APPELLATE CRIMINAL

Before Mr. Justice Ziaul Hasan

1935
May 30

SITAL (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Indian Penal Code (Act XLV of 1860), sections 109, 114, 322 and 325—"Voluntarily causing grievous hurt" in section 325, I. P. C., meaning of—Accused thrusting lathi *into rectum of a person and causing grievous hurt—Presumption of intention or knowledge of likelihood of causing grievous hurt—Sections 109 and 114, I. P. C., applicability of.*

A person is said "voluntarily to cause grievous hurt" when not only is the hurt which is caused grievous but also he intends to cause or knows himself likely to cause grievous hurt. A person who forcibly thrusts a *lathi* into the rectum of another must at least know that he is likely thereby to cause grievous hurt to the victim as the rectum is a very tender part of the human body, even if it be supposed for a moment that he did not thereby intend to cause grievous hurt, and if grievous hurt is caused he is guilty of voluntarily causing grievous hurt.

While section 109 of the Indian Penal Code is a section dealing generally with abetment, section 114 applies to those cases only in which not only is the abettor present at the time of the commission of the offence but the abetment has been completed prior to and independently of his presence. The real test to see whether or not section 114 is applicable lies in the words of the section "who if absent would be liable to be punished as an abettor." These words clearly show that abetment to come under section 114 must be one which is prior to the commission of the offence and complete by itself and not abetment which is done immediately before or at the time of the commission of the offence. Therefore where there is no evidence that the accused either instigated his son or entered into a conspiracy with him beforehand for the purpose of a *lathi* being thrust into the complainant's rectum though undoubtedly he did abet his son's offence by intentionally aiding him at the time of the commission of the offence, his act comes under section 109 and not under section 114 of the

*Criminal Appeal No. 52 of 1935, against the order of S. Qadir Hasan, Assistant Sessions Judge of Bara Banki, dated the 28th of November, 1934.

Indian Penal Code. *Barendra Kumar Ghosh* v. *King-Emperor* (1) referred to.

Mr. *B. K. Dhaon*, for the appellant.

The Assistant Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

ZIAUL HASAN, J.:—This is an appeal by one Sital Brahman who has been convicted by the learned Assistant Sessions Judge of Bara Banki under section 325/114 of the Indian Penal Code and sentenced to rigorous imprisonment for five years and a fine of Rs.50 in default of payment of which he is to undergo further rigorous imprisonment for six months.

It is said that on the 19th of July, 1934, while Ram Lal, complainant, was weeding his field, the appellant and his son Fatteh came armed with *lathis* and on account of previous enmity attacked the complainant and that when he fell down on receiving the *lathi* blows dealt him, the appellant held up the complainant's legs and Fatteh thrust a *lathi* into his rectum causing profuse bleeding. A report of the occurence was made by Ram Lal the same day and he was sent to the Daryabad hospital where he was medically examined and was found to have nine injuries. Eight of these were simple but the ninth was a contused wound $\frac{3}{4}'' \times \frac{1}{4}'' \times \frac{1}{4}''$ at the opening of the anus with bleeding from the rectum and distended abdomen and bladder. The injury was, in the medical officer's opinion, grievous and dangerous and was caused by a blunt weapon. Ram Lal remained in the Daryabad hospital up to the 10th of August, 1934, but as the inner injuries could not be examined there for want of the necessary apparatus, he was sent the same day to the Sadr hospital at Bara Banki. There also he was medically examined and the report of the Civil Surgeon (exhibit 7) shows that Ram Lal had a very grievous injury in the rectum and the urine used to come out of the rectum instead of the natural passage. Ram Lal was discharged from hospital as cured on the 13th of September, 1934.

(1) (1924) L.R., 52 I. A., 40.

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On Ram Lal's report, a case under section 323 of the Indian Penal Code had been registered by the police but after receiving the report of the Medical Officer of Daryabad, the Sub-Inspector started investigation and with the permission of the Superintendent of Police challaned the appellant under section 307 of the Indian Penal Code. Fatteh is said to be absconding.

The appellant denied the charge and stated that the case against him was due to the enmity of the Rai Sahib of Daryabad towards him. He however produced no evidence in his defence.

In appeal it was frankly conceded before me that Ram Lal was beaten by the appellant and his son Fatteh but it was urged that the story about the appellant abetting his son Fatteh in causing an injury to the rectum of the complainant was not true. I cannot, however, accept this contention. Ram Lal's daughter-in-law, Musammat Parbhudei, was working in the field along with Ram Lal on the day of the occurrence. She as well as Patti P. W. 4 and Bhabhuti P. W. 5 swear to having seen the incident in question. I see no reason to disbelieve their evidence which is fully corroborated by the evidence of two medical men who examined Ram Lal. It was said that Patti and Bhabhuti should be disbelieved as they cannot say on what part of Ram Lal's body the first *lathi* blow was given or whether the appellant or his son began the assault. These details are however too minor to be remembered by the witnesses at a time of excitement and they do not at all affect the truth of their evidence.

It was argued that having regard to the provisions of section 322 of the Indian Penal Code Fatteh or the appellant cannot be said to have voluntarily caused grievous hurt to Ram Lal, but I cannot accept this argument also. No doubt a person is said "voluntarily to cause grievous hurt" when not only is the hurt which is caused grievous but also he intends to cause or knows himself likely to cause grievous hurt. A person who forcibly thrusts a

lathi into the rectum of another must at least know that he is likely thereby to cause grievous hurt to the victim as the rectum is a very tender part of the human body, even if it be supposed for a moment that he did not thereby intend to cause grievous hurt.

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Next, it was urged that Bhabhuti and Patti's statements that the appellant held up Ram Lal's legs to enable Fatteh to thrust a *lathi* into his rectum was not corroborated by Musammat Parbhudei who only says that Sital opened Ram Lal's loin cloth. Musammat Parbhudei's statement does not necessarily rebut the statement of Bhabhuti and Patti. But even if it be granted that all that the appellant did was to open Ram Lal's loin cloth, he was nevertheless guilty of abetment of Fatteh Singh's act, as he by his act did facilitate Fatteh Singh's act.

Lastly, it was urged that the sentence of five years rigorous imprisonment was too severe. The offence committed on Ram Lal was undoubtedly very inhuman and heinous but I think a sentence of three years together with the fine imposed by the Court below will meet the requirements of the case.

I may however observe that the learned Assistant Sessions Judge was wrong in applying section 114 of the Indian Penal Code to the appellant. It was section 109 and not 114 which was applicable to the case. Not that there is any difference betwen these two sections about the extent of punishment to be awarded but every case must be dealt with under the appropriate section of the Indian Penal Code.

As there appears to be some misconception as to the proper applicability of section 114, I consider it necessary to say a few words on the point.

The mistake lies in the idea that section 114 is applicable to every case in which the abettor is present at the commission of the offence abetted. This idea is quite erroneous and while section 109 of the Indian Penal Code is a section dealing generally with abetment, section

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114 applies to those cases only in which not only is the abettor present at the time of the commission of the offence but the abetment has been completed prior to and independently of his presence. The real test to see whether or not section 114 is applicable, lies in the words of the section "who if absent would be liable to be punished as an abettor." Section 107 of the Indian Penal Code shows that abetment is of three kinds, namely,

(1) Abetment by instigation;

(2) Abetment by conspiracy; and

(3) Abetment by intentionally aiding by any act or illegal omission the commission of the offence.

Every abetment must of course precede the commission of the offence abetted. There is however a difference between an abetment which is done at the time the principal offence is committed or, so to say, on the spur of the moment and one that is done prior to and independently of the commission of the offence. If abetment is divided into these two kinds it follows that while abetment by instigation and abetment by intentionally aiding the offence can both be done, either immediately before the commission of the offence or prior to it, abetment by conspiracy can hardly be committed at the time of the commission of the offence. In other words one can abet an offence by instigation either at the time of the commission of the offence or an hour, a day, a week or a month before the commission. Similarly abetment by aiding can precede the commission of the offence immediately or by an hour, a day, a week and so on. Abetment by conspiracy however presupposes a deliberate and previous act on the part of the abettor.

Now, the words "who if absent would be liable to be punished as an abettor", clearly show that abetment to come under section 114 must be one which is prior to the commission of the offence and complete by itself and not abetment which is done immediately before or at the time of the commission of the offence, for in the latter case the abettor would not have committed the

abetment if he had not been present and would not therefore have been liable to punishment as an abettor.

The following passages from Ratan Lal's Law of Crimes support the view expressed above—

(1) To bring a person within this section (section 114) the abetment must be complete apart from the presence of the abettor.

(2) It is necessary first to make out the circumstances which constitute abetment so that if absent he would have been liable to be punished as an abettor and then to show that he was present when the offence was committed. Previous concert is an essential factor in the constitution of the offence of abetment under this section.

(3) Where no conspiracy, instigation, or act or illegal omission, is proved and the abetment consists only of participation in the actual commission of the offence, section 109 is the section applicable.

I may also quote the following remark of their Lordships of the Judicial Committee in the case of *Barendra Kumar Ghosh* v. *King Emperor* (1)—

"As to section 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition."

In the present case there is no evidence that the appellant either instigated his son or entered into a conspiracy with him beforehand for the purpose of a *lathi* being thrust into the complainant's rectum though undoubtedly he did abet his son's offence by intentionally aiding him at the time of the commission of the offence. From what has been said above it follows therefore that his act came under section 109 and not under section 114 of the Indian Penal Code.

The appeal is partly allowed and the appellant's conviction changed from under section 325/114 of the Indian

(1) (1924) L.R., 52 I.A., 40(52).

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Penal Code to section 325/109 of the Indian Penal Code and the sentence reduced to three years' rigorous imprisonment and a fine of Rs.50 in default of payment of which he shall undergo further rigorous imprisonment for six months.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

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ANANT RAM (DEFENDANT-APPELLANT) *v.* SARJU PRASAD (PLAINTIFF-RESPONDENT)*

Specific Relief Act (I of 1877), sections 14, 15 and 19—Specific performance of contract—Contract of sale—Party found entitled to sell half only—Specific performance, whether can be allowed—Terms on which specific performance can be allowed—Compensation for part unperformed whether can be allowed.

Where a person claims a decree for specific performance of part of the contract and the portion of the contract which must be left unperformed is equal to the portion in respect of which specific performance is claimed, it is impossible to say that the part unperformed is small and section 14 cannot apply, but the case is governed by section 15 of the Specific Relief Act. He can get a decree for specific performance of only so much of the contract as can be performed on payment of the full amount agreed upon provided he relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Section 19 of the Act is to be read subject to the provisions of sections 14 and 15 when the case is one of specific performance of part of the contract. *Graham* v. *Krishna Chunder Dey* (1), referred to.

Mr. *Mahabir Prasad Srivastava,* for the appellant.

Mr. *Ram Bharose Lal,* for the respondent.

SRIVASTAVA, J.:—This appeal arises out of a suit for specific performance of a contract of sale. Both the lower

*Second Civil Appeal No. 342 of 1933, against the decree of S. Khurshed Husain, First Subordinate Judge of Kheri, dated the 31st of August, 1933, modifying the decree of M. Mohammad Tufail Ahmad, Additional Munsif of Kheri, dated the 16th of April, 1932.

(1) (1924) L.R., 52 I.A., 90.