IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

JUSTICE SUJOY PAUL
&
JUSTICE AMAR NATH (KESHARWANI)
ON THE 13th MARCH, 2023
CRIMINAL APPEAL No. 1854 OF 2012

BETWEEN :-

1- MADHAV PAW S/O SHRI DADNU PAW, AGED ABOUT 64 YEARS, R/O VILLAGE GHORBANDHA POLICE STATION-KOTMA, DISTRICT-ANUPPUR (MADHYA PRADESH)

2- MANDAL PAW S/O SHRI DADNU PAW, AGED ABOUT 54 YEARS, R/O VILLAGE GHORBANDHA POLICE STATION-KOTMA, DISTRICT-ANUPPUR (MADHYA PRADESH)

3- AMRIKA PAW S/O SHRI MADHAV PAW, AGED ABOUT 35 YEARS, R/O VILLAGE GHORBANDHA POLICE STATION-KOTMA, DISTRICT-ANUPPUR (MADHYA PRADESH)

4- SMT. MUNNI BAI W/O AMRIKA PAW, AGED ABOUT 30 YEARS, R/O VILLAGE GHORBANDHA POLICE STATION-KOTMA, DISTRICT-ANUPPUR (MADHYA PRADESH)

……...APPELLANTS

(SHRI KHALID NOOR FAKHRUDDIN- ADVOCATE FOR THE APPELLANTS)

AND

THE STATE OF MADHYA PRADESH THROUGH POLICE STATION NARSINGHPUR (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI S.K. KASHYAP- GOVERNMENT ADVOCATE)

This Criminal Appeal coming on for hearing this day, ***Justice Sujoy Paul*** *passed the following :-*

J U D G M E N T

This criminal appeal filed under Section 374(2) of Criminal Procedure Code mounts challenge to the judgment dated 24-07-2012 passed in Sessions Case No. 235/2009 decided by learned Additional Sessions Judge, Anuppur whereby four accused persons were held guilty for committing offence under Section 148 of I.P.C. and Section 302 of IPC read with Sections 149 of IPC (two counts) and directed to undergo sentence as under :-

Convicted under Sections	Sentenced to undergo
148 of the IPC	R.I. for 3 years
302 read with 149 of IPC (on two counts) for murdering Toran Paw and Munna Paw.	Life imprisonment and fine of Rs.100/- R.I. for 6 months (on each count).
With the direction that all the sentences shall run concurrently	

2. At the outset, it is relevant to mention here that during the pendency of this appeal vide order dated 12-05-2015 and order dated 13-03-2023, the name of appellant No. 1- Madhav Paw and appellant No. 2- Mandal Paw were directed to be deleted. Thus, this appeal survives only for appellant Nos. 3 and 4.

3. Admittedly, the appellant No. 3-Amrika Paw is in actual custody for more than 14 years and 2 months whereas his wife appellant No. 4-Munni Bai got benefit of suspension of sentence on 14-12-2012.

4. In short, the case of the prosecution is that there was a land dispute between the appellants and the other side. On 18-06-2008, Toran Paw and Munna Paw left their house at around 6:00 A.M to cultivate the disputed land. The appellants reached the place of incident and a sudden quarrel had taken place, because of which, the appellants caused multiple injuries to Toran Paw and Munna Paw. As per the prosecution story, '*lathi*' and '*tangi*' were used to assault Toran Paw and Munna Paw.

5. The appellant No. 4, as per the prosecution story, was standing at the scene of crime and was using abusive words. Kunwar Paw (PW-4) is an eye- witness, who reached the place of incident. Toran Paw and Munna Paw succumbed to the injuries.

6. The Sarpanch of the village namely Indrapal lodged the '*Merg*'. Intimation/First Information Report. Both the dead bodies were subjected to post-mortem. The post-mortem reports are Ex.P/11 and Ex. P/12. The statements of Madhav Paw, Mandal Paw and Amrika Paw were recorded and on the basis of their memorandums recorded under Section 27 of Indian Evidence Act, a '*tangi*' was recovered from Mandal Paw and a '*lathi*' was recovered from appellant No. 3- Amrika Paw. Appellants were arrested. The weapons were seized and sent to Forensic Science Laboratory (FSL). After investigation, challan was filed. In due course, the matter was committed and came before the

learned Sessions Judge. The appellants abjured the guilt and prayed for full-fledged trial.

7. The Court below framed six points for its determination. After recording the evidence and hearing the parties, the impugned judgment has been passed convicting the appellants for committing offences under Sections 148 and Section 302 read with Section 149 of I.P.C (two counts).

Contention of appellants :-

8. Shri Khalid Noor Fakhruddin, learned counsel for the appellants submits that Kunwar Singh (PW-4) is the alleged eye-witness. In addition, this witness deposed that Munna before his death informed him that all the five accused persons assaulted him. However, the Court below has not given any finding whether this oral dying declaration is trustworthy or not. Thus, oral dying declaration cannot be pressed into service. Moreso, when Sarpanch Indrapal (PW-1) has categorically deposed that when he received the information from various villagers, he gathered that because of assault both the injured persons who later-on died were unable to speak. This contention of appellants was specifically raised and recorded by Court below in Paras 49 and 50 of the judgment but Court below has not given any finding on this contention/argument of the appellants. Thus, there is no finding in this regard in the impugned judgment that oral dying declaration given to Kunwar Singh (PW-4) is trustworthy.

9. It is submitted that Amratlal (PW-6) is son of deceased Toran. In his deposition, he categorically admitted that land in question wherein

incident had taken place was subject matter of dispute between the appellants and the deceased person. Tahsil Court gave judgment in favour of the appellants. Thus, it is strenuously argued that the land belongs to the appellants, but deceased and their companions were forcibly trying to cultivate the land of the appellants. When appellants raised objection, a sudden quarrel without there being any premeditation had taken place. Thus, element of 'motive' or 'intention' is totally absent. To buttress this contention further, Shri Khalid Noor Fakhruddin placed reliance on the statement of Patwari (PW-7) who clearly stated that the disputed land belongs to the appellants and deceased forcibly tried to cultivate the said land.

10. In absence of any 'motive' or 'intention', the Court below has committed an error in holding the appellants as guilty. The Court below has failed to see that because of the sudden fight between the parties which may be termed as 'free fight', some of the appellants also received injuries. The injuries were duly described by Dr. O.P. Choudhary (PW-5). The attention of this Court is drawn on Para-8 of his deposition wherein description of injuries on appellant No.4 Munni Bai was given. In a case of this nature, Section 34 or 149 cannot be made applicable.

11. Furthermore, it is submitted that from Munni Bai, no weapon has been recovered. From appellant No.3, a '*lathi*' has been recovered. By taking this Court to the injuries, it is submitted that the major injuries which became reason of death were cut injuries caused by '*Tangi*' and not by '*lathi*'. The individual role of each of the accused person needs

to be seen in a case of this nature where sudden quarrel has taken a dirty shape.

12. So far role of appellant No. 3 is concerned, it is submitted that he was allegedly carrying a '*lathi*'. No '*lathi*' injury became cause of death. The incident is outcome of a sudden outburst because the other side was aggressor and in order to protect the land of appellants (for which there was a judgment in their favour by Tahsil Court) they reached the place of incident. Thus, necessary ingredients for attracting Section 148, 149 and 302 are totally absent. Reliance is placed on a Division Bench judgment of this Court in the case of **Ramesh Vs. State of M.P** reported in **2020(1) MPLJ (Cri.) 7**.

13. It is further submitted that so far appellant No.4 Munni Bai is concerned, eye-witness PW-4 stated that she was standing on a "मेढ़"(divider) and was saying "*maro - maro*". Similarly PW-12 deposed that Munni Bai was standing at a distance with a small child. Shri K.N. Fakhruddin has taken pains to contend that had there been any intention/motive to cause injury or entering into a quarrel, the appellant No.4 would not have carried a small child with her. This itself shows that the incident had taken place suddenly. In nutshell, the argument of the appellants is that the oral dying declarations are not trustworthy and the Court below has also not given any conclusive finding on these oral dying declarations. There is no element of planning/premeditation. In absence of any 'intention' or 'motive' the Court below has committed an error in invoking Section 148/149 of the IPC. The appellants in their own land tried to protect their crop as

well as themselves and this right of self-defence is duly recognised. Reliance is placed on **2015(6) SCC 268 Raj Singh Vs. State of Haryana and Others with connected cases**. In addition, **1998 SCC (Cri.) 906 S.Veayudhan Vs. Krishnan and Others** is relied upon to submit that where aggressor is injured/deceased, the eye-witnesses are close relatives, it is not safe to convict the accused persons under Section 302 of the IPC.

Argument of State :-

14. Shri S. K. Kashyap, learned counsel for the State submits that the Court below has passed the judgment after marshalling the evidence and there is no flaw in the judgment which warrants interference by this Court. The Sarpanch (PW-1) lodged a named FIR promptly. The contents of FIR were duly corroborated by various prosecution witnesses including eye-witness Kunwar Singh (PW-4). The assault on deceased persons show that it has been done in furtherance of common intention of appellants. He placed heavy reliance on paragraphs 59 and 60 of the impugned judgment.

15. No other point is pressed by learned counsel for the parties.

16. We have heard the parties at length and perused the record.

Findings :-

17. Kunwar Singh (PW-4) is an eye-witness. The Court below in the impugned judgment has treated this witness to be an eye-witness. A careful reading of statement of this witness makes it clear that he is younger brother of deceased Munna, whereas deceased Toran was his

uncle. Thus, appellants and deceased persons were close relatives. This witness clearly deposed that he had seen the incident from a distance and accused persons were assaulting the deceased persons by means of *lathi* and other materials which they were carrying. He has not mentioned the specific role of each of appellants. However, in para-2 of his deposition, he stated that deceased Munna informed him that all the five accused persons assaulted him. In the same para, he deposed that appellant No.4 was standing on the "मेढ़" (divider) of the agricultural field and was saying '*maro - maro*'. This witness further admitted that in relation to land in question, there was a land dispute and same was decided by Tahsil Court of Jaitpur. He also admitted that there was a previous enmity based on the said land dispute between the parties.

18. So far question of oral dying declaration is concerned, the parties have taken diametrically opposite stand on the question of findings given by this Court regarding oral dying declaration. Thus, this is a ponderable point for us. In para-30, the Court below has mentioned about oral dying declaration. A careful reading of paras-30 & 31 shows that the learned Court below has only mentioned and discussed the evidence relating to oral dying declaration.

19. A microscopic reading of above two paragraphs makes it clear that there exists no finding/conclusion in the impugned judgment, whether Court below accepted the said oral dying declaration as trustworthy. Indeed, the further paragraphs i.e. 49 & 50 shows that the Court below has devoted both the paragraphs on the question of oral

dying declaration and reproduced the contention of learned counsel for accused persons. Thereafter, the Court below has not given any finding whatsoever whether the said contention of appellants' counsel is trustworthy or not. Thus, we find substance in the argument of Shri Fakhruddin, learned counsel for the appellant that there is no conclusive finding given by the Court below regarding any oral dying declaration. Thus, conviction of appellants cannot get a stamp of approval on the basis of any oral dying declaration.

20. The statement of Dr. O.P.Choudhary (PW-5) clearly shows that Munni Bai received certain injuries in the fight between the parties. The relevant portion of his deposition describing injuries on Munni Bai is as under :-

> " .....मुन्नी बाई पत्नी अमेरीका उम्र–25 वर्ष निवासी घोरबंध को मेडिकल परीक्षण हेतु लाया गया जिसके जॉच करने पर निम्नलिखित चोटे पाई गई :–
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> 1. 1 इंच x आधा इंच x मास कें गहराई तक एक फटी हुई चोट दाए अंगूठे पर मौजूद थी जिसमें जमा हुआ खून मौजूद था । 2. 1 इंच x 1 इंच आकार का एक छिली हुई चोट दाये कान के पीछे वाले भाग पर मौजूद थी । 3. 1 सेमी0 x आधा सेमी0 आकार की एक छिली हुई चोट बाये पाव में मौजूद थी।
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> 9. अभिमत :– मेरे राय के अनुसार उक्त चोटें सख्त एवं बोथरे हथियार के द्वारा पहुचाई गई थी, एक से दो दिन की ये सभी चोटे थी। चोटें साधारण प्रकृति की थी । मेरी रिपोर्ट प्रदर्श पी0–13 है जिसके ए से ए भाग पर मेरे हस्ता0 है।"

A conjoint reading of statements of prosecution witnesses leaves no room for any doubt that there was a civil dispute between the parties relating to the disputed land on which incident had taken place. A conjoint reading of statements of Amratlal (PW-6), son of deceased

Toran and Patwari (PW-7) show that land on which incident had taken place was of the appellants and it was forcibly cultivated by the deceased persons because of which a sudden quarrel had taken place. Thus, ancillary question is whether in a case of this nature, where a sudden quarrel took place in spur of moment without there being any pre-meditation, principle of vicarious liability can be pressed into service. It is profitable to consider certain judgments which are as under :-

21. Supreme Court in the case of **Puran v. State of Rajasthan, (1976) 1 SCC 28 held as under :-**

> **"4.** Now, two important circumstances clearly emerge from the evidence and they are based on concurrent findings of fact recorded by the learned Additional Sessions Judge as well as the High Court. First, this was a case of sudden mutual fight between the parties and there could, therefore, be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on the appellant. The appellant could be convicted only for the injuries caused by him by his individual acts."
>
> **(Emphasis Supplied)**

22. In the case of **Lalji v. State of U.P., (1974) 3 SCC 295 Apex Court has held as under :-**

> **"10.** The circumstances of the case show that lathis were then wielded by the appellants, other than Lalji, not with a view to enforce any right or supposed right in respect of the water channel but because of the fact that a fight had started and the complainant's party was found to be armed. As

there was no premeditation and the occurrence was a sudden affair, each of the appellants, in our opinion, should be held to be liable for his individual act and not vicariously liable for the acts of others."

(Emphasis Supplied)

23. Apex Court in para-7 of the judgment of **Ishwar Singh v. State of U.P., (1976) 4 SCC 355** was of the view that **:-**

"7. Having regard to the injuries sustained by some of the prosecution witnesses and also by two of the accused, it seems that there was a free fight between the two sides. The defence version of the occurrence may not also be quite true, but considering all the circumstances we do not think it is possible to say with any certainty that the accused were the aggressors though undoubtedly the prosecution side got the worse of it after the fight was started. If really the accused were not the aggressors, no case either under Section 147 or Section 148 of the Penal Code can be maintained against them, and then it is for the prosecution to prove the individual assaults of which there is no evidence. The conviction of appellants Ilam Singh, Harpal, Brahm Singh and Deep Chand under Section 326, Section 324 and Section 323 of the Penal Code, founded against each of them on the basis of Section 149 of the Code, is not therefore sustainable."

(Emphasis Supplied)

24. Judgment delivered in **State of Rajasthan v. Shiv Charan, (2013) 12 SCC 76** can be relied upon wherein Supreme Court opined as under **:-**

19. The pivotal question of applicability of Section 149 IPC has its foundation on constructive liability which is the sine qua non for its application. It contains essentially only two ingredients, namely, (I) offence committed by any member of any unlawful assembly consisting five or more members and; (II) such offence must be committed in prosecution of the common object (Section 141 IPC) of the assembly **or** members of that assembly knew to be likely to be committed in prosecution of the common object. It is not necessary that for common object there should be a prior concert as the common object may be formed on the spur of the moment. Common object would mean the purpose or design shared by all members of such assembly and it may be formed at any stage. Even if the offence committed is not in direct prosecution of the common object of the unlawful assembly, it may yet fall under the second part of Section 149 IPC if it is established that the offence was such, as the members knew, was likely to be committed. For instance, if a body of persons go armed to take forcible possession of the land, it may be presumed that someone is likely to be killed, and all the members of the unlawful assembly must be aware of that likelihood and, thus, each of them can be held guilty of the offence punishable under Section 149 IPC. The court must keep in mind the distinction between the two parts of Section 149 IPC, and, once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be

convicted for vicarious liability. However, it may be relevant to determine whether the assembly consists of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain the common object of the assembly. However, it is only the rule of caution and not the rule of law. **Thus, a mere presence or association with other members alone does not per se be sufficient to hold every one of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act, being a member of unlawful assembly as provided for under Section 142 IPC. It may also not be a case of group rivalry or sudden or free fight or an act** of the member of unlawful assembly beyond the common object. (Vide Baladin v. State of U.P. [AIR 1956 SC 181 : 1956 Cri LJ 345], Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226], Chandra BihariGautam v. State of Bihar [(2002) 9 SCC 208 : 2003 SCC (Cri) 1178 : AIR 2002 SC 1836], Ramesh v. State of Haryana [(2010) 13 SCC 409 : (2011) 1 SCC (Cri) 1176 : AIR 2011 SC 169], Ramachandran v. State of Kerala [(2011) 9 SCC 257 : (2011) 3 SCC (Cri) 677 : AIR 2011 SC 3581] , Onkar v. State of U.P. [(2012) 2 SCC 273 : (2012) 1 SCC (Cri) 646] , Roy Fernandes v. State of Goa [(2012) 3 SCC 221 : (2012) 2 SCC (Cri) 111] and Krishnappa v. State of Karnataka [(2012) 11 SCC 237 : (2013) 1 SCC (Cri) 621] .)

(Emphasis Supplied)

25. Supreme Court in the case of **Kanwarlal v. State of M.P., (2002) 7 SCC 152** was of the view that **:-**

> **"7.** The High Court has also noticed that PWs 1, 7 and 16 also received injuries in the incident. However, there was no specific evidence as to which of the accused caused these injuries; it is admitted by the witnesses that the stones were pelted from both the sides and injuries to these persons were caused by pelting of stones; it appears that there was some kind of free fight on the spot between the two parties; so unless it was shown that a particular accused caused these injuries, no one can be held responsible by taking recourse to Section 149 IPC."
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> **(Emphasis Supplied)**

26. In **(1980) 3 SCC 68 (Mariadasan VS. State of T.N.), (1996) 8 SCC 678 (State of Haryana Vs. Chandvir), (1996) 11 SCC 72 (State of Punjab Vs. Sarwan Singh) and (2011) 12 SCC 235 (Raghubir Singh Vs. State of Rajasthan)** the Supreme Court has taken a similar view.

27. In view of *ratio decidendi* of these judgments, neither Section 34 nor 149 of IPC can be pressed into service and role of each of the appellants needs to be examined to consider the question of conviction and sentence.

28. So far appellant No.3 is concerned, he allegedly caused *lathi* injury. The incident had taken place suddenly. The right of self-defence is also a factor, which needs to be considered because on the land of the appellants (for which there was a judgment of Tahsil Court in their favour), the deceased persons went there and tried to cultivate

the land. In order to stop them, sudden quarrel and unfortunate incident had taken place, in which some of the appellants were also injured. Thus, Section 34 or Section 149 of IPC cannot be pressed into service.

29. The witnesses could not establish with accuracy and precision about the nature of injury caused by appellant No.3 by means of '*lathi'*. The severe/grievous injury were caused by means of '*Tangi'*.

30. Considering the nature of incident, in our opinion, it will not be safe to give stamp of approval to the conviction of appellant No.3 under Section 148 and Section 302 read with Section 149 of IPC.

31. In view of above discussion, we deem it proper to modify the conviction of appellant No.3 under Section 304 Part-I of IPC with sentence of 10 years (2 counts). Since appellant No.3 has already undergone the said sentence he be released forthwith, if his presence is not required in any other matter.

32. Appellant No. 4 Munni Bai was standing with a small child as per the version of PW-12 whereas PW-4 deposed that she was standing at a far-off place and was shouting '*maro-maro*'. Thus, there is a glaring contradiction in the testimony of above witnesses which does not inspire confidence. She has not used any force nor used any weapon whatsoever. Her individual role does not bring her overt act within the ambit of Section 302 of IPC. Admittedly, Munni Bai received certain injuries which were clearly mentioned by Dr. O.P. Choudhary. Thus, we are unable to approve the conviction of Munni Bai under Section 148 and Section 302 read with Section 149 of IPC. She deserves to be acquitted by this Court.

33. Resultantly, the impugned judgment dated 24.07.2012 passed in Sessions Case No.235/2009 is modified to the extent it relates to appellant No.3 Amrika Paw. In place of conviction under Section 148, 302 read with Section 149 of IPC, he shall be treated to be convicted under Section 304 Part- I and shall be required to undergo sentence of 10 years (two counts) concurrently. If he has already undergone the said sentence and his presence is not required in the prison for any other offence, he be released *forthwith*.

34. The impugned judgment dated 24.07.2012 passed in ST No. 235/2009 is set aside to the extent it relates to conviction and sentence of appellant No. 4 Munni Bai.

35. Appeal is **partly allowed** to the extent indicated above.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE

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