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Court : Rajasthan

Decided On : Apr-23-1969

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Judge : D.M. Bhandari, C.J. and; S.N. Modi, J.

Acts : Evidence Act, 1872 - Sections 32, 101 to 104 and 114; Indian Penal Code (IPC), 1860 - Sections 299 and 300

Appeal No. : Criminal Appeal No. 685 of 1966

Appellant : Ram Kumar

Respondent : State of Rajasthan

Advocate for Def. : B.C. Chaterji, Addl. Govt. Adv.

Advocate for Pet/Ap. : O.C. Chatterji, Adv.

Judgement :

Bhandari, C.J.

1. Ramkumar appellant and Ramsingh were tried by the Sessions Judge, Kota, for causing the murder of Yuvrajsingh. Ramkumar has been convicted for the offence of murder under Section 302 of the Indian Penal Code and sentenced to imprisonment for life, while Ramsingh accused has been acquitted. This appeal has been filed by Ramkumar challenging his conviction.

2. Briefly the prosecution case is that Ramsingh, Ramkumar and Yuvrajsingh went from Kota for a picnic on the morning of 21st November, 1985 to a Talai near village Sakatpur. Ramsingh had a licence for a muzzle loading gun and he carried it with him.

At the Talai they took liquor and then food was prepared by Prabhulal P. W. 10 who also accompanied them and all of them had their lunch. Prabhulal P. W. 10 then left the place with the utensils, leaving Ramsingh, Ramkumar and Yuvraj at the Talai. At about 4 P. M. one gunshot was fired by Ramkumar appellant and it is alleged that it seriously injured Yuvrajsingh. The two accused thereafter ran away with the gun, Mst. Kishni P. W. 5 was near the Talai with her nephew Kanhaiyalal P. W. 6. On hearing the report of the gun she went to the place where Yuvrajsingh was lying in serious condition. Yuvrajsingh requested Mst. Kishni to take him to the hospital. Soon some other villagers assembled. Kanhaiyalal went to the office of Bundi Silika Company at Kunhari and asked Babu P, W. 9 to telephone the Police that a man had been shot at the Talai. Babu telephoned to the Police Station Bhim-ganjmandi. Vinod Dhane P. W. 11 Station House Officer received the message at about 4-30 P. M. On this message the first information report was prepared.

In the first information report it is mentioned that the name of the man who had received the gunshot was Yuvrajsingh and that the person who had fired at him was Ramkumar. The name of the other companion was Ram Singh. Vinod Dhane went to the Talai. He found Yuvrajsingh seriously Injured on the road at about 150 feet away from the tank. He was taken to the M. B. S. Hospital at Kota. He was examined by Dr. Hukamchand Jain and admitted in the hospital.

The doctor noted in the bed ticket Ex. D. 1 that the person (injured) stated that he had been shot at by his class mate Ramkumar of Genta. Vinod Dhane, the Station House Officer, himself recorded the dying declaration in the presence of Dr. Hukamchand, The dying declaration is Ex. P. 3.The gist of the dying declaration is that Yuvrajsingh, Ramsingh and Ramkumar had gone from Kota to have drinks. They had taken sufficient quantity of liquor which Ram-sing had brought. Ramsingh had also brought a gun for hunting. Ramkumar took the gun from

Ramsingh and shot at him at the left hip of Yuvrajsingh. The gun was fired by Ramkumar, It was a double barrel muzzle loading gun. Thereafter both of them ran away with the gun.

3. The injury report shows that the deceased had three pea size gunshot wounds lacerated in nature on the left hypochond-rium. They were skin deep and simple. There was one oval gunshot wound in the left hypochondrium 3/4' x 1/2' going into the peritorial cavity and bowels were visible. This last injury was grievous. There was also fracture of the left 10th rib and a tear in the posterior wall of the stomach. Dr. N. K. Sharma performed the operation and removed a pea size stone (shot). Yuvrajsingh, however, did not survive and succumbed to the injuries on 22nd November, 1965. The post-mortem examination on the dead body of Yuvrajsingh was performed by Dr. R. K. Gupta. The cause of death was perforation of stomach leading to peritonitis and shock.

4. Vinod Dhane arrested the accused Ramsingh and Ramkumar and recovered a gun from Ramsingh.

5. Both the accused were challaned before the Additional Munsif Magistrate First Class, Court No. 2, Kota who committed them for trial to the Sessions Judge, Kota. The accused denied to have committed the offence. Ramkumar in his statement under Section 342 Criminal P. C. stated that they had gone to the Talai at village Sakat-pur for a picnic party. Yuvrajsingh forced him to take liquor and he became drunk. Thereafter he did not know what happened. Two defence witnesses were produced to show that Ramkumar did not take liquor.

The learned Sessions Judge held that the deceased had made a dying declaration to Dr. Hukamchand Jain which was recorded in Ex. D. 1, that he made another dying declaration to the investigating officer in the presence of the said doctor and that was recorded in Ex. P. 3 and both these dying declarations were proved by their evidence. The learned Sessions Judge found corrobora-tion of these dying declarations from the other circumstances brought on record. He held that Ramkumar had shot Yuvrajsingh and Yuvrajsingh died on account of the gunshot injuries thus inflicted. He disbelieved the case put forward by the accused that he was made to drink forcibly and rejected the argument of the learned counsel for

the defence that the accused Ramkumar was entitled to protection under Section 85 of the Indian Penal Code. Ramkumar was convicted under Section 302 of the Indian Penal Coda and sentenced to imprisonment for life.

6. In this appeal, learned counsel for the appellant has challenged the dying declarations mainly on the ground that the dying declarations made at the hospital were not in conformity with the dying declaration made by the deceased to Kanhaiyalal P. W. 6 and Mst. Kishni P. W. 5 as before these witnesses the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has no doubt stated that Yuvrajsingh had named Ramsing and Ramkumar as the persons who had shot at him. He admitted in cross-examination that he had no talk with the injured, that it was his maternal aunt who had a talk with injured person and that on her enquiry, the injured had named Ramsingh and Ramkumar. He further stated that his maternal aunt had a talk with the injured person in his presence. He was standing about 15 paces away from the injured.

Mst. Kishni P. W. 5 has stated that on enquiry the deceased told her that he was a resident of Genta and his name was Yuvraj-singh and the deceased had named Ramsingh and Ramkumar as the two persons who had come there. She did not state that the deceased had named Ramsingh and Ramkumar as his assailants. Kanhaiyalal has also stated that he had conveyed on the telephone the names of Ramsingh and Ramkumar as the assailants of the victim. Learned counsel has also relied on the statement of Babu P. W. 9 that he was informed by Yuvraj Singh when he was lying at the Talai where the witness went with the police that Ramsingh and Ramkumar and some other persons had shot him.

7. In our opinionr the trial Court has rightly held that the two dying declarations one contained in. Ex. D. 1 and the other in Ex. P. 3 were made by the deceased when he was fully conscious and that they were consistent with each other and were not in any way in conflict with any other statement made by the deceased. Babu P. W. 9 has made a statement which was very vague. Kanhaiya Lal P. W. 6 had not himself interrogated the deceased and he merely stated what the deceased is said to have stated to Mst. Kishni in his presence. Mst. Kishni has not stated that Yuvrajsingh had named both the accused as his assailants. The evidence of these

witnesses does not cast any doubt on the dying declarations Ex. D. 1 and Ex. P. 3.

8. Learned counsel for the appellant has argued that the appellant could not be convicted solely on the basis of these dying declarations. The law on the subject has been laid down by their Lordships of the Supreme Court in Khushal Rao v. State of Bombay, AIR 1958 SC 22 (29) in the following passage :

'Hence, in order to pass the test of relia-bility, a dying declaration has to be subjected to a very close scrutiny, keeping in view; the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of thatstatement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.'

9. The circumstances of the case show that Ramkumar and Ramsingh were both present near Yuvrajsingh at the time of the incident, and there is no reason whatsoever for Yuvrajsingh to falsely implicate his class mate Ramkumar. Yuvrajsingh had also sufficient opportunity to see who had fired the gun. He has given consistently the name of Ramkumar as his assailant in his dying declarations. In Ex. P. 3 he has amplified that Ramkumar had taken the gun from Rumsingh and had shot at him and that it was Ramkumar who had actually fired the gun. In our opinion, the dying declarations made by Yuvrajsingh were true. On the strength of these dying declarations it is proved beyond any manner of doubt that it was Ramkumar appellant who had fired the gun at Yuvrajsingh.

10. The important question which has engaged our careful attention in this case is whether on the facts and in the circumstances of this case, we should maintain the conviction of the appellant for the offence of murder. The Indian Fenal Code defines in Section 299 the offence of culpable homicide. Under this section it is to be proved that an accused has caused death of any person by an act and that act was done (1) with the intention of causing death or (2) with the intention of causing such bodily injury as is likely to cause death or (3) with the knowledge that he is likely by such act to cause death. Section 300 of the Code lays down that except in cases falling within the exceptions mentioned in that section, culpable homicide

would be murder if the act by which the death is caused is done with the intention or knowledge as specified in that section.

Thus while defining the offence of culpable homicide and murder, the framers of the Code laid down that requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be. The framers of the Code designedly used the two words 'intention' and Knowledge', and it must be taken that the framers intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he 'must have been aware that certain specified harmful consequences would or could follow.' (Russell on Crime, Twelfth Edition Volume 1 page 40).

This awareness is termed as knowledge. But the knowledge that specified consequ-ences would result or could result by doing an act is not the same thing as the intention that such consequences should ensue. If an act is done by a man with the knowledge that certain consequences may follow or will follow, it does not necessarily mean that he intended such consequences and acted with such intention. Intention requires something more than a mere foresight of the consequences. It requires a purposeful doing of a thing to achieve a particular end. This we may make it clear by referring to two passages from leading text-books on the subject. Kenny in his Outlines of Criminal Law, 17th Edition at Page 31 has observed:

'To intend is to have in mind a fixed purpose to reach a desired objective; the noun intention' in the present connexion is used to denote the state of mind of a man who not only foresees but also desires the possible consequences of his conduct ..... It will be noted that there cannot be intention unless triers is also foresight, since a man must decide to his own satisfaction, and accordingly must foiesee, that to which his express purpose is directed... .Again, a mancannot intend to do a thing unless he desires to do it.'

11. Russell on Crime, Twelfth Edition Vol. 1st page 41 has observed :

'In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims.....

Differing from intention, yet closely resembling it, there are two other attitudes of mind, either of which is sufficient to attract legal sanctions for harm resulting from action taken in obedience to its stimulus, but both of which can be denoted by the word 'recklessness'. In each of these the man adopts a line of conduct with the intention of thereby attaining an end which he does desire, but at the same time realises that this conduct may also produce another result which he does not desire. In this case he acts with full knowledge that he is taking the chance that this secondary result wiu follow. Here, again, if this secondary result is one forbidden by law, then he will be criminally responsible for it if it occurs. His precise mental attitude will be one of two kinds--(a) he would prefer that the harmful result should not occur, or (b) he is indifferent as to whether it does or does not occur.'

12. The phraseology of Sections 299 and 300 of the Code leaves no manner of doubt that under these sections when it is said that a particular act in order to be punishable be done with such and such intention, the requisite intention must be proved by the prosecution. It must be proved that the accused aimed or desired that bis act should lead to such and such consequences. For example, when under Section 299 it is said'whoever causes death by doing an act with the intention of causing death,' it must be proved that the accused by doing the act, jntended to bring about the particular consequences, that is, causing of death. Similarly, when it is said that 'whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death,' it must be proved that the accused had the aim of causing such bodily injury as was likely to cause death.

Thus, in order that the requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide proved, it is necessary that any of the two specific intentions must be proved. But even when such intention is

not proved, the offence, will be culpable homicide if the doer of the act causes the death with the knowledge that he is likely by his such act to cause death, that is, with the knowledge that the result of his doing his act may be such as may result in death.

13. Learned Additional Government Advocate has laid much stress on the point that the intention of an accused is a subjective state of mind which cannot be positivelyproved in every case except by the accused himself stating either in evidence or in his explanation that such and such was his intention when he performed the act and that unless such an explanation is forthcoming from the accused and accepted by the Court, he must be presumed to intend the natural consequences of his act. He has relied on several cases on this point. But this maxim is not a substantive principle of law. It is only a maxim of great evidentiary value. In this connection, we may refer to the following passage from Glanville L. Williams, 1953 Edition, Article 27, page 81 :

'It is now generally agreed, in conformity with this opinion, that the maxim does not represent a fixed principle of law, and that there is no equiparation between probability and intent. This was pointed out by Stephen, although his words for some time had little effect upon the language used by judges. Recently Denning L. J. said: 'there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense.'

14. In the same book (Article 227) while discussing the burden of proof in homicide the learned author has observed :

'Foster stated that every killing was presumed to be murder until the contrary was shown, and this statement was unintelligently copied from one textbook to another although it was contrary to the fundamental presumption of innocence. The heresy was extirpated by the House of Lords in Woolmington, 1935 AC 462; which decided that there is no persuasive presumption of murderous malice, and that when a defence to a charge of murder is accident or provocation, the burden of satisfying the jury still rests on the prosecution. Lord Sankey said: 'if thejury are left in reasonable doubt whether the act was unintentional or provoked, the prisoner is entitled to be acquitted, i. e. of murder.'

15. The Supreme Court referred to Woolmington's case, 1935 AC 462 in K. M. Nanawati v, State of Maharashtra, AIR 1962 SC 605, and observed as follows :

'As in England so in India, the prosecution must prove the guilt of the accused, i. e. it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence, he is entitled to the benefit of doubt.'

16. Another case is Dahyabhai v. State of Gujarat, AIR 1964 SC 1563. It was a case in which the plea of insanity was under consideration. It was observed :

'It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. The general burden never shifts and it always rests on the prosecution.'

17. Learned Additional Government Advocate has relied on the following observations of their Lordships of the Supreme Court in Bhikari v. State of Uttar Pradesh, AIR 1966 SC 1 (2) :

'There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of mankind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it

to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the pro-sedition to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law.'

But in that very case their Lordships have pointed out that it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and that if upon the evidence adduced in the case whether by tbe prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused, he would be entitled to be acquitted.

18. Learned Additional Government Advocate has further relied on the following observations in Director of Public Prosecutions v. Smith, 1961 AC 290 (331) :

'Another criticism of the summing up and one which found favour in the Court of Criminal Appeal concerned the manner in which the trial Judge dealt with the presumption that a man intends the natural and probable consequences of bis acts. I will cite the passage again: 'the intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a rnan intends the natural and probable consequences of his acts.' It is said that the reference to this being a presumption of law without explaining that it was rebuttable amounted to a misdirection. Whether the presumption is one of law or of fact or, as has been said, of common sense, matters not for this purpose. The real question is whether the jury should have been told that it was rebuttable. In truth, however, as I see it, this is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity

or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable.'

19. This case has been the subject-matter of great controversy and so far as we are concerned, it may be stated that in this very passage it has been mentioned in unmistakable terms that the presumption arising that a man intends the natural and probable consequences of his act is rebuttable. In order to put the law beyond any controversy in England, the Parliament enacted Section 8 Criminal Justice Act, 1967 which runs as follows :

'A Court or jury, in determining whether a person has committed an offence,--

(a) shall not be bound in law to inferthat he intended or foresaw a resultof his actions bv reason only of its beinga natural and probable consequence of those actions; but.

(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances.'

The effect of this new section is that there is no room for doubt to interpret Smith's case in the light that the presumption that a person intends the natural consequences of his act will be irrebuttable. Now, under the English Law, the subjective intent to cause grievous bodily harm must be proved though it may be interred taking into account the totality of all the circumstances pertaining to the case.

20. Under the Indian law, it has been enacted in Section 300 that 'culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.' In one way this provision makes the presumption that a person intends the natural and probable consequence of his act irrebuttable to the extent that if it is proved that the particular injury intended to be inflicted by the accused turned out objectively to be sufficient in the ordinary course, of nature to cause death, the accused cannotj

plead that he had not the intention of caus-ing a bodily injury sufficient in the ordinary course of nature to cause death. Tbe sub-jective test is confined to proving that the accused intended to cause such bodily injury as was likely to cause death and it is not necessary that it must further be proved by the prosecution that the accused intended to inflict bodily injury sufficient in tbe ordinary course of nature to cause death. It is sufficient if it is proved that the particular bodily injury was sufficient in the ordinary course of nature to cause death for holding the accused guilty for the offence of murder. This law has been clarified in Virsa Singh v. State of Punjab, AIR 1958 SC 465, Anda v. State of Rajasthan, AIR 1966 SC 148, and Harjin-der Singh v. Delhi Administration, AIR 1968 SC 867. Apart from this, there is no difference between the Indian law and English law as clarified by the Criminal Justice Act, 1967, on this point

21. It is, however, urged before us that at least in the case of gunfire it was for the accused to explain that he was acting without any intention to cause such bodily injury as was likely to cause death and that in the absence of any plea or explanation, the presumption has remained unrebutted. It is further pointed out that in this case Ram Kumar appellant took up the defence that he acted under intoxication of liquor which was forcibly administered to him, and that this defence has been rejected by the trial Court. We accept that the trial Court was right in rejecting this plea. But we are of the view that if the circumstances of thecase otherwise show that the prosecution has failed to prove that the accused had the requisite intention required to be proved under Sections 299 and 300 I. P. C. we can rely on those circumstances in spite of the fact that he had not taken that plea or had not offered an explanation suggesting such defence. In this connection we may quote the following passage from the speech of Viscount Simon L. C. in Mancini v. Director of Public Prosecutions, 1942 AC 1 (7) :

'Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence --a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal--it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact

that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the Judge from the duty of directing the jury to consider the alternative if there is material before the Jury which would justify a direction that they should consider it. Thus, in Rex v. Hopper, (1915) 2 KB 431, at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental, but Lord Reading C. J., in delivering the judgment of the Court of Criminal Appeal, said: 'We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence--we say no more than that--upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand'.'

22. Judged in the light of the aforesaid observations, we are of the view that in spite of the fact that the accused has not taken any definite plea of accident and that he has not explained why he fired the gun at the deceased, we may minutely examine all the circumstances on record and see whether the facts and circumstances pointed out that the appellant must have intended to cause the death of Yuvrajsingh or to cause such bodily injury to him as was likely to cause his death. The circumstances of the case appear to us not to impute such intention to the appellant for the following reasons :

(1) That the appellant Ramkumar and the deceased Yuvrajsingh had gone for a picnic party to the tank at Sakatpur and whatever they did there all shows that they were engaged in merry making. They drank liquor and took their meals.

(2) The appellant had not taken any weapon with him as it is the prosecution evidence that the gun belonged to Ramsingh who had taken it with him.

(3) It is in the evidence of Mst. Kishni that the gun was used by Ramsingh for shooting at sparrows before the incident.

(4) No motive or enmity has been proved by the prosecution which may have actuat-ed the appellant to commit the crime.

(5) The shooting was performed in broad day light without any attempt to hide it and is consistent with the fact that the appellant may have tried to handle the loaded gun recklessly.

23. We are, therefore, not inclined to draw the inference that the appellant had either the intention of killing the deceased or that he had the intention of causing him such bodily injury as was likely to cause his death.

24. Even if we rule out any such intention on the part of the appellant, there is no room for doubt that the appellant must have had the knowledge that he was doing an act which was likely to cause the death. There can be no doubt that the gun when the appellant took it from Ramsingh was loaded and that he must have had the knowledge that if he pressed the trigger of such a gun aiming in the direction of the deceased, it was likely to cause his death. The distance from which the gun was fired was not more than 5 feet from the deceased according to the medical evidence and even if we do not impute to the appellant the knowledge that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, yet we must impute to the accused the knowledge that he was doing an act with the knowledge that he was likely by such act to cause death. We are, therefore, of the view that the appellant's conviction under Section 302 of the Indian Penal Code be set aside and he be convicted under Section 304 Part 2 of the Indian Penal Code.

25. We therefore set aside his conviction under Section 302 I. P. C. as also the sentence of imprisonment for life and instead convict him under Section 304 Part 2 of the Indian Penal Code and sentence him to five years' rigorous imprisonment.