

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 403 of 1999

Babulal (Dead) through LR – Santosh Kumar Dewangan S/o Late Babulal Dewangan, Aged about 38 years, R/o Santoshi Para, Jagriti Chowk, Camp-2 Ward-24, Bhilai, Distt. Durg (C.G.)

---- Appellant

Versus

State of Madhya Pradesh (Now Chhattisgarh) through P.S. Chhawani, Distt. Durg,

---- Respondent

And

Criminal Appeal No. 793/1999

Banshi, S/o Kishun Chandrakar, aged about 41 years, R/o Jagriti Chowk, Santoshi Para, Chhawani, Bhilai, P.S. Chhawani, Distt. Durg

---- Appellant

Vs

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

And

Criminal Appeal No.713/1999

Bhushandas, S/o Durkkaluram Mahar, aged about 23 years, R/o Jagriti Chowk, Santoshi Para, Camp-2, Bhilai, Distt. Durg

---- Appellant

Vs

State of Madhya Pradesh (Now Chhattisgarh) through P.S. Chhawani, Distt. Durg,

---- Respondent

And

Criminal Appeal No.990/1999

Bisru, S/o Dalal Khor Sahu, aged about 38 years, R/o Jagriti Chowk, Santoshi Para, Chhawani, Bhilai, P.S. Chhawani, Distt. Durg

---- Appellant

Vs

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

And

Criminal Appeal No.1040/1999

Chhoturam, S/o Shivilal Dewangan, aged about 32 years, R/o Jagriti Chowk, Santoshi Para, Chhawani, Bhilai, P.S. Chhawani, Distt. Durg

---- Appellant

Vs

State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent

For Appellants:
Advocate
and Shri
For Respondent:

Shri Surendra Singh, Senior
along with Shri Neeraj Mehta
Alok Bakshi, Advocates
Shri Vinod Deshmukh,
Govt. Advocate.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order On Board**Per Navin Sinha, Chief Justice****29/06/2015**

1. The sole Appellant-Babulal in Criminal Appeal No.403/1999 has been deceased on 30.3.2014. I.A. No.1/15 has been filed under Section 394 (2) Cr. P.C. by his son Santosh Kumar Dewangan for substitution to pursue the appeal. After hearing the parties it is allowed. The amendment being very formal in nature, the office shall carry out necessary corrections.
2. Likewise, the sole Appellant-Chhoturam in Criminal Appeal No.1040/1999 is also stated to have been deceased on 1.6.2006. The appeal stands abated with regard to him.
3. The Appellants stand convicted under Section 302 IPC to life imprisonment with fine of Rs.200 each, in the event of failure to pay which, they were required to undergo two months further rigorous imprisonment, as ordered on 9.2.1999 by the Additional Sessions Judge, Durg in Sessions Trial No.116/1997.
4. Gajanand Pathak, PW-2, Head Constable No.482 was on night patrol on 7.10.1996 at about 12.00 am. He found the deceased Raju Musalman lying dead at the Jagriti Chowk crossing. P.C. Sonkar, PW-11, the S.H.O,

P.S. Chhawani also reached there. The body was sent to the hospital where the deceased was declared brought dead and kept in the mortuary. "Merg", Exhibit P-2, was thereafter lodged on 8.10.1996 at 2.50 am by Gajanand Pathak, PW-2.

5. Postmortem, Exhibit P-1, was conducted on 8.10.1996 at about 2.00 p.m which found total 18 injuries on the person of the deceased, antemortem in nature caused by hard, blunt rough object. The cause of death was opined to be coma due to injuries to skull resulting in brain hemorrhage and the time elapsed since death was within 24 hours approximately.

6. Learned Senior Counsel for the Appellants submitted that the dead body of the deceased was found abandoned at the Jagriti Chowk crossing by the Head Constable on patrol duty. P.C. Sonkar, PW-11, the S.H.O also reached there. The body of the deceased was taken to the hospital by them and kept in the mortuary. The F.I.R., Exhibit P-19, on basis of the "Merg" was lodged by PW-9, O. P. Singh, the Investigating Officer, against unknown on 8.10.1996 at 10.45 p.m. If Bhuru, PW-5 and Fouzdar, PW-8, the brother and the father of the deceased respectively, were eye witnesses to the assault as claimed by them, there has to be an explanation by the prosecution why the "Merg" or the F.I.R was not lodged by them and the Appellants not mentioned as the assailants. Neither Gajanand Pathak, PW-2, O.P. Singh, PW-9 nor P.C. Sonkar, PW-11 have talked of the presence of Bhuru, PW-5 or Fouzdar, PW-8, brother and father of the deceased as present at the place of occurrence or at the place of hospital when the body was taken there.

7. Learned Senior Counsel next submitted that from the evidence of Bhuru, PW-5 and Fouzdar, PW-8, it is evident that they were not eye-witnesses to the occurrence but were seeking to falsely implicate the Appellants by giving false evidence. The contradictions in their evidence

belies any truthfulness in their statement. Both of them have consistently stated that they were at home and came out on hearing commotion when they saw the assault on the deceased by the Appellants. They were also threatened when they attempted to give water to the deceased. Bhuru, PW-5 has stated that the deceased did not reside with them. Despite the police station being hardly at a distance of one or two kilometers from the house of the witnesses, there is no explanation that if they had eye-witnessed the assault, why they did not go to the police station to lodge a report. Their police statement was recorded 5-7 days later. There is no explanation forthcoming as to why they did not consider it necessary to go and lodge a police report for such a long period of time if they were actual eye-witnesses to the assault. The deceased was a man of criminal antecedents with several cases against him and was on bail. He was also under police surveillance. The possibility that the deceased may have been killed by some others with whom he had enmity and the Appellants had been falsely implicated, cannot be ruled out. Further more, the witnesses had themselves acknowledged that the area where the assault took place was a crowded locality and about 20-25 persons were present, but there is no independent eye-witness.

8. Learned Senior Counsel further submitted that it is highly unusual conduct of the witnesses that their own blood relative was being assaulted and they preferred to be silent spectators. PW-5, Bhuru acknowledged not having gone to the police station but with no explanation regarding the same if he had actually eye witnessed the assault by the Appellants. The conduct of Fouzdar, PW-8, father of the deceased was to say the least highly unusual and contrary to normal human conduct that having witnessed the assault on his son he felt uneasy and went back inside his house. Normal human behaviour of a father on seeing his son being assaulted would have been to

raise an alarm and go the aid of his son. There is no explanation coming from the two witnesses that even if they did come to the aid of the deceased at the time of assault, or did not go to the police for lodging the report, why they did not consider it necessary even to go to the hospital immediately. It is not their case that they had taken the body to the hospital along with the police. The fact that they had signed the inquest report, Exhibit P-4 at 11.30 am on 8.10.1996 in identification of the body, but the F.I.R was registered the same day at 10.45 p.m against unknown manifests that they were not eye witnesses to the assault. Otherwise, the name of the Appellants would have been mentioned in the F.I.R and it would not have been registered against unknown. The mere fact there may have been recovery of any lathi, sword or iron rod on their alleged confession is inconsequential not because there is no FSL report but also because the evidence collected under Section 27 of the Evidence Act cannot be substantive basis for conviction but only corroborative material.

9. Learned Counsel for the State opposing the appeal submitted that it is possible that Bhuru, PW-5, brother of the deceased may have fallen out with the deceased and therefore did not go to his aid. His failure to go to the police station cannot automatically lead to the conclusion that he was not an eye-witness. The evidence of Bhuru, PW-5 and Fouzdar, PW-8 as contained in their police statement and in Court is consistent which clearly suggests that they were in fact eye witnesses. Merely because the deceased may have been a man of criminal antecedents, it cannot be presumed that he may have been killed by some other especially when his own family members claim to be eye witnesses. There has been recovery of the weapons of assault on their confession also.

10. We have considered submissions on behalf of the parties and perused the evidence on record.

11. To sustain the conviction, it is necessary for the prosecution to prove beyond all reasonable doubt that the Appellants were the only assailants. Unless and until the prosecution establishes beyond all reasonable doubt that PW-5, Bhuru and PW-8, Fouzdar, were reliable eye witnesses and that the Appellants were the only assailants, no conviction can be based on surmises and conjunctures, more so when the evidence given by the persons who claimed to be the eye-witnesses are found to be fundamentally flawed, there conduct highly suspicious as being contrary to the normal human behaviour, raising doubts about the veracity and truthfulness of the same. In normal circumstances, even if an assault had taken place in a public place, it is not uncommon that independent witnesses are not forthcoming for various reasons and it is only a relative of the deceased who come forward to give evidence. Therefore, merely because Bhuru, PW-5 and Fouzdar, PW-8 were the brother and father of the deceased respectively can be no reason to doubt the correctness of their evidence, if it is otherwise acceptable, which in the present case unfortunately is not.

12. We find considerable force in the submission on behalf of the Appellants that reading the evidence of the two star prosecution witnesses, it is neither convincing nor credible to sustain conviction. If the deceased was assaulted at the crossing about midnight and the residence of the witnesses was very close by to police station, being hardly at a distance of one or two kilometers, there was commotion when the witnesses came out of their house, there has to be some explanation given by them why they did not first of all rush to the aid of their brother/son or at least shouted for help or attempted to call the police. There has to be some explanation by them that if

they had eye-witnessed the assault, why did they keep quiet for approximately 5-7 days till the police recorded statements under Section 161 Cr.P.C. The two witnesses did not even go the hospital along with the body of the deceased accompanying the police.

13. There is no explanation on behalf of the witnesses why the "Merg" was lodged by Gajanand Pathak, PW-2, the Head Constable making no reference to the presence of the witnesses. No questions appear to have been asked to Gajanand Pathak, PW-2 in this regard on behalf of the witnesses. Likewise, P.C. Sonkar, PW-11, the S.H.O also accompanied the body to the hospital but does not make any statement regarding the presence of the Appellants. No questions have been put to him also in this regard. If they were eye-witnesses to the assault, the onus lies on them to explain that if they had informed the police, how the First Information Report came to be lodged against unknown at 10.45 p.m on 8.10.1996 when the witnesses are stated to have signed the inquest report the same morning at about 11.30 am. The evidence available on record clearly suggests that they were not eye-witnesses to the assault. We also find the conduct of Fouzdar, PW-8 highly inconsistent to normal human behaviour that he saw his son being assaulted and went back inside his own house without making even an endeavour to shout for help, let alone to go to the place of occurrence.

14. The deceased was a man of criminal antecedents with several cases against him and was on bail. Bhuru, PW-5 in his evidence has acknowledged that the deceased was also under police surveillance because of his criminal antecedents. O.P. Singh, PW-9, the Investigating Officer has also confirmed that the deceased was a habitual criminal and was under police surveillance. The possibility, in the facts of the case, that the deceased may have been done to death by some others cannot be ruled out. The benefit of doubt has to

be given to the Appellants. In the nature of the evidence it will not be safe to rely upon the two related witnesses without corroboration which unfortunately is completely wanting.

15. The mere fact that there may have been recovery on the confession of the Appellants of lathi, sword and iron rod is of no consequence as any evidence obtained under Section 27 of the Evidence Act cannot be substantive evidence for conviction but only for purposes of corroboration. There is not even any FSL report with regard to the same. In (2007) 9 SCC 315 (Geejaganda Somaiah v. State of Karnataka) it was observed :-

“22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act.”

16. We are therefore, unable to sustain the conviction of the Appellants who are acquitted subject to the conditions under Section 437-A Cr.P.C.

17. The Appeals are allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(Shri P. Sam Koshy)
JUDGE