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**(2000) 05 MP CK 0020**  
**In the Madhya Pradesh High Court**  
**Case No : Criminal Appeal No. 195/95**

Hafiz Khan and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

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**Date of Decision :** 11-05-2000

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 309  
Evidence Act, 1872 — Section 33  
Penal Code, 1860 (IPC) — Section 148, 149, 302, 307

**Citation :** (2001) 1 JLJ 158 : (2000) 3 MPHT 439

**Hon'ble Judges :** J.G. Chitre, J;A.K. Gohil, J

**Bench :** Division Bench

**Advocate :** Jaisingh, for the Appellant; G. Desai, Dy. A.G., for the Respondent

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## Judgement

J.G. Chitre, J.—The appellants are hereby assailing correctness propriety and legality of the judgment and Order passed by the Additional Sessions Judge, Jaora in the matter of Sessions Trial No. 98/89.

2. The prosecution case in brief is that on 6-7-89 deceased was proceeding by riding on motor-cycle at about 11 or 11.15 P.M. near Mandi Samiti and at that time as per allegation of the prosecution, the appellants came there by boarding in a Jeep. The appellants gave a dash to the motorcycle which was being driven by the deceased and in the result the deceased fell. All the appellants alighted from the said Jeep being armed with lethal weapons and started assaulting deceased. Deceased sustained injuries which resulted in his death. After necessary investigation, the appellants have been put to trial before learned Additional Sessions Judge, who after recording evidence and appreciating it passed the Order of conviction and sentence, convicting the appellants for convicting the offence punishable under provisions of Section 148, 302/149 and 307/149, IPC. The learned Sessions Judge sentenced the appellants to R.I. for 5 years for offence punishable u/s 307/149, IPC and inflicted fine of Rs. 2000/- in default of payment of fine to undergo R.I. for 2 years. u/s 148, IPC, he

sentenced the appellants for R.I. to the term of one year and fine of Rs. 500/-, in default R.I. for 6 months. For committing the offence punishable u/s 302/149, IPC, he sentenced all the appellants to the imprisonment for life. He inflicted fine of Rs. 5000/- and in default to undergo R.I. for 3 years.

3. Shri Jaisingh, counsel for appellants pointed out that the learned trial Judge committed the error in appreciating the evidence on record. He submitted that the learned Judge concluded that Ex. P-25 FIR recorded at the instance of P.W. Sheru and his dying declaration Ex. P-24 recorded by Naib Tehsildar will have to be treated as admissible in evidence in view of provisions of Section 33 of the Evidence Act, 1872 (for short "Evidence Act").

4. Shri Desai, Dy. Advocate General attempted to justify the said conclusions.

5. Section 33 of the Evidence Act provides :

"33. Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided--

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation :-- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

6. As an essential ingredient of the provisions of Section 33 of the Evidence given by a witness has to be in judicial proceeding. Exs. P-24 and 25 are not coming under the pervue of word "Evidence" which has been embodied in Section 33 of the Evidence Act. It further indicates that the said evidence has to be recorded in a judicial proceeding and should be intended to be used in later judicial proceedings. Ex. P-25 is the first information report recorded at the instance of prosecution witness Sheru (deceased). Ex. P-24 is the statement recorded by Shri R.C. Rathore, Naib Tehsildar (P.W. 10). Neither these two documents can be called as Evidence and, therefore, the act of learned trial Judge in acting on these two documents for basing conviction is totally illegal, because Sheru died in an accident 2 years after the incidence which does not have any nexus whatsoever with the incidence in question. It is pertinent to note that he did not

die of the injuries sustained in the incidence which was the subject matter of the trial in which the appellants were convicted.

7. After dealing with this aspect, this Court comes to the evidence of prosecution witnesses No. 7 Salim and No. 8 Sabir. Shri Jaisingh submitted that the evidence of these two witnesses cannot be believed because in the cross-examination they admitted that when the alleged incident took place, there was total darkness at the spot. He pointed out that these two witnesses stated that in their evidence that the night was also dark. He further pointed out that the evidence of these two witnesses in the cross-examination clearly shows that they could not have seen anything except the backs of the persons who would have been engaged in the said incident. He submitted that the learned trial Judge committed error of law in accepting their evidence for basing a conviction against the appellants.

8. Shri Desai, for the prosecution submitted that the appellants adopted a tricky attitude and it is indicated by the act of their Advocate praying for adjournments when the examination in chief was over. Shri Desai submitted that these two witnesses have been won over by the appellants and, therefore, they were stabbing the prosecution in back. He submitted further that the learned trial Judge has committed no error whatsoever in passing the Order of conviction and sentence against the appellants.

9. It is important to note that neither P.W. Salim nor Sabir have been declared hostile by the prosecution. In fact when both these witnesses stated something different in examination in chief and in cross-examination, it was the duty of the Prosecutor in charge of the prosecution to request for the permission from the Court to put the questions to these witnesses in the nature of the cross-examination for the purpose of impeaching their credit and bringing on record that for some ulterior motive they were suppressing the truth and coming with a false story. Unfortunately, it has not been done. The trial Court should not have granted the adjournment because that granting of adjournment finally resulted in such type of evidence which has been given by these two witnesses in the Court. Shri Jaisingh has pointed out the judgment of Supreme Court in this context as reported in Sukhram Vs. State of M.P., to support his submission that the evidence of these two witnesses cannot be relied for basing the conviction.

10. Shri Desai for prosecution has pointed out the observations of the Supreme Court in the matter of Cr. A. No. 1152/97 [Ambika Prasad v. Delhi (Admn.)], Cr. A. No. 1153/97 [Ram Chander v. State (Delhi Admn.)], Cr. A. No. 1154/97 [Rajinder Singh v. State (Delhi Admn.)] wherein the Supreme Court has held as under :

"It is also to be pointed out that P.W. 4 Vikram Singh (informant) who had lodged FIR immediately was under constant threat and was compelled not to speak the truth despite the fact that he was the brother of the deceased. Other witnesses also turned hostile including P.W. 6 Premsingh son of Pratapsingh and P.W. 8 Rattan Singh which indicates, as observed by the High Court, that the accused

party was stronger in terms of money power and muscle power. At this stage, we would observe that the Sessions Judge ought to have followed the mandate of Section 309 Cr.P.C. of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution. It appears from the record that the examination in chief of P.W. 4 Vikramsingh was over on 6-2-1984. The counsel representing Ambika Prasad requested the Court that because of his uncle's demise, he would not be in a position to cross-examine the witness and, therefore, the witness was cross-examined in the month of July, 1985. In our view, this is highly improper. Even if the request for adjournment of the learned counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days."

11. In this case also the learned Judge should have adopted the mandate of Section 309, Cr.P.C. and should have insisted for cross-examination of these two witnesses on the same day or should have adjourned the hearing for couple of days. Now a days, Session Cases are not being tried like Sessions case. They are being tried as if they are petty matters. The Investigation Officer does not take pains to remain present with all the witnesses before the Sessions Court. The Sessions Trials are also not conducted day by day. That has to be done. The unnecessary adjournments are sought and granted and that causes dent to the administration of justice and also gives rise to the grievances of the victims and their relatives.

12. The Sessions Courts should fix the Sessions cases for day to day examination of prosecution witnesses. All the prosecution witnesses should be produced before Court on those days which have been prescribed for recording of their evidence. The prosecution machinery should be free from obstacles in producing all the witnesses on those days, without any excuse. The Investigating Officer has to be present alongwith the witnesses to assist the prosecutor who is In-Charge of the prosecution. Unfortunately the prosecution and the State does not take this aspect seriously and that results into the cases like present one. The State has to take serious steps for the purpose of assuring presence of the prosecution witnesses for such day to day trials. Mandate of Section 309, Cr.P.C. should be strictly followed by Sessions Court for conducting the Sessions Trials.

13. Unfortunately lapses which have been noted in this case, has left this Court with no alternative but to assess the evidence of Salim and Sabir as it is. These witnesses have not been declared hostile and prosecution has not disowned the evidence which has been given by them in the cross-examination that when the said incidence took place there was dark on the spot and they were not able to identify the persons who were involved in the said incident. They have gone further by stating that they could see backs of those persons only. Not only that, they have disclaimed the identification of the appellants as the assailants. The conviction can be based on acceptable evidence which is sterling sound to prove the guilt of accused beyond "reasonable doubt". The guilt has to be proved to

the extent of "must" and not to the extent of "may" as observed by the Supreme Court in the matter of Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, .

14. In the result, the Order of conviction and sentence passed against the appellants is hereby set aside. Appellant No. 1 be set at liberty forthwith. Bail bonds furnished by other appellants stand discharged.