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Court : Rajasthan

Decided On : Apr-02-1975

Reported in : 1975(8)WLN243

Judge : Kan Singh and; S.N. Modi, JJ.

Appeal No. : D.B. Criminal Appeal No. 31 of 1971

Appellant : Laxman

Respondent : The State of Rajasthan

Judgement :

Kan Singh, J.

1. This appeal has been brought by accused Laxman against the judgment of the learned Additional Sessions Judge, Gangapur City, dated 17th October, 1970, convicting the accused of an offence under Section 302 IPC and sentencing him to imprisonment for life together with a fine of Rs. 1,000, in default, further rigorous imprisonment for one year.

2. The incident to which the case relates, took place on the night between 26th and 27th March, 1970 at the house of Moolia P.W. 4 at village Kot, which is within the bounds of the Police Station, Mahua situate at a distance of 14 miles from the police station. Moolia PW 4 was at his field that night and his wife Smt. Kistoori,

aged 40 years, was at his house. She was aroused at dead of night when a miscreant tried to snatch away a Khangwali, an ornament worn on the neck. She tried to catch hold of the miscreant and was able to grasp the shirt worn by the miscreant. At that stage, the miscreant gave two stabs to Smt. Kistoori with a knife that he was having with him. One injury was caused en her right leg and the other on her abdomen. She raised an alaram & the miscreant fied away. She was able to recognise the miscreant and, according to the version that she gave to some persons including her husband Moolia, it was none other than accused Laxtman who bad inflicted the two injuries on her person. The villagers took injured woman to the Primary Health Centre at Mandawar about 5 a.m. Dr. H.P. Gupta PW 1 incharge of the Primary Health Centre, attended to the injuries of Smt. Kistoori. Smt. Kistoori told Dr. Gupta how she had been injured and she further named Laxman as her assailant Dr. Gupta sent information to the Police Station at Mandawar. The First Information Report is EX. P.1 on the record. Smt. Kistoori expired the same day at 5.35 p.m. but before her end came, Dr. Gupta had arranged for the presence of Shri Krishna Singh, Tehsildar & Second Class Magistrate, Mahua. PW 2, who was camping at Mandawar. Shri Krishnasingh recorded the dying declaration which is Ex. P. 8 on the record. The post mortem examination of the dead body was performed by Dr Gupta who found the following external injuries on the dead body:

1. Punctured wound 2' x 11/2' x 4 1/2' in the epigastria region,

2. Incised wound 1' x 1/2' x 1/4' on the right leg 4' below the right knee joint on the medial side of the leg.

The internal injury was one punctured wound 1' x 1/4' x 1 1/2 at inferior surface pf the right lobe near the hilum of the liver. It was the result of external injury No. 1. The cause of death was shock resulting from internal haemorrhage by injury to liver. The injury to the liver was sufficient in the ordinary course of nature to cause death. There was no eyewitness in the case which depended on the three dying declarations, the first one made by Smt. Kistoori before the villagers. It was deposed to by P.W. 3 Zahoor khan and P.W. 4 Moolia. The second dying declaration was deposed to by Dr. Gupta PW 1 and the third one was the

declaration Ex. P. 8 recorded by Shri Krishnasingh P.W. 2. The learned Additional Sessions Judge placed reliance on the testimony of P.W. 4 Moolia though he did not believe P.W. 3 Zahoor Khan. He further believed the testimony of Dr. Gapta aid Shri Krishnasingh before whom the respective dying declarations were made. The plea of the accused was one of denial and he stated that he was at his field at the relevant time. He examined D.W. 1 Kajod and D.W. 2 Kalyan in support of his plea of alibi their evidence was not accepted as trust-worthy by the learned Judge.

3. Learned Counsel for the appellant has taken us through the evidence and has advanced a twofold argument. In the first place, he submits that the evidence was not at all sufficient for conviction and for this he attacked the dying declarations. He urged that the dying declarations were promoted by the husband and other persons and the injured could not have reconised her assailant as it was night-time. In the second place, he argued that it could not be said with any, definiteness that the accused aimed the blow at any particular part of the body of Smt. Kistoori or that he had the intention to cause the particular injury which resulted in Smt. Kistoon's death. Learned Counsel maintains that, in the circumstances, if at all, the accused would be guilty only of the offence under Section 304 Part I IPC and not under Section 302 IPC.

4. What Smt. Kistoori conveyed to Dr. Gupta is contained in the First Information Report Ex. P. which reads as follows:

Sub : Information about the injured patient Smt. Kistoori wife of Moolia Khatik.

It in to write in the above connection that today on 27-3-70 at about 5 a.m. Smt. Kistoori w/o Moolia Khatik of village Kot was brought to the Primary Health Centre in an injured confliction. She was admitted. When questioned at the time of the admission, she stated that she was sleeping in the tibari of her house. At night about 2 am Laxman Chowkidar son of Baiajja Chowkidar, resident of Village Kot tried to take away the Khangwali worn on her neck. Thereupon she caught hold of him. The baniyan of Laxman came in her hands and it was torn, and Laxman stabbed with a knife on her belly and he ran away.

The doctor added that her condition was serious. It was further mentioned that Moolia son of Chittar Khatik, Bhagwena son of Birbar Khatik, Babulal son of Moolia, Mansukha Nai and Jahoora son of Rahim had brought her from Kot for treatment. PW 4 Moolia stated that about 1.30 or 2 a.m. in the night when he was sleeping at the threshing floor his field, one Ramswaroop accompanied by one Motilal came and told him that his wife had been stabbed by a thief. H then came to the village The villagers had assembled at his house. Smt. Kistoori was lying on a cut under the chappar. She had two injuries, one on her abdomen and the other on her leg and blood was coming out of the wounds. The wounds had been dressed. Moolia then acquired from his wife as to who had injured her and he stated that Laxaman son of Bhajja had struck her with the knife. She said nothing else and then she was brought to the Mandawar Hospitol.

5. We have read the statement of P.W. 3 Zahoorkhan as well. The Learned Additional Sessions Judge had discarded it and having read it, we think, he did so rightly. While Zahoorkhan said one thing in his examination-in-chief, be said quite the contrary in the cross examination. It is surprising that h; was not declared hostile by the prosecution and subjected to cross-examination. Be that as it may, we are inclined to think that he had been won over.

6. PW 2 Shri Krishnasingh stated that on 27-3-70 while he was camping at Mandawar, a Head Constable of the Police made an application (Ex. P. 7 on the record) requesting him to take down the dying declaration of Smt. Kistoori who was admitted at the Mandawar Hospital. Accordingly, he proceed to the hospital and recorded the statement of Smt. Kistoori which is Ex. P. 8 on the record. Shri Krishna singh had, however, admitted that Smt. Kistoori was disposing by gestures about the attempt of the accused to snatch her khangali and she being stabbed with a knife. It was only on Shri Krishnasingh's asking her that she named the accuse with his parentage as her assailant. It has to be further noticed that this statement was recorded at 5.30 p.m. and Smt. Kistoori expired nenly five minutes thereafter. We are, therefore, not inclined to attach that much value to the dying declaration as we would do in the case of the statement of a person recorded at a time when the faculties of the deponent would not be at a low debt; the life being in its flicker. Any way it is noteworthy that there is not even a suggestion of any ill will

or enmity between Smt. Kistoori and the accused or between Moolia and the accused or his people.

7. It was the fifth day of Chaitra and therefore at 2 a.m., the time of the incident, there would be sufficient moon light to enable the victim to recognise the miscreant. Smt. Kistoori was sleeping in a tibari, an open verandah and not in any closed apartment and normally at that time of the year, one may not sleep inside a room Further, the accused was no stinger to Smt. Kistoori as the two belonged to the same village. Apart from this, there was scuffle between Smt. Kistoori and the accused and as Smt. Kistoori was stabbed on the abdomen, the accused must be face to face with her and she would thus be having sufficient opportunity of recognising the assailant. There is no reason why should name the accused as her assistant if be were not really the assailant. Further, there was no reason why Moolia PW 4 would falsely name the accused as the assailant of his wife. Likewise, there is no reason why Dr. Gupta would be falsely deposing to the dying declaration made be Smt. Kistoori at the time of her admission at the Primary Heath Centre. We are, therefore, satisfied that the dying declarations are genuine as well dependable and the first two dying declarations could safely be acted upon although we are not prepared attach that much value to the third dying declaration deposed to by Shri Krishna Singh, as that time the faculties of Smt. Kistoori would be very much unpaired. Therefore, we are satisfied that the accused has been rightly convicted.

8. Now, we may deal with the contention of the learned Counsel for the appellant about the offence. He invited our attention to Harjindersingh v. Delhi Administration : 1968 CriLJ1023 & contended that the third clause of Section 300 IPC requires that the intention of the accused must be to inflict a particular injury on a particular part of the body and where this is not proved, the accused cannot be convicted for the offence under Section 302 IPC la the cited case, a fight had taken place between one Dalipkumar and the accused Harjinder singh at 2 30 p.m. near a water tap in front of a tin factory in Zamirwali lane, Delhi. Harjinder was apparently worsted in the fight and he then left the place holding out a threat that he would teach a lesson to Dalipkumar. PW 12. After sometime, the accused returned with his brother Amarjit Singh to the house of PW 12 and shouted to him

to come out. Smt. Tejibai opened the door of the house and asked the accused & Amarjitsingh to go away. But then the accused pulled Dalipkumar out of the house into the lane and gave him a beating. At that time, the deceased Kewalkumar. who was the brother of Dalipkumar PW 12, came and tried to intervene and rescue his brother. It was at that stage the Amarjit singh accused caught hold of Kewakumar and accused Harjindersingh took out the knife and stabbed the deceased. The injuries that were sustained by the deceased were two. The first one was a stab wound 1' x 1 1/4' on the left thigh upper and below the inguinal ligament. The second one was abrasion 1' x linear in back of left fore arms middles. The direction of the stab wound was oblique and was going medially. Sartorius muscle was cut underneath along with femoral artery and vein, cut over major part of their diameter. There was effusion of blood in the muscles and around the track over left thigh upper end. The death was due to stock and haemotrhage from injury to femoral vessels by stab wound of the thigh which resulted in the cutting of these Vessels and loss of blood. It was in this context that after referring to the earlier cases Virassingh v. State of Punjab : 1958 CriLJ818 and Rajwantsingh v. State of Kerala A.I.R. 1966 S.C. 1874, their lordships of the Supreme court observed that, in the circumstances, it cannot be said with any definite ness that the appellant aimed the blow at this particular part of the thing knowing that it would cut the artery. Their lordships further observed that the accused had not used the knife while he was engaged in the fight with Dalipkumar. It was only when he felt that the deceased hand come against him that he whipped out the knife. In these circumstances, their lord-hips were not able to hold it proved that it was the intention of the appellant to inflict this particular injury on this particular injury on this particular place and consequently, it was not possible to apply Clause 3 of Section 300 IPC to the act of the accused. Learned Counsel end eavours of derives support from these observations. He submits the only anxiety of the accused appellant in the present case was to get himself released from the woman so that be could escape and it was only for the purpose of securing his escape that be used the knife as the means without intending to cause any injury on the abdomen or the particular injury which proved fatal for that matter.

9. Now, when Clause 3 of Section 300 IPC should be attracted and when it could not be so attracted has been dealt with in the earlier cases Narayanan Nair

Raghavan Nair v. The State of Travancore Cochin : 1956 CriLJ278 and Rajwantsingh v. State of Kerala (supra). In Narayanan Nair's case, the facts were that there was a quarrel between one Velayudhan Nair, a son-in law of deceased Ayyappan and the accused Narayanan Nair. In the course of the quarrel, Velayudhan Nair slapped the accused across his cheeks. At that time, the deceased and one Krisknan Nair came up and Krishnan Nair tried to separate them, while the deceased and his son in law no to quarrel and he would find a solution far this. At that stage, Narayanan Nair took out a pen-knife from his wash and bit out at the deceased. The deceased tried to ward off the blow and was hit on the back of his left fore arm. The appellant then struck again and this time the blow land on the chest of the deceased Ayyappan and caused the injury which eventually proved fatal. In the meantime the second accused came up and inflicted a stab wound on the back of the deceased with another knife. This, however, could not have been the cause of death. Their lordships referred to the passage in Modi's Medical Jurisprudence about the wounds of the wounds of the diaphragm and then observed:

This is fundamentally a question of fact. Modi's bock does not establish that injuries to the diaphragm cannot be fatal: some are and some are not. The question is, therefore, reduced to one of fact in each case, Was particular injury in question of the fetal or nonfatal type? Both courts have relied on the doctor who says emphatically that the injury was fatal. We see no reason to differ from that and can find nothing to indicate negligence.

Thus, according to that judgment, the test for seeing as to what offence was made out is whether the particular injury was fatal or of non-fatal type. In Virsasingh's case (supra), then lordships pointed out that for the application of Clause 3 of Section 309 IPC, it must be first established that the injury was caused. Next, it must be established objectively what the nature of that injury in/tie/ordinary course of nature is. If the injuries were found to be sufficient to cause the death, one test is satisfied. Then, further it must be proved that there was an intention to inflict that very injury and not some other injury, and that it was not accidental or unintentional. If this is also held against them offender the offence of murder is satisfied. The same thing was repeated by Hidayatullab J., as he then was, in

Rajwantsingh's case (supra). That is for the application of Clause 3 of Section 300 IPC, one has to see whether an injury was caused. Next, it must be established objectively what the nature of that injury in the ordinary course of nature is. That is the first part and in the second place, it will have to be seen that there was intention to inflict that very injury and nm some other injury and that it was not accidental or unintentional.

10. A recent case of the House of Lords, namely, Hyam v. Director of Public Prosecutions (1974) 2 All. E.L.R. 41 has come to our notice. In that case, the House of Lords, as per the speech of Lord Hailsham L.C. has dealt with various aspects of mens rea as an ingredient of murder and the various ingredients like intention, foresight, probable consequences, the intension to cause death of grievous bodily harm as a probable consequence of the act, have been elaborately discussed. A number of precious decisions have been referred to in the opinion of Lord Hailsham, Lord Chancellor. The position has been summarised as follows:

(1) Before an act can be murder it must be aimed at someone as explained in Director of Public Prosecutions v. Smith, and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant : (i) The intention to cause death; (ii) The intention to cause grievous bodily harm in the cense of that term explained in Director of Public Prosecutions v. Smih, i.e. really serious injury; (iii) Where the defendant know that there is a serious rish that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not and in none of these casese does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

(2) Without an intention of one of these three types the mere fact that the defendant's conduct is done in the knowledge that grievous bodily harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder.

11. Here, therefore, it emerges that the first test is whether the act was aimed at someone. Then, in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the accused. The intention could be to cause death or it could be to cause grievous bodily harm, that is, really serious injuries, or where the accused knows that there is a serious risk that death or grievous bodily harm would ensue from his act and he then commits those acts deliberately and without lawful excuse. The intention is to expose a potential within to the risk of death as the result of those acts and it does not matter in such circumstances whether the accused desire those consequences to ensue or not and in none of these cases does not matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

12. The conclusions reached by their lordships of the House of Lords, if we may say so with all respect, accord with the conclusions arrived at by their lordships of the Supreme Court in Nariayan Noir's, virsasingh's and Rajwantsingh's cases (Supra) By and large, it will depend on the nature of the injury and it will be a question of fact in each case whether ii was accidentally caused or unintentionally caused or the injury was intended. The conclusion will have to be reached bearing in mind the facts and circumstances of each case.

13. Now, in the present case, there was a struggle between the deceased Smt. Kistoori and the accused. The accused wanted to snatch away Smt. Kistoori's Khangwali while the was asleep. Smt. Kistoori was aroused and reacted by struggling with the accused and in doing so, caught hold of his baniyan. It was at that stag-j that the accused whipped out a knife and subbed Smt. Kistoori. She was nit twice The stab would received by Smt. Kistoori on the abdomen resulted in the puncturing of the liver to a depth of half an inch at the inferior surface of the right lobe near the hilum of the liver. This was, to our mind, a pretty serious injury and the bow must have been given with force. It not only punctured the abdomen but pierced the lever of the deceased as well to a considerable depth & the blow must have been given with sufficient force. While the dominant idea of the accused may have been to get himself released, but, in doing so, he caused this serious injury to the deceased on her vitai part and it proved fatal. The injury, in the circumstances, cannot be said to be an unintentional or accidental one.

Therefore, in our view, Clause 3 of Section 300 IPC is fully applicable to the facts of the present case and the accused has been rightly convicted of the offence under Section 302 IPC.

14. However, we notice that when learned trial Judge awarded the sentence of life imprisonment, there was no point in imposing a sentence of fine in addition Perhaps, he was labouring under a misconception that a sentence of fine is mandatory. Bat this is not so. Therefore, we dismiss the appeal with the slight modification that the sentence of fine and the imprisonment awarded in default thereof are set aside.

15. Learned Counsel for the appellant orally prayed for grant of certificate for appealing to the Supreme Court. There is no case for grant of such a certificate and the oral prayer is hereby refused.