

HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

CRIMINAL APPEAL NO. 1481/2010

Roshan and others

Vs

The State of Madhya Pradesh

Counsel for the appellants : Mr.H.S.Dubey, Learned Senior Advocate
with Mr. Shivam Chhalotre, Advocate

Counsel for the Respondent/State : Mr.Manhar Dixit, Panel Lawyer

Corum : **Hon'ble Mr. Justice Atul Sreedharan**
Hon'ble Mrs. Justice Sunita Yadav

J U D G M E N T
(21-12-2021)

Per : Sunita Yadav, J.

The present appeal has been filed by the appellants aggrieved by the judgment dated 30.07.2010 passed in Sessions Trial No. 370/2007 by the learned 11th Additional Sessions Judge, Jabalpur, by which the appellants herein have been convicted for the offence under Section 302/34 of IPC and sentenced to undergo life imprisonment and fine of Rs.1,000/- with default stipulation of additional rigorous imprisonment of 3 months. The appellants have also been convicted under Section 307/34 of IPC and sentenced to undergo rigorous imprisonment for seven years and fine of Rs.1,000/-, with default stipulation of 3 months additional rigorous imprisonment. The appellants have further

been convicted under Section 324/34 of IPC and sentenced to undergo rigorous imprisonment for two years, with default stipulation of 3 months additional rigorous imprisonment.

2. The prosecution case in brief is that on 14.05.2007 at about 08:00 p.m. near *Chandimata Mandir, Badhai Mohalla*, by reason of the dispute over money transaction, the appellants herein hurled abuses at deceased Naresh Koshta. On protest being made by the deceased, appellant No.1 Roshan Vishwakarma gave him a blow of knife. When Ajay Berman (PW-2) and Kanju Vishwakarma (PW-3) who were standing nearby intercepted and tried to rescue Naresh Kostha, the appellants assaulted them with knife and *gupti*. Thereafter, the FIR was lodged by Ajay Berman (PW-2) and the police have registered various offences against the appellants.

3. The learned trial Court after recording the evidence of the prosecution witnesses and hearing the parties, convicted and sentenced the appellants for the offences as mentioned above; hence the appellants preferred this appeal before this Court.

4. The learned counsel for the appellants submitted that the prosecution has failed to prove its case as the eye witnesses PW-1 Munna Koshta, PW-2 Ajay Berman and PW-4 Vicky Rajak, who are also injured witnesses, have not supported the case of the prosecution and turned hostile. He has further argued that the evidence of PW-11 Mahesh Kumar Koshta cannot be relied upon as he is an interested witness being the uncle of the deceased. He has further argued that

initially the name of PW-11 Mahesh Kumar Koshta was not there in the challan papers and his name has been introduced as a false witness later on. That PW-17 Dr. Arun Jain has not stated that the injuries to the deceased were sufficient to cause death and as such no case under Section 302/34 is made out.

5. On the other hand the learned counsel for the respondent-State submitted that the appellants had not been able to show any material which would merit the interference of this court in the concurrent findings of the court below.

6. PW-17 Dr. Arun Jain conducted the post-mortem of the dead body of deceased Naresh Koshta on 15.05.2007 and gave his report Ex.P-33.

This witness has noted following injuries on the dead body:

Injury No.1 one stab wound on right side of chest close to sternum between 3 to 4 inter costal space, $\frac{1}{2}$ X $\frac{1}{2}$ inches deep to penetrating left atrium, chest cavity was full of blood, third rib was partially cut. Underlying muscles, tissues, blood vessels found cut.

Injury No.2 three incised wounds were present on right side of chest, close to nipple size $\frac{1}{2}$ x $\frac{1}{2}$ x $\frac{1}{2}$ inches.

Injury No.3 two abrasions, one on right cheek and another on right wrist each size 1 x $\frac{1}{2}$ inches.

Injury No.4 incised wound $\frac{1}{2}$ x $\frac{1}{2}$ x $\frac{3}{4}$ inches, on left axilla directing upwards blood found at the site of injury.

7. PW-17 Dr. Arun Jain has opined that the death of Naresh Koshta was on account of hemorrhagic shock caused by excessive bleeding.

8. Dr. A.K.Jain (PW-12) has done MLC of injured Kanju Vishwakarma and Ajay Raikwar on the same day at 9 pm at Victoria Hospital. He found following injury on the body of Kanju Vishwakarm:

An incised wound on left axilla region, the injury was one inch long; width was $\frac{3}{4}$ inch, however the depth could not be ascertained. There was excessive bleeding from the said injury.

9. According to Dr.A.K.Jain (PW-12) the injuries found on the body of Ajay Raikwar were as below:

Injury No.1- incised wound over the right lateral aspect of abdomen $1\frac{1}{2}$ inch x $\frac{3}{4}$ inch deep.

Injury No.2- incised wound over the lateral aspect below umbilicus size of $1\frac{1}{2}$ inch x $\frac{3}{4}$ inch x $1\frac{1}{2}$ inch deep.

10. PW-15 Dr.Anil Gupta has deposed that he examined the patient Kanju Vishwakarma who had a cut vein. This witness has repaired the vein while the patient was admitted in the hospital. The injured were also examined by PW-9 Dr.D.U.Pathak who has deposed that he treated and operated the injuries of the above mentioned injured. This witness has further deposed that the police had sent the queries asking him to give opinion on the nature of injuries caused to the above injured persons. He has answered the queries through his letters Ex. P-19 and Ex P-20 respectively stating that the nature of injuries caused to Kanju and Ajay were grievous and might cause their death.

11. The testimonies of PW-9 Dr.D.U.Pathak, PW-17 Dr.Arun Jain, PW-12 Dr.A.K.Jain and PW-15 Dr.Anil Gupta remained unchallenged

in their cross-examination which proves that the deceased Naresh died due to the injuries caused upon him and PW-7 Munna Koshta and PW-2 Ajay Berman had grievous injuries on their bodies which might have caused their death. The next question is whether the above injuries were caused by the appellants herein?

12. The prosecution case is based on direct evidence. According to the prosecution story PW-1 Munna Koshta, S/o late Laxman Prasad Koshta, PW-2 Ajay Berman, PW-3 Kanju Vishwakarma, PW-4 Vikkey Rajak, PW-7 Munna Koshta, S/o Punnulal Koshta and PW-11 Mahesh Kumar Koshta are the eye witnesses. However, out of these eye witnesses only PW-7 Munna Koshta and PW-11 Mahesh Kumar Koshta have supported the case of the prosecution.

13. PW-7 Munna has deposed that on 14.5.2007 at about 8:00 p.m. he was coming back home from work. When he was near *Chandimata Mandir* he heard sounds of scuffle. He followed the sound to see that the accused Raju had caught hold of Naresh and accused Roshan and Rahul were assaulting Naresh. He has further deposed that Roshan was wielding a *Gupti* and Rahul had a knife. This witness saw that Kanju Vishwakarma (PW-3) and Ajay Berman (PW-2) were trying to rescue Naresh. The accused persons assaulted Kanju and Naresh with knife and *gupti*.

14. The Trial Court disbelieved the evidence of PW-7 Munna Koshta on account of material omissions and contradictions between his Court statements with the Police statement. In his police statement this

witness didn't say that at the time of incident accused Raju had caught hold of Naresh and other accused persons were assaulting him. During the cross-examination this witness has changed his earlier version that he saw accused persons assaulting Ajay and Kanju, instead said Ajay Berman and Kanju Vishwakarma were running away from the spot with blood oozing out from their injuries; therefore, he is saying they might have been beaten up by the accused persons. In the light of above material omissions and variations in the statement of this witness, his evidence has rightly been disbelieved by the trial Court.

15. Now we have to consider whether sole testimony of the eye witness PW-11 Mahesh Kumar Koshta is sufficient to convict the appellants herein for the crime? This witness has deposed that on 14.5.2007 at about 8:00 pm he was out for a stroll. As he reached *Badhai Mohalla* near *Chandimai Temple* he saw Roshan, Rahul and Raju Vishwakarma were abusing Naresh. Thereafter accused Roshan inflicted a blow of *gupti* on the chest of Naresh who fell down on the ground. When Ajay Berman and Kanju Vishwakarma tried to rescue Naresh, Rahul assaulted them too. Ajay Berman and Kanju Vishwakarma also received injuries. This witness has further stated that the fight took place because of the dispute over money transaction between the two parties.

16. In the cross-examination of PW-11 Mahesh Kumar Koshta, nothing has been brought by the defence to discredit him. No material omissions or contradictions have been proved by the defence to cast

suspicion on the story of prosecution. The presence of this witness at the scene of occurrence cannot be disbelieved because his presence as an eye witness is mentioned in the FIR Ex.P/2 which was registered within 20 minutes from the incident. The Registration of FIR was so prompt that there was no time to concoct or fabricate a false case against the appellants. The oral statement of PW-11 Mahesh Kumar Koshta has also been corroborated by the medical evidence of PW-9 Dr. D.U.Pathak and PW-12 Dr.A.K.Jain.

17. The presence of PW-11 Mahesh Kumar Koshta at the scene of crime is also corroborated by the evidence of PW-6 Ghanshyam who is the witness of subsequent event. At Paragraph-7 of his statement this witness has said that upon hearing scuffling sounds he reached at the place of incident and before his arrival his uncle (PW-11 Mahesh Kumar Koshta) was already there. The said statement of this witness PW-6 Ghanshyam has remained unchallenged in his cross-examination. Therefore, the presence of PW-11 Mahesh Kumar Koshta on the spot at the time of incident cannot be disbelieved upon.

18. Learned counsel for the appellants argued that initially the name of PW-11 Mahesh Kumar Koshta was not mentioned in the copy of the charge-sheet/challan papers which was supplied to the appellants. Later on his name was added as a witness in the charge-sheet; therefore, his statement cannot be believed. But we don't find much weightage in the above argument because the name of PW-11 Mahesh Kumar Koshta is

mentioned in the FIR as an eye witness which has been registered just after 20 minutes from the incident.

19. The learned counsel for the appellants further argued that since the injured witnesses PW-2 Ajay Berman and PW-3 Kanju Vishwakarma have turned hostile therefore the prosecution story cannot be believed. But, the said argument is not acceptable as PW-3 Kanju Vishwakarma has categorically admitted in his court statement that he has cordial relations with the appellants and he doesn't want to spoil it which shows that the eye witnesses who have turned hostile are lying just to protect the accused persons to save their friendship. It is also apparent that the FIR was lodged within 20 minutes from the incident and even though PW-2 Ajay Berman has denied having lodged the FIR but has admitted that his sign is on it. The FIR was registered at 8.20 pm and PW-9 Dr. D.U.Pathak has examined PW-2 Ajay Berman and PW-3 Kanju Vishwakarma at about 11.55 pm and found injuries caused by sharp and cutting object. PW-12 Dr. A.K.Jain has also examined PW-2 Ajay Berman and PW-3 Kanju Vishwakarma on the very date of incident i.e. 14.5.2007 and corroborated the prosecution version that injuries of sharp and cutting objects were found on their bodies as described by PW-11 Mahesh Kumar Koshta. Therefore, only on account of the injured witnesses being hostile the entire prosecution case cannot be disbelieved. It is well settled that evidence is to be weighed and not counted. For ascertaining the truth by the court, the number of witnesses is not considered, but the quality of evidence is

taken into a note. The testimony of the sole witness is sufficient to convict the accused provided he is wholly reliable.

20. In the case of *State Through PS Lodhi Colony, New Delhi Vs. Sanjeev Nanda* reported in AIR 2012 SC 3104, it has been held by the Apex Court that; “We cannot, however, close our eyes to the disturbing fact that even the injured witness, who was present on the spot, turned hostile. Further in the case of *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1 and in *Zahira Habibullah Shaikh (5) v. State of Gujarat*, (2006) 3 SCC 374 it has been observed that; “Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation.”

21. The next argument of the learned counsel for the appellants is that the Doctor (PW-17 Arun Jain) who conducted the post-mortem of deceased has not stated that the injuries to the deceased were sufficient to cause his death; therefore, no case under section 302/34 of IPC is made out. However, we do not agree with him as it is an accepted principle that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. The value of medical evidence is only corroborative; it proves that the injuries could have been caused in the manner as alleged and nothing

more. In this case it has been proved by the testimony of eye witness that the appellants inflicted injuries upon the deceased by sharp and cutting weapons. The deceased suffered 4 incised wounds on account of the assault as described earlier. PW-17 Dr.Arun Jain has opined that the death of Naresh Koshta was on account of hemorrhagic shock caused by excessive bleeding from the said injuries. Therefore, the connection between the injuries caused by the appellants and the death of Naresh Koshta is established. The defence has not proved that such injuries were caused on account of some other reasons. Thus it is also proved that the death of deceased was homicidal in nature and was caused by the appellants only.

22. Consequently, as discussed above the impugned judgment and order is found to be in accordance with facts and law and there is no reason to interfere with the said judgment and order.

23. In view of above, the appeal is found to be without substance, hence, **dismissed**.

24. The appellant No.2 Rahul and appellant No.3 Raju are on bail. Their bail bonds stand cancelled. They are directed to surrender forth with before the trial court and the trial Court shall send them to jail for serving out remaining part of their jail sentence, in accordance with law.

25. As far as appellant No.1 Roshan is concerned, as per Jail report dated 10.04.2021 he is in jail and has completed 11 years, 3 months and 7 days of imprisonment on the said date.

26. However, we make it clear that dismissal of this appeal shall not come in the way of State Government to exercise its discretion for granting remission to the appellants as and when the state feels it just and proper.

(Atul Sreedharan)
Judge

(Sunita Yadav)
Judge

SM