

Mustqeen Vs. State of Rajasthan

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SooperKanoon Citation : sooperkanoon.com/764914

Court : Rajasthan

Decided On : May-01-1996

Reported in : 1996(3)WLC190; 1996(2)WLN556

Judge : N.L. Tibrewal and; Shiv Kumar Sharma, JJ.

Appeal No. : D.B. Criminal Appeal No. 286 of 1994

Appellant : Mustqeen

Respondent : State of Rajasthan

Judgement :

N.L. Tibrewal, J.

1. All the three accused, namely, Mustqeen, Nausad and Rafiq have preferred this joint appeal against the judgment and order dated, May 30, 1994 passed by the Sessions Judge, Baran, whereby the appellant. Mustqeen was convicted under Section 302 IPC and other two appellants Nausad and Rafiq were convicted under Section 302 read with Section 34 IPC and sentenced to suffer imprisonment for life and to pay a fine of Rs. 500 each. In default of payment of fine, to under go simple imprisonment for three months.

2. We need not state the facts of the case in detail as the learned Counsel appearing for the appellants, restricted his contention on the question about the

nature of the offence committed by the appellants and the sentence to be awarded. Still, in order to appreciate the real controversy, some necessary facts may be given; At the relevant time of incident, the appellant and the deceased Jakir Hussain resided in the same locality of Baran town. At about 7.45 p.m. on the fateful night of 18.3.93 the occurrence took place when deceased Jakir Hussain was passing in front of the appellants house. He was carrying a 'Thalia' (Cycle cart) to store fruits in the house of Asfaq where he had hired one room on rent. At that time, women folk of the parties were having oral altercation. It is alleged that deceased Jakir Hussain, when reached in front of the house of the accused, was inflicted a lathi blow by the appellant Nausad, while Rafiq gave him a fist blow and the appellant Mustqeen inflicted a knife blow on his lumber region. On receiving knife blow. Jakir Hussain fell down on the ground and was immediately shifted to the Government hospital, Baran where he was admitted in emergency ward. The duty doctor intimated to the Police on telephone about admission of Jakh Hussain in a seriously injured condition. The telephonic message was received by P.W. 16 Ram Laxman, the second Officer, at Police Station. Kotwali Baran at 8.10 p.m. and the same was recorded in 'Rojnamcha' vide Ex. P. 17. There upon. Shri Ram Laxman Sharma came to the hospital along with Madan Lal. Constable and recorded 'Parcha Bayan' (Ex. P. 14) of Jakir Hussain. As condition of Jakir Hussain was precarious, his dying declaration (Ex. 24) was also got recorded by Shri Prabhu Lal. Addl. Munsif and Judicial Magistrate No. 2. Baran in the same night at 9.20 p.m. after obtaining certificate of fitness from the Medical officer. On the basis of 'Parcha Bayan'. Crime No. 81/93 was registered Under Section 307 & 323/34 IPC. The injured Jakir Hussain, however, succumbed to his injuries next day at 2 p.m. as such the offence Under Section 302 IPC was added.

3. P.W. 10 Dr. Narendra Kumar Tiwari, Medical Jurist, Government Hospital, Baran, had examined the injuries of Jakir Hussain at 8 p.m. in the same night and following injuries were noticed by him:

1. Stab wound (vertically placed) 2' * 1/2' into 1' below abdominal cavity 1' right to the umbicus, omentum was coming out.

2. Contusion 4' * 1-1/2' on the back lower side.

3. Contusion 3' * 1-1/2' below injury No. 2.

4. Injury No. 1 was caused by sharp edged weapon, while injuries No. 2 and 3 were caused by blunt object. Injury No. 1 was opined to be dangerous to life and sufficient to cause death.

5. After death of Jakir Hussain, the autopsy was also conducted by Dr. Narendra Kumar Tiwari, vide post-mortem report (Ex. P. 10) and the following injuries were noticed by him:

1. stitched wound 8' long vertically present on abdominal wall right side of umbilicus.

2. contusion 4' * 1-1/2' back lower side.

3. Contusion 3' * 1-1/2' back lower side below injury No. 2.

6. On internal examination, he found the scalp, skull bones, verterbrae, spinal cord, ribs, cartilages, pericardium, large vessels, stomach and large intestines etc. normal. There was 8' long stitched wound present on the abdominal wall (right side of the umbilicus) and another 8' long stitched wound present on the rectus--muscle of abdominal wall. There was 8' long stitched wound on peritorium, Mesentery was having 5 stitched wounds and a small intestine was having stitched wound on ilium of half of its circumference. Cause of death was opined to be shock as a result of stab injury to mesenteric vessel. In opinion of the doctor, the injury was sufficient to cause death in the natural course.

7. After registration of the case, investigation commenced, and after usual investigation, a charge-sheet was filed against all the three appellants in the court of Chief Judicial Magistrate, Baran, who committed them to the court of Sessions for trial for causing murder of Jakir Hussain. The learned Sessions Judge, Baran, framed charge Under Section 302 IPC against the appellant Mustqeem and under Section 302/34 IPC against other two appellants. During trial, prosecution examined 18 witnesses. The appellants denied their involvement in the crime in their statements under Section 313 Cr.P.C. No. witness was examined in defence. The learned trial Court, placing reliance on the testimony of the eye-witnesses, the

two dying declarations made by the deceased Jakir Hussain and medical evidence, convicted and sentenced the appellants as aforesaid.

8. The short question that calls for decision in this appeal is, whether the appellant, Mustqeen is guilty of culpable homicide amounting to murder punishable under Section 302 IPC or of culpable homicide not amounting to murder punishable under Section 304 Part-II IPC and whether the other two appellants shared common intention with appellant Mustqeen for causing knife injury to Jakir Hussain?

9. The contention of the learned Counsel, appearing for the appellants, is that the incident occurred all of a sudden without premeditation. The immediate cause of the occurrence, according to the learned Counsel, was quite insignificant and trivial as the incident was an off-shoot of an oral altercation between the women folk of the parties, which was going on at the relevant time. Learned Counsel also contended that the appellant Mustqeen was hardly 17-18 years of age at the time of incident and he inflicted a solitary injury to the deceased on being provoked by the quarrel which was going on between his mother and the women folk of the deceased and no attempt to cause another blow was made by him. Learned Counsel therefore, contended that in the facts and circumstances, it cannot be said that the appellant either intended to cause death or to cause particular injury on the abdomen of the deceased and the knife blow, by chance landed on the abdomen. For other appellants, it was contended that Rafiq was unarmed and he is said to have given one fist blow while the appellant, Nausad one simple injury by a lathi on non-vital part of the deceased and that they did not cause any injury after infliction of vital blow by the appellant Mustqeen, as such, it cannot be said that they shared common intention with him. On the other hand, learned Public Prosecutor supported conviction of the appellants and contended that the instant case is squarely covered by Clause thirdly of Section , 300 IPC. Learned Public Prosecutor strongly placed reliance on the decision of the Apex Court in *Virsa Singh v. State of Punjab and Ors.* : 1958 CriLJ818 and subsequent judgments.

10. The crucial question for determination in the appeal is confined, whether the case is covered by clause thirdly of Section 300 IPC or not. If clause thirdly is

attracted, the offence would be of murder punishable under Section 302 IPC, otherwise it would be culpable homicide not amounting to murder punishable under Section 304 IPC. Section 299 IPC defines 'culpable homicide', While Section 300 IPC defines 'culpable homicide amounting to murder' if the case is covered by any of the four clauses mentioned therein. Clause (b) of Section 299 corresponds to Cls. (2) and (3) of Section 300. In Clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding Clause (b) of Section 299, the words 'sufficient in the ordinary course of nature' have been used. Obviously, the distinction lies between bodily injury likely to cause death and an abdominal injury sufficient in the ordinary course of nature to cause death. The distinction is fine, but if over-looked, may result in miscarriage of justice. The difference between Clause (b) of Section 299 and Clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether culpable homicide is the grievous, medium or the lowest degree. The word 'likely' in Clause (b) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury sufficient in the ordinary course of nature to cause death' mean that the death will be the most probable result of the injury having regard to the ordinary course of nature. For cases to fall within Clause (3), it is necessary that the offender intended to cause death so long as death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.

11. In *Virsa Singh v. State of Punjab* (supra), Vivian Bose J. speaking for the Court explained the meaning of Clause (3) thus:

To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly';

First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved; These are purely objective investigations Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, fourthly, it must be proved that the injury of the type just described made up of the three elements set out; is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

12. Thus, according to the rule laid down in Virsa Singh's case once these four elements are established by the prosecution, the offence is murder under Section 300 thirdly. Once the intention to cause bodily injury is actually found to be proved, the rest of the inquiry is purely objective and the only question is whether in a matter of purely objective inference, the injury is sufficient to cause death in the ordinary course of nature.

13. The next case relied upon by the learned Public Prosecutor is Jagrup Singh v. State of Haryana : 1981 CriLJ1136 . In this case, following the ratio laid down in Virsa Singh's case, it was held by the Apex Court as under:

There is no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting in the death must always necessarily reduce the offence to culpable homicide not amounting to murder punishable under Section 304. Part II of the Code. If a man deliberately strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause a fracture of the skull. He must, in the absence of any circumstances negating the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death.

14. The last case relied upon by the learned Public Prosecutor is State of Karnataka v. Vidanayagam 1995 Cr.LR (S.C.) 69, wherein there was only single injury by a dagger and conviction was maintained Under Section 302 IPC. The relevant considerations for conviction Under Section 302 IPC are stated in Para-7 of the judgment which run as under:

In the instant case, the accused had illicit intimacy with the wife of P.W. 1. From this it can be said that there was hostility between P. W. 1 and the accused. On the fateful day P. W. 3 the mother of the deceased and the mother of the accused were quarreling with each other, and even by then the accused hearing the quarrel came out of his house armed with a dagger. Seeing this P.W. 1 went and brought the deceased. Then the accused shouted that 'you have defamed me. I would not leave you. I will kill'. Saying this he stabbed on the left side of the chest of the deceased and the accused. The words uttered by the accused against the deceased followed by the stabbing with the dagger on the left side of the chest of the deceased, would clearly indicate that he intended to cause that particular injury which was objectively found to be sufficient in the ordinary course of nature to cause death.

15. There is no quarrel with the proposition laid down by their Lordships of the Supreme Court in relation to the interpretation of clause thirdly of Section 300. The contention of the learned Public Prosecutor is correct that by mere fact of a solitary blow on the vital part of the body resulting in the death of the victim does not always necessarily reduce the offence to culpable homicide not amounting to murder punishable Under Section 304 Part-II IPC. Each case has to be decided on facts to determine whether the accused deliberately and intentionally gave the particular blow resulting in the death. To decide this aspect, all the facts and circumstances, namely, the motive, the origin of the fight and the manner in which it took place have to be taken in consideration. If on facts and in the circumstances of the case, it cannot be definitely and pointedly held that the accused intended to cause that particular injury resulting in the death (sufficient in the ordinary course of nature to cause death) the offence shall not be covered by clause thirdly of Section 300 and it would be culpable homicide not amounting to murder punishable Under Section 304 Part-II.

16. In *Chamru Budhwa v. State of Madhya Pradesh* : AIR 1954 SC652 , where there was exchange of abuses between the two parties, both of whom were armed with lathis, they came to the blows and in the course of fight that ensued, the accused struck a lathi blow on the head of the deceased which caused a fracture of the skull resulting in his death. In view of the fact that the accused had given

only one blow in the heat of moment, it was held that it can be said that he had given the blow with the knowledge that it was likely to cause death and therefore, the offence fell Under Section 304 Part-II IPC.

17. In *Williams Slaney v. State of Madhya Pradesh* : 1956 CriLJ291 there was a sudden quarrel leading to exchange of abuses and in the heat of moment, a solitary blow with a hockey stick was given on the head. The Apex Court held that the offence amounted to culpable homicide not amounting to murder punishable under Section 304 Part-II.

18. Similarly, in *Harjinder Singh v. Delhi Administration* : 1968 CriLJ1023 and *Laxman Kalu Nikaley v. State of Maharashtra* : 1968 CriLJ1647 , the principle enunciated in the *Virsa Singh's* case was excluded because, the third ingredient laid down viz. the intention to cause the particular injury was likely to cause death, was not present. Similar views were expressed in *Randhir Singh v. State of Punjab* : 1982 CriLJ195 , *Jagtar Singh v. State of Punjab* : 1983 CriLJ852 , and *Khanjan Pal v. State of U.P.* (1990) 4 SCC 53 In *Khajan Pal's* case their Lordships observed as order:

The evidence clearly established that the whole incident was a sudden development and that the appellant had acted at the spur of the moment and without any premeditation. There had been no ill-will or enmity between the two. A casual remark made by the appellant provoked the deceased and the altercation ensued which culminated in the stabbing with knife. The appellant used the knife only once and did not act in any cruel manner. It was in the sudden quarrel in heat of passion that the appellant inflicted the injury on the deceased without any intention to cause death but having knowledge that such act was likely to cause the death of the deceased. In such circumstances, the act of the appellant falls under Exception 4 to Section 300, IPC and the appellant is liable to be convicted only under Section 304, Part II, IPC.

19. In *Jagtar Singh's* case (supra), the accused gave a knife blow on the chest of the deceased, *Narendra Singh* who succumbed to the injury after some time. The incident preceded by exchange of abuses as deceased *Narendra Singh* was injured by the projecting 'Parnala' of the house of the appellant. The blow on the

chest pierced deep inside the chest cavity resulting injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. Considering the nature of the offence it was observed:

The question is whether in the circumstances in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no premeditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal.

20. Following the ratio of the aforementioned decisions, we now consider the facts of the present case to consider whether the offence committed by the appellant Mustqem is Under Section 302 IPC or 304 Part-II IPC? The evidence on record indicates that there was no enmity or malice between the parties and the incident took place all of a sudden without premeditation on the spur of the moment. The immediate cause of the incident, which has come on record, was an oral altercation between the mother of the appellant and the women-folk of the deceased which in itself was insignificant or too trivial for causing death. The appellant was a young boy between 18-19 years of age of the time of incident. In his statement Under Section 313 Cr.P.C. he gave his age as 19 years while the learned trial Judge assessed his age as 20 years on 5.1.94, A solitary blow was given by him with no attempt to repeat another blow and the incident had taken place in front of the house of the accused. Taking into consideration the totality of the circumstances, it appears that the solitary blow was given by the appellant probably being provoked by the quarrel and altercation which was going on

between his mother and the womenfolk of the deceased. It cannot be held with certainty that he intended to cause the particular injury sustained by the deceased, though it landed on his lumbar region, a vital part of the body resulting in his unfortunate death. We, therefore, are of the confirmed view that conviction of the appellant, Mustqeen Under Section 302 IPC is not sustainable in the eye of law and it should be scaled down Under Section 304 Part-II IPC.

21. Similarly, the appellants, Rafiq and Nausad cannot be said to have shared common intention with the appellant, Mustqeen in the facts and circumstances of the case. The appellant Rafiq is said to have inflicted a fist blow, while the appellant, Nausad inflicted a lathi blow to the deceased. The injury report and post-mortem report of the deceased show that he had sustained two insignificant contusions on his back. Admittedly, they did not cause any injury to the deceased after the assault made by the appellant, Mustqeen.

22. In *A. Mohanam v. State of Kerala* 1990(Supp) SCC 66 in a similar circumstance, it was observed that the common intention has to be gathered from their overt acts and not from what the other accused did subsequently and hence, they could be convicted Under Section 323 IPC.

23. Accordingly, we allow this appeal in part. Conviction and sentence of all the appellants Under Section 302 or 302/34 IPC are set aside. The appellant Mustqeen is convicted under Section 304 Part-II IPC and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs. 10,000/-. If the amount of fine is recovered, it shall be paid to P.W. 1, Basir Mohammad, father of the deceased Jakir Hussain. In the event of default in payment of fine, the appellant Mustqeen shall further undergo rigorous imprisonment for one year. The appellants Nausad and Rafiq are convicted under Section 323 IPC to suffer the period of imprisonment already undergone by them. The appellants Mustqeen and Nausad are in jail. Appellant Nausad shall be released forthwith if not required in any other case. The appellant, Rafiq is on bail, he need not surrender.