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Court : Rajasthan

Decided On : Jul-06-1974

Reported in : 1974WLN736

Judge : V.P. Tyagi and; J.P. Jain, JJ.

Appeal No. : D.B. Criminal Murder Reference No. 2, 59 and 99 of 1974

Appellant : The State of Rajasthan

Respondent : Badri

Judgement :

V.P. Tyagi, J.

1. All these three matters-D.B. Criminal Murder Reference No. 2 of 1974-the State of Rajasthan v. Badri D.B. Criminal (Jail) Appeal No. 99 of 1974-Badri v. The State of Rajasthan and D.B. Criminal Appeal No. 67 of 1974-Badri and Anr. v. The State of Rajasthan arise from the judgment of the learned Additional Sessions Judge, Gangapur City dated 18th of January, 1974, whereby the learned Judge has convicted Badri appellant under Section 302 Indian Penal Code for causing the murder of Mst Somoti and sentenced him to death. He has also convicted Badri under Section 307 Indian Penal Code for causing gun shot injury to Sanwalia and sentenced him to 10 years rigorous imprisonment. Along with Badri his nephew Bhambal has also been convicted with the aid of Section 34 for offences under

Section 302 and 307 Indian Penal Code and under the former offences he has been sentenced to imprisonment for life while 10 years rigorous imprisonment has been awarded under the latter offence. This judgment will dispose of all the aforesaid three matters.

2. The prosecution case, in brief was that on 20th of September, 1973 Sanwalia, his wife Mst. Somoti and his elder son Ramdhan (P.W 3) were coming back to their village from Rasidpur where they had gone to participate in a feast arranged by their friend Ratna Gujar in connection with the Shradh ceremony of his father. They had heard a sound of somebody coming from behind when they were passing through the jungle known as Morakhiya-kidungri. All these three persons stopped and looked back to see as to how the sound was coming, and they saw that Bidri and Bhambal were chasing them. Badri was armed with a double barrel muzzle loading gun and Bhambal had a sword in his hand. Badri opened a fire from his gun resulting in the instantaneous death of Somoti. At this Sanwalia & his son entreated Badri not to behave in that manner but he did not listen to them and opened another fire injuring Sanwalia on right thigh Sanwalia immediately, fell down because of the gun shot injury sustained by him Sanwalia was carrying in his lap his youngest son aged 1 1/4 month & Ramdhan had his younger sister aged about 2 years in his lap. Ramdhan immediately removed both the kids from the place of occurrence to a nearby Dhani & after leaving them with P.W.5 Gokul, he proceeded to the Police Station, Sapotra to lodge the report. The first information report recorded at the police Station, Sapotra at the instance of P.W. 3 Ramdhan is Ex.P.2 on the file On hearing the news of the incident a few persons living in the Dhani came to the spot and administered water to Sanwalia The Station House, Officer Shankerbux Singh (P W 6) reached the spot in the evening where the dead body of Mst. Somoti was lying. Sanwalia and the body of Mst. Somoti were removed to Sapotra where Sanwalia was medically examined by Dr. Jagmohan Lal (P.W.4) The post-mortem examination of the dead body of Mst. Somoti was also performed by the same doctor who found that the lady had died of gun shot wound and that Sanwalia had sustained a gun shot injury in his right thigh.

3. After investigation both Badri and Bhambal were challenged in the court of the Munsif-Magistrate First Class, Karauli from where they were sent to the court of Sessions to stand their trial for offences under Sections 302, 307, 302/34 and 307/34 Indian Penal Code.

4. The prosecution produced only two eye witnesses, namely, PW 1 Sanwalia and PW3 Ramdhan. Both these witnesses at the trial tried to assign a positive act to Bhambal that after Sanwalia sustained the gun shot injury Bhambal was asked by Badri to kill Ramdhan with his sword and that Bhambal in compliance with this direction ran after Ramdhan but could not succeed in his design.

5. From the trend of cross-examination, it was suggested by the defence that Sanwalia was responsible for killing Mst. Somoti as he suspected her fidelity and on account of enmity a false case had been foisted on Badri and Bhambal. Both the accused denied the charge and pleaded alibi, In support of their defence three witnesses were examined, but learned Counsel appearing on behalf of the appellants candidly conceded that the plea of alibi and the suggestion that Sanwalia, was responsible for killing Mst. Somoti will not be pressed into service as he himself does not give any credence to these pleas. He, however, frankly conceded that Mst Somoti died of the gut shot wound, but the gun that was presented by the accused to the Magistrate before whom he surrendered has not been connected with the crime and, therefore, the prosecution has failed to prove beyond doubt that the gun produced before the court was used by the assailant to kill Mst. Somoti.

6. With regard to the case of Bhambal it has been urged by Mr. Chatterji appearing on behalf of the appellants that the prosecution has miserably failed to prove any overt act of Bhambal to connect him with the commission of murder by attracting the provisions of Section 34 Indian Penal Code and, therefore, he has assailed the conviction of Bhambal with all the vehemence at his command.

7. For Badri, learned Counsel urged that the circumstances brought on the record do not justify the award of capital punishment to Badri as there was no motive for Badri to have killed Mst. Somoti with whom, he had developed illicit intimacy. According to Mr Chatterji, the prosecution has purposely withheld from the gaze

of the court the circumstances in which the murder of Somoti has taken place and, therefore, it will not be in the interest of justice to award the capital, punishment to Badri.

8. We have perused the testimony of the two eye witnesses, namely, P.W.1 Sanwalia and P.W 3 Ramdhan in the light of the criticism advanced by Mr. Chatterji. We would like to deal with the cases of the appellants separately.

9. Both P.W.1 Sanwalia and P.W. 3 Ramdhan have stated on oath before the trial court that Ramdhan had a naked sword in one of his hands and a sheath in the other hand when he was accompanying Badri who had double barrel muzzle loading gun in his hand. They, have also deposed that after Mst. Somoti was killed by a gun fire and, Sanwalia sustained a gun shot injury on his right thigh, Badri directed Bhambal to kill Ramdhan with his sword. It is said that in obedience to the command, received from his uncle, Bhambal ran after Ramdhan but he could not reach him as Ramdhan made good his escape by running from that place. This fact that Bhambal had a naked sword in one of his hands and a sheath in the other and that he ran after Ramdhan to kill him with his sword is missing in the first information report which was lodged by Ramdhan without any loss of time at Police Station, Sapotra. Both Sanwalia and Ramdhan when they were examined under Section 161 Criminal Procedure Code, failed to depose this fact Both of them were confronted with their police statements (Ex. D 1 and Ex. D 2) for not deposing this important fact that Bhambal ran after Ramdhan after Sanwalia was injured and Mst. Somoti was killed. The only explanation given by them is that they had deposed this fact before the Station House Officer but they cannot say how it was not recorded in their police statements Ex, D. 1 and Ex. D. 2. Similarly, Ramdhan when confronted with his previous statement which formed the basis of Ex. P. 2 (first information report), could not give any reasonable explanation for this serious omission except that he had deposed this fact before the Sub Inspector, but he cannot account for its absence in the first information report. Learned Public Prosecutor, however, urged that this is simply an omission & not a contradiction and, therefore, this omission cannot be allowed to be pressed into service by the defence to discredit the prosecution witnesses. The Supreme Court in *Yudhister v. The State of Madhya Pradesh* 1971 SCC 684 has observed:

When a particular fact deposed to by witnesses does not find mention both in the F.I.R. and in statements recorded under Section 161, Cr.P.C. it is an improvement and in cannot be consid-red.

10. First information report (Ex. P. 2) was lodged on the same evening and both Sanwalia and Ramdhan were examined by the investigating officer under Section 161 Criminal Procedure Code the next day. The first information report is silent about the overt act which has been attributed at the trial by the eye witnesses to Bhambal. The police statements also do not speak about the part played by Bhambal in the incident. In order to attract the provisions of Section 31 of the Indian Penal Code, it appears that the prosecution witnesses have improved their version & assigned the overt act to Bhambal that he also tried to kill Ramdhan at the instance of Badri. It is true that no mention in FIR report & in the police statements is an omission, but this is an omission of a very serious nature which cannot be ignored by the Court while assessing the worth of the evidence produced at the trial. In view of what the Supreme Court has laid down in Yudhister's case 1971 SCC 684, we feel it difficult to accept the statements of PW 1 Sanwalia and PW 3 Ramdhan to the extent to which the part played by Bhambal in the incident is related by them.

11. There is no evidence except the statements of Sanwalia & Ramdhan to show that Bambal accompanied Badri as a result of any pre-concert. In Pandurang, and Ors. v. State of Hyderabad : 1955 CriLJ572 their Lordships of the Supreme Court while considering the application of the provisions of Section 34 of the Indian Penal Code have observed as follows:

Now, in the case of Section 34 it is will established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, & each can individually inflict a Separate fatal blow and yet hone would have the common intention required by the section because there was ho prior meeting of

minds to form a pre arranged plan In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others....

12. In Mahbub Shah v. Emperor AIR 1945 PC 118, their Lordships of the Privy Council while discussing the difference between similar and common intention, observed that 'the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.'

13. The only circumstance that has been brought on the record in this case is that Bhambal was coming with Badri and that he was armed with a sword. This deposition that Bhambal had a naked sword in one hand and a sheath in another hand seems to be an afterthought as it is positively an improvement on their previous statements where both Sanwalia and Ramdhan had deposed that he had a sword in his hand The presence of sword in the hand of Bhambal and his coming on the way with his uncle Badri cannot necessarily lead us to this inference alone that Bhambal was accompanying Badri with an intention to kill Somoti or her husband Sanwalia This possibility cannot altogether be ruled out that Bhambal might have joined Badri to go to their Village on the way. The presence of a sword by itself is not sufficient to infer that the sword was taken by Bhambal at the instance of Badri to accompany him to fulfil his nefarious design to kill Somoti and her husband Sanwalia.

14. Learned Public Prosecutor while relying on State of U.P. v. Iftikhar Khan and Ors. : 1973 CriLJ636 , urged that from the very presence of Bhambal with a sword in his hand, it can safely be inferred that Bhambal had gone with Badri with a common intention to kill Somoti and her husband. The facts & circumstances of that case are entirely different from the circumstances of the present case In that case all the four assailants had gone in a body to the house of the victim and after committing the crime all of them ran together from that place. In the absence of any reasonable explanation coming from the accused for their presence at the house of the victim at that add hour their Lordships of the Supreme Court held that in the circumstances of the case provisions of Section 34 Indian Penal Code would

easily be attracted, but that is not so in the present case as Bhambal and Badri were coming on a path where two could have met even without any intention to commit a crime. In these circumstances, we cannot sustain the conviction of Bhambal under Section 302 read with Section 34 & Section 307 read with Section 34 Indian Penal Code as we cannot safely infer common intention which could be attributed to Bhambal.

15. Coming to the case of Badri, we do not find any reason to disbelieve the deposition of Sanwalia and Ramdhan that Badri used his gun to kill Mst. Somoti and to injure Sanwalia. The suggestion given by the defence in the course of their cross examination' that Sanwalia was responsible for killing Mst. Somiti as her fidelity was suspected by him is negative by that fact that Sanwalia himself sustained the guns not injury during the incident and it is not the case of the defence, nor any effort has been made by the defence to elicit the opinion of the doctor that the injury of Sanwalia could be self-inflicted. There is no reason to disbelieve the testimony of Sanwalia (PW1) and Ramdhan (PW3.) so far it relates to the action of Badri The prosecution has not taken any pains to bring on the record the motive for the commission of this crime but from the trend of the cross-examination, it appears that Mst. Somoti has some intimacy with accused Badri. Ramdhan has admitted in this cross-examination that she used to love Badri. It has also come in the testimony of these two witnesses that Badri had taken Mst. Somoti about a week before the incident to Gangapur city and this action of Badri was not liked by Sanwalia. This fact undoubtedly would provide a motive to Badri to kill Sanwalia but it is a mystery as to how Badri took to his head to kill Mst. Somoti with whom he had intimate relations. However, the fact that the prosecution has not brought on the record all the circumstances, can be taken into consideration while considering the question of sentence to be awarded to the accused The absence of motive for killing Mst. Somiti cannot absolve Badri from the commission of crime which squarely falls under Section 302 Indian Penal Code. Both Sanwalia and Ramdhan have categorically stated that as soon as they turned to see as to how the sound was coming from behind, they saw Badri coming with a double barrel muzzle loading gun and without telling anything to any one he aimed the gun at Mst. Somoti & fired it hitting her on her head which resulted in the instantaneous death of Mst. Somoti. Thereafter, Sanwalia entreated

Badri not to act in that manner but he did not listen to him and opened another fire hitting Sanwalia in his thigh. There is no reason to disbelieve the testimony of Ramdhan (PW3) which finds corroboration from the first information report which he had lodged at police station, Sapotra without any loss of time. This incident was related by Ramdhan to Gokul (PW5) soon after the death of Somoti. The learned trial Judge has placed reliance on the testimony of the two eye witnesses and we do not find any reason to take a different view of their deposition. In our opinion, the prosecution has succeeded to prove beyond any manner of doubt that Badri was responsible for the murder of Mst. Somoti and for causing gun shot injury to Sanwalia. The guilt, therefore, under Section 302 and 307 Indian Penal Code has been brought home to Badri.

16. Now remains the question of sentence awarded to Badri. Mr. Chatterji has argued that there was no reason for Badri to kill Mst. Somoti with whom, according to the prosecution itself he had illicit relations. According to Mr. Chatterji, the death of Mst Somoti must have taken place accidentally as Mst. Somoti was the nearest to assailant when he opened the fire with his gun. In this view of the matter, he urged that capital punishment will be a severe punishment & the circumstances of the case, according to him, warrant conversion of the capital punishment into that of imprisonment for life. Learned Public Prosecutor, on the other hand, urged that Badri used a formidable weapon to accomplish his design and that he aimed his gun towards Somoti before he opened his fire and, therefore, it cannot be said that the death of Somoti had taken place on account of some accident. He also urged that the Court that has tried the accused has used its discretion in awarding capital punishment and, therefore, this Court should not interfere with the discretion of trial court unless the sentence appears to be too harsh.

17. The prosecution has not taken any care to bring those facts on the record which could provide a motive for Badri to kill Mst. Somoti, It is in the cross-examination of the eye witnesses that facts have been revealed that (sic) was having intimate relations with Badri & she was taken to Gangapur City by Badri which fact was disliked by her husband Sanwalia. It is also in the cross-examination of these witnesses that Sanwalia had asked Badri not to visit his house in future. These facts can provide a motive to do away with Sanwalia, but

that cannot give a cause to Badri to take the life of Mst Somoti with whom he was having illicit relations. The motive for the commission of murder of Mst. Somoti is shrouded in mystery. The Supreme Court in *Devendra Singh v. State of U.P.* : 1971 CriLJ1283 , while dealing with the question of awarding capital sentence to Devendra Singh, who was responsible for shooting Santosh Kumar with his pistol, observed:

It seems to us that all the true facts of the incident which led to the shooting of Santosh Kumar have not been fully brought to light by the prosecution. It is quite possible that some such incident happened again which led to Devendra Singh taking Out the pistol and shooting Sintosh Kumar. In such a situation the sentence of death ought not to have been imposed on Devendra Singh.

18. The absence of the circumstances which led to the murder of Mst. Somoti Compels us to think that life imprisonment to Badri appellant will meet the ends of justice It is true that the trial court in its discretion has awarded the extreme penalty to Badri, but the matter has come up before this Court under the provisions of the Criminal Procedure Code for the confirmation of the death sentence and, therefore, we shall have to soru inise the entire circumstances to formulate our in dependent opinion regarding the adequacy of sentence and cannot be guided by the discretion exercised by the trial court. We are fortified in this view by the observations of the Supreme Court in *Neti Sreeramulu v. State of Andhra Pradesh* 1973 SCC 940

19. Before Criminal Amendment Act. No. 26 of 1955, death sentence was the rule for the offence of murder and transportation for life an exception. If the lesser penalty was to be imposed, then Sub-section (5) of Section 367 of the Criminal Procedure Code required reasons to be given By the amendment of 1955 the Parliament seems to have taken note of the current penological thought and had recast the provisions of the law which has done away with the requirements of giving reasons for awarding lesser punishment. The Court has how a discretion to award either of the two penalties prescribed under Section 302 Indian Penal Code. According to the Supreme Court in *Chawla and Anr. v. State of Haryana* : 1974 CriLJ791 the death sentence is now exacted where the murder was perpetrated

with marked brutality. The position is reversed with the passing of the new code of 1973 where Section 354(3) of the Criminal Procedure Code requires special reasons to be given for awarding sentence of death. This has made the death sentence as an exception and life imprisonment a rule. We are left in dark about the reasons for committing the murder of Mst. Somoti. The murder has been committed with the aid of formidable weapon which has put an end to the life of Mst. Somoti without inflicting any torture to her. In these circumstances, we cannot hold that murder was a brutal one which calls for the extreme penalty of death. In view of these circumstances, while maintaining the conviction of Badri under Sections 302 and 307, Indian Penal Code, we think it proper to reduce the death penalty to one of life imprisonment under Section 302 Indian Penal Code. The sentence awarded under Section 307 Indian Penal Code is however, maintained.

20. The reference made by the trial court in the circumstance mentioned above is rejected.

21. The appeal of Bhambal is allowed and he is acquitted of the the charges under Sections 302/34 & 307/31 Indian Penal Code. The sentences awarded to him for the aforesaid charges are hereby set aside. Bhambal is in Jail. He shall be released forthwith if not required in any other case.