

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE ACHAL KUMAR PALIWAL
ON THE 12th OF JUNE 2023
CRIMINAL APPEAL No. 2049 OF 2012

BETWEEN :-

1. BABULAL DHEEMER S/O KAMTA
RAIKWAR AGED ABOUT 55 YEARS
(DEAD)
2. ASHOK RAIKWAR S/O BADLI
RAIKWAR, AGED ABOUT 41 YEARS.
3. RAMKUMAR S/O BABULAL
RAIKWAR, AGED ABOUT 32 YEARS.
4. RAKESH S/O BABULAL RAIKWAR,
AGED ABOUT 26 YEARS.

ALL R/O VILLAGE CHHOTAPOHA, P.S.
NIWARI, DISTRICT TIKAMGARH (MP)

..APPELLANTS

(BY SHRI R.S. PATEL - ADVOCATE)

AND

STATE OF MADHYA PRADESH,
THROUGH STATION HOUSE NIWARI,
DISTRICT TIKAMGARH (MP)

....RESPONDENT

(BY SHRI ARVIND SINGH - GOVERNMENT ADVOCATE)

This criminal appeal coming on for final 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 the Code of Criminal Procedure, 1973 (In short 'Cr.P.C') takes exception to the judgment dated 30.08.2012 passed in Sessions Trial No.255/10 by the learned 4th Additional Sessions Judge, Tikamgarh whereby the appellants were held guilty for committing certain offences and directed to undergo sentences which are mentioned in a chart as under:-

Conviction under Section	Sentenced to undergo
302/149 of I.P.C.	Imprisonment for Life and fine of Rs.1,000/-, in default to suffer R.I. for six months.
323/149 (two counts) of I.P.C.	R.I. for six months and fine of Rs.200/-, in default to suffer R.I. for one month (on each count).
148 of I.P.C.	R.I. for one year and fine of Rs.500/-, in default to suffer R.I. for two months.
342/149 of I.P.C.	R.I. for six months and fine of Rs.200/-, in default to suffer R.I. for one month.
With the direction that all the sentences shall run concurrently.	

2. In short, the case of the prosecution is that on 18.07.2010 the complainant Swami Prasad Dheemar (deceased) was traveling on his bicycle to his village Chhotapoha. Soon he reached in front of the house of Babulal Dheemar, Ashok Dheemar and Babulal Dheemar caught hold of him and forcibly took him inside their house, closed the

door and thereafter all the appellants/accused persons started assaulting him by means of *lathi*, *luhingi* etc. The complainant shouted for help and upon hearing his cry, Kailash Raikwar (PW/1) and Ram Singh Raikwar (PW/2) reached to the place of the incident. PW/1 and PW/2 knocked the door of Babulal and asked him to open the door. The family members of Babulal (since deceased) did not open the door and they started abusing PW/1 and PW/2 from inside and also started throwing stones/bricks from inside.

3. The aforesaid prosecution witnesses, left with no option, informed the police and in turn, police reached the scene of crime. At police's instance, the doors of the said house were opened and both the witnesses found that complainant Swami Prasad was lying on the courtyard of the house of Babulal Dheemar in injured condition.

4. Indisputably, in the instant case the FIR was lodged on 18.07.2010 (Ex.P/25) by the victim Swami Prasad himself at 20.30 o'clock. He died on the same day.

5. The police after conducting the investigation, filed the charge-sheet. In turn, the matter travelled before the Sessions Court. All the appellants abjured the guilt and pleaded innocence.

6. The Court below framed six questions for its determination and recorded statements of 13 prosecution witnesses and 5 defence witnesses. After recording the evidence, by impugned judgment, the Court below held the appellants as guilty for committing offence and directed them to undergo the sentence as mentioned in Para -1 above.

Contention of appellants:-

7. Shri R.S. Patel, learned counsel for the appellants submits that during the pendency of this appeal, appellant Babulal Dheemar died. Appellant Nos.2, 3 and 4 are family members of Babulal. It is submitted that the FIR was lodged by Swami Prasad on 18.7.2010. The FIR was recorded by A.S.I. Pheran Singh Rajput. Since Pheran Singh Rajput died during the pendency of trial, he could not enter the witness box. Learned counsel for the appellants submits that in absence of his deposition, appellant could not cross-examine him regarding fitness of Sami Prasad who lodged the FIR. In addition, it is argued that when MLC was recorded by Dr. Vinod Bajpai (PW-12), he clearly admitted in para-18 that at the time of preparation of MLC, Swami Prasad Dheemar was not in a fully conscious state. Only his eyes were moving but he was not totally conscious.

8. Considering the aforesaid, it is submitted that there is no material to show that when FIR was lodged by Swami Prasad, he was in a fit state of mind to lodge the FIR. For this reason, appellants deserve acquittal as there is no material on the strength of which the FIR can be treated to be a dying declaration.

9. Shri R.S. Patel, Advocate confined his arguments to the extent indicated hereinabove.

Stand of prosecution :-

10. Shri Arvind Singh, learned G.A. for the State supported the impugned judgment by submitting that the Court below has considered the evidence on the basis of permissible parameters. There are many eye-witnesses to the incident, whose statements will show

that they have stated about the 'oral dying declaration' given by Swami Prasad to them. In view of the incident, the Court below has rightly convicted the appellants and sentenced the appellants.

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

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

Findings :-

13. The body of Swami Prasad was found inside the house of the appellants on 18.07.2010. On the date of incident itself, Swami Prasad lodged the FIR in the police station. The two important eye-witnesses entered the witness box in support of the prosecution story. Firstly, Kailash Raikwar (PW-1) categorically deposed that when he heard the cry of Swami Prasad for help, he immediately rushed to the place of incident and found the door of the house of Babulal locked from inside and Swami Prasad was crying for help from inside the said house. He knocked the door and made several requests to the appellants to open the door but the door was not opened. In turn, he called the police and only police could open the door of the house of Babulal. Inside the house, in the courtyard of appellants' house, Swami Prasad was lying in an injured condition.

14. This witness Kailash Raikwar (PW-1) categorically deposed that upon asking, Swami Prasad informed him that Babulal, Ashok, Rakesh, Chhotu and Ram Kumar had assaulted him by means of *Lathi* and *Luhangi*.

15. Ram Singh (PW-2) deposed his statement in the same line in which statement of Kailash Raikwar (PW-1) was recorded. His statement also shows that there exists an oral dying declaration wherein Swami Prasad informed him about the nature of incident, the weapons used and the assault made by the aforesaid accused persons. The above statements of PW-1 and PW-2 could not be demolished during cross-examination.

16. The statements of these two eye-witnesses were further supported by Raj Kumar (PW-3) and Sewak Raikwar (PW-5). Raj Kumar (PW-3) has taken a different view about overt act of appellant No.2-Ashok Raikwar. Otherwise rest of his statement about the overt act of other appellants is in tune with the statement of Sewak Raikwar (PW-5). A cumulative reading of statements of eye-witnesses namely Kailash Raikwar (PW-1), Ram Singh Raikwar (PW-2), Rajkumar (PW-3) and Sewak Raikwar (PW-5) makes it clear that all of them have mentioned about the role of appellants with utmost clarity. Beni Bai (PW-4) also deposed that Swami Prasad was assaulted by appellants by means of axe and *Lathi*. The appellants did not open the door of their house, instead they started pelting stones on this witness. The door could be opened only when police made efforts and at that point of time, he found the body of his grandfather lying at the courtyard of their house.

17. The statement of Prafull Shrivastava, Sub-Inspector (PW-13) contains a note (appended by the Court) wherein it is mentioned that ASI, Pheran Singh Rajput who recorded the FIR is no more. In para-8 of this statement. the witness clearly deposed that the FIR was indeed

lodged by ASI, Pheran Singh Rajput. This police officer produced the FIR from official custody and identified the signature of his fellow employee ASI, Pheran Singh. No amount of cross-examination could demolish this statement and therefore, we find no reason to disbelieve the genuineness of the FIR. We are unable to persuade ourselves with the line of argument of Shri R.S. Patel, Advocate that FIR cannot be believed because the person who has recorded it was not produced in the Court. Non-production of the said witness because of his death, has not caused any prejudice to the appellant. Moreso, when averments of the FIR find support by statements of two eye-witnesses namely Kailash Raikwar (PW-1) and Ram Singh Raikwar (PW-2).

18. It is noteworthy that in **AIR 1999 SC 3361 (Jaiprakash Vs. State)** the statement of deceased was recorded in the nature of a complaint by the police officer in the hospital. The said statement was lateron treated as dying declaration. The Apex Court opined that failure to obtain certificate of mental fitness from the Doctor was inconsequential. In view of this judgment, the argument of Shri R.S. Patel, learned counsel for the appellant regarding the aspect of fitness of Swami Prasad at the time of lodging of FIR must fail.

19. A document is admissible under Section 35 of the Indian Evidence Act if following conditions are satisfied:

- (i) It should be in the nature of entry in any public or official register;
- (ii) It must state fact in issue or relevant fact;
- (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in

performance of duty specially enjoined by the law of the country, and

- (iv) all persons concerned indisputably must have an access thereto.

[See : AIR 2006 SC 2157 (Ravinder Singh Gorkhi Vs. State of U.P.)]

20. This view is consistently followed by the Supreme Court in catena of judgments (See: AIR 1983 SC 684 (**State of Bihar Vs. Radha Krishna Singh**), AIR 1982 SC 1057 (**Umesh Chandra Vs. State of Rajasthan**), AIR 2011 SC 1691 (**Murugan Vs. State of T.N.**) and AIR 2010 SC 2933 **Madan Mohan Singh Vs. Rajni Kant.**)

21. So far probative value of the document / FIR or contents thereof are concerned, suffice it to say that *in the peculiar facts and circumstances of this case*, two eye-witnesses Kailash Raikwar (PW-1) and Ram Singh Raikwar (PW-2) have categorically deposed about oral dying declaration given to them by Swami Prasad wherein role of present appellants was made clear. Thus, FIR cannot be disbelieved nor its probative value can be questioned.

22. In view of foregoing analysis, in our opinion, the FIR must be treated as a 'dying declaration'. The FIR clearly shows that because of previous enmity relating to land, Swami Prasad was assaulted by the accused persons. Thus, there existed a motive for assaulting Swami Prasad. The incident is an outcome of a pre-meditation. It is not outcome of any sudden quarrel. Indeed, the appellants with clear understanding and planning has forcibly taken Swami Prasad inside their house, locked the house from inside and assaulted him on various

parts of his body. The injuries found on the person of deceased as per autopsy report is as under:

- “चोट क्र. 1 एक छिलन 3x1 से.मी. दाहिने टांग के उपरी हिस्से पर।
चोट क्र. 2 एक फटा हुआ घाव 1x1/2x1/2 से.मी. दाहिने टांग के निचले हिस्से पर।
चोट क्र. 3 दाहिने टांग के निचले हिस्से का आकार बिगड़ा हुआ था। असामान्य रूप से मुड रहा था।
चोट क्र. 4 एक फटा हुआ घाव 2x1/2x1/2 से.मी. बांये टांग के निचले हिस्से पर।
चोट क्र. 5 एक फटा हुआ घाव 1x1/2x1/2 से.मी. बांए टांग के निचले हिस्से पर।
चोट क्र. 6 एक छिलन 3x2 से.मी. बांये कोहनी के पिछले हिस्से पर।
चोट क्र. 7 एक छिलन 02x02 से.मी. बांये कोहनी के पिछले हिस्से पर।
चोट क्र. 8 एक फटा हुआ घाव 3x1/2x1/2 से.मी. निचले होठ के अंदर के हिस्से पर।

उक्त सभी चोटे सख्त व भौतरे हथियार की थी व 06 घंटे के अंदर की थी। चोट नं. 1, 2, 3, 4 एवं 5 के लिए एक्सरे की सलाह दी थी। चोट नं. 6, 7 व 8 साधारण थी। मरीज को आगे हेतु मेडीकल कॉलेज जाने की सलाह दी थी। उसकी परीक्षण रिपोर्ट प्र.पी.-21 है। जिसके ए से ए भाग पर उसके हस्ताक्षर है।

- 19— डॉ. विनोद बाजपेई (अ0सा0-12) ने अपने न्यायालीन कथन में यह भी बतलाया कि दिनांक 19.07.10 को सैनिक काशीराम क्र. 302 थाना निवाड़ी द्वारा स्वामीप्रसाद पुत्र चैने रैकवार के शव को परीक्षण हेतु लाया था उसके द्वारा शव का परीक्षण निम्नानुसार किया गया था :-

बाह्य परीक्षण :-शरीर सीधा रखा हुआ था शरीर पर जगडन थी। सफेद शर्ट, लाल अंडरबियर था आंखे खुलीइ थीं मुंह आधा खुला था जीभ दांतो के भीतर थी।

मृतक के शरीर पर निम्न चोटें थी।

- चोट क्र. 1 एक छिलन 3x1 से.मी. दाहिने टांग के उपरी हिस्से पर।

- चोट क्र. 2 एक फटा हुआ घाव 1X1/2X1/2 से.मी. दाहिने टांग के निचले हिस्से पर।
- चोट क्र. 3 दाहिने टांग के निचले हिस्से का आकार बिगड़ा हुआ था। असामान्य रूप से मुड़ रहा था।
- चोट क्र. 4 एक फटा हुआ घाव 2X1/2X1/2 से.मी. बांये टांग के निचले हिस्से पर।
- चोट क्र. 5 एक फटा हुआ घाव 1X1/2X1/2 से.मी. बाएं टांग के निचले हिस्से पर।
- चोट क्र. 6 एक छिलन 3X2 से.मी. बांये कोहनी के पिछले हिस्से पर।
- चोट क्र. 7 एक छिलन 02X02 से.मी. बांये कोहनी के पिछले हिस्से पर।
- चोट क्र. 8 एक फटा हुआ घाव 3X1/2X1/2 से.मी. निचले होठ के अंदर के हिस्से पर।
- उक्त सभी चोटें मृत्यु पूर्व की थीं व सख्त व भौतरे हथियार से पहुंचायी गयी थी।

आंतरिक परीक्षण :- छाती की 6वीं 7वीं दाहिने व बाईं पसलियां टूटी हुयी थी। दाहिना व बाएं फेफडा कटे फटे थे। छाती पर दोनों तरफ खून भरा था। पेट के अंदर अधपचा भोज्य पदार्थ था। दाहिनी टिबियाफिबुला अस्थि टूटी हुयी थी।”

23. A plain reading of nature of injuries shows that there were multiple injuries on the person of deceased and cause of death was excessive bleeding. As per the autopsy report (Ext-P/22), Swami Prasad died due to injuries in his lungs and excessive bleeding. It was clearly established that the death is homicidal in nature.

24. In view of the aforesaid discussion, it is clear that the appellants with common object assaulted Swami Prasad, because of which, he died. Thus, on the basis of evidence on record, in our opinion, the prosecution could establish its case beyond reasonable doubt. The Court below has appreciated the evidence on the basis of permissible

parameters. No perversity or illegality could be pointed out. In appellate jurisdiction, if Court below has taken a plausible view, this Court is not obliged to interfere in the judgment.

25. Accordingly, we find no reason to interfere in the impugned judgment. Resultantly, the judgment dated 30.08.2012 is affirmed. The appeal is **dismissed**.

(SUJOY PAUL)
JUDGE

(ACHAL KUMAR PALIWAL)
JUDGE