

State of U.P. Vs. Hari Ram and anr.

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Court : Allahabad

Decided On : Nov-28-2003

Reported in : 2004CriLJ1895

Judge : M.C. Jain and ;Onkareshwar Bhatt, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 304 and 323

Appeal No. : Govt. (Cri.) Appeal No. 1544 of 1981

Appellant : State of U.P.

Respondent : Hari Ram and anr.

Advocate for Def. : Sanjeev Ratan, Adv.

Advocate for Pet/Ap. : P.C. Srivastava, Adv. ;K.P. Shukla, A.G.A.

Disposition : Appeal allowed

Judgement :

M.C. Jain, J.

1. The two accused-respondents Hari Ram and Bansu, real brothers, were tried before the Sessions Judge, Basti in S. T. No. 301 of 1980 for the offence punishable under Section 302 I. P. C. read with Section 34 I. P. C. for murdering their own brother Bhagwan Das. By judgment dated 2-4-1981 passed by Sri

Chandra Mohan, the then Sessions Judge, Basti, they were acquitted. Aggrieved, the State has preferred this appeal.

2. We have heard Sri K. P. Shukla, learned A. G. A. from the side of the State and Sri Sanjeev Ratna, learned counsel for the accused respondents. The record of the lower Court has also been summoned before us which we have carefully perused.

3. The relevant facts may be related shortly. The incident took place on 31-8-1980 at about 7.00 a.m. in village Sitarampur, Police Station Kalwari of District Basti and the report by oral narration was lodged on 31-8-1980 at 9.25 p.m. by deceased's wife Shanti Devi at Police Station Kotwali. The F. I. R. was sent to Police Station Kalwari through a constable where a case was registered. The deceased Bhagwan Das used to work in Bombay and send money out of his earnings to Bansu accused. He had come to the village some time before August 1980. On 31-8-1980 at about 7.00 a.m. he was digging earth from old joint Khandhar for constructing cattle grove for his cow. Both the accused appeared there and asked him to dig out the earth from there. The deceased insisted to dig out the earth whereupon at the instigation of accused Hari Ram, the other accused Bansu dealt a lathi blow on the head of the deceased. He fell down and then Hari Ram assaulted him with kicks and fists. Shanti Devi wife of the deceased was nearby who raised shouts attracting the witnesses Nand Lal, Sarva Deo and Udai Bhan. The accused retreated. The victim was taken up to road by his wife and daughter and from there in rickshaw to District Hospital where he breathed his last on 31-8-1980 at 7.05 p.m. It was thereafter that Shanti Devi went to Police Station Kotwali and lodged the F.I.R. by oral narration as stated earlier. Investigation was conducted by S. I. Ram Nath PW 5. On an information having been sent from the Hospital to the Police Station, an A.S.I. prepared inquest report and other necessary papers. Sealing the dead body, he sent the same for post mortem which was conducted by Dr. S. G. Tekriwal CW 1 on 1-9-1980 at about 5.00 p.m. The deceased was aged about 38 years and the ante-mortem injuries found on his person were lacerated wound 4 cm x 1 cm x bone deep, with traumatic swelling on skull left side, 2 cm from midline 12 cm above the root of nose and multiple abrasions in an area of 10 cm x 5 cm front of right leg., 13 cm. below knee joint.

4. Internal examination revealed ecchymosis and depressed fracture of left parietal bone 6 cm long. The death had occurred due to coma as a result of ante-mortem head injury.

5. At the time of his initial medical examination (when he was alive) by Dr. D. P. Mishra CW 2 on 31-8-1980 at 9.20 a.m. the same injuries were found.

6. The defence of the accused was of denial. Their stand was that the deceased Bhagwan Das was digging earth from dilapidated house and he was injured by the fall of a brick. Hearing his cries, they as well as other family members had rushed up and taken him to the hospital.

7. The prosecution examined, in all, five witnesses. Out of them, Shanti Devi PW 1, Astabhuj Prasad alias Nand Lal PW 2, Sarva Deo PW 3 and Prem Narain PW 4 were examined as eye-witnesses. S. I. Ram Nath PW 5 was the Investigating Officer. CW 1 Dr. S. G. Tekriwal who conducted post mortem over the dead body of the deceased, CW 2 Dr. D. P. Mishra who conducted initial medical examination of the deceased (whose reference has come to be made earlier) and CW 3 Dr. K. M. Chandra CMO, Basti were examined. The prosecution evidence did not found favour with the trial Judge in whose opinion the witnesses had fabricated a false case against the accused on account of enmity. The deceased, according to him, most probably died as a result of accidental injury received by him on a fall of brick. He also made it a point of criticism that there was delay in the lodging of the F. I. R. and interpreted it in favour of the accused-respondents that as per the F. I. R. they had also gone to the hospital with the victim. This, as per the trial Judge, indicated their innocence. Resultantly, he acquitted the accused respondents.

8. On a careful consideration, we are of the firm opinion that none of the reasons adopted by the trial Judge for acquittal can be sustained on an in depth analysis of the evidence on record and attending circumstances. So far as the late lodging of the F.I.R. was concerned, there was plausible and acceptable explanation thereof. True, the incident took place on 31-8-1980 at about 7.00 a.m. and the report was lodged (after the deceased died in the hospital) at 9.25 p.m. but it has to be taken note of that the victim had received serious injury in his head. Therefore, it was of prime importance to save his life, if possible, by instantly providing medical aid and

treatment to him. Naturally, therefore, his wife, an illiterate lady, first rushed him to the hospital for the purpose. She could not be expected to run to the Police Station like a computer immediately after the occurrence, leaving her injured husband uncared for and unmindful of providing Immediate medical aid and assistance to him. Judged in this correct perspective, no adverse inference could be drawn against the prosecution case on the premise of late lodging of the F. I. R.

9. The fact that the accused-respondents had also gone to the hospital could not be interpreted that they were innocent. After all, the deceased was their own brother. The incident had taken place on a sudden quarrel between him on the one hand and the accused-respondents on the other. It could be because of filial relationship that overtaken by remorse and repenting their folly, the accused-respondents also went to the hospital where the victim was taken immediately after the incident. This factor could not eclipse the impact of the trustworthy testimony adduced from the side of the prosecution that they were the assailants.

10. It was not at all disputed that the deceased was injured on 31-8-1980 at about 7.00 a.m. when he was digging out earth from the dilapidated house. There was direct testimony of Shanti Devi PW-1 wife of the deceased and Prem Narain PW 4. They had seen the accused respondent Bansu giving a lathi blow on the head of the deceased after brief altercation between the two over the issue of digging of earth, the former asking him not to do so and the latter insisting that he would dig the earth. There was hardly any reason for any of these two witnesses to falsely implicate the accused-respondents. It has come in the testimony of Shanti Devi PW1 that the deceased used to work at Bombay as a carpenter and had come to the village four months before the incident. She also stated that he used to even send money through money order to accused respondent Bansu as financial help, meaning thereby that there was no previous animosity between the deceased and the accused respondent Bansu who struck the fatal lathi blow on his head. Rather, moved by brotherly consideration, the deceased was even helping the accused-respondent Bansu by sending money to him from Bombay. It appears that the incident occurred at the spur of moment on a sudden quarrel over a minor issue. The presence of Shanti Devi PW 1 was natural. Prem Narain PW 4 also explained that the place of occurrence was visible from his door. He saw the deceased

digging earth and two accused respondents appearing there. Some altercation took place between the deceased on the one hand and the accused-respondents on the other whereafter the accused-Bansu dealt a lathi blow on the head of the deceased Bhagwan Das who fell down and accused respondent Hari Ram assaulted him with kicks and fists. Learned counsel for the accused respondents argued that the name of Prem Narain does not find place in the F. I. R. It should be stated that the F. I. R. was lodged by an illiterate lady by oral narration immediately after her husband died in the hospital owing to the lathi blow given to him by the accused respondent Bansu. Her mental condition at that time can well be visualized. No adverse inference should be drawn if in emotionally surcharged frame of mind, she omitted to give the name of Prem Narain also as a witness. Prem Narain himself had no enmity with the accused-respondents which could actuate him to depose falsely against them. We also wish to observe that the names of Nand Lal PW 2 and Sarva Deo Upadhyay PW 3 find place in the F. I. R. Nand Lal PW 2 gave res gestae evidence that he reached the spot on hearing shouts; he found Bhagwan Das bleeding from the head and that his wife Shanti Devi PW 1 was shouting aloud that Bansu had struck lathi blow on her husband and Hari Ram had assaulted him with kicks and fists. The statement of Sarva Deo Upadhyay PW 3 is that he had reached the spot on hearing shouts. He found Bhagwan Das lying injured and when he inquired from his wife, she disclosed that he had been assaulted by Bansu and Hari Ram. This piece of res gestae evidence fortifies the testimonial assertions of Shanti Devi PW 1 and Prem Narain PW 4.

11. The eye-witness account could not be disbelieved on the hypothesis that there was likelihood of the fatal head injury having been sustained by the victim by the fall of a brick on his head as has been deduced by the trial Judge. CW 1 Dr. S. G. Tekriwal who conducted the autopsy on the dead-body of the deceased was categorical that the said head injury could not be sustained by the deceased by fall of a brick. There was strong and firm reason for it that this injury was bone deep with the depressed fracture beneath. It clearly indicated that it could be caused only with the use of sufficient force which could not usually be there by the fall of a brick on the head. Since CW 2 Dr. D. P. Misra who conducted the initial medical examination of the deceased stated that the injury could be caused by fall of a brick, the trial Judge examined Dr. K. M. Chandra, Chief Medical Officer, Basti CW

3 as an expert who stated that there was equal possibility of the questioned injury being sustained by a lathi blow or by fall of a brick. He, therefore, concluded that the possibility of the injury sustained by fall of a brick could not be overruled. We do not think that the matter could be decided simply on the basis of the number of the Doctors deposing one way or the other. The damage sustained beneath the questioned injury i.e. depressed fracture of left parietal bone, was a clear indicator that it was the outcome of a lathi blow struck with force and it could not be attributed to the fall of a brick. In any case, the statement of CW 2 Dr. P. D. Mishra and CW 3 Dr. K. M. Chandra Chief Medical Officer, Basti that there was also the possibility of this injury having been sustained by fall of a brick could not overshadow the ocular testimony contained in the statements of Shanti Devi PW 1 and Prem Narain PW 4 coupled with the res gestae evidence of Nand Lal PW 2 and Sarva Deo Upadhyay PW 3. The res gestae evidence of Nand Lal PW 2 and Sarva Deo Upadhyay PW 3 that immediately after the incident she was crying hoarse that lathi blow had been struck on her husband by accused respondent Bansu and another accused-respondent Hari Ram assaulted him with kicks and fists, obliterated the scope of any concoction on her part subsequently.

12. The trial Judge has also referred to this aspect of the matter that CW 2 Dr. D. P. Mishra had noted the injury as an accidental injury. To our mind, it did not justify a conclusion against the prosecution case. The explanation was there in the own testimony of CW 2 Dr. D. P. Mishra as to why the injury was mentioned by him as an accidental injury. According to him, the injury being noted as accidental injury meant that either the injury was sustained in an accident or the patient had no money to pay private fee for medical examination. He also stated that the victim was brought by his wife who did not pay any fee to him. So, the case was registered by him in the accident register. The victim having been taken to the hospital immediately after the incident by his illiterate wife, who has no money to pay, was the reason of the injury being mentioned by the Doctor as accident injury. It could not be used as a ground to reject the evidence coming forth against the accused-respondent at the trial.

13. We are of the opinion that the trial Judge was unnecessarily overwhelmed by suspicion. Exaggerated devotion to the aspect of doubt is bound to result in

miscarriage of justice.

14. To come to the point, it was proved by the evidence on record that after a brief altercation between the victim on the one hand and accused-respondents on the other over an issue of digging of earth, in the heat of passion in a sudden fight, the accused-respondent Bansu gave a lathi blow on the head of the deceased which proved to be fatal. The case is, therefore, covered by exception No. 4 to Section 300, I.P.C. It was a culpable homicide not amounting to murder. It is also relevant to note that the blow was not repeated. Moreover, it is there in the testimony of Prem Narain PW 4 that after Bhagwan Das fell down on receiving lathi blow, Hari Ram assaulted him with kicks and fists. He was unarmed. The common intention of striking the lathi over the head of Bhagwan Das by Bansu cannot, therefore, be imputed to accused-respondent Hari Ram. He, therefore, only committed the offence punishable under Section 323, I.P.C. of voluntarily causing hurt to the deceased Bhagwan Das with kicks and fists after he had fallen down. So far as Bansu is concerned, the fact is that the blow was not repeated. It just so happened that the lathi blow dealt by him proved to be fatal, though he had no intention of causing either death or such bodily injury as was likely to cause his death. But knowledge has to be imputed to him that the act of striking lathi blow on the head of the deceased was likely to cause his death. Therefore, he committed the offence of culpable homicide riot amounting to murder and the offence is punishable under Part II of Section 304, I.P.C.

15. Accused respondent Bansu who was aged about 55 years at the time of the incident, must be nearly 78 years of age now.

16. On global consideration, we think that the ends of justice would be met by sentencing the accused respondent Bansu to rigorous imprisonment for two years under Part II of Section 304, I.P.C. and a fine of Rs. 20,000/- (Rupees twenty thousand only). In default of payment of fine, he shall suffer further two years rigorous imprisonment. The fine, if realized, shall be paid as compensation to the widow of the deceased Bhagwan Das, The sentence of payment of fine of Rs. 1000/- (Rupees one thousand only) under Section 323, I.P.C. would be imposed on accused respondent No. 2 Hari Ram and in default of payment of fine,

he would be ordered to suffer three months rigorous imprisonment.

17. in the result, we allow this appeal and reverse the finding of acquittal recorded by the trial Judge. We convict the accused-respondent Bansu under Part II of Section 304, I.P.C. and sentence him to rigorous imprisonment for two years and to pay a fine of Rs. 20,000/- (Rupees twenty thousand only). In default of payment of fine, he shall suffer further rigorous imprisonment for two years. The fine if realized, shall be paid as compensation to Shanti Devi PW 1 wife of deceased, or failing her to the other immediate heir of the deceased Bhagwan Das, The fine shall be paid within three months from today.

18. We convict accused respondent No. 2 Hari Ram under Section 323, I.P.C. and sentence him to pay a fine of Rs. 1000/-. In default of payment of fine, he shall undergo rigorous imprisonment for three months. The fine shall be paid within two months from today.

19. The office is directed to send a copy of this judgment along with the record of the case to the Chief Judicial Magistrate, Basti for follow up action. The accused respondent Hari Ram is on bail. In case the fine of Rs. 1000/- (Rupees one thousand only) is not deposited by the accused-respondent Hari Ram within two months from today, the Chief Judicial Magistrate, Basti shall cause him also to be arrested and lodged in Jail to suffer three months rigorous imprisonment. The accused respondent Bansu is also on bail the Chief Judicial Magistrate, Basti shall forthwith cause him to be arrested and lodged in jail for executing the sentence passed against him.

20. The Chief Judicial Magistrate concerned shall report compliance within three months from today.