

Ghariby and ors. Vs. the State

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Court : Allahabad

Decided On : Oct-21-1952

Reported in : AIR1953All491

Judge : Kaul, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 304 and 325; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 32 and 439(5)

Appeal No. : Criminal Appeal No. 308 of 1951

Appellant : Ghariby and ors.

Respondent : The State

Advocate for Def. : Dy. Govt. Adv.

Advocate for Pet/Ap. : Kesri Bir Prasad, Adv. (for Nos. 1 to 3) and ;Mohd. Yaqub Siddequi, Adv. (for No. 3)

Disposition : Appeal allowed

Judgement :

Kaul, J.

1. Ghariby, Bhaggan, Autar and Mahadin were convicted by the learned Sessions Judge of Barabanki for an offence under Section 304, latter part, and Section 323

read with Section 34, Penal Code. They were sentenced each to five years' rigorous imprisonment under Section 304, Penal Code, and to six months' rigorous imprisonment under Section 323. The sentences were to run concurrently. Of them three, Ghariby, Bhaggan and Autar, come up in appeal. No appeal has been preferred by Mahadin.

2. The case for the prosecution as established at the trial briefly stated is as follows :

On 11-7-1950, some time after mid-day, Pancham was tethering his bullocks in his field in village Pandrawan, police station Tikaitnagar, district Barabanki. One of the bullocks began to fight the bullock of Ram Bakhsh Kori and injured it, whereupon Bhaggan, who was standing there, abused Pancham. This led to further hot words and exchange of abuse whereupon Ghariby, Bhaggan, Autar and Mahadin assaulted Pancham with lathis. His niece (brother's daughter) Santa, his brother Budh and his own wife Ram Raji attempted to intervene and they were also injured. Pancham became unconscious. He was carried to police station Tikaitnagar. He regained consciousness and a first information report of the occurrence was recorded at 5-15 p.m. the same day, at the police station which was only one and a half miles from the place of occurrence. Pancham died the next day, that is 12-7-1950.

3. Bhaggan also made a first information report at police station Tikaitnagar at 8 p.m. on 11-7-1950, giving his own version of the affair. According to him Pancham's bullock, had fought and injured his bullock. This led to exchange of hot words between him and Pancham. whereupon Pancham, Budhu, Ram Ghulam and Lautan belaboured him. Ram Bakhsh and Mahadin who attempted to intervene were also belaboured.

4. The three appellants with Mahadin, who has not appealed pleaded not guilty before the Sessions Judge. Autar relied on an alibi. The other accused contented themselves with stating that they had been implicated on account of enmity. Pancham being dead Budhu P. W. 1, Santa P. W. 2 and Ram Raji P. W. 3 were the main witnesses of the occurrence. As they had received injuries, their presence at the place of occurrence could not not be disputed. The learned

Sessions Judge relied on their evidence and the statement of other prosecution witnesses and convicted the appellants as well as Mahadin as already stated.

5. The learned counsel for Ghariby and Bhaggan contented himself with arguing the appeal on the question of sentence. His contention was that in the circumstances of the case, the accused were guilty only of an offence under Section 325, Penal Code, and not under Section 304, Penal Code as held by the learned Sessions Judge. The learned counsel for Autar, however, challenged the correctness of the finding arrived at by the learned Sessions Judge that the accused before him were guilty of having inflicted upon Pancham the injuries which resulted in his death. He complained that the Sessions Judge had omitted, to consider his client's alibi evidence.

6. Before dealing with the arguments advanced by the learned counsel for the appellants, I will refer briefly to the injuries on the person of Pancham. We find from the post mortem report of his dead body that he had six injuries on his person :

1. A contused wound 1' x 1/6' scalp deep on the left side 3' above the left ear.
2. An abrasion 1 1/2' x 1' on the left side of the head 2' below the first injury.
3. A contusion with swelling 4 1/2' x 3 1/2' on the left elbow.
4. A contusion 3' x 1/2' on the right side of the back in the middle.
5. A contusion 1 1/2' x 3/4' at the back of the left forearm.
6. An abrasion 2 1/2' x 1' on the left foot in the middle. The parietal and the temporal bones were fractured. There was congestion of the blood to the extent of 6' x 5' x 3/4' on the right side and 2' x 2' x 1/2' on the left side. The brain had been pressed inside.
7. The plea of Autar's alibi may be disposed of in a few words. His case was that on the date of occurrence he had filed a suit before the Panchayat Court, 12 miles away from the place of occurrence. He produced what purported to be a copy of the plaint and copy of what purported to be a deposition of one Autar recorded by

the Sarpanch. No evidence was, however, led to prove that he was the same person who presented the plaint before the Panchayat Court and if the person whose deposition was recorded was Autar the present appellant. In the absence of such proof, naturally these documents could be of no assistance to Autar. Moreover, it will be noticed that there is nothing to show at what hour of the day the plaint was presented and the deposition relied on by Autar recorded. It cannot, therefore, be said that there is any proof of Autar's presence at a place so far removed from the place of occurrence that he could not participate in the commission of the offence. There is definite evidence not only of Budhu, Santa and Ram Raji but also of other witnesses that he participated in the commission of, the crime. The plea of alibi must, therefore be rejected.

8. I will now consider the argument advanced on behalf of Ghariby and Bhagga that the appellants were not guilty of an offence under Section 304 Penal Code. I have mentioned above the injuries which were found upon the person of the deceased Pancham. Death in the opinion of the Surgeon who performed the autopsy was due to the fracture of the skull and consequent shock and haemorrhage. It will be noted that all the injuries except the first, found on Pancham, were simple. His death was due to injury No. 1 which was grievous and proved fatal. Who inflicted this injury is not clear, but all the four accused, i.e., the three appellants and Mahadin, who has not appealed, were convicted under Section 304, Penal Code, read with Section 34, Penal Code. This section runs as follows :

'When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.'

9. If we now turn to Section 304, Penal Code, we find that before a person can be convicted under the latter part of that section, the Court must record a finding that the act which caused death was done with the knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. Accordingly if four persons attack another with lathis, with the common intention of beating him, we have an illustration of a

criminal act done by several persons in furtherance of the common intention of all. If death is caused as a result of one of the injuries inflicted by some one of these persons, they would all be surely guilty under Section 325, Penal Code, in view of the provisions of Section 34. The question may arise, if they can be held guilty of the graver offence under Section 304, Penal Code. It will be seen that a particular knowledge is an essential ingredient of the offence under Section 304, latter part. Unless a Court can record a finding that an accused person had the knowledge that the act done by him and his companions was likely to cause death, the accused cannot be rightly held guilty under Section 304, second part, This was the view taken by a Full Bench of our Court in -- 'State v. Saidu Khan', AIR 1951 All 21 (A). At page '43 of the report Wanchoo J. observed as follows : 'I am, therefore, of opinion that it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code, provided the Court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death. This is my answer to the first question.' The first question referred to the Full Bench was :

'Whether it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code.'

10. We may now apply the law thus enunciated to the facts of the present case. We have seen that of the six injuries inflicted upon the deceased, five were simple. They comprised three contusions and two abrasions none of which was of any serious character. It was injury No. 1, a contused wound on the scalp above the left ear, which was grievous and resulted in Pancham's death. Obviously, this injury could have been inflicted only by one person. It must be taken that the person who inflicted this injury had the knowledge that it was likely to cause death for, if one strikes another on the head with a lathi, he must be taken to have such knowledge. But knowledge of one person is not necessarily knowledge of others who joined him in beating Pancham and as it has not been ascertained as to who inflicted the fatal injury, I am of opinion that none of these appellants can be rightly convicted under Section 304, Penal Code. They are all, however, guilty under Section 325, Penal Code.

11. Having regard to the circumstance that the fight was not premeditated, I am of opinion that this is fit case in which a heavy sentence need not be passed. As is not unusual, a few hot words used by Pancham may have been responsible for the unfortunate result which followed. Hot words grew into vulgar abuse and then resort was had to lathis. It is very unfortunate that a man lost his life, but that should not be a reason for inflicting too severe a punishment.

12. Accordingly I allow the appeal in so far that the appellants' conviction and the sentence under Section 304/34 passed upon them are set aside and they are convicted under Section 325/34, Penal Code. Their conviction and sentence under Section 323/34 is maintained. They are sentenced to two years' rigorous imprisonment each under section 325/34, Penal Code. The sentences under both the sections shall run concurrently.

13. For the reasons given in my judgment in Criminal Appeal No. 308 of 1951, in exercise of the revisional jurisdiction of this Court I acquit Mahadin of the offence under Section 304/34, Penal Code, and instead convict him under Section 325/34, Penal Code. He is sentenced to two years' rigorous imprisonment for that offence. His conviction and sentence under Section 323/34, I. P. C. is maintained. Both the sentences shall run concurrently.

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