

Dev Karan and ors. Vs. State of Rajasthan

Dev Karan and ors. Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/771999

Court : Rajasthan

Decided On : Jul-26-2002

Reported in : RLW2004(2)Raj1072; 2002(4)WLC374

Judge : S.K. Keshote and; F.C. Bansal, JJ.

Acts : Indian Penal Code (IPC) - Sections 148, 149, 302, 304 and 323

Appeal No. : D.B. Criminal Appeal No. 474 of 1996

Appellant : Dev Karan and ors.

Respondent : State of Rajasthan

Advocate for Def. : S.S. Rathore, Public Prosecutor

Advocate for Pet/Ap. : A.K. Gupta, Adv.

Judgement :

Keshote, J.

1. This appeal under Section 374 Cr.P.C. is directed by the accused appellants Dev Karan S/o Ram Narain Gujar, Pappu S/o Ram narain Gujar, Hazari Lal S/o Prabhu Lal Gujar, Sheoji S/o Prabhu Lal Gujar and Prabhu Lal S/o Mohanji Gujar against the judgment and order of Scissions Judge, Jhalawar in Sessions Case No. 263/1994, Under this judgment and order the learned Sessions Judge,

Jhalawar had convicted the accused appellants for commission of the offence punishable Under Section 302 r/w 149 (PC and sentenced them to undergo life imprisonment. For the commission of offence punishable Under Section 148 IPC they have been convicted and sentenced to undergo one year rigorous imprisonment. For the offence punishable Under Section 323 IPC they have also been convicted and sentenced to undergo six months rigorous imprisonment. All the sentenced are ordered to run concurrently.

2. We find from the record of the appeal that except the accused appellants Dev Karan and Hazari other accused have been enlarged on bail and learned counsel for the parties are in agreement that these accused appellants are on bail.

3. PW-5 Ram Charan S/o Gopal, by caste Gujar R/o Maloni submitted written report Ex. P-4 at Police Station Sarola Kalan District Jhalawar. On this written report of Ram Charan (Ex.P-4), F.I.R. (Ex.P-19) was chalked out and a criminal case No. 76/94 was registered for the offence Under Section 447, 147, 149, 427 and 393 IPC against the accused appellants.

4. The prosecution case is that on 29.7.1994 Ram Cliaran PW-5 at about 5.00 p.m. was at his house, he saw that in their Muwalwale Soyabin field buffaloes are grazing. He went to the field where he noticed that these buffaloes are of Dev Karan son of Ram Narain and Hazari Lal S/o Prabhu Lal Gujar r/o Maloni. He saw that Dev Karan S/o Ram Narain, Hazari S/o Prabhu Lal and Prabhu Lal are sitting near to the field on the 'Parat' land. When Ram Charan (PW-5) started to drag the buffaloes out of field, Dev Karan and Hazari Lal started abusing him why he is dragging the buffaloes, land is not of your father. Rain Charan PW-5 has told why they are permitting the grazing of their Soyabin by the buffaloes. On this Dev Karan inflicted Lathi blow on the head of Ram Charan. hazari Lal has inflicted lathi blow on his hand as a result of which he fell down and started crying. From the side of the village his brother Orn Prakash was coming. He rushed to him to save him. Dev Karan, Hazari Lal, Pappu, Sheoji and Prabhu Lal have started beating Om Prakash also by lathis. Both brothers Ram Charan and Om Prakash cried on which their brother Radha Kishan, father Gopal and Smt. Dhan Kanwar have rushed to their rescue. The accused have started beating them also by lathis.

Prom the village Balram and Ram Charan Gujar have come to their rescue. Radha Kishan sustained serious head injuries, Balram and Ram Charan drifted him and they carried him to hospital at Sarola. In Parcha Bayan (Ex.P-4) it is stated that Dev Karan and Hazari Lal and the complainants have old enmity and thus the accused persons have beaten them. In Parcha Bayan (Ex.P-4) the injuries received by the complainants were mentioned.

5. On this Parcha Bayan (Ex.P-4), First Information Report (Ex.P-19) has been chalked out on the same day at 11.45 P.M. A case was registered for the offences Under Section 457, 147, 149, 427 and 323 IPC against the accused appellants.

6. Radha Kishan died and accordingly Section 302 IPC was added.

7. Post-mortem of the body of deceased Radha kishan was conducted by Dr. G..S. Chauhan PW-4, Medical Jurist, SRG Hospital, Jhalawar. Post mortem report is also marked as Ex.P-4. As per this report the cause of death is head injury due to depressed fracture of left parietal bone. The injuries) which were found on the body of the deceased are:-

Injuries- natural; exact position and measurements including direction especially in incised wounds;

1. Stithced would 1-1/4x long stitches removed lacerated would bone deep. Over left parietal part of head.

2. Stitched would 1-1/2' x long stitches removed lacerated bone deep over Rt. parietal part of head.

3. Bruise (Bluish black) 2-1/2' x 1 post lat. aspect of left arm.

4. Abrasion - 1/4' x 1/8' ant. aspect of (Dark red) Rt. ankle.

8. PW-4 Dr. G.S. Chauhan, in his statements, has given out details of these injuries. He stated that the skull of deceased on frontal part thereof and both the parietal parts of right and left haemotoma was there. There was a fracture of left parietal bone which was depressed, he has opined that the cause of death of the deceased was due to injuries which were there on the left of the head depressed

fracture of the parietal bone. He further stated that the injury No. 1 in ordinary course was sufficient to cause death. In the cross examination the doctor admitted that the injury No. 1 may be caused due to fall from height or roof. So far injuries Nos. 2, 3 and 4 are concerned, it is stated that these are simple and in ordinary course are not sufficient to cause death.

9. After investigation of the case challan was submitted by the police in the Court. Learned Magistrate has committed the case to the Sessions Court vide order dated 16.9.1994 for the offences Under Section 147, 148, 323 and 302 IPC.

10. Learned Sessions Judge on 5.6.1995 framed the charge against Dev Karan accused for the offence Under Section 148, 302 and 323 IPC. Accused Hazari Lal was charged for the same offences. Sheoji accused was charged for the offences Under Section 148, 302 r/w 149 and 323 IPC. Pappu and Prabhu Lal were charged for the same offences.

11. The prosecution to prove its case examined as many as 16 persons, PW-1 to PW-16. Documentary evidence has also been produced. In defence the accused have not produced any ocular evidence but statements of some of the prosecution witnesses recorded Under Section 161* Cr.P.C. were produced for contradiction.

12. Under the impugned judgment and order as afore-stated the accused appellants have been convicted and sentenced for different offences, hence this appeal.

13. Shri A.K. Gupta, learned counsel for the appellant contended that the prosecution has utterly failed to prove the case against the accused appellant Under Section 148 IPC. It is contended that the assembly of the accused appellants was not otherwise also unlawful. In support of this contention Shri Gupta has relied upon on the decisions in following cases:-

(1) Sudhir Samanta v. State of West Bengal and Anr. (1).

(2) Rama Ashish Yadav and Ors. v. State of Bihar (2).

14. The second contention raised is that as per the statements of Dr. G.S. Chauhan-PW-4 on the head of the deceased two injuries were there, out of which one was fatal as a result of which the death is stated to have been caused. The prosecution has filed to establish out of two accused, namely, Dev Karan and Hazari Lal who has caused this injury and thus this case does not go beyond Section 325 IPC. In support of this contention reliance has been placed on the following decisions:-

1. Ram Lal v. Delhi Administration (3)
2. Administrator, Municipal Council, Sikar v. Madan Lal (4)
3. Mehrooda and Ors. v. State of Rajasthan (5)
4. Dinesh and Anr. v. State of Haryana (6)

15. Learned counsel for the appellants submitted that whole case of the prosecution is based on the statements of highly interested witnesses and it is not safe to rely thereupon for conviction of accused appellants.

16. It is contended that the eye witnesses stated that all the accused appellants have inflicted injuries on the deceased but as per the injuries and post mortem reports four injuries were found on his body and their statements could not have been relied upon. It is urged that even evidence produced by the prosecution is taken to be correct on its face value, it is a case of a sudden fight on the point of grazing of buffaloes in the fields of the complainant. Thus, it cannot be taken that the accused appellants have any intention to cause the death of deceased Radha Kishan. Carrying this contention further it is submitted that the deceased Radha Kishan has come on scene of incidence afterwards.

17. It is next contended that the other injuries on head of deceased Radha Kishan were not serious. The incident is of 29.7.1994 and Radha Kishan died on 31.7.1994. The evidence has come on the record that from the place of incident deceased Radha Kishan has gone to village on his own and from there to hospital.

18. Lastly, it is contended that the statements of deceased Radha Kishan recorded Under Section 161 Cr.P.C. cannot be taken to be a dying declaration as same are not signed by him.

19. In contra Shri S.S. Rathore, Public Prosecutor supported the judgment of the learned trial Court.

20. Shri Rathore, Public Prosecutor has not disputed that there were two injuries on the head of deceased Radha Kishan. He also does not dispute that out of which one was serious and as a result thereof the death of deceased Radha Kishan was there.

21. Ex.P-6 is the injury report of Radha Kishan dated 29.7.1994 which has been prepared by Dr. Pradeep Salodiya PW-11. This report has been prepared on 29.7.1994 at 11.30 P.M. The injuries are-

1.

CLW

4cm x 1/2cm x bone deep

Parietal region Blunt of scalp Rt. side

(1) Black til AP near sternal of notch Rt.

& lat. skull

2.

CLW

4 cm x 1/2cm x bone deep

Parietal region Blunt of scalp left side

(2) Black til

3.

Bruise

6 cm x 2 cm

postero lateral Simpleblunt of left Arm in upper 1/2 part.

Chest wall left wise 2cm medial to Aerola.

4.

Abrasion

1 x 1/2 cm.

Anterior aspect SimpleBlunt of Rt. ankle joint

Duration 6 - 12 hours.

Referred to SRG Hospital Jhalawar for X-ray and Treatment.

22. Injury Nos. 1 and 2 are by blunt weapon. Postmortem report has already been referred. From a conjoint reading thereof with the statement of Dr. G.S. Chauhan, it is the injury No. 1 as a result of which the death of Radha Kishan had been caused.

23. Injury No. 2 was not a serious. Dr. Chauhan has categorically stated that injury No. 2 is simple and in ordinary course is not sufficient to cause death.

24. In the FIR Ex.P. 19 lodged by Ram Charan PW-5 who is an eye witness of the incidence and injured also stated that all the five accused appellants have beaten the deceased Radha Kishan by lathis. The FIR is first version of the incidence, Ram Charan PW- 5 has not stated therein as to on which part of the head of the deceased Radha Kishan the accused appellants have inflicted lathi blows. In the statements recorded in the court Ram Charan PW-5 stated that the accused Hazari has inflicted lathi blow on the head of Radha Kishan from front side and then Dev Karan has inflicted lathi blow on his head. On being confronted by his police statements Ex.-D-4 he admitted that it is not mentioned therein that Hazari

accused has inflicted lathi blow on the head of deceased Radha Kishan, In the cross examination he showed his inability to state on which side of the head of the deceased Dev Karan and Hazari accused inflicted lathi blows.

25. Smt. Dhan Kanwar (PW-6) stated that Hazari and Dev Karan inflicted blows on the head of deceased Radha Kishan. Other accused have also beaten him.

26. Om Prakash (PW-7) stated that Hazari and Dev Karan have inflicted lathi blow on the head of Radha Kishan.

27. Gopal (PW-8) stated that first Hazari has inflicted lathi blow on the head of Radha Kishan and then Dev Karan on the head of Radha Kishan.

28. Balram (PW-9) stated that Hazari and Dev Karan inflicted lathi blows on Radha Kishan. He has not stated in his examination in chief on which part of body of the deceased they inflicted lathi blows, he further stated that all the accused started to beat Radha Kishan by lathis on different parts of the body.

29. Ram Karan (PW-10) stated that Hazari and Dev Karan have inflicted lathi blow on the head of deceased Radha Kishan.

30. Having gone through the statements of these witnesses and closely and careful scrutiny thereof, we are satisfied that injury No. 1 has not been assigned either of two Dev Karan of Hazari Lal.

31. In the case of Ram Lal v. Delhi Administration (supra) the conviction of the appellant under Section 302 1PC was altered to Section 325 IPC. In the case in hand there is not dispute that the death of deceased Radha Kishan was caused as a result of the Injury No. 1. It is to be stated at the cost of repetition that accused appellants No. 1 and 3 inflicted one blow each on the head of the deceased. In the case aforesaid, their Lordships of the Hon'ble Supreme Court held that it is essential to bring home the offence of murder, to the appellant, that the lathi blow given by him on the head of the deceased has proved fatal. The prosecution evidence though disclosed that two lathi blows had been given on the head of the deceased but there is no evidence which of these two accused appellants gave the injury which proved fatal, the benefit of doubt is go to him. He may have given

the fatal blow or he may have given the blow which did not prove fatal.

32. The facts of the case in hand are, in substance, similar to that of the case of Ram Lal (supra). Here also evidence is not there as to which of the injuries on the head of the deceased was given by which of the accused appellants. Either of the appellants may have given the fatal blow or may have given the blow which was not proved fatal, In view of the facts of the case, the prosecution evidence produced and having gone through the decision of the Supreme Court in the case of Ram Lal (supra), we are satisfied that the conviction of the accused appellants under Section 302 IPC is not sustainable.

33. The learned trial court held that none of the accused appellants can be convicted for the offence under Section 302 IPC. This charge under Section 302 IPC is against only two accused appellants, namely, Dev Karan and Hajari Lal, however, the learned trial court held other accused appellants guilty of the offence punishable under Section 302 with the add of the Section 149 IPC. They have also been held guilty of the offence punishable under Sections 148 and 323 IPC.

34. On the vital part of the body of the deceased i.e. head of the deceased, undisputedly, injuries were caused by lathi blow only by accused appellants Dev Karan and Hajari Lal. A finding of fact has also been recorded by the learned trial court and we endorse the same that no other accused appellants had inflicted lathi blow on the head of the deceased. The cause of death of the deceased Radha Kishan was as a result of the injury No. 1 on his head. The other accused appellants could not have been convicted for the offence under Section 302 IPC and the charges have also not been framed under Section 302 IPC against any of them The charges framed against them is under Section 302 read with Section 149 IPC. Case under Section 302 IPC is not made out against accused appellants Dev Karan and Hajari Lal and consequently this charge under Section 302 IPC with the aid of Section 149 IPC framed against other accused appellants also goes. The other accused appellants at the most may be held liable for the offence with the aid of Section 149 IPC for which accused appellants Dev Karan and Hajari Lal are found guilty by us. This is possible also only when we accept it to be a case fall under Section 149 IPC.

35. First question falls for our consideration is whether the prosecution has proved its case under Section 149 IPC.

36. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence.

Section 141 IPC provides that an assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is-

'First.....

Second.....

Third.- To commit any mischief or criminal trespass, or other offence; or....'

37. On close and careful scrutiny of the statements of Ram Charan (PW-5), Dhan Kanwar (PW-6), Om Prakash (PW-7), Gopal (PW- 8), Bal Ram (PW-9) and Ram Karan (PW-10) we find that the land over which this incidence took place, is a forest land, there buffaloes of the accused appellants were grazing. Their only intention and purpose was to take the buffaloes to the scene of incidence for grazing. Obviously at that point of time it cannot be said that they constituted an unlawful assembly within the meaning of Section 141 IPC inasmuch as it has also not been established by the prosecution that they had any of the five objects specified in that Section, as their common object. Explanation to Section 141 IPC, no doubt, provides that an assembly, which was not unlawful when it was take in place, may subsequently become an unlawful assembly, but from the evidence of the prosecution witnesses it is difficult to conceive that at a later stage or point of time the accused appellants had nurtured one of the five specified objects as provided in Section 141 IPC as there common object. Section 149 IPC postulates that any assembly of five or more persons having common object, namely, one of those enumerated in Section 141 IPC, and commits an offence in prosecution of

the common object of that assembly or they knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of the offence is a member of the same assembly, is guilty of that offence. Until it is proved beyond reasonable doubt that the accused person constituted unlawful assembly, there conviction by recourse to Section 149 IPC is unsustainable. The co accused cannot be made vicariously liable for over act of other accused. They can be made liable for their individual acts in the given case.

38. From parcha bayan and the statements of eye witnesses we find that the deceased Radha Kishan, injured Gopal and Dhan Kanwar came at the place of incidence afterwards. When the deceased Radha Kishan came at the scene of incidence afterwards, how it can be taken that the accused appellants had any common object to kill him. The accused appellants came to the place of incidence with any object to assault on complainant party and more particularly on deceased Radha Kishan, there is no evidence on the record. The prosecution has failed to proved beyond any reasonable doubt that there was unlawful assembly of the accused appellants, thus the co-accused cannot be made liable for the overt act of other accused appellants Dev Karan and Hajari Lal.

39. Section 148 IPC provides - whoever is guilty of rioting being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to there years, or with fine, or with both.

40. Rioting has been defined in Section 146 IPC - whenever force of violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

41. On close and careful consideration, scrutiny and appreciation of the evidence of the prosecution, we have already held that the prosecution has failed to make out a case of unlawful assembly of the accused appellants and as a consequence thereof the conviction of the accused appellants under Section 148 IPC does not stand.

42. Accused appellants Dev Karan and Hajari Lal each had inflicted one lathi blow on the head of the deceased Radha Kishan. Question which does arise for the consideration is what offence has been committed by these accused in the facts of this case.

43. Shri A.K. Gupta, learned counsel for the appellant, relying upon the decision of the Apex Court in the case of Ram Lal v. Delhi Administration (supra), contended that they may at the most be held guilty of offence punishable under Section 325 IPC.

44. From the post mortem report and the statements of doctor, who conducted it, the cause of death of the deceased Radha Kishan was as a result of one grievous head injury. In the case of Ram Lal v. Delhi Administration (supra) there were two injuries and out of which one was grievous and the prosecution had failed to prove that which of the appellants therein caused that injury and on that basis the conviction of the appellants therein under Section 302 IPC was set aside. That is what also the case here. The appellants No. 1 and 3, Dev Karan and Hajari Lal, have not been held guilty of the offence under Section 302 IPC for this very reason by the trial court and that has been accepted by us. One of the injuries on the head of the deceased is grievous and it has been stated by doctor that in ordinary course of nature it was sufficient to cause death. Accused appellants Dev Karan and Hajari Lal both inflicted head injuries and out of them one injury was the cause of his death. The death of Radha kishan was homicidal due to ante mortem injuries.

45. Now we to consider under which of the Parts of Section 304 IPC the case of accused appellants No. 1 and 3, Dev Karan and Hajari Lal, will fall. Section 304 IPC provides for punishment for culpable homicide not amounting to murder. Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. A culpable homicide whether done with intention or with knowledge, is the determining factor in the case whether it falls

under Part-I or Part-II of Section 304 IPC.

46. From the prosecution evidence each of the accused appellants No. 1 and 3, Dev Karan and Hajari Lal, inflicted only one lathi blow on the head of the deceased. The accused appellants No. 1 and 3 each gave a single lathi blow on the head of the deceased. There was no previous enmity between the parties. It has come in evidence that all are occupying forest land. Ram Charan (PW-5) stated that after his incident took place deceased Radha Kishan walked to the Village. Om Prakash (PW-7) has stated that after this incident took place deceased Radha Kishan went to the village on foot. He further stated that injured went to the hospital on foot also. He admitted that there was no previous enmity between the parties. Suddenly this incidence was there on the cause of grazing buffaloes. Gopal (PW- 8) has also admitted that deceased Radha Kishan came walking from the place of incidence. Bal Ram (PW-9) has admitted that there was no previous enmity enmity between the parties. This incident spontaneously took place due to the cause of grazing of buffaloes of accused appellants. Ram Karan (PW-10) has admitted that deceased Radha Kishan walked upto Sarola (Village) from the scene of incidence.

Thus we find firm the prosecution evidence that-

- (i) there was no previous enmity between the parties;
- (ii) the incident took place on the spur of moment on the cause of grazing of buffaloes of the accused appellants;
- (iii) each of the accused appellants No. 1 and 3, Dev Karan and Hajari Lal, inflicted only one lathi blow on the head of deceased Radha Kishan.
- (iv) Deceased Radha Kishan died after three days of the incidence; (v) incident was of 29th of July, 1994 and he died on 31 st of July, 1994;
- (vi) deceased walked to the Village Sarola from the scene of incidence.

47. On this prosecution evidence in this case the act of the accused appellants No. 1 and 3 to inflict lathi blows on the head was not with the intention to cause death

or such bodily injury as is likely to cause death of Radha Kishan. This case does not fall under Part-I of Section 304 IPC. However, their this act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

48. In the result, this appeal is partly allowed. The conviction and sentence of the accused appellants under Section 302 read with Section 149 of the IPC is quashed and set aside. Their conviction and sentence under Section 14 IPC is also quashed and set aside. Conviction of all of the accused appellants under Section 323 IPC is maintained. Accused appellants No. 1 and 3, Dev Karan and Hajari Lal, are convicted for the offence punishable under Section 304 (Part-II) IPC. Accused appellants No. 1 and 3, Dev Karan and Hajari Lal are in Jail for the last seven years. The interest of justice will meet in case they are sentenced for committing this offence to undergo rigorous imprisonment for the period already undergone by them. Accused appellants No. 1 and 3, Dev Karan and Hajari Lal, be set at liberty forthwith if they are not needed in any other criminal case.