1993 P Cr. L J 55

[Quetta]

Before Munawar Ahmad Mirza, CJ anti Amir-ul-Mulk Mengal, J

KISHORE KUMAR and 3 others---Appellants

Versus

THE STATE---Respondent

Criminal Appeal No.42 and Criminal Revision Petition No.31 of 1992, decided on 5th August, 1992.

(a) Penal Code (XLV of 1860)---

----Ss. 302/34 & 307/34---Appreciation of evidence---Ocular evidence was not corroborated by medical evidence---Presence of accused on the spot although was established, yet it was shrouded in mystery that they in fact had caused any blow either to deceased or to injured prosecution witness---Accused were acquitted on benefit of doubt in circumstances.

P L D 1982 Lah. 577 rel.

(b) Penal Code (XLV of 1860)---

----Ss. 302/34 & 307/34---Appraisal of evidence---Mere presence of a person on the spot shall not be sufficient to saddle- him with criminal liability if his actual participation in the commission of offence is not proved.

(c) Penal Code (XLV of 1860)---

----Ss. 302/34 & 307/34---Appreciation of evidence---Ocular testimony was fully corroborated by medical evidence and recoveries of weapons of offence stained with human blood at the instance of accused---Accused pleading self-defence was not found to have acted in self-defence---Convictions and sentences of accused were upheld in circumstances.

1972 S C M R 74 distinguished.

(d) Qanun-e-Shahadat (10 of 1984)---

----Art. 121---Penal Code (XLV of 1860), Ss.302/34 & 307/34---Burden of proof---When in a criminal trial accused raises a specific plea then it is incumbent upon him to prove the plea so raised.

(e) Penal Code (XLV of 1860)---

----S. 302/34---Criminal Procedure Code (V of 1898), S.435/439 --- Sentence, enhancement of---One accused was a college student and the other was suffering from some disease---Accused were not previous' convicts and had faced trial for a period of more than three years---Sentence of imprisonment for life awarded to accused was not enhanced to one of death in circumstances.

Muhammad Aslam Chishti and Ehsan-ul-Haq for Appellants. Salahuddin Mengal AA.-G. for the State. Raja Rab Nawaz for the Complainant.

Date of hearing: 2nd July, 1992.

JUDGMENT

AMIR-UL-MULK MENGAL, J---- The appellants have filed this appeal challenging, the judgment, dated 9-3-1992, passed by the learned Sessions Judge Sibi Division at Sibi whereby he found the appellants guilty under section 302/307/34, P.P.C. and passed the following sentence:--

> "Accused Kishore Kumar, Ashoke Kumar, Ram Chand and Mokaish Kumar are sentenced to life imprisonment each -and to pay fine of Rs.10,000 each or in default of payment of fine to suffer R.I. for one year for the offence under .section 302/34, P.P.C. They are also sentenced for offence under section 307/34, P.P.C. to suffer R.I. for 3 years each and to pay a fine of rupees one thousand each or in default to suffer R.I. for three months each. Both the sentences will run concurrently. The sentence in default of fine shall run consecutively. The fine, if recovered be paid to legal heirs of deceased Mukhi Kishan Chand."

2. The facts in nutshell, are that an F.I.R. No.16/88 was lodged on 11-10-1988 at Saddar Police Station Mach under section 302/307/34, P.P.C., wherein it was alleged that appellants were armed with Dandas and knives, who assaulted Ramesh Chand and his brother Mukhi Kishan Chand in Bazar Mach. As a result whereof they received injuries. Mukhi Kishan Chand died on reaching. hospital. The appellants were, arrested and the police conducted formal investigation into the case and submitted the challan before the learned Sessions Judge, Sibi.

3. It is revealed from the record that in fact Muhammad Nawaz S.H.O. Police Station Mach received a telephonic information regarding incident and went to Civil Hospital Mach where he found Mukhi Kishan Chand lying dead and Ramesh Chand as injured. He recorded statement of Ramesh Chand on the basis whereof the F.I.R. was lodged.

4. The mot behind this occurrence is alleged to be a dispute over a sum of Rs.27,000 against Gopi Chand and when payment was demanded altercation took place culminating into the death of Kishan Chand.

5. The charge was framed under section 302/307/34, P.P.C. against the accused persons to which they did not plead guilty and claimed trial.

6. In order to substantiate the accusation, prosecution examined the following 18 witnesses: --

> ?P.W.1 Ramesh Chand, P.W.2 Hari Chand alias Babu LA P.W.3 Namamal, P.W.4. Ratan Kumar, P.W.5 Ghulam Rasool, P.W.6 Pehlaj Rai, P.W.7 Ch. Daulat Ram, P.W.8 Musa Khan, P.W.9, Akbar Ali, P.W.10, Abdullah, P.W.11 Haider Nawaz, P.W.12 Faiz Muhammad, P.W.13 Pooran Dass, P.W.14 Dr. M. Nawaz, P.W.15 Yar Muhammad, P.W.16 Muhammad Nawaz, P.W.17 Muhammad Usman and P.W.18 Yar Muhammad Khan.

7. Besides, statements of the appellants were recorded under section 342, Cr.P.C. where the allegations were repudiated. The learned trial Court also examined the appellants on oath under section 340(2), Cr.P.C. Following points were considered for determination by the trial Court:--

?(1)????? Whether Mukhi Kishan Chand died an unnatural death after receiving??? injuries?

(2)??????? Whether the accused were responsible for causing injuries and death of Mukhi Kishan Chand?

(3)??????? Whether P.W. Ramesh Chand had received .injuries and the accused did an act with such intention or knowledge and under such circumstances that if they by that act caused the death they would have been guilty of murder?

(4)??????? Whether the accused did so in furtherance of their common intention for causing injury to Ramesh Chand and death of mukhi Kishan Chand?

(5)??????? Whether the accused have succeeded to explain their position satisfactorily?

(6)??????? What offence, if any, is committed?

8. The learned trial Judge found the appellants guilty for an offence under section 302/307/34, P.P.C. and passed the sentence as mentioned in the first par a. of the judgment.

9. It is pertinent to point out that the State also filed Criminal Revision No.31 of 1992 under section 435/439, Cr.P.C. praying for enhancement of sentence of the convict/appellants from life imprisonment into death. We, therefore, intend to dispose of the Criminal Appeal No.42 of 1992 as well as Criminal Revision No.31 of 1992 by this common judgment.

10. Heard Mr. Ehsanul Haque, Advocate for the appellants. Learned A.A.-G. for the State.

11.?????? The prosecution evidence consists of the following items:--

(i)???????? Ocular evidence.

(ii)??????? Recovery of knives, Kunda and Danda.

(iii)?????? Medical evidence.

(iv)?????? Report of Chemical Analyser.

(v)??????? Circumstantial evidence.

12. Out of the appellants Ram Chand, when examined under section 340(2), Cr.P.C. stated that while he was going to fetch medicine for his ailing daughter he heard commotion and saw people running towards that side of Bazar Mach. He too went there and saw Mukhi Kishan Chand and Ramesh Chand attacking Ashoke Kumar. Mukhi Kishan Chand was holding a knife in his hand. He tried to intervene but complainant Ramesh Chand caught him while Mukhi Kishan Chand inflicted knife injury on his head. According to him he went to lodge a report to the police station where he was made to sit and then he was taken to hospital. After dressing him Doctor advised A.S.I. to bring him again to Civil Hospital Mach on the next morning.

13. Appellant Kishore Kumar in his statement on oath stated that he was student of Agriculture University Tando Jam, studying in the First Year B.E. Agriculture. Due to disturbances in Hyderabad he had come to Mach. On 11-10-1988 at about 8-05 p.m. Mokesh Kumar was sitting alongwith him in his shop. On commotion both went towards west of Mach Railway Station. He saw Ramesh Chand, Kishan Chand and Ram Chand lying injured. He came to know that a quarrel had taken place between Ashoke Kumar and Ramesh Chand and Mukhi Kishan Chand. He saw that there was bleeding from head of Ram Chand. According to him he accompanied Ram Chand to police station for lodging report. However, police did not lodge the report.

14. Ashoke Kumar stated on oath before the trial Court that after closing his coal depot, on 11-10-1988 he left for Mach Bazar. His office is located near Railway Station Mach. Complainant Ramesh Chand met him on the way in front of shop of Babu Lal witness. Ramesh Chand shook hands with him and held his hands saying that there was outstanding amount which is not being paid. According to appellant he asked him to demand money from person concerned. Complainant used harsh words and abused him. He also abused the complainant and gave him 2/3 fist blows. After when he gave kick blow on his abdomen complainant ran away. After going 10/15 paces he saw Mukhi Kishan Chand and Ramesh Chand proceeding towards him. Mukhi Kishan Chand was armed with knife which he was holding in his hand. He then ran away towards back side to find out something. He found a broken glass bottle lying near the shop of Nama Mal. He picked up the bottle and fought with Mukhi Kishan Chand and Ramesh Chand in defence. Then his uncle Ram Chand came at the spot. Ramesh Chand caught hold of him and Mukhi Kishan Chand inflicted knife injury on his head. Ram Chand fell on the ground. Then they attacked him and he fought injuring both of them. Thereafter, he ran away out of fear. According to him accused Mokesh Kumar and Kishore Kumar were not present at the time of fight. He denied possession of knife in his hand. The fourth appellant Mokesh Kumar during examination by the trial Judge stated that he is a student of Agriculture College Beleli at Quetta. On the eventful day he and Kishore Kumar were sitting in their shop where his uncle Pehlaj Dass is running his business. Shop of Mukhi Kishan Chand is located 3/4 shops behind their shop. It was 8-05 p.m. that he heard commotion and went towards west of Railway

Station. He saw Ram Chand, Ramesh Chand and Mukhi Kishan Chand who were lying injured. According to him he came to know that Ramesh Chand and Mukhi Kishan Chand had quarrel with Ashoke Kumar. On account of fear he went to Quetta. He pleaded innocence.

15. Before proceeding further we feel it necessary to discuss the ocular evidence produced by prosecution to substantiate the charge. P.W.1 Ram Chand deposed that on 11-10-1988 at about 8-15 p.m. he was going from Mach Railway Station to Mach Town. He went to the shop of Babu Lal to purchase shoes, but did not find any. Then he went towards Railway Station in search of shoes. He purchased Chappal from shop of Ashoke Lal, and then went to shop of Hari Chand alias Babu Lal. When they were talking about Chappal Ashoke Kumar and Mokesh Kumar asked him to accompany them as there is some work with him. He told them to disclose as to what was the matter. On his refusal he was dragged by them. In the meanwhile co-accused Ram Chand and Kishore. Kumar came there, then all of them started beating him. Ashoke Kumar was armed with knife, Mokesh Kumar was having Kunda of a door. Ram Chand and Kishore Kumar were armed with Lathis. As a result of this attack he received injuries on his belly and other parts of body. P.W. Ghulam Rasool and Babu Lai were present there who tried to rescue him. In the meanwhile other persons'also came there. Then the accused left him and went towards the shop of Nama Mal. His brother Kishan Chand was going and all the four accused attacked him. P.W.1 then went there. Mokesh Kumar and Ashoke Kumar ran away from the place of incident. He found his brother lying injured on the road. Many persons gathered there. Ram Chand and Kishore Kumar were trying to manage their escape in a jeep belonging to Biad. People then removed him and his injured brother Kishan Chand to the Civil Hospital Mach. After examination the doctor pronounced his brother as dead. He was giving medical treatment when S.H.O. came there and recorded his statement. Said Fard-e-Bayan was exhibited as Exh.P.3. According to him the motive for murder was that 3/4 years back Gopi Chand had purchased cloth worth Rs.69,000 from him and paid him only a sum of Rs.42,000. A balance of Rs.27,000 was still outstanding against him. He demanded the money on 8-10-1988 as a result of which there was altercation between him .and Amer Dass who is brother of Gopi Chand. Lal Chand, Bhoj Raj and Gordan Dass interfered and separated them. Amer Dass threatened him of dire-

16. P.W.2 Hari Chand alias Babu Lai gave identical statement that Ashoke Kumar was having knife, Mokesh Kumar was having Kunda and remaining accused had Dandas. He admitted in cross-examination that his sister was wedded with Mukhi Kishan Chand. He further admitted in cross?examination that after the first incident Ramesh Chand went to Mukhi Kishan Chand. He also admitted that second incident took place at a distance of 150 feet from the shop of the deceased. According to him although Bazar was open but nobody was present at the time of second incident. However, people gathered there after the incident. He further stated in cross-examination that when accused were assaulting Kishan Chand deceased, Ramesh Chand was in his shop. They together went to the place of incident. When they reached there accused ran away.

17. P.W.3 Nama Mal is the person in front of whose shop the occurrence had taken place. He deposed that he knew all the accused persons. He supported the, prosecution story stating that all the four accused persons attacked deceased Mukhi Kishan Chand. Ashoke Kumar was armed with a knife, Mokesh Kumar was having a Kunda of iron and remaining two accused persons had Dandas. All of them attacked Kishan Chand who fell on the ground as a result of injuries. In cross-examination he admitted his relationship with the deceased.

18. P.W.4 Ratan Kumar deposed only that he saw all the four accused persons getting down from a Pick-up cream colour which was an Official vehicle: After getting down from the vehicle they proceeded to Mach Bazar. After half an hour he came to know that Mukhi Kishan Chand had been murdered. His statement was recorded after 7 months of the incident.

19. P.W.5 Ghulam Rasool stated that he was sitting in the shop of Babu Lal. Ramesh Lai came to the shop of Babu Lal to purchase Chappal. In the meanwhile Ashoke Kumar and Mokesh Kumar came there and asked Ramesh to accompany them. On his refusal they dragged him. In the meanwhile Ram Chand and Kishore Kumar reached there. They were armed with Dandas and Ashoke Kumar had a knife in his hand and Mokesh was armed with iron Kunda. They started beating Ramesh Chand. The witness and other persons intervened and rescued Ramrsh Chand from the accused persons. Then all the four accused persons went towards shop of Kishan Chand and seeing Kishan Chand near the shop of Nama Mal they

attacked him as a result whereof he fell down. Many other persons gathered there. Ramesh Chand and Kishan Chants were taken to hospital where doctor declared that Mukhi Kishan Chand had died.

20. P.W.6 Pehlaj Rai stated that he was returning from Mandar when he saw a rush in front of shop of Babu Lal. He enquired and was informed by the people that Ramesh and Ram Lal's party are fighting with each other. He came to inform the brother of Ramesh Chand namely; Kishan Chand about the fighting who asked the witness to look after the shop and himself went towards the place where there was fighting.

21. P.W.7 Ch. Daulat Ram stated that he was at his shop on 11-10-1988 and at about 8-30 p.m. he cam;, to know that Mukhi Kishan Chand has been injured and he has died in the fight. He went to the hospital and saw the dead and the injured. The Hindu community requested the Assistant Commissioner, Mach not to perform autopsy of Mukhi Kishan Chand. Assistant Commissioner, handed over the dead body of the deceased to his relatives. However, blood-stained clothes of deceased were handed over to police Recovery memo. of the clothes was prepared in his presence and he has put his signatures on Exhs.P.4 and P.5. He also identified the parcel Article 1 and Article 2.

22. P.W.8 Musa Khan stated that he alongwith H4zoor Bakhsh Bangulzai accompanied the police. When they reached the lease Ashoke Kumar went to a pit and picked up a knife and Kunda from underneath of engine. The police prepared recovery memo. and he thumb-marked those papers. Knife was sealed in his presence. He identified Articles 9 and 10 i.e. knife and Kunda.

23. P.W.9 Akbar Ali Awan stated that during interrogation accused Ram Chand disclosed that Danda used by him in the fight has been thrown on the roof of shop of Haji Wali Muhammad. He accompanied the police alongwith accused and Danda was recovered.

24. P.W.10 is Abdullah mashir of Fard of Danda.

25. P.W.11 is Haider Nawaz who deposed about the register (ledger) where account of Amer Dass appears at page 164.

26. The next material witness is P.W.16 Muhammad Nawaz who was S.H.O. Police Station Mach. He has conducted investigation and made recoveries.

27. P.W.17 Muhammad Usman was A.S.I. and P.W.18 Yar Muhammad Khan D.S.P. Crimes Branch Quetta who conducted fresh investigation in the case and re-examined the witnesses and submitted challan.

28. From the aforesaid discussion it can safely be concluded that there were two incidents, According to prosecution story the first incident took place when Ashoke Kumar and Mokesh Kumar called Ramesh Chand from the shop of nabu Lal and on his refusal to accompany them they dragged him. In the meanwhile two other persons Ram Chand and Kishore Kumar reached there armed with Lathis and all of them inflicted injuries on the person of Ramesh Chand. The second incident was in front of shop of Nama Mal where Mukhi Kishan Chand was attacked and received injuries at the hands of appellants and died.

29. On the other hand the defence version is that a sum of Rs.27,000 was outstanding against the relative of Ashoke Kumar and Ramesh Chand asked Ashoke Kumar to make payment of the outstanding amount. There was a scuffle between the two and Ramesh Chand ran away. Whereafter, he informed his brother Kishan Chand and both came to attack Ashoke Kumar. Ashoke Kumar picked up a bottle and fought in self-defence causing injuries to deceased as well as to Ramesh.

30. Mr. Ehsanul Haque learned counsel for appellants at the very outset argued that P.W.14 had produced Exhs.P.12 and P.13 the medical certificates issued by the Medical Officer. According to medical, certificates only sharp weapons were used. There was no wound inflicted with a blunt weapon like Danda. The prosecution story being that Ram Chand and Kishore Kumar were having Dandas with Which they inflicted injuries to Ramesh and deceased Kishan Chand. This story is contradicted by medical evidence becausA: admittedly as per medical certificates no blunt weapon was used. According to medical certificate Exh.P.12 Ramesh was examined by the doctor who found the following injuries:--

1. There are three stab wounds in the abdomen.

(a)??????? at left hypertention 1/2".

(b) ?????? near umblicus 1/3".

(c) ?????? at left lumber region 1/2".

(2) ?????? There is one stab wound at back.

(3) ?????? There are two stab wounds at scalp.

Weapon used:-- ????????? Sharp

Type of injury ? Simple.?

Similarly after examination of dead body of Kishan Chand the doctor found the following injuries:-

?External examination: ---

There is stab wound 1/2" just above the umblicus in Epigastrict Area.

> There is stab wound on right side of chest. There is incised wound on the level of left hip joint and there is some glass particle on some wound, there is severe bleeding from the same wound.
>
> Weapon used:- ??????????? Sharp.
>
> Nature of wound:????????? No.1 and No.2 are stab wound. No.3 is incised wound.

Cause of death: Most probably it is due to severe bleeding.?

31. From minute perusal of these two documents it is fully established that no wound with blunt weapon was found on the dead body of Kishan Chand nor on the body of Ramesh Chand, therefore, the ocular evidence is not corroborated by the medical evidence. It appears that after hearing a commotion Kishore Kumar went to the spot whereas Ram Chand also reached there. According to his statement he intervened and as a result of which deceased Kishan Chand infected knife blow on his head. The question that he was injured is further supported from the statement of P.W.16 Muhammad Nawaz who conducted initial investigation. According to his statement received a telephonic information and proceeded to Civil Hospital Mach. The dead body of Mukhi Kishan Chand was lying in the hospital while Ramesh Chand was present in an injured condition. Even the eye-witnesses including Ramesh Chand stated that Ram Chand and Kishore Kumar reached on the spot at a later stage when Ashoke Kumar and Mokesh Chard were inflicting injuries to him. As per ocular testimony of prosecution, two accused persons were having Daridas, but as already pointed out that no Danda blow was found on the dead body of Kishan Chard or on the body of Ramesh Chand. Furthermore from conduct of the four accused persons, if seen in the light of evidence, it is revealed that Ram Chand and Kishore Kumar did not abscond; whereas Ashoke Kumar and Mokesh Kumar ran away from the spot. However, mere presence of Kishore Kumar and Ram Chand on the spot even if Dandas with their hands is believed, it will not be sufficient to connect them for causing fatal injury to the deceased. The medical evidence showing no sign of wounds inflicted by a blunt weapon, clearly contradicts the ocular testimony to that extent. Reliance, if any, be made P L D 1982 Lah. 577. Even if statement of P.W.1 Ramesh Chand is thoroughly scrutinised, it is revealed that it was Ashoke and Mokesh who dragged him from the shop of Babu Lal and attacked him. Ram Chand and Kishore Kumar came later. From the aforesaid circumstances although it is established that both Ram Chand and Kishore Kumar were present on the spot but it is shrouded in mystery that they in fact caused any blow to Ramesh Chand in the first incident and Kishan Chand in the incident followed later on. Mere presence of a person on the spot shall not be sufficient to saddle him with criminal liability if it is not proved that he actually participated in the commission of offence. Thus, we are inclined to give benefit of doubt to Ram Chand and Kishore Kumar, therefore, their conviction is set aside.

32. Adverting now to remaining two appellants namely; Ashoke Kumar and Mokesh Kumar, the prosecution has brought sufficient ocular testimony against them which is fully corroborated from the medical evidence. Exhs.P.12 1 and P.13 both substantiate the testimony of the eye-witnesses. Both certificates show stab wounds on the body of Ram Chand as well as deceased Kishan Chand.

33. Another important feature of the case is that Ashoke Kumar admitted to have inflicted injuries although taking plea of self-defence which shall be considered later at a proper place of the judgment. However, Mokesh Kumar denied the allegations in toto. According to statement of Ramesh Chand, Babu Lal, Ghulam Rasool and other eye-witnesses it is established that Mokesh Kumar was inflicting injuries to the deceased with a Kunda whereas Ashoke Kumar had a knife with which he attacked the deceased. On 4-11-1988 accused Ashoke Kumar led the police party and on his pointation Article 9 a knife was recovered. So also a Kunda Article 10 was recovered. The same were sent for examination by Forensic Expert through Parcel No.3 and Parcel No.4 and it was opined that these were stained with human blood. Thus, recovery of these articles and the fact that these were stained with human blood is fully established which provides another piece of evidence corroborating the prosecution version.

34. In view of aforesaid overwhelming evidence we are of the opinion that prosecution has successfully proved its case against appellants Ashoke Kumar and Mokesh Kumar.

At the cost of repetition, we feel it necessary to deal with the plea taken by Mr. Ehsan-ul-Haque learned counsel for appellants that the entire ocular testimony be discarded because it is not fully supported by the medical evidence. While further explaining his point of view the defence counsel stated that as no blows with blunt weapon like Danda were found on the dead body of Kishan Chand or on the body of Ramesh Chand, therefore, the entire ocular testimony becomes doubtful. Reliance was placed on 1972 S C M R 74.

35. It may be observed that merely because no injury with blunt weapon was found on the dead body, although the medical evidence fully supports the prosecution version regarding stab wounds, the entire evidence cannot be discarded. The presence of all the accused persons is admitted by them. So much so that Ram Chand stated that he received knife injury on his head and Kishore Kumar contended that he went to the spot. This admission coupled with medical evidence in our opinion does riot affect the credibility of ocular testimony. The case cited above is distinguishable inasmuch as in that though empties were recovered but the weapon was not. Here in case in hand the Kunda and knife both were recovered and were found stained with human blood.

36. Now we would proceed to determine the plea raised by defence that Ashoke Kumar acted in self-defence. Precise plea taken by defence counsel was that there were two incidents. In the first incident when Ramesh Chand met Ashoke Kumar, he asked him to return the money outstanding against Gopi Chand. After exchange of some harsh words there was a scuffle and when Ashoke Kumar gave fist blows to Ramesh Chand and Ramesh Chand ran away. He informed his brother Kishan Chand and both of them came to find out Ashoke Kumar in order to take revenge.

37. The second incident took place when complainant party met Ashoke Kumar near the shop of Nama Mal and attacked him. Ashoke Kumar picked up a glass bottle and defended himself. In the altercation Ramesh Chand and Kishan Chand received injuries at the hands of Ashoke Kumar who fought with them in self-defence. The learned counsel further, submitted that after the first incident when Ramesh Chand ran away, there remained no reason or motive for Ashoke Kumar to follow and attack Ramesh or Kishan Chand. In fact the complainant party came to take revenge of the first incident.

38. We have given our anxious consideration to the defence plea and do not agree with the arguments for the following reasons:--

(i)???????? The defence utterly failed to produce a single witness in support of the aforesaid contention. Although both the incidents had taken place in Bazar Mach where admittedly there were several

shopkeepers but none of them was produced in support of defence version. It is now a settled principle of law that when in a criminal trial the defence raises 1 a specific plea then it is incumbent upon it to prove the plea so raised.

D.W.1 Ibrahim produced by the defence is not a witness to support this version.

(ii)??????? There is no evidence in the prosecution which would support the defence plea. However, Mr. Ehsanul Haque emphatically urged that the defence plea is supported by Exh.P.13 (medical certificate). It was argued that the fact that Ashoke Kumar inflicted injuriesth glass bottle is substantiated because the doctor found some glass particles on the injuries of Kishan Chand. This argument is equally devoid of any force for the reason that there were many stab wounds on the dead body of Kishan Chand. Only on injury No.3 some glass particles were found but neither the Investigating Officer found any glass bottle on the spot during inspection nor the defence produced any witness to support this contention. It is highly probable that when deceased fell down after receiving injuries he might have struck with some piece of glass. Be that as it may defence produced no witness in support of this specific plea.

(iii)?????? Ashoke Kumar in his statement before the trial Court stated that he alone fought with Ramesh Chand and Kishan Chand. According to him Kishan Chand was having a knife in his hand whereas Ashoke Kumar was empty-handed and fought only with a glass bottle. It is indeed astonishing to note that 2 armed persons attacked Ashoke Kumar but he received not a single injury in the incident which in the ordinary course, is unbelievable. It is also not confidence inspiring that a single person could inflict several scab injuries to two persons who according to the defence plea had come armed in order to take revenge.

(iv)?????? Besides, according to Ashoke Kumar deceased was armed with a knife. Admittedly he fell down after receiving injuries, No knife was recovered from his possession or from place of incident. There is no explanation in this regard nor any suggestion made regarding recovery of knife. ??????????

(v)??????? The defence plea is contradicted by statements of accused Ram Chand and Kishor Kumar. According to Ram Chand he also went to the spot and intervened but received an injury on his head. Whereas Ashoke Kumar stated that he was all alone and there was non else from the accused party.

(vi)?????? On the contrary there is ocular evidence produced by the prosecution that Ashoke Kumar was armed with a knife and Mokesh Kumar had a Kunda with which they inflicted injuries on the complainant. However, Kishore Kumar and Ram Chand were having only Dandas. Although the presence of Ram Chand and Kishore Kumar is not denied by them but it is not established that they inflicted any injury. Thus, the ocular evidence of the prosecution is consistent and confidence inspiring as against the defence plea and this evidence finds support from medical certificates.

(vii) ???? The prosecution version is more confidence inspiring and believable. According to P.W. Pehlaj Rai, he informed Kishan Chand (deceased) that his brother was being beaten. Kishan Chand asked Pehlaj Rai to take care of the shop and he went to see as to what was happening. As soon as - he reached near shop of Nama Mal, the accused party attacked him. It is natural that when deceased heard about beating of his brother, he proceeded to inquire about him. This appears to be more plausible and convincing.

For these reasons we do not find any force in the argument that Ashoke Kumar acted in self-defence.

39. We now attempt to dilate upon the points raised by learned AA.-G. in report of the Criminal Revision No.31 of 1992 for enhancement of the sentence awarded to the. appellants. It was urged by learned A.A.-G. that once trial Court came to an affirmative finding that offence of murder has been committed as a result of concerted action of the convicts the Court should have passed normal penalty of death. According to learned A.A.-G. sufficient evidence was brought against convicts and besides ocular evidence motive was published, recovery of crime weapon at the instance of accused persons was proved as well as common intention. Therefore, he prayed that the sentence awarded be enhanced to death. We

have already discussed the prosecution and & fence version and we found that prosecution has fully established charge against Ashoke Kumar and Mokesh Kumar. However, we did not find sufficient evidence connecting Ram Chand and Kishore Kumar with the commission of offence of murder.

40. As regards sentence passed against the convicts we have gone through the reasons given by the trial Judge for lesser punishment of life imprisonment. The learned Judge has taken into consideration the fact that Mokesh Kumar is a student of Agriculture College and Ashoke Kumar is suffering from some disease. They are not previous convicts and they have faced trial for a period of more than 3 years. Besides, if the entire evidence is taken into consideration the attending circumstances would justify the observations made by the learned trial Judge. We are, therefore, not inclined to enhance the imprisonment for life into death penalty. The revision petition is thus dismissed.

41. The upshot of the aforesaid discussion would be that we maintain conviction and sentence passed by trial Court vide impugned judgment, dated 1 9-3-1992 as regards appellants Ashoke Kumar and Mokesh Kumar. However, while giving benefit of doubt to appellants Ram Chand and Kishore Kumar we set aside their conviction and sentence. Resultantly Ram Chand and Kishore Kumar shall be set at liberty forthwith if not required in any other case. Consequently, Ashoke Kumar and Mokesh Kumar shall suffer the sentence7as awarded by the trial Judge. With these observations Criminal Appeal No.42 of 1992 and Criminal Revision No.31 of 1992 are disposed of accordingly.

N.H.Q./419/Q??
Order accordingly.

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