

STATE OF MADHYA PRADESH

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v.

GANGABISHAN @ VISHNU & ORS.

(Criminal Appeal No. 2393 of 2009)

JULY 27, 2018

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[ABHAY MANOHAR SAPRE AND S. ABDUL NAZEER, JJ.]

*Penal Code, 1860:*

*ss. 302/149, 325/149, 147, 148, 440 and 304 (Part I) – Prosecution of nine accused u/ss. 302/149, 325/149, 147, 148 and 440 – Injured eye-witness to the incident – Dying declaration recorded – Conviction by Trial court – High Court acquitted all the accused except accused No.1 – Conviction of accused No.1 was altered to one u/s.304 (Part I) – Appeal by State challenging acquittal order – Held: Statement of the eye-witness as well as dying declaration of deceased not corroborated by medical evidence – In the facts of the case liability cannot be fastened on the respondent-accused (accused Nos. 2 to 9) – In view of medical evidence it is evident that accused No.1 was not having intention to commit murder, but his act was to cause bodily injury which was likely to cause death – Therefore, conviction of accused No.1 u/s. 304 (Part I) and acquittal of rest of the accused by High Court was justified.*

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**Dismissing the appeal, the Court**

**HELD: 1. The general statement by PW-1 regarding participation of all the accused with different weapons and causing injury to the deceased as well as to himself is not duly corroborated by medical evidence of PW-8 and autopsy surgeon PW-7. The version of PW-1 is belied by medical evidence. In the dying declaration the deceased has deposed that except accused No.1, he was not knowing as to who had assaulted him but in the same breath he has stated that he was assaulted by lathi by accused No.3 and accused No.2. However, his version is not corroborated by medical evidence. [Para 7] [353-E-G]**

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**2. The dispute between the parties arose on account of entrance of cattle and causing damage to the crops, as well as**

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A use of way in which deceased and PW-1 sustained injuries. Taking overall view of the matter, the High Court has acquitted accused Nos.2 to 9. Insofar as accused No.1 is concerned, his overt act is fully corroborated by the medical evidence, as well as the dying declaration (Ex.P/4). Though, PW-1 sustained injuries caused by hard and blunt object but according to his version, he was assaulted by all the appellants, whereas he sustained only four injuries and no injury was sustained by him by fire arm or sharp edged weapon. Therefore, it would be difficult to fix the liability for causing injuries to this witness by the respondents. [Para 8] [353-G-H; 354-A-B]

C 3. Insofar as the deceased is concerned, he suffered gunshot injury and entry wound was on back of his left thigh. In view of the medical evidence, it would be easy to infer that if accused No.1 was having intention to commit murder of the deceased and used fire arm for that purpose, the injury could have been caused on upper limb, above waist of the deceased. Thus, though the accused No.1 was not having intention to commit murder of the deceased but the act was to cause bodily injury which was likely to cause death. Therefore, the High Court found that he would be responsible for commission of culpable homicide not amounting to murder punishable under Section 304 (Part I) of IPC. The High Court after scanning the entire evidence also held that the respondents were not having an intention to commit murder of the deceased. There is no infirmity in the judgment of the High Court. [Para 9] [354-C-F]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2393 of 2009.

From the Judgment and Order dated 06.12.2006 of the High Court of Madhya Pradesh, Bench at Indore in Criminal Appeal No. 1370 of 2001.

G Ms. Swarupama Chaturvedi, Niraj Sharma, Ms. Priya Hingorani, Chandra Bhushan Prasad, Kuldeep S. Parihar, H. S. Parihar, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

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**S. ABDUL NAZEER, J.** 1. This appeal by special leave is preferred against the judgment dated 06.12.2006 passed by the High Court of Madhya Pradesh at Indore in Criminal Appeal No. 1370 of 2001 arising out of Sessions Trial No. 197 of 2000 passed by the Additional Sessions Judge, Shajapur, Madhya Pradesh, dated 4<sup>th</sup> December, 2001, wherein the High Court has set aside the judgment and order of conviction of the respondents under Sections 302/149 and 325/129 IPC against all the respondents except respondent No.1. The respondent No.1 has been held guilty under Section 304 (Part-I) IPC and sentenced to undergo ten years R.I. and fine of Rs.25,000/- and in default to undergo three years further R.I.

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2. Briefly stated the prosecution case is that Dinesh (PW-1) and his brother Rajesh (deceased) were in their field situated in the forest, for the purpose of watching the crops. At that juncture, the accused persons reached over there having lathis and swords in their possession except accused No.1 Gangabishan alias Vishnu, who was having 12 bore gun and started assaulting Rajesh with their respective weapons. Accused No.1 caused gunshot injury on the left thigh of the deceased by 12 bore gun because of which he fell down on the ground. Dinesh raised cry. However, no one came to their rescue. Somehow he managed to run away from the scene of occurrence and disclosed about the incident to Sidhnath, Ramsingh, Gopal Khati and Laxminarayan Khati. They all brought the deceased Rajesh on a cot from the field and thereafter took him in a mini truck. The deceased Rajesh became unconscious. The accused persons were also causing damage to the standing crops of PW-1 by grazing their cattle and the incident occurred because of the objection being raised by PW-1 in the morning of the same day.

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3. The police after registration of the crime and recording of the FIR (Ex. P/1) prepared the inquest. Post mortem examination of the deceased was conducted by Dr. Kapil Sahay (PW-7). The post mortem report is Ex. P/10. Dr. Vijaysingh, PW-8 initially examined the deceased Rajesh, the same day and also PW-1. Their MLC reports are Exhibits P/11 and P/12 respectively. Dying declaration (Ex. P/4) of the deceased was also recorded by Tehsildar Shri Purshottam Sharma (PW-2). After investigation, accused were charge sheeted for the commission of

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- A offences under Sections 302/149, 325/149, 147, 148 and 440 of the IPC. Accused No.1 was also charge sheeted under Section 30 of the Arms Act.

4. The trial court after undertaking a full-fledged trial found the accused guilty under Sections 302/149 of IPC and sentenced them to  
B undergo life imprisonment and Rs.20,000/- fine and on default additional three years of R.I., two years of imprisonment under Section 325/149 of IPC and fine of Rs.2000/- and on default one year additional R.I, three years of R.I under Section 440 of IPC and fine of Rs.5000/- and on default six months additional R.I and except accused No.1, rest of the  
C accused were sentenced to one year of R.I under Section 147 IPC and fine of Rs.500/- and on default two months of additional R.I. Accused No. 1 was further convicted under Section 148 IPC and Section 30 of the Arms Act and was sentenced to suffer two years of R.I and fine of Rs.1000/- and on default four months of additional R.I. and four months of R.I and a fine of Rs.1000/- and on default four months of additional  
D R.I respectively.

5. Feeling aggrieved, the accused approached the High Court by filing an appeal. By the impugned judgment herein, the High Court set aside the judgment and order of conviction of accused Nos.2 to 9 (respondent Nos.2 to 9). However, respondent No.1 has been held  
E guilty under Section 304 (Part I) IPC and sentenced to undergo ten years R.I and fine of Rs.20,000/- and in default to undergo three years R.I in addition.

6. We have heard learned counsel for the parties. Learned counsel for the appellant submits that the High Court has failed to appreciate the findings of the trial court that the respondents who were nine in number and were armed with sharp edged weapons, lathis and one of them had a 12 bore gun had come to the spot of the incident with premeditation and common intention to assault and kill the complainant and his brother and in this transaction of violence the brother of complainant succumbed to gunshot injury inflicted by accused No.1. Therefore, the court below  
F was not justified in setting aside the sentence and conviction of respondent Nos. 2 to 9. It is further submitted that the High Court was also not justified in setting aside the conviction and sentence of the respondent No.1 under Section 302 IPC and imposing lesser punishment of ten years of R.I under Section 304 (Part I) IPC. On the other hand, learned  
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advocate appearing for the respondents has sought to justify the impugned judgment of the High Court. A

7. We have carefully considered the submissions of the learned counsel appearing for the appellant-State and the learned advocate appearing for the respondents. It is clear from the evidence on record that the deceased Rajesh suffered only one injury on interior aspect of thigh, which was an exit wound. Injury No. 2 was a gunshot entry wound on the back side of left thigh. There was haematoma and fracture of thigh bone. Dr. Vijaysingh (PW-8) examined the deceased and issued MLC report (Ex. P/11). He also examined PW-1 Dinesh, brother of the deceased and found three contusions and one lacerated wound. In the opinion of the doctor all the injuries were simple in nature except injury No.1 on the left forearm. PW-1, Dinesh is an eye-witness. PW-2 recorded the dying declaration of the deceased Rajesh (Ex. P/4). It is evident from the statement of PW-1, that he has given a general and omnibus statement about the assault upon the deceased and himself by the accused. Accused No.1 was having a twelve bore gun and the other accused were armed with lathis. However, the doctor's report shows that deceased had sustained only one injury on the left thigh caused by accused No.1. Neither the deceased nor PW-1 had any injury caused by sharp edged weapon. PW-1 suffered fracture of left ulna bone and three simple injuries caused by hard and blunt object but he has not pointed out as to which accused did cause injuries to him. His general statement regarding participation of all the accused with different weapons and causing injury to the deceased as well as to himself is not duly corroborated by medical evidence of PW-8 and autopsy surgeon PW-7, Dr. Kapil Sahay. The version of PW-1 is belied by medical evidence. In the dying declaration the deceased has deposed that except Vishnu Prasad (accused No.1) he was not knowing as to who had assaulted him but in the same breath he has stated that he was assaulted by lathi by Chaturbhuj (accused No.3) and Laxmichand (accused No.2). However, his version is not corroborated by medical evidence as he did not suffer even a single scratch on his body except fire arm injury. B C D E F G

8. It is necessary to notice here that the dispute between the parties arose on account of entrance of cattle and causing damage to the crops, as well as use of way in which deceased and PW-1 sustained injuries. Taking overall view of the matter, the High Court has acquitted

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- A accused Nos.2 to 9. Insofar as accused No.1 is concerned, his overt act is fully corroborated by the medical evidence, as well as the dying declaration (Ex.P/4). Though, PW-1 sustained injuries caused by hard and blunt object but according to his version, he was assaulted by all the appellants, whereas he sustained only four injuries and no injury was sustained by him by fire arm or sharp edged weapon. Therefore, it would be difficult to fix the liability for causing injuries to this witness by the respondents.

9. Insofar as the deceased Rajesh is concerned, he suffered gunshot injury and entry wound was on back of his left thigh. This shows that the shot was fired from his back side. There was no blackening, charring on exit wound. Blackening and charring were present on entry wound which shows that the gunshot was fired within the range of 6 to 8 feet. In view of the medical evidence, it would be easy to infer that if accused No.1 was having intention to commit murder of the deceased and used fire arm for that purpose, the injury could have been caused on upper limb, above waist of the deceased but the part chosen for causing injury was the back portion of left thigh. Thus, though the accused No.1 was not having intention to commit murder of the deceased but the act was to cause bodily injury which was likely to cause death. Therefore, the High Court found that he would be responsible for commission of culpable homicide not amounting to murder punishable under Section 304 (Part I) of IPC. The High Court after scanning the entire evidence also held that the respondents were not having an intention to commit murder of the deceased Rajesh. We do not find any infirmity in the judgment of the High Court.

10. Accordingly, the appeal is dismissed.