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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2752 of 1998**

1. Chamru Son of Mangalu aged 48 years.
2. Jugul son of Mangalu aged 30 years.
3. Lekadu son of Mangalu, aged 30 years.

All Agriculturist, residents of village Dorna, Police Station Dhourpur, Police Chauki Lundra, District Surguja (Madhya Pradesh) (Now Chhattisgarh).

---- Appellants

Versus

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

Criminal Appeal No. 2345 of 1998

1. Jugeshwar @ Gaje son of Ravi Kolta, Age 40 years.
2. Sarve @ Sarveshwar son of Kashi Ram Age 26 years, Occupation-Agriculture.
Both R/o village Dorna, P.S. Dhorpur, Outpost Lundra, District Sarguja Madhya Pradesh (Now Chhattisgarh).

---- Appellants

Versus

The State of Madhya Pradesh Through P.S. Dhorpur, District Sarguja Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellants	:	Shri Manoj Mishra and Shri Shakti Raj Sinha, Advocates for the Appellants.
For Respondent	:	Shri Neeraj Mehta, Panel Lawyer.

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

Judgment on Board**Per Navin Sinha, Chief Justice****17.06.2015**

1. The Appellants stand convicted under Section 147/ 302/ 149 IPC to life imprisonment in Sessions Trial No. 19 of 1988 dated 25.9.1998 by the First

Additional Sessions Judge, Ambikapur, District Surguja. The sentences have been directed to run concurrently.

2. The deceased Hira Ram was an employee of the Forest Department. The Appellants are stated to have assaulted him at about 3:00 p.m. on 9.6.1987 in the fields. The First Information Report (Exhibit P-2), was lodged by PW-2, Tumildas, brother of the deceased on 10.6.1987.

3. The post-mortem of the deceased (Exhibit P-27A) was conducted by PW-20, Dr. Ashok Kumar Jain, who found the following injuries on the person of the deceased:

1. An incised wound 1 $\frac{3}{4}$ inch x $\frac{1}{4}$ inch x full skin thickness deep on vertex of scalp situated transversely on anterior half of scalp. Clotted blood and sand was present in wound.
2. A lacerated wound 1 $\frac{1}{4}$ inch x $\frac{1}{2}$ inch x full skin thickness deep triangle shaped. Situated 4 inch above the left ear and 2 inch behind injury No.1.
3. Multiple abrasions 3 inch x $\frac{1}{2}$ inch on right forehead.
4. Three contusions were present on left side of face measuring $\frac{1}{4}$ inch x 1 inch, 1 inch x $\frac{1}{2}$ inch and $\frac{1}{4}$ inch x $\frac{1}{4}$ inch with $\frac{1}{2}$ inch gap between second and third contusion.
5. A lacerated wound 2 inch x $\frac{1}{4}$ inch x skin deep on posterior aspect of left upper arm. Clotted blood present.
6. An incised wound of 1 $\frac{1}{2}$ inch x $\frac{3}{4}$ inch x skin deep on flexor aspect of left forearm, 3 $\frac{1}{2}$ inch above the wrist joint. Clotted blood present. On dissection fracture of ulna at the junction of middle 1/3rd and lower 1/3rd was found.
7. Contusion of 3 inch x 2 inch size on anterior aspect of left elbow joint and forearm. Clotted blood present on dissection. Dislocation of elbow joint was found.
8. An incised wound of 1 inch x $\frac{1}{4}$ inch x skin deep on anterior aspect of left elbow joint situated above injury No.7.
9. Abrasion 1 inch x $\frac{1}{8}$ inch size on posterior aspect of lower 2/3rd of right forearm.
10. Abrasion $\frac{1}{4}$ inch x $\frac{1}{4}$ inch on dorsal aspect of right hand at level of middle finger.
11. An incised wound of 1 inch x $\frac{1}{8}$ inch x $\frac{1}{8}$ inch on

anterior aspect of left leg 2 inch below the left knee. Clotted blood was present.

12. An abrasion 2 inch x $\frac{1}{4}$ inch on medial aspect of left knee.

13. Lacerated wound $\frac{1}{2}$ inch / $\frac{1}{2}$ inch x muscle deep on anterior aspect of right leg at the junction of middle and lower $\frac{1}{3}$ rd.

14. Just above the injury No. 13 an abrasion of 3 inch x $\frac{1}{4}$ inch size was present.

15. Abrasions three in number size varying from 1 inch x $\frac{1}{2}$ inch to $\frac{1}{2}$ inch x $\frac{1}{4}$ inch on outer lateral aspect of right knee.

16. An abrasion of 2 inch x $\frac{1}{4}$ inch was present on inner medial aspect of left knee.

17. Two abrasions 2 inch x 1 $\frac{1}{2}$ inch and 3 inch x 1 $\frac{1}{2}$ inch was present on right medial aspect of lower thigh and knee.

18. An abrasion of 1 inch x $\frac{1}{4}$ inch on anterior aspect of left leg.

19. An abrasion of 1 $\frac{1}{2}$ inch x $\frac{1}{2}$ inch was present on anterior aspect of left leg situated three inch below injury No. 18.

20. A contusion with abrasion of 6 inch x 2 inch size was present on right iliac fossa, right iliac bone and right buttock.

21. An incised wound of 3 inch x 1 inch x $\frac{1}{2}$ inch situated on posterior medial aspect of left foot. Clotted blood present. Maggots were present on dissection. Fracture of calcaneus bone was seen.

4. The Appellants in their defence under Section 313 Cr.P.C denied the allegations and claimed false implication.

5. Learned Counsel for the Appellant Sarve alias Sarveshwar, in Criminal Appeal No. 2345 of 1998 submitted that his conviction is not sustainable. The presence of the Appellant during the occurrence has not been established. The sole eyewitness, PW-8, Sukhlal, has denied his presence in his police statement as also in Court deposition. The witness denied having named the Appellant in his police statement and reiterated it in Court. The statement under Section 164 Cr.P.C was recorded 9-10 days later and cannot be the basis for conviction in the facts of the case. The Appellant deserves to be

acquitted. He is not named in the F.I.R also and suspicion has been raised against Appellant-Chamru only.

6. Common submissions have been made with regard to other Appellants in both the appeals. It was submitted that there was no pre-meditated design or intention to kill, much less any common object. If there were only four persons present, Sections 147 and 149 IPC have no application, the number being less than five. The Appellants did not come to the fields with any intention to kill but were naturally present in the fields doing agricultural works when the deceased came and purported to seize the wood. The assault took place on the spur of the moment. The allegations for assault are omnibus in nature. It cannot be said with certainty who made the fatal assault. There are contradictions in the Court statement of PW-8, Sukhlal, the sole eyewitness. The witness first stated that Appellant-Jugeshwar alias Gaje alone had a spade and the rest no weapons in their hands. Subsequently it was stated that the Appellant-Jugul had a "tangi" in his hand. Further, it was a highly unusual conduct of the witness that having eye-witnessed the assault he did not go to the police or tell anyone else. Both these aspects raise doubts about his evidence and claim of being an eyewitness. The witness claims to have seen the occurrence from approximately ½ KM away. It is sufficient distance to blur vision. The witness himself stated that because of the distance, he could not see with what weapon the assault was being made. The credibility of the eyewitness is further shaken because PW-9, Manroop who was allegedly present with him has denied having witnessed the occurrence. The statement of witnesses under Section 164 Cr.P.C was recorded under police duress 9-10 days later and cannot be the basis for conviction in absence of other reliable and cogent evidence. There are contradictions in the police statement and Court deposition of PW-8, Sukhlal. In his police statement the witness stated that the Appellant-Jugeshwar alias Gaje shouted to kill the deceased. In his

Court deposition, the witness stated that he shouted to kill the witness. The assault was made on the leg, a non vital part of the body which is evidence of lack of intention to kill and only to teach a lesson. It was next submitted that if there is a solitary eyewitness and his evidence is not very convincing, leaving room for doubt, the benefit must go to the accused. It will be highly unsafe to uphold conviction on the evidence of a doubtful solitary eyewitness without corroboration.

7. An alternate submission was made that even that according to the prosecution case, assault on the deceased by a weapon was made by Jugul alone. The others did not possess any weapon of assault. The Appellants are therefore liable for their individual acts. The allegations of assault are omnibus and it cannot be said which individual injuries were caused by the other Appellants. With the exception of Appellant-Jugul, the others may at best be liable under Section 326 IPC in nature of the allegations that they had allegedly pinned down the deceased after which Appellant-Jugul alone assaulted.

8. Learned Counsel for the State opposing the appeal submitted that PW-8, Sukhlal is a reliable eyewitness. His police statement was recorded the next day after the occurrence on 11.6.1987. There are no material or vital contradictions between his police statement and deposition in Court so as to doubt his evidence entirely. The contradictions are trivial given the fact that he gave his evidence in Court nearly five years after the occurrence. The essence of his evidence with regard to the sequence of events, manner of assault including the presence of the Appellants remains the same. The Appellants have not disputed the presence of PW-8, Sukhlal during the occurrence but only questioned his visual capacity. The assault was made in the fields and the body was then dragged to the shrub area evident from the nature of abrasions on the body and sand in the wounds.

9. If the evidence of even a single eyewitness is cogent, convincing and reliable, conviction can be sustained on it. The evidence of a hostile eyewitness does not get washed off completely and can be taken into consideration to the extent it finds corroboration.

10. PW-9, Manroop did not deny his presence during the occurrence as deposed by PW-8, Sukhlal and corroborated the latter to that extent. He then turned hostile stating that he did not see the assault. It is evident that he was deposing falsely to save the Appellants.

11. The common intention to kill developed on the spot evident from the fact that the Appellant Jugeshwar alias Gaje shouted that the deceased should not be let off on that day and must be finished. Merely because Jugeshwar alias Gaje then did not assault himself but handed over the axe to Jugul cannot detract from his intention in view of the subsequent conduct. The first assault was made by Jugul on the ankle of the deceased who then was obviously was not in a position to run away. The Appellants then lifted the deceased and threw him on the ground, after which the deceased was held down by his two hands and the neck facilitating repeated assaults by Jugul. The appeal therefore merits no consideration and is fit to be dismissed.

12. We have considered the submissions on behalf of the parties and examined the evidence on record also.

13. There is no invariable rule of criminal jurisprudence that conviction cannot be maintained on the evidence of a solitary eyewitness if he is otherwise convincing and reliable. Contradictions and omissions which are not material and only trivial cannot disqualify the quality of the evidence otherwise. It is only where the evidence of a sole eyewitness leaves some doubt or raises certain questions that corroboration may be required.

14. Likewise, the statement under Section 164 Cr.P.C cannot always be substantive evidence for conviction but at best may be corroborative evidence. In the present case, statement under Section 164 Cr.P.C was recorded 9-10 days later. There is no evidence of the need for the same. In any event it is not considered relevant in view of the eye-witness account of PW-8, Sukhlal. The submission that PW-8, Sukhlal and PW-9, Manroop were taken away by the police initially suggests that they were first suspected for commission of the offence is too extreme to accept.

15. PW-8, Sukhlal was not an interested witness. He is a chance witness. A chance witness is considered reliable as there is no or little possibility of his making out stories with regard to the manner in which the occurrence may have taken place. The police statement of the witness was recorded the next day of the occurrence. Events were obviously fresh in his mind. The Appellants have not denied or disputed his presence. No suggestion was given in cross-examination that he was not an eye witness. Only his ocular capacity was sought to be questioned. There is no defence that he did not have normal vision. The occurrence took place in broad daylight at 3:00 p.m. In his police statement also, the witness stated that the Appellants were present in the fields when the deceased came and purported to seize the wood belonging to Appellant-Chamru. The deceased picked up a "tangi" lying on the ground, but is not stated to have even attempted an assault on any of the Appellants. On the contrary, Appellant Jugeshwar alias Gaje came running with an axe shouting not to spare the deceased that day and kill him. Jugul snatched the "tangi" from the hands of the deceased and assaulted him on his left ankle. Obviously the deceased was now handicapped and not in a position to run. Appellant-Jugeshwar alias Gaje then gave his axe to Appellant-Jugul after which Appellant-Jugeshwar alias Gaje, Chamru and Lekadu together picked up the deceased who was unable to resist or run due to injury on his

ankle, and threw him on the ground. The deceased was then pinned down on the ground by the latter three holding his two hands and neck after which Appellant-Jugul assaulted repeatedly leading to death.

16. The contradiction in the police statement that the Appellant had shouted to kill the deceased while in the Court PW-8, Sukhlal may have stated that they shouted to kill the witness is too trivial to shake the credibility of his evidence otherwise.

17. Likewise there is no major contradiction between the statement of the witness that Jugeshwar alias Gaje had an axe and the others were unarmed and the subsequent statement that Appellant-Jugul assaulted with “tangi”. We have already noticed that Appellant Jugul had snatched the “tangi” from the deceased and assaulted him on the ankle after which Appellant-Jugeshwar alias Gaje gave his axe to Appellant-Jugul who then assaulted the deceased with it. The fact that PW-8, Sukhlal may not have informed anyone on the way back after having witnessed the assault or did not go to the police station is not considered very crucial because he came back to the village and immediately informed co-villager Patiram. There can be myriad reasons why he did not go to the police station. Having eye-witnessed a murderous assault, he may either been in a state of shock or preferred not to get involved further until the police came to his door steps. He gave his statement to the police the very next day. We did not see this as such an unusual conduct to doubt the genuineness of his evidence completely.

18. The submission that in the nature of the assault the Appellants were individually liable for their acts and in absence of convincing evidence as to who caused which injury, the allegations of assault being omnibus and death being not being attributed to any particularly injury with the exception of Appellant-Jugul, others were entitled to acquittal or alternatively, conviction under section 326 IPC also does not appeal to us. It is true that the Appellants

had not come with any premeditated design to kill, were present in their agricultural fields and the assault took place on the spur of moment. But the manner in which the events developed thereafter including the form and manner of assault, the conduct of the Appellants in pinning down the deceased who was helpless, including their utterances at the time of assault leads us to the only conclusion that they were determined to do away with the deceased and developed the common intention on the spot.

19. The deceased was injured on his ankle and obviously not in a position to run. This physical condition of his was taken advantage of and he was lifted by the three Appellants with exception of Appellant-Jugul and thrown on the ground. After he fell down, if Appellant-Jugul alone would have assaulted, matters would have been entirely different. The others pinned him down on the ground with both his hands and neck. In other words, the deceased was made absolutely immobile to ensure that he was not able to offer any resistance whatsoever or even attempt to flee. This was obviously done with the intention to facilitate a murderous assault which must succeed without fail after which Appellant-Jugul assaulted repeatedly with the axe. Had the deceased been a free man, he may have tried to run or limp away or alternatively, defend himself in a scuffle with Appellant-Jugul. The other Appellants ensured that he was not in a position to do so. It was ensured that the deceased was a sitting target with no possibility of missing in the intention and design to ensure his elimination. It is therefore apparent that common intention developed on the spot. The convincing eye-witness account by PW-8, coupled with the nature and number of abrasions on the person of the deceased, presence of sand in the wounds all make it obvious that after he was killed in the fields the dead body was dragged to the jungle to give a different story to the occurrence. But the Appellants have acquitted of the charge under Section 201 IPC and there is no appeal against the same.

20. The fact that there may have been no proper seizure of any weapon of assault or blood stained clothes is not considered relevant in view of the convincing eyewitness account by PW-8, Sukhlal.

21. In the FIR itself, PW-2, Tumildas, brother of the deceased had expressed suspicion against Appellant-Chamru because the deceased was an employee of the Forest Department and earlier also there had been a scuffle between the two with regard to cutting of wood. Obviously, as an employee of the Forest Department, the deceased was under a duty and obligation to prevent the same. The motive also therefore existed. Merely because the deceased may not have lodged a police report with regard to the earlier scuffle cannot lead to the conclusion that motive did not exist.

22. In view of the evidence of PW-8, Sukhlal, the eyewitness denying the presence of Appellant-Sarve alias Sarveshwar during occurrence and having stated so both in his police statement as also Court deposition, we are unable to sustain conviction of Appellant-Sarve alias Sarveshwar. He is set at liberty subject to the conditions under Section 437-A Cr.P.C.

23. The remaining Appellants, being four in number, conviction with the aid of Section 147/149 obviously becomes unsustainable. The conviction is required to be altered to one under Section 302 read with Section 34 IPC. No prejudice can be said to have been caused to the Appellants by alteration of the conviction from one Section 302/147/149 to Section 302/34 IPC as they have had full opportunity to lead their defence with regard to the occurrence where they were all present together. In (1992) 1 SCC 49 (Nethala Pothuraju v. State of Andhra Pradesh) it was observed as follows :-

“5. The question still remains as to whether the appellants can be convicted under Section 302 read with Section 34 IPC. Both Sections 149 and 34 IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences. The non-applicability of Section 149 IPC is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC if the evidence discloses

commission of an offence in furtherance of the common intention of them all.”

24. With the aforesaid modification of the conviction only, sentence remaining the same, Criminal Appeal No. 2345 of 1998 is allowed in part with regard to Appellant-Sarve alias Sarveshwar and dismissed with regard to Appellant-Jugeshwar alias Gaje. Criminal Appeal No. 2752 of 1998 is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P.Sam Koshy)
JUDGE