
(2007) 02 MP CK 0056
In the Madhya Pradesh High Court

Kanriya @ Kanwarlal

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 21-02-2007

Acts Referred:

Evidence Act, 1872 — Section 32

Penal Code, 1860 (IPC) — Section 300, 302, 304, 323, 506

Citation : (2007) CriLJ 3073 : (2007) 2 MPHT 271 : (2007) 3 MPLJ 254

Hon'ble Judges : S.L. Kochar, J; Manjusha Namjoshi, J

Bench : Division Bench

Judgement

S.L. Kochar, J.

The appellant has called in question legality of his conviction u/s 302 of the IPC sentenced to RI for life and fine of Rs. 5,000/-; in default of payment of fine additional RI for one year passed by learned Addl. Sessions Judge Rajgarh (Biaora) in Sessions Trial No. 1/1992 judgment dated 7-12-1996.

This is the appeal of the year 1997. Appellant is on bail. Neither appellant nor his Advocates are present, though, this appeal is being listed for final hearing since 2005. On 24-8-2005 appeal was adjourned because none appeared on behalf of the appellant. Thereafter it was listed on 2-2-2006. On this date Advocate Shri Vikas Yadav sought adjournment on the ground of sickness of arguing Counsel Sr. Advocate Shri Jaisingh. The appeal was adjourned for two weeks. Thereafter it was listed on 3-4-2006, 4-4-2006, 5-4-2006, 7-4-2006, 13-4-2006, 21-4-2006, 28-4-2006 and on all these dates none appeared on behalf of the appellant and the appeal was adjourned. On 4-5-2006, 21-7-2006 and 11-8-2006 this appeal was listed for final hearing, but did not reach to Board and adjourned. Again this appeal was listed for final hearing on 19-2-2007, 20-2-2007 and on these dates none appeared to argue the appeal. Today also no Advocate is present to represent the appellant. Therefore, in view of Supreme Court Judgments passed in case of Bani Singh and others Vs. State of U.P., and Kishan Singh Vs. State of U.P., this appeal is heard on merit. The respondent is

represented by learned Dy. AG, Shri G. Desai.

Briefly stated the prosecution case as unfolded before the Trial Court is that on 7-10-1991 in the evening at 6.00 p.m. deceased/complainant Girdhari was returning back to his house with bundle of grass. He was intercepted near the well of one Patel by the appellant and appellant caused lathi blows on his left hand, right toe, right palm and on several parts of the body because of which Girdhari sustained number of injuries. The incident was witnessed by Ratansingh and Surajsingh (P.W. 13). The deceased was assaulted by the appellant on account of previous ill-will. Deceased was taken to the Police Station, Khilchipur where deceased lodged the report recorded in Rojnamcha Sanha No. 258 by Head Constable Rajmangal Singh (P.W. 18), D.S. Sharma (P.W. 17) Town Inspector registered the crime vide Exh. P-12 under Sections 323 and 506 of the IPC. Thereafter injured Girdhari was sent for medical examination and examined by Dr. S.K. Jain (P.W. 10). His MLC report is Exh. P-6, Dr. Jain, after medical examination and primary treatment, referred the deceased for further treatment at District Hospital, Rajgarh (Biaora). In District Hospital, Rajgarh, Girdhari died in the noon on 8-10-1991 at about 12 o'clock, Dr. O.P. Tripathi (P.W. 12) sent message (Exh. P-8) to police regarding death of deceased. On the basis of this report, merg was registered and inquest proceeding was performed by police of P.S. Khilchipur. Dead body of deceased was sent for post-mortem examination and same was conducted by Dr. J.C. Gupta (P.W. 11). Post-mortem report is Exh. P-7. Police also seized blood stained and controlled earth from the spot. The appellant was arrested and on his memorandum statement one lathi was seized. Seized articles were sent for examination to FSL but its report was not filed before the Trial Court. After necessary investigation, appellant was charge-sheeted under Sections 302 and 506 of the IPC.

The appellant refuted the charges and his defense was that because of enmity he was falsely implicated. Appellant has not examined any witness in defense. The learned Trial Court, after examination of the prosecution witnesses and hearing both the parties, found the appellant guilty of commission of murder of deceased Girdhari and convicted him as mentioned herein above.

We have perused the entire record of the case and learned Dy. A.G. Shri Desai has assisted us effectively.

The conviction of the appellant is based on eye witness account of Suraj Singh (P.W. 13), an independent witness, report lodged by the deceased (Exh. P-13) which has been rightly considered as a dying declaration by the learned Trial Court because it discloses the cause of death of deceased as also evidence of oral dying declaration before Champalal (P.W. 8) and Ramgopal (P.W. 9) and medical evidence of Dr. S.K. Jain (P.W. 10) and J.C. Gupta (P.W. 11).

We have perused the statement of Surajsingh (P.W. 13) who has deposed that on the date of incident, in the evening he was watching the maize crop in the field. At that moment he over heard the cry coming from the field of one Mansingh. He

saw that appellant was assaulting deceased by lathi and deceased suffered injuries all over his body. When he reached near them appellant asked him as to why he reached over there upon which he ran away. In cross-examination, he deposed that he narrated the incident to Laxminarayan and Champalal and on the next day of the incident he was interrogated by the police. He also stated that he disclosed about the incident to villagers. In Para eight he denied the defense suggestion that on account of grazing of she-buffaloes, he had quarrel with appellant. In Para 12 he was confronted with "A to A" portion of his police statement (Exh. D-1) but in that portion only missing word is hearing cry. The whole portion is not missing in his case diary statement. We have carefully perused the statement of this witness and do not find any material substance which may corrode the testimony of this witness who has no axe to grind against the appellant. The statement of this witness is duly corroborated by the medical evidence of Dr. S.K. Jain (P.W. 10) and Dr. J.C. Gupta (P.W. 11) who have stated that deceased suffered injuries caused by hard and blunt object.

Now the next point required to be considered is the report lodged by deceased (Exh. P-13). This report was lodged by the deceased and recorded by Rajmangalsingh (P.W. 18). No evidence has come on record that deceased could not be in a position to speak or talk. Champalal (P.W. 8), the Village Chowkidar and Ramgopal (P.W. 9) as well as recording officer Head Constable Rajmangal Singh (P.W. 18) have specifically stated that deceased was conscious and disclosed the name of the appellant as his assailant. It is pertinent to mention here that appellant is the nephew of deceased. Therefore, there was no question of incorrect identification of the appellant by the deceased. None of the medical expert have stated that deceased was in a serious condition or unconscious or was not in a position to speak even when he was medically examined in the night, after lodging of the report. Report (Exh. P-13) is fully covered by the provisions of Section 32, Sub-section (1) of Evidence Act which reads as under:

32. Cases in which statement of relevant fact by person who is dead of cannot be found, etc. is relevant.--Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) when it relates to cause of death.--When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

In view of the above mentioned provision of Section 32, the statement made by the deceased is relating to his cause of death, therefore, admissible in evidence.

Champalal (P.W. 8) is the brother of the deceased and uncle of the appellant. He was also village chowkidar. According to this witness, on the date of incident he reached near deceased Girdhari and asked as to who assaulted him. Deceased disclosed the name of appellant, thereafter in bullock cart Girdhari was taken to Khilchipur police station where he lodged the report and was sent to Khilchipur Hospital. On the next day morning as per advice by Doctor he was taken to Rajgarh Hospital where between 11-12 a.m. he died. He was also witness of inquest (Exh. P-5). In Para six the say of this witness is that he was not knowing about any kind of previous dispute or quarrel between deceased and the appellant. In para seven of the cross-examination, he stated specifically that deceased was not unconscious. He was speaking. He being a village chowkidar asked the deceased and the deceased disclosed the name of the appellant. In Para 10 he stated that they reached to Police Station, Khilchipur between 10 to 11 in the night and report was lodged by injured Girdhari. In Para 11 he admitted that deceased was his brother and appellant is the son of his real brother, but he denied any kind of dispute with the appellant.

Next witness for oral dying declaration is Ramgopal (P.W. 9), the son of the deceased. According to this witness he was returning back on bullock cart from his field to his house whereas his father was going on foot path. He heard the sound of cry. He stopped his bullock cart thereafter he heard the cry of his father and when he reached, he saw the appellant running away from the place of incident. He saw number of injuries on the person of his father and asked as to what happened on which his father disclosed that appellant Kanwarlal assaulted him. Thereafter deceased was taken to the village and from village to Khilchipur police station where his father lodged the report and then taken to the hospital. Though, very long and piercing cross-examination has been done, but nothing substantial has come to discard the testimony of this witness. In Para 10 of cross-examination he stated specifically that he gave support to his father. At that time his father was speaking and he denied the defence suggestion that when he saw the deceased, he was unconscious and remained unconscious till his death. He also denied the defence suggestion in Para 15 that they grabbed the land of appellant Kanwarlal. He admitted that appellant was a nephew of deceased. The cross-examination of this witness is disclosing the fact that there was some sort of land dispute between the deceased and the appellant. This has also been mentioned by the deceased in the report.

Before the Trial Court the learned Counsel for appellant pressed in service about contradictory medical evidence of Dr. S.K. Jain (P.W. 10) and Dr. J.C. Gupta (P.W. 11). The learned Trial Court dealt with this issue in Para 23 and given finding that as such there is no contradiction or discrepancy between the medical evidence of these two expert.

We have perused the statements of both the medical expert. Dr. S.K. Jain (P.W.

10) examined the deceased first in time and proved MLC report (Exh. P-6). This Doctor found seven external injuries out of which injury number one was lacerated wound 2 1/2" x 1/2" x skin deep, injuries number two and three were lacerated wound on right and left leg, injury number five was also lacerated wound on right arm, injuries number four and seven were abrasions on left leg and left hip whereas injury number six was contusions on left forearm. He examined deceased on 8-10-1999 at 00.12 hours in the night. He opined that injury could be caused within 10 hours by hard and blunt object and in his opinion except injury number six-contusion on left forearm, rest injuries were simple in nature. He gave primary treatment to deceased and referred the deceased for further treatment to Rajgarh Government Hospital. He also gave opinion for X-ray examination of left forearm. Dr. J.C. Gupta (P.W. 11), an autopsy surgeon also found five external injuries out of which underneath the injury number one, there was fracture of parietal bone which he found on internal examination. The learned Counsel has argued that when Dr. S.K. Jain (P.W. 10) examined the deceased he did not find any fracture underneath the injury number one on right side of his skull.

We have perused the statements of both the witnesses as well as the medical evidence. The way of examination to a live person by the medical expert would altogether be different than the performance of post-mortem examination. When Dr. S.K. Jain (P.W. 10) examined the deceased, he was not in a serious condition. He found lacerated wound on right side of his skull. He gave him primary treatment, stitched the wound for stopping bleeding and all other wounds, thereafter immediately referred the deceased for further treatment. It does not mean that there was no fracture underneath the lacerated wound present on right parietal region. When post-mortem was done by Dr. J.C. Gupta (P.W. 11) he found on external examination by pressing the head fracture of parietal bone, that kind of pressure could not be applied by Dr. Jain (P.W. 10) for confirming whether there was any fracture or not. If pressure would have been applied, there was possibility of more damage to the internal organ of the head like brain and brain membrane. Autopsy surgeon could not find or noted two abrasion on the person of the deceased and that is the only difference between the statement of Dr. S.K. Jain (P.W. 10) and Dr. J.C. Gupta (P.W. 11) and this difference is of negligible nature because abrasions were superficial in nature and there was no bleeding from the same.

Now the next question for us to determine whether the appellant is responsible for commission of culpable homicide amounting to murder on the basis of material available on record. On careful scrutiny of the statements of eye witnesses, FIR lodged by the deceased (Exh. P-13) and registration of Crime through Exh. P-12, it is crystal clear that the offence registered by the police was only under Sections 323 and 506 of the IPC, meaning thereby at the time of lodging of the report, the condition of deceased was not serious and Town Inspector as well as Head Constable D.S. Verma (P.W. 17) and Rajmangal Singh (P.W. 18) did not find the deceased in serious condition and on external looking

of the injuries they were of the opinion that deceased suffered simple injuries. This also shows that appellant was conscious and able to lodge the report. According to the medical evidence, deceased suffered fracture of right parietal bone, another fracture of left lower end of radius and ulna and fracture of proximal phalanges of third right middle finger. Dr. J.C. Gupta (P.W. 11) has nowhere stated that injury number one, i.e., injury to skull was sufficient in ordinary course of nature to cause death. In cross-examination he deposed that so many persons survived even after sustaining such injuries. In his opinion, rest injuries did not contribute into the death of Girdhari and Girdhari died only because of head injury. Out of seven injuries only one lacerated wound on right parietal region was on vital part of the body. Rest injuries were on hands and legs. The lathi is not considered as lethal weapon and there is no evidence on record that lathi was having any kind of iron cap on its both ends and there were no iron rings surrounded to knots of the lathi. The possession of lathi in village by the villagers is a common feature. Therefore, it cannot be said that appellant had intended to commit murder of deceased looking to all these facts and features of the case, but at the same time he can be attributed knowledge that because of his act there was likelihood of death of deceased. Therefore, the act of the appellant would not fall within any of the categories of culpable homicide amounting to murder u/s 300 of the IPC.

In the case of *Molu and Others Vs. State of Haryana*, the Supreme Court has considered this aspect. In this case the appellant was tried for commission of two murders. Deceased number one suffered 14 external injuries whereas number two suffered 16 injuries. Deceased died because of damage to the big blood vessels and crack fracture of upper arm. Though for causing injuries to deceased persons piercing sharp edged weapons as well as hard and blunt objects were used, there was no opinion given by the medical expert that injuries were sufficient in ordinary course of nature to cause death. In the opinion of the medical expert, deceased persons died due to shock and haemorrhage as a result of multiple injuries. In this case, the Supreme Court has convicted the appellant u/s 304-II of the IPC. In the case at hand, except one injury, all injuries were on non-vital part of the body. Weapon used was not a dangerous weapon or lethal weapon. What was the background for the incident is not specifically clear and appellant mainly chosen non-vital parts like legs and hands for causing injuries except one injury on right parietal region. There was no instantaneous death of deceased. Injured Girdhari was conscious for a pretty long time. Therefore, the act of the appellant in our considered view would fall within the purview of culpable homicide not amounting to murder punishable u/s 304-II of the IPC.

In the result, this appeal is allowed in part. The conviction and sentence of the appellant u/s 302 of the IPC sentenced to RI for life are hereby set aside instead he is convicted u/s 304-II of the IPC, sentenced to RI for seven years and fine of Rs. 5,000/-, in default of payment of fine he shall undergo further RI for one year. The appellant is on bail. He is directed to surrender before the Trial Court to

undergo remainder part of the jail sentence on 11th April, 2007 failing which the learned Trial Court is directed to take appropriate steps in accordance with the law for arrest of the appellant and action against his surety, under intimation to this Court.