

SamsuddIn Khan and ors. Vs. State

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Court : Orissa

Decided On : Jun-17-1991

Reported in : 1991(II)OLR291

Judge : L. Rath, J.

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

Appeal No. : Criminal Appeal No. 39 of 1988

Appellant : SamsuddIn Khan and ors.

Respondent : State

Advocate for Def. : S.K. Das, Addl. Govt. Adv.

Advocate for Pet/Ap. : P.K. Mishra and G.N. Mohapatra

Judgement :

L. Rath, J.

1. All the appellants who were charged Under Section 302, read with Section 34, IPC for murdering one Ushman Ali Khan, Under Section 323 read with Section 34, IPC for voluntarily causing hurt to PWs 8 and 12 and Under Section 342 read with Section 34 IPC for wrongfully confining the said witnesses, having been convicted Under Section 304, Part I, IPC and sentenced to RI for eight years each,

as also under Secs 323 and 342 read with Section 34 IPC and sentenced on each count to RI for six months each, have preferred this appeal.

2. The prosecution case for which the appellants stood trial was that on 21-2-1986 at about 4 p. m. PWs 8 and 12 and the deceased had been to Raghunathpur to witness a cinema but since there was yet some time left for the show to begin, they proceeded to PWs 8's aunt's house at Dharadharpur where they met PW 2 and went to his house. While they were returning to Raghunathpur to visit the show and had reached the outskirts of village Raghunathpur, the appellant Nos. 1 and 2 came from behind and the appellant No. 1 abusing PW 8 dealt a fist blow on his head. The appellant No. 2 also gave a lathi blow on his head. The appellant No. 1 charged PW 8 of his having talked in a boastful manner on the previous day and assaulted him, Since because of such assault the deceased and PW 12 intervened, the appellant No. 2 assaulted them with lathi. In the meantime the appellant Nos. 3 and 4 reached there. Appellant No. 3 threw a cycle on PW 12. At that time the appellant No. 2 dealt a knife blow on the left side abdomen of the deceased on account of which he fell down. It was the version of PW PW 8 that on the day preceding the occurrence he had been to Raghunathpur and Dharadharpur to take measurement of a grill gate of the Plan and while he was taking measurement the appellant No 1 came there and asked him why he had gone to the deity's place with shoes on. PW 8 had replied that he had not entered inside the sanctum sanctorum of the deity but the appellant No. 1 has abused and chased him with a view to assault from which he had been rescued by the Mou'abi and one Mangu Khan.

3. From the very narration of the prosecution case it is apparent that there is hardly any case of the other appellant sharing the common intention with the appellant No. 2 to inflict the knife blow on the deceased. It is apparent that the object of attack was not the deceased but PW 8 but however as providence had it, the deceased came to be attacked by the appellant No. 2 suddenly while he was trying to intervene in the matter. There is absolutely no evidence of the other appellants sharing the intention with the appellant No. 2 to inflict the knife blow on the deceased. They thus could not have been convicted Under Section 304, Part I read with Section 34 IPC, the charge Under Section 302 IPC having failed. The

appellant Nos. 1,3 and 4 hence must be acquitted of the charge Under Section 304, Part 1 read with Section 34 IPC.

4. Admittedly the deceased was removed to the S. C. B. Medical College Hospital where he underwent treatment and died twelve days after on 4-3-1986. Surprisingly the doctor who treated the deceased has not been examined as a witness. The only medical evidence as regards the deceased is that of PW 7, the doctor who conducted the autopsy. His evidence reveals of his having discovered the following external and internal injuries on the deceased :

'(1) On opening the surgical bandage from the right-chest and abdomen, there was a drainage tube of 1 cm dia found intact in the right side of the chest in the 7th intercostal space in the mid-axillary line.

(2) Healed abrasion of size 2 cm x 2 cm on the forehead in mid-line adjacent to the x hair line.

(3) Incised operational wound of size 2 cm x 1 1/2 cm x thoracic deep on the right-second thoracic space,.

(4) Operational wound on the right chest intercostal space over mid-axillary line of size of 3 cm x 2 cm with slough over it communicating to the right-thoracic cavity.

(5) Healed incised wound of size 5 cm x 5 cm over left anterior 'superior iliac spine.

(6) Healed incised wound with four stitch marks over left hypocho- ndriac region along anterior axillary line along the mid-way between left nipple and left anterior-superior iliac spine, the distance of which is 32 cm.

(7) Operational wound of 17 cm length with 14 nylon stitches with alternative new and old one on left para umbilical line.

(8) One healed incised wound with one nylon stitch of 3.5 cm x long above right anterior superior iliac spine obliquely placed.

(9) Four healed abrasions with scar over it on right leg and knee and below it on the anterior aspect of the left knee, one healed abrasion of size 2 cm x 1 cm.

Internal injuries :

'(1) Right lungs collapsed partially, soiled with pus intensively thick pus on cut section comes out. pleura adhere to the chest wall With pyogenic materials. The side is in a state of pyopneumo- thorax. Left side lungs also adhere to the chest wall along, with pyogenic materials and pleura and the state is in a state of pyothorax. Both the lungs are congested with multiple areas of necrosis and pus.

(2) In the heart patchy congestion present in tricuspid valve and acute inflammatory changes present in mitral valve.

(3) Stomach_Anterior wall at upper 1/3rd repaired surgically towards greater curvature. Stomach shows patchy haemorrhagic areas, In the posterior wall some mucous membrane shows a cut injury of size of 2.5 cm. long, not piercing thorough and thorough.

(4) Diaphragm repaired on the left side and it shows area of necrosis with pus over it.

(5) Possible track of the wound involves the external injury No. 1 and internal injury Nos. 3 and 4 leading to extensive infections.'

Admittedly the injuries of the accused had become infected and the opinion of the doctor was that the cause of the death was due to secondary shock resulting from septicaemia. His very description of the injuries would show the injuries to have become infected. According to him want of proper treatment is one of the causes of infection and that formation of pus is a gradual development. Though the injuries were ante mortem yet no evidence was coming forth from him that they were such as would have ordinarily resulted in death. The cause of death being septicaemia it can hardly be said that the deceased died due to infliction of injuries by the appellant No. 2. To sustain a conviction Under Section 304, Part I, IPC it is necessary to be established that the culpable homicide not amounting to murder occurred by reason of an act which had been committed with the intention of

causing death. Hence the two ingredients necessary are that the death must have been occasioned on account of the act committed by the accused and that such act must have been committed with the intention to put the deceased to death or must have been done with the intention to cause such extent or nature of injury which in all probability would cause death. So far as the appellant No. 2 is concerned, there is absolutely no evidence that the injuries inflicted by him were in ordinary course to result in death and since as a matter of fact the deceased did meet his death after 12 days during which period septicaemia developed which is said to be the cause of the death, it cannot be said that either the appellant No. 2 is guilty of the act for which the death was caused or that he intended to inflict such injury which could in ordinary course result in death. Because of such reason the appellant No. 2 cannot be Convicted Under Section 304, Part I, IPC. for the same reason, the conviction would not be also Under Section 304, Part II, IPC because the possibility cannot be ruled out that had the deceased been properly treated, he could have recovered and hence it cannot be said that the appellant No. 2 had inflicted the injury with the knowledge that such injury was likely to cause death or that it was inflicted with the knowledge that such bodily injury was likely to cause death.

5. From the nature of the injuries inflicted there seems to be little doubt that the injuries were grievous in nature and that the appellant No 2 had inflicted grievous hurt upon the deceased. But for the fact that the deceased died within twelve days of the occurrence because of the speticaemia it can be well presumed that the deceased could not have recovered from the injuries before twenty days. The offence committed by the appellant No. 2 would properly fall Under Section 326 IPC and hence I would, while setting aside his conviction Under Section 304, Part I, convict him Under Section 326 IPC and sentence him to four years' RI. The learned counsel appearing for the appellants has not seriously challenged the conviction of the appellants under Secs. 323 and 342 read with Section 34 IPC, but has made the submission of reduction of sentence imposed on those counts. It appears that the appellant Nos. 1,3 and 4 have already suffered imprisonment for 61 days i.e. for a period of 9 days from 21-2-1986 to 1-3-1986 and for a period of 52 days from 6-2-1988 to 29-3-1988. I would accept the submission of the learned counsel for these appellants and would limit their sentence to the period already

undergone and hence they be set at liberty forthwith

6. In the result, the appeal is allowed in part.

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