

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 2841 OF 1999

1. Ratan S/o Raghuram, aged 33 yrs
2. Tirnath S/o Raidhar Kalar, aged 24 yrs
3. Raidhar S/o Raghuram Kalar, aged 40 yrs
4. Girdhar S/o Sukaluram, aged 24 yrs
5. Sukalu Ram S/o Bannuram, aged 43 yrs
6. Bailsingh S/o Sukaluram, aged 22 yrs
7. Raghuram S/o Dalsay, aged 70 yrs

All R/o village-Turemarka, Gudipara,
P.S. Lohandiguda, District Bastar

... Appellants

Versus

1. State of Madhya Pradesh

... Respondent

For Appellants	:	Mr. Rajesh Jain and Ms. Kiran Jain, Advocates.
For Respondent-State	:	Ms. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgement on Board

Per NAVIN SINHA, C.J.

26/06/2015

1. The appeal was originally filed by seven Appellants convicted under Section 302/149 IPC to life imprisonment with fine of Rs.500/-, under Section 147 IPC to three months rigorous imprisonment with fine of Rs.100/- and under Section 148 IPC to six months rigorous imprisonment with fine of Rs.100/-, in the event of failure to pay the fine they were required to undergo further imprisonment of two months and one month respectively, as ordered by the First Additional Sessions Judge, Bastar, in Sessions Trial No.389 of 1994, dated 29.7.1999.

2. During pendency of the Appeal, Appellant no.5 Sukalu Ram and Appellant no.7 Raghuram are stated to have been deceased. The Appeal thus stands abated with regard to them. A plea of juvenility was taken on behalf of Appellant no.2 Tirnath and Appellant no.6 Bailsingh. The inquiry ordered under the Juvenile Justice (Care and Protection of Children) Act,

2000, confirms that they were juveniles, aged 17 years 11 months & 22 days and 16 years 8 months respectively, on the date of occurrence i.e. 23.9.1994. They are stated to have already undergone approximately 7 years of custody.

3. The deceased was assaulted by the Appellants pursuant to which, FIR Exhibit P-1, was lodged on 23.9.1994 by PW-1 Rigo Bai, wife of the deceased. The witness, her son PW-2 Chumman Ram, and daughter PW-3 Tilak Bai had eye witnessed the assault. Appellants, Ratan and Raidhar assaulted with "*tangia*" and Appellant Girdhar with a "*gupti*" while the others were holding the deceased. The three witnesses went and gave water to the deceased who was lying injured on the ground. The Appellants Girdhar and Ratan came back and assaulted the deceased again, after which the deceased died on the spot.

4. The postmortem, Exhibit P-4, was conducted by PW-7 Dr. Virendra Thakur, who found the following injuries on the person of the deceased:-

- (1) Penetrating wound 3 in number one over chin just below center of lower lip approx. 0.4cm in diameter, depth up to bone underneath one over 1cm below injury no.1 approx. 0.4cm diameter and depth up to bone one over 2cm below injury no.2 diameter approx. 0.4cm and depth up to bone. Incisor teeth on lower jaw and left molar loosened in their socket and dried blood clot present around them.
- (2) Lacerated wound 6cm x 1.5cm x bone deep compound fracture over right side of forehead near centre.
- (3) Lacerated wound 3cm x 1.4cm x 0.4cm over right side of forehead.
- (4) Penetrating wound 1cm diameter x 0.5cm depth near pinna (left).
- (5) Contusion bluish 7cm x 2cm over left cheek. One over right side of chin 5cm x 1cm bluish.
- (6) Contusion over upper part of the neck 6cm x 3cm. Two over medial and lateral end of right clavicle, each 5 x 1cm. Right eye and both lids bluish.

The cause of death was opined as shock and hemorrhage caused due to the injuries, particularly the head injury. Injuries no.2 and 3 were opined to be sufficient in the ordinary course of nature to cause death. The injuries were all ante-mortem homicidal in nature.

5. Learned Counsel for the Appellants submitted that PW-1 Rigo Bai, PW-2 Chumman Ram, PW-3 Tilak Bai and PW-5 Aso *alias* Asmati were all relatives of the deceased, the last being the niece. The occurrence took place in the open village fields at 13:00 hours in the daylight and yet there is no independent witness available which is highly unusual. The only witnesses available are the relatives of the deceased. The prosecution witnesses have alleged motive for the assault. In the facts of the case, corroboration by independent witnesses was necessary. PW-6 Amlu, the only independent witness has given a different version of the occurrence naming only two of the seven Appellants, Ratan and Girdhar of assaulting, and that too not with a "*tangia*" but with "*lathi*" only. The other independent witness PW-4 Ghasiya has not supported the prosecution story. It will therefore not be safe to uphold the conviction on basis of the evidence of interested and related witness only without corroboration.

6. The deceased and the Appellants were related to each other, forming two different branches of the same family. There was an earlier dispute between them with regard to the killing of a swine for which the deceased had falsely implicated the Appellants. The Appellants had protested against their false implication because of which the family of the deceased had again implicated the Appellants.

7. PW's 1, 2, 3 and 5 mentioned assault by seven people. In that event, there should have been seven injuries on the person of the deceased but only six injuries have been found. Most of the injuries are simple in nature except for the head injury. The allegations of assault are omnibus and none of the witnesses have stated who assaulted on which part of the body. There is variation between the ocular version of the assault by the witnesses and the medical evidence available with regard to the same. There are contradictions between the evidence of PW's 1, 2 and 3. The wife of the deceased PW-1,

stated that when the deceased did not return home she sent PW-2 Chumman and PW-3 Tilak Bai, her son and daughter, to look for him and she followed later. But, PW-2, son of the deceased, stated that he went alone to see and his mother and sister followed him later. PW-3, daughter of the deceased, deposed that she did not go to the place of occurrence and that they witnessed the assault from their home. According to the eye-witnesses the assault took place in two parts. In the first part seven people assaulted and in the second part after the deceased was given water, three people assaulted. The evidence available clearly suggests that the witnesses did not see the first part of the assault and may have witnessed only the second part of the assault. The Doctor, PW-7, did not say that the injuries were sufficient in the ordinary course of nature to cause death. A plea of alibi was taken on behalf of the Appellant Raidhar supported by defence witnesses which was not considered properly and has wrongly been rejected due to erroneous appreciation of evidence.

8. Learned Counsel for the State submitted that there existed previous enmity between the parties with regard to killing of the swine. The Appellants therefore had a motive for assaulting the deceased as they believed he had falsely implicated them. Contradictions, if any, in the evidence of PW's 1, 2 and 3 are minor and trivial which do not affect the value and credibility of the witnesses so as to doubt their entire evidence. The witnesses have remained firm otherwise on all material aspects and the medical evidence corroborates the ocular evidence of assault. The Appellants intended to cause death of the deceased is evident from their conduct in having come back and assaulted the deceased again after he had fallen down pursuant to the first assault and was given water by PW's 1, 2 and 3. The conviction calls for no interference.

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

10. PW's 1, 2, 3 and 5, eye witnesses to the assault are the wife, son, daughter and niece of the deceased. There is no invariable rule of criminal jurisprudence that the evidence of a related witness must be doubted, rejected or viewed with suspicion and unless it finds corroboration, cannot be considered much less conviction sustained on that basis. If the evidence of the related witness is convincing, cogent and reliable, discrepancies, if any, and contradictions are trivial, it cannot be rejected on the ground simplicitor that they are related to the deceased and may not be speaking the truth or merely because there may have been a possibility of false implication due to previous enmity between the parties. The principle for benefit of doubt cannot be carried to that extremity. In (2013) 15 SCC 284 (Guiram Mondal v. State of West Bengal) rejecting the objection that the witnesses were related to the deceased it was observed as follows:-

“16. We are also not impressed by the argument of Ms Rupali S. Ghosh, learned counsel appearing for the appellant, that not much reliance could be placed on the evidence of eyewitnesses as most of them are relatives of Amrita Dome and not a single independent witness was examined by the prosecution. In our view, merely because a witness is a relative of the deceased is not a reason for discarding his evidence. Many a time, strangers will not come forward to depose as witnesses, even if they have witnessed the crime. Further, possibility of influencing such witnesses is also not uncommon. Evidence of relatives can be acted upon if the court finds that the evidence of such a witness is reliable and trustworthy.”

11. More often than not, even if an assault takes place in a public place, persons other than the relatives of the deceased prefer to stay away in their own interest and fear of retribution should they depose as witness, and even when they do, opt to become hostile in Court for various reasons, especially if the time period between the date of occurrence and the date of their evidence is as long as three to five years as in the present case, for myriad reasons. In (2015) 2 SCC 734 (Inder Singh v. State of Rajasthan), the assault also took place in the open fields. The witnesses were only the relatives of the deceased. There were several assailants. A similar objection on behalf of the

defence was taken and additionally that no pellets had been recovered by the Investigating officer from the place of occurrence, the allegation being for use of fire arms. Rejecting the same it was observed as follows:-

“12. On going through the entire evidence of material witnesses, other materials and judgment of the courts below, we find that since the number of accused persons was quite large and they were bold and strong enough to cause four deaths in the open field in presence of large number of persons, it cannot be difficult to understand and appreciate as to why independent witnesses from the village who might have seen the occurrence, did not prefer to come out to support the prosecution. But that will not take away from the worth of deposition of six eyewitnesses when they have given a consistent account of the occurrence which was disclosed in a nutshell soon after the occurrence in the FIR lodged by PW 15 who was seriously and critically injured in the same occurrence and whose presence cannot be doubted. If, per chance, he would have been the sole witness, even then it may have been possible for the courts below to convict the accused persons on his testimony after testing its veracity in the light of his earlier statement contained in the FIR. In such a factual scenario, we find no reason to doubt the prosecution case if the IO failed to recover pellets from the open field which was the place of occurrence or if he could not obtain ballistic report. The eye version account of the occurrence and the medical evidence showing large number of injuries including firearm injuries support each other. On this issue, the discussion and findings of the trial court against the accused persons is found to have sufficient merit.”

12. Conversely, when a person is killed no one is more interested than the relatives of the deceased to ensure that the real culprits are brought to book. When the relatives happen to be the wife and the children of the deceased, greater credibility will attach to their evidence as they would be the most interested to ensure that the real assailants of their husband/father is brought to book. Therefore, to reject the evidence of related witnesses may prove counter productive to the administration of justice and may lead to upsetting the entire criminal justice system if that were to be considered as a ground to reject such evidence. In (2009) 11 SCC 382 (Rajender Singh v. State of Haryana) it was observed :-

“33.....It is difficult to believe that the relatives of deceased Dinesh would spare his real assailants and falsely involve

other persons responsible for committing the offence. It is well settled that if the witness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would inter alia be interested in ensuring that real culprits are punished.”

13. The occurrence with regard to the dispute between the parties in respect of a swine was more than one year old. It is difficult accept that the Appellants were being falsely implicated so belatedly for that reason. Presence or absence of motive by itself cannot be an incriminating or mitigating factor to decide culpability and may only be a corroborative factor.

14. PW-1, wife of the deceased, PW-2, son of the deceased and PW-3, daughter of the deceased, are consistent with regard to the fact that the Appellants were the assailants. The assault was witnessed by them. The deceased who was injured lay on the ground. They went to give him water. At this time the three Appellants again came back and assaulted the deceased. The conduct of the Appellants in having come back and made the second assault leaves no doubt about their intention to ensure that the deceased was done to death. The fact that PW-1, wife of the deceased, may have deposed that she asked her children to go first and later followed or that PW-2 went alone on the asking of PW-1 or that PW-3 stated that they all witnessed the assault from the house itself are all considered trivial contradictions not affecting the credibility of their being eye-witnesses as the common thread that runs through all of them is that they have named the Appellants as the assailants with a vivid description of the manner in which the assault took place in two stages. We do not find any evidence on record to suggest that they had not witnessed the first part of the assault. In any event that is hardly relevant as the three Appellants are clearly stated to have assaulted the helpless injured who was lying on the ground after he had been given water while he was breathing his last.

15. PW-5, Aso *alias* Asmati, the niece of the deceased, has deposed that on hearing commotion she went to the fields and saw the Appellants assaulting. The deceased was still breathing when they gave water to him and the three Appellants came back and assaulted the deceased again. PW-6, Amlu, is an independent eye-witness. He has tried to go hostile by endeavoring to give another version of the occurrence. The evidence of a hostile witness is not to be rejected in its entirety. So much of that evidence which finds corroboration from other witnesses can be considered. The witness has also confirmed that on the fateful day and time the Appellants Girdhar and Ratan did indeed assault the deceased. The part of his statement that he saw them assaulting with "*lathi*" and not "*tangia*" is but an attempt to protect the Appellants and is belied by the medical evidence which is contrary to his ocular evidence from the nature of the injuries caused. In (2010) 9 SCC 567 (C. Muniappan v. State of Tamil Nadu) with regard to the evidence of a hostile witness it was observed:-

"83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

In (2010) 10 SCC 259 (Abdul Sayeed v. State of Madhya Pradesh) the issue of contradiction between ocular evidence and medical evidence, and when the latter would prevail was considered and it was observed :-

"39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

16. The fact that there is no forensic report with regard to the bloodstained earth seized from the place of occurrence or report regarding presence of blood on the weapon of assault or that PW-8, Baldev, the seizure list witness

has not supported recovery of the weapon of offence are not considered so crucial in the facts of the case so as to doubt the entire genesis of the occurrence by the eye witness account. The recovery of the weapon of offence was not on a confession but is more of self incriminating evidence for production by them at the police station and cannot be taken into consideration at all. If the Investigating officer was negligent and did not obtain FSL report of the sample of earth sent for chemical analysis, in the nature of eye-witness account available in the present case it is considered inconsequential and no benefit can be derived by the Appellants from the same.

17. PW-7, Dr. Virendra Thakur, who conducted the post-mortem, found the injuries to be ante-mortem and homicidal in nature. Injuries 2 and 3 were found to be sufficient in the ordinary course of nature to cause death.

18. PW-9, Sanjay Devsthale, the Investigating Officer, has proved the spot-map, Exhibit P-15, as being in the open fields, the inquest report, Exhibit P-16 and recording of the statements of the witnesses including the lodgement of the FIR.

19. A plea of alibi has been taken on behalf of Raidhar that he had gone to village Chhindbahar. The evidence of DW-1, Saradhu, in our opinion, corroborates that part of the evidence of PW's 1, 2, 3, 4 and 5 that he saw the deceased lying injured on the ground at the place of assault in proximity to the time the assault took place. DW-2, Bitoo, also deposed that the Appellant Raidhar had gone to village Chhindbahar for measurement of the lands of Raghuram. DW-3 Raghuram has deposed that Appellant Raidhar had come for the measurement of his lands at 7:00 am and had stayed till 3:00 pm. A plea of alibi is a weak defence. It was for the Appellant Raidhar to have placed the measurement report as complete proof of his alibi. No such report has been brought on record. No such plea has been urged on behalf of the

other two Appellants. Additionally no plea of alibi was taken by the Appellant Raidhar in his statement under Section 313 Cr.P.C. It is therefore apparent that an attempt was being made to build up the plea of alibi on basis of defence witness without any material. In (1997) 1 SCC 283 (Binay Kumar Singh v. State of Bihar) it was observed:-

“23. The Latin word alibi means “elsewhere” and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.”

20. The surgical precision suggested that if there were seven assailants there had to be corresponding injuries is a mathematical formula which has no applicability to criminal jurisprudence. It is likewise difficult to accept the submission on behalf of the Appellants that if death was attributable to the head injury alone and it could not be said with certainty which one of the Appellants assaulted on the head, conviction was not sustainable. According to the opinion of the Doctor, PW-7, death was a cumulative result due to

hemorrhage and shock caused by the injuries including the skull injury. The conviction being with the aid of Section 147 and 149 IPC, the defence merits no consideration.

21. We therefore find no reason to interfere with the conviction of the surviving Appellants. But, Appellants no. 2 and 6 have been held to be juveniles on the date of occurrence and have undergone approximately 7 years of custody, which is more than the maximum period of sentence that could have been imposed on them. They are therefore not required to undergo any further period of custody. The Appellants, Ratan, Raidhar and Girdhar, are required to surrender forthwith and/or be taken into custody for serving out the remaining period of his sentence.

22. The appeal is dismissed.

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

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