corroborated by the wife of the injured, who has been examined as PW-3. This witness has deposed that after taking dinner she had just opened the door. Suddenly, both the appellants made their forcible entry in their house, pushed her aside and thereafter appellant No. 1 attempted to kill her husband with a gun. This witness has also deposed that Protul Pathak had aimed to fire the gun-shot on the body of her husband but due to intervening action by her husband, the shot missed the target. However, it caused little bruise on the head of her husband. PW-3 has further deposed that while her husband was struggling with Protul Pathak, the other appellant, Kumud Bora assaulted her husband with a dao and thereafter both of them fled away.

16. Suggestions put to PWs-2 and 3 in the cross-examination reveal that both the informant's family as well as the appellants are from the same village and there was enmity in between them. PW-2 has been suggested that one month prior to the incident of attempted murder, a dacoity took place in the house of the appellant No. 1 and the dacoits had shared the booty in the house of PW-2. The witness was given another suggestion, which too was denied, that sometime back a box containing money was dug out from the front of his house and there was altercation and quarrel regarding the money with the villagers. PW-2 has again been given a third suggestion of enmity relating to establishing a husking mill.

These suggestions of long enmity corroborate the theory of intention to kill PW-2 with the use of fire arm. Since the accused persons were from the same village and well known to the informant as well as to the injured and other witnesses, there was also no difficulty to identify them. Accordingly, both the appellants were specifically named in the FIR.

17. PW-2 is the brother of the injured and the PW-6 is the victims daughter. PW-2 came running to the place of occurrence after getting the news of the incident. Then, he was narrated the entire story by the victim and his wife. This witness was reported that the appellants had attempted on the life of PW-2. Similarly, PW-6 has also spoken about the incidence of firing but she had no occasion to identify the assailants as moments before her arrival at the scene, the assailants had fled away PWs 5 and 7 are reported witnesses and not much discussion about their testimony is required.

18. Now, I shall look at the medical evidence. PW-4 is the doctor. This witness has deposed that he examined PW-2, Shri Puspa Bora on 20.9.1995 and found the following external injuries:

(i) Small abrasion in the scalp in the middle of the head and another abrasion in the left foot.

(ii) Multiple particles of gun-shot were bound in the midst of scalp hairs.

19. The doctor has opined that the injuries were caused by a blunt object and were simple in nature. To a query by the court, the medical officer affirmatively opined that the particles found inside the hairs were that of gun-shot. In the cross-examination, PW-4 has admitted that he did not notice any blackening or burning mark on the skin. Since the bullet did not pierce the skin, no such marks could have been noticed. It is true that the cross-examination, the doctor has admitted the fact that the abrasions found on the scalp and foot were not the result of gun shot. After going through the entire evidence on record, the minor injury on the foot can be said to be the result of soufle. However, the abrasion on the scalp can still be attributed to gun shot inasmuch as the injured himself has deposed that the bullet had passed through his head. Apart from this evidence of the injured, even

the doctor has spoken that he had noticed bullet particles in the hairs. Presence of bullet particles clearly indicates that the abrasion noticed in the scalp was that of gun shot. Even for a moment, it is presumed that PW-2 did not receive any physical injury, even then, firing of bullet from the gun itself would complete the act of attempt to murder and it would bring the offence Under Section 307 of the IPC.

20. Shri Choudhury, learned senior counsel submitted that neither the bullet particles were seized by the I.O. nor sent it to any FSL to ascertain if there was any incidence of firing.

21. In the case of State of Karnataka v. K. Yarappa Reddy reported in 1999(4) Crime 171 (SC), the Hon'ble Apex Court has held that defect and irregularities in investigation cannot be a ground for acquittal. Identical view has also been taken in many other cases (for reference cases reported in the case of Visveswaram v. State reported in : 2003 CriLJ2548 and in the case of Dhanaj Singh v. State of Punjab reported in 2004 Cri. L.J. 1807}. Hence, the aforesaid omission in the investigation can have no reflection in the otherwise proved prosecution story. At this stage, I would also like to refer to the rough sketch map of the place of occurrence (Ext. 7). In the index, the investigation officer has indicated that there was sign of hitting of bullet on the wall under Sl. No. 3. Unfortunately, the I.O. failed to pin-point the exact place in the sketch map. In other words, the I.O. forgot to indicate the scene No. 3 in the sketch map. In addition to these evidences, the I.O. had also seized the cartridge from the scene and seized the same under Ext. 1. All these evidences cumulatively prove the fact that the appellant No. 1 had fired the gun shot.

22. Even if I exclude the disputed question of actual firing, even then, facts like entering deep inside the dwelling house of P W-2 duly armed with fire arm and pointing the same towards the head of PW-2 coupled with old enmity are sufficient to draw the inference that the appellant No. 1 had made all the preparations with an intention to kill PW-2. The overt act of appellant No. 1, like pointing the gun with his fingers on the trigger also rules out any theory other than the theory of the intention of killing PW-2. Be that as it may, there are evidences, which corroborate the theory of actual gun shot. At this stage, I would again like to refer to the case

of Om Prakash (supra) wherein the Hon'ble Supreme Court had upheld the conviction Under Section 307 IPC in a case where a newly wed woman was kept on starvation. In that case, the Hon'ble Apex Court had taken a view that it was a case of calculated starvation with an intention to accelerate the death of the woman. However, the facts of the case before me are on stronger footing. Hence, I do not find any fault in the judgment of the learned Sessions Judge convicting the appellant No. 1 for the offence Under Section 307 IPC. I also do not see any infirmity in the conviction of the appellant No. 2 Under Section 448 IPC. Accordingly, both the convictions are hereby upheld.

22.1 At the fag end of the argument, learned Counsel for the appellants also submitted that appellant No. 1 was a juvenile and as such, he should have been tried under the provisions of Juvenile Justice Act, 1986. Under that law, the age of the juvenile was 16 years. According to the learned Counsel, the learned Judicial Magistrate himself has observed in the order dated 10.10.98 that the accused Protul Pathak was under 16 years of age. I have seen the said order and find that the aforesaid observation was given on the basis of an age. certificate produced on behalf of the accused. However, while giving statement Under Section 313 Cr.P.C, the said accused disclosed his age being 19 years as on 25.3.1998. The incident took place in the month of September, 1995. Accordingly, on his own admission, the said accused was more than 16 years old. Besides this, while filing appeal before this Court, the appellant No. 1 also filed an application Under Section 389 Cr.PC on 06.4.1998. In this application, it was stated that the appellant No. 1, Protul Pathak was a student of 2nd, year of Three Year Degree Course. This statement was supported by documents. From this statement also it appears to me that the said appellant was above 18 years of age at the relevant time. Be that as it may, the question of juvenility was not raised at any stage of the trial or in the memo of appeal as well. Hence, I do not find any illegality in the trial. The submission is over-ruled.

23. Coming to the question of sentence, I find that appellant No. 1 has been sentenced to undergo RI for 4 (four) years and fine of Rs. 500/- with default sentence of one month's R.I. The appellant No. 2 has already been released after admonition under the provisions of the Probation of Offenders Act. I find that the

learned Sessions Judge has already shown magnanimity in the matter of sentence considering young age of the accused. Hence, there is no scope of giving any further discount in the quantum of sentence. Consequently, the sentence awarded to appellant No. 1 is hereby maintained.

24. In view of my analysis of the impugned judgment and evidence available in the record, I do not find any merit in the appeal. Consequently, the appeal stands dismissed. The appellant No. 1 is directed to surrender in the court of learned Sessions Judge, North Lakhimpur, Lakhimpur immediately to serve out the sentence.

Return the trial court record with a copy of this judgment immediately.

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