

Tunda Vs. Rex

Tunda Vs. Rex

SooperKanoon Citation : sooperkanoon.com/451136

Court : Allahabad

Decided On : Jul-11-1949

Reported in : AIR1950All95

Judge : Bind Basni Prasad, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 80, 87, 304 and 304A

Appeal No. : Criminal Appeal No. 330 of 1948

Appellant : Tunda

Respondent : Rex

Advocate for Def. : J.S. David, Adv.

Advocate for Pet/Ap. : B.S. Darbari, Adv.

Disposition : Appeal allowed

Judgement :

Bind Basni Prasad, J.

1. Tunda, aged twenty-four years, a resident of village Jaoli, district Mathura, was sent up by the police under Section 304, Penal Code for having caused the death of one Munshi. Learned Sessions Judge, however, acquitted him of that charge but convicted him under Section 304A, Penal Code for having rashly caused the

death of Munshi. The question is whether or not the appellant was guilty of a rash and negligent act within the meaning of S. 304A.

2. The prosecution case was that the appellant and Munshi were fond of wrestling and on the morning of 13th May 1947, the appellant invited Munshi to the akhara in Kanhaiya's bagichi for a wrestling bout. They wrestled there. It is alleged that after sometime the deceased said that he would not wrestle any more and went to adjoining chabutra where he began to put on his dhoti. The prosecution goes on to say that the appellant then caught hold of him and threw him down on the hard ground with head downwards with the result that Munshi's skull was fractured and he died. There was an allegation of previous enmity between the appellant and Munshi.

3. Learned Sessions Judge has carefully analysed the evidence. He has held that there was no previous enmity between the parties. That is a correct conclusion. If there had been any such enmity, it is highly improbable that the deceased would have gone with the appellant to the akhara. There was a clear absence of intention on the part of the appellant to cause the death of Munshi.

4. Mr. David holding the brief of the learned Government Advocate contends that if the appellant threw down Munshi on the hard chabutra, then certainly the appellant was guilty of a rash and negligent act within the meaning of Section 301. I have looked into the evidence of the Investigating Officer. He does not state that he found any marks on the chabutra to indicate that the occurrence took place there. The eye-witnesses, Joti, Tula Ram, Lila and Bhup Singh, who were all 'chance' witnesses, were disbelieved by the learned Sessions Judge on account of certain inconsistencies in their evidence and inherent improbabilities in their evidence. I agree with him that the eye-witnesses cannot be believed. There is thus no evidence before us that Munshi was thrown down by the appellant on the hard chabutra. It is improbable also and there was no reason for the appellant to throw down Munshi on the hard ground.

5. Learned Sessions Judge has summed up this finding in the following words:

'To me it appears that, whilst having a wrestling bout, Munshi deceased was thrown and his head came in contact with the hard ground of the chabutra which resulted in the fracture of his skull.'

The investigating Officer has stated that the the chabutra adjoins the akhara. There can be no doubt that the fracture was caused by the impact of the skull with the edge of the chabatra. But this impact was accidental and not intentional as the prosecution would have us believe. Section 80, Penal Code provides that:

'Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.'

Section 87 provides:

'Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.'

6. The illustration under Section 87, Penal Code is relevant for the purposes of this case. It runs as follows:

'A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.'

7. The position in the present case is that the appellant and deceased were friends, both fond of wrestling, and the injury was sustained by Munshi accidentally. When they agreed to wrestle with each other, there was an implied consent on the part of each to suffer accidental injuries. There is no proof of any foul play on the part of the appellant. Here I may refer to the case of Basant Singh

v. Emperor, A. I. R. (14) 1927 Lah. 880: (29 Cr. L. J. 487). In that case Basant Singh with some companions went into a jungle to shoot pigs. He took up his position and waited while his companions proceeded to beat the pigs towards him. In due course a boar was driven in his direction and Basant Singh fired at it. He, however, missed the boar and hit Amar Singh causing him injuries which resulted in his death. It was held that the act of Basant Singh in firing was neither negligent nor rash within the meaning of Section 304A, Penal Code. This case was followed in Shakur Khan v. Emperor, A. I. R. (18) 1931 Lah 64 : (32 Cr.L.J. 587). I may also refer to King-Emperor v. Timmappa, (1901) 3 Bom. L. R. 678. The present case falls completely within Sections 80 and 87, Penal Code. The appellant is not guilty under Section 304A.

8. The appeal is allowed and the conviction and sentence are set aside. The appellant need not surrender to his bail.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com