

Ashok and Anr Vs. State

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Court : Rajasthan Jodhpur

Decided On : May-21-2015

Appellant : Ashok and Anr

Respondent : State

Judgement :

1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR :::
S.B.Criminal Appeal No.198/1990 Ashok & ORS.versus State of Rajasthan Date
of order: 21st May, 2015 PRESENT HON'BLE Mr.JUSTICE GOPAL KRISHAN
VYAS Mr.Manoj Pareek for Mr.Sanjay Mathur, for the appellant.

Mr.Rajesh Bhati, Public Prosecutor.

<><><> BY THE COURT: The instant cr.

appeal has been filed by the accused appellants under Section 374 Cr.P.C.to
challenge the judgment dated 3.7.1990 passed by the learned Sessions Judge,
Banswara in Sessions Case No.27/87 whereby the accused appellant Ashok was
convicted for offence under Section 304 Part II and under Section 458 IPC, so
also, the accused Ranchore and Ganga Ram were convicted for offence under
Section 458 IPC.

The trial Court passed following sentence against them, which reads as under:
S.No.Name of Accused Offences u/s Punishment 1.

Ashok u/s 304 Part 4 years RI and 9 months RI II and 458 and a fine of Rs.100/- in IPC default of payment of fine to further undergo one months SI2 Ranchore u/s 458 IPC9months RI and a fine of Rs.100/- in default of payment Ganga Ram of fine to undergo one month SI.

All the sentences have been ordered to run concurrently.

2 As per brief facts of the case on 24.1.1987 at about 11.05 p.m. upon verbal report of Dhulji (deceased) an FIR was registered at Police Station Lohariya in which complainant Dhulji alleged that today at about 10 p.m. when he was in his house alongwith his wife Smt.

Ratan Bai, mother, brother Raghunath and two children, his brother Raghunath was taking food, all of sudden all the 3 accused appellants opened and entered in the house and assaulted them.

In the FIR, it is stated by the Dhulji that accused appellant no.1 Ashok dragged him out of house and gave beating by Lathi and on account of Lathi blow on his head, his condition become serious.

As per further allegation, the accused Ashok tried to give further blow by knife but one Gangaram caught hold him.

In the incident Smt.

Ratan Bai wife of Dhulji and brother Ruga Ram were also assaulted by the accused Ranchore and Ashok by Lathi.

Upon aforesaid information, the SHO Police Station Lohariya District Banswara registered the FIR (Ex.P/24) on 24.1.1997 at 11.00 p.m. against all the accused appellants under Section 452 and 323 IPC and recorded the statement (Ex.P/25) of complainant Dhulji under Section 161 Cr.P.C. on the same day in which he has reiterated the allegation leveled in the FIR.

On commencement of investigation, the injured persons were brought to the hospital but on 25.1.1987 at about 2.45 a.m., deceased Dhulji was examined and injured 3 Raghunath and Smt.

Ratan were examined at 2.30 a.m and 2:15 am respectively.

by the medical officer, MG Hospital, Banswara.

The injury reports Ex.P/20 of Dhulji, Ex.P/21 of Raghunath and Ex.

P/22 injury report of Ratan W/o deceased Dhulji were prepared but complainant Dhulji died at 6:30 am, therefore, post mortem of his body was conducted by the medical jurist at about 9.45 a.m.on 25.1.1987 and post mortem report (Ex.P/23) was taken to the Investigating Officer.

All the accused appellants were arrested and as per information given by the accused appellant Ashok under Section 27 of the Evidence Act, Lathi was recovered vide Ex.

P/9 in front of witness Shanker (PW-8) and Kuriya.

Likewise one Lathi was recovered vide Ex.P/11 upon information given by accused Ranchore and another Lathi was recovered upon information given by accused Ganga Ram in front of witness Narendra Kmar and Kishan Lal vide Ex.P/18.

The Investigating Officer taken in possession one blood stained stone from the place of occurrence vide Ex.P/8.

After completion of investigation, challan was filed against all the accused appellants in the court of Judicial Magistrate, FiRs.Class, Banswara from where the case was committed to the Sessions Court, Banswara for trial under Section 302, 322, 325 and 452 IPC read with Section 34 IPC.

4 The District & Sessions Judge, Banswara after framing charge against the accused appellants for offence under Section 302, 325, 324 and 453/34 IPC commenced the trial.

In the trial, the statements of 14 prosecution witnesses were recorded and 30 documents were exhibited to prove the prosecution case.

After recording statement of prosecution witnesses, the learned trial court proceeded to record statement of all accused appellants under Section 313 Cr.P.C.in which they denied the allegation leveled against them by the prosecution witnesses and in defence, no evidence was produced by them.

The learned trial court after hearing the learned counsel for the parties finally acquitted all the accused appellants for offences under Section 302/34, and 323, 325 IPC and convicted the accused appellant Ashok for offence under Section 304 Part II IPC and under Section 458 IPC and held accused appellants Ranchore and Ganga Ram guilty for offence under Section 458 IPC vide judgment dated 3.7.1990 in Sessions Case No.27/87.

In this appeal the accused appellant are challenging the validity of the judgment dated 03.07.1990 on various grounds.

The learned counsel for the appellants vehemently argued that gross error has been committed by the learned 5 trial court to convict the accused appellant Ashok for offence under Section 304 Part II and 458 IPC because the prosecution has failed to prove the allegation leveled against the accused appellants for commission of aforesaid offence, therefore, the judgment impugned deserves to be quashed because none of the witnesses supported the prosecution case but conviction is based only on the basis of dying declaration contained in the FIR.

Therefore, the conviction of appellants under Section 458 IPC is ex facie illegal for the simple reason that in the so called dying declaration in FIR there is no averment to say that accused persons were armed with the weapon when they entered in the house.

As per appellant in absence of such evidence it is plain and simple case of house breaking in the night.

The learned counsel for the appellants submits that no reliance could have been placed on the alleged dying declaration because the deceased Dhulji himself stated that after receiving injury upon head his condition became precarious and he rushed to the police station for filing FIR.

The investigating officer nowhere stated that Dhulji was not fit to give statement when he lodged the FIR, therefore, conclusion based upon fabricated document is not sustainable in law.

The learned counsel for the appellants lastly argued that the injury upon the head of the deceased was simple in nature, therefore, the conviction of the appellant under Section 304 Part II IPC is also not sustainable because the appellant never intended to cause serious injury to cause death.

Therefore, the conviction cannot travel beyond Section 323 and 325 IPC.

Therefore, conclusion and sentence awarded by the Sessions Judge, Banswara vide judgment impugned may be quashed.

The learned counsel for the appellant submits before this Court that if this Court comes to the conclusion that no interference is called for in the conviction for offence under Section 304 Part II IPC against the accused appellant Ashok and for offence under Section 458 IPC against the accused appellants Ashok, Ranchore and Ganga Ram then offence awarded to the appellants may kindly be reduced to already undergone because sword of litigation is hanging upon the accused appellant from last 28 years. Per contra, learned Public Prosecutor vehemently opposed the prayer and submits that it is a case in which prosecution has proved its case beyond reasonable doubt because FIR was registered on the basis of statement made by the deceased Dhulji in the police station and the day on which FIR was registered the deceased was conscious and specifically made allegations against the accused appellants for assault.

On the basis of above facts it is submitted that learned trial court has rightly relied upon the dying declaration of deceased Dhulji because after registration of the FIR injured was brought to the hospital, where he died 7 in the morning of 25.01.1987, therefore, the finding given by the learned trial court to hold accused appellant Ashok guilty for offence under Section 304 Part II IPC does not require any interference.

Learned Public Prosecutor further argued that there is no error in the finding given by the learned trial court to hold all accused appellants Ashok, Ranchore and Ganga Ram guilty for offence under Section 458 IPC because FIR was registered upon the statement of deceased Dhulji which is dying declaration and as per statements of other witnesses, prosecution proved its case beyond reasonable doubt that accused appellants entered in the house of deceased Dhulji cause injuries to Dhulji, Raghunath and Smt.

Ratan, therefore, the conviction and sentence awarded to the appellant does not require any interference.

After hearing learned counsel for the parties, I have perused the entire evidence of both the sides and the finding given by the District & Sessions Judge, Banswara in the judgment dated 03.07.1990 so also considered the arguments advanced by the parties.

The learned District & Sessions Judge held the accused appellants Ranchore and Ganga Ram guilty for offence under Section 458 I.P.C. and convicted them for nine months RI alongwith fine of Rs.1000 and in default of payment of fine to undergo one month SI and acquitted them from the charge under Section 302/34, 323 and 325 I.P.C. The trial Court held guilty accused appellant Ashok for offence under Section 304 8 Part II and 458 I.P.C. and convicted him for 4 year Rs. RI and 9 months' RI and a fine of Rs.100/- in default of payment of fine to further undergo one months' SI.

It is obvious that out of 14 prosecution witnesses, injured eye witness PW-1 Raghu Nath, PW-2 Smt.

Samrath wife of Gotam, PW-4 Onkar son of deceased Dhulji turned hostile and did not support the prosecution case.

PW-3 Ratan Bai wife of deceased Dhulji stated in the examination in Chief that her husband Dhulji was assaulted by 10-20 persons by lathi and he died due to injury upon his head and specific allegation is levelled against Ashok for causing Lathi blow upon his head.

It is also stated by her in her examination in chief that before inflicting lathi blow upon my head, the injuries were inflicted upon the body of her brother in law Raghunath and husband Dhulji but in the cross examination, the said witness PW-3 Smt.

Ratan Bai stated that 10-12 % .

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12 % / : :- " Similarly PW-5 Babu S/o Dhulji stated in cross examination that % % % " Meaning thereby both the witnesses are not supporting the prosecution case but learned trial Court while trating the statement of deceased Dhulji recorded under Section 161 Cr.P.C.Ex.P.25 as dying declaration held accused appellant Ashok guilty for offence under Section 304 Part II I.P.C.because deceased Dhulji stated in his statement that one lathi blow was inflicted by accused appellant Ashok upon his head.

It is also worth while to observe that as per injury report of deceased Dhulji Ex.P/20, four injuries were found upon the body of deceased Dhulji, out of which, one injury was lacerated wound and injuries No.2, 3 and 4 were contusions and injury No.6 was abrasion and as per the opinion of Doctro in post-mortem report, injury No.1 was cause of death.

The learned trial Court gave finding that although accused Ashok cause one lathi blw upon the head but there was no intention to cause death of deceased, therefore, accused appellant Ashok is not guilty for offence under Section 302 and 325 I.P.C.and held him guilty for offence under Section 304 Part-II I.P.C.It is also one of the fact that FIR Ex.24 was registered upon the oral statement of injured Dhulji under his 10 thumb impression at 11.5 P.m.On 24.1.1987 and deceased died on 6.30 a.m.On 25.1.1987 in the Hospital thereafter Section 302 I.P.C.was added by the investigating officer.

It is also one of the important fact that injured eye witness Raghunath PW-1 brother of deceased turned hostile before the Court and did not level allegation against any of the accused appellants for inflicting the injury.

The witness of recovery of lathi at the instance of accused Ashok and PW-8 Sukha as per turned hostile before the Court and did not support the prosecution case.

The witness PW-6 Chunni Lal and PW-7 Javer Chand stated before the Court that a blood stained stone was taken in possession by the investigating officer from the place of occurrence.

Meaning thereby, prosecution has not proved the fact of recovery of lathi on the information of the accused Ashok, which is said to be used for inflicting injury upon the body of deceased.

Upon overall assessment of evidence it is found that the witness PW-3 Ratan Bai and in the statement of deceased recorded under Section 161 Cr.P.C., which is treated as dying declaration the presence of all the accused appellants on spot is proved, therefore, obviously, the finding given by the trial Court for commission of offence under Section 458 I.P.C.against the accused appellants Ashok, Ranchore

and Ganga Ram does not suffer from any perversity or illegality.

It is true that recovery of lathi from accused Ashok is not proved by the prosecution and injured eye witness brother of deceased Raghunath PW-1 turned hostile before the Court so also and PW-2 Ratan Bai stated in cross examination that whether Ashok or other person has inflicted the injury upon the 11 head of deceased, therefore, the finding has been given by the trial Court on weak type of evidence to convict the accused appellant Ashok for offence under Section 304 Part II and 458 I.P.C. But upon consideration of statement of deceased Dhulji recorded under Section 161 Cr.P.C. Ex.P.25 which is dying declaration and injury report, I am of the firm opinion that the prosecution has proved its case to the extent of inflicting one injury by accused Ashok by lathi upon the head of deceased without intention to cause death, therefore, no interference is called for in the finding given by the trial Court.

I have considered the alternative prayer made by the learned counsel for the appellants for reducing the sentence awarded to the accused appellants.

Admittedly, the incident in question took place in the month of January, 1987 and this case has come up for hearing in the year 2015 after 28 years. The accused appellant Ashok was arrested by the police on 24.1.1987 and remained in custody till 03.09.1987 and after the judgment of the trial court on 03.07.1990, he was again taken into custody and released on 3.8.1990 after passing the order of suspension of sentence by this Court, therefore, it is obvious that accused appellant Ashok remained in custody for nearabout 9 months.

Likewise accused appellant Ranchore and Ganga Ram remained in custody from 24.1.1987 to 17.02.1987, but they convicted for offence under Section 458 I.P.C only, therefore, while following the judgment of this Court in the case of *MiSr. versus State of Raj.*, reported in 2013 (4) Cr.L.R.(Raj.) p.1755 and the judgment of this Court in case of *Gamna versus State of Raj.*, reported in 2014 (2) Cr.L.R.(Raj.) p.631, while maintaining the 12 conviction of accused appellant Ashok for offence under Section 304 Part-II and under Section 458 I.P.C. I deemed it appropriate to reduce the sentence of the accused appellant to already undergone.

Consequently, the instant criminal appeal is partly allowed and while modifying the judgment dated 3.7.1990 passed by the learned Sessions Judge, Banswara in Sessions Case No.27/1987 the sentence awarded to the accused appellant Ashok for offence under Section 304 Part II IPC and 458 IPC is hereby reduced to already undergone and sentence awarded to the accused appellants Ranchore and Ganga Ram for offence under Section 458 IPC is also reduced to already undergone.

However, the amount of fine of Rs.100/- awarded to the accused appellant Ashok is enhanced to Rs.40,000/- and the amount of fine of Rs.100/- awarded to the accused appellants Ranchore and Ganga Ram is hereby enhanced to Rs.20,000/- each, in default of payment of fine, they are liable to further undergo six months SI.

The enhanced amount of fine shall be deposited by the accused-appellants in the trial court within a period of two months from the date of receiving certified copy of this order.

On deposit the total fine amount by the accused-appellants.

The said amount of fine of Rs.80,000/- shall be paid to PW-3 Ratan Bai W/o deceased Dhulji by the learned trial court.

The record of the trial court shall be sent forthwith.

(GOPAL KRISHAN VYAS).J cp/arun

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