

Jabbar and ors. Vs. State

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Court : Allahabad

Decided On : Dec-17-1965

Reported in : 1966CriLJ1363

Judge : M.H. Beg, J.

Appellant : Jabbar and ors.

Respondent : State

Judgement :

M.H. Beg, J.

1. The appellant Jabbar has been convicted under Section 316, I.P.C. and sentenced to five years' R.I., whereas his brothers, appellants Ishaq and Habib, have been convicted under Section 316/34, I.P.C. and sentenced to four years' R.I. The appellants, Jabbar and Habib, were also convicted under Section 323/34, I.P.C. and sentenced to three months' R.I., whereas the appellant Ishaq was convicted under Section 323, I.P.C. simpliciter, and sentenced to six months' R.I.

2. The prosecution of the appellants resulted from an incident which is said to have taken place in front of the house of Jamna (P.W. 8) on the evening of 31st August, 1963, in village Sansarpur, P.S. Koraon, in the district of Allahabad. It was alleged that Sarju (P.W. 4), the brother of Jamna (P.W. 8), had been engaged as a labourer by Ishaq appellant to carry lime stone from Saraiya hill. It was alleged that

Sarju, having expressed his willingness to carry only five Dharas instead of seven 'dharas' (seers) of lime, as desired by Ishaq, annoyed Ishaq appellant who slapped him twice. After that, the three brothers, Jabbar and Ishaq and Habib, are alleged to have gone to the house of Jamna before sunset and to have found Sarju sitting there while Smt. Pangoli (P.W. 9) was applying some turmeric on the back of his neck. As soon as the appellants came to the spot, Ishaq appellant is alleged to have struck two lathi blows at Sarju, who ran from there towards his own adjoining Kotha. After that, Jabbar appellant is said to have enquired from Smt. Pangoli (P.W. 9) where her husband Jamna was. As Smt. Pangoli was unable to tell him where Jamna was, the appellant Jabbar is alleged to have pushed her so that she fell on her stomach and then the appellant Jabbar is said to have kicked her on a side of her stomach. As a result, Smt. Pangoli (P.W. 9), who was pregnant, was taken ill and gave birth prematurely to a seven month old baby which died. A first information report of this incident was lodged on 2nd September, 1963, at 4,30 p.m.; at police station Koraon, at a distance of ten miles from village Sansarpur.

3. The F.I.R. was certainly lodged after considerable delay and the explanation that the fear of the appellants prevented the lodging of the F.I.R. is not convincing. Sarju (P.W. 4) stated that he had asked the witnesses to accompany him to the Thana, but they were not prepared as Jabbar was said to possess a gun. The statement of the Investigating Officer, Sudhar Singh (P.W. 15), revealed the fact that Jabbar appellant had no licence for a gun. But, the further explanations that it was the rainy season and that it had rained so that they could not go to the police station at 9 p.m., together with the fact, mentioned frankly in the F.I.R., that the family of Smt. Pangoli was waiting for Motilal (P.W. 5), who is the Sarpanch of the village and a local leader, to return as he had gone out of the village, appear to be truthful. Added to this, the fact that Smt. Pangoli is a Kule and comes from a very backward section of humanity, and that there are only a few houses of Kules in the village, may account for the fact that no F.I.R. was lodged until somebody strong enough to give protection or do some pairvi could be found. The fact that the corpse of the child, which died as a result of the fall sustained by Smt. Pangoli, was preserved for three days appears to me to provide a strong corroboration of the story told by Smt. Pangoli (P.W. 9).

4. The names of Sheodhari (P.W. 6) and Sheomural (P.W. 13) and Hinchu (not examined) and Sugriv (not examined) are mentioned in the F.I.R. as those of persons who came to the scene as a result of the cries of Smt. Pangoli. The F.I.R. does not mention anything more than a quarrel on the morning of 31st of August, 1963, between Sarju and Ishaq which resulted in the visit to the house of Jamna made by the three brothers. It is not mentioned in the F.I.R. that some persons were sitting, in front of the house of Jamna in a Court yard (Sahan) and smoking when the three brothers came there or that Spit. Pangoli was applying turmeric to the back of Sarju. The F.I.R. sets out a very unvarnished story in the dialect of Smt. Pangoli herself who made it. It was stated by Abdul Wahid (P.W. 14) that Smt. Pangoli was in pain when she came to the Thana on 2nd September, 1963, and that she was directed to get her report written out by somebody. Then Moti Lal (P.W. 5) wrote out the report in the compound of the Thana as dictated by her. The fact that Smt. Pangoli was suffering may also account for some delay in lodging the F.I.R.

5. The defence of the appellants was that no such incident as alleged by the prosecution witnesses took place at all in the village on 31st August, 1963. Jabbar appellant stated on 18.4.1964, that the prosecution witnesses were staying with Moti Lal for the previous three years, that Jabbar takes Thekas for wood and stone presumably for supplying wood and lime stone, and that he had advanced Rs. 500 to Sarju (P.W. 4) and Dudhai and Ganga and Jamna, who are all brothers, and that a Panchyat was held in that connection at which Moti Lal was the Panch who had succeeded in depriving Jabbar of Rs. 500. Presumably, Jabbar meant to convey that Motilal had been instrumental in causing a loss of Rs. 500 to him which he had advanced to Sarju and Jamna and Dudhai and Ganga. Jabbar appellant also stated that Moti Lal (P.W. 5) had procured witnesses against the appellants.

6. I have been taken through the whole evidence in the case and find that Sheodhari (P.W. 6) and Sheo Murat (P.W. 13) are not reliable witnesses. Sheodhari has no doubt denied that he is the 'halwaha' of Moti Lal, although he has admitted that he is a cousin of Jamna and that the house of Moti Lal adjoins his house. Sheo Murat (P.W. 13) was shown to have given evidence earlier also

on behalf of Moti Lal, and slated that he had stood surety for Jabbar once but had to forfeit Rs. 500 as a result. He also admitted that he belongs to the same Biradri as Moti Lal. Both these witnesses were shown to have gone back on some of their earlier statements. A more serious objection to the credibility of both these witnesses was that the F.I.R. mentions that they came to the scene of occurrence after Smt. Pangoli had raised a hue and cry so that the version sought to be advanced at the trial, that they were already sitting in the courtyard of Jamna, appears to be a subsequent elaboration not supported even by the mention of a courtyard in the site plan. Even Suraj (P.W. 4), the brother-in-law of Smt. Pangoli, is not an entirely satisfactory witness. It is alleged that he was struck twice and that there was a mark on his hand which he showed to the doctor, Dr. Verma, who examined him on 4.9.1963 at 5 p.m., however, did not find any external marks of injury. Again, this witness had stated that he was given two slaps in the morning, and, afterwards, stated that he was slapped on the head. Smt. Pangoli (P.W. 9) was, however, supposed to be applying some turmeric to the resulting injury on his back below his neck. Neither the beating in the morning nor the fact that the three brothers came to the house of Jamna when others were sitting in front of it are mentioned in the F.I.R. I, therefore, hold that the allegation that Sarju was beaten is not established. Sarju was, however a natural witness.

7. The houses of Sarju and Jamuna adjoin each other and the houses of Ganga and Dudhai are situated right in front. Perhaps that area between the houses facing each other has been described by witnesses as Jamuna's courtyard. The site plan does not show the place where the witnesses Sheodhari (P.W. 6) and Jamuna (P.W. 8) and Sheomurat (P.W. 13) were said to be sitting and smoking. Jamuna (P.W. 8), the husband of Smt. Pangoli, is not even mentioned in the F.I.R. as present there at all, and Sheodhari (P.W. 6) had stated before the Committing Magistrate that he had not seen Jamuna at the spot. Moreover, Jamuna is alleged to have got up when the appellants were ten paces away from the witnesses and to have left the place. The argument that, if Jamuna had been present, there was no point in asking Smt. Pangoli the whereabouts of Jamna is not without force. I, therefore, seriously doubt the presence of any person apart from Smt. Pangoli (P.W. 9) and Sarju (P.W. 4) at the place of occurrence at the time when the three brothers are said to have arrived and Smt. Pangoli was thrown on the ground in

the manner stated above. If Sheodhari and Sheomurat and Jamuna had been present it would be more difficult to understand the delay in lodging the first information report.

8. The question, therefore, arises whether the version of Smt. Pangoli (P.W. 9) has been sufficiently corroborated by the statement of Sarju (P.W. 4) and by circumstances. The presumption under the law is that witnesses giving evidence on oath are truthful, as held by Division Bench of this Court in *Tahsildar Singh v. State* : AIR1958 All214 . It is true that neither Smt. Pangoli (P.W. 9) nor Sarju (P.W. 4) is entirely reliable. Nevertheless, even evidence which is not completely reliable can be acted upon when corroborated by reliable evidence. It cannot be doubted that the carcass of the child lost was preserved for three days. It has been rightly urged that such an action on the part of Smt. Pangoli does indicate that the child had not died a natural death as a result of miscarriage. Moreover, the statement given by Jabbar himself shows that he was considerably annoyed with the four brothers. This annoyance on the part of Jabbar would make it likely that he should act in the manner attributed to him by Smt. Pangoli (P.W. 9) and Sarju (P.W. 4). As I have already observed, the F.I.R. apparently contains an unembellished account in the dialect of Smt. Pangoli herself. If the appellant Jabbar had advanced money to Jamuna and his three brothers, it is natural to expect that these four brothers would feel under an obligation to Jabbar. Smt. Pangoli could not let herself become a tool of Moti Lal merely in order to enable Moti Lal (P.W. 5) to injure the appellants when her family was obliged to the appellant Jabbar. Moreover, no such enmity between Moti Lal (P.W. 5) and the three brothers has been revealed which could induce Moti Lal to conduct a completely false case against the three brothers. If there had really been a conspiracy between Moti Lal and the prosecution witnesses they could have made more serious allegations and against each of the three appellants.

9. I, however, find that so far as the pushing and kicking of Smt. Pangoli is concerned, the only accused to whom any part is assigned is the appellant Jabbar. It is not stated that the other two tried either to maltreat Smt. Pangoli or to push her or kick her. Even so far as kicking is concerned, it is not proved that it took place when the appellant Jabbar was wearing anything on his feet. Indeed, if Smt.

Pangoli had fallen on her stomach, it is doubtful how much of her stomach could be or was exposed to be kicked from the side over her clothes. It may be mentioned that all that is stated in the F.I.R. is that Jabbar 'started kicking' her after having pushed her. It does not specifically state that he kicked her on the stomach. The slight variation between pushing her, which is found in the F.I.R. and pulling her by the hand, which is mentioned by witnesses at the trial, is not material. After having considered all that could be said against the evidence of Smt, Pangoli and Sarju, corroborated by the circumstances mentioned above, I have come to the conclusion that it is established, beyond reasonable doubt, that Jabbar did push Smt, Pangoli, who was in an advanced and visible stage of pregnancy, and that he even tried to kick her after that, so that the child she was carrying was either born dead or died immediately after its birth.

10. The three brothers had gone to look for Jamuna probably in order to induce him to work for them and were annoyed that he was no longer working for them but was working for Moll Lal. The action of Jabbar against Smt. Pangoli could not, however, be said to be part of a pre-conceived plan. It was by chance that Smt Pangoli was found there and asked by Jabbar where her husband was. In these circumstances, Section 34, I.P.C. was clearly inapplicable.

11. The next question which arises is: What is the offence committed by Jabbar appellant alone in pushing Smt. Pangoli (P.W. 1) and trying to kick when she was in an advanced and visible stage of pregnancy. The trial Court has convicted the appellant Jabbar under Section 316, I.P.C., This section reads as follows:

316. Whoever does any act under such circumstances, that if he thereby caused death he could, be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

It is clear that Section 316, I.P.C. can only apply if the action resulting in a death was capable of amounting to culpable homicide. The section does not specifically state that the action must be directed against the mother and not the quick unborn child. From the illustration to the section, which is intended to clarify the meaning

of the 'act', it appears that the act must be of such a nature that the offence committed against the mother herself would be culpable homicide if the mother had died as a result of it. If the act is intended only to cause miscarriage without the consent of the mother, it could fall under Sections 312 and 313, I.P.C. or under Section 314, I.P.C. If the act is intended to cause the death of the child before its birth or to cause it to die after its birth it is an offence punishable under Section 315, I.P.C. Hence, an offence under Section 316, I.P.C. must be deemed to refer to acts directed against the mother. And these acts have to be of such a character that the offender would have been guilty of culpable homicide if she had died. The resulting injury to the child carried in the womb of the mother may be quite unintended and yet an offence under Section 316, I.P.C. would be made out. The action must be such that it results in the death of a 'quick unborn child' instead of the death of the mother which could have been caused by the action.

12. As the offence under Section 316, I.P.C. consists of action against the mother which must be capable of causing 'culpable homicide'. I have to examine the definition of 'culpable homicide' and determine whether 'the act' in this case could result in a culpable homicide of the mother. Now, culpable homicide has been defined by Section 299, I.P.C. It involves the doing of an act either with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the act is likely to cause death. Unless the act is done against the mother with an intention or with a knowledge which brings it within the purview of Section 299, I.P.C., it cannot constitute an offence under Section 316, I.P.C. merely because the death of a quick unborn child has resulted from an act against the mother. It may be that, in certain circumstances, where the accused is aware of the particularly feeble state of health of a pregnant woman, he can be assumed to know that the likely consequence of his conduct in pushing her could be the death of the pregnant woman, but, in the present case, there is no evidence to show that Smt. Panguli was either in such an exceptionally feeble state of health or known to the appellant Jabbar to be in such a state of health that her own death was a likely consequence of the acts proved to have been committed by Jabbar appellant against her. There is no evidence that the life of Smt. Panguli herself was endangered. Deaths of pregnant women due to falls causing miscarriages are possible but rare. For the

reasons given above, I cannot concur with the view taken by the trial Court that the action of the appellant came clearly within the purview of Section 316, I.P.C. I do, however, find that the offence committed by the appellant Jabbar falls within the purview of Section 304a, I.P.C. which reads as follows:

304-A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

13. The only difficulty which was placed before me, in convicting Jabbar Under Section 304, I.P.C., was that the child in the womb of the mother was said not to have a 'separate existence' from the mother so that it cannot be spoken of as a 'person'. In this connection, my attention was drawn to the statement of Dr. Vashisht (P.W. 2) that he could not state whether the child had died in the womb of the mother or had been born alive and then died, because the body of the child was sufficiently decomposed and that 'its age was less than that of separate existence'. I find it difficult to understand what Dr. Vashist meant by saying that 'the age' of the child was 'less than that of separate existence'. 'The age commences strictly only after birth. He should have only spoken of the duration of the pregnancy or the development of the child. Dr. Vashista tried to clarify his statement later by stating that the child becomes capable of 'separate existence' after seven months, although it begins to move in the mother's womb after five months. This also does not clarify what was meant by 'separate existence'. The post mortem report shows that hands and feet and all other parts of the body of the child had formed In other words, the child was formed sufficiently to be capable of being considered an entity which, in the eye of law, could be distinct from the mother. The question is not free from difficulty. It was not possible to determine the precise extent to which the child had been formed because of the state of decomposition. I, however, see no reason to doubt the evidence of Smt. Pangoli (P.W. 9) and her husband Jamuna (P.W. 8) that the pregnancy of Smt. Pangoli was seven months advanced. It had, therefore, a 'separate existence' as that terra was explained by Dr. Vashista.

14. The real question, in my opinion, is whether the term 'person', as Used in Section 304a, I.P.C. could include an unborn child in the mother's womb after seven months of pregnancy. It would certainly be 'a quick unborn child' as contemplated by Section 316, I.P.C. If it can be regarded as 'a child' within the meaning of Section 315, I.P.C. or Section 316, I.P.C. I do not see why it cannot be a 'person' within the meaning of Section 304a, I.P.C. The term 'person' has not been defined in a technical or narrow sense in the I.P.C. Section 11, I.P.C. defines it in the same way as the term 'person' as defined in Section 3(42) of the Central General Clauses Act (X of 1897). The definition in Section 11, I.P.C. is:

11. The word 'person' includes any company or association or body of persons whether incorporated or not.

This is hardly a definition. It seems to be only an indication of the intention of the legislature to use the word 'person' in a fairly wide sense so as to include even artificial persons. The word person is said to be derived from 'persona' which stood for the mask worn by an actor on the stage amongst the ancient Greeks and Romans. In law it implies the juristic personification of an entity which may or may not be an animate being.

15. An unborn child can be regarded as a living entity with a life of its own. The word 'person' is defined in the Shorter Oxford English Dictionary in two ways: firstly, it is defined as 'an individual human being' or 'a man, woman, or child'; and, secondly, as 'the living body of a human being'. I do not think that it can be denied that an unborn child in advanced stages of pregnancy has a being or life of its own and that it has a body. It may be that its life and body are not independent of the mother's existence so that the unborn child cannot be said to have a separate existence. The word 'person' has not been defined in such a way as to involve a separate existence or the living creature spoken of as 'a person'. As there is no such technical definition, I prefer to adopt the ordinary meaning of the term 'person' as including a 'child' whether born or unborn. Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as a 'person' if its body is developed sufficiently to make it possible to call it a 'child'. The post mortem report shows that the child had developed sufficiently to have an identity

of its own as a child? That would, in my opinion, be enough to satisfy the definition of the term 'person' as used in Section 304a, I.P.C.

16. The pushing and kickings of a pregnant woman is an act fraught with risk to the mother and the child. Causing of premature birth and death of the child were its reasonably foreseeable direct consequences. It is nobody's case that death of the child was caused by some act after birth. It is, as the trial Court has observed, immaterial whether the death took place before or after premature birth of the child. Therefore, I hold that the offence under Section 304a, I.P.C. had been committed by Jabbar alone and he is liable to be convicted for it. The maximum sentence under Section 304a, I.P.C. is two years' R.I. with fine. Smt. Pangoti had done no wrong to Jabbar who was probably annoyed with the whole family because his workmen had been taken away by Moti Lal (P.W. 5) who is also shown to have undertaken Thekas, similar to those taken by Jabbar, from time to time. The push he is proved to have given and such kick as he may have given to Smt. Pangoli were certainly rash and negligent acts towards a defenceless pregnant woman. As, however, there is no previous conviction proved against the appellant and there is no evidence that he intended any serious injury to Smt. Pangoli, the ends of justice will be served if the appellant is sentenced to one year's R.I. and to pay a fine of Rs. 500.

17. In the result, I set aside the various convictions of the appellants under Section 316 and 316/34, I.P.C. and Sections 323 and 323/34, I.P.C. I convict Jabbar of an offence punishable under Section 304a, I.P.C. and sentence him to one year's R.I. and to pay a fine of Rs. 500, and, in default, to undergo three months' further R.I. Out of the fine, if realised, half will be paid to Smt. Pangoli. All the appellants are on bail. The appellants Ishaq and Habib need not surrender. Their bail bonds are cancelled. The appellant Jabbar will surrender forthwith and serve out the remaining period of his sentence.