

BADAL MURMU AND ORS.

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v.

STATE OF WEST BENGAL
(Criminal Appeal No. 1502 of 2004)

FEBRUARY 5, 2014

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**[RANJANA PRAKASH DESAI AND
MADAN B. LOKUR, JJ.]**

Penal Code, 1860: s.302 r/w s.149 - Murder - Assault with lathis leading to death - Two wives of the victim-deceased present at the place of incident where the deceased was called along with PW-7 by accused-appellants, witnessed the incident - PW-7 managed to escape - Deceased was assaulted with lathis which led to his death - Conviction u/ s.302 r/w s.149 by courts below - On appeal, held: The evidence of the prosecution witnesses was truthful and, therefore, rightly relied upon by courts below - However, the evidence on record showed that some of the accused had tangies (sharp cutting weapon) in their hand but they did not use it - All accused were stated to have assaulted the deceased simultaneously with lathis - No individual role was ascribed to any one - Doctor also did not state which injury was fatal - Therefore all the accused cannot be said to be guilty of murder - In peculiar facts, it cannot be held that the accused shared common object to murder the deceased and that in prosecution of that common object they caused his death - It is unusual case where a trivial incident of theft of hen by deceased led to his murder - Accused were poor tribals and have been in jail for 14 years - In the interest of justice, conviction u/s.302 r/w s.149 is set aside and the accused are convicted u/s.304 Part II and the sentence already undergone by them is directed to be treated a sentence imposed on them u/s. 304 Part II IPC.

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A The prosecution case was that there was inimical
relation between the deceased and accused family due
to stealing of hen of one appellant-B by the deceased. On
the fateful day, the deceased and PW-7 were called for a
meeting. When deceased and PW-7 reached the place of
B meeting, the appellants tied them with a rope against the
bamboo pole and tree. The appellants were armed with
lathis and tangies (Sharp cutting weapons). They
assaulted the deceased with lathis. PW-7 managed to
escape. The appellants continued to beat the deceased
C and as a result he died. The two wives of the deceased
who had followed the deceased to the place of meeting
saw the incident. The trial court found all the eleven
appellants guilty and convicted them under section 148
and section 302 r/w section 149, IPC. The High Court
D affirmed the same. The instant appeal was filed
challenging the order of the High Court.

Disposing of the appeal, the Court

E HELD: 1. PW-1, the first wife of deceased narrated the
entire incident after describing the previous incident
about the stealing of the hen by her husband and the
penalty imposed by the Salishman. She stated how PW-
7 was tied to a Kull tree and beaten up; how PW-7 fled
away and how deceased was beaten to death by using
F lathis by the appellants after tying him to a bamboo pole.
She did not, however, describe the exact role of each of
the appellants. She did not state who assaulted where.
The evidence of PW-3 was on similar lines. PW-6, the
second wife of deceased also corroborated PW-1 so far
G as the assault on deceased was concerned. PW-7, the
injured witness described the events that preceded the
incident. He stated that he somehow managed to escape
and got himself examined by the doctor. His evidence
indicated that out of fear he ran away and did not inform
H anyone about the incident. The doctor PW-9 who did the

post-mortem of deceased stated that the death was caused due to the injuries described by him and that the injuries could be caused by a blunt object like lathi. The evidence of PW-1, PW-3, PW-6 and PW-7 was truthful and was rightly relied upon. They were rustic witnesses and candidly stated all that they had seen. Pertinently, PW-7 did not hesitate to name his brother as one of the assailants. No doubt, these witnesses were related to deceased, but the tenor of their evidence was such that it was not possible to say that they have falsely involved the appellants. Their evidence had a ring of truth. The prosecution, therefore, proved that the appellants assaulted deceased with lathis which resulted in his death. [para 6] [330-F-G; 331-A-F]

Kirti Mahto & Ors. v. State of Bihar 1994 Supp. (2) SCC 569; *Molu & Ors. v. State of Haryana* AIR 1976 SC 2499; *Munivel v. State of Tamil Nadu* (2006) 9 SCC 394; 2006 (3) SCR 813 ; *Alistar Anthony Pareira v. State of Maharashtra* (2012) 2 SCC 648; 2012 (1) SCR 145; *Kashmiri Lal & Ors. v. State of Punjab* AIR 1997 SC 393; 1996 (5) Suppl. SCR 335 - relied on.

2. Appellant-B's hen was stolen by deceased. This dispute was settled. Penalty was paid. Yet, the appellants called deceased to Saheb Hasda's courtyard. Deceased went there with PW-7. They were tied to the trees and beaten up. The attendant circumstances did not indicate that the appellants shared any common object to kill deceased. Probably, they were not happy with the penalty imposed by the Salishman. Therefore, they called him to Saheb Hasda's courtyard and beat him with lathis. If they wanted to kill him, they would have used some sharp cutting weapons. In fact, the evidence on record showed that some of the appellants had tangies in their hand. PW-1 stated that some of them had tangies but they did not use them. Really, if the appellants wanted to kill deceased, the easiest way to achieve their object would

A have been to use the tangies and assault him. What may
have started as an exercise to teach a lesson to deceased
by beating him with lathis, took an ugly turn. In a frenzy,
lathi blows were dealt with force. It is true that the doctor
noticed fourteen injuries on the deceased. Most of them
B were bruises and abrasions. All the accused were stated
to have assaulted the deceased. It is true that there were
also two rib fractures and haemotoma under the scalp.
But the doctor had stated that all the injuries led to the
death of deceased. It was not, therefore, known as to
C which was the fatal injury. Moreover, none of the eye-
witnesses have stated who caused which injury. No
individual role was ascribed to any of the appellants. The
eye-witnesses made an omnibus statement that the
appellants assaulted the deceased with lathis. It, therefore,
D cannot said that all the appellants are guilty of murder. In
the peculiar facts of this case, therefore, it cannot be held
that the appellants shared common object to murder the
deceased and in prosecution of that common object they
caused his death. [paras 7, 8, 10] [331-G-H; 332-B-F; 333-
C; 334-F]

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Sukhdev Singh v. State of Punjab AIR 1992 SC 755;
Sarman & Ors. v. State of Madhya Pradesh 1993 Supp. (2)
SCC 356 - relied on.

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3. There were certain special features in this case,
which distinguished it from other cases. It is an unusual
case where a trivial incident led to a murder. The
appellants as well as the material witnesses belong to
Santhal community. They are tribals. They come from a
very poor strata of the society and appear to be
G untouched by the effect of urbanization. They live in their
own world. They are economically so weak that
possession of a hen is very important to them. The
deceased stole a hen, killed it and made a feast out of it.
H This angered the community and the village panchayat

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penalized deceased. He was ordered to give a hen to appellant-B and, in addition, he had to give two handies of liquor. Though, there can be no justification for the appellants' actions, their anger and reaction to the theft of hen must be viewed against the background of their economic and social status. Moreover, the appellants are in jail for almost 14 years. Apart from the legal angle, this is a case where justice must be tempered with mercy. In the peculiar circumstances of the case, the appellants is convicted for culpable homicide not amounting to murder and sentencing them for the period already undergone by them by resorting to Section 304 Part II of the IPC to meet the ends of justice. In the circumstances, the conviction of the appellants for offences punishable under Section 302 read with Section 149 of the IPC is quashed and set aside. Instead, they are convicted for culpable homicide not amounting to murder and the sentence already undergone by them is directed to be treated as sentence imposed on them under Section 304 Part II of the IPC. The impugned order is modified to the above extent. [Paras 11, 12] [334-G-H; 335-A-F]

Case Law Reference:

1994 Supp. (2) SCC 569	Relied on	Para 4
AIR 1976 SC 2499	Relied on	Para 4
2006 (3) SCR 813	Relied on	Para 5
2012 (1) SCR 145	Relied on	Para 5
1996 (5) Suppl. SCR 335	Relied on	Para 5
AIR 1992 SC 755	Relied on	Para 8
1993 Supp. (2) SCC 356	Relied on	Para 9

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1502 of 2004.

From the Judgment and Order dated 20.01.2003 of the High Court at Calcutta in Criminal Appeal No. 202 of 2000.

A Vibha Datta Makhija, Ruchi Agnihotri for the Appellants.

Anip Sachthey, Kabir S. Bose, Shagun Matta, Saakaar Sardana for the Respondents.

The Judgment of the Court was delivered by

B **(SMT.) RANJANA PRAKASH DESAI, J.** 1. There are eleven appellants. All of them were tried by the Additional Sessions Judge, Burdwan for offences punishable under Section 148 and Section 302 read with Section 149 of the IPC. They were convicted for offences punishable under Section 148 and Section 302 read with Section 149 of the IPC and sentenced to undergo imprisonment for life for causing death of one Jhore Soren ("deceased-Jhore Soren"). The appellants' appeal was dismissed by the High Court. Hence, the present appeal.

D 2. The prosecution story could be shortly stated:

E The appellants and the prosecution witnesses belong to Santhal Community of village Mobarakpur. In March, 1989, deceased-Jhore Soren killed the hen of one Bhagbat. This created a furore in Santhal community. A Salish was called and the deceased was asked to give one hen and two handies of country liquor to Bhagbat as a penalty by the Salishman. Deceased-Jhore Soren complied with Salishman's order. On F 14/4/1989, when deceased-Jhore Soren and PW-7 Kanka were discussing the same incident, appellant-Bhagbat overheard it and showed his displeasure to PW-7 Kanka. When PW-7 Kanka protested, the appellants Bhagbat, Ragai and Sambhu caused bleeding injuries to him. PW-7 Kanka went to a doctor and got himself examined. On the next day, in the G morning, deceased-Jhore Soren and PW-7 Kanka were called to the courtyard of one Saheb Hasda on the pretext that a meeting was to be held over the previous day's incident. When deceased-Jhore Soren and PW-7 Kanka came to the courtyard of Saheb Hasda, they were tied with a rope against one H

bamboo pole and one Kul tree respectively by the appellants. The appellants were armed with lathis, tangies (sharp cutting weapons) etc. They started assaulting deceased-Jhore Soren and PW-7 Kanka with lathis. PW-7 Kanka managed to escape. The appellants continued to beat deceased Jhore Soren. He was beaten to death. Two wives of deceased-Jhore Soren, who had followed him to the courtyard of Saheb Hasda, saw the incident. The women who had assembled there also assaulted the wives, mother and sister of deceased-Jhore Soren. PW-1 Nilmoni, the first wife of deceased-Jhore Soren rushed to Memari Police Station and gave her statement. In her statement, she named all the appellants as persons, who assaulted her husband - deceased-Jhore Soren with lathis. On the basis of her statement, investigation was started and upon completion of the investigation, the appellants came to be charged as aforesaid.

3. The prosecution examined 10 witnesses. The accused denied the prosecution case. Prosecution case found favour with the trial court which convicted and sentenced the appellants as aforesaid. Their conviction and sentence was confirmed by the High Court.

4. Ms. Makhija, learned amicus, who on our request is appearing for the appellants, submitted that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, the appellants deserve to be acquitted. She submitted that, in any case, if this Court comes to a conclusion that the appellants are guilty, then it should hold them guilty of culpable homicide not amounting to murder because there was no intention to kill the deceased. Counsel submitted that the appellants have admittedly used lathis and, therefore, Section 304 Part II of the IPC is clearly attracted to this case. In this connection, counsel relied on *Kirti Mahto & Ors. v. State of Bihar*¹. Counsel submitted that the injuries are not on the vital part of the deceased's body. They are superficial in nature. This also

1. 1994 Supp. (2) SCC 569.

A indicates that there was no intention to kill the deceased. In this connection, counsel relied on *Molu & Ors. v. State of Haryana*². Counsel submitted that the appellants are poor tribals; they are in jail for a considerably long time and, hence, they may be sentenced to the period already undergone by resorting to Section 304 Part II of the IPC.

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5. Mr. Anip Sachthey, learned counsel for the State, on the other hand, submitted that the ocular evidence establishes the prosecution case. Counsel submitted that it is true that the appellants used lathis but even if the common object was to inflict injuries, the appellants who were members of the unlawful assembly knew that the murder was likely to be committed in prosecution of common object and since death was caused, every member of the unlawful assembly must be held guilty of murder. In support of this submissions, counsel relied on *Munivel v. State of Tamil Nadu*³ and *Alister Anthony Pereira v. State of Maharashtra*⁴. Counsel submitted that the appellants persistently assaulted deceased-Jhore Soren and caused grievous injuries to him which resulted in his death. The intention to commit murder is clear and, hence, they are guilty of murder. In this connection, he relied on *Kashmiri Lal & Ors. v. State of Punjab*⁵. Counsel submitted that the appeal be dismissed.

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6. PW-1 Nilmoni, the first wife of deceased-Jhore Soren narrated the entire incident after describing the previous incident about the stealing of the hen by her husband and the penalty imposed by the Salishman. She stated how PW-7 Kanka was tied to a Kull tree and beaten up; how PW-7 Kanka fled away and how deceased-Jhore Soren was beaten to death by using lathis by the appellants after tying him to a bamboo pole. She did not, however, describe the exact role of each of the appellants. She did not state who assaulted where. PW-3 Rabi

2. AIR 1976 SC 2499.

3. (2006) 9 SCC 394.

4. (2012) 2 SCC 648.

H 5. AIR 1997 SC 393.

Soren is the sister of deceased-Jhore Soren. Her evidence is on similar lines. PW-6 Sumi Soren, the second wife of deceased-Jhore Soren also corroborated PW-1 Nilmoni so far as the assault on deceased-Jhore Soren is concerned. PW-7 Kanka, the injured witness described the events that preceded the incident and stated how he and deceased-Jhore Soren were tied to trees; how appellants - Badal, Sambhu, Ragai, Bhagbat and Phangu assaulted deceased-Jhore Soren with lathis; how appellant Sombha was guarding the place with a tangi and how the other appellants encouraged them. He stated that he somehow managed to escape and got himself examined by the doctor. His evidence indicates that out of fear he ran away and did not inform anyone about the incident. PW-9 Dr. Prodip Kumar, who did the post-mortem of deceased-Jhore Soren stated that the death was caused due to the injuries described by him and that the injuries could be caused by a blunt object like lathi. The evidence of PW-1 Nilmoni, PW-3 Rabi Soren, PW-6 Sumi Soren and PW-7 Kanka is truthful and has rightly been relied upon. They are rustic witnesses and have candidly stated all that they had seen. Pertinently, PW-7 Kanka did not hesitate to name his brother as one of the assailants. No doubt, these witnesses are related to deceased-Jhore Soren, but the tenor of their evidence is such that it is not possible to say that they have falsely involved the appellants. Their evidence has a ring of truth. The prosecution has, therefore, proved that the appellants assaulted deceased-Jhore Soren with lathis which resulted in his death.

7. Now the question is which offence was committed by the appellants. The cause of this entire episode is very trivial. Appellant-Bhagbat's hen was stolen by deceased-Jhore Soren. This dispute was settled. Penalty was paid. Yet, the appellants called deceased-Jhore Soren to Saheb Hasda's courtyard. Deceased-Jhore Soren went there with PW-7 Kanka. They were tied to the trees and beaten up. It is argued that these facts show that the appellants shared common object to kill deceased-Jhore Soren and in prosecution of the common

A object, they killed deceased-Jhore Soren. In our opinion, the attendant circumstances do not indicate that the appellants shared any common object to kill deceased-Jhore Soren. It appears that they were not happy with the penalty imposed by the Salishman. Therefore, they called him to Saheb Hasda's
 B courtyard and beat him with lathis. If they wanted to kill him, they would have used some sharp cutting weapons. In fact, the evidence on record shows that some of the appellants had tangies in their hand. PW-1 Nilmoni stated that some of them had tangies but they did not use them. Really, if the appellants
 C wanted to kill deceased-Jhore Soren, the easiest way to achieve their object would have been to use the tangies and assault him. It appears to us that what started as an exercise to teach a lesson to deceased-Jhore Soren by beating him with lathis, took an ugly turn. In a frenzy lathi blows were dealt with
 D force. It is true that the doctor noticed fourteen injuries on the deceased. Most of them were bruises and abrasions. It is true that there were also two rib fractures and haemotoma under the scalp. But the doctor has stated that all the injuries led to the death of deceased-Jhore Soren. It is not, therefore, known as to which is the fatal injury. Moreover, none of the eye-
 E witnesses have stated who caused which injury. No individual role is ascribed to any of the appellants. The eye-witnesses have made an omnibus statement that the appellants assaulted the deceased with lathis.

F 8. In this connection, we may usefully refer to the judgment of this Court in *Sukhdev Singh v. State of Punjab*⁶. In that case, the appellant therein was convicted under Section 302 of the IPC and sentenced to life imprisonment. The question arose as to what was the nature of the offence committed by him. He
 G had given one blow to the deceased. Thereafter, the deceased had fallen down. That blow, according to the prosecution, was sufficient to cause death in the ordinary course of nature. This Court accepted the testimony of PW-3, PW-4 and PW-5 as to the participation of the appellant therein in the crime. But, it

H ⁶. AIR 1992 SC 755.

rejected their evidence giving specific overt act to each of the accused because according to the prosecution, the victim was surrounded by all the four accused, each one was armed with weapons and they attacked the deceased simultaneously. This Court observed that it was therefore difficult to say that fatal injury was caused by the appellant therein. This Court observed that the evidence of the witnesses on that aspect has to be considered with a pinch of salt. Under the circumstances, the sentence of the appellant under Section 302 of the IPC was set aside and he was sentenced under Section 304 Part II of the IPC. In this case also all the accused are stated to have assaulted the deceased simultaneously. No individual role is ascribed to anyone. The doctor has not stated which injury was fatal. It is difficult therefore to say that all the appellants are guilty of murder.

9. In *Sarman & Ors. v. State of Madhya Pradesh*⁷, there were seventeen injuries on the deceased. The appellants therein were armed with lathis. They were charged for offences punishable under Sections 147 and 302 of the IPC. Some injuries were described as incised wounds. Injury No.15 had resulted in a depressed fracture of parietal bone. Like the present case, the doctor in a general way, stated that the cause of death was "multiple injuries". He specifically stated that injury No.15 individually was sufficient to cause death of the deceased. It must be noted that no such assertion is made by the doctor in this case. The prosecution case, in general, was that all of them were found with lathis. Nobody had stated which of them had caused injury No.15 which unfortunately resulted in the death of the deceased. This Court observed that in these circumstances the question that arises was whether all the accused were responsible for the death of the deceased. This Court noted that if anyone of the appellants had exceeded the common object and acted on his own, it would be his individual act but, unfortunately, no witness had come forward to say which of the accused had caused which injury. This Court noted that

7. 1993 Supp. (2) SCC 356.

A in those circumstances, it was difficult to award punishment
under Section 302 read with Section 149 of the IPC. This Court
noticed that although the post-mortem report stated that all the
injuries might have caused the death of the deceased inasmuch
B they were simple, and on non-vital parts, it cannot be said that
their object was to kill the deceased. They may merely have
knowledge that the blows given were likely to cause death. This
Court, in those circumstances, set aside the conviction of the
appellants for the offences punishable under section 302 read
C with Section 149 of the IPC and instead convicted them for
offence punishable under Section 304 Part II read with Section
149 of the IPC.

10. As earlier noted by us, in this case none of the eye
witnesses have given specific role to any of the appellants. They
D have not stated which appellants gave which blow and on which
part of the deceased's body. They have not stated which injury
was caused by which accused. The doctor has not stated which
injury was fatal. Undoubtedly, the deceased had suffered two
fractures and haemotoma under the scalp, but nobody has said
E that any particular appellant caused these injuries. It bears
repetition to state that though sharp cutting weapons i.e. tangies
were available, the appellants did not use them. In the peculiar
facts of this case, therefore, it is not possible to hold that the
appellants shared common object to murder the deceased and
F in prosecution of that common object they caused his death. It
would not be possible to sustain their conviction for offence
punishable under Section 302 read with Section 149 of the IPC.
It would be just and proper to resort to Section 304 Part II of
the IPC and treat the sentence already undergone by them as
G sentence for the said offence.

11. Before parting we must note certain special features
of this case, which distinguish it from other cases. It is an
unusual case where a trivial incident led to a murder. The
appellants as well as the material witnesses belong to Santhal
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community. They are tribals. They come from a very poor strata of the society and appear to be untouched by the effect of urbanization. They live in their own world. They are economically so weak that possession of a hen is very important to them. The deceased-Jhore Soren stole a hen, killed it and made a feast out of it. This angered the community and the village panchayat penalized deceased- Jhore Soren. He was ordered to give a hen to appellant Bhagbat and, in addition, he had to give two handies of liquor. Though, there can be no justification for the appellants' actions, their anger and reaction to the theft of hen must be viewed against the background of their economic and social status. Moreover, we are informed that the appellants are in jail for almost 14 years. Apart from the legal angle, this, in our view, is a case where justice must be tempered with mercy. In the peculiar circumstances of the case, in our opinion, convicting the appellants for culpable homicide not amounting to murder and sentencing them for the period already undergone by them by resorting to Section 304 Part II of the IPC will meet the ends of justice.

12. In the circumstances, the conviction of the appellants for offences punishable under Section 302 read with Section 149 of the IPC is quashed and set aside. Instead, they are convicted for culpable homicide not amounting to murder and the sentence already undergone by them is directed to be treated as sentence imposed on them under Section 304 Part II of the IPC. The impugned order is modified to the above extent. The appellants are in jail. They are directed to be released forthwith unless they are otherwise required in any other case. The appeal is disposed of.

D.G.

Appeal disposed of.