

Lehru Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-28-2001

Reported in : 2002(5)WLC471

Judge : Sunil Kumar Garg, J.

Acts : Indian Penal Code (IPC) - Sections 300, 302, 304(I) and 304(II)

Appeal No. : S.B. Criminal Appeal No. 365 of 1999

Appellant : Lehru

Respondent : State of Rajasthan

Advocate for Def. : Ramesh Purohit, P.P.

Advocate for Pet/Ap. : N.K. Rastogi, Adv.

Judgement :

Garg, J.

1. This appeal has been filed by the accused appellant against the judgment and order dated 14.5.99 passed by the learned Additional Sessions Judge No.2, Bhilwara, in Sessions Case No. 38/97 (208/97) by which the learned Judge convicted the accused appellant for offence under Section 304(1) I.P.C. and sentenced to 7 years' R.I. and a fine of Rs. 1000/-, in default to further undergo 6

months' S.I.

2. It arises in the following circumstances:

On 7.2.97, at about 2.30 p.m. P.W. 4 Mohan lodged a written report Ex.P/5 in the Police Station Raipur, Dist. Pali, before P.W. 9 Jai Singh, SHO of the police station, alleging that at about 12 noon, when he was in his house his nephew P.W. 5 Prema came and told him that Girdhari Kaka (hereinafter referred to as the Deceased) had been killed by the accused appellant in the well of P.W. 2 Hajari and he was going towards the field. He has further stated in the report Ex.P/5 that P.W. 5 Prema was informed about that incident by P.W. 2 Hajari and Jassa. When he was going towards the field, they further told him that he should inform the members of his family. Thereafter P.W. 4 Mohan reached the well where he found that the dead body of the deceased (deceased is brother of P.W.4 Mohan) was lying near the well and blood was coming from back side of his head, He also found P.W. 8 Nanu Ram sitting there and P.W. 8 Nanu Ram also told him that the accused appellant after killing the deceased had run away and he has further stated that P.W.2 Hajari, and Jeta asked him to sit there. P.W. 4 Mohan further had suspicion that mother of the accused appellant might be partly responsible in killing his brother.

3. On this report, police chalked out regular FIR Ex.P/6 and started investigation.

4. During investigation post mortem of the body of the deceased was got conducted by P.W. 7 Dr. Kishore Garg and the post mortem report is Ex.P/11 where the cause of death as assigned by P.W. 7 Dr. Kishore Garg was head injury and that injury was sufficient to cause death.

5. During investigation, the accused appellant was got arrested through Fard Ex. P/13 by P.W. 9 Jai Singh on 8.2.97 and while he was in police custody, he gave information on 9.2.97 to P.W. 9 Jai Singh to the effect that he could get recovered that stone by which he killed the deceased and in consequence of that information, P.W. 9 Jai Singh recovered in presence of two molbirs. P.W. 1 Asu Ram and Bhoja Ram, one stone stained with blood at the instance of the accused appellant from near the village where the murder took place of the deceased beneath the tree of

Neem. That stone was seized by P.W. 9 Jai Singh through Ex.P/4 and sealed on the spot and marked 'A' and it was sent to FSL through letter Ex.P/9 and the FSL report is Ex.P/17 where human blood was found on that stone.

6. After usual investigation, police submitted challan against the accused appellant for offence under Section 302 I.P.C. in the Court of Magistrate stating that the accused appellant had murdered the deceased by throwing stone on the back of the head, from where the case was committed to the Court of Sessions Judge, Bhilwara who transferred it to Additional Sessions Judge No.2, Bhilwara.

7. On 5.11.97 the learned Additional Sessions Judge framed charges for offence under Section 302 I.P.C. against the accused appellant who pleaded not guilty and claimed trial.

8. During trial, 10 witnesses have been produced by the prosecution and thereafter statement of accused under Section 313 Cr.P.C. was recorded, and no evidence was led in defence.

9. After conclusion of the trial, the learned Additional Sessions Judge No.2, Bhilwara convicted the accused appellant for offence under Section 304(1) I.P.C. in place of Section 302 I.P.C. and sentenced him as stated above inter alia holding that;

(i) No doubt in this case there is no eye witness, but from the statements of P.W. 2 Hajari and P.W. 3 Jai Ram, it is clear that at the place of occurrence, the deceased as well as accused appellant was found.

(ii) Before P.W. 2 Hajari, the accused appellant made confession that he killed the deceased by throwing stone.

(iii) Since P.W. 3 Jai Ram does not say anything about extra Judicial confession, made by the accused appellant, this fact does not affect the prosecution case as he had left the place earlier to P.W. 2 Hajari.

(iv) The learned trial Judge did not treat P.W. 5 Prema as eye witness.

(v) He placed reliance on the statements of P.W. 2 Hajari and P.W. 3 Jai Ram.

(vi) The learned trial Judge also sought corroboration from the recovery of stone stained with blood and the recovery of stone at the instance of accused appellant has been proved.

(vii) The act of accused appellant amounted to culpable homicide not amounting to murder punishable under Section 304(1) I.P.C. and not under Section 302 I.P.C. Thus, he convicted and sentenced the accused appellant for offence under Section 304(I) I.P.C.

10. Aggrieved from the said judgment and order, this appeal has been filed by the accused appellant.

11. In this appeal, following submissions have been made on behalf of the accused appellant:

(i) It is not proved as to who was the aggressor whether the deceased or the accused appellant.

(ii) The statements of P.W. 2 Hajari and P.W. 3 Jai Ram on which reliance has been placed are not worth reliable witnesses.

(iv) The corroboration which has been sought from the recovery of stone is also wrong and extra-judicial confession of the accused appellant made before P.W. 2 Hajari is very weak evidence and the learned trial Judge should not have placed reliance on them. He has thus, argued that the accused appellant be acquitted.

12. On the contrary, the learned P.P. has opposed the submissions made by the learned counsel for the appellant and submits that the judgment and order passed by the learned trial Judge do no call for any interference.

13. I have heard both.

14. In my considered opinion, the findings of learned Additional Sessions Judge No.2, Bhilwara given in his judgment dated 14.5.99 are liable to be confirmed one except one that the accused appellant committed offence under Section 304(1) I.P.C. for the reasons mentioned just below.

15. To appreciate the above contentions, first medical evidence and other evidence has to be seen and the same is found in the statement of P.W. 7 Dr. Kishore Garg who conducted the post mortem of the deceased on 7.2.97 and found following injuries on his body:

(i) Lacerated wound on occipital region (head) 3 x 1cm. with 2 x 1 cm. x depth bone deep blood trickled out from wound.

(ii) Bruise right eye lid with lacerated wound 1 x 2cm. blood stained at wound.

(iii) Abrasion scalp right frontal region 5x5 cm. (iv) Swelling left arm.

16. He has further opined that cause of death of the deceased was his head injury (injury No. 19 and he has proved his post mortem report Ex.P/11. He has admitted in cross-examination that injury No.1 on the back of the head can be caused if the deceased would have fallen on the ground from back side.

17. Thus, from the statement of P.W. 7 Dr, Kishore Garg, the fact that the death of deceased was homicidal one has been well established.

18. The next question to be considered is whether the injuries on the person of the deceased were caused by the accused appellant or not.

19. According to the report Ex.P/5, the fact is that P.W. 5 Prema who was nephew of P.W. 4 Mohan and the deceased, was informed by P.W. 2 Hajari and Jassa that the deceased had been killed by the accused appellant. From the report Ex.P/5 it is also clear that P.W. 4 Mohan went to the well and found the dead body of the deceased having injuries on the back side of his head. He also found P.W. 8 Nanu Ram sitting there who told him that the accused appellant had run away after killing the deceased.

20. Thus, from report Ex.P/5 the star witnesses are P.W. 2 Hajari, Jassa and P.W. 8 Nanu Ram.

21. P.W. 2 Hajari has stated that on the fateful day, he was giving water to his crop and at that time, P.W. 3 Jai Ram was with him and quarrel took place between the deceased and the accused appellant and he heard the cries of the deceased and

he went towards well and saw the accused appellant sitting and body of the deceased was lying on the ground and at that time, the deceased was breathing his last and he gave water to the deceased and thereafter he asked the accused appellant who murdered the deceased, upon this the accused appellant told that both were throwing stones against each other, but suddenly his stone struck the head of the deceased as a result of which, he died and after 15 minutes P.W. 8 Nanu Ram and Jeta also came and thereafter P.W. 5 Prema also came there. Then P.W. 5 Prema Ram and Jeta went to the village to inform, but P.W. 8 Nanu Ram remained there near the dead body of the deceased. This witness has admitted following facts in cross-examination.

'that he has not seen the actual occurrence but heard the cries of the deceased' Hai Maa Par Gaya' and hearing this cry he reached the well along with P.W. 3 Jai Ram.

22. Thus, the learned Additional Sessions Judge has rightly observed that in these circumstances P.W. 2 Hajari cannot be regarded as ocular witness in true sense but after two minutes on the occurrence, he reached the spot and found both the accused appellant and the deceased.

23. P.W.2 Hajari shows the presence of P.W. 3 Jai Ram along with him.

24. P.W. 3 Jai Ram also states that both P.W.2 Hajari & Jairam PW 2 went after hearing the cries of the deceased 'Hai Maa Par Gaya' and when he and P.W.2 Hajari reached there, they saw the accused appellant standing and the dead body of the deceased was lying and he has also stated that the deceased was taking last breath, but seeing this condition he ran away. In the cross examination, he has clearly stated that within one or two minutes of hearing cries, he reached the place of occurrence and at that time, the accused appellant was also there.

25. In my opinion, the learned Additional Sessions Judge has rightly placed reliance on these two witnesses and from the statements of these two witnesses, it does not appear that they are telling lie on any point, but rather their statements are natural one as they reached the spot within one or two minutes and found the accused appellant and the deceased there.

26. P.W. 2 Hajari has further stated that the accused made extra-judicial confession before him, but P.W. 3 Jai Ram does not say like that. On this point, it has been argued by the learned counsel for the accused appellant that extra judicial confession in these circumstances should not have been acted upon by the learned Additional Sessions Judge as when presence of P.W. 3 Jai Ram was there, therefore, he should have also stated this fact.

27. The learned Additional Sessions Judge has rightly rebutted this fact by saying that from the statement of P.W. 3 Jai Ram, it is very well clear that he left the place of occurrence earlier to P.W. 2 Hajari being frightened. Therefore, in these circumstances, if P.W. 3 Jai Ram does not say about extra-judicial confession, it does not mean that no such confession was made by accused appellant before P.W.2 Hajari. P.W.2 Hajari and P.W. 3 Jai Ram have very well established the presence of accused appellant on the scene. It is also established that the deceased was hit by stone thrown by the accused appellant which hit the back side of head of the deceased.

28. Recovery of stone at the instance of accused appellant is another circumstance that goes against the accused appellant. Motbir P.W.1 Asu Ram of Fard Recovery Ex.P/4 who is Sarpanch has also supported the statement of P.W. 9 Jai Singh, SHO on the point of recovery. Thus, recovery at the instance of the accused appellant is well established by the prosecution and P.W. 9 Jai Singh has very well proved the information Ex.P/14 given by the accused appellant on 9.2.97 and thereafter recovery of stone through Fard Ex,P/4 on 10.2.97. The argument that it was open place, therefore, this recovery is of doubtful nature is not to be appreciated because of the simple reason that the stone was recovered just near the place where the incident took place and it was beneath a Neem tree and stone is such an article which could not have been easily taken away by the accused appellant after the occurrence and possibility that he threw the stone near bushes cannot be ruled out and thus, in these circumstances the, recovery of stone at the instance of the accused appellant is well proved. Apart from this it was stained with human blood and this fact is well proved from FSL report Ex.P/17. Thus, in the present case, chains of circumstantial evidence are of definite nature pointing out towards the guilt of accused and in their totality lead to the conclusion that the

deceased was murdered by the accused appellant by throwing stone which hit the back of his head.

29. The argument that extra judicial confession made by the accused appellant before P.W. 2 Hajari is not admissible in evidence in the present case as it was not disclosed to anybody is not to be appreciated in view of the fact that after the occurrence P.W. 2 Hajari reached on the spot and same was made by the accused appellant before him and thus, if the learned Additional Sessions Judge has placed reliance on extra judicial confession as one of the circumstances, he has committed no illegality or irregularity.

30. In this case, had there been a case of prosecution solely based on extrajudicial confession made before P.W.2 Hajari, then position would have been different. In the present case, apart from the extra judicial confession there are other evidence which is found in the statement of P.W. 2 Hajari and P.W.3 Jai Ram and the accused appellant was found near the body of the deceased and recovery of stone at the instance of accused appellant and thus, as stated above chain of circumstantial evidence are of definite nature pointing out towards the guilt of the accused.

31. In this case, the judgment cited by the learned counsel for the appellants, namely, Surendra Kumar v. State of Punjab (1), would not be helpful.

32. For the reasons mentioned above, the findings of the learned Additional Sessions Judge that the accused appellant committed offence of culpable homicide by hitting back of head of the deceased with stone are liable to be confirmed one.

WHETHER THE ACT OF THE ACCUSED APPELLANT COMES WITHIN THE PURVIEW OF SECTION 304(1) I.P.C. OR NOT?

33. The learned Additional Sessions Judge has come to the conclusion that by doing the above act, the accused appellant committed the offence punishable under Section 304(1) I.P.C. in place of Section 302 I.P.C.

34. In my considered opinion, this finding of the learned Additional Sessions Judge is not correct one and the act of the accused appellant would fall within the purview of Section 304(11) I.P.C. for the reasons mentioned just below.

35. There is no dispute on the point that the deceased died because of hitting of stone thrown by the accused appellant from back side.

36. In *Mohinder Pal Jolly v. State of Punjab* (2), the Hon'ble Supreme Court has made a distinction very well between a case falling under Section 304 Part I or 304 Part II in 'the following manner:

'A question now arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death, then he would be guilty under part I. .On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of Clause '4thly', then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part 1.'

37. When the element of intention is missing, there is knowledge in such case, the head injury inflicted would be covered under Part II of Section 304 I.P.C. So, where the accused had knowledge, but no intention that such blow was likely to result in death, it would be held that the offence committed would be culpable homicide not amounting to murder punishable under Part II of Section 304 I.P.C.

38. Thus, the position in respect of offences under Sections 302, 304 Part-I and 304 Part II may be summarised as follows:

(i) That if the act of the accused is covered by Clauses First, Second, and Third of Section 300 I.P.C., then it would amount to culpable homicide amounting to

murder punishable under Section 302 I.P.C.

(ii) That if the act of the accused is covered by any of the exceptions (five Exceptions) of Section 300 I.P.C., then it would amount to culpable homicide not amounting to murder punishable under Section 304 Part-I I.P.C.

(iii) That if the act of the accused is covered by Clause (4) of Section 300 I.P.C., then it would amount to culpable homicide not amounting to murder punishable under Section 304 Part-II I.P.C.

39. Keeping the above legal principle in mind, the facts of the present case are being examined.

40. As per the statement of P.W. 2 Hajari, it appears that the incident took place between the deceased and the accused appellant as a result of throwing stone against each other and stone thrown by the accused appellant struck on the back side of the head of the deceased which resulted into death of the deceased.

41. In these circumstances in my considered opinion, this act of accused appellant would fall certainly under Clause 4th Section 300 I.P.C. punishable under Section 304(II) I.P.C. in place of Section 304(1) I.P.C, as held by the learned Additional Sessions Judge because by throwing the stone, it cannot be inferred that the accused appellant had Intention to murder the deceased, but knowledge on his part can be attributed that he was having knowledge that by the said act he was likely to cause death of the deceased. Therefore, in the above circumstances the act of the accused appellant falls under Section 304(II) I.P.C. and thus, it would amount to culpable homicide not amounting to murder punishable under Section 304(II) I.P.C. and not under Section 304(1) I.P.C. Thus, the findings of the learned Additional Sessions Judge are liable to be altered accordingly.

42. For the reasons mentioned above, the accused appellant is liable to be convicted for offence under Section 304(II) I.P.C- in place of Section 304(1) I.P.C. and for that offence, sentence of 6 years' R.f. would be sufficient to meet the ends of justice.

43. In the result, the appeal filed by the accused appellant Lehu is partly allowed in the following manner:

'The accused appellant is convicted for offence under Section 304(H) I.P.C. in place of Section 304(1) I.P.C. and the findings of conviction recorded by the learned Additional Sessions Judge, No.2, Bhilwara through his Judgment dated 14.5.99 are altered accordingly.

44. Similarly, the accused appellant Lehu is sentenced to six years' R.I. for offence under Section 304(II) I.P.C. in place of 7 years' R.I. for offence under Section 304(1) I.P.C. and the sentence awarded by the learned Additional Sessions Judge No.2, Bhilwara through his order dated 14.5.99 stands modified accordingly. The order of fine passed by the learned Additional Sessions Judge No.2, Bhilwara dated 14.5.99 is maintained.

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