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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 1145 OF 2000

1. Budhru S/o Samaru Yadav, age 40 years, post : Shuklakhar, Police Station Baki Mongra

2. Paras Ram S/o Itwar Sai Yadav, age 18 years, post : Ajgar Bahar, Police Station Katghora, District Korba

... Appellants

Versus

State of Madhya Pradesh, through Police Outpost Baki Mongra, Tahsil Katghora, District Korba

... Respondent

For Appellants	:	Ms. Sofia Khan, Advocate.
For Respondent-State	:	Mr. Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgement on Board

Per NAVIN SINHA, C.J.

19/06/2015

1. The Appellants stand convicted under Section 302/34 IPC to life imprisonment and fine of Rs.2000/- each, in the event of failure to pay which, they were required to undergo six months further simple imprisonment, as ordered by the Sixth Additional Sessions Judge, Bilaspur, on 30.3.2000, in Sessions Trial No. 400/1999.

2. Merg, Exhibit P-5, was lodged on 11.8.1999 at 23:30hrs by PW-3 Bihanu Ram, son of the deceased, that his father had been fatally assaulted inside the house of Appellant no.1. The dead body was lying there. FIR was lodged the same day at 23:35hrs. The inquest report, Exhibit P-11, states that the body was found inside the house of the Appellants. The crime spot map, Exhibit P-1, also mentions the place of crime inside the house of the Appellants. The postmortem report, Exhibit P-15, by PW-8 Dr. R.S. Kanwar found the following injuries on the person of the deceased:-

- (1) Incised wound on left side and front of neck size about 2" x 1/2" x 2^{1/2}" bone deep trachea, major artery & veins were cut off.

- (2) Incised wound over left side of neck just below chin 3" x 2" x 1" oblique & shallow at lateral end.
- (3) Incised wound over left side of back of neck 2" x 1/2" x 1" adjoining to hairline.
- (4) Incised wound over back and front of left side of neck 2" x 1/2" x 1 1/2" oblique.
- (5) Incised wound between superior part of scapula on back more deep on the left side then Rt. side 3 Nos. 2 1/2" x 1/4" x 1/8" transverse and parallel of each other intervening skin intact.

3. Learned Counsel for the Appellants submitted that the Merg is based on hearsay evidence. PW-2 Ramayan, PW-4 Nakul and PW-5 Dalsai are not eye-witnesses to the occurrence. There is material contradiction between their police statements and Court deposition with regard to which one of the Appellants assaulted with a "*tangi*" and the other with a "*lathi*". If it cannot be said with certainty who assaulted with what weapon, and death is attributed to injuries caused by a sharp cutting weapon only, PW-8, Dr. R.S Kanwar opining that there was no injury on the deceased caused by a hard-blunt substance, not only the place and manner of occurrence becomes doubtful but also the question as to who gave the fatal assault. The independent seizure witness PW-5, Dalsai has not supported recovery of "*tangi*" from Appellant no.1. PW-3, Bihanu, the son of the deceased, was an interested witness and therefore his deposition or supporting recovery of "*tangi*" from Appellant no.1 cannot be safely relied upon. There is no forensic report with regard to the "*tangi*" or the blood stained earth seized from the place of occurrence. The benefit of doubt therefore must go to both the Appellants.

4. Learned Counsel for the State submitted that the dead-body has been found inside the house of Appellant no.1. There is no explanation forthcoming from Appellant no.1 how the deceased died a homicidal death inside his house. The evidence is that Appellant no.1 invited the deceased to his own house. The prosecution witnesses have stated of blood present inside the house of Appellant no.1. PW-2 Ramayan, PW-4 Nakul and PW-5 Dalsai in their police statement, marked Exhibits P-2, P-10 and D-2 respectively, have

all consistently said of assault by Appellant no.1 with a "*tangi*". The recovery of "*tangi*" from the roof of the house on the confession of Appellant no.1 and also that he had a motive because the deceased had misbehaved with his wife makes it apparent that he is the assailant. Mere absence of FSL report with regard to the presence of blood on the "*tangi*" or with regard to the sample of earth seized at the place of occurrence is inconsequential in the facts of the case so long as Appellant no.1 does not offer any explanation how the deceased was done to death inside his house.

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

6. The prosecution witnesses PW-2, Ramayan, PW-4, Nakul and PW-5, Dalsai, have consistently stated in their police statement recorded the day next to the occurrence, that the deceased was invited by Appellant no.1 to his house for a smoke. They were also present. There was no denial of this fact in cross-examination or even any suggestion made to the contrary by Appellant no.1. The inquest report, Exhibit P-11, mentions that the dead-body was found inside the house of Appellant no.1. The crime spot map, Exhibit P-1, also mentions the place of the crime as the house of Appellant no.1. The three witnesses in their police statement stated that an altercation took place while they were inside the house of Appellant no.1. The latter assaulted the deceased with a "*tangi*" and Appellant no.2 allegedly with "*lathi*". PW-4 Nakul, in his Court statement said blood was present on the floor of the house of Appellant no.1. No question was asked in cross-examination with regard to the same. All the three eye-witnesses in a pattern turned turtle in Court from their police statement and reversed the role of the Appellants in assaulting with a "*tangi*" and "*lathi*" respectively. It is apparent that this was being done intentionally to create confusion about the role of the Appellants to give them both benefit of doubt about who the assailant was. This conduct of the witnesses confirms their presence at the time of occurrence and having eye

witnessed the assault giving credibility to their police statement recorded the next day of the occurrence as distinct from their Court deposition recorded nearly six months later giving sufficient time to retrospect and make tutored statements.

7. Once the prosecution has established that the deceased was invited to his house by Appellant no.1 and soon after his dead body was found in his house with homicidal assault, it becomes the bounden duty of Appellant no.1 under Section 106 of the Evidence Act to explain the manner of death, a fact specifically within his knowledge because of the situs of the crime. It is not his defence that any third person was present and who may have assaulted the deceased or that Appellant no.1 had gone out of his house and came back to find that the deceased had been assaulted and had died as a result of the same. The only question that remains for determination is which one of the Appellants assaulted with the “*tangi*”, a sharp cutting weapon. The post-mortem report contains only injuries caused by sharp cutting weapon. Dr. R. S. Kanwar, PW-8, has deposed that there were no injuries caused by hard-blunt substance. The question of assault by “*lathi*” therefore does not arise. Merely because there may be some embellishment in the evidence of the witnesses because Appellant no.2 may also have had a “*lathi*” in his hand, a normal event for a villager, it cannot be said that they were not speaking the truth and the entire evidence must be rejected. The grain can easily be shifted from the chaff, from the evidence of the three prosecution witnesses considered cumulatively. The Appellants have not contended that the witnesses were not present at the time of assault.

8. In (2003) 7 SCC 749 (Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble) it was observed that:-

“25. It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The maxim “*falsus in uno falsus in omnibus*” has no application in India and the witnesses cannot be branded as liars. The maxim “*falsus in uno falsus in omnibus*” has

not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence."

9. In his defence under Section 313 Cr.P.C, Appellant no.1 in reply to the question that the dead-body was found inside his house simply stated it was false without any explanation why he was being falsely implicated or that the dead-body had been brought and placed there after assault elsewhere. No defence was offered in support of the plea of false implication. On being asked if he wanted to lead further evidence in his defence, he answered in the negative. In (2006) 10 SCC 681 (Trimukh Maroti Kirkan v. State of Maharashtra) it was observed as follows :-

"15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

10. To our mind, what emerges from the prosecution story, is that Appellant no.1 invited the deceased to his house. The three prosecution witnesses were also present. The deceased died a homicidal death inside the house of the Appellants. The initial burden having been discharged by the prosecution it was for the Appellant no.1 to prove his innocence in view of Section 106 of the Evidence Act. He completely failed to do so. Notwithstanding the fact that a person died a homicidal death inside the house of Appellant no.1, both the Appellants must be acquitted merely

because it cannot be said with certainty which one of them assaulted with a “*tangi*”. That in our opinion would be a travesty of justice.

11. Having said so, the next question for our consideration would be that from the nature of the evidence available, which one of the Appellants assaulted with the “*tangi*”. The conviction with regard to him will call for no interference and the Appellant who is alleged to have assaulted with “*lathi*” acquitted. The police statement of the three prosecution eye-witnesses were recorded the next day after the occurrence. All of them consistently stated that Appellant no.1 assaulted with a “*tangi*”. A suggestion was given by the defence that it was occasioned because of the deceased attempting to misbehave with the wife of Appellant no.1. Appellant no.2 was approximately 18 years of age. The possibility that he may have been standing with a “*lathi*” cannot be ruled out. There is no evidence of any overt act by him. This may have persuaded the witnesses to embellish their evidence by adding that he also assaulted with a “*lathi*”. The medical report read with the evidence of the Doctor, PW-8, completely belies any assault by Appellant no.2. There is no evidence available to infer any common intention to kill in the facts of the case.

12. The “*tangi*”, was recovered on the confession of Appellant no.1 from his house. PW-7 K.N. Sharma, the Investigating Officer, proved seizing the bloodstained earth, marked Exhibit P-12, and the seizure of the “*tangi*”, marked Exhibit P-7, on the confession of Appellant no.1. He also proved recording the statement of the witnesses exactly in the manner as made by them. The confession of Appellant no.1 and Exhibit P-7 were witnessed and signed by PW-3, Bihanuram and PW-5, Dalsai. Merely because the former was the son of the deceased, his evidence cannot be rejected on the ground that he was a related witness. There is no principle of criminal jurisprudence that the evidence of a relative cannot be considered. He denied having signed on a blank paper. No defence has been taken why the witness was falsely

implicating Appellant no.1. PW-5, attempted to rescile by baldly stating that his signature was obtained at the police station. PW-7, the Investigating Officer has denied the same. In the facts of the case we are inclined to draw a presumption that official acts were duly performed.

13. The “*tangi*”, Exhibit P-7 and blood stained earth seized from the place of occurrence, Exhibit P-11, were sent for forensic report by PW-7, Investigating Officer on 27.9.1999. No final report has been placed by the prosecution. The absence of a forensic report cannot always be fatal to the prosecution case. It will depend on the facts of each case. In view of the eye-witness account of the three prosecution witnesses, coupled with a homicidal death inside the house of Appellant no.1 caused by a sharp cutting instrument and no explanation being offered in defence, not much will turn on the absence of a forensic report. If the ocular evidence is convincing and reliable, absence of forensic evidence cannot shake the credibility of the same.

14. The Investigating Officer was apparently lax and negligent in performance of his duties. But that cannot be allowed to become a ground for acquittal. PW-7, ought to have been more careful in discharge of his duties. In (2012) 4 SCC 37 (Rajendra Pralhadrao Wasnik v. State of Maharashtra) it was held as follows :-

“26. From the report of the experts, it is clear that there is no direct evidence connecting the appellant to the commission of the crime but it is not the case of the defence that the FSL report was in the negative. Merely because the report was inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty, particularly where the prosecution has been able to establish its case on circumstantial evidence as also by direct oral evidence.”

Similarly in (2012) 4 SCC 559 (Promode Dey v. State of West Bengal)

it was observed as follows :-

“20. Similarly, we do not find any merit in the contentions of the learned counsel for the appellant that PW 3, PW 4, PW 5, PW 6, PW 7 and PW 9 do not support the prosecution case and that the FSL report was not collected from the forensic science laboratory if the guilt of

the appellant is established beyond reasonable doubt through the evidence of PW 1, PW 2, PW 8, PW 11 and Ext. 6.”

15. The discussion as aforesaid leads us to the conclusion that the conviction of Appellant no. 2 is unsustainable. There is no allegation of any overt act or even utterance by him. There exists no evidence to infer common intention by him. He was merely present according to the evidence available. The Appeal is allowed in part. The conviction of Appellant no.2 is set aside subject to conditions under Section 437-A Cr.P.C. The conviction of Appellant no.1 is confirmed under Section 302 I.P.C. He is directed to surrender forthwith and/or be taken into custody for serving out the remaining period of his sentence.

16. The appeal is allowed in part.

**Sd/-
(Navin Sinha)
Chief Justice**

**Sd/-
(P. Sam Koshy)
Judge**