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RAMKISHAN AND OTHERS

v.

STATE OF RAJASTHAN

SEPTEMBER 2, 1997

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[DR. A.S. ANAND AND K. VENKATASWAMI, JJ.]

Indian Penal Code, 1860 :

C *Ss. 304 (Part-II)/149 and 148—Ten accused including five appellants prosecuted u/s. 302/148—Prosecution case indicating 10-12 persons having attacked complainant party out of whom one died and others received injuries—High Court acquitting five of the accused and convicting the five appellants u/s. 302 and s. 148—High Court upholding the conviction and sentence—Held, on the basis of finding of trial court, the intention of appellants could only have been to cause injuries to deceased and they did not share any common intention to cause death of deceased—Medical evidence also does not support the ultimate finding recorded by trial court—In the circumstances the case would fall under s. 304, part II read with s. 149—Conviction and sentence u/s. 302 is set aside—Appellants convicted under s. 304 part II read with s. 149—Each one of them would suffer 5 years rigorous imprisonment.*

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S. 149—Though no specific charge indicating the applicability of s. 149 was framed, but all the ingredients of the section were clearly indicated in the charge framed against the appellants—Omission to mention s. 149 in the charge is only an irregularity.

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Willie (William) Slaney v. State of Madhya Pradesh, AIR (1956) SC 116, followed.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 626 of 1986.

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From the Judgment and Order dated 6.5.86 of the Rajasthan High Court in D.B. CrI. A. No. 554 of 1983.

Shanti Swarup Sharma, (NP) for the Appellants.

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K.S. Bhati for the Respondents.

The following Order of the Court was delivered :

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Five appellants alongwith five others were tried for offences under Sections 302, 148 IPC and some minor offences. The learned Sessions Judge acquitted five co-accused of the appellants but convicted and sentenced them for offences under Section 302/148 IPC. They filed an appeal in the High Court which was dismissed by the Division Bench of the High Court on 6th May, 1986. By special leave the appellants have called in question the judgment of the High Court dated May 6, 1986.

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In short, the prosecution case is that on 14th November, 1981 at about 10.00 p.m. when the complainant party was taking its bullock cart through a path way of the abadi to village Galia Kua, the cart suffered a sudden and violent jerk. It was noticed that a ditch had been freshly dug in the path way, though the complainant party had not noticed the existence of any such ditch earlier on their way to the forests in the evening. As soon as the bullock cart suffered a jerk, 10 or 12 persons came out from house of Ranjita and Hira. They were armed with sticks and axes. They assaulted Bhura, Badri, Dhanna and Ramphool. Ramphool and Dhanna, however, escaped unhurt. Bhura succumbed to the injuries. Badri also received injuries. Ramphool, PW. 3, went to the police station and lodged the First Information Report on 15th November, 1981 at about 6.45 a.m. The investigation was taken in hand and ten persons including five appellants were sent up for trial. According to the prosecution case the assailants had mounted the attack on the complainant party and inflicted injuries on Bhura and Badri with a view to take revenge for a violent incident which took place in 1973 when Ranjita, appellant, suffered fracture on his leg which led to the filing of criminal prosecution against Bhura and Ramphool. As many as 11 witnesses were examined by the prosecution at the trial. Dr. Bansal, PW, conducted the postmortem examination on the dead body of Bhura on 15th November, 1981 at 2.30 p.m. He noticed as many as 11 injuries on the dead body. Out of these injuries eight were incised wounds and others were injuries caused by blunt weapon. Out of the incised wounds, there were some injuries on the legs and the left thumb and the remaining three injuries were on the head of the deceased. Badri, PW, was also examined and nine injuries were found on his person. There was no fracture of any bone, though some of his injuries were described as grievous injuries. At the trial, Dr. Bansal deposed that the injuries found on the deceased were sufficient to cause death in the ordinary course of nature. During cross-examination however Dr. Bansal admitted that apart

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A from injuries which were caused by incised weapons there were other injuries also on the body of the deceased and that "*other injuries could also have resulted in his death*". The prosecution also relied upon recoveries of some weapons alleged to have been effected on the basis of the statements made by the appellants and others under Section 27 of the Evidence Act on 22nd November, 1981 in support of its case.

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The trial court found that there were two sets of accused in the case, one set belonging to Kumhar caste while the other belonging to the Gujar community. The appellants belong to the Gujar community. The trial court found that the evidence of the eye witnesses who had implicated not only the appellants but also five others belonging to the Kumhar caste could not be believed fully and consequently gave benefit of doubt to five accused belonging to the Kumhar caste and acquitted them.

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The trial court after appreciating the evidence, in the case of the appellants, opined that there was no evidence on the record to show any pre-meditation on the part of the appellants. It was also concluded that the prosecution had failed to establish as to who among the 10 accused, had stuck the fatal blow resulting in the death of Bhura. The learned Sessions Judge further observed that "it remains a mystry who the killers of Bhura are". This observation was made in the context of as to who had caused the fatal injuries, particularly when according to the prosecution case itself none of appellants was armed with a lathi and the deceased had suffered a few blunt weapon injuries. We find that the prosecution has established the complicity of the appellants with the crime but, the question, however, is about the nature of offence committed by them.

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Dealing with the actual assault, the learned Sessions Judge has observed :

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"As Bhura and Ramphool had broken the leg of Ranjeeta and they were going to 'Foota Dungaar' on bullock cart to fetch wood from there, the Gujar accused *must have intended to attack them by obstructing the cart and inflicting injuries to them in that situation.*"

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(Emphasis ours)

The trial court went on to observe :

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"As sufficient evidence is not available regarding the fact that all the five accused were involved in causing the death of the deceased

Bhura and that all the five accused had come out from one 'Pole', it cannot be said that they had formed an unlawful assembly to kill the deceased Bhura before the incident. But after the start of "marpit" they (accused) inflicted grievous hurt (to) deceased Bhura." A

So far as the recoveries are concerned the trial court rightly did not believe the same and observed : B

"I have, therefore, no hesitation to conclude that all the ten accused were arrested on 15.11.81 and that the evidence regarding their arrest on 21.11.1981, and disclosure statements and recoveries of weapons on 22.11.1981 is all fabricated and false. The I.O. seems to have acted in this manner in his zeal to strengthen the prosecution case." C

However, inspite of recording all the above findings, the trial court still convicted the appellants for offences under Section 302 IPC and Section 148 IPC and High Court also confirmed their conviction and sentence. In our opinion the approach of both the courts below on the question of nature of offence was faulty and erroneous. D

On the basis of the findings of the learned trial court, as noticed above, it is quite obvious that the intention of the appellants could only have been to cause injuries to the deceased by obstructing his bullock cart and they did not share any common intention or object to cause the death of the deceased. Indeed by causing injuries with an axe it could be said that the appellants should have realised that the injuries were likely to cause his death but that would only bring the case of the appellants under Section 304 Part II IPC and not one under Section 302 IPC. E F

In view of the findings recorded by the learned Sessions Judge and the material on the record, we are unable to ascribe to the finding that the appellants' intention was to cause death of Bhura deceased. The finding betrays the observation of the trial court as noticed above. The medical evidence also does not support the ultimate finding recorded by the trial court and upheld by the High Court. The offence in the established facts and circumstances of the case in the case of the appellants would only fall under Section 304 Part II IPC read with Section 149 IPC and not under Section 302 IPC. Indeed no specific charge indicating the applicability of H

- A** Section 149 IPC was framed, but all the ingredients of Section 149 IPC were clearly indicated in the charge framed against the appellants and as held by the Constitution Bench of this Court in *Willie (William) Slaney v. State of Madhya Pradesh*, AIR (1956) SC 116, the omission to mention Section 149 IPC specifically in the charge is only an irregularity and since no prejudice is shown to have been caused to the appellants by that omission it cannot affect their conviction.
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- In our opinion this appeal deserves to succeed to the extent that the offence committed by the appellant would not fall under Section 302 IPC. We, therefore, set aside the conviction and sentence of the appellants for the offence under Section 302 IPC and instead convict them for an offence under Section 302 Part II IPC read with Section 149 IPC and impose a sentence of 5 years rigorous imprisonment upon each one of them. The conviction and sentence of the appellants for the offence under Section 148 IPC is, however, maintained. The appellants are on bail. Their bail bonds are cancelled. They shall be taken into custody to undergo remaining part of the sentence, if any.
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R.P.

Appeal allowed.