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Camilo Vaz Vs. State of Goa

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Court : Supreme Court of India

Decided On : Apr-10-2000

Reported in : AIR2000SC1374; 2000(1)ALD(Cri)923; 2000CriLJ1816; JT2000(4)SC540; 2000(3)SCALE195; (2000)9SCC1; [2000]2SCR1088

Judge : D. P. Wadhwa and; Ruma Pal, JJ.

Acts : Indian Penal Code (IPC) - Sections 120, 140, 143, 144, 149, 302, 304, 307, 325, 326; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 319 of 1998

Appellant : Camilo Vaz

Respondent : State of Goa

Advocate for Def. : A. Subhashini, Adv.

Advocate for Pet/Ap. : P.R. Namjoshi, Sr. Adv.,; Uday U. Lalit and; Teja Kahdars

Prior history : From the Judgment and Order dated 28.11.1997 of Bombay High Court in Cri. A. No. 25 of 1995

Judgement :

D.P. Wadhwa, J.

1. Sole appellant is aggrieved by the judgment dated 28-11-1997 of the Bombay High Court at Goa upholding his conviction for an offence under Section 302 of Indian Penal Code ('IPC for short) and sentence of life imprisonment awarded to him by the District and Sessions Judge, South Goa at Margao.

2. Originally there were 17 accused including one absconding, who were tried for offences under Sections 302, 307, 326, 325, 143, 144, 140, IPC read with Section 149 and Section 120B, IPC for having committed the murder of Simon Fernandez (Simon), a Sub-Inspector of Police and attempt to murder his two brothers, namely, Irineu Fernandez (Irineu) and Victor Fernandez (Victor). Sessions Court convicted five of them including the appellant holding them guilty of murder of Simon under Section 302 read with Sections 120B and 149, IPC. They were further held guilty for attempt to murder of Irineu and Victor under Section 307 read with Sections 120B and 149, IPC. They were also held guilty of unlawful assembly under Section 143 and rioting under Section 148 read with Sections 120B and 149, IPC. For these offences they were respectively sentenced to life imprisonment, 7 years imprisonment and 2 years imprisonment. No separate sentence was passed for an offence under Section 143, IPC. All these five accused had appealed to the High Court against their conviction and sentence. High Court maintained the conviction and sentence of the appellant under Section 302, IPC. Other four accused were convicted under Section 326, IPC and their conviction for offence under Section 302 and 307, IPC were set aside. Their sentences were reduced to the Imprisonment they had already undergone. High Court also rejected the alternate plea of the appellant that on the facts of the case there could be conviction only for an offence under Section 304, Part-I or Part-II, IPC.

3. The incident, which resulted in conviction of the appellant and others, occurred on the midnight of 4/5-5-1993. Arlem Festival was celebrated on 1-5-1993, 2-5-1993 and 4-5-1993. Boys of two villages - Khaneband and Calconda - were not on best of terms between them. During the festival they had been fighting with each other. On the night of 4/5-5-1993 Victor, who was from Calconda, attended the festival. He went at 9.30 p.m. and returned back home at about 12.00 midnight. Simon and Irineu did not attend the festival on the day and were already there in

the house as they all lived together. At about 2.30 a.m. someone banged the door of their house. These three brothers came out and saw a young boy standing outside a few feet away under a banyan tree. They asked him what was the matter about. Suddenly a group of 15/20 boys emerged from the bushes near the banyan tree and started beating the three brothers. They were armed with sticks, cycle chains and bottles. These boys belonged to Khareband. They assaulted the three brothers. Appellant hit Simon with the stick on the thickness of 2' and length of 4'. Simon fell down unconscious. Still he was being his and beaten by the assailants. Victor and Irineu were also beaten up and suffered injuries. Hearing the loud shouts the neighbours, which included boys of Calconda, came and the assailants ran away. Condition of Simon was serious. He was taken in a rikshaw by one of the neighbours to the Hospicio Hospital. Another neighbour brought his car and removed Irineu and Victor to Hospicio Hospital. Since condition of Simon continued to be serious he was shifted to GMC Bambolim. Irineu and Victor were also taken to GMC Bambolim in the same ambulance with Simon. Police came to the hospital and recorded the statement of Irineu on the morning of 5-5-1993. He said on 4-5-1993 after having dinner at about 10.30 p.m. they went to sleep. On the morning of 5-5-1993 at about 2.30 a.m. someone banged the front door and asked them to come out. When they came out they did not see anyone outside. They went ahead by the footway and saw a group of 15 persons holding iron rods, sticks and cycle chain. When they approached near them they pelted soda bottles on them and immediately assaulted them with sticks and iron rods on the head. Appellant gave a blow on his head and he fell down unconscious. Irineu said that assault continued for about three to four minutes and when the neighbours came there those persons fled away. Irineu made complaint against the appellant and his group of gangs, who assaulted him, his brothers Simon and Victor causing serious head injuries on them. He stated that they were admitted to the hospital by their neighbours. He also said that there was no enmity between them and the appellant. On the basis of the complaint lodged by Irineu police first registered the case under Section 307, IPC. When Simon died on 8-5-1993 offence under Section 302, IPC was also added. After completing the investigation as many as 17 accused were sent for trial for various offences. Prosecution examined as many as 33 witnesses. Statement of each of the accused was recorded under Section

313 of Cr PC. They denied their Involvement in the crime and said they had been falsely implicated. Apart from Irineu and Victor, who were examined as PW-8 and PW-9, there were other eye witnesses whose statements were recorded.

4. Dr. Purnanand Audi conducted the post mortem on the dead body of Simon. On external examination of the dead body he found following 11 Injuries:

1. Stitched lacerated wound of 9 x 3 cms. deep with bruise around was present on left eyebrow.

2. Black eye 6x6 cms. on left eye.

3. Black eye 5x6 cms. on right eye.

4. Laceration 3x1 cms. mucosa deepa on the lower lip right side.

5. Grazed abrasion 6x4 cms. on right side of face below cheek bone,

6. Sutured incised wound of inverted U type 14 cms. linear on right temporal parietal region of head underneath there was a bruise.

7. Sutured vertical wound of 3 cms. linear on left temporal region.

8. Needle prick mark on dorsum of the right feet and right dorsum of the head.

9. Abrasion 3x1 cms. front of the left knee.

10. Rail road type patterned bruise of 3 x 1.8 cms. on front of the left elbow towards forearm side.

11. Bruise of 2 x 1 cms. on base of nose.' According to Dr. Audi injuries numbers 1 to 5 and 9 to 11 were caused by impact of the blunt force and injuries numbers 6 to 8 were made by the surgeon as part of the treatment. On Internal examination Dr. Audi found that there were outpouring of the blood under injuries numbers 1,6, 7 and 11. He further found 'there was fracture of frontal bone left side extending to left orbital plate and anterior crania fossa further to right wing of the snood bone. In right middle crania fossa extending further to the right temporal bone, there was in extradural haemotoma of 4 x 2 x 1 cms. on right temporal lone of brain. There was

thing subdural haemotoma of 6 x 2 x 1 cms. on right temporal lone of the brain. Sub aracnoid hemorrhage was present on both the sides of the brain. There was contusion neurosis on left cortical part of orbital lobe of the brain. There was swelling on the brain and brain material was coming through the hole made by the surgeon, while giving the treatment. There were pin point hemorrhages through the white matter of the brain. There was hernia ion of both Para hypo carpal region of the brain. There was also fracture of the nasal bone in addition to the skull bone as said earlier'. In the opinion of Dr. Audi cause of death was due to crania cerebral damage, head injury as result of the impact.

5. Dr. Vasudeo Devari (PW-4), who was working as Medical Officer in Hospicio Hospital, examined Irineu and found the following injuries:

1. CLW 6' x 1/2' x bone deep extending from right parietal region to the left parietal region. The opinion was kept reserved.

2. CLW 2' x 1/2 x 1/2 left parietal prominence caused by blunt instrument, simple in nature.

He said the injuries could be caused by blunt Instrument. He also examined Victor and found the following injuries:

1. CLW l 1/2 x l 1/2' x 1' on the right eyebrow caused by hard blunt object less than 6 hours duration. The opinion of all the injuries were kept reserved.

2. Swelling 5' in the right maxillary region extending to the right angle of mandible. Caused by hard blunt object, less than 6 hrs. of age.

' 3. CLW 1 x 1/2 x 1 x 1/2' on the upper lip, caused by hard blunt object, less than 6 hours. A doubtful fracture on the upper. Zipih sternum on the middle point and loss of upper counter and there was swelling. The opinion of fracture had to be confirmed by x-rays etc. and as such the opinion was reserved. A swelling with deformity on the left forearm caused by hard blunt object.

When Simon was brought to the Hospicio Hospital Dr. Devari had also examined him and found him unconscious, his pupils were dilated and reacting sluggishly.

He found following injuries on the body of Simon:

1. Multiple CLW 1' x 1/2 x 1/2' with depressed fracture on the left side of the forehead caused by hard blunt object, less than 6 hours duration. In view patient having head injury, the patient was referred to G.M.C. for expert neuro surgical management. After giving initial treatment, the Police were advised to collect further report from the G.M.C.

According to Dr. Devari injuries found on Simon could be caused by stick as also by bottles. He, however, said that he felt that in this case the object might be having multiple rough and irregular edges because there were multiple injuries. He said such edges were absent in bottles and sticks and injuries could, therefore, have been caused by. stone. He was unable to say if injuries on Simon could have been caused by throwing of a stone of about half a kg. weight. He said injuries on Simon were several but localised in one region mainly on the left side of the forehead. Statement of Dr. Devari has been severally criticized by the learned Sessions Judge.

6. Trial Court has referred to the incident which occurred at Arlem Festival on 1, 2 and 4-5-1993, which according to him could have been a prelude to the main incident In question furnishing the motive for the same. It was the rivalry between the boys of Khareband and Calconda villages. It is on record that there were rival gangs of Khareband and Calconda and while injured and the prosecution witnesses are from Calconda the accused are from Khareband. According to the learned Sessions Judge the fracas, which occurred between these two rival gangs on the nights, of 1-5-1993, 2-5-1993 and 4-5-1993 had been duly established. At the same time learned Sessions Judge was of the opinion that when the case rested on the direct evidence failure of the prosecution to prove the motive was of not much significance.

7. There is concurrent, finding that it is the appellant who hit Simon with a stick on his head and he fell unconscious. The appellant and other assailants did not stop at that and they went on beating and hitting Simon with the result he received multiple injuries. Ultimately the medical evidence showed that it was the injury on the head caused by blunt weapon which resulted in the death of Simon.

8. Mr. P. R. Namjoshi, senior advocate, has severally contended that First Information Report (PW-8/A) lodged by Irineu on the morning of 5-5-1993 did not implicate the appellant as the one having caused head injury on Simon. He said according to Irineu (PW-8_ himself it was he who was hit by the appellant and he fell unconscious. This point was also raised with all seriousness in the trial Court as well as in the High Court. On that very day in the evening further statement of Irineu was recorded where he clarified that head injury was caused on Simon by the appellant. He explained the discrepancy which crept in the FIR (PW-8/A). He said since his brother was in serious condition he was worried. His explanation has been accepted by both the Courts and we see no reason to take a different view. Both Irineu and Victor have said that the appellant had caused the head injury which resulted in the death of Simon. After the statement of Dr. Devari (PW-4) prosecution did try to improve upon their version when it brought in the story of stone hit on the head of Simon in the deposition of two witnesses. This theory of Simon being hit by stone and the statements of those eye witnesses were, however, discarded by the trial Court and in our opinion rightly.

9. There cannot be any dispute about the incident having taken place where three brothers received Injuries resulting in the death of one of them. The question, which has now been seriously contended before us, is could in these circumstances the appellant be held guilty of an offence under Section 302, IPC.

10. The instant incident is the fall out of the quarrel between the rival gangs of Khareband and Calconda. They have been fighting on 1-5-1993, 2-5-1993 and 4-5-1993. On the night of 4-5-1993 boys of Calconda had gone to Arlem Festival. Some of the persons who are accused before the trial Court of the rival Khareband gang were also present. Altercation took place between them which has been deposed to by the witnesses. From the side of Khareband, it was the appellant who superheated the fight. He beat up Jayesh (PW-14) and threw him on the ground and gave him kick blows. He hit a boy Dinesh as well. Other accused present were Shivappa (accused No. 2), Mehaboob (accused No. 3), Raju Jamune (accused No. 4), Mosses Martins (accused No. 5), Raju Naik (accused No. 6), Mustaq (accused No. 7) Milind (accused No. 8) Babda (accused No. 9), Kadar (accused No. 10), Damu (accused No. 11), Simon Martins (accused No.

15), and Seby Calaco (accused No. 16). People intervened and asked the appellant not to fight. Leaving Jayesh (PW-14) injured, it appears, he left the scene along with others. The incidents of 1-5-1993, 2-5-1993, and 4-5-1993 were not reported to the Police and have been played down by Artemio D'Silva (PW-25) who was the co-organisor of the Artem Festival.

11. As noted above, the accused were variously armed (with weapons) like dandas bottles and cycle chains or even stones. When the three brothers reached near the banyan tree and they saw a boy who was identified as accused No. 6 and inquired from him as to why he was banging the door of their house. All of a sudden, from the bushes near the banyan tree 15 to 16 boys started attacking the three brothers by throwing bottles on them. Fortunately, the bottles did not hit them. It was the appellant with a danda and Seby (accused No. 16) with a chain that came to assault Simon. Both Irineu (PW-8) and Victor (PW-9) asked the appellant as to why they were going to assault them. At this stage, the appellant hit a danda on the head of Simon. There was simultaneous assault on Irineu and Victor. As noted above, on the night of 4-5-1993, there was altercation at the Arlem festival between the boys of Kharaband and Calconda. Victor had also attended the festival that night. Most of the boys of Calconda including Jayesh (PW-14) returned from the festival but some of them including Sanjay. (PW-21) and Sandesh, brother of Dinesh stayed back. Dinesh went to the house of Jayesh (PW-14) to inquire about his brother Sandesh. He was worried about him. Dinesh woke up other boys. They all lived in that area near the house of Jayesh (PW-14). House of Jayesh (PW-14) is at a distance of about 150 meters from the house of Simon (deceased). While they were standing in the paddy field near the house of Jayesh (PW-14), they heard shouts coming from the scene of the offence and they ran towards that. They witnessed the occurrence. After danda blow was given on the head of Simon, he fell down unconscious. Mosses Martins (accused No. 5), Mustaq (accused No. 7), Ramesh Babda (accused No. 9), Nissar (accused No. 12), Pundalic (accused No. 14), Simon Martins (accused No. 15) and Seby (accused No. 16) also assaulted Simon trial Court has held that from the evidence led by the prosecution, it had been established that the assault on the Simon was made by the appellant and Seby (accused No. 16). Trial Court said that when there is assault by a large group of persons, it is not possible to get corroboration

from the witnesses to see as to what assault was made by each of the accused. Trial Court was, however, of the opinion that the prosecution had been able to establish that ;it was the appellant who was the author of the .injury No. 1 on the person of deceased Simon underneath which there were fractures, which was sufficient in the ordinary course of nature to cause death. It was said that the danda blow was thus given with force on the head which is vital part of the body. Trial Court described injuries 2 to 5 and 9 on account of kicks given to the deceased Simon by Seby (accused No. 16). Cause of injuries Nos. 10 and 11 could not be established. Those had been caused by sharp and blunt weapons including danda. Trial Court further held that it was Mosses Martins (accused No. 5) who assaulted Irineu (PW-8) on his head. There were two injuries on the perietal regions found by Dr. Devari (PW-^ one of which had been caused by Mosses Martins (accused No. 5) and other by Mustaq (accused No. 7). Trial Court further held that the appellant Mosses Martins (accused No. 5), Mustaq (accused No. 7) and Simon Martins (accused No. 15) assaulted Victor and caused injuries to him.

12. After considering the evidence in detail and taking into account all the relevant considerations the trial Court convicted some of the accused and sentenced them as aforementioned. High Court, it appears, has not considered the record of the case in any detail. Rather on each aspect of the matter it has referred to the judgment of the trial Court. It rather appears to us that judgment of the trial Court is an annexure to the judgment of the High Court. It has not been possible for us to appreciate the judgment of the High Court as to how it has convicted the accused appellant before it. High Court has held that the appeals of accused Nos. 5, 7, 15 and 16 succeeded so far as the prayer for bringing out their case from the purview of Section 149, IPC in relation to the principal charge of murder under Section 302, IPC is concerned. High Court then said that the order of conviction under Section 307, IPC is set aside 'completely' . Then it went to hold that the conviction of accused Nos. 5, 7, 15 and 16' Is maintained for the rest of the offences a held by the trial Court and conviction of accused No. 1 (the appellant) is made under Section 302, IPC. Since the case of other accused except the appellant is not before us, we leave the matter at that. Position as it presents today is that the appellant stands convicted for an offence under Section 302, IPC on account of

the fatal blow he caused on the head of Simon (deceased).

13. Simon met with homicidal death. When the Khareband boys came to the house of Simon and his two brothers led by the appellant they did not come with the intention to kill anyone. They were not armed with any particular weapon to commit the murder. There was a rivalry between them and during the Arlem Festival on 1-5-1993, 2-3-1993 and 4-5-1993 there were minor fracas. In fact, the rivalry existed even much prior to these dates. They came to the house of Simon and his brothers not to commit murder but to thrash them. What transpired at the Arlem festival on the night of 4-5-1993 that they came to the house of Simon and his brothers It has not been possible to say, Only one of the brothers, namely, Victor had gone to attend the festival and returned around midnight. The brothers are from Calconda. These boys of Khareband who came to the house of the three brothers were armed with dandas, bottles and cycle chains. The purpose apparently was to beat up the brothers by giving them sound beatings but certainly not with any intention to kill anyone of them. In fact Irineu in his First . Information Report to the police (PW 8/A) had stated that there was no enmity between them. In these circumstances, can it be said that the appellant has committed the offence of murder because he hit Simon on the head, a vital part of the body, with such a force with danda in his hand that Simon fell unconscious and later succumbed to his injury To us, it appears, at the most it can be said that the act of the appellant in hitting Simon was done with the knowledge that it was likely to cause death but without any intention to cause death or to cause such a bodily injury as is likely to cause death. The case of the appellant would, therefore, clearly fall under Section 304, Part II, IPC. Courts below did not apply their mind to this aspect of the matter in proper perspective and they were rather swayed by the fact that on account of the danda blow by the appellant, Simon died an unnatural death. There was no material on record which showed .that appellant was bent upon killing Simon and 'eventually death came out to be the result'. This is merely a surmise of the High Court, Section 304 is as under:

304. Punishment for culpable homicide not amounting to murder- whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

14. This section is in two parts. If analysed the section provides for two kinds of punishment to two different situations. (1) if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death. Here important ingredient is the 'intention'; (2) if the act is done with knowledge that it is likely to cause death but without any intention to cause death or such bodily injury ,as is likely to cause death. When a person hits another with a danda on vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation case will fall in Part II of Section 304, 'IPC as in the present case. We are also not oblivious of the fact that other four accused who were similarly convicted with the appellant with the aid of Section 149, IPC have been held guilty only for offence under Section 326, IPC.

15. We, therefore, hold the appellant to be guilty for an offence under Section 304, Part II, IPC. His conviction under Section 302, IPC Is, therefore, set aside. We sentence the appellant to undergo Rigorous Imprisonment for seven years and to a fine of Rs. 50,000/-. In case of non-payment of fine, appellant shall undergo further rigorous imprisonment for a period of two years. Fine when realised shall be paid to the widow of Simon.

16. Appeal is, thus, partly allowed.

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