

Malkhan Vs. State of U.P.

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Court : Allahabad

Decided On : May-14-1997

Reported in : 1998CriLJ96

Judge : G.P. Mathur and ;Kundan Singh, JJ.

Acts : Evidence Act - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 299, 299(2), 300, 307, 301, 302, 323 and 325; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : Criminal Appeal No. 3139 of 1979

Appellant : Malkhan

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : J.N. Chaturvedi and ;Prem Prakash, Adv.

Disposition : Appeal dismissed

Judgement :

G.P. Mathur, J.

1. Mal khan has preferred this appeal against his conviction under Sections 307 and 302, I.P.C. and sentence of 7 years R.I. and imprisonment for life by the

judgment and order dated 26-10-1979 by IXth Addl. Sessions Judge, Bareilly in S.T. No. 283 of 1978. Rampal was also prosecuted along with the appellant in S.T. No. 9 of 1979. He was convicted under Section 323, I.P.C. and was sentenced to the period already undergone. He has however not preferred any appeal against his conviction.

2. The case of prosecution, in brief, is that a quarrel took place between the children of the appellant-Malkhan and the deceased Khunnu in which the appellant gave abuses to the deceased and his parents. The deceased wanted to lodge a F.I.R. but on account of intervention by the village people he did not do so though the appellant had held out a threat. At about 4.00 P.M. on the date of incident i.e. 12-2-1978 Km. Mania daughter of the appellant and co-accused Rampal plucked peas from the field of the deceased. The deceased lodged a protest about it to Malkhan. On this Malkhan and his cousin Rampal started abusing Beni (father of Khunnu-deceased). Beni objected to the abuses on which Rampal assaulted him with a lathi. Smt. Ramkali w/o Beni rushed to save her husband. Malkhan then climbed over the roof of his 'Khaprail' and fired from there twice from his gun which hit Khunnu and Smt. Ramkali. Some persons of the village who had arrived on the scene reprimanded Malkhan who then went inside the house. Khunnu then carried his mother Smt. Ramkali on a tonga to P. S. Faridpur which is 6 Km. from the place of occurrence and lodged an oral report of 8.00 p.m.

3. Khunnu and Smt. Ramkali were sent to P.H.C. Faridpur along with Constable Chandrapal where they were medically examined by Dr. R. P. Goel who found gun shot injuries on the body of both the injured. Beni was also examined at P.H.C. Faridpur on the next day and a lacerated wound was found on his person. The case was initially investigated by Suraj Singh S.I. and after his transfer the investigation was taken over by Bhagwati Prasad Misra, S.O. of P. S. Faridpur. Suraj Singh went to village Bikku Nagla in the night and collected plain and blood stained earth from the spot and prepared its recovery memo. Khunnu was admitted in the district hospital. He succumbed to his injuries on 4-3-1978. After his death, the case which had been initially registered under Sections 323/307, I.P.C. was converted into Section 302, I.P.C. Bhagwati Prasad Misra, S.O. of P. S. Faridpur, after completing investigation, submitted charge-sheet against

appellant Malkhan and Rampal on 10-9-1978.

4. The learned Magistrate took cognizance of the offence and committed the case to the Court of Session. Learned Sessions Judge framed charges under Section 323 read with Section 34 and Sections 307 and 302, I.P.C. against the appellant-Malkhan. Rampal co-accused was charged under Section 323, I.P.C. and Sections 307 and 302 read with Section 34, I.P.C.. The accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 12 witnesses including three eye witnesses. The appellant-Malkhan and co-accused Rampal in their statement under Section 313, Cr.P.C. denied the case of the prosecution and alleged their false implication on account of enmity.

5. P.W. 1 Smt. Ramkali has given details about the case of prosecution in her examination -in-chief. She has stated that a quarrel between the children had taken place two months before the incident in which the appellant had given threats to Khunnu. At about 4 p.m., on the date of incident, Km. Mania d/o Malkhan and Rampal had plucked the peas from the field of Khunnu on which he had lodged a protest. Malkhan then started abusing Beni who objected to it. Rampal gave a blow to him by lathi. When Rampal started assaulting Beni she and Khunnu rushed to save him. It was at that stage that the appellant-Malkhan climbed over the roof of his 'Khaprail' and fired from there due to which she and Khunnu received injuries. She has further stated that after their medical examination at P.H.C. Faridpur both she and her son Khunnu were sent to Bareilly hospital for treatment. P.W. 3 Beni has given a similar statement and has stated that when Khunnu lodged a protest to Malkhan regarding plucking of peas, he (Malkhan) started abusing them. The witness then objected to the abuses on which Malkhan assaulted him with lathi. When Khunnu and Smt. Ramkali rushed to save him, Malkhan climbed over the roof of 'Khaprail' and fired twice from his gun. P.W. 2 Ram Singh is a resident of the same village Bokhu Nagla. He stated that on hearing alarm, he went near Chabutra of Beni. He saw an injury on the head of Beni. At that time, Malkhan was standing on the 'Khaprail' of his house and he fired from the gun which hit Khunnu and Smt. Ramkali.

6. P.W.5 Dr. Y. M. Shukla was M. O. Incharge of P.H.C. Faridpur on 13-12-1978. He examined Beni at 1.25 p.m. and found the following injury on his person;

Lacerated wound 4 cm. x 1 cm. x scalp deep on the left side head 12 cm. above the left ear.

In the opinion of doctor, injury was about one day old and had been caused by some plant and hard weapon.

7. P.W. 8 Dr. R. P. Goel was M. O. Incharge of P.H.C. Faridpur on 12-2-1978. He examined Khunnu at 8.55 p.m. and found the following injuries on his body;

1. Six gun shot wounds of Entry 3 cm. x 3 cm. to 3 cm. 4 cm. x X variable depth (skin to muscle) on the back and in the inner side of the right forearm and hand.

2. Five gun shot wound on the right lower abdomen 3cm. x 4 cm. variable depth (not probed) kept under observation.

3. Fourteen gun shot wounds of entry on the right buttock and thigh (outside). 2 cm. x 2 cm. to 4 cm. x 4 cm. to variable depth from the skin to the muscle deep.

4. One gun shot wound of entry on the front of the right leg upper 1/3rd cm. x 3 cm. x skin to muscle deep.

5. Two gun shot wounds on the front of the left thigh 3 cm. x 4 cm. x variable depth.

The same doctor examined Smt. Ramkali at 8.40 p.m. and found the following injuries on her body;

1. Gun shot wound of Entry 3 cm. x 3 cm. depth not probed just on the middle of left clavical bone kept under observation.

2. Gun shot wound 3 cm. x 3 cm. on outer side of left arm 10 cm. below top of shoulder.

3. Gun shot wounds of Entry 4 cm. x 3 cm. x variable depth of left fore arm back side 3 cm. below elbow joint.

4. Two gun shot wound 2.5 cm. x 3 cm. x variable depth on left fore arm inner side 3 cm. above wrist joint.

5. One gun shot wound. 3 cm. x 3 cm. x skin deep on the front of middle of index finger. The witness has stated that the injuries to both the injured had been caused by a fire arm.

8. P.W. 10 Dr. S. K. Khare conducted post mortem examination on the body of Khunnu at 3.30 p.m. on 4-3-1978 and found the following ante mortem injuries on his person;

1. Multiple gun shot wound of entry scabbed 16 in number in an area of 38 cm. x 16 cm. on the Rt. side of abdomen lower part and upper part to the Rt. thigh in front & lateral aspect average size. 0.4 cm. of each wound.

2. Multiple gun shot wound of entry scabbed on the ulnar aspect of the dorsum of the hand five (5) in number in an area of 10 cm. x 5 cm. each wound of average 0.4 cm. x 0.4 cm. size.

The internal examination showed that cavity was full of pus and there was perforation in small intestine. Seven pellets were also recovered from the body. In the opinion of doctor, death had occurred on account of generalised peritonitis as a result of injuries sustained.

9. P. W. 7 Sadat Ali was compounder in the district hospital, Bareilly and he has proved the original bed head tickets of Khunnu and Smt. Ramkali which have been brought on record.

10. P.W. 4 Nathu Lal is a resident of the same village and is a witness of recovery of plain and blood stained earth from the spot and also of its seizure memo. P.W. 6 Chandrapal has stated that he was posted as Constable at P. S. Faridpur on 12-2-1978 and in his presence Khunnu son of Beni had dictated report which was written by Head Constable Udaipal Singh. He has proved the F.I.R. Ex. Ka. 4 which was dictated by Khunnu and was taken down by Head Constable. He has further stated that he had prepared the Chitthi Majroobi of both the injured namely Khunnu and Ramkali which are Ex. Ka. 5 and Ex. Ka. 6 and thereafter he had

taken them to P.H.C. Faridpur for their medical examination. When the medical examination was being conducted Shri Krishna Murari Misra, S. I. came there and recorded statement of Khunnu under Section 161, Cr.P.C. In this statement Khunnu gave the details of the prosecution case and stated about the quarrel between the children which had taken place two months earlier. He further stated about the incident which took place on that date at about 4.00 p.m. regarding plucking of peas and the assault by Rampal upon Beni. He also stated that when he and his mother rushed to save his father Beni, Malkhan fired from his gun due to which he and Smt. Ramkali received gun shot injuries. The witness has proved the statement of Khunnu which was recorded by Shri K. M. Misra in the case diary and has filed a copy of the same which is Ex. Ka. 7 on record. It may be mentioned here that a Knunnu died on 4-3-1978 as a result of injuries sustained by him, the F.I.R. dictated by him on 12-2-1978 which is Ex. Ka. 4 and his statement under Section 161, Cr.P.C., copy of which is Ex. Ka. 7, are being relied upon as dying declaration by the prosecution.

11. P. M. 12 Suraj Singh, S. I. has stated that Shri K. M. Misra, S. I. died and therefore, his hand writing etc. has been proved by P.W. 6 Chandrapal Constable. P. W. 13 Udai Pal Singh, Head constable has proved chick F.I.R. Ex. Ka. 4 which he had been prepared on the dictation of Khunnu. P.W. 9 Bhagwali Prasad Misra has stated about the steps which were taken by him during investigation and has proved the charge-sheet Ex. Ka. 14 which was submitted by him.

12. The evidence adduced by the prosecution shows that at about 4.00 p.m. on the date of incident Km. Mania daughter of Malkhan and Ram Pal had plucked peas from the field of Beni. The deceased Khunnu lodged a protest with Malkhan on which he started giving abuses. Beni objected to the abuses. Rampal gave him a lathi blow which hit him on the head. On this Khunnu and Smt. Ramkali rushed to save him and then Malkhan climbed over the roof of his Khaprail and fired from his gun and both of them received gun shot injuries. Out of three eye witnesses examined by the prosecution P.W. 1 Smt. Ramkali and P.W. 3 Beni are injured witnesses. The F.I.R. of the incident was lodged at 8.00 p.m. at P. S. Faridpur which is six Km. from the place of occurrence. The medical examination of Smt. Ramkali and Khunnu was done at 8.40 p.m. and 8.55 p.m. respectively on the

same night at P.H.C. Faridpur. Thus the evidence shows that the F.I.R. regarding the incident was lodged promptly and the medical examination of two injured who had gone to the police station was also done within few minutes of the lodging of the F.I.R. The statement of two injured witnesses finds complete corroboration from the medical evidence on record. P.W. 2 Rani Singh is also a resident of the same village. His presence on the spot is quite natural and probable. The defence has not been able to elicit anything in his cross-examination which may cast any doubt on his statement. The testimony of three eye witnesses examined by the prosecution proves beyond any shadow of doubt that Rampal assaulted Beni with lathi and Malkhan fired from his gun due to which Khunnu and Smt. Ramkali received injuries. In this case, the F.I.R. was dictated by deceased-Khunnu which is Ex. Ka. 4 on record. This bears his thumb impression. Thereafter, the statement of Khunnu under Section 161, Cr.P.C. was recorded in the case diary by S. I. K. M. Misra at P.H.C., Faridpur and its copy is Ex. Ka. 7. This statement was recorded round about the time when the injured were examined i.e. around 8.45-8.55 p.m. on 12-2-1978. Since Khunnu died subsequently on account of injuries received by him and in the F.I.R. and also in the statement under Section 161, Cr.P.C. he had stated about the person who gave him injuries and the manner in which they were caused to him both the F.I.R. and the statement under Section 161, Cr.P.C. are admissible under Section 32 of the Evidence Act. These documents Ex. Ka. 4 and Ka. 7 give the same version of the incident as has been stated by the eye witnesses and there is no contradiction of any kind between them. Thus from the evidence adduced by the prosecution, it is established beyond any shadow of doubt that Rampal assaulted Beni with lathi and appellant-Malkhan fired from his gun due to which Smt. Ramkali and Khunnu received injuries and that Khunnu died on account of the aforesaid injuries on 4-3-1978.

13. Sr. P. P. Yadav, learned counsel for the appellant has submitted that the incident took place on 12-2-1978 but Khunnu died after 2()days on 5-3-1978 and death took place on account of generalised peritonitis and, therefore his conviction under Section 302, I.P.C. is illegal. He has also submitted that the site plan shows that firing had been done from a distance of 22 paces and, therefore the intention to cause death cannot be attributed to the appellant. In support of his submission Sri Yadav has placed reliance on Iqbal Husain v. Emperor AIR 1930 Oudh 252

wherein it was held that if a victim of an assault dies of peritonitis due to rupture which could not be connected with the injuries received in the assault, it was not a case of culpable homicide not amounting to murder and the accused were convicted under Section 325, I.P.C. Learned State counsel has, on the other hand, submitted that the offence committed by the appellant is under Section 301, I.P.C.

14. The question which requires consideration is whether on proved facts and evidence on record the offence committed by the appellant amounts to culpable homicide as defined under Section 299, I.P.C. or murder as defined in Section 300, I.P.C.. According to P.W. 10 Dr. S.K. Khare, who conducted post mortem examination, death had occurred due to generalised peritonitis which had been caused due to injuries and peritonitis had developed due to gun shot injury. He has clarified this point in his cross-examination, wherein he stated that on account of pellet injuries the deceased got peritonitis and there was infection. He has further stated that he cannot make a statement whether the deceased would have survived had there been no infection. The peritoneal cavity, the largest cavity in the body is lined by a serous membrane comprised of flattened polyhedral cells resting upon a thin layer of fibroelastic (see Bailey 19th Edn. page 358). In 'A companion in Surgical Studies' by Ian Aird, 2nd Edn. page 762, the reasons for developing peritonitis are given as under:

1. directly from an abdominal wound;
2. from a suppurative process in one of the intraperitoneal viscera (as in appendicitis).
3. after operation upon a hollow abdominal viscus with an infected content;
4. by blood infection;
5. rarely by downward lymphatic infection from the pleura;
6. by direct spread along the female genital tract from the exterior.

This shows that an abdominal wound can result in peritonitis. Dr. Khare has stated that the deceased died on account of peritonitis which developed due to pellets of

gun shot. Therefore, the death of the deceased is directly attributable to the injuries caused by the appellant and it cannot be held that the same took place on account of any supervening or extraneous reason other than the wound inflicted by the appellant.

15. An identical question was considered by a Division Bench in *Zorawal v. State* 1986 All Cri C 390 (2) : 1987 Cri LJ 641 where the deceased had sustained gun shot injuries but died after 12 days on account of peritonitis. It was held that the offence committed by the accused was under Section 302, I.P.C. In *Naresh v. State* 1980 All Cri C 262 : 1981 UPLT NOC 60, knife injuries were caused to the deceased on 2-3-1974. After initial treatment at Ghaziabad he was shifted to Safdarjang Hospital, Delhi where he died on 10-4-1974. The post mortem examination showed that the death took place due to septicaemia and there was pus in the operational injury. It was held that septicaemia caused by the abdominal operational injury accelerated the death of the victim and injury sustained by him was the real cause of his death. In *Jageshwar Singh v. State of Bihar* 1968 Cri App R (SC) 73 it was held as follows;

Even if the injuries caused the death combined with the complication of tetanus, it must be held that those injuries were the cause of death, or that, in any case, the circumstances in which those injuries were received, would be circumstances of transactions which resulted in his death.

16. It may be pointed out that Explanation (2) to Section 299, I.P.C. lays down that where death is caused by bodily injury, the person who causes such bodily injuries shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment, the death might have been prevented. In *Morcha v. State of Raj.* : 1978 CriLJ1710 it was held that the mere fact that if immediate expert treatment had been available and the emergency operation had been performed there were chances of survival of the deceased can be of no avail to the accused in view of Explanation (2) to Section 299, I.P.C. Though the nature of the offence committed by an accused has to be judged with reference to Sections 299 and 300 of the Indian Penal Code at the same time, it will be useful to refer to the law on the point in U.K. and U.S. A. as many principles of our Justice System

have been borrowed from the aforesaid countries.

17. In Halsbury's Law of England 4th Edn. Vol. 11 para 1156 the law on the point has been stated as follows :

For the purposes of offences of homicide, a person causes the death of another where by any act or omission he accelerates the death of that other. The act or omission need not be the sole or the substantial cause but it must be one of the causes, and one that is more than minimal. It is, therefore, possible to have two or more independent operative causes of death, and any person whose conduct constitutes a cause may be convicted of an offence in respect of the death.

It is not necessary that the death should have been caused in the way intended or foreseen by the defendant. It is enough that the death was a foreseeable or natural consequence of the defendant's conduct, so if the defendant threatened the victim who accidentally killed himself in trying to make his escape, the defendant is liable for murder or manslaughter according to his mens rea.

18. If a wound is inflicted and death results, the person who inflicted the wound will be held to have caused the death although the victim may have neglected to use proper remedies, or have refused to undergo a necessary operation. Similarly, where a wound or hurt has necessitated medical treatment and such treatment is improper or negligent so that death ensues, the wound will be regarded as causing the death if it continues to be an operative cause at the time of death, but if the original wound is merely the setting in which another cause operates, or has become merely part of the history of the case, an ensuing death cannot be said to result from the wound and the person who inflicted it cannot be said to have caused the death.

19. In U.S.A., the law on the point has been stated as under in 40 American Jurisprudence 2d paras 15, 16 and 20;

15. Contribution of act to death :

Liability for homicide does not depend upon the fact that death is the immediate consequence of the injury inflicted by the accused. One who inflicts an injury on

another is deemed by the law to be guilty of homicide if the injury contributes mediately or immediately to the death of such other. He is legally accountable if the direct cause of death is the natural result of his criminal act. The fact that other causes contribute to the death does not relieve the actor of responsibility, provided such other causes are not the proximate cause of the death. Criminal responsibility for inflicting an injury which is the efficient cause of death is not lessened merely because of the predisposed physical condition of the decedent, without which the blow or wound would not have been fatal. 16. Acceleration of death :

Criminal responsibility for homicide is not relieved because the person killed has previously been mortally wounded by another, if the act of the accused actually causes or accelerates death. The law declares that one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible thereof. It is said in this connection that if any life at all is left in a human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being. In accordance with this rule, one who inflicts injury on the deceased after the latter is mortally wounded by another may be guilty of homicide if the effect of the former's act hastens death. In such cases, the person who inflicts the first injury may also be convicted, according to some authorities, if it appears that the injury or wound inflicted by him would have resulted in death without the intervening act. 20. Disease or physical condition, resulting from or co-operating with injury :One who inflicts a blow or wound upon another, which devolves into or initiates an affliction or disease, is criminally responsible for the death of such person ultimately resulting from the affliction or disease. It is not indispensable to a conviction that the wounds be necessarily fatal and the direct cause of death. It is sufficient that they cause death indirectly through a chain of natural effect and causes unchanged by human action. This rule is applied not merely where the consequential development is in the form of an immediate infection of the wounds itself, such as erysipelas, septicaemia or blood poisoning, but also where the condition developing is anatomically dissociated from the mere external wound, as in the case of miscarriage, or pneumonia, or where blows cause congestion of the brain resulting in death, or in exposure which causes death.

20. The legal position which emerges is that if injury is caused which makes it imperative for the victim to have medical treatment and such treatment is improper or negligent or is not up to the mark and the victim dies, the injury will be regarded as causing the death of the victim and the fact that other causes contribute to the death do not mitigate or reduce the liability of the accused unless the other causes are wholly independent and do not owe their origin to anything connected with the injury or their treatment and are the sole cause of death. Therefore, even assuming that peritonitis would not have developed or infection would not have been caused if proper medical aid had been given, it can be no ground to hold that the injuries inflicted by the appellant were not directly responsible for the death of Khunnu deceased and consequently his liability cannot be reduced in any manner.

21. If injury is caused by firing from a gun the knowledge that the injuries are likely to cause death of the victim can be safely attributed to the assailant. Thus the case is fully covered by Clause Secondly of Section 300, I.P.C. and the offence committed by the appellant will be under Section 302, I.P.C.

22. For the reasons mentioned above, the appeal fails and is hereby dismissed. The conviction of the appellant under Sections 307 and 302, I.P.C. and the sentence of seven years' R.I. and imprisonment for life imposed thereunder are affirmed. The appellant is on bail. He shall surrender forthwith to undergo the sentences imposed upon him. After he has been taken into custody, his sureties and bail bonds shall stand discharged.