

Hari Vs. State of M.P.

Hari Vs. State of M.P.

SooperKanoon Citation : sooperkanoon.com/503035

Court : Madhya Pradesh

Decided On : May-02-2007

Reported in : 2007(3)MPHT148

Judge : S.L. Kochar and ;Manjusha Namjoshi, JJ.

Appellant : Hari

Respondent : State of M.P.

Judgement :

S.L. Kochar, J.

1. Appellant has filed this appeal against his conviction under Section 302 of the IPC, sentenced to R.I. for life and fine of Rs. 1,000/-, in default of payment of fine additional RI for 2 years passed by the learned Additional Sessions Judge, Manawar, District Dhar in Sessions Trial No. 173/1990 vide judgment dated 7-1-1998.

2. According to the prosecution case, police of Police Station Badwani received information from hospital about arrival and admission of deceased Harikant, which was recorded in daily diary No. 1306/15-3-1990 1306/15-3-1990 . Head Constable Ashok Mishra (P.W. 10) was authorised to investigate into the matter. Deceased Harikant was having grievous injury on his head and was unconscious. He was accompanied by eye witness Kishan (P.W. 2), who disclosed that deceased

Harikant Mandloi was assaulted by the appellant on a dispute regarding share of wheat, by Kharaliya (wooden log used in bullock-cart to give support to luggage). On the basis of this, the offence under Section 307 of the IPC was registered vide FIR (Exh. P-13). The place of incident was within the jurisdiction of Police Station Manawar, therefore, FIR (Exh. P-13) was sent by Badwani police to Manawar police, where Crime No. 151/90 under Section 307 of the IPC was registered vide FIR (Exh. P-5). Deceased Harikant was medically examined first in time by Mr. Moti Mitrani (P.W. 4). His medical report is Exh. P-1. Deceased Harikant was shifted from Badwani Primary Health Center to Choithram Hospital, Indore, where he was also examined and his report is Exh. P-12 proved by P.W. 8 Head Constable Tilak Singh. Deceased remained hospitalised for about 8 days and died on 22-3-1990. The inquest report (Exh. P-4) was prepared by the police and dead body was sent for postmortem examination to M.Y. Hospital, Indore. The post-mortem was performed by Dr. K. Agrawal. Appellant was arrested and from his disclosure statement (Exh. P-6) Kharaliya was seized through seizure memo (Exh. P-8). From the spot blood stained and controlled earth was also seized through seizure memo (Exh. P-15). After investigation appellant was charge-sheeted for commission of murder of Harikant.

3. Appellant denied the charges, therefore, put to trial. He did not examine any witness in defence, whereas prosecution examined 10 witnesses and got proved 18 documents to prove its case. Learned Trial Court found the appellant guilty, convicted and sentenced him as mentioned hereinabove. None present for the appellant though this appeal is listed in weekly cause list week commencing from 30th April, 2007 and also in daily cause list. The case is called twice, but none has appeared on behalf of the appellant. Appellant is on bail, but he is also not present. This is the appeal of the year 1998. Therefore, in view of the Supreme Court judgments passed by the cases of Beni Singh v. State of U.P. : 1996 CriLJ3491 and Kishan Singh v. State of U.P. : (1996)9SCC372 , this appeal is heard finally on merit.

4. We have heard the learned Counsel for the State who assisted us at length on all aspects of the case. On perusal of record and the impugned judgment, it emerged that the conviction of the appellant is mainly based on eye-witnesses

account of Kishan (P.W. 2) and Najru (P.W. 3), medical evidence of Dr. Moti Mitrani (P.W. 4), statement of Dinesh (P.W. 1) to whom Kishan (P.W. 2) immediately gave information about causing of injury to deceased by the appellant upon which this witness with the help of Kishan (P.W. 2) took the deceased on motorcycle to hospital and statement of police officials Ramlal Malviya (P.W. 9) and Ashok Kumar (P.W. 10). In this case post-mortem report of the deceased could not be proved because the concerned doctor was not available and prosecution tried its level best to trace him out. The summons were sent through Director, Health Services, Bhopal, who is the Controlling Authority all over in M.P., but the learned Trial Court had taken into consideration the post-mortem report holding that judicial notice could be taken. We have considered this aspect of the matter and are of the opinion that post-mortem report was not even formally proved and this could have been done by the prosecution by calling any witness of the hospital, who was knowing the handwriting and signature of Autopsy Surgeon. If handwriting and signature of Autopsy Surgeon would have been proved by the prosecution through any witness, who was acquainted with him the contents of the post-mortem report can be considered in evidence as per provision under Section 32, Sub-section (2) of the Evidence Act, which reads as under:

32. Cases in which statement of relevant fact by person who is dead or cannot, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found of, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) *** ***(2) or is made in course of business- When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

5. The post-mortem report, a statement, in writing prepared by the doctor in ordinary course of business and in discharge of professional duty is written, signed and date was also mentioned by Dr. Agrawal, whose attendance could not be procured in spite of all sincere efforts, but without formal proof of handwriting and signature by the person acquainted with the post-mortem report, its contents cannot be used as evidence against the appellant. The learned Trial Court has erred in holding that judicial notice could be taken of the post-mortem report. For taking judicial notice of the document under the Evidence Act, specific provision under Section 56 prescribes about fact judicially noticeable need not be proved and Section 57 prescribes the facts of which Court must take judicial notice. In both the Sections the document, viz., post-mortem report is not falling, therefore, judicial notice of which could not have been taken by the learned Trial Court. In the facts and circumstances of the instant case, in absence of the post-mortem report, it would be difficult to determine the cause of death of deceased as well as homicidal death, because deceased remained hospitalised for about 8 days and according to the eye witnesses the assault was made by the appellant by Kharaliya, which is not a conventional weapon made for assault, but at the same time it is a thick wooden log and used to support the luggage in a bullock-cart. Therefore, it can be considered as a dangerous weapon and not falling within the definition of lathi or bamboo stick. It is ordinarily more thicker and heavy than the lathi. Deceased was medically examined at the first instance by Dr. Moti Mitrani (P.W. 4) on 15-3-1990. He found one lacerated wound 5' x 1/2' on left parietal region and second lacerated wound 1' x 1/4' above right eye. In the opinion of Dr. Moti Mitrani, injury No. 1 was grievous in nature and deceased was admitted in hospital in unconscious condition. He advised X-Ray of injury No. 1. After medical examination and reference made by Dr. Moti Mitrani, the deceased was admitted in Choithram Hospital, Indore, where he died on 22-3-1990. In view of the medical evidence of Dr. Mitrani, deceased suffered grievous injury.

6. Now, we proceed to consider the eye witnesses account of Kishan (P.W. 2) and Najru (P.W. 3). Kishan (P.W. 2) has deposed that on the date of incident, at 11.30 a.m., in Village Kundi, he was in the Khalihan (granary) and weighing wheat. At that moment, appellant Hari reached over there and directed them not to weigh the wheat, therefore, they stopped weighing wheat and sat underneath the tree. This

witness Kishan was also accompanied by Najru and one Ranchhod. They were weighing the wheat. This witness Kishan sent Ranchhod to call Harikant the deceased, who went to call the deceased. Deceased Harikant reached the granary (Khalihan) and asked appellant Hari as to why he stopped weighing of wheat, at which he dealt a Kharaliya blow on the head of Harikant. He also wielded second blow resulting into fall of deceased on the ground. This witness Kishan immediately rushed to call Dinesh (P.W. 1), brother of deceased, who also reached on the spot with this witness and they took the deceased on a cot to their house and from the house, on motorcycle to hospital. In cross-examination, the say of this witness is that he was having his own agricultural field and was also doing labour work and deceased Harikant and appellant had cultivated the field in partnership. Prior to that he was cultivating the field of Harikant. We have perused the whole statement of this witness and do not find any material substance which may cause dent to the prosecution case. In Paragraph 4 this witness has deposed that he saw the appellant assaulting the deceased by Kharaliya from a distance of 20 feet and he rushed to save the deceased, upto that time deceased fell on the ground and when they reached near the appellant, snatched Kharaliya from his hand and appellant ran away to his house. He denied the defence suggestion in cross-examination that appellant Harikant demanded money from deceased Harikant because he was sick. Appellant also told the deceased that he had not made payment to the appellant about reaping of the crop of rainy season and he was in need of money, on which there was verbal altercation and hurling of abuse between appellant and deceased and both scuffled with other, in which Harikant fell on the ground. The statement of this witness Kishan is duly corroborated by Dinesh (P.W. 1) to whom he immediately reported the incident and both came on the spot as well as by the eye witness Najru (P.W. 4).

7. P.W. 4, Najru described the whole incident as described by Kishan (P.W. 2), but in cross-examination Paragraph 3, he admitted the defence suggestion about demand of money by appellant from deceased, thereafter, exchange of filthy abuse, scuffle between them and thereafter fall of the deceased on the ground, but nowhere this witness has stated that deceased sustained injury on his head because of fall. Therefore, because of admission of defence suggestion in Paragraph 3 by this witness his statement about causing of Kharaliya blow on the

head and above eye of the deceased would not fragile. In view of the defence suggestion given to both the eye-witnesses the presence of the appellant on the spot at the time of sustaining injury by the deceased is also established coupled with the eye witnesses account. Statements of both eye witnesses are also fully corroborated by the medical evidence of Dr. Moti Mitrani (P.W. 4) and according to Dr. Mitrani injury No. 1 of the deceased was grievous in nature. Since, prosecution has failed to prove post-mortem report in accordance with law, the contents of the same cannot be taken into consideration against the appellant to come to the conclusion about homicidal death of deceased, but in view of the medical evidence of Dr. Mitrani and eye witnesses account the appellant would be liable for commission of offence punishable under Section 326 of the IPC as the Kharaliya, a wooden log can be considered as a dangerous weapon, which is always a heavy and thicker than the lathi. The Kharaliya was also seized at the instance of the appellant by the Investigating Officer (P.W. 9) Ramlal Malviya through memorandum statement (Exh. P-6) and seizure memo (Exh. P-8). For seizure of this Kharaliya, if statement of Investigating Officer Ramlal Malviya may not be accepted because the eye witness Kishan (P.W. 2) has stated that the Kharaliya was snatched by them and the Kharaliya seized was having measurement of about quarter to four feet and its thickness was 3', both eye witnesses have consistently stated that the appellant caused injury on skull of the deceased by Kharaliya.

8. In view of the aforesaid discussion, we are of the considered view that conviction and sentence of the appellant under Section 302 of the IPC is not sustainable, but appellant is liable for conviction under Section 326 of the IPC.

9. In the result, this appeal is allowed in part. Conviction and sentence of the appellant under Section 302 of the IPC and imprisonment for life are hereby set aside. Instead thereof he is convicted under Section 326 of the IPC, looking to the date of incident, i. e., 15-3-1990 when the appellant was aged about 23 years of age, he is sentenced to R.I. for 3 years and fine of Rs. 2,000/- in default of payment of fine he shall suffer additional RI for 6 months. The appellant is on bail. He is directed to surrender before the Trial Court on 30th July, 2007 and the Trial Court is directed to send him jail for serving out the remainder part of the jail

sentence. On failure of the appellant to appear on 30th July, 2007, the Trial Court is directed to take appropriate action against the appellant and his surety in accordance with law under intimation to this Court. Copy of the judgment be sent to the Trial Court alongwith the record for compliance.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com