

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH

HON'BLE SHRI JUSTICE SHEEL NAGU
&
HON'BLE SHRI JUSTICE VIVEK AGARWAL

Criminal Appeal No.339/2006

Ramjilal Sharma and othersAppellants

Vs.

State of M.P. ...Respondent

Shri R.K.Sharma, learned counsel for the appellants.

Shri Sangeeta Pachauri, learned Public Prosecutor for the respondent/State.

Whether approved for Reporting :

J U D G M E N T
(Delivered on this 13th day of December 2018)

Per Justice Vivek Agarwal :

This Criminal Appeal has been filed by the appellants being aggrieved by judgment and sentence dated 24.02.2006 passed by the Special Judge, Bhind in Special Case No.74/2002, whereby learned Special Judge has convicted all the four appellants. Appellant No.4- Mukesh has been convicted under Section 302 of IPC, whereas other appellants have been convicted under Section 302 read with Section 34 of IPC.

2. It is submitted that appellant No.4 - Mukesh has already completed the prescribed sentence and, therefore, appeal for him was withdrawn vide order dated 16.07.2016. Therefore, this appeal has been argued only for appellants

No. 1 – Ramjilal Sharma, No.2 – Brijkishore Sharma and No.3 – Mukesh.

3. Learned counsel for the appellants submits that out of old dispute and rivalry, appellants No.1 and 3 have been falsely implicated. There is no iota of evidence against them. On the contrary, they were shown to be armed with axe and have been shown to have attacked the deceased with axe but as per the post mortem report (Ex.P/11), there are no injuries caused by an axe. On the contrary, Dr. R.K.Taneja (P.W.6) has deposed that there were two entry wounds of gun shot; one in left thigh causing injury to femoral artery and muscles and second one close to right nipple 4 inch above in the chest having corresponding exist wound. In the postmortem report (Ex.P/11), cause of death has been shown to be result of shock and haemorrhage due to syncope to vital organs, namely; right lungs and left femoral vessel from a fire arm weapon causing ante mortem and homicidal injury in nature.

4. Learned counsel for the appellants submits that since in the FIR (Ex. P/12) recorded on 17.01.2002, it is mentioned that Ramjilal had hit Munshilal with Kulhari (axe). When Munshilal caught hold it from his hand, Mukesh had fired a gun shot with 12 bore gun causing injury in the chest. Second fire was made by Kallu with single bore gun hitting Munshilal in left thigh, when Munshilal started profusely bleeding and fallen down, then it is apparent that the overt act which is

corroborated by medical evidence, is attributable to only appellant No.2 Brijkishore Sharma @ Kallu and appellant No.4 Mukesh and no such overt act has been attributed to appellants No. 1 and 3, therefore, their conviction with aid of Section 34 under Section 302 of IPC is not maintainable.

5. It is also submitted that since appellant No.2 Brijkishore Sharma @ Kallu had caused a gun shot injury on a non vital part of the body, therefore, it is a fit case to convert his conviction from one under Section 302 /34 of IPC to one under Section 304 part I of IPC and since he has already undergone sentence to the extent to 13 years and 8 months, he be directed to be released forthwith.

6. Learned counsel for the appellants has placed reliance on the judgment of Hon'ble Supreme Court in the case of **Nankanunoo Vs. State of U.P.** as reported in **AIR 2016 SC 447** and attention of this court has been invited to para 8 and 13 of said judgment. It is also submitted that Laxminarayan Kori (P.W.1), Devendra Kumar Shakya (P.W.2), Ramgopal Kori (P.W.3), Mamta (P.W.5) and Ramkali (P.W.7) were cited as eye witnesses of the case and the trial court has disbelieved Devendra Kumar Shakya (P.W.2), nephew of the deceased and Sanjeev Kumar Kori (P.W.4), another nephew of the deceased, vide para 21 of the impugned judgment, therefore, only eye witnesses, which are to be considered are Laxminarayan Kori (P.W.1), Mamta (P.W.5), daughter

of the deceased and Ramkali (P.W.7) wife of the deceased.

7. Laxminarayan Kori (P.W.1) deposed that his nephew Devendra had visited Mukesh to seek remuneration for grinding when Mukesh and Brijesh had beaten him and Devendra had returned back to his house. Thereafter Mukesh armed with 12 number double bore gun and Kallu armed with single bore gun, Ramjilal and Brijesh with axe came to the door of Munshilal when he was surrounded. Ramjilal had hit Munshilal with an axe and when he caught hold of the axe, Mukesh had fired one bullet, which had hit on right side of the chest and Kallu had fired one bullet hitting him in his thigh when wife of Munshilal, namely Ramkali and daughter Mamta arrived at the scene so also his son Sanjeev, nephew Surendra and Devendra. They had taken Munshilal on cot to the Police Station where while on way he died.

8. It is submitted that this witness is related to the deceased and in para 12 of his cross-examination he has admitted that there was no old enmity between Mukesh and Munshilal and they were usually playing game of cards together. He has also admitted that he had not seen any dispute taking place in front of him and Devendra had informed him while they were on way to police station. It is also pointed out that from the testimony of Munshilal it is apparent that Mamta (P.W.5) and Ramkali (P.W.7) are not eye-witnesses but had reached the place of incident after such incident had

taken place.

9. Reading evidence of Mamta (P.W.5), it is submitted that there is no medical corroboration of attack on Munshilal with an axe by the appellant No.1 Ramjilal and there is no evidence of any common intention. Therefore, in the light of the law laid down in the case of **Mithu Singh Vs. State of Punjab** as reported in **AIR 2001 SC 1929** (para 6) and in **Pandurang Kalu Patil Vs. State of Maharashtra** as reported in **AIR 2002 SC 733**, appellants No.1 and 3 could not have been convicted under Section 302 with the aid of Section 34 of IPC.

10. It is pointed out that even Mamta (P.W.5) has admitted that prior to the incident, there was no dispute between Munshilal and accused persons. She also admitted that in front of her house, there are houses of Tenti, Tunde and Balwant so also Ramsiya, Gangasingh, Ramsewak, Kailash and Pulandar but none of these persons have been examined by the police, though they could have been the best independent witnesses. It is also admitted that deceased was consuming alcohol and she further admitted that though police visited their village on the same day but they had not recorded her statement on the same day or on the next 3rd and 4th day. Her statement was recorded on the 5th day of the incident. In para 16, she has admitted that she had informed police in her case diary statement the place where her father was murdered and also the place where she had seen the body but it is pointed out in the spot

map (Ex.P/11), there is no such mark and such vital facts are missing from the spot map and therefore statements of this witness are not corroborated with the spot map.

11. It is also submitted that this witness has admitted that her mother had come out of the house before firing took place has been narrated by her for the first time before the court. She admitted that she is not recollecting as to whether this fact was narrated in her case diary statement (Ex.D/4) or not.

12. Smt.Ramkali (P.W.7) has given contradictory statement and has mentioned that Mukesh had hit her husband with an axe. Then she changed her version that her husband was hit with axe by Ramjilal, when Mukesh had fired with 12 bore gun and Kallu with another 12 bore gun. Brijesh had hit her husband with an axe. In cross-examination she has admitted that her husband had caught hold of the axe and had sustained injury in the hand but such injury has not been found in the hand of the deceased as per Dr.R.K.Taneja (P.W.6). She has also contradicted Laxminarayan Kori (P.W.1) and has submitted that she had come out of her house prior to incident of firing taking place but at the same time, she has admitted that prior to the incident, there was no altercation between the accused and her husband. She has also admitted that police had taken her statement after five days of the incident. Placing reliance on such statement, it is submitted that she is not a reliable witness and her testimony is not sufficient to convict the

appellants.

13. Learned Public Prosecutor for the respondent/State opposes the appeal and submits that in fact injury caused to femoral artery was so grievous that it alone was capable of causing death and therefore plea of firing on a non vital part is not available.

14. After hearing the arguments and going through the record, two things are apparent; one, involvement of appellant No.1 Ramjilal Sharma and Appellant No.3 Brajmohan @ Kallu is not made out as ocular evidence is not corroborated by medical evidence given by Dr.Taneja (P.W.6) and secondly, as far as appellant No.2 Brijkishore Sharma @ Kallu is concerned, in view of specific finding given by Dr.R.K.Taneja (P.W.6), that cause of death was homicidal and it occurred because of injury in femoral artery as well as gun shot injury in lungs, it can not be said that femoral artery is not a vital organ. Thus, it is apparent that Kallu shared common intention, whereas presence of appellant No.1 and 3 is doubtful. Therefore, appellants No.1 and 3 should have been extended benefit of doubt which has been wrongly denied by the trial court. When no independent witnesses are examined and medical evidence is not corroborated by the prosecution story, then conviction was reversed as held by the Hon'ble Supreme Court in the case of **Lilia Vs. State of Rajasthan** as reported in **(2014) 16 SCC 303**. Therefore, this court finds that this is a fit cases to record acquittal in favour of appellants No.1 Ramjilal and No.3

Brijnandan @ Brijesh Sharma. As far as conviction of appellant No.2 under Section 302 with the aid of Section 34 of IPC is concerned, it is clearly made out.

15. As far as judgment in the case of **Nankaunoo (supra)**, is concerned, in para 13, a fact has been distinguished by the Hon'ble Supreme Court that the prosecution has not elicited from the doctors that the gunshot injury on the inner part of left thigh caused rupture of any important blood vessel and that it was sufficient in the ordinary course of nature to cause death and therefore conviction under Section 302 of IPC was converted to Section 304 Part I IPC. But in the present case, Dr.R.K.Taneja (P.W.6), who had conducted the post mortem, in his post mortem report (Ex.P/11) has categorically opined that death has resulted from shock and haemorrhage due to syncope to vital organs right lung and left femoral vessels from fire arm weapon. Wounds were ante mortem and homicidal in nature, therefore, when there is clear opinion of the doctor i.e. Dr.R.K.Taneja (P.W.6) that death was caused due to fire arm injury not only to lungs but also to femoral vessels, the facts of the case of **Nankaunoo (supra)** are distinguishable from the facts of the present case.

16. Appellant has also placed reliance on the law laid down by the Hon'ble Supreme Court in the case of **Mithu Singh (supra)**, wherein it is held that merely because accused knew that co-accused was himself armed with pistol and also had knowledge about previous enmity

between the co-accused and the deceased, inference that accused had common intention to kill cannot be drawn. This court is in respectful agreement with the ratio of the law laid down in the case of **Mithu Singh (supra)** and therefore has recorded acquittal for appellant No.1 Ramjilal Sharma and Appellant No.3 Brijnandan @ Brijesh but the same ratio will not be applicable in the case of appellant No.2 Brijkishore Sharma, who had himself used firearm and caused grievous injury to femoral artery.

17. In fact, as has been held in the case of **Pandurang Kalu (supra)**, on which reliance has been placed by the learned counsel for the appellants, common intention can not be deduced only because appellants had accompanied other assailants. It has been held that when other appellants armed with knives did not inflict any injury, not even after deceased fell down, then there was nothing to indicate that other appellants armed with knives knew about design of other assailants and accordingly acquittal of other assailants was not interfered with. In the present case, this ratio of law is applicable to the case of appellants No.1 and 3 but not in the case of appellant No.2, inasmuch as now it is the matter of record that appellant No.2 also fired a gun shot on the thigh causing bursting of femoral artery and therefore his case will not fall in any of the exceptions given under Section 300 of IPC so to convert the conviction from one under section 302 of IPC to 304 Part I of IPC. However, for the appellants No.1 and 3, the law

laid down in the case of **Niranjanjan Prasad Vs. State of M.P.** as reported in **AIR 1996 SCC 3010** will be handy, wherein it has been held that when testimony of eye witnesses that the deceased and injured were assaulted with sharp cutting weapons not corroborated with medical evidence showing deceased having injured by blunt weapon only, conviction was set aside. In the present case also as far as appellants No.1 and 3 are concerned, since testimony of eye witnesses do not corroborate with the medical evidence, therefore, conviction deserves to be and is hereby set aside.

18. Accordingly, this appeal is allowed in part. Conviction of appellants No.1 Ramjilal Sharma and Appellant No.3 Brijnandan @ Brijesh is set aside. They are acquitted from all the charges. They are on bail. Their bail bonds stand discharged. Conviction of appellant No.2 Brijkishore Sharma is maintained. He shall accordingly undergo remaining jail sentence.

Record of the trial Court be sent back.

(Sheel Nagu)
Judge

(Vivek Agarwal)
Judge

SP