

Checked & Verified, 2013

1
03

Division Bench (Criminal)

न्यायालय : समक्ष मध्य प्रदेश उच्च न्यायालय : जबलपुर

फौजदारी अपील क्रमांक : 2796 /1998

अपीलाधीन :

B

1. कल्लू उर्फ संतोष पिता वही. जैराम अय्यर उम्र 22 साल,
 2. राजू उर्फ राजकुमार आत्मज वही. जैराम अय्यर उम्र 21 साल,
- दोनों निवासी-ग्राम महमदखार घुमारोड, तोरबा बिलासपुर, जिला-बिलासपुर म. प्र. १

78781
Filed on... 26/11/98
by Shri... N. N. K. N. S. Advocate

-: विरुद्ध :-

Rel. A. R. गैर अपीलाधीन :

मध्य प्रदेश शासन

धारा

सजा

302/34 भा0दं0 वि0

आजन्म कारावास एवं 500/-रु. पांच सौ रुपये जुर्माना, अदा न करने पर दो माह का अतिरिक्त सश्रम कारावास.

324 /34 भा0दं0 वि0

दो साल का सश्रम कारावास दोनों सजायेक साथ चलेगी ।

फौजदारी अपील अन्तर्गत धारा 374 दण्ड प्रक्रिया संहिता-



HIGH COURT OF CHHATTISGARH, BILASPUR

D.B.: HON'BLE SHRI NAVIN SINHA, ACTING CHIEF JUSTICE &
HON'BLE SHRI P. SAM KOSHY, J.

Criminal Appeal No. 2796 OF 1998

APPELLANTS

Kallu alias Santosh and Another

Versus

RESPONDENT

State of Madhya Pradesh (Now
Chhattisgarh)

(Criminal Appeal under Section 374 (2) of The Code of Criminal
Procedure, 1973)

Appearance:

Ms. Renu Kochar, Advocate for the Appellants.

Mr. Ravindra Agrawal, Panel Lawyer for the State/respondent.

J U D G M E N T

(Passed on 2nd of February, 2015)

Following judgment of the Court was dictated on Board by

NAVIN SINHA, ACTING CJ.

1. The two Appellants stand convicted under Sections 302/34 and 324/34 I.P.C. by the First Additional Sessions Judge, Bilaspur in Sessions Trial No.437 of 1997 dated 13.11.1998.
2. The Appellants who are brothers along with their third brother Anil Kumar are stated to have assaulted the deceased Lalit Mohan Dey and PW 5 Subrat Dey on 14.7.1997 in the fields. Anil Kumar has been acquitted giving him the benefit of doubt. The FIR, Exhibit P-1 was lodged the same morning by PW 1, Ram Kumar. Appellant No.1 is

alleged to have assaulted with *Tangia* on the head while the other two are alleged to have assaulted with *lathis*. The MLC of Lalit Mohan Dey, Exhibit P-21 was conducted by PW 14 on 14.7.1997 and revealed injuries on the left and right parietal region, lacerated wound on the dorsal surface of right palm with diffuse swelling. The deceased expired on 15.7.1997. The inquest report was marked Exhibit P10. The postmortem report Exhibit P-13, conducted by PW-11, Dr. Vijay Kumar Verma revealed fracture of right parietal and temporal bone, fracture of left parietal bone. Death was opined to have been caused due to brain injury. The MLC of PW-5, Subrat Dey, revealed cut wound on right parietal region, cut wound on the right ear and cut wound on the right parieto temporal region. On the confession of Appellant No.2, a *lathi* was seized along with his shirt and trousers. The FSL report Exhibit P-35 confirmed presence of blood on the same. The *Tangi* recovered on confession of Appellant No.1 and his *lungi* according to the FSL report did not confirm presence of blood.

3. On 12.5.1999 an objection was raised in appeal on behalf of Appellant No. 2 that he was a juvenile below 16 years of age on 14.7.1997 when the occurrence took place. The age of juvenility under the law as it then existed was 16 years. It was subsequently amended by the Juvenile Justice (Care and Protection of Children) Act, 2000 as 18 years. Section 2(I) was added on 22.8.2006 providing that the juvenile in conflict with law means a juvenile who is alleged to have

committed an offence and has not completed eighteen year of age as on the date of commission of offence meaning thereby that the objection could be taken at any stage, including in appeal.

4. Pursuant to the order dated 15.5.1999, an enquiry was directed regarding the age of Appellant no.2. By a report dated 9.7.1999, Appellant No.2 was held to be above 16 years of age but below 17. The report attained finality and was questioned by none.

5. On 17.7.2014 a fresh application was filed on behalf of both the Appellants taking the plea of juvenility on the date of occurrence. The earlier report dated 9.7.1999 not having been brought to the attention of the Court, fresh orders came to be passed for holding enquiry regarding age of both the Appellants as on the date of occurrence. The fresh report dated 18.12.2014 holds Appellant No.1 to be approximately 16 years of age and Appellant No.2 to be approximately 14 years of age on the date of occurrence. In view of the first enquiry of 9.7.1999 having attained finality, we need not look in the second report regarding the claim of juvenility by Appellant No.2. It stands established that he was a juvenile on the date of occurrence, 16 years of age. He has remained about 7 years in custody. The allegation against him is of assault by lathi. Death is not attributed to any assault by him. In view of the fact that we are unable to sustain the conviction of Appellant No.1 on merits, the conviction of Appellant No.2 under Section 34 IPC automatically becomes unsustainable as the sole accused. The conviction against him

would survive only under Section 324 IPC. He has already undergone more than the maximum period of custody that could have been ordered against a juvenile.

6. That leaves the question with regard to the plea juvenility of Appellant No.1. According to the report dated 18.12.2014, Appellant No.1 is 1½ years elder to Appellant No.2. If that be the correct position Appellant No. was also a juvenile on the date of occurrence.

7. Learned Counsel for the State submits that Appellant No.1 has remained in custody for only approximately 2½ years and has not completed three years of custody. He therefore cannot be put at par with Appellant No.2 by giving him the benefit of having already undergone maximum period of custody permissible for a juvenile. His case is therefore required to be decided on merits.

8. FIR, Exhibit P/1 was lodged on 14.7.1999 by PW 1 Ramkumar. A bare perusal of the FIR by the naked eye with regard to the narration of assault by *Tangia* reveals that originally the name mentioned was Anil Kumar. Kallu has been overwritten. Likewise with regard to the assault by lathi, originally the name Kallu was written which has been overwritten by the name Anil Kumar. The overwriting is bold and repetitive in an attempt to ensure that the earlier name is not readable. PW 1 in his cross-examination has denied having written in the FIR that he had read the contents and that it had been recorded as narrated by him.

9. The next important witness PW 5 Subrat Dey, who is also alleged to have been injured, in his cross-examination stated having told the Police that Anil Kumar had also assaulted the deceased apart from Appellant Kallu. PW 6 Ramchandra, the independent witness on which the Trial Court has primarily relied, in his chief stated that he saw the assault from far and in cross-examination stated that it appeared to him that one of them was holding a *Tangia* without naming anyone specifically. He further deposed that the assault took place behind his back as he was driving a tractor.

10. The FIR was the first and correct rendition of the sequence of events even if it is not a substantial piece of evidence. If there is any overwriting and/or interpolation in the FIR, it is for the prosecution to explain the same. PW 15 Arun Mishra, the Investigating Officer has not explained why and under what circumstances and at what stage the corrections were made and overwriting done. As it appears from the allegations prior to overwriting the assault on the head with a *Tangia* was made by Anil Kumar. Appellant No.1 assaulted with *Lathi*. After the overwriting, the roles changed. Anil Kumar, on that basis has already been given the benefit of doubt by acquittal. PW 1, the author of the FIR has denied writing that he had read the contents of the FIR which were correct. It therefore becomes doubtful as to who was the assailant of the deceased, whether it was Anil Kumar or Appellant No.1 Kallu. The defence has thus been able to create a plausible doubt with regard to

the assailant questioning the veracity of the FIR. The benefit of doubt has to go to the accused. No explanation is forthcoming from the prosecution how, why and when the overwriting was done in the FIR. In the aforesaid background the FSL report not confirming presence of blood on the Tangia recovered on his confession becomes relevant.

11. In (2011) 11 SCC 724 (Mustkeem alias Sirajudeen Vs. State of Rajasthan) noticing the overwriting in the seizure memo it was observed as follows :

"21. The recovery memos also reflect that there were overwriting on the same which has not been explained by PW 16 Diwakar Chaturvedi (Investigating Officer). He admitted that memos and annexures were prepared in his own handwriting but also admitted in his cross-examination that the same were in a different handwriting. This lacuna should have been explained by the prosecution more so when the whole case rested only on circumstantial evidence".

12. The issue with regard to overwriting again came to be considered in (2014) 5 SCC 730 (Muralidhar alias Gidda Vs. State of Karnataka) in context of a dying declaration holding that it creates suspicion about its credibility and benefit of doubt is to be given. It was held as follows:

"18. The sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our opinion, this by itself creates a lot of suspicion about credibility of such statement



113

and the prosecution has to clear the same to the satisfaction of the court. The trial court on overall consideration of the evidence of PW 25, PW 30 and PW 36 coupled with the fact that there was overwriting about the time at which the statement was recorded and also insertion of two names by different ink did not consider it safe to rely upon the dying declaration and acquitted the accused for want of any other evidence. In the circumstances, in our view, it cannot be said that the view taken by the trial court on the basis of evidence on record was not a possible view. The accused were entitled to the benefit of doubt which was rightly given to them by the trial Court". s

13. In conclusion, therefore, we are of the opinion that Appellant No.1 is entitled to the benefit of doubt in like manner as given to acquitted accused Anil Kumar holding that allegations against him have not been proved beyond all reasonable doubt. Appellant No.2 having completed over three years of custody is directed to be released unless wanted in any other case.

14. Appellant No.1 is therefore acquitted and directed to be released immediately subject to the conditions under 437-A Cr.P.C. unless wanted in any other case.

15. The appeal stands disposed.

**Sd/-
Acting Chief Justice**

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