
(2011) 12 CHH CK 0005
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 395 of 1996

Shivram and Others

APPELLANT

Vs

State of M.P. (Now State of Chhattisgarh)

RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 323

Citation : (2011) 3 CG.L.R.W. 442

Hon'ble Judges : Sunil Kumar Sinha, J; R.S. Sharma, J

Bench : Full Bench

Advocate : Surendra Singh, with Mr. N.K. Mehta and Mr. Ajit Singh, for the Appellant; Ravindra Agarwal, Panel Lawyer, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—This appeal is directed against the judgment dated 22nd of February 1996 passed in ST. No. 34/1993 by the Additional Session Judge, Khairagarh, Camp Court, Kawardha. By the impugned judgment, the appellants have been convicted and sentenced in the following manner with a direction to run the sentences concurrently:

The facts, briefly stated, are as under:-

Agricultural fields of deceased-Mahabir and accused persons were adjacent to each other. The deceased had raised Med (small partition raised by earth between two fields) in his field, which was separating the fields of both the parties. The accused persons put some soil of their field on the Med, earlier raised by the deceased and his family members. This was not acceptable to the deceased. On 8-12-1992, at about 4-5:00 p.m., deceased Mahabir, Sarjuram (PW-2), Chaturram (PW-3), Dwarikaprasad (PW-4), all sons of the deceased and Urmila Bai (PW-5), daughter-in-law of the deceased went to their field and started throwing the soil, put on their Med by the accused persons, in the field of accused persons. When the accused persons came to know, they reached there

and tried to prevent the deceased and his family members from throwing soil in their field from the Med. The allegations are that in this process, a quarrel took place and the accused persons assaulted the deceased and 4 injured witnesses namely Sarjoram (PW-2), Chaturram (PW-3), Dwarikaprasad (PW-4) and Urmila Bai (PW-5). Mahabir succumbed to his injuries on 12-12-1992. The matter was reported to the Police Station by Sarjoram (PW-2), on which, the First Information Report (Ex.P/1) was registered. The postmortem examination was conducted by Dr. R.D. Nariya (PW-7). He found two external injuries on the dead body of the deceased. There was a lacerated wound on the left forearm, on which, there were 4 stitches. There was an oblique contusion on the back. The deceased was aged about 65 years. On internal examination, he found a fracture on vertex of about 4 cm and there was extra dural haemorrhage in the vertex region. The Autopsy Surgeon opined that the cause of death was shock on account of the head injury. The postmortem report is Ex.P/3.

The learned Session Judge relied on the testimonies of Bholaram (PW-1), Sarjoram (PW-2), Chaturram (PW-3), Dwarikaprasad (PW-4) and Urmilabai (PW-5) and held that the appellants formed unlawful assembly, participated in rioting with deadly weapons and in furtherance of the common object of the unlawful assembly, committed murder of deceased Mahabir and they also caused simple injuries to Sarjoram (PW-2), Chaturram (PW-3), Dwarikaprasad (PW-4) and Urmilabai (PW-5), therefore, they were liable for punishment as aforementioned.

2. Mr. Surendra Singh, learned Senior Counsel appearing on behalf of the appellants, argued that there is no evidence of formation of unlawful assembly; it was a case of free fight, in which, 3 appellants namely Shivram (A-1), Prabhu (A-4) and Genduram (A-5) also received injuries, therefore, there is no question of conviction with the aid of Section 149 IPC. So far as conviction u/s 302 IPC is concerned, he argued that it was not proved as to who caused injury on the skull of the deceased, which proved fatal; the deceased had received only two external injuries, which were simple and the injury to the skull could have been caused by sudden fall as admitted by the Autopsy Surgeon. He further argued that in absence of any corresponding external injury to the internal fracture sustained in the skull of deceased Mahabir, no one could be convicted u/s 302 IPC and in the above facts and circumstances, the appellants would be liable for punishment for their individual acts.

3. On the other hand, Mr. Ravindra Agarwal, learned Panel Lawyer appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Session Court.

4. We have heard the learned counsel for the parties at length and have also perused the records of the session case.

5. Bholaram (PW-1) is an independent witness. He deposed that on the fateful day, when he reached near the place of occurrence, an altercation was going on

between the accused party and the deceased party. Deceased Mahabir called him and told him that the accused persons are quarrelling. The quarrel was on account of Med. He asked the deceased about his field and advised to call Panchas from 5 villages and Patwari etc. and settle the dispute. Thereafter, as soon as he turned around to go, he heard the noise of quarrel and saw that both the parties were fighting with each other by using lathi. All the persons were blowing their lathi. Thereafter, he went away from the place of occurrence. He was declared hostile by the prosecution. Though many questions were asked to him in cross-examination by the Public Prosecutor, but nothing material could be brought on record in his evidence against his deposition in examination-in-chief.

6. Sarjoram (PW-2) is son of the deceased. He deposed that on account of the Med, in the above quarrel, all the accused persons assaulted them by lathi. He very specifically deposed that his father (deceased) was assaulted by lathi by Genduram (A-5), Shivram (A-1) and Prabhu (A-4), who received injuries on his left forearm, chest, back of the head and private part. During cross-examination, he admitted that the accused persons had also sustained injuries in the same transaction, for which, a criminal case is pending in the Court of Judicial Magistrate First Class against him, Chaturram (PW-3), Dwarikaprasad (PW-4) and Urmilabai (PW-5). In the cross-examination, he was confronted with the contents of the First Information Report (Ex. P/1), in which, he did not depose that the accused persons had assaulted on the skull of his father by lathi. He could not explain the above omission in the First Information Report and deposed that he had told that the accused persons had assaulted his father by lathi on his head also.

7. Chaturram (PW-3) is another son of the deceased. He also deposed in similar fashion. However, in the cross-examination, he also could not explain the omission in his case diary statement that his father Mahabir (deceased) received lathi injury on his skull on account of assault by the accused persons. Dwarikaprasad (PW-4), the third son of the deceased, deposed about the incident like his two other brothers, but he also could not explain the omission in his case diary statement that the injury received on the skull of his father was caused by lathi by the accused persons. He deposed that he had given statement to the Police that his father had received injuries on his skull and private part and if the said version is missing in his case diary statement, he cannot tell the reasons for that. Urmila Bai (PW-5) is the wife of Chaturram (PW-3). Thus, she is the daughter-in-law of the deceased. She deposed that the deceased was assaulted by all the 5 accused persons by lathi. In the cross-examination, she admitted that they were throwing soil in the field of accused persons from their Med. After receiving the assault, her father-in-law fell down on the Med facing his head.

8. Mr. Surendra Singh has argued that it was a case of free fight, in which, many accused persons also received injuries. We find from the records that on account of the same incident, a First Information Report (Ex. D/3) was lodged by the accused party also and a criminal case was registered against Sarjoram (PW-2),

Chaturram (PW-3), Dwarikaprasad (PW-4), Mahabir (since deceased and a lady of their family. The accused persons namely Shivram (A-1), Genduram (A-5), Prabhu (A-4) were sent for medical examination and multiple injuries were found over their persons. Their injury reports have been filed as Ex.D/9, Ex.D/10 and Ex.D/11. We further note that two teeth of Shivram (A-1) were uprooted in the said incident and they were also sent for examination and a report-Ex.D/12 was received. Lathi and Tangiya were also seized during the investigation from the possession of complainant party vide seizure memos Ex. D/5, D/6, D/7 & D/8. Bed-head tickets of the two appellants were also seized vide seizure memo Ex.D/4. On the above evidence on record, it clearly emerges that it was a case of sudden mutual fight between the parties and therefore, there is no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on all the appellants. There is no dispute that in the same transaction, as many as 3 accused persons sustained injuries for that a case under Sections, 147, 148, 324, 323 and 325 IPC was registered against the deceased party. The pendency of the criminal case as also the injuries sustained by the above appellants have also been admitted by Sarjoram (PW-2).

9. In *Kanwarlal and Another Vs. State of M.P.*, the Supreme Court held that in a case of free fight, conviction by recourse to Section 149 was not permissible and unless it is shown that a particular accused caused the injury, he cannot be convicted.

10. In *Dharnidhar Vs. State of U.P. and Others*, the Supreme Court held that in case where the conviction is with the aid of Section 149 IPC, only question to be determined in such a case is whether assembly consisted of five or more persons and whether said persons entertained one or more of common objects specified in S. 141. For determination of common object, conduct of each of the members of said assembly before attack, at the time of attack and thereafter, as well as motive for crime are relevant considerations. However, time of forming unlawful intent is not material because it is possible that an assembly, which is lawful to begin with, subsequently becomes unlawful. Lastly, it is not even expected of prosecution to assign particular or independent roles played by each accused once it is proved they were members of unlawful assembly and had assaulted deceased resulting in death.

11. In the instant case, firstly, altercation took place between the accused party and deceased party on account of throwing soil from the Med in the field of the accused persons; Bholaram (PW-1) tried to pacify; thereafter, a free fight took place between them, in which, members of both the parties received injuries and the deceased succumbed to the injuries after 4 days. We find from the records that there is no evidence to show that the accused persons had formed unlawful assembly and they entertained the alleged common object. We also do not find in the evidence that the accused persons participated in rioting and in fact, in furtherance of the common object of the alleged unlawful assembly, they assaulted the members of the complainant party.

12. For the foregoing reasons, we are unable to sustain the conviction of the appellants with the aid of Section 149 IPC and the same has to be set aside.

13. So far as conviction u/s 302 IPC is concerned, we find from the postmortem report that there was no corresponding external injury to the internal injury received by the deceased on his skull. The MLC report of the deceased has not been proved by the prosecution. It is on internal examination only, the Autopsy Surgeon found the above skull injury. The learned Session Judge had held that the above injury must have been caused by the accused persons, who were assaulting the deceased by lathi, by which, he had received 2 simple external injuries. Dr. R.D. Nariya (PW-7) has clearly admitted in the cross-examination that there was no corresponding external injury to the above fracture on the vertex of the deceased and the said fracture could be caused on account of fall. Urmila Bai (PW-5) has also deposed that when the deceased was assaulted by the accused persons, he fell down from the Med facing his head. The cause of death was the injury sustained on the head of the deceased. We are of the view that it was not established by the prosecution that the head injury, fatal to the deceased, was caused by the accused persons by giving lathi blows to the deceased. If the said injury would have been caused by the lathi blows, there must have been a corresponding external injury, which we do not find in this matter. In the above facts and circumstances, the learned Session Judge was not justified in convicting the appellants for commission of murder of the deceased. We are fortified in our view by the judgment rendered in Kathi Odhabhai Bhimabhai and others Vs. State of Gujarat, . In our opinion, the concerned appellants who assaulted the deceased would be liable for punishment for causing simple injuries to the deceased and not for commission of his murder.

14. We find from the records that the injury reports of Sarjoram (PW-2), Chaturram (PW-3), Dwarikaprasad (PW-4) and Urmila Bai (PW-5) have not been proved by the prosecution. Their injury reports are lying with the unproved documents. The learned Session Judge appears to have convicted the appellants for causing simple injuries to these witnesses on the basis of their oral testimonies. Though the injury reports of the above injured persons including that of the deceased have not been proved, but there is sufficient evidence on record to hold that the above witnesses and the deceased were assaulted by the appellants by lathi in the free fight, who sustained simple injuries and the appellants would be individually liable for their act of causing simple injuries to the above persons.

Accordingly, the appeal is partly allowed. The conviction and sentences awarded to the appellants under the aforementioned Sections of the IPC are set aside. Appellants Prabhu (A-4) and Shivram (A-1) are convicted u/s 323 IPC for causing simple injuries to Sarjoram (PW-2), appellants Genduram (A-5) and Shivram (A-1) are convicted u/s 323 IPC for causing simple injuries to Chaturram (PW-3), appellants Mohan (A-3) and Genduram (A-5) are convicted u/s 323 IPC for causing simple injuries to Dwarikaprasad (PW-4), appellants Genduram (A-5) and

Prabhu (A-4) are convicted u/s 323 IPC for causing simple injuries to Mahavir (deceased), appellant Shivram (A-1) and Shivrati (A-2) are also convicted for causing simple injuries to Urmila Bai (PW-5) and all are sentenced to the period already undergone by them, which comes about 5 months in this matter. The direction to run the sentences concurrently is maintained.