

(2015) 01 CHH CK 0027

In the Chhattisgarh High Court

Case No : Criminal Appeal Nos. 980 and 1094 of 1999

Alekho and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 09-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437A
Penal Code, 1860 (IPC) — Section 300, 302, 307, 323, 326

Citation : (2015) 2 CGLJ 428

Hon'ble Judges : Navin Sinha, A.C.J; Chandra Bhushan Bajpai, J

Bench : Division Bench

Advocate : T.K. Tiwari and Ashok Das Vaishnav, for the Appellant; Vinod Deshmukh, Dy. Government Advocate, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Navin Sinha, Acting C.J—The appeals arise from judgment of conviction dated 1.4.1999 by the 3rd Additional Sessions Judge, Durg in Sessions Trial No. 63/1998. Appellant Gajanan and Moti have been convicted under Sections 302/34 IPC to life imprisonment with fine of Rs. 500/- and in the event of failure to pay fine they were required to undergo three months each further imprisonment. The two have been further convicted under Sections 307/34 IPC to seven years rigorous imprisonment each along with fine of Rs. 500/- each, and in the event of failure to pay the fine they were to undergo three months further imprisonment Appellant Alekho @ Budu has been convicted under Section 323/34 IPC and sentenced to rigorous imprisonment for six months. According to the Dehati Nalishi, Exhibit P11, lodged on 12.10.1997 by PW7, Chandrashekhar Mishra the occurrence is stated to have taken place in two parts on 11.10.1997. The first part of the occurrence took place at about 11-11.30 pm at Mukesh Chowk. The witness was returning from the Temple. The Appellants were sitting at the Mukesh Chowk. The witness enquired from one of them why they were sitting so late in the night leading to a verbal duel followed by fisticuffs and kicking. The witness went home and told his brother Rakesh, the deceased, and

Mukesh (PW-9). The three brothers then came back to Mukesh Chowk with Lathis leading to the second part of the occurrence. Appellant Gajanan is then alleged to have assaulted the deceased Rakesh in the stomach while the another accused Bablu and the Appellant Moti also assaulted. The sister of Moti (Laxmi) caught the collar of PW7 and when he turned around, the lathi that he was carrying hit Moti's sister. Moti then assaulted him on the head. The deceased and the injured were taken to the hospital where Rakesh was declared dead. The first information report, Exhibit P-14, was also lodged by PW7 on 12.10.1997 at 2:30 am. The postmortem of the deceased Exhibit P-13, was conducted by Dr. S.R. Churendra, PW12, who found three stab wounds on the lower part of the anterior surface of the right side of the chest, on lower part left iliac fossa and upper part of right gluten region. The injury on PW7, Chandrashekhar Mishra, on the forehead lower left side caused by hard and blunt object was opined by Dr. Dr. S.K. Sinha, PW14, to be simple in nature/The injury on PW9, Mukesh, was penetrating in the abdominal area.

2. A Rojnamchasanha, Exhibit P-2A, was recorded by the police on information given by the Appellant Moti with regard to the injury caused to his sister, the medical report of which states of swelling over right ear with no other external injury. The Appellant Alekho @ Budu is also alleged to have suffered lacerated wound on the scalp on the right parieto occipital area and superficial abrasion on the chest.

3. Learned Counsel for the Appellant submitted that in the first part of the occurrence only fisticuffs and kicks were indulged between the informant and the Appellants. The matter had ended with that. The occasion for the fight was too trivial or rather non-existent. PW7 then went home and called his brothers immediately who came armed with lathis. Both PW7 and his brother PW9, Mukesh have stated that the Appellants were still sitting at Mukesh Chowk and none of them had any weapons of assault in their hands. A fracas ensued which obviously was initiated by PW7 and PW9 and their deceased brother who had returned immediately with lathis making them the aggressors with their intentions obvious. If they had wanted to go to the police station to report the earlier fracas, they could have easily avoided going through the Mukesh Chowk as there was an alternative route available. Their intention therefore was not to go to the police station but to come and fight by settling scores. In such a moment of heat of passion, the Appellant Gajanan and Moti whose house was adjacent are stated to have gone and brought a sword and iron rod. The assault on Moti's sister after she tried to intervene, considering prudent human behaviour, in this heat of passion, obviously self control was difficult to maintain leading to assault by the Appellants also. In such a case of free fight matters cannot be tested in a golden scale.

4. It was a case of free fight where PW7, PW9 and the deceased were the aggressors. The Appellants were provoked and only then they went and brought weapons. Moti's sister Laxmi had also suffered injuries and the Appellant Alekho

@ Budu had also suffered injuries. The case of Alekho @ Budu and Moti stands at par as both of them are alleged to have caught hold of the deceased when Appellant Gajanan assaulted with a sword. All other facts being identical, there is no justification to convict Moti under Section 307/34 IPC while Alekho (a) Budu has been convicted under Section 323/34 IPC only. There is no distinguishing feature for the same. The conviction under Section 323 IPC is not sustainable in case of a free fight where both sides have suffered injuries and the prosecution side was the aggressor. PW7 and PW9 have acknowledged that there was no previous enmity or dispute between them. The contention therefore was that it was a flee fight on the spur of the moment with no premeditation and no intention to cause death but all in the heat of the moment where each one of them was responsible for their individual acts of assault. With regard to the Appellant Gajanan, it was submitted that at best, in the facts and circumstances of the case, he may be answerable under Section 304-I IPC only for the assault on the deceased. He has already undergone 6 years 11 months 21 days of custody which is sufficient punishment in the facts of the case. With regard to the assault by Appellant Gajanan on PW9, it was submitted that at best it may make out a case under Section 326 IPC and not under Section 307 IPC. The question of any common intention in the facts and circumstances of the present case does not arise and each one is answerable for his own acts. Reliance was placed on Budhi Singh Vs. State of H.P., (2013) 1 AD 145 : (2013) CriLJ 962 : (2012) 12 JT 460 : (2012) 12 SCALE 393 .

5. Learned Counsel for the State opposing the appeals submitted that both PW7 and PW9 have stated that they had back gone to the Mukesh Chowk with the only intention to ask the Appellants why they were fighting. They had no intention to assault or indulge in a free fight. While the prosecution witnesses were possessed of lathis, the Appellants acted much in excess by assaulting them with sword and iron rod which is evidence of their intention by itself from the nature of weapons used. There is no material except for the solitary statement in the Dehatinalishi reiterated by PW7 in the FIR that he came back with his brothers with lathis. If the Appellants acted in unison, were together, common intention is apparent and the order of conviction requires no interference.

6. We have considered the submissions on behalf of the parties and perused the evidence on record also. The episode was in two parts stands established. That the Appellants were sitting without any weapons of assault in their hands during first part of the occurrence stands established from the evidence of PW7. The second part of the occurrence took place when PW7, PW9 and their deceased brother returned immediately to the Mukesh Chowk with lathis leading to the assaults. At this time also PW7 and PW9 have acknowledged in their evidence that the Appellants were sitting at the same place without any weapons of assault in their hands. PW9 in his cross-examination has acknowledged that if they wanted to go to the police station, they could easily have avoided going through the Mukesh Chowk and that there was an alternative route from their

house. The Dehatinalishi was the first and correct rendition of the sequence of the events lodged immediately. PW7 clearly stated in it that he went home and came back with his brothers to the place of occurrence with lathi in their hands. PW9 in his cross-examination has admitted that PW7 was carrying a wooden stick, though he tried to explain it as having been picked up on the way. Similarly, PW7 has also acknowledged that when he was assaulted by Appellant Gajanan and Moti, he protected himself with a wooden stick in his hand. If PW7, PW-9 and the deceased had not returned to the spot immediately, the second part of the occurrence could well have been avoided. The occurrence by way of a free fight between the parties is therefore not in dispute.

7. PW-3, Maniklal a witness to the first part of the incident has proved that after the initial altercation, they went their ways. PW-5, Dr. S.K. Sahu proved the first aid given to PW7 and PW-6 proved the inquest report Exhibit P-10.

8. PW7 deposed that after he was assaulted by legs and fists he went home and told his brothers. They came back to the place of occurrence with lathis and enquired why the Appellants had assaulted when Appellant Gajanan and Moti brought sword and iron rod from home and assaulted him. The witness states that he protected himself with a wooden stick that he was carrying and suffered injuries on his head. Gajanan assaulted the deceased Rakesh and also PW9 in the stomach. He proved the Dehatinalishi and the FIR lodged by him. In cross-examination, he denied the suggestion that he had first assaulted the Appellant Gajanan with a lathi and also denied that he had assaulted Laxmi the sister of Moti who had fallen down. He sought to deny that he had not gone back to fight. It was acknowledged that there was no previous enmity between the parties. The witness acknowledged in his cross-examination that he was carrying a wooden stick when he returned with his brothers for his own safety along with his brothers.

9. PW9, Mukesh likewise stated that Appellant Gajanan assaulted the deceased and Appellant Moti and Alekho @ Budu held the deceased to facilitate the assault. That Appellant Gajanan apart from assaulting the deceased with the sword also assaulted the witness in the stomach after which he fainted. In his cross-examination, he further acknowledged that if he had not gone back to the place of occurrence, his brother may not have been killed. This witness also acknowledged that there existed no previous animosity. The witness does not deny he had a lathi in his hands.

10. PW-12, Dr. S.R. Churendra proved the postmortem of the deceased. PW13, the police officer proved registering of the Dehatinalishi Exhibit P-11 and the FIR, Exhibit P-14 and recording of the Merg at the police station itself, marked Exhibit P-15. He also proved recovery of wooden stick from the place of occurrence with blood on them, Exhibit P-24. It is significant to notice that lathis were carried by the prosecution witnesses while the Appellants were alleged to be possessing sword and iron rod. The forensic report, Exhibit P-29 confirms presence of blood on the wooden stick recovered from the place of occurrence. The witness further

proved that the Appellant Gajanan and Moti had come to the police station and informed of the assault on Moti's sister by PW7 and his brothers which was recorded in the Rojnamchasanha at Serial No. 271. He further proved having recorded to have sent Laxmi for medical examination and explained that because of the simple nature of injuries he did not register any case either with regard to her or Alekho @ Budu but which he did record in the case diary. He also prepared spot map Exhibit P-21. PW14, Dr. S.K. Sinha proved the injury report of PW7, marked Exhibit P-17A and that of PW9, marked Exhibit P-19A. The Investigating Officer PW18 recorded memorandum of the Appellants which is not considered very necessary to discuss in view of the fact that the occurrence itself is not in dispute either with regard to its time or manner.

11. DW-1, P.S. Bais of the Government Railway Police also proved the Rojnamchasanha at serial No. 271 as having been written on the report of Appellant Moti and of Laxmi having been sent to the Railway Hospital for treatment. DW-2, Dr. S.K. Sahu deposed of the injury on the right mastoid area of Laxmi and having given her first aid medical treatment for the swelling and then referred to the Durg hospital.

12. If PW7, PW9 and the deceased had not come back to the place of occurrence with lathis or had gone to the police station by the alternate route, the second part of the occurrence could well have been avoided. Both these issues combined lead us to the conclusion that PW7, PW9 and the deceased deliberately came back to the place of occurrence with lathis in their hands evidently revealing that they desired to settle scores by indulging in assault with the lathis. They were the aggressors. Merely because they may have come with lathis there is nothing to suggest that without any provocation by them the Appellants went home and brought sword and rod. On the contrary events suggest that the prosecution witnesses made the first move for assault. The sister of Appellant Moti intervened and was hurt. When this fight started, the Appellants also went and brought arms and what was originally an aggression by PW7, PW9 and their deceased brother, turned into a free fight.

13. In the facts of the present case, it is difficult to assume any common intention on part of the Appellants to kill the deceased. It was a free fight on the spur of the moment. Each will be answerable for his own acts of assault relying on *Boota Singh v. State of Punjab* 1997 SCC (Cr.) 94. The assault on the deceased by three stab wounds is attributable to Appellant Gajanan alone, there being no other assault on the deceased by any other Appellant, Gajanan would remain answerable for his own actions. But we find it difficult to uphold his conviction under Section 302 IPC in the facts of the case and are of the considered opinion that his case falls under exception I to section 300 IPC as having been caused under grave and sudden provocation, the provocation having not been sought or voluntarily provoked. The conviction of the Appellant Gajanan is therefore altered to one under Section 304-I IPC. But keeping in mind that he did not make a single assault but thrice, we are satisfied to order his conviction

for a period of 12 years only.

14. The stab injury assault on PW9 is also attributable to Appellant Gajanan who alone had a sharp weapon in his hand. In absence of any report with regard to the nature of the injury we convert his conviction under Section 307 IPC to one under Section 326 IPC and considering that he is alleged to have made a single assault convict him for five years. The sentences shall run concurrently. He is directed to surrender and/or be taken into custody for serving out the remaining period of his sentence.

15. So far as the injuries caused by Appellant Moti to PW7 is concerned, it has been found to be simple in nature caused by hard blunt object. We therefore find it difficult to separate his case from that of Appellant Alekho @ Budu, who has been convicted only under Section 323 IPC. The conviction of the Appellant Moti is therefore altered to one under Section 323 IPC.

16. The next question for our consideration shall be that if in the nature of free fight alleged with the prosecution side being the aggressors, whether the conviction under section 323 IPC would be maintainable. We hold that the conviction under Section 323 IPC in the facts of the case because of the free fight between the parties, when the injuries are stated to have been caused on both sides is not sustainable. In State of Haryana Vs. Balkar Singh and Others, AIR 2010 SC 46 : (2009) 7 JT 677 : (2009) 5 SCALE 465 : (2009) 11 SCC 592 : (2009) 6 SCR 322 : (2009) AIRSCW 5538 the order of acquittal under Section 302, 323, 34 was declined to be interfered when both sides had injuries and it could not be deciphered who was the aggressor. The conviction of the Appellants Moti and Alekhu @ Budu is set aside. They are acquitted and discharged of their bail bonds subject to Section 437A Cr.P.C. The appeal is partly allowed with modification of sentence with regard to appellant Gajanan.