

## Habib Khan Vs State of M.P.

**Court:** Madhya Pradesh High Court (Indore Bench)

**Date of Decision:** Feb. 13, 2015

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) - Section 374

Evidence Act, 1872 - Section 27

Penal Code, 1860 (IPC) - Section 294, 302, 304, 307

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(5)

**Hon'ble Judges:** S.R. Waghmare, J; J.K. Jain, J

**Bench:** Division Bench

**Advocate:** Bhimsen Soni, Learned Counsel, for the Appellant; R.S. Parmar, Learned Panel Advocate, Advocates for the Respondent

**Final Decision:** Partly Allowed

### Judgement

1. By this criminal appeal u/s. 374 of the Code of Criminal Procedure, appellant has challenged his conviction for the offences punishable u/s. 302

of the Penal Code by judgment dated 25.7.2006 passed by Special Judge, Dhar in S.T. No. 3/2005 convicting and sentencing him to life

imprisonment with fine of Rs. 500/- and in case of non-payment of fine, he was to undergo further simple imprisonment of six months.

2. Brief facts of the prosecution case are that on the date of incident i.e. 21.11.2004 at 6.30 pm. the deceased Onkar S/o. Harsingh filed a report

to the effect that he was resident of Village Jamnia and in Village Umarban he used to do joint agriculture with one Kailash S/o. Gajanand. About

3-4 days of the incident, the Forest Guard Habib (present appellant/accused) had told him to fetch the firewood and on the date of incident at

about 5.30 pm., when he was going to the home of Kailash from the field, as he reached to Nayapura Umarban, the accused Habib stopped him

and asked that he was asked to fetch the firewood and why he had not done so. The deceased retorted and said that he could not fetch the

firewood today and would do so tomorrow. Whereupon, the accused Habib started hurling abuses of mother and sister and threatened to kill him.

He went inside his house and came out with a knife and assaulted the deceased in the stomach twice. At the time of incident, Kailash, Gajanand,

Bablu of Umarban were present on the spot and tried to intervene in the matter. On report, the A.S.I. R.S. Chouhan (PW-9) registered the Crime

No. 032/2004 for the offences punishable u/s. 294, 307 of Indian Penal Code and u/s. 3(2)(5) of the S.C. S.T. (Prevention of Atrocities) Act,

1989 and F.I.R. was recorded vide Exh. P-7 and P-8 and thereafter sent the injured for medical examination.

3. On the same day at 8.10 pm. at Community Health Centre, Manawar, Dr. Narendra Kumar Pawaiya (PW-12) examined the injured Onkar

and noted vide Exh. P-13 two stab injuries in the stomach by a sharp and hard object which were grievous in nature. The condition of the injured

Onkar started deteriorating and, therefore, he was referred to District Hospital, Barwani, where his dying declaration was recorded by Naib

Tehsildar vide Exh. P/9 at 9.01 pm. On the date of incident i.e. 21.11.2004 itself, Constable Dilip Kumar posted at Police Chowki Umarban

recorded the F.I.R. at Crime No. 032/2004 and forwarded it to the Inspector, D.K. Karandikar who later on recorded the final F.I.R. (Crime

No. 470/2004) vide Exh. P-14 and launched investigation. The injured was lodged at the Surgical Ward of District Hospital, Barwani where he

succumbed to the injuries at 5.40 am. Dr. Prakshchandra Barfa, Medical Officer informed about the death of Onkar to Police Station, Barwani

vide Exh. P-2 in the afternoon at 12.15 pm. Dr. Prakashchandra Barfa performed the post mortem and the post mortem report is Exh. P-3. On

completion of the investigation, the Investigating Officer-Phoolsingh Meena (PW-11), S.D.O.P., Manawar, added offence u/s. 302 of the Indian

Penal Code. A spot map was prepared vide Exh. P-1 and sample of blood stained earth was collected along with pieces of cement; a cap; plastic

bag; ""Dainik Bhaskar"" newspaper from the spot. After recovery, Panchnama was prepared vide Exh. P-10 and statements of witnesses Babla @

Bablu, Kailash, Narayan, Gajanand were recorded and on 24.11.2004, the accused Habib was arrested vide Panchnama (Exh. P-4). At the

instance of accused Habib, the alleged weapon knife was recovered from the house of accused below the cooler as per memorandum u/s. 27 of

the Evidence Act of accused Habib vide Exh. P-6. Several other documents were also recovered and were sent to FSL at Rau, District Indore.

On completion of the investigation, accused Habib was committed to trial. The accused abjured his guilt and stated that he has been falsely

implicated in the case. He, however, did not examine any witnesses in his defence and the trial Court convicted the accused Habib and sentenced

him, as indicated hereinabove.

4. Counsel for appellant vehemently urged the fact that it was a case of false implication. He submits that even if the evidence of Kailash (PW-4),

who is supposed to be an eye-witness, is considered, according to this witness, he was informed by his son Bablu (PW-3) that Onkar Baba was

injured by means of knife and witnesses were urgently required and had, therefore, he is a witness of res-gestae and only witnessed accused Habib

at the place of incident and had thereafter taken the injured Onkar to the Police Station and to the hospital. Counsel submitted that thus he was not

an eye-witness and cannot be relied upon for conviction.

5. Counsel for appellant submits that Bablu (PW-3) who is alleged to be an important eye-witness of the incident, was a child witness and the trial

Court has erred in placing reliance on his testimony. He submits that the impugned judgment is contrary to the evidence on record. Similarly,

referring to the testimony of Narayan (PW-2) and Gajanand (PW-1), counsel submitted that there were material contradictions and omissions in

their deposition and their testimony cannot be relied upon for conviction of the appellant.

6. Referring to the oral dying declaration of deceased Onkar, counsel stated that the FIR (Exh. P-7) was also not to be considered primarily

because the FIR was recorded twice. According to him, once at the Police Station and thereafter it was recorded by D.K. Karandikar, the

Inspector and similarly, Kailash (PW-4) has also stated that he had reported the matter to the Police and there has been suppression of the initial

FIR.

7. Counsel further stated that dying declaration recorded by Tehsildar (Exh. P-9) is also not reliable since if it is considered in juxtaposition with the

FIR (Exh. P-14) then it is found that name of accused has been mentioned whereas in the dying declaration (Exh. P-9), the deceased has

categorically stated that he did not know the name of the Forest Guard. In these circumstances, there ought to have been test-identification parade

which has not been done. He prayed that the impugned judgment be set aside and the appellant accused be acquitted from the aforesaid offences.

8. In the alternative, Counsel for appellant submitted that at the time of incident, the appellant was 60 years old and there was no intention to cause

injury to the deceased. Even if the M.L.C. (Exh. P-8 and P-13) of deceased is considered, he received only two stab injuries. There is also a

doubt regarding weapon of murder. The knife used as witnessed by Bablu (PW-3) is a quite different knife ("Chhura"). Moreover, counsel submits

that the entire dispute arose regarding petty matter of collection of firewood and it would be crucial to convict the accused u/s. 302 of the Indian

Penal Code and in the alternative, if this Court is satisfied that there was insufficient evidence regarding offence u/s. 302 of the Penal Code and

mens rea was absent, it would be more appropriate to consider offence u/s. 304 Part II of the Penal Code and prayed that the impugned judgment

be set aside and instead the accused be convicted for offence u/s. 304 Part II of the Penal Code.

9. On the other hand, Counsel for State has fully supported the impugned judgment and submits that there were as many as three eye-witnesses to

the incident viz. Gajanand (PW-1), Narayan (PW-2), and Bablu (PW-3) and even Kailash (PW-4) arrived on the spot and found that deceased

was lying in an injured condition and had taken him to the Police Station and to the hospital. He was also told first hand by the deceased that it was

the present accused appellant who had caused stab injuries to him. In these circumstances, Counsel for State submitted that there was no need to

doubt implication of accused appellant. The appellant was named in the FIR by the witnesses and there was no need to doubt his identity.

Moreover, Counsel for State submitted that in the post mortem report (Exh. P-3), it is categorically stated that there were two stab injuries found

on the dead body and they were in the abdomen as noted under:--

The cause of death is Asphyxia as a result of ac hemorrhagic shock, due to injury to (Rt) ante abdominal wall, stomach wall and mesocolon.

The duration of death is within 24 hours, since per examination.

Counsel for State submits that there is no doubt regarding fatal blow being struck by the appellant. However, Counsel for the State was unable to

satisfy this Court regarding mens rea. He pointed out that all the witnesses as well as deceased had stated that accused Habib on refusal by Onkar

to handover firewood had gone inside the house to fetch the knife to commit the murder and hence, it cannot be said that there was no intention to

murder as is being alleged by the Counsel for the appellant. He prayed for dismissal of the appeal.

10. On considering the above submissions, we are of the opinion that the accused appellant was 60 years of age and the deceased was 70 years

of age, apparently, there was a rising of temper on a petty issue of collection of firewood. Hence, the intention or mens rea cannot be attributed to

the present appellant. However, considering the ocular testimony of Gajanand (PW-1), Narayan (PW-2) and Bablu (PW-3), there can be no

doubt that it was the appellant who was responsible for inflicting the fatal blow struck on the deceased Onkar. Similarly, the dying declaration

(Exh. P-9) recorded by the Tehsildar is in accordance with law and there is no need to doubt these documents. Merely because it does not contain

the name of Forest Guard would not make the dying declaration unreliable. Moreover, as observed by the trial Court in the impugned judgment,

the Forest Guard who lived in the vicinity of witnesses was known to all the these witnesses. In this regard also, there is no need to doubt about

identity of accused. Thus, consequently we find that the appellant accused should be given benefit of the fact that ""mens rea"" to commit the murder

of deceased Onkar has not been established in accordance with the provisions of law, and it would be crucial to convict the accused for murder

u/s. 302 of the Indian Penal Code when the dispute arose for such a petty issue like collection of firewood and in this regard, we find that the

impugned judgment for offence u/s. 302 of the Indian Penal Code needs to be set aside.

11. In the result, the appeal is allowed in part, conviction and sentence of the accused appellant Habib u/s. 302 of the Indian Penal Code are

hereby set aside, instead the appellant is convicted u/s. 304 Part II of the Indian Penal Code and is sentenced to undergo 10 years" R.I. The

sentence of fine-amount, as imposed by the trial Court, is maintained. The trial Court is further directed to verify the period of custody undergone

by the accused appellant Habib and set him at liberty only if he has completed the sentence as hereinabove directed.

12. With the aforesaid observation, appeal stands allowed in part, to the extent indicated above. A copy of this judgment be sent to the trial Court

for compliance.

C.C. as per Rules.