

**SUPREME COURT OF INDIA**

Babboo

Vs.

State of M.P.

Crl.A.No.409 of 1974

(S. Murtaza Fazl Ali and D. A. Desai, JJ.)

30.11.1978

**JUDGEMENT**

**DESAI, J.:-**

1. The appellants in this appeal by special leave are original accused No. 1 Babboo alias Kalyandas, accused No. 3 Gopi son of Ubdha Maina, accused No. 5 Kamal son of Devi Ram Teli, and accused No. 7 Jawahar son of Devi Ram Teli, all of whom were convicted for having committed an offence under section 302 read with section 149 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life. They were also convicted for having committed an offence under section 148 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for two years by the learned II Additional Sessions Judge, Bhopal in Sessions Trial No. 16/74. Their Appeal No. 243/74 was summarily dismissed by the Madhya Pradesh High Court.

2. The appellants alongwith four others (acquitted by the Additional Sessions Judge) were tried for committing murder of one Diwan Singh on 21st September 1973. The prosecution case against them was that around 10 p.m. to 11 p.m. on the date of occurrence Diwan Singh was at his house,

relaxing on a cot, after taking his food. His wife Phoola Bai (P. W. 6) was sitting on the cot. At about that time, accused No. 8 Mohandas and accused No. 9 Kashidas (both acquitted by the Additional Sessions Judge) came to the house of Diwan Singh and informed him that he was required by one Prabhu. On receipt of this intimation Diwan Singh started from his house and Phoola Bai (P. W. 6) followed him. When Diwan Singh reached near the house of Devi Ram Modi, he was accosted by the appellants and four acquitted accused. All the accused were armed with Katarnas. Accused No. 1 Babboo alias Kalyandas struck a blow with Katarna on the shoulder of Diwan Singh. Immediately, thereafter all the rest of the accused also gave blows with Katarnas to Diwan Singh, P. W. 6 Phoola Bai was threatened that if she were to raise shouts, she would be killed. However, Phoola Bai screamed which attracted the attention of one Lachhman (P. W. 7) and Lachhman interceded and implored the accused not to beat Diwan Singh. At that time accused No. 4 Teekaram pushed the wooden handle of Katarna into the mouth of Lachhman. Diwan Singh fell down on the ground. Accused No. 2 queried if Diwan Singh had been done away with and when informed it was so, all the accused went away and entered the house of Devi Ram Modi, Phoola Bai (P.W. 6) went to the house of Ram Singh (P. W. 10), uncle of deceased Diwan Singh and informed him that her husband Diwan Singh was killed and was lying near the house of Devi Ram. Ram Singh (P. W. 10) called one Rati Ram and Gandharva Singh (P. W. 11). Gandharva Singh is the cousin of Diwan Singh, Phinsa (P. W. 5) the chowkidar of the village was sent for, and he soon arrived at the spot where the dead body of Diwan Singh was lying and at that time Phoola Bai (P. W. 6) and mother of Diwan Singh were also present there. Ram Singh (P. W. 10) and Gandharv Singh (P. W. 11) asked Phinsa (P. W. 5) to go to the police station and lodge a report and accordingly Phinsa went to Dehgaon Police Station and lodged report Exhibit P-25 on the basis of which an offence was registered and investigation was undertaken. Ultimately nine accused were charge-sheeted for the aforementioned offences.

3. The learned Additional Sessions Judge on a concession by the learned Government Pleader acquitted accused Nos. 8 and 9 holding that they had not participated in the actual assault and no deadly weapon was recovered from either of them and therefore they could not be said to be sharing the common object of the unlawful assembly. Similarly, in case of accused No. 2 and No. 4 the learned Additional Sessions Judge was of the opinion that merely because they caught hold of Phoola Bai they could not be said to be sharing the common object of the unlawful assembly. With these observations accused Nos. 2, 4, 8 and 9 were acquitted. In respect of accused Nos. 1, 3, 5, 6 and 7, the learned Additional Sessions Judge held that evidence of Phoola Bai corroborated by the evidence of Lachhman (P. W. 7) as also the evidence of Kanhaiyalal (P. W. 8) would affirmatively establish that the aforementioned five accused formed an unlawful assembly the common object of which was to commit murder of Diwan Singh and in prosecution of the common object of all of them, they simultaneously beat and belaboured Diwan Singh who died in consequence of the injuries suffered by him and therefore they were guilty of committing an offence under section 302 read with section 149 of the Indian Penal Code as also for committing an offence under section 148 of the Indian Penal Code and they were convicted and sentenced as mentioned above.

4. Their appeal to the High Court was dismissed in limine by a laconic order which leaves much to be desired brevity being its only merit.

5. The only and the most important witness against the appellants is Phoola Bai (P. W. 6). According

to her, original accused Nos. 8 and 9 came to her house, around 10 p.m. to 11 p.m. and told her husband Diwan Singh, who was then resting on a cot, kept in Dehlan, that he was required by one Prabhu. On this intimation Diwan Singh immediately started in company of accused Nos. 8 and 9 for going to the house of Prabhu. Phoola Bai then said that she followed her husband. This strikes us as utterly unnatural. If Diwan Singh had the slightest suspicion of any foul play he would not have readily agreed to accompany the original accused Nos. 8 and 9 who came to call him. His readiness to accompany the original accused Nos. 8 and 9 would dispel any suggestion of any suspected foul play otherwise Diwan Singh would have said that he would meet Prabhu on the next day in the morning because the intimation of a call by Prabhu did not disclose any urgency. Now, if Diwan Singh going with accused Nos. 8 and 9 would raise little or no suspicion, it is difficult to believe that for no rhyme or reason Phoola Bai would follow Diwan Singh.

She does not say that she had any suspicion. Undoubtedly, she is the third wife of Diwan Singh and even a second wife was staying with him at the relevant time. Son of Diwan Singh, then aged 12, was also staying with him. In these circumstances, evidence of Phoola Bai that she followed Diwan Singh appears to be utterly unnatural and a serious doubt arising out of this unnatural conduct, instead of being dispelled, gets reinforced and strengthened by the contents of the First Information Report Exhibit P-25, to which we would presently turn.

6. Phoola Bai further deposed that when her husband reached near the house of Devi Ram Modi present appellants and four acquitted accused accosted him and belaboured him with Katarnas. She was threatened not to raise shouts but she screamed and thereupon Lachhman arrived at the spot and beseeched accused not to beat Diwan Singh. She claimed to have identified the assailants and pointed them out in the court. This part of her evidence is belied by F. I. R., Ex. P-25 and the evidence of Ram Singh and Gandharv Singh to whom she did not give the names of the assailants. She did not disclose the identity of assailants to chowkidar Phinsa who was sent to lodge the F.I.R. Ex. P-25.

7. The next important witness who claims to be an eye-witness is Lachhman (P. W. 7). Lachhman stated that on the date of occurrence at about 11 p.m. he was returning from the house of Diwan Singh and when he reached near the house of one Kanhaiya, he heard the shouts of Phoola Bai. He rushed in that direction and he saw Diwan Singh being beaten by accused Nos. 1 to 9 with Kartarnas. He implored the accused not to beat Diwan Singh whereupon accused No.4 hit him by the blunt side of Katarna on his face. Accused No. 4 threatened him not to raise shouts or else he would be killed. Thereafter, all the accused went away. He saw Diwan Singh bleeding from his injuries. After sometime Ram Singh (P. W. 10) Gandharv Singh (P. W. 11) and Phoola Bai came there. He also stated that he was examined for the injuries suffered by him. Dr. S. Y. Jaffri (P. W. 2) stated that he examined Lachhman on 24-9-73 at 4 p.m. and he found abrasion in the upper lip inside infected 1/2" x 1/4" opposite upper right incisor tooth. Presence of Lachhman at the time of occurrence is very doubtful. Accordingly to Lachhman he left Diwan Singh's house at 11 p.m where he had gone to tether bullocks. He was then on his way to his house. He does not refer to the presence of accused Nos. 8 and 9 at the house of Diwan Singh. If accused Nos. 8 and 9 appeared at the house of Diwan Singh sometime after Lachhman left, it is not possible to believe that he would

be somewhere in the vicinity of the scene of occurrence so as to be able to hear the shouts of Phoola Bai. According to Phoola Bai accused No. 4 thrust wooden handle of Katarna into the mouth of Lachhman but according to Lachhman he gave a blow on his face. If what Lachhman says is true, the medical evidence would not bear out his testimony. He was not contacted till 23-9-73 and he is examined by Dr. Jaffri on 24-9-73 at 4 p.m. There is a serious contradiction in his evidence with reference to his evidence in the Committing Magistrate's court wherein he speaks about the visit of accused Nos. 8 and 9 to the house of Diwan Singh in his presence.

If that be so, he does not say that he saw Diwan Singh leaving in company of accused Nos. 8 and 9 followed by Phoola Bai. His house is not in the vicinity of scene of occurrence. Further according to chowkidar Phinsa he was present near the deadbody of Diwan Singh and yet he failed to disclose the names of assailants whom he claims to have identified before Phinsa left for the police station. Further Kanhaiyalal does not refer to Lachhman's presence. Viewed from either angle, his presence at the scene of occurrence and at the time of occurrence is doubtful.

8. The third witness in this context is Kanhaiya Lal (P. W. 8). Kanhaiya Lal deposed that on the date of the occurrence between 10 p.m. and 11 p.m. he was at his house. Phoola Bai came crying towards his house whereupon he got up and he saw 5 to 6 persons beating Diwan Singh and among them he identified accused Nos. 1 to 7. He does not speak of the presence of accused Nos. 8 and 9. He saw accused Nos. 1 to 7 beating Diwan Singh with Katarnas. He also saw Phoola Bai coming crying from that side. He made a very important statement that except Phoola Bai no other person excluding Diwan Singh and the accused was present there. This, to some extent, eliminates the presence of Lachhman. In his cross-examination he admitted that from near his house or the open court-yard styled as Dehlan, one cannot see the Dehlan of Devi Ram Modi as that place is about 30 to 35 paces from his house. The light available was a kerosene lantern near the house of Devi Ram. It is not possible to believe that Kanhaiya Lal would be able to have a view of the scene of occurrence from near his house as also to be able to identify the assailants. Therefore, Kanhaiya Lal does not appear to be an eye-witness as claimed by him.

9. We could have been persuaded to wholly overlook the infirmities pointed out by us in the evidence of principal prosecution witnesses Phoola Bai, Lachhman and Kanhaiya Lal, but for a very serious infirmity which stares into our face and renders the prosecution case utterly unworthy of belief.

10. Ram Singh (P. W. 10) is the uncle of deceased Diwan Singh, and Gandharv (P. W. 11) is the cousin of Diwan Singh. Phoola Bai went from the scene of occurrence to the house of Ram Singh, which would mean that the first person she approached after she had witnessed the brutality committed on her husband was no stranger to her but a near relation. She was asked by Ram Singh as to who was killed; to which she replied that the deadbody of her husband was lying near Modi's house. She does not say who were the assailants of Diwan Singh. Ram Singh immediately sent for Gandharv Singh (P. W. 11) and in his presence Phoola Bai spoke that Diwan Singh was killed. The

names of the assailants were not given. If Ram Singh and Gandharv Singh, the two near relations of deceased Diwan Singh, were approached within a couple of minutes after the occurrence and if Phoola Bai was the witness to the occurrence, as she claims to be, the most natural conduct on her part would be to give the names of the assailants to Ram Singh and Gandharv. The evidence of Ram Singh and Gandharv Singh would show that even though Ram Singh asked the specific questions as to who killed Diwan Singh, the only information that Phoola Bai gave was that the dead-body of her husband lying near the house of Modi. Could this be the conduct of the eye-witness, particularly of the wife, who claims to be a witness to the brutal assault on her husband and who claims to have identified the assailants? This lacuna renders the evidence of Phoola Bai, Lachhman and Kanhaiya Lal utterly unworthy of belief.

11. This infirmity in the evidence becomes more-telling when we refer to the evidence of Phinsa the chowkidar (P. W. 5) who was summoned to the scene of occurrence by Ram Singh soon after the occurrence. Phinsa stated that Ram Singh informed him that the dead-body was near the door of Modi, whereupon he went to the scene of occurrence and at that time Phoola Bai, mother of Diwan Singh, Lachhman, Ram Singh and Gandharv Singh were present there and he was told by Ram Singh and Gandharv Singh to make a report of the occurrence to the police station. He accordingly went to the police station Dehgaon and lodged a report Exhibit P. 25. This is the first information report. In Exhibit P-25 Phinsa states that he was informed by Ram Singh Maina around 11 p.m. on the previous night that a dead-body was lying near the house of Modi. He stated that he went to that place and found the dead-body of Diwan Singh lying there with the injuries on chest, head and hands caused with a weapon like Katarnas and blood was oozing out of the body. The report further recites that Ram Singh, Lachhman, Diwan Singh's wife Phoola Bai and mother were present there and he was informed that somebody had committed murder of Diwan Singh. This would affirmatively establish that Phoola Bai, Lachhman and Kanhaiya Lal were not witnesses to the occurrence, and that they had not seen or identified the assailants of Diwan Singh. This report was received at the police station on 22-9-73 at 12.30 noon. It would be a reasonable inference that for a period of 12 hours after the occurrence the names of the assailants were not disclosed and this would wholly belie the prosecution case that Phoola Bai, Lachhman and Kanhaiya Lal were witnesses to the occurrence. This renders the prosecution case utterly unworthy of belief.

12. There is no other evidence in this case which will remove or resolve the doubt arising from the contents of F. I. R. Exhibit P-25 as well as conduct of Phoola Bai in not giving the names of the assailants to her near relation Ram Singh to whom she first approached as well as to Chowkidar Phinsa. The distressing feature of this case is that neither the learned Sessions Judge nor the High Court attached due importance to this glaring infirmity in the prosecution case. An utterly incorrect statement was made in the judgment of the Additional Sessions Judge that Phoola Bai narrated the commission of the offence as witnessed by her to witness Ram Singh which fact is not borne out by the evidence of Ram Singh and Gandharv Singh but on the contrary after specific questions of Ram Singh, Phoola Bai does not give the names of the assailants. The learned Additional Sessions Judge does not even refer to this serious Lacuna in the prosecution case.

13. The learned Additional Sessions Judge has also referred to the recovery of Katarnas on the

information given by accused Nos. 1, 3 and 5. These recoveries hardly have any probative value in the facts and circumstances of this case. If there is no substantive evidence worth the name the recovery of Katarnas would hardly advance the prosecution case against the accused. Katarnas appear to have been stained with human blood. However, it is revealing to refer to the recovery memos. Katarna is recovered from accused No. 1 under seizure memorandum Ex. P-8 in which it is recited that accused No. 1 made the statement that he would show the Katarna with which he assaulted Diwan Singh on 21-9-73 at night. The first part in the seizure memo would be inadmissible because the fact that accused No. 1 assaulted Diwan Singh is not discovered in pursuance of the information given by accused No. 1. It would be a confessional statement to police officer hit by section 25 of the Evidence Act. Same infirmities were to be found in regard to the recovery memos in respect of accused Nos. 3 and 5. In this background we are not disposed to attach any importance to the recovery of blood-stained Katarnas on the information given by accused Nos. 1, 3 and 5.

14. It would thus appear that the prosecution has totally failed to bring home the charge against the appellants and accordingly this appeal is allowed and the conviction and sentence imposed upon the appellants are set aside and they are acquitted of all charges for which they were convicted. They are on bail. Their bail bonds are cancelled.

15. Before parting with this case, we feel impelled to express our sense of distress at the manner in which the High Court has disposed of the appeal preferred by the present appellants. When the appeal came up for admission, the High Court referred in one line to the evidence of Phoola Bai observing that she had named all the five appellants as having caused injuries to Diwan Singh with Katarnas. The next sentence is with reference to the evidence of Lachhman which evidence is disposed of by a cryptic observation that he supports Phoola Bai. The following sentence is with reference to Kanhaiya Lal's evidence and it is observed that he corroborates both Phoola Bai and Lachhman. Then comes a statement which may be reproduced in the words of the High Court. It reads as under:-

"Similarly, there are two other eye-witnesses, Ram Sing (P. W. 2) and Gandharv Singh (P. W. 11)."

This statement is wholly incorrect and a mere glance at the evidence of Ram Singh and Gandharv Singh would show that they were not eye-witnesses. The only inescapable conclusion is that such a serious appeal has been disposed of in a laconic manner without application of mind. The High Court then refers to the recovery of shirt of accused No. 1 and accused No. 3 having been stained with human-blood. The learned Additional Sessions Judge has not attached any importance to the recovery of these two shirts. When at a criminal trial a number of accused are convicted of such a serious offence as one under section 302 I.P.C. and there is only one appeal on facts to the High Court ordinarily it is expected that the contentions raised by the accused would receive serious considerations at the hands of the High Court. It is undoubtedly open to the High Court to dismiss such an appeal in limine but as is expected by this Court it must be by a speaking order. No useful

purpose would be served by paying lip sympathy to the requirements of making a speaking order if glaring inaccuracies and serious infirmities in the prosecution evidence are wholly over-looked. A mere statement that a witness implicates all the accused and a broad statement that other two witnesses corroborate the first witness cannot be styled as a speaking order, more so, when the averment in the judgment is not borne out by the record or is contrary to record. Even if the High Court chooses to rely on a witness in whose evidence there is a glaring infirmity namely that at the earliest opportunity the witness did not name the assailants, some reason for overlooking such an infirmity must ordinarily find its place in the judgment. In a criminal trial absence of names in first information report has considerable importance. If the absence of names of assailants in first information report is to be overlooked, cogent reasons must be assigned and they must appear in the judgment for the benefit of this Court. The High Court being the last fact-finding court it would not be too much to expect it to examine evidence with utmost care and caution.

Appeal allowed.