

Kalla Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : May-17-2002

Reported in : 2002(3)MPHT247

Judge : S.S. Jha and ;P.C. Agarwal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 148, 149, 300, 302 and 304

Appeal No. : Criminal Appeal No. 106/86

Appellant : Kalla

Respondent : State of M.P.

Advocate for Def. : S.M.A. Naqvi, Addl. Govt. Adv.

Advocate for Pet/Ap. : J.P. Gupta, Sr. Adv. and ;Sanjay Gupta, Adv.

Judgement :

P.C. Agarwal, J.

1. In all 5 persons were put to trial in S.T. No. 104/84 (State v. Baldeva and 4 others) before Sessions Judge, Guna. On 18-6-1986, three were acquitted. The appellant and his father Baldeva s/o Dhannuji were convicted under Sections 302/149 and 148 of the Indian Penal Code (for short 'Code' only) and sentenced to undergo life imprisonment and one year's R.I. with a direction of concurrent

execution of the both. However, Baldeva, the father of present appellant died during the pendency of the appeal, which abated as per order of the Court dated 26-9-2001.

2. As per prosecution, Arjun (P.W. 5) and his elder brother Bhagsingh are bhumiswamis of Khasra No. 423/2, area 0.512 hectare, in which two mango trees were situate. Late Baldeva, father of the present appellant, had taken these mango trees on batai. On 27-5-1984, in the morning time, deceased Khushilal was seen lying in badly injured condition below one of the mango trees. Gyarsilal (D.W. 2) informed the police that deceased Khushilal had come to steal mangoes and had fallen down from the same as watchman, Baldeva and appellant and others saw him and tried to catch him. However, deceased Khushilal narrated them different story that 6 or 7 persons armed with barchhi and lathis had belaboured him taking him to be one of the thieves, who had come to steal mango fruits. He named the appellant, his father Baldeva and three others, who were co-accused in the Trial Court. Dehati Nalishi (Ex. P-7) was recorded. Deceased Khushilal was sent for medical examination. Dr. A.P. Agrawal (P.W. 2) medically examined him and recorded his dying-declaration vide Ex. P-3-A on requisition of police. Later on, Sanjay Kumar Deewan (P.W. 1), Executive Magistrate also recorded dying declaration (Ex. P-1) on the same day. However deceased Khushilal succumbed to his injuries. His autopsy was done by Dr. A.P. Agrawal (P.W. 2). On 29-5-1984, the appellant was arrested with other co-accused vide Ex. P-12. He disclosed the barchhi used in the offence vide Ex. P-13 and the same was seized, concealed in the grass heap from his barn, vide Ex. P-15. Abarchhi was seized from co-accused Sagar also while lathis were seized from other 3 co-accused. When the barchhi, seized from the appellant, was sent to Chemical Examiner, he noted blood on it vide Ex. P-27 and the Serologist noted human blood on the same vide Ex. P-29. After due investigation, a charge-sheet was filed under Sections 307; 147, 148, 149 and 302 of the Code against the appellant and co-accused.

3. The appellant pleaded not guilty. He has pleaded complete innocence and denied seizure of barchhi from him. According to him, he was falsely implicated due to enmity. Similar defences were taken by other co-accused. However, Bhagwatsingh (D.W. 1) and Gyarsilal (D.W. 2) were examined by the defence with

the story that deceased Khushilal had gone to steal mango crop and on being surprised by oncoming watchman, had fallen down the tree and was injured.

4. However, the Trial Court believed the prosecution story in part and convicted the appellant and his father under Sections 302/149 and 148 of the Code as already seen and acquitted three of the co-accused.

5. In appeal, the learned Advocate for appellant had reiterated that the appellant is innocent. According to him, he has been falsely implicated. It is also claimed that the appellant had merely acted in exercise of his right of private defence of the property, i.e., against theft of mango fruits and thus was justified.

6. The learned Additional Govt. Advocate has supported the judgment of the Trial Court.

7. Homicidal death of deceased Khushilal is well proved by statements of Bhavootsingh (P.W. 8) and Arjunsingh (P.W. 5). Bhagwandas Dubey (P.W. 3) ASI, who recorded Ex. P-7 dehati nalishi on intimation given by Khushilal and sent him for medical examination, has supported such story. Dr. A.P. Agrawal (P.W. 2) has medically examined deceased Khushilal during his life-time and vide Ex. P-2 has noted 6 injuries on his person and has recorded his dying-declaration vide Ex. P-3-A. After the death, he has conducted post-mortem examination on his dead-body vide Ex. P-5 and has opined that deceased Khushilal had died due to syncope consequent upon internal haemorrhage from injuries on his person. He has opined that the death was homicidal and injuries were sufficient in the ordinary course of nature to cause death of deceased Khushilal. Even Sanjay Kumar Deewan (P.W. 1) Executive Magistrate, who recorded the dying-declaration (Ex. P-1) of deceased Khushilal, has supported the story. The defence witnesses Bhagwatsingh (D.W. 1) and Gyarsilal (D.W. 2) also admitted that deceased Khushilal had sustained fatal injuries on his person. The appellant has merely shown ignorance, which is of no avail in view of overwhelming evidence. Thus, it is proved beyond doubt that deceased Khushilal had died homicidal death. Such a finding of the Trial Court is confirmed.

8. Conviction of the appellant is mainly based on three dying-declarations : (i) Ex. P-7 dehati nalishi recorded by Bhagwandas Dubey (P.W. 3) ASI, Cantt. Chowki, (ii) Ex. P-3 recorded by treating Dr. A.P. Agarwal (P.W. 2) and (iii) Ex. P-1 recorded by Sanjay Kumar Deewan (P.W. 1), Naib-Tahsildar and Executive Magistrate. The learned Trial Court has considered all these 3 dying declarations and have scrutinised them minutely. All these 3 dying declarations have been signed by deceased Khushilal. In all these 3 dying-declarations, deceased Khushilal had named the appellant as one of the assailants and had ascribed a barchhi in his hand. Narration in all these 3 dying-declarations is natural and consistent. Medical evidence has also supported such a story. Deceased Khushilal certainly had at least 3 penetrating wounds on his body, which could be caused by barchhi. Dr. A.P. Agarwal (P.W. 2) has examined this barchhi (Article B) and has opined that injury Nos. 4, 5 and 6 in post-mortem report (Ex. P-5) could be caused by such a barchhi.

9. Though of course, a story of fall of deceased Khushiram from a mango tree on being surprised by the Watchman is taken by Bhagwatsingh (D.W. 1) and Gyarsilal (D.W. 2), it is true that even Arjunsingh (P.W. 5) in para 9 has alluded to such a story. Such a story was put forward in Ex. P-6 also by Gyarsilal (D.W. 2). However, the learned Trial Court for cogent reasons has rightly discarded this story. Obviously, such a story does not explain the three penetrating wounds on the body of deceased Khushilal. Such a story is overshadowed by overwhelming prosecution evidence of 3 consistent dying-declarations of deceased Khushilal. Further more, presence of human blood on barchhi, seized from the appellant, is also inconsistent with such story. Obviously, Bhagwatsingh (D.W. 1) has not been reliable. Of course, neither Bhagwatsingh (D.W. 1) nor Arjun Singh (P.W. 5), who claim to have reached the spot earliest, has neither reported the matter to the police nor informed the relatives of deceased or tried to provide any help to him, such a conduct is unnatural. Of course Gyarsilal (D.W. 2), who happens to be father of the 2 acquitted co-accused Ashok and Kamalsingh, is highly interested witness. He has even denied having given information (Ex. P-6) to the police. In our considered opinion, the learned Trial Court has not erred in discarding such a defence story.

10. Bhagwandas Dubey (P.W. 3) ASI had arrested the appellant on 29-5-1985 with other co-accused vide Ex. P-12. On enquiry, the appellant discovered a barchhi vide Ex. P-13. The barchhi was seized on his information, concealed in grass heap, vide Ex. P-15. Bhavootsingh alias Bhavooti (P.W. 8) has partly supported the A.S.I. about seizure. Though of course, the appellant has denied such seizure, but his denial is merely evasive and is of no avail. Thus, a barchhi (Article B) was seized from the appellant. The same was sent to FSL, who vide report Ex. P-27 found blood stains on the same. Later on, Serologist vide its report Ex. P-29 has noted human blood marks on such barchhi. Of course, seizure of barchhi, which was stained with human blood, without any explanation from the appellant, has taken the prosecution case very far. As already seen, denial of appellant has been merely evasive and overshadowed by prosecution evidence and thus has been rightly discarded. Thus, we hold that the appellant was one of those who caused death of deceased Khushilal.

11. Now, it remains to be seen as what offence is proved on material on record against the appellant. Obviously, 2 mango trees were situate in the field of Arjunsingh (P. W. 5). Baldeva (since deceased), the father of the appellant, was bataidaar for these mango trees. Obviously, deceased Khushilal was found lying injured below one of these trees. By the side of body of deceased Khushilal, one gunny bag and about 30 kgs of unripe mango fruits were seen lying on earth by Bhagwandas Dubey (P.W. 3) ASI, who seized the same vide Ex. P-10, the seizure-memo. In the spot map (Ex. P-8) also existence of gunny bag and 30 kg of unripe mango fruits was noted. Tofansingh (P.W. 11), the Patwari, had also shown presence of such mango fruits in spot map (Ex. P-25) prepared by him on 6-6-1984. It is also noteworthy that Bhagwandas Dubey (P.W. 3) ASI has noted existence of another gunny bag with unripe mango fruits and some scattered mango fruits at a distance of about 136 feet away from the mango trees, which clearly betray presence of some companions of deceased Khushilal, who had run away seeing the oncoming Watchman. In all 3 dying-declarations of deceased Khushilal, he had clearly admitted that he had no enmity either with the appellant or his relatives.

12. That, from prosecution evidence itself, it is clearly established that the appellant and acquitted co-accused have exceeded in exercise of their right of private defence of property. Obviously, they had surprised the thieves of Mango fruits and had beaten the deceased with lathis and barchhies causing in all 6 injuries on his person. Thus, obviously the appellant has merely exceeded in exercise of his right of private defence of property. The case clearly falls under Exception II of Section 300 and, thus, the appellant could be convicted only under Section 304, Pt. II of the Code.

13. As such learned Trial Court had convicted only the appellant and his father Baldeva and formation of unlawful assembly of more than 5 persons was not established. Thus, conviction under Section 148 cannot be maintained. So is the conviction under Sections 302/149 of the Code. Thus, the appellant is acquitted under Sections 302/149 and 148 of the Code. Instead he is held guilty under Section 304 (Part II) of the Code. Offence was committed on 27-5-1984. Eighteen years have elapsed since then. Sessions Court convicted and sentenced the appellant on 18-6-1986. Appellant remained in detention between 29-5-1984 to 24-8-1984. He was taken into custody by Trial Court on conviction. His sentence was suspended by this Court on 4-8-1989. His surety bond was accepted on 23-8-1989. Thus, the appellant has been in custody for about 3 years and 3 months. The learned Senior Advocate has relied upon Chandlal v. State of Rajasthan (AIR 1992 SC 597) and K. Ramakrishnan Unnithan v. State of Kerala (AIR 1999 SC 1428) and has argued that the appellant may be not sent to jail once again and be let off with sentence to the period already undergone. In the first these cases, the appellant was acquitted by the Trial Court. High Court had allowed the appeal. Hon'ble Apex Court had granted bail to him. In the second case, the appellant had undergone in jail for about 4 years.

14. In all these facts and circumstances of the case, the appellant is sentenced to undergo R.I. of 5 years with a fine of Rs. 2,000/-; in default of payment of which, he shall further undergo R.I. for 6 months. Period of detention and imprisonment after conviction shall be set off in the sentence awarded to him. The appellant shall surrender within a month before Chief Judicial Magistrate, Guna, to serve out the remaining sentence. On default of appearance, non-bailable warrant shall be

issued against him.

15. Thus, the appeal is partly allowed. Appellant is acquitted under Sections 302/149 and 148 of the Code. Instead he is convicted under Section 304 (Part-II) of the Code. His sentence is reduced.

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