

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 549 OF 2000

1. Janikram son of Bhagoli Yadav,
aged about 27 years, resident of
Vill. Dhamni, Police Station Palari,
Distt. Raipur (M.P.)

2. Yatiram son of Bhulau Kannouje,
aged 18 years, resident of
Vill. Dhamni, Police Station Palari,
Distt. Raipur (M.P.)

---- Appellants

Versus

1. State of M.P.

---- Respondent

For Appellants	:	Mr. P.P. Sahu, Advocate.
For Respondent-State	:	Mr. Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Navin Sinha, Acting Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgement on Board

Per Navin Sinha, Acting Chief Justice

27/03/2015

1. The Appellants stand convicted under Section 302 IPC to life imprisonment with fine of Rs.500/-, in the event of failure to pay fine they were required to undergo one month's further rigorous imprisonment each, as ordered by the First Additional Sessions Judge, Baloudabazar, on 29.12.1999, in Sessions Trial No.171 of 1999.

2. The deceased was an 18 year old school boy named Rajendra. Merg Intimation was given by his father, PW-1 Agar Ram on 10.2.1999 at about 15:00 hrs that his son, a student of Class 12th of Rohasi High School had left home at 10.30 for school on his bicycle. Around 12 noon, Ravi Kumar DW-1, a student of the same, informed him that the deceased was lying dead near the "Teda Nala". The witness along with DW-1, Ravi Kumar and one Mahendra went and saw the deceased lying in the "Teda Nala". The bicycle of the deceased was lying beside him. There were bleeding injuries on his head.

Palari PS Case No. 34/1999 was registered on basis of the same on 10.2.1999 under Section 302 IPC at about 22:10 hrs against unknown.

3. Postmortem of the deceased was done on 12.2.1999 at about 9:05 am by PW-5, Dr. F.R. Nirala who found the following injuries on the person of the deceased :

- (a) Skull compressed and cracking sound present;
- (b) both jaws broken;
- (c) upper jaw and two teeth inciser and canine right side absent;
- (d) area around eyes swollen;
- (e) lower jaw and teeth attached but broken and cracking sound;
- (f) skull broken in multiple fragment;
- (g) contusion 3" x 1^{1/2}" near left ear;
- (h) contusion 4" x 1/2" over neck on the left side oblique in nature;
- (i) ruptured right eye.

All the injuries were ante-mortem and homicidal in nature. Death was opined due to shock by excessive blood loss due to head injury.

4. The Appellants were taken into custody on 13.2.1999. The records do not reveal that at the time of remand, they had lodged any complaint with regard to any ill-treatment by the police in custody.

5. Learned Counsel for the Appellants submitted that the conviction is primarily based on the evidence of PW-9, Kishore Kumar alleged to be an eye-witness. It is evident from his deposition that he was not an eye-witness but a planted witness. There remain many unanswered issues with regard to his evidence and which create doubt about his being an eye-witness. Unless it can be said with certainty that he was an eye-witness, it would be highly unsafe to uphold conviction on a doubtful eye-witness. The conduct of PW-9, Kishore Kumar was highly unusual and inconsistent with his claim of being an eye-witness. There is no explanation coming why he did not tell the father of the

deceased or anyone else in the village if he had witnessed the murderous assault on the deceased by the Appellants. His deposition that he had informed his parents after going home also arouses suspicion as there is no explanation forthcoming why even the parents did not consider it necessary to inform the father of the deceased, PW-1 Agar Ram, the police or any other co-villager. If PW-9, Kishore Kumar was actually an eye-witness, he would not have just walked away from the scene of the crime, gone around his usual chores of washing his buffalo and gone home. He would have made some effort to protect the deceased and persuade the Appellants to desist from the assault or take him for treatment. The first statement by PW-9, Kishore Kumar was made to the police 10-12 days later as deposed by PW-1, Agar Ram who took him to the police station. There is no reason why the father of the deceased would be stating falsehood.

6. If the statement of PW-9 Kishore Kumar was recorded 10 to 12 days later after the occurrence, there was absolutely no material for the police to suspect the Appellants and take them into custody two days later on 13.2.1999. It is therefore apparent that the Appellants have been falsely implicated after taking them into custody as the police was unable to find the real culprits.

7. It was next submitted that PW-8 Vijay Kumar who allegedly saw the Appellants near the Teda Nala, the same day little prior to the occurrence, never disclosed the name of the Appellants in his statement under Section 161 Cr.P.C. A bare look at his statement under Section 161 Cr.P.C, marked as Exhibit D-1, makes it apparent that insertion of the names of the Appellants is an afterthought entered after the signature of the Investigating Officer.

8. The Appellants in their statement under Section 313 Cr.P.C had denied any seizure of clothes from them putting forth the defence that their signatures had been forcibly obtained on the seizure list. There was no motive for the Appellants to assault the deceased. Appellant No.1 had already left the school

much earlier. Even if the girl Neeraj had occasionally gone on his bicycle when he was in school, it was too distant and remote an event to operate as motive. DW-1, Ravi Kumar has deposed of enmity between the Appellant and PW-9, Kishore Kumar and of their not being on good terms as they were both applicants for a government post, which ultimately went to Appellant No.1.

9. Reliance was placed on AIR 1976 SC 2488 (State of Orissa v. Mr. Brahmananda Nanda and 2013 (5) SCC 705 (Shivasharanappa and Others v. State of Karnataka) in support of the submission regarding the unusual conduct of PW-9, Kishore Kumar making his credibility as an eye-witness doubtful. On basis of the aforesaid it was submitted that the Appellants are entitled to the benefit of doubt and the conviction is liable to be set aside.

10. Learned Counsel for the State submitted that the conduct of PW-9, Kishore Kumar was perfectly natural. He saw the assault from close quarters. The witness was unsure if the deceased was unconscious or dead. He legitimately may have presumed the deceased had been rendered unconscious and therefore simply went away without considering the need to inform anyone else except his parents. The police had made enquiries from him in the village two days later after which the Appellants were arrested. His statement under Section 161 Cr.P.C was recorded 5 days later on 15.2.1999.

11. The evidence of PW-9 Kishore Kumar finds support from the evidence of PW-7 Bhaktu and PW-8 Vijay Kumar Yadu both of whom have stated having seen the Appellants near Teda Nala prior to the occurrence and coming from that direction.

12. It was lastly submitted that PW-1 Agar Ram, father of the deceased, in his deposition stated that stones lying near the head of the deceased had blood spots. The Appellants in their confession also told the police of assault by stones leading to recovery of the stones at the place of occurrence. The clothes of the Appellants were seized and sent for forensic examination. Presence of blood has been confirmed on the stones and the shirt and trousers of both the

Appellants for which they have offered no explanation. The conviction, therefore, calls for no interference and the Appeal be dismissed.

13. We have considered the submissions on behalf of the parties and examined the evidence on record also.

14. The place of occurrence and discovery of the dead body is indisputably the Teda Nala. The presence of blood stain on stones found near the dead body, marked Exhibits P-5 and P-7, mentioned by PW-1 Agar Ram, father of the deceased, has been confirmed in the Forensic examination. The medical report by PW-5, Dr. F.R. Nirala reveals the severe nature of repeated assault on the head as the cause of death, opining that the injuries could have been caused by a heavy instrument such as stones. The possibility of the head injuries having been caused due to fall from the bicycle has been denied by the Doctor. PW-1, Agar Ram, deposed having heard from DW-1 Ravi Kumar of some skirmish between the Appellants and the deceased with regard to cricket and an Upadhyay girl. The witness also confirmed having taken PW-9, Kishore Kumar to the police for recording his statement.

15. PW-2 and PW-10, Shyamsunder and Goutam, are inquest report witnesses.

16. PW-3, Bhagchand named by PW-1 Agar Ram, in the Merg was a seizure list witness of Exhibits P-5 and P-7 and Exhibits P-10 and P-11, the shirts and trousers of the two Appellants. He specifically acknowledged his signatures on the seizure list without any explanation that it was not voluntary. Presence of blood has been confirmed in the Forensic report on the clothes of both the Appellants.

17. PW-6 B.L. Sahu, the Assistant Police Inspector, proved the Merg and the FIR recorded by him. PW-7 Bhaktu deposed that his house was close to that of the deceased. On hearing the commotion he gone to Teda Nala and seen the body of the deceased. On way he saw the two Appellants coming from the Teda Nala. Likewise, PW-8 Vijay Kumar Yadu, deposed that at about

10:00 am he met the two Appellants near Teda Nala. He had not seen any dead body lying in Teda Nala at that time. He denied having named the Appellants as the assailants in his statement under Section 161 Cr.P.C to the police. That lends credence to the submission of the learned Counsel for the Appellants that insertion of their names in the statement of the witnesses under Section 161 Cr.P.C after the signature of the Investigating Officer was an afterthought implication. But that is not a material contradiction in the facts and circumstances of the case in view of the other evidence available against the Appellants.

18. PW-9, Kishore Kumar is the eye-witness. He deposed that his cattle had not returned the previous night and he went in the morning looking for the cattle. At about 15 to 20 feet before Teda Nala he saw the Appellants assaulting the deceased and on seeing him both of them ran towards the rest house. The witness further stated that due to fear he did not go near the deceased and proceeded to the river to wash his cattle and then left for home. In cross-examination, he explained that he was not sure if the deceased had died or was only injured and rendered unconscious and therefore only informed his parents about the assault. He did not see any others on the way. The police had made inquiries from him two days later. The Appellants were arrested two days after the occurrence. In his statement to the police he had mentioned about having gone to wash his cattle and having informed his parents. The absence of the same in his 161 Cr.P.C statement is not such a vital omission so as to doubt the credibility of his evidence entirely. The witness denied any animosity with Appellant No.1 because of both of them being applicants for the same job.

19. PW-11 Raj Kumar Lalwani was the Investigating Officer, who proved the inquest report, having sent the body for postmortem, the seizure made by him of the stones and clothes of the Appellants and having sent them to the

Forensic laboratory by Exhibit 21 and having arrested the Appellants two days later.

20. DW-1, Ravi Kumar named by PW-1 Agar Ram, is the person who informed him that the deceased was lying in the Teda Nala, deposed that the Appellants were playing cricket with him in the morning till 10 o'clock. They all went home later and went to school. The defence witness acknowledged that he, the Appellants and the deceased as also the Upadhyay girl Neeraj, studied in the Rohasi High School. Neeraj would occasionally come to school on the bicycle of Appellant No.1. Later the Appellant had left the school. DW-2 Ravi Prasad Upadhyay, the father of Neeraj, denied that his daughter had anything to do with the Appellant No.1 though he admitted that she studied in the same school.

21. Motive can neither be evidence of guilt and neither its absence can be presumption of innocence. Motive can have relevance in a case of circumstantial evidence and may not be very relevant in the event of availability of an eye witness. In the present occurrence, the motive could have been the ire of the Appellant No.1 regarding Neeraj going to school on the bicycle of the deceased. No question in this regard was put in cross examination to PW-1, Agar Ram who had deposed with regard to motive.

22. The first question for our consideration would be if PW-9, Kishore Kumar is a reliable solitary eye witness to uphold the conviction. The alleged grudge of the witness against Appellant No.1 in our opinion is a vague and weak plea. Learned Counsel for the Appellants had strongly contended that PW-9, Kishore Kumar cannot be believed as an eye-witness because his conduct was highly unnatural if he had actually witnessed the murderous assault. The witness was a school going boy.

23. A closure scrutiny of the evidence of PW-9, Kishore Kumar reveals that he witnessed an on going assault upon the deceased by the Appellants from a distance of 15 to 20 feet. On seeing him the Appellants ran away. In his cross-

examination, he has explained that he was not sure if the deceased had died or was rendered unconscious only. Unsure of himself, the witness did not consider it necessary to inform others or that there was any urgency in the matter. But he did inform his parents about the assault on the victim. In our opinion, this was a very natural conduct considering that he was only a school going boy. It is not unusual for the police to make preliminary inquiries with regard to an occurrence. The witness stated that the police had made inquiries from him two days after the occurrence and not that his statement was recorded. The Appellants were then arrested two days after the occurrence. The statement of the witness was recorded five days later. The reference to ten days by PW-1, a rustic villager was an approximate only. The contention of the Appellants that they were taken into custody on basis of no materials and then falsely implicated does not merit consideration.

24. All witnesses will not react in the same manner if they witness an occurrence. The reaction will vary from person to person based on a variety of factors. 1994 (4) SCC 549 (Marwadi Kishor Parmanand and Another v. State of Gujrat) was also a case of a solitary eye-witness to a murderous assault. Upholding the conviction, it was observed as follows:-

“25.In our opinion the learned trial judge committed a serious error in rejecting his evidence on this account totally ignoring the fact that different persons react differently in different situations and circumstances. No hard and fast rule of universal application with regard to the reaction of a person in a given circumstance can be laid down. Most often when a person happens to see or come across a gruesome and cruel act being perpetrated within his sight then there is a possibility that he may lose his equilibrium and balance of mind and therefore he may remain as a silent spectator till he is able to reconcile himself and then react in his own way. There may be a person who may react by shouting for help while other may even choose to quietly slip away from the place of occurrence giving an impression as if they have seen nothing with a view to avoid their involvement, in any way, with the occurrence. Yet, there may be persons who may be so daring, hazardous and chivalrous enough to come forward unhesitantly and jump in the fray at the peril of their own life with a zeal to scare away the assailants and save the victim from

further assailants. Thus it is common knowledge that different persons react differently and no hard and fast rule as to their behaviour can precisely be laid down in a defined way....”

25. In 2008 17 SCC 425 (Babasaheb Apparao Patil v. State of Maharashtra), again with regard to unnatural conduct of a witness it was observed that different persons would react differently on seeing the serious crime and their behavior and conduct would therefore be different, declining to interfere with the conviction on the ground that the conduct of the eye-witness was unnatural. In 2013 (6) SCC 417 (Lahu Kamlakar Patil and Another v. State of Maharashtra) with regard to what may or may not constitute unnatural conduct of a witness, it was observed as follows:-

“26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded.”

26. Brahmananda Nanda (supra) relied upon by the Appellants is distinguishable on its own facts because in the present case, PW-9 Kishore Kumar has deposed that he was not himself sure whether the deceased had been fatally assaulted or was only injured. In any event, the judgement does not lay down any absolute proposition that under all circumstances delay by itself would constitute unnatural conduct.

27. Shivasharanappa (supra) is also distinguishable on its own facts. The deceased was assaulted in front of her own daughter who was 11 years old. The daughter ran to her grand-mother, mother of the deceased, who was

residing with another daughter and disclosed the assault. The lack of appropriate action by the mother of the deceased was considered unnatural conduct in view of the familial bond between the deceased and the witness.

28. Once we hold that PW-9 Kishore Kumar was a natural eye-witness, the evidence of PW-7 Bhaktu and PW-8 Vijay Kumar Yadu of having seen the Appellants near or coming from Teda Nala becomes relevant and corroborative evidence.

29. We have already noticed above that the Appellants at the time of their remand never complained of any police misbehaviour or assault. This defence was taken under Section 313 Cr.P.C. in a bald way only when the question was put with regard to seizure of their clothes, marked as Exhibits P-10 and P-11 respectively on which blood has been found. It is not the case of the Appellants that they never wore clothes of the nature seized or that it was not their clothes because it would not fit them. No explanation has been given by the Appellants how blood came on their clothes which is not natural.

30. Before we part with the case, in fairness to the Appellants, it appears that the Forensic report was not formally marked as Exhibit. PW-11 had deposed sending the seized items for forensic examination marked Exhibit P-21. No cross examination was done on it by the Appellants. This fact as also the Forensic report was specifically put to the Appellants under Section 313 Cr.P.C. It was therefore only an irregularity which does not vitiate the conviction. In any event no prejudice on this count has been urged or shown on behalf of the Appellants. In (2012) 2 SCC 648 (Alister Anthony Pareira v. State of Maharashtra) it was observed :-

“61. From the above, the legal position appears to be this: the accused must be apprised of incriminating evidence and materials brought in by the prosecution against him to enable him to explain and respond to such evidence and material. Failure in not drawing the attention of the accused to the incriminating evidence and inculpatory materials brought in by the prosecution specifically, distinctly and separately may not by itself render the trial against the accused void and bad in law; firstly, if having regard to all the

questions put to him, he was afforded an opportunity to explain what he wanted to say in respect of the prosecution case against him and secondly, such omission has not caused prejudice to him resulting in failure of justice. The burden is on the accused to establish that by not apprising him of the incriminating evidence and the inculpatory materials that had come in the prosecution evidence against him, a prejudice has been caused resulting in miscarriage of justice.”

31. Similar view has been taken in (2015) 1 SCC 496 (Nar Singh v. State of Haryana) as follows :-

“20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

32. The aforesaid discussion leaves us satisfied to hold that the order of conviction and sentence calls for no interference.

33. The Appellants are stated to be on bail. Their bail-bonds are cancelled and they are directed to surrender forthwith and/or be taken into custody for serving out the remaining period of their sentence.

34. The Appeal is dismissed.

(Navin Sinha)
Acting Chief Justice

(P. Sam Koshy)
Judge