

UMA SHANKAR GAUTAM
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No.1451 of 2009)

DECEMBER 9, 2014.

[V. GOPALA GOWDA AND C. NAGAPPAN, JJ.]

Penal Code, 1860 – s.147 and 302/149 – Prosecution under – Of six accused – Conviction by trial court – High Court confirmed conviction of 3 accused, acquitted 2 accused and case against one accused stood abated – Appeal by accused No. 1 – Plea of acquittal on parity with the acquitted accused – Held: It is always open to the court to distinguish the case of acquitted accused with the convicted ones – High Court rightly declined to acquit accused No. 1 on the principle of parity.

Dismissing the appeal, the Court

HELD: 1. The High Court has given benefit of doubt by acquitting accused Nos. 5 and 6 on the ground that no injury of lathi was found on the person of the deceased and the names of accused Nos. 5 and 6 were not mentioned in FIR and they could have been falsely implicated later on account of enmity. The High Court had elaborately considered the role and overt act of appellant/ accused No. 1 and held that his presence stood established not only by the ocular testimony but also in the first intimation, his name is specifically mentioned and concluded that he was sharing common intention with accused Nos. 3 and 4, who were armed with *barchhi* and *farsa* respectively and confirmed their conviction and sentence. [Para 11] [403-B-E]

2. The appellant-accused No. 1 cannot be acquitted

A on parity with accused Nos. 5 and 6. It is always open to the Court to differentiate the accused who had been acquitted from those who had been convicted. The High Court rightly declined to acquit the appellant on the principle of parity. [Paras 12 and 13] [403-F-G; 404-C]

B *Gangadhar Behera Vs. State of Orissa (2002) 8 SCC 381: 2002 (3) Suppl. SCR 183 – relied on.*

Case Law Reference:

C 2002 (3) Suppl. SCR 183 relied on Para 12

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1451 of 2009.

D From the Judgment & Order dated 12.08.2008 of the High Court of Madhya Pradesh in Criminal Appeal No. 1537 of 1998.

Mahavir Singh, Aakriti Dawar (A.C.) Kuldip Singh for the Appellant.

E Samir Ali Khan, Aditya Narayan Singh, Mishra Saurabh for the Respondent.

The Judgment of the Court was delivered by

F C. NAGAPPAN, J. 1. This appeal is preferred against the judgment and order dated 12.8.2008 passed by the High Court of Madhya Pradesh at Jabalpur, in Criminal Appeal No.1537 of 1998.

G 2. The appellant herein is accused no.1 and he along with five other accused were tried in Sessions case no.193/1995 on the file of Sessions Judge, District Shahdol and the trial court convicted them for the commission of offences under Section 147 and Section 302 read with Section 149 IPC and sentenced each of them to undergo rigorous imprisonment for one year for the first offence and each of them to undergo H imprisonment for life for second offence. Aggrieved by the

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same all the accused preferred Criminal Appeal no.1537 of 1998 to the High Court of judicature at Jabalpur. During the pendency of appeal appellant no.2/accused no.2 Ramashankar died and the appeal preferred by him stood abated. The High Court confirmed the conviction and sentence of accused no.1 Umashankar, accused no.3 Shivashankar and accused no.4 Gaurishankar and at the same time acquitted accused no.5 Vasudev and accused no.6 Gyandev by allowing the Criminal Appeal in part. Challenging his conviction and sentence, accused no.1 Umashankar has preferred the present appeal.

3. Briefly the case of the prosecution is narrated as follows : PW7 Savitri Bai is the mother of Kalua @ Ramnath and PW9 Usha Bai is his wife. On 19.7.1995 at about 8-8.30 a.m. the appellant herein/accused no.1 along with five other accused had gone to the house of Nan @ Lakhan situated at village Dindori Tola Bamhani and were hurling abuses in the courtyard. Nan was not in the house at that time and upon hearing the noise Kalua @ Ramnath went to Nan's house. Accused no.3 Shivashankar armed with barchhi, accused no.4 Gaurishankar armed with farsa and accused nos.1,2,5 and 6 armed with lathis attacked Kalua with the said weapons and inflicted injuries on him. PW7 Savitri Bai tried to save his son Kalua and she was also beaten up. PW9 Usha Bai and PW2 Shiv Kumari, mother of Nan, also witnessed the occurrence. After sometime accused no.1 Umashankar and accused no.4 Gaurishankar again came to the occurrence place on motorcycle and accused no.1 Umashankar kicked Kalua and they went away. PW9 Usha Bai went to PW12 Sarpanch Bhaiya Lal and narrated the occurrence. He along with PW4 chowkidar Bisahu Yadav came to the occurrence place and Exh.P-6 intimation report was sent through PW4 Bisahu Yadav to Police Station Anuppur. On receipt of information PW14 sub-Inspector Raghvendra Baghel went to the occurrence place and received Exh.D1 complaint given by PW9 Usha Bai and took up the investigation. He conducted inquest on the body of Kalua and sent it for post mortem examination. He prepared Exh.P-7 map

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A and seized blood stained earth and plain earth from the occurrence place and examined PW2 Shiv Kumari, PW7 Savitri Bai, PW9 Usha Bai, PW12 Bhaiya Lal and some other witnesses and recorded their statements.

B 4. PW13 Dr. P.C. Joshi conducted autopsy on the body of Kalua at 11.45 a.m. on 19.7.1995 and found following injuries

(i) There was a compound fracture at the 1/3rd part of left forearm, which was attached to the skin only.

C (ii) There was compound fracture on the joint of right wrist which was attached with skin only.

(iii) Stab injuries on right forearm 4cm x 3cm which were bone deep.

D (iv) On the right partial part of the head incised wound 4cm x 2cm on the outer side of ear.

(v) One stab wound on the right side of chest.

E (vi) 6 wounds on the left thigh wherein one wound was 4cm x 3 cm, second 6cm x 4cm, 3rd 7cm x 3cm, 4th 5cm x 3cm, 6th 6cm x 2cm and last 4cm x 3cm and all these wounds were muscle deep.

F (vii) 3 stab wounds on the front side of right leg which were muscle deep.

(viii) Stab wound on the right shoulder 4.5cm x 3cm x muscle deep.

G (ix) One stab wound on left infrascapular region 6.5cm x 4cm x muscle deep.

(x) One stab wound on lumber region 3cm x 2cm x muscle deep.

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He expressed opinion that homicidal death has occurred due to hemorrhage from external and internal injuries and issued Exh.P-31 post-mortem report.

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5. PW14 sub-Inspector seized the blood stained clothes of the deceased and sent them for chemical examination. On 22.7.1995 PW14 sub-Inspector arrested all the accused and inquired them and on the information furnished by accused no.3 Shivashankar, barchhi came to be recovered and on the information furnished by accused no.4 Gaurishankar, farsa came to be recovered and on the information furnished independently by the other accused, lathis were recovered by him. He sent the recovered weapons to chemical analysis and after obtaining the Forensic Laboratory report he filed the charge sheet against the accused.

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6. The prosecution examined PWs 1 to 14 and marked the documents. The accused were questioned under Section 313 Cr.P.C. and their answers were recorded. DWs 1 to 5 were examined on the side of defence. The trial court found all the accused guilty of the charges and sentenced them as stated above. On appeal by the accused, the High Court confirmed the conviction and sentence of accused nos.1,3 and 4 and acquitted accused nos.5 and 6. Challenging his conviction and sentence accused no.1 Umashankar has preferred the present appeal.

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7. Mr. Mahabir Singh, learned senior counsel appearing for the appellant, contended that the eye witnesses have not stated that the appellant/accused no.1 caused injury on the hands of deceased Kalua with lathi and the High Court had given the benefit of doubt to accused nos.5 and 6 as no injury of lathi has been found on the person of deceased and on the ground of parity the appellant also deserves to be acquitted. We also heard the similar submission made by Amicus Curiae Ms. Aakriti Dawar on behalf of appellant. Mr. Samir Ali Khan, learned counsel appearing for the respondent State, contended that the presence of the appellant and his overt act against the

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A deceased stood established by ocular testimony and also
intimation report in Exh.P-6 and the High Court in the impugned
judgment has elaborately considered the same and has
confirmed his conviction and the same is sustainable.

B 8. We carefully considered the rival submissions and
perused the record.

C 9. Kalua @ Ramnath suffered 10 injuries in the occurrence
as evident from Exh.P-31 post mortem report and injuries no.1
and 2 mentioned therein are compound fracture on the left
forearm and on the right wrist respectively and the other 8
injuries are stab and incised wounds. PW13 Dr. P.C. Joshi,
who conducted autopsy, had opined that homicidal death has
occurred due to hemorrhage from external and internal injuries
in the post-mortem report. Exh.P-33 Query Memo was sent to
D him on 21.9.1995 with respect to the compound fracture injuries
on the hands and report he has opined that the compound
fracture could have been caused by hard and blunt object
besides a sharp edged weapon. In his testimony before court
as PW13 he has reiterated the said opinion.

E 10. The eye witnesses to the occurrence are PW2 Shiv
Kumari, mother of Nan, PW7 Savitri Bai, mother of the
deceased and PW9 Usha Bai, wife of the deceased. All of them
have testified that accused no.3 armed with barchhi, accused
no.4 armed with farsa and accused nos.1,2,5 and 6 armed with
F lathis attacked Kalua with the said weapons and inflicted
injuries on him. Weapons barchhi and farsa are sharp edged
whereas lathi is hard and blunt. PW7 Savitri Bai has testified
in her testimony in para 15 has stated that lathi injuries were
caused on the leg and waist. PW9 Usha Bai has testified that
G appellant/accused no.1 Umashankar inflicted injury with lathi.
In the cross examination she has stated in para 16 that the lathi
injuries were inflicted on the legs and waist of the deceased.
Referring to the above testimony the High Court has observed
that the said witness has not stated that lathi injuries were
H caused on the hands of the deceased. As per the post mortem

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report both the hands of the deceased were attached with the skin only, rest of the portion found cut and obviously the said injuries were caused by the sharp edged weapons. The fact remains that compound fractures were found on the left forearm and right wrist which as per medical opinion attributable to attack made by hard and blunt object.

11. The High Court has given benefit of doubt by acquitting accused nos.5 and 6 on the ground that no injury of lathi was found on the person of the deceased and the names of accused nos.5 and 6 were not mentioned in Exh.P-6 first intimation report and they could have been falsely implicated later on account of enmity. On the contrary as already seen, there were compound fractures indicative of attack with lathis. Be it may. The High Court had elaborately considered the role and overt act of appellant/accused no.1 Umashankar and held that his presence stood established not only by the ocular testimony but also in the first intimation in Exh.P-6 report his name is specifically mentioned and concluded that he was sharing common intention with accused nos.3 and 4, who were armed with barchhi and farsa respectively and confirmed their conviction and sentence.

12. We do not find any substance in the submission of the learned senior counsel appearing for the appellant that since accused nos.5 and 6 have been acquitted; on the ground parity the appellant herein also deserves to be acquitted. It is always open to the Court to differentiate the accused who had been acquitted from those who had been convicted. The power of the courts to distinguish the cases of one or more of the accused from the other(s) is far too well recognized to need reiteration. Still, we may notice the principle as stated in *Gangadhar Behera Vs. State of Orissa* (2002) 8 SCC 381, wherein this Court observed as follows :

".....Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other

A co-accused persons, his conviction can be maintained. It
is the duty of the court to separate the grain from the chaff.
Where chaff can be separated from the grain, it would be
open to the court to convict an accused notwithstanding
the fact that evidence has been found to be deficient to
B prove guilt of other accused persons.”

C 13. In our view, the High Court applied the said principle
in distinguishing the role of appellant herein from that of
accused no.5 and accused no.6, who have been acquitted. In
other words, the High Court rightly declined to acquit the
appellant herein on the principle of parity. The impugned
judgment does not call for any interference under Article 136
of the Constitution of India. †

D 14. In the result the appeal is dismissed. The bail bond
shall be cancelled and the appellant is directed to surrender
before the Sessions Judge, District Shahdol to serve out the
remaining sentence, failing which the learned Sessions Judge
is requested to take him into custody and send him to jail to
serve his left over sentence.

E Kalpana K. Tripathy

Appeal dismissed.