

Babloo @ Ganesh Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Oct-06-2005

Reported in : 2006(1)MPHT330

Judge : Deepak Verma and ;A.K. Saxena, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 374; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 304, 323, 325 and 342

Appeal No. : Criminal Appeal No. 1016/2005

Appellant : Babloo @ Ganesh

Respondent : State of M.P.

Advocate for Def. : Aseem Dixit, Dy. Govt. Adv.

Advocate for Pet/Ap. : Imtiyaz Hussain, Adv.

Judgement :

A.K. Saxena, J.

1. Feeling aggrieved by the judgment dated 30-4-2005 passed by the First Additional Sessions Judge, Harda in Sessions Trial No. 446/02, the appellant Babloo @ Ganesh has preferred this appeal against his conviction under Section 302 of the IPC whereby he is sentenced to undergo life imprisonment and fine of

Rs. 1,000/-, in default six months rigorous imprisonment.

2. The appellant Babloo @ Ganesh has preferred this appeal under Section 374 of the Code of Criminal Procedure, 1973 on the following grounds:-

(A) There is no evidence on record to suggest that the appellant gave a beating to the deceased Hatimtai @ Hakim Khan resulting his death.

(B) The learned Trial Court failed to appreciate the prosecution evidence properly.

(C) The house in which the dead body of Hatimtai @ Hakim Khan is said to have been found, was not occupied by the appellant alone and there were other inmates also.

(D) There is no evidence to prove that the appellant gave a beating by a lathi and, therefore, there was no justification to hold him guilty for an offence punishable under Section 302 of IPC.

(E) The charges have not been proved beyond reasonable doubt and at the most the appellant could have been punished under Section 323 of the IPC.

3. The short facts of the prosecution story are that on 28-8-2002 at about 10-11 P.M., some quarrel had taken place between the deceased Hatimtai @ Hakim Khan and the appellant and at that time, the appellant's wife Gulab Bai was also present. The appellant and his wife brought the deceased Hatimtai to their house. At about 1.00 A.M. on 29-8-2002, Suresh Mali and Gulab Bai came to the house of P.W. 5 Tejram who was chowkidar of Village Rupi Paretiya and informed him that Hatimtai is abusing Babloo in their house. On receiving this information, P.W. 5 Tejram went to the house of appellant and found that Hatimtai was tied with a pole with the help of rope. On his instruction, the appellant untied the rope but by that time Hatimtai had died. Thereafter, the chowkidar informed the villagers about this incident and after that he went to Police Station Harda and lodged Ex. P-6 merger intimation and Ex. P-7 FIR. After receiving this information, the Investigating Officer of Police Station Harda commenced the investigation and prepared Ex. P-3 inquest report after issuance of Ex. P-2 notice. He also prepared Ex. P-4 site plan. A plank and two pieces of nylon rope were seized from the possession of

appellant upon his information and Ex. P-9 memorandum and Ex. P-9-A seizure memo were prepared. The dead body of Hatimtai @ Hakim Khan was sent to the hospital for post-mortem where P.W. 13 Dr. S.K. Sengar conducted the autopsy. After completion of investigation, the charge sheet was filed against appellant/accused.

4. The Trial Court framed the charges under Sections 342 and 302 read with Section 34 of the IPC against the present appellant and against co-accused Gulab Bai, who died during the trial. The learned Trial Court found that the offence under Section 342 of the IPC could not be proved beyond shadow of doubt and the appellant was acquitted of the charge under Section 342 of IPC but, he was convicted under Section 302 of the IPC and sentenced him as mentioned hereinabove.

5. On perusal of the record of Trial Court, it is apparent that there is no eye witness to prove as to what had happened in the house of appellant. The whole prosecution story is based on circumstantial evidence. As per prosecution story, initially, some quarrel had taken place between the appellant and the deceased near the temple where few witnesses were present and at that time both these persons were dragging each other in their presence. Thereafter, the appellant and his wife brought the deceased Hatimtai to their house and when P.W. 5 Tejram, Chowkidar went to the house of appellant upon receiving the information from Suresh Mali and Gulab Bai, he found that Hatimtai had already died.

6. There is overwhelming evidence on the point of quarrel which had taken place near the temple and P.W. 2 Shankarlal, P.W. 6 Sakharam, P.W. 9 Hari Prasad, P.W. 10 Suresh, P.W. 11 Nanhelal and P.W. 12 Golu @ Omprakash have categorically stated that the appellant and Hatimtai were dragging each other near the temple. On this point, surprisingly, there was no cross-examination on behalf of appellant/accused on P.W. 9 Hari Prasad, P.W. 10 Suresh and P.W. 12 Golu @ Omprakash. The prosecution has proved beyond reasonable doubt this circumstance that at the initial stage, some scuffle had taken place between the appellant and the deceased and then they went towards the house of appellant. There is sufficient evidence to prove that the deceased Hatimtai @ Hakim Khan

was found dead in the veranda of the house of appellant and at that time the appellant was also present in his house. On this point, the statement of P.W. 5 Tejram is fully trustworthy.

7. The learned Counsel for the appellant contended that the dead body of Hatimtai was found at an open place where anybody can come and commit this offence, therefore, the learned Trial Court committed an error in holding that the appellant had committed this offence. We are not inclined to accept this argument because the statement of P.W. 5 Tejram, who is an independent witness, is totally trustworthy. He had no inimical terms with the appellant. Ex. P-4 site plan also shows that there is a veranda attached to the rooms belonging to the appellant where the dead body was found and this fact is also noteworthy that the appellant was present in his house at that time. Now, it becomes the duty of the appellant to explain as to how the dead body of Hatimtai was found tied with the pole. A heavy burden lies on the appellant to explain the above situation but he failed to explain it, which goes against him. The prosecution has also proved that two pieces of nylon rope were seized from the possession of appellant upon his information and Ex. P-9 memorandum and Ex. P-9-A seizure memo were prepared by the investigating officer P.W. 14 S.S. Udawat in presence of P.W. 5 Tejram. For the foregoing reasons, we are of the view that prosecution has completed the chain of circumstances which leads to this conclusion that some quarrel near the temple and some kind of incident in the house of the appellant had taken place between him and the deceased and thereafter, the deceased was found dead in the house of appellant.

8. Now most crucial point arises for our consideration as to whether the appellant had committed murder of the deceased Hatimtai @ Hakim Khan and can he be convicted under Section 302, IPC The learned Counsel for the appellant submitted that there is no direct evidence to show that the appellant had any intention to commit the murder of Hatimtai @ Hakim Khan. There is no eye witness to prove that the appellant gave a beating to the deceased in his house. The appellant and the deceased were found in a drunken condition. Therefore, at the most, the appellant can be held responsible for committing the offence punishable either under Section 323 or under Section 325 of the IPC and for this, the learned

Counsel for the appellant placed his reliance on Mangu v. State of M.R 1998(1) Vidhi Bhasvar 23. He further submitted that the facts of this case and the facts of present case are totally identical and in the similar circumstances, the accused Mangu was held responsible for committing the offence punishable under Section 325 of IPC.

9. In Mangu's case (supra), the story was that there was some altercation between the accused and his wife and accused caused some injuries to his wife and brought her to their house and after that the wife of the accused was found dead. No doubt, similar facts and circumstances are also prevailing in the present case. There is no evidence in this case also to show that the appellant gave a beating to Hatimtai by a plank though, a plank was recovered from the possession of appellant but, it is not a material evidence in this case as the plank can be found in anybody's house. Therefore, the fact that the plank was recovered from the house of appellant, is not sufficient to hold that the appellant caused any injury to Hatimtai by using this plank.

10. To arrive on any conclusion on this point as to whether there was any justification to hold the appellant guilty for the offence punishable under Section 302, IPC, the statement of P.W. 13 Dr. S.K. Sengar and Ex. P-14 post-mortem report should be considered. P.W. 13 Dr. S.K. Sengar as per his statement and post-mortem report, while conducting the autopsy, found the following external injuries on the body of the deceased :-

(1) Contusion cum ligature like marks starting from Thyroid Cartilage along the root of neck, below right side of chin up to right side of ear.

(2) Abrasion 2 cm x 1 cm below mid post of left chin.

(3) Contusion on right side of neck from mid part of sterno mestoid extending up to back of neck at C2 level.

(4) Contusion on back, left side in line of inferior angle of left scapula 7th I.C.S. to 9th I.C.S. 4' x 3'.

(5) Contusion from 10th I.C.S. on left side of scapula to left Iliac crest 5' x 3'.

- (6) Abrasion 3' x 1' on left side below No. 6 obliquely lateral to mediul.
- (7) Contusion below left angle of scapula longitudinally 4' x 1/2'
- (8) Abrasion just below chin right side 3 cm x 1 cm.
- (9) Contusion from right Iliac crest to right side of nose.
- (10) Contusion 3' x 1' at the centre of injury No. 9 as shown in picture.
- (11) Multiple contusions four in number intermingled to each other 4'-5' x 6'-7' on the right thigh.

The autopsy surgeon has also found that there was a fracture of 9th rib and the liver was ruptured and there was an internal injury 3' x 1/2' x 2' of size on the post surface of the liver. He opined that the cause of death is shock due to multiple injuries and injury to liver.

11. P.W. 13 Dr. S.K. Sengar had admitted in his cross- examination that if a person fell down with force, rapture of liver is quite possible. He found that there was an abrasion on left side above the stomach on the person of Hakim Khan. This external injury was not of grievous in nature, rather it was simple injury. Since there is no eye witness on this point that the appellant caused any grievous external injury by using plank and the doctor had also not found any external grievous injury on the person of deceased and apart from that, the prosecution has totally failed to prove that there was any intention of the appellant to commit murder of Hatimtai @ Hakim Khan, therefore, it is not possible for us to hold that the appellant committed the murder of Hatimtai @ Hakim Khan. At the most, his act can be attributed to the offence punishable under Section 325, IPC for causing grievous hurt to the deceased as he caused grievous internal injury without intention or knowledge that the deceased may die.

12. In the similar circumstances, this Court had held in the Mangu's case (supra) as follows :-

The next point that arises for determination in the case is whether accused intended to kill his wife. Though accused has caused nearly 10 injuries, but the

injuries have not caused damage to the open and visible vital part of the body. There is possibility that injury No. 5(which is of the size 7x3 cm) has caused damage and rupture to the liver. In such a situation, the knowledge of likelihood of death can not be inferred. In our considered opinion, the accused intended to chastise his wife and caused injuries with that intent. The accused is held responsible for the injuries caused unless there were intervening circumstances. In this case, he has caused grievous injuries by causing injury on the chest and abdomen which resulted in rupture of the liver. Thus, he would be held guilty for causing grievous injury, as the injury was not only dangerous to life, but actually resulted in death.

13. In the instant case also, there is no evidence to prove this fact that the appellant caused any grievous injury with an intention to kill the deceased. Apart from that, Dr. S.K. Sengar had not opined that the deceased Hatimtai had died because of asphyxia due to pressure on his neck, though, the doctor found the ligature like mark at the root of the neck. There was some scuffle between the appellant and the deceased and at that time, they were in drunken condition. The Senior Scientist and Chemical Examiner of F.S.L. vide Ex. P-17 report also found the presence of alcohol in the viscera of Hatimtai @ Hakim Khan. All these facts and circumstances show that the appellant was not having any intention to commit murder of Hatimtai @ Hakim Khan.

14. After considering abovementioned facts and circumstances, we are inclined to hold that the appellant had not committed either the murder of deceased or the offence of causing homicidal death not amounting to murder. At the most, his act falls under Section 325, IPC for causing grievous hurt to the deceased. There is no evidence to convict this appellant under Section 302 or 304 Part I or Part II of the IPC, but he can very well be convicted under Section 325 of the IPC for having caused grievous injury to the deceased. The learned Trial Court has totally failed to appreciate all the aspects of the case while holding the appellant./accused guilty of committing murder of the deceased. The finding of the Trial Court on this count is totally erroneous.

15. In the above circumstances, the appeal is partly allowed. The appellant Babloo @ Ganesh is acquitted of the charge under Section 302 of the IPC and instead of holding his conviction under Section 302 of IPC, he is convicted under Section 325 of the IPC. It is apparent from the certificate issued by the learned Additional Sessions Judge that the appellant is in judicial custody since 3-8-2002. The appellant has almost completed a period of more than 3 years in judicial custody and in our opinion, the period of judicial custody is sufficient sentence in the light of facts and circumstances of the case. Therefore, only the jail sentence is reduced and the appellant is sentenced to period already undergone. We direct that if the amount of fine has already been deposited and the appellant is not required in any other case, he be released forth-with.

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