HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

PRESENT:

HON'BLE MR. JUSTICE G.S. AHLUWALIA

Criminal Appeal No. 203 OF 2006

Mangaliya & Anr.

-Vs-

State of M.P.

Shri Vikrant Sharma, counsel for the appellants.

Shri B.P.S. Chauhan, Public Prosecutor for the respondent/State.

J U D G M E N T
(09/03/2017)

This appeal under Section 374 of Cr.P.C. has been filed against the judgment dated 29.12.2005 passed by Additional Sessions Judge, Gohad, District Bhind in S.T.No. 51/2002 by which the appellant No.1 has been convicted under Section 307 of IPC and has been sentenced to undergo the rigorous imprisonment of 10 years and a fine of Rs. 5,000/- with default imprisonment and under Section 25/27 of Arms Act and has been sentenced to undergo the rigorous imprisonment of 3 years and a fine of Rs. 1000/- with default imprisonment. The appellant No.2 has been convicted under Section 307/34 of IPC and has been sentenced to undergo the rigorous imprisonment of 10 years and a fine of Rs. 5000/-. The sentences awarded to the appellant No.1 were directed to run concurrently.

The prosecution case in short is that on 13.3.2001 total 12 accused persons including the appellants formed an unlawful assembly whose common object was to kill the

complainant Keshav Singh. In furtherance of the common object the appellant No.1 fired at Keshav Singh by his 12 bore gun with an intention and knowledge to kill Keshav Singh. It was further alleged that the appellant No.2 and co-accused Dhaniram and Balvir fired from their gun and the remaining accused persons pelted stones on Harimohan Singh and Keshav Singh. The complainant Harimohan Singh Gurjar lodged a FIR on 13.3.2001 at about 7:30 AM alleging that he along with the injured Keshav Singh, Surajbhan, Kartar Singh were coming back to their house. They met with the appellants and co-accused Dhaniram and Balvir who were sitting in front of their houses along with guns. The injured Keshav Singh enquired from Mohar Singh that why in the evening of the previous day they had objected and on this issue the hot talk took place between the complainant party and the accused persons, as a result of which the appellant No.1 fired at Keshav Singh causing injury on his right knee. The appellant No.2 and co-accused Dhaniram and Balvir fired from their guns and the other co-accused persons started pelting stones. Thereafter, the co-accused Roop Singh, Deeman, Panjab, Vinod etc. also fired from their guns. It was further alleged that the appellant No.1 in furtherance of common object fired at Keshav Singh with an intention to kill. On this FIR the case was registered. During investigation the prosecution seized the weapons from the appellants and other co-accused persons and they were arrested and after recording the statements of the witnesses and fulfilling the other requirements filed the charge sheet.

The Trial Court by order dated 1.4.2002 framed the charges against the appellants and co-accused persons under Sections 147, 148, 307 r/w Section 149 of IPC and under Section 25/27 of Arms Act.

The appellants abjured their guilt and pleaded not guilty.

The Trial Court by judgment dated 29.12.2005 acquitted 10 co-accused persons and convicted the appellants. The appellant No.1 has been convicted under Section 307 of IPC and under Section 25/27 of Arms Act whereas the appellant No.2 has been convicted under Section 307/34 of IPC.

The prosecution in order to prove its case examined injured Keshav (PW-1), Harimohan (PW-2), Kartar Singh (PW-3), Harendra Singh (PW-4), Kaliyan (PW-5), Surajbhan (PW-6), Deewan Singh (PW-7), Vinod Singh (PW-8), R.C. Karn (PW-9), Rajkishore Singh (PW-10), Panjab Singh (PW-11), Dr. Yogendra Singh(PW-12), Roop Singh (PW-13) and Surendra Singh Parmar (PW-14) whereas the appellants in their defence examined Satyabhan (DW-1) and Betal Singh (DW-2).

As the total 10 accused persons out of 12 have been acquitted by the Trial Court and no appeal against their acquittal has been preferred either by the complainant or by the State, therefore, the facts of this case will be considered only in respect of the allegations made against the appellants.

First of all, it would be essential to consider the injuries sustained by Keshav Singh.

Dr. Yogendra Singh (PW-12) had medically examined injured Keshav Singh and he had found that the gunshot injury has passed through and through his right leg from which excessive bleeding was going on. There was an entry wound and an exit wound on the right knee of the injured Keshav Singh. For the treatment of the injured and for the specialist he had advised x-ray. His MLC report is Ex.P/12. In cross-examination, he admitted that there is a hospital in Malanpur and he could not recollect that whether the injured was referred to any doctor from Malanpur or not. He further admitted that there is no mention in this regard in his MLC Ex.P/12. He further stated that the gunshot was fired from a distance of more than three feets and no tattooing or charring

was found around the wound. Except the evidence of Dr. Yogendra the prosecution did not examine any other witness to prove the nature of the injuries sustained by the injured Keshav. Thus, the prosecution has merely proved that the injured Keshav had sustained a gunshot injury which passed through and through his right leg and entry as well as exit wounds were also found. However, the Trial Court in paragraph 22 of the judgment has mentioned that the x-ray plate as well as the x-ray report of Dr. Mohit Gupta of Gwalior is available on the record. It was also mentioned by the Trial Court that during the recording of evidence of the injured Keshav the leg of the injured was seen by the Court and his leg below the knee has been amputated, as a result of which the injured has suffered permanent disability and he walks with the help of walking stick. However, there is nothing on record to show that the leg of the victim Keshav was amputated because of the injuries sustained by him in the present incident. The Trial Court has referred to the x-ray report and x-ray plate which are available on record but for the reasons best known to the prosecution the same have not been got exhibited/proved by leading evidence, therefore, it is well established principle of law that an unexhibited document cannot be read in favour of the prosecution as the x-ray report as well as x-ray plate were not proved by the prosecution in the trial, therefore, these two documents cannot be read against the appellants. Although the victim Keshav might have suffered amputation because of the injuries sustained by him in the incident but in absence of any proof by the prosecution that the injured Keshav was treated and because of the medical complications, his right leg below the knee was amputated, it cannot be held that the amputation of the right leg of the complainant below the knee was because of the injury caused to him in the incident.

Accordingly, it is held that the observation made by the

Trial Court in paragraph 22 of the judgment as well as in the subsequent paragraph with regard to the availability of the x-ray plate and the x-ray report of Dr. Mohit Gupta and the amputation of the right leg below the knee was contrary to law and, therefore, these two circumstances will be ignored while deciding this appeal.

Keshav (PW-1) is the person who had sustained the gunshot injury. In his examination-in-chief he had stated that in the Sarpanch election as his family had supported one Ramesh who against whom Ratiram and Hakim Singh had contested the election and Hakim Singh had won the election, therefore, the enmity between the family of the complainant party and Ratiram was going on. At about 8-9 PM in the night he was going on his duty along with Rajbhan and Kartar Singh, at that time Mohar Singh had asked the names of the persons who were going and then he informed his names and thereafter Mohar Singh started abusing them. The complainant and other persons went on their duty and did not lodge the report. In the morning when they were coming back they, enquired from the appellant No.2 that why they were abusing the complainant and the other witnesses in the night. At that time the appellant No.2 said that they will continue to abuse him. At the relevant time the appellants and co-accused Dhaniram and Balvir were having guns with them whereas the other four co-accused persons were empty handed. When the complainant was about to move from the place of incident, at that time, the appellant No.2 exhorted the appellant No.1 to kill the injured and thereafter the appellant No.1 fired at him, as a result of which he sustained injury on the knee of his right leg and now his leg has been amputated. Thereafter the companions of the victim rushed towards their villagers and he fell down on the spot. All the three persons fired about 10 to 20 gunshot fires and the remaining co-accused persons

started pelting stones. His brother Hari Mohan accompanied him to lodge the FIR and from the police station he was sent to Gwalior for treatment. He remained in the hospital for 25 days. In cross-examination, this witness has stated that although he had informed the police that the appellant No.1 had fired at him causing injury on his leg but could not tell the reason as to why the said fact was not recorded in his case diary statement Ex.D/1. This witness further admitted that because of repeated gunshot fire, no other persons had received any injury and even none had received any injury because of pelting of stones. He further stated that he had informed the police in his case diary statement Ex.D/1 that the appellant No.2 had exhorted the appellant No.1 to fire at him but could not explain as to why the said fact was not mentioned in his case diary statement.

Harimohan (PW-2) has stated that the appellant No.2 exhorted the appellant No.1 and the appellant No.1 fired at Keshav (PW-1) causing injury on his right knee. Referring to the case diary statement of this witness Ex.P/2 it was submitted by the counsel for the appellants that this witness was not an eyewitness and according to case diary statement of this witness which is Ex. D/2, when this witness reached on the spot, the injured had already received an injury.

Kartar Singh (PW-3) has stated that the appellant No.1 on the exhortation of the appellant No.2, fired at the injured Keshav. However, referring to the case diary statement of Kartar Singh (PW-3), it was submitted by the counsel for the appellants that there is no allegation that the appellant No.2 had at any point of time exhorted the appellant No.1 to fire at the complainant.

Surajbhan (PW-6) has also stated before the Court that on exhortation by the appellant No.2, the appellant No.1 fired at the complainant Keshav (PW-1). Referring to the case diary

statement of Surajbhan (PW-6) Ex.D/4, it is submitted by the counsel for the appellants that there was no allegation of exhortation by the appellant No.2 in the case diary statement of Surajbhan. It is further submitted by the counsel for the appellants that Harimohan (PW-2), Kartar Singh (PW-3) and Surajbhan (PW-6) could not explain as to why the allegation of exhortation by the appellant No.2 is not mentioned in their police case diary statements. Thus, it was submitted by the counsel for the appellants that there is a material omission in the case diary statements of Keshav (PW-1), Harimohan (PW-2) and Kartar Singh (PW-3) and Surajbhan (PW-6) with regard to exhortation by the appellant No.2.

It is well settled principle of law that every omission in the case diary statement of the witnesses is not fatal and, therefore, the accused cannot get advantage of the same. However, where the omission is found to be so grave in nature which completely changes the nature of the offence, the name of the assailants etc. then the said omission cannot be said to be trivial in nature and the same would get converted into contradiction.

The Supreme Court in the case of **Narayan Chetanram Chaudhary vs. State of Maharashtra** reported in **(2000) 8 SCC 457** has held as under:-

> "42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be

of trivial details, as in the present case, the same would not cause any dent in the testimony of PW2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness. In this regard this Court in *State of H.P. v. Lekh Raj (2000) 1 SCC 247* (in which one of us was a party), dealing with discrepancies, contradictions and omissions held: (SCC pp.258-59, paras 7-8)

> "Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in *Ousu Varghese v. State of Kerala* (1974) 3 SCC 767 held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In *Jagdish vs. State of M.P.* 1981 Supp SCC 40 this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in *State of Rajasthan v. Kalki* (1981) 2 SCC 752 held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal,

and not expected of a normal person.

Referring to and relying upon the earlier judgments of this Court in *State of U.P. v. M.K. Anthony* (1985) 1 SCC 505, *Tehsildar Singh v. State of U.P.* AIR 1959 SC 1012, *Appabhai v. State of Gujarat* 1988 Supp. SCC 241 and *Rammi v. State of M.P.* (1999) 8 SCC 649, this Court in a recent case *Leela Ram v. State of Haryana* (1999) 9 SCC 525 held:

'There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.....

The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not failing within a set pattern is unproductive and a pedantic exercise.' "

The Supreme Court in the case of **Shashidhar Purandhar Hegde & Anr. vs. State of Karnataka** reported in **(2004) 12 SCC 492** has held as under:

"12. The word "contradiction" is of a wide connotation which takes within its ambit all material omissions and under the circumstances of a case, a court can decide whether there is one such omission as to amount to contradiction. (See *State of Maharashtra v.*

> *Bharat Chaganlal Raghani* (2001) 9 SCC 1 and *Raj Kishore Jha v. State of Bihar* (2003) 11 SCC 519. The Explanation to Section 162 of the Code of Criminal Procedure, 1973 (in short "the Code") is relevant. "Contradiction" means the setting of one statement against another and not the setting up of a statement against nothing at all. As noted in *Tahsildar Singh v. State of U.P.* AIR 1959 SC 1012 all omissions are not contradictions. As the explanation to Section 162 of the Code shows, an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant or otherwise relevant having regard to the context in which the omission occurs. The provision itself makes it clear that whether any omission amounts to contradiction in the particular context is a question of fact."

The Supreme Court in the case of **Nand Kishore vs. State of M.P.** reported in **(2011) 12 SCC 120** has held as under:-

> "14. As far as the alleged discrepancy with regard to recovery of knife is concerned, it is not possible for the Court to attach undue importance to this aspect. The court has to form an opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations *per se* do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. (Vide *State v. Saravanan,* (2008) 17 SCC 587, *Arumugam* v. *State,* (2008) 15 SCC 590 and *Mahendra*

Pratap Singh v. *State of U.P.,* (2009) 11 SCC 334."

Thus it is clear that where omissions are of trivial in nature and do not go to the root of the case and do not shake the basic version of prosecution, then the accused cannot get the advantage of minor omissions. However, if the nature of contractions are such that the basic case of the prosecution is uprooted and gives a deep dent, then the accused must get advantage of the same.

Thus, it is clear that where the omissions are minor in nature then they may not take a shape of contradiction within the meaning of Section 145 of Evidence Act. However, when the omission is of such a nature which cannot be said to be minor and which gives a deep dent to the prosecution case then it would be certainly a contradiction within the meaning of Section 145 of Evidence Act. All the witnesses were confronted with their police case diary statements and they could not explain as to why the allegation of exhortation by the appellant No.2 is not mentioned in their police case diary statement.

So far as the evidence of Deewan Singh (PW-7), Vinod Singh (PW-8), Panjab Singh (PW-11) and Roop Singh (PW-13) is concerned, they have not stated in their court evidence that the appellant No.2 at any point of time exhorted the appellant No.1 to fire at Keshav (PW-1). They have specifically stated that when the hot talk was going on between the complainant as well as the accused party, the appellant No.1 fired at Keshav.

Thus, from the evidence of Keshav (PW-1), Harimohan (PW-2), Kartar Singh (PW-3), Surajbhan (PW-6), Deewan Singh (PW-7), Vinod Singh (PW-8), Panjab Singh (PW-11) and Roop Singh (PW-13) it is clear that all the witnesses have specifically stated that it is the appellant No.1 who fired at

Keshav causing injury on his right knee.

So far as the act of appellant No.2 is concerned, as this Court has come to a conclusion that there is a contradiction in the case diary statement of Keshav (PW-1), Harimohan (PW-2), Kartar Singh (PW-3), Surajbhan (PW-6) with that of their Court evidence and since these witnesses had not stated in their case diary statements that the appellant No.2 ever exhorted the appellant No.1, therefore, this Court is of the view that the benefit of such contradiction must go in favour of the appellant No.2.

Kaliyan (PW-5) is the seizure witness of gun from the possession of Mangaliya. He has stated that a gun was seized from the possession of Mangaliya vide seizure memo Ex.P/4. However, he denied that any custodial statement was made by the appellant No.1 in his presence, on this issue he was declared hostile but nothing could be elicited from his evidence which may show that the gun was recovered from the possession of Mangaliya on the disclosure statement made by him.

R.C. Karn (PW-9) has stated that on 5.5.2001 he had recorded the confessional statement of the appellant No.1 which is Ex.P/5 and on the basis of the disclosure statement made by him a 12 bore single barrel gun was seized from the possession of the appellant No.1 vide seizure memo Ex.P/4.

Rajkishore Singh (PW-10) had examined the gun seized from the possession of the appellant No.1 and had found that the gun was in working condition. The enquiry report given by this witness is Ex.P/11. However, it is surprising that the prosecution has not proved the sanction granted by the District Magistrate, Bhind for prosecution under Section 25/27 of Arms Act. In absence of sanction for prosecution under Section 25/27 of Arms Act, this Court is of the view that the appellant No.1 cannot be convicted for offence under Section

25/27 of Arms Act.

The Trial Court in paragraph 30 of its judgment has referred to the sanction granted by the District Magistrate, Bhind on 30.7.2011 and came to a conclusion that the said sanction has been placed on record, therefore, the appellant No.1 can be convicted under Section 25/27 of Arms Act.

From the record, it is clear that the prosecution for the reasons best known to it, did not try to prove the sanction granted by the District Magistrate Bhind. A document which was not proved by the prosecution cannot be relied upon by the prosecution. Under these circumstances, this Court is of the view that the Trial Court committed a mistake in relying upon the sanction granted by the District Magistrate, Bhind which was not proved by the prosecution.

Accordingly, conviction of the appellant No.1 for offence under Section 25/27 of Arms Act is set aside for want of sanction for prosecution.

Thus, in the considered opinion of this Court as all the witnesses have stated specifically that it is the appellant No.1 who had fired at the complainant Keshav (PW-1) causing injury on his right leg, therefore, it is held that the prosecution has proved beyond reasonable doubt that the appellant No.1 had caused injury on the right knee of the leg of the injured Keshav (PW-1) by firing at him. However, the Trial Court has wrongly held that the right leg of the injured Keshav has been amputated because of the injuries sustained by him. As already pointed out that except the evidence of Dr. Yogendra Singh (PW-12), the prosecution has not examined any other doctor to prove the bed head ticket of the complainant to show that his right leg below the knee was amputated only because of the injuries sustained by the complainant Keshav (PW-1).

Considering the facts and circumstances of the case, this Court is of the view that the prosecution has failed to prove

the guilt of the appellant No.2 and the evidence of Keshav (PW-1), Harimohan (PW-2), Kartar Singh (PW-3) and Surajbhan (PW-6) cannot be relied upon to hold that the appellant No.2 had exhorted the appellant No.1 to fire at the complainant Keshav. As all other accused persons have been granted the benefit of doubt and they have been acquitted, therefore, this Court is of the considered opinion that the case of the appellant No.2 is at parity with that of the other co-accused persons who have been acquitted by the Trial Court.

Accordingly, it is held that the appellant No.2 is not guilty of offence under Section 307/34 of IPC.

So far as the appeal filed by the appellant No.1 Mangaliya is concerned, in the light of the consistent evidence of the witnesses, it is clear that it is the appellant No.1 who had fired at the complainant Keshav (PW-1) causing injury on the knee of his right leg.

So far as the nature of offence committed by the appellant No.1 is concerned, suffice it to say that once the appellant No.1 with an intention or knowledge that his act may result in death of the complainant, fired at him then merely because the injury was caused on the non-vital part of the body of the complainant would not mean that the intention or the knowledge of the appellant No.1 was not to kill the complainant.

Accordingly, it is held that the appellant No.1 is guilty of committing offence punishable under Section 307 of IPC.

So far as the question of sentence is concerned, the Trial Court has awarded a sentence of 10 years rigorous imprisonment and a fine of Rs. 5000/-. However, it appears that while awarding the sentence of 10 years, the Trial Court has taken into consideration the fact that the right leg of the complainant was ultimately amputated because of the injuries sustained by the complainant in the incident. As already

pointed out that in absence of any direct evidence to show that the right leg of the complainant Keshav was amputated below the knee because of the injuries sustained by him in the incident, this inference cannot be drawn that merely because the right leg of the complainant has been amputated, therefore, it must have been amputated because of the complications arising out of the injuries sustained by him due to the gunshot fire by the appellant No.1.

Thus, in the considered opinion of this Court, the sentence of 10 years awarded by the Trial Court is on a higher side and it requires interference. Under the facts and circumstances of the case and the manner in which the incident is alleged to have taken place, this Court is of the view that the sentence of rigorous imprisonment of 5 years and a fine of Rs. 5000/- would serve the purpose. Accordingly, the sentence passed by the Trial Court is modified and instead of rigorous imprisonment of 10 years, a rigorous imprisonment of five years and a fine of Rs. 5000/- is imposed. In case of default in payment of fine amount, the appellant No.1 shall further undergo the rigorous imprisonment of one month.

As this Court has already held that the prosecution has failed to prove the sanction for prosecution under Section 25/27 of Arms Act, therefore, the appellant No.1 is acquitted for offence under Section 25/27 of Arms Act and the sentence awarded by the Trial Court is set aside.

Hence, the appeal filed by the appellant No.1 Mangaliya is **partly allowed** to the extent mentioned above.

The appeal filed by the appellant No.2 is hereby **allowed**.

The judgment and sentence passed by the Trial Court in respect of the appellant No.2 is set aside.

(G.S. AHLUWALIA)
Judge

(alok)