MADAN RAJ BHANDARI

*v.*

STATE OF RAJASTHAN

*July* 29, 1969

[S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.]

*Criminal trial—Accused charged with abetment—Principal offender acquitted—Accused convicted of having abetted another person—No such charge—Legality of conviction.*

The appellant was charged with having abetted one R in causing miscarriage to a woman who died in the attempt. R was acquitted but the appellant was convicted of the offence of abetting the deceased woman in the commission of the offence. The High Court confirmed the conviction.

In appeal to this Court,

HELD : The facts of the present case fell within the rule that a charge of abetment fails *ordinarily* when the substantive offence is not established against the principal offender. The High Court erred in holding that the rule laid down in *Gallu Sah* v. *The State of Bihar*, [1959] S.C.R. 861, applied to the facts of the case. That was an exceptional case. [693 B—D]

*Faguna Kanta Nath* v. *State of Assam*, [1959] Supp. 2 S.C.R. 1, followed.

*Umadasi Dasi* v. *Emperor*, I.L.R. 52 Cal. 112, approved.

Further, the appellant cross-examined the prosecution witnesses only to show that he had nothing to do with his co-accused R, as he was not aware of the fact that he would be required to show that he did not in any manner abet the deceased. Therefore, he was prejudiced by the absence of the charge of abetting the deceased woman and hence, was entitled to an acquittal. [693 A-B]

*Willie Slaney* v. *The State of M.P.*, [1955] 2 S.C.R. 1140, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 82 of 1967.

Appeal by special leave from the judgment and order dated March 15, 1967 of the Rajasthan High Court in Criminal Appeal No. 219 of 1965.

*Sobhag Mal Jain* and *V. S. Dave*, for the appellant.

*K. B. Mehta*, for the respondent.

The Judgment of the Court was delivered by

**Hegde, J.** The appellant's conviction by the learned Additional Sessions Judge, Jodhpur under s. 314 read with s. 109, Indian Penal Code, having been affirmed by the High Court of Rajasthan, he appeals to this Court after obtaining special leave. The charge on the basis of which he was tried was that some

A days prior to May 1, 1963, he abetted one Mst. Radha at Jodhpur to cause the miscarriage of one Miss Atoshi Dass *alias* Amola, who as a result of administration of tablets and introduction of "laminaria dento" by the said Mst. Radha, died on May 1, 1963. The case for the prosecution is that in about the years 1962-63, the appellant was the President of Gramotthan Pratishthan at
B Jalore. Miss Atoshi Dass was a teacher working in Indra Bal Mandir, Tikhi, an institution under the management of the appellant. She was young and unmarried. Illicit relationship developed between the aforementioned Atoshi Dass and the appellant as a result of which Miss Atoshi Dass became pregnant. With a view to cause abortion of the child in her womb, the appellant
C took Miss Dass to Jodhpur and there attempted to cause the miscarriage mentioned above through one Mst. Radha. The attempt was not successful. The insertion of "laminaria dento" in the private parts of Miss Dass caused septicaem as a result of which she died in the hospital on May 1, 1963.

D The appellant's case is that he had no illicit relation with Miss Atoshi Dass nor did he abet the alleged abortion. He denies that Miss Atoshi Dass died as a result of any attempt at abortion.

E As seen earlier the appellant was charged and tried for the offence of abetting Mst. Radha to cause the miscarriage in question but he was ultimately convicted of the offence of abetting Miss Dass in the commission of the said offence.

It may be stated at this stage that one Mst. Radha was tried alongwith the appellant in the trial court but she was acquitted on the ground that there was no evidence to show that she had anything to do with the abortion complained of.

F Despite the contentions of the appellant to the contrary, we think there is satisfactory evidence to show that the death of Miss Dass was due to septicaem resulting from the introduction of "laminaria dento" into her private parts. On this point we have the unimpeachable evidence of Dr. A. J. Abraham, P.W. 4.

There is also satisfactory evidence to show that the appellant
G was in terms of illicit intimacy with Miss Dass. It is true that the principal witness on this point is Miss Chhayadass, P.W. 6, the sister of the deceased, a witness who has given false evidence in several respects. But as regards the illicit relationship between the appellant and Miss Atoshi Dass, her evidence receives material corroboration from the evidence of P.W. 7, M. B. Sen and P.W.
H 5, Misri Lal. Further it also accords with the probabilities of the case. It is not necessary to go into that question at length as we have come to the conclusion that the appellant is entitled to an acquittal for the reasons to be stated presently.

While we are of opinion that there was illicit intimacy between the appellant and the deceased, we are unable to accept the assertion of Miss Chhayadass that the appellant was her only paramour. Exh. D.3 conclusively proves that the deceased had illicit relationship with one Sood at Delhi. In the committal court Miss Chhayadass admitted that the address on Exh. D-3 is in the handwriting of the deceased. In that court she was positive about it: but in the trial court she went back on that admission. In many other respects also she had deviated from the evidence given by her in the committal court. Hence we are unable to accept her statement in the trial court that the address found on Exh. D-3, an inland letter is not in the handwriting of the deceased. Exh. D-3, appears to be a self-addressed letter sent by the deceased to one Sood. The fact that the deceased had more than one paramour is not a material circumstance though it may indicate that the appellant could not have had any compelling motive to abet the abortion complained of. The fact that the appellant was on terms of illicit intimacy with the deceased, an unmarried girl and that she later became pregnant through him is without more, not sufficient to connect the appellant with the crime.

From the evidence of Misrilal and Sengupta, it is clear that the appellant and the deceased had gone together to Jodhpur on April 24, 1963. But from the evidence of Sengupta, it is also clear that the deceased had some work to attend to at Jodhpur. It is also clear from the evidence of Miss Chhayadass that the deceased and the appellant were going together to Jodhpur and other places off and on. It may be noted that while returning from Jodhpur to his native place, the appellant left the deceased with Mr. and Mrs. Sengupta. Hence the circumstance that the appellant and the deceased went together to Jodhpur on April 24, 1963, cannot be held to be an incriminating circumstance.

This leaves us with the evidence relating to the actual abetment. On this aspect of the case the only evidence brought to our notice is the evidence of Miss Chhayadass and the letter Ex. P.4. Miss Chhayadass deposed in the trial court that when the pregnancy of the deceased became noticeable, the appellant told the deceased in the presence of that witness that he would get the the child aborted through Mst. Radha. As mentioned earlier Miss Chhayadass is a highly unreliable witness. She had admitted in the committal court that she had been tutored by the police to give evidence. In fact she pointed out a police officer who was in the court as the person who had tutored her. In the trial court she denied that fact. There is no gainsaying the fact that she was completely under the thumb of the police. She deviated from most of the important admissions made by her during her cross-examination in the committal court. Coming to the question of the abetment referred to earlier, this is what she stated during her cross examination in the committing court :

A

"My sister did not tell Madan Raj about her illness (arising from her pregnancy) in my presence. On being enquired by me about my sister at Jalore I was informed that my sister had gone to Mst. Radha Nayan in the hospital for treatment. No talks about it were held before me prior to my talk at Jalore (talks between
B Madanraj and my sister about treatment)."

According to the admissions made by her in the committal court she came to know for the first time about her sister's intention to cause miscarriage only after her death. No reliance can be placed on the evidence of such a witness.

C Now coming to Exh. P.4, this is a letter said to have been written by the deceased sometime before her death intending to send the same to the appellant which in fact was not sent. It was found in her personal belongings after her death. There was some controversy before the courts below whether the same is admissible under s. 32 (1) of the Evidence Act and whether it could be brought within the rule laid down by the Judicial Com-
D mittee in *Pakala Narayana Swami* v. *Emperor*(1). We have not thought it necessary to go into that question as in our opinion the contents of the said letter do not in any manner support the prosecution case that the appellant instigated the deceased to cause miscarriage. The letter in question reads thus:

"Santi Bhawan 28-4-63.

E

I went with your letter to the father. Since I could not get money from him, I dropped you a letter. I went to Mst. Radha and asked her to give me medicine. I further said that the money would be received. She gave me a tablet and told me that injection would be given on receipt of full payment. This tablet is caus-
F ing unbearable pain and bleeding but the main trouble will not be removed without the injection. How can I explain but the pain is untolerable. I have left Sen's residence. He and particularly neighbouring doctor would have come to know everything by my condition, which is too serious. (*Meri is halat se unaki vishesker*
G *pas me Daktarji ko sub kuch pata chal jati powon tak ulati ho jati*). Firstly I intended to proceed to Jalore but on reaching the Station I could not dare to proceed. I feel that you are experiencing uneasiness and trouble for me. I am causing monetary as well as mental worries to you. I have been feeling this for a considerable longer period. Please do not be annoyed.

H

It has become very difficult for me to stay alone for the last several days.

(1) A.I.R. [1939] P.C. 47.

Had you accepted me as your better half you would have not left me alone in my such serious condition. You cannot know what sort of trouble I am experiencing. Had you been with me I would not have felt it so much. Please do not be annoyed. Perhaps no one has given you so much trouble.

I will write all these facts to my mother. I will also write about our marriage.

28-4-63.

Today is Sunday. I cannot book a trunk call to you in the court. Today I tried on the Phone number of Hazarimal but it was engaged, and later on it was cancelled. My Pranam.

Yours Ritu.

Today I have taken injection and have come from Shanti Bhawan."

No portion of that letter indicates that the appellant was in any manner responsible for the steps taken by the deceased for causing miscarriage. No other evidence has been relied upon either by the trial court or by the High Court in support of the finding that the appellant was guilty of the offence of abetting the deceased to cause miscarriage.

For the reasons mentioned above we are of the opinion that there is no legal basis for the conviction of the appellant.

The learned Counsel for the appellant challenged the conviction of the appellant on yet another ground. As mentioned earlier he was charged and tried for the offence of abetting Mst. Radha to cause abortion of the child in the womb of the deceased but curiously enough he was convicted for abetting the deceased to cause miscarriage. Abetment as defined in s. 107 of the I.P.C., can be by instigation, conspiracy or intentional aid. If the abetment was that of Mst. Radha, it could have been only by instigation or conspiracy but if it was an abetment of the deceased, it could either be by instigation or by conspiracy or by intentional aid. Throughout the trial the accused was asked to defend himself against the charge on which he was tried. At no stage he was notified that he would be tried for the offence of having abetted the deceased to cause miscarriage. It is now well settled that the absence of charge or an error or omission in it is not fatal to a trial unless prejudice is caused—see *Willie (William) Slaney* v. *The State of Madhya Pradesh*(1). Therefore the essential question is whether there is any reasonable likelihood

(1) [1955] 2 S.C.R. 1140.

A of the accused having been prejudiced in view of the charge framed against him. From what has been stated above one can reasonably come to the conclusion that the accused was likely to have been prejudiced by the charge on the basis of which he was tried. From the cross-examination of the prosecution witnesses, it is seen that the principal attempt made on behalf of the appellant was
B to show that he had nothing to do with the co-accused, Mst. Radha. He could not have been aware of the fact that he would be required to show that he did not in any manner abet the deceased to cause miscarriage. The facts of this case come within the rule laid down by this Court in *Faguna Kanta Nath* v. *The State of Assam*(1). The case of *Gallu Sah* v. *The State of Bihar*(2) relied by the High Court is distinguishable. Therein
C Gallu Sah was a member of an unlawful assembly. He was said to have abetted Budi to set fire to a house. One of the members of the unlawful assembly had set fire to the house in question though it was not proved that Budi had set fire to the house. Under those circumstances this Court held that the offence with which Gallu Sah was charged was made out. As observed by Calcutta
D High Court in *Umadasi Dasi v. Emperor*(3) that as a general rule, a charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions. *Gallu's* case was one such exception.

For the reasons mentioned above we allow the appeal and acquit the appellant. He is on bail. His bail bonds stand cancelled.

V.P.S. *Appeal allowed.*

(1) [1959] 2 Supp. S.C.R. 1.
(2) [1959] S.C.R. 861.
(3) I.L.R. 52 Cal. 112.