

HIGH COURT OF CHHATTISGARH AT BILASPUR

Judgment Reserved on : 20.06.2017

Judgment Delivered on : 25.07.2017

Criminal Appeal No. 706 of 2012

1. Patarsai, aged about 22 years, S/o. Melan Nagesia,
2. Melan, aged about 50 years, S/o. Chamru Nagesia,
3. Ganesh, aged about 18 years, S/o. Melan Nagesia,

All R/o. Village-Dorana, P.S. - Lundra, District – Surguja (C.G.)

---- Appellants

Versus

State of Chhattisgarh, Through : Police Station – Lundra, District – Surguja (C.G.).

---- Respondent

AND

Acquittal Appeal No. 70 of 2013

Ram Kishun Yadav, S/o. Shri Samaru Yadav, aged about 23 years, R/o. Village-Dorna, Thana – Lundra, Civil and Revenue District – Ambikapur (Surguja) (C.G.).

---- Appellant

Versus

1. State of Chhattisgarh, Through : District Magistrate -Ambikapur, District -Surguja (C.G.).
2. Sonsay, S/o. Tallu Nageshiya, aged about 45 years, R/o. Village-Dorna, Thana – Lundra, Civil & Revenue District – Ambikapur (Surguja) (C.G.)
3. Kamil, S/o. Shri Etwaram Nageshiya, aged about 35 years, R/o. Village-Dorna, Thana – Lundra, Civil and Revenue District – Ambikapur (Surguja) (C.G.).

---- Respondents

For Appellants : Ms. Sofia Khan & Mr. Sunil Sahu,
Advocates
For State/Respondent : Mr. Adhiraj Surana, Dy. Govt. Advocate

Hon'ble Shri Justice Pritinker Diwaker &
Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV JUDGMENT

Per R.C.S. Samant, J.

25/07/2017

1. Since both the above appeals arise out of the common judgment dated 30.06.2012, passed by the 1st Additional Sessions Judge, Ambikapur, District – Surguja (C.G.) in Sessions Trial No.342/2010, the same are being disposed of by this common judgment.
2. Appellants in Criminal Appeal No.706/2012 have challenged their conviction under Section 302/34 of the Indian Penal Code being sentenced with life imprisonment along with fine of Rs.1000/- with default stipulations.
3. The acquittal appeal is filed by Ram Kishun Yadav, brother of the deceased – Vishnu Yadav challenging the acquittal of accused – Sonsay and Kamil.
4. Brief facts of the case of the prosecution is that on 15.05.2010, deceased -Vishnu Yadav along with Rajnath Yadav (P.W.-2) was going towards Junadih Jungle then they saw 8 to 10 persons along with accused persons were bringing Sarai wood

towards village. Seeing that, deceased- Vishnu Yadav stopped them and asked as to why they have cut the tree, on which the accused Patar Sai started arguing with him and said that forest belongs to nobody and nobody can stop him. In the heat of argument, appellant – Patar Sai assaulted the deceased by a club on his head. At the same time, appellant- Melan assaulted him with an Axe and the rest of the accused persons present on the spot exhorted the appellants to kill the deceased. Rajnath Yadav (P.W.-2) raised alarm hearing which, Samal (P.W.4) and Sujana (P.W.-8) came on the spot. Rajnath Yadav (P.W.-2) gave intimation in Police Station – Lundra. On the basis of morgue intimation (Ex.P/33) and FIR (Ex.P/6) was lodged on 16.05.2010 at about 6.50 am on the basis of information given by the Rajnath Yadav (P.W.-2). Postmortem was conducted by Dr. Santosh Singh (P.W.13) on the dead body of the deceased. Vide Postmortem report, Ex.P/19, he opined that death of the deceased was homicidal in nature.

5. Conducting the investigation, spot map, Ex.P/3 was prepared by the Revenue Officer. At the instance of the appellant- Patar Sai, vide his memorandum statement Ex.P/8, an axe was recovered and seized from his possession vide Ex.P/9. Blood stained cloth of appellant- Patar Sai was seized vide seizure memo Ex.P/10. Blood stained shirt was seized from appellant – Melan vide seizure memo Ex.P/11. At the instance of the appellant – Melan, vide memorandum statement Ex.P/12, one

club was seized vide Ex.P/13. One spot map, Ex.P/21 was separately prepared by the Investigation Officer. Blood stained soil was preserved, sealed and seized vide Ex.P/23. A query with respect to the seized article was made by the Investigation Officer vide Ex.P/31 and the report was obtained accordingly. Seized articles were sent for FSL examination vide Ex.P/35. Presence of blood was found on the articles, the blood stained soil from the spot, axe seized from the appellant – Patarsai and Club seized from the appellant -Melan and cloths seized from the appellants/accused persons. Blood stains on *Gamchha*, shirt and one another *Gamchha* seized in the investigation was confirmed to be human blood in the report of Serologist vide Ex.P/37 and further blood group – B Positive on *Gamchha* seized in the investigation was ascertained in the same report. Statements of witnesses were recorded under Section 161 of Cr.P.C. Charge-sheet was filed against appellants and acquitted accused persons.

6. Appellants and acquitted accused persons namely Sonsai and Kamil were charged under Section 302/34 of Indian Penal Code. The appellants and acquitted accused persons denied the charges and prayed for trial. Prosecution has examined as many as 15 witnesses. On examination under Section 313 of Cr.P.C., the appellants and co-accused persons denied all the incriminating evidence against them and pleaded innocence and false implication. No witness was examined in defence.

7. After affording opportunity of hearing and leading evidence for the prosecution and the defence, the impugned judgment has been passed in which Sonsai and Kamil were acquitted of the charges, whereas, the appellants stands convicted and sentenced as aforementioned.
8. The grounds in the criminal appeal are these that the trial Court has passed erroneous judgment. The prosecution has failed to prove his case beyond all reasonable doubts. Statement of eye-witness Rajnath Yadav (P.W.-2) was unreliable, who has improved his statement before the Court. There is no legally admissible evidence against the appellants so as to hold them guilty for the offence charged against them. Hence prayed that the impugned judgment be set-aside.
9. The grounds urged in the appeal against acquittal of Sonsai and Kamil, filed by the Ramkishun, brother of the deceased Vishnu Yadav are these that the acquittal of accused Sonsai and Kamil is an erroneous finding of the trial Court. There had been eye-witness against the accused persons, which has been discarded by the trial Court without assigning any proper reason. The trial Court has held in the impugned judgment that names of the respondent No.2 and 3 in acquittal appeal i.e. acquitted accused persons were not mentioned in the FIR and has considered it as ground for acquitting them, which is totally erroneous conclusion, as it is well settled that the FIR is not a encyclopedia of the entire case, hence there is no requirement

that name of each and every accused should be mentioned in the FIR itself. Hence material irregularities have been committed by the trial Court. Prayer has been made for setting aside the acquittal of respondent No.2 and 3 and for convicting and sentencing them under the offence charged.

10. It is submitted by the counsel for the appellants that star witness of this case Rajnath Yadav (P.W.-2) is an interesting witness and he has improved his version before the trial Court, which has been established on the basis of his previous statement Ex.P/7, hence contradiction and omission established are material on the basis of which, the trial Court should have held that he is a unreliable witness. The FIR was recorded after a delay of more than 11 hours and the delay has not been explained sufficiently by any of the prosecution witness, which does not rule out the possibility of concoction and deliberation before lodging of FIR, hence the evidence of prosecution did not have the colour of proof beyond reasonable doubt this could not have been made the basis of conviction against the appellants.

11. Counsel for the appellant in acquittal appeal has submitted that in the statement of Rajnath Yadav (P.W.-2), he has clearly identified each of the accused persons including the respondent No.2 and 3 in the Court and has stated that respondent No.2 and 3 were present on the spot and also participated in assaulting the deceased -Vishnu Yadav with an

axe. His statement has not been rebutted in the cross-examination. Since statement of Rajnath Yadav (P.W.-2) has been relied upon for convicting the rest of the appellants/accused, the same could not have been rejected for giving finding against the acquitted accused persons. Hence for these, reasons, the acquittal of respondent No.2 and 3 is bad in law.

12. Counsel for the State has duly supported the case of the prosecution and opposes the arguments submitted on behalf of the appellants in appeal against conviction.
13. The question of determination on the basis of grounds in criminal appeal and the arguments submitted is that whether the statement of Rajnath Yadav (P.W.-2) is reliable and inspires confidence in the matter of conviction of the appellants? Further the question is whether the order of acquittal recorded against the respondent No.2 and 3 in acquittal appeal is correct finding in the impugned judgment?
14. It being so that the death of the deceased Vishnu Yadav is not disputed and his death being homicidal on the basis of the evidence of the prosecution is also not disputed, there is no need to discuss on the evidence in this respect.
15. Main witness in this case Rajnath Yadav (P.W.-2) is only eye-witness, who was in company of the deceased at the time of incident. He has stated that when he was going towards

Jungle with deceased at about 7 to 7.15 PM on the date of incident, both of them saw 8 to 10 persons amongst whom the appellants and accused were also present were transporting a tree. Deceased -Vishnu Yadav asked them why they have cut the tree and why they are transporting it, on which appellant-Patar Sai started arguing and in the heat of argument; he attacked Vishnu Yadav with a wooden club on his head. Appellant- Melan caught hold of Vishnu Yadav and at the same time appellant – Ganesh assaulted Vishnu Yadav by axe in the backside of his head. Acquitted accused -Kamil and Sonsai were armed with axes, who assaulted the deceased on his leg. He raised alarm, then appellants and accused persons started threatening on which he run away from the spot. He informed about the incident to Ambika Yadav (P.W.-3) and Somaru Yadav (P.W.-1) on mobile phone. He accompanied Somaru (P.W.-1) to Police Station – Lundra, where he lodged the FIR, Ex.P/6.

16. In cross-examination, Rajnath Yadav (P.W.-2) was confronted with his previous statement Ex.P/7 and some contradictions and omissions have been established, such as actual act of assault committed by each of the accused persons, which can not be considered as material, otherwise active participation of all the appellants has been stated with conformity with his previous statement. Regarding act and participation of the acquitted accused Kamil and Sonsai, his statement before the

Court seems to be clearly improved, because in previous statement (Ex.P/7), he has stated that he was not acquainted with other persons present on the spot, apart from appellant Patar Sai, Melan and Ganesh. He has made a contradictory statement before the Court which is material contradiction hence it can not be believed and taken into consideration.

17. Somaru (P.W.-1), is the father of the deceased, who was informed by Ambika (P.W.-3) that Vishnu Yadav has been assaulted by some persons, he went to the spot in Junadih Jungle and saw the dead body of the deceased. He was then informed by Rajnath Yadav (P.W.-2) that Vishnu was assaulted by appellants and the acquitted accused persons. The name of the acquitted accused persons is mentioned in his previous statement, Ex.P/5, which was recorded on 16.05.2010, but he has stated before the police that it was Ambika (P.W.3), who informed him about the participation of the acquitted accused persons. The statement before the Court is that it was Rajnath Yadav (P.W.-2), who informed about the participation of acquitted accused persons is improved statement, which can not be taken into consideration. Rest of his statement is just hearsay evidence.

18. Ambika (P.W.-3) has stated that he was informed on telephone that his brother Vishnu Yadav has been murdered by the appellants Patar Sai, Melan and Ganesh, he does not mentioned the names of acquitted accused persons even in

his examination-in-chief. Other witnesses, Duhan @ Kochai (P.W.-10) and Manik Kishore Khalkho (P.W.-14), who came on the spot on raising alarm by Rajnath Yadav (P.W.-2), have not supported the case of the prosecution and declared hostile.

19. Other evidence in support of the prosecution is of memorandum and seizure. K.K. Kerketta (P.W.-15) has stated that on interrogation appellant -Patar Sai gave statement for recovery of axe and at his instance one axe was recovered and seized vide Ex.P/9 in presence of the witnesses. Similarly appellant- Melan gave statement vide memorandum Ex.P/12 for recovery of a bamboo club and at his instance, one bamboo club was recovered from his possession vide Ex.P/13. In the same procedure, one *Sendo baniyan* was seized from a place near the house of appellant – Patar Sai vide Ex.P/10. Similarly one blood stains blue shirt was seized from the possession of appellant - Melan. These seized articles were sent for FSL examination.

20. Ex.P/35 is the FSL report, which confirms presence of blood in the soil found from the spot and *Gamchha* and shirt seized from the spot, axe seized from accused appellant – Patar Sai, club seized from appellant – Melan and on cloths seized from other accused persons. Ex.P/37 is the report of Serologist, which further confirms that *Gamchha* seized from the spot, shirt seized from the spot, one *Gamchha* seized from accused person had human blood. It was further confirmed that

Gamchha seized from the spot had blood of B-Group. The questions were put to the appellants/accused persons in their examination under Section 313 of Cr.P.C., which they have not explained and no effort has been made to challenge the FSL report Ex.P/35 and the report of Serologist Ex.P/37, which is although not conclusive but is supporting and is a corroborative piece of evidence, which stands as a support to the prosecution version.

21. In conclusion we are of the considered opinion that statement of Rajnath Yadav (P.W.-2) before the Court against the appellants accused persons is totally reliable and in conformity with the earlier statement given by him before the Investigating Officer. Regarding delay in recording of FIR, he has not given any explanation but he has stated that after the incident he went to his own village Sahanpur and he came to police Station Lundra in the morning of next day in company with Somaru (P.W.-1). He denied lodging of false report. In cross-examination, no question was put to him to explain the delay in lodging of FIR. Similarly no question was put to Investigating Officer, K.K. Kerketta (P.W.-15) in the cross-examination for explanation of delay in lodging of FIR. Delay in lodging FIR by itself is not a reason to disbelieve or discredit the prosecution case although there is requirement that delay should be explained but no question was put to the witnesses either by the prosecution or by the defence for explanation of

delay in lodging FIR. Hence it has to be understood from the facts of this case. Reason of delay in lodging FIR (Ex.P/6) is mentioned only in these words that incident could not be reported because of fall of night. Further it was Rajnath Yadav (P.W.-2), who could have gone and informed the police, but on getting afraid due to threatening given by the appellants/accused persons, he ran away from the spot and went to his house in village-Sahanpur, hence this could be considered as a plausible reason for delay in lodging FIR, which can not be considered as fatal to the prosecution.

22. Considering, analyzing and scrutinizing all the relevant evidence with respect to the questions of determination, we are of the considered opinion that conviction of appellants is based on reliable evidence of the prosecution, which is well corroborated and supported by the circumstantial evidence. We are also of the view that, acquittal of the accused respondent No.2 and 3 in the acquittal appeal is correct finding, as the evidence in this respect on record of the Court has been found to be clearly improved statement. Hence on the basis of the finding and the reasons mentioned herein above, no substance is found in appeal against conviction and similarly no substance is found in the acquittal appeal. In the result, criminal appeal No.706/2012 and Acquittal Appeal No.70/2013 are dismissed accordingly.

23. The appellant No.2 is reported to be on bail. His bail bonds stands canceled. He shall immediately surrender before the Court below concerned to serve out the remaining jail sentence imposed upon him.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.C.S. Samant)
Judge