

Court No. - 13

Case :- CRIMINAL APPEAL No. - 79 of 2003

Appellant :- Ajay Kumar And Another

Respondent :- State of U.P.

Counsel for Appellant :- Farhan Alam Osmany,A.N.Misra

Counsel for Respondent :- Govt.Advocate

Hon'ble Karunesh Singh Pawar,J.

1. Heard Shri A.N. Mishra, learned counsel for the appellants as well as Shri Alok Tewari, learned AGA for the State.

2. The present appeal has been filed against the judgment and order dated 21.02.2003 passed by the Special/Additional Sessions Judge (Essential Commodities Act), Hardoi convicting the appellants under Sections 307/34 IPC for five years of rigorous imprisonment.

3. Brief facts of the prosecution case is that the complainant Raj Kumar and the accused Swami Dayal etc. are resident of the same village Mauja Behati Khurd, P.S. Bilgram, District Hardoi. The accused Mukesh (deceased), Ajay Kumar and Murali are sons of co-accused Swami Dayal. On 19.03.1995, when the complainant was going to Bilgram carrying milk and crossed half of the field, then about 6:30 am, the accused persons Swami Dayal, Mukesh (deceased), Ajay Kumar and Murali who were sitting in the orchard of Gaya Prasad wherein crop of pigeon pea was standing, started beating him with lathi and pharsa and due to that he suffered injuries on his head and other parts of the body. Swami Dayal was armed with pharsa, Mukesh was armed with country made pistol and Ajay and Murali were having lathi in their hands. Upon raising alarm by the complainant, his father Brij Kishor, Avadhesh, Chander and Ramu reached there and the accused fled away after the witnesses reached. Had the witnesses did not reach, the accused persons would have killed the complainant.

4. Chik report (Ex. Ka-1) pursuant to the incident was lodged by the complainant at P.S. Bilgram. On the basis of chik report, F.I.R. (Ex.Ka-3) was registered and it was entered into GD (Ex.Ka-4). In the incident, preliminary inquiry was done by Sub Inspector T.R. Verma and thereafter the inquiry was done by Sub Inspector Bindra Singh. The investigating officer after conducting investigation such as taking statements of the witnesses, getting conducted medical examination (Ex.Ka-5) and x-ray (Ex.Ka-6) of the injured Raj Kumar, preparing site plan and inspecting the same, filed charge sheet (Ex.Ka-8).

5. The accused Swami Dayal was charged under Section 307 IPC and the other accused persons namely Mukesh (deceased), Ajay Kumar and Murali were charged under Section 307 read with Section 34 IPC. The accused denied charges and claimed to be tried. During course of the trial, accused Mukesh died and the trial court has acquitted accused Swami Dayal under Section 307 IPC and convicted other accused persons under Section 307/34 IPC.

6. Prosecution to prove its case has produced PW-1 Raj Kumar, PW-2 Avadhesh Kumar, PW-3 Dr. R.C. Aggarwal (Radiologist), PW-4 Constable Ganesh Chandra Tripathi, PW-5 Dr. Karan Singh, Deputy CMO and PW-6 Sub Inspector T.R. Verma.

7. The statement of the accused persons under Section 313 Cr.P.C. was recorded. Their case was of denial and false implication due to enmity.

8. PW-5 Dr. Karan Singh conducted medical examination of the injured on 19.03.1995 and found following injuries:-

"(i) फटा हुआ घाव 4 सेमी0 x 1 सेमी0 हड्डी तक गहरा माथे पर बाईं तरफ 4 सेमी0 बाईं भों से उपर था। घाव के चारों ड्रास्टिक सूजन मौजूद थी। आहत दर्द की शिकायत बता रहा था।

(ii) नीलगू निशान 10 सेमी0 x 1 1/2 सेमी0 पीठ पर कई तरफ स्कैपुलर रीजन पर नीलगू निशान लालिमा लिये हुआ हुये था।

(iii) खरशदार नीलगू निशान 11 सेमी0 x 0.5 सेमी0 दाहिनी अग्रबाहु के पिछले हिस्से पर लालिमा लिये हुये।

(iv) खरशदार नीलगू निशान 3 सेमी0 x 1 सेमी0 दाहिनी अग्रबाहु के पीछे की तरफ से दाईं कुहनी के जोड़ से 3 सेमी0 नोचे लालिका लिये हुये।

(v) खरशदार नीलगू निशान 5 सेमी0 बाईं अग्रबाहु के पिछले हिस्से में 3.5 सेमी0 बाईं कलाई के जोड़ के नीचे लालिमा लिये हुये था।

(vi) खरश 2 सेमी0 x 5 सेमी0 बाईं टांग के उपरी हिस्से में आगे की ओर बाहर की तरफ था।

(vii) नीलगू निशान 6 सेमी0 x 1 सेमी0 बाईं टांग के उपरी भाग में हर की तरफ लालिमा लिये हुये था।"

According to the opinion of the doctor regarding injury no. 1, the injured was advised for x-ray as it was serious. He further opined that except injury no.1, all other injuries were simple and were caused by blunt object. As per his opinion, the injuries were caused at 6:30 am on 19.03.1995. He further stated that injury no. 1 though was serious, however, was not fatal.

PW-3 Dr. R.C. Aggarwal has found fissure fracture on the frontal bone of the injured.

PW-4 Constable Ganesh Chandra Tripathi proved chick FIR

(Ex.Ka-3) and also recorded the statement in the GD (Ex.Ka-4).

PW-6 T.R. Verma is the investigating officer of the case.

PW-1 Raj Kumar in his statement has submitted that Swami Dayal hit him from pharsa and other accused person by lathi. In the cross-examination, he stated that Swami Dayal hit him by pharsa once which came on his head. The other accused caused blow upon him by lathi.

PW-2 Avadhesh Kumar is also eye witness and supported the prosecution case. He in his cross-examination has stated that while, the accused persons were assaulting the injured, he was 25-30 paces away from the incident and he saw that Swami Dayal has inflicted two pharsa upon the accused.

9. Learned counsel for the appellants submits that even if the entire prosecution case is accepted at it is as per the statement of PW-5 Dr. Karan Singh, Deputy CMO, except injury no. 1, all the injuries were simple in nature. Injury no. 1 as per his own statement was serious but not fatal. Injury no. 1 was a lacerated wound of 4 cm x 1 cm bone deep on the forehead. Rest of the injuries were on non-vital part.

10. So far as injury no. 1 is concerned, as per statement of the injured PW-1 and as per statement of eye witness PW-2, injury no. 1 was caused by Swami Dayal who has been acquitted by the learned trial court. Even injury no. 1 was fatal as per the statement of PW-5 Dr. Karan Singh, it cannot be said that the accused were having the intention to commit murder or were having knowledge that such injury can cause death of the injured. The intention or knowledge of the accused to commit murder is absent in this case and in absence of these ingredients, there cannot be any offence of "attempt to murder". The intention is to be gathered from all circumstances and not merely from the consequences that ensue. The nature of weapon used, motive of the crime and severity of the blow etc. are some of the relevant factors. The relevant part of the judgment of the Supreme Court in "**Hari Kishan and another Vs. Sukhbir Singh, 1988 AIR 2127**", is extracted below:-

"On the first question as to acquittal of the accused under s.307/149 IPC, some significant aspects may be borne in mind. Under s.307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary constitute' murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under s. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences

that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration it, determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it."

11. Learned counsel for the appellants while relying on the case of ***Sarju Prasad Vs. State of Bihar, AIR 1965 SC 843***, has submitted that the prosecution is under obligation to prove that offences committed by the appellants squarely fall under Section 307 IPC. He also submits that if the prosecution case is taken as it is, it shall not travel beyond Section 324 IPC considering the fact that Swami Dayal has been acquitted and injury no. 1 is not attributed to the present appellants. There is no evidence on record to show or suggest that injury which are alleged to have been caused by the appellants could have been fatal for life or that injuries were caused by the appellants with an intention or having knowledge that these injuries can cause death and therefore, he submits that the appellants should not have been convicted under Section 307 IPC.

12. Learned A.G.A. has opposed the submission submitting that at the place of incident, presence of the appellants is admitted. He also submits that the prosecution has successfully proved its case, however, could not dispute the fact that Swami Dayal, co-accused has been acquitted and injury no. 1 is not attributed to the present appellants.

13. On due consideration to the submission advanced as well as considering the fact that there is nothing on record to show that except injury no. 1 which is attributed to co-accused Swami Dayal who has been acquitted, there is no other injury which could have caused death or these injuries were caused by the appellants with an intention to kill-injure or the appellants were having knowledge that the injured will be killed by these assault and considering the judgment of the Supreme Court in the case of ***Ramesh Vs. State of U.P., AIR 1992 SC 664 and Sarju Prasad (supra)***, I am of the opinion that the offence alleged against the appellants under Section 307 read with Section 34 IPC will not travel beyond Section 324 IPC.

14. Accordingly, the conviction under Section 307 read with Section 34 IPC cannot be sustained, however, the appellants in view of the evidence gathered by the prosecution and the injury sustained by the injured are liable to be convicted under offences punishable under Section 324 read with Section 34 IPC.

15. In the case of ***Ramesh Vs. State of U. P. : AIR 1992 SC***

Page 664, where a single injury was found on the back of the injured, the appeal of accused-appellants who were tried along with two others was convicted u/s 307/34 IPC and sentenced to undergo rigorous imprisonment for four years, while the two others were acquitted, was partly allowed by the Apex Court. His conviction was altered into section 324 IPC and the sentence was reduced to the period already undergone with fine of Rs. 3000/-, which was to be paid to the complainant as compensation.

16. In the case of *Merambhai Punjabhai Khachar and others Vs. State of Gujarat : AIR 1996 SC Page 3236*, there was an attempt to commit murder by fire arm and a pellet hit the victim, however, the Apex Court held that Section 307 IPC cannot be held to have been satisfied and the conviction was altered to Section 324 IPC.

17. In the instant case, as regards the injuries are concerned, there is no evidence on record to show that these injuries could have been fatal for life of the injured or that the injuries were caused by the appellants with intention to kill the injured. Thus, it clearly shows that there was no intention of the accused appellants to kill the injured. Thus, I am of the view that conviction of the appellants under Section 307 read with Section 34 IPC cannot be sustained. But, in fact, the appellants are liable to be convicted for the offence punishable under Section 324 IPC.

18. At this juncture, learned Counsel for the appellants has contended that has not committed any crime prior to the said incident and, therefore, they are "first offender", hence the benefit of Section 4 of the Probation of Offenders Act may be given to the appellants.

19. Learned AGA, on the other hand, does not dispute the fact that the appellants are the first offender but he vehemently submitted that if the benefit of Section 4 of the Probation of Offenders Act is given to the appellants some restrictions may be provided so that appellants may not repeat such a crime in future.

20. As to whether the appellants are entitled to get the benefit of Section 4 of the Probation of Offenders Act or not, I deem it appropriate to reproduce Section 4 of the Probation of Offenders Act, which reads as under :-

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the

circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

21. It is relevant to mention here that Section 360 Cr.P.C. also confers the powers on the Court to release the accused on probation for good conduct or after admonition.

22. For the reasons aforesaid, the appeal filed by the appellants is disposed of.

The conviction of appellants namely **Ajay Kumar and Murli** under Section 307 read with Section 34 IPC and sentence awarded to them is set aside. However, they are found guilty for the offence punishable under Section 324 read with Section 34 IPC and are convicted thereunder.

They shall get benefit of Section 4 of Probation of Offenders

Act.

They shall file two bonds to the tune of Rs.20,000/- each coupled with personal bonds to the effect that they shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If they are in breach of any of the conditions, they shall subject themselves to undergo one year rigorous imprisonment. The bonds aforesaid shall be filed by the appellants within three months from the date of judgement. The time for submitting the bail bonds shall not be extended on any ground whatsoever.

23. Let a copy of this judgment along with original lower Court record be sent to the Court concerned for compliance forthwith.

Order Date :- 11.10.2023

R.C.