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Naseem Alias Bhatey Vs. State

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Court : Allahabad

Decided On : Nov-18-1999

Reported in : 2000CriLJ3043

Judge : J.C. Gupta and ;S.K. Jain, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 302 and 304; ;Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Cri. Appeal No. 2861 of 1980

Appellant : Naseem Alias Bhatey

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Pratap Narain Misra, Adv.

Judgement :

1. This appeal is directed against the judgment and order dated 10 -12-1980 passed by the then Addl. Sessions Judge, Metropolitan Area, Kanpur convicting the appellant under Section 302, I.P.C. and sentencing him to imprisonment for life.

2. This case relates to the murder of Ali Hasan alias Pallar who Is said to have been stabbed at about 11 p.m. on 27-8-1980 by the appellant in front of the shop

of Kallu Cyclewala in Mohalla Chamanganj lying within the circle of police station Rai Purwa Kanpur. The case of the prosecution is that at the aforesaid time the deceased Ali Hasan alias Pallar and accused Naseem alias Bhatey were passing in front of the shop of Kallu Cyclewala and were talking to each other. The accused was demanding his share from the deceased and then hot words were exchanged between the deceased and the accused during, the course of which accused took out a knife from his pocket and inflicted one injury in the abdomen of the deceased . The incident was witnessed by Ali Husain PW 1 the brother of the deceased. Mohd. Sami PW 2 and Amar Hasan PW 8. The residential house of the deceased was situate only at a distance of about 20 paces from the place of occurrence. On hearing shrieks, Bawan PW 3 father of the deceased also rushed to the spot and saw the accused running from the place of occurrence. Ali Hasan alias Pallar was then moved to hospital in injured state by the father and his brother Ali Husain PW 1, Dr. P.P. Gupta PW 5 medically examined Ali Husain on the same night at 11.30 p.m. and he noticed the following injury on his person.

Incised wound left side abdomen with loop of intestine coming out size 8 cm x 4 cm x cavity deep.

The injury was fresh and X-ray was advised. Since the injured was in precarious condition, he was admitted in the hospital where he succumbed to his injury in the next morning at 8.55 a.m.

3. Dr. J.P. Yadav PW 4 conducted the post mortem examination on the dead body of Ali Husan and he found following ante mortem injuries :

1. A horizontal stab wound with clean cut margin, 7 cm. x 3. 5 cm. X abdominal cavity deep, on the left side, 5.5. cm. Below and lateral to the unbilicus tapering medially with the small intestine protruding.

2 . A horizontal incised wound, with clean cut margin, on the right waist line 2.75 cm x 0.75 cm x muscle deep, 2 cm lateral to the midline, of the back and 1.5 cm below the upper border of the right pelvic bone.

3. One cut open and stitched surgical wound 1 cm long cm the right lower leg.

4. One cut open and stitched surgical wound 1 cm long on the left leg.

On internal examination the doctor found a through and through cut measuring 3.5 cm x 0.75 cm on the peritoneum under injury No. 1, with 1.5 litters of blood in the abdominal cavity. The small intestines also had a through and through cut measuring 2 cm x.0.5 under injury No. 1. There was also a cut, in the large intestine, under injury No. 1 measuring 1 cm x 0.25 cm. The spleen also had a through and through cut measuring 2.5 cm x 0.5 under injury No. 1. In the opinion of the doctor death occurred due to shock and haemorrhage as a result of injury No. 1.

4. Ali Hussain PW 1 after leaving injured Ali Hasan in the hospital went to the police station and dictated oral first information report Ex. Ka. 1 at 00.20 on the same night which was reduced to writing in check register by constable clerk. Udai Bhan Singh PW 9. Case was registered and investigation ensued, which was entrusted to Sub -Inspector R.C. Agnihotri PW 10. The Investigating Officer reached the place of occurrence in the same right and interrogated Ali Hussain and other witnesses. Thereafter he went to the hospital and found that Ali Hasan was not in a position to make any statement as he was unconscious. He , however, interrogated his father Bawan. He again came back to the place of occurrence, made an inspection of the scene of occurrence, prepared site plan Ex. Ka. 11 and collected blood from there through memos Exs. Ka. 12 and Ka. 13. After the death of Ali Hasan, he completed inquest and sent the dead body for post mortem examination with constable Sattar Ahmad PW 6 and constable Ram Singh. On completion of investigation he submitted charge sheet Ex. Ka. 21 against the accused appellant.

5. The appellant was duly tried in the Sessions Court. A charge under Section 302, IPC was framed against him to which he pleaded not guilty.

6. In order to prove its case against the appellant the prosecution produced as many as ten witnesses, out of whom PW 1 Ali Hussain, PW 2 Mohd. Sami and PW 8 Amir Hasan were examined as witnesses of fact while PW 3 Bawan deposed that he reached the place of occurrence from his house and saw the accused while he was making good his escape from the scene of occurrence. The accused

in his statement recorded under Section 313, Cr.P.C. denied the prosecution allegation and stated that at the time of the incident he was sleeping in his shop. He produced no witness in defence.

7. The learned Sessions Judge placing reliance on the evidence of the eye witnesses came to the conclusion that it is established beyond doubt that the accused appellant caused stab injuries to Ali Hasan at the time and place and in the manner as alleged by the prosecution. He accordingly convicted the appellant under Section 302, IPC and sentenced him to life imprisonment .

8. We have heard Sri P. N. Mishra learned Counsel for the appellant and Sri. S.K. Singh, Addl. Govt. Advocate for the State.

9. The factum of death of Ali Hasan has neither been challenged in the trial Court nor before us. Learned counsel for the appellant has also not disputed that Ali Hasan had received stab injuries on his person at about 11 p.m. on 27-8-1980. At this juncture we may also point out that Ali Hasan was medically examined by Dr. P.P. Gupta PW 4 at 11.30 p.m. on the same night and the injury was found fresh. Dr. Gupta categorically stated that the abdominal injury suffered by Ali Hasan was bleeding and could be caused at 11 p.m. on the same night by a knife. Dr. J.P. Yadav PW 4 proved the post mortem report as Ex.Ka. 3 wherein also he noted a fatal stab ante mortem injury in the abdomen of the deceased. Therefore it cannot be doubted that the deceased sustained knife injures, one in his abdomen and the other on his back. The abdomen injury was fatal while injury on the back was a simple one.

10. It has now to be seen whether accused appellant can be held responsible for causing the aforesaid injuries to Ali Hasan as alleged by the prosecution. The prosecution relied upon the evidence of Ali Hussain PW 1, Mohd. Sami PW 2, Amir Hasan PW 8 and Bawan PW 3. We have gone through their evidence carefully and find no sufficient reason to take a view different from the one taken by the learned Sessions Judge. It is true that Ali Hussain is the brother of the deceased while PW 3 Bawan is the father of the deceased but since their presence at the time of occurrence is established beyond doubt and is also found consistent with the medical evidence their testimony cannot be brushed aside

merely on the ground of their being close relatives of the deceased. Both Ali Hussain PW 1 and PW 2 Mohd. Sami were playing carom at the door of Gullu Babu and this place is shown by letter 'B' in the site plan Ex. Ka. 11. The incident occurred just in front of this place at a distance of 10 paces only. It has also been deposed by the witnesses that there was an electric light at the relevant time and presence of such light could not be disputed by the defence. Even no suggestion was thrown to any of the witnesses that there was no such light or that there was complete darkness. Both these witnesses were busy playing carom at about 11 in the night and it may safely be visualized that they must not be playing carom in darkness and there must have been some source of light. The Investigating Officer has also shown the place of light by letter 'C' in the site plan. Undisputedly accused was well known to the witnesses from before the incident as such there would have been no difficulty about his identity as the assailant of the deceased. As already pointed out above. Ali Hussain was removed from the place of occurrence in an injured state to the hospital by his father and his brother and his medical examination was held within half an hour of the incident, this circumstance further strengthens the claim of Ali Hussain PW 1 and Bawan PW 3 of there being present at the time of occurrence.

11. Learned counsel for the appellant submitted before us that the fact that PW 1 was playing carom in electric light with PW 2 Mohd. Samim was not disclosed in the F.I.R. which creates a doubt of their presence at the time of occurrence. In the circumstances of the case however, we find sufficient ground to reject this submission of the learned Counsel of the appellant. Ali Hussain PW 1 has given a very plausible explanation of omission by stating that he did not dictate such a fact to the scribe of the first information report as he was very much perturbed. It has come in evidence that accused had stabbed his brother in his presence and he with the help of the father of the deceased, removed the injured to the hospital and then after leaving him there, he then rushed to the police station where he dictated a very short oral report. In such circumstances it was most natural that the he must not have been in a sound frame of mind and since the F.I.R. was not a lengthy document, the omission in his not disclosing the reason of his presence would not in any way impair his otherwise reliable evidence. It may be pointed out here that even in this short F.I.R. he had specifically mentioned that he was present at the

scene of occurrence and had challenged the accused whereupon the accused took to his heels. Therefore, it cannot be said that he is a got up witness.

12. On a careful examination of the record we find that the evidence of the eye witnesses is consistent trustworthy and reliable. The F.I.R. was lodged promptly wherein the appellant was specifically nominated as the sole assailant of the deceased. The medical evidence further corroborates the testimony of the eye witnesses. Nothing could be brought on record that any of the eye witnesses had any animosity against the accused. The learned Sessions Judge has thus committed no error in placing reliance on their testimony and in coming to the conclusion that it is provide beyond doubt that it was the appellant accused alone who caused stab injuries to deceased Ali Hasan at about 11 p.m. in the night of 27-8-80 in front of the shop of Kallu Cyclewala.

13. Next it has to be seen as to what offence has been committed by the accused appellant. The counsel for the appellant vehemently argued that accused cannot be held guilty for committing the offence of murder and at best the offence would amount to culpable homicide not amounting to murder. We have given our anxious thoughts to this submission of the learned Counsel for the appellant. It cannot be disputed that there was only a single injury in abdominal region of the deceased which was sustained by him at the hands of the appellant and the said injury alone proved fatal. The other injury was on the back and was simple. The question that arises for consideration is whether it has been proved beyond doubt that the appellant had intended to inflict that particular bodily injury that is to say that it was not accident unintentional or that some other kind of injury was intended. It is in the prosecution evidence itself that the deceased was of a bad character. It is further admitted by PW 2 Mohd. Sami that the deceased was a thief and that there had been exchange of hot words between him and the accused before the accused actually inflicted the knife blow. It is further the case of the prosecution that accused was to get some share from the deceased which he was demanding from the deceased which resulted in the exchange of hot words. It has not been clarified by any of the prosecution witnesses that as to on what account the accused was having a share which was due on the deceased. It has also been deposed by PW 5 Dr. Gupta that when Ali Hasan deceased was brought before

him for medical examination at 11.30 p.m. in the night smell of liquor was coming from his mouth. That indicates that at the time of the incident the deceased was drunk. In the circumstances where the deceased was drunk and had a quarrel with the accused and even had exchanged hot words with him when the accused demanded his due share, it cannot be necessarily inferred that the accused appellant intended to cause that particular injury, i.e. injury No. 1 which proved fatal. In Virsa Singh v. State of Punjab AIR 1958 SC 465 : 1958 Cri LJ 818 the Apex Court held that the prosecution must prove the following facts to bring a case under Section 302 'thirdly';

First it must be established quite objectively that a bodily injury is present; Secondly, the nature, of the injury must be proved;

(these are purely objective investigations);

Thirdly it must be proved that there was an intention to inflict that particular bodily injury that is to say, that it was not accidental or unintentional or that some other kind of injury was intended.

(Once these three elements are proved to be present the inquiry proceeds further) and Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature.

(The part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender)

14. It is thus well established law that in order to bring a case within the mischief of clause 'thirdly' a bodily injury should be intended and such injury should be sufficient in the ordinary course of nature to cause death. The question is not whether the accused intended to inflict a serious injury or a trivial one but whether he intended to inflict that particular injury which proved fatal. If it could be shown that he did not or if the totality of the circumstances justify such an inference, then of course the intent that the section requires is not proved. Against as observed in Virsa Singh's case the question so far as the intention is concerned, is not whether

he intended to kill or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and one the existence of injury is proved, the intention to cause it will be presumed unless the evidence or the circumstances warrant the opposite conclusion.

15. We are also fully aware that merely for the reason that there is a single injury by a single accused without there being any premeditation the offence, cannot be brought down from the offence of murder to culpable homicide not amounting to murder unless the circumstances appearing in the case justify that the accused had not intended to cause that particular bodily injury at a particular set of the body. From the circumstances pointed out above it cannot be necessarily inferred that the accused appellant had intended to cause injury No. 1 to the deceased All Hasan and we are left in a doubt whether he had such an intention. Since only injury No. 1 proved fatal, it can be inferred without any doubt that the appellant at least knew that the said injury was likely to cause death. Accordingly, we find the appellant guilty for the offence punishable under Section 304 Part I of the I. P.C. and convict him there for.

15A. What shall be the appropriate sentence is the next question which calls for our consideration. The incident had occurred about 19 years ago. The appellant was convicted by the order of the Sessions Judge dated 10-12-1980. His appeal remained pending in this Court for the last 19 years. The accused appellant was a young lad of about 22 years of age at the time of the incident and after a lapse of 19 years he must be about 42 years of age. During this long interval his socio-economic conditions must have gone radical changes. Having regard to all these circumstances as well as to the nature of the injury caused by the appellant the weapon used by him and the circumstances in which the offence was committed , we feel that a sentence of 7 years R.I. shall meet the ends of justice.

16. The appeal is partly allowed the conviction of the appellant under Section 302, IPC is altered to Section 304, Part I, of IPC and sentence of life imprisonment to 7 years R.I. The appellant is, therefore, convicted under Section 304, Part I of the IPC and he is sentenced to undergo rigorous imprisonment for 7 years. He is on bail. He shall be taken into custody forthwith to serve out the sentence as awarded

by this Court. The appeal is accordingly disposed of. A copy of this order shall be sent at the earlier to Chief Judicial Magistrate concerned for compliance.

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