

1
**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

CRIMINAL APPEAL No. 7430 of 2021

BETWEEN:-

**BABU DAMOR S/O GATTU DAMOR, AGED ABOUT 36
YEARS, OCCUPATION: AGRICULTURIST VILL-
PANCHKUE NAYAGAONKHALSA TEH. MEGHNAGAR
(MADHYA PRADESH)**

.....APPELLANT

(BY SHRI ABHAY SARASWAT, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH STATION HOUSE
OFFICER THR. P.S. MEGHNAGAR. (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI S.S. THAKUR, GA FOR STATE)

.....
***Reserved on :10.07.2023
Delivered on :02.08.2023***
.....

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

JUDGMENT

Appellant has preferred this appeal under Section 374 of the Code of Criminal Procedure, 1973 (for short 'the Code') against the judgment dated 13.11.2021 passed by Special Judge, SC/ST (P.A) Act, District Jhabua, in S.T. No.364/1997, whereby the appellant has been convicted for the offence punishable under Section 304 (2) & 323 of I.P.C. and sentenced to undergo 10 years & 01 Year R.I with a fine of Rs.50,000/-, & Rs.1000/- respectively and in default of payment of fine, to further undergo One year R.I. and 03 months

R.I.

02. The prosecution story, in a nutshell is that on 08.05.2020, at about 10:30am complainant Mallu Bai lodged a report before the police station by submitting that on 07.05.2020, she along with her daughter Kali Damor and her son Golu Damor were working in front of her house and her husband Tamesh gone for labour work. In the evening, at about 6:30PM, her relative Babu Damor has come there and said that where is her husband, he is nothing in front of him. When she thwarted him to dispute with her husband, he assaulted her daughter Kali Damor with stone on her left leg. Her brothers-in-law namely Samsu and Bhallu came and intervened. Meanwhile, her husband, coming home, stayed at his brothers field and asked appellant Babu as to why he had disputed with his wife, then Babu assaulted him with a brick on the back side of his head. Following that her husband fell down on the ground and the appellant fled away from the spot. Brothers of the injured saw the incident and further they called the ambulance and taken him to the Govt. Hospital Meghnagar. The doctor referred the injured to District Hospital, Jhabau and during the treatment, the injured died at about 8:30 PM. Hence, the police party, after following due procedure, arrested the accused person and registered the case against the appellant. After due investigation, charge-sheet was filed against the appellant/accused under Section 302 and 323 of IPC.

03. In turn, the case was committed to the Court of Session and thereafter, appellant was charged for offence under Section Section 302 and 323 of IPC. He abjured his guilt and took a plea that he had been falsely implicated in the present crime and prayed for trial.

04. In support of the case, the prosecution has examined as many as 12 witnesses namely Mallubai (PW-1), Kali PW-2), Samsu (PW-3), Ramesh (PW-

4), Rajesh (PW-5), Dr. J.S. Jhala (PW-6), Dr. Shailesh Damor (PW-7), Dr. Sailekshi Verma (PW-8), Dilip Verma (PW-9), Manoj (PW-10), Kaushalya Chouhan (PW-11), Golu (PW(12)). No witness has been adduced by the appellant in his defence.

05. Learned trial Court, on appreciation of the evidence and argument adduced by the parties, pronounced the impugned judgment on 13.11.2021 and finally concluded the case and convicted the appellant for commission of the said offence under the provisions of Section 304-II and 323 of IPC while acquitted him from the charges under Section 302 of IPC.

06. Learned counsel for the appellant submits that the the appellant is innocent and the learned trial Court has convicted the appellant wrongly without considering the evidence available on record. Counsel for the appellant further submits that the appellant has not caused any fatal injury to the deceased because there is nothing on record to show that the deceased was died due to the injury caused by the appellant. It is further submitted that there are material contradictions and omissions in the statements of the prosecution witnesses but the learned trial Court has erred in ignoring the same and in convicting the appellant. It is further submitted that the prosecution has made witnesses of one family who are allegedly to be the eye-witnesses and all of them are interested witnesses.

7 . It is further submitted that the prosecution has failed to prove the place of incident and there is difference between the place of incident as per the prosecution case because two places of incidents are there in the present case as per the prosecution story. It is further submitted that the learned Court below has failed to appreciate the prosecution evidence and has also erred in

convicting the appellant. Hence, prays for acquittal of the appellant.

8. In alternate, learned counsel for the appellant Submits that the learned trial Court has convicted the appellant under Section 304(II) of IPC and sentenced for 10 years R.I. which is maximum as per the provisions of law. The appellant has already undergone approximately 4 years of his incarceration period including the remission period and prays that if the appellant is awarded sentence of jail to the period of the imprisonment already undergone under the provisions of Section 304(II) of IPC then the ends of justice will be met. In support of this contention, counsel for the appellant has placed reliance upon the judgment of this Court in the case of **Vimal Rana & Others vs. State of Madhya Pradesh** passed in Criminal Appeal No.745/2006 dated 19.07.2010 whereby the Division Bench has awarded Six years of jail sentence under Section 304(2) of IPC.

09. Learned Public Prosecutor has opposed the prayer. Inviting my attention towards the conclusive paragraphs of the impugned judgement, learned public prosecutor has submitted that the deceased had died due to the injury caused by the appellant and the learned trial Court has rightly convicted the appellant by sentencing him appropriately. Hence, prays for dismissal of the appeal.

10. I have considered rival contentions of the parties and perused the record.

11. The statements of the eye-witnesses of the incident namely Mallubai (PW-1), Samsu (PW-3), Ramesh (PW-4) and Golu (PW-12) are having their immanent value. In addition to that Kali (PW-2) is an injured witness and she has elucidated in her examination in chief vividly that the appellant Babu had caused injury on her leg by throwing stone and when her father Tamesh asked

the accused as to why he was squabbling with his family members then, in reply, the appellant caused injury on the back side of his head. Due to which, he fell down, further he had been taken to the hospital, Meghnagar and from where referred to Jhabua District Hospital.

12. In cross-examination, the testimony of this witness has not been rebutted. Since this witness is an injured witness of the incident, hence, her statement regarding prosecution case having its own value. As far as the importance of testimony of injured witness Kali (PW-2) is concerned, the view of Hon'ble Apex court rendered in the case of **Bhajan Singh @ Harbhajan Singh and others Vs. State of Haryana AIR 2011 SC 2552** is condign to quote here as under:-

"The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

13. At this juncture, the attention of this Court has been drawn towards the judgment of Hon'ble Supreme Court in **Brahm Swaroop & Anr. vs. State of U.P. [2011 (6) SCC 288]**, wherein Hon'ble Supreme Court pronounced as under:-

"22. Where a witness to the occurrence has himself been

injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

14. That apart, this case has been well corroborated by Mallubai (PW-1) and the FIR Ex.P/1 wherein she has deposed and supported the prosecution case. Samsu (PW-3), Ramesh (PW-4) and Golu (PW-12) have also supported the prosecution case. All of these witnesses have clearly averred that the appellant had inflicted injury with brick at the back side of head of the deceased. The statement of this witness has not been controverted in their cross-examination.

15. Learned counsel for the appellant, on this point, vehemently contended that the testimony of these witnesses are full of contradictions and omissions and since they are relatives of the deceased, they should not be relied.

16. So far as the testimony of Mallubai (PW-1) and Kali (PW-2) are concerned, they belong to Scheduled Tribes category. On this aspect, the Hon'ble Apex Court in the case of **Beti Padiya vs. State of Orissa [AIR 1981 SC 1163]** has ordained that when an unsophisticated tribal woman witnessed and deposed with minor discrepancies, her evidence should be accepted on account of its naturalness.

17. In **Babasaheb Apparao Patil v. State of Maharashtra [AIR 2009 SC 1461]** the Hon'ble Apex Court held as under:-

"12. 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."

18. Now, the contention of learned counsel regarding relative witnesses, 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 Bengal 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. The testimony of these witnesses have been supported by Dr. J.S Jhala (PW-6). The other prosecution witnesses namely Dilip Verma, Manoj & Kaushalya Chouhan have also well supported the prosecution case and no major shortcoming was pointed out by counsel for the defence during final arguments of the case. So far as the conclusion of the learned trial Court regarding the offence of culpable homicide not amounting to murder under

Section 304(2) of IPC is concerned, since no appeal has been filed by the State in this regard, it is not expected from this Court to analyse that finding. Anyway, after perusing the judgment, finding of the learned trial Court regarding conviction under Section 304(2) of IPC, is also found absolute and correct.

21. Actually, in many of the criminal cases, it is quiet often that the offence is witnessed by close relatives of the victim whose presence on the spot of the incident would be natural. The evidence of such witnesses cannot automatically be discarded by leveling them as interested witnesses. In order to arrive at the conclusion of the guilt, the Court has to judge the testimony of the witnesses by the yardstick of the probabilities and their intrinsic worth. In view of the aforesaid propositions of law, the finding of learned trial Court regarding conviction of the appellant under Section 304(2) of IPC, is found immaculate and infallible.

22. Regarding the injury of Kali (PW-2) caused by the appellant, the same is also supported by the injured herself and other witnesses as well as by medical testimony of Dr. Shailekshi Verma. **Hence, the finding regarding Section 323 of IPC is warranting no interference and the same is hereby upheld.**

23. So far as the sentence part is concerned, certainly, this case is pending since 07.05.2020 and the period of more than three years has already been lapsed and the appellant is in jail and suffering the sentence so awarded by learned trial Court. On this aspect, guidelines can be taken from the judgment of the Division Bench of this Court rendered in *Vimal Rana (Supra)*. It is worth mentioning here that the punishment of 10 years under Section 304(2) of IPC is maximum sentence. This is a case where ferocious intention is not emanated from the record. Hence, the sentence part of the accuse is required to be

modified.

24. On this aspect, the following excerpt of the judgment of Hon'ble Apex Court rendered in **Bhagwan Narayan Gaikwad vs. State of Maharashtra; [2021 (4) Crimes 42 (SC)** which is as under:-

"28. Giving punishment to the wrongdoer is the heart of the criminal delivery system, but we do not find any legislative or judicially laid down guidelines to assess the trial Court in meeting out the just punishment to the accused facing trial before it after he is held guilty of the charges. Nonetheless, if one goes through the decisions of this Court, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation, etc."

25. In conspectus of aforesaid proposition of law and mitigating circumstances of the case, this appeal is partly allowed. The finding of the learned trial Court regarding conviction and sentence under Section 323 of IPC is affirmed while the while the conviction for the offence under Section 304(II) of IPC is affirmed with modification of sentence to the extent of seven years R.I. instead of 10 years of R.I. and with fine of Rs.20000/- in place of Rs.50000/-. In case of default of payment of fine amount, the appellant shall undergo further three months Simple Imprisonment.

26. He be set at liberty forthwith if not required in jail in any case after completion of the aforesaid jail sentence. The judgment regarding disposal of the seized property stands confirmed. Out of the total fine amount, if recovered fully, Rs.15000/- be paid to complainant Mallubai (PW-1).

27. A copy of this order be sent the learned Court below concerned for

information.

28. Certified copy, as per rules.

(PREM NARAYAN SINGH)
JUDGE

amit

