

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No. 2369 of 1999

1. Hirau, aged 35 years son of Jagdev Nishad.
2. Amar Singh, aged 34 years, Son of Mansharam.
3. Bhangi, aged 35 years, son of Bahadur Yadav.
4. Mannu, aged about 50 years, son of Sukara.

All resident of village Tarra, PS Dharseewa, District Raipur, Madhya Pradesh.

---- Appellants

Versus

The State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellants	:	Smt. Renu Kochar, Advocate.
For Respondent/State	:	Smt. Smita Ghai, Panel Lawyer.

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

Judgment on Board

Per Navin Sinha, Chief Justice

11/12/2015

1. The Appellants stand convicted under Section 147, 201, 302/149 to one year rigorous imprisonment, two years rigorous imprisonment and life imprisonment respectively with fine, and in default of payment they were required to undergo three months further rigorous imprisonment on each count as ordered on 9.8.1999 by the 2nd Additional Sessions Judge, Raipur, in Sessions Trial No. 276 of 1995. Twenty one accused were to put on trial for the death of the deceased Kulwantin Bai. Except for the Appellants the others have been acquitted on benefit of doubt.
2. A missing persons report was lodged on 30.5.1995 at 11:05 hours by PW-1, Mohan Singh that the previous night at about 10:00-11:00 pm Kulwantin Bai was chased, dragged and assaulted by the accused persons on suspicion of practicing witchcraft on Somnath@Dhruv Kumar the son of Appellant No. 4, Mannu.

The witness went to the house of the victim in the morning but did not find her there. PW-14, U.K.Chandravanshi, the Investigating Officer came to the village. Preliminary report, Merg No. 0 of 1995 (Exhibit P-22) was recorded by PW-11, Arvind Dwivedi, Assistant Sub-Inspector of Police at the village on 30.5.1995 at 15:00 hours naming the Appellants as suspects. The confession of Appellant Hirau (Exhibit P-3) was recorded, witnessed by PW-1, Mohan Singh leading to recovery of the dead body from the well. The Inquest report was (Exhibit P-2) was also signed by PW-1, Mohan Singh. After recovery of the dead body another 'Merg' was recorded regarding the same at 3:15 pm by PW-11. Formal FIR No. 5 of 1995 was then registered on 30.5.1995 itself at 18:25 hrs.

3. The Trial Court convicted the Appellants holding that they had consistently been named by Rameshwari Bai (PW-2), Vidya Bai (PW-3) and Jagdish Prasad (PW-18).

4. The post mortem of the deceased (Exhibit P-27) was conducted on 31.5.1995 by late Dr. D.C. Jain and PW-13, Dr. Sanjay Dadu who proved the signature of the former. There were multiple ante mortem injuries on the body caused by hard and blunt object. The deceased was opined to have been thrown in the well in a living condition and the cause of death was stated to be asphyxia due to drowning. The evidence reveals that a heavy stone was tied around the stomach of the deceased and she was thrown in the well.

5. Learned Counsel for the Appellants submitted that conviction on basis of the the evidence of PW-2, PW-3, PW-6 and PW-18 was unjustified. There was nothing in their evidence to suggest that they had committed the offence much less that they had thrown the deceased into the well. PW-2, Rameshwari Bai was contended to be an unreliable witness in view the omissions and contradictions between her police statement and Court statement with regard to the number of the accused. In the former she had named 21 persons. But during Court deposition she named six persons only selectively and of them two have been acquitted. The witness

acknowledged that she had not seen any of the Appellants assaulting the deceased but only stated that they and others were expressing annoyance suspecting the deceased of practicing witchcraft on the son of Appellant Mannu. No assault had taken place at the house of the deceased who ran away to the *Gothan* which was about 1½ KM from her house. PW-3, Kumari Vidya Bai, daughter of the deceased was a minor aged about ten years. Conviction by relying on a minor witness and that too related to the deceased was highly unsafe as tutoring cannot be ruled out completely. The Court was itself not satisfied of her capacity to depose and therefore did not administer oath to her before recording her deposition. She had also named all the accused in her police statement but named only two of the Appellants selectively in Court. If she could not recognize other accused due to darkness it is suspicious to accept that nonetheless she recognized Appellants Mannu and Bhangi as persons who dragged out her mother from the house. PW-18, Jagdish Prasad also acknowledges that it was a dark night. If there was a mob of persons, the possibility of false implication due to naming of persons on estimation cannot be ruled out. The witness named all the accused in his police statement like PW-2, but in Court named only two of the Appellants selectively making him also an unreliable witness. Reliance was placed on AIR 1994 SC 1251 (*Jagdish Prasad v. State of Madhya Pradesh*). The witnesses were attempting to spin stories in their Court deposition which cannot be relied upon for conviction. The Appellants were therefore also entitled to acquittal on benefit of doubt as the others.

6. The incriminating material against Appellant Hirau that the dead body was recovered from the well on his confession is highly suspicious. The memorandum was recorded at 17:10 on 30.5.1995. Merg (Exhibit P-24) was recorded at 15:15hrs stating that the dead body had been recovered from the well. PW-1, Mohan Singh has denied that any confession of the Appellant was recorded in his presence. No *Panchnama* was prepared with regard to the recovery of the dead body which makes the story of confession and recovery highly suspicious. Though, the incident

had occurred on 29.5.1995 at 10-11 pm, FIR has been registered belatedly on 30.5.1995 at 18:25 hours.

7. PW-16, Ramanand named in the missing persons report as a member of the mob has been made a prosecution witness and acquitted. In their defence under Section 313 CrPC, the Appellants had taken the stand that there was a *Mela* in the village and a lot of outsiders had come. This defence has not been considered at all and the possibility of any outsider having committed the offence cannot be ruled out. The benefit of doubt must necessarily be given to the Appellants. The last submission was that conviction under Section 147 and Section 302 with the aid of Section 149 IPC was not sustainable if ultimately only four persons were found guilty. To invoke common object at least five accused persons are required. If the number of accused has dropped below five, it was mandatory for the prosecution to establish the individual role of each of the accused for fixing individual liability to convict.

8. Learned Counsel for the State submitted that in the facts of the case, there has been no delay in reporting to the Police much less institution of the FIR. The occurrence took place on 29.5.1995 at about 10:00-11:00 hours in the night in a village. The Police Station was 18 km east from the village. It was but natural that due to poor communications nobody could have gone to the Police Station at that late hour. At that late hour the deceased was merely suspected to have gone missing and there was no reason to believe that she had been killed. The husband of the deceased was already dead as deposed by her daughter PW-3. The deceased was living with her minor son and daughter only. The missing person report was lodged with promptness on 30.5.1995 at 11:05 hours. The Police came to the village in the morning itself. Suspects were named in the report itself. The police therefore had a clue for start of investigation. After preliminary investigation Crime No. 0 of 1995 was registered at 3:00 pm and formal FIR was registered at 18:25 hours the same day, as Crime No. 5 of 1995.

9. The police from the suspects named in the missing persons report lodged started to make inquiries in the village immediately. The confession of Appellant Hirau was recorded on 30.5.1995 itself leading to recovery of the dead body from the well. The subsequent 'Merg' was then recorded with regard to the recovery of the dead body at 15:15 hours and the Inquest report (Exhibit P-2) prepared signed by PW-1, Mohan Singh. The witness did not deny his signature on the confession of the Appellants or the Inquest report. He was essentially an official witness being Kotwar of the village. The killing was gruesome. The deceased was chased, assaulted, dragged and then a big stone was tied around her waist and she was thrown alive in the well and died of drowning. The time elapsed since death mentioned in the postmortem report (Exhibit P-27) was approximately 24-30 hours which coincides with the time of commencement of the occurrence. Motive clearly existed because of the suspicion that the deceased practiced witchcraft and was responsible for the illness of the son of Appellant Mannu. The Trial Judge from the evidence has adequately distinguished the case of the Appellants from those acquitted. Merely because originally there may have been more than five accused and some of them were given the benefit of doubt, reducing the number to four does not take the offence out of the purview of common object. The question of any individual liability to be proved by the prosecution with regard to the four Appellants does not arise. Common object persisted as the others have been given acquittal on benefit of doubt only and not on merit.

10. We have considered the submissions on behalf of the parties and perused the evidence on record also.

11. The deceased was suspected of practicing witchcraft regarding illness of the son of Appellant Mannu hindering his recovery. Motive or its absence cannot be sufficient by itself to convict or acquit. But in cases of circumstantial evidence it can become a relevant consideration viewed along with other surrounding materials. There is no direct evidence of actual assault. Motive therefore becomes an

important consideration in the facts of the case. This part of the prosecution story has not been controverted or denied by the Appellants. When motive will become relevant and its importance in conjunction with surrounding circumstances and evidence was considered in (1995) 3 SCC 228 (Prem Kumar v. State of Bihar) observing as follows :-

“5...In our opinion, in a case when motive alleged against the accused is fully established, it provides a foundational material to connect the chain of circumstances. We hold that if the motive is proved or established, it affords a key or pointer, to scan the evidence in the case, in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant and important aspect — (a) to highlight the intention of the accused and (b) the approach to be made in appreciating the totality of the circumstances including the evidence disclosed in the case.....”

12. The missing persons report was lodged the next morning on 30.5.1995 by Mohan Singh (PW-1) at 11:05 hours. He was none other than the Kotwar (Watchman) of the village having an official status. The Appellants accompanied by several others came to house of the deceased abusing her of witchcraft causing illness of son of Appellant Mannu. She was assaulted, dragged and beaten up. She ran towards the *Gothan*. The witness did not go there out of fear late at night. In the morning he did not find the deceased in her house and lodged the report. The occurrence having taken place late in the night and the Police Station being approximately 18 km east to the village, we find nothing unusual in PW-1 or any other villager not having gone to the Police Station for lodging a report. The occurrence is of 1995 when travel and communications in villages were poor and even mobile phone communications were not available. There was no male member in the house of the deceased. PW-1 did not suspect that the deceased had been done to death but only that she was missing. The Police came to the village with promptness and commenced inquiry based on the information given. ‘Merg’ No. 0 of 1995 (Exhibit P- 22) was recorded in the village itself at 15:00 hours by the Investigating Officer, U.K.Chandravanshi, PW-14 naming the Appellants and certain others of having killed the deceased, tied a stone around her waist and

thrown her in the well. The suspects were already under interrogation. The body was recovered from the well evident from the Inquest report (Exhibit P-2) signed by PW-1, Mohan Singh. Another 'Merg' for recovery of the body was registered at the village by PW-11, Arvind Dwivedi, Assistant Sub-Inspector of Police. Formal FIR was then registered on 30.5.1995 itself at 18:25 hours.

13. In the facts and circumstances of the case we are satisfied that there has been no delay in the lodging of the police report. There can be no abstract standard of delay and it will have to be considered in the facts of each case. It also being a question of fact has to be specifically urged with a foundation of facts to suggest possibility of interpolation and embellishments. In the present case the ground was neither urged before the Trial Judge and has also not been pleaded in the grounds of the memo of appeal. In (2013) 2 SCC 146 (Surajit Sarkar v. State of W.B.) it was observed :-

“62. We may mention that the learned counsel for Surajit Sarkar submitted that there was a delay in forwarding the FIR to the Magistrate concerned. Since no foundation has been laid for this contention nor was this contention urged either before the trial court or before the High Court we see no reason to entertain it at this stage.”

14. We are not satisfied in the facts of the case, as was sought to be urged before us, that the body was recovered first and the confession of Appellant Hirau was recorded subsequently to falsely implicate them. In the totality of the facts displaying a sequence of events, the Appellants being named as suspects in the missing persons report itself, the police promptly having come to the village apparently investigation had commenced. The confession was recorded the same day. Merely because there may be some discrepancy in the timing mentioned in the confession cannot make it suspect as to reject the disclosure and recovery itself. PW-14, U.K.Chandravanshi the Investigating Officer deposed having recorded the confession on 30.5.1995 at Indira Bhawan in presence of PW-1, Mohan Singh. In cross examination only a bald suggestion was made that no confession was given. PW-1 admitted his signature on the confession but sought to

retract on a frivolous unsupported plea of having signed in fear. The Inquest report prepared on recovery of the dead body from the well based on the confession is also signed by PW-1. Considering a similar contention of time discrepancy in confession it was observed in (2014) 7 SCC 443 (Mohd. Jamiludin Nasir v. State of W.B.) as follows :-

“55. We do not find any substance in the said submission since with reference to such time factor there should always be some time allowance given, in which event, the said factor cannot be taken as a non-corroborative factor at all to reject the confession made by Nasir....”

Since the records of the Appeal and Trial were transferred from Madhya Pradesh High Court after reorganization of the State, part of the records before commitment has not been transferred. In any event it is not the case of the Appellant Hirau that he was not in police custody as a suspect before 17:10 hours on 30.5.1995.

15. PW-2, Rameshwari Bai, Sarpanch, specifically named the Appellants and two others Santosh Chauhan and Dhirpal Nishad amongst the persons present. She specifically named Appellant Mannu as shouting and Amar Singh threatening to fix anybody who would come forward to oppose. She tried to reason with Appellant Hirau who simply shrugged her off. The Appellants and others were shouting at the door of the deceased accusing her of witchcraft leading to illness of the son of Appellant Mannu. The deceased was being assaulted and dragged when the deceased ran towards the *Gothan* to save herself and was followed by the accused persons. The deceased then went missing and her body was recovered from the well the next day.

16. PW-3, Vidya Bai was the minor daughter of the deceased, a student of Class III. She has named Appellant Bhangi as having called her mother from outside their house. Then the Appellants Mannu and Bhangi dragged her mother out of the house. The Trial Judge asked her questions to which she independently replied that she had come to Raipur for deposing in the Court and knew what stating the truth meant. The mere absence of an oath cannot make her statements

suspect as tutored when no evidence in that behalf has been led. Moreover there was no male in her family to tutor her. It is not the case of the Appellants that they had enmity with any particular person in the village and who may have tutored her. She had seen her mother being assaulted. As a child the incident would be etched in her mind because of the horror of the scene itself and a passage of two and half years at time of deposition could not have effaced it. There is no reason why the child would falsely implicate the two Appellants. The evidence of the child witness in the present case finds sufficient corroboration. The capacity of a child witness to recapitulate a gruesome assault on own parents was considered in (2010) 12 SCC 324 (State of U.P. v. Krishna Master) observing :-

“36....When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.”

17. PW-18, Jagdish Prasad, neighbor of the deceased turned hostile and claimed not to have seen the accused persons. The Trial Judge however rightly relied upon that part of his evidence admissible as finding corroboration that he heard the deceased shouting for help at night. When she ran out of her house, Appellant Hirau chased her and he also saw Appellant Amar Singh and Mannu. The fact that he is stating the truth is reinforced by the reference to the presence of PW-2, Rameshwari Bai, Sarpanch which again confirms that the Appellants accompanied by others came to the house of the deceased and were shouting, threatening and assaulted her and chased her. The witness also confirms the deposition of PW-2, Rameshwari Bai that Appellant Amar Singh was shouting that if anyone intruded in between, he would also be killed. Merely because he could not identify others in the mob due to darkness cannot shake his credibility regarding the identification of the Appellants. The failure to seize the torch is not considered significant in view of the corroborative evidence of identification by PW-2 and PW-3.

18. The Trial Judge on appreciation of the evidence has rightly come to the conclusion that the evidence with regard to the other persons named as members of the mob was not reliable and convincing in so far as their identification was concerned, the benefit of which had to be given to them. The Trial Judge has further come to the conclusion from the evidence of PW-2, PW-3 and PW-18 with regard to the consistency in evidence regarding the presence of the Appellants. Criminal jurisprudence does not provide that if allegations are made against certain persons and some of them are acquitted, the rest must necessarily be acquitted. Much will depend on the nature of evidence available with regard to those who were acquitted and those who may be convicted. The Trial Judge has adequately discussed the prosecution evidence to arrive at his conclusion with regard to the presence of the four Appellants identified as members of the mob which chased and assaulted the deceased after which the dead body was discovered in a very short span of time the very next day. Nothing has been pointed out to us from the prosecution evidence how the Appellants were similarly situated as those acquitted to grant them the same benefit of doubt.

19. The submission that if originally the accused were more than five and some of them have been acquitted reducing the number convicted to below five, conviction with the aid of Section 147 or 149 IPC was not sustainable, cannot be upheld. Acquittal on benefit of doubt due to insufficient evidence does not mean that the others were not present. Relying on past precedents it was held in (2012) 3 SCC 221 (Roy Fernandes v. State of Goa) as follows :-

“17. Acquittal of three of the five accused persons comprising the unlawful assembly does not in the light of the settled legal position make any material difference. So long as there were four other persons with the appellant who had the common object of committing an offence the assembly would be unlawful in nature acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them notwithstanding.”

20. The killing was gruesome. The deceased was chased from her own house where she lived with her two minor children only late at night around 11:00 pm. She

ran for her own safety. She was chased, assaulted and her body bore marks of assault. A stone was then tied around her waist and she was thrown alive into the well and died of asphyxia due to drowning. Surely she must have struggled because of the human instinct for survival. But the stone tied to her body obviously made it impossible to regain life. A defence was vaguely taken of a village fair in which large number of persons had come to suggest that the deceased may have been killed by others but no evidence whatsoever was led in this regard making it a false defence and an incriminating factor against the Appellants. The deceased had gone missing after she was chased and assaulted at night. The body was recovered from the well next morning. There is also a proximity of time between the assault by the Appellants and recovery of the body with no suggestion of any intervening factors to suggest killing by another and at another place.

21. Jagdish Prasad (supra) relied upon by the Appellants is completely distinguishable on its own facts. The witness who was found unreliable with regard to the disclosure of names made by him during investigation and in the Court because he was a witness to the entire occurrence, fled for his life, had hid himself inside a room and in which background it was considered extremely crucial that he omitted the name of the first accused named originally in the Court deposition to hold that he was unreliable.

22. We therefore find no reason to interfere with the judgment of conviction. The appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE