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Court : Allahabad

Decided On : Apr-29-1952

Reported in : AIR1953All203

Judge : Raghubar Dayal and ;Agarwala, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 299, 300, 302 and 304

Appeal No. : Criminal Appeal No. 419 of 1951

Appellant : Behari and ors.

Respondent : State

Advocate for Def. : Bhatt, Asst. Govt. Adv.

Advocate for Pet/Ap. : Bhagwan Das Gupta, Adv.

Disposition : Appeal partly allowed

Judgement :

Agarwala, J.

1. Behari, Kaddey and Tota, all residents of Aghapur, police station Milakpur, district Rampur, have appealed against their conviction under Section 302, IPC and sentence of death. There is also before us a reference for the confirmation of the sentence of death.

2. The prosecution case against the appellants was that Tota appellant, aged 20 years, a gardener, was on visiting terms with the deceased Khargi,a barber. For some time past Tota started to associate with Behari and Kaddey, appellants, and severed his connection with Khargi deceased. This was not liked by Khargi and he asked Tota to pay visits to him. Upon this there was an exchange of abuse between the deceased and the appellants and the relations between the parties became strained. On 22-8-1950 a little after sunrise the three appellants went to the choupal of the deceased armed with lathis and started belabouring the deceased. A river flows below the choupal of the deceased. After receiving injuries the deceased fell into the river. The appellants assaulted the deceased with lathis even after he had fallen in the river till he died and was drowned and his body was washed away by the river.

3. The villagers searched for the body of the deceased but could not find it. Later on, the body was found by the Sub-Inspector in a canal about half a mile from the place of occurrence. The body had been eaten by tortoises and the head and the face were bitten off and the skin had dropped off. The eye lids were absent. The post mortem examination was held the next day at about 1 P. M. The visible injuries on the body consisted of a contusion 2' x 3' on the left shoulder and another contusion 1' x 1' on the right shoulder. Soft tissues of head and neck were absent. There was a tria radia fracture of right parietal bone. In the brain there was clotted blood in an area 4' x 4' on the right lobe of cerebrum. The membrances were congested with petechial haemorrhage. In the opinion of the doctor, who performed the post mortem examination, death was due to coma following the injury on the head. The doctor in his statement in Court stated that the head injury could have been caused by one blow or by more than one blow and that the death was due to head injury and not to drowning because there was not much bloating and the deceased had not sucked in a large amount of water.

4. The appellants denied the commission of the offence and said that they had been prosecuted on account of enmity. In support of the prosecution case, Mohan, son of the deceased, who lodged the first information report, Masih Charan sweeper, who was grazing pigs on the bank of the river at the time of murder, Ishri, Bandu, Ghanshiam and Tirki, who were ploughing their fields at the banks of

the river, were produced as eye-witnesses of the incident. The statements of these witnesses are not free front contradictions. But having given our best consideration to the arguments of the learned counsel for the appellants upon the question whether they should be believed or not, we have come to the conclusion that in substance their statement that the appellants beat the deceased with lathis is true, but that the prosecution case that the deceased was beaten even after he had fallen in the river has not been satisfactorily established.

5. Having regard to the statement of the doctor we are satisfied that the deceased met his death as a result of coma caused by haemorrhage in the brain consequent upon the injury on the head and not by drowning. It is possible that there was only one injury on the head. There were two other injuries on the shoulders and they must have been caused by the two other persons.

6. As the question whether the injury received by the deceased on the head, though it caused death of the deceased, was sufficient in the ordinary course of nature to cause death, was not cleared up in the court below; we examined the doctor in this Court. He has stated that the injury caused in the present case was sufficient in the ordinary course of nature to cause death.

7. It is not clear from the evidence on record as to who caused the fatal injury on the head.

8. The question then is what offence has been committed by the person who caused the injury on the head and what offence has been committed by the other two appellants, having regard to the applicability of Section 34 and 35, Penal Code. It is contended by learned counsel for the appellants that the person who caused the injury on the head could not be held guilty of murder under Section 302, I. P. C., but must at the most be held guilty of culpable homicide not amounting to murder under Section 304, I. P. C. and that the other two accused, having regard to the common intention of them all, which was merely to beat the deceased, could not be held guilty either of murder or of culpable homicide not amounting to murder but only of causing simple injuries, even if Section 34 or 35, I. P. C. were applied to the case.

9. A large number of authorities have been cited before us, which are not easily reconcilable. Opinions expressed in cases decided by the various Courts in India differ not only with regard to the application of Section 299, 300 and 304, I. P. C. to the particular facts of a case but also with regard to the true meaning of those sections. It is, therefore, necessary first to examine the sections themselves and to determine their true meaning.

10. Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. It is strange that in some cases Section 299 has been taken to be the definition of culpable homicide not amounting to murder, although the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first the genus 'culpable homicide' is defined and then murder, which is a species of culpable homicide, is defined. What is left out of culpable homicide after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder.

This can best be understood if we put Section 299 and 300 side by side.

Section 299

Section 300

A person commitsculpable homicide, if the act by which the death is caused is done.

Subject to certainexceptions culpable homicide is murder, if the act by which the death iscaused is done.

(a) With the intentionof causing death,

(1) With the intention of causing death,

(b) With the intentionof causing sueh bodily injury as is likely to cause death,

(2) With the intention of causing such bodily injuryas the offender knows to be likely to cause the death of the person to whomthe harm is caused.

(e) With the knowledgethat the act is likely tocause death.

(3) With the intention of causing bodily injury toany person, and the bodily injury intended to be inflicted is sufficient inthe ordinary course of natureto cause death,

(4) With the knowledge that the act is so imminentlydangerous that it must in all probability cause death, or such bodily injuryas is likely to cause death, and there is no excuse for incurring the risk.

Clause (a) of Section 299 corresponds with Clause (1) of Section 300. Clause (b) of Section 299 corresponds withClauses (2) and (3) of Section 300, and Clause (c) of Section 299 corresponds with Clause (4) of Section 300.

11. 'Clause (b) of Section 299 and Clause (3) of Section 300.' Clause (b) of Section 299 speaks of intention to cause an injury likely to cause death. Clause (3) of Section 300 speaks of an intention to cause bodily injury which injury is sufficient in the ordinary course of nature to cause death. The word 'likely' means 'probably'. It is distinguished from 'possibly'. When the chances of a thing happening are even with or greater than, its not happening, we say that the thing will 'probably' happen. Whrfn the chances of its happening are very high, we say that it will 'most probably' happen. An injury 'sufficient in the ordinary course of nature to cause death' merely means that death will be the 'most probable' result of the injury having regard to ordinary course of nature. The expression does not mean that death must result in which such an injury is caused.

Therefore, the expression 'sufficient in the ordinary course of nature' is a species of the genus 'likely'. In Section 299 and 304, the word 'likely' is used in a comprehensive sense as including both the higher and the lower degrees of likelihood. This is very often lost sight of. In Section 308, the word 'likely' is used in the sense of a higher degree of likelihood only as subsequent discussion will show. In common parlance, however, the word 'likely' is used only as denoting a lower degree of likelihood. It is in this sense that the word is used in decided cases

to distinguish between an offence falling under Section 302 from that falling under Section 304. I shall also hereafter use it in that sense except where the contrary appears from the context.

12. When we talk of the intention of causing an injury 'likely to cause death' it is not necessarily implied that the consequences of the injury are foreseen. All that is necessary to be shows is that such an injury was intended as in fact is likely to cause death. So also in Clause (3) of Section 300, the intention spoken of is to cause a particular injury which in fact is of such a nature as is ordinarily sufficient to cause death. It is not necessary that the accused should have the knowledge that the injury he intends to cause will be sufficient in the ordinary course of nature to cause death.

13. In this connection the case of -- 'Emperor v. Damullya Molla : AIR1931 Cal261 , is very often quoted in support of the view that it must be proved that the accused had knowledge that the injury which he intended to cause was sufficient in the ordinary course of nature to cause death. This is a misreading of that decision. In that case there was a trivial quarrel between husband and wife, the husband at first beat his wife with a lathi and then picked up a water pot and hit her on the head which caused a fracture of the left parietal bone. The case was tried by a jury who held that the accused was not guilty of murder but was guilty under Clause (2) Section 304 I.P.C. It was urged in the High Court that the offence was of murder. The contention was repelled by the Court.

Rankin, C. J., observed:

'The question in such cases is not concluded by any amount of reasoning from the mere fact that the injury caused did in fact result in death. What one has to see, is, first what degree of injury did the man intend, and secondly, what did he know as to the consequences of such injury. In this case, the jury were quite entitled to find that he did not know that the amount of injury which he would do when he struck the woman on the head by a waterpot would likely cause death nor did he intend such an injury as in the ordinary course ofnature would cause death.'

The learned Chief Justice was endeavouring to show that the injury actually inflicted could not have been intended to be inflicted and from that point in view his Lordship referred to knowledge of the consequence of such injury. As the husband could not imagine that he would be causing fracture of the skull by hitting the woman with a water pot, he could not be said to have intended an injury that would be sufficient in the ordinary course of nature to cause death or even an injury which was likely to cause death.

14. The difficulty that usually arises is of ascertaining the intention of the accused when, say, the injury actually caused is fracture of the skull and compression of the brain resulting in death. The injury actually caused is sufficient in the ordinary course of nature to cause death. Did the accused intend to cause the injury actually caused or did he merely intend to cause a wound on the head? The presumption is that man intends the natural consequences of his act. But this doctrine cannot be carried too far, for otherwise, it would eliminate from the law the distinction between intentional and negligent or accidental wrong doing.

The true rule is that where the injury caused is not the result of accident or of negligence, a strong presumption arises that the injury caused was intended to be caused, though this presumption may be rebutted by other circumstances, e. g. the motive of the accused, the nature of attack, the time and place of attack, the position and condition of the deceased, the number of injuries, the force used etc.

15. 'Clause (b) of Section 299 and Clause (2) of Section 300'. When Clause (3) of Section 300 speaks of an injury 'sufficient in the ordinary course of nature to cause death,' it contemplates an injury caused to a normal grown up human being, and does not take account of the special physical condition of the person harmed accelerating his death. When an injury which would not be sufficient to cause the death of an ordinary grown up human being, is sufficient to cause the death of a person in a sub-normal state of health, e. g., by reason of age, disease, or weakness or previous injuries, it is spoken of as an injury 'likely to cause the death of the person 'to whom the harm is caused'', bearing in mind that person's special physical condition. This is provided for in Clause (2) of Section 300.

A person is guilty of murder if, having full knowledge of the peculiar physical condition of another, and further having knowledge that the injury intended to be caused will most likely result in that person's death on account of his peculiar physical condition, he causes the injury to him and death ensues.

The conclusion that Clause (2) of Section 300 refers to the case of a person with a peculiar physical condition and to the accused having knowledge of that peculiarity, is reached on the following considerations:

(a) A comparison of Clauses (3) and (2) indicates that while in Clause (3), the person to whom the harm is caused is not spoken of at all, he is particularly mentioned in Clause (2). The inference is irresistible that some peculiarity of the person harmed was intended by the legislature to be within the knowledge of the accused in Clause (2).

(b) Illustration 2 to Section 300 which undoubtedly illustrates the meaning of Clause (2) also speaks of a person with a diseased spleen.

(c) If no peculiar physical condition of the person harmed were intended, then Clause (2) would cover a case of an injury which is merely likely to cause death and not necessarily 'sufficient in the ordinary course of nature to cause death' to be enough to make the offender guilty of murder, provided he knows this fact.

Since there is no direct evidence of knowledge of a person and knowledge of a normal human being is imputed to all, the condition requiring knowledge that the injury is likely to cause death of the person harmed (assuming the person harmed to be a normal one) will serve no particular protection to the offender, and in practically all cases a person will be held guilty of murder even if the injury is not sufficient in the ordinary course of nature to cause death, but is merely 'likely to cause death', i. e., even when the probability of death is not very high. This would render Clause (3) wholly superfluous and unnecessary.

(d) In case of doubt, a penal statute must be construed in favour of an accused rather than in favour of the prosecution. The present tendency is to take a more humanitarian view than used to be taken formerly.

16. This view is supported by opinion of Melville, J. in -- 'Reg v. Govinda', 1 Bom 342. See also -- 'The King v. Aung Nyun', AIR 1940 Rang 259 (FB), & --'Babulal Beharilal v. Emperor', AIR 194G Nag 120.

17. In almost every case in which a somewhat contrary opinion seems to have been expressed, the case was really governed by Clause (3) of Section 300. For example:

18. (1) In -- 'Ghurey v. Rex : AIR1949 All342 (decided 'by P.L. Bhargava J. and one of us) a number of injuries were caused on different parts of the body, but none on any vital part of the body. Death was due to shock & haemorrhage caused by multiple injuries. It was held that the multiple injuries inflicted upon the man were sufficient in the ordinary course of nature to cause death. But it was added 'at any rate, were such as were likely to cause death.' These additional remarks were unnecessary and were made under the impression that Clause (2) of Section 300 applied even to normal persons. On a further consideration of the matter we have come to a contrary conclusion.

19. (2) In -- 'Mewa v. Rex', 1950 All LJ 75 (Kidwai and Chandiramani JJ.) the injuries caused were sufficient in the ordinary course of nature to cause death. The opinion expressed in - -'Gajraj v. Emperor', 1942 Oudh WN 316 which was referred to with approval in the above case restricting the applicability of part 1 of Section 304 to cases falling under the exceptions to Section 300 is with great respect unsupportable.

20. (3) The same remarks apply to --'Emperor v. Ratan AIR 1932 Oudh 186.

21. Clause (c) of Section 299 and Clause (4) of Section 300.

Both require knowledge of the probability of the act causing death. Clause (4) of Section 300 requires this knowledge in a very high degree of probability. The following factors are necessary:

(i) that the act is imminently dangerous, (ii) that in all probability it will cause death or such bodily injury as is likely to cause death, and (iii) that the act is done without any excuse for incurring the risk.

22. Clause (4) of Section 300 is not intended to apply to cases in which a person intends to inflict an injury likely to cause death because the section speaks Of knowledge and not of intention of an injury likely to cause death. Usually it applies to cases in which there was no intention of causing death or of causing any bodily injury. It may, however, also apply to an act in which the intention is to cause simple grievous hurt merely, but the act is done with the knowledge and in the circumstances mentioned in the clause.

23. As a result of the above discussion it may be laid down that Section 304 will apply to the following classes of cases, (i) when the case falls under one or the other of the clauses of Section 300 but it is covered by the exceptions to that section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower, degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300, (iii) when the act is done with the knowledge that death is likely to ensue but there is no intention to cause death or an injury likely to cause death. In such sases there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death.

24. When death is caused by a lathi blow or blows, the nature of the offence committed will depend upon -- (a) the intention of the accused, or/and (b) the knowledge of the accused, and (c) the nature of the injury caused.

25. At one time it was considered that the wielding of a lathi was an imminently dangerous act and that, therefore, when a severe injury was caused resulting in death, the case fell within the purview of Clause (4) of Section 300 vide --'Garib v. Emperor', 17 All LJ 985, -- 'Emperor v. Umrao', 21 All LJ 316 and -- 'Parshadi v. Emperor', 1929 All LJ 244.

26. This view has not been consistently followed in this Court.

27. In -- 'Perana v. Emperor', 1936 All LJ 333, it was observed that

'the use of lathis is certainly dangerous but is not so dangerous that one would suppose that anybody would in the ordinary course think that death is a probable cause of the use of a lathi. Our experience is that lathis are frequently used and result in nothing more than injuries which are simple hurts or at the most grievous hurts.'

In --'Ganga Sahai v. State', Cri Appeal No. 1072 of 1949, decided by Sapru and V. Bhargava, JJ. on 27-3-1951, it was observed:

'The learned Sessions Judge appears to think that because the fatal injuries were caused by a lathi which is a dangerous weapon Section 302 was the right section to apply. As is well known, this view no longer finds favour with this Court. It cannot be said of every lathi blow that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.'

Some times where death resulted from a single lathi blow on a vital part of the body e. g. the head, it has been held that the case fell under Section 304 because the injury intended to be caused was such as was 'likely to cause death' vide -- 'Khiman v. Emperor', 1936 All LJ 73. -- 'Perana v. Emperor', 1936 All LJ 333. But in none of these cases Clause (3) of Section 300 was discussed.

28. Where actual injury caused was sufficient in the ordinary course of nature to cause death and it could not be said that the injury was accidentally or negligently caused a strong presumption arises that the intention was to cause the injury which has been caused and as such the case would fall under cl, 3 of Section 300. It would be particularly so if the attack was premeditated,just as it was in the present case. This presumption may be rebutted. It is not the law that where death is caused by one lathi Wow alone the offence will invariably fall under Section 304, IPC. In determining the intention other circumstances as have been already mentioned in the earlier part of the judgment will also have to be taken into consideration.

29. In the present case the injury was sufficient in the ordinary course of nature to cause! death. There is nothing to show that the injury was caused accidentally or negligently. The presumption, therefore, is that the intention was to cause the

injury which was actually caused or in other words the intention was to give a smashing blow on the head. The fact that there was one injury only does not destroy the presumption, because the force with which the blow was caused must have been very great. The motive was to take revenge on the deceased for having abused the appellants though this was in exchange of the abuse showered upon the deceased by the appellants themselves.

The motive further was to prevent the deceased from asking Tota appellant to visit the deceased. The motive was not strong epough for causing death. Even if the accused did not have the intention of causing death, they certainly had the intention of beating the deceased. In the absence of any definite evidence that the intention of giving the beating was confined to causing simple hurt or grievous hurt or an injury likely to cause death ('likely' used in the sense of a lower degree of likelihood), the presumption of intention drawn from the nature of the injury actually caused remains unshaken. It must, therefore, be held that the person who actually caused the injury on the head was guilty of murder as defined in Clause (3) of Section 300.

30. The same intention must be attributed to the other two persons for the very same reasons as stated above. In their case also there is nothing to show that the intention of beating was merely confined to causing simple hurt or grievous hurt or an injury likely to cause death. It is true that they inflicted simple injuries but all the three were acting in concert and the intention to be inferred must be the intention deducible from the entire act committed by all the three. The entire act included the injury on the head. The intention of the other two persons must be gathered not merely from the two simple injuries which they inflicted but also from the injury on the head. The reason is that under Section 34 when a criminal act is in furtherance of the common intention of all, everyone of the joint actors is responsible for the entire act. When three persons attack another with lathis, not upon a sudden quarrel but in concert and after previous consultation, they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention.

31. If, however, we conclude that the common intention was to give simple hurt or grievous hurt or an injury likely to cause death, then the mere fact that one of them has actually caused an injury sufficient in the ordinary course of nature to cause death would be immaterial and the persons who actually did not cause the fatal injury would not be guilty of murder but would be guilty of causing simple hurt or grievous hurt or of culpable homicide not amounting to murder, as the case may be. The reason is that in such a case either the person who caused the fatal injury, (injury sufficient in the ordinary course of nature to cause death) caused it either accidentally without intention of causing such injury, or, exceeded the common intention and formed a stronger intention of causing an injury of that nature.

If he caused the injury without the intention of causing the injury sufficient in the ordinary course of nature to cause death, he would not be guilty of murder under Section 300, but would not (sic) be guilty of the offence which would be made out upon and (sic) the intention and knowledge attributed to him, i. e. either for simple hurt, for grievous hurt, or for culpable homicide not amounting to murder, and if he could not be held guilty of murder, his associates too could not be held guilty of murder.

If on the other hand he exceeded the original common intention and formed the intention of causing the injury which was actually caused, he alone would be guilty of causing murder but his associates would not be guilty of murder, because the act was done by him not in the furtherance of the common intention which was of a lower degree but in furtherance of a different intention which was of a higher degree, and which was formed by him alone. It should be remembered that Section 34 makes persons liable for the 'acts' of an associate and does not make them liable for the 'offence' which might be committed by an associate, and further Section 34 makes persons liable for the act of an associate only when the act was done 'in furtherance of the common intention' and not in furtherance of a different intention.

The intention to cause an injury sufficient inthe ordinary course of nature to cause death isan intention which is quite different from theintention to cause simple hurt or grievous hurt oran injury likely to cause death.

32. In the present case, however, as already discussed above, there is nothing to show that the intention of the person who actually caused the fatal blow on the head was different from the intention of the others. Hence all the three will be liable for murder as defined in Clause (3) of Section 300.

33. In a case of this nature where only one blow on the head was given and the lathi was an ordinary lathi used by villagers, neither ringed nor extra heavy, and where it is not known who gave the fatal blow, we consider that the lesser penalty provided by law will meet the ends of justice.

34. The result, therefore, is that while affirming the conviction of the appellants under Section 302,I.P.C. we substitute the sentence of transportationfor life in place of the sentence of death imposedby the lower Court. The appeal is allowed onlyto this extent. The reference is rejected.