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**(2010) 2 WLN 379**

**Rajasthan High Court**

**Case No:** None

Om Prakash and  
Others

**APPELLANT**

**Vs**

State of Rajasthan

**RESPONDENT**

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**Date of Decision:** March 12, 2010

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) â€” Section 161, 313#Penal Code, 1860 (IPC) â€”  
Section 147, 148, 149, 302, 323

**Citation:** (2010) 2 WLN 379

**Hon'ble Judges:** Gopal Krishan Vyas, J; A.M. Kapadia, J

**Bench:** Division Bench

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**Judgement**

Gopal Krishan Vyas, J.

In this criminal appeal, the appellants are challenging the judgment dated 28.02.1986 passed by the Sessions

Judge, Churu in Sessions Case No. 20/1985, whereby, learned trial Judge convicted the each of the appellants for offence u/s 302, read with

Section 149 I.P.C. and sentenced them to suffer life imprisonment with a fine of Rs. 500/- and for offence u/s 148 I.P.C. awarded sentence of

imprisonment for one year.

2. According to brief facts of the case, an FIR was filed by P.W.-1 Kishore Singh S/o Durjan Singh at Police Station Meerwas (District Churu) at

03.35 P.M. on 17.01.1985, in which, it was stated that his brother Mandan Singh, by caste Rajput, r/o village Bhojan was going on camel

towards the temple. At that time, in front of the house of Heer Singh S/o Dhan Singh, Sardara Ram, Om Prakash, Satveer, Bhaga Ram and Antar

Singh, by caste Jat, r/o village Bhojan assaulted his brother Mandan Singh and gave beating to him. At the time of assault, Sardara Ram, Bhagaram

and Antar Singh were having "lathies" in their hands and Om Prakash and Satveer had "geti" with them. Upon above statement of P.W.-1 Kishore

Singh, FIR No. 9/85 was registered for offences punishable under Sections 323 and 147 I.P.C. Thereafter, the investigating office proceeded to

commence the investigation. It is also pertinent to observe that prior to registration of the above FIR, another FIR No. 8/85 was registered upon

complaint filed by the accused-appellant Om Prakash at the same police Station Meerwas (District Churu) at about 11.55 A.M. for offence u/s

324 I.P.C. As per said FIR filed by accused-appellant Om Prakash, the complainant party inflicted injury upon his head and arms with a sharp-

edged weapon; meaning thereby, for one incident, cross FIRs were registered, one by accused-appellant Om Prakash at about 11.55 A.M. which

is FIR No. 8/85 and, subsequent FIR was filed by P.W.-1 Kishore Singh at the same police station as FIR No. 9/85.

3. In the investigation, after examination of the injuries of Madan Singh at about 4.45 P.M. by Dr. Subhash Rajput, P.W. -12 on 17.01.1985,

injured Madan Singh died during treatment at 9.15 P.M. on 18.01.1985, the next day of registration of the FIR No. 9/85. Soon after the

occurrence, on 17.01.1985, when Dr. Subhash Rajput, P.W. -12 examined deceased Madan Singh, in the examination following 9 simple injuries

were found:

1. Lacerated wound  $1\frac{1}{2}$ " X  $\frac{1}{5}$ " X  $\frac{1}{5}$ " transversely on inter parietal region.
2. Bruise 2" X  $\frac{1}{10}$ " on left shoulder.
3. Bruise 3" X 2" X  $\frac{1}{4}$ " on right upper fore arm posteriorly.
4. Bruise 4" X 1" X  $\frac{1}{5}$ " right infra scapular region.
5. Bruise 7" X 1" X  $\frac{1}{10}$ " left infra scapular region.

6. Abrasion 4" X linear right infra scapular region.

7. Abrasion 3" X 3/4" on front of middle of left leg.

8. Abrasion 2" X 1" middle of left leg laterally.

9. Abrasion 1/2" X 1/2" upper 1/3rd right leg.

4. On the same day, accused appellant Om Prakash was also examined by Dr. Subhash Rajput, P.W.-12 and upon medical examination made at

the request of the police, he found the following injuries upon the person of accused-appellant Om Prakash:

1. Lacerated wound L shaped 3" X 1/5" X bone deep on left parietal region.

2. Bruise with abrasion 2" X 2" X 1/4" on left elbow laterally.

5. Injured Madan Singh, who was examined on 17.01.1985 by Dr. Subhash Rajput, P.W.-12, died during treatment on 18.01.1985 at about 9.15

P.M. and post mortem of his body was conducted by Dr. B.L. Soni, P.W.-10 and report Ex.-P/16 was prepared. In the post mortem report,

following injuries were mentioned:

(1) Stitched wound transversely placed 2" long on the inter parietal region, more on the right side.

(2) Vertical abrasion 3 1/2" X 1/2" to 3/4" on the middle of the left leg.

(3) Irregular abrasion 2 1/2" X 1" on the lateral aspect of left leg.

(4) Vertical abrasion 2" X 1/4" above the left lateral malleolus.

(5) Irregular abrasion 1" X 1/4" on the medial aspect of right knee.

(6) Abrasion 1/2" X 1/2" on the medial aspect of right leg upper 1/3rd.

(7) Abrasion 1 1/2" X 1/2" on the medial aspect of upper part of the right leg.

(8) Multiple linear abrasions of different length on the lateral aspect of right side abdomen.

(9) Abrasion 1" X 1/4" on the posterior surface of left fore. arm.

(10) Contusion 3" X 2" on the right fore-arm upper part.

(11) Multiple contusions of different size on the dorsal regions.

All these injuries were ante-mortem, simple in nature and caused by some blunt weapon.

6. In the post mortem report Ex.-P/16, while explaining the nature of the injuries, however, Dr. B.L. Soni, P.W.-10 gave his opinion as to cause of

death that the cause of death was shock and intra cranial haemorrhage due to head injury.

7. Upon completion of investigation, the police filed challan in both FIRs. Against the complainant party challan was filed for offence u/s 324 I.P.C.

and, due to death of Madan Singh, police filed challan against accused-appellants for offences under Sections 302, 147, 148 and 149 I.P.C.

before the Chief Judl. Magistrate, Churu from where the case against the accused-appellants was committed to the Sessions Court and, after

framing charges under Sections 147, 148, 302/149 I.P.C. the trial was commenced and concluded vide the impugned judgment dated

28.02.1986.

8. At the trial, statements of as many as 14 prosecution witnesses were recorded. Thereafter, statements of all the accused-appellants u/s 313

Cr.P.C. were recorded by the trial Court and opportunity to produce evidence in defence was also granted to the accused-appellants. Learned

trial Court, after hearing both the parties and taking into consideration entire evidence held the appellants guilty for committing offence under

Sections 148 and 302, read with Section 149 I.P.C. and acquitted the accused from the charge u/s 147 I.P.C. The learned trial Judge completely

acquitted two other accused Jai Singh and Pratap Singh from all the charges who were challaned by the police. Being aggrieved and dissatisfied

with the said judgment, the accused-appellants have filed this appeal.

9. At the commencement of arguments, learned Counsel appearing on behalf of the appellants urged that he is not disputing the incident which took

place on 17.01.1985. Further, it is stated that he would not argue the appeal on merit but will only submit arguments on nature of the offence and

quantum of punishment.

10. Learned Counsel for the appellants vehemently argued that the finding recorded by the trial Court with regard to commission of offence u/s

302, read with Section 149 I.P.C. and, for offence u/s 148 I.P.C. is erroneous. To substantiate the above argument, it is submitted that admittedly

in the alleged incident, accused-appellant Om Prakash received head injury which is proved by Dr. Subhash Rajput, P.W.-12. According to the

injury report, there were two injuries on the body of Om Prakash but there is no explanation from the side of the prosecution with regard to injuries

received by Om Prakash and learned trial Court has completely failed to consider this aspect of the matter and wrongly arrived at the finding of

guilt against the accused-appellants for commission of offence u/s 302, I.P.C., therefore, conviction for the said offence is not sustainable.

11. According to learned Counsel for the appellants, as per the prosecution story at the time of examination of the deceased Madan Singh by Dr.

Subhash Rajput, P.W.-12 on 17.01.1985 at about 4.45 P.M. there were 9 injuries out of which one lacerated wound 1 1/2" X 1/3" X 1/5

transversely on inter parietal region and none of the other injuries was on vital part of the body. Further, it is submitted that injury No. 1 was also

found to be simple but the doctor advised X-ray examination of the said injury; meaning thereby, the prosecution has concocted a false story that

there were number of persons who beat his brother Madan Singh because this fact cannot be treated to be proved for the simple reason that only

one simple lacerated wound upon the inter parietal region was found and other injuries were bruises and abrasions. In this view of the matter, from

the nature of the injuries it can be gathered that there was no intention or motive for alleged murder of deceased Madan Singh. Said argument is

further supported by the fact that Madan Singh died on the next day i.e., 18.01.1985 at 9.15 P.M. and, as per opinion of the doctor given in the

post mortem report, Madan Singh died due to shock and haemorrhage caused due to head injury; meaning thereby, deceased Madan Singh died

because he was not given proper treatment.

12. Learned Counsel for the appellants invited our attention towards the fact that in the investigation challan was also filed by the police in FIR No.

8/17.01.1985 filed by the accused party, therefore, learned trial Judge committed gross error while giving finding that accused-appellants have

committed offence u/s 302 read with Section 149 I.P.C. and Section 148 I.P.C. without considering the important aspect of the matter that who

was aggressor. Therefore, conviction for offence u/s 302 read with Section 149 I.P.C. deserves to be set aside because even if it is presumed that

the incident took place, in which, deceased Madan Singh received injuries and died, then also, this Court cannot lose sight of the fact that appellant

Om Prakash also received one head injury on parietal region which is vital part of the body. In this view of the matter, conviction of the appellants

for offence u/s 302, read with Section 149 I.P.C. is not sustainable and the case does not travel beyond offence u/s 325, read with Section 149,

I.P.C. Upon assessment of evidence on record it is revealed that the finding of the learned trial Court with regard to commission of offence u/s 302,

read with Section 149 and commission of offence u/s 148 I.P.C. does not stand before the eye of law because cross FIRs were filed for the same

incident and, after the incident, deceased Madan Singh was first brought to the police station along with complainant Kishore Singh, from where,

he was taken to hospital at about 4.45 P.M. where the doctor examined him and found all the injuries simple in nature and advised X-ray for injury

No. 1. But, later on, during treatment in the hospital, he died on 18.01.1985 and before that, as per prosecution case, statement u/s 161 Cr.P.C.

was recorded. The trial Court treated the said statement u/s 161 Cr.P.C. as dying declaration but the same cannot be treated as dying declaration

because soon after examination when the deceased was examined all the injuries were found to be simple in nature but, later on, when Madan

Singh died the next day, therefore, his statements recorded u/s 161 Cr.P.C. were used as dying declaration. At best, the statement recorded u/s

161 Cr.P.C. can be used to prove the incident but it cannot be treated to be dying declaration.

13. Learned Counsel for the appellants while submitting his arguments invited our attention towards certain judgments of this Court as well as apex

Court which are as follows:

1. 1985 Cr. L.R. (Raj.) 35 Mathura Lal & Birdha v. State of Rajasthan.
2. 1990 Cr. L.R. (Raj.) 537 Jangir Singh and Anr. v. State of Rajasthan.
3. Shaikh Karimullah @ Babu and Others Vs. State of A.P.,
4. Lakshmi Singh and Others Vs. State of Bihar,
5. State of Punjab Vs. Rajinder Singh,

14. Learned Counsel for the appellants submits that as per verdict of the Division Bench of this Court as well as Supreme Court, upon the facts of

the present case, offence does not travel beyond Section 325, read with Section 149 I.P.C. and finding of the trial Court with regard to offence u/s

302, read with Section 149 I.P.C. deserves to be quashed and set aside.

15. Per contra, learned Public Prosecutor submits that the prosecution has proved its case beyond reasonable doubt for commission of offence u/s

302, read with Section 149 I.P.C. and for offence u/s 148 I.P.C. Learned trial Judge has rightly assessed the evidence adduced by the

prosecution and rightly convicted the appellant-accused.

16. While admitting the fact that one more FIR was registered on the basis of statement of accused-appellant Om Prakash prior to filing of FIR

No. 9/17.01.1985, in which, challan was filed in both the cases but, in this case, due to injuries inflicted by the appellants injured Madan Singh

died and his statement u/s 161 Cr.P.C. was recorded and that statement is to be treated as dying declaration, therefore, only on this ground alone,

it is very much clear that prosecution has proved its case for committing offence u/s 302, read with Section 149 I.P.C. and offence u/s 148 I.P.C.

Learned trial Judge has considered the reliability of the dying declaration and found that Madan Singh died due to injuries inflicted by accused-

appellants. Therefore, from any angle, contention of learned Counsel for the appellants cannot be accepted that prosecution has failed to prove its

case for commission of offence u/s 302, read with Section 149 I.P.C. and offence u/s 148 I.P.C. The judgment impugned in this case does not

require any interference because the trial Court has scanned the evidence in right perspective. Further, it is pointed out by learned Public

Prosecution that accused-appellants are not disputing the incident but their submission is with regard to nature of the offence; but, such type of

argument is totally untenable because Madan Singh died due to injuries inflicted by the accused-appellants. In this view of the matter, this appeal

deserves to be dismissed.

17. After hearing both the parties we have scanned the entire evidence which is on record and considered the arguments advanced by both the

counsel appearing on behalf of the respective parties. We have also perused the judgments cited by learned Counsel for the appellants.

18. In this case, admittedly, for one incident, two FIRs were registered, one, by accused-appellant Om Prakash on 17.01.1985 at about 11.55

A.M., being FIR No. 8/17.01.85, and, second FIR No. 9/17.01.85 was registered at the instance of complainant Kishore Singh, brother of

deceased Madan Singh, for offences under Sections 323 and 147 I.P.C. Admittedly, as per statement of Dr. Subhash Rajput, P.W.-12, he had

examined deceased Madan Singh and found as many as 9 injuries upon his body. Out of 9 injuries, injury No. 1 was lacerated wound on inter

parietal region and all other injuries No. 2 to 9 were bruises and abrasions. Injury No. 1 was found to be simple in nature. Later on, on the next

day, injured Madan Singh died during the course of treatment and, after his death, post mortem was conducted by Dr. B.L. Soni, P.W.-10 and

post mortem report Ex.- P/16 was prepared and, in the post mortem report, Dr. B.L. Soni, P.W.-10 gave opinion that all the injuries were ante

mortem and simple in nature caused by some blunt weapon.

19. In this case, accused-appellant Om Prakash was also medically examined by Dr. Subhash Rajput, P.W.-12 and the doctor found two injuries

upon the body of accused-appellant Om Prakash. Out of these two injuries, one was upon head of the accused-appellant and another upon his

arm. But, there is no explanation on record as to how these injuries were found upon the body of accused-appellant Om Prakash. The prosecution

has not explained how the injury upon the head of accused-appellant Om Prakash was found; meaning thereby, the prosecution has only adduced

evidence to explain the injuries upon the body of the deceased Madan Singh and completely failed to explain how injuries upon the body of

accused-appellant Om Prakash were found; meaning thereby, upon appreciation of the said fact, argument of learned Counsel for the appellants

gains strength that there was quarrel in between the parties and it resulted into injuries upon both the sides and one person was injured on the side

of the accused party and one person from the complainant side was injured. For the said reason, obviously the counsel appearing on behalf of the

appellants is not disputing the incident.

20. In our opinion, there is strength in the argument of learned Counsel for the appellant that no offence u/s 302, read with Section 149 I.P.C. is

made out. Upon appreciation of the evidence it also emerges that there is no evidence on record with regard to motive or intention and learned trial

Court has lost sight to this important aspect of the matter. If the important ingredient which is motive and intention is absent, then, of course, it can

be said that there was no intention or motive to kill deceased Madan Singh. Learned trial Court has failed to adjudicate who was aggressor.

21. We have perused the statement of deceased Madan Singh, Ex.-P/13, recorded u/s 161 Cr.P.C. on 17.01.1985. In that statement also, no

previous enmity has been indicated by deceased Madan Singh in between the parties. Only one fact was stated by him that on 13.01.1985, at

about 10-11 in the night, Ram Singh and Richhpal Singh, sons of Chandgi Ram came to residence of deceased Madan Singh. At that time,

Sardara Ram and Bhaga Ram were trying to assault them and they did not allow appellants Sardara Ram and Bhaga Ram to assault them. In our

opinion, such incident cannot be treated to be enmity to cause death of person who came to rescue of Ram Singh and Richhpal Singh on

13.01.1985. Admittedly, there was no previous enmity in between deceased Madan Singh and accused party. Therefore, in our opinion, when the

injuries were simple in nature upon the body of the deceased and injuries upon the parietal region and arm of accused-appellant Om Prakash was

not explained by the prosecution, then, the offence cannot travel beyond Section 325, read with Section 149, I.P.C.

22. Division Bench of this Court and, in recent judgment, Hon"ble Supreme Court have held that even if the appellant gave the first blow upon the

head, then also, offence punishable u/s 302 I.P.C. is not made out. Here, in this case, there is no specific allegation for inflicting any grievous injury

upon the head of the deceased. As per Dr. B.L. Soni, P.W.-10, who conducted the post mortem, all the injuries were ante mortem and simple in

nature caused by some blunt weapon Out of those injuries, injury No. 1 was upon the parietal region but that too was not attributed to any of the

accused-appellant specifically.

23. According to the opinion of the doctor also who conducted the post mortem no specific injury was sufficient to cause death though in the

statement recorded before the Court he stated that head injury was sufficient to cause death; but, this opinion was not expressed by him in the post

mortem report; meaning thereby, upon assessment of the opinion given in the post mortem report, which was conducted on 18.01.1985 and injury

report Ex.-P/18 which was prepared by Dr. Subhash Rajput on 17.01.1985, soon after the occurrence. In this view of the matter, upon

assessment of the entire evidence it appears that the finding of learned trial Court for committing offence u/s 302, read with Section 149 I.P.C. by

the accused-appellants is not proper because this case does not travel beyond offence u/s 325, read with Section 149, I.P.C.

24. In the judgment of Hon'ble Supreme Court reported in Lakshmi Singh and Others Vs. State of Bihar, it has been held that the non

explanation of injuries found upon the person of accused by the prosecution is manifest defect of the prosecution case. Para 17 and 18 of the said

judgment read as follows:

17. Thus in view of the inherent improbabilities, the serious omissions and infirmities, the interested or inimical nature of the evidence and other

circumstances pointed out by us, we are clearly of the opinion that the prosecution has miserably failed to prove the case against the appellants

beyond reasonable doubt. Normally this Court does not interfere in an appeal by special leave with concurrent finding of fact, but this is one of

these cases where the judgment of the High Court is manifestly perverse and where the High Court has not considered important circumstances

which completely demolish the prosecution case. In fact the High Court has hardly made any real attempt to analyse or discuss the evidence and

has merely affirmed the finding of the Sessions Judge by narrating the evidence relied upon by it. We have already pointed out that one of the most

important points arising in a criminal trial, namely, the nonexplanation of the injuries on the person of the accused by the prosecution, the High

Court has not only committed an error of fact but an error of law by showing a lack of proper appreciation of the principles decided by this Court.

For these reasons, therefore, we think there are special circumstances in the present case which have compelled us to interfere in this appeal by

special leave.

18. The appeals are accordingly allowed. The convictions and sentences passed on the appellants are set aside and all the appellants are acquitted

of the charges framed against them. The appellants are directed to be set at liberty forthwith.

25. In recent judgment of Hon"ble apex Court reported in State of Punjab Vs. Rajinder Singh, while reiterating the proposition laid down in the

judgment rendered in Laxmi Singh's case (supra), it has been held that omission on the part of the prosecution to explain the injuries on the person

of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a

version which competes in probability with that of the prosecution case.

26. Upon assessment of the reliability and credibility of the prosecution evidence in the light of above adjudication of Hon"ble Supreme Court, we

are of the view that there is strength in the arguments of learned Counsel for the appellants that finding of the trial Court for commission of offence

u/s 302, read with Section 149 I.P.C. is erroneous and the case, in fact, does not travel beyond offence punishable u/s 325, read with Section 149

I.P.C. In this view of the matter, conviction of the appellants vide judgment impugned dated 28.02.1986 for commission of offence u/s 302, read

with Section 149 I.P.C. deserves to be set aside because no specific allegation has been levelled against any of the accused-appellants for inflicting

a particular injury upon the body of the deceased.

27. As a result, this criminal appeal is partly allowed. Conviction of the accused-appellants for offence u/s 302, read with Section 149 I.P.C. is set

aside. Impugned judgment dated 28.02.1986 passed by the trial Court is modified and conviction of the accused-appellants is hereby altered from

Section 302, read with Section 149 I.P.C. to offence u/s 325, read with Section 149 I.P.C. and conviction of the accused 24 appellants for

offence u/s 148 I.P.C. is maintained and appellants are sentenced to imprisonment already undergone by each of them. The fine imposed by the

trial Court is, however enhanced to Rs. 2000/- each which shall be deposited by each appellant within two months from the date of this judgment.

The appellants are on bail. Their bail bonds are hereby discharged.