

Gorey and anr. Vs. Rex

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Court : Allahabad

Decided On : Sep-13-1948

Reported in : AIR1949All191; 1949CriLJ250

Judge : Wanchoo and; Agarwalla, JJ.

Appellant : Gorey and anr.

Respondent : Rex

Judgement :

ORDER

Agarwalla, J.

1. Gorey, Bhagwan, Ram Dayal, Earn Singh and Murli were charged under Section 304 read with Sections 149, 325 read with Section 149 and 147, Penal Code for being members of an unlawful assembly and, in prosecution of the common object of this assembly, for having committed the offence of rioting, and also culpable homicide not amounting to murder by causing such an injury to Sukha as resulted in his death and also voluntarily causing grievous hurt to Hoti. Earn Dayal, Earn Singh and Murli were acquitted by the learned Sessions Judge. Gorey and Bhagwan were convicted under Section 325, Penal Code, only and sentenced to two years' rigorous imprisonment each. They have come up in appeal to this Court.

2. The appellants and the other three accused who were acquitted are all residents of village Karaiya, police station Sahpau in the Mathura district. Gorey and Bhagwan appellants are brothers. Ram Dayal and Earn Singh were also brothers and Murli was their cousin. Ram Singh accused was also the headman of the village Hoti and Sukha were nephew and uncle and lived together in one house. Hoti had three more brothers, namely, Amru, Ram Prasad and Gulab and had one more uncle Churaman. Now Hoti and Sukha's house was near the house of Gorey and Bhagwan. Gorey and Bhagwan are sons of one Ghansham.

3. The prosecution case was that there was some open space in front of the houses of Sukha and Hoti on the one hand and Gorey, Bhagwan and Ghansham on the other. There were a number of cattle troughs in that open space. About fifteen days before the occurrence of 18th September 1945, which is the subject-matter of investigation in the present case, Ghansham and his sons Gorey and Bhagwan had constructed a new cattle trough in this open space. This was in front of Sukha and Hoti's house. No cattle, however, were tied on this cattle trough till 18th September 1945, On that date at about 8 P. M. Ghansham and his sons brought their cattle to be tied at this cattle trough, whereupon there arose a dispute between these three persons on the one hand and Hoti on the other. Hoti untied the cattle. Ram Singh and Murli incited Ghansham, Gorey and Earn Dayal to give a beating to him. He was given a beating. Hoti cried out and fell down. On hearing his cries, Sukha came out and tried to save him and he was also beaten by the above named person B.

4. The injuries on the person of Hoti comprised of two contused wounds on the front part of the head and two simple contusions, one of which was grievous as it was accompanied by fracture of the skull and two contusions which were simple. The injuries on the person of Sukha were five in number-four being simple and one being grievous. This grievous injury was a contused wound on the head. At the time nobody suspected that under this contused wound there was a fracture of the skull too. The whole skin of the size of a rupee at the place of this injury on the head was missing. It is unfortunate that Sukha's injury was neither correctly diagnosed nor correctly treated by the medical officers concerned. Sukha remained as an indoor patient in the Sadabad dispensary from 18th September to

15th October 1945, and superficial treatment only was given. On 8th of October a note in the bedhead ticket was made to the effect that the wound had dried up and that the patient, was better. On 12th October pus was again found in the wound. On 15th October he was discharged. Sukha again had to come back to the hospital on 21st October. He remained there till 26th October and was again allowed to go back to his house. Now his injury had become septic and the Sadabad dispensary was not able to cope with it. He went to the Mathura Sadar Hospital and remained there as an indoor patient from 12th November 1945, to 7th December 1945. He left for his home without the wound being healed up, with the result that after his return to his house he died on 22nd December 1945, of meningitis and pneumonia.

5. The post mortem report of Sukha deceased showed that there was a septic wound $2\frac{1}{2}' \times 3\frac{3}{4}'$ x bone deep on the top of head slightly on right side. There was discharge of pus and the margins were unhealthy. On opening the scalp it was found that the underneath surface of the scalp was all septic and covered with pus. The scalp as a whole was found to be very thin and atrophied. There was a fracture in an area $1\frac{1}{2} \times 1'$ on the right parietal bone on the top. The front parietal and inter parietal and parieto occipital sutures were all covered with pus. The whole of periosteum covering the top of skull bones was disintegrated and covered with a thin layer of pus. The periosteum underneath both parietal and occipital bonea were partially atrophied and were in an inflamed condition. The meninges were all full of pug and deeply congested. The brain was deeply congested. Periosteum as a whole covering the base of skull were in an inflamed condition. The pleura was badly adherent on both the sides.

6. Doctor A. N. Mullick, who conducted the post mortem examination, deposed that the wound had become septic due to some outside infection possibly due to dirty dressing and bad handling. He further said that the doctor in charge was going by the external condition of the wound when he noted its condition in the bed-head ticket. It is a sad commentary on the sense of duty and efficiency of the doctor in charge of the Sadabad hospital. According to Doctor Mullick the injury on the head was not dangerous to life or fatal even with a fracture of the skull as compression of the brain had not been produced. There-is no doubt that if the

case had been handled properly Sukha would not have died, and as the wound became septic because of dirty dressing or bad handling by the persona concerned, they have exhibited a woeful lack of sense of duty and efficiency.

7. The first information report in that case was made on the same day on which the occurrence took place at about 11 p. m., by Sukha and Hoti themselves. No names of witnesses were given in this report. It was merely stated that they would be produced in Court. No action seems to have been taken on this report by the police as it was recorded under Sections 323 and 504, Penal Code. Ram Prasad, brother of Hoti, then filed a complaint on 26th September 1945, and it was upon this complaint that the case was ultimately inquired into and committed to the Court of Session. Ram Prasad did not disclose the names of the witnesses in the complaint nor even in the statement made on the back of the complaint. A great deal of capital was made because of this omission of the mention of the names of witnesses, both in the F. I. R. and in the subsequent complaint. The explanation for this omission given on behalf of the prosecution was that the names were not mentioned because it was feared that Ram Singh accused, who was the headman of the village, would be able to influence the witnesses because of his high position. The learned Sessions Judge has believed this explanation and we see no reason to differ from him.

8. The defence of both the appellants was that there was no such incident as alleged by the prosecution and they, at any rate, did not take part in it.

9. On behalf of the three accused who have been acquitted a counter theory was put forward and this was that there had been a fight, but the fight was between sukha, his brother Churaman and Hoti's brother Amru on the one side and Hoti and his brother Earn Prasad and Gulab on the other. This fight had taken place at Sukha's door on account of Amru having cut away Sukha's crop, and after this fight there had been a compromise between the combatants and after the compromise, in order to harm the accused with whom the complainants had previous enmity, they had foisted the causing of injuries of Hoti and Sukha on to the accused.

10. In support of the prosecution case five eye-witnesses were examined, namely, Hoti himself, Babu Lai Brahmin, Durag Singh Jat, Sukh Ram and Har Bhajan Brahmin. [After discussing the prosecution evidence his Lordship came to the conclusion that there was no satisfactory evidence on record as to the attack on Sukha. The judgment then proceeds thus:

11 The appellants along with their father undoubtedly beat Hoti causing one grievous injury and three simple injuries.

12. The next question is: what is the offence committed by the appellants. We think that there is no satisfactory proof on the record to show that Ghansham deceased and his two sons, the appellants, had any preconceived plan of attacking Hoti. Durag Singh's statement merely shows that Ghansham was having an altercation with Hoti while Gori and Bhagwan were sitting on the chabutra in front of their own house. In these circumstances we do not think that we can infer a prearranged plan to beat Hoti. It may be that because of the altercation and because of the action of Hoti in untying the cattle in the face of Ghansham and his sons, the three persons beat him in a fit of anger all of a sudden.

13. If Section 34, Penal Code, does not apply to the facts of the case, the next question is; whether all the three can be convicted under Section 325, Penal Code? Now it is not known as to which caused the grievous injury on the head of Hoti. In the absence of such evidence, can we convict all for causing grievous hurt to Hoti. In *Emperor v. Bishwanath Tiwari*, 1945 A. L. J. B. 631 : A. I, B. (S3) 1946 ALL. 168: 47 Cr. L. J. 632), Mulla J., was of the opinion on similar facts that all the accused could be convicted of an offence under Section 325, Penal Code. In that case, after pointing out that there was no evidence to show that there was a pre-arranged plan to beat the complainants and that, therefore, Section 34, Penal Code, could not apply to the facts of the case and after pointing out that none of the accused could be convicted under Section 304, Penal Code, his Lordship observed as follows:

At the same time I think when four persons simultaneously attack another person with lathis, it can fairly be presumed against every one of them that he had at least the intention of causing grievous hurt. I think, therefore, that each one of the

appellants in this case is guilty of an offence under Section 325, Penal Code.

Two propositions seem to have been laid down by His Lordship : 1) that where several persons attack another with lathis, the former can be presumed to have had the intention of causing grievous injuries; and (2) each one of them can be convicted of an offence of causing grievous injury although there is no evidence to show which one of them caused the grievous injury.

14. This case was commented upon by a Division Bench of this Court to which one of us was a party in *Dipa v. Emperor* 1947 A.L.J B, 208 : A.I.R. (34) 1947 ALL. 408 i 48 Cr. L. J, 858), In that case also the facts were similar, namely Section 34, Penal Code, did not apply as there was no pre-arranged plan and there was no evidence as to which of the accused who had beaten the complainant had given the grievous injury. The first proposition laid down by Mulla J. was not at all adverted to. The second proposition laid down by him was expressly dissented from. It was held that:

Where there is no evidence to indicate as to which, of the accused persons actually caused the grievous hurts none of them could be convicted of an offence under Section 325, Penal Code.

15. In the end all the accused were convicted under Section 323, Penal Code.

16. We are not called upon in this case to express any opinion upon the first proposition enunciated by Mulla J., and we agree with the decision in the case of *Dipa v. Emperor* 1947 A. L. J. B. 208 : A.I.R. (34) 1947 ALL. 408: 48 Cr. L. J. 858) that, in circumstances like these, none of the accused can be convicted -of an offence under Section 325, Penal Code; each one of them can be convicted only for the offence of causing simple injuries under Section 323, Penal Code.

17. As we are informed that there is some misunderstanding in *Dipa's* case : 1947 A. L. J. 208: A.I.R. (34) 1947 ALL. 408: 48 Cr. L. J. 858) (*ubi supra*), on account of the faulty headnote in the Allahabad Law Journal Reports, we wish to point out that the observations in that case are applicable only when Section 34, Penal Code, does not apply. If B, 84, Penal Code, is applicable to the facts of the case,

every one of the accused can be held guilty of causing grievous hurt and not merely simple hurt.

18. There is before us also an application in revision for enhancement of the sentence. The prayer for enhancement of the sentence is based upon the plea that the injuries to Sukha were of such a nature as were likely to cause death. It is argued that the mere fact that Sukha could y have been saved, but for the carelessness or negligence of the doctor is no ground for holding that an offence under Section 304, Penal Code, has not been made out. We have been referred to the following rulings on this point, *Fazla v. Emperor* A.I.R. (15) 1928 Lah. 851 (2) : 29 Cr. L. J. 678); *Nuro v. Emperor* 23 i.e. 744 : A.I.R. (I) 1914 Sind 105: 15 cr. L. j. 376); *Nga Paw v. Emperor* A.I.R. (23) 1936 Bang, 526:(38 Cr.L.J. 103); *King v. Abor Ahmed* A.I.R. (24) 1937 Bang. 396 : 38 cr. L. j. 1097 P. B.) and 'Russell on Crimes, vol. I, p. 59.' We express no opinion the point as in the present case we have already held that there is no reliable evidence in support of the allegation to connect the accused with the injuries caused to Sukha. No question, therefore, of any enhancement of sentence arises. We accordingly discharge the notice for enhancement.

19. The result, therefore, is that we allow this appeal, alter the conviction of the appellants from one under Section 325 to one under Section 323, Penal Code, and sentence both the appellants to undergo a sentence of one year's rigorous imprisonment each. They are on bail. They will surrender to their bail and serve out their sentence. The revision for enhancement of sentence is dismissed.