
(2008) 04 MP CK 0040
In the Madhya Pradesh High Court

Bhaiyalal and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 11-04-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 294, 302, 304, 323

Citation : (2008) ILR (MP) 3309 : (2008) 2 JLJ 105 : (2008) 3 MPHT 37

Hon'ble Judges : Rakesh Saksena, J;Ajit Singh, J

Bench : Division Bench

Judgement

Rakesh Saksena, J.—Appellants have filed this appeal against the judgment dated 19-11-1998 passed by the Sessions Judge, Panna, in Sessions Trial No. 78/1997, convicting them u/s 302/34 of the Indian Penal Code and sentencing them to imprisonment for life. Appellant Nos. 2 and 3 have further been convicted u/s 323/34 of the Indian Penal Code and sentenced to Rigorous Imprisonment for one month with fine of Rs. 200/-.

2. It is to be noted that accused Mathura (acquitted) is "Phoopha " (husband of father's sister) of Badda @ Devi Dayal (deceased) and appellants Bhaiyalal, Kaura and Manja are the sons of Mathura. Betu (P.W. 1), Kallu (P.W. 2), Durga (P.W. 8) and the deceased are real brothers. Premabai (P.W. 4) and Vimlabai (P.W. 5) are the wife and daughter of the deceased.

3. In short, the prosecution case is that on 8-8-1997 at about 19.00 hours, appellants alongwith accused Mathura went to the house of Badda @ Devi Dayal. Mathura called him out and admonished for his making false accusation against him of theft of buffalos. Badda denied to have made any such accusation against him. This led to a hot altercation in the course of which Mathura abused him and exhorted appellant Manja to beat Badda whereupon Man a dealt a lathi blow on his head. Appellant Kaura dealt another blow on his head.

4. It is alleged that, thereafter, appellant Bhaiyalal also dealt a lathi blow on his Shoulder, Badda fell down. When Betu (P.W. 1) and Gaya tried to save him,

appellant Manja dealt lathi blows to them also. Betu (P.W. 1) alongwith injured Badda went to Police Station, Dharampur and lodged the report (Exh. P-1) at 21:00 hours. Head Constable Baijnath Mishra (P.W. 14) recorded the First Information Report and sent the injured persons for medical examination to Primary Health Centre, Dharampur. Dr. M.S. Tomar (P.W. 15) examined the injuries of Badda, Betu and Gaya. He found one incised wound 7 cms x 1 cm x deep upto bone on the occi-parietal region of the skull of Badda. According to him, the injury was caused by a sharp cutting object. Injury report is Exh. P-17. Dr. M.S. Tomar (P.W. 15) found one lacerated wound on the left parietal region of the skull of Betu (P.W. 1) vide injury report (Exh. P-18) and one incised wound on the right parietal region of the skull of Gaya vide injury report (Exh. P-19). Looking to the serious condition of Badda, Dr. M.S. Tomar (P.W. 15) referred him to Primary Health Centre, Ajaygarh for X-ray examination and further treatment. On the same day, Badda in unconscious state was admitted to the Primary Health Centre, Ajaygarh where, during the course of treatment he expired at about 5.00 a.m. on 9-8-1997. Dr. P.C. Shrivastava (P.W. 6) sent intimation of his death to Police Station, Ajaygarh, whereupon a "merg" report (Exh. P-5) was recorded.

5. Dr. V.S. Upadhyay (P.W. 11) carried out the post-mortem examination of the dead body of Badda and found two injuries on his body. One was a contusion on his left clavicle measuring 4 cms x 1 cm and second was a lacerated wound on the left parietal bone measuring 6 cms x 2 cms x bone deep. On internal examination, he found fracture of the left parietal bone of his skull. According to him, both the injuries were ante mortem in nature and were caused by hard and blunt object. In his opinion, the cause of death of the deceased was coma and shock due to head injury. The post-mortem report given by Dr. V.S. Upadhyay is Exh. P-9.

6. In the course of investigation appellants were arrested. On their informations, lathis were seized and were sent to Forensic Science Laboratory, Sagar. As per the report of FSL (Exh. P-33), bloodstains were found on the seized lathis. After investigation, charge-sheet was filed and the case was committed for trial.

7. Trial Court framed charges against appellants Kaura and Manja under Sections 323, 323/34, 302, 302/34 and 341 of the Indian Penal Code. Appellant Bhaiyalal was charged under Sections 294 and 302/34 of the Indian Penal Code and accused Mathura was charged u/s 302/109 of the Indian Penal Code. Appellants abjured their guilt and pleaded false implication. According to them, Durg (P.W. 8), Gaya and Betu (P.W. 1) had assaulted them due to past enmity. When they were going to lodge a report, a "Panchayat" was convened. While they were holding "Panchayat" under a Banyan tree, suddenly a branch of the tree fell down on Badda as a result of which he suffered injuries. Gaya who was sitting nearby also suffered injury in the same manner. According to them, appellant Bhaiyalal also lodged a report about their beating. Appellants examined Head Constable Baijnath Mishra (D.W. 1) and Hemprasad (D.W. 2) in support of their defence. Trial Court relying upon the evidence of eyewitnesses Betu (P.W. 1),

Kallu (P.W. 2), Bihari (P.W. 3), Premabai (P.W. 4), Vimlabai (P.W. 5) and Durga (P.W. 8) and the medical evidence of Dr. V.S. Upadhyay (P.W. 11), convicted and sentenced the appellants as aforesaid. However, finding the evidence insufficient against accused Mathura, acquitted him.

8. Learned Counsel for the appellants submitted that the prosecution examined only relatives and interested witnesses. Since no independent witness was produced by the prosecution, the Trial Court committed error in convicting the appellants on the evidence of such witnesses. He submitted that the evidence of Dr. M.S. Tomar (P.W. 15) who examined the injuries of Badda and the evidence of Dr. V.S. Upadhyay (P.W. 11), who performed the post-mortem examination, are inconsistent and contradictory. As such, the Trial Court erred in placing reliance on the evidence of Dr. V.S. Upadhyay (P.W. 11). He further submitted that since the prosecution witnesses did not explain the injuries of appellants their conviction deserves to be set aside.

9. Per contra, learned Panel Lawyer for the State has submitted that the evidence of eye-witnesses cannot be discarded merely on the ground that they were relatives of the deceased, especially when their evidence is consistent, natural and trustworthy. Their presence at the house of the deceased, where the incident took place, is natural. The evidence of eye-witnesses has been corroborated by the medical evidence. As such, the Trial Court has committed no error in holding the appellant guilty. He supported the judgment of conviction passed by the Trial Court.

10. Since the eye-witnesses in the case are brothers and relatives of the deceased, we have examined their evidence with great caution and have perused the record of the case carefully.

11. Betu (P.W. 1) has testified that at about 7.00 p.m. on the day of occurrence, when Badda was taking his meals, appellants came to their house. Accused Mathura called him out and told that he had levelled accusation of theft against them. When Badda tried to explain that he did not make any such allegation. Mathura abused him and exhorted appellant Manja to beat him. Then appellant Manja dealt a lathi blow on the head of Badda. Appellant Kaura dealt another lathi blow on his head. Appellant Bhaiyalal came running and shouting that he should be killed and inflicted a lathi blow on his shoulder. When Betu (P.W. 1) and his father Gaya tried to save him and to take him inside the house, appellant Manja dealt lathi blows to them also. According to him, the incident was witnessed by Kallu (P.W. 2), Bihari (P.W. 3), Premabai (P.W. 4), Vimlabai (P.W. 5), Durg (P.W. 8) and some other persons. After assaulting, accused persons ran away from the spot. He lodged the First Information Report (Exh. P-1) at Police Station Dharampur. He, Gaya and Badda were sent to Primary Health Centre, Dharampur where their injuries were examined. On the next day, in the morning, Badda died at Ajaygarh hospital. This witness was subjected to a lengthy cross-examination, but nothing could be elicited to disbelieve his evidence in respect to appellants Kaura and Manja. However, when he was confronted with his case

diary statement (Exh. D-1), it was revealed that he did not disclose before the police that appellant Bhaiyalal inflicted any injury to Badda. This fact was also not found mentioned in the First Information Report (Exh. P-I) lodged by him. In cross-examination, he admitted that the relations between him and appellants were not strained, rather were cordial. He denied that he, Premabai, Vimlabai, Bihari, Chotelal and Durga Prasad assaulted appellants by lathis. He also denied that the Banyan tree fell down on Badda and Gaya when they were sitting for "Panchayat" under it.

12. The evidence of Betu (P.W. 1) is substantially corroborated by the evidence of Kallu (P.W. 2), Bihari (P.W. 3), Premabai (P.W. 4), Vimlabai (P.W. 5) and Durga (P.W. 8) who categorically stated that appellants Manja and Kaura assaulted Badda and that Manja also assaulted Betu and Gaya. Though they also stated that appellant Bhaiyalal dealt a lathi blow on the shoulder of Badda when he fell down, but this fact was found conspicuously missing in their respective case diary statements. Other contradictions appearing in their evidence do not relate to any material aspect of the case, affecting their credibility.

13. We have closely scrutinized the evidence of Vimlabai (P.W. 5) who happened to be a child of about 10 years age, but we do not find any indication therein that she was prompted or tutored by anybody. The evidence of Betu (P.W. 1) with respect to appellants Kaura and Manja is also corroborated by the First Information Report (Exh. P-I) lodged by him just after two hours of occurrence.

14. We are not impressed by the argument advanced by the learned Counsel for the appellants that the evidence of eye-witnesses is inconsistent with the medical evidence. It is true that Dr. M.S. Tomar (P.W. 15) who initially examined the injuries of Badda and Gaya found one incised wound on the skull of each of them, which according to him were caused by a sharp edged weapon. On perusal of the evidence of Dr. V.S. Upadhyay (P.W. 11), who performed the post-mortem examination of the dead body of Badda, it is seen that he found one contusion on the clavicle bone and a lacerated wound on the parietal bone of the deceased. In his opinion, both the injuries were caused by hard and blunt object. In view of this inconsistency, perhaps, learned Counsel for the appellants submitted that eye-witnesses' account was not trustworthy. Dr. M.S. Tomar (P.W. 15) in his evidence admitted that many times it happens that when an injury is caused by a stick on the parietal region of the skull it looks like an injury caused by a sharp edged weapon. He also stated that the injury found on the head of Gaya was not possible by falling of branch of the tree.

15. According to Dr. M.S. Tomar, at the time when Badda was brought to him his pulse was feeble, his pupils were dilated and he was unconscious. He had, therefore, referred him for X-ray examination and treatment to Primary Health Centre, Ajaygarh. It appears that in view of the serious condition of Badda, Dr. M.S. Tomar (P.W. 15) hastily and cursorily examined his injuries, whereas Dr. V.S. Upadhyay (P.W. 11) examined the injuries on his dead body minutely. Dr. M.S. Tomar (P.W. 15) did not speak about the injury found on the clavicle region of

Badda. The evidence of Dr. V.S. Upadhyay (P.W. 11) appears more reliable if examined in juxtaposition of the evidence of eye-witnesses who stated that appellants Manja and Kaura inflicted lathi blows on the head of the deceased. In Paragraph No. 11 of the impugned judgment, the Trial Court has considered this aspect of the case elaborately. We find no ground to disagree with the finding of the Trial Court that the injuries to the deceased, Betu (P.W. 1) and Gaya were caused by lathis.

16. Taking into consideration the evidence of eye-witnesses and the evidence of Dr. V.S. Upadhyay (P.W. 11), we feel satisfied that the appellants Kaura and Manja assaulted Badda (deceased), Betu (P.W. 1) and Gaya with lathis and as a result of the injury caused on the head of Badda, parietal bone of his skull was fractured and he ultimately died and Betu (P.W. 1) and Gaya suffered simple injuries. However, in view of the fact that none of the eye-witnesses disclosed in their case diary statements that appellant Bhaiyalal dealt any lathi blow to Badda and that there was absolutely no evidence on record that he caused any injury to Betu (P.W. 1) and Gaya, a serious doubt is created about his participation in the incident. Accordingly, we set aside, his conviction u/s 302/34 of the Indian Penal Code. He is acquitted.

17. The question now before us is whether the appellants Kaura and Manja have been rightly convicted u/s 302 of the Indian Penal Code. The defence of the appellants is two fold. According to them, Gaya, Bihari, Kallu, Chotelal, Durga and Betu assaulted them with lathis as a result of which they suffered injuries and when the members of the complainant party including the deceased and Gaya were holding "Panchayat" under a Banyan tree, one of its branches broke down and fell on them as a result of which Badda and Gaya suffered injuries. In support of this plea, appellants examined Hemprasad (D.W. 2) who testified that Badda, Durga, Gaya and Betu had beaten the appellants with lathis due to past enmity and when they were going to lodge the report with the police, on his intervention both the parties sat beneath a Banyan tree for "Panchayat" and then suddenly a branch of the tree fell down on Badda due to which he suffered injury on his head. In our opinion, it is difficult to place reliance on the evidence of this witness. As per defence version, appellant Bhaiyalal lodged a report at the Police Station against the complainant party of having assaulted them with lathis. This report (Exh. D-I) was recorded by Head Constable Baijnath Mishra (D.W. 1) in Rojnamcha S. No. 209 at about 10:30 p.m. on 8-8-1997. Baijnath Mishra (D.W. 1) admitted that at about 9:00 p.m. on the same day, Betu (P.W. 1) also lodged the report which was recorded in Rojnamcha S. No. 212. Bhaiyalal, his brothers Manja and Kaura were sent for medical examination and on the report by Betu (P.W. 1), he, Badda and Gaya were sent for medical examination. In the report (Exh. D-I), there is absolutely no mention that Betu, Badda and Gaya suffered any injury by fall of a branch of the Banyan tree. This inevitably renders the evidence of Hemprasad (D.W. 2) unworthy of reliance.

18. Dr. M.S. Tomar (P.W. 15), has testified that he had medically examined

appellants Manja, Kaura and Bhaiyalal in the night of 8-8-1997 and had found a swelling and an abrasion on the finger and wrist of appellant Manja, one laceration on the head and one swelling on the wrist of the left hand of appellant Bhaiyalal and one abrasion on the left shoulder of appellant Kaura. Their injury reports are Exhs. D-7, D-8 and D-9 respectively. Since these injuries were simple in nature and were not visible, the prosecution was not obliged to explain these injuries, but at the same time from the aforementioned material it stands established that appellants also received injuries in the same incident in which deceased, Betu and Gaya were injured.

19. It must be noted that Dr. M.S. Tomar (P.W. 15) as well as Dr. V.S. Upadhyay (P.W. 11), both, found only one injury on the head of Badda which resulted into his death. None of the two doctors stated that the said injury was sufficient to cause his death. According to Dr. M.S. Tomar (P.W. 15), it was, however, dangerous to life. All the eye-witnesses have stated that appellants Manja and Kaura, each dealt one lathi blow, on his head. Thus, it is difficult to hold as to which of the two appellants caused injury on his head. Taking into consideration the fact that the appellants also suffered injuries in the same incident, in the fact situation of the case, it is not possible for us to hold that appellants Kaura and Manja intended to cause the death of Badda. However, in these circumstances, it can be held that appellants Manja and Kaura knew that by their acts they were likely to cause his death, making themselves liable to be convicted u/s 304 Part II of the Indian Penal Code.

20. For the foregoing reasons, we set aside the conviction of appellants Kaura and Manja u/s 302/34 of the Indian Penal Code and the sentence of imprisonment for life, instead, convict them u/s 304 Part II read with Section 34 of the Indian Penal Code and sentence them to Rigorous Imprisonment for five years. Their conviction u/s 323/34 of the Indian Penal Code is affirmed. Appellant Manja, who has undergone whole of the sentence awarded to him, shall be released forthwith, if not required in any other case. Appellant Kaura Prasad, who is on bail shall surrender to serve out the remaining sentence. Appellant Bhaiyalal is acquitted. He is on bail, his bonds shall stand discharged.

21. Appeal is partly allowed.