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Court : Allahabad

Decided On : Jan-18-1957

Reported in : AIR1957All377; 1957CriLJ617

Judge : Roy and ;Sahai, JJ.

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

Appeal No. : Criminal Appeal No. 1546 of 1956

Appellant : Hafizullah

Respondent : State

Advocate for Def. : Shri Rama, Dy. Govt. Adv.

Advocate for Pet/Ap. : S.K. Verma, Adv.

Disposition : Appeal dismissed

Judgement :

Roy, J.

1. The appellant Hafiz Ullah son of Manzoor Khan, aged twenty-two years, a resident of village Shahjhahanpur, within police circle Kithore, in district Meerut, has been convicted Under Section 302, I. P. C. for the murder of one Abdul Rahim on the 26th of January, 1956, and also under Section 307, I.P.C. for causing

injuries on the person of one Rafiq with knife with such intent that if death had been caused he would have been guilty of the offence of murder. He has been sentenced to death under Section 302, I.P.C. and to seven years' rigorous imprisonment under Section 307, I.P.C. He has appealed against his conviction and sentence. There is also before us the usual reference for the confirmation of the death sentence.

2. The prosecution story lay within a very narrow compass. It was said that Ilhamullah Khan P.W. 2 had a garden in village Shahjahanpur where he had a nursery of plants. On the morning of the 26th of January, 1956, Ilhamullah Khan learnt that about eighty-five apricot plants had been removed and stolen from the nursery on the preceding night. He also learnt that Hafiz Ullah Khan had been seen in the garden on the previous night at about 10 p.m. He called Hafiz Ullah and his father and complained to them about the theft. It is said that Hafiz Ullah's father rebuked him in very strong words and asked Hafiz Ullah to leave his house. It is further said that thereafter, at about 9 a.m., Hafiz Ullah made his appearance in the garden equipped with a knife and there he made a concerted attack on Abdul Rahim who had purchased the papaya crop of the grove and was keeping watch over the same in the garden, and he also made a concerted attack on Rafiq who came to the rescue of Abdul Rahim.

It was contended that it was Abdul Rahim and Khuda Baksh the watchmen of the grove who had given the information to Ilhamullah Khan, and had confirmed it in the presence of the father of the accused, that they had seen the accused in the garden on that night. At the time of the attack Ilhamullah Khan, it is said, was supervising the work of taking out manure from a manure-pit in one portion of the garden and Patch Khan P.W. 4 arid Zarafat Ullah P.W. 5 were working there as labourers. Khuda Baksh P.W. 6 was said to have been working at another place in the garden. All these four persons saw Hafiz Ullah accused stabbing Abdul Rahim, and subsequently stabbing Rafiq when Rafiq came to the aid and assistance of Abdul Rahim.

3. A written report of the occurrence was sent by Ilhamullah Khan, which was filed at police station, Kithore on the same morning at 9-30 a.m., the police station

having been at a distance of about one mile from the place of occurrence. The report was taken down as the report of an offence punishable under Section 307, I.P.O. Sub-Inspector Anand Swarup (P.W. 16), the station officer of police station, Kithore, was present at file time of the making of the report. He started for the scene of occurrence, reaching there at about 10 a.m. It is said that when he was proceeding there he met Hafiz Ullah, the accused, at the gates of the Thana and he interrogated him and took off his jersey from his person in the presence of Ram Swarup and Dal Chand.

The jersey was said to have been blood-stained and a recovery memo. Ex. P-7 was prepared. Anand Swarup interrogated Ilhamullah Khan. He inspected the place of occurrence and prepared the site-plan. He took blood stained earth from the place of occurrence and sealed it up. After interrogating other witnesses, he returned back to the Tharia at 1-10 p.m.

4. The jersey and the blood-stained earth were sent to the Chemical Examiner and to the Serologist to Government for analysis and report. They reported that these things were stained with human blood.

5. Abdul Rahim was medically examined by Dr. K.M. Lal on the 26th of January, 1956, at 2-50 p.m. Six incised wounds and two stab wounds were found on his person. According to the evidence of Dr. K.M. Lal the injuries were caused by some sharp-edged weapon and were about six hours old at the time of the examination.

6. Rafiq was also medically examined on the same date at 3-15 p.m. One stab wound and two incised wounds were found on his person the nature whereof was as follows;--

1. Stab wound 3/4' x 1/4'' x 1 3/4' in the middle line of the back in the cervico-dorsal region 1 1/4' medial to the medial end of the spine of left scapula.

2. Incised wound 1/2' x 1/6' x 1/2' on the left side of chest in its lower part in the mid-axillary line 2' above left wrist and tailing forwards.

3. Incised wound 3/4' x 1/2' muscle deep on the right side back in its lower part 1' above the right iliac crest and 3 1/4' lateral to the middle line of the back and tailing downwards.

These injuries according to Dr. Lal were caused by some sharp-edged weapon and the duration thereof was about six hours at the time of the examination. Dr. Lal was not cross-examined at all on the probable duration of the injuries. This factor goes a long way to negative the suggestion made on behalf of defence viz., that Abdul Rahim and Rafiq had been assaulted in that garden some time in the early hours of the morning when it was still dark on account of which the assailants could not be detected.

7. Abdul Rahim died at the hospital on the same day at 9 p.m. Information of his death was sent to police station Kotwali. Second Officer Beg Raj Singh P.W. 10 went to the hospital at 10-30 p.m. and held an inquest over the dead body.

8. The post-mortem examination on the dead body of Abdul Rahim was conducted by Dr. N. Prakash on the 27th of January, 1956, at 3-30 p.m. The following external marks of injury were found on his person :

1. Incised wound 3/4' x 1/2' muscle on the left upper part back 1 1/2' from the mid line, going downwards.

2. Incised wounds 1' x 1/4' muscle deep on the left side of shoulder blade lower part, going downwards.

3. Incised would 1 1/2' x 1/2' bone deep on the outer 1/4' of left clavicle and going inwards.

4. Two Incised wounds each 3/4' x 1/4' muscle in the axilla on posterior fold, left side.

5. Incised wound 2' x 3/4' abdominal cavity on the lower part of left side chest, directing downwards.

6. Incised wound 1' x 1/2' abdominal cavity on the left side chest, 1/2' below injury No. 5 downwards.

7. Incised wound 1/2' x 1/2' muscle on the back of left hand inner aspect at the back of left little finger.

On internal examination the sixth and seventh ribs were found completely cut under injuries Nos. 5 and 6. There was congestion under the injuries. The peritoneum was found punctured under injuries Nos. 5 and 6. There was a clear cut wound l' x 1/4' on the stomach upper surface into the entire thickness of wall which was the result of injury No. 5 which had penetrated downwards cutting the posterior wall also. The spleen was also cut. In the opinion of Dr. Prakash death was due to shock and haemorrhage following the injuries which were caused by some sharp-edged weapon.

The medical evidence disclosed that Abdul Rahim and Rafiq had been attacked with a knife same time at about 9 a. m. on the 26th of January, 1956, and that Abdul Rahim died on account of those injuries, and further that the injuries of Rafiq were with such intent that if death had been caused the person who inflicted them would have been guilty of the offence of murder.

9. The defence case was that Abdul Rahim & Rafiq had been assaulted in that very garden on that date by some thieves before 6 a. m. when it was still dark and that the assailants could not be recognised. In support of that story a witness of the name of Bira was produced who stated that at about 6 a. m. when he had reached near the gate of the garden he heard a man groaning and when he went inside the garden he saw Abdul Rahim lying unconscious on account of the injuries that he had received and also Rafiq lying injured.

Bira's evidence does not fit in with the probabilities of the case or with the medical evidence on the record and his testimony had been rightly rejected by the learned Sessions Judge.

10. The evidence against the appellant was three-fold. Firstly, there was the statement of the eye-witnesses. Secondly, there was a dying declaration, of Abdul Rahim alleged to have been recorded by prosecution witness Hakim Islam Ullah Khan who is a cousin of Ilhamullah. Thirdly, there was the evidence of the recovery of a blood-stained jersey from the person of the accused.

We have examined the alleged dying declaration and also the evidence regarding the alleged recovery of the blood-stained jersey from the person of the accused, and we are not inclined to rely upon them. The dying declaration is not signed or thumb-marked by the deceased.

Moreover, the contradictory nature of the evidence given by Hakim Islam Ullah and that given by Sub-Inspector Anand Swarup who investigated the case leads us to think that this dying declaration is a suspicious document. According to Hakim Islam Ullah (P. W. 1), Station Officer Anand Swarup had asked him to take down the dying declaration and he took that statement in the presence of Sub-Inspector Anand Swarup and also in the presence of others.

Sub-Inspector Anand Swarup on the other hand stated that when he reached the place of occurrence Abdul Rahim was not fit to make a statement; that he was unconscious; that he remained unconscious throughout the time that he was there and that Hakim Islam Ullah Khan did not take down the statement of Abdul Rahim in his presence. No other witness was produced on behalf of the prosecution to support the contention that Hakim Islam Ullah had recorded the dying declaration of Abdul Rahim in his presence. In view of the evidence aforesaid we are unable to pin any faith upon the dying declaration.

11. On the alleged recovery of the bloodstained jersey from the person of the accused it may be stated that the accused had denied that any such recovery was made. Sub-Inspector Anand Swarup stated that when he started for the investigation from the Thana he met Hafiz Ullah appellant at the gates of the Thana and it was there that he interrogated him and he took off his jersey in the presence of Ram Swarup and Dal Chand.

We have not been able to appreciate as to why Hafiz Ullah should have been at the gate a of the Thana simultaneously with the making of the first information report, unless we are asked to believe that he had gone to surrender to the police and to make a clean breast of the whole thing. Ram Swarup was examined as a witness for the prosecution but his evidence to our mind is not very satisfactory. We are therefore not in a position to rely upon this alleged recovery of blood-stained jersey from the person of the accused.

12. We are therefore left with the evidence of the eye-witnesses. These are Ilhamullah the maker of the first information report, Rafiq the injured man, Fateh Khan and Zarafat Ullah, two of the labourers who were working in that gardea where Ilhamullah was also present, and Khuda Baksh witness. Khuda Baksh has not been relied upon by the learned Sessions Judge on account of the fact that his name was not mentioned in the first information report.

The presence of Rafiq on the scene of occurrence cannot for a moment be doubted inasmuch as he had received injuries. The presence of Fateh Khan and Zarafat Ullah cannot also be doubted because according to the defence version itself these persons were in the employment of Ilhamullah as labourers in that garden. For that reason they were natural and probable witnesses. We have examine the evidence of Ilhamullah, Rafiq, Fateh Khan and Zarafat Ullah and we have come to the conclusion that their evidence, was given in a consistent and true manner and that the charge was amply supported by them.

It appears that in the night between the 25th and 26th of January, 1956, there was a theft of about eighty-five apricot plants from the garden of Ilhamullah. Rafiq gave information to Ilhamullah that in the night in question the accused had been seen in that garden. Ilhamullah accordingly called Hafiz Ullah and his father Manzoor Khan and had asked Hafizullah as to why he had entered in the garden in the night. It was on that occasion that Manzoor Khan rebuked his son Hafiz Ullah and told him that he would turn him. out of his house.

Manzoor Khan was examined on behalf of defence and he no doubt denied that the accusation was made in his presence or that he had reprimanded his son. But the evidence of Ilhamullah and of Rafiq on that point was clear and convincing. Manzoor Khan, the father of the accused, had reason to come forward to deny that contention, for he had a motive to shield the accused.

Manzoor Khan's contention that on that date he had gone away to Meerut to sell certain goods and that he returned to the village at 2-30 p. m. rendering his presence in the village at about 8 a. m. impossible, was not supported by any corroborating evidence. He stated that he had gone to Meerut where he had sold potatoes in the arhat of one Aziz, but no evidence from that quarter was produced;

nor was the receipt of toll-tax having been paid by him produced. We are therefore satisfied from evidence that the occurrence took place in the manner alleged by the prosecution.

13. It has been contended on behalf, of the appellant that at best an offence under Section 304, I. P. C., is made out against the appellant so far as it relates to the death of Abdul Rahim, and not an offence under Section 302, I. P. C., and for this proposition reliance has been placed upon Exception 1 to Section 300 of the Indian Penal Code.

Alternatively it has been contended that even If an offence under Section 302, I. P. C., is made out, the extreme penalty of law is not called for. The first submission is founded upon the contention that the offence was committed under grave and sudden provocation when the offender was deprived of the power of self-control because a charge of theft had been levelled against the offender and the offender's father had told the offender to clear out of the house.

The offence as proved by the prosecution story had been committed by the appellant after half an hour of the summoning of the appellant and his father into the grove where Ilhamullah is said to have inquired of the appellant as to why he had gone into the garden at night and where the appellant's father is said to have reprimanded him and to have asked him to leave his house.

Under Exception 1 of Section 300 of the Indian Penal Code, the provocation must be grave and sudden and must have by its gravity and suddenness deprived the accused of the power of self-control. In other words, it ought to be distinctly shown not only that the act was done under the influence of some feeling which took away from the person doing it all control of his action but that that feeling had an adequate cause.

In the absence of such proof the atrocity of the offence will not be mitigated and the offender will not be able to escape the legal consequences of his act. The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normally reasonable man to lose control of himself to the extent of inflicting the

injury or injuries that he did inflict. The test, in other words, is that of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary man to act as he did.

In applying the test it is of particular Importance to consider whether sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion Induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a sharp and large knife. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to culpable homicide not amounting to murder.

The act must be done whilst the person doing it is deprived of self-control by grave and sudden provocation, that is it must be done under the immediate impulse of provocation, and the fatal blow should be clearly traced to the passion arising from that provocation. The killing will amount to murder if between the provocation received and the stroke given the party giving the stroke had reasonable time to cool down and if after a sufficient lapse of time, as in the present case, the act is committed. Again if it appears that he meditated upon his revenge or used any trick or circumvention to effect it, it would show deliberation, which would be inconsistent with the excuse of sudden passion and would be the strongest evidence of malice.

The length of time intervening between the alleged affront and the retaliation is evidence in itself of deliberation. It must not, however, be understood that any trivial provocation which in point of law amounts to an assault or even a blow will reduce the crime of the party killing to culpable homicide not amounting to murder, for, where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the affront advanced and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty and the crime will amount to murder notwithstanding such

provocation.

In the present case the provocation, if any, was neither grave nor sudden and the offence will not be reduced, in our opinion, to one of culpable homicide not amounting to murder. It was a clear case of murder falling under Clause (3) of Section 300 where the act was done with the intention of causing bodily injury to Abdul Rahim and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death, and this act was not excepted by Exception 1 of Section 300. The appellant has been rightly convicted under Sections 302 and 307, I. P. C.

We find no extenuating circumstance which might justify the awarding of the lesser sentence provided under Section 302 in a case of this nature Where Abdul Rahim was given deliberately a number of incised wounds with a sharp-edged weapon like a knife which entered the ribs causing rupture of the peritoneum and the abdominal cavity, entering into the stomach and the liver and the spleen making clear cut injuries in them. Under circumstances such as these a sentence of death was the proper sentence under Section 302, I. P. C.

14. For reasons stated above we dismiss this appeal and confirm the conviction of the appellant under Sections 302 and 307, I. P. C., and confirm also the sentence of death passed against him under Section 302 which should be carried out in accordance with law; and we also confirm the sentence given to him by the learned Additional Sessions Judge under Section 307, I. P. C. The reference is accepted.

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