

CASE NO.:
Appeal (crl.) 624 of 2007

PETITIONER:
Asharam & Anr

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 25/04/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL No. 624 OF 2007
(Arising out of SLP (Crl.) No. 4593/2006)

KAPADIA, J.

Leave granted.

This criminal appeal is filed by the accused against judgment and order dated 1.5.2006 passed by the Madhya Pradesh High Court, Jabalpur in Criminal Appeal No. 690/92 whereby the order of acquittal dated 30.8.1991 passed by Second Additional Sessions Judge, Betul in Session Case No. 22/89 stood reversed. By the impugned judgment, the appellants stand convicted under Section 307/149 IPC and sentenced to undergo 5 years R.I. and a fine of Rs. 5000/- to each accused.

As per the case of the prosecution, on 31.10.1988 Nandan (PW-1), Tikaram (PW-2), and Koshabai (PW-3) had gone to sow the seeds in their field. After sowing the seeds, when they were returning to their village, they saw the appellants along with three others hiding in the field of Chunni come out of the hiding and assaulted Nandan (PW-1). When Tikaram (PW-2) and Koshabai (PW-3) came to the rescue of Nandan, they were also beaten up. All the three were taken to the village Bijadehi and the FIR was lodged by PW-1 at Police Station, Bijadehi at 4:00 p.m. where the offence was registered under Sections 147, 148, 149, 324 and 307 IPC. The injured were sent to the Bijadehi hospital and from there they were referred to the District Hospital, Betul where they were x-rayed. In the x-ray, grievous injuries including fractures were found on the body of Koshabai and Tikaram. They remained in the hospital for 10/15 days.

The main question before the trial court was: whether an accused committed an offence under Section 307/149 as a member of unlawful assembly and in furtherance of their intention, attempted to murder Nandan, Tikaram and Kaushabai by causing deadly injuries.

According to the trial court, Nandan made two different statements in respect of Exhibit P/1 (report), in one statement, he stated that he did not go to the police station for lodging the report, in the other, he stated that he had lodged the report on the insistence of the police at his house and made his signature thereon. According to the trial court, if PW-1 had become unconscious at the scene of occurrence and had gained consciousness only at 8:00 p.m. at the Hospital then PW-1 could not have lodged the report at 4:00 p.m.. That,

Rampal was not examined by the prosecution. In the circumstances, the trial court held that lodgment of the report (Exhibit P/1) by PW-1 was doubtful. This, according to the trial court, was one of the circumstances in favour of the accused.

According to the trial court, there was serious contradictions in the evidence of Nandan (PW-1), Tikaram (PW-2) and Koshabai (PW-3). In this connection, the trial court noted the evidence of Koshabai in which she stated that at the time of assault, Bhura and Sukhdev were present but in the cross-examination, Nandan stated that Sukhdev and Bhura were not present at the time of assault. This, according to the trial court, was one of the contradictions in the evidence of PW-1 which made his testimony doubtful.

According to the trial court, Koshabai in her evidence stated that all the 5 accused were hiding behind the tuar tree and they came out together but in her cross-examination she stated that Dayaram came out first followed by others. According to Nandan, all the accused came together. On account of these contradictions, the trial court held that all the accused did not come together as alleged by the prosecution. This, according to the trial court, was one more contradiction between the evidence of PW-1 and the evidence of PW-3.

Further, according to the trial court, one of the accused, Mansharam, was ill, he was undergoing treatment under a Government doctor during the period 20.10.1988 to 10.12.1988, that he was suffering from typhoid, hence according to the trial court, Mansharam was not at the scene of offence and eliminating him the number of accused fall below five and, therefore, there was no question of formation of unlawful assembly.

According to the trial court, Nandan had stated that when Asharam had tried to assault him with ballam, he caught hold of ballam in order to snatch it from Asharam; that during this scuffle, Dayaram, appellant no. 2, had hit Nandan with the lathi which had only pierced his ear; that Tikaram (PW-2) was hit by lathi on his right hand, which was fractured; however, since PW-1 in his evidence stated that the police did not conduct any investigation and nor did the police record the statements of the witnesses, the whole evidence of PW-1 was doubtful.

According to the trial court, even PW-10 (doctor) has not stated that the injuries caused to PW-1, PW-2 and PW-3 were dangerous to the lives of the injured, that the injuries like fracture could have been caused by fall and that the fracture on the hand was not serious as hands were not vital organs. According to the trial court, in view of the above evidence no case under Section 307 was made out and at the most the case stood covered under Section 324 IPC.

According to the trial court, there were further contradictions, namely, according to Koshabai, there was a scuffle which lasted for two minutes whereas, according to Sushma (PW-5), the scuffle continued for 10-15 minutes.

According to the trial court, Nandan, in his evidence, had stated that when the scuffle started, Dayaram, came from behind with the lathi and hit him on his ear and Tukaram (co-accused) fractured his right hand with a stick on account of

which he fell whereas, according to Koshabai, when her husband fell she fell on him to save him when he was assaulted by Dayaram and Tukaram. According to the trial court, Nandan has nowhere referred to assault by Tukaram and, therefore, his evidence was contrary to the evidence of Koshabai.

According to the trial court, there was doubt even about the identity of the spot of occurrence. In this connection, reliance was placed on the contradiction between the statements of PW-1, PW-2 and PW-3 who stated that the accused were hiding in the field of Chunni, that they come out when they saw the complainant, PW-2 and PW-3 and the evidence of PW-18 who stated that incident occurred 1 kilometer to 1½ kilometers away from the field of PW-1.

For the above reasons, the accused were given the benefit of doubt and acquitted the accused of the charges under Section 307/149 IPC.

Aggrieved by the decision of the trial court, the matter was carried in appeal by the State being Criminal Appeal No. 690/92.

By the impugned judgment, the Division Bench held that the complainant party was badly beaten, they were left unconscious on the spot, the accused thought that the complainant party was dead upon which they fled and, therefore, intention of the accused party stood duly established and, accordingly, the appellants herein were convicted for the offence under Section 307/149 IPC. The appellants were accordingly sentenced to 5 years R.I. with fine of Rs. 5000/- each, in default the accused were required to undergo further sentence of 5 years R.I.. Aggrieved by the said decision, the appellants have moved this Court by way of special leave petition.

Mr. Dinesh Dwivedi, learned senior counsel appearing on behalf of the appellants submitted that the FIR was ante-dating and unreliable. In this connection it was urged that Nandan (PW-1) in his deposition before the court had stated that he had not gone to the Police Station, Bijadehi to lodge the FIR whereas according to the prosecution PW-1 had come to the Police Station, Bijadehi and had lodged the FIR. In this connection, reliance was placed on Exhibit P/1. Learned counsel submitted that PW-1 had totally denied of having gone to Police Station, Bijadehi to lodge the report and, on the contrary, PW-1 had deposed in his evidence before the court that he had become unconscious and had regained consciousness on 31.10.1988 only in the night. Learned counsel submitted that PW-1 in his deposition had stated that he had not lodged the report and that the report was lodged by Rampal. However, Rampal was not examined by the prosecution. Learned counsel urged that when PW-1 was the star witness who stated that he did not lodge the FIR as he was unconscious throughout the day, it was clear that the said FIR was fabricated. Learned counsel submitted that there was prior enmity and, therefore, embellishments in the evidence cannot be ruled out. In this connection, reliance was placed on the judgment of the Allahabad High Court in the case of Shyama Charan and others v. State of U.P. reported in 1984 All.L.J.1303 para 9. In this connection, learned counsel further urged that apart from the complainant party consisting of Nandlal, Tikaram and Koshabai, three other witnesses were related and since there were serious

contradictions in the evidence inter se all these witnesses, the FIR was not reliable. In this connection, learned counsel further stated that according to the police, Nandan (PW-1) was taken to the Police Station, Bijadehi but according to PW-1 no such report was lodged by him at the police station. According to PW-1, the report was lodged at his house, which was visited by the Inspector. Therefore, according to the learned counsel, Exhibit P/1 was doubtful. Learned counsel submitted that the story given in the FIR did not tally with what was stated before the court by PW-1. Further, according to the learned counsel, Nandan's (PW-1) statement under section 161 of the Criminal Procedure Code was not even recorded by the police. In the circumstances, according to the learned counsel, the said FIR was fabricated. It was further urged that the said FIR appears to have been made 15 days after the incident. Learned counsel urged that when a person comes with a ballam (spear) it is highly unnatural of his having hit the wrist or the hands of the complainant. Learned counsel, therefore, submitted that the entire story of the attack with the ballam appears to be unnatural. Learned counsel further urged that even the case of incident appears to be doubtful. According to the complainant party and three other witnesses, the accused along with three others were hiding in the field of Chunni where the incident is alleged to have taken place. According to the witnesses for the prosecution, Chunni's field was close to Nandan's field whereas according to the Sub-Inspector (PW-18) the place of incidence was approximately 1 to 1½ kilometers away from the field of PW-1. Hence, according to the learned counsel, even the place of occurrence indicated by the complainants and the other witnesses was doubtful. Learned counsel submitted that the accused were falsely implicated on account of enmity between the accused on one hand and the complainants on the other hand. Learned counsel submitted that the above circumstances given by the trial court show that the case of the prosecution was doubtful and there was no reason for the High Court to overrule the judgment of acquittal given by the trial court. In the alternative, learned counsel submitted that at the highest, looking to the nature of the injuries, case under Section 324 was made out. Learned counsel, therefore, submitted that the trial court was right in giving benefit of doubt to the appellants herein and rendering the order of acquittal in favour of the appellants herein.

We do not find any merit in the above contentions. According to the trial court, the foundation of the investigation was not proved and, therefore, all the accused were entitled to acquittal. In this connection, the main circumstance on which the trial court relied upon is ante-timing of the FIR. In the present case, we have gone through the notes of evidence. One of the points which was argued before us was that Exhibit P/1 (FIR) appears to have been made 15 days after the incident. We are not prepared to accept this argument. The evidence of Dr. S.B. Aerpude (PW-10) indicates that on 1.11.1988 he had medically examined Nandan, who was brought to Primary Health Center, Bijadehi. He was brought by Constable Panja of Police Station, Bijadehi. The said Constable had come to the Primary Health Center with a requisition note (Exhibit P/7). Further, in his evidence, PW-10 has stated that even Koshabai was brought to the Center by Constable Panja on 1.11.1988 under the requisition slip, Exhibit P/9. In the circumstances, it cannot be said that FIR was made 15 days after the incident. The requisition slips carried by the Constable indicates that the FIR preceded 1.11.1988 when Nandan and his wife Koshabai were brought to the Center by Constable

Panja of Police Station, Bijadehi. The question which still remains to be answered is whether Exhibit P/1 was lodged in the police station by Nandan or whether it was at his residence. In this connection, we find that the only discrepancy is with regard to the place where the FIR was recorded. There is no discrepancy regarding the contents of the FIR. It is well settled that an FIR is not a substantive piece of evidence. It cannot contradict the testimony of the eye witnesses even though it may contradict its maker. (see *Dharma Rama Bhagare v. The State of Maharashtra* reported in 1973 (3) SCR 92 at page 100). Nandan, in his evidence, had stated that Exhibit P/1 had his signature. That signature was obtained by the I.O. when the I.O. had come to his house. However, Nandan had stated that he had not gone to the police station to lodge the report and that it was Rampal who had gone to the police station to lodge the report. The most crucial fact is that the said report bears the signature of Nandan. It is important to appreciate that Nandan had collapsed when he was assaulted with lathi by Tukaram. His arm was fractured. He was taken to Bijadehi hospital where he regained his consciousness. However, before being taken to Bijadehi hospital he was taken to his house where his signature was taken on Exhibit P/1. He was taken to Baitul hospital after the x-ray. In our view, there is no reason to disbelieve PW-1. In any event, Exhibit P/1 cannot discredit the evidence of Tikaram (PW-2) and Koshabai (PW-3). That evidence corroborates the evidence of PW-1 who has categorically stated in his evidence that his land was situated in Neemgarh Village; that before Diwali he had gone to his field with Sukhdev, Bhure, Tikaram and Koshabai; that after sowing the field till 12:00 noon, Nandan (PW-1) with others was returning home for lunch and when the complainant party consisting of Nandan, Tikaram and Koshabai had reached the field of Chunni, they saw Asharam, Tukaram, Dayaram and Mansharam hiding in the tuar; that Asharam, appellant No. 1, had ballam (spear) with him and the rest of the accused had lathis; that Asharam came forward to pierce the spear in his abdomen when he caught hold of the spear; that there was a scuffle between Asharam and Nandan when Dayaram, appellant No. 2, assaulted Nandan with lathi from behind which hit his right ear and, at the same time, Tukaram, co-accused, gave a lathi blow on the right arm of Nandan caused its fracture; that at that stage Nandan fell and the accused started hitting him with lathis; that when his wife, Koshabai, saw her husband being assaulted, she fell on him in order to save him and in that process, Koshabai also got injured. That even Koshabai sustained injuries on her hands. That, Tikaram was injured on account of lathi blow given by Dayaram. According to PW-1, when Nandan became senseless, the accused fled thinking that he had died. This part of the evidence is corroborated by the evidence of Koshabai and Tikaram. In her evidence, Koshabai (PW-3) stated that Dayaram, appellant No. 2, had also assaulted her husband with a lathi; that Tukaram, co-accused, had also assaulted her husband with the lathi which fractured his hand and at that stage Nandan had fallen down and in order to save her husband, she fell on him and in the process she was also assaulted. There are certain discrepancies regarding the place at which the injuries were inflicted. However, a common thread runs through the evidence of the three complainants and other two witnesses who have deposed the time of the incident, namely, around 1:00 P.M. on 31.10.1988. They have categorically stated that October was the sowing time. They have categorically stated that they were returning for lunch after sowing their fields. They have categorically

stated that the incident took place at/near Chunni's field. They have categorically stated that the accused were hiding in the tuar. In the circumstances, we are not prepared to believe the I.O. who stated that the incidence took place 1 to 1= kilometers away from Nandan's field. The evidence of complainant party and the other witnesses mainly PW-5, PW-6 and PW-9 shows the manner in which the assault was carried out. They categorically deposed that the assailants were armed with ballam and lathis. The manner in which the injuries were inflicted have also been elaborately described, moreover, Nandan, Tikaram and Koshabai were injured witnesses. Their evidence was fully corroborated by medical evidence. The evidence further shows that the appellant, Asharam, came with the ballam, he tried to pierce the ballam into abdomen of Nandan; that if Nandan would not have caught hold of the ballam, Asharam had almost succeeded in piercing the spear into the abdomen; and lastly, the evidence shows that the accused fled when they thought that Nandan had died when in fact he had become unconscious on account of injuries. Therefore, the weapons were used by the accused as intended to be used. We are further of the view that there were minor omissions in the statement under Section 161 CrPC. There were no contradictions. The injuries have been duly proved. This is not a case where there are no injuries. There were 16 injuries on the body of Nandan, 4 on Koshabai and 7 on Tikaram. They were hospitalized for 15 days. Further, at this stage, we may point out that even according to Koshabai after the accused fled, she and Nandan had come to their house at Bijadehi where the police had come and from the house of Nandan and Koshabai, the complainant party had gone to Bijadehi hospital around 4:00 P.M. in the evening. Therefore, it is clear that the police had gone to the house of Nandan and Koshabai where the signature of Nandan was obtained on Exhibit P/1. Under the above circumstances, the High Court was right in coming to the conclusion that there was a common intention to cause serious injuries; that the presence of all the accused was proved on the scene of offence; that the specific role performed by each of the accused stood established and, therefore, there was intention to murder and, consequently, the High Court was right in convicting the accused under Section 307 read with Section 149 IPC. We are also in agreement with the view of the High Court that Dr. Narvaria (DW-2), Medical Officer, Chicholi had not proved his having treated Mansharam, co-accused, (for typhoid) during the period 28.10.1988 to 10.12.1988. That, DW-2 did not produce any document or register of the Health Center to show that Mansharam was an indoor patient in the hospital. That, there was nothing to show that he was treated in a private hospital. DW-2 had deposed that he had issued the certificate Exhibit D/7 on the demand made by Mansharam. The doctor did not maintain any register of the certificates issued by him, particularly when he says that he had private practice also. In the circumstances, the High Court was right in disbelieving Dr. J.P. Narvaria. In the present case, Nandan, Koshabai and Tikaram are the eye witnesses. They are injured eye witnesses. Hence, on the evidence, discussed above, there is no reason to doubt their credibility. Even assuming for the sake of argument that there are inconsistencies in the deposition of Nandan, we see no reason to disbelieve the evidence of Koshabai and Tikaram, who have substantially corroborated the evidence given by Nandan, particularly with regard to the place at which the 5 accused had assembled in the tuar, the spot at which the occurrence took place, namely, Chunni's field, the manner in which the assault was carried out, the weapons carried by the assailants and the manner in

which the injuries were inflicted. Lastly, the evidence further shows the running away of the accused from the scene of the offence after they saw that Nandan had fallen down on the ground when they thought him to be dead, when actually Nandan had become unconscious. In the circumstances, the offence under Section 307/149 IPC stood proved.

For the aforesaid reasons, the conviction rendered by the High Court is upheld and the appeal is accordingly dismissed.

JUDIS