

(2012) 07 CHH CK 0052
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 2779 of 1998

Vijay Kumar alias Munna and Another	APPELLANT
Vs	
State of Madhya Pradesh (Now State of Chhattisgarh)	RESPONDENT

Date of Decision : 03-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304(1)

Citation : (2012) 3 Crimes 636

Hon'ble Judges : Pritinker Diwaker, J

Bench : Division Bench

Advocate : J.K. Shastri, for the Appellant; Vivek Sharma, P.L. for the State, for the Respondent

Final Decision : Dismissed

Judgement

Pritinker Diwaker, J.—This appeal arises out of the judgment and order dated 17.11.1998 passed by Additional Sessions Judge, Surajpur in Sessions Trial No. 40671993 convicting the accused/appellants u/s 304(1) IPC and sentencing each of them to undergo rigorous imprisonment for ten years and pay fine of Rs. 500, in default of payment of fine to further undergo rigorous imprisonment for three months. In the case in hand name of the deceased is Sukhlal alias Sukhal who is alleged to have been murdered by the present appellants herein as well as the acquitted accused persons namely Koleshwar, Satyanarayan and Shivnarayan. According to the case of the prosecution, five accused persons including the appellants herein who were prosecuted by the Court below happen to be the real brothers. On 28.11.1992 merged intimation Ex. P3A was recorded at the instance of Kamli Bai (PW5) wife of the deceased to the effect that all the accused persons five in number, had killed the deceased. Based (sic) this merged intimation, unnumbered FIR Ex. P3 was registered on that day itself at police station Jhilmili under Sections 147, 149 and 302 IPC and later numbered FIR Ex. P27 for the same offences was also registered. After completion of investigation, challan was filed by the police on 23.2.1993 for the offence under Sections 302, 147, 148

and 149 IPC."

2. In support of its case, prosecution has examined as many as 12 witnesses. Statements of the accused persons were also recorded u/s 313 of the Code of Criminal Procedure in which they denied the allegation made against them and pleaded their innocence and false implication in the case.

3. After hearing the parties, the Court below acquitted three accused persons namely Koleshwar, Satynarayan and Shivnarayan of the charges levelled against them but convicted the accused/appellants herein as mentioned in paragraph No. 1 of this judgment.

4. Counsel for the accused/appellants submits that there is no eyewitness to the incident and conviction of the appellants is based on the oral dying declaration of the deceased made before Kamli Bai (PW5) and Chando Bai (PW6). He submits that statements of these two witnesses are contrary to each other and based thereon the accused/appellants cannot be convicted. He submits that other important witnesses have not supported the case of the prosecution and declared hostile. According to the counsel for the appellants, in fact the deceased was murdered by Mahavir (PW10) as he (Mahavir) was having illicit relations with the sister of the deceased namely Karmato. According to the counsel for the appellants, copy of the FIR was also not forwarded to the concerned Magistrate as required under the law and that while convicting the accused/appellants learned Court below has considered the case diary statement of Prem Kumar (PW2) which was recorded with an inordinate delay of 17 days.

5. On the other hand, counsel for the respondent/State supports the judgment impugned and submits that statements made by Kamli Bai (PW5) and Chando Bai (PW6) are fully reliable and that in the cross-examination of these witnesses no question was put to them whether at the relevant time deceased was in a fit condition to make dying declaration or not. He submits that even though other witnesses have not supported the case of the prosecution, conviction based on the statements of Kamli Bai (PW5) and Chando Bai (PW6) is in accordance with law and no infirmity is there in the same. According to the State counsel, even if copy of the FIR has not been forwarded to the Magistrate promptly, the defence has failed to show as to what prejudice has been caused to it by the same and that being so this argument advanced by the counsel for the appellants is not that much important for disposal of this appeal.

6. Heard counsel for the parties and perused the material available on record.

7. Ramadhin (PW1) has stated in his evidence that on the date of incident when he was in the field, some Rajesh came there and informed him that the accused persons (including acquitted ones) had killed the deceased by assaulting him with club and the agriculture equipment locally known as Akhaini. Thereafter, he went to the Sarpanch of the village and then accompanied by two other villagers namely Babulal and Kumadhiyo went to see the deceased who happened to be his nephew and found that his hands and legs were broken but he was still

breathing. On being asked by him, the deceased named the accused persons (five in number) to be the assailants causing injuries with club and the agriculture equipment locally known as Akhaini. Thereafter, while the deceased was being brought to his house with the help of other villagers, he died on the way itself. According to this witness, incident was the outcome of some dispute related to the sister of the accused persons. However, in cross-examination this witness has stated that when at about 3-4 p.m. he had gone to see the deceased, by that time he was no more. He has further stated that he was not aware as to person involved in murder of the deceased. Prem Kumar (PW2) who is said to have informed Kamli Bai (PW5) and Chando Bai (PW6) about the injured condition of the deceased, has not supported the case of the prosecution and has been declared hostile. This witness however has stated that on the date of incident at about 9-10 a.m. when he was going to Bhatgaon on bicycle, he saw the deceased in a dying condition and then he and one Atmanand informed the same to the family members of the deceased. In cross-examination, he has stated that when he reached the place of incident, nobody was there and by that time deceased had already expired. Gautam Prasad Tiwari (PW3) is the witness to inquest Ex. P1. Sodhan (PW4) has not supported the case of the prosecution and has been declared hostile. Smt. Kamli Bai (PW5) wife of the deceased has stated that on the date of incident when she was working in her house and her husband had gone to village Anrokha, she was informed by Atmanand (not examined) that all the five accused persons had killed her husband. According to her, when she reached the place of incident, she saw her husband in an injured condition and at that time he was alive. When she asked as to who had assaulted him, the deceased named all the accused persons to have caused injuries with club and the agriculture equipment locally known as Akhaini. She is stated to have seen injuries on hands, legs and head of the deceased and on seeing him she started weeping. At that time, her father-in-law (not examined) also reached there and then while her husband was being shifted home, he died on the way itself. Thereafter, report Ex. P3 was lodged in police station Bhailyathan. In cross-examination, this witness has admitted that Mahavir Sao had accompanied her to police station for lodging the report. She has denied the fact that she was making the statement in the Court as was asked by Mahavir. She has further stated that she was informed about the incident by Atmanand and when she reached the place of incident, Atmanand and Prem Kumar (PW2) were already there. Chando Bai (PW6) has stated in her evidence that on the date of incident when she was cooking food in her house, Atmanand and Prem informed her that deceased was killed and thereafter when she reached the spot, she saw the deceased lying in an injured condition but he was alive and had informed her naming all the accused persons who had assaulted him with and the agriculture equipment locally known as Akhaini. She has stated that while being shifted home, he died on the way. According to her, she reached the spot half an hour after receiving information from Atmanand and at that time the deceased was there itself. She has stated that before Atmanand, nobody had reached the spot. She has however admitted that deceased was co-accused in the case of murder

of brother of the accused persons. Dr. Arun Kumar Sharma (PW7) is the witness who conducted post mortem examination on the body of the deceased and gave his report Ex. P4 mentioning the following injuries on his body:

(i) Incised wound on back of right elbow joint in the size of 1-1/2 x 1" x bone deep.

(ii) Bruise and abrasion on lower part and back of left arm in the size of 4 x 4".

(iii) Multiple bruise and abrasion on forearm in the size of 2 x 2", 1 x 1", 2 x 1/2" and 1 x 1".

(iv) Bruise, swelling on upper part of left leg, diffuse swelling present and dissection, by haematoma present subcutaneously in muscles in the size of 3 x 4.

(v) Bruise on front of left region, skin blue in colour, diffuse swelling present in the size of 15 x 10

(vi) Bruise and swelling on left knee joint. Fracture at middle, blood collected on the joint.

(vii) Bruise and swelling on lower part of leg 4" above left ankle joint, diffuse swelling present. Tibia and fibula lower part fractured.

(viii) Abrasion present on left foot III, IV, V toe on dorsal surface.

(ix) Abrasion on left foot III, IV, V toe on dorsal surface, blood stained, red in colour.

Cause of death has been opined to be shock and hemorrhage due to fracture and injury and mode was homicidal.

Babulal (PW8) has not supported the case of the prosecution and has been declared hostile. Sub-Inspector namely Prakash Soni (PW9) is the investigating officer who has fully supported the case of the prosecution. Mahabir (PW10) is the witness to seizure and memorandum vide Ex. P10 to Ex. P17 who has supported the case of the prosecution. Sahdev Ram (PW11) is the witness who recorded merger intimation Ex. P26 and FIR P27.

8. Minute examination of the evidence on record makes it clear that on 28.11.1992 the deceased died after suffering as many as 9 injuries. The factum of deceased sustaining number of injuries has been established from the post mortem report Ex. P4 conducted by Dr. Arun Kumar Sharma (PW7). Kamli Bai (PW5) and Chando Bai (PW6) are the two important witnesses before whom oral dying declaration was made by the deceased. Both these witnesses have categorically stated that when they attended to the deceased, they saw him in an injured condition and that he was alive at that time. According to them, on being asked the deceased had informed them that it is the accused persons who had caused injuries to him with club and agricultural equipment locally known as Akhaini. These two witnesses were cross-examined at length by the defence but they remained firm in stating as to in what manner the dying declaration was

made to them by the deceased. This Court does not find any reason to disbelieve the statements of these two witnesses especially when no such question was put to them as to whether at the relevant time the deceased was in a fit condition to make such oral dying declaration. Further memorandum Ex. P10 of accused/appellant No. 1 was recorded pursuant to which seizure of club vide Ex. P11 and blood stained Kurta of this accused vide Ex. P18 was made and likewise based on memorandum Ex. P12 of accused/appellant No. 2 seizure of club was made under Ex. P13 and both i.e. memorandum and seizure have been proved by Mahavir (PW10). This Court further finds no force in the argument of the counsel for the appellants that copy of the FIR was not forwarded to the Magistrate and therefore the appellants are liable to be acquitted, for the reason that the defence has utterly failed to prove by leading any clinching evidence as to what prejudice has been caused to them if the copy of the FIR was not forwarded to the Magistrate. Thus in view of the aforesaid discussion, this Court is of the considered opinion that the prosecution has proved its case beyond reasonable doubt and that being so the Court below has been fully justified in passing the judgment impugned convicting the accused/ appellants as mentioned above. Findings of the court below being in conformity with the evidence of the witnesses are flawless and no interference therewith is called for by this Court. Accordingly, the appeal has no substance and the same is liable to be dismissed. It is dismissed as such. The appellants are reported to be on bail. Their bail bonds stand cancelled. They be sent to jail forthwith for serving out remaining part of their sentence.