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ABDUL AZIZ
v.
STATE OF RAJASTHAN

MAY 3, 2007

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[S.H. KAPADIA AND B. SUDERSHAN REDDY, JJ.]

Penal Code, 1860:

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s.460 and 302/149—Conviction by trial court u/s 460 substituted by High Court u/s 302/149—Propriety of—Accused along with others, prosecuted u/ss. 302/148/149/460—Trial Court convicting him only u/s 460—No appeal by State—On appeal by accused, High Court, without issuing notice to him for enhancement, convicting him u/s 302 holding that trial court inadvertently convicted him u/s 460—Held, High Court was wrong in convicting the accused u/s 302—This is travesty of justice—Judgment of High Court set aside, conviction and sentence u/s 460 by trial court restored.

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The appellant-accused was charged along with others under sections 302, 140, 149, and 460 IPC, and was convicted by the trial court only under section 460 IPC and sentenced to ten years imprisonment. No appeal was filed by State for enhancement of sentence or for conviction u/s 302 IPC. But in the appeal filed by the appellant, the High Court convicted him u/s 302 IPC and sentenced him to life imprisonment holding that the trial court instead of convicting him u/s 302 IPC had inadvertently convicted and sentenced him u/s 460 though considering the evidence on record he was liable to be convicted u/s 302/149 IPC. Aggrieved, the accused filed the present appeal.

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Allowing the appeal in part, the Court

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HELD: The High Court has convicted the appellant under Section 302/149 IPC in his own appeal by substituting the order of conviction and sentence under Section 460 IPC passed by the trial court, holding that through inadvertence the trial court had failed to invoke Section 302/149 IPC. No appeal was filed by the State for convicting the appellant u/s 302/149 IPC. No prior notice for enhancement was issued by the High Court. This cannot be done. This would amount to travesty of justice. Accordingly, the appellant stands convicted under Section 460 IPC. Consequently, the sentence of life

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imprisonment, imposed by the High Court, shall stand substituted by the sentence of rigorous imprisonment for ten years as imposed by the trial Court. [Para 9 and 11] [1172-B-D; F-G] A

Re: *Singaram and Anr.*, AIR [1954] Madras 152, distinguished.

Sohan Singh Kesar Singh v. State of Punjab, AIR AIR [1964] Punjab 130, held inapplicable. B

Jagdeo v. State of Uttar Pradesh, [1953] 51 Allahabad Law Journal 501, referred to.

Raju @ Raj Kumar v. State of Rajasthan, Criminal Appeal No. 664 of 2007 arising out of S.L.P. (Crl) No. 4446 of 2006 decided by Supreme Court on 3.5.2007, cited. C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 665 of 2007. D

From the Final Judgment and Order dated 13.01.2006 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 513 of 2004.

Jaspal Singh, R.K. Kapoor, M.K. Verma, S.S. Yadav and Govind Kaushik (for Anis Ahmed Khan) for the Appellant. E

Kumar Kartikay, V. Madhukar, Sumit Ghosh, Sanjay Jha and Aruneshwar Gupta for the Respondent.

The Judgment of the Court was delivered by F

KAPADIA, J. (1) Leave granted.

(2) This criminal appeal by grant of special leave is directed against impugned judgment dated 13.1.06 delivered by the Rajasthan High Court, Jaipur Bench, in D.B. Criminal Appeal No.513/04 converting the conviction under Section 460 IPC imposed by Additional District and Sessions Judge, Jaipur, in Session Case No.49/2001 into conviction under Section 302 IPC, without the State filing appeal in that regard, on the ground that the trial court had on account of inadvertence convicted the appellant only under Section 460 IPC. G

A (3) This judgment is a sequel to our judgment in the case of *Raju @*
Raj Kumar v. State of Rajasthan, Criminal Appeal No. 664 of 2007 arising out
of S.L.P. (Crl.) No.4446 of 2006, pronounced today. Therefore, we are not
B required to restate the case of the prosecution. Suffice it to state that Abdul
Aziz (appellant herein) was accused No.1. He was convicted by the trial court
under Section 460 IPC. We have extensively quoted the relevant paragraphs
of the operative part of the judgment of the trial court in the earlier judgment.
On the merits of the case, we find no infirmity with the concurrent findings
recorded by the courts below. The evidence of Uttam Prakash (pw.4), who was
C present at the time when his father was attacked by 10 to 12 persons with
knives, was the eye-witness. He had seen the appellant entering the room
where the deceased was in conversation with pw.4's aunt. Appellant was
named in the FIR. That, evidence of pw.4 is supported by recovery and
medical evidence.

(4) Under Section 460 IPC constructive liability is imposed on persons
jointly concerned in committing house trespass at night, in the course of
D which death or grievous hurt is caused. The section applies to persons who
actually committed house trespass at night and the act of causing death or
grievous hurt by any one of the intruders would make others, who did not
cause the injury, equally liable. In the present case, the ingredients of Section
460 IPC are complied with. However, it is contended on behalf of the State
E that on reading the judgment of the trial court it is clear that the trial court
has found Abdul Aziz (appellant herein) guilty of murder and he was liable
to be convicted under Section 302 IPC. This point was argued by the State
before the High Court in the criminal appeal filed by the appellant herein. It
has been held, in the impugned judgment delivered by the High Court, that
the trial court had instead of convicting Abdul Aziz (appellant herein) for
F offence under Section 302 IPC had inadvertently convicted and sentenced
him for offence under Section 460 IPC and that considering the evidence on
record, the appellant herein was liable to be convicted for an offence under
Section 302/149 IPC.

(5) In the present case, we find that the appellant was charged under
G Section 302, 148, 149 and 460 IPC but the trial court had convicted him only
under Section 460 IPC and sentenced to ten years imprisonment. No appeal
was filed by the State for enhancement or for conviction under Section 302
IPC and yet in the appeal filed by the appellant the High Court has convicted
him under Section 302/149 IPC and sentenced him to life imprisonment.

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(6) In the case of *Jagdeo v. State of Uttar Pradesh*, (1953) 51 *Allahabad Law Journal* 501, a similar situation arose for determination. In that case Jagdeo had moved the High Court in appeal against his conviction under Section 460 IPC. However, the High Court had issued the notice to show cause why the sentence passed against Jagdeo be not enhanced. There is no such notice in this case. In that case Srimati Lalji was found murdered, her ornaments were removed and the appellant (Jagdeo) was convicted under Section 460 and sentenced to 5 years rigorous imprisonment. It was held that if what was alleged against the accused was correct then an offence under Section 302 IPC was made out and in such an event the offence would not come under Section 460 IPC. We quote hereinbelow the relevant portion of the said judgment which reads as under:

“On the facts of this particular case, the provisions of Section 460 are not applicable for another reason. It is not disputed that Section 460, I. P. C. will not apply to the case of a single individual who alone commits lurking house trespass and during such commission causes or attempts to cause death or grievous hurt to any person, and there is very little evidence led about others joining the accused in the commission of this offence.

There may arise a case in which several persons commit lurking house-trespass and someone among them causes or attempts to cause death or grievous hurt. In such a case it cannot be said that any particular person committed those acts and it might be possible, as held in — ‘Mohammada v. Emperor’, AIR 1936 Lah 911 (B), that all of them be liable to conviction under Section 460, I. P. C.

Of the cases referred to, the actual person, who while committing lurking house-trespass also caused or attempted to cause death or grievous hurt, was convicted in — ‘Queen v. Lukhun Doss, (1865) 2 WR CrL. 52 (A)’ and in — ‘Faiz Bakhsh v. Emperor’, 48 Cr.L.J. 269, without any discussion as to whether his case really came within that section or not. In the case reported in — ‘Queen - Empress v. Ismail Khan’, ILR 8 All 649 (D) an observation has been made without any discussion to the effect:

“Sections 459 and 460 provide for a compound offence, the governing incident of which is that either ‘a lurking house-trespass’ or ‘house-breaking’ must have been completed, in order to make a person who accompanies that offence either by causing

A grievous hurt or attempt to cause death or grievous hurt responsible under those sections.”

It was actually decided in that case that the accused had not committed lurking house-trespass or house-breaking and, therefore, their conviction under Sections 459 and 460, I. P. C. could not be maintained.

B The case reported in ‘Chatur v. King Emperor’, 8 All LJ 574 (E) is very apposite to the present case. One person had entered a house, attempted to rob a girl of a ‘hansli’ and stabbed her father to death when he seized the thief. He was convicted by the sessions court of an offence under Section 460, I. P. C. and was sentenced to transportation for life. On appeal his conviction was altered to Section 302, I. P. C., and in the exercise of revisional jurisdiction the sentence of transportation for life was enhanced to a sentence of death. Richards, J., who delivered the judgment - observed while interpreting Section 460, I. P. C.:

D “In our opinion this section was intended to provide for the punishment of persons who are jointly concerned in the committing of the house-trespass or house-breaking altogether irrespective whether they were the persons who caused or attempted to cause death or grievous hurt.”

E This may be interpreted to mean that Section 460 provided for the punishment of the person who actually caused or attempted to cause death or grievous hurt while committing lurking house-trespass or house-breaking. But the observation just following the aforesaid quoted remarks makes it clear that the section would apply to the associates of such actual offender.

F *We cannot now alter the conviction of the appellant to Section 302, I. P. C., and enhance sentence* in the exercise of revisional jurisdiction, in case we come to the conclusion on hearing full arguments that the appellant did murder her in view of the Full Bench decision in — ‘Taj Khan v. Rex’, AIR (1952) All 369 (FB) (F).”

G (emphasis supplied)

H (7) In *re Singaram and Anr.*, AIR (1954) Madras 152, the case was concerning murder and robbery. The accused were charged and tried for offences under Section 302/34 IPC. The trial court convicted them under

Section 460 IPC and, therefore, the State filed an appeal questioning the correctness of acquittal under Section 302/34 IPC. It was held in that case that the trial court had wrongly convicted the accused under Section 460 IPC; that their acquittal by the trial court under Section 302/34 IPC was erroneous and accordingly each of the appellants was sentenced for life imprisonment. The sentence of seven years imposed by the trial court for offence under Section 460 IPC was set aside. However, it is important to note that in the said case appeals were filed by the State and it is in those appeals that the accused were convicted under Section 302/34 IPC and sentenced to life imprisonment. In the present case, there is no such an appeal. In the present case, appeal has been filed before the High Court by Abdul Aziz (appellant herein) and not by the State. Before us appeal has been filed by Abdul Aziz. In the circumstances, the High Court was wrong in convicting Abdul Aziz for an offence under Section 302 IPC when the trial court had convicted him under Section 460 IPC, particularly, in the absence of any appeal from the State.

(8) In the case of *Sohan Singh Kesar Singh v. State of Punjab*, AIR (1964) Punjab 130, Sohan Singh was convicted under Sections 302, 380 and 457 IPC; he was sentenced to death under Section 302 IPC and to rigorous imprisonment for three years under each of the Sections 457 and 380 IPC. Sohan Singh preferred an appeal against his conviction and sentence. One of the arguments advanced on behalf of Sohan Singh was that the offence in question fell within the purview of Section 460 IPC and not under Section 302 IPC. It was argued that while committing the offence of house-breaking by night death of the child was caused and, therefore, the accused could be punished only under Section 460 IPC. It was in the context of this argument that the High Court held as follows:

“Section 460 merely provides for constructive liability of persons committing or concerned in, ‘*inter alia*’ house-breaking by night in the course of which death is caused by one of the offenders and it prescribes enhanced penalty for the joint offenders. To attract this section it matters little as to who actually causes the death, for, everyone jointly concerned in committing the house-breaking is liable to the enhanced penalty under this section if death is caused in the course of the offence, no matter who is really responsible for the death. It does not, as indeed it cannot, be considered to serve as an exception to Section 302, Indian Penal Code. If a person committing house-breaking by night also actually commits murder he must attract the penalty for this latter offence under Section 302 and I find it

A almost impossible to hold that he can escape the punishment provided for murder merely because the murder was committed by him while he was committing the offence of house-breaking, and that he can only be dealt with under Section 460. Neither the language of Section 460 nor the scheme of Indian Penal Code nor logic and common sense would seem to support this contention which I unhesitatingly repel.”

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(9) The above judgment has no application to the point in issue. In that case, Sohan Singh was convicted under Section 302. He was sentenced to death. If a person commits house-breaking by night and also commits murder, his act attracts Section 302 IPC. There is no dispute about the said proposition.

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However, in the present case, the appellant was charged under Sections 302, 460 and 149 IPC. He was not convicted under Section 302 IPC. He was not convicted under Section 302/149 IPC. He was convicted only under Section 460. No appeal was filed by the State for convicting him under Section 302 IPC. No appeal was filed by the State for convicting him under Section 302/149 IPC. The High Court has convicted Abdul Aziz (appellant herein) under

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Section 302/149 IPC in his own appeal by substituting the conviction and sentence. No prior notice for enhancement was issued by the High Court. In our view, this cannot be done. In our view this would amount to travesty of justice. It is only in the impugned judgment that High Court observed that through inadvertence the trial court had failed to invoke Section 302/149 IPC.

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(10) For the aforesaid reasons, we hold that Abdul Aziz (appellant herein) stands convicted under Section 460 IPC and he will serve the sentence of rigorous imprisonment for ten years and pay the fine as ordered by Additional District and Sessions Judge, No.1 (Fast Track) Jaipur City, Jaipur, in Session Case No.49/2001 decided on 9.3.2004.

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(11) Consequently, the sentence of life imprisonment, imposed by the impugned judgment of the High Court, shall stand substituted by the sentence of rigorous imprisonment for ten years and fine of Rs.500/- (in default, three months sentence) as imposed by the trial court vide its judgment dated 9.3.2004 in Session Case No.49/2001.

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(12) Accordingly, the appeal is partly allowed.

R.P.

Appeal partly allowed.