

**IN THE HIGH COURT OF MADHYA
PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 8383 of 2018

BETWEEN:-

**PHENDA S/O REMA HARIJAN
JHAMRAL, AGED ABOUT 55 YEARS,
OCCUPATION: BANS KI TOKRI
BANANA GRAM SUSTIKHEDA
BORCHAPADA FALYA THANA
SILAWAD DISTT BARWANI (MADHYA
PRADESH)**

.....APPELLANT

(BY SHRI AJIT KUMAR TIWARI, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
STATION HOUSE OFFICER THROUGH
P.S. VARLA DISTT BARWANI
(MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI SURENDRA GUPTA, GOVERNMENT ADVOCATE)

Reserved on : 17.08.2023

Delivered on : 19.09.2023

This appeal coming on for orders this day, heard with the consent of parties and the court passed the following:

JUDGMENT

This criminal appeal has been filed under Section 374 of

Cr.P.C. by the appellant being crestfallen by the judgment dated 29.12.2017 passed by the learned 2nd Additional Sessions Judge Sendhwa, District-Barwani in Sessions Trial No.90/2015 whereby the appellant Phenda has been convicted for the offence under Sections 307 of IPC, 1860 and sentenced to undergo 7 years R.I. with fine of Rs.500/- and default stipulation.

02. Briefly stated facts leading to the present appeal in short are that the complainant lodged a complaint that the complainant borrowed the money Rs.1,200/- from the accused/Phenda, out of which Rs.1,000/- was paid to the accused. Thereafter, the accused purchased some goods from the kirana shop of the complainant. On 19.04.2015 at about 8:00 o'clock, the accused met with the complainant and demanded borrowed money Rs.200/-, in reply, the complainant said to him that money is due over him, as and when the due amount paid to complainant, the same will be returned to the accused. On this sequence, upon aggression, accused used filthy language and assaulted the complainant with knife and caused injuries. On screaming of complainant, his son Suresh and his wife Shelubai came on the spot, as they reached, the accused threw his knife and fled away. Thereafter, the complainant took the said knife and went the Police Station to lodge report alongwith his son Suresh, Sarpanch Banshilal. Thereafter, the police party, following due procedure, arrested the accused person, registered the case against the appellant. After necessary investigation, charge-sheet was filed against the appellant under Section 307 of IPC.

03. In turn, the case was committed to the Court of Session vide

order dated 29.12.2017 and thereafter, appellant was charged for offence under Section 307 of IPC. He abjured his guilt and took a plea that he had been falsely implicated in the present crime and prays for trial.

04. In support of the prosecution case, the prosecution has examined as many as 11 witnesses namely Padwi (PW-1), Suresh (PW-2), Shelubai (PW-3), Bhangya (PW-4), Kaliya (PW-5), Sildar (PW-6), Nandilal (PW-7), Katarsingh (PW-8), Suresh Mahale, Inspector (PW-9), Rajendra Thakur, Medical Officer (PW-10) and Dr. Kailashchandra Mandloi (PW-11). No witness has been adduced by the appellant in his defence.

05. Learned trial Court, on appreciation of the evidence and arguments adduced by the parties, pronounced the impugned judgment dated 29.12.2017 by concluding the case and convicted the appellant for commission of the said offence by sentencing him as hereinabove.

06. Learned counsel for the appellant submits that the learned trial Court has not considered the material evidence available on record, the learned trial Court has committed grave error of law in not considering the material contradictions and omissions in the statements of the prosecution witnesses. It is further submitted that there is no one to look after the family and he is facing the trial since 2015. The appellant is aged about 65 years and no fruitful purpose would be served to keep the old age person in judicial custody.

07. Learned counsel for the State on the other hand supports the

impugned judgment and prays for dismissal of this appeal by submitting that the appellant has assaulted the injured/complainant and caused injuries to him. Hence, he is not entitled for any relief from this Court.

08. In back drop of the arguments advanced by counsel for both parties, the point for consideration is as to whether the findings of the learned trial Court in convicting and sentencing the appellant under Section 307 of IPC, is erroneous in the eyes of law and facts.

09. At the outset, the statement of injured/complainant/Padwi (PW-1) is required to be contemplated. He has deposed that on 19.04.2015 at about 8:00 o'clock, the accused met with the complainant and demanded borrowed money Rs.200/-, in reply, the complainant said to him that money is due over him, as and when the due amount paid to the complainant, the same will be returned to the accused. On this sequence, upon aggression, accused used filthy language and assaulted the complainant with knife and caused injury.

10. Suresh (PW-2) and Shelubai (PW-3) have also stated in their statements that the accused Phenda assaulted the injured/Padwi and supported the prosecution story in the same way. The other witnesses have also supported the prosecution case.

11. Rajendra Thakur, Medical Officer (PW-10) has found two following injuries on the person of injured /Padwi (PW-1) when he has examined him :-

(I) Stab wound over back side on scapula bone approx 6X3X4 cm.

(II) Cut mark on left hand approx 7X2X1 cm.

12. However, this witness has stated that he has found injuries which were grievous in nature. On going through the examination of injured Padwi, it is found that he has clearly stated in Para 4 that he got treated in Varla Hospital, thereafter, treated in Sendhwa Hospital and Badwani Hospital.

13. The complainant-Padwi (PW-1) has elucidated in his examination-in-chief that the accused assaulted with knife on left side on his back at first time and on second time, he has assaulted on his left hand. On screaming, his son Suresh (PW-2) and Shelubai (PW-3) came to the scene of crime, the accused fled away from there. His statement finds support from exhibit-P/1 and also the testimonies of Suresh (PW-2), Shelubai (PW-3). Dr. Rajendra Thakur, Medical Officer (PW-10) has also supported the prosecution case. In addition to that Bhangya (PW-4) and Kaliya (PW-5) have also deposed regarding the injuries of Padwi (PW-1). Both witnesses have submitted that they have reached on crime scene after sometime and found Padwi in injured condition. Virtually, the statements of Bhangya (PW-4) and Kaliya (PW-5) are also relevant under Sections 6 and 8 of the Evidence Act being *res gestae*. In cross-examination, the statements of these witnesses have not been shaken in any way. Certainly, Sildar (PW-6) has not supported the prosecution case. He has turned hostile. However, Nandilal (PW-7) has also partially supported the prosecution case and he has been declared hostile. The other witnesses, Kaliya (PW-4), Suresh Mahale, Inspector (PW-9),

Rajendra Thakur, Medical Officer (PW-10) and Dr. Kailashchandra Mandloi (PW-11) have also born out the prosecution case.

14. Anyway, the statement of Padwi (PW-1) has been well fortified by the statements of other witnesses Suresh (PW-2), Shelubai (PW-3), Bhangya (PW-4), Kaliya (PW-5) and medical witnesses Rajendra Thakur, Medical Officer (PW-10) & Dr. Kailashchandra Mandloi (PW-11). On this point, learned counsel for the appellant has contended that all witnesses are relative and interested witnesses. Thus, on the basis of statements, the appellant cannot be convicted.

15. Certainly, the witnesses are related to each other. On this aspect in the case of “*Dilip Singh vs. State of Punjab*” reported as *AIR 1953 SC 364* the full Bench of Hon’ble Supreme Court observed in para 26 as under:

26. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.”

16. Further in the case of *Masalti vs. State of Uttar Pradesh* reported in [*AIR 1965 SC 202*] wherein it has been held in para 14 as under:

“14. There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has

to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not the evidence strikes the Court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice.”

17. Endorsing the aforesaid citations, Hon’ble Apex Court in the recent judgment rendered in *Kurshid Ahmed vs. State of Jammu and Kahsmir* reported as [AIR 2018 SC 2497] has reiterated as under:

“26. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.”

18. Now, the contention of learned counsel regarding interestedness of witnesses is concerned, it is also required to be pondered. Certainly, all eye-witnesses are relatives of deceased, however, the defence failed to evince the submission regarding their interestedness against the appellant. On this aspect, the decision laid down by Hon'ble Apex Court in the case of **Laltu Ghosh vs. State of West Bangal AIR 2019 SC 1058** is relevant to be referred here:

"This Court has elucidated the difference between ‘interested’ and ‘related’ witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the

result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused".

19. So far as the arguments regarding non-availability of independent witnesses is concerned, it is well settled that no criminal case can be overboarded due to non-availability of independent prosecution witnesses. In this regard, the following verdict of landmark judgment of the Hon'ble Apex Court rendered in the case of *Appa Bhai vs. State of Gujarat, AIR 1988 SC 696* is worth referring here as under:

"10.....Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused....."

20. In the case of *Mohd. Naushad Vs. State (Govt. of NCT of Delhi), 2023 LawSuit (SC) 659*, the Full Bench of Hon'ble the Apex Court, considering the kind of apathy adopted by the general public in not coming forward to depose to associate with the prosecution, endorsed the aforesaid verdict. As such, only on the basis of non-examination of any independent witness, the prosecution case cannot be thrown out, specially when the

testimony of witnesses inspires confidence.

21. So far as the demurrer regarding contradictions and omissions are concerned, all of the witnesses, belong to unsophisticated society. Therefore, on the basis of minor discrepancies, their testimonies cannot be discredited. Learned counsel for the appellant has also not adverted any material discrepancies in the ocular testimonies of witnesses. On this aspect, the view of Hon'ble the Apex Court in the case of ***Babasahed Apparao Patil Vs. State of Maharashtra, AIR 2009 SCC 1461***, has pondered as under :-

It is to be borne in mind that some discrepancies in the ocular account of a witness, unless these are vital, cannot per se affect the credibility of the evidence of the witness. Unless the contradictions are material, the same cannot be used to jettison the evidence in its entirety. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Merely because there is inconsistency in evidence, it is not sufficient to impair the credibility of the witness. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court would be justified in discarding his evidence.

22. Thus, the contentions regarding discrepancies and minor contradictions is also not worth the candle. Now, coming to the last limb of arguments that whether the appellant's act is coming under the purview of Section 307 of IPC. In this regard, the intention of the appellant has to be gathered from the circumstances. The prosecution has vindicated the injury on the person of injured.

23. In the case at hand, the accused has assaulted with knife repeatedly over the person of complainant-Padwi and as per medical report, the complainant has received two grievous injuries on his back and also on his leg. These injuries are in ordinary course of nature, may cause the death of the injured.

24. In order to justify the conviction under Section 307 of IPC, the Court has to examine the nature of the weapon used and the manner in which it is used. In addition to that severity as well as number of the blows and the part of body where the injuries are inflicted, are also taken into account to determine the nature of the offence. The role of motive is also ought to be taken into consideration.

25. In a recent case of **Mukesh S/o Jam Singh Damor vs. State of M.P. & Others** 2022 Law Suit (MP) 165; High Court of M.P. Bench has observed as under:-

"9. It is well settled that an act which is sufficient in the ordinary course to cause death of the person, but the intention on the part of the accused is lacking, the act would not constitute an offence under Section 307 of IPC. The medical evidence has to be taken for determining the intention of the accused. The intention and knowledge of the act being one of the major factor i.e. used to decide conviction under Section 307 of IPC. Before it is held that the act committed by the accused amounts to attempt to murder, it should be satisfied that the act was committed with such intention or knowledge under such circumstances that if it had caused death, it would have amounted to murder."

26. In this case, the appellant has caused grievous injury on the back of injured which was nearby on scapula bone measuring 6x3x4 cm and as per doctor, it was grievous injury. The appellant

has not been satisfied by this injury but also caused second injury on the left arm of complainant and it was measuring 7x2x1 cm. On this point, the observation of Hon'ble the Apex Court in the case of *Jage Ram Vs. State of Haryana, (2015) 11 SCC 366* has held as under:-

“For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 of IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc .”

27. In view of the aforesaid proposition and on the basis of above discussion, it can be safely articulated that the prosecution has proved its case beyond reasonable doubt that the appellant has committed such type of injuries which are sufficient to cause culpable homicide amounting to murder of the injured/Padwi and therefore, the conviction of appellant under Section 307 of IPC for committing attempt to murder is immaculate and infallible in the eyes of law and facts.

28. Now, coming to the point of sentence, looking to the fact that the appellant is in custody since 29.12.2017. That apart, he

has also suffered custody period of 125 days in course of trial, that means, the appellant has already completed approximately six years of punishment.

29. In view of aforesaid discussion in entirety, the appeal is partly allowed and the appellant is convicted to the period of sentence which he has already suffered in custody with fine of Rs.500/-. In case of failure to deposit the fine amount, he be suffered 15 days S.I. The bail bond of the appellant shall be discharged after depositing of the fine amount or completion of the aforesaid period of 15 days for default of payment of fine amount. Hence, he shall be released forthwith, if not required in any other case.

30. The judgment of the learned trial Court regarding disposal of the seized property, if any, stands affirmed.

31. Pending I.As. if any, stand closed.

32. A copy of this order be sent to the concerned trial Court for necessary compliance.

Certified copy as per rules.

(PREM NARAYAN SINGH)

JUDGE

vindesh