HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

DIVISION BENCH

Criminal Appeal No. 1771/2006

APPELLANT

Mohanlal Yadav S/o Shri Buchuni Yadav, aged about 39 years, R/o Village-Barkoda, P.O.-Nayagaun, P.S.- Jaysingh Nagar, District-Shahdol (MP)

Versus

RESPONDENT

The State of Madhya Pradesh through P.S. Jaysingh Nagar, District-Shahdol (MP)

Date of hearing: 09/09/2017
Date of Judgment: 22/09/2017

PRESENT :

HON'BLE SHRI JUSTICE **S.K.Palo**
HON'BLE SMT. JUSTICE **Nandita Dubey**

Whether approved for reporting : YES

For the Appellant:

Shri Prakash Upadhyay, Advocate.

For the State:

Shri Abhay Shankar Pathak, Govt.Advocate..

Law laid down
Significant paragraph numbers :8,16

J U D G M E N T

As per Nandita Dubey, J.:

This appeal has been filed by the appellant being

aggrieved by the judgment dated 01.08.2006, passed by learned Addl. Sessions Judge, Beohari, District-Shahdol in Sessions Trial No. 08/2006, whereby the appellant has been found guilty for the offence punishable under Section 302 of IPC and has been sentenced to undergo life imprisonment and fine of Rs.500/-.

2. The prosecution story setting in motion the aforesaid trial, in nut shell, is that there existed previous enmity between the appellant and the deceased Unjeelal (somewhere written as Kunjeelal in the impugned judgment) with regard to some land dispute. On 29.10.2005, at about 4 PM, the appellant, armed with a *Tangi* (axe), came to the house of Unjeelal and took him towards Lahwar Dam, where he pushed Unjeelal on the ground, and attacked on his neck with his *Tangi,* as a result of which neck of Unjeelal got severed, and consequently he died. The incident was witnessed by Dilip Kumar Yadav @ Dipak (PW.10), minor son of the deceased who lodged a report (Ex.P/13) regarding the same at PS-Jaisingh Nagar at about 7.30 PM on the same day. On the basis of aforesaid report, FIR (Ex.P/14) was registered for the offence punishable under Section 302 of IPC by T.S.Gautam (PW.15). Pursuant to the same, the investigation followed. The

dead body was recovered and *Panchnama* (Ex.P/15) was prepared and the body was sent for autopsy. Site plan was prepared in the presence of the witnesses. The appellant was arrested on 31.10.2005 and on his disclosure, a *Tangi* was recovered from him.

3. Dr. R.P.Singh (PW.9) who conducted the postmortem on the dead body at 3.45 PM on 30.10.2005 found seven incised wound on neck and three abrasions on posterior aspect of right elbow joint. All the injuries found were antemortem in nature. In the opinion of the Dr.R.P.Singh (PW.9) the cause of death was shock due to excessive haemorrhage caused by rupture of internal jugular veins and common carotid and internal carotid arteries. According to the doctor, such type of injuries could not have been caused by *Tangi*. As per the medical evidence, the nature of death was homicidal and the death occurred within 24 hours of the postmortem.

4. The trial Court, after considering the entire evidence on record, convicted the appellant as aforementioned placing reliance on the evidence of child witness Dilip @ Dipak (PW.10) which according to the trial Court was duly corroborated by the evidence of Kalawati (PW.6) and Neeraj (PW.7).

5. Shri Prakash Upadhyay, learned counsel

appearing for the appellant, has submitted that the appellant had been falsely implicated by the family members of the deceased on account of the previous enmity with regard to some land dispute. It is further submitted that there is no eye-witness in the case and Dilip (PW.10), the minor son of the deceased, is a child witness, and cannot be relied upon. Relying on the decision of **Rajkumar vs. State of M.P. (2014) 5 SCC 353** and **K.Venkateswarlu vs. State of Andhra Pradesh (2012) 8 SCC 73**, it is submitted that the trial Court has committed grave error while placing reliance upon the deposition of the child witness which is full of omissions and contradictions. It is also submitted that it is a clear case of circumstantial evidence, and in the facts and circumstances of the case, the appellant be acquitted of the aforesaid charge.

6. Per contra, Shri Abhay Shankar Pathak, learned Govt. Advocate appearing for the State has vehemently opposed the submissions made by the appellant, contending that the appellant had a premeditated intention to commit the offence and that is why he came armed with a *Tangi* and forcibly took the deceased with him. It is contended that the appeal lacks merit and is liable to be dismissed.

7. We have heard the learned counsel for the parties and meticulously perused the record.

8. The issue regarding the admissibility of the evidence of a child witness is no more *res integra* . In **Rajkumar (supra),** the Supreme Court has observed thus:-

> **"18.** *It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him.*
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> ***19.*** *This Court in* ***State of Madhya Pradesh v. Ramesh*** *,* ***(2011) 4 SCC 786****, after considering a large number of its judgments came to the conclusion as under:*
>
> > *"14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require*

> *corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."*

9. In the instant case, Dilip @ Dipak (PW.10), the alleged eye-witness, was a child of 14 years' of age at the time of incident. The trial Court has found him worth reliance as he has understood the questions put to him and he was able to answer the same.

10. Dilip (PW.10), the alleged eye-witness, who had lodged the complaint (Ex.P/13) has deposed that the appellant had killed his father due to previous enmity on account of dispute regarding land. He had further stated that on account of this enmity, both the families have not kept any relation with each other, and they do not go to each other house. He had further deposed that his father, the deceased, was not well and having fever and was lying on the bed on the date of incident, hence, he did not go to school and remained at home to look after his father. According to Dilip (PW.10), the accused armed with *Tangi* came to their house at 4 PM and asked the deceased to go with him which was objected

to by his mother Kalawati (PW.6). Despite objection of his wife, the deceased agreed to go with the accused and he went after them, whereas in his complaint Dilip had stated that the deceased was forcibly taken out of the house by the accused. He had further stated that when the accused and deceased reached near the boundary of Lahwar Dam which is near about one kilometer from their house, he saw that the accused pushed the deceased on the ground, and attacked him with *Tangi* and thereafter gave six to seven blows of *Tangi* on the neck of deceased, as a result of which the neck of Unjeelal got severed, and he died. Seeing this, Dilip (PW.10) shouted for help and hearing his shouts, accused Mohan ran away. Hearing the shouts of Dilip (PW.10), his mother Kalawati (PW.6), brother Neeraj (PW.7) and two uncles came to the spot of occurrence. However, in his cross-examination, he had stated that when he reached the spot of occurrence, the accused had run away, whereas in his cross-examination he had stated that he went after his father and when he reached the spot of occurrence, the accused had run away.

11. Kalawati (PW.6), wife of the deceased, though admitted previous enmity with the accused, had stated

in the case diary statement that on the date of incident, the accused came twice to her house, once in the morning for getting "*Jhadphoonk*" done by the deceased, and in the second time in the evening at 4 PM and invited the deceased outside for having liquor, and forcibly took the deceased with him so she sent her son Dilip after them, who came back running at 4.30 PM and informed her that the accused had killed the deceased. At that time, Rakesh (PW.4) also came and informed that Mohan killed Unjeelal, then all of them had gone to the place of occurrence and found Unjeelal dead. However, in her statement before the Court Kalawati (PW.6) had improvised and stated that accused Mohan only came once to get the "*Jhadphook*" done in the evening and after getting the "*Jhadphook*" done, invited the deceased to accompany him for having liquor. Contrary to the statement of Dilip (PW.10) about the deceased being not well, having fever and resting at home, she had stated that Unjeelal went to school to cook and serve mid-day meal and came back at 4 PM. According to Kalawati (PW.6), they heard the shouts of Dilip @ Dipak (PW.10) and rushed to the spot and saw the accused assaulting the deceased with the *Tangi*.

12. Neeraj (PW.7), the elder son of deceased, contrary

to his case diary statement, had stated nothing about the "*Jhadphook*" in his deposition before the Court. He deposed that when accused came to their house, his father was making a paste of soil for plastering. On an invitation of the accused Mohan, his father went for a stroll towards the dam. At that time, his younger brother Dilip (PW.10) and his mother Kalawati (PW.6) were at home. As his father had not eaten anything for two days, he went out to look for him, and witnessed the accused killing his father. He came back to his house and informed everybody, and all of them went back to the spot of occurrence and then he went to lodge the report along with his brother.

13. Interestingly, another witness Sokhilal (PW.8), elder brother of deceased, had also claimed to have witnessed the incident. He had stated that while he was grazing his buffaloes about 50 mtrs.away from the place of occurrence, he saw the accused killed the deceased with *Tangi*. He ran towards the spot, but the accused ran away. According to him, only Garu Chamar and Rakesh were present at that time. Thus, he completely denied the presence of Dilip & Dipak (PW.10), Kalawati (PW.6) or Neeraj (PW.7) at the time and the place of occurrence.

14. Rakesh (PW.4), on the other hand, had denied witnessing the incident. He had stated that some traveller told him that a man is lying dead and then he saw accused Mohan clearing his *Tangi* with sand. This witness was declared hostile. However, in his cross-examination, he had stated that accused Mohan made a disclosure to him that he had killed Unjeelal and asked him not to tell anyone and went away. He had further stated that thereafter he went to see the dead body and thereafter went to inform Kalawati (PW.6) and Dilip (PW.10) who were at home, thus, making the presence of Dilip @ Dipak, doubtful, at the place of occurrence.

15. On a careful analysis of the afore-discussed infirmities, contradictions and improvisations in the statements of witnesses, and in view of the medical evidence on record, it is highly doubtful that the incident happened in the manner as alleged by the prosecution for the following reasons :-

> **(I)** All the witnesses are very consistent on one aspect that there was previous enmity with the accused Mohan on account of some land dispute. In view of the statement of the child witness Dilip (PW.10) that both the families had not kept any relationship with each other nor go to each other's house, it is highly unlikely that the accused armed with a

Tangi would go to the house of the deceased for getting his "*Jhadphook*" done, and the deceased without any apprehension would go out willingly and happily for having liquor with him;

(II) In view of the statement of Dilip @ Dipak (PW.10) that the Dam was about one km.away from his house and it took him half an hour to reach there, it is not possible that his cry/shouts for help could be heard by Kalawati (PW.6) and others and they would reach there in time and see the accused killed Unjeelal;

(III) Further more, the seizure witness of *Tangi,* had turned hostile. The prosecution has not produced the FSL report to connect the seized weapon "*Tangi"* with the crime and in view of the statement of Dr.R.P.Singh that such injury of deceased could not have been caused by the *Tangi*, there is no evidence to connect the appellant with crime."

16. It is settled law that suspicion, howsoever strong, cannot form the basis of conviction. In the case of **Rajiv Singh Vs. State of Bihar (2015) 16 SCC 369,** the Supreme Court has held:

> **66.** *It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any*

court, suspicion alone cannot take the place of legal proof. The well-established canon of criminal justice is "fouler the crime higher the proof". In unmistakeable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

67. *The above enunciations resonated umpteen times to be reiterated in* ***Raj Kumar Singh Vs. State of Rajasthan (2013) 5 SCC 722*** *as succinctly summarized in para 21 as hereunder* :

> **"21.** *Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping*

> *in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."*

> ***68**. In supplementation, it was held in affirmation of the view taken in Kali Ram vs. State of H.P. **(1973) 2 SCC 808** that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted*."

17. In view of the afore-discussed case laws, and the facts and circumstances of the case, we are of the considered opinion that the appellant is entitled to benefit of doubt and his conviction only on the sole testimony of child witness Dilip @ Dipak (PW.10), cannot

be sustained.

18. Accordingly, this appeal is allowed, and the appellant is acquitted of the aforesaid charge levelled against him. He shall be released forthwith, if not required in connection with any other case.

(S.K.Palo)
JUDGE
22/09/2017

(Nandita Dubey)
JUDGE
22/09/2017

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