



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 332 of 2008.

Reserved on: 19.09.2014.

Date of Decision :09.10.2014.

State of Himachal Pradesh

.....Appellant.

Versus

Ajay Kumar and others

.....Respondents.

Coram

**The Hon'ble Mr. Justice Rajiv Sharma, Judge.
The Hon'ble Mr. Justice Sureshwar Thakur, Judge.**

Whether approved for reporting? Yes.

For the Appellant: Mr. Ashok Chaudhary, Addl. Advocate General.

For the Respondents: Mr. G.R. Palsra and Mr. T.S. Chauhan, Advocates.

Sureshwar Thakur, Judge

The instant appeal is directed by the State, against the impugned judgment, rendered on 8.1.2008 by the learned Sessions Judge, Mandi, Himachal Pradesh in Sessions Trial No. 23 of 2007, whereby, the learned trial Court acquitted the accused/respondents for theirs having committed an offence under Section 302 read with Section 34 IPC.

2. Brief facts, of the case are that complainant Om Chand is the father of deceased Yadav Singh @ Sanjay. His son was working as driver in PWD in Lauhal area prior to his death. He came home on 19.10.2006 and on the morning of 20.10.2006 he had gone to collect the sale consideration of Alto Car which had sold to one Bitu about two months back. Sanju reached home at about 7.45 p.m from Sundernagar. At about 8.30 p.m. his son received a call on his mobile and thereafter he left the house telling his father that he would come soon. Sanju did not come at night and the complainant thought that his son had stayed at the house of his Mausi. Later on a telephone call was received by Harish (PW-12) younger son of the complainant on his mobile that somebody has picked up quarrel with his brother Sanju. However, he did not tell about this to his father Om Chand. Next day i.e. on 22.10.2006 at 7 p.m. a telephonic call was received by his nephew Kirnu from Mohindru of village Badyar that a dead body was lying near the bushes by the side of the road and the complainant should verify the same. Thereafter complainant alongwith 4/5 persons went in a car to village Badyal and found the dead body lying in the bushes. In the meantime Pradhan of Gram Panchayat Badyal had informed the police and the police also arrived at the spot and examined the dead body. They noticed injury marks on the

dead body. Statement of complainant Om Chand under Section 154 Cr.P.C was recorded on the basis of which FIR Ex. PP was registered. PW-19 SHO Hemant Kumar took the photographs Ex. PW-6/1 to 20 and thereafter he filled up the inquest papers vide Ex. PB. Vide memo Ex. PC articles lying near the dead body were taken into the possession. Site plan Ex. PY of the place where the ~~dead~~ body was lying also prepared. Statements of the witnesses were recorded. The accused were arrested on 22.10.2006. On 24.10.2006 the disclosure statement of accused Ajay was recorded. On the basis of disclosure statement made by accused, Darat Ex. P-2 was recovered from his cowshed and the same was taken into possession vide memo Ex. PG in the presence of the witnesses. The site plan of place of recovery is Ex. PG/1. The disclosure statement of accused Manoj Kumar Ex. PF was also recorded. On the basis of which police got recovered sickle Ex. P-3 vide Ex. PH. The site plan of place of recovery is Ex. PH/1. Mobile phone of the associates of the deceased were also taken into possession vide memo Ex. PAC. On the disclosure statement of accused Yogesh Kumar Ex. PJ, danda Ex. P4 was recovered from the kitchen of his house. The same was taken into possession vide memo Ex. PK and site plan of place of recovery Ex. PK/1 was prepared. The house of father of accused Manoj kumar was searched under memo

Ex. PAD. Similarly house of Pawan Kumar was also searched under memo Ex. PA and Kudali Ex. P-7 was recovered. The dimension of the Kudali Ex. P-7 was taken; memo in this regard is Ex. PR. On application Ex. PU, PW-16 has conducted the post mortem and issued a post mortem report comprised in Ex. PV. In his opinion, the cause of death was injury to heart and brain but mainly to the heart. During the course of investigation, the doctor examined the accused Ajay Sharma and noticed three injuries. He has issued MLC Ex. PO and opined that injury No.1 is possible with grip having sharp edged weapon.

3. On completion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 Cr.P.C was prepared and filed in the Court.

4. The accused were charged for theirs having committed an offence punishable under Section 302 read with Section 34 IPC, by the learned trial Court, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined 19 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned Trial Court in favour of the accused/respondents. Mr. Ashok Chaudhary, the learned Additional Advocate General has concertedly and vigorously contended, that the findings of acquittal recorded by the learned trial Court below are not based on a proper appreciation of the evidence on record rather, they are sequelled by gross mis-appreciation of the material evidence on record. Hence, he, contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondent.

7. On the other hand, the learned defence counsel has with considerable force and vigour contended that the findings of acquittal recorded by the Court below are based on a mature and balanced appreciation of the evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. The alleged occurrence took place on the night of 21.10.2006. In the said occurrence, deceased Sanjay @ Yadav is alleged to have been assaulted by the accused with Drat, Danda and sickle, etc., for avenging the previous altercation interse him and accused Ajay Kumar at the shop of Kaku chicken vendor. The occurrence aforesaid preceding the alleged occurrence is alleged to have taken place on 21.10.2006 at 8.00 p.m in the presence of Ashok Kumar (PW-6) and (PW-5) Yuvraj. Besides, accused Ajay Kumar who allegedly sustained injuries caused by the deceased reported the matter to the police, comprised in Ext.PL. Consequently, on the score of accused Ajay Kumar hence nursing a motive to avenge the injuries inflicted upon him by the deceased Sanjay Kumar on 21.10.2006 at 8.00 p.m., as such, with the motive reared by him he is alleged to have done to death deceased Sanjay Kumar. The deposition of PW-1 Om Chand, father of the deceased as also the complainant, though does not render a vivid ocular version qua the incident, yet it elucidates the factum of on 21.10.2006 at 7.45 p.m., when deceased Sanjay arrived home at 8.30 p.m., his having received a call over his mobile which led him to leave home with an intimation PW-1 that he would return home soon. However, though deceased Sanjay Kumar had intimated to PW-1 on his departure from home of his intending to return

home soon, however, he did not return. Nonetheless, the brother of the deceased, Harish Kumar (PW-12) did receive a call divulging the fact of somebody having had an altercation with the deceased. In the morning of the succeeding day, at 7.20 a.m., one Mahindru is deposed to have made a call to Kirnu, nephew of complainant Om Chand, disclosing therein that a dead body was lying near the pump house in the bushes. The intimation aforesaid, led PW-1 alongwith his nephew Sanju, Kiran Kumar and Raj Kumar to leave for the spot, where they found the dead body of Sanjay. It is apparent on a reading of the testimony of PW-1 that PW-12 Harish Kumar remained home throughout the night of 21.10.2006. However, a disclosure qua the incident which took place on the previous night was yet not made by PW-12 to PW-1. Obviously, perse when PW-12 remained home throughout the night of 21.10.2006, he, was ill-equipped as well as disempowered to make a disclosure or reveal the details of the incident which took place then. Concomitantly, then any disclosure made by PW-12 to PW-1 about any incident which took place on 21.10.2006 cannot acquire any tenacity.

10. Even otherwise, the inculpatory role, as attributed to the accused by the prosecution fades in the face of PW-1 having not disclosed in his statement comprised in Ext.P-1,

the names of any of the accused even in the face of a vivid disclosure enumerating the details of the incident which occurred on the night preceding the recovery of the body of the deceased having been disclosed to him by PW-12. Consequently, an apt inference which flows is that both PW-12 and PW-1 were unaware of the identity of the accused. In sequel, it has to be concluded that the learned trial Court while according weight to the said factum and its prodding it to conclude that the identity hence of the accused who had assaulted the deceased and caused his death had remained un-established, does not suffer from any perversity or absurdity of mis-appreciation of evidence on record.

11. Even an advertence to the testimony of PW-12 is significant. He in his examination-in-chief has deposed that on 21.10.2006 at 8.00 or 8.15 p.m. he received a telephonic call from Yuvraj from Behna that a quarrel had taken place with his deceased brother at Badyal, which led PW-12 to leave for Badyal on a scooter. On his arriving at Badyal, PW-12 found Ghan Shyam, Om Prakash and deceased Sanju quarrelling with each other. However, he interceded and separated them. He continues to depose that Yuvraj inquired from accused Ajay about the telephone number of Kaku Chicken Vendor and Ajay apprised him that he was not aware of the said number. He deposed that there was again an

altercation interse the two and he separated them. He also admitted that fact that his deceased brother Sanju gave a blow on the face of Ajay and the former apologized to Ajay for his mis-demeanor. He deposes that he alongwith Sanju, Ghanshyam and Yuvraj when had arrived near the Pump house, then from behind Ajay, Yogesh and Manoj also arrived there. Accused Ajay has been deposed to be carrying a weapon like Darat, accused Yogesh has been deposed to be carrying sickle and accused Manoj has been deposed to be carrying a Danda. Though, he deposes that he concerted to intercede and repulse the assault, however, to no avail. Accused Ajay has been deposed to have chased Sanju on the road and he deposes his having heard cries of Sanju 'Bhag Gaya'. Subsequently, he deposes that he alongwith the above associates came towards Behna and Ghanshyam left him on the way. On reaching home he found that deceased Sanju was not there. He has also deposed that he alongwith Yuvraj went to Bedyal on scooter to search for Sanju and made a telephonic call on his mobile, which remained unanswered. Lastly, he deposes that he went to bed at 9.30 p.m and omitted to disclose the entire incident to Om Chand PW-1.

12. The deposition of the brother of the deceased PW-12 Harish Kumar comprised in his examination-in-chief, has not got to be accepted at its face value. For unearthing the

truth of his deposition, it is imperative for this Court to incisively discern and also read his testimony comprised in his cross-examination so as to look for existence therein of any embellishments or improvements arising from omission on the part of PW-12 to previously state before the police the facts deposed by him during his examination-in-chief. Only in case his testimony is read in a wholesome manner and its omitting to unravel interse contradictions or intrase contradictions vis-à-vis his previous statement recorded in writing would credibility be hence imputed to the deposition of PW-12. An incisive reading of the testimony of PW-12 comprised in his cross-examination unveils the factum of this witness having deposited certain facts in his examination-in-chief which were omitted to be stated by him to the police in his statement recorded under Section 161 Cr.P.C. Obviously, facts deposited for the first time in Court by PW-12 during the course of recording of his examination-in-chief, obviously when omitted to be stated to the police earlier, constitute embellishments and improvements rendering his testimony qua the facts deposited for the first time in Court to be disempowered to attain sanctity. The facts which have been deposited by PW-12 for the first time in Court and which render them to be acquiring the taint of improvements and embellishments are (a) omission in the previous statement of PW-12 made to the

police of a telephonic call having been made by Yuvraj from Behna and of his having not stated to have gone to Badyal where Yuvraj, Sanju and Ghanshyam met to him. (b) Lack of occurrence in his previous statement recorded under Section 161 Cr.P.C. comprised in Mark-D of deceased Sanju having assaulted accused Ajay on his face in his presence and of an apology having been made by the deceased to Ajay, (c) lack of narration in his previous statement comprised in mark-D of all the three accused leading a crowd of 30 to 35 persons including the family members of the accused. (d) Omission to narrate in his previous statement that accused Manoj was carrying Danda (Ext.P-4) and sickle (Ext.P-3) was wielded by accused Yogesh. (e) Reticence in his previous statement comprised in Mark-D that owing to Diwali festival, he omitted to disclose the details of the incident to his family members.

Lack of occurrence in the previous statement of PW-12 comprised in Mark-D of facts aforesaid existing in his examination-in-chief while for reiteration comprising improvements and embellishments, hence rendering his testimony to be imbued with falsity, are grave, pervasive and immense. They unstrip and unshred the veracity of the version qua the incident deposed by PW-12 in his examination-in-chief. As a concomitant, the prosecution version anvilled upon the deposition of PW-1 and PW-12 is

wholly infected with the vice of untruthfulness, concoction and invention, on which no reliance can be placed by this Court.

13. A perusal of the deposition of PW-5 Yuvraj, the person who was purportedly accompanying PW-12 at the material time while omitting to unravel the fact of his having recognized accused Yogesh and Manoj in the crowd owing to darkness, while comprising an intra-se contradiction vis-à-vis the deposition of PW-12 who, however, has attributed an inculpatory role to both aforesaid, hence renders imbued with the vice of prevarication, the testimonies of both PW-5 and PW-12. Besides it renders untruthful of both having purportedly gathered at the site of the occurrence. For lack of existence of harmony and consistency interse the testimonies of PW-5 and PW-12 qua the genesis of the prosecution case then an apt and ready inference which ensues, is, that hence when both were not together at the site of occurrence then too the concomitant deduction which spurs, is that both are rendering a concocted and manufactured version qua the incident, which cannot gain credence with this Court.

14. The deposition of PW-6 omits to lend support to the prosecution case. Besides the scanning of the testimony of PW-4 Ghanshyam underscores the factum of his having not lent support to the prosecution case. He during the course of his cross-examination by the learned Public Prosecutor on his

having come to be declared hostile feigns ignorance qua the presence of the accused in the crowd as also with his having deposed that he did not perceive any Danda wielded by any member of the crowd renders his testimony to be rendering no support or succor to the prosecution version. A perusal of the testimonies of the witnesses aforesaid whose depositions were relied upon by the learned Additional Advocate General to canvass before this Court that hence the charge against the accused stood convincingly established and proved, does rather as aptly concluded by the learned trial Court constrain a conclusion, that their testimonies are infirm and discrepant, ridden with improvements and embellishments vis-à-vis their previous statements recorded in writing, besides theirs turning hostile and hence not rendering support to the prosecution case, renders the prosecution case to capsize.

15. Even the deposition of PW-16 the doctor who conducted the post mortem examination on the body of the deceased omits to give strength to the prosecution version inasmuch, as, (a) on weapons of offence, purportedly wielded by the accused with which the purported lethal blow was delivered on the person of the deceased being Darat, Kudali, Drati and Lathi, when shown to this witness and perceived to be having blunt and broken edges at places and not sharpen enough to cause injuries noticed by him on the body of the

deceased (b) his having unequivocally voiced that the sharp injury is not possible with blunt weapon like Lathi. In sequel, his testimony unfolds the fact of the user of none of the weapons shown to this witness being the cause of the injuries as noticed by PW-16 on the body of the deceased while conducting his post mortem examination. However, Ext.P-21 Kudal, the weapon of offence, purportedly used by the accused for purportedly assaulting the deceased was introduced by the prosecution/Investigating Officer and shown to PW-16 during the course of the recording his testimony.

On Ext.P-21 being shown to PW-16, it sequelled elicitation of an opinion of PW-16 that Injury No. 3 as elucidated in his post mortem report Ext.PB is possible with its user. Consequently on strength of the opinion rendered by PW-16 on Ext.P-21 on its having been shown to the former during the course of his examination-in-chief an empathic argument, is, concerted to be built by the learned Additional Advocate General, that, hence the prosecution has been able to clinch the factum of the inculpation of the accused, in the commission of the offence alleged against them. However, the said argument, is, bereft of any force or vigour, inasmuch, as (a) the introduction of Ext.P-21 Kudal is not preceded by preparation of a disclosure statement or a recovery memo in consequence to its recovery thereof having been made at the instance of

the accused, for rearing open an inference that hence even when it was shown to PW-16 during the course of the recording of his examination-in-chief it was an efficacious weapon of offence wielded and used by the accused for perpetrating the assault on the deceased. Lack of evidence portraying the factum of its purported recovery at the instance of the accused in succession to a disclosure statement qua the fact of its place of hiding or concealment musters the conclusion that its introduction by the prosecution, is, tainted and besmirched. Consequently, it is an unworthy introduction which carries no force in the eyes of law. Also then any opinion rendered by PW-16 qua its having begotten the Injury No. 3, is not edificatory. (b) Even assuming that any injury which purportedly led to the demise of the deceased was sequelled by the user at the instance of the accused of Kudal Ext.P-21 yet with the entire thrust and weight of the oral evidence qua the occurrence being ridden with a plethora of improvements and embellishment as well as blatant interse and intra se contradictions in the testimonies of the prosecution witnesses, as such, discounting the very fact of the occurrence as portrayed by the prosecution to have taken place, strips of in its entirety the factum of user of Ext.P-21, if any, by the accused for perpetrating the assault

on the person of the deceased, which assault ultimately led to his death.

16. As such, the impugned judgment does not suffer from any vice, absurdity or perversity of mis-appreciation or non appreciation of evidence. Consequently, reinforcingly, it can be formidably concluded that the findings of the learned trial Court are based on a mature and balanced appreciation of evidence on record and do not merit interference.

17. In view of the above discussion, we find no merit in this appeal which is accordingly dismissed and the judgment of the learned trial Court is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

**(Rajiv Sharma)
Judge**

9th October, 2014.
(TM/Jai)

**(Sureshwar Thakur)
Judge**