

Molamudha and ors. Vs. the State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Oct-10-2012

Appellant : Molamudha and ors.

Respondent : The State of Madhya Pradesh

Judgement :

HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT, JABALPUR SINGLE BENCH PRESENT: HON'BLE JUSTICE SHRI N. K. GUPTA CRIMINAL APPEAL NO.730/1999 Mola Mudha and 3 others Vs. State of Madhya Pradesh

..... For the
appellants : Shri Aditya Adhikari, Advocate. For the respondent: Shri Ajay
Tamrakar, Panel Lawyer.
.....

JUDGMENT

(Delivered on the 10th day of October, 2012) The appellants have preferred this appeal against the judgment dated 10.3.1999 passed by the IIInd Additional Sessions Judge, Rewa in ST. No.23 of 1998 whereby the appellants were convicted for offences punishable under Sections 304 (Part II) of I.P.C or 304 (Part II) read with Section 34 of I.P.C and sentenced for seven years rigorous imprisonment.

2. The prosecution's case, in short, is that on 18.7.1997 the deceased Ramratan along with his son Keshav (PW3) went to plough the field situated at Village Dani

(Police Station Gudh, District Rewa). There was a dispute relating to ownership and possession of that particular field with the appellants and therefore, the appellants along with one Sukhlal came to the spot and stopped the complainant/deceased to work on the fields. The 2 Criminal Appeal No.730 of 1999 appellants were armed with the sticks and therefore, the deceased Ramratan and Keshav left the field and went back to the village. On the way the appellants Ram Dutt, Sudarshan, Manot alias Chottan Mishra restrained the deceased and assaulted the deceased Ramratan and his son Keshav with sticks. Both the injured persons fell upon the earth. On their shouting Chhotelal (PW4), Chandrakali (PW1) and Ishwari etc. came to the spot. They took the injured persons to the Village Dani. Thereafter, the deceased Ramratan was taken to the Police Station Gudh where he lodged an FIR Ex.P/13. All the injured persons were sent to Government Hospital Rewa for their medico legal examination and treatment. Dr. M. K. Tiwari (PW6) after examining the victims Ramratan and Keshav gave his reports Ex.P/6 and P/7 respectively. He found swelling and tenderness on the left hand of Ramratan and bony cervix sound was also there at the first metacarpal bone in his hand. No other injury was found on him whereas, Keshav sustained 4-5 injuries caused by hard and blunt objects on his chest, back, left side of the head, fore arm, right knee and other places of the body. Both the patients were admitted in the hospital and Ramratan was referred for his X-Ray examination. Dr. Atul Singh (PW7) examined the victim Ramratan radiologically and gave his report Ex.P/8. He found a fracture in his first metacarpal bone. Again the victim Ramratan was referred for radiological examination on 22.7.1997 and a fracture was found in his head. Ultimately the victim Ramratan 3 Criminal Appeal No.730 of 1999 expired on 30.9.1997. Panchayatnama lash Ex.P/25 was prepared of the deceased and body of the deceased Ramratan was sent for post mortem. Dr. B. K. Sharma (PW10) did the post mortem on the body of the deceased Ramratan and found that he died due to complications of head injury. After due investigation a charge sheet was filed before the JMFC, Rewa who, committed the case to the Court of Sessions Judge, Rewa and ultimately it was transferred to the IInd Additional Sessions Judge, Rewa.

3. The appellants abjured their guilt. They did not take any specific plea in the case but, they have stated that they were falsely implicated in the matter. In

defence Shivendra Kumar Agnihotri (DW1) and Baijnath Tiwari (DW2) were examined to prove the alibi of accused Manot and Surendra Prasad Mishra (DW3) was examined to prove the alibi of the accused Sukhlal .

4. After considering the evidence adduced by the parties the learned Additional Sessions Judge acquitted the other accused persons from all the charges. The appellants were also acquitted from the charges of offences punishable under Section 307, 302, 341, 294, 323 and 506-B of I.P.C but the appellants Ram Dutt, Sudarshan, MaNo.@ Chottan Mishra were convicted for offences punishable under Section 304 (Part II) read with Section 34 of I.P.C whereas, the applicant Mola was convicted for the offence punishable under Section 304 (Part II) of I.P.C and all of them were sentenced for 7 years rigorous imprisonment.

5. I have heard the learned counsel for the parties. 4 Criminal Appeal No.730 o

6. The learned counsel for the appellants have submitted that the evidence of the various eye witnesses may be perused. They did not support the prosecution story. The learned Additional Sessions Judge convicted the appellants on the basis of the FIR lodged by the deceased Ramratan considering it as a dying declaration. The learned Additional Sessions Judge was confused about the overt act of the appellants as an individual. While convicting the appellants the learned Additional Sessions Judge convicted them for offence punishable under Section 304 (Part II) read with section 34 of I.P.C, whereas at the time of granting the sentence he sentenced the appellant Mola for offence punishable under section 304 (Part II) read with Section 34 of I.P.C, whereas the remaining appellants were sentenced for offence punishable under Section 304 (Part II) of I.P.C. There was no overt act specifically mentioned in the FIR as to who had caused the head injury to the deceased Ramratan and therefore, no accused could be convicted for main offence of Section 304 (Part II) of the I.P.C. It is also submitted that FIR was not at all a dying declaration in the eyes of law. In support of his contention the learned counsel for the appellants placed his reliance upon the judgments passed by Hon'ble the Apex Court in the case of Sukhar Vs. State of Uttar Pradesh. AIR 199.SC 388.in which it is observed that FIR is not admissible as dying declaration. It is also submitted that from the FIR it is not at all clear as to who assaulted the

victim Ramratan. Under such 5 Criminal Appeal No.730 of 1999 circumstances, such FIR cannot be believed. To disbelieve the FIR (dying declaration) the learned counsel for the appellant placed his reliance upon the judgment of Hon'ble the Apex Court in the case of Maniram Vs. State of M.P.

. (1994 Supp (2) SCC 539). Therefore, it is prayed that the appellants be acquitted.

7. On the other hand the learned Panel Lawyer has submitted that the conviction as well as the sentence directed by the trial Court appears to be correct and no interference is required from this end in the appeal.

8. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case it is to be considered as to whether the appeal filed by the appellants can be accepted ?. And whether the sentence directed against the appellants can be reduced ?.

9. The present case is a peculiar case in which Keshav (PW3) son of the deceased Ramratan, an injured witness, turned hostile. Chandrakali (PW1), Keshav (PW3) and Chhotelal (PW4) were examined as eye witnesses who turned hostile. They simply stated that they saw the victim Ramratan lying injured on the earth. Ramratan was taken to the Police Station Gudh where he had lodged an FIR Ex.P/13. The incident took place on 18.7.1997 and Ramratan expired after that incident. There is no allegation that the mental condition of the deceased Ramratan was not sound and therefore, the FIR which was lodged within reasonable time 6 Criminal Appeal No.730 of 1999 after the incident and proved by the Head Constable Shiv Pratap Singh (PW8) is acceptable. Dr. M.K. Tiwari (PW6) examined the victim Ramratan and Keshav and found the corresponding injuries as mentioned in the FIR. Initially one visible injury was found on the victim Ramratan which was in his fingers of left hand. No visible injury was found on his head. Though symptoms of vomiting etc. were not reiterated then on 22.7.1997 a second X- Ray was done to the victim Ramratan and Dr. Atul Singh (PW7) gave his report Ex.P/10. He found that the victim Ramratan sustained a fracture in the fronto parietal region of the skull corresponding to parietal border at orbit. By that discovery it was found that victim Keshav sustained some injuries on his head.

The deceased Keshav died after some time due to complications which arose in his head injury and when, the injuries were not of such nature so that they were sufficient to cause his death initially, therefore, it was rightly observed by the trial Court that the culprits who, assaulted the deceased Ramratan were guilty of offence punishable under section 304 (Part II) of I.P.C and not guilty of offence punishable under Section 302 of I.P.C.

10. The prime question is about the culprit who assaulted the deceased or participated with the common intention. It is nowhere clear in the judgment of the learned Additional Sessions Judge that how he selected the culprits for conviction. In the FIR Ex.P/13 it was stated that the deceased Ramratan and Keshav ran from the spot and thereafter Ram Dutt and Manot restrained the 7 Criminal Appeal No.730 of 1999 victim and assaulted them. It is nowhere mentioned in the FIR that the appellant Mola had also participated in the assault but the learned Additional Sessions Judge convicted the appellant Mola without any basis.

11. The learned counsel for the appellants has placed his reliance upon the judgment passed by Hon'ble the Apex Court in the case of Sukhar (supra) to show that the FIR was not at all a dying declaration. If the judgment passed by Hon'ble the Apex court is perused then it would be clear that no discussion took place in the judgment that whether FIR was a dying declaration or not. The judgment was discussed on the point relating to Section 6 of the Evidence Act i.e rule of res gestae and therefore, virtually no discussion took place in the judgment on the provisions of Section 32 of the Evidence Act. Hon'ble the Apex Court simply approved the conclusion of the High Court that in the present case the FIR lodged could not be considered as dying declaration. Under such circumstances, the judgment passed by Hon'ble the Apex Court in the case of Sukhar (supra) is not a precedent on the point that whether an FIR can be considered as a dying declaration or not. In this context judgment passed by Hon'ble the Apex Court in the case of State of Punjab Vs. Amarjit Singh. AIR 198.SC 201.may be referred in which it was laid that the practice of the investigation officer himself recording the dying declaration during the course of investigation ought not to be encouraged and it would be better to have the 8 Criminal Appeal No.730 of 1999 dying declaration recorded by a Magistrate but no hard and fast rule can be laid down in

this regard. In that case Hon'ble the Apex Court approved the dying declaration recorded by the Police under the circumstances of that case. In the present case when the FIR was recorded there was no possibility of death of the deceased Ramratan and FIR was written in a routine manner therefore, it cannot be said that the FIR cannot be treated as a dying declaration under Section 32 of the Evidence Act.

12. The FIR Ex.P/13 is the only evidence against the appellants in the present case and therefore, it should be observed as to whether the dying declaration given by the deceased by way of FIR is trustworthy or not. The dying declaration have various qualities. It should be clear and it should allege against the culprits with some clarity. In this case initially six accused persons were prosecuted. The deceased Ramratan in the FIR Ex.P/13 made omnibus statements against three persons viz. Ram Dutt, Sudarshan and Manot that they assaulted him. The deceased sustained only two injuries. One was there on his fingers and another was on his head. His head injury was so peculiar that no visible injury was found on his head. It could be located after four days of the incident when radiological examination of his head was done. Dr. B. K. Sharma (PW10) has informed that the deceased was 70 years old man who lost his resistance. At such an age various bones of the body turn brittle and therefore, one stroke on the head could cause several 9 Criminal Appeal No.730 of 1999 fractures in the head. Under such circumstances, it cannot be accepted that more than one stroke was given on the head. If more than one stroke was given on the head then there must be some visible injury on his head and he must be in coma from the very beginning but, the deceased Ramratan was conscious at the time of lodging the FIR. During the MLC examination neither he complained about his injury on his head nor the doctor found such an injury. Under such circumstances, it is also possible that he sustained the head injury later on and therefore, it cannot be said that initially he sustained more than two stroke on his body.

13. The deceased Ramratan had alleged in the FIR Ex.P/13 that three persons had assaulted him and his son. It is an omnibus allegation against the culprits. He did not make any specific allegation that out of those culprits who assaulted upon him. The culprit who gave a stroke on his head was mainly responsible for the

offences punishable under Section 304 (Part II) of the I.P.C and a culprit who, assaulted the deceased Ramratan on his hand could be convicted for offence punishable under Section 304 (Part II) of I.P.C due to his common intention but, a person who did not assault the victim Ramratan could not be convicted for offence punishable under Section 304 (Part II) of I.P.C either directly or on the basis of Section 34 of I.P.C because there was nothing on record to say that he had any common intention with the main accused and therefore, the learned Additional Sessions Judge acquitted the two accused persons on 10 Criminal Appeal No.730 of 1999 this count.

14. If only two persons had assaulted the deceased Ramratan out of these appellants, it is clear from FIR Ex.P/13 that there is no allegation upon the appellant Mola that he assaulted the deceased Ramratan and therefore, his common intention cannot be presumed with other co-accused persons. Similarly out of the remaining three appellants viz. Ram Dutt, Sudarshan and Manoj one person appears to be innocent, who did not participate in the crime. It is possible that he had assaulted the victim Keshav but, by such an act it cannot be said that he had any common intention with the other co-accused persons who assaulted the deceased Ramratan. If the omnibus allegations in the FIR Ex.P/13 are accepted then it would be injustice to one of the appellant who, did not participate in the crime and when the appellant is not isolated in the case then it is possible that he could be either Ram Dutt, Sudarshan or Manoj. Under such circumstances, when it is not possible to isolate that innocent person amongst the appellants Ram Dutt, Sudarshan and Manoj, a benefit of doubt is to be given to all the appellants of the case.

15. In such circumstances, the FIR Ex.P/13 the dying declaration of the deceased Ramratan is not specific and clear by which any conviction can be drawn against any specific appellant. Under such circumstances, it would be risky to convict all the three persons for the offences whereas only two persons had participated in the crime done against the deceased Ramratan. 11 Criminal Appeal No.730 of 1999 The situation as mentioned above is not safe to rely upon the allegations made by the deceased Ramratan in the FIR because such allegations are not clear. Under such circumstances, none of the appellants could be convicted for

offence punishable under Section 304 (Part II) of I.P.C or any inferior offence of the similar nature either directly or with the help of Section 34 of I.P.C. The learned Additional Sessions Judge erred in convicting the appellants for offence punishable under section 304 Part II read with Section 34 of I.P.C.

16. On the basis of the aforesaid discussion the appeal filed by the appellants appears to be acceptable and therefore, it is accepted. The conviction as well as the sentence directed against the appellants for offence punishable under section 304 Part II read with Section 34 of I.P.C is hereby set aside. They are acquitted from all the charges appended against them. The presence of the appellants is no more required before this Court and therefore, it is directed that their bail bonds shall stand discharged.

17. Copy of the judgment be sent to the trial Court along with its record for information. (N.K.GUPTA) JUDGE 10 10.2012 bina

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