M/S. Formina Sebastian Azardeo And ... vs State Of Goa, Daman & Diu on 3 October, 1991

Equivalent citations: AIR1992SC133, 1992CRILJ107, 1992SUPP(2)SCC218, AIR 1992 SUPREME COURT 133, 1991 AIR SCW 2826, 1992 (2) SCC(SUPP) 218, 1992 APLJ(CRI) 289, 1992 SCC(CRI) 671, (1993) 2 MAHLR 652, (1992) 2 APLJ 7

Bench: S.R. Pandian, M. Fathima Beevi

JUDGMENT

1. These two appeals are preferred by the above three appellants who were arrayed as accused Nos. 1 to 3 before the Trial Court; in that Appeal No. 577 of 1979 is preferred by the appellants 1 and 2 and Appeal No. 578 of 1979 is preferred by the third appellant (third accused). These two appeals arise out of the common judgment in Criminal Appeals Nos. 1 and 2 of 1978 rendered by the Addl. Judicial Commissioner of Goa, Daman and Diu at Panaji where-under these appellants stand convicted under Section 302 read with Section 34 and Section 342 read with Section 34, I.P.C. and sentenced to undergo imprisonment for life for the conviction under Section 302 read with 34, I.P.C. From the judgment, it appears that no separate sentence was awarded for the conviction under Section 342 read with 34, I.P.C.

2. All these appellants took their trial on the accusation that on 18-2-77 between 5.00 and 8.00 p.m. they in furtherance of their common intention wrongfully confined Orlando D'Souza at Francisco Costa Waddo at Utorda by tying him to an electric pole with ropes and thereafter started beating, branding and applying pressure to his legs with a danda, iron rod, wooden rib and firewood and caused his death in order to prevent the deceased from spreading of scandalous information concerning the alleged illegitimate intimacy between the first appellant and the second appellant.

3. The facts of the case are well set out in extenso both in judgments of the Trial Court and the High Court and hence we feel that it is not necessary to reproduce the same except some salient features which will be necessary for the disposal of these two appeals.

4. The first appellant is the wife of the third appellant and the second appellant is the nephew of the first and third appellants, being the son of the sister of the third appellant. According to the prosecution, the second appellant developed illicit intimacy with the first appellant. The deceased who was in the prime of his youth aged about 23 years was making a wide publicity about the alleged intimacy of appellant No. 1 with appellant No. 2. On account of this the appellants, it is stated, have committed this offence. According to the prosecution that on the fateful day - namely on 18-2-77 between 5.00 p.m. to 8.00 p.m. the appellants caught hold of the deceased, tied him to an electric pole with a rope and beat him as a result of which the deceased Orlando lost his life. To substantiate this charge against the appellants, the prosecution has examined PWs 4 to 9, 10, 14, 15,

16, 17 and 19 as eye-witnesses of whom PWs 9, 15 and 16 who were in the nearby liquor bar claim to have seen the deceased having already been tied to the electric pole. The High Court after elaborately examining the entire materials was disinclined to accept the evidence of PWs 4 to 8, 10, 14, 17 and 19 holding thus:

> All these witnesses who claim to have seen the incident both inside and outside the house, did not make any attempt to inform the police or take any effective steps to get Orlando released. In these circumstances and for the reasons already indicated, it is difficult to place reliance on the evidence of PWs 4 to 8, 10, 14, 17 and 19.

5. However, coming to the testimony of the other three witnesses, namely, PWs 9, 15 and 16, the High Court held that their evidence could be accepted and acted upon and finally held that since it was only these three appellants who had tied the deceased to the electric pole, they must be held to be liable to be punished under Section 302 read with Section 34, I.P.C. and accordingly convicted and sentenced all the three as above mentioned. Hence these two appeals.

6. Even in the event of believing the testimony of these witnesses, the question would be whether all or any of them participated in the occurrence and if so, what is the nature of the offence such appellants have committed.

7. The High Court in paragraph 17 of its judgment has culled out the incriminating circumstances tending to prove the guilt of the appellants 1 and 2 but not of appellant No. 3.

8. We have also gone through the evidence and the entire circumstances and the judgments of both the Courts very carefully and we feel that the evidence adduced against the third appellant is insufficient to sustain the conviction and as such the third appellant is entitled for an acquittal. Now coming to the case of the first and the second appellants we have to examine the nature of the offence under which they will be liable to be punished. PW 11, the medical officer, who conducted the autopsy of the dead body of the deceased found as many as 55 injuries on the body of the deceased many of which were abrasions and bruises. The Medical Officer had opined that out of the injuries on the deceased, injuries Nos. 11, 12, 13, 14, 15 and 16 were responsible for causing the death of the deceased.

9. It is not the case of the prosecution that either of the appellants 1 and 2 expressed his intention by word or gesture to put an end to the life of the deceased or any of them was armed with deadly weapons. The circumstances of the case clearly indicate that these two appellants evidently in order to teach a lesson to the deceased Orlando for spreading a scandalous information in that locality concerning the alleged amorous intimacy between the first and the second appellants had resorted to this kind of illegal action. But unfortunately the deceased who was tied to the electric pole died due to the injuries sustained by him. In Exh. P2 which is the inquest panchnama, it is stated that the deceased was smelling of liquor. In Exh. P15, the memo of post-mortem examination, it is stated as follows:

> About two ounces of food material containing meat found in stomach in partly digested state. In the contents of stomach (there is?) smell of alcohol.

10. The above entries in Exhs. P 2 and 15 indicate that at the time when the deceased was tied to the electric pole he was in a drunken mood. Only from the totality of the evidence to the effect that PWs 9, 15 and 16 have seen the deceased having been kept tied to the pole, the High Court has inferred that the appellants were responsible for the death of the deceased. When the entire evidence is carefully scanned, we are of the view that in the absence of any definite evidence attributing specific overt act to any of the appellants in the backdrop of the circumstances appearing in the case, it would not be safe to draw such an allegation that the appellants had intended to cause the death of the deceased and did commit the offence of murder. But on the other hand, the circumstances would indicate that the appellants evidently wanted to teach a lesson to the deceased for having spread the scandalous information by tying him to the pole and assaulting him. Hence, the offence would be one punishable under Section 326, I.P.C. in that the appellants 1 and 2 intended to cause grievous injury to the deceased. The nature of the injuries found on the deceased, in our opinion, attract the definition falling under Clause (viii) of Section 320, I.P.C. establishing that the injuries were such to endanger the human life.

11. In the result, we set aside the conviction of the appellants 1 and 2 under Section 302, I.P.C. read with Section 34, I.P.C. and the sentence of life imprisonment imposed therefor instead convict them under Section 326 read with 34, I.P.C. and sentence each of them to undergo rigorous imprisonment for a period of five years. The conviction under Section 342 read with 34 is retained to which conviction, the Court below has not awarded any separate sentence.

12. The conviction and the sentence of the third appellant, namely, Sebastian Azardeo under Section 302 read with 34 and 342 read with 34, I.P.C. are set aside and he is acquitted on both the counts.

Accordingly, Criminal Appeal No. 578 of 1979 is allowed and Cri. Appeal No. 577 of 1979 is partly allowed as indicated above.