
(2007) 02 MP CK 0002
In the Madhya Pradesh High Court
Case No : Criminal A. 1212 of 1992

Shiv Kundal and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 07-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Penal Code, 1860 (IPC) — Section 147, 148, 302, 323

Citation : (2008) 2 MPJR 139

Hon'ble Judges : A.K. Saxena, J

Bench : Single Bench

Advocate : Vijay Nayak and Mr. Hemant Sen, for the Appellant; R.N. Yadav, Panel Lawyer, for the Respondent

Judgement

A.K. Saxena, J.

The Appellants Shiv Kundal, Suresh Kumar, Laxmi Narayan, Ram Naresh and Chintamani have preferred this appeal u/s 374 of Code of Criminal Procedure, 1973 against the judgment passed by the 1st Additional Sessions Judge, Satna in sessions Trial No. 84/90 whereby, all the Appellants/accused have been convicted and sentenced as follows:

Name

Sections

Sentence

Shiv Kundal

148 and 304 Part-II

Two years and Seven years R.I. and fine of Rs. 1000/- and Rs. 5000/- and in default six months and two years R.I.

Suresh Kumar

147 and 323 read

One year and six months R.I.

Laxmi Narayan

with Section 149

and fine of Rs. 1000/- and Rs.

Ram Naresh

of I.P.C.

500/- and in default four

Chintamani

months and two months R.I.

The Police Station, Sabhapur filed a charge-sheet against the Appellants/accused along with another accused Gourishankar with this story that on 07.04.1990 at about 10.15 P.M., P.W.5 Kamlesh Kumar was viewing the television in his house along with family members. He found that television was not working properly, therefore, he went out side of his house to check and he found that Mubarak, a disk owner, was repairing the line. At that time, Gourishankar was also present. Kamlesh Kumar asked to repair the line as soon as the song is over, but accused Ram Naresh and Chintamani raised an objection. In the meanwhile, Kamlesh Kumar's elder brother Rajkumar reached there and some altercation took place between Chintamani, Ram Naresh and Kamlesh Kumar. Thereafter, Kamlesh Kumar and Rajkumar went back towards their house but at that time, all the accused persons came with rod, lathi and wooden pieces and Shiv Kundal caused an injuries by the means of lathi on the head of Rajkumar, who fell down. Thereafter, the accused Gourishankar inflicted an injury by the means of rod on Rajkumar's eye. Thereafter, the accused Suresh Kumar kicked him. At that time, the accused Laxmi Narayan was standing with wooden piece. During this incident, the mother and brother of Kamlesh Kumar tried to save Rajkumar and at that time, accused Gourishankar and Chintamani also caused injuries to them. Several persons reached at the place of incident and saved the injured persons. Thereafter, all the accused persons fled away from the place of incident. Rajkumar became unconscious. Kamlesh Kumar along with Rajkumar reached at Police Station, Sabhapur and lodged the report Ex. P/8. Thereafter, Investigating Officer started investigation and Rajkumar, Rakesh and P.W. 11 Shanti were sent to hospital for medical examination. Doctor S.N. Mishra RW. 12 examined these persons and handed over his reports Ex. P/14, P/15 and P/17 to police. On 08.04.1990, the injured person Rajkumar died and inquest report was prepared by the Investigating Officer in presence of the witnesses. The dead body of Rajkumar was sent to hospital for post-mortem and Doctor V.K. Gandhi P.W. 14, did post-mortem report on the dead body and then he handed over the post-mortem Ex. P/18 to police.

During investigation, site plan Ex. P/19 was prepared and lathi, wooden pieces and rod were recovered from the possession of the accused and seizure memos Ex. P/2 to Ex. P/6 were prepared. After completion of further investigation, the charge-sheet was filed against the Appellants and another accused.

Appellant/accused Shiv Kundal was charged for the offences punishable under Sections 147, 148, 302, 302 read with Section 149 and 323 read with Section 149 of I.P.C., whereas other four Appellants/accused were charged u/s 147, 148, 302 read with Sections 149 and 323 read with Section 149 of I.P.C. The trial Court after completion of the trial, found that none of the Appellants have committed the offence punishable u/s 302 or 302 read with Section 149 of I. P.C. and they were acquitted of this charge, but instead of that, the trial Court came to this conclusion that the Appellant Shiv Kundal committed the offences punishable u/s 148 and 304 Part-II of I.P.C. and other Appellants committed the offences punishable u/s 147 and 323 read with Section 149 of I.P.C. and they were convicted and sentenced as above.

These five Appellants have preferred this appeal on these grounds that the judgment passed by the trial Court is totally against the evidence produced on behalf of prosecution. It could not be proved that the Appellants Chintamani, Laxmi Narayan and Ram Naresh took any participation during the incident and, therefore, their conviction under Sections 147 and 323 read with Section 149 of I.P.C. is totally against the evidence. The conviction of Appellant Suresh Kumar is also bad-in-law because, it is also against the evidence. The members of other party were the aggressors and the Appellants had a right of private defence. On the basis of the evidence of Doctors, it is very much clear that the offence u/s 304 Part-II was not proved against the Appellant Shiv Kundal and at the most, a case u/s 323 of I.P.C. is made out. The trial Court failed to discuss the prosecution evidence in proper perspective. There are material contradictions in the statements of the prosecution witnesses and considering those contradictions, the Appellants are entitled for acquittal, as the offences could not be proved beyond reasonable doubt.

First of all, it would be proper to discuss the prosecution evidence with regard to role of all the Appellants and if it is found that all the Appellants were present at the time of incident and they took any kind of participation during the incident or they had any common object then only, the conclusion would be that the Appellant Shiv Kundal is liable for punishment u/s 148 of I.P.C. and other Appellants are liable for punishment u/s 147 of I.P.C. Thereafter, it can be considered whether the Appellant/accused Shiv Kundal was responsible for committing the offence of culpable homicide not amounting to murder and whether the other Appellants are responsible for the acts of others and they are also liable for conviction u/s 323 read with Section 149 of I.P.C.

Before considering the statements of the witnesses, it would be proper to look at FIR Ex. P/8 lodged by Kamlesh Kumar, who is brother of deceased Rajkumar. In this report, it was disclosed that Shiv Kundal and Gourishankar caused the

injuries to Rajkumar by the means of lathi and rod, respectively, and thereafter, Suresh Kumar kicked Rajkumar and then Gouri Shankar and Chintamani caused injuries to Rakesh and Shanti. It is nowhere stated in this report that the Appellants Ram Naresh, Laxmi Narayan and Chintamani caused any injury to Rajkumar.

In the light of facts of FIR, now the statements of the witnesses can be considered. P.W.5. Kamlesh Kumar deposed that Shiv Kundal inflicted one blow of lathi on the head of Rajkumar and because of that, Rajkumar fell down and thereafter, Gourishankar caused an injury on his eye by the means of rod. Suresh Kumar also kicked Rajkumar. P.W.11 Shanti disclosed in her statement that the accused persons were armed with rod, lathi and "Katta" and accused Shiv Kundal caused head injury to Raju by the means of rod and Gourishankar inflicted a lathi blow on his eye and then accused Suresh Kumar kicked him. These witnesses have totally failed to disclose as to which part of the body of Rajkumar sustained injury because of act of the accused Suresh Kumar. The statements of these witnesses against Appellant Suresh Kumar are totally ambiguous. P.W.11 Shanti exaggerated the facts of the incident by saying that the sons of Shiv Kundal threw the stones at the time of incident and "Katta" was also shown to Kamlesh. Even after this exaggeration, she failed to disclose the role played by Appellants Laxminarain, Ram Naresh and Chintamani at the time of incident.

Mere presence at the time of incident, is not sufficient to make out a prime facie case against any one. Any kind of overtact of a person, physically or verbally, at the time of incident should have been disclosed in the prosecution story and that part of story should have been corroborated by the witnesses. It is obligatory on the part of the prosecution to prove that any person had common intention or common object at the time of incident. But on a perusal of statements of abovementioned eye witnesses, it is very much clear that these witnesses have totally failed to prove beyond reasonable doubt that the Appellants Laxmi Narayan, Ram Naresh and Chintamani had any common intention or common object at the time of incident. If these Appellants were relatives of other Appellants, it does not mean that they also had a common object at the time of incident. Bare relationship of an accused with other accused has got no importance to prove any offence with the aid of Section 149 of I.P.C. if mere presence of a person at the place of incident is taken as sufficient evidence to prove the guilt, the eye witness would also become an accused in the case with the aid of either Section 34 or 149 of

I.P.C. Considering all the facts of the case and the evidence produced on behalf of prosecution, I found that the trial Court has come to this wrong conclusion that the Appellants Laxmi Narayan, Ram Naresh and Chintamani had a common object at the time of incident to cause injuries to Rajkumar. These three Appellants were only present at the time of incident and they did not take part in the incident, therefore, it could not be proved beyond reasonable doubt by the

prosecution that these three Appellants committed the offence of rioting.

Since, the prosecution has totally failed to prove that the Appellants Laxmi Narayan, Ram Naresh and Chintamani had common object at the time of incident, therefore, it could not be proved that in furtherance of common object of these Appellants, the other accused persons caused any injury to Rajkumar and no offence u/s 147 of I.P.C. could have been proved beyond reasonable doubt against the Appellants Laxmi Narayan, Ram Naresh and Chintamani. The findings of the trial court in this respect are erroneous. Since, these Appellants had no common object or common intention at the time of incident and they did not participate during the incident, therefore, on the basis of mere presence, it cannot be held that they are also responsible for that act of other persons and in these circumstances, these Appellants cannot be convicted u/s 323 read with Section 149 of I.P.C.

Since, the prosecution has totally failed to prove that abovementioned three Appellants took any participation at the time of incident, therefore, it cannot be said that other Appellants too were members of unlawful assembly. For the constitution of assembly an unlawful assembly, it is required that (1) the assembly must consist of five or more persons and (2) the assembly should have as its common object one or more of the objects stated in the Section 141 of I.P.C. Both the ingredients of this provision could not be proved by the prosecution in this case, therefore, no offence u/s 148 of I.P.C. and no offence u/s 147 of I.P.C. could be proved beyond reasonable doubt against the Appellants Shiv Kundal and Suresh Kumar, respectively.

Now, it has to be considered whether the Appellant Suresh Kuamr is liable for conviction u/s 323 read with Section 34 of I.P.C. in this case. As it has been discussed earlier that there are ambiguous statements of P.W. 5 Kamlesh Kumar and P.W. 11 Shanti in respect of role played by the Appellant Suresh Kumar at the time of incident, therefore, it cannot be presumed that this Appellant caused any injury to Rajkumar or he kicked him. P.W. 12 Doctor S.N. Mishra examined Rajkumar on 07.04.1990 and according to his statement and his report Ex. P/14, there were only two injuries on the person of Rajkumar. Injury No. 1 was on the head and the injury No. 2 was over the upper eyelid of left eye. It means, there was no other injury on the person of Rajkumar to show that this Appellant Suresh Kumar also caused an injury. Apart from that, the witnesses. R W. 6 Mubarak, P.W.7 Ram Kumar and P.W.8 Munnilal have been declared hostile and they do not support the case of the prosecution. One of the important witnesses Rakesh has not been examined in the Court. Considering the above facts, I am of the opinion that the prosecution has totally failed to prove beyond reasonable doubt that the Appellant Suresh Kumar took any kind of participation during the incident and he caused any injury to the deceased and for that he kicked him or in furtherance of common object of this Appellant, Shiv Kundal or Gourishankar caused an injury to Rajkumar. Therefore, the prosecution has totally failed to prove the offence punishable u/s 323 read with Section 149 of I.P.C. beyond

reasonable doubt against the Appellant Suresh Kumar. This finding of the trial Court is erroneous that Appellant Suresh Kumar committed the offence punishable u/s 323 read with Section 149 of I.P.C.

Now, the question arises for consideration whether the Appellant Shiv Kundal committed the offence punishable u/s 304 Part-II as held by the trial Court ? Learned Counsel for the Appellants vehemently argued that considering the fact of case, cause of incident and other facts, it is very much clear that the Appellant Shiv Kundal had no intention to commit murder of Rajkumar. An altercation took place between the parties on a petty matter and the Appellant Shiv Kundal inflicted only one blow of lathi without any intention of committing murder of Rajkumar and that too in his right of private defence, therefore, this Appellant had not committed any offence. If it is found that the Appellant had no right of private defence then, at the most, an offence u/s 323 of I.P.C. is made out against this Appellant. It has also been argued that there is contradictory evidence of two important eye witnesses and other witnesses do not support the case of prosecution, therefore, even the offence punishable u/s 323 of I.P.C. is not proved against this Appellant.

No doubt, some of the witnesses failed to support the prosecution story, but the statements of PW/5 Kamlesh Kumar and P.W. 11 Shanti are trustworthy in respect of act of Appellant Shiv Kundal though, Shanti is mother of the deceased Rajkumar and Kamlesh Kumar is brother. The trial Court has not committed any error in believing these statements. The trial Court has rightly held that the Appellant/accused Shiv Kundal inflicted one blow on the head of Rajkumar and because of that injury, Rajkumar died afterwards. Considering the facts of the case, in my opinion, no right of private defence was available to Shiv Kundal as he was the aggressor at the time of incident. It could not be proved that Shiv Kundal sustained any injury during the incident, therefore, it was not the duty of prosecution to explain his injury.

Now, it has to be seen whether the trial Court has rightly held that the accused Shiv Kundal had committed the offence of culpable homicide not amounting to murder as he inflicted the blow of lathi on the head of Rajkumar with the knowledge that it is likely to cause death, but without any intention to cause death.

Learned Counsel for the Appellants placed his reliance on the cases of Lal Mandi Vs. State of West Bengal, , Deoka and Ors. v. State of Maharashtra, 1993 Supp (1) SCC 447 and Annapurna Dutt and others Vs. State of U.P., . In these citations, after considering the circumstances and evidence produced by the prosecution, it was found that the accused are liable for committing the offence punishable u/s 325 of I.P.C. Now, it has to be seen whether the Appellant Shiv Kundal committed the offence punishable u/s 304 Part-II of I.P.C. or the offence punishable u/s 325 or 323 of I.P.C.

The trial Court has rightly held in para 20 of the judgment that because of act of

Ram Naresh, the incident took place. This shows that since initial stage of the incident, the Appellant Shiv Kundal had no intention to commit murder of Rajkumar. It is very much clear from the prosecution evidence that only one blow of lathi was inflicted on the head of Rajkumar by the Appellant Shiv Kundal and this fact has also been found by the trial Court in paragraph 38 of the judgment. It was not the prosecution story that the Appellant Shiv Kundal tried to inflict another blow of lathi or tried to cause other injuries to Rajkumar. It is apparent that after inflicting one blow, the Appellant Shiv Kundal kept mum.

It is apparent from the statement of P. W.14 Doctor V.K. Gandhi and his post-mortem report Ex. P/18 that Rajkumar sustained fracture at left parietal region. Though, there was another injury on the head, but this witness admitted that only one blow was sufficient to cause both the injuries. It means, the Appellant Shiv Kundal did not inflict another blow of lathi to Rajkumar.

It is apparent from the prosecution story and so also from the prosecution evidence that there was no motive of the Appellant Shiv Kundal behind his act. The incident had taken place all of a sudden. The Appellant Shiv Kundal inflicted a blow of lathi on the spur of the moment. The facts and circumstances indicate that the Appellant Shiv Kundal caused grievous injury to the deceased Rajkumar without any intention to kill him. The most important ingredients of Section 299 of I.P.C. are missing in this case that the Appellant Shiv Kundal caused death of Rajkumar by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death of Rajkumar. In these circumstances, the offence punishable u/s 304 Part-II of I.P.C. was not proved in this case against the Appellant Shiv Kundal and instead of this, the offence u/s 325 of I.P.C. is proved beyond reasonable doubt against him. The trial Court committed an error in holding that the accused Shiv Kundal committed an offence punishable u/s 304 Part-II of I.P.C, but it cannot be held that the Appellant Shiv Kundal was responsible for causing only simple injury to Rajkumar as argued on behalf of this Appellant.

In the opinion of this Court, the prosecution has totally failed to prove the offence punishable u/s 304 Part-II of I.P.C. against the Appellant Shiv Kundal. Since, he committed the offence punishable u/s 325 of I.P.C, therefore, it would be proper to convict the Appellant Shiv Kundal u/s 325 of I.P.C. As far as the other Appellants are concerned, the prosecution failed to prove any offence beyond reasonable doubt against them, therefore, they are entitled for acquittal.

For the aforesaid reasons, the appeal of the Appellants is partly allowed and the judgment, order of conviction and sentence passed under Sections 147 and 323 read with Section 149 of I.P.C. against the Appellants Suresh Kumar, Ram Naresh, Laxmi Narayan and Chintamani is set aside and they are acquitted of these charges. The order of conviction and sentence of Appellant Shiv Kundal u/s 148 of I.P.C. is also set aside and he is also acquitted of this charge. The order of conviction and sentence passed against the Appellant Shiv Kundal u/s 304 Part-II

of I.P.C. is set aside. Instead, he is convicted for the offence punishable u/s 325 of I.P.C.

As far as the sentence part is concerned, it appears that the Appellant Shiv Kundal remained in custody for a period of more than three years. Considering the nature of allegations, role played by this Appellant at the time of incident, cause of incident and this fact that the Appellant is facing trial and the proceedings of appeal since 1990, I am of the opinion that the above period is sufficient and, therefore, the Appellant Shiv Kundal is sentenced u/s 325 of I.P.C. for a period already undergone.