

BEFORE THE HON'BLE HIGH COURT OF CHHATTISGARH AT
BILASPUR

Cr.A. No. 321 /2012

APPELLANTS
(IN JAIL)

1. Kaleshwar Ram @ Kalesh, son of
Ghurwa Ram, aged about 45 years,
Occupation – Agriculture.

A. No. 321/12
Presented by Sri R. Mahapatra
Dated 26.03.12

2. Bhishma Pitamah son of Kaleshwar
Ram @ Kalesh, aged about 25 years,
Occupation – Agriculture.

Both resident of village Baherna, P.S.
Asta, District Jashpur (C.G.)

VERSUS

RESPONDENT

The State of Chhattisgarh, through,
S.H.O., P.S. Asta, District Jashpur
(C.G.)

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL
PROCEDURE.

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 321 of 2012

1. Kaleshwar Ram @ Kalesh, S/o Ghurwa Ram, aged about 45 years, Occupation- Agriculture.
2. Bhishma Pitamah S/o Kaleshwar Ram @ Kalesh, aged about 25 years, Occupation- Agriculture.

Both resident of village Baherna , P.S. Asta, District Jashpur (CG)

---- Appellants

Versus

- The State Of Chhattisgarh, through S.H.O., P.S. Asta, District Jashpur (CG)

---- Respondent

For Appellants	:	:	Shri A.K. Prasad, Advocate
For Respondent	:	:	Shri V.A. Goverdhan, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgement

P. Diwaker, J

22/03/2018

1. Challenge in this criminal appeal is to the judgment of conviction and order of sentence dated 3.3.2012 passed by the learned Sessions Judge, Jashpur, District Jashpur in S.T. No.109/09 convicting the accused/appellants for commission of offence under Sections 302/34, 307/34 & 325/34 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo RI for life & fine of Rs.5,000/-; RI for 7 years & fine of Rs.1,000/- and RI for 3 years & fine of Rs.1,000/-, with usual default clauses, respectively.

2. As per prosecution case, deceased Meghnath was having illicit

relationship with the wife of accused/appellant Kaleshwar and therefore the relation between the accused persons and deceased were strained. On 24.7.2009 when the deceased was standing in front of his house, accused/appellant No.2, son of accused/appellant No.1, came there and firstly knocked him down and thereafter hurled stones through his catapult (Gulel) which hit on his eye causing injury. On the same day, when the deceased along with his son Bhojraj (PW-3) were going to lodge the report of said incident, the accused/ appellants attacked on them. Accused/appellant No.1 was having crowbar and accused/appellant No.2 was having axe in their hands. Accused Kaleshwar inflicted crowbar blows on various parts of the body of the deceased. Accused Bhishma Pitamah had also inflicted axe blows on the head of the deceased. On account of assaults by accused/appellants, the deceased died on the spot itself. They also caused injuries to Sukhrim Bai (PW-1) & Bhojraj (PW-4). Incident was witnessed by Sulukumar (PW-5) and at his instance, Merg Intimation (Ex.P-4) was recorded on 24.7.2009 at 1.25 p.m. Soon thereafter at 1.50 p.m. FIR (Ex.P-3) was registered against the appellants under Section 302/34 of IPC. Sukhrim Bai (PW-1), wife of deceased, was medically examined vide Ex.P-14A by Dr. Purushottam Kumar Singh (PW-10) and he noticed fractures in ulna bone and shaft of radius. Bhojraj (PW-4), son of deceased, was also medically examined by PW-10 vide Ex.P-13A and he noticed incised wound over right side of frontal bone of 4" in size and deep bone, fracture in left parietal bone and pain in chest. As per opinion of the doctor, the injuries sustained by the injured persons were grievous in nature. Inquest on the body of deceased was prepared vide Ex.P-26. Body was sent for post-mortem examination which was conducted by Dr. Purushottam Kumar Singh (PW-10) vide Ex.P-15A and noticed following injuries;-

- Fracture on right side of head on parietal bone.
 - Incised wound on occipital bone of 4" in size and deep bone fracture.
 - Fracture in right temporal bone.
 - Right ear cuts into two pieces.
3. The autopsy surgeon has opined the cause of death to be haemorrhagic shock due to rupture of vital organs (brain) and the death was homicidal in nature. On the basis of memorandum (Ex.P-18) of accused/appellant No.1, one crowbar, axe & clothes were seized vide seizure memos Ex.P-19, P-20 & P-8 respectively. On the basis of memorandum statement (Ex.P-16) of accused/appellant No.2, one catapult and six stones were seized vide seizure memo Ex.P-17. Seized articles were sent for chemical examination to the Forensic Science Laboratory and as per report of FSL (Ex.P-32), the articles seized at the instance of accused/appellants were found to be stained with blood. Statements of witnesses under Section 161 of CrPC were recorded.
4. After completion of investigation, charge sheet under Sections 302/34, 307/34 & 325/34 IPC was filed against the accused/appellants and accordingly the charges were framed by the trial Court against them. So as to hold the accused/appellants guilty, the prosecution has examined 11 witnesses in support of its case. Statements of accused/appellants were also recorded under Section 313 Cr.P.C. in which they denied the charges levelled against them and pleaded their false implication in the case. They have examined two witnesses in their defence.
5. After hearing counsel for the parties, the trial Court by the impugned judgment convicted and sentenced the accused/appellants in the manner as described above.
6. Counsel for the appellants submits that;-

- conviction of appellants is primarily based on the evidence of eyewitness namely Sukhrim Bai (PW-1) & Bhojraj (PW-3), but these witnesses are family members of the deceased and as such are interested witness, therefore, the trial Court ought not to have relied upon such evidence to base a conviction.
- non-examination of memorandum witnesses makes the fact of recovery unbelievable.
- the appellants have also received injuries in the same incident but their report was not registered by the police.
- from the evidence on record it is apparent that appellant Bhishma Pitamah had no role to play in the murder of deceased and he had only caused injuries to PW-1 & PW-3 and therefore his conviction under Section 302/34 of IPC is not sustainable in law.
- from the evidence on record it is apparent that it was a case of sudden fight which had taken place at the spur of moment, without there being pre-meditation and therefore, the appellants can be said to have committed an offence under Part I or II of Section 304 of IPC and not under Section 302/34 of IPC as has been concluded by the trial Court.
- appellants are in jail for the last more than eight & half years and therefore they be set free forthwith after converting their conviction for lesser offence.

7. On the other hand, counsel for the respondent-State supports the impugned judgment and submits that the incident in question occurred in two parts; at first point of time, accused/appellant Bhishma Pitamah alone caused injuries to the deceased by catapult and thereafter when the deceased and his son were going to lodge the report of that incident, both the appellants attacked, assaulted and caused injuries to the deceased by

deadly weapons like axe & crowbar which resulted in his instantaneous death. They have also caused grievous injuries to injured PW-1 & PW-3. He further submits that in the light of evidence of injured eyewitness who have given vivid description of the incident, mere non-examination of memorandum witness alone is not sufficient to disbelieve the entire prosecution case. He further submits that the manner in which injuries were caused in the occipital, temporal and parietal region of the deceased and the weapon used by the appellants i.e. axe & crowbar, clearly show that not only they were having knowledge but their intention was to kill the deceased. In these circumstances, the conviction of appellants under Section 302/34, 307/34 & 325/34 IPC and the resultant sentences are just and proper and no interference therewith is warranted.

8. We have heard learned counsel for the parties and perused the material available on record including the impugned judgment.
9. Sukrim Bai (PW-1) is the wife of deceased Meghnath. She has also received injuries in the incident. According to this witness, on the date of incident she was in her house and her husband had gone to get their son Bhojram (PW-3) admitted in the school. After returning from the school, when her husband (deceased) was telling her that wife of accused/appellant Kalesh had quarrelled with him, all of a sudden accused/appellant Bhishma Pitamah came there and assaulted her husband. She has further deposed that when she along with her husband and son was going to the police station to lodge the report, on the way the accused persons met them. Accused Kalesh Ram was carrying crowbar whereas accused Bhishma Pitamah was having axe in his hand. Accused/appellant Kaleshwar opened assault on her husband Meghnath by crowbar. Thereafter accused Bhishma had assaulted her husband with an axe causing injuries on his head, neck and near the ear. She has

further deposed that accused Kaleshwar had also inflicted crowbar blow on the left arm of her son Bhojraj, whereas accused Bhisma Pitamah gave axe blow on his head. When she intervened in the matter, accused/appellant Bhisma Pitamah assaulted on her hand by axe. On account of assaults made, her husband died whereas her son became unconscious. In the cross-examination of this witness an effort was made by the defence to bring on record the aspect regarding previous dispute between the parties, but this witness remained firm to what has been stated by her in the examination-in-chief.

10. Smt. Basanti Nikunj (PW-2) is the Patwari who prepared the spot map Ex.P-1.
11. Bhojraj Bunkar (PW-3), son of deceased, has deposed that on 24.7.2009 he and his father (deceased) had gone to the school for his admission and while returning home when they were passing in front of the house of accused persons, accused Bhishma Pitamah came out of the house and knocked his father down. He separated them. Thereafter accused Bhishma went inside his house, came out with catapult (Gulel) and hit near his father's eye with a stone hurled through catapult. He also hit a stone to his ear with the help of catapult. He has further deposed that when he along with his father started running towards their house, accused Pitamah threw axe towards them, but the same did not hit them. He has further stated that when they were going to the police station to lodge the report, the accused persons met them on the way and being asked, his father informed that they are going to the police station to lodge the report. Hearing this, accused Kaleshwar, who was carrying crowbar, had assaulted on the back of his father by it. When his aunt Mitri Devi tried to save his father and to catch hold of accused Kaleshwar, she too was assaulted by him with crowbar as a result of she fell down. He has

further deposed that accused Kaleshwar also assaulted on his back by crowbar. Accused Bhishma Pitamah gave repeated axe blows to the deceased on his vital parts including neck. Accused Bhishma assaulted on his head thrice by axe as a result of which he became unconscious. After gaining consciousness in the hospital at Raipur, he came to know that his father has been murdered. This witness has been cross-examined at length by the defence but nothing substantial could be elicited so as to render her evidence doubtful in any manner.

12. Krishna Ram (PW-4) is the police person who brought the body of deceased to the Community Health Centre, Manora for post-mortem examination.
13. Suluram (PW-5) is an independent eyewitness of the incident. He is the lodger of FIR (Ex.P-3). He is also a witness to Merg Intimation (Ex.P-4), Inquest (Ex.P-6), seizure memos Ex.P-7 to Ex.P-10 and map Ex.P-2. According to this witness, on the fateful day he was at his home. Hearing the voice of 'save save', he came near the house of one villager Polu and saw that accused Kaleshwar was assaulting the deceased by rod. He also saw that accused Bhishma Pitamah had assaulted on the head of deceased by axe as a result of which he fell down and thereafter accused Kaleshwar again assaulted him by rod. He has further stated that on account of axe blows by accused Bhishma Pitamah, the deceased died on the spot itself. He has further stated that accused/appellants had also assaulted Sukrim Bai (PW-1) with rod & axe causing fracture injury to her. Nothing incriminating could be elicited by the defence in the cross-examination of the aforesaid witnesses so as to make their testimonies unreliable or untrustworthy.
14. R.C. Nishad (PW-6) & Christopher Ekka (PW-7) are the police personnel who assisted in the investigation. H.S. Tomar (PW-8) is the investigating

officer who has duly supported the prosecution case.

15. Purushottam Kumar Singh (PW-10) is the doctor who conducted post-mortem examination over the body of deceased. He has opined that the death of deceased was caused due to shock & haemorrhage as a result of rupture of vital organs like brain, the injuries were ante mortem and the death was homicidal in nature. The time that elapsed between death and post mortem examination was within 3 to 4 hours. He also did MLC of injured witnesses i.e. PW-1 & PW-3. According to this witness, the injuries noticed on the person of injured Sukrim Bai (PW-1) & Bhojraj (PW-3) were caused by any sharp & hard object, the same were grievous in nature and caused 2 to 3 hours before examination. To a specific query put to him, the doctor has opined that injuries found on the body of deceased and the injured persons could have been caused by the weapons produced before him for examination.
16. Naresh Krishnani (PW-11) is the Neuro Surgeon who has done x-ray examination of Bhojram (PW-3).
17. Surajmukhi (DW-1), wife of accused/appellant No.2, has deposed that on the date of incident, deceased and his son Bhojraj forcible entered her house and finding that her husband & in-laws are not in the house, they caught hold of her hands, dragged her out and attempted to outrage her modesty. Hearing her cries, her husband (accused Bhisma) reached there and having failed to stop them from doing so, her husband hit them by means of catapult as a result of which Meghnath & Bhojram fled from there. After some time, they along with Mistrin again came near to her house, they were carrying axe, chain & club in their hands. Hurling abuses, Meghnath asked to open the door. He was saying that today they will kill them. When they did not open the door due to fear, accused Meghnath hit the door by axe.

18. Patar Ram (DW-2) has stated that on the date of incident he saw deceased Meghnath, Bhojraj & Mistribai carrying axe, chain & club in their hands respectively and they were hurling abuses to Kaleshwar and also giving threat of life to him.
19. Close scrutiny of the evidence available on record makes it is clear that it is the accused/appellants who had not only committed murder of deceased Meghnath but also caused grievous injuries to Sukrim Bai (PW-1) & Bhojraj (PW-3) by means of deadly weapons like axe & crowbar. Both the injured witnesses have categorically stated that when they along with deceased Meghnath were going to the police station to lodge the report, the accused/appellants armed with crowbar & axe respectively, stopped their way and accused Kaleshwar inflicted crowbar injury to Meghnath, whereas accused Bhishma Pitamah gave three axe blows on the head, neck & ear of deceased Meghnath by it. Accused Kaleshwar also inflicted crowbar injury on the left arm of Bhojraj (PW-3) and when Sukrim Bai (PW-1) tried to save her son, she too was assaulted by accused Bhishma Pitamah on her hand with axe. Evidence of PW-1 & PW-3 is corroborated by independent eyewitness PW-5 Suluram. According to Suluram (PW-5), on the fateful day hearing the voice of 'save-save', he went near the house of one Polu and saw that accused Kaleshwar was assaulting deceased. He also saw that accused Bhishma Pitamah assaulted on the head of deceased by axe as a result of which he fell down and thereafter accused Kaleshwar again assaulted him. According to this witness, the accused/appellants had also assaulted Sukrimbai (PW-1) & Bhojraj (PW-3) and caused injuries to them. Thereafter he went to the police station and lodged the report (Ex.P-3). The manner of assault and injuries sustained by deceased Meghnath and injured Sukrim Bai (PW-1) & Bhojraj (PW-3) stand corroborated from the

medical evidence. As already noted above, the autopsy surgeon had found as many as three incised wounds besides fractures in parietal, occipital and temporal bone. The cause of death, as per opinion of autopsy surgeon, was "haemorrhagic shock due to rupture of vital organs (brain)" and death was homicidal in nature. A query was made from the autopsy surgeon as to whether the injuries could be caused by the axe & crowbar to which the doctor answered that injuries found on the body of deceased were possible by the weapons produced before him for examination. Furthermore, statements of eyewitnesses get corroboration from FIR lodged within two hours of the incident. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. Most importantly, when soon after the occurrence the FIR is lodged at the police station, false story being cooked-up and/or false implication of accused stands ruled out. In the case of **Mehraj Singh v. State of UP** reported in (1994) 5 SCC 188, the Supreme Court has observed thus:-

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story....."

20. True it is that witnesses to memorandum have not been examined by the prosecution but such non-examination assumes importance only if the available evidence is unworthy of reliance. In the case in hand, we see no reason to disbelieve the version of eyewitnesses to the incident namely Sukrim Bai (PW-1), Bhojraj (PW-3) & Suluram (PW-5), and therefore non-examination of memorandum witnesses does not assume any importance.

21. Coming to the contention regarding interestedness of eye-witnesses, the law on the point is well settled that relationship by itself is not a ground to discard the sworn testimony of a witness. A relation would not hide the real assailants and implicate innocent persons as it will result in screening the real culprits. Merely because the witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be not trustworthy. The Hon'ble Apex Court in the matter of State of A.P. v. S. Rayappa & others reported in (2006) 4 SCC 512, has observed thus:-

"It has now almost become a fashion that the public is reluctant to appear and depose before the Court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are a harassed lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses

should be examined cautiously....."

Similar view was taken by this Court the Hon'ble Apex Court in a judgment in the case of Kuria & another v. State of Rajasthan reported in (2012) 10 SCC 433 and relevant paragraph portion of the said judgment reads thus:-

"34. The testimony of an eyewitness, if found truthful, cannot be discarded merely because the eyewitness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to Sunil Kumar v. State of Punjab reported in (2003) 11 SCC 367, Brathi v. State of Punjab reported (1991) 1 SCC 519 and Algupandi v. State of T.N. (2012) 10 SCC 451."

In the case in hand, PW-1 & PW-3 had given a clear and vivid account of the incident which gets full corroboration from not only the medical evidence but also statement of Suluram (PW-5), an independent eyewitnesses. Both these witnesses were subjected to lengthy cross-examination but nothing could be elicited showing any strong motive or ill will on their part to exonerate the real person who caused the injuries to them and the deceased and to falsely implicate the accused/appellants. In such a situation, evidence of eye-witnesses Sukhrim Bai (PW-1) & Bhojraj

(PW-3) cannot be brushed aside merely on the ground of their close relationship with the deceased.

22. Further, we are of the view that there was clear and cogent evidence to establish that accused/appellants armed with deadly weapons like crowbar & axe, stopped the deceased and injured person, accused/appellant No.1 gave an crowbar blow to the deceased, while accused/appellant No.2 gave three axe blows on the vital parts of the body of deceased which resulted in his death. They also caused injuries to PW-1 & PW-3 by axe and crowbar. These facts clearly show that there was common intention between accused/appellants to cause death of the deceased and grievous injuries to injured.

23. Thus, the ocular evidence corroborated by independent eyewitnesses, who had absolutely no motive to have falsely 'deposed against the accused/appellants, goes to establish beyond reasonable doubt the complicity of the appellants in the crime in question.

24. Finally, we are unable to uphold the argument of learned counsel for the appellants that the case falls under Section 304 Part I or II of IPC. The acts of accused/appellants of coming on the spot with lethal weapons (axe & crowbar) and thereafter causing serious injuries including fatal injuries on the unarmed members of complainant party are indicative of the fact that those injuries were inflicted on the deceased with the intention that those injuries are likely to cause death. Therefore, it is difficult to hold that there was no intention to cause an injury of a kind that is sufficient to cause death or that the incident had taken place all of sudden in the heat of passion and without premeditation. In such a situation, it is difficult to hold that the accused/appellants are liable to be convicted under Section 304 Part I or II of IPC.

25. For the reasons afore-stated, we do not find any infirmity in the judgment of conviction recorded by the trial Court, which warrant our interference. This appeal is, accordingly, dismissed. Since the accused/appellants are already in custody no extra direction is needed regarding their surrender etc.

**Sd/-
Pritinker Diwakar
Judge**

**Sd/-
Sanjay Agrawal
Judge**

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