

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 876 OF 2008

Dinesh Suryavanshi, son of Uchit Ram, aged about 22 years, resident and cultivator of Jalso, Chowki-Pachpedi, P.S. Masturi, District – Bilaspur (C.G.)

... Appellant

Versus

State of Chhattisgarh, through: Chowki Pachpedi, P.S. Masturi, District- Bilaspur (C.G.)

... Respondent

For Appellant	:	Mrs. Renu Kochar, Advocate.
For Respondent-State	:	Mr. Vinod Deshmukh, Dy. G.A.

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

C A V Judgement

Per NAVIN SINHA, C.J.

29/07/2015

1. The Appellant stands convicted under Section 302/34 IPC to life imprisonment with fine of Rs.100/-, in the event of failure to pay which, he was required to undergo six months further rigorous imprisonment, as ordered on 10.9.2008 by the Sessions Judge, Bilaspur, in Sessions Trial no.52 of 2008.

2. The deceased Kartik Ram was done to death on 17.1.2008 at about 5:30-6:00 p.m. His dead-body was found the next morning at about 6:00 a.m. in the Bhararai Nullah close to the 'Leelaghar' river. Merg, Exhibit P-2, was lodged by his son, PW-1 Balgovind Kurre, at 8:35 a.m. on 18.1.2008 against unknown. Blood was found near the body as also chilli powder and the stick that the deceased carried with him was lying broken in three pieces. Formal F.I.R., Exhibit P-1,

was registered the same day. The trail of co-accused Jwala was separated as he was a juvenile.

3. Post-mortem, Exhibit P-23, was conducted on 18.1.2008 about 4:00 p.m by PW-13, Dr. Chandrashekhar Ukey who found the following injuries on the person of the deceased:

“(i) Ante-mortem injury over forehead 'L' shaped incised wound (1x1 inch), sharp horizontal incised wound over right eyebrow 1 inch long. One lacerated wound over left cheek 1 cm. One lacerated wound on left arm midway between elbow and hand.

(ii) Two incised wound 1.5 inch long on center of forehead parallel to each other.

(iii) Another wound (incised) 2 inch long beside above wound.”

All the injuries were ante-mortem in nature. Death was opined due to excessive bleeding caused by multiple head injuries. Time elapsed since death was 24hrs.

4. Learned Counsel for the Appellant submitted that the case of the prosecution rested on an alleged solitary eye witness, PW-4, Samir Patle. He was a minor witness aged sixteen years only. It will not be safe to base conviction on a solitary child eye witness. The contradictions and omissions between his police statement and deposition in Court make it suspicious that he was actually an eye witness. Reliance was placed on (2012) 8 SCC 73 (K.Venkateshwarlu v State of Andhra Pradesh). The conduct of the witness in keeping quiet for four days before telling his classmate Kamlesh PW-5, and not mentioning to anyone about having seen the occurrence, including his parents was a highly unnatural conduct raising serious doubts about the reliability and credibility of his evidence. The police was coming to the village for the past few days since the occurrence but the witness gave

his police statement only on 25.1.1998, eight days after the occurrence. The Trial Judge erred in holding that the conduct of the witness in keeping quiet for four days was a perfectly normal conduct. Kamlesh, PW-5 never corroborated that PW-4, Samir Patle had told him anything about the assault.

5. PW-4, Samir Patle, in his police statement said that he went to his fields at 2:00 p.m. for tending to the crops and witnessed the initial assault only on the deceased at about 5:30- 6:00 p.m. who fell down. He then went away to the house of his friend Ramesh to collect his practical copy. The witness therefore did not see that the deceased was infact killed by the Appellant. In his Court statement, he said that he had gone to the house of Ramesh to collect his practical copy and was coming back via his fields when he witnessed the assault. This was also contrary to his statement that he went home from his fields after witnessing the assault and did not go elsewhere or meet anyone.

6. The occurrence took place in the month of January at 6:00 p.m. Darkness sets in early in winters. It was not possible for him to have witnessed the assault in the darkness from about 200 feet and identified the Appellant. Even if it was not completely dark, visibility was definitely not clear for identification. The Trial Judge has not appreciated the argument properly before holding that visibility existed for identification on surmises and conjectures.

7. The deceased had recently sold his lands. His son PW-1, Balgovind Kurre and his wife wanted part of the money for their needs which the deceased had refused to give. The witness himself, his son PW-2, Birendra Kurre and other prosecution witnesses, including PW-9 Bihari Lal Kurre, PW-7 Feruram Yadav have deposed that relations

between the deceased and his family were not cordial and they were not on speaking terms. The deceased did not approve of the conduct of his daughter-in-law in entertaining Manaram in their house. The deceased used to cook his own food and also bought his own cereals because of the strained relations. PW-1, Balgovind Kurre has acknowledged that the police initially suspected them along with Manaram and had called them to the police station for interrogation for about six days. The Appellant has then been made a scapegoat by false implication. The Appellant never made any extra judicial confession before PW-3, Mahavir Katkar, PW-7 Ferurram Yadav and PW-8 Radhelal Suryavanshi. The alleged confession was made in presence of the Investigating Officer PW-11, apparent from deposition of the witnesses and is therefore inadmissible in evidence. If he had made an extra judicial confession there is no explanation why he arrested only 26.1.2008.

8. The Appellant had taken the defence of false implication under under Section 313 Cr.P.C. and that the deceased had been killed by PW-1 Balgovind Kurre for money with the help of his friends. The three broken pieces of stick recovered from the spot have not been examined forensically to establish that they were parts of the same one stick. There is no FSL report with regard to the recovery of the "*lathi*" from the riverbed on the confession of the Appellant regarding presence of any blood on it. Likewise there is no FSL report also with regard to his vest and trouser alleged to have been seized by the police confirming presence of blood on it. The Appellant has been made an accused on suspicion only and falsely implicated. The conviction is not sustainable in the entirety of the evidence and the benefit of doubt must be given to

the Appellant as the possibility that the deceased may have been killed by his own family for money or any other for the same reason cannot also be ruled out.

9. An alternative submission was made that at best the Appellant may have had the intention to rob the deceased of his money. Chilli powder has been found scattered at the place of occurrence. The assault is alleged by "*lathi*" and not any sharp cutting weapon. The ocular and medical evidence, that there were incised wounds only on the deceased, therefore do not match. If the Appellant had come with intention to kill he would have carried a sharp cutting weapon or any other lethal instrument for assault to ensure death suggestive of a pre-meditated intention. In the facts of the case the Appellant may at best be liable under Section 304 Part-II IPC for having knowledge that death may be caused after he assaulted on the spur of the moment. The opinion of the Doctor that the incised wounds may have been caused by fragmented edges of the stick is merely the expression of an opinion that cannot lead to a conclusive finding that the incised wounds were not the result of an assault by a sharp cutting weapon.

10. Learned Counsel for the State submitted that the occurrence is stated to have taken place around 5:30 to 6:00 p.m. The Trial Judge has held that visibility existed. PW-4, Sameer Patle, in reply to the Court question has specifically stated that he saw the assault by the Appellant from a distance from 200 ft. The witness further stated that the Appellant was known to him. Furthermore they were residents of the same village. The police statement and Court deposition of the witness is consistent on all material aspects. The omissions and contradictions, if any, cannot invalidate the otherwise convincing and reliable eye

witness evidence of PW-4, Sameer Patle. He was a student of Class 10 studying at the Higher Secondary level. He therefore clearly had a level of understanding and narration to depose. It cannot be said that he was making stories to falsely implicate the Appellant unaware or unmindful of the consequences that may follow from his deposition with regard to conviction or acquittal. No motive has been assigned by the Appellant why the witness was falsely implicating him. The entire defence under Section 313 Cr.P.C. with regard to PW-1 Balgovind Kurre being the assailant for money has not been supported by leading any evidence in support of the same. The taking of a false defence is also an incriminating factor against the Appellant. It is apparent from Exhibit P-11, the seizure list, that three pieces of one broken stick used for assault was recovered at the place of occurrence. The stick was fragmented and frayed at the places it was broken. PW-13, Dr. Chandrashekhar Ukey, has stated in his deposition that the incised injuries of the nature found on the deceased were also possible if the assault was made with a fragmented "*lathi*" or the sharp edge of the fragmented portion. The Doctor had further stated that the pieces were of the same single stick. The police statement of PW-4, Sameer Patle, was recorded on 25.1.2008. The Trial Judge has rightly held that the conduct of the witness in keeping quiet for four days as he was scared was not an unnatural conduct. The witness had told his cousins, Kabir and Rakesh, his uncle Dhananjay and also Kamlesh, PW-5. The defence has not put any question to PW-5, Kamlesh or PW-4, Sameer Patle, vice versa that the latter had not mentioned anything in this regard to the former. The nature of the injuries on the deceased is itself evidence of the intention to kill.

11. We have considered the submissions on behalf of the parties, perused the evidence on record and considered the appreciation of evidence by the Trial Court.

12. PW-4, Sameer Patle, aged about 16 years, is the star witness and the only eye-witness to the assault. The evidence of a solitary eye-witness, if it is otherwise convincing, reliable and inspires confidence can be the basis for conviction. If the evidence is not satisfactory, corroboration must be sought from all surrounding circumstances. But, it cannot be said that under no circumstances can conviction be based on the evidence of a solitary eye-witness.

13. Likewise the evidence of a child witness cannot be viewed with suspicion from the very inception merely for that reason. Much shall depend on the facts of each case. In cases where the Court has any doubts about the child witness corroboration must be sought. PW-4, Sameer Patle, was not a witness of a very young impressionable age. He was 16 years old studying in Class 10. He will therefore be presumed to have the capacity to depose aware of the consequences that may follow for the accused by conviction or acquittal. We find nothing in his evidence to suggest that he was incapable of deposing or understanding the value of his own statements. The Trial Judge who had the opportunity to see the demeanor of the witness was also satisfied with regard to his ability to depose. Section 118 of the Evidence Act states that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or giving rational answers to the questions because of tender years or any such cause to the satisfaction of the Court. A child witness can also be allowed to testify if he has an

intellectual capacity to understand the questions and give rational answers. Summing up the principles with regard to a rural child witness in 1980 Supp SCC 400 (Tehal Singh v. State of Punjab) it was observed as follows :-

“6. Hardip Singh is a lad of 13 years. In our country and particularly in the rural areas it is difficult to think of a lad of thirteen years as a child. A vast majority of boys round about that age go to the fields and do men’s work. They are certainly capable of understanding the significance of the oath and the necessity to speak the truth. The learned Sessions Judge who had the opportunity of seeing the witness Hardip Singh in the witness box did not consider it necessary to treat him as a child witness. A perusal of his evidence also shows that he has certainly attained a measure of mature understanding. We do not think we can accept Dr Chitale’s argument and proceed on the basis that Hardip Singh is a child witness. Even otherwise, having gone through his evidence we are satisfied that his evidence does not suffer from any infirmity. He was cross-examined at great length but nothing was elicited from him to dub him as a false or a tutored witness.....”

The same principle has been reiterated in K. Venkateshwarlu (supra) relied upon by the Appellant observing as follows :-

“9.....The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.”

14. The occurrence is stated to have taken place on 17.1.2008 at about 5:30 to 6:00 p.m. According to the Almanac Calendar for that date in Chhattisgarh, the Sunrise was at 6:42 a.m. and Sunset at 5:39 p.m. Civil twilight when objects are clearly distinguishable without artificial light lasted from 6:18 a.m. till 6:03 p.m. The time of occurrence was an estimation only as PW-4, Samir Patle has stated that he does not wear a watch. He witnessed the occurrence from barely 200ft. The Appellant, a resident of the same village, was known to him since earlier. Even if the sun had set, it can safely be concluded that there existed sufficient light for recognition of a known person from that distance. It need not be discussed that such identification by village folk can be from various factors including voice and gait even if it is a silhouette. We therefore find it difficult to accept the submission that identification was not possible.

15. The second contention on behalf of the Appellant that the conduct of PW-4, Sameer Patle, in having kept quiet for four days and not telling anyone that he had seen the assault also does not impress us. The witness was 16 years of age. He has clearly stated that he had got scared and did not step out of his house for four days. He told his uncle Dhananjay about the occurrence and thereafter to the police after he was asked questions. The fact that the police had been visiting the village and he still made no disclosure including to his family members is not such an unusual conduct so as to doubt the veracity of his evidence completely. Different persons may react in different ways after witnessing a murderous crime. Some may get excited and run to the police or any other. Another may be dumb struck. The third may get

mortally afraid and go into hiding or become a recluse for some time. The reaction will vary more when it is a child. In (2009) 6 SCC 712 (Himmat Sukhadeo Wahurwagh v. State of Maharashtra) it was held that it was not an unusual conduct if the two child witnesses aged eleven and thirteen years hid themselves after witnessing the murder of their father and grandfather respectively, and did not inform anyone immediately. In (2010) 12 SCC 545 (Balaji v State) the father of the ten years old witness was killed on 23.10.1999. She did not tell anybody till 3.11.1999 when her grandfather came visiting to her house. The Supreme Court rejected the challenge to the conviction on the ground that it was highly unnatural conduct of the witness to have kept quiet for ten days.

16. In (2013) 6 SCC 417 (Lahu Kamlakar Patil v. State of Maharashtra) dealing with different reactions of victims 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.”

17. We do not find any material contradiction or omission in the police statement and Court deposition of PW-4, Samir Patle. On the contrary, it is consistent on all material aspects. The fact that in his police statement he may have spoken of going to the house of his friend Ramesh to pick up the practical copy after having witnessed the assault or the Court deposition that he went to the house of Ramesh and was returning via the fields is not such a major contradiction as to hold the witness to be speaking falsehood.

18. The evidence of PW-1 Balgovind Kurre, the son of the deceased, PW-2 Birendra Kumar Kurre, the grandson of the deceased, PW-3 Mahavir Katkar, a co-villager and PW-7 Feruram Yadav who is also a co-villager, establishes that the deceased had sold 59 decimals of land five days earlier for Rs.1,05,000/-. Part payment of Rs.66,000/- had been made earlier. A day prior to the occurrence the deceased had executed the sale deed and received the balance consideration of Rs.39,000/-. The deceased had kept the money with himself evident from the deposition of his son PW-1 Balgovind Kurre and grandson PW-2 Birendra Kumar Kurre. The deceased went to his fields for tending the crops with the money on his person. His lands were close to the Nullah and the adjoining 'Leelagar' river. The lands of PW-4, Sameer Patle, as deposed by him were situated adjacent.

19. The defence of the Appellant including under Section 313 Cr.P.C. that relations between the deceased and his son PW-1, Balgovind Kurre as also his daughter-in-law, were strained and that the deceased may have been killed by them because he was refusing to give them money from the sale proceeds, merits no consideration at all. PW-2 Birendra Kumar Kurre has deposed that the deceased had told him that

the witness may ask him for money whenever he needed. We therefore find it difficult to accept the submission that PW-1, Balgovind Kurre, and his wife had a motive to kill the deceased for obtaining the money.

20. The witnesses have deposed that the "*lathi*" used by the deceased regularly was found lying broken in three pieces at the place of occurrence. Chilli powder was lying scattered on the ground with blood at the place of occurrence. The recovery of a "*lathi*" on the confession of the Appellant, Exhibit P-6 from the river bed or that there was no FSL report regarding the same are not considered relevant in the nature of the charge under Section 302/34 IPC and the evidence available. In any event, if the "*lathi*" was lying in the river bed under one feet flowing water the question of any blood being found on it in any FSL report upon recovery on 26.1.2008 is irrelevant as the bloodstains would have got washed away. It is therefore apparent that the Appellant along with his accomplice Jwala entertained the idea to snatch the sale proceeds of the land which the deceased was keeping with him. They initially used chilli powder only in their effort to snatch the money from the deceased. After the deceased resisted the stick that the deceased carried was then utilised to assault the deceased. The assault obviously was not limited to snatching the money only. It was made with a determined effort to completely thwart any attempt on part of the deceased to resist and ensure that the Appellant under any circumstances has access to the money even if it required the killing of the deceased. Intention may be pre-meditated or can develop on the spot. There will hardly be any direct evidence of intention which has to be culled out from all surrounding circumstances including the nature of weapon and the manner of assault. It shall be reasonable and prudent

to presume that after chilli powder proved ineffective, assault by “*lathi*” of the Appellant was also resisted. The Appellant had become desperate to have the money at any cost including a murderous assault if necessary. The assault was then intensified with such severity as to result in the “*lathi*” breaking into three pieces. The medical evidence suggests that the assault continued with the broken “*lathi*” and the fragmented edges caused incised wounds. Two pieces of the lathi would have had only one fragmented edge while the middle portion would have had two fragmented edges. The Appellant and his accomplice now had two different weapons of assault.

21. The Appellant never made any confession except before the police and which is therefore inadmissible in evidence.

22. The next question for our consideration is with regard to alteration of the conviction to one under Section 304 Part-II IPC. In order to do the same, the conduct of the Appellant must fall under one of the Exceptions to Section 300 IPC. In the facts and circumstances of the case, we find it difficult to come to any such conclusion.

23. The Appeal is dismissed.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge