



17/11/2009

AFR (31)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 541 of 1989

CORAM: HON'BLE MR. T. P. SHARMA &
HON'BLE MR. R. L. JHANWAR, JJ.

Bagar and another

Versus

State of M.P. (now C.G.)

JUDGMENT FOR CONSIDERATION

Sd/-

T. P. Sharma
Judge

Hon'ble Mr. R. L. Jhanwar

g agree
Sd/-
R. L. Jhanwar
Judge

Post for Judgment on :

Sd/-
T. P. Sharma
Judge



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Criminal Appeal No. 541 of 1989

CORAM: HON'BLE MR. T. P. SHARMA &
HON'BLE MR. R. L. JHANWAR, JJ.

APPELLANTS
(In Jail)

1. Bagar aged 26 years son of Kundu Uranva.
2. Shivram aged 29 years son of Kundu Uranva
R/o Village Kot, Police station Ambikapur
District Sarguja

Versus

RESPONDENT

State of M.P. (now C.G.)

(CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL
PROCEDURE, 1973)

Present:-

Mrs. Hamida Siddique, counsel for the appellants.

Mr. Ravindra Agrawal, Panel lawyer for the State/respondent.

JUDGMENT

(Delivered on 30th November, 2009)

The judgment of the Court was delivered by T. P. Sharma, J.:-

1. By this appeal, the appellants have challenged the legality and propriety of the judgment of conviction & order of sentence dated 22.5.1989 passed by the Second Additional Sessions Judge, Ambikapur in Sessions Trial No. 111/87 whereby & whereunder learned Second Additional Sessions Judge after holding appellant No. 1 Bagar guilty for commission of offence punishable under Section 302 of the Indian Penal Code and appellants No. 2 Shivram and deceased appellant No. 3 Kandhu for commission of offence punishable under Section 302/34 of the Indian Penal Code, sentenced them to undergo imprisonment for life.

2. Judgment & order are challenged on the ground that without there being any credible and clinching evidence sufficient for conviction against the appellants, the Second Additional Sessions Judge has convicted and sentenced the appellants as aforementioned and thereby committed illegality.
3. Case of the prosecution in brief is that deceased Choya was issueless. Appellant Bagar, son of deceased appellant Kandhu was residing with him since 10 years. In the year 1986, appellant Bagar demanded partition of the land from deceased Choya and inflicted injury to him. The deceased ousted appellant Bagar from his house. On 30.3.86 at about 5.30 p.m., deceased Choya was coming with dry grass (pairo). While he was passing in front of the house of Bharthari, appellant Bagar assaulted him over his right temporal region, neck and right hand by axe. He fell down. Handle of axe was broken in two pieces. Appellant Bagar took piece of handle of axe and fled away from the spot. Witness Bharthari, his wife and daughter had seen the incident and shouted, then Moharsai came there. At about 1 a.m. Puran (PW-1) has lodged the FIR vide Ex.P/1. Merg intimation was also recorded vide Ex.P/14. Investigating officer proceeded for the scene of occurrence. After summoning the witnesses (Ex.P/2), inquest over the body of Choya was prepared vide Ex.P/3. Bloodstained soil, plain soil and one axe with broken handle were recovered from the spot vide Ex.P/4. Dead body of the deceased was sent for autopsy vide Ex.P/10 to Assistant Surgeon, Ambikapur. Dr.R.K.Pandey (PW-8) has conducted autopsy vide Ex.P/11 and found following injuries:-
- i) One incised wound of 2" x $\frac{1}{2}$ " x 4" deep over back just below the inferior border of right scapula bone.
 - ii) Right lungs was cut as a result of such injury of 2" x $\frac{1}{2}$ " x 2"
4. Injury was ante mortem and sufficient for causing death. Death was homicidal in nature. Bloodstained clothes of appellant Bagar was seized vide Ex.P/5. Sealed clothes of the deceased Choya was seized vide Ex.P/6.

Spot map was prepared by patwari vide Ex.P/7. Rojnamcha Sanha was recorded vide Ex.P/8 on 17.12.85. Deceased Choya was also assaulted by appellant Bagar. He was examined by Dr.Suman Kumar Agrawal (PW-10) vide Ex.P/9A and found two abrasions. Nails of appellant Bagar were cut and seized vide Ex.P/15. Seized articles were sent for chemical analysis vide Ex.P/16 where presence of blood over axe, lungi and underwear of appellant Bagar were confirmed vide Ex.P/17.

4. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'). After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Ambikapur, who in turn committed the case to the Court of the Sessions Judge, Ambikapur from where Second Additional Sessions Judge, Ambikapur received the same on transfer for trial.
5. In order to prove the guilt of the accused/appellants, prosecution examined as many as 11 witnesses. Statements of the accused/appellants were also recorded under Section 313 of the Code where they denied the circumstances appearing against them and claimed innocence and false implication in the crime in question. Accused persons have also examined defence witness Thururam (DW-1) who has deposed that if some person will present in front of Bharthari then it cannot be seen from hand pump situated more than 1 $\frac{1}{2}$ furlong from the house of Bharthari.
6. After affording an opportunity of hearing to the parties, Second Additional Sessions Judge has convicted and sentenced the appellants as aforementioned.
7. We have heard Mrs.Hamida Siddique, counsel for the appellants and Mr.Ravindra Agrawal, Panel lawyer for the State and perused the judgment impugned as also record of the Court below.
8. Learned counsel for the appellants vehemently argued that in the present case though appellant No.3 Kandhu is died and case against him is abated,



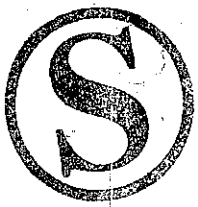
but prosecution has not adduced any evidence against the appellants sufficient for their conviction. Even according to the case of the prosecution, only appellant No.1 Bagar has caused single injury and no other persons have caused any injury or were present at the time of such incident. Conviction of other co-accused in sharing common intention is bad in law. Learned counsel placed reliance in the matter of *Dhulya @ Dhulji & Ors. v. State of M.P.*¹ in which the High Court of Madhya Pradesh has held that in case of assault started after sudden quarrel and fatal injury was caused by one person, then other persons cannot be held for commission of murder with the aid of Section 34 of the Indian Penal Code. They can at most be convicted for his individual act of Section 323 of the Indian Penal Code.

9. On the other hand, learned State counsel supported the judgment impugned and argued that prosecution has proved its case beyond all shadow of doubt. Prosecution has adduced sufficient evidence which is sufficient for drawing inference that appellant No.1 Bagar has committed the offence of murder and rest appellants have also committed murder of deceased Choya in sharing common intention. Learned counsel placed reliance in the matter of *Major Singh v. State of Punjab*² in which the Apex Court has held that the accused holds the hands of the deceased for allowing other persons for causing injury is equal liable with the aid of Section 34 of the Indian Penal Code.

10. In order to appreciate the contentions of the parties, we have examined the evidence adduced on behalf of the parties. In the present case, homicidal death as a result of injury of deceased Choya is not substantially disputed, otherwise also established by the evidence of Dr.R.K.Pandey (PW-8), autopsy report (Ex.P/11), F.I.R. (Ex.P/1) and mere intimation (Ex.P/14). Dr.R.K.Pandey (Ex.P/8) has specifically deposed that on 31.3.86 he has examined dead body of Choya. One incised wound of 2" x 1/2" x 4" deep over back just below the inferior border of right scapula bone and

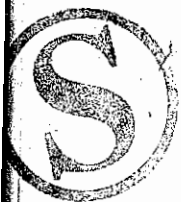
¹2008 Cri.L.J.(NOC) 495 (M.P.)

²JT 2002 (9) SC 576



external cut injury of lungs having dimension of $2" \times \frac{1}{2}" \times 2"$. Cut injury found over lungs is dangerous and sufficient for instantly death of the deceased by the aforesaid injury. Homicidal death of the deceased Choya as a result of injury is established.

11. In order to establish the complicity of the accused/appellants in the crime in question, we have examined the evidence adduced on behalf of the prosecution. Puran (PW-1) has deposed that at the time of incident, appellant Bagar was residing separately from Choya. On the date of incident at about 5 p.m. before sunset, he was present in his house. He heard sound of Bechni, then he came out from his house. Dead body of Choya was lying on the courtyard of Bharthari. Injury was found over back of Choya. He was informed by Bachni and Buddi that appellant Bagar has assaulted Choya, then he immediately went to the police station and lodged the F.I.R. Buddi @ Geetkolhin (PW-2) has deposed in her evidence that while her husband Choya was coming from barn, at that time appellants Kandhu and Shiva caught hold him and assaulted by kick. Appellant Bagar assaulted the deceased by axe over his back and caused dangerous injury. She and Bachni were present at the time of incident and cried for help. Deceased Choya was also cried for help. Deceased Choya fell down. Appellants fled away after removing axe from back of the deceased. After hearing cries, persons of the vicinity came to the spot. Bechni (PW-3) has also corroborated the evidence of Buddi (PW-2). Patar (PW-4) has deposed in his evidence that he was coming from the field and while he was passing near the house of one Garra, he heard sound of Buddi and Bechni. They were crying (कुदिहा मारत है), then he immediately reached to the spot. Choya was lying in the land and axe was inserted in his back. He tried to provide water for drinking to Choya, but Choya was not in a position to drink. Bechni and others informed him that appellant Bagar has assaulted Choya by axe. Thururam (DW-1) has deposed in his evidence that front portion of the house of Bharthari is not visible from hand pump and $1 \frac{1}{2}$ furlong away from the house of Bharthari. Thururam is resident of



another village Lamgaon and incident took place at village Kot, but he has admitted in his evidence that when he reached to the spot he saw that dead body of Choya was lying in front of the house of Bharthari and also found injury over the body of Choya. Thururam has not alleged that he has seen the incident, but he has admitted that dead body of Choya was lying in front of house of Bharthari in injured condition. Buddi @ Geetkolhin has deposed that she has seen the incident. In her detail cross-examination, he has admitted in para 7 that after hearing sound of Bechni she came out from the house and reached to the spot along with Bechni and Manmatiya. She has seen the incident. In her cross-examination, she has categorically deposed the incident, but there are some improvement, omissions and contractions in her statement with the police (Ex.D/1). Bechni (PW-3) has corroborated the evidence of Buddi (PW-2). In her detail cross-examination, she has specifically deposed that she heard sound (कुदिहो मोला मारत है) and also deposed that she stated those words in her statement recorded under Section 161 of the Code, but same words have not been written in Ex.D/2, her previous statement recorded by police. Puran (PW-1) and Patar (PW-4) have deposed that they came to the spot after hearing sound for help and they have seen the body of Choya in injured condition.

12. Buddi (PW-2), wife of deceased Choya is relative witness, but her evidence cannot be discarded only on the ground that she is wife of the deceased and closed relative. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Close relation would be the last to screen the real culprit and falsely implicate an innocent person. While dealing with the question of reliability of relative witness the Apex Court in the matter of Dalip Singh and others v. The State of Punjab³ has held that a witness is normally to be considered

³ AIR 1953 SC 364



independent unless he or she springs from sources which are likely to be tainted. Para 26 of the said judgment reads as under:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts." Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

13. While dealing with the same question, the Apex Court in the matter of **Guli Chand and others v. State of Rajasthan**⁴ has held that mere fact that relative witness or his relations is not sufficient to discard his testimony.
14. The evidence of Buddi (PW-2) has corroborated by the evidence of Bechni (PW-3) and other eyewitnesses and the evidence of Puran (PW-1) and Patar (PW-4) whom they have informed that they came to the spot after hearing sound for help. Puran (PW-1) has lodged the F.I.R. which reveals that appellant Bagar came with axe and assaulted the deceased by axe but in the F.I.R. (Ex.P/1) any act or overact or presence of other persons have not been mentioned. Merg intimation (Ex.P/14) was recorded on the same time and only the role attributed to appellant Bagar has been mentioned. It appears that part of the statement relating to the act attributed to appellant Kandur and Shivram does not find support from the F.I.R. (Ex.P/1). F.I.R. does not reveal the name of other co-accused or the fact

⁴(1974) 3 SCC 698



that other persons were also associated in connection with commission of the crime. It appears that the evidence relating to appellant Kandhu and Shivram is improving statement, not supported by the F.I.R. or mere intimation, but only on the ground of improvement, exaggeration or false statement, entire statement of the witnesses cannot be discarded. The Court is under obligation to separate truth of grain from the chaff of falsehood if possible.

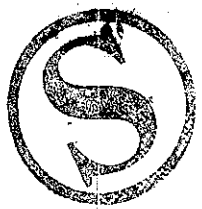
15. While dealing with the question of reliability of the evidence of the person who has exaggerated and partially given false statement up to some extent, the Apex Court in the matter of *Laxman and others v. State of Maharashtra*⁵ has held that witnesses cannot be branded as liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. Relevant portion reads as under:

"Before we discuss the evidence further, we may observe that Professor Munsterberg in a book called "On the Witness Stand" (p.51), "Law and the Modern Mind" (see: 1949 ed. P.106) gives instances of experiments conducted by enacting sudden unexpected preplanned episodes before persons who were then asked to write down, soon afterwards, what they had seen and heard. The astounding result was:

"Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragic-comedy were completely eliminated from the memory of a number of witnesses".

Hence, the Professor concluded: "We never know, or imagine". Witnesses can not, therefore, be branded as liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. The astute judge can separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted or acted upon. It is sound commonsense to refuse to apply mechanically, in assessing the worth of necessarily imperfect human testimony, the maxim: "falsus in uno falsus in omnibus"

⁵ AIR 1974 SC 308



16. In the present case, the evidence of eyewitnesses Buddi (PW-2) and Bechni (PW-3) have been corroborated in material part of the evidence of Puran (PW-1) and Patar (PW-4). F.I.R. (Ex.P/1) and mere intimation (Ex.P/14) inspire confidence and are safe to rely the evidence of these witnesses and are sufficient for drawing inference that appellant Bagar has caused fatal injury over scapula bone of the deceased Choya and as a result of such injury he fell down and instantly he died, but these witnesses are not sufficient for drawing inference that appellants Shivram and Kandur were assaulted with the commission of crime or in sharing common intention, they have committed any offence. Prosecution is required to prove its case beyond all shadow of doubt and to prove commission of the crime, credible and clinching evidence to rule out the possibility of innocence of the appellants is necessary.

17. In the present case, the evidence of the aforesaid witnesses are not sufficient for drawing inference that appellants Shivram and Kandur have acted in sharing common intention and committed any offence. In absence of any credible and clinching evidence against appellants Shivram and Kandur, any positive finding of commission of offence against them would not be sustainable.

18. As regards the motive of crime is concerned, in case of direct evidence, motive loses its importance. Even otherwise, it is aid in criminality and can be inferred from the kind of weapon used, part of body hit, nature of injury and other circumstances.

19. In the present case, the appellants have inflicted injury by axe over back of the deceased and complete axe was inserted in the body of the deceased Choya. Even handle of axe broken shows the force used by the appellants while causing injury. The appellants have not caused any injury as a result of sudden fight or contravention, but while the deceased was coming from barn, appellant Bagar who was holding axe has caused dangerous injury sufficient for causing death of the deceased Choya

instantly shows his intention to cause homicidal death. Appellant Bagar has caused the aforesaid dangerous and fatal injury. The evidence adduced on behalf of prosecution is sufficient for drawing inference that appellant Bagar has caused homicidal death amount to murder of Choya. Conviction & sentence imposed upon appellant Bagar under Section 302 of the Indian Penal Code are sustainable under the law, but in absence of credible and clinching evidence against appellants Shivram and Kandur, their conviction & sentences under Section 302 read with Section 34 of the Indian Penal Code are not sustainable under the law.

20. For the foregoing reasons, the appeal is partly allowed. Conviction & sentence imposed upon appellant Bagar under Section 302 of the Indian Penal Code are hereby maintained and conviction & sentences imposed upon appellants Shivram and Kandur under Section 302/34 of the Indian Penal Code are hereby set aside. Appellant Shivram is on bail. His bail bonds are discharged and he need not surrender before the Court.

Sd/-
T. P. Sharma
Judge

Sd/-
R.L. Jhanwar
Judge