

(2018) 04 MP CK 0108
In the Madhya Pradesh High Court
Case No : Criminal Appeal No.574 OF 2006

Bal Kishan And Others

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Indian Penal Code 1860 — Section 147, 148, 149, 300, 302, 450
Code Of Criminal Procedure, 1973 — Section 161, 162

Citation : (2018) 04 MP CK 0108

Hon'ble Judges : ANAND PATHAK, J;VIVEK AGARWAL, J

Bench : Division Bench

Advocate : N.P. Dwivedi, S.K. Tiwari, Siraj Kureshi

Final Decision : Dismissed

Judgement

Appellants -accused have preferred this appeal against the judgment and order dated 17/07/2006 passed by the Third Additional Sessions Judge (fast

track), Guna in S.T.No.18/2006, whereby appellant No.1 -Balkishan has been convicted for the offence under Section 302 of IPC and sentenced to

suffer rigorous life imprisonment with a fine of Rs.1,000/- and in default thereof one year additional RI and further convicted under Section 148 of IPC

and sentenced to suffer 1 year RI with fine of Rs. 500/- and under Section 450 of IPC and sentenced of 2 years with fine of Rs.1,000/- with default

stipulation.Â Appellants No.2 to 5 have been convicted under Section 147 of IPC and sentenced to suffer one year RI each with fine of Rs.500/-

each and furtherÂ convicted under Section 302 r/w Section 149 of IPC and sentenced to suffer life imprisonment with fine of Rs.1,000/- each and in

default thereof one year additional RI.

2- Prosecution case in short is that on 01/12/2005 around 4-5 am in the morning

at Village Hinotiya Gird, in the house of Mullo Bai, her son Bal Kishan s/o Bhagwan Singh was sleeping in the cattle shed. At that time, appellants/accused while sharing common object to murder Bhagwan Singh, caused murder of Bal Kishan. Undisputed facts of the case are that mother of the deceased Bal Kishan i.e. Mullo Bai (PW-8) was living in the house alongwith her family members which is situate at agriculture field at Village Hinotiya Gird. Pahalwan Singh (PW-2), Kamal Singh (PW-3), Nathan Singh (PW-4) and Diman Singh (PW-10) were acquainted with the accused persons. Husband of Mullo Bai -Bhagwan Singh and her son Bal Kishan went to Gwalior High Court to attend a date of a case and on the date of incident, her daughters-in-law -Kamla and Sarda, her grand son and daughter, namely Rameshwar and Gaytri, brother-in-law of Mullo Bai -Diman Singh and son-in-law -Prakash were in the house. Around 3-4 am in the morning, barking of dogs prompted Mullo Bai to wake up and in the light of torch, she saw that in the cattle shed, accused Bal Kishan wielding an axe and other accused appellants No.2 to 5 wielding sticks (Lathis) in their hands were standing and thereafter accused Bal Kishan entered into cattle shed and with intention to kill her son Bal Kishan gave a blow of axe and thereafter they ran away from the spot.

3- After incident, Mullo Bai went to the cattle shed and found a deep wound over the neck of her son Bal Kishan oozing blood and immediately then and there only Bal Kishan died on the spot. On shouting of Mullo Bai, family members got up, to whom Mullo Bai narrated the incident. Village Chowkidar -Kamal Singh (PW-3) informed the Police Station Bajarang Garh about the incident around 8:40 am vide Ex.P42 and responding to the same, Investigating Officer -Mahesh Sharma (PW-12) went to the place of incident. Safina Form Ex.P-1 was issued. In presence of the witness, Naksha Panchanama Lash was prepared vide Ex.P-2. Around 9:45 am Mullo Bai gave information which was recorded as Dehati Nalshi vide Ex.P-37 on which marg report was registered vide Ex.P-36 and case was registered vide Crime No.180/2005 under Sections 147 and 302 of IPC at Police Station Bajarang Garh vide Ex.P-42. At the time of inspection, Senior Scientific Officer S.P. Sharma (PW-5) alongwith Mahesh Sharma (PW12) visited the spot and prepared a report (Ex.P-20) and spot map Ex.P-21 was also prepared.

4- From the spot, part of blood stained mattress and plain pieces of mattress were seized vide seizure memo Ex.P19 and appellants/ accused were arrested on 05/12/2005 (vide arrest memo Ex.P-4 to P-8) thereafter, on their information, axe and sticks were seized.Â Meanwhile, postmortem over the body of the deceased Bal Kishan was conducted and postmortem report vide Ex.P-35 was prepared by Dr. Milind Bhagat (PW-7).Â Statements of witnessesÂ Mahendra, Kamla, Gaytri, Kamal Singh (PW-3), Diman Singh (PW-10) were recorded and after investigation, charge-sheet against the accused under Sections 147, 148, 302, 450 r/w Section 149 of IPC was filed.Â Â Accused abjured their guilt therefore, trial was conducted.

5- Appellants/ accused took the defence of false implication.Â Their main defence was that due to enmity they have been falsely implicated.Â Evidence was led by the prosecution in which total 12 witnesses were examined wherein Mullo Bai (PW-8) was the sole eye witness and other witnesses were in support of the prosecution out of which Ratan Singh (PW-1), Pahalwan Singh (PW-2) did not support the story of prosecution therefore, they were declared as hostile by the prosecution. Â In support of defence, two witnesses were examined and they tried to bring home the theory of alibi in respect of accused/appellant No.1-Bal Kishan. 6- After appreciating the evidence led by the parties and considering the documents, the trial Court convicted the appellants/ accused as referred above therefore, the instant appeal is preferred by the accused/ appellants.Â

7- Learned Senior Advocate appearing on behalf of the appellants raised the ground about the evidence led by the prosecution for implicating the appellants.Â Mullo Bai (PW-8) was the sole eye witness and she narrated the course of events.Â Only one injury of axe was found on the body of the deceased and no overt act of appellants No.2 to 5 was referred by the eye witnesses.Â In para 28 of her deposition, she submitted that she had seen the incident as well as accused persons through torch light which is not practically possible. There is material contradiction in her statements made before the police authorities under Section 161 of Cr.P.C. as well as in the Court.Â She had not seen the incident because the place where she was sleeping was far off from the place of incident therefore, it was not possible that she could have seen the incident.Â He relied upon the judgments rendered by the Apex Court in the cases of Govindaraju alias Govinda Vs. State by Srirampuram Police Station and Another, (2012) 2

SCC (Cri) 533 as well as AIR 1957 SC 614, Chinniah Servai Vs. The State of Madras.

8- Learned Senior Advocate further submits that the testimony of the sole eye witness is to be seen with doubt and cannot be relied upon to convict

the appellants. It is further submitted that Kamal Singh (PW-3) village Chowkidar around 8:15 am informed the Police Station Bajarang Garh about

the incident and vide entry No.946 in Rojnamcha Ex.P-42, the incident was jotted down.Â Therefore, it amounts to registration of FIR and

subsequent documentation in the form of Dehati Nalshi and the marg intimation report were like statements under Section 161 of Cr.P.C and cannot

be taken into account and the statements of the witnesses were not under Section 161 of Cr.P.C., in fact the statements were under Section 162 of

Cr.P.C.Â He submits that Mullo Bai (PW-8) signed the Dehati Nalshi and therefore, it was hit by the provisions of Section 162 of Cr.P.C. He relied

upon the judgment of the Apex Court in the case of State of Andhra Pradesh Vs. Punati Ramulu and Others, 1994 SCC (Cri) 734.Â While relying

upon the testimony of Kamal Singh (PW-3), it is submitted that Kamal Singh did not intimate the police authorities about the assailants who murdered

the deceased Bal Kishan.Â This material omission smacks doubt over the story of the prosecution.

9- Similarly, non-examination of Mahendra Singh and Kashi proved fatal for the case of prosecution because Mahendra Singh was the person who

informed Kamal Singh about the incident and Kashi visited the spot immediately after the incident therefore, they were material witnesses and their

omission rendered the prosecution case a weak semblance of effective prosecution. While referring the application for autopsy/ postmortem of the

corpse (Ex.P-35), no information has been detailed out regarding cause of death (and the names of probable accused) and it also prejudicially affects

the case of the prosecution.Â While referring testimony of Dr. Milind Bhagat (PW-7) who had conducted postmortem over the body of the deceased,

learned counsel submits that unless the Doctor refers that the injury was sufficient to cause death in ordinary course of nature, it could not have been

presumed that the death was homicidal in nature.Â He relied upon the judgment of Apex Court in the case of Bhupendra Singh and Others Vs. State

of Uttar Pradesh, 1991 SCC (Cri.) 571 as well as Parsuram Pandey and Others Vs. State of Bihar, AIR 2004 SC 5068.Â

10- It is also submitted on behalf of the appellants that common object of the other co-accused has not been established by the prosecution. In

absence of any cogent material to advance theory of common object viz. appellants No.2 to 5, liability under Sections 148 and 149 of IPC is not

attracted. He relied upon the judgments of apex Court in the case of Md. Ankoos and Ors. Vs. The Public Prosecutor, High Court of A.P., 2009

(4) Crimes 158 (SC) as well as Mahadev Sharma Vs. State of Bihar, AIR 1966 SC 302.

11- On the other hand, learned Public Prosecutor opposed the prayer made by the appellants with equal vehemence and submits that Section 149 of

IPC is in respect of constructive liability and therefore, appellants cannot wriggle out from it. He referred AIR 2010 SC 3580, Sikandar Singh and

Others Vs. State of Bihar and AIR 1989 SC 754, Lalji and Others Vs. State of U.P. It is further submitted that information given in Rojnamcha by

the village Chowikidar Kamal Singh (PW-3) cannot be treated as FIR on the basis of Section 300 of IPC. He submits that all appellants are liable to

be punished under Sections 147, 148 and 149 of IPC alongwith Section 302 of IPC. He relied upon the judgment of the Apex Court rendered in

AIR 2006 SC 2986, Settu and Ors. Vs. State of Tamil Nadu. He prayed for dismissal of the appeal.

12- Heard the learned counsel for the parties at length and perused the judgment and material available on record. 13- The first and foremost question

in the case in hand is the nature of death of the deceased Bal Kishan s/o Bhagawn Singh; whether it is homicidal, suicidal or accidental in nature.

Dr. Milind Bhagat (PW-7) conducted postmortem on the body of the deceased. According to his testimony, postmortem report (Ex.P-35) indicated

that the cause of death was excessive bleeding and shock which was caused due to slitting of neck which is the most vital organ of the body.

Injuries mentioned in the postmortem report reads as under: Injuries mentioned in the postmortem report reads as under:

esUMhcy ls ysdj LvwuksZesLVkbM Hkkx rd Fkk] vkdkj 9x4 lseh 6 lseh xgjkBZ rd Fkka nkfguh dku dk ykso dVv Fkk rFkk 'kjhj ds lkFk ugh ik;k x;k

Fkka

14- From perusal of the postmortem report and testimony of expert witness Dr. Milind Bhagat (PW-7), no iota of doubt remained that the cause of

death was homicidal in nature.Â

15- Next question comes for consideration about the culpability of the appellants; whether the appellants in pursuance of common object formed un-

lawful assembly and slit the neck of the deceased causing his death.Â In support of its case, the prosecution examined 12 witnesses, out of which

Mullo Bai (PW-8) was the sole eye witness.Â As per the testimony of Mullo Bai (PW-8) she categorically submitted that she was sleeping in the

area adjacent to cattle shed and got up by the sound of barking of the dog (Shekhu) and in the torch light she saw appellant No.1- Bal Kishan wielding

axe and other appellants with sticks in their hands and they killed her son Bal Kishan s/o Bhagwan Singh. In her deposition, she referred that the lamp

was being lit in the cattle shed at the time of incident and therefore, she saw the assailants.Â She also submits in categorical terms that her family and

appellants' family were sharing animosity and therefore, she could easily recognize them and could recognize their voice. Appellants belong to one

family andÂ 2-3 days prior to the date of incident, Bal Kishan, Santosh and Parvat Singh were roaming around the house with an axe in their hands

although Mullo Bai had not referred the factum of lamp and torch light in marginal intimation report (Ex.P-36) and Dehati Nalshi (Ex.P-37) but in her

statements which was taken by the Investigating Officer on the same day of incident i.e. 01/12/2005 vide Ex.D1, she referred the factum of torch

light.Â She categorically stated in her statement under Section 161 of Cr.P.C. that she could recognize the appellants because of torch light and their

voice.Â Being the residents of same vicinity and with shared animosity, it was much possible that she could have recognized the assailants/ appellants

immediately.Â

16- So far as the question of placement of Mullo Bai (PW-8) vis a vis the place of incident is concerned, the same is clarified by the Investigating

Officer -Mahesh Sharma (PW-12).

When a specificÂ question was asked to him by the Court about the visibility of place of incident from the place where Mullo Bai was sleeping,

Investigating Officer categorically replied that the spot of incident is clearly visible from the place where Mullo Bai was sleeping at the time of

incident.Â This aspect is further corroborated by the spot map prepared by Senior Scientific Officer, S.P. Sharma vide Ex.P-21.Â He established the

said fact in his deposition as PW-5. Investigating Officer also prepared a spot map vide Ex.P-38 and the said spot map is a bit different than the spot

map prepared by the Patwari Manish Shrivastava (PW-9) vide Ex.P39.Â The trial Court rightly considered the said aspect while dealing with the

question andÂ rightly relied upon the spot map prepared by the Senior Scientific Officer vide Ex.P-21 and Investigating Officer vide Ex.P-38.Â

Therefore, it was established that visibility was there for Mullo Bai to see the incident.

17- One important aspect of the case in hand is that the eye witness Mullo Bai (PW-8) through Dehati Nalsi (Ex.P37) and vide police statement

Ex.D-1, referred the name of all the accused persons and through out her statement, she referred the name of all the accused persons therefore, the

credibility of eye witness cannot be treated as shaken to the extent of disbelief. Appellants on the basis of some contradictions between her

submissions and Dehati Nalshi report and her statement under Section 161 of Cr.P.C., tried to contend that this witness does not deserve to be

believed because of contradictory nature of statements but the contradiction is not to the extent of discarding the statement of this witness. It isÂ the

general human response that on reiteration of narration of facts, the fact which was earlier lost in the narration got included subsequently.Â Mullo Bai

(PW-8) is a rustic villager aged about 55 years therefore, those contradictions are not such grave in nature rendering the evidence discarded out

rightly. Even Ratan Singh (PW-1) who did not support the story of the prosecution and declared hostile, but in his examination-in-chief, he referred the

fact about mentioning of names of appellants by Mullo Bai (PW-8) to him.Â This aspect is material piece of evidence, corroborates the narration of

events by Mullo Bai.

18- Another ground of defence was non-appearance of Mahendra Singh, Kashi in the witness box but since Mahendra Singh and Kashi both were not

eye witnesses of the incident and reached at the spot, after the incident therefore, their nonexamination does not have material bearing in the case.

Village Chowkidar-Kamal Singh (PW-3) although referred the incident on the basis of information given by Mahendra Singh that somebody in the

night killed Bal Kishan but Kamal Singh did not visit the spot and met Mullo Bai after the incident and before intimating the police about the incident.Â

When Kamal Singh did not meet Mullo Bai before intimating the police about the incident then it cannot be inferred that Mullo Bai did not refer the name of accused to Kamal Singh.

19- Another ground of defence in respect of plea of alibi taken in respect of accused Bal Kishan does not hold ground due to the fact that Neelam

Singh (DW-1) has made statements supporting the case of appellant No.1-Bal Kishan that Bal Kishan was engaged by him to perform agriculture

work over his field in commissioning of bore well at his agriculture field but any documentary receipt/ agreement etc., have not been produced in

support of the story therefore, the plea of alibi is not established by the defence in support of appellant No.1-Bal Kishan.Â According to him, Police

arrested Bal Kishan on 01/10/2005 whereas the Police caught hold of Bal Kishan on 05/12/2005 which is clear from deposition of Investigating

Officer Mahesh Sharma (PW-12). Therefore, said witness was not trustworthy and cannot be relied upon.

20- The judgments relied upon by the appellants move in different factual realm.Â The fact situation of the present case gives sufficient

differentiation vis a vis those judgments.Â Here in the present case, testimony of sole eye witness remained unshaken throughout.Â In her initial

Dehati Nalshi report, marg report, police statement and deposition she maintained the course of incident as it was and since beginning she referred the

names of appellants as perpetrator of the incident who caused death of her son.Â Her location was proximate enough to infer about her credibility.

21- The Sessions Judge has critically examined the evidence of the eye-witnesses in a comprehensive manner and rightly reached a conclusion that

the evidence of eye witness is worth credence.Â That apart, the Hon'ble Supreme Court in the case of Hardev Singh Vs. Harbhej Singh and Others,

(1997) 1 SCC 80, rejected the contention for want of examination of the independent eye-witness, the conviction based on testimony of relatives was

bad in law and held as under:

â??This Court time and again has emphasized that the evidence of close relations who testified the facts relating to the occurrence be not rejected

merely on the ground that they happened to be relatives.Â All that this Court has ruled is that the evidence of such witness be scrutinized very

carefully.â??

Therefore, in the opinion of this Court, the Sessions Judge has not committed any illegality while relying upon the evidence of the sole eye-witness;

namely; PW-8 Mullo Bai conclude that the appellant was member of the unlawful assembly.Â

22- In the case of Sarwan Singh and Others Vs. The State of Punjab, AIR 1978 SC 1525, it has been held that in order to find out the person guilty of

offence under section 302 read with Section 149 of IPC, the prosecution is required to establish that the offence was committed by any member of an

unlawful assembly in prosecution of the common object or knowledge of the assembly or such act as a member of the assembly knew to be likely to

be committed in furtherance of the common object or knowledge.Â The cumulative effect of the injuries are of relevant nature which are found to

have been sufficient in the ordinary course of nature to cause death where the common object or knowledge of the unlawful assembly was to commit

an offence under Section 302 IPC.

Further in the case of Lalji and Others Vs. State of U.P., (1989) 1 SCC 437, the Hon'ble Apex Court while interpreting the provision as contained

under Section 149 of IPC ruled that a member of unlawful assembly is responsible as a principal for the acts of each and all the members being a

member of an unlawful assembly and knew it to be likely to be committed.Â The foundation ofÂ such constructive guilt under Section 149 of IPC of

the member of the unlawful assembly is with requisite common object or knowledge.Â Therefore, mere presence of a member of the unlawful

assembly even in the absence of any overt act or active participation in furtherance of the common object of commission of crime, the person being

member of such unlawful assembly shall be vicariously liable for the criminal act under Section 149 of IPC.

23- The information given by Kamal Singh village Chowkidar (PW-3) and jotting down of said information in Rojnamcha does not render the said

Rojnamcha entry as FIR. It is the information given to the police authorities to swung into action, it cannot be treated as FIR because precise

information jotted down in Rojnamcha may be sufficient information for the police authorities to swung into action but so far as FIR is concerned,

contentions are cryptic and bereft of description therefore, the reliance placed by the petitioner in respect of Section 162 of Cr.P.C. and the judgment

of the Apex Court in the case of State of Andhra Pradesh Vs. Punati Ramulu (surpa) is of no help to the cause of appellants as precedent. In the

cumulative analysis of the evidence and documents referred, it is established by the prosecution that appellants caused injury to the deceased Bal

Kishan while forming unlawful assembly to share common object and rightly found guilty of the offence under Sections 302 and 450 of IPC and other

co-accused under Sections 302 r/w 149 of IPC for life imprisonment and for other jail sentence as referred above. No case for interference is made

out.

24- The appeal stands dismissed.

25- Appellants No.1 -Bal Kishan is in jail from the date of conviction. Appellants No.2 to 5 are on bail. They are directed to surrender before

the trial Court immediately to serve the remaining part of jail sentence. In case of non surrender by appellants No.2 to 5, trial Court is free

to proceed further.

26- Copy of the the judgment be sent to the concerned trial Court for information and necessary compliance.