2024 INSC 20

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1348 OF 2011

JITENDRA KUMAR MISHRA
@ JITTU **...APPELLANT**

VERSUS

THE STATE OF MADHYA PRADESH **...RESPONDENT**

WITH

CRIMINAL APPEAL NO. 1347 OF 2011

J U D G M E N T

PANKAJ MITHAL, J.

1. Heard learned counsel for the parties.

2. Four persons namely Manja alias Amit Mishra, Jitendra Kumar Mishra @ Jittu, Gledwin alias Banti Isai and Ajay alias Ajayya were convicted to life imprisonment under Section 302 r/w 34 IPC with a fine of Rs.5000/- each, and in default of payment of

fine with a further rigorous imprisonment for six months in Sessions Trial Number 378 of 2007 vide judgment and order dated 15.09.2008 passed by the 13th Additional Session Judge (Fast Track), Jabalpur, M.P.

3. On appeals, i.e., Criminal Appeal No.2031 of 2008 preferred by Manja @ Amit Mishra and Jitendra Kumar Mishra @ Jittu together and Criminal Appeal No. 2237 of 2008 preferred by Gledwin @ Banti Isai and Ajay @ Ajayya together, the conviction and sentence awarded by the Session Trial was upheld and both the appeals were dismissed by the High Court.

4. It is in connection with the aforesaid Sessions trial and the conviction of the appellants under Section 302/34 IPC that the present appeals have been preferred one by Manja @ Amit Mishra and Jitendra Kumar Mishra @ Jittu and another by Gledwin @ Banti Isai and Ajay @ Ajayya. Both the appeals were tagged and leave to appeal was granted on 08.07.2011. During the pendency of the appeal, one of the appellants, namely, Manja @ Amit Mishra in Criminal Appeal No. 1348 of 2011 died.

Therefore, the said appeal is being pressed only on behalf of the appellant- Jitendra Kumar Mishra @ Jittu.

5. The incident is of 08.06.2007 which probably took place around 08.45 pm in the night, in front of Machchu Hotel which is located near Shukla Hotel within the jurisdiction of Police Station Ghamapur, Jabalpur. In the said incident, one Pappu alias Rajendra Yadav had died. It is alleged that when he along with his friends Virendra Verma and Amit Jha was coming out of the Machchu Hotel, he was beaten and assaulted by all the four accused with knife and other weapons such as sickle and kesia.

6. The information of the alleged incident of beating and assaulting the deceased Pappu was given by one Virendra Kumar (PW-1) at about 09.00 PM to the brother of the deceased, i.e., Rajkumar Yadav and his mother Usha Rani Yadav. On receiving the said information, both Rajkumar Yadav and his mother rushed to the place of occurrence and found the deceased Pappu Yadav lying on road in a pool of blood. The mother of the deceased took the head of Pappu Yadav in her lap whereupon clothes were tied

on his wounds by Rajkumar probably to stop bleeding. They took the deceased in a rickshaw to the Police Station Ghamapur. After Rajkumar Yadav (complainant) lodged the report (FIR exhibit P/2 at 09.30 PM), he took the deceased to the Victoria Hospital, Jabalpur for treatment where he was declared dead.

7. The prosecution is based upon the dying declaration of the deceased. The said dying declaration is in oral form. It was made by the deceased to his brother Rajkumar Yadav and mother Usha Rani Yadav who have reached the place of occurrence on being informed that the deceased was being beaten and assaulted by the accused persons near Machchu Hotel. The dying declaration as revealed by Rajkumar Yadav was made by the deceased on the asking of the mother as to what had happened? It is in response to the above query that the deceased stated that the Banti Isai, Manja, Ajay have assaulted him with knife, dagger and kasia respectively whereas Jittu caught both his hands. The above dying declaration is in the shape of an answer to the question asked by the mother of the deceased as

to what had happened to him when she saw him lying on the road in a pool of blood.

8. The statement of the mother of the deceased PW-5 also contains a similar dying declaration of the deceased.

9. In addition to the above dying declaration, reliance has been placed upon the testimony of one of the eye witnesses, Rahul Yadav (PW-13). The said witness stated that the incident in which the deceased Pappu Yadav was killed had taken place between 08.30 pm to 09.00 pm on 08.06.2007 near Machchu Hotel. He was returning from his friend's house and when reached near Shukla Hotel, he saw the accused persons namely Banti, Manja, Jitendra and Ajay beating Pappu Yadav. He tried to rescue Pappu Yadav but the accused persons drove him out. He then rushed to the House of Pappu Yadav to inform about the incident to his family members, but he found no one at the house and therefore left for his home.

10. It has come in evidence that Rahul Yadav (PW-13) is a relative of the deceased Pappu Yadav and as such he is not a free and independent witness. He is likely to be an interested witness.

The evidence reveals that he is a person with criminal background. He is involved in one of the cases registered under Section 324 and 326 IPC. He has been chargesheeted under Section 3/5 of the Explosive Substance Act. He has avoided the process of the Court and had been absconding for almost 7 months.

11. In view of his above background, his testimony has to be considered with great circumspection and cannot be relied upon blindly without taking into account available corroborative evidence on record, if any. The evidence on record (i.e. site map) cast a serious doubt as to whether the place of occurrence or the Machchu Hotel was visible from the Shukla Hotel where the above witness was standing and from where is said to have seen the occurrence of the incident.

12. The above witness was not found at the place of occurrence by the brother and mother of the deceased when they reached the place of occurrence immediately after the alleged incident had taken place or at the time when the deceased was lying on the road. They have not mentioned about his presence though he

ought to have been there as he had tried to save the deceased. Even the deceased has not mentioned in his alleged dying declaration or the statement given to his brother and mother that someone tried to save him or that the above witness Rahul Yadav (PW-13) had come to his rescue but was made to run away. Additionally, even the FIR does not mention the presence of PW-13. All these factors cast a serious doubt as to presence of PW-13 and the conviction cannot be based on his testimony alone.

13. The FIR specifically mentioned that the incident was witnessed by Virendra and Amit Jha, the friends of the deceased who were with him at the time of incident. Both these two persons have not supported the prosecution case.

14. These two eye-witnesses to the incident (i.e. Virendra (PW-1) and Amit Jha (PW-12), were declared hostile and as such their depositions are of no use now.

15. Now coming to the dying declaration made by the deceased to his brother and mother. We find that the injuries sustained by the deceased were very grave. The doctor (Dr. Abhishek Singh,

PW-9) who performed the postmortem at Medical College, Jabalpur opined that the left lung of the deceased was punctured causing respiratory failure and the left lung was pale. The heart injury sustained by him could have caused excessive bleeding and in that situation the person would have died between 5 to 10 minutes of receiving such injuries or within a maximum of 15 minutes. The postmortem report on record which was duly proved reveals that the deceased had died due to haemorrhage shock and cardio-respiratory failure. Apart from the injuries referred above, the deceased had suffered other serious injuries, not only on neck, chest and abdomen but also on the lower limbs from where bleeding had taken place. There was also an injury on the skull.

16. The brother of the deceased Rajkumar Yadav is a lawyer by profession. The brother and the mother of the deceased had rushed to the spot only after receiving information of the incident from PW-1 who after seeing the accused persons assaulting the deceased had gone to their house to inform of the incident. All this, obviously, could have consumed 15-25 minutes which means that by the time they reached the place

of occurrence, the deceased could not have survived so as to make any declaration. There is no specific material piece of evidence to establish that the deceased was alive or in a position to speak when his brother & mother reached the spot. In these circumstances, the dying declaration cannot be *ex facie* accepted to be correct unless it stands corroborated by any other cogent evidence. There is no material to corroborate the said dying declaration.

17. We are conscious of the fact that the appellate court should be slow in interfering with the conviction recorded by the courts below but where the evidence on record indicates the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and that a plausible view, different from the one expressed by the courts below can be taken, the appellate court should not shy away in giving the benefit of doubt to the accused persons.

18. In the overall facts and circumstances of the case, we are of the opinion that the courts below ought to have extended the benefit of doubt to the appellants. Accordingly, we are of the opinion

that the conviction and sentence of the appellants are liable to be set aside and are hereby set aside by granting the benefit of doubt. They stand acquitted and are set free. They are on bail, their bail bonds are discharged.

19. The appeals are allowed.

..... J.
(ABHAY S. OKA)

..... J.
(PANKAJ MITHAL)

NEW DELHI;
JANUARY 5, 2024.