

CASE NO.:
Appeal (crl.) 258 of 2005

PETITIONER:
Bhagga and Ors

RESPONDENT:
State of M.P

DATE OF JUDGMENT: 11/10/2007

BENCH:
P.P. Naolekar & Altamas Kabir

JUDGMENT:
J U D G M E N T

Altamas Kabir, J.

1. This appeal by way of special leave granted on 4th February, 2005, is directed against the judgment and sentence passed by the Madhya Pradesh High Court on 31st October, 2003, affirming the judgment of the Second Additional Sessions Judge, Shivpuri, (M.P.) in Session Trial No. 133 of 1987 convicting the appellants under Sections 148, 302/149 and 323/149 of the Indian Penal Code and sentencing them for two years R.I. under Section 148 and for life imprisonment under Section 302/149 and for one year R.I. under Section 323/149 Indian Penal Code.

2. Of the 12 accused persons, who had originally been charge-sheeted, Shyamlal s/o Munna was found not guilty of the charges against him and he was, therefore, acquitted. Apart from Shyamlal s/o Munna, one other accused, Jairam, was found to be a juvenile during the course of trial and his case was accordingly separated and sent to the Juvenile Court for disposal.

3. Consequently, only 10 of the 12 accused persons filed Criminal Appeal No. 30 of 1989 before the Madhya Pradesh High Court, which affirmed the judgment of conviction and sentence passed by the learned Sessions Judge. All the said 10 accused are also the appellants in this appeal.

4. The case made out by the prosecution is that on 4th June, 1986, all the appellants who were armed with lethal weapons such as axe, lathi and Lohangi gathered at Village Burhanpur under Bamorkalan Police Station and formed an unlawful assembly and after entering the house of one Babulal, committed his murder and caused injury to his wife, Raina Bai.

5. The facts leading to the aforesaid incident is that appellant Malkhan is alleged to have cut down two Khair trees from the field of deceased Babulal. Babulal thereupon asked Malkhan to return the trees and Malkhan is said to have promised to return the trees cut by him to Babulal. On 4th June, 1987 at about 7 in the

morning, Malkhan went to Babulal's house and told him to take back the trees which had been cut down by Malkhan. Once Babulal reached Malkhan's house, he was assaulted by all the appellants. The incident was witnessed by Raina Bai (P.W.1), Raj Kumari Bai (P.W.4), Gyan Bai (P.W.6), Bhawani Singh (P.W.7), Harkunwar (P.W.8) and Lakhan Singh (P.W.14).

6. It is the further case of the prosecution that when Raina Bai and Gyan Bai tried to intervene, they too suffered injuries. Due to severe assault on Babulal he succumbed to his injuries and during post mortem the doctor found as many as 10 injuries, which in the opinion of doctor was the cause of Babulal's death, which was homicidal in nature.

7. Relying on the evidence of Raina Bai (P.W.1), Raj Kumari Bai (P.W.4) and Gyan Bai (P.W.6), the High Court was of the view that the evidence of the eye-witnesses was relevant and cogent and that the trial court after appreciation of the evidence had convicted the appellants. The High Court also observed that from the evidence the presence of the injured witnesses at the place of occurrence could not be doubted and their evidence inspired confidence. Consequently, the High Court dismissed the appeal.

8. The evidence as adduced by the prosecution indicates that on the day of incident Raj Kumari (P.W.4) was present at the house of her maternal uncle, Tej Raj, at Burhanpur. In the morning at 7 a.m. she had come out of the house to throw cow dung, when she heard a commotion from the side of the house of Shyamlal, Malkhan and Santosh. On hearing the commotion, she went to the spot and saw Malkhan, Santosh, Munna, Ramcharan and other accused, who were present in the Court, assaulting Babulal. She then went and informed Raina Bai (P.W.1) who is her sister-in-law that the accused persons were assaulting Babulal. She and Raina Bai came to the place of occurrence and saw Munna and Malkhan armed with Lohangis, Harnam and Shyamlal son of Balu armed with axes and the remaining accused persons armed with lathis and they were all beating Babulal. According to P.W.-1 when she tried to rescue Babulal from the accused persons she too was assaulted and accused Munna hit her with a Lohangi on the left hand, on the shoulder, right elbow and thigh. It is also in her evidence that her elder brother-in-law Bhawani Singh, elder sister-in-law, Raj Kunwar, Lakhan Singh and Har Kunwar also reached there. Thereafter, the accused persons took Babulal inside Malkhan's house.

9. P.W. 6 Gyan Bai's evidence indicates that on the day of incident she was in her house when Raina Bai and Harkunwar came and told her that her son had been killed. She then went to the house of Malkhan and saw that the accused had confined her son inside the house. She too deposed that Malkhan, Kalyan, Munna and Shyamlal were armed with Lohangis, Santosh was armed with lathi and Harnam was armed with an axe. On her protests Kalyan and Munna dropped her at the door-step of the

house from where she saw blood flowing from the mouth of her son Babulal, as Santosh had hit him on the mouth with a lathi. At the same time she also deposed that Harnam hit Babulal with an axe while Shyamlal son of Balu hit him with Lohangi and Ramcharan hit him with lathi. She also deposed that her elder son, Bhawani Singh and daughter-in-law, Raj Kunwar reached the place of occurrence at the same time. Both Bhawani Singh and Raina Bai went to Banmore Police Station and later on Head Constable of Police came to the spot and recorded the statement of Babulal which was subsequently treated to be his dying-declaration. P.W.-7 Bhawani Singh, P.W.-8 Har Kunwar, P.W.-9 Amol Singh, P.W.-14 Lakhan Singh have all supported the prosecution case and reiterated that the appellants had surrounded Babulal and had assaulted him with different weapons, as a result of which he fell down and subsequently the accused persons lifted him and took him into the house of Malkhan.

10. The defence taken on behalf of the accused was that all the accused are members of the same family and in the same way the deceased and all the eye-witnesses were also members of the same family and that exhibit P6 and P7 would reveal that there was continuous enmity between the two families. According to the defence, only family members of the deceased had been examined as witnesses on behalf the prosecution and although many villagers had assembled at the spot, no independent witness was examined by the prosecution. It was also the case of the defence that there were several discrepancies in the statement of the witnesses recorded in court and in the FIR as also the police statement, dying declaration and doctor's evidence. It was contended that there was contradiction even in regard to the place of incident. Furthermore, no human blood was found on the weapons recovered and no motive as such had been attributed to the accused persons for committing Babulal's murder.

11. As indicated hereinbefore, placing reliance on P.W.1, P.W.4 and P.W.6 who had witnessed the assault on Babulal by the accused persons and Babulal's dying declaration before the Head Constable, Dayanand Tyagi (P.W.15), the trial court was satisfied that the prosecution had been able to prove its case fully and accordingly convicted all the accused persons as mentioned hereinabove.

12. The High Court agreed with the findings of the trial court as to the veracity of the evidence of the eye-witnesses and maintained the order of conviction and sentence.

13. During the hearing of the appeal, we had occasion to look into the evidence of the eye-witnesses on which reliance has been placed by both the courts below and the names of Malkhan, Santosh, Harnam, Munna, Ramcharan, Shyamlal and Kalyan have been attributed specific roles by PWs 1,6,7 and 14, who claimed to have witnessed the assault on Babulal. Of course, P.W.4 who was the first witness to witness such assault has initially named only Malkhan, Santosh, Munna and Ramcharan as having

assaulted the deceased, but from her deposition it is quite possible that she did not witness anything further after coming back to the place of occurrence with P.W.1 Raina Bai. Apart from Shyamlal s/o Munna who was acquitted by the Trial Court, the role attributed to Bhagga, Shankara and Bahadura by the prosecution witnesses appears to be doubtful. As mentioned hereinbefore, P.W.4 Raj Kumari appears to have been the first witness from the side of the prosecution to have witnessed the assault on the deceased, Babulal and she has specifically named Malkhan, Santosh, Munna and Ramcharan as the persons who along with the other accused were assaulting Babulal. When she returned to the spot along with her sister-in-law, Raina Bai, the name of Harnam was added. However, it may be pointed out that from the evidence of P.W. 4 it appears that on returning with Raina Bai to the place of occurrence she remained at some distance, and Raina Bai alone went to the actual spot. Raina Bai, thereafter, named Bhagga, Kalyan, Ramcharan and Shankara as being the other persons who were assaulting her husband. P.W.6, Gyan Bai, has also named Kalyan who was present and had assisted Malkhan in carrying her and throwing her down at Malkhan's door-step. She has also alleged that Malkhan and Kalyan caught hold of both her hands and put their legs on her waist. P.W.7 Bhawani Singh and P.W.14 Lakhani Singh mention that Bahadura and Shankara along with the others had surrounded Babulal and were assaulting Babulal. Except for making such a general statement, no specific role has been assigned to them in regard to the incident.

14. Apart from the fact that all the eye-witnesses were consistent about the incident and involvement of Malkhan, Santosh, Munna, Ramcharan, Harnam, Shyamlal and Kalyan, there is also Babulal's dying declaration which implicates all the accused persons, except Shyamlal son of Munna. The evidence of P.W.12 Dr. Ramesh Kumar who performed the post mortem on the deceased and the injuries found by him on the body of the deceased is consistent with the prosecution case of assault of the victim by the accused persons.

15. PWs 1,4 and 6 have been believed both by the trial court and the High Court, but having regard to the fact that P.W.4 on returning to the spot with P.W.1 remained at a distance of about 100 yards and also having regard to the fact that the eyesight of P.W.6 was weak, we will have to treat their evidence with caution. As held by both the courts below, the mere fact that all the said eye-witnesses belong to one family cannot be a reason to disbelieve their evidence, since they were all on the spot or nearby the spot when the incident occurred. There is also no reason to disbelieve the dying declaration of the deceased in its entirety, but having regard to some amount of discrepancy in the evidence of the eye-witnesses, we are inclined to hold that the common object of all the accused to kill Babulal has not been established by the prosecution and Bhagga, Shankara and Bahadura, who are the appellants Nos. 2, 4 and 10 before us are entitled to be given the benefit of doubt.

16. It may be mentioned that upon his failure to

surrender, the special leave petition of Santosh was dismissed on 30th August, 2004.

17. Accordingly, we allow the appeal in part. The judgment of conviction and sentence of the trial court as confirmed by the High Court is affirmed as far as Harnam, Shyamlal, Kalyan, Munna and Malkhan are concerned. The said appellants, if on bail, shall surrender before the Chief Judicial Magistrate, Shivpuri, within a month from date to undergo their sentence. If the said appellants fail to surrender in terms of this order, the Chief Judicial Magistrate, Shivpuri, shall take steps to ensure that the said appellants are apprehended and made to undergo their sentence. The bail bonds, if any, in respect of these appellants shall stand cancelled.

18. The appeal is allowed as regards Bhagga, Shankara and Bahadura. The judgment of the trial court as affirmed by the High Court are set aside as far as they are concerned. Their bail bonds, if any, are discharged and they be set at liberty forthwith, if not required in connection with any other case.