
(2018) 04 MP CK 0149

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 1063 OF 2007

Deoraj @Bhagga And Others

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 24-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302

Citation : (2018) 04 MP CK 0149

Hon'ble Judges : S.K. GANGELE, J; ANJULI PALO, J

Bench : Division Bench

Advocate : Durgesh Gupta, Ghanshyam Pandey, Siddharth Sharma, Ajay Shukla

Final Decision : Allowed

Judgement

Appellants have filed this appeal against the judgment dated 26/04/2007 passed in Sessions Trial No. 172/2006.

2. Appellants were prosecuted for commission of offence of murder. The trial court held appellant No. 1 Deoraj @ Bhagga guilty for commission of

offence of murder under Section 302 of IPC. Rest of the appellants are also convicted with the aid of Section 34 of IPC and awarded sentence of life

and fine amount of Rs. 1,000/-.

3. Prosecution story in brief is that there was enmity between the appellants and deceased on panchayat election. On the date of incident i.e.

18/10/2006 deceased Khemsingh was returning back to his house. The appellants surrounded him. Appellant Deoraj was armed with sword and rest

of the appellants were armed with lathis. They had beaten the deceased and thereafter they ran away from the spot. Father of the deceased-

Khemsingh lodged report at police station. Police conducted investigation, appellants were taken into police custody on 24/10/2006. On their

memorandum clothes and sword were seized. After conducting investigation police filed charge-sheet. Appellants during trial abjured their guilt and pleaded innocence. The trial court held the appellants guilty for commission of offence as mentioned above in the judgment and awarded sentence.

4. Learned counsel appearing on behalf of the appellants has submitted that the trial court has committed an error in relying on the evidence of eye witnesses PW/7 and PW/14. They are not witness of the incident. Their evidence is not reliable. The police was not sure that who had committed the crime. Number of persons were kept in police custody and subsequently accused persons were implicated in the case.

5. Learned counsel appearing on behalf of appellants no. 2, 3 and 4 have submitted that the aforesaid appellants were convicted with the aid of

Section 34 of IPC . Witnesses deposed that they were armed with lathis and they had caused injuries of lathis on the person of the body of the

deceased, however, there was no injury caused by lathi on the person of the deceased neither lathis were seized from the aforesaid accused persons,

hence, evidence of the aforesaid witnesses is not reliable against these accused persons. Apart from this there is other evidence that police had no

knowledge about involvement of the accused persons. Hence, the appellants could not be convicted with the aid of Section 34 of IPC.

6. Learned counsel for the State has submitted that there is sufficient evidence against the appellants to hold them guilty beyond reasonable doubt for

commission of offence of murder. Eye witnesses specifically deposed that all the appellants were present on the spot. FIR is prompt and named.

Clothes of the appellants were seized on which human blood was found as per report of FSL, hence, the trial court has rightly convicted the appellants

for the offence. In support of his contentions learned counsel for the State relied on the judgment of Hon'ble Apex Court in the case of

Rajkishore Purohit Vs. State of Madhya Pradesh and others (2017) 9 SCC 483 and Sudip Kumar Sen alias Biltu VS. State of West Bengal and others

(2016) 3 SCC 26.

6. PW/7 and PW/14 are the eye witnesses. We would like to examine their evidence first. PW/7 Devsingh Barkade, in his evidence deposed that at

around 8 O'clock on 18/10/2006 I was at my home. I had heard sound of maarpeet from the side of road and came out from my house. I had

seen that Deoraj, Kariya, Annulal and Rajendra were beating deceased Khemsingh, he fell down. I had further seen in the light of torch that all the accused persons ran away towards badi. Deoraj was armed with sword and rest of the accused persons were armed with lathis. Due to fear I came to my house. Villagers came on the spot after sometime, thereafter I went to the place of incident. He further deposed that there was election in the village and on the aforesaid count there was rivalry between the appellant and deceased. In para 6 of his cross-examination he deposed that I told the police that I had seen appellants in the light of torch why this fact has not been mentioned in my police statement Ex. P/3 I cannot say the reason. In para 12 of his cross-examination he further admitted that I, Ganesh, Rajeshwari and Deepak were kept in the police custody at Police Station Mandla for 5 to 6 days. He further admitted in his cross-examination that police released me on 24/10/2006 from the police custody.

7. PW/14 Ganesh Prasad Markam, is another eye witness. He deposed that on the date of incident at around 6 Oâ??clock in the evening I had gone at the residence of Murari to watch T.V. my wife Rajeshwari Bai, and son were also watching T.V. at the house of Murarilal. Accused-Rajendra came there he told me that Kariya, Deoraj and Annulal were calling me. I refused to go with him and told him that I would talk to them in the morning. At that time I noticed that Khemsingh was going to his house. He was having a torch, Rajendra was behind him and after sometime I had seen that Deoraj, Kariya, Annulal and Rajendra were beating the deceased. Thereafter, I came to my house and again saw that all the accused persons came on the different side. Appellant-Deoraj was armed with sword. Rest of the appellants were armed with lathis. Thereafter I had seen in the light of torch that they had ran away near badi. I came to my house andÂ told my wife that accused persons had killed the deceased. There was enmity between the deceased and accused persons due to panchayat election. In para 8 of his cross examination he admitted that I told the police that Deoraj was armed with sword and other accused persons were armed with lathis, why, this fact has not been mentioned in the police statement, I could not state the reason.

8. FIR Ex. P/14 was lodged by PW/4-father of the deceased on the same day at around 21.40. It is mentioned in the FIR that my son Anand have

seen dead body of the deceased. He told me about the said act. Thereafter I went at the place of incident and noticed that a dead body was of my son Khemsingh. He was killed by some unknown persons. I had suspicion on Kariya, Deoraj, Annulal and Rajendra because there was enmity between the deceased and these persons due to panchayat elections.

9. PW/4 Kadhoralal-father of the deceased, deposed that at around 8 O'clock I was at my house. At that time Anand came to me he was

weeping and told me that my another son was killed. I went on the spot other family members and villagers were reached at the spot and noticed that

dead body of the deceased was lying on the earth. There were no clothes on the dead body he was naked, thereafter I went to police station and

lodged report Ex. P/14. Police came on the spot at around 10 O'clock and panchanama of the dead body was prepared on the next day. There

was enmity between the accused persons and deceased due to elections of panchayat. In para 12 of his cross-examination he admitted the fact that

police had searched the residence of the villagers in the night and on the next day in the morning SP also came to my house. All the villagers were

called, appellants were also there. I had seen the appellants upto 19/10/2006.

10. PW/5 Smt. Nirmala Bai, another witness. She deposed that I heard sound of weeping and came to know that deceased was killed by somebody

else. She further admitted in his cross examination that Police had called all the villagers of the mohalla and inquired from the villagers that who had

killed the deceased.

11. PW/6 Deepak Padwar also admitted that on the date of incident police was there and they had inquired about the incident from all the villagers.

Police had taken Deoraj, Annulal, Kariya, Dhanni, Kaliram, Rajendra and Dadulal to the police station.

12. PW/8 Rajeshwari Bai, another witness. She deposed that I had came to know that deceased was killed. She is wife of PW/14 Ganesh Prasad. In

her cross-examination she deposed that police had taken me, Ganesh and Devsingh to police station Mandla for interrogation, after 2 to 3 days we

were came to our house.

13. PW/9 Dr. A. Husain, who performed autopsy of the deceased. He deposed that I noticed following injuries on the person of the deceased.

(1) One incised injury 7x1" right side of the neck. Mandible bone was also

cut. Survical bone was exposed.

(2) Another incised injury 3â??x1/2â?? on left side of the head bone deep.

(3) There was clotting of blood on area of head.

(4) Parietal bone was cut. Injuries were caused by hard and blunt object.

He further deposed that the deceased was died due to injuries suffered by him. Injuries were antemortem in nature. Injuries could be caused from the

sword which was seized by the police. I had given my opinion in this regard. In his cross examination he further admitted that the injuries were caused

by sharp edged weapon.

14. PW/12-Narmada Prasad is the witness of seizure. He deposed that police had inquired before me from Deoraj and on his memorandum Ex. P/4 a

sword was seized from Nanbai ki madhiya vide seizure memo Ex. P/5 I signed both the documents. Appellant- Kariya also given memorandum Ex.

P/6 in regard to T-Shirt and jeans containing blood stains were seized vide seizure memo Ex. P/7. Appellant-Annulal deposed that I had taken out the

pajji of the deceased jeans and shirt which were kept in my house and on his memorandum Ex. P/8 pants and shirt were seized vide seizure memo Ex.

P/9 I signed the same. On memorandum of appellant-Rajendra Ex. P/10 lungi containing blood stains was seized from the house of the aforesaid

appellant vide seizure memo Ex. P/11. Appellants were arrested on 19/10/2006.

15. PW/13 Anand Prakash Thakur deposed that I and father of the deceased went to police station to lodge FIR.

16. PW/15 prepared spot map which is Ex. P/23.

17. PW/16 G.P. Dubey, deposed that on 18/10/2006 I was posted asÂ Station House Officer Incharge at Kotwali. On the date of incident Kadhori

informed the police about death of the deceased and I registered merg Ex. P/15Â I signed the same Kadhori also signed the same, thereafter I

prepared Panchnama of the dead body which is Ex. P/2 and signed the same. Dead body of the deceased was sent for postmortem. I inspected the

spot and prepared spot map on 19/10/2006 and signed the same. On the aforesaid date I recorded statements of Ganesh, Rajeshwari, Devsingh,

Deepak Padwar, Nirmala, Narmada, Gyanchand, Kadhori and Anand. Thereafter, on 23/11/2006 I sent seized articles to FSL vide Ex. P/27. I

recorded memorandum of Deoraj on 24/10/2006 Ex. P/4 and on his

memorandum a sword was seized from Madhiya of Nanbai vide seizure memo

Ex. P/5. Jeans and T-shirt were also seized vide seizure memo Ex. P/7. Similarly on 24/10/2006 on the memorandum Ex. P/6 of appellant Kariya,

clothes which he was wearing at the time of incident were seized vide seizure memo Ex. P/7. Similarly on the memorandum Ex. P/8 of appellant

Annulal on the same dayÂ Lungi of the deceased was seized vide seizure memo Ex. P/9. Similarly on the memorandum of Rajendra Ex.P/10 lungi

and shirt which the deceased was wearing were seized vide seizure memo Ex. P/11 and I signed all the documents. On 19/10/2006 plain earth and red

earth was seized vide seizure memo Ex. P/12 I signed the same. A torch was also seized vide seizure memo Ex. P/13. Seized articles were sent to the

FSL. He denied the fact that accused persons were kept in the police lockup on 19/10/2006.

18. The trial court placed reliance on the evidence of PW/7 and PW/14. The objection was raised before the trial court by the defence that as per

evidence of PW/7 and PW/14 except accused Deoraj other persons were beating the deceased by lathis andÂ as per medical report there was no

injury caused by lathi on the person of the deceased, hence, the evidence of these witnesses against other accused persons except DeorajÂ is not

reliable. The trial court rejected the aforesaid contention and observed that the appellants were present on the spot, hence they are also liable to be

punished with the aid of Section 34 of IPC.

19. Honâ??bleÂ Apex Court in the case of Mahavir Singh Vs. State of Madhya Pradesh (2016) 10 SCC 220 has held as under in regard to

contradictions between medical evidence and ocular evidence.

â??The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that

though the ocular testimony of a witness has greater evidentiary value vis-Ã-vis medical evidence, when medical evidence makes the ocular

testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes far that

it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved â??

Â Honâ??ble Apex Court also referred previous judgment reported in the case of Abdul sayeed Vs. State of Madhya Pradesh (2010) 10 SCC 259,

in the aforesaid judgment the Honâ??ble Apex Court has considered in detail the principle of medical evidence vs. ocular evidence and has held as

under-

â??32. In *Ram Narain Singh v. State of Punjab*, AIR 1975 SC 1727, this Court held that where the evidence of the witnesses for the prosecution is

totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution's case and

unless reasonably explained it is sufficient to discredit the entire case.

33. In *State of Haryana v. Bhagirath & Ors.*, (1999) 5 SCC 96, it was held as follows:-

The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft

of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact

situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view

which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that

opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular

subject." [Emphasis added] 34. Drawing on Bhagirath's case (*supra.*), this Court has held that where the medical evidence is at variance with ocular

evidence,

â??it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the

eyewitnesses' account which had to be tested independently and not treated as the ""variable"" keeping the medical evidence as the ""constant"".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities can not be accepted as

conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely

prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

â??The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses

held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of

observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. (Vide Thaman

Kumar v. State of Union Territory of Chandigarh, (2003) 6 SCC 380; and Krishnan v. State, (2003) 7 SCC 56).

36. In Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484, this Court observed, "Ordinarily, the value of medical evidence is only

corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the

medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses.

Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the

manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the

medical evidence." [Emphasis added]

37. A similar view has been taken in Mani Ram & Ors. v. State of U.P., 1994 Supp (2) SCC 289; Khambam Raja Reddy & Anr. v. Public

Prosecutor, High Court of A.P., (2006) 11 SCC 239; and State of U.P. v. Dinesh, (2009) 11 SCC 566.

38. In State of U.P. v. Hari Chand, (2009) 13 SCC 542, this Court re-iterated the aforementioned position of law and stated that,

In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect

that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular

testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far

that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.â??

The principle of law is that where the medical evidence goes as far that it completely rules out all possibility of the ocular evidence being true, the

ocular evidence may be disbelieved.

20. In the present case eye witnesses deposed that except appellant-Deoraj other appellants were armed with lathis and they had been beaten the

deceased by lathis. Doctor noticed two incised injuries on the person of the body of the deceased which were caused by sharp edged weapon. He

deposed that injuries could be caused by sword which was seized from appellant-Deoraj. There was no lacerated wound or any other injury on the

person of the body of the deceased, hence, medical evidence completely rules out ocular evidence. Apart from this no lathi was seized from the

accused persons. I.O. in his evidence does not explain that why lathis were not seized from the accused persons, hence, the evidence of eye

witnesses PW/7 and PW/14 is not reliable against the accused persons except appellant No. 1-Deoraj.

21. The next question is that whether it could be presumed that accused persons were present on the spot. Eye witnesses did not depose that accused

persons were present on the spot they were unarmed. They deposed that they were armed with lathis and they had been beating the deceased. In

such circumstances the evidence of all the eye witnesses is not reliable against other accused persons.

22. The next point is that clothes were seized from the accused persons and there were blood stains present. The Apex Court in the case of State

of Rajasthan Vs. Rajaram (2003) 8 SCC 180 has held as under in regard to presence of blood stains on the clothes of the accused persons and

whether on this ground accused persons be convicted:-

Coming to the bloodstains on the cloth which were allegedly seized on being pointed out by the accused, the forensic laboratory report indicated

that there were blots of human blood on the shirts and trousers of the accused. There was no effort to find out the blood group. In fact, the High Court

noted this position and observed that presence of PW-4 at the time of recovery is doubtful as he has been found to be an unreliable witness. It was

observed that even if it is accepted that there was existence of blood, this circumstance is not such from which it can be found that the accused was

perpetrator of the crime. In the aforesaid report (Ex.61) it was clearly stated that the blood group of blood found on the clothes could not be

determined. Neither the blood group of the deceased nor that of the accused was

determined. In that background, the High Court held that the possibility of the blood being that of the accused cannot be ruled out. In view of the findings recorded by the High Court about the non-acceptability by evidence relating to alleged extra judicial confession, the conclusions of the High Court cannot be said to be one which are unsupportable. We decline to interfere in the appeals, and the same are dismissed.â??

23. Apart from this the prosecution witnesses themselves have deposed as stated above in the judgment that police had searched the house of neighbours and villagers in the night. When the SP came at village all the villagers were called. At that time the accused persons were also there. This fact has been admitted by father of the deceased PW/4 in his evidence. Number of persons were kept in police custody. This fact has been admitted by the prosecution witnesses and specifically deposed by two defence witnesses DW/1 & DW/2 that police searched involvement of other persons that is why there was search in the village and number of persons were detained in the police station for near about 4 to 5 days. There is no answer to this question. In the FIR father of the deceased has stated that he had suspicion on all the accused persons because there was rivalry due to Panchayat elections.

24. The Apex Court in the case of Sudip Kumar Sen alias Biltu VS. State of West Bengal and others (2016) 3 SCC

26 has held as under in regard to Section 34 of IPC:-

â??14. Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:-

(i) there was common intention on the part of several persons to commit a particular crime and (ii) the crime was actually committed by them in furtherance of that common intention.

Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be

proved. The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result.

The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each

case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to

commit an offence with which they could be convicted. â??

25. Looking to the evidence on record as discussed above in our opinion, the trial court has committed an error in convicting the appellants except

Deoraj with the aid of Section 34 of IPC.

26. In regard to appellant no.1-Deoraj there is evidence of eye witnesses that he was armed with sword and he had inflicted injuries on the person of

the body of the deceased by sword. The evidence corroborates from the evidence of doctor who performed autopsy. A sword was seized from the

possession of the appellant Deoraj. Human blood was found on the sword as per FSL report. The deceasedÂ sustained two grievous injuries which

could be caused by sword as per opinion of the doctor. Hence, in our opinion, the trial court has rightly convicted the aforesaid accused-Deoraj for

commission of offence of murder and awarded a proper sentence.

27. Consequently, the appeal filed by the appellants is partly allowed. Appeal filed by appellant No. 1 Deoraj is hereby dismissed. His conviction and

sentence awarded by the trial court is upheld. The appeal filed by appellants No. 2,3 & 4 Kariya, Annulal and Rajendra is hereby allowed. They are

acquitted from charges of Section 302/34 of IPC. Their conviction and sentence awarded by the trial court is hereby set-aside. They are on bail. Their

bail bonds are hereby discharged.