

Abdul Habib Vs. the State

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Court : Allahabad

Decided On : Aug-16-1973

Reported in : 1974CriLJ248

Judge : K.B. Srivastava and ;S.K. Kaul, JJ.

Appellant : Abdul Habib

Respondent : The State

Judgement :

K.B. Srivastava, J.

1. The appellant Abdul Habib has been convicted under Section 302 of the Indian Penal Code, and sentenced to undergo imprisonment for life. This appeal is directed against that conviction and sentence.

2. The prosecution case, in brief, is as follows:

One Dr. Kapur in the Army Medical Corps. was posted at Lucknow and was occupying the Payagpur house as his residence. Sarwan Singh (P. W. 13) was also in Army Service and one of his duties was to carry Army dak to the residence of Dr. Kapur. He went to deliver the dak. as usual at about 4-45 P.M. on January 17. 1970, and after parking his cycle outside the house, delivered the dak to him. While he was about to return after delivering the dak, he noticed the appellant

mounting his cycle and attempting to run away. Sarwan Singh challenged the appellant to stop and intercepted the flight by catching hold of his cycle. The appellant thereupon whipped out a knife and gave a stab blow near the right elbow and then leaving the cycle aside, took to his flight. Sarwan Singh raised a hue and cry and many persons joined in the pursuit of the fleeing appellant. They were raising a slogan that the appellant should be arrested. Bhimsen Mehta (P. W. 1) and his son Naresh Kumar, a young lad, aged about 18 years, were standing near a Pan Shop, situate in the close vicinity of Narang Building on the Ashok Marg in the city of Lucknow, when the appellant emerged from the Narhi Galla Mandi lane and started running on the Ashok Marg brandishing a knife, and continued his flight in the direction of the Narang Building. The slogan that was being raised by the pursuers, was heard by Naresh Kumar who advanced towards the appellant with the intention of apprehending him but the appellant, in order to evade his arrest, struck a blow by his knife and stabbed him in his abdomen and repeated the blow and stabbed him on the buttock also. In the meantime. Bhimsen Mehta and those pursuing the appellant apprehended him, but not before the appellant had been given a large number of blows to disable him from further flight. A. N. Das (P. W. 5) took the injured Naresh Kumar to the Civil Hospital. Bhimsen Mehta dictated his F. I. R. to Sant Bux Singh (P. W. 4) and thereafter he and several others took the appellant, and the knife Ext. 1 recovered from him. to police station Hazratganj, where Bhimsen Mehta got his F. I. R. registered at 5-20 P. M.

3. The investigation was made by S. I. B. D. Sharma (P. W. 14) who recorded the statements of Bhimsen Mehta, Raj Kumar Gulati and Ram Swaroop, P. Ws. 1 to 3 and of several others at the police station. The injuries of Naresh Kumar were examined by Dr. Yadubir Saran Das (P. W. 12) at the Civil Hospital at 5-10 P. M. and he was found to have received the following injuries:

1. Incised wound 1' X 1/2' X 1 3/4' deep starting from the medial side and going laterally 5 1/2' below the left nipple.
2. Incised wound 1' X 1/2' X 1 3/4' starting superiorly and going inferiorly on the left buttock and
3. Abrasion 1' X 1/10' on the middle and vertical surface of the left ring finger.

His condition was pretty low and, therefore, after 10-30 P. M. he was sent to the Medical College. He died on January 20 and then his autopsy was held by Dr. S. B. Lal Saxena at 1 P. M. on January 20. He found that the deceased had sustained the following ante-mortem. external and internal, injuries-

External injuries.

1. Stitched wound 10' with 26 stitches. 9 1/2' below the inner part of the left clavicle on the left side of the abdomen extending upto lower abdomen.
2. Stitched wound 6 1/2' with 16 stitches on the left side of the lower chest joining injury No. 1. 7' below left nipple.
3. Stitched wound 1' with two stitches on the left buttock.
4. Superficial cut 1 3/4' X linear on the right buttock and
5. Three abrasions in an area of 5 1/2' X 2 1/2' on the inner aspect of upper right leg.

Internal injuries.

There were stitched wounds on the left side of the chest, on the pleura, diaphragm, abdomen, peritoneum and the greater curvature of the abdomen. Death, in the opinion of Dr. Saxena was due to shock and internal haemorrhage as a result of the injuries sustained.

4. The appellant had also received injuries during the course of his arrest. These were examined by Dr. B. D. Srivastava (C. W. 1) at 5-20 P. M. on January 18 after the appellant had been admitted inside the jail. These injuries are as follows:

1. Abraded contusion 3' X 3/4' on the back of the right upper arm in the lower part.
2. Contusion 1 1/2' X 1/2' on the back of the right upper arm in the middle part about 4' above injury No. 1.
3. Multiple contusions in an area of 10' X 4' on the right buttock and on the back of the right thigh.

4. Contusion 4' X 4' on the left but-tock.
5. Contusion 1 1/2' X 1/2' on the back of left side at the level of the waist.
6. Contusion 2' X 3/4' on the right side of the back in the upper (part.
7. Contusion 2' X 1' on the middle part of the right side of the back.
8. Abrasion 1 1/2' X 3/4' in the left nostril and
9. Stitched wound 1' X linear on the right eye brow.

As a result of the investigation, the appellant was charge-sheeted and committed to the Court of Session. He pleaded not guilty and stated that one Bihari Lal Valid was cremated on January 17, 1970 and he and others had joined in the cremation. He was returning from the cremation ground at about 4-30 or 5 P, M. and passed through the Galla Mandi in Narhi when he noticed a marpit going on between two factions. He stood there as a spectator but the factions suspected him to be one of the persons responsible for the marpit and he was attacked on that account. He immediately took to his heels in order to save himself but the people collected near the scene of the marpit went after him in hot pursuit, shouting that he should be arrested. The pursuers had Dandas and knives with them. When he reached the Ashok Marg, these pursuers and others arrested him and started belabouring him with Dandas and knives. One of the knife blows fell on his right eye-brow and the injury started bleeding. He admits that he had come running over the Ashok Marg from the Galla Mandi in Narhi and people were pursuing him. He also admits that he was arrested on the Ashok Marg and was beaten there. He further admits that Naresh Kumar was stabbed on the Ashok Marg but he is unable to say who did it and why and in what manner, t

5. The prosecution has examined Bhimsen Mehta. Raj Kumar Gulati and Ram Swarup P. Ws. 1, 2 and 3 as eyewitnesses and Sarwan Singh (P. W. 13) to prove the circumstances in which the appellant had run away from Narhi Galla Mandi.
6. We think it better to discuss the evidence of Sarwan Singh first. He has deposed that he had gone to distribute the dak to the residence of Dr. Kapur at

about 4-30 P. M. on January 17 and that on arrival at the residence of Dr. Kapur. he parked his cycle outside his house and then became busy with the dak. As soon as he was free from distribution, he noticed the appellant attempting to run away on his cycle and he challenged him to get down and also caught hold of the carrier of the cycle but at this stage the appellant stabbed him on his right elbow with a knife and ran away. He raised an alarm which attracted the notice of several passers by and they at once ran in pursuit of the appellant. The learned Counsel appearing for the appellant has criticised his evidence on a variety of grounds. Admittedly. Sarwan Singh did not lodge any F. I. R. in respect of the stabbing received by him. He says that Dr. Kapur took him to the Command Hospital, where his injuries were examined but no injury report has been exhibited. He was interrogated by the Investigating Officer on February 28, that is to say more than a month after the murder of Naresh Kumar. The witness identified the appellant, in Court even though no test identification had been held earlier. These are the main grounds on which his evidence has been criticised and the learned Counsel has pressed that we should discard his evidence. He also urged that in his statement under Section 161, Code of Criminal Procedure, the witness had stated that he had only challenged the appellant to get down from the cycle and not to run away with it but he added to it in his statement in Court by saying that he had caught hold of the carrier of his cycle also. We have considered these aspects of his evidence but we are not inclined to disbelieve him. Firstly, he has no enmity with the appellant and indeed, not even a suggestion was made to him of his having entertained any ill-will or hostile animus against him. The appellant was not even known to him from before that date. It is undoubtedly true that no test identification was held but that does not make the evidence inadmissible, and at best it weakens its testimonial value. The question whether the witness was taken to the Command Hospital and examined there or not is not relevant in the murder charge against the appellant. The omission to exhibit the injury report also falls in the same line. It would have been better if all this evidence had been produced at the trial, but the failure to produce will not shake the evidence of murder, if it is otherwise reliable. Sarwan Singh is at best a witness on a side aspect of the case as to the reason why the appellant was running from Narhi Galla Mandi to the Ashok Marg. That fact was not challenged by the appellant himself. He has

admitted in so many words that he was present in the Galla Mandi. He has further admitted that he ran away from Galla Mandi and stepped on to the Ashok Marg and continued his flight. He has again admitted that he was being hotly pursued by persons from Galla Mandi to Ashok Marg. This is what is material evidence in the case. There must have been some reason why the appellant decided to run away from Galla Mandi to Ashok Marg. He has given one reason, namely, that he was an innocent spectator at a faction fight that was taking place inside Galla Mandi and for no ostensible reason, the contestants in that fight suspected his complicity and left fighting inter se and made him a common enemy and chased him from there to Ashok Marg, This version does not appear to have a ring of truth. We find no reason why a mere innocent spectator should be made the target of a wholly uncalled for assault. He does not say that he was aligned to one of these factions. He does not even say that anyone of the two factions knew him from before. There is no reason why they should suspect him. as he says, for his mere standing there. On the other hand, Sarwan Singh's statement is more downright and acceptable. As stated earlier, he had no axe of his own to grind against the appellant. He is not alleged or even suggested to have had any alignment or partiality for the family of the deceased. He is not branded as a police stooge, In the circumstances, therefore, in spite of the blemishes pointed out, he has impressed us as a witness of truth. We. therefore, place reliance upon his evidence and hold that the appellant had stabbed Sarwan Singh inside Galla Mandi and when he realised that he was likely to be arrested, he took to his flight and came to the Ashok Marg. Thereafter he was not likely to walk slowly as the pursuit was still on. He had committed two offences inside Galla Mandi, namely the offence of theft and also the offence of causing hurt by a cutting weapon, that is to say. offences punishable under Sections 379 and 324, of the Indian Penal Code, He was bound to escape to obtain his freedom and the people were equally bound to pursue and apprehend him. if they could.

7-8. It is in the aforesaid background that the murder of Naresh Kumar came to be committed. His father Bhimsen Mehta is the Manager of an Ice Cream Factory situated in a part of the Narang Building. This building is situate towards the north of the Nawal Kishore Road, where it joins the Ashok Marg. The itinerant vendor of pan sells that stuff in a trolley and parks it outside Narang Building. Bhimsen

Mehta was standing near this Pan shop to purchase pan and there is no wonder if his son was standing near him. He must have been standing as the murder was committed in front of the building. Bhimsen Mehta cannot be disbelieved merely because he is the father of the deceased. His evidence shows that he did not know even the appellant from before, and that presumably explains why no suggestions of any enmity were made against the witness. The only infirmity that was pointed out in his evidence was that he stated that he and others had no Danda or a knife, and none of them wielded any such weapon to cause any injuries to the appellant and that he went further and stated that even those who had come chasing the appellant, caused no injuries to him. He had mentioned in the F. I. R. that the appellant was arrested after he had been beaten. It appears to us that possibly he is suppressing this fact. The other witnesses are certain that the appellant was beaten on the spot and arrested. In any case, the discrepancy that has appeared in the evidence of Bhimsen Mehta is wholly beside the mark inasmuch as the appellant has admitted that all the beating that he re-received was on the Ashok Marg and in the face of that admission, a discrepancy that had occurred in the statement of Bhimsen Mehta is hardly material. Raj Kumar Gulata is the second eye-witness. He is a waiter in a tea stall situate in the Narang Building. His duty is to cater to the needs of the occupants of that building and some other business houses. He had gone to another business house to supply tea and was returning with the tray and empty tea pot and cup and saucer when he noticed the appellant running various persons pursuing him. and he ran some distance and then put down his burden on the ground, and ran after the appellant. The criticism levelled against his evidence was that he used to supply tea to Bhimsen Mehta also and. therefore, he is an interested witness. We are not impressed by this argument. The mere fact that a witness is in service of a concern which sells food stuffs to all and sundry and if such stuffs are also supplied to a person in occupation of a portion of that building, not by way of charity but in the manner of business transactions, on payment of price he cannot be branded as an interested or partial witness. He is a very natural witness and could have seen the occurrence. Even if he took some time in running he had not to cover a long distance, as the distance was only about 150 paces, and in broad day light, his vision will not be precluded. Ram Swamp (P. W. 3) claimed to be an

eye-witness but turned out to be a witness of circumstance only. He stated that he had seen the appellant running away that he had seen him running with a knife; that he had seen a host of persons pursuing him, that he had seen the injured Naresh Kumar immediately thereafter; that he had seen the appellant under arrest and the knife with him. but he had not seen him giving the actual blows. That shows that he is a witness of truth and is not willing to perjure himself on the vital fact of giving of blows, though he is prepared to support the other witnesses in all other respects. S. I. Bisram Singh (P. W. 7) is also a witness of circumstance. He and another S. I. were standing in front of the Hazratganj police station when they received a report that some stabbing had taken place and the assailant was running and thereupon they also ran in that direction but by the time they reached the spot the incident was over and they could only see the appellant under arrest and a knife with Bhimsen Mehta. His evidence, as the fact indicates is much less important than that of Ram Swarup. Altogether, we are of the view that it is the appellant who committed the murder of Naresh Kumar.

9. The learned Counsel for the appellant then argued that the appellant had the right of private defence of person and that right extended even to the causing of death and, therefore, no offence was committed by him. This argument has various links in the chain. His argument was that assuming that he had stabbed Sarwan Singh inside Galla Mandi, that incident had not been witnessed by the deceased Naresh Kumar and, therefore he had no right to arrest him. He built this argument under two Sections, namely Section 59. Code of Criminal Procedure, and Section 20, Arms Act. Section 59 says that any private person may arrest any person who in his view, commits a non-bailable and cognizable offence, or any proclaimed offender. This means that a private individual may arrest a person only when (1) he is a proclaimed offender, or (2) he, in his view, commits a non-bailable and cognizable offence. The essential thing is that the offence must be committed in his view. The words 'in his view' mean 'in presence of' or 'within sight of' and not 'in his opinion' or on his suspicion or on receipt of information. In the instant case, the stabbing of Sarwan Singh had not taken place in the view of Naresh Kumar. True a slogan was being raised that he should be arrested but there was no indication as to why he should be arrested, or as to what crime he had committed. Even if that fact had been mentioned, there would be no material

change in the law because what Naresh Kumar had heard or would have heard was that a crime had been committed and that may well have led him to formulate an opinion or a suspicion but that would not attract Section 59 because the right to arrest accrues not on the basis of opinion, suspicion or information but on the basis of his visual knowledge that is to say, on the basis of his own personal knowledge derived from the use of his own eyes in seeing the crime being committed. We are, therefore, in agreement with the learned Counsel that this element of Section 59 is missing. Again, even though the appellant was noticed running with an unlicensed knife, which is an offence punishable under Section 25(1)(b). Arms Act. read with Section 4 of that Act, that offence is only cognizable but it cannot be said that it is non-bailable. Schedule II. Code of Criminal Procedure mentions in column 5. the offences which are bailable under the Indian Penal Code. With regard to offences against other laws it says that if such an offence is punishable with imprisonment for three years and upwards, but less than seven years, it would be bailable except in cases (not relating to fire arms) under the Indian Arms Act, 1878, Section 19. which shall be bailable. The Indian Arms Act. 1878 has been repealed by Section 46 of the Arms Act, 1959. However, the repeal to our mind, does not materially change the intention of the legislature, as mentioned in column 5 of Schedule II regarding offences against other laws. Section 19 of the old Act corresponds to Section 25. The meaning is, therefore, plain enough that an offence under Section 25 will be non-bailable if it is in relation to a fire arm but if it is in relation to any arm. other than a fire arm, the offence would be bailable. That being so, we are of the view that Naresh Kumar had no right to apprehend the appellant. The learned Deputy Government Advocate argued that even if such a right stands negatived under Section 59. Code of Criminal Procedure, such a right vested in Naresh Kumar under Section 29. Arms Act. That section, in our view, is also irrelevant to the facts of the case. It says that where any person is found carrying or conveying any arms or ammunition whether covered by a licence or not in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use them, or that the same may be used, for any unlawful purpose any...person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance may arrest him without warrant and seize from him

such arms or ammunition. Naresh Kumar was not employed in any of the modes afore-mentioned and, therefore, he had no right of arrest. Further, there is no evidence to show that the knife was going to be used. We, therefore, hold that Naresh Kumar had no right of arrest under any law.

10. It is on the basis of these facts that the learned Counsel for the appellant argued and if we may say so. with great vehemence, that Section 100, clause (6th-ly) of the Indian Penal Code had application. That Section says that the right of private defence of the body extends, under the restrictions mentioned in the last preceding section to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. In order, therefore, for this exception to apply there must be proof of the following facts, namely, there must be an assault, (ii) that assault must be with the intention of wrongful confinement, (iii) such an assault must be made under the circumstances which may reasonably cause a person to apprehend that he will be unable : to have recourse to the public authorities for his release, (iv). all the three must co-exist and (v) even if all these four exist, the act must fall under the restrictions mentioned in Section 99. Section 349 defines 'force' and 'criminal force' is defined by Section 350. Section 351 says as to what constitutes an offence of assault. Under that section whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Naresh Kumar is said to have heard the slogan that the appellant should be arrested, and is alleged to have run towards him, that is to say, to have made that gesture indicating that he was likely to arrest him. We therefore, agree with the learned Counsel that Naresh Kumar committed an assault or attempted to commit an assault. The question is as to what was the intention of that assault because the assault must be accompanied by an intention and that intention must be of wrongful confinement. If we judge the evidence in the background and the circumstances of the case, we cannot escape the conclusion that the intention was to apprehend and take the appellant to the police station. A large number of (persons were

pursuing the appellant; the appellant was running fast to elude the grasp of these pursuers : and it is at this stage that Naresh Kumar ran to contribute his own humble mite in the joint or common effort to catch hold of the appellant. Will that act of catching or arresting amount to wrongful restraint or wrongful confinement is another matter that requires consideration. Wrongful restraint is defined by Section 339 and wrongful confinement by Section 340. The former means voluntarily obstructing any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed; the latter means wrongfully restraining any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. When we take into consideration these two sections, we feel that the intention was of wrongful confinement rather than of wrongful restraint. The intention was to arrest the appellant on the spot and to take him to the police station, that is to say, to permit him to move only within the limits of the place of arrest and the police station, and not outside these limits. However, we do not agree with the contention of the learned Counsel that the circumstances were such that any reasonable person would have apprehended that he would not be able to secure the help of the public authorities in obtaining his release. He would have been taken to the police station. There is no evidence to indicate or suggest, much less to prove, that the intention was to confine him in a room or other place. The intention is obvious and clear to us that he was to be arrested and taken to the police station by a person who had no right either to arrest or take him to the police station and in the circumstances, therefore the fact resulted in wrongful confinement and not wrongful restraint. However, as soon as the appellant would reach the police authorities, namely police officials who would then deal with him in accordance with the mandates of law. If he was an innocent person, he would secure his freedom and liberty; and if, on the other hand, he had committed an offence, the law would have taken its own course. That being so in the circumstances afore-mentioned there was no right of private defence of person whatsoever. Again, the right of private defence is not an unfettered right but is subject to the restriction contained in Section 99. No one has a right to use more harm than is necessary in a given set of facts. Naresh Kumar was unarmed. He was only going to arrest the appellant and not to cause any injury to him. Indeed, he did not even cause an injury. The injuries were caused by others. In the

circumstances, the appellant had no right to whip out his knife and to give not one but several blows thereby causing injuries that proved fatal. It is not even a case, where we can say that he had a right of private defence of person but he had exceeded that right. The murder committed was culpable homicide not amounting to murder.

11. Altogether, therefore, there is no substance in this appeal which is accordingly dismissed and the sentence awarded to the appellant is confirmed. He is in jail and shall serve out the sentence.

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