[2023/RJJD/012555]

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Revision Petition No. 128/2023

1. Samane Khan

Versus

1. State Of Rajasthan, Through Pp

----Respondents

For Petitioner(s)	:	Mr.Siddharth Karwarsara
For Respondent(s)	:	Mr. Gaurav Singh, AGA-cum-PP Mr. Dhirendra Singh,Sr. Advocate assisted by Ms. Priyanka Borana

HON'BLE MR. JUSTICE FARJAND ALI

Order

ORDER RESERVED ON ::: 27/04/2023

ORDER PRONOUNCED ON ::: 10/*05*/2023

BY THE COURT:-

1. The instant Criminal Revision Petition has been filed by the accused petitioners challenging the legality, correctness and propriety of the order dated 23.11.2022 passed by the learned Additional Sessions Judge No.1, Barmer in Sessions Case No.142/2022, whereby the learned trial Court has directed framing of charges against the petitioners for the offence under Sections 147, 148, 341, 323, 325, 427 & 307 r.w. Section 149 of the IPC.

2. Bereft of elaborated details, the brief facts which are necessary for the disposal of the instant revision petition are that on 01.07.2022, at the instance of the complainant Roje Khan an FIR No.150/2022 was lodged at the police station Shiv, District Barmer alleging therein that on the day of incident, in the morning at 6:00 a.m. when he went to drop his brothers Fatan Khan and Ishan Khan at the Sarhad Gunga bus stand, an assault was made over them by the accused persons who were there in a lurking position. As per the FIR, the petitioners, who were eight in numbers, were yielded with iron rod and ropes. They brutally beaten his brothers Fatan Khan and Ishan Khan and broke down the wind screen of the taxi. The victims were evacuated to Shiv Hospital wherefrom they were referred to Govt. Hospital, Barmer. It was alleged that the said assault was made by the accused-petitioners with an intent to kill his brothers. The accused persons were arrested and after usual investigation, charge sheet came to be submitted against them for the offences mentioned above in the court concerned. After taking cognizance of the offences enumerated, the matter was committed to the Court of learned Additional Sessions Judge No.1, Barmer (hereinafter referred to as 'the learned trial Court') for further

proceedings. Vide impugned order dated 23.11.2022, the learned trial Court directed to frame charges against the petitioners under Sections 147, 148, 341, 323, 325, 427, 307 r.w. Section 149 of the IPC. The said order is under assail before this Court by way of filing the instant revision petition.

3. Shri Siddharth Karwarsara, learned counsel appearing for the petitioners would submit that neither the circumstances of the case nor the injuries allegedly sustained by the victims bring the matter within the ambit and scope of Section 307 of the IPC and yet framing of the charge for the above offence was not in accordance of law, therefore, the same deserves to be quashed and set aside.

4. Per contra, learned Public Prosecutor and Shri Dhirendra Singh, learned Senior Counsel assisted by Ms.Priyanka Borana appearing for the complainant vehemently opposed the submissions made by the learned counsel for the petitioners.

5. Heard learned counsel for the petitioners, learned Public Prosecutor as well as learned counsel for the respondent-complainant. Perused the material available on record.

6. After careful scanning of the material available on record, it is observed by this Court that it is an admitted fact situation that there was no previous animosity between the parties though, there may have some discord between them but the same was not so serious in nature for that the accused-petitioners would think to commit murder of the victims. From perusal of the circumstances of the case, it can be presumed at the best that the petitioners wanted to hurt the victims or to chastise them or to harm them physically or

frighten them but from no stretch of imagination, it can be inferred that the intent of the accused-petitioners was to kill the victims and for that purpose they made an attempt upon them.

7. The Penal law has defined and categorized different acts of the accused with distinct quantum of punishment. Voluntarily causing simple hurt; causing voluntarily simple hurt by using a dangerous weapon or means; voluntarily causing grievous hurt; which has further been clarified by a different provision under Section 326 of the IPC with the definition of voluntarily causing grievous hurt by a dangerous weapon and means. Causing or receiving injury is not an integral part of constituting an offence under the first Clause of Section 307 of the IPC which reads as under:-

> *"Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;"*

8. The plain reading of the first limb of Section 307 of the IPC makes it abundantly clear that receiving injury in the course of attempt to kill the victim, is not a condition precedent in this clause. The second Clause of this Section begins with the word which are reproduced as under:-

> *"if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned"*.

9. The main difference between the first and second Clause is with regard to quantum of punishment only, which is categorized

as "*if in the course of making an attempt to murder, any injury is received by the victim then, the punishment would be graver than to the first clause*". Here, it is also pertinent to mention that no particular kind and nature of injury has been described even in the second limb of Section 307 IPC. It may be a simple or grievous or life endangering injury, it matters not. The only fact would be needed for the second part of Section 307 IPC is that in the course of attempt to kill, an injury is received by the victim.

10. Having element of an intent to bring the matter within the ambit of Section 307 of the IPC is a condition precedent. Intention is the state of mind of an offender and there could be no physical evidence which can be produced as a thing, object or fact to establish the same in a concrete manner. It has to be inferred from the circumjacent circumstances of the case and the evidence available on record. Intention can be adduced from the act itself as well as from consequences of the fact. Some of the prominent aspects that may be taken into consideration to draw an inference regarding the mental state of the accused are as under:-

(i) the number of injuries;

(ii) the nature of injuries received by the victim;

(iii) the kind of weapon used by the accused for inflicting injury;

(iv) the part of body which the accused chosen to inflict the injury;

(v) the other surrounding circumstances like time and place of incident whether it was crime place belonged to the accused or it belonged to the victim or a random public place;

(vi) previous animosity between the accused and victim which must be of such a degree which would indicate itself strong reason or motive of the accused so as to show the intent to cause death of the victim. It should not be just a discord acrimony or bitter relationship or strife of an ordinary nature or of common petulance.

(vii) the position of the accused and the victim at the place of crime; if the accused is in dominating position or rather more in number than to the victim; the victim is in helpless or hapless condition; not hopeful of being rescued or getting assistance from anyone and still if the accused does not take undue advantage of his position by not inflicting more injuries or by not using much force upon the victim, is a strong circumstance to draw an inference regarding the criminal intent of the accused. Not taking undue advantage of his dominating position is a significant sign to show the intent.

11. There may be some other factors which may be taken into consideration for the purpose of drawing an inference regarding intent of the accused so as to know whether the accused wanted to kill/murder the victim or he only wanted to harm and cause some simple or grievous injuries to the victim.

12. Though, a straight jacket formula cannot be made as determinable factor and the above mentioned factors are illustrative not exhaustive.

13. While examining the instant case, in light of the discussion made herein above, it would emanate from the record that the accused were eight in numbers and all were allegedly armed with

iron rod and ropes. The victims Ishan Khan, Fatan Khan and Yusuf Khan were bashed up by the accused.

14. A perusal of the injury report of victim No.1 Ishan Khan revealing that he received one injury on his right forearm with no superficial appearances, therefore, the nature of injury kept reserved. The injury No.2 measuring 3 cm X 1 cm was found on his head. Both the injuries were caused by blunt object. The report was prepared on 01.07.2022 by the Medical Officer. The nature of both the injuries were kept reserved until radiological examination. On the very same day, the radiological report/X-ray report was prepared by the radiologist, as per which, the injury on forearm was found to be grievous because of bony injury on radius or ulna bone. After radiological examination, The injury No.2 was not found to be a bony injury thus, the head injury was opined to be simple in nature.

15. The victim Fatan Khan received two injuries; one on his head and another on his forearm. The head injury was opined to be simple in nature because as per X-ray plate, no bony injury was noticed. The injury on hand was found to be grievous in nature because of fracture of radius and ulna bone. Another victim Yusuf Khan received a negligible injury which was simple in nature and was caused on his index finger.

16. It is noteworthy that the radiological examination got done on the very same day i.e. 01.07.2022 and the doctors have given opinion over this.

17. Thus, looking to the determinable factors mentioned in the preceding paras, if the case is examined further, it is revealing that the accused persons were eight in numbers and all were allegedly having iron rod in their hands still they did not opt or chose to inflict more injuries to the victim. No repetition of injuries was made by them even it can be assumed that all eight accused persons did not participated in causing injuries to the victims as the total injuries caused to victims are four in numbers i.e. two to Fatan Khan and two to Ishan Khan and one simple hurt to Yunus. Nobody was there to restrict or restrain the assailants to apply more force or to inflict more injuries. Thus, a safe inference can easily be drawn that the accused persons were not having any intent to murder the victims rather the assault was only made by them for causing some hurt to the victims only.

18. Now, coming to the next point regarding the opinion subsequently given by the Medical Officer. It is notable that the incident took place on 01.07.2022, both the victims were examined on the very same day. Their radiological examination got done on the very same day (particulars of which have been mentioned in the last paragraph). The opinion regarding nature of injuries had been given by the Medical Officer and radiologist on 01.07.2022 then there was no occasion for the Investigating Officer to ask for further opinion of the Medical Officer on 07.07.2022 by sending a letter to the concerned so as to know whether the injuries were dangerous to life or not.

19. This Court would show anguish upon the fact that as to what were the compelling circumstances which prompted the

Investigating Officer to ask the doctor again after seven days of the incident to know as to whether the injuries were dangerous to life or not when the opinion in this regard had already been obtained from the said Medical Officer on 01.07.2022.

20. To the utter dismay, neither any complaint was made by the victims nor any document regarding their health was shown but the Medical Officer without examining the physical condition of the victim, vide its response dated 07.07.2022 had mentioned that "*head injury of Fatan Khan might be life threatening, if not treated on time as active bleeding was present"*.

21. Admittedly, it is shocking that when after examination of the victim by the Medical Officer as well as by the radiologist, an opinion regarding the nature and number of injuries had been obtained on 01.07.2022 then, how the same Medical Officer after seven days of the incident that too, without examining the victim or without considering further details regarding victim's health record can give a second opinion contrary to the first. Be that as it may. The opinion is not firm in nature, which ought to be because it is called an opinion of Expert.

22. Section 45 of the Indian Evidence Act envisages regarding opinion of the experts as per which When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions]are relevant facts. Such persons are called experts. It

is expected from an expert that his opinion must be firm and should not be vague, bald or evasive or dependent upon the contingencies. The injuries should be opined to be simple or grievous in nature. The phrase used by the doctor that the "*injuries might be life threatening if not treated on time*" is not an opinion given by an expert doctor serving in Community Health Center. Such type of opinion can be given by any rustic villager or an illiterate person. Why the opinion is sought from the doctor, if can't give a definite opinion. There is no opinion on record that the said injury was sufficient in ordinary course of nature to cause death. The crux of the provision contained under Section 45 of the Indian Evidence Act is that whenever a Court of law that feels it should seek an opinion on the aforementioned point, then it is expected that it would seek opinion from a person, who is specially skilled in such law, science or art etc. It means that ultimately, the opinion of the expert is sought only for the assistance of the Court and thus, it can be said that the Court is the expert of the experts. Whenever, an opinion is sought regarding the nature of injuries; it must be given by a specifically skilled person so as to bring him in the definition of "expert" on that particular point. It must not be fallacious or fallible as the same may instead of assisting the Court, mislead or confuse the Court. Thus in my view, the opinion should be firm and definite and only in that situation the same is admissible in evidence under Section 45 of the Evidence Act. The vague, bald, probable, infirm or uncertain opinion is not an opinion of an expert, therefore, the second opinion given by the doctor dated 07.07.2022 is in no manner can be taken as a report submitted by an expert rather a

cloud of doubt arises as to what was the occasion for the Investigating Officer to seek or for the doctor to give the opinion without examining the victim injured or without examining his medical documents.

23. In my firm and humble view, the second report dated 07.07.2022 prepared by the Medical Officer, CHC Shiv, Barmer does not come within the definition of an expert report and which do not help the Court of law to reach at a just and legitimate conclusion.

24. As an upshot of the discussion made herein above, suffice it would be to say that viewing from any angle, there are no reasonable grounds to presume that the accused-petitioners should be charged for the offence under Section 307 of the IPC and thus they deserves to be discharged from that offence.

25. Accordingly, the revision petition is allowed in part. The order dated 23.11.2022 passed by the learned Additional Sessions Judge No.1, Barmer in Sessions Case No.142/2022 is hereby quashed and set aside to the extent of framing of charge under Section 307 of the IPC against the accused-petitioners. The charge regarding the offences punishable under Sections 147, 148, 341. 323, 325 and 427 of the IPC read with Section 149 of the IPC are maintained as it is. Since the maintained charges are exclusively triable by the Court of Magistrate, therefore, it is deemed appropriate to transfer the case for conducting trial to the Court of Chief Judicial Magistrate, Barmer. The accused-petitioners are directed to appear before the learned Chief Judicial Magistrate, Barmer on 31.05.2023 whereupon

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the learned Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report.

26. The revision petition is partly allowed in above terms. The Stay petition and all pending applications, if any, are disposed of.

(FARJAND ALI),J

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