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IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)

Criminal Appeal No. 2530 /1999

Appellants

1. Naresh S/o Jagatram Yadav,

Aged about 60 years,

2. Pardesi, S/o Naresh Yadav,

Aged about 35 years,

3. Soru alias Ram Prasad,

S/o Naresh Yadav, Aged about 22 years

4. Buju alias Ram Khilavan,

S/o Naresh Yadav, aged 26 years,

5. Shiv Prasad, S/o Tussu Gond,

Aged about 20 years,

All residents of Nawadeeh Majhgaon
P.S. Kota, Distt. Bilaspur (M.P.).

VERSUS

Respondent

State of Madhya Pradesh

Through Police Station Kota

District Bilaspur (M.P.).

CRIMINAL APPEAL UNDER SECTION 374(2) OF
THE CODE OF CRIMINAL PROCEDURE.

In compliance of
Honble C/o dtd. 3/9/14
deleted the appellant
No. 25.

12623

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Amended present
C.O. dt. 18/11/2014.

REC-57
19/11/01

Dukhy Gond

Tussu Gond,

20B

CLERK
D/o. Advocate Gond
Jabalpur

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HIGH COURT OF CHHATTISGARH AT BILASPUR
DIVISION BENCH

**CORAM: HON'BLE SHRI NAVIN SINHA, ACTING CHIEF JUSTICE &
HON'BLE SHRI P. SAM KOSHY, J.**

Criminal Appeal No. 2590 of 1999

APPELLANTS : Naresh & Others.

VERSUS

RESPONDENT : State of Madhya Pradesh (Now
Chhattisgarh)

**CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL
PROCEDURE.**

Appearance: Shri S.C.Verma, Advocate for the Appellants.
Shri B. Gopa Kumar, Deputy Advocate General for the
State.

JUDGMENT
(19th day of January, 2015)

Per Navin Sinha, Acg. Chief Justice

1. The Appellants have been convicted under Sections 147, 148, 324/149 and 302/149 IPC for varying period of custody alongwith fine of Rs. 200/-. In the event of failure to pay fine, they were required to undergo two months further rigorous imprisonment.
2. The FIR, Exhibit P-1 was lodged on 26.11.1997 at about 9 a.m by PW-5 Brijlal with regard to an assault on the deceased Vishram, the same day at 7 a.m. PW-5 was himself also injured and his MLC marked Exhibit P-21. He named the Appellants as the assailants of the deceased and also as having assaulted him. Postmortem was done by PW-10 Dr. Mrs. A.V.Chipde on 27.11.1997 at 11 a.m, marked Exhibit P-38 and the following injuries have been found on the person of the deceased:

- Contusion 5"x3" over the left back and lumber region.
- Incised wound 2"x1"x1/4" right side of chin.
- Incised wound 2"x1/2"x1/4" left side of chin.
- Lacerated wound 3"x1"x1/4" left side of the forehead.
- Lacerated wound 2"x1"x1/2" right side of the forehead.
- Lacerated wound 3"x1"x1/2" over front of the scalp.
- Lacerated wound occipital region 5"x5"x1".
- Lacerated wound 4"x3"x1" left temporal region.
- Abrasion dorsal aspect of left leg over calf muscle 5"x2".
- Abrasion 3"x1" post aspect of left thigh near left knee joint.
- Abrasion 2"x1" right lateral aspect of the chest.
- Abrasion left forearm 2"x1" near elbow joint.

The occipital temporal bone on the left side was also found fractured. On opening of the Lumbar region, left side of the kidney was found to have been ruptured. The doctor opined that the death was occasioned due to injury caused to the kidney and on the head region of the body.

3. Learned counsel for the Appellants submitted that there existed previous enmity and PW-5 had to face trial, acknowledged in his deposition on a case filed by the Appellants. It was next submitted that PW-5 was in a ditch as per his statement in cross-examination and could not have eye witnessed the assault from behind the haystack. It was submitted that PW-5 was not a reliable witness as he named the Appellant-Naresh in the FIR but his name did not figure in the statement under Section 161 CrPC of the witness during investigation and transpired again in the Court. Likewise, he did not tell the police in his statement under Section 161 CrPC that the Appellants were engaged in thrashing wheat contrary to the statement made by him in the FIR reiterated in his deposition in the Court. It was submitted that due to these omissions, his credibility as a witness speaking the truth cannot be accepted and the possibility that he was exaggerating to falsely implicate

the Appellants because of previous enmity cannot be ruled out. The benefit of doubt must be given to the Appellants. With regard to PW-6, the other eye-witness, it is submitted that he has not attributed any specific assault on any particular part of the body of the deceased by any one of the Appellants by name. It cannot be said with certainty due to whose assault the injury was caused to the kidney or fracture of the occipital bone leading to death of the deceased. There was no evidence to suggest the existence of any common object. The Appellants were at home. It was the deceased who alongwith PW-5 were the aggressors as having come there. Reliance was lastly placed on 1993 Supplementary 2 SCC 356 (Sarman & Others v. State of Madhya Pradesh) to submit that if it could not be said with certainty in an assault by more than one person as to whose injury had caused death, conviction under Section 302/149 was not sustainable and it ought to be converted under Section 304-II/149 IPC. The Appellant-Soru has undergone more than 7 years custody before his release on bail. In the facts of the case, the conviction of the other two Appellants may also be directed to be confined to the period already undergone.

4. Counsel for the State opposing the appeal submitted that there can never be direct evidence of common object and it has to be inferred from all surrounding circumstances. The deceased and PW-5 are not alleged to have come armed in any manner. If they came either because of the land dispute or stealing of the cattle, there was no occasion for the Appellants to gather to assault the deceased in the manner done causing damage to the kidney, one lacerated wound on the head, four

sharp cutting injuries on the head and the surrounding areas. The manner in which the deceased was assaulted without any provocation by weapons of assault is suggestive of a common object. The materials urged on behalf of the Appellants to doubt the credibility of PW-5 as an injured eyewitness is on peripheral aspects not relevant with regard to the assault and cannot discredit his status as an injured witness. There were no material contradiction but mere trivial omissions. If the conviction has to be altered to one under Section 304-II IPC, because all of them acted in unison by making an assault, the period of conviction has also to be common.

5. We have considered the submissions on behalf of the parties and examined the evidence on record also. PWs-5 and 6 are eye-witness to the assault. The rest are hear say witness apart from the official witnesses. PW-5 was injured in the episode himself. The credibility of an injured witness is always high and there is presumption that he was speaking the truth. This presumption is rebuttable, provided it is established that there are material and major contradictions in the evidence raising serious doubt about the credibility. In the present case, the omission sought to be urged from the statement under Section 161 CrPC of PW-5, whether the Appellants were thrashing wheat or not etc. are considered trivial omissions not material to the prosecution case in the nature of the assault. If the Appellant-Naresh had been mentioned in the FIR for having assaulted and it is reiterated in the Court, mere absence of the same in the statement under Section 161 CrPC, in our opinion, is not such a material contradiction as to go to the very root of

the prosecution case to suspect the entire foundation.

6. PW-5 was himself injured in the incident and his MLC (Exhibit P-21) has been proved by PW-9. It is not the case of the Appellants even in the cross-examination of the witness that the injuries caused to him had been occasioned in any other episode or in some other manner with which the Appellants were not connected. The suggestion that he was in a ditch unable to watch the assault on the deceased has specifically been denied by the witness stating that the deceased was being assaulted on the other side of the haystack and he was on the opposite side. There is no evidence with regard to the height of the haystack which may have prevented vision. Enmity may cut both ways and it cannot be conclusively opined as false implication simplicitor.

7. PW-6 is also an eyewitness. But he has also made omnibus allegations of assault by the appellants on the deceased without any specific attribution of a particular assault by an individual Appellant. Death is opined to have been caused due to the injury to the kidney and due to the assault on the head region. There is no evidence as to which Appellants caused those two fatal injuries which culminated in death.

8. In Sarman (supra) sought to be relied upon by the Appellants, also there were 17 injuries on the deceased. Five of them were incised wounds. One injury, depressed fracture of parietal bone proved fatal. Death was opined to have been caused by the latter injury only. It was held that it was not possible to conclude that all of them were responsible for the death of the deceased as the prosecution has not



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explained the nature of injuries caused by each. There was no evidence as to who had caused the fatal injury. If any one of them exceeded the common object and acted on his own, it would be his individual act. The conviction was converted from Section 302/149 IPC to Section 304-II/149 IPC and sentence reduced for a maximum period of seven years.

9. In the nature of the occurrence which has taken place presently, we are of the considered opinion that it is difficult to hold that the Appellants had the common object to kill the deceased though it can certainly be held that they had a common object to teach a lesson to the deceased and PW-5, short of death. In absence of any evidence with regard to which of the Appellant caused injury to the kidney and the head region leading to fracture and death, we modify the conviction under appeal from under Section 302/149 IPC to under Section 304-II/149 IPC. The conviction under Sections 147, 148 and 324/149 IPC merits no interference. The period of conviction is also altered to seven years imprisonment. The sentences shall run concurrently. The Appellant-Soru who has undergone more than seven years of custody, is set at liberty and discharged of his bail bonds. The other two Appellants-Naresh and Buju @ Ram Khilawan are directed to surrender forthwith or be taken into custody for serving out their remaining period of sentence.

10. With that modification of conviction, the appeal stands disposed.

Sd/-
Acting Chief Justice

Amit

Sd/-
P. Sam Koshy
Judge