



Criminal Appeal No.2020/2002

13.4.2017

Judgment pronounced, signed and dated.

It was a jail appeal, thus the appellant be intimated the result of this appeal through the Jail Superintendent concerned.

(R.S.Jha)  
Judge

(A.K.Joshi)  
Judge

**HIGH COURT OF MADHYA PRADESH**  
**PRINCIPAL SEAT AT JABALPUR**

**Division Bench: Hon'ble Shri Justice Ravi Shankar Jha**  
**Hon'ble Shri Justice Ashok Kumar Joshi**

Criminal Appeal No.2020/2002

Madhav Prasad S/o Badri Prasad Shivhare  
R/o Dhuma, Police Station Dhuma,  
District Seoni (M.P.) - Appellant (in jail)

Versus

State of M.P. - Respondent

Shri Ajay Kumar Jain and Shri A.K.Gupta, learned counsel for the appellant.

Shri G.P.Kekre, learned government advocate for the respondent/State.

Whether approved for reporting: Yes/No

**JUDGMENT**

(Pronounced on 13/4/2017)

**Per: Ashok Kumar Joshi J.**

1. By this appeal under Section 374(2) of the Code of Criminal Procedure, the appellant has challenged his conviction for the offence punishable under Section 302 of the I.P.C. and sentence of life imprisonment with a fine of Rs.5,000/-, in case of default, he is directed to further undergo the sentence of three years' rigorous imprisonment vide judgment dated 19.12.2002 passed by the Additional Sessions Judge, Lakhnadon, District Seoni in Sessions Trial No.73/2002.
2. Briefly stated, the prosecution's case is that appellant Madhav Prasad was a tenant on rent in the house of deceased Dumman alias Bhawani Prasad. On the date of incident 13.6.2002 at 4:30 p.m. in front of betel leaves' shop of Banti alias Bhupendra Trivedi (P.W.5) in town Dhuma, deceased Dumman alias Bhawani Prasad demanded rent of his house from the appellant, then the appellant denied from giving rent and started abusing. When the deceased objected to the appellant from giving abuses, then appellant Madhav Prasad took out a wood which was kept below the shop of betel leaves and thereafter the appellant assaulted with that wood on deceased's head, neck and body. After receiving injury on the head, Dumman alias Bhawani Prasad fell down on the ground. At the time of incident, Raju alias Rajkumar (P.W.2), Banti alias Bhupendra Trivedi (P.W.5), Pramod Kumar (P.W.1), Shambhu Prasad (P.W.6) and Bhakku alias Bheekam (P.W.3) came on the spot, then the appellant fled away leaving the wood on the spot. The incident was promptly reported by Suresh Kumar Soni (P.W.4) at Police Station

Dhuma, on which F.I.R. (Ex.P.4) was recorded by Sub-Inspector R.C.Barti (P.W.15).

3. From the spot injured Dumman alias Bhawani Prasad was immediately taken to government hospital, Dhuma but the doctor was not available there, thus he was immediately taken to the Community Health Centre, Lakhnadon, where Dr.J.Prasad (P.W.9) recorded M.L.C. report (Ex.P.13). Dumman alias Bhawani Prasad shortly died in Lakhnadon hospital, then Dr.J.Prasad (P.W.9) sent a written intimation to Police Station Dhuma through a ward boy about death of Dumman alias Bhawani Prasad at 5-50 p.m. in the hospital on which marg report (Ex.P.19) was registered. Head Constable Omprakash Sanodia (P.W.16) in presence of panch witnesses prepared the memo of inquest (Ex.P.9). Dr. Ku.Snehlata Kaushle (P.W.12) conducted the autopsy of the dead-body of Dumman alias Bhawani Prasad in Lakhnadon hospital and recorded post-mortem report (Ex.P.15). Marg diary bearing no.zero was sent from Police Station Lakhnadon to Police Station Dhuma, where registration report (Ex.P.20) relating to marg was recorded. Sub-Inspector R.C.Barti (P.W.15) reached to the spot on the date of incident itself and on inspection, he found the weapon of offence, wood lying on the spot and also found blood stained soil in front of shop of betel leaves. In presence of panch witnesses, the wood (Article 'A') was seized by seizure memo (Ex.P.5). Seizure memo (Ex.P.6) relating to seizure of blood stained soil and simple soil was prepared. A sealed packet of deceased's clothes received from the hospital was seized through seizure memo (Ex.P.12). During

investigation, the seized wood was sent with a query letter (Ex.P.16) of I.O. to Dr.Ku.Snehlata Kaushle (P.W.12) who after seeing the wood sent her report (Ex.P.16A). Thereafter, seized material were sent to F.S.L., Sagar, whose report (Ex.P.25) was received later on. After completing the investigation, a charge-sheet was filed in the concerned Magistrate's Court, who committed the case to the Sessions Court, from where sessions trial was sent for trial to the Additional Sessions Judge, Lakhnadon.

4. The trial Court framed charge under Section 302 of the I.P.C. against the appellant. The appellant abjured the guilt. He did not take any specific plea, but has stated that he was falsely implicated. No any defence witness was examined. The trial Court after considering the evidence adduced by the prosecution convicted and sentenced the appellant as mentioned above.
5. Counsel for the appellant vehemently urged the fact that there was no intention of the appellant to cause death of deceased Dumman alias Bhawani Prasad. It was also argued that the alleged eye witnesses Pramod Kumar alias Ghanshyam Prasad (P.W.1), Rajkumar (P.W.2), Bhakku alias Bheekam (P.W.3), Suresh Kumar Soni (P.W.4), Shambhu Prasad (P.W.6) and Rajendra Kumar Burman (P.W.7) deposed that they had not seen the beating of the deceased and they were also declared hostile by the prosecution and only Banti alias Bhupendra Trivedi (P.W.5) deposed that he had seen the appellant taking the wood, which was fixed below his shop and assaulting the deceased by that wood. It has been

submitted that at the most, the case would fall under the purview of Section 304 (Part-I) of the I.P.C.

6. On the other hand, learned government advocate has supported the recorded conviction under Section 302 of the I.P.C. and contended that according to medical evidence, three fractures of different bones were found, thus the intention of the appellant to cause death of the deceased was proved from the produced evidence.
7. According to evidence and MLC report (Ex.P.13) of Dr.J.Prasad (P.W.9), on 13.6.2002 in Lakhnadon hospital, he has found following six injuries on the body of unconscious Dumman alias Bhawani Prasad:-
  1. Contusion of size 1 x 1 Inch in middle of forehead.
  2. Contusion of size 2 x 2 Inches on left eyebrow.
  3. Contusion of size 3 x 3 Inches on right cheek.
  4. Contusion of size 3 x 3 Inches on left mandible .
  5. Contusion of size 4 x 4 Inches on left side of neck
  6. Contusion of size 2 x 2 Inches on right side of the chest.
2. In the opinion of Dr.J.Prasad (P.W.9), all the six injuries to Dumman alias Bhawani Prasad were caused by hard and blunt object within 24 hours from his examination and he had referred for x-ray examination in reference to injuries no.2,3,4 and 6 and he had advised that the injured be sent to the Medical College, Jabalpur.
3. Dr.Ku.Snehlata Kaushle (P.W.12) deposed that on 14.6.2002 on her emergency duty in Community Health Centre, Lakhnadon at 10.45 a.m., she started the post-mortem of the dead body of deceased Dumman alias Bhawani Prasad and

found that rigor mortis was present and blood was oozing from his mouth and nose. According to her post-mortem report (Ex.P.15), she found following external and relating internal injuries on the body of deceased:-

1. Contusion of the size 1 x 1 Inch on forehead.
  2. Contusion on left eyebrow of size 2 x 2 inches, under which there was fracture of bone, which has extended upto external cranial fossa.
  3. Contusion of size 3 x 3 inches on right cheek, beneath which mandible bone was fractured.
  4. Contusion of size 3 x 3 inches on left jaw, beneath which left mandible bone was fractured.
  5. Contusion of size 4 x 4 inches on left side of neck, which was having no any internal injury
  6. Contusion of size 2 x 2 inches on right side of chest, where the chest and abdomen meets, beneath which tenth rib was fractured.
2. Dr.Snehlata Kaushle (P.W.12) also deposed that on dissection of the body, superior surface of liver was found lacerated and right kidney was also lacerated and about 1000 ml blood was collected there. In her opinion, all the external injuries of the deceased were caused by hard and blunt object within twelve hours from her starting the post-mortem and injuries no.1 and 5 were simple, but injuries no.2,3 and 4 were of grievous nature and injury no.6 was fatal. She deposed that in her opinion, the deceased had died within 6-36 hours from post-mortem due to shock, which had arisen due to heamorrhage

from right kidney and liver. She has proved her post-mortem report (Ex.P.15) and her written answer (Ex.P.16-A) to the query letter (Ex.P.16) sent by the investigator alongwith seized wood. She had deposed that after seeing the seized wood, she opined that the seized wood could cause the death. She recorded the length of the lathi to be 35 inches and circumference of lathi as 6 inches and also recorded that the lathi was solid in consistency. Thus, the homicidal death of Dumman alias Bhawani Prasad on the date of incident is proved beyond reasonable doubt.

3. According to the F.I.R. (Ex.P.4), reporter Suresh Kumar Soni (P.W.4) was not an eye witness to the incident, but just after the incident, when reporter Suresh Kumar Soni (P.W.4) reached to the spot of incident, he found prosecution witnesses Raju alias Rajkumar (P.W.2), Banti alias Bhupendra Trivedi (P.W.5), Pramod Kumar (P.W.1), Shambhu Soni (P.W.6) and Bhakku (P.W.3) present at the scene of occurrence. Among these prosecution witnesses, only Banti alias Bhupendra Trivedi (P.W.5) has deposed as an eye witness seeing the beating given by appellant Madhav Prasad to Dumman alias Bhawani Prasad. Except Banti alias Bhupendra Trivedi (P.W.5), all other above mentioned prosecution witnesses including reporter Suresh Kumar Soni (P.W.4) were declared hostile by the prosecution, as they did not give evidence in accordance with their police statements recorded under Section 161 of the Cr.P.C. But Rajkumar (P.W.2) though did not state about witnessing the incident, but he supported the evidence given by Banti alias



Bhupendra Trivedi (P.W.5) in relation to circumstances, which were existing just before and just after the incident on the scene of occurrence.

4. According to evidence of all these prosecution witnesses, the date of incident 13.6.2002 was the day of weekly haat of town Dhuma and the incident had occurred in front of betel leaves' shop of Banti alias Bhupendra Trivedi (P.W.5) and nearer to shop of Banti alias Bhupendra Trivedi (P.W.5), there was a shop of shoes of Rajkumar (P.W.2). Rajkumar (P.W.2) deposed that on the date of incident at about 5:00 p.m., when he was at his shoes' shop, appellant Madhav Prasad was sitting on a stool which was kept in front of his shop and at that time, Dumman came there and demanded money from the appellant and altercation and abuses started between the appellant and Dumman, then he asked both of them to leave his shop as he was working, then the appellant and Dumman shifted themselves in front of adjacent betel leaves' shop of Banti. According to evidence of all these prosecution witnesses, Banti's betel leaves' shop was situated on a trolley (thela or thiliya). Banti alias Bhupendra Trivedi (P.W.5) deposed that at about 4:00 p.m. when he was at his shop, appellant Madhav Prasad, who was previously sitting in front of the shop of Raju and Dumman came in front of his shop and at that time Dumman demanded rent from the appellant, then a dispute occurred between them, during which appellant Madhav Prasad took out a wood, which was fixed beneath his shop and the appellant gave the first blow by that wood on right side of head of Dumman above his ear,

then Dumman fell down, thereafter appellant also struck Dumman by the same stick three times again. Banti alias Bhupendra Trivedi (P.W.5) deposed that he tried to stop the appellant, but the appellant did not pay heed to him and due to the day of weekly haat, there was a crowd on the spot and after assaulting Dumman, the appellant fled away and thereafter Dumman was taken to government hospital through a thiliya (handcart).

5. Rajkumar (P.W.2) deposed that within few seconds after the appellant and Dumman shifted themselves from his shop to adjacent Banti's leaves' shop, after hearing noise when he came out of his shop, then he saw that Dumman was lying on the road in injured condition in front of shop of Banti and blood was oozing from his mouth and appellant Madhav Prasad was standing nearby, but at that time, he did not see any weapon in appellant's hands and the people were saying that appellant Madhav Prasad has killed Dumman by a stick and within few minutes, injured Dumman was taken from the spot to the hospital and later on he heard that Dumman had died.
6. It appears that Banti alias Bhupendra Trivedi (P.W.5) tried to deviate from his evidence given in examination-in-chief in para no.7 of his cross-examination, but thereafter in reply to Court's question, Banti alias Bhupendra Trivedi (P.W.5) had clearly answered that he had witnessed the beating given by appellant Madhav Prasad to Dumman by the wood. Thus, it is clear that the total evidence of Banti alias Bhupendra Trivedi (P.W.5) is stable in relation to role of the appellant in the

incident, which is materially corroborated by deposition of Rajkumar (P.W.2).

7. The hostile declared prosecution witnesses Suresh Kumar Soni (P.W.4), Bhakku alias Bheekam (P.W.3), Rajendra Kumar Burman (P.W.7) and Pramod Kumar alias Ghanshyam Prasad (P.W.1) though deposed that they had not seen the beating and Bhakku alias Bheekam (P.W.3), Suresh Kumar Soni (P.W.4) and Pramod Kumar alias Ghanshyam Prasad (P.W.1) have stated that they had not seen the appellant on the spot, but all these witnesses clearly deposed that just after the incident, they had reached on the spot. Shambhu Prasad (P.W.6) has clearly deposed that on the date of incident at about 4:00 p.m., when he was returning from haat, then he had seen on the spot that injured Dumman Soni was lying on the earth and near to him, appellant Madhav Prasad was standing having a stick in his hand and within few seconds, the appellant fled away from the spot. Rajkumar (P.W.2) had also deposed that just after the incident, he had seen injured Dumman lying on earth and nearby him, the appellant was standing, who fled away.
8. The hostile declared prosecution witnesses Suresh Kumar Soni (P.W.4), Bhakku alias Bheekam (P.W.3), Rajendra Kumar Burman (P.W.7) and Pramod Kumar alias Ghanshyam Prasad (P.W.1) have clearly deposed that just after the incident, the people gathered on spot were saying that appellant Madhav Prasad has beaten injured Dumman alias Bhawani Prasad. All these witnesses were residents of Dhuma and each has clearly deposed that he knew the appellant and deceased,

who were also residents of the same village. It is well established legal position that the evidence of hostile declared prosecution witnesses could not be discarded totally, but that part of their depositions could be taken into consideration, which is supported by other evidence available on record. Deceased Dumman was maternal uncle of Pramod Kumar alias Ghanshyam Prasad (P.W.1), but Banti alias Bhupendra Trivedi (P.W.5), Rajkumar (P.W.2), Shambhu Prasad (P.W.6), Bhakku alias Bheekam (P.W.3) and Suresh Kumar Soni (P.W.4) appear to be independent witnesses. Nothing could be brought in their cross-examination, which could establish their intimacy with the deceased or enmity with the appellant. Reporter Suresh Kumar Soni (P.W.4) was having his shop of repairing punctured tyres at about 100 feet distance from Banti's betel leaves' shop. Reporter Suresh Kumar Soni (P.W.4) lodged prompt F.I.R. (Ex.P.4) at 17:30 (5:30 p.m.) on the date of incident at Police Station Dhuma. According to marg report (Ex.P.19), the deceased had died at 5.50 p.m. on the date of incident 13.6.2002 in Lakhnadon hospital. The wood (stick) was seized by investigator R.C.Barti (P.W.15) from the spot on the date of incident by seizure memo (Ex.P-5). Investigator R.C.Barti (P.W.15) has also identified the seized wood (article 'A') at the time of recording of his deposition before the trial Court. The seized wood was also sent to the lady doctor, who conducted the post-mortem with a query letter (Ex.P.16). Even hostile declared prosecution witnesses have clearly deposed that they have seen heavily injured Dumman lying on the scene of

occurrence. In all these established facts and circumstances, the eye witness account given by Banti alias Bhupendra Trivedi (P.W.5), materially supported by Rajkumar (P.W.2) and Shambhu Prasad (P.W.6) inspires confidence.

9. It is clear from the evidence of Banti alias Bhupendra Trivedi (P.W.5) and Rajkumar (P.W.2) that the incident had occurred because after reaching to the spot, Dumman alias Bhawani Prasad demanded rent from the tenant-appellant. It could not be inferred that only by demanding due rent from the tenant-appellant, Dumman alias Bhawani Prasad had given any sudden or grave provocation to the appellant. From medical evidence, it is clear that mandible bone of the deceased was fractured at two places and tenth rib of the deceased was also fractured and there was laceration over liver and right kidney just beneath its fractured rib. In the opinion of the relating doctor, this sixth injury found on the body of the deceased was fatal and three other injuries were also of grievous nature. Deceased's skull bone beneath the forehead was also fractured. According to the evidence of Banti alias Bhupendra Trivedi (P.W.5), after receiving first assault on head, Dumman alias Bhawani Prasad had fallen down on the ground and thereafter the appellant also gave three blows on lying and fallen Dumman alias Bhawani Prasad.
10. In the case of **Kikar Singh Vs. State of Rajasthan** (AIR 1993 SC 2426), the Apex Court in para 9 of its judgment has observed as follows:-
  1. "Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, exception

4 is not attracted and commission must be one of murder punishable under S. 302. Equally for attracting exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4 to Section 300 of the I.P.C.â

19. In reference to the words âundue advantageâ used in above mentioned Exception 4 of Section 300 of the I.P.C., it has been observed by the Apex Court in the case of **Santokh Singh Vs. State of Punjab** (AIR 2009 SC 1923) as under:-

â15. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh Vs. State of Rajasthan (AIR 1993 SC 2426), it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head, it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage.â

20. In above mentioned facts and circumstances, it is clear that the appellant after altercation with unarmed Dumman alias Bhawani Prasad was having an intention to cause death of Dumman alias Bhawani Prasad by used wood. The cause of death given by the doctor was due to injuries to vital organs like right kidney and liver, thus leading to a heavy internal heamorrhage and mode of death was shock. Looking to these peculiar facts with other grievous injuries of the case in hand, the argument of the learned counsel for the appellant could not be accepted that the offence would fall into any category

under Section 304 of the I.P.C.

21. In light of the above mentioned citations, among which the case of **Kikar Singh Vs. State of Rajasthan** (AIR 1993 SC 2426) has some factual resemblance to the present case, the above mentioned contention of the appellant's learned counsel appears to be totally unacceptable and liable to be rejected. We are of the considered opinion that the learned trial Court has not committed any error in convicting the appellant under Section 302 of the IPC.

22. On careful scrutiny of the total evidence available on record, we are of the considered opinion that conviction and sentence as recorded by the trial Court are totally justified and legal. The appeal filed by the appellant is devoid of any substance.

23. Consequently, the appeal filed by the appellant is dismissed and the conviction and sentence recorded under Section 302 of the I.P.C. by the trial Court are affirmed. The detained appellant be intimated about result of his appeal through the concerned Jail Superintendent. Record of the trial Court be returned with copy of the judgment.

**(RAVI SHANKAR JHA)**  
**JUDGE**

**(ASHOK KUMAR JOSHI)**  
**JUDGE**

