

:: बन्दीगण की ओर से ::

4644
16

माननोय उच्च न्यायालय मध्यस्कैंडल, ज्युडिकैशन, जबलपुर, सण्ठीठ
ग्रालियर

आपाराधिक अपील क्रमांक २२७। २००४।



Officer
Advocate

B १) महेन्द्र सिंह पुत्र श्रीलाल, आडु ३२ वर्ष,
निवासी ग्राम शायपुरा नं०२ धाना
बालमपुर, जिला मिष्ठ.

२) भागीरथ पुत्र हरीदास, आडु ३० वर्ष,
निवासी ग्राम नदीगाँव, धाना नदीगाँव,
जिला जालौन (य०पी०)

--अपील अधीरण।

वनाम.

४०प्र० शासन द्वारा आर्जी के ज़ बालमपुर
जिला मिष्ठ

--रेस्पॉन्डेंट

आपाराधिक अपील अन्तर्गत धारा ३७४ वज्ज द्रष्टव्या संहिता
विरुद्ध निर्णय व इण्डिया दि. १६-२-२००४ पारित
द्वारा श्री रस०दी० वर्मा, न्यायालय अपर एन्ड न्यायाधीश,
लहार, जिला मिष्ठ, प्रकरण क्रमांक २२८। २००२ सन् वाद
जिसके तहत अपील अधीरण को धारा ३०७ मा०द०दि. ० में
अपील थी भागीरथ वर्मा सात वर्ष के सभी कारावास एवं
दो छार रूपया अर्थदण्ड तथा अपील थी क्रमांक १ महेन्द्र सिंह
को धारा ३७। ३४ मा०द०दि. ० में सात वर्ष के सभी
कारावास एवं दो छार रूपया अर्थदण्ड से दण्डित किया गया।
अर्थदण्ड के व्याहिक में प्रत्येक अभियुक्त को सूक-एकवर्ष के
सभी कारावास की सजा से दण्डित किया गया।

--२



HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR



CRIMINAL APPEAL NO. 224 OF 2004

Mahendra Singh and another

-Vs-

State of Madhya Pradesh

ORDER

Post for: 02/02/2016


(N.K. Gupta)
Judge
(01/02/2016)

*Order 22/16
skd*

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

CRIMINAL APPEAL NO. 224 OF 2004

Mahendra Singh and another

-Vs-

State of Madhya Pradesh

For the appellant No. 1: Shri Vikrant Sharma, Advocate.

For the appellant No. 2: Shri Raghuveer Singh, Advocate, appointed from the Panel of High Court Legal Services Committee.

For the State: Shri B.P.S. Chauhan, Public Prosecutor.

PRESENT:HON'BLE MR. JUSTICE N.K. GUPTA, J.

**JUDGMENT
(02/02/2016)**

The appellants have preferred the present appeal being aggrieved with the judgment dated 16.02.2004 passed by Additional Sessions Judge, Lahir District Bhind in S.T. No. 213/2002, whereby appellants Mahendra Singh and Bhagirath have been convicted of offence under Section 307 read with Section 34 of IPC and Section 307 of IPC respectively and each was sentenced to seven years' rigorous imprisonment with fine of Rs.2,000/-; in default of payment of fine, one year's rigorous imprisonment in addition.

2. Facts of the case, in short, are that on 13.06.2002 at about 06:00 PM Jhadule @ Arvind (PW-11) had sustained injury due to a bite from scorpion. He requested the witness Gulli @ Sukh Singh (PW-14) to take him to the doctor on his tractor. When

Gulli was turning his tractor, appellant Mahendra Singh and co-accused Bhagirath came to the spot having a farmer's spade (*Phawada*) and a half barrel gun respectively. Bhagirath fired upon the victim Jhogal (PW-12) for 3-4 times, however, Jhogal saved himself. In the meantime, the appellant Mahendra Singh held the victim Jhogal and threw him on the ground, thereafter, he assaulted him with the spade on his head for two times and also on his neck, thigh and back. Thereafter, the appellant Mahendra and his companion Bhagirath ran away. Jhogal was taken to the Police Station Alampur District Bhind, where he had lodged an FIR, Ex. P-15. He was sent for his medico legal examination to Community Heath Centre, Lahar, where Dr. K.D. Singh (PW-8) examined him and gave a report, Ex. P-10. He found two incised wounds on the head of victim Jhogal, whereas one each contused wound was found on his left shoulder and left thigh. One abrasion was also found on his left back. He was referred for radio logical examination but thereafter Dr. K.D. Singh did not find any bony injury. After due investigation, charge-sheet was filed before the JMFC, Lahar, who committed the case to the Court of Sessions and ultimately it was transferred to Additional Sessions Judge, Lahar.

3. The appellants abjured their guilt. They took a plea that they were falsely implicated in the matter. However, no defence evidence was adduced.

4. The trial Court after considering the prosecution's evidence convicted the appellants Bhagirath and Mahendra Singh of offence under Section 307 and 307 read with Section 34 of IPC respectively and sentenced them as mentioned above.

5. At the time of final hearing, it was noticed that learned

counsel for the appellant No. 2 Bhagirath was not appearing to argue the matter and, therefore, Shri Raghuveer Singh, Advocate from the Panel of High Court Legal Services Committee, who has vast experience to deal with the criminal cases, was appointed to argue the matter on behalf of the appellant No. 2 Bhagirath.

6. I have heard the learned counsel for the parties at length.

7. Shri Raghuveer Singh, Advocate has argued the matter finally but it was found that the appellant No. 2 has already undergone the entire sentence, therefore, vide order dated 20.01.2016 (later on) appeal filed by the appellant No. 2 Bhagirath was dismissed being infructuous. Therefore, the crime of the appellant Bhagirath shall be considered only to consider the overt act of appellant Mahendra Singh under Section 34 of IPC.

8. In the present case, it is alleged against the appellant Mahendra Singh that he assaulted the victim Jhogal (PW-12) with a spade and he sustained various injuries. Dr. K.D. Singh (PW-8) had examined the victim Jhogal and gave his report Ex. P-10. It is found that the victim Jhogal sustained one incised wound on right occipital region, one incised wound on right parietal region, one contusion on left shoulder, one contusion on left thigh and abrasion on left back. Dr. K.D. Singh has also stated in Para 4 of his statement that all the injuries were found to the victim Jhogal were simple in nature. He did not find any fracture to the victim Jhogal or any symptom of brain hemorrhage or brain injury, hence, the injuries caused to the victim Jhogal were neither fatal nor grave.

9. Out of various eyewitnesses, independent eyewitnesses

namely Matadeen (PW-1), Phool Singh (PW-2), Gendelal (PW-4), Pooran (PW-5), Feran (PW-6) and Prem Kaurav (PW-7) have turned hostile. They did not support the prosecution's story, whereas the victim Jhogal (PW-12), Chukhi @ Narendra (PW-9) son of the victim, Rajjulal (PW-10) brother of the victim, Gulli @ Sukh Singh (PW-14) brother of the victim and Jhadule @ Arvind (PW-11) son of the victim have stated that initially Jhadule suffered with Scorpio bite and, therefore, on his request, Chukhi @ Narendra, Rajjulal and Bhan Singh got down from the tractor and Gulli @ Sukh Singh took Jhadule on the tractor to take him for his treatment. Gulli and Jhadule could not leave the spot and the appellants Mahendra Singh and Bhagirath appeared in the seen of crime. Bhagirath fired for four times with a half barrel gun but everyone was saved, thereafter, the appellant Mahendra Singh assaulted the victim Jhogal for so many times with a spade causing him injuries. On cross-examination, it was found that there was enmity between the appellant Mahendra Singh and witness Gulli @ Sukh Singh, brother of victim Jhogal. However, enmity is a double edged weapon. Due to enmity, anyone can hurt his adversary to take revenge or can be falsely implicated by the enemy. Therefore, in such a case, prosecution's evidence should be examined minutely.

10. Learned counsel for the appellant Mahendra Singh has submitted that the enmity as told by Gulli @ Sukh Singh that a false case was lodged by the appellant Mahendra Singh and his associates upon Gulli @ Sukh Singh and, therefore, the enmity was developed. It is further submitted that looking to the nature of enmity, it was not for the appellant Mahendra Singh or his servant to take revenge but if a false case was lodged

the victim Jhogal was assaulted by culprits with help of spade. Under these circumstances, the testimony of the witnesses on the basis of timely lodged FIR, Ex. P-15, medical report Ex. P-10 proved by Dr. K.D. Singh, spot map, Ex. P-16 is believable and therefore it is proved beyond doubt that the appellant Mahendra Singh assaulted the victim Jhogal with spade. It is apparent that the appellant Mahendra Singh assaulted for more than once and, therefore, it is apparent that he intended to cause injuries to the victim Jhogal and, therefore, looking to his act at least an offence under Section 324 of IPC is constituted that he had voluntarily caused hurt to the victim Jhogal with help of a sharp cutting weapon. If crime of the appellant Mahendra Singh is considered of offence under Section 307 of IPC then it would be apparent that the appellant Mahendra Singh did not have any direct enmity with the victim Jhogal, he had enmity with Gulli @ Sukh Singh brother of the victim and, therefore, there was no advantage to the appellant Mahendra Singh to assault the victim to cause his death. Dr. K.D. Singh has stated that no injury of the victim was fatal or grave. Looking to the report of Dr. K.D. Singh, the appellant Mahendra Singh did not assault the victim Jhogal with any powerful blow. If powerful blow of spade would have been given on the head of victim Jhogal then he would have sustained a fracture on the skull or due to powerful blow he would have suffered with brain hemorrhage. Looking at the entire five injuries, it appears that two powerless blows were given by the appellant Mahendra Singh on the head of victim Jhogal but thereafter he did not assault on any vital part of the body of the victim Jhogal. Looking at his haphazard blows given to the victim Jhogal,

whereas he did not use much force, it would be apparent that the appellant Mahendra Singh was not intended to kill the victim Jhogal.

13. Since injuries caused to the victim Jhogal were neither fatal nor grave and it could not be established that the appellant Mahendra Singh assaulted the victim Jhogal to cause his death then no ingredient of Section 300 of IPC is established against the appellant Mahendra Singh and he could not be convicted of offence under Section 307 of IPC, he could be convicted of offence under Section 324 of IPC, however, if judgment of the trial Court is considered then the appellant Mahendra Singh has been convicted of offence under Section 307 of IPC with help of Section 34 of IPC and, therefore, it is found by the trial Court that the appellant Mahendra Singh was found guilty to the crime committed by his companion Bhagirath. Under these circumstances, overt act of the appellant Mahendra Singh should be examined as to whether he had common intention with the co-accused Bhagirath or not.

14. As mentioned above, since the appeal filed by the appellant Bhagirath has turned infructuous and there is no need to discuss the overt act of the appellant Bhagirath in detail but for considering the common intention of the appellant Mahendra Singh, his overt act may be considered. It was alleged against the appellant Bhagirath that he fired with a half barrel gun for four times. However, no one sustained any injury. It was mentioned by the witnesses that Bhagirath was the employee of the appellant Mahendra Singh and, therefore, he did not have any enmity either with Gulli @ Sukh Singh or victim Jhogal. When a person has half barrel gun and he fired with gun for

four times then any of the interested witnesses would have suffered with the injuries if he would have aimed upon a particular person. Gulli @ Sukh Singh has stated that he saved himself by entering into a house of his relative, which indicates that if the appellant Bhagirath was firing then he was not firing upon a particular person and everyone present there had fear that he could be shot by firing done by the appellant Bhagirath, hence, it cannot be said that the appellant Bhagirath was much interested in killing the victim Jhogal.

15. It is also apparent from the statements of various eyewitnesses that when the appellant Bhagirath was firing, the appellant Mahendra Singh did not assault the victim with spade, when firing was over the appellant Mahendra Singh started assaulting the victim Jhogal and since the victim Jhogal was injured, therefore, it was presumed by the witnesses that appellant Bhagirath had tried to kill the victim Jhogal by firing. In this connection, the statement in Para 2 of victim Jhogal (PW-12) is considered then it would be apparent that when firing done by the appellant Bhagirath was over then the appellant Mahendra Singh came to the spot with spade and he knocked down the victim Jhogal on the ground and thereafter he gave 4-5 blows. Looking to this statement, it would be apparent that when the appellant Bharirath was firing with a gun, the appellant Mahendra Singh was not present. Victim Jhogal was not actually chased by the appellant Mahendra. Since the appellant Bhagirath was firing the victim then victim and witnesses started running to hide themselves and when Jhogal reached near the *Neem* tree, the appellant Mahendra Singh suddenly appeared in the scene of crime and knocked down the

victim Jhogal by giving a blow of spade and thereafter he further assaulted for 3-4 times with spade. The statement of Jhogal is important which indicates that when firing was done by the appellant Bhagirath, it was not established that the appellant Mahendra Singh was present at the spot. When he saw the victim Jhogal in an unsafe condition then he took advantage of that condition and assaulted him with a spade, therefore, if the appellant Bhagirath had fired with the gun upon a crowd of persons including the witnesses and the victim Jhogal, then it cannot be said that the appellant Mahendra Singh had any common intention with the appellant Bhagirath. When the victim himself has accepted in his examination-in-chief that when firing was closed, the appellant Mahendra Singh appeared on the scene of crime and knocked him down with help of a spade then if other witnesses are telling about the presence of the appellant Mahendra Singh from very beginning then in the light of statement of victim Jhogal, their evidence cannot be accepted. Under these circumstances, the trial Court has committed an error in finding the common intention of the appellant Mahendra Singh along with co-appellant Bhagirath.

16. On the basis of aforesaid discussions, it would be apparent that the crime committed by the appellant Mahendra Singh falls within the purview of Section 324 of IPC and he did not commit a crime of Section 307 of IPC. His common intention could not be established with the co-accused Bhagirath and, therefore, the appellant Mahendra Singh could not have been convicted of offence under Section 307 of IPC either directly or with help of Section 34 of IPC. The trial Court has committed an error in convicting the appellant Mahendra Singh for such an offence.

against Gulli @ Sukh Singh then certainly it was for Gulli @ Sukh Singh to make a false complaint to implicate the appellant Mahendra Singh. Hence, where the independent witnesses have turned hostile, the testimony of the other eyewitnesses should not be believed. It is further submitted that the victim Jhogal fell down from a cultivator and, therefore, he sustained such injuries.

11. It is true that all the independent eyewitnesses have turned hostile. It is also true that there is enmity between the parties and enmity is of such nature that no action was warranted from the side of the appellant Mahendra Singh, however, the entire defence argument shall rest upon the evidence of Dr. K.D. Singh. Dr. K.D. Singh did not accept that the injuries No. 1 and 2, i.e., incised wounds on the head of victim Jhogal could be caused due to fall from the cultivator. It was suggested that if some iron blade was projected on the back of the tractor then on such falling on those blades, such injuries could be sustained on the head of victim Jhogal. However, such suggestion was given to Dr. K.D. Singh appears to be hypothetical. No clear suggestion was given to Dr. K.D. Singh that injuries caused on the head of victim Jhogal could be caused due to fall from the cultivator. It was for the defence to establish that the tractor on which Gulli @ Sukh Singh was riding, had some sharp object on the back side so that if the victim Jhogal would have fallen on such sharp blades then such incised wounds could be caused on his head due to fall. Defence could not prove that on the tractor of Gulli @ Sukh Singh, there was any sharp object of such nature. Hence, the defence taken by the appellant Mahendra Singh is not acceptable. Explanation

given to the injuries caused to victim Jhogal is not acceptable and since he sustained 4-5 injuries, out of them two injuries could be caused due to assault with spade from the sharper side and three remaining injuries could be caused with spade from the blunt side, therefore, looking at the nature of injuries and weapon as alleged in the incident, it cannot be said that the witnesses are telling a falsehood and the appellant Mahendra Singh is falsely implicated in the case.

12. Looking at the injuries, there was no possibility that victim Jhogal sustained such injuries due to fall from a cultivator. The victims have timely lodged the FIR, Ex. P-15. It is possible that the independent witnesses could be the friends of the appellant Mahendra Singh and, therefore, they did not support the prosecution's story. Some minor contradictions were found in the statement of the aforesaid interested eyewitnesses relating to number of fire done by the appellant Bhagirath or number of assault done by the appellant Mahendra Singh on the head of victim Jhogal. However, looking to the nature of the incident that the victim Jhogal was persistently chased by the appellant Mahendra Singh and so many blows were given to him during that chase. If the victim Jhogal would have sustained injuries near a tractor then the Investigation Officer Manoj Singh Chauhan (PW-16) in his spot map Ex. P-16 could not find the blood lying below a tree of *Neem* near one hand pump. Blood was found below a tree of *Neem* and that place was much away from the spot where the tractor was alleged to be placed. It is not stated by the appellant Mahendra Singh etc., that the tractor was standing near the *Neem* tree. Hence, it is not a case of accident but it is a case that

However, offence under Section 324 of IPC is an inferior offence of the same nature and, therefore, the appellant Mahendra Singh can be convicted of offence under Section 324 of IPC under the charge of Section 307 of IPC.

17. So far as the sentence is concerned, it is true that the appellant Mahendra Singh was 30 years old at the time of incident and he could not get any advantage of probation on the basis of his age. Looking to his overt act, there is no reason so that the appellant Mahendra Singh may be enlarged on probation under the provisions of the Probation of Offenders Act, however, he was the first offender, who has faced the trial and appeal for the period of 13 to 14 years. He remained in the custody for 5 months and 21 days during the trial and approximately 4 months and few days during the pendency of this appeal. In all, he remained in the custody for more than 10 months. Hence, it would not be appropriate to send the appellant Mahendra Singh to the jail again. His custody period appears to be appropriate sentence for the offence committed by him.

18. On the basis of aforesaid discussions, the appeal filed by the appellant Mahendra Singh is hereby partly allowed. His conviction of offence under Section 307 or 307 read with Section 34 of IPC along with sentence passed by the trial Court is hereby set aside. The appellant Mahendra Singh is acquitted from the charge of offence under Section 307 or 307 read with Section 34 of IPC but under the same head of the charge, he is convicted of offence under Section 324 of IPC and he is sentenced with the jail sentence for which he remained in the custody. A fine of Rs.2,000/- is also imposed upon him. Since he

has deposited the fine amount before the trial Court for offence under Section 307 of the IPC, there is no need to make the provision of default sentence. However, it is made clear that out of that fine amount, a sum of Rs.1,500/- would be provided to the victim Jhogal son of Tulsi Ram resident of Shahpura, Police Station Alampur District Bhind by way of compensation.

19. The appellant Mahendra Singh was on bail. His presence is no more required and, therefore, it is directed that his bail bonds shall stand discharged.

20. Copy of the judgment be sent to the Court below along with its record for information and compliance.

Abhi

- (1) Application received on 6/2/16
- (2) Applicant told to appear on 15/2/16
- (3) Applicant appeared on 19/2/16
- (4) Application (With or without Authorisation / particulars of the Record keeper / Dealing Assistant, if any)
- (5) Application (With or without record, and for further particulars, if any required) received from the Dealing Assistant / record keeper on 19/2/16
- (6) Applicant given notice for further or other particulars on 19/2/16
- (7) Applicant given notice for further hearing on 19/2/16
- (8) Notice in Sr. No. (6) or (7) complied with on 19/2/16
- (9) Copy ready on 19/2/16
- (10) Copy delivered on 19/2/16
- (11) Court fee realized - 5/-

Copyist

Head Copyist

8/2/16
(N.K. Gupta)

Judge

02/02/2016

CERTIFIED TO BE A TRUE COPY
N. 9/2/16
Section Officer
Madhya Pradesh High Court
Gwalior Bench, Gwalior
Certified u/s 76 of the Evidence Act

Checked & Found Correct
19/2/16
A.H.C.