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Court : Himachal Pradesh

Decided On : Jul-26-1954

Judge : Ramabhadran, J.C.

Acts : Indian Penal Code (IPC), 1860 - Sections 300, 302, 423(1) and 423(2)

Appeal No. : Criminal Appeal No. 9 of 1953

Appellant : Naraln Das

Respondent : State

Advocate for Def. : Bakshi Sita Ram, Govt. Adv.

Advocate for Pet/Ap. : K.C. Pandit, Adv.

Disposition : Appeal dismissed

Judgement :

Ramabhadran, J.C.

1. The appellant, Narain Das, was committed to the Court of Session to stand his trial of an offence under Section 302, Penal Code. The learned Sessions Judge convicted him of an offence under Section 326, Penal Code and sentenced him to transportation for life. This appeal was originally filed through the Superintendent of the jail. Subsequently Mr. K. C. Pandit, Advocate, appeared on behalf of the appellant and argued the appeal.

2. The prosecution case was that on 30-12-1952 the appellant committed the murder of one Dila Ram, Pujari of Deota Chhatarmukh of Mehlan under the following circumstances :

A Pu1a ceremony was to be held that day and, In accordance with local custom, goats were to be sacrificed, at the temple. The appellant and Dila Ram (victim in this case) belonged to the Jharik family and the arrangement was that the first goat to be sacrificed that day was to be provided by the appellant. Early in the morning Dila Ram shouted from the courtyard of the temple to the appellant (who was at his house close by) asking him to bring the goat but the appellant gave no answer. Dila Ram again shouted for the goat but the appellant kept quiet. Dila Ram them climbed to the third storey of the temple and stood leaning against the Tailing of the veranda, with his face towards the courtyard. After twenty or twentyfive minutes the appellant went to the veranda, where Dila Ram was standing, and attacked him with a darat, causing a very serious injury on the left side of the head. As a result of the impact Dila Ram fell from the veranda to the courtyard below. He succumbed to his injury within an hour or so. The matter was reported to the police by Dila Ram's son. The dead body was sent to Snowden Hospital, Simla, for postmortem examination.

3. The appellant's case was that he was present at the temple throughout the night and that Dila Ram had demanded the goat, but he expressed his inability to supply it as no payment had been made. This led to an exchange of hot words and Dila Ram slapped him. In self-defence the appellant raised both his hands and touched the hands of Dila Ram, with the result that the latter lost his balance and fell down to the courtyard. He denied that he had attacked Dila Ram with a darat. While falling, Dila Ram struck his head against the roof of the chabutra.

4. The following points for determination arise in this case:

1. Whether the appellant caused the death of Dila Ram?

2. If so, what offence is brought home to him? and

3. Is it open to this Court to alter, if necessary, the conviction of the appellant to one under Section 302, I.P.C.?

5. As far as point No. (1) is concerned, the postmortem report and the statement of Dr. Narain Das, who performed the postmortem examination, reveal that the victim sustained 'inter alia' an incised wound 4' x 1' x 1/2' on the left side of the skull 2' above the ear; as a result of this injury the skull bones and meninges were cut and the brain matter was protruding. Internal examination revealed a fissured fracture 4' long running vertically above the right parietal bone. In the opinion of the doctor the former injury could have been caused by a 'darat', like Ex. P. 1, while the latter injury could have been caused by a fall. The doctor was of the opinion that either of these injuries was sufficient to cause death, although, he was unable to state which of the injuries had actually caused the death or whether death was due to the combined effect of both the injuries.

Obviously, therefore, there has been foul play. Prom the statements of Beli Ram, Paras Ram,. Ram Nand, Sham Sukh, Jawala Dass, Shiv Ram, Hira Nand, Manohar Dass and Nain Chand, P.Ws., it is satisfactorily established that it was the appellant who gave the blow, with the 'darat', Which caused the head injury to Dila Ram and also resulted, in his falling from the veranda to the courtyard below. Although the appellant denied having wielded at the 'darat', his own witnesses e.g. Parma Nand and Jatti Ram have deposed that following exchange of hot words the appellant picked up the 'darat' and thrust it towards Dila Ram's head. I am clearly of the opinion, therefore, that the incised injury on Dila Ram's head was caused by the petitioner by means of the 'darat', Ex. P. 1.

6. The learned Sessions Judge felt himself unable to convict the appellant of murder because the Civil Surgeon had expressed his view that death might have been caused either by the 'darat' blow or by the fissured fracture or by the combined effect of both. The 'darat' was sent for during the course of arguments in this Court. It is a very formidable heavy weapon. It must have been wielded by the appellant with great force. It was aimed at the victim's head. The force, with which it was used, can be imagined from the fact, that the 'darat' cut the skull bone and the meninges and the brain matter was seen protruding throughout the length of

the wound, The victim, at that time, was leaning (according to the prosecution evidence) against the veranda railing. It is no wonder that as a result of the impact of the blow, the victim tottered and fell down into the courtyard and this caused fissured fracture of the skull bone. According to the Civil Surgeon, the incised injury was sufficient in itself to cause death, in the ordinary course of nature.

Bearing the further circumstance in mind, namely, that the victim would not have fallen into the courtyard but for the powerful blow given with the darat I find no hesitation in coming to the conclusion that the appellant must be held responsible for causing death of Dila Ram. That brings us to the next point. The learned Sessions Judge convicted the appellant under Section 326, I. P. C. because, in his opinion, it was not clear whether death was due to the incised injury or to the fissured fracture. For reasons already stated, this is not of material importance. The learned Sessions Judge has found that there were no mitigating circumstances in this case. Nor do I find that there was any ground for provocation, It may be that Dila Ram abused the appellant in filthy language, but, that would not amount to grave and sudden provocation. In my view, the appellant is clearly guilty of an offence under Section 302, I. P. C. I do not agree with the learned Counsel for the appellant that the offence is merely one under Section 304, second part, I. P. C.

7. The only point now remains to be decided is whether it is open to this Court to alter the conviction to one under Section 302, I. P. C. Learned Government Advocate has cited the following authorities in support of his contention that this can be done :

(a) 'Bawa Singh Sawan Singh v. Emperor', AIR. 1941 Lah 465 (PB) (A), There a Fall Bench of the Lahore High Court held that :

'The word 'alter' in Section 423 (1) (b) (2) means to change one finding to another finding and therefore the words 'alter the finding' in Section 423 (1) (b) (2) mean that the finding can be altered to any other finding that the Court considers proper on the findings of fact at which it arrives in appeal.'

'In the case contemplated in Section 423 (1) (b) there is no question of a complete acquittal, for the appeal is against a conviction and therefore, there is no necessity to annul or set aside any finding that the man is innocent or not guilty of anything at all. All that is taken away from the appellate Court is the power of enhancing the sentence, but no restriction is placed on the power of appellate Court to change the finding to any that it considers suitable to the. purpose.'

(b) 'Zamir Qasim v. Emperor', AIR 1944 All 137 (PB) (B). There it was held that: 'An. appellate Court is, subject to the other provisions contained in Criminal P. c:, empowered under Section 423 (1) (b) (2) to alter a finding of acquittal into one of conviction even though no appeal has been preferred, by the Provincial Government. This power is, however, subject to the condition that the appellate Court cannot, enhance the sentence imposed by the trial Court.'

(c) Gulab v. State', AIR 1951 All 660 (FB) (C). There it was held that : 'In an appeal by the accused in such a case it is open to the appellate Court to find, there being no Govt. appeal against the acquittal of such acquitted persons, that, although it cannot interfere with such acquittal, such persons or some of them had been wrongly acquitted and had in fact taken part in the commission of the alleged act in association with the appellant and on this ground hold that the appellant was rightly convicted. The mere omission of the State Govt. to appeal against an order of acquittal does not, in all cases, 'give finality to such finding and it can be altered by the H, C. under Section 423 (1) (b), Cr. P. C. which does not impose any limitation upon the powers of the Court to alter any finding so long as it does not involve any enhancement of sentence.'

(d) 'Taj Khan v. Rex', AIR 1952 All 369 (FB) (D). There a Pull Bench of Allahabad High Court held that the power to alter the finding from one of acquittal to that of conviction cannot proceed beyond a case where even after the alteration of the finding the sentence, imposed by the trial Court, can be validly maintained. The power to alter the finding does not exist where the sentences inflicted by the trial Court cannot legally be maintained.

(e) 'Roshan v. State', AIR 1954 All 51 (E). There the decision was :

'Accused charged under Section 365, Penal Code, acquitted of that offence but convicted under Section 342 of that Code--ppellate Court has power to alter the finding and convict him under Section 365, Penal Code, without altering the sentence imposed by trial Court so as to enhance the same.' (1) 'Damei Sethi v. Udi Behera', AIR 1954 Orissa 145 (F). There a Division Bench of the Orissa High Court observed that : 'The expression 'alter the finding' occurring in Section 423 (1) (b) (2) is not subject to any limitation except that the sentence cannot be enhanced by the appellate Court. That power is undoubtedly subject to the provisions contained in the chapter dealing with joinder of charges and the appellate Court cannot afford to ignore the provisions of Sections 236 and 238. But it would be unduly restricting the scope of the appellate powers under Section 423 (1) (b) (2) to hold that that power can be exercised only in cases falling within Sections 236, 237 and 238.'

8. In the present case the appellant was charged under Section 302, I. P. C. That offence is punishable either with death or of transportation for life. The learned Sessions Judge convicted the appellant of an offence under Section 326, I.P.C. and sentenced him to transportation for life. Having regard to the judicial authorities, cited above, I am of the opinion that it is open to this Court and necessary in the interest of justice to alter the conviction to one under Section 302 I.P.C. and maintain the sentence of transportation for life.

9. The result is that the conviction of theappellant is altered from one under Section 326, I.P.C.to one under Section 302, I.P.C. The sentence for transportation for life is maintained. Subject to thismodification, the appeal is rejected.

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