

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 346 of 2011**

1. Badan alias Veerendra alias Beerendra Mahapatra, S/o Sunil Mahapatra, aged about 40 years, R/o village Rajakhariyar, Shantinagar, Ward No.2, Police Station Rajkhariyar (Orissa)

---- Appellant**Versus**

1. State of Chhattisgarh through Police Station Devbhog, District Raipur, CG

---- Respondent

For Appellant: Smt. Fouzia Mirza, Advocate
 For Respondent/State: Shri Avinash K. Mishra, PL

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice I.S. Uboweja****CAV JUDGMENT****Pritinker Diwaker, J****30/09/2015**

This appeal has been filed against the judgment of conviction and order of sentence dated 28.12.2010 passed by the Additional Sessions Judge, Gariyaband, Raipur in Sessions Trial No. 09/2010 convicting the accused/appellant under Sections 302, 323 and 427 IPC and sentencing him to undergo imprisonment for life with fine of Rs. 5000 u/s 302, rigorous imprisonment for one year u/s 323 and rigorous imprisonment for two years u/s 427 IPC, plus default stipulations.

2. As per the case of prosecution on 27.11.2009 at about 9 pm when Basant Kumar Khandekar (PW-1), Akshhay Nand (PW-2) both forest guards, Guruwaru (PW-3) – the Beat Guard and Bharat (PW-4) – the peon in the forest department were sitting near the house of

Deputy Forest Ranger namely Mark Tandi (deceased), they heard some noise like that of cutting of tree and arrival of some vehicle. On hearing this noise, Basant Kumar Khandekar (PW-1) called Deputy Forest Ranger namely Mark Tandi on his cell phone. Thereupon, the deceased Forest Ranger asked him to call Akshhay Nand (PW-2) forest guard and Bharat - the watchman, and all of them went inside the jungle where they saw two persons carrying torch and some gun-like weapon. Immediately thereafter, about 8-10 persons came out from the dense forest, out of whom two persons caught hold of deceased forest ranger, started abusing him saying as to why he had come in the jungle, and slapped Basant Kumar Khandekar (PW-1) on the neck, and seeing this, Basant Kumar Khandekar, Akshhay Nand, Guruwaru and Bharat ran towards jungle leaving the motorcycle there itself. In the next morning all of them went to the house of the deceased forest ranger and came to know through his wife that he had not returned. Thereafter, they along with other villagers went to the spot in search of deceased forest ranger but as he could not be located, they got back to the village and after some time one Jagat Rawat of Idagaon informed them about somebody lying in the jungle. On hearing this, they proceeded to the jungle and found the dead body of the said forest ranger. Inquest Ex. P-3 was made on 28.11.2009. On that day itself at about 11.05 am, FIR (Ex.P-1) was registered against 10-12 persons for the offences under sections 147, 148, 149, 435, 323, 302 IPC and 25, 27 Arms Act followed by *merg* recorded at 11.15 am vide Ex. P-2. Postmortem examination was conducted on the body of the deceased on that very day by Dr. Anju Sonwani (PW-14) who gave her report Ex. P-20 stating that cause of death was haemorrhagic shock due to head

injuries, and the death was homicidal in nature.

During investigation, the statements of the witnesses under Section 161 of the Code of Criminal Procedure were recorded on 29.11.2009, he was taken into custody from Orissa on 14.1.2010, identification parade was conducted on that day itself, his memorandum was recorded and the seizure based thereon was effected. At the instance of the accused/appellant spot panchnama Ex. P-14 was prepared on 15.1.2010, seizure of purse of the deceased was made under Ex. P-13 and then the accused/appellant was arrested. After investigation, charge sheet was filed against the accused/appellant for the offences punishable under Sections 302, 323, 34 and 427 IPC showing one Jairam as an absconding accused. However, the charge was framed by the Court below under sections 302, 323 and 427 IPC.

3. In order to prove the complicity of the accused/appellant in the crime in question, the prosecution has examined 16 witnesses. Statement of the accused/appellant under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case.

4. After hearing the parties, the Court below has convicted and sentenced the accused/appellant as mentioned above.

5. Counsel for the accused/appellant submits as under:

(i) That simplicitor the charge has been framed against the accused/appellant under Section 302 IPC whereas as per the case of the prosecution there were at least 10-12 persons who had committed the offence as the prosecution has utterly failed to prove that it is the accused/appellant alone who has caused injury to the deceased and committed his murder. In support of this

argument reliance is placed on the decisions of the Apex Court in the matter of **A. Kadar Mujawar v. State of Maharashtra** reported in **(2010) 15 SCC 131** and in the matter of **Bala Seetharamiah v. Perike S. Rao and others** reported in **(2004) 4 SCC 557**.

(ii) That the Test Identification Parade has not been conducted by the prosecution as required under the law as the incident took place in the dark night of 27.11.2009 and as per the evidence of the witnesses two persons were carrying torch in their hands. Thus according to the counsel for the accused/appellant the question of identification of the accused/appellant does not arise because in normal course light would flash on the face of other persons and not on the face of those who were carrying the torch. She submits that the accused/appellant has been identified on the basis of *kada* but in the test identification parade it has not been proved by the prosecution that those persons were wearing any *kada*.

(iii) That the Test Identification Parade has been conducted after a lapse of one and a half month after the incident and it is difficult for anyone to identify someone after such a long time particularly when he was seen for just a few seconds that too in the dark night. In support of her submissions on Test Identification Parade counsel for the appellant placed reliance on the decisions of the Apex Court in the matter of **Tamilselvan v. State represented by Inspector of Police, Tamil Nadu** reported in **(2008) 7 SCC 755**, in the matter of **Wakil Singh and others v. State of Bihar** reported in **1981 (supp) SCC 28**, in the matter of **Manzoor v. State of Uttar Pradesh and Suleman v. State of Uttar Pradesh** reported in **(1982) 2 SCC 72**, in the matter of **Bollavaram Pedda Narsi Reddy and others v. State of Andhra Pradesh** reported in

(1991) 3 SCC 434 and in the matter of **Iqbal and another v. State of Uttar Pradesh** reported in **(2015) 6 SCC 623**.

(iv) While referring to the statement of Basant Kumar Khandekar (PW-1) it has been argued that in paragraph No. 12 he has categorically stated that he could not tell as to whether the accused present in the Court was the person who had killed the deceased.

(v) Referring to paragraph 14 of the statement of Smt. Nandini Tandi (PW-5) – the wife of the deceased it has been argued that the cell phone of the deceased was immediately handed over to this witness after the incident and likewise she saw the purse and mobile of the deceased with the police. Thus according to the counsel for the appellant when the purse and mobile were in possession of the police on the date when the dead body was found, question of making recovery of purse on the basis of memorandum of the accused dated 15.1.2010 does not arise and the said evidence has been created just to implicate the accused in a false case.

(vi) Referring to the memorandum of the accused Ex. P-12 it has been argued that the accused/appellant took out all the articles from the purse but as per seizure memo Ex. P-13 all the articles were in tact in the purse. Thus according to the counsel for the appellant seizure of purse is nothing but a totally false story cooked up by the prosecution.

(vii) That the appellant has been projected as a wood smuggler but there is no evidence to establish the said fact nor any document has been filed to this effect, rather it is reflected from the record that he does not have any criminal history against him.

(viii) On the date of incident the Naxalite people had given a call of *Band* and therefore the possibility of the deceased who was an forest employee, having been killed by the Naxalites cannot be ruled out and as the police could not catch the real culprit, accused/appellant has been brought from Orissa and shown as the murderer of the deceased.

6. On the other hand counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below are strictly in accordance with law and there is no infirmity in the same. He submits that in the dock identification PWs 1 to 4 have duly identified the accused/appellant and even if some discrepancies in the Test Identification Parade are there, the same is merely a corroborative piece of evidence and cannot taken against the prosecution. He submits that it was within the special knowledge of the accused as to where he had thrown the purse of the deceased and at his instance the spot *panchanama* Ex. P-14 was prepared and purse of the deceased was found about 30 ft. away from the spot. Referring to the statements of PWs. 1 to 4 it has been argued that they have categorically supported the case of the prosecution and stated that in the test identification parade they identified the accused and therefore his conviction is strictly in accordance with law.

7. Heard counsel for the parties and perused the evidence on record.

8. Basant Kumar Khandekar (PW-1) is the witness who at the relevant time was working as forest guard and as per the case of the prosecution he accompanied the deceased inside the jungle along with Akshhay Nand (PW-2), Guruwaru (PW-3) and Bharat (PW-

4). He has stated that on the date of incident at about 9-9.15 pm when he was sitting with Gurwaru, certain sound like falling of tree and that of vehicle emanated from the jungle and on sensing this he telephonically called up the deceased who in turn being unwell asked him to go inside the jungle by taking some watchman with him. Immediately thereafter the deceased called back this witness expressing his readiness to go into the forest but asked him to call the staff people in the meantime. Thereupon, Akshay Nand, Guruwaru, Bharat, deceased forest ranger and he himself proceeded towards the jungle on two motorcycles and as soon as they reached near *Dhoban Nala* two persons accompanied by 8-10 others flashed light at them and hurling abuses asked them to stop. After they stopped, those two persons went to deceased forest ranger and one of them hitting him with the butt of the gun in his cheek asked him why he was not heeding to their repeated warnings. According to this witness, the other person slapped him on the back side of his head by catching hold of hair. He has stated that as soon as the said two persons attacked the deceased forest ranger, Guruwaru, Bharat and Akshay Nand left the spot. When those two miscreants did not release the deceased forest ranger, this witness also left the spot acting upon his advice and while doing so Akshay Nand had met him on the way. At about 1-1.30 am they heard the sound of firing and damaging the vehicle and till 4 am they remained hidden in the field but by then the deceased forest ranger did not get back. Thereafter at 4 o'clock they went to village Indagaon and informed the wife of deceased forest ranger and one Ganni Pathan about the incident. They also went to the house of one Bhanu Pratap Singh and informed him about the incident. Thereafter, according to this witness, Ganni Pathan and

Bhanu Pratap Singh went inside the jungle to search out the deceased on a motorcycle but after getting back they informed that the motorcycle of the deceased was not there and that of him (this witness) has been damaged and burnt. After this, several villagers started search campaign and at about 7-8 o'clock Bhanu Pratap Singh informed him on phone that there was no clue of the deceased but his cell phone was ringing. At about 11 o'clock one villager of Indagaon gave an information that somebody was lying in the jungle and thereafter when the villagers went there, the said body was found to be that of the deceased. This witness has further stated that on 28.11.2009 at about 11-12 am he along with the villagers went to Devbhog police station and lodged the FIR Ex. P-1 and *merg* registered at his instance is Ex. P-2. Body of the deceased is also said to have been taken to the police station where the inquest Ex. P-3 was conducted on it. He did not incline for his medical examination which he had given to the police in writing because he did not sustain any injury. In paragraph No. 12 this witness has stated that he did not identify the persons who had assaulted him and the deceased, and that he was also not aware whether it is the person present in the Court was one of the assailants. At this stage this witness has been declared hostile. In cross examination, he has stated that in the Tehsil office he had identified the accused/appellant on the basis of his height, *kada* in his hand and mustache. In paragraph No. 18 he has admitted that village Indagaon is a naxalite affected village, that on 27.11.2009 the naxalites had given a call of *Band* and the Indagaon-Gariyaband road was blocked by putting a tree after being cut. He has also admitted the fact that one of the persons was carrying gun and all of them had wrapped themselves with shawl etc. and that

due to darkness he could not see as to what weapon the other persons were carrying. He has further stated that 4-5 days after the incident one Nagvanshi of police department had called him in the Tehsil office for identification where he had been in the company of Akshay Nand, Gurwaru and Bharat. He has denied the fact that in the Tehsil office no identification parade took place and he and his companions were made to sign Ex. P-8. He has stated that at the time of recording of his case diary statement Ex.D-1 he had informed the police that he would identify the accused on the basis of height, *kada* and mustache but if it is not written there, he could not tell the reason for that. He has further stated that in the FIR and while recording his case diary statement he had informed the police that the accused had hit the deceased with the butt of the gun but if it does not find place there, he could not say anything for that.

9. Akshhay Nand (PW-2) is the forest guard who at the relevant time had gone inside the jungle in the company of Basant Kumar Khandekar (PW-1), Guruwaru (PW-3), Bharat (PW-4) and the deceased. He has made almost similar statement like Basant Kumar Khandekar (PW-1). According to him, in the test identification parade, he identified the accused/appellant on the basis of mustache and *kada* in his hand. However, in paragraph No. 16 he has stated that out of the persons he came across, two were carrying guns on the back. Just thereafter, he has stated that the object carried with them looked like gun as due to darkness the visibility was not clear. According to this witness, while recording his case diary statement Ex. D-2 he had informed the police that in the torch light he identified accused/appellant on the basis of steel *kada* and it is he who had assaulted Basant Kumar Khandekar (PW-1) and the deceased but if they are missing therefrom he could not

say anything for that. Likewise he is also stated to have informed the police in his diary statement regarding hearing the sound of causing damage to the motorcycle but he could not say anything if those things do not find place in the same. According to him, about a week after the incident he along with Basant Kumar Khandekar (PW-1), Guruwaru (PW-3) and Bharat (PW-4) was called in the Tehsil office for identification of the accused and one Nagwanshi had asked them to identify the accused.

10. Guruwaru (PW-3) is also the witness who had gone inside the jungle with Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2) Bharat (PW-4) and the deceased. He has also stated almost the same thing like Basant Kumar Khandekar (PW-1) and Akshay Nand (PW-2). According to him, he identified the accused/appellant in the test identification parade on the basis of his face and black colour *kada* in hand. In paragraph No. 7 of his deposition this witness has stated that the two persons who were assaulting the deceased were carrying some gun-like object but as it was dark in the night he could not see as to what it exactly was. He is also stated to have informed the police while recording his case diary statement Ex. D-3 that he had identified the accused on the basis of face and black *kada* in his hand but if the same is not recorded therein he could not tell the reason therefor.

11. Bhaarat alias Bharat (PW-4) is the witness who had gone inside the jungle along with Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3) and the deceased. His statement too is more or less identical with the ones' given by them i.e. PW-1 to PW-3. According to this witness, he identified the accused/appellant in the test identification parade and had informed the police while recording his case diary statement Ex. D-

4 that it was he (accused) who had assaulted Basant Kumar Khandekar (PW-1) and the deceased but if it is not recorded therein he could not tell the reason for that. According to him, he was not aware that the persons who had stopped them were wrapping themselves with shawl or blanket as it was dark there and those persons were behind them.

12. Smt. Nandini Tandi (PW-5) - the wife of the deceased has stated that on receiving the telephonic call from the Beat Guard, her husband had left the house around 9.30-10 in the night on motorcycle and at about 5 O'clock in the morning, Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3) and Bharat (PW-4) came to her house and inquired whether her husband had come back and when she told them in the negative, they informed that he (deceased) was detained in the jungle. Thereafter, according to this witness, a search for her husband began and at about 11 am she came to know that the dead body of her husband was lying in the jungle. She is stated to have informed the police that her husband used to carry purse with him in which the photograph of herself and that of her husband, driving licence and diary were there and on being shown by the police, she had identified the same in the the police station and then Panchnama Ex. P-11 was prepared. As per paragraph 8, she is stated to have been informed by her husband that the accused/appellant had once threatened him of life, but she had asked him not to lodge any report for that. However, in paragraph 9 she has stated that she did not tell anyone that the accused/appellant had ever threatened her husband of life and the report for that was to be lodged. She has stated that as the mobile of her husband was already with the police, she did not think it proper to inform about

the same. She has denied that the proceedings for identification of purse, diary and licence of her husband were undertaken by the police. She has clarified that when she reached the police station, purse and mobile of her husband was already with the police.

13. Dhan Singh (PW-6) is the witness to inquest Ex. P-3. Panduram (PW-7) is the witness of memorandum of the accused/appellant Ex. P-12 and the seizure of purse of the deceased made by the police from jungle under Ex. P-13. He is also the witness to inquest Ex. P-3 and the spot *Panchnama* Ex. P-14. In cross examination, this witness has stated that about 7-8 days after the incident, on being called by the police he had gone to police station and at that time the accused/appellant was already there. Police people are said to have informed him that they had brought the accused from Khariyar and the matter was to be inquired into. It is relevant to note here that the incident had taken place on 27.11.2009, this witness was called to police station about 7-8 days thereafter i.e. latest by the first week of December whereas the accused/appellant is said to have been arrested on 15.1.2010.

14. Bhanu Pratap Singh (PW-11) is also the witness of memorandum of accused/appellant Ex. P-12 and seizure made under Ex. P-13. He has stated that on the disclosure statement of the accused/appellant purse was seized from jungle. C.L. Oti (PW-12) is the Tehsildar who conducted the test identification parade of the accused/appellant. He has stated that Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3) and Bharat (PW-4) had identified the accused/appellant vide identification memo Ex. P-8. According to this witness, he had not noticed whether the accused/appellant was wearing *kada* or not nor had he noticed the

fact that the persons who were mixed with the accused, were wearing any such *kada*. He has stated that none of the persons who identified the accused/appellant has stated that they had identified him on the basis of mustache, *kada* or T-shirt. Sushil Kumar Patel (PW-13) is the Patwari who prepared spot map Ex. P-17 and *panchnama* Ex. P-18. Dr. Anju Sonwani (PW-14) is the doctor who conducted postmortem examination on the body of the deceased and gave her report Ex. P-20 stating that she noticed following injuries on his body:

- (1) Two reddish brown colour abrasions over right knee joint - (i) 1 x 1 cm (ii) 1 x 1/2 cm.
- (2) Reddish brown colour abrasion of 1/2 x 2 ^{1/2} cm over anterior aspect of neck.
- (3) Bruise 13 x 2 cm over right side of neck.
- (4) Bruise of 9 x 2 cm over left side of neck.
- (5) Swelling of 5 x 4 cm over parital region with bluish mark.

According to this witness, cause of death was haemorrhagic shock due to head injury and the death was homicidal in nature.

15. Ravi Tripathi (PW-15) is the constable who took the dead body for postmortem examination. T.R. Nagvanshi (PW-16) is the investigating officer who has duly supported the case of the prosecution and stated that on his application the test identification parade of the accused was conducted. He has admitted that village Indagaon was a Naxalite affected area and quite often the Naxalites used to call Bandh. According to him, on the date of incident i.e. 27.11.2009 also the call for Band was given by the Naxalites as a result of which vehicles were not plying. He has further admitted that in the news paper a news item was published that the

deceased was killed by the Naxalites. However, he was not aware as to on what basis such news was published.

16. Sudhir Kumar Patra (DW-1) and Sutikshan Joshi (DW-2) are the witness examined by the defence but except giving the date of arrest of the accused as 15.1.2010, they have not stated anything worth-mentioning which may be relevant for the decision of this appeal.

17. Heard counsel for the parties and perused the material available on record.

18 Close scrutiny of the evidence on record makes it clear that on 27.11.2009 victim Mark Tandi was done to death by causing several injuries on his body. Though as per the case of the prosecution it is the accused/appellant along with absconded accused Jairam and other persons who committed the murder of the deceased but the trial Court has framed the charge simplicitor under Section 302 IPC. This Court finds enough substance in the argument of the counsel for the appellant that the identification of the accused/appellant in the dark night appears to be doubtful especially when out of number of accused persons two were carrying torch in their hand because in the normal course if the persons carrying torch flash the light, it will fall on the person against whom it is focussed and it is their face which can be seen in the said light of the torch. However, here is a case where the torch light was flashed by some of the accused persons on the face of the witnesses and the deceased and thus question of identification of the accused/appellant becomes doubtful. It is not the case of the prosecution that the deceased and other witnesses i.e. Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3)

and Bharat (PW-4) were also carrying torch with them or that they had also flashed the light on the face of the accused persons. It was a dark night of 27.11.2009 with no other source of light and this Court has also seen the calendar and the chart showing the moon rise and moon set position of that day. According to the said chart at about 9-10 pm on 27.11.2009 it was complete dark. Furthermore, Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3) and Bharat (PW-4) might have seen the appellant for just a few seconds and therefore also the identification of the accused in the dark night again creates doubt in the mind of this Court. This apart, the witnesses have identified the accused/appellant on the basis of *kada* and mustache but as per the statement of executive magistrate CL Oti (PW-12), Basant Kumar Khandekar (PW-1), Akshay Nand (PW-2), Guruwaru (PW-3) and Bharat (PW-4) never informed him that they identified the accused/appellant on the basis of mustache or *kada* whereas all the persons who had identified the accused/appellant have categorically stated that they identified the accused mainly on the basis of *kada*. If the test identification parade memo is seen it nowhere mentions that the witnesses identified the accused/appellant on the basis of *kada* and mustache and thus the very identification parade becomes doubtful. Basant Kumar Khandekar (PW-1) in paragraph 12 of his deposition has stated that he did not identify the person who killed the deceased nor could he tell that the person killing the deceased was present in the Court. As per the case of the prosecution, purse of the deceased was found in the jungle on the basis of discovery statement made by the appellant whereas if paragraph 14 of the evidence of Smt. Nandini Tandi (PW-5) – the wife of the deceased is seen, it goes to

show that when she had gone to the police station, purse and phone of her husband were lying there and then the cell phone was handed over to her immediately. Thus the recovery of the purse on the so-called disclosure statement of the accused also becomes doubtful. Furthermore, as per the memornadum of the accused/appellant Ex. P-12 appellant took out all the articles from the purse but as per the seizure memo Ex. P-13 all the articles were intact in the purse and thus herein again the seizure of purse of the deceased on the disclosure statement of the accused becomes doubtful. Though in the present case the appellant has been shown as wood smuggler but no such evidence, oral or documentary, has been adduced by the prosecution. Rather the evidence reflects that the appellant does not have any criminal antecedent. Yet another important aspect of the case is that on the date of incident i.e. 27.11.2009 call for Band was given by the Naxalites in the village Indagaon also and thus the possibility of murder of the deceased by someone else cannot be ruled out. Even the investigating officer (PW-16) has admitted the fact that in the newspaper a news was published that deceased was killed by the Naxalites. As per the statement of Kotwar, about 7-8 days after the incident he was called to the police station by the police people and at that time the accused/appellant was sitting there and he (this witness) was also informed by the police that the accused/appellant was brought from Khariyar for inquiry whereas as per the arrest memo he was arrested on 15.1.2010. Here again the sotry of prosecution becomes doubtful.

19. Thus taking into consideration the totally of facts and evidence on record, this Court is of the opinion that the prosecution has not been able to establish the case beyond reasonable doubt

and being so the appellant is entitled for benefit of doubt. Court below has thus recorded the findings without appreciating the evidence of the witnesses in its proper perspective, which are not sustainable in the eye of law. Accordingly, the judgment impugned is hereby set aside and the accused/appellant acquitted of the charge levelled against him. Accused/appellant is in jail and therefore he is directed to be set free forthwith if not required in any other case.

20. Appeal allowed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(I.S.Uboweja)
Judge

