

Jagdeo vs State on 27 July, 1953

Equivalent citations: AIR1954ALL99, AIR 1954 ALLAHABAD 99

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Jagdeo appeals against his conviction under Section 480, I. P. C. A notice was issued to him to show cause why the sentence passed against him be not enhanced.
2. Srimati Lalji was found murdered inside her house at 11 a. m. on 27-4-1949. Her ornaments had been removed. On investigation, Jagdeo appellant was sent up for trial of the offence under Section 460, I. P. C. He was convicted of this offence and sentenced to five years' rigorous imprisonment.
3. The evidence in the case against the appellant was of two kinds: one kind of evidence consisted of his alleged extra-judicial confession to Baij Nath, and the other type of evidence was about the alleged recovery of certain ornaments of the deceased at his instance. In view of the opinion, we have formed during the hearing of the arguments of the learned counsel for the appellant, that the case should be retried, we did not hear him fully on the merits and have consequently formed no opinion about the merits of the case.
4. We are of opinion that the offence made out against the accused, if what is alleged against him be correct and satisfactorily established, would be an offence under Section 302, I. P. C. and not under Section 460, I. P. C., is in these words:

"If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be 'punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'"

It is clear from the provisions of the section that it makes those, who join the person who voluntarily causes or attempts to cause death or grievous hurt while committing lurking house trespass or house-breaking at night, liable to enhanced punishment for their own conduct of simply committing such lurking house-trespass by night or house-breaking by night. The person who actually acts in

that manner will not be liable for that conduct of his under Section 460, I. P. C. but will be liable under other sections making that conduct an offence. His actions are mentioned in the first part of the section as the circumstances in which the persons mentioned in the latter part Will be punishable with enhanced punishment and the expression "every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night" must mean every other person who was jointly concerned with him in committing the lurking house-trespass or house-breaking by night.

A comparison of the provisions of sections 459 and 460, I. P. C. tends to support this interpretation. Section 459, I. P. C., which provides the same punishment as Section 460. I. P. C. does, covers the case of a person who while committing lurking house-trespass or house-breaking causes grievous hurt or attempts to cause death or grievous hurt to any person. It was, therefore, not necessary to provide for punishment of such a person under Section 460 as well. Section 459, I. P. C. did not cover the case of a person who while committing lurking house-trespass or house-breaking caused the death of any person. It was not necessary as the case of such a person will come under either Section 304 or 302, I. P. C. according to the circumstances of the case.

5. Reference may be made to the observations of Gaur in his Penal Law of India, Vol. II. In paragraph 5547 following Section 460 he notes:

"This section defines the constructive liability of the actual offender's associates in a case which is. otherwise. little distinguishable from the last section."

He again notes in paragraph 5555:

"But though this phrase (all persons jointly concerned) is wide, it is not wide enough to include the actual offender, assuming that the is known. In one case this appears to have been taken for granted -- 'Queen v. Lukhun Doss', 2 WR Cr 52 (A), but it is by no means the necessary deduction from the section, which is enacted solely with the object of defining the constructive liability of persons other than the actual offender, whose liability is left to be defined by the general law. For instance a person who voluntarily causes death may be guilty of murder, and in that case the penalty prescribed here would be wholly inadequate to his case."

We have been referred to Section 149, Penal Code, in support of the contention that a person, who actually does lurking house-trespass, and during such commission actually causes the death of any person could be convicted under Section 460, I. P. C. There are two points for distinction: One is that the provision of Section 149 makes every person who is a member of an unlawful assembly at the time of the commission of any particular offence guilty of that offence when that particular offence is committed by any member of that unlawful assembly in certain circumstances. It does not say that every person jointly concerned with that member who actually committed that offence would be liable for that offence. The second point for distinction is that that particular offence is committed by any member of that assembly either in prosecution of the common object of that assembly or is such as the members of that assembly knew to be likely to be committed in

prosecution of that object, and consequently the offence of which each member of the unlawful assembly is made liable is one and the same, while in case of an offender who commits lurking house-trespass and actually causes death the offence made out against him can also be different from the offence which can be made out against the other persons who are jointly concerned in committing lurking house-trespass. There is, therefore, a good reason why the case of the actual offender should not fall under Section 460 but should fall under the particular section fully applicable to his individual conduct.

6. 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.

7. 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.

8. 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 -- '2 WR Cr 52 (A)' and in -- 'Faiz Bakhsh v. Emperor', AIR 1947 Lah 188 (C). 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', 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 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.

9. The case reported in -- 'Chatur v. 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.:

"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."

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, it being "In the present case if Chatur had other comrades committing the house-trespass with him, they could be punished under Section 460." 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).

10. In view of the above, we are of opinion that the case as put in court does not fall under Section 460, I. P. C. and that the appellant should, therefore, be tried for an offence under Section 302, I. P. C. We, therefore, allow the appeal, set aside the conviction of the appellant under Section 460, I. P. C. and send back the case to the court below for the retrial of the appellant for the offences under Section 302, I. P. C. and under Section 457, I. P. C. after framing proper charges. Intimation be sent to the jail authorities that hence-forth the appellant will be treated as an undertrial prisoner till further orders.

11. We discharge the notice issued for the enhancement of the sentence.