

HIGH COURT OF MADHYA PRADESH AT JABALPUR

**Division Bench : Hon'ble Shri Justice J.K.Maheshwari
Hon'ble Smt. Justice Anjuli Palo**

CRA No. 219/1995

**Nandu @ Nandua & Ors.
r/o village Hirapur, District Sagar (MP)**

Vs.

The State of Madhya Pradesh

Shri Sankalp Kochar, counsel for the appellants.
Shri Mahendra Choubey, Government Advocate for the
respondent/State.

JUDGMENT (17/05/2019)

Per : J.K.Maheshwari, J :-

This appeal has been preferred by the accused-appellants under Section 374(2) of the Cr.P.C. being aggrieved by the judgment dated 01.02.1995 passed by the 3rd Additional Sessions Judge, Sagar in Sessions Trial No. 281/1993 convicting the appellants as under :

Appellants Nandu @ Nandua, Gariba and Arjun have been convicted and sentenced as under :

Section	Act	Imprisonment	Fine	In default of fine
147	Indian Penal Code	251 days	-	-
148	Indian Penal Code	1 year RI	-	-
302/34	Indian Penal Code	Life imprisonment	200/-	One month RI
323	Indian Penal Code	6 months RI	-	-

Appellants Ashokrani and Kallobai have been convicted and sentenced as under :

Section	Act	Imprisonment	Fine	In default of fine
147	Indian Penal Code	251 days	-	-

2. Appellant No. 2-Gariba has died during the pendency of the appeal and appellant No. 3-Kallobai and appellant No. 4-Ashokrani have already undergone the jail sentence. Hence, this appeal is pressed on merit only on behalf of appellant no. 1-Nandu @ Nandua and appellant No. 5-Arjun Chamar.

3. The case of the prosecution in brief is that on 18.07.1993 at about 3:00 pm at village Hirapur, District Sagar. The complainant Gokul (PW-6) was fixing the fence of his field along with deceased Kilku, accused-Gariba (since deceased), reached on the scene of occurrence and made an attempt to stop them. On being unsuccessful he went away and after some time came on the spot along with other co-accused persons armed with *lathis* and *ballam*. As alleged, appellant no. 1-Nandu was armed with *lathi* and appellant no. 5-Arjun was armed with *ballam*. It is further alleged that the accused persons assaulted on deceased Kilku over his head and neck, when Gokal (PW-6) came to his rescue, the accused persons also assaulted him in which he sustained injuries. Dharma (PW-5) reached on the spot and saw the incident. FIR was promptly lodged by Gokal (PW-6) on which the offence was registered under Section 302/34, 147, 148, 302/34 and 323 of Indian Penal Code against all the accused persons. The injured as well as the deceased were medically examined by Dr. G.S.Kesharwani (PW-12) and conducted autopsy of the deceased Kilku and opined that the cause of his death is shock and coma due to excessive bleeding.

4. After completion of investigation, challan was filed before the competent Judicial Magistrate Court. Thereafter, case was committed to the Court of Sessions and assigned to the 3rd Additional Sessions Judge, where charges were framed against the appellants Nandu, Gariba and Arjun under Sections 147, 148 and 302/34 of the Indian Penal Code and against appellants Kallobai and Ashokrani under Sections 147 and 302/109 of IPC. All the accused persons have abjured their guilt and demanded trial taking defence by appellant no. 1-Nandu of right to private defence, while appellant no.5-Arjun of false implication.

5. Learned trial Court has disbelieved the testimony of eye-witness Jagrani (PW-10)-wife of Lula Ahirwar, but relied upon the testimony of the injured witness Gokal Prasad (PW-6) and eye witness Dharma (PW-5) which is corroborated by the medical evidence hence, convicted both the appellants for the charges as described hereinabove.

6. Learned counsel for the appellants has pressed this appeal only on behalf of appellant No.1-Nandu and appellant No.5-Arjun Chamar since, appellant No.3-Kallobai and appellant No.4-Ashokrani have already undergone their sentence and appellant No.2-Gariba has died during the pendency of the appeal while he was on bail.

7. Learned counsel for the appellant contends that so far as appellant No.1-Nandu is concerned, he received various injuries as revealed from the statement of the Dr. G.S. Kesharwani (PW-12). No explanation is put forth by the prosecution to the injuries received by him however, he has exercised the right to private defence for himself as well

as for his father Gariba with whom incidence has taken place on the issue of fixing fence encroaching the field. Therefore, in absence of any explanation to his injuries, prosecution story cannot be believed. In an alternative, if this Court finds that there is sufficient cogent evidence available, then extending the benefit of right to private defence to person, protecting his property, though it exceeded on account of death of deceased Kilku, the sentence already undergone by him which is more than 7 years and 10 months, may be sufficient in the facts of the case. Learned counsel for the appellant has relied upon the judgment of Hon'ble the Supreme Court in case of **Pathubha Govindji Rathod and Anr. vs. State of Gujarat; (2015) 4 SCC 363**.

8. So far as appellant-No.5 Arjun is concerned, it is contended that as alleged he was armed with *ballam* which is a weapon by which piercing injury can be caused. But as per the evidence of doctor, a lacerated wound was found to the deceased therefore, the allegation causing of injury by him is not corroborated by the medical evidence. In fact, appellant No. 5-Arjun was not present on the spot as is apparent from the defence put forth to the eye-witness which finds support from the defence witness Gokal Prasad Sahu (DW-1). Therefore, it is a case of his false implication adding the names of all the family members. In alternative, learned counsel for the appellant submitted that, in case the appellant is being dealt with for the charges under Section 302 of IPC, looking to the facts of the case whereby it is a case of free fight, then individual act is required to be seen. In case if there is no piercing injury on the person of

the deceased as stated by the autopsy surgeon, without having any explanation by the prosecution about causing injury by the said weapon, the conviction of appellant under Section 302 of IPC is not made out. Therefore, the findings may be set aside. In support of the said contentions, learned counsel for the appellant has placed reliance upon the judgments of Hon'ble the Supreme Court in cases of **Hallu and Ors. vs. State of Madhya Pradesh, (1974) 4 SCC 300; Devatha Venkataswamy @ Rangaiah vs. Public Prosecutor, High Court of Andhra Pradesh, (2003) 10 SCC 700; Krishnegowda & Ors. vs. State of Karnataka by Arkalgud Police, (2017) 13 SCC 98; and Kumar vs. State represented by Inspector of Police, (2018) 7 SCC 536.**

9. In addition, it is argued that the incident took place all of a sudden when the deceased and the injured persons were on their field while putting the fence encroaching the land of the accused persons. All of a sudden incident took place and in a case without specification of any injury caused by the accused persons using specific weapons, conviction under Section 302 of the IPC is not sustainable. Hardly it may be a case of 304 Part II, because the incidence happened all of a sudden, without having any knowledge and intention to commit murder. In support of the said contention reliance has been placed on the judgment of Hon'ble the Supreme Court in the case of **Bunnilal Chaudhary vs. State of Bihar, (2006) 10 SCC 639** and **Shahajan Ali & others vs. State of Maharashtra & Ors., (2017) 13 SCC 481**. In view of the said submissions, it is urged that the conviction of appellant No.1-Nandu and appellant No.5-Arjun may

be set aside allowing this appeal.

10. On the other hand, learned Government Advocate has argued with vehemence in support of the findings of the Court *inter alia* contending that it is a case in which complainant Gokal (PW-6) is an injured witness of the incidence which finds support from the testimony of the Dharma (PW-5) who reached on the spot from his field and saw the incidence. The allegations, as alleged in their testimony finds support from the medical evidence. Therefore, in such circumstances, the conviction of appellant No.1-Nandu and appellant No.5-Arjun and the sentence as directed by the trial Court are just and proper. However, interference in this appeal is not warranted.

11. After having heard learned counsel on behalf of both the parties and on perusal of the facts of this case, as per the marg intimation (Ex.P-16) it reveals that when deceased Kilku was putting a fencing on his land, co-accused appellant Gariba (since died) reached there and tried to stop him. Kilku said that alike every year they are putting the fence, on which Gariba went to the village and came back after some time with other co-accused persons who were armed with *lathi* and *ballam* and assaulted over the head and the neck of Kilku. When complainant Gokal reached there to save Kilku from the accused persons, he was also assaulted by them. Complainant-Gokal who lodged the merg intimation is an injured eye witness of the incidence who identified in Court all the accused persons and deposed that all the accused persons were involved in assaulting him and deceased Kilku. Although, he requested them to exempt his brother Kilku, even then appellants Nandu, Gariba and Arjun armed

with *lathi* and *ballam* made repeated blows, due to which Kilku died on account of injuries over his head caused by means of *ballam* by Arjun and but he could not see who caused injury on his hands. He has seen the injuries caused by all the accused persons to Kilku over the head and neck due to which he died on spot. At that time Dharma (PW-5) and Jagrani (PW-10) reached on spot. He has acknowledged the lodging of the FIR and preparation of the spot map by the police. In the cross-examination the right to private defence with respect to the assault made to Nandu @ Nandua and his father Gariba has been put, in the facts that when the deceased and the injured persons were trying to encroach upon the land of the accused persons, the incidence took place, it is said Arjun was not present and it was only Nandu and Gariba who were present. But the said fact has been denied by the eye witness Gokal (PW-6) concurring the act of Arjun as well as Nandua. Other eye-witness Dharma (PW-5) who reached on the spot also saw the incidence and the presence of Nandua and Arjun is not doubted in his statement. Although in paragraph 8, at one place he stated that when he reached at the spot, Kilku was lying on the field of Gokal, the accused persons were not present but in his examination-in-chief in subsequent paragraphs he has explained that he has seen the incidence and therefore, the assault by the accused appellant Nandu as well as Arjun has been proved by the innocular testimony of the eye-witness.

12. In the said context, if we see the testimony of the Dr. G.S. Kesharwani (PW-12) and the injuries received to the deceased then it is apparent that he sustained injuries over his neck and head, lacerated wounds were found and the deceased died due to coma, shock and

hemorrhage caused by these injuries. Injured Gokal (PW-6) has also received the injuries as apparent from paragraph 1 of his testimony. Therefore, the corroborative injuries were found as per the statement of the injured witness as well as eye witness and doctor.

13. Learned counsel for the appellant has strenuously urged that no piercing injury has been found on the person of the deceased. Therefore, without any explanation by the prosecution, merely saying assault by means of *ballam* has been made by Arjun, cannot be relied upon. In this regard, reliance has been placed on the judgments of Hon'ble the Supreme Court in cases of **Hallu, Devatha Venkataswamy @ Rangaiah and Krishnegowda & Ors., Kumar (supra)** by the learned counsel for the appellant. But looking to the testimony of the eye witnesses it reveals that appellant No.1-Nandua was armed with *lathi* and appellant No.5-Arjun was armed with *ballam* which is a weapon having piercing (pointed) edge at one side attached to a *lathi*. They stated that the assault has been made over the head and the neck. It is not a case of prosecution that the *ballam* was used from the sharp and pointed side. In fact, the eye witnesses stated that the accused persons assaulted over the head and the neck. Therefore, it is apparent that the injuries received to the deceased and also to the injured person were caused by *lathi* as well as *ballam* from the hard and blunt edge which finds corroboration from the medical evidence. Once the prosecution itself come out with a case of assault even by the *ballam* similar to *lathi*, the explanation is not required to be put by them with respect to the injuries received to the deceased as well as injured by use of the said weapons explaining the same in the facts of this case.

14. Considering the peculiar facts of the present case, the judgment as relied upon by the learned counsel for the appellant with respect to the spear and axe, not having any explanation on the part of the prosecution because the injuries caused to the deceased persons were either bruise or swelling, have no application to the facts of the present case. Therefore, the appellant cannot derive the benefit of the said judgments with respect to the injuries neither having corroboration by medical evidence nor having any explanation by the prosecution to that effect. Considering the aforesaid, looking to the testimony of the injured eye-witness Gokal (PW-6) and the independent eye-witness Dharma (PW-5), it can safely be held that the allegation of assault by appellant No.1-Nandu and appellant No.5-Arjun is corroborated by the medical evidence of Dr. G.S. Kesharwani (PW-12). Therefore, their presence at the scene of occurrence and assault made by them cannot be doubted. Therefore, the findings recorded by the trial Court in this regard is hereby affirmed due to the aforesaid analysis, in addition to the discussion made by the trial Court.

15. Now, reverting to the argument made by learned counsel for the appellant with regard to Nandu appellant No.1 with respect to plea of right to private defence and not having explanation of the injuries received to him as corroborated by the evidence of Dr.G.S. Kesharwani (PW-12) is concerned, as per the FIR, no doubt the incidence started in the presence of Gariba (since deceased) who is father of appellant No.1 Nandu. After some time, having common object all the accused persons reached on the spot but no explanation with regard to the injuries received by the injured has been brought on record by the prosecution even in the testimony of the

Investigating officer. However, in such circumstances when accused-Nandu has also received the injuries in the incidence and that is with respect to putting a check on fixing fence allegedly encroaching upon the land of the accused persons. The appellant No.1-Nandu can derive the benefit of right to private defence and when he himself received the injuries due to not having any explanationa, though the said right to private defence is exceeded looking to the nature injuries received by him. The argument of the counsel for the appellant to give the benefit in the sentence already served by him which is more than 7 years and 10 months, appears to be just for exceeding the right on the private defence by him. Therefore, the said argument of the counsel for the appellant so far as it relates to appellant No.1-Nandu, deserves to be accepted and is hereby allowed.

16. So far as, appellant No.5-Arjun is concerned, he has taken the plea of alibi in his defence but looking to the discussion made hereinabove and the findings of the trial Court which appears to be just, his presence on the spot is not doubted. He inflicted injuries by means of *ballam* using it similar to *lathi* and made an assault over the head of the deceased and the said injury is sufficient to cause death of the deceased. Therefore, the arguments as advanced based on plea of alibi is contradictory and is repelled.

17. At this stage, learned counsel for the appellant, has advanced arguments in alternate relying upon judgments of Hon'ble the Supreme Court in cases of **Bunnilal Chaudhary** and **Shahajan Ali & Ors. (supra)** to convict the appellant No.5-Arjun for the culpable homicide not amounting to murder and to deal with him for an offence under Section

304 Part II. In this regard, as per the merged statement of the eye-witnesses including injured witness, it is apparent that initially appellant Gariba (since deceased) reached on spot in the noon and tried to stop the deceased Kilku from erecting fence. Some altercation took place between them, thereafter Gariba went away and returned at about 2:30 pm he reached alongwith the accused persons who were armed with *lathi* and *ballam* and by those weapons, repeated injuries have been caused to the injured persons due to which he died. Considering the aforesaid, it cannot be said to be a case of not having pre-meditation or intention and knowledge to commit murder. The nature of injuries were so grievous that on the assault made by the accused persons, deceased died on the spot. The said case do not fall under the category of culpable homicide not amounting to murder, therefore, the arguments as advanced by the counsel for the appellant being devoid of any merit, is not acceptable.

18. Accordingly, this appeal is hereby **allowed in part**. The conviction of both the appellants Nandu @ Nandua and Arjun under Sections 147, 148, 323 and 302/34 of Indian Penal Code is hereby maintained. However, giving benefit of right to private defence, that too exceeding from his defence, sentence of **appellant No.1-Nandu @ Nandua** is reduced to the sentence already undergone by him. So far as, **appellant No.5-Arjun** is concerned, sentence of life imprisonment for the major offence under Section 302/34 and the sentence awarded under Sections 147, 148 and 323 of IPC is hereby maintained.

19. Appellant No.1-Nandu @ Nandua and appellant No.5-Arjun both are on bail, their bail bonds shall stand discharged. So far as appellant

No.5-Arjun is concerned, he shall surrender before the trial Court within a month from today, otherwise, the Court will take him into custody for serving the remaining part of the sentence.

20. Let a copy of this judgment along with the record be sent to the Court below for information and compliance.

(J.K.MAHESHWARI)
JUDGE

(SMT. ANJULI PALO)
JUDGE

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