

CASE NO.:
Appeal (crl.) 817 of 2002

PETITIONER:
State of Rajasthan

RESPONDENT:
Nana & Ors

DATE OF JUDGMENT: 02/08/2007

BENCH:
Dr. ARIJIT PASAYAT & P.P.NAOLEKAR

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. State of Rajasthan is in appeal against the judgment of the Division Bench of the Rajasthan High Court at Jodhpur directing acquittal of respondents Sawa and Bada while altering the conviction of accused respondent Nana from Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') read with Section 34 IPC to Section 304 Part II read with Section 34 IPC. The learned Additional Sessions Judge No.1, Udaipur, in Sessions case No.50 of 1995 on convicting each of the respondents for offence punishable under Section 302 IPC read with Section 34 IPC sentenced to undergo imprisonment for life with a fine of Rs.100/- each. Respondent Sawa was also convicted for offence punishable under Section 324 IPC. For the first offence he was sentenced to undergo imprisonment for life and to fine of Rs.100/-, for the latter offence accused respondent Sawa was sentenced to undergo imprisonment for one year. Two other co-accused were convicted under Section 323 IPC and were released on probation.

2. Background facts in a nutshell are as follows:

On the intervening night of 12th and 13th May, 1995 at about half past 12 the accused respondents and co-accused Sundara and Reshma were roaming in village fair where they met Deeta (hereinafter referred to as the 'deceased'), Gena (PW-2), Narsa (PW-3), Uda (PW-5) and Soma (PW-9). There were other 10-12 persons alongwith the accused respondents. Sawa and Nana were armed with knives and the remaining were having stones in their hands. The accused persons came from the side of Devalchora. As soon as they were spotted by the complainant party the latter ran towards Merpur road, upon which Bada, Sundara and Reshma threw stones towards them causing injuries to Gena and Soma felling them down. Deceased and Narsa PW-3 were caught by accused persons. Accused respondents Sawa and Nana inflicted knife injuries on the back of Deeta causing bleeding. In the meantime Narsa (PW-3) fled towards the fair and was chased and injured by Bada and Sundara causing knife injuries by which he fell down bleeding. In the melee Deeta died and Narsa fell unconscious.

A First Information Report (in short the 'FIR') to the above effect was lodged at 12.45 A.M. on 13.5.1995 by Dhanna (PW-1). After usual investigation five persons were charged and challaned in the court below for offences punishable under

Sections 302/34, 302/149, 324/149, 325/149, 323/149 IPC.

Upon pleading not guilty and claiming trial the prosecution examined 18 witnesses and exhibited 28 documents. In statements given under Section 313 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') accused persons denied all the incriminating evidence appearing against them and pleaded false implication. No defence evidence was produced. Thereafter the learned trial court convicted and sentenced the accused respondents as stated above.

3. The trial court placing reliance on the injured witnesses PW 1 to 3 and 9 recorded conviction and sentence as noted above. Accused respondent preferred appeal before the High Court. The High Court was of the view held, accepting the plea of the respondents that in the FIR and the statement made during investigation, PW1 had stated that accused Nana and Sawa had assaulted the deceased. But during trial he stated that the attack was by Nana and Bada. To similar effect was the evidence of PWs 2 and 3.

4. Above being the position the prosecution version was pleaded to be vulnerable. The High Court accepted this plea, directed acquittal of all the accused who were in custody but so far as Nana is concerned, his conviction and sentence under Section 302 IPC read with Section 34 IPC was set aside instead he was convicted under Section 304 Part II IPC read with Section 34 IPC.

5. In support of the appeal, learned counsel for the appellant-State submitted that the High Court has clearly overlooked the fact that all the eye witnesses PWs. 2, 3 & 9 in addition to PW 1 have stated that attack on the back of the deceased was by Nana and Bada. The High Court should not have directed his acquittal. It is further submitted that there was no infirmity so far as the conviction under Section 302 read with Section 34 IPC is concerned, as case under Section 302 IPC was clearly made out.

6. There is no appearance of respondent in spite of service of notice.

7. We find that the evidence of the eye witnesses PWs 2, 3 & 9 need to be accepted so far as assault by accused Bada is concerned. In spite of incisive cross examination all these witnesses have in clear terms described the role of Bada and accepted that he had assaulted the deceased. The High Court was right that in the FIR and during investigation PW 1 had stated that Nana and Sawa assaulted the deceased. The statement made in the FIR is a factor which is relevant so far as the statement of the maker of the FIR is concerned. It does not have any effect on the credibility of evidence of the other witnesses who have as noted above at all stages have categorically stated about the role played by the Bada. Therefore merely because there was some difference in the version of PW 1 so far as his statement in the court vis-a-vis Statement in the FIR is concerned that does not in any way affect the credible and cogent offence of PWs 2 and 3. Therefore, the High Court was not justified in directing acquittal of Bada. But so far as the role of Sawa is concerned, none of the witnesses had spoken anything about the role played by him. That being so, his acquittal is in order. The High Court has indicated detailed reasons as to why according to it, offence was one punishable under Section 304 Part II

IPC. We find no infirmity in the reasons indicated to warrant interference.

8. The appeal is partly allowed to the extent that the acquittal of accused Bada is set aside and he is convicted for offence punishable under Section 304 Part II IPC read with Section 34 as in the case of Nana. In the case of accused Nana his custody was about six years. Therefore, High Court had directed his release. The custodial sentence shall be seven years in case of accused Bada.

9. The appeal so far as respondent Sawa is concerned, stands dismissed.

10 The appeal is allowed to the aforesaid extent.