Parma Vs. the State

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SooperKanoon Citation : sooperkanoon.com/751207

Court : Rajasthan

Decided On : Sep-02-1955

Reported in : AIR1956Raj39; 1956CriLJ270

Judge : Bhandari, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 40, 307, 320 and 326; Code of Criminal Procedure (CrPC) , 1898 - Sections 4, 225, 236, 237, 238, 238(1) and 238(2)

Appeal No. : Criminal Appeal No. 32 of 1953

Appellant : Parma

Respondent : The State

Advocate for Def. : R.A. Gupta, Adv.

Advocate for Pet/Ap. : H.S. Sahai, Adv.

Disposition : Appeal dismissed

Judgement :

Bhandari, J.

1. This is an appeal on behalf of Perma appellant who has been convicted by the Additional Sessions Judge, Gangapur under Section 326, I. p. C. and sentenced to

two years' rigorous imprisonment and to pay a fine of Rs. 100/- and in default to undergo three months' further rigorous imprisonment.

2. The facts giving rise to this appeal are very simple. In the village Maunch, there is a house Murli Mahajan with a shop underneath it and in front of the shop there is a chabootra, On 25-10-1952 at about 8 P. M. several persons were sitting on that Chabootra and were settling the rate of chillies which Pakira P. W. 4 had come to purchase from Karauli.

Ratanlal P. W. 1 was also sitting on the chabootra and on his back the appellant was standing. It is alleged by the prosecution that the appellant aimed a blow of the sword which he carried wrapped in a Dhoti, on the neck of Ratanlal. but the blow struck Ratanlal on his right shoulder. This blow of the sword caused two injuries detailed below:

1. One incised wound 4' x 1 1/2' x 1 1/2' on the top of the right shoulder.

2. Cutting of the acromion process of the right scapula, the bone being cut through 1/6' x 1/3'.

The blow of the sword which struck Rattanlal on his shoulder had penetrated several layers of the dhoti Ex. P-4 which he had on his shoulder and had also cut through the shirt Ex. 3. It is further alleged by the prosecution that after inflicting the blow Parma said that he had cut Ratanlal and all those who are his kith and kin should run away. Thereafter he ran away with his naked sword in his hand leaving behind the sheath Ex. 2 of the sword.

A report of this incident was lodged at the Police Station Karauli at about 8 A. M. on. 26-10-1952. Parma appellant is also said to have produced the sword Ex. 1 before the Sub-Inspector in charge of Police Station Karauli at about 10-15-A.M.

3. The appellant was arrested and was challaned before the Sub Divisional Magistrate, Karauli and the Sub Divisional Magistrate. Karauli committed the appellant to the court of the Additional Sessions Judge, Gangapur to stand his trial for the offence under Section 307, I. P. C,

4. The appellant in his defence pleaded that he was not guilty and that on the date of occurrence 30 or 40 persons were on the chabootra of Murli Mahajan and several of them were conspiring to murder his father Mukanda. Ratanlal had also a sword covered in his Dhoti, but the appellant saw the sword and wanted to snatch away the sword from Ratanlal.

At this Ram Ratan one of the persons sitting there who is P. W. 2 in this case, gave a lathi blow. Thereupon, the appellant ran away. The learned additional Sessions Judge disbelieved the defence and held the appellant guilty of having committed the offence under Section 326, I. P. C.

5. The prosecution has examined several eyewitnesses of which the learned Additional Sessions Judge has believed Pakira P. W. 4, Genda P. W. 5, Ram Ratan P. W. 2, Kalua P. W. 3 and the complainant Ratan Lal. Ratan Lal P. W.1, Ram Ratan P. W. 2 and Kalua P. W. 3 had stated that the blow was aimed at the neck of Ratanlal, but it eventually struck the shoulder.

The learned Additional Sessions Judge disbelieved this part of the case that the blow was aimed at the neck as none of the witnesses, Ratanlal P. W. 1, Bam Ratan P. W. 2 and Kalua P. W. 3 were facing the appellant and they could not have seen the appellant striking the blow. The learned Judge places great confidence in the statement of Fakira P. W. 4 who is a Mahajan of Karauli and who had come to purchase chillies from the residents of Maunch. Genda P. W. 5 who was also present was also relied upon by the learned Additional Sessions Judge.

Taking the evidence of these two witnesses as independent evidence and after carefully scrutinising the evidence of Ratanlal P. W. 1, Ram Ratan P. W. 2, Kalua P. W. 3, Fakira P. W. 4 and Genda P. W. 5 and also of the defence witnesses D. W. 1 Lohrey and Raghunandan D. W.2. the learned Additional Sessions Judge came to the conclusion that Parma struck the blow of the sword on the right side of the shoulder of Ratanlal who cried that he had been hit and that thereupon the appellant moved a little further off and uttered that he had cut Ratanlal and persons of his kith and kin should run away.

6. The learned advocate for the appellant argued that the evidence of these prosecution witnesses was not properly appreciated by the learned Additional Sessions Judge. His criticism is that Rani Batan P. W. 2 and Kalua P. W. 3 are distantly related to Ratanlal P. W. 1, thereare. to -be disbelieved and that Ratanlal P. W. 1 had enmity with Mukanda father of the appellant.

With, regard to Pakira P. W- 4, the criticism is that he had stated in cross-examination that -the witness did not see the appellant giving the blow of the sword. He saw the appellant standing before the blow was inflicted 'and then saw him when the appellant told that he had cut Ratanlal. Genda has similarly stated that lie did not see the appellant hitting Ratanlal. According to him Ratanlal cried that he had been hit and the appellant ran away.

The appellant had told in his presence that he had cut Ratanlal and those who are his kith and kin should run away, and the witness saw a naked sword in the hand of the appellant when he told this. It might be true that these witnesses might not have 'seen the appellant striking at Ratanlal, but all of them are so definite regarding the fact that the appellant was stand-, ing behind Ratanlal, that as soon as Ratantal cried, the appellant toJd the people to run away as he had struck Ratanlal and that he had a naked sword in his hand at that moment and Ratanlal was blesding of the wound inflicted on his shoulder.

All these factors lead to the conclusion that it was the appellant who had inflicted a blow of the sword on the right shoulder of Ratanlal and there is no room to doubt as to the identity of the person who inflicted the injury. In my opinion, the finding of the learned Additional. Sessions Judge on this point cannot be seriously challenged.

7. It is next argued by the learned counsel for the appellant that granting, that the blow was inflicted by the appellant, the injury caused is not- of such a nature that would be designated as grievous hurt under section 326 of the Indian Penal Code. He has urged that in order that a hurt may be designated as a grievous hurt, there must be a fracture or dislocation of tooth or bone.

' Dr. B. P. Singh, District Medical and Health Officer, Karauli who is P. W. 9 in this case has designated injury No. 2 as grievous hurt. He has stated that the acromion process was cut through by 1/6' x 1/3', though there was no displacement of bone. Ho has further stated that injury No. 2 was grievous because the bone was cut. The learned advocate has cited before me the cases of -- 'Maung Po Yi v. Ma E Tin', AIR 1937 Rang 253 (A) and -- 'Mutukrlhari Singh v. Emperor', AIR 1942 Pat 376 (B) to support Ms contention.

In the case of 'Maung Po Yi (A)', the learned Judge held on the evidence of Medical Officer that though the skin and membrances outside the skull bone were cut through and that the knife then touched the skull bone and perhaps caused some injury to its surface, yet it did not cut it through and did not crack it. On this finding, the Hon'ble Judge rightly held that no grievous hurt was caused. In the course of the judgment, the Hon'ble Judge remarked as follows:

'The primary meaning of the word 'fracture' is 'breaking', though it is conceded that it is not necessary in the case of a fracture of the skull bone that it be divided into two separate parts because it may consist merely of. a crack; but the point is that if it is a crack it must be a crack which extends from toe outer surface of the skull to the inner surface.'

With these remarks the. Hon'ble Ranawat J. has disagreed as being too wide, in the case of'Kalya v. The State', (S) AIR 1955 Raj 36 (C). I also share the same view. The case of 'Mutuk-dhari (B)', only indicates that

'when the evidence is merely that a bone-had been cut and there was nothing whatever to indicate the extent of the cut, whether deep or a mere scratch upon the surface, it is impossible to infer from that evidence alone that grievous hurt had been caused'.

This case is distinguishable from the case before me. Here it has been definitely stated by the doctor that there has been a cut through 1/6' x 1/3' of the acromion process. According to the medical authorities, acromion is a flattened piece of bone. It is continuous with the spine at the angle between its two unattached borders. It extends in a lateral direction and overhangs the shoulder joint above

and behind.

It may be that when the dimensions of at cut of a bone are not known, it may be difficult to say whether it is a grievous hurt. But in this case a vital part of the shoulder has been cut through 1/6' x 1/3' and I have no doubt that this is a grievous hurt within the meaning of Section 320, I. P. C.

8. The next point argued before me is that the charge that had been framed against the appellant was that under Section 307, I. P. C. and the appellant cannot be convicted under Section 326, I. P. C., as this was not a minor offence in respect of Section 307, I. P. C. This takes me to the discussion whether the offence proved was included in the offence charged, as laid down under section 238 of the Criminal Procedure Code.

Section 238, Criminal P. .C. lays down the]: limit under which a person who has been charged' with a particular offence, can be convicted of any other offence. It is an exception to the general rule that a person cannot be convicted of an offence with which he is not charged. In order that the conditions prescribed under section 238 of the Criminal Procedure Code may be fulfilled, it is necessary that under clauses 1 and 2 of the section, the offence for which the accused is sought to be convicted must be, minor in relation to the offence with which he is charged which may be called the major offence.

The first requisite that an offence may be minor in relation to the offence charged is that the punishment provided for committing minor offences must be in all cases less than that provided by law for committing the major offence. The expression 'minor offence' is not defined anywhere, but taking the common sense view of the matter, this condition is, but evident.

This is further implied in the very definition I of the word 'offence' under Section 4(c), Criminal P. C.' The offence

'means any act or omission made punishableby any law for the time being in force; it alsoincludes any act in respect of which a complaintmay be made under S. 20, Cattle-Trespass Act,1871.'

Unless any act or omission is made punishable, it is not an offence. The same with necessary variation is the' definition of the word 'offence' in the Indian Penal Code. This shows that the eleme'nt of punishment is essentially associated with the offence. In order that an offence may be minor offence, it is necessary therefore that it must be punishable with minor punishment.

I with all respects do not agree with the observations made in the case of -- 'Emperor v. Abdul Rahim&n; Akramdin', AIR 1936 Bom 193 (D) that

'it is an unwarranted assumption that the test by which an offence is deemed in Section 238(1) to be major or minor is the gravity of the punishment incurred.'

Of course punishment is not the sole test but the gravity of punishment is a primary consideration to judge whether the offence is a minor offence in relation to another offence which may be an ordinary offence. The Hon'ble Judge in. that case has himself taken, the element of punishment into consideration when he has observed at a later stage that it was also a minor offence in the sense that the punishment to which the accused become liable is less grievous than to which they would have been liable if all the particulars alleged in the charge had been proved.

9. In the case of -- 'Makkhan v. Emperor', AIR 1945' All 81 (E), it has been observed that 'the gravity of the offence must depend upon the severity of the punishment that can be inflicted.' To my mind the severity of punishment is the first test in judging whether the offence is a minor offence in relation to the major offence. Bu this is not the only test and other conditions laid down in Section 238, sub^s. 1 and 2 must be fulfilled.

These two sub-clauses lay down the conditions which must be fulfilled before it may be called a minor offence. Sub-section 1 to Section 238, Criminal P. C. lays down as follows:

'When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be

convicted of the ' minor offence, though he was not charged with it.'

Under this sub-section, all the particulars which complete a minor offence must be present in major offence. They may be in aggravated form. It is further clear from the reading of this section that there might be other particulars which might be present in the major offence and which are not present in the minor offence.

It is not necessary to prove the offence charged in the indictment to the whole extent provided the facts proved, constitute a complete offence.

Similarly it is not necessary to prove the offence charged in the same aggravated form provided what is proved constitutes a complete offence.

10. Judged from this test, the offence under Section 326 Ms not a minor offence in respect of an offence under Section 307. Under Section 326, it is necessary that

'there must be 'voluntarily causing grievous hurt by means of any instrument for shooting, stabbing, or any instrument which, used as a weapon of offence, is likely to cause death....'

Under Section 307 it is not necessary that any hurt-may be caused. It is only in second para, of Section 307, I. P. C. that causing of grievous hurt is mentioned in connection with providing heavier-punishment of death. The ingredient of causing 'hurt is absent in first para, of Section 307, I. P. C. Even under the second para, the distinction between the simple & grievous hurt is not drawn and the kind- of instrument that may -cause hurt is not considered relevant.

Strictly speaking, it cannot be said that any person charged with an offence under Section 307, I. P. C. cnn be convicted under Section 326 by virtue of Section 238(1), Criminal P. C. The additional fact that causing of grievous hurt is to be proved under Section 326 takes it out from being a minor offence under Section 307.

11. The question remains, can it be a minoroffence under Sub-section 2 of the same section. Subsection 2 to S'. 238 runs as follows;

'When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of- the minor offence although he is not charged with it.'

In the case of -- 'Emperor v. Atadul Rahim Akramdin (D)' referred to above, the Hon'ble Judge has observed that

'section 238 sub-Clause 2 speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes.'

In that case it was not necessary for the learned Judge to decide what should be the nature of the additional facts proved. But this clause, clearly points out that the additional facts must be such as reduce the offence charged to a minor offence. To my mind the interpretation! of this clause is that there are all the particulars present in the case which make it a major offence. But certain additional facts are brought before the court either by the prosecution or by the defence to reduce the offence to a minor offence.

There may be various circumstances which when proved, may make an offence less serious even though all the elements constituting that offence as major offence are present. Various sections of the Indian Penal Code lay down various illustrations of this type. Illustration (b) of Section 238 is as follows:

'A is charged, under section 326, I. P. C., with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code.'

This illustration may serve as a guide to interpret Section 238(1), Criminal P. C. I do not mean . to say that the illustrations restrict the main provisions, 'but those illustrations greatly facilitate the understanding of the law', as observed by the Indian Law Commission and the illustrations will lead the mind of the student through same steps by which the minds of those who framed the law proceeded.

All the ingredients present in Section 325 may become an offence under Section 335, I. P. C. because certain additional facts are brought on record which make the offence less serious and punishable with less severity.

When 'A is charged, u/s. 326, I. P. C., with) voluntarily causing grievous hurt to B by means of an instrument for shooting, this is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.' (See illustration B to Section 221 of the Criminal Procedure Code). But the additional facts may be proved which may make it a case provided under Section 335 of the Indian Penal Code.

General exceptions or exceptions to a particular section may make an offence less serious or minor even though-all the particulars of the major offence may be present. I need not multiply the illustrations on this point. It is a matter of every day occurrence,

12. Just judging from this point of view, an offence under section 326 of the Indian Penal Code does not necessarily become a minor offence with respect to an offence under Section 307, I. P. C. The other Clauses 2 (A) and 3 of Section 238, Criminal P. C. do not obviously apply to the case and need not be discussed herefore,

13. The appellant therefore, may not be legally convicted of an offence under Section 326, I. P. C. by virtue of Section 238, Criminal P. C. but in my opinion, he cannot escape his liability to conviction under Section 326 by virtue of Section 237, Criminal P. C. Sections 236 and 237 are to be read together.

Under Section 236, if an act committed by the accused is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences. In this case Parma appellant struck Ratanlal with a sword blow. The prosecution had evidence with them that the blow was aimed at the neck and further the blow was of such a serious nature that it was likely to cause death. Under the circumstances the appellant could have been charged at the stage from the framing of the charge both under Sections 326 and 307, I. P. C. But the charge under Section 326 was

not framed.

Section 237, Criminal P. C. lays down that in such circumstances, even if the accused is charged with one offence & it appears in evidence that he has committed a different offence for which he might have been charged under Section 236, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. To my mind this provision of law is clearly applicable to the facts of the present case.

14. The charge that has been framed in this case runs as follows:

'That you on or about 25-10-1952 at about 8 P. M. in village Maunch struck at Ratanlal with a sword with the intention of causing his death, thereby causing grievous and simple injuries on the right shoulder of Ratanlal, thus committing an offence punishable under section 307 of the Indian Penal Code.

It clearly satisfies the fact that the appellant had struck at Ratanlal with a sword. It was a charge of which the accused had sufficient notice, and even if section 326 is not mentioned it does not in any way prejudice the accused. Under Section 225, priminal P. C. even if there is an error or omission in stating the offence it is not treated as material unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice.

In this connection reference may be made to the case of -- 'Sk. Idris v. Emperor', 43 Gal WN 782 (F). The defence of the accused shows that the appellant was never misled and there is no injustice occasioned to the appellant in this case.

15. I, therefore, hold that the appellant has been rightly convicted under Section 326, I. P. C.

16. Lastly, it was argued that the statement of the accused under Section 342, Criminal P. C. was not properly recorded. I find that there is no such substance in the argument and it was also given up by the learned counsel for the appellant.

17. I dismiss the appeal, and maintain the conviction and sentence. The appellant is on bail and he must surrender himself to the Additional Sessions Judge,

Gangapur to undergo the remaining period of imprisonment.