

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.484 of 2000**

1. Kalang Sahay, son of Basu Basore, aged 35 years,
2. Pochi, son of Basu Basore, aged 35 years,
3. Jainath, S/o Basu Basore, aged 40 years,
4. Vishwanath, S/o Basu Basore, aged 38 years,

All cultivators and residents of Village Beldagi, P.S. Lakhanpur, District Surguja, Madhya Pradesh (now Chhattisgarh)

---- Appellants

versus

State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellants	:	Shri Jagat Sher Singh and Shri Neeraj Kumar Mehta, Advocates
For State/Respondent	:	Ms. Smita Ghai, Panel Lawyer

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

Per Deepak Gupta, Chief Justice

6.9.2016

1. This appeal is directed against judgment dated 24.1.2000 passed in Sessions Trial No.190 of 1998 by the First Additional Sessions Judge, Ambikapur, whereby the accused/Appellants were convicted for having committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code (IPC) and have been sentenced to undergo imprisonment for life and for having committed offence punishable under Section 148 IPC and have been sentenced to undergo rigorous imprisonment for 3 years, in respect thereof.
2. The trial was initiated against six persons, i.e., the present four Appellants and Dirpan and Sirbhanjan. Dirpan and Sirbhanjan have been acquitted of the charges framed against them and hence the present appeal has been preferred by the four Appellants, i.e., Kalang, Pochi, Jainath and Vishwanath challenging their conviction and sentence awarded by the Trial Court.

3. The prosecution story, briefly stated, is that on 6.5.1998, PW-3, Jeetram along with Moharsai (deceased), PW-4, Dharmpal, PW-7, Deonarayan and Kailash and Bachansai, who have not been examined by the prosecution, had gone to attend a marriage in Bhandarpara. They were returning after attending the marriage from Bhandarpara. At about 10:30 p.m., the four accused Kalang, Jainath, Vishwanath and Pochi, who are real brothers, were hiding behind a bush (which is known as *Besharam Jhad* in common parlance) by the side of the road and as soon as the deceased and others reached there, accused Kalang suddenly got-up and using abusive language said kill Moharsai. Accused Jainath raised a cry that kill Jeetram also. Both Jeetram and Moharsai ran in different directions. Jeetram fell into a ditch. He then got up and turned around. He saw that accused Kalang gave a blow on the thigh of Moharsai. Being scared, Jeetram ran away and went towards the village and met his neighbours and after gathering some people from the village returned to the scene of occurrence and found that Moharsai was lying dead next to the Channai river. Thereafter, he, along with some villagers and the Village Kotwar, went to the police station to lodge a report. On the basis of his statement, First Information Report (Ex.P-7) was lodged. After the F.I.R. was lodged, police investigated the matter. The body of Moharsai was sent for post mortem, which was conducted by PW-2, Dr. R.N. Gupta. Thereafter, other investigations were also conducted and on the basis of the material collected during the investigation, report under Section 173 of the Code of Criminal Procedure was filed against the accused. They were charged with having committed murder of Moharsai in furtherance of their common intention. They were also charged for the offence of forming an unlawful assembly. They pleaded not guilty and claimed trial. After trial, the accused, i.e., the Appellants herein have been convicted and sentenced as

mentioned above. The other two co-accused Dirpan and Sirbhanjan have been acquitted of the charges framed against them.

4. The entire case revolves around the testimony of three witnesses, PW-3, Jeetram, PW-4, Dharmpal and PW-7, Deonarayan. PW-3, Jeetram, while deposing in the Trial Court, stated that when he along with others while was returning from Bhandarpara after attending a wedding, the accused were hiding behind a bush. When the witness and others reached near the bush, accused Kalang suddenly got-up and shouted that they should kill Moharsai. He also used abusive language against Moharsai. Accused Jainath raised a cry to kill the witness also. As soon as the four accused, i.e., the present Appellants got-up from the bush, the witness saw that they were armed with weapons. Accused Kalang and Pochi were carrying Tabbals. Accused Jainath and Vishwanath were armed with Tangiya (Axe). These are sharp edged weapons. The accused started running towards Moharsai who also started running away from them. Accused Kalang gave a blow with a Tabbal on the thigh of Moharsai. Moharsai cried *Bachao Dau*, but, the other three accused had surrounded Moharsai. The witness did not see anything further and ran away to the house of one Bigan. There he told Bigan about the entire incident. Then the witness went to the house of PW-6, Anand, the Sarpanch and told him about the incident. Thereafter, the witness along with Sarpanch Anand, PW-6 and others went to the house of Salikram and Rajaram. Finally, this witness along with PW-6, Anand, Salikram and Rajaram went to Channai river and near the river they found that Moharsai had fallen down. On examination, they found that Moharsai had died and he had sustained three injuries on his thigh and head. He also had an injury on the back and another on his stomach. Thereafter, the witness went to Chowkidar Tapidas and then went to the police station to lodge the FIR. The witness has been cross-

examined. At the outset, it may be mentioned that there is no cross-examination of the witness with regard to the identity of the four accused. No suggestion has been put to him that he did not know or did not recognise them. He also states in the cross-examination that when they reached near the bush, all the four accused got-up together and then he and Moharsai started running. A suggestion has been put to the witness by the Defence Counsel that when they started running away the accused were at some distance from them. In cross-examination, he also states that he and Moharsai ran towards different directions. Moharsai went towards southern side and he went towards northern side. He also admits a suggestion that he fell down in a small ditch and after he had fallen down in the ditch he did not see anything. The nature of the cross-examination itself indicates that the accused did not dispute their identity or the occurrence itself. It is true that there are some contradictions as to when the witness and Moharsai changed direction while running, but these are very minor contradictions. A person who has suffered the traumatic experience and is running away from four armed accused will not remember as to what exactly had happened at a given point of time. The facts that the witness had identified all the four accused and had also stated that accused Kalang had given a blow on the thigh of the deceased are not in dispute. The other two witnesses, PW-4, Dharmpal and PW-7, Deonarayan only partly support the prosecution version.

5. Both PW-4, Dharmpal and PW-7, Deonarayan have supported PW-3, Jeetram that they along with deceased Moharsai and PW-3, Jeetram were coming back from Bhandarpara after attending there a wedding. However, their version is that Moharsai and Jeetram were walking ahead of them and they were behind them in the *Ghat* (slope). These witnesses also state that suddenly four persons came out and attacked the deceased, but they could not identify them. Both these

witnesses also stated that they did not know anything about the incident other than saying that four persons got-up and attacked the deceased. Nothing further has been gleaned from their statements.

6. PW-2, Dr. R.N. Gupta states that he found three injuries on the person of the deceased and the nature of the injuries were ante mortem, which are as follows (Ex.P-5):

Ante Mortem Injuries:

(1) Incised wound – 10 cm x 5 cm x muscle deep, all muscles are cut and femur was seen. Over anterior medial aspect of left thigh 10 cm below the anterior superior Iliac spine. Scialic nerve was intact but femoral artery and femoral vein was cut (separated) due to incised wounds.

(2) Incised wound – 5 cm below the 1st incised wound – size 8 cm x 5 cm x muscle deep over left thigh anteriomedially. Here Scialic nerve was intact, femoral vein was cut but artery was not seen. (Shrunken after cutting at wound No.1).

(3) Incised wound – size 4 x 1 cm x skin deep over right side of scalp in parietal area posteriorly.

7. PW-2, Dr. R.N. Gupta also opined that injury No.1 was sufficient to cause death. Injury No.2 may cause death, but injury No.3 was not sufficient to cause death. His opinion is also that the death of the deceased occurred due to excessive bleeding and haemorrhagic shock.
8. We have heard Learned Counsel appearing for the parties and have also perused the record with utmost circumspection.
9. Shri Jagat Sher Singh, Learned Counsel appearing for the Appellants submits that the statement of PW-3, Jeetram cannot be relied upon because there is contradiction in the statement made by him in the Court and what he stated in the FIR and in his statement recorded by the police under Section 161 Cr.P.C. He also submits that the other witnesses PW-4, Dharmpal and PW-7, Deonarayan have not at all

supported the case of the prosecution. According to the Learned Counsel, the statement of the said witnesses clearly show that the accused/Appellants were not identified. His further submission is that even if the statement of PW-3, Jeetram is believed to be correct, then the injuries caused by accused Kalang were on the non-vital part of the body and, therefore, this is not a case of murder. He also submits that there is no evidence to indicate that any of the three accused/Appellants other than accused/Appellant Kalang had caused any injury to Moharsai and, therefore, they have wrongly been convicted and sentenced. In the alternative, Learned Counsel submits that the offence committed by the accused/Appellants would fall within the ambit of Section 326 IPC. They can only be convicted for common intention of causing grievous injuries but not for the common intention of causing murder of the deceased.

10. On the other hand, Ms. Smita Ghai, Learned Panel Lawyer appearing for the State submits that this is a clear-cut case where the accused/Appellants had formed an unlawful assembly. They were armed with deadly weapons and they ran towards Moharsai and surrounded him, which sufficiently indicates their intention to kill Moharsai and they achieved their purpose and killed Moharsai. Therefore, the accused/Appellants have rightly been convicted and sentenced. She urged that the judgment of conviction and order of sentence passed by the Trial Court do not warrant any interference.
11. Reliance has been placed by Learned Counsel for the Appellants on a judgment of the Apex Court in **Harjinder Singh v. Delhi Administration, AIR 1968 SC 867**, wherein it is held as follows:

“10. Nevertheless, the deceased was in a crouching position when the appellant struck him with the knife. Though the knife was 5” to 6” in length including the handle it was nonetheless a dangerous weapon. When the appellant struck the deceased with the knife, he

must have known that the deceased then being in a bent position the blow would land in the abdomen or near it—a vulnerable part of the human body and that such a blow was likely to result in his death. In these circumstances it would be quite legitimate to hold that he struck the deceased with the knife with the intention to cause an injury likely to cause death. We are, therefore, of the opinion that the offence falls under Section 304 Part I.”

12. In criminal cases reliance can be placed in support of the defence, but each case is decided on its own facts and merits. It is only where legal issues are involved that precedents can be relied upon in criminal cases. What is proved beyond reasonable doubt will depend from case to case. No two cases will be identical on facts. No two cases can have the same factual situation. Each crime is committed in a different environment and at different place. It is not our intention to say that judgments should not be cited, but in criminal cases judgments may be cited to show what are the essential ingredients of a section or to support the legal submissions. If we go through paragraph 10 of the judgment in **Harjinder Singh case** (supra), it says that in the circumstances of that case it was quite legitimate to hold that the accused struck the deceased with the knife with the intention to cause an injury likely to cause death. The facts of the present case are totally different.

13. In the present case, the offence took place at about 10:30 p.m. The accused were hiding behind the bush. They were armed with deadly weapons, i.e., Tabbal and Tangiya. They had come with an intention to at least cause serious injuries. When Moharsai reached near the bush, accused Kalang suddenly got up and raised a cry almost like a war cry saying that kill Moharsai and he also used abusive language. It is true that PW-3, Jeetram had only seen Kalang giving one blow and that blow was given on the thigh. We have now to infer from the

rest of the facts and circumstances of the case what was the intention of the accused. The entire occurrence took place in 70-80 feet. Moharsai ran towards the river. The four accused also ran towards Moharsai. Moharsai was surrounded by the three accused and was given a blow by accused Kalang. We are clearly of the view that the facts of chasing and crying to kill Moharsai and the fact that Moharsai was given serious injuries are sufficient to hold that all the four accused had intention to cause serious injuries to Moharsai.

- 14.** The only question that is to be considered is that since the injuries were on the non-vital parts of the body of the deceased, the intention of the accused may not have been to kill the deceased, but, at best, to maim him, to cripple him and to teach him a lesson. The doctor, who conducted the post mortem of the deceased, had found two serious injuries on the left thigh of deceased Moharsai. The deceased had also been given another injury on the head which was skin deep. No question has been put to the doctor in this regard. Since PW-3, Jeetram did not indicate that who caused the head injury, the possibility, that the head injury would have been caused by any one of the four accused immediately after the two injuries were caused on the left thigh, cannot be ruled out. Since the head injury was only skin deep, it could also have been caused by falling down of the deceased. Even if we assume that the head injury was caused by one of the accused, this injury as opined by the doctor was neither a grievous injury nor was sufficient to cause death. Therefore, though we agree that the judgment of the Trial Court that the attack took place in the manner as stated by PW-3, Jeetram, we also agree that the action of the accused in attacking the deceased in the middle of the night clearly indicates that they all had the common intention to cause grievous injuries on Moharsai. We, however, cannot hold that it is proved beyond reasonable doubt that their intention was to cause

death because if there had been an intention to cause death, when after Moharsai had fallen down, they could have, with the Tangiya and Tabbal in their hands, caused serious injuries on the vital parts of the body of the deceased to ensure his death. The injuries found by the doctor were on the non-vital parts. At the same time, the nature of the injuries and the manner of the attack clearly indicate that the accused were aware that the offence being committed by them was of such a nature that it may cause death. Therefore, we convert their conviction from Section 302 IPC to one Section 304 Part I IPC.

15. We are clearly of the view that the four accused are equally liable and, therefore, should be awarded same sentence. In the facts and circumstances of the case and keeping in view the fact that the occurrence took place as many as more than 18 years back, it would be just and proper to reduce the jail sentence to 10 years' rigorous imprisonment. Hence, all the four accused/Appellants are convicted under Section 304 Part I IPC and are sentenced with rigorous imprisonment for 10 years.

16. The bail bonds of the Appellants are cancelled and they are directed to surrender forthwith to serve out remaining part of jail sentence, if any. A copy of this judgment be sent to the Trial Court for information and necessary action. In case, the Appellants do not surrender, non-bailable warrants of arrest be issued against them through the concerned Superintendent of Police and they be taken into custody for serving out remaining part of jail sentence.

17. The appeal is allowed in part in the aforesaid terms.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(Sanjay K. Agrawal)
JUDGE