

Hakim Ali Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Nov-30-1979

Reported in : 1979WLN(UC)456

Judge : S.N. Deedwania, J.

Appeal No. : S.B. Criminal Revision No. 24 of 1975

Appellant : Hakim Ali

Respondent : The State of Rajasthan

Judgement :

S.N. Deedwania, J.

1. Petitioners Hakimali, Mohammed Ali and Asgar Ali have preferred this revision petition against the judgment of the Additional Sessions Judge, Ganganagar, dated January 1, 1975 whereby conviction of petitioner Hakimali under Section 307 and 27 Indian Arms Act was upheld and the conviction of Mohammed Ali and Asgar Ali was altered from Section 307/114 and 307/109 IPC

2. The fact according to the prosecution were these. Maternal grandfather of Gulam Kadir Dula had agricultural land in Chak 20 PTP. Dula died about one year before the incident. In connection with this land a dispute arose between Mst. Amira mother of Gulam Kadir and wife of injured Wazir khan. On 30-9-1970 at

about 6 p.m Gulamkadir was returning from his field to his house. When he has reached near the Mosque he saw the three appellants standing near the house of jalaluddin He heard appellants Mohammed Ali and Asgar Ali exhorting Hakimali to open fire. He then heard a gun fire report Gulamkadir reached his house and there his brother Lakhan came running and informed him that Wazirkhan has been shot dead. Gulamkadir went to the site and found his father Wazirkhan lying injured Immediately thereafter Gulamkadir left for police station Sadulshahar and lodged the FIR of the incident there at 8 p.m. The SHO Lal Chand police station Sadulshahar registered a case under Section 307 and rushed to the scene of incident. The injured was removed to primary health centre, Sadulshahar where he was medically examined by Dr. S.N. Goel at 9.45 p.m. Hakimali was arresed on 4-10-1970 and the licenced rifle was recovered from his possession. After completing the usual investigation the police filed a charge sheet against appellant Hakimali only Under Section 307 IPC and Section 27 Arm3 Act. Gulam Kadir filed a private complaint in the court of Munsif Magistrate, Hanumangarh On 30-11 - 1970 on this complaint cognizance was also taken against the three appellants who were committed after preliminary enquiry to the court of Sessions Judge, Ganganagar. It was transferred to learned Assistant Sessions Judge, Hanumangarh who convicted the appellants and an appeal was taken to the court of Additional Sessions Judge, Gangana-gar who maintained the conviction in the manner stated above.

3. I have heard the learned Counsel for the petitioners and the learned APP and Shri B.R. Arora learned Counsel for the complainant.

4. I was argued on behalf of petitioners Mohammed Ali and Asgar Ali that the learned trial court and the appellate court committee gross error in convicting them. The prosecution case is sought to be built up on the basis of interested testimony and no independent evidence was forthcoming to support the prosecution case. The learned appellate court misread the evidence in as much as it observed 'I have made a careful scrutiny of the evidence of the three eye-witnesses Wazirkhan, Hamirnissa and Lakhan and find no hesitation in concurring with the learned trial court that the evidence of these three witnesses is sufficient and cogent to bring the guilt home to the accused.' A careful scrutiny of the

testimony of the three witnesses would clearly point out that at least two of them were not the eye witnesses of the incident. I have considered the argument carefully which has substantial force. The learned Counsel for the complainant and the learned APP argued that the finding of the trial court and the appellate court was not perverse and, therefore, this Court in its revisional jurisdiction should not upset or alter the finding of fact. In my opinion this argument has no force because the trial court and the appellant court has misread the evidence in coming to a finding that lakhan was an eye witness. PW 4 Lakhan stated that he and Mohammed Sarwar intended to go to Matili for seeing Ramlila They came with their aunt Hamir Nissa on the shop of Mukan. Hakimali and Ors. came from towards the Mosque and abused them and also threatened. He went away to his house. Hamir nissa asked them to go to the house. They started and came in front of the house of Mohammed Saddique. His father Wazir khan then came there. He then saw that the three petitioners came from their house. Hakam Ali was armed with a gun and the two other with lathis Mohammed Ali and Asgar Ali exhorted Hakimali to fire and Hakimali fired which hit his father. Curiously enough the statement of the witness in the police Ex.D-10 is to the contrary and he did not afford any explanation for the omissions made therein In Ex. D-10 the witness did not state about the fact of exhortation by the two petitioners and also the fact of firing by petitioner Hakimali. He rather stated in the police statement--'my father came and bade us to go to our house. As soon as we entered the street a gun fire was made from behind. We saw that my father had fallen down on the ground.' In view of the earlier police statement of the witness where he had not claimed to be an eye witness, in my opinion the learned lower courts made a gross error in holding him as an eye witness of the incident. This witness did not see petitioner Hakimali firing nor the witness is reliable on the point that he heard the other two petitioners exhorting Hakimali to fire.

5. PW 2 Gulamkadir also claimed to be an eye witness at the trial but it appears that he also did not see the incident. He stated that he was returning from his field in a cart. When he reached near the Mosque he saw the three appellants. On the Chabutri of Jalaluddin he heard the voice of Monmmed Ali and Asgar Ali--'Kill fire at Wazir enemy'. He then went away in the cart to his house His brother lakhan came and informed him that Wazir khan had been shot. He has also made certain

improvements in his testimony at the trial. In his statement Ex. D. 5 he did not state that Mohammed Ali and Asgar Ali were armed with lathis. In Ex.P.1 it is written. ^{ns}[krk D;k gS gkfde xksyh ekj ns [^]. The witness in the court has desposed in a different manner. In Ex D.5 and D.1 the witness did not state that La-khan informed him that Hakimali had fired at Wazir khan. It may not be lost sight of that this witness is the son of the injured & has inimical relations with the appellant. I am then fore, of the opinion that from his testimony it could not be believed that Asgar Ali and Mohammed Ali exhorted Hakim Ali to shoot Wazir khan. His statement is reliable to this extent that just after the incident he was informed of it and thereafter he came at the scene of incident and lodged the report in the police.

6. This leaves me with the two witnesses Hamirnissha stated that she went to the shop of Mukanlal She told her son Mohammed Sarwar not to go to witness Ramlila at Matili. Hakim Ali came from towards the Mosque and asked her as to why she was standing there. She replied that she was standing there of on her own free will. Thereupon Hakimali abused and threatened her She then proceeded to her house When she was near the house of Mohammed she saw Wazirkhan going out of their house. Hakim ali was aimed with a gun & she other two were having lathis Appellants came near the flour mill of Jalaluddin. There Asgarali & Mohammedali exhorted Hakim Ali to shoot & thereafter Hakam ali fired which hit Wazir khan. In my opinion this statement does dot inspire confidence. In her police statement Ex. D. 2 and D 1, she did not state about this exhortation. She also gives no explanation for this omission. In view of this material contradiction. I am not inclined to believe her evidence on the point that Agarali and Mohammad Ali exhorted Hakimali to shoot Wazirkhan. No doubt, Wazirkhan had also desposed similarly. However, his solitary statement cannot be believed on this point in view of the fact that Hamir Nissa has been disbelieved on this past of the story For all these reasons. I am of the opinion that it is rot safe to convict Asgar ali & Mohammed Ali for the offence under Section 307/34 IPC The possibility of over implication cannot be ruled out in view of the enmity between the parties and the various contradictions noticed in the evidence.

7. As regards, petitioner Hakim Ali, the offence is well proved by the statement of injured Wazir Khan. There is also the statement of Hamirnissha, I have gone through their testimony and could find no cogent reason to disbelieve them. It is further corroborated by the statement of PW 4 Ikhlan and PW 2 Gulam Kadir, who saw the appellant at the time of incident armed with a gun. The incident was promptly reported to the, police. The first information report, therefore, could be used to corroborate the prosecution case in general. The finding of the trial court and the appellate court is, therefore, not vitiated by any material irregularity or illegality in the appreciation of the evidence.

8. It was next argued by the learned Counsel for the petitioner that the learned lower courts were in error in convicting the petitioner under Section 207, IPC. It is not proved from the facts and circumstances of the case that Hakim Ali intended to kill Wazir Khan or he intentionally inflicted an injury which was sufficient in the ordinary course of nature to cause death. Petitioner Hakim Ali therefore, was guilty of the offence under Section 324, IPC only. On the other hand, it was argued that Hakim Ali had the intention to kill Wazir Khan. This could also be gathered from the fact that he used a fire arm. In the alternative, it was argued that Hakim Ali was guilty for the offence under Section 308, IPC in as much as, he knew that his act of firing his gun was likely to cause death. I have considered the rival contentions in order to make out an offence under Section 307, IPC, the prosecution had to prove the following ingredients:

(1) That the accused did an act.

(2) That it was done.

(i) with the intention, or

(ii) with the knowledge-

(a) of causing death;

(b) of causing such bodily injury as the accused knew to be likely to cause the death of the person to whom the harm was attempted to be caused; or

(c) of causing bodily injury to a person and the bodily injury intended to be inflicted would have been sufficient in the ordinary course of nature to cause death; or

(d) that the act if completed would have been so imminently dangerous that it would have in all probability caused death and the act attempted was committed with any excuse for incurring the risk of causing death.

Reference in this connection may also be made to *Sarju Prasad v. State of Bihar* : 1965 CriLJ766 :

Having said all this we must point out that the burden is still open to the prosecution to establish that the intention of the appellant in causing the particular injury to Shankar Prasad was of any of the three kinds referred to in Section 300, Indian Penal Code. For, unless the prosecution discharges the burden the offence under Section 307, IPC cannot possibly be brought home to the appellant. The state of the appellant's mind has to be deduced from the surrounding circumstances and as Mr. Kohli rightly says the existence of a motive to cause the death of Shanker Prasad would have been a relevant circumstance. Here, the prosecution has led no evidence from which it could be inferred that the appellant had a motive to kill the victim of his attack. On the other hand he points out that as the appellant had no enmity with Shanker Prasad that neither of them even knew each other and that as the appellants inflicted the injury on Shanker Prasad only to make him release the wrist of Sushil while Sushil was in the act of stabbing Madan he cannot be said to have had the motive to kill Shanker Prasad and, therefore, no intention to cause murder or to cause any injury which may result in death could be inferred.

9. In my opinion, there are no reasons to suppose that the petitioner had the intention to kill Wazirkhan. No doubt, there was some enmity with regard to the land in between them. However, on that day, there was no immediate cause for murder and it appears with Hakim Ali had some exchange of hot words with Hamsrissa and this led to the incident. The mere use of fire arm in every case would not lead to the necessary inference that the petitioner had the intention to kill the victim. Learned Counsel for the petitioner in this respect brought to my notice the following two authorities:

(1) Bhogwan Din v. State : AIR1967 All580 :

It is; therefore, clear that the mere fact that a gun has been used by an accused person for causing injuries to the complainant will not necessarily bring the case under Section 307 of the Indian Penal Code. There can be no presumption that the accused intended to cause the death of the complainant merely because he used a fire arm to cause him hurt.

We respectfully agree with the observations mentioned above. It is well established that if the intention or necessary knowledge to cause death was there, it is immaterial whether or not any hurt has been caused to the victim, and the accused can be held liable for an offence under Section 307, IPC even though no hurt was caused.

(2) Harji v. State of Rajasthan 1978 RLW 1: At the outset I may observe that the prosecution was bound to prove the intention of Harji independent of the act committed by him. The mere fact that Harji caused hurt to Dula Ram by means of any instrument for shooting is not sufficient to make out a case under Section 307, IPC against him. The requisite intention or knowledge of Harji could be established either from the nature of the injuries actually caused by him or from other surrounding circumstances, e g. any expression of his intention made by him at the time of the act, his motive to commit the crime and severity and the number of blows given by him in quick succession, the part of the body of the victim of assault selected by him for causing the injuries etc.

10. On the other hand, learned Assistant Public Prosecutor for the State drew my attention to Ramchander v. State of Rajasthan 1970 RLW 118, wherein, it was thus observed:

Having said all this, we must point out that the burden is still upon the prosecution to establish that the intention of the appellant Ramchander in causing the particular injury to Hanuman and Bagrawat was of the three kinds referred to in Section 300, IPC. Unless the prosecution discharges the burden, offence under Section 347, IPC can not possibly be brought home to the accused. The state of the appellant's mind has to be inferred from the surrounding circumstances. It is in

the prosecution evidence that both Hanuman and Bagrawat were not on good terms with the appellant. It is also in the prosecution evidence that before the occurrence Hansraj and Jagdish had altercations with Budhram and his mother and when Hansraj was beaten, he also retaliated and beat Budhram's mother with a sugar-cane. For the determination of the existence of a motive, this happening is a relevant circumstance. In case of attempt to commit murder by fire-arm, the act amounting to an attempt murder is bound to be the only and the last act to be done by the culprit Till he fires, he does not do any act towards the commission of the offence and once he fires and something happens to prevent the shot taking serious turn, offence under Section 307, IPC is brought home. If a person fires at another, it would ordinarily mean that he wants to kill that person. The fact that the person fired at was not killed does not necessarily mean that he had no intention to kill that man. A person may at times be excited and for that reason he may not be able to hit properly, or the aim may be missed because the person aimed at may move aside That does not however, mean that Section 307, IPC will have no application to a case like this.

11. I have considered this authority carefully and with respect wish to state that the observations were made in the facts of that particular case in view of existing enmity between the accused and the injured. No doubt, the mere fact that the injury actually inflicted by the accused did not cut or hit any vital organs of the injured is not by itself sufficient to take the act out of purview of Section 307, IPC. However, It is well settled that the prosecution has to prove that the intention of the accused for causing a particular injury was one of the three kinds referred to in Section 302, IPC or that he knew that his act was so imminently dangerous that it would have in all probability caused death. Such does not appear to be the case here. The shot was fired from some distance. The injured was hit only on the hip. The injury caused was not sufficient in the ordinary course of nature to cause death. Thus, the petitioner did not have the requisite intention to cause death or an injury which was sufficient in the ordinary course of nature to cause death. His act was also not so imminently dangerous as to in all probability cause the death. The petitioner, therefore, in my opinion could not be liable for the offence under Section 307, IPC.

12. Learned Assistant Public Prosecutor then vehemently argued that in any case, the petitioner could be fastened with the knowledge that his act of firing his gun at Wazir Khan was likely to cause death and, therefore, he was liable for the offence under Section 308, IPC. It is evident that the petitioner can be fastened with knowledge that he was likely by the act of his gun fire to cause death. He committed such act without any lawful excuse. Reference in this connection may be made to the following cases:

Provincial Government v. Abdul Rehman AIR 1943 Nagpur 145:

I take the view that the illustration to Section 308 does not warrant the conclusion that the type of case mentioned in the illustration is the only type of case falling under that section, and I consider that there may be other types of cases falling under Section 308.

In Sections 207 and 308 the words 'intention or knowledge' are used. Intention or knowledge are alternative ingredients of both Section 299 and Section 300. Hence I consider that an offence under Section 307 can be committed where there is no intention proved but only knowledge that the act is so imminently dangerous that it must in all probability cause death, and that an offence under Section 308 can be committed where there is no intention proved but only knowledge by the offender that he is likely to cause death by his act. For example, in the case of a self-intoxicated person Section 86, Penal Code, fastens on him liability based on an assumed knowledge which he may not have possessed, but does not fasten intention on him. So that though he may be too drunk to form a criminal intent he can (though no doubt he often will not) be convicted on the ground of such knowledge as he would have had if sober. I consider therefore that a drunk man incapable of forming a criminal intent is liable to be convicted under Section 307 or Section 308 Penal Code, if his act is sufficiently dangerous to life, though I think the word 'liable' in Section 86 is intended to vest a reasonable discretion in the Courts.

And I would add that so far as a conviction is to be based on knowledge as opposed to intention, it is obvious that the act (not necessarily the injury caused) must be likely to cause death, and I consider Section 307 or Section 308 will apply according to the degree of likelihood and the knowledge of the assailant

established.

James Dowdall v. Emperor AIR 1936 Nagpur 103-

Now, in an unpremeditated joint attack, when each individual beats with a stick, anything more than the knowledge that their joint act in its cumulative effect is likely to cause death cannot be imputed to them collectively. The distinction between the knowledge that an injury is likely to cause death and one that is sufficient in ordinary course of nature to cause death is, though subtle, real. It is indeed a question of probability, which depends on the nature of the weapon used and the particular part of the body against which it is used. As was pointed out by Melvill, J., in 1 Bom.342 (20):

A blow from the fist or a stick on a vital part may be likely to cause death; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.

As observed in the same case, the former is culpable homicide and the latter is murder. The learned Sessions Judge relied on 35 All 506 (21) and 45 All 130 (22). In both these cases the victim's head was smashed and it was rightly held that a concerted attack directed against the head which was smashed was with the knowledge that the injury which they were inflicting was sufficient in the ordinary course of nature to cause death. These cases therefore have no bearing on the present case in which the medical testimony is to the effect that the death was due to shock which was the cumulative effect of the various injuries. The Intention was not to cause death or to cause such bodily injury as is likely to cause death, but there was knowledge that the cumulative injuries were likely to cause death. The offence falls within the second part of Section 304, IPC.

13. I, therefore, hold that Hakim Ali is guilty of the offence under Section 308, IPC. The offence occurred in the year 1970. Looking to the nature of the offence and the circumstances in which it was committed and the desperate, character of the appellant, I do not deem proper to give him the benefit of probation. The sword of conviction was hanging over the head of the petitioner for 9 long years. Some allowance has to be made in awarding the punishment to the petitioner. I,

therefore, think that the award of punishment of 18 months and a fine of Rs. 500/- would meet the ends of justice.

14. I, therefore, partly accept the revision petition and set aside the conviction and sentence of Mohammed Ali and Asgar Ali under Section 307 read with 34, IPC and I also set aside the conviction and sentence of Hakim Ali for the offence under Section 307, IPC and convict and sentence him to 18 months rigorous imprisonment and a fine of Rs. 500/- in default of payment of which, he shall suffer further imprisonment for 3 months under Section 308 IPC. In case, the fine is recovered, it shall be paid to injured Wazir Khan. Petitioner Hakim Ali is on bail and he shall surrender to his bail-bonds to serve out the remaining period of the sentence awarded to him.

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