

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 427 of 2011

- Govind, S/o Hari Singh Khairwar, aged about 26 years, R/o Thihai Tola, Beljhariya, P.S. Marwahi, District – Bilaspur (C.G.)
- Ramcharan @ Bhagulla, S/o Bahulla Khairwar, aged about 38 years, R/o Thihai Tola, Beljhariya, P.S. Marwahi, District – Bilaspur (C.G.)
- Fagun Singh, S/o Suraj Khairwar, aged about 25 years, R/o Thihai Tola, Beljhariya, P.S. Marwahi, District – Bilaspur (C.G.)

---- Appellants

Versus

- State of Chhattisgarh, through the Station House Officer, Police Station Khadgawa, District Korea (C.G.)

---- Respondent

For Appellant : Mr. Shrwan Kumar Chandel, Advocate.
For Respondent/State : Mr. Ashish Shukla, Government Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja
CAV JUDGMENT

Delivered on : 31/03/2016

Per, I.S. Uboweja, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 04.12.2010 passed in Sessions Trial No.18/2009 by the 3rd Additional Sessions Judge (FTC), Manendragarh, whereby the appellants have been convicted and sentenced in the following manner with a direction to run all the sentences concurrently.

CONVICTION	SENTENCE
U/s 397 / 34 IPC	R.I. for 7-7 years and fine of Rs.500 - 500/-, in default of fine additional R.I. for 3-3 months to each accused persons.
U/s 398 / 34 IPC	R.I. for 7-7 years and fine of Rs.500 - 500/-, in default of fine additional R.I. for 3-3 months to each accused persons.
U/s 302 / 34 IPC	Life imprisonment and fine of Rs.2000 - 2000/-, in default of fine additional R.I. for 6-6 months to each accused persons on account of committing murder of Ramdas

U/s 302 / 34 IPC	Life imprisonment and fine of Rs.2000 - 2000/-, in default of fine additional R.I. for 6-6 months to each accused persons on account of committing murder of Amarlal Yadav
U/s 307 / 34 IPC	R.I. for 10-10 years and fine of Rs.1000 - 1000/-, in default of fine additional R.I. for 4-4 months to each accused persons on account of attempting to commit murder and causing grievous hurt to Chhotelal.
U/s 323 / 34 IPC	S.I. for 1-1 year and fine of Rs. 200 - 200/-, in default of fine additional R.I. for 1-1 month to each accused persons.
U/s 324 / 34 IPC	R.I. for 3-3 years and fine of Rs. 500 – 500/-, in default of fine additional R.I. for 3-3 months to each accused persons.
U/s 25 (1-Kha-Ka) of the Arms Act, 1958	R.I. for 3-3 years and fine of Rs. 500 – 500/-, in default of fine additional R.I. for 3-3 months to each accused persons.
U/s 27(3) of the Arms Act, 1958	R.I. for 10-10 years and fine of Rs. 1000 – 1000/-, in default of fine additional R.I. for 6-6 months to each accused persons.

2. Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.
3. As per case of prosecution, injured Chhotelal (PW-1) is a member of “Van Suraksha Samiti”. He used to go in the forest areas of village Bhouta alongwith the employees/officers of the forest department to stop illegal cutting of forest trees by the villagers, on this the appellants belonging to village Beljhariya, who used to cut the forest tress illegally, were being annoyed with him. On 14.10.2008, complainant Chhotelal (PW-1) lodged FIR vide Ex.P-1 at police station Jhagarakhand against three unknown persons, upon which offence under Sections 302, 307 read with Section 34 IPC and

Sections 25 & 27 of the Arms Act has been registered. As per FIR (Ex.P-1) lodged by complainant Chhotelal Yadav (PW-1), as usual the complainant was in his village on 14-10-2008, in the night the accused persons reached to village Bhouta armed with country made Katta with bullets to threat him. One person came and asked him about the address of Chhotelal Yadav, he saw that person who was asking his address, armed with weapon and club (*Danda*), therefore the complainant told him that Chhotelal Yadav is living at "*Niche Para Main*". When the complainant was going towards the house of Bhagwan Das, one person who followed the complainant, chased him and when the complainant tried to raise alarm, accused fired at the complainant, bullet of which hit in between the left neck and shoulder. Then all these three accused persons rushed to near the house of Ramdas Yadav and caught the complainant. After hearing the sound of the bullet, Ramdas including his family members woke up and heard the voice of Chhotelal, at that time, the time was 2' O clock in the night, Budhan Bai (PW-2) lighted the lamp, her husband Ramdas (deceased) opening the door came out from his house, and at the same time they also heard the sound of knocking of another door and sound of gun-shot, then Ramdas by pressing his chest came inside the house and said that he was killed and fell down on the floor. When wife of deceased Ramdas tried to close the door, accused persons knocked the door by fists and clubs, forcibly entered the house and started assaulting Budhan Bai (PW-2) by

hands and clubs and ordered her to bring out the gold, silver and cash amount and thereafter they looted the ornaments. When daughter Ganeshiya requested not to beat her father, one accused person who was holding knife, gave knife blow on her back due to which she fell down, thereafter the appellants fired the gun-shot third time, Ramdas asked for water and after some time of drinking water, Ramdas died. On hearing voice, younger brother Amar Lal Yadav (deceased) of Ramdas came out from the house and when he was going to the house of Ramdas, one accused person who was having 315 Bore country made pistol fire at the abdomen, he fell down near *Kothar* and died. After committing the offence, accused persons fled away from the spot.

4. Investigating officer reached to place of occurrence and after summoning the witnesses vide Exs.P-3 & P-4, inquests over the dead bodies of deceased Ramdas Yadav and Amar Lal Yadav were prepared vide Exs. P-5 & P-6. Dead bodies of the deceased were sent for post-mortem to Community Health Centre, Manendragarh, where Dr. Suresh Kumar Tiwari (PW-12) conducted autopsy on the dead body of the deceased Amar Lal Yadav vide Ex.P-21 and found following injuries and symptoms :

- (i) Rigor mortis present in all four limbs and even in small muscles.
- (ii) There was oval 2 x 2 cm size wound of entry is noted just 01 cm below right costal margin.

- (iii) No tatooing seen around the wound of entry. Part of omentum was seen coming out from above wound, dark clotted blood present over the body and over clothes.
- (iv) He wears violet coloured Baniyan with whole at identical part, there was bloodstain over clothes.
- (v) No other external injuries observed over the body.

Cause of death was severe haemorrhagic shock due to injury on I.V.C. due to gun shot and the death was homicidal in nature.

5. Dr. S.K. Tiwari (PW-12) also conducted autopsy on the dead body of the deceased Ramdas Yadav vide Ex.P-22 and found following injuries and symptoms :-

- (i) Rigor mortis present in all four limbs and even in small muscles.
- (ii) 01 x 01 cm wound at entry oval situated in 7th I.C. Space anteriorly on right side. Tatooing all around wound of entry is present covering 26 x 15 cm area all around (multiple whole present on Baniyan) at identical region.
- (iii) There was wound of exit at level of thoracic T-11th on back just lateral to spine on right side. Measured 01 x 01 cm. No other mark of injury was seen.

Cause of death was severe haemorrhagic shock due to rupture of liver and kidney due to gun shot injury and the death was homicidal in nature.

6. In further investigation, bloodstained and plain soil were recovered from the courtyard of deceased Ramdas vide Ex.P-7. One empty cartridge red in colour over which 'Baca Express' was written, was seized from the back side of the house of deceased Ramdas vide Ex.P-8. One bullet from the wall of house of deceased Ramdas was seized vide Ex.P-9. Patwari prepared spot map vide Ex.P-31.

7. During the course of investigation, accused/appellants were taken into custody, they made disclosure statements regarding used arms, cartridges and bullets vide Exs. P-11, 12 & P-13 and the same were recovered at their instance vide Exs. P-14, P-15 & P-16. They have also made disclosure statements regarding looted ornaments, which were recovered at their instance vide Exs. P-18, P-19 & P-20. Seized ornaments were sent for test identification parade before the Executive Magistrate, Manendragarh who has conducted the test identification parade and prepared memo vide Ex.P-47.
8. Accused / appellants were arrested and they were also sent for test identification parade before the Executive Magistrate who conducted test identification parade of the accused persons and prepared memo vide Ex.P-2. Injured Chhotelal, Ganeshiya and Budhanbai were also examined by the Doctor who prepared MLC vide Exs.P-27, P-28 & P-29. Query regarding X-ray of injured Chhotelal was done vide Ex.P-30. Weighment of seized ornaments was done by Goldsmith - Santosh Kumar Soni (PW-20) vide Exs. P-32 to P-37. Bullet of gun-shot was received from the Hospital and seized vide seizure memo Ex.P-38. Clothes of the deceased and used bullets were received from the Hospital and seizure memo was prepared vide Ex.P-39. Three cycles were seized from the house of Fulesh and seizure memo vide Ex.P-40 was prepared.
9. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'the Code'). After

completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Manendragarh, who in turn committed the case to the Court of Sessions, Koriya, from where learned Additional Sessions Judge received the case on transfer for trial.

10. In order to bring home the charges of the accused/appellants, the prosecution examined as many as thirty one witnesses. Accused /appellants were examined under Section 313 of the Code, in which they denied the circumstances appearing against them and pleaded innocence and false implication in the crime in question.
11. After providing opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellants as aforementioned.
12. We have heard learned counsel for both the parties and perused the judgment impugned including the record of court below.
13. Learned counsel appearing for the appellants vehemently argued that evidence adduced on behalf of the prosecution is not sufficient to punish the appellants in the crime in question. He further argued that conviction of the appellants is substantially based on the evidence of eye-witnesses Chhotelal (PW-1), Budhan Bai (PW-2), Vidyavati (PW-4) and Ganeshiya (PW-19), but their testimonies are not reliable and trustworthy because they are the members of deceased Ramdas and Amar Lal family. He also argued that memorandum and seizure witnesses have not supported the prosecution case and also the Test Identification Parade of accused persons and ornaments were not

properly conducted by the Executive Magistrate, therefore, it cannot be made basis for conviction of the appellants. Lastly, he also argued that there are major contradictions and omissions in the statements of the aforesaid eye-witnesses, therefore, the conviction awarded to the accused/appellants cannot be sustained.

14. On the other hand, learned State counsel opposing the appeal submitted that dock identification is a substantive piece of evidence and that is enough for identification purpose. He also submits that seizure may be relied solely on the evidence of Investigating Officer. Reliance has been placed in the matter of **Ronny alias Ronald James Alwaris and others v. State of Maharashtra** reported in **(1998) 3 SCC 625** in which the Apex Court has held that if the Evidentiary value of identification of accused in test identification parade and in the court compared, while former is a corroborative evidence, latter is a substantive evidence – If accused is known to the witness earlier, having opportunity to interact with him and notice his distinctive features, evidence of identification in court by such witness for the first time without participating in TI parade can be relied upon in absence of any inherent infirmity or inconsistency. He further placed reliance in the matter of **Sanjay alias Kaka v. State (N.C.T. of Delhi)** reported in **AIR 2001 SC 979** in which the Apex Court has held that if robbery and murder were part of same transaction then the accused persons from whom recoveries were made, consequent upon their disclosure statements, did not offer any explanation

regarding their possession of the stolen properties – Thus by drawing presumption under S. 114 of Evidence Act it can safely be held that accused persons were least guilty of offence of robbery – Similarly “Recent and unexplained possession of stolen properties” could be taken to be presumptive evidence of charge of murder as well. He also placed reliance in the matter of **Modan Singh v. State of Rajasthan** reported in **AIR 1978 SC 1511** in which the Apex Court has held that if the evidence of investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version.

15. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.
16. In the present case, homicidal death of the deceased Ramdas and Amarlal as a result of fatal injuries found over their dead bodies has not been substantially disputed on behalf of the appellants. Even otherwise, it is also established by the evidence of Chhotelal (PW-1), Budhan Bai (PW-2), Vidyavati (PW-4) and Ganeshiya (PW-19), FIR (Ex.P-1), Dr. Suresh Kumar Tiwari (PW-12) and autopsy reports (Exs.P-21 & P-22) that death of deceased Ramdas and Amarlal was homicidal in nature.
17. As regards the complicity of the appellants in crime in question, conviction of the appellants is substantially based on the evidence of

Chhotelal (PW-1), Budhan Bai (PW-2), Vidyavati (PW-4) and Ganeshiya (PW-19) who are the star witnesses of the prosecution, they have witnessed the incident and trial Court has relied on their evidence. We have to scan their evidence.

18. Chhotelal (PW-1) is the injured eye-witness. He deposed that in the intervening night between 13 – 14.10.2008, there was sufficient light. At about 1.45 a.m., three accused came to his house and asked him about Chhotelal's house, he replied in negative. One of the accused persons who was holding a weapon look like an axe was Fagun and other two accused persons, who covered their body with shawl with face left open, were going towards the house of Ramdas and Bhagwandas. Thereafter, this witness came out of his house and saw Fagun also started moving towards the house of Ramdas and Bhagwandas swirling the weapon. There are two pathways to reach the house of Ramdas and Bhagwandas and this witness, in order to reach the house of Ramdas and Bhagwandas, started moving swiftly from the other pathway (short-cut route). Finding this witness going towards the house, Fagun Singh also followed him and suspecting that Fagun Singh could assault him, this witness started running and was chased by Fagun Singh and ultimately reached the door of the house of Ramdas where the other accused persons, namely, Ramcharan and Govind Singh were present. This witness was traced by Fagun Singh, who fired at him, because of which he got injured and became fainted on the spot and felt dizziness. When he regained

consciousness, he saw all the three accused persons targeting their weapons towards him, upon which, he fled away from the spot and ran towards the house of Ramdas and Amarlal. When he reached the house of Ramdas, he was caught hold by the accused persons and somehow he managed to escape from their clutches and ran towards his house. While running towards his house he kept on turning back to see as to whether accused persons were following him, then he heard some explosion sound and also saw the lightening near the house of deceased Ramdas. Thereafter, he raised alarm stating that thieves fired gun-shot at Ramdas. On the next day morning he came to know that Ramdas and Amarlal have died due to gun-shot fire, then he fled away from the spot and came to his old house where he narrated the whole incident to his elder brother Lalbahadur stating that Fagun Singh fired gun-shot at him. He specifically stated that he has identified all accused / appellants in test identification, he also admitted his signature in test identification report (Ex.P-2). He also stated that he was admitted in the hospital for treatment where he remained for twenty days. This witness has been cross-examined at length by the defence, but the defence failed to elicit anything in the cross-examination to discredit his testimony.

19. Budhan Bai (PW-2), wife of deceased Ramdas who was killed by the accused persons, has stated that after taking meals she alongwith her husband was sleeping and at about 2.00 a.m. some explosion sound was heard by them. Chhotelal (PW-1) was calling "*Daudo-Daudo*",

and when her husband deceased Ramdas opened the door, accused / appellants have gun-shot fire at her husband and killed him, he was lying near the door, accused entered her house and assaulted her by fists and clubs, she became unconscious. After sometime, when she regained consciousness, she saw accused persons assaulting her daughter Ganeshiya (PW-19), one accused caught hold her hand and ordered to bring out all the ornaments, she brought and gave the ornaments and cash to them. She stated that the incident night was bright night, therefore, she saw the clear face of the accused and she also identified them in the identification parade conducted by Naib Tahsildar in Tahsil Office and also identified in the dock of the Court. She was also cross-examined at length by the defence, but she remained firm in her statement.

20. Vidyavati (PW-4), wife of injured eye-witness Chhotelal (PW-1), has deposed that at about 2.00 a.m., three persons came to her house and asked her husband that where was the house of Chhotelal, on this he replied that he did not know, thereafter, two accused persons moved forward and one accused Fagun Singh indicated others and chased her husband, then she closed the door. Later on, she heard the sound of explosion, she suspected that her husband might have been killed, therefore, she alongwith children ran away from her old house. She further deposed that accused were identified by her in the test identification parade conducted in Tahsil office. This witness has

also been cross-examined at length by the defence, but failed to elicit anything to discredit her testimony.

21. Ganeshiya (PW-19), daughter of deceased Ramdas, has deposed that after hearing the sound of gun-shot fire and alarm raised by her uncle Chhotelal, her father deceased Ramdas opened the door at that time accused Govind had fired gun-shot at her father, she had identified the accused Govind at Tahsil office in the test identification parade and also at Court dock. This witness has also been cross-examined at length by the defence, but failed to elicit anything to discredit her testimony.
22. Investigating Officer, F.J. Minj (PW-22) has deposed that during the investigation appellants were taken into custody and disclosure statements of accused Govind, Ramcharan and Fagun Singh were recorded vide Exs.P-11, P-12 & P-13 under Section 27 of the Evidence Act on 18.10.2008 and *Katta*, empty cartridge, unused cartridges and number of ornaments were seized at their instance vide Exs. P-15 & P-18, Exs. P-14 & 19 and Exs. P-16 & 20.
23. Netsingh (PW-10), witness of memorandums and seizure memos has not supported the prosecution case and was declared hostile, though he admitted his signature in the documents, but has not clarified as to how he put his signature in those documents. Therefore, it is clear that he is intentionally not supporting the prosecution case.
24. Dr. Suresh Kumar Tiwari (PW-12) has conducted autopsy on the dead bodies of deceased Amarlal and Ramdas, he has proved the

homicidal death of those persons by his statement and by PM Reports Exs. P-21 & P-22.

25. Dr. S.N. Gupta (PW-14) has deposed that on 14.10.2008 he has examined Chhotelal and found 35 small shot injuries on his neck and 5 small shots were taken out from his body. His report is Ex.P-27. He further stated that he has also examined Ganeshiya and found one cut injury which was simple in nature, his report is Ex.P-29. He has clearly stated in his statement that injuries of Chhotelal were dangerous to his life, his query report is Ex.P-30.
26. Samual Joseph (PW-30) has proved the permission of prosecution (Ex.P-48) in respect of District Magistrate.
27. Other witness Amrit Singh (PW-11) has clearly supported the evidence of Investigating Officer F.J. Minj (PW-22). Prosecution has clearly proved the memorandums and recoveries at the instance of accused persons.
28. Tahsildar L.K. Paikra (PW-16) has deposed that he has conducted test identification parade on 19.10.2008 at Tahsil Office on the request of police. Accused persons were mixed with other fifteen persons and accused persons were identified by Smt. Vidyavati, Chhotelal, Budhan Bai, thereafter he prepared test identification parade document vide Ex.P-2 and the same is supported by Vidyavati (PW-4), Chhotelal (PW-1) and Budhan Bai (PW-2), who participated in that test identification parade. Thus, document (Ex.P-

2) has been clearly proved by the prosecution beyond any reasonable doubt.

29. Naib Tahsildar, Devendra Kumar Chaudhary (PW-23) has deposed that he has conducted test identification regarding ornaments, he mixed up other ornaments which was available in the market. Further he stated that Budhan Bai (PW-2) had identified their ornaments before the witnesses. Budhan Bai (PW-2) has also deposed that she has identified their house ornaments in Tahsil office, other witnesses Ramkhilawan (PW-8) and Ramvati (PW-18) have supported the statements of Deven (PW-23) and Budhan Bai (PW-2), therefore, document (Ex.P-27) was clearly proved by the prosecution beyond any reasonable doubt.
30. After appreciating the evidence available on record, prosecution has clearly proved that accused persons came to the house of Chhotelal on 14.10.2008 at about 2.00 a.m., they were armed with deadly weapon i.e. firearm and clubs and they have used the same for committing murder of Amarlal and Ramdas, and same were also used for attempting murder of Chhotelal and assaulting Budhan Bai and Ganeshiya, it is also proved that accused persons used the deadly weapons during the commission of robbery of ornaments in the house of Budhan Bai, it is also proved that accused had looted the ornaments from the house of Budhan Bai, which were seized later on from the possession of accused / appellants, neither any explanation has been offered by any of the accused persons in their 313 Cr.P.C.

statements nor any defence has been adduced in this regard. Eye-witnesses Chhotelal (PW-1), Budhan Bai (PW-2), Vidyavati (PW-4) and Ganeshiya (PW-19) had clearly identified all accused persons during the test identification parade and also during the trial in the “dock” they had identified the accused persons before the Court. The available evidence of injured eye-witnesses being credible, cogent and trustworthy is itself sufficient for the purpose of recording conviction.

31. On close scrutiny of the evidence, we do not find any illegality or infirmity in the judgment of conviction and order of sentence passed by the trial Court.
32. Consequently, the appeal being devoid of merit is liable to be and is hereby dismissed.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(I.S. Uboweja)
JUDGE