
(2009) 05 MP CK 0016
In the Madhya Pradesh High Court

Dwarka Soni and Others

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 14-05-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 34

Citation : (2009) 3 JLJ 63

Hon'ble Judges : Sushma Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sushma Shrivastava, J.

1.Appellants have preferred this appeal challenging their conviction and order of sentence passed by IVth Additional Sessions Judge, Chhatarpur in S.T. No. 165/93, decided on 13.5.98.

2. Appellants No. 1, 3 and 4 have been convicted u/s 323/34 of IPC for causing hurt to Ramkripal and sentenced to rigorous imprisonment for six months with fine of Rs. 200/-, in default rigorous imprisonment for one month. They are further convicted u/s 325/34 on two counts for causing grievous hurt to Chandrapal & Ramkishore and sentenced to rigorous imprisonment for four years with fine of Rs. 500/-, in default rigorous imprisonment for one year, on each count. Appellant No. 2, however, has been convicted u/s 323/34 for causing hurt to Ramkripal, u/s 325 of IPC for causing grievous hurt to Ramkishore, u/s 325/34 of IPC for causing grievous hurt to Chandrapal and sentenced to rigorous imprisonment for six months with fine of Rs. 200/-, rigorous imprisonment four years with fine of Rs. 500/- on two counts, in default rigorous imprisonment for two months and one year respectively. Appellant No. 3 has been further convicted u/s 294 of IPC and sentenced to rigorous imprisonment for one month with fine of Rs. 50/-, in default rigorous imprisonment for fifteen days.

3. According to prosecution, on 18.2.93 about 8.30 P.M. at village Sarvai, when

complainant Ramkishore and his brothers Ramkripal & Chandrapal were going to their Saw mill and reached near Balaji temple, appellants armed with lathis met them on the way. In the meanwhile, Jaypal's tiffin fell down from his hand, complainant Ramkishore then lit his torch. Thereupon appellants began hurling obscene abuses. On protest, all the appellants began assaulting complainant Ramkishore and his brothers Ramkripal and Chandrapal by lathi causing various injuries on their person including fracture in ulna bones of Ramkishore & Chandrapal. Appellants also intimidated them and threatened to kill. The matter was reported to the Police by complainant Ramkishore at Police Station Sarvai. Complainant Ramkishore, injured Chandrapal & Ramkripal were sent for medical examination. Upon receipt of their medical and X-ray reports, an offence was registered against the appellants and was investigated. Lathi used in the commission of offence were also seized from them. After due investigation, appellants were prosecuted and put to trial u/s 294, 323, 307 and 506-B of IPC.

4. Appellants denied the various charges framed against them and pleaded false implication. According to appellant Ramlakhan, he was not present on the place of occurrence, while other appellants took the plea of private defence consequent to the assault made on them by complainant party.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted all the appellants of the charges u/s 307 & 506-B of IPC, but found them guilty for causing hurt to Ramkripal and grievous hurt to Chandrapal & Ramkishore and also found appellant Jaypal guilty for uttering obscene abuses on the public place, convicted and sentenced them as aforesaid by the impugned judgment, which has been challenged in this appeal.

6. Learned Counsel for the appellants submitted that the trial court erroneously convicted the appellants by placing implicit reliance on the inconsistent and unreliable testimony of the partisan witnesses and failed to consider that appellants Dwarka, Shivilal and Jaypal also sustained injuries in the incident, which remained unexplained by the prosecution, and they acted in exercise of right of private defence, while appellant Ramlakhan was not present on the place of occurrence.

7. Perused the evidence on record. Complainant Ramkishore (P.W-1) deposed in his evidence that on 18th Feb. 1993 at about 8.30 in the evening, when he was going home for taking his meals and his brothers Chandrapal & Ramkripal were coming back from home after having meals, appellants Dwarka, Jaypal, Shivilal and Ramlakhan met them on the way near Balaji temple carrying lathi in their hands. Appellant Jaypal was having a tiffin, which fell down; when complainant Ramkishore lit the torch, appellant Jaypal hurled obscene abuses. According to Complainant Ramkishore (P.W-1), when he protested against hurling of abuses, appellant Shivilal exhorted appellant Jaypal to assault him. Appellant Jaypal then gave him a lathi blow, appellant Shivilal also gave a lathi blow on his right hand causing fracture, his brothers Chandrapal and Ramkripal also received injuries on their legs and scalp. He then reported the matter at Police Station Sarvai. His

report was recorded in Rojnamcha by A.S.I. R.K. Rai (P.W-8).

8. P.W-2 Chandrapal also corroborated this fact that on the day of occurrence, when he was going to his Saw mill after having meals and reached near Balaji temple, he saw that all the four appellants were assaulting Ramkishore by lathi; when he intervened, appellant Jaypal Soni assaulted him causing injuries; his brother Ramkripal also received injuries in the incident. P.W-3 Ramkripal also corroborated the fact that appellants were assaulting his brother Ramkishore near Balaji temple by lathi and when he intervened, appellant Jaypal assaulted Chandrapal and appellant Shivilal assaulted him causing injuries on their back, head and hands.

9. There is also medical evidence on record indicating that complainant Ramkishore (P.W-1) and his brothers Ramkripal (P.W-3) and Chandrapal (P.W-2) were injured in the incident. Dr. M.K. Prajapati (P.W-9), who examined the three injured persons, namely, Ramkishore, Ramkripal and Chandrapal, found various injuries on their body caused by hard and blunt object as per their medical reports (Ex.P-18, Ex.P-19 and Ex.P-20). Dr. M.K. Khare (P.W-7), upon X-ray examination of injured Chandrapal & Ramkishore, also found fractures in their ulna bones.

10. There are no reasons to discard or disbelieve the medical evidence of Dr. M.K. Prajapati (P.W-9) and Dr. M.K. Khare (P.W-7). It is clearly evident from their testimony that complainant Ramkishore (P.W-1), Chandrapal (P.W-2) and Ramkripal (P.W-3) had sustained various injuries in the incident and grievous hurt was also caused to complainant Ramkishore and Chandrapal in the form of fracture in their ulna bones.

11. The main thrust of the submission of learned Counsel for the appellants has been that the ocular evidence is quite inconsistent and unreliable and learned trial judge failed to consider that complainant party was the aggressor and appellants Jaypal, Dwarka and Shivilal also sustained various injuries, as established from the testimony of Dr. R.C. Malariya (D.W-1), in the assaults made on them and they acted in exercise of the right of private defence. It was further submitted that the complainant party was assaulting appellant Jaypal and on hearing his shrieks, appellants Dwarka and Shivilal had reached the spot and they had no common intention to cause injury to anyone.

12. However, there is no substantial evidence on record to the effect that complainant Ramkishore, Chandrapal and Ramkripal were aggressors or they first assaulted appellant Jaypal. P.W-1 Ramkishore, P.W-2 Chandrapal and P.W-3 Ramkripal have denied the suggestion given in their cross-examination that they had assaulted or attacked first and caused injuries to the three appellants. Although complainant Ramkishore (P.W-1) admitted in his cross-examination that appellants Shivilal, Dwarka and Jaypal had also sustained injuries, and like him the other injured persons, namely, Chandrapal (P.W-2) and Ramkripal (P.W-3) also admitted that a counter criminal case was pending against them, but again

there was no evidence on record that complainant party was the aggressor or they first caused injuries to the three appellants. Appellants led no such evidence, nor there is any whisper in the impugned judgment, that complainant Ramkishore, Ramkrupal & Chandrapal were found guilty in the counter case. On the other hand, the trial court after appreciation of the evidence on record, held that appellants were the aggressors.

13. The Apex court has laid down in catena of decisions that it cannot be stated as a universal rule that whenever the injuries are found on the body of the accused persons, a presumption must be raised that they acted in exercise of right of private defence. It would be profitable to reproduce the following observation made by the Apex Court in this behalf in the case of Naveen Chandra Vs. State of Uttranchal, :

It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilise the version of the right of private defence. But mere nonexplanation of the injuries by the prosecution may not affect the prosecution case in all cases. The burden is on the accused to show that he had the right of private defence

14. As regards non-explanation of injuries sustained by three appellants, the Apex Court also held in its three Judges' Bench decision rendered in Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on failure of the prosecution to do so, the prosecution case should be disbelieved.

15. Needless to repeat that there is no substantial evidence on record to infer that the complainant party was aggressor or caused injuries to the three appellants so as to give rise to the exercise of right of private defence by the appellants.

16. Even if it is assumed on the basis of injuries found by Dr. R.C. Malariya (D.W-1) on the person of three appellants, though there is no such evidence on record, that there was a free fight, it is also well settled as laid down by the Apex Court in the case of Vishvas Aba Kurane Vs. State of Maharashtra, that in case of free fight, no right of private defence is available to either party. Thus, in the instant case, plea of exercise of right of private defence by the three appellants, namely, Dwarka, Jaypal and Shivilal is not found established.

17. There is also no evidence on record that appellant Ramlakhan was not present on the place of occurrence and was elsewhere. Needless to point out that the burden to prove the plea of alibi is also on the accused.

18. On the other hand, it is clearly evident from the testimony of complainant

Ramkishore (P.W-1), Chandrapal (P.W-2) and Ramkripal (P.W-3) that all the three appellants were involved in the assault made on three injured persons. The aforesaid three witnesses being injured eyewitnesses, their presence on the place of occurrence cannot be doubted. Although there is some incoherence in their evidence with regard to the specific act of assault by each of the appellants, but the evidence of injured eyewitnesses cannot be brushed aside on that score, particularly when it was recorded after lapse of three years.

19. Learned Counsel for the appellants submitted that complainant Ramkishore (P.W-1) admitted in his evidence that appellants Dwarka and Shivilal came on the spot after hearing the voice of his brother Jaypal, therefore, it could not be said that appellants had any common intention to cause injury to anyone; but such intention can be developed even on the spur of the moment. Moreover, it is borne out from the evidence of P.W-2 Chandrapal that the house of the appellants was at the distance of two furlong from the place of occurrence, while the house of the complainant party was at the distance of only eight paces. Therefore, the submission made at the behest of the appellants that they came subsequently on the spot on call of his brother and had no common intention to injure anyone, has no force.

20. Per contra, there is clear and cogent evidence on record, which virtually remained unrebutted, that all the four appellants were present on the place of occurrence and participated in the incident of assault resulting into injuries to complainant Ramkishore, Chandrapal and Ramkripal and grievous hurt to Ramkishore and Chandrapal in the form of fracture in their Ulna bones. It also transpires from the medical evidence of Dr. M.K. Prajapati (P.W-9) that injured Chandrapal had sustained as many as ten injuries on his person, besides fracture in his ulna bone as found by Dr. M.K. Khare (P.W-7).

21. In view of aforesaid discussion, the findings as recorded by the trial court against the appellants for causing hurt to Ramkripal and grievous hurt to Ramkishore and Chandrapal in furtherance of their common intention, cannot be said to be erroneous so as to call any interference in appeal.

22. The conviction of appellants Dwarka, Jaypal and Ramlakhan u/s 323/34, 325/34, 325/34 for causing hurt to Ramkripal and grievous hurt to Ramkishore and Chandrapal and conviction of appellant Shivilal u/s 323/34, 325, and 325/34 of IPC for causing hurt to Ramkripal and grievous hurt to Ramkishore and Chandrapal respectively, therefore, deserves to be affirmed and is hereby affirmed. The conviction of appellant Jaypal u/s 294 of IPC, however, does not appear to be well founded and deserves to be set aside and is hereby set aside.

23. As regards the sentence, learned Counsel for the appellants submitted that the incident of the case is about sixteen years" old and the three appellants also sustained injuries in the incident and they have also suffered imprisonment for a period of two months, whereas appellant Ramlakhan suffered imprisonment for seven days, they should not be sent to jail after so many years, when they have

settled in life; it was submitted that their sentence of imprisonment should be reduced to the period already undergone by them with some additional fine.

24. In view of the aforesaid facts and circumstance of the case, particularly the fact that the incident of the case is as old as 18.2.93 and three of the appellants have undergone sentence of imprisonment for two months, while appellant Ramlakhan also suffered imprisonment for seven days, interest of justice would be subserved if the impugned sentence of imprisonment awarded to the appellants for the offences u/s 323, 325 of IPC is modified and reduced to the period already undergone by each of them, with some additional fine for the offence u/s 325 of IPC on each count.

25. Accordingly, the substantive sentence of imprisonment awarded to the appellants for the offences u/s 323/34, 325, 325/34 of IPC on each count is reduced to the period already undergone by each of them and the same is also directed to be concurrent. However, each appellant shall pay an additional fine of Rs. 1500/- (one thousand five hundred rupees only) for the offence u/s 325 of IPC on each count, in default simple imprisonment for two months. The impugned sentence of fine awarded to the appellants u/s 323/34 is maintained.

26. The conviction of appellant Jaypal and sentence passed on him u/s 294 of IPC are hereby set aside.

27. The total amount of additional fine of Rs. 3000/- (rupees three thousand only) each shall be paid by the appellants within three months from today. Appeal stands allowed to the aforesaid extent.