

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Appeal No. 881 of 1999**

1. Jai Nandan, son of Budhu, aged about 60 years, cultivator.
2. Anup Kumar alias Toli, son of Jai Nandan, aged about 27 years, cultivator.
3. Manbodh, son of Bhoi Khan, aged about 28 years, cultivator.
4. Thakur Prasad, son of Jai Nandan, aged about 32 years, cultivator.

All residents of Village Basa, Police Station, Ambikapur, District Surguja (M.P.) (Now Chhattisgarh).

---- Appellants.

Versus

The State of Madhya Pradesh (Now Chhattisgarh).

Criminal Appeal No. 925 of 1999

1. Makdu S/o Chertu, aged about 30 years, occupation, agriculture, resident of village Bansa, Police Station, Ambikapur, District Surguja (CG).
2. Agustus S/o Brij Mohan, aged about 25 years, occupation, agriculture, resident of village Deori, Police Station Batuli, District Surguja (CG).

---- Appellants.

Versus

State of Madhya Pradesh (Now Chhattisgarh) through Police Station, Ambikapur, District Surguja (CG).

&

Criminal Appeal No. 969 of 2003

Dhanushdhari @ Dhannu S/o Baldev, aged about 26 years, resident of Village Basa, PS Ambikapur, Distt. Surguja (CG).

---- Appellant.

Versus

The State of Chhattisgarh.

Respondent.

For Appellants in CRA No.881 of 99 : Smt. Hamida Siddique, Advocate.

For Appellants in CRA No.925 of 99. : None.

For Appellant in CRA No.969 of 03 : Smt. Ranjana Jaiswal, Advocate.

For Respondent/State : Shri Ashok Swarnakar, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

C A V JUDGMENT

Per P. Sam Koshy, J.

Delivered on 03/12/2015.

1. Present are three Criminal Appeals preferred by the Appellants challenging the judgment dated 17.03.1999 passed by the First Additional Sessions Judge, Ambikapur, District Surguja, in Sessions Trial No.353 of 1997 by which the Appellants were found guilty of offence under Section 148 IPC and sentenced to undergo RI for three years and also under Section 302/149 IPC and sentenced to life

imprisonment. The Appellants have also been convicted under Section 323 IPC and sentenced to undergo RI for one year.

2. The Appellants in Criminal Appeal No. 881 of 1999 are represented by Smt. Hamida Siddique, Advocate. The Appellant in Criminal Appeal No. 969 of 2003 is represented by Smt. Ranjana Jaiswal, Advocate. In spite of the matter being called on for hearing on last couple of occasions, there has been no representation on behalf of the Appellants in Criminal Appeal No. 925 of 1999. Since the Appeal is an old Appeal of the year 1999, the Court requested the counsel for other Appellants to assist the court Criminal Appeal No. 925 of 1999 keeping in view 2014 (14) SCC 222 (Surya Baksh Singh Vs. State of Uttar Pradesh).
3. The case of the prosecution in brief is that on 14.09.1997 at around 9 AM, PW-13, Bahoran lodged First Information Report (for short, FIR) stating that on 13.09.1997 at around 5 PM all the Appellants got together and caught hold of Indar Ram i.e. son of PW-13, Bahoran and assaulted him with Tangi and Lathies etc. as a result of which Indar Ram received multiple grievous injuries on his body leading to his death. PW-13, Bahoran and PW-12, Salo Bai are said to be the eyewitnesses to the assault. PW-13, Bahoran is father and PW-12 Salo Bai is sister of the deceased. PW-12 on seeing the Appellants assaulting the deceased, rushed to the spot to save her Brother Indar

Ram and in the course, the Appellants also had assaulted her causing injuries. The dead body of deceased was sent for postmortem. PW-10 Dr. V.K. Shrivastava, who conducted the postmortem, found following injuries on the body of the deceased in his report Exhibit P/8-

- i. One lacerated wound at 1" above & in front of left ear at left side of forehead size 1"x ½"x bone deep margins irregular clotted blood present left eye is black, eye in dissection clotted blood present. A fracture of Left temporal bone present which is extended in base of skull.
- ii. One lacerated wound 1"x½" at dorsal aspect of right hand. Muscle deep Antemortem in nature.
- iii. One lacerated wound 1"x½"xbone deep at posterior aspect of right elbow joint inter condylar fracture of left humerus present.
- iv. One lacerated wound 1"x½"bone deep at posterolateral aspect of left elbow joint.
- v. One lacerated wound ½"x½" at dorsal aspect of left hand bone deep, there is fracture of 2nd and 3rd metacarpal present.
- vi. One abrasion 2"x½" oblique at right side of chest beneath this fracture of 7th, 8th, 9th rib present.
- vii. One abrasion 1½"x½" oblique at left side of chest present beneath this fracture of 4th 5th 6th rib present.
- viii. One lacerated wound ½"x½"x sub cutaneous layer deep at posterior aspect of right knee joint.
- ix. One lacerated ½"x½"x subcutaneous layer deep at medial aspect of right ankle joint.
- x. One lacerated 1"x1"x bone deep at posterior aspect of left knee joint.

The Doctor, in his opinion, has finally held that death of the deceased Indar Ram occurred due to shock and hemorrhage on account of multiple injuries.

4. The matter was thereafter put to trial before the First Additional Sessions Judge, Ambikapur. In all, the prosecution examined 14 witnesses.
5. After trial was concluded, the trial Court vide judgment impugned found the charges levelled against the Appellants to be proved beyond doubt and holding them guilty of offence under Sections 148, 302/149 and 323 IPC convicted them with sentence as enumerated in the preceding paragraph.
6. Learned counsel for the Appellants challenging the said judgment submitted that prosecution has not been able to prove its case beyond reasonable doubt and there are many contradictions and omissions in the evidence of each of the prosecution witnesses. In addition, it is also contended that there are serious doubts as to the deposition of PW-12 Salo Bai and PW-13, Bahoran of their being eyewitnesses as there are many conflicting statements given by these two witnesses which gives rise to great element of doubt, and therefore, prayed for disbelieving their deposition. It is further contended that the prosecution has substantially failed to establish the offence under Sections 148 and 149 IPC against the Appellants in as much as the ingredients necessary for making out a case under Section 149 IPC is missing from the prosecution story.
7. Further, the prosecution has failed to lead evidence to show that there was any prior meeting of minds between the accused persons and has

also not been able to show common intention or object in the minds of the Appellants/accused of killing the deceased. It is also submitted that prosecution has failed to establish that all the accused persons had come together with common intention of killing and assaulting the deceased. The Appellants in the given facts and circumstances could not be said to have formed an unlawful assembly and assaulted the deceased to meet the requirement under Section 149 IPC. It is further submitted that even if the prosecution case is taken into consideration as it is, the prosecution has not been able to lead any evidence to prove the presence of Appellant Agustus in the unlawful assembly or in the assault made on the deceased, and therefore, conviction of Appellant-Agustus is not proper. It is further contended that since the conviction of Appellants by the trial court was solely on basis of evidence of PW-12 and PW-13, a perusal of record and deposition of these two witnesses would establish that they in their court statement have not proved beyond doubt regarding the presence of Appellants Manbodh and Makdu in the course of attack.

8. It is also argued by the Appellants that prosecution case itself gets weakened and can be said to have not been properly proved for the reason that the Investigating Officer himself was not examined as a prosecution witness before the court, and therefore, the benefit of the same should go in favour of the Appellants. It is also argued that seizure of Tangi and Lathies have also not been established properly and that the alleged seizure of Tangi also does not help the

prosecution case for the reason that no bloodstain was found on the Tangi allegedly used in the said assault.

9. Further, since the prosecution has not been able to meet the requirement under Section 149 IPC, conviction of the Appellants under Section 149 IPC should be quashed and if the offence under Section 149 IPC is quashed from the charges, the burden is further cast upon the prosecution to prove the individual overt-act on the part of each of the Appellants. It is for the prosecution to prove its case by showing the act and role played by each of the Appellants in the course of assaulting the deceased. The entire prosecution story is based upon the evidence of two interested eyewitnesses PW-12 and PW-13 i.e. sister and father of the deceased. For all the aforesaid reasons, it is prayed on behalf of the Appellants to set aside the judgment and sought for acquittal of Appellants. Reliance was placed upon AIR 1998 SC 2883 (Rewa Ram Vs. Teja & Others) and 2003(2) SCC 257 (Rajendra Shantaram Todankar Vs. State of Maharashtra & Others).
10. Per contra, State counsel opposing the Appeals submitted that the judgment of conviction passed by the Court below is a well reasoned judgment and does not warrant any interference as the prosecution has proved its case beyond all reasonable doubts. He submitted that there is no element of doubt created in the deposition of eyewitnesses PW-12 and PW-13. It is further submitted that it is a case where the name of the Appellants were all along reflected firstly in the FIR, then

in the statements under Section 161 Cr.P.C in the court statement and as such there is a definite and consistent piece of evidence on behalf of the prosecution to prove and establish its case.

11. It is further contended that only because PW-12 and PW-13 happened to be family members of deceased would by itself not lose their credibility as the circumstances itself would reveal that they were the only witnesses which could have reached to the spot at the first instance. Further, referring to multiple injuries from the postmortem report counsel appearing for the State would submit that number and gravity of injuries itself would reveal that it was cumulative act on the part of more than one accused person. The contention put forth by the Appellants in their defence is not reflected in the statement under Section 313 made by the accused persons before the court. Lastly it is submitted on behalf of the State that whatever contradictions and omissions the Appellants are referring to from the deposition of prosecution witnesses, are too trivial in nature and the same cannot be termed as major contradictions so as to lose confidence in the statements of the prosecution witnesses and thus, prayed for rejection of Criminal Appeals filed by the Appellants.
12. We have considered the submissions on behalf of the parties and perused the judgment impugned and the records of the case.
13. Dispute between the family of Appellant-Jai Nandan and the family of Bahoran, PW-13 is an admitted fact which has been established by

more than one witness as also admitted by the accused in his 313 statement.

14. A perusal of records would show that Appellant-Jai Nandan is the father of two other accused persons Anup Kumar alias Toli and Thakur Prasad. PW-12 is the sister of deceased. In addition of being eyewitness to the incident, she was also injured in the assault made by the accused persons. Her injuries have also been proved and substantiated from the MLC report, Exhibit-P/6 conducted by PW-9, Dr. B.P. Chandra, who found that four teeth of PW-12 had been loosened and she was complaining of severe tooth ache as well as pain over the body. She was further advised for dental checkup. The injury of PW-12 is also established from the evidence of PW-14, S.C. Shukla vide Exhibit-P/12. The Dental Surgeon, on examination of PW-12, gave a report proving loosening and also missing of two teeth.
15. Likewise, a perusal of record starting from the FIR itself would show that all the accused persons were named in the FIR except for Appellant-Agustus. Even in the merg intimation which was lodged immediately after the incident by PW-13, specific names of all the accused persons, except Agustus are reflected. Likewise, PW-12 who ran to the spot of incident on hearing the cry of deceased, has very specifically narrated the entire incident in almost in the same way as is reflected from the merg intimation as well as in the FIR. She has also identified all the accused person being present at the place of incident armed with either Tangi or Lathi. She also witnessed the assault being

made by the accused persons on the deceased except for Appellant-Agustus. Further, from the deposition of PW-13 also what is reflected is the re-iteration of presence of all accused persons except Appellant-Agustus affirming what he had stated while recording the merger intimation as well as the FIR. From the cross-examination of PW-12 and PW-13, the defence could not extract anything to disbelieve the versions of these two witnesses. The defence has not been able to create the slightest doubt in the mind of the court to doubt credibility of these two eyewitnesses. From the examination of these witnesses, it would further reveal that the defence have not been able to put any specific question by which it could be said that they were making false statements in the court or for that matter were falsely implicating the Appellants.

16. The other witnesses PW-1, Pancho Bai and PW-2, Tara are the independent witnesses who turned hostile and have not supported the case of the prosecution. However, PW-2, Tara in his cross-examination has accepted the fact regarding recording of statement under Section 161 Cr.P.C. vide Exhibit-P/2. He also admits the contents of the said statement particularly in respect of averment of PW-13 wherein he had informed PW-2 naming all accused person except Appellant-Agustus of having committed the crime. There is also consistency in the statement made by PW-3, Chaudhary and PW-4, Jagmohan who have also made the statements before the court as

PW-2 as far as reaching the spot immediately after the incident where they found Dhanushdhari @ Dhannu holding the Tangi in his hand, to which also the defence has not cross-examined to disprove this fact. So far as the other witnesses are concerned, their evidences are not of much relevance except for PW-9, Dr.B.P. Chandra, Dental Surgeon, who conducted the MLC of PW-12 and has proved the MLC report Exhibit-P/6. Likewise, Dr. V.K. Shrivastava, PW-10 is the doctor who conducted the postmortem of deceased and has proved and established the postmortem report as well as the injuries sustained by the deceased.

17. From the aforesaid evidences which has been led by the prosecution, what is evidently clear are:
 - i. the presence of all the accused person except for Appellant-Agustus stands proved.
 - ii. the motive for committing the said offence also stands established from the evidence which shows that there was a long standing dispute between the family of PW-13 and the family of Jai Nandan i.e. one of the Appellant in Criminal Appeal No. 881 of 1999.
 - iii. the injuries on the body of deceased establishes the fact that deceased was assaulted by more than one person and the cause of death was the merciless assault made by the Appellants.

- iv. the evidence would reveal that in the cross-examination of prosecution witnesses, the defence could not extract anything and even suggestion was not made to these prosecution witnesses by which credibility of their evidence should be doubted.

18. Likewise, on perusal of record it would reveal that the accused persons in their statements under 313 Cr.P.C. have not been able to substantiate the defence that they had taken, in as much as, Jai Nandan in his statement under 313 Cr.P.C. has tried to take a plea of Alibi, but could not substantiate the same. On the contrary, he admits that there was a land dispute between him and Bahoran, PW-13. The accused Thakur Prasad in his statement under 313 Cr.P.C. has tried to take a defence of not being present at the place of incident on the ground of sickness but he also could not prove the sickness part before the court by leading any sort of evidence. Thus, the defence of the accused persons cannot be accepted to be of any worth as it has not been proved or substantiated.
19. So far as the contention of Appellants regarding presence of Makdu, Manbodh and Agustus being doubtful in the light of the evidence of PW-12 is concerned, a perusal of statement of PW-12 would reveal that except for the name of Agustus, the two relevant eyewitnesses have specifically taken the name of all the accused person except for Agustus as is reflected from the merg intimation, the FIR, 161 statements as well as the statements made before the court proving

the presence of all other accused persons at the place of incident. This fact is also corroborated by the statement of PW-2, PW-3 and PW-4. True it is that name of Agustus is not reflected in any of the relevant papers by which he could be implicated. As far as Manbodh and Makdu are concerned, they have been clearly identified by the prosecution witnesses so far as their presence at the place of occurrence is concerned.

20. From the evidence of prosecution witnesses, there can be no doubt so far as presence of Makdu and Manbodh are concerned as there is a consistent stand that Manbodh was initially holding a Tangi which he later handed over to Dhanushdhari @ Dhannu as is evident from the deposition of PW-12 & PW-13. From the record, it is also established that except for Agustus, all the other Appellants were present at the place of occurrence. No suggestion to the contrary was made to the two eyewitnesses by the defence. In addition, from the deposition of eyewitnesses, it has also been established that the assault was made by the accused person except for Agustus to which also there has been no cross-examination for doubting the credibility of said witnesses. PW-12, in her cross-examination had doubt in her mind as far as the presence of Agustus is concerned, but so far as other accused persons are concerned, there was absolutely no confusion or doubt in the her mind. Thus, presence of all the accused

persons in the unlawful assembly except for Appellant-Agustus stands proved and established beyond reasonable doubt.

21. The contention of the Appellants that there are omissions and contradictions in the deposition of PW-12 & PW-13 is concerned, a conjoint reading of entire records would show that infact there were only minor omission and contradiction in the deposition of eyewitnesses and only because of minor omission, the entire version of eyewitnesses cannot be disbelieved. Further, one cannot expect the eyewitnesses to narrate the minute details what they had witnessed and stated in their initial statements as compared to the evidence that they gave before the court after a considerable period of time.
22. The Supreme Court in 1983 (3)SCC 217 (Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat) has held as under:

“.....discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. More so, when the all important 'probabilities factor' echoes in favour of the version narrated by the witnesses. It is therefore, neither appropriate nor permissible to enter upon a reappraisal or re appreciation of the evidence in the context of the minor discrepancies. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. Ordinarily, a witness is overtaken by events and therefore, mental faculties cannot be expected to be attuned to absorb the

details. A witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span, and is liable to get confused, or mixed up when interrogated later on. Court atmosphere and piercing cross-examination by counsel often cause confusion and nervousness. Moreover, the power of observation differ from person to person. As regards the time of an incident, or the time duration of an occurrence, a very precise and reliable estimate cannot be expected for, usually people make there estimates by guess-work on the spur of the movement at the time of interrogation, and the time-sense of individuals varies from person to person.”

23. As regards the contention of the Appellants that offence under Section 149 IPC is not made out against the accused person on account of fact that the prosecution witnesses have not been able to give common intention and all the accused persons coming together pre-determined coupled with the non-disclosing of the individual overt-act on the part of accused persons is concerned, if we look into the provisions of Section 149 IPC, it would clearly reveal that in the present case all the ingredients required under Section 149 IPC is present in the facts and circumstances of the case particularly the presence and the number of injuries.

24. The Supreme Court in 2013(4)SCC 607 (Subal Ghorai and Others Vs. State of West Bengal) has held as under :

“.....Once the case of a person falls within the ingredients of Section 149 IPC, the question that he did nothing with his

own hands, would be immaterial, because everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined and it is not necessary that all the persons forming an unlawful assembly must do some overt-act. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolved them of liability for the offence with the aid of Section 149 IPC if they shared the common object of the unlawful assembly, as has been established in this case as far as all accused persons named in the FIR are concerned.”

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.....It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some material to form an opinion that the accused shared the common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations.....”

25. In the light of aforesaid judgments of the Supreme Court, the case law cited by the Appellants counsel {in cases of Rewa Ram (Supra) and Rajendra Shantaram Todankar (Supra)} are of no help to the Appellants as the facts of those cases were under entirely different backdrop.

26. In the instant case, a perusal of the entire evidence of the prosecution witnesses and also on perusal of record it would prove that attack has been consistently described by the witnesses in similar version and that the name of all accused person except Agustus have also been taken by them, to add with one of the eyewitness is also an injured person.
27. If the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.
28. Thus, since the evidence of two eyewitnesses do not suffer from any basic infirmity and that these two eyewitnesses being very specific about all the accused person except for one Agustus, looking to the nature of attack and the injuries inflicted by the accused persons, it can be safely conclude that all the Appellants/accused person except for Agustus had gathered by way of unlawful assembly and have also assaulted the deceased resulting in his death. Therefore, the judgment of conviction passed against the accused persons (except for Agustus-Appellant No.2 in CRA No. 925 of 1999) do not call for any interference as the same is in accordance with evidence available on record.
29. Accordingly, Criminal Appeal No.881 of 1999 and Criminal Appeal No. 969 of 2003 are dismissed. Conviction of Appellants is affirmed and

maintained. The Appellants are on bail. Their bail bonds are cancelled and they are directed to surrender forthwith and/or be taken into custody for serving out the remaining sentence.

30. Criminal Appeal No.925 of 1999 is allowed to the extent that conviction and sentence imposed upon the Appellant No.2-Agustus is set aside and he is acquitted from the charges subject to the conditions in Section 437-A Cr.P.C. However, the conviction of Appellant No.1-Makdu is affirmed and maintained. His bail bonds are cancelled and he is directed to surrender forthwith and/or be taken into custody for serving out the remaining sentence.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P.Sam Koshy)
JUDGE