

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.432 of 2001

1. Harendra Kumar, son of Haripad Viswas, R/o Village Ujala, aged 26 years,
2. Harvilas Viswas, son of Haripad Viswas, aged about 23 years,

Both Agriculturists R/o Village Ujala, District Kanker, Chhattisgarh

---- Appellants

versus

State of Chhattisgarh

---- Respondent

For Appellants	:	None
For State/Respondent	:	Smt. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

12/4/2016

1. The Appellants who are both own brothers stand convicted to life imprisonment under Section 302 IPC on 4.5.2001 by the Second Additional Sessions Judge, Kanker in Sessions Trial No.335 of 1999 with regard to an occurrence of 29.3.1999 for the murder of their younger brother over a land dispute.

2. The present appeal was filed in the year 2001 and admitted on 11.5.2001. The Appellants were granted bail on 3.8.2004. The matter has thereafter been regularly adjourned at the behest of the Appellants on 30.1.2009, 10.7.2014, 17.7.2014 and 24.7.2014 and 31.10.2014. Today, when the matter is taken-up no one appears on behalf of the Appellants who continue to enjoy the privilege of the bail. The name of the Counsel appears in the cause-list and it has also been displayed on the Electronic LED Display that the case has been called out despite which there is no appearance.

3. Considering the age of the appeal, we are not inclined to adjourn it on that ground in view of the observations in (2014) 14 SCC 222 (Surya Baksh Singh v. State of Uttar Pradesh) and have taken up the appeal for consideration with the assistance of the State Counsel.

“24. It seems to us that it is necessary for the appellate court which is confronted with the absence of the convict as well as his counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in court. If even this exercise fails to locate and bring forth the convict, the appellate court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in *K.S. Panduranga v. State of Karnataka*, (2013) 3 SCC 721. After a comprehensive analysis of previous decisions our learned Brother had distilled the legal position into six propositions: (SCC p. 734, para 19)

“19.1. that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

19.2. that the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3. that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. that it can dispose of the appeal after perusing the record and judgment of the trial court;

19.5. that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. that if the case is decided on merits in the

absence of the appellant, the higher court can remedy the situation.”

25. The enunciation of the inherent powers of the High Court in exercise of its criminal jurisdiction already articulated by this Court on several occasions motivates us to press Section 482 into operation. We reiterate that there is an alarming and sinister increase in instances where convicts have filed appeals apparently with a view to circumvent and escape undergoing the sentences awarded against them. The routine is to file an appeal, apply and get enlarged on bail or get exempted from surrender, and thereafter wilfully to become untraceable or unresponsive. It is the bounden duty cast upon the Judge not merely to ensure that an innocent person is not punished but equally not to become a mute spectator to the spectacle of the convict circumventing his conviction. (See *Stirland v. Director of Public Prosecutions*, (1944) 2 All ER 13 (HL), quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*, (2003) 11 SCC 271.) If the court is derelict in doing its duty, the social fabric will be rent asunder and anarchy will rule everywhere. It is, therefore, imperative to put an end to such practice by the expeditious disposal of appeals. The inherent powers of the High Court, poignantly preserved in Section 482 CrPC, can also be pressed into service but with care, caution and circumspection.”

4. Learned Counsel for the State has meticulously taken us through the judgment under appeal, the evidence of the prosecution witnesses and the exhibits on record which has facilitated us in consideration and adjudication of the appeal on merits.

5. There existed a land dispute between the deceased and the Appellants who are own brothers. The deceased was assaulted in the fields on 29.3.1999 at about 9:00–10:00 am. First Information Report, Exhibit P-1 was lodged by PW-2, Sahdeo Vishwas that on hearing commotion in the fields he ran and witnessed the assault by the Appellants on the deceased.

PW-4, Sindhu Sarkar and PW-5, Bhagidar were also named as FIR witnesses concluding that the Appellants carried away the body of their deceased brother. The post mortem report, Exhibit P-8A by PW-6, Dr. M.S. Kanwar found injuries over right frontal head with a vertical lacerated wound oval in shape with an irregular edge, 2½” long and 1” wide in the middle with clotted blood around the area. There was compound fracture on the left temporal bone, left parietal bone and occipital bone was also fractured. There was punctured wound over the left side of parietal bone, 1½” in diameter with the bone ruptured and brain tissue spilling out. There were also multiple blackish abrasions all over the body, injury over back of neck and left laterally multiple blackish mark over contusion. The first, second and third cervical vertebra were also dislocated. Death was opined to be homicidal in nature due to brain hemorrhage caused by blunt and sharp objects. The time elapsed since death was estimated at 1 – 8 hours before the post mortem on 29.3.1999 at about 4:30 P.M.

6. The confession of Appellant No.1 led to recovery of a Sabbal, Exhibit P-5 confirmed to have blood stains on it in the FSL Report, Exhibit P-14B. Serum Report, Exhibit P-14A has also confirmed that it is human blood. Similarly, human blood has also been found on the half sleeve shirt of Appellant No.2. The Tangia recovered, Exhibit P-7 on confession of Appellant No.2 has also been confirmed to contain human blood. The sample of earth seized from the place of occurrence Exhibit P-8, has also been confirmed to contain human blood. The inquest report, Exhibit P-3 has been proved by PW-2, Sahdeo Vishwas.

7. PW-5, Bhagidar, aged 13 years, a student of Class V and cousin of the Appellants is stated to be an eyewitness. He deposed that he was going to the pond for a bath in the morning and saw Appellant No.1 carrying a Sabbal and Appellant No.2 a Tangia. The statement of the witness was also

recorded on 20.4.1999, within less than a month of the occurrence under Section 164 Cr.P.C. before the Judicial Magistrate First Class. In cross-examination, no question was put to the witness with regard to his statement under Section 164 Cr.P.C. The statement cannot be considered as substantive evidence for conviction but it is corroborative in nature. The witness went home and told his father PW-1, Ishwar Chand Vishwas, who is also related to the Appellants and the deceased that the Appellants assaulted the deceased with a Sabbal and Tangia, respectively. The evidence of PW-1, Ishwar Chand Vishwas is therefore admissible under Section 6 of the Evidence Act as *res gestae* when he states that his son came home and informed him. The witness further stated that he saw blood on the clothes of Appellant No.2 and admonished him that he had behaved like an animal when the Appellant no.2 also threatened him.

8. In (2011) 7 SCC 130 (Krishan Kumar Malik v. State of Haryana) on admissibility of *res gestae* evidence it was observed : -

“37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter.....”

9. PW-2, Sahdeo Vishwas also deposed that he came running on hearing the commotion as he was related to the Appellants and the deceased and went straight to the Police Station. He had heard the cries of the deceased for help and soon thereafter saw the deceased being carried away by the Appellants. Likewise, PW-3, Babloo Vishwas deposed that when he heard that the deceased had been assaulted and went to the fields, he saw the Appellants carrying the deceased. On being asked, Appellant No.1 stated that the deceased had fallen into the canal and they were taking

him home. Considering the nature of injuries on the deceased and the evidence of PW-5, Bhagidar, this was clearly a false defence taken by the Appellants, which is an incriminating factor against them. No question was asked to the witness in cross-examination that they had never made such a statement. PW-4, Sindhu Sarkar, an FIR witness, even if he turned hostile, corroborated the commencement of the fight on the lands because of the land dispute between the Appellants and the deceased at about 9:30 – 10:00 A.M. Similarly, PW-7, Nakul Vishwas, who is also a cousin of the Appellants and the deceased deposed that he saw the Appellants taking away the deceased. The witness also confirmed that there was a land dispute between the parties.

10. Under Section 313 Cr.P.C. the Appellants offered no defence, but simply pleaded that they had been falsely implicated due to enmity because the witnesses had fought with their father when he was alive.

11. The prosecution has therefore been able to establish the fact of a land dispute between the deceased and the Appellants. The deceased wanted to build a house on the lands to which the Appellants were objecting. The Appellants assaulted the deceased in the fields. The nature of injuries found on the body of the deceased clearly indicate that he had been mercilessly assaulted by more than one person. The third brother, who assaulted the deceased with a hammer turned out to be a juvenile and has been tried separately. Human blood has been found on the Sabbal recovered on confession of Appellant no.1 and clothes of Appellant No.2 as also the Tangia recovered on his confession for which they have offered no explanation.

12. That leaves the only question whether it would be safe in the facts of the case to convict on the solitary eyewitness account of a child witness PW-5, Bhagidar. There is no rule of criminal jurisprudence that the evidence

of a minor cannot be taken into consideration. The only requirement is of caution and if doubts arise to seek corroboration. If the evidence of a child witness is convincing, reliable and leaves the Court satisfied, conviction can be based on it also. PW-5, Bhagidar was a cousin of the Appellants and the deceased. The defence has not put forth any plea with regard to existence of any enmity or animosity because of which the witness may be deposing falsely except a bald suggestion in cross-examination that he was deposing falsely due to enmity. The witness was returning from the pond in the morning after a bath and was therefore a perfectly natural or chance witness who is considered reliable. The fact that there were houses of others between the place of occurrence and his house and after he witnessed the assault did not tell any one and quietly went home and then told his father PW-1, Ishwar Chand Vishwas, is not considered abnormal as to doubt his complete evidence itself. He was a student of Class V. Having witnessed a murderous assault, quite naturally given his tender age he must have been in a state of trauma and shock and therefore quietly went home and thought it safe from all aspects including his own safety to confidentially disclose the matter to his father given the relationship of trust between them.

13. In (2012) 10 SCC 451 (Alagupandi v. State of T.N.) the question for reliability of a child witness was considered observing as follows :-

“36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to

such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.”

14. In the entirety of the discussion, we therefore find no reason to interfere with the conviction and the sentence of the Appellants. Their bail bonds are cancelled and they are directed to be taken into custody and/or surrender forthwith for serving out the remaining period of sentence.

15. The appeal is dismissed.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE