

Harej Ali Vs. State of Assam

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Court : Guwahati

Decided On : Jun-26-1981

Judge : D. Pathak, AG. C.J. and K.N. Saikia, J.

Appellant : Harej Ali

Respondent : State of Assam

Judgement :

K.N. Saikia, J.

1. The appellant Harej Ali has open convicted under Section 302 I. P. C and sentenced to imprisonment for life on the basis of a statement recorded in course of investigation, treated as a dying declaration, and evidence of eye witnesses.

2. On 25-7-75 P. W. 2, Ahmed Ali, lodged an ejahar at the Dhing Police Station that at about 2 P- M. that Friday while his father Abdul Rahman Khan (deceased) was laying thatch on the road near their house, an altercation ensued between him and Harej All, Harmui Ali Mafizuddin, Abdul Matalib and Sirajul Haque, and Harej and Harmuj, as ordered by the rest, bringing, lathis from their house clubbed - and felled Abdul Rahman Khan as well as Ahmed Ali (the complainant). Registering a case thereupon police (P. W. 6) came to the place of occurrence and recorded Abdul Rahman's statement and forwarded him for treatment to Ahomgaon State Dispensary wherefrom, after treatment, he was brought back home where he died next morning. Charge sheet was submitted only against Harei and Harmuj under

Section 302/34 I. P. C, and being committed to Session, charge was framed there under Section 302/34 I.P.C. for murder of Abdul Rahman and under Section 303/34 for causing simple injuries to Ahmed AH, Both pleaded not guilty to the charges. The prosecution examined 7 witnesses including the Doctor (P. W. 1) and the Investigating Officers, p. Ws. 6 and 7. while the defence examined none.

The prosecution evidence is that in the night of 24-7-75 a theft took place at the house of one Hurmat Ali Haji, a co-villager, and the two accused persons, namely, Harei Ali and Harmuj Ali having been suspected, a village 'mel' or 'bichar' was held at the Village Maktab where Abdul Goffur, the eldest son of the deceased Abdul Rahman played leading role and the suspected persons were cautioned for future. While returning from that 'mel' the two accused persons had altercation with Abdul Rahman where at they went to their house and came back armed with lathis and Harej assaulted Abdul on his head. Ahmed Ali, the complainant, who was working in a nearby field and came running to his rescue, was also given lathi blows on his head by the two accused persons. Abdul Rahman receiving Harej AH's lathi blow fell down. Simonnessa (P. W. 3), wife of Abdul Rahman, was with him and hearing hue and cry Jab-bar, Asrab Ali and Abdul Gaffar having arrived, the accused persons fled away towards their house.

3. The defence version is that when the two accused persons were returning from the 'mel' by the road Abdul Rahman (deceased) passed filthy remarks at them resulting in altercation and Abdul Rahman and Ahmed Ali, being armed chased the two accused persons who fled to their house where Ahmed Ali assaulted Surui Ali, their younger brother, with a dao and a mutual marpit ensued at their courtyard; and in G.R. Case 2146/75 Ahmed Ali was convicted for it under Section 324 I.P.C.

4. The trial court disbelieved the defence version and relying on Ext, 3 and evidence of eye witnesses convicted the appellant Harei Ali as above, but acquitted Harmuj All Hence this jail appeal.

5. P. W. 1, Dr. T. N. Bhattacharjee, B.D.M. & H.O. Nowgong Civil Hospital, who held autopsy on corpse of Air dul Rahman found the foilowinc external iniuries:

One stitched wound 2" in length, sagi-tal (Longitudinal) in direction in the vertex.

Internal:

Skull One depressed fracture 3' x 1' cm right temporal bone near vertex. Membrane torn 4' x 1/2' in vertex. Brain material lacerated, Blood clots present In right temporal lobe over an area of 6' x 4.

6. All these internal injuries corresponded to the external injury. In his opinion the death was due to shock and haemorrhage as a result of the head in-Jury. He did not know where the injury was stitched.

7. The death of Abdul Rahman is not in dispute nor is it disputed that the death was due to the above injuries though it came after a day of occurrence.

8. P. W. 2 is Ahmed Ali. son of Abdul Rahman (deceased), who was also assaulted. He deposed that his father was spreading Ahu straws on the road in front of their house with his mother Simmonnessa, while he was reaping paddy at a distance of about 15 nals. The accused persons came out from their house armed with lathig and, as ordered by Sirai and Matlib, Harei and Harmuj assaulted Abdul Rahman, the tormet giving a lathi blow On his head while the latter on his shoulder. Seeing this when he rushed near the place of oc~ currence he was also given lathi blow on his head by both Harei and Harmuj and he raised alarm whereat Jabbar, As-rab, and Abdul Mazid arrived and the accused persons fled away towards their house. Abtful Rahman was taken On a cart to the Ahomgaon State Dispensary and he (the witness) lodged the ejahar. There was no enmity between the complainant family and that of the accused persons prior to the occurrence. In cross-examination he, however, states that there was no altercation between Abdul Rahman and the accused persons though he mentioned that in the ejahar. Abdul Rahman being assaulted fell down on the spread paddy stsaws which became smeared with blood. In cross-ex animation he admitted that the accused persons also filed a counter, case agains; him and his brothers and he had convicted for four months rigorous imprisonment for assaulting Suruj, the younger brother of the accused persons. He clearly denied the suggestions that they passed comments while the accused persons were returning from the 'mel'

saying that their hands and legs should be chopped off, and that resulted in altercation between the two groups, and that they chased the accused persons up to their house where he gave dao blows on Surui and mutual marpit ensued.

9. P. W. 3 is Simonnessa, wife of Abdul Rahman. Her evidence is that she and her husband were spreading paddy straws on the road in front of their house while Ahmed was working in a field. The accused Harei and Har-mui came there from their house with lathis in hand and Harei first gave a lathi blow on her husband's head, then Harmui also assaulted with lathi. Hearing her alarm her son Ahmed came to the spot and both the accused persons assaulted him also with lathis. Then Asrab and Jabbar having come to the place of occurrence hearing cries, on their sight the accused persons fled away towards their house. Her husband was carried home by Asrab and Jabbar wherefrom he was taken to a hospital, but that Doctor did not treat him. After police arrived her husband was again taken to hospital on police requisition. He was treated there and brought back home where he breathed his last at late hours of night. Her husband spoke before police at their house. This witness was thoroughly cross-examined but could not be dislodged from her statement that Harei first dealt a lathi blow on Abdul Rahman's head. She reiterated that her husband was in speaking condition when police arrived at their house but was not in a position to speak when he was returned back from hospital after treatment till his death. She denied the suggestion that she was not present at the place of occurrence. Thus, her evidence is of clinching nature, as regards Harej giving lathi blow on head of Abdul Rahman.

10. P. W. 4 is Asrab Ali. He deposes that he was catching fish near the drain of the road about 15 nals away from the place of occurrence. Just when he reached the road he saw Abdul Rahman being assaulted by the accused Herej and Harmui with lathi and no sooner than Ahmed Ali came to the spot and he was also assaulted by them with lathis and when the witness came near, the accused persons fled away towards their house, Jabbar also arrived along with him; and both carried the injured Abdul Rahman to his house. Though at first he said that Abdul Rahman was lone, later he said that Abdul Rahman's wife was also at the place of occurrence when the occurrence took place. He did not hear any hue and cry before the assault which he saw from a distance of about 10 nals. On receipt

of the blow Abdul Rahman raised alarm.

11. P. W. 5 is Abdul Jabbar, who was cutting paddy at his nearby field and hearing noise he ran towards the place of occurrence and as he was running he saw Harei and Harmui assaulting Abdul Rahman and Ahmed, and on reaching there he found, injuries On head of Abdul Rahman and Ahmed and also saw the accused persons fleeing therefrom. He also found Asrab and Simmonnessa there. In cross-examination he stated that he was the brother-in-law of the deceased Abdul Rahman by village courtesy and that he heard noise of hot altercation, did not see the actual mar-pit, but saw the accused persons returning towards their house lathis in band.

12. P. W. 6, Mofiz Uddin Ahmed, deposed that he carried on the preliminary enquiry, visited the place of occurrence, prepared the sketch map, and took the Btatements of Ahmed Ali and Abdul Rahman, Ext. 3 is the statement of Abdul Rahman recorded by him, which reads as under:

Upon being questioned, he says in injured state that he was laying out hay lor drying on the road near...when, 11 of a sudden, Haref All and Harmui Ali came carrying lathis and clubbed fen On the head felling him. He cannot say why he was assaulted. He can-Wrt talk much as he has head injuries.

13. On the next day he held the in-guest and challaned the dead body. He Bid not seize anything from the place of occurrence. Abdul Rahman was examined at about 6.30 P.M. inside his house where he was in lying condition. He was not given any treatment till the Statement was recorded. At 7 P. M. he forwarded Abdul Rahman to the State Dispensary. The injured's condition according to this witness was very serious and after saying 3/4 sentences he complained of pain in head and he could not say anything further. None except Ahmed Ali and Simmonnessa were prer sent when the statement was recorded

14. From the above corroborative account of the eye witnesses there arises no doubt that appellant Harej first dealt lathi blow on the head of Abdul Rahman. The medical evidence shows one external injury 2' in length, sagital (Longitudinal) in the direction in the vertex. Corresponding to this external injury one depressed

fracture 3' x 1' of the skull on right temporal bone near vertex. The death was due to shock and haemorrhage as a result of the head injury. The evidence of P. W. 3 particularly is clinching in this regard. She clearly stated that Harei Ali first gave a lathi blow on Abdul Rahman's head. The statements of P. Ws. 4 and 5. and in Ext. 3 that both Harei and Harmui assaulted Abdul Rahman are to be read with that of P. W. 3, who being the wife that standing by could notice the assault more closely. P. W. 2 corroborates P. W. 3 in this regard.

15. Miss P. Das, appearing as Amicus Curiae. submits that in view of the cross case in which P. W. 2 Ahmed Ali was convicted for assaulting Suruj in a mutual marpit the prosecution version was not reliable. We do not find sufficient evidence in support of this submission. The particulars of the cross case have not been proved in this case, nor is it proved that it arose out of the same transaction. The accused-appellant submitted a written statement under Section 313 of the Code of Criminal Procedure. But the situs of this offence has been proved to be the road and not the courtyard of the accused, as stated by him. Counsel further submits that the trial Court erred in law in treating fixt. 3, which was hit by Section 162 Cr. P. C, as a dying declaration, and in relying on It,

16. P. W. 6, Maflzuddin Ahmed stated: 'I met injured Abdul Rahman at his residence. Ext. 3 is the statement of the injured Abdul Rahman'. In cross-examination he said:

Abdul Rahman Khan was examined at about 6.30 P. M. inside his house in lying condition. He was not given any treatment till I recorded his statement. Then at 7 P. M. I forwarded him to State Dispensary for treatment with requisition. I cannot say whether he was treated afterwards or not. His condition was very serious and after saying 3/4 sentences he complained of pain in head and he could not say anything further. At the time of his recording statement, none was present except Ahmed Ali and Simonnessa.

17. The contention that the statement is hit by Section 162 Cr.P.C. is not sustainable in view of the provisions of Section 162(2) of the Code of Criminal Procedure, which says:

(2) Nothing in this Section shall be deemed to apply to any statement falling within the provisions of Clause (1) of Section 32 of the Indian Evidence Act, 1872, or to affect the provisions of Section 27 of that Act.'

Section 32(1) of the Evidence Act reads:

(1) When it relates 'to cause of death. When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was Or was not, at the time when they were made, under expectation of death, and whatever may Be the nature of the proceeding in which the cause of his death comes into question.

18. Thus, the statement in Ext. 3 would be protected by Section 162(2) of the Code of Criminal Procedure, 1973.

19. In Eajindra Kumar v. State AIR 1960 Puni, 310 : 1960 Cri LJ 851 where the statement of the deceased was recorded by police under Section 161 of the Cr. p. C, it was held to be admissible under Section 32(1), even though the deceased died much later and was not in immediate apprehension of death when he made the statement, This was followed in Kishan Singh Munsha Singh v. State

. In Re Kalusingh Motisingh : AIR 1964 MP30 , relying on AIR 1939 PC 47 : 1939-40 Cri LJ 364 AIR 1960 Bom 290 : 1960 Cri LJ 894 and AIR 1960 Punj 310 : 1960 Cri LJ 851. it. was held that a statement of the deceased made to other caste members before the attack but after the incident earlier in the morning was admissible, not regardine the cause of his death; but as one regarding a circumstance of the transaction which resulted in his1 death. Dying declaration need not have been made in expectation of death. Tehal Singh v. State of Punjab. : 1979 CriLJ1031 .

20. As a dying declaration such a statement has naturally to be scrutinised with care as the maker is not available for cross examination, but it is settled law that a

dying declaration, if believed, can form the basis of conviction. Where after making the statement before the police, the victim succumbed to his injuries the statement can be treated as a dying declaration and is admissible under Section 32(1) of the Evidence Act (Munnu Raja v. State of Madh Pra : 1976 CriLJ1718 .) If the truthfulness of a dying declaration is accepted it can always form the basis of conviction of the accused : 1978 CriLJ644 , : 1972 CriLJ828 .) The statement in Ext. 3 may not have been full in particulars as he could not speak further in pain. The statement of a dying person cannot be judged by the standard of fullness of particulars, (Som Nath v. State of Haryana : 1980 CriLJ925 .) Where a dying declaration is believed by the court a conviction can be based upon it even without any corroboration Khusha v. State of Orissa : 1980 CriLJ408 ; Jorubha Juser Singh v. State of Gujarat : 1980 CriLJ314 . A dying declaration cannot be ignored where crucial facts are found in it. : 1981 CriLJ9 .

21. It is appropriate to refer to the note of caution in Dalip Singh v. State of Punjab 1979 Cri LJ 700 : AIR 1979 SC 1173 that although a dying declaration recorded by a Police Officer during the course of the investigation is admissible under Section 32 of the Indian Evidence Act, in view of the exception provided in Sub-section (2) of Section 162 of the Cr. P. C, 1973, it is better to leave such dying declaration out of consideration until and unless the prosecution satisfied the court as to why it was not recorded by a Magistrate or by a Doctor. As observed in Munnu Raja v. State of Madhya Pradesh : 1976 CriLJ1718 , the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged. Not that such dying declarations are always untrustworthy but, that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the Police Officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.

22. In the instant case, of course, the statement was not recorded as a dying declaration. Circumstances whereunder it was recorded are clear. Besides, we find sufficient corroboration of Ext. 3 in the depositions of the eye witnesses, which by themselves are sufficient to found conviction.

23. The last question is that of the sentence. The F. I.R. mentions altercation. The evidence of the eye witnesses as well as the written statement of the appellant under Section 313 Cr.P.C. 1973 leave no doubt that the assault was preceded by some altercation which perhaps related to the outcome of the village 'mel'. Provocation was a natural probability. The quarrel was sudden and the fight was in the heat of passion. There was no previous enmity or erudge between the families. There was only one external injury and the internal injuries did correspond to it. The lathi with which the injury was caused on Abdul Rahman's head has not been seized. It is also in evidence that at the sight of Gaffar and Asrab the accused ran away towards their house. There is no evidence of the accused having taken undue advantage or acted in a cruel or unusual manner. The intention to cause death is not proved. We, therefore, consider it to be a case under Section 304 Part I, I P. C. rather than under Section 302 I. P. C The accused-appellant is stated to be 22 years on the date of examination (15-3-80), while the occurrence was on 25-7-75, when he was a teenager.

24. Considering all these factors we judge that the ends of justice and crime prevention will be met if the appellant is convicted under Section 304 First Part and sentenced to rigorous imprisonment for 6 (six) years. We order accordingly. Appeal allowed to that extent.

25. The appellant shall surrender to serve out the remaining part of the sentence.

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