

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1469 of 2015**

- Ganesh Ram Kashyap son of Dhaniram Kashyap, aged about 56 years, Occupation - Cultivator, resident of village - Shiva Chowk, Salkhan, Police Station - Sheorinarayan, District - Janjgir-Champa (C.G.)

---- Appellant**Versus**

- The State of Chhattisgarh, Through : Station House Officer, Police Station – Sheorinarayan, District Janjgir-Champa (C.G.)

---- Respondent**And****CRA No. 1537 of 2015**

- Manmohan S/o Lakhan Lal Kashyap, aged about 33 years, occupation agriculturist, R/o Shiva Chowk, Salkhan, Police Station Shivrinarayan, Civil and Revenue District Janjgir-Champa (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh, Through : Police Station Shivrinarayan, District Janjgir-Champa (C.G.)

---- Respondent**And****CRA No. 98 of 2016**

- Raju Kashyap S/o Santram Kashyap, aged about 27 years, village Shiva Chouk Salkhan, P.S. Shivrinarayan, District Janjgir-Champa (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh, Through : Shivrinarayan, District Janjgir-Champa (C.G.)

---- Respondent

For Appellant in Cr.A. No.1469/2015 :	Shri Bharat Rajput, Adv.
For Appellant in Cr.A.No.1537/2015 :	Shri Govind Ram Miri, Adv.
For Appellant in Cr.A.No.98/2016 :	None
For Respondent/State :	Shri Avinash K. Mishra, P.L.

**D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt Justice Rajani Dubey**

Judgment On Board

29.04.2019

Per Manindra Mohan Shrivastava, J

This order shall govern disposal of aforesaid three appeals which arise out of the same judgment of conviction and order of sentence filed by three different accused Ganesh Ram, Manmohan and Raju Kashyap.

02. The appellants have been convicted in Sessions Trial No.156/2013 vide judgment dated 03.11.2015 passed by learned Sessions Judge, Janjgir-Champa (C.G.) on the allegation of commission of offence of murder of one Ramnath Kashyap and sentenced as described below:-

Conviction	Sentence
Under Section 302/34 IPC	For life imprisonment and fine of Rs.1,000/- each, in default of payment of fine, 6 months additional R.I.

03. The prosecution case, as unfolded from the records of the case and the impugned judgment, is that, in relation to an incident of assault given on Ramnath Kashyap (the deceased), Teras (PW/5) lodged FIR in Ex.P/8 in the police station wherein, it was recorded that on the date

of incident at about 7.30 in the evening, he was informed by villagers Fandu Kashyap and Dilip Kashyap that his nephew Ramnath Kashyap is being assaulted by the three appellants by knife, and upon receipt of this information, he ran towards the spot and found that his nephew Ramnath Kashyap was being assaulted by those three persons and having seen him, they ran away from the spot. Ramnath Kashyap was lying in bloodbath on the ground and had sustained stab injuries, which were bleeding. It was further recorded that the incident was seen by Fantu Kashyap, Dilip Kashyap, Santosh Kashyap and Kuteli Bai, mother of deceased Ramnath Kashyap. Later on, at the time of lodging report, according to FIR informant, the assault was given, therefore, police registered offences under Sections 294, 506(B), 324 read with section 34 IPC against the present appellants. Later on, however, Ramnath Kashyap died. The police, therefore, proceeded to hold investigation on the allegation of commission of murder of Ramnath Kashyap by the present appellants. The postmortem report of deceased Ramnath Kashyap prepared by Dr. (Ms.) Anveeta Dhruw in Ex.P/13 revealed multiple stab injuries, and in her opinion, cause of death was hemorrhagic shock leading to death. Presence of multiple injuries led the Doctor to opine that the death was homicidal in nature. Investigation eventually culminated in filing of charge sheet against all the appellants for alleged commission of offence of murder of Ramnath Kashyap. The trial Court framed charges, appellants having abjured guilt, were put to trial.

In order to prove its case, the prosecution mainly relied upon the evidence of FIR informant Teras (PW/5), parents of the deceased

namely Mohan Lal (PW/2) and Kuteli Bai (PW/6) as also evidence of Fandulal (PW/9), before whom, the deceased was said to have given oral dying declaration. Fandulal (PW/9), after examination-in-chief, could be cross-examined only after a long time and, in his cross-examination, he turned hostile on all aspects relating to oral dying declaration, memorandum, seizure etc. Learned trial Court relied upon the prosecution evidence with regard to oral dying declaration given by deceased Ramnath Kashyap, homicidal death and held the appellants guilty of commission of offence, giving rise to these aforesaid appeals.

04. We have heard learned counsel for the parties and perused the records in our hands.

05. Learned counsel for the appellants, assailing legality and correctness of the impugned judgment of conviction and order of sentence, argued in extenso to contend that the prosecution has failed to prove its case beyond reasonable doubt. The evidence of Teras (PW/5) and Kuteli Bai (PW/6) as eye-witnesses are wholly unreliable because of serious contradictions and omissions. Teras (PW/5), in the FIR, which is said to have been lodged at the instance of Teras (PW/5), claims to have seen the incident, but in his diary statement (Ex.D/1), he only stated regarding oral dying declaration and not as eye-witness. In the Court statement, this witness's evidence of he having seen the incident is, therefore, unreliable. Oral dying declaration evidence of this witness is also contradictory as according to him, Ramnath Kashyap stated regarding the incident while he was being taken in the vehicle. The evidence of Kuteli Bai (PW/6), the mother and Mohan Lal (PW/2), the father, is not reliable for additional reason that their diary

statements were recorded after unexplained 90 days delay. The evidence of Fandulal (PW/9) is liable to be discarded because in his cross-examination, he has not supported the prosecution case and turned hostile stating that no oral dying declaration was given before him nor any memorandum was recorded or seizure made. Further submission is that as far as the prosecution story of oral dying declaration given by the deceased is concerned, not only the witnesses' own statement is contradictory to their diary statements but also their statement is contradictory to each other. Dr. (Ms.) Anveeta Dhruw (PW/10) has stated in her cross-examination that with the kind of injuries deceased had sustained, where his spleen was completely damaged, he could not speak and that is what has been stated by Fandulal (PW/9) as also Heeral Lal (PW/11) that Ramnath Kashyap was not speaking to anybody, therefore, the evidence of oral dying declaration is also not reliable. The place of incident, as per the spot map, is an open public place. According to Dilip Kumar (PW/1), Mohan Lal (PW/2), Teras (PW/5) and Fandulal (PW/9), there were other independent witnesses being villagers, who were acquainted and familiar with the incident, namely Ramkhilawan, Banwari, Anand, Fulu and Lalit Sahu, but none of them were examined and the Investigating Officer has not given satisfactory explanation as to why despite the disclosure of names of these persons, they were not examined, which only indicates that the investigation was not fair but biased with predetermined notion that the appellants must have committed the offence. Further submission is that the prosecution has failed to prove beyond reasonable doubt the memorandum statement of appellant

Manmohan in Cr.A.No.1537/2015 and recovery of knife from him because the witnesses of memorandum and recovery namely Dilip Kumar (PW/1) and Fandulal (PW/9) have not supported the case of the prosecution and turned hostile. Neither the knife was produced in the Court nor shown to the accused and even no evidence has been led to prove that the knife was bloodstained. Therefore, recovery of knife does not establish any live link between the commission of offence and the weapon used, much less used by the appellant Manmohan. The prosecution has not come out with any genesis of dispute nor any motive as to why the appellants would commit murder. In his statement recorded under Section 313 Cr.P.C., appellant Manmohan has stated that because of certain panchayat proceeding, some enmity was nurtured and that could possibly be a reason behind his false implication. It has also been argued that, though, Kuteli Bai (PW/6), the mother, has stated that more than one statement was recorded, the prosecution has not come out with all the statements of that lady, which also renders the prosecution case doubtful.

In support of their submission, learned counsel for the appellants have placed reliance on decisions in the matters of **Pratap Singh and another v. State of Madhya Pradesh**¹, **Mustkeem alias Sirajudeen v. State of Rajasthan**², **Vijay Singh v. State of Madhya Pradesh**³, **Sudershan Kumar v. State of Himachal Pradesh**⁴ and order dated 03.07.2018 passed by this Court in Cr.A.No.730/2008 (**Ram Prasad V. State of Chhattisgarh**).

1 (2005) 13 SCC 624

2 2011 CRI.L.J. 4920

3 2005 CRI.L.J. 299

4 (2014) 15 SCC 666

06. On the other hand, learned counsel for the State, supporting the impugned judgment of conviction and order of sentence argued that even if it is held that the eye-witness account is doubtful, there is overwhelming evidence led by the prosecution to prove oral dying declaration given by deceased Ramnath Kashyap to Teras (PW/5), Kuteli Bai (PW/6) and Fandulal (PW/9). He would argue that the omissions and contradictions, which have been elicited, are not so material as to warrant rejection of the entire evidence. He would further argue that even if, Fandulal (PW/9) turned hostile, probably because his cross-examination had taken place after more than one year, the evidence of Teras (PW/5) and Kuteli Bai (PW/6) provides sufficient corroboration to the prosecution case regarding oral dying declaration. Learned State counsel would further submit that the recording of memorandum of accused Manmohan in Cr.A.No.1537/2015 and recovery of knife cannot be doubted because the Investigating Officer has reliably stated regarding the procedure drawn with regard to recording of memorandum and recovery of knife and the witnesses Dilip Kumar (PW/1) and Fandulal (PW/9) have admitted their signatures in the documents. He would also submit that looking to the prompt FIR, in which all the appellants were named, the prosecution story could not be disbelieved merely because the case diary statements of Mohan Lal (PW/2) and Kuteli Bai (PW/6), witnesses to oral dying declaration, were recorded after 90 days. Learned State counsel would also argue that once the evidence of the witnesses regarding oral dying declaration is found reliable, Doctor's opinion would not render them improbable or unreliable because it

cannot be said as to exactly at what point of time, the victim died, but the evidence has come that he was in a position to speak till some time after the incident and he died only when he was brought to the hospital.

07. We have heard learned counsel for the parties and perused the records of the case.

08. The homicidal death of Ramnath Kashyap is not substantially in dispute, in view of emphatic evidence of Dr (Ms.) Anveeta Dhruw (PW/10) and the postmortem report (Ex.P/13) prepared by her. The deceased was found having sustained number of stab injuries in various parts of the body and his spleen was ruptured because of the attacks on his body by sharp object, which led to excessive bleeding, shock and death.

09. Teras (PW/5), who is the uncle of the deceased and the FIR informant also, has deposed in his evidence that he lodged the FIR in the police station. Lodging of FIR has also been proved by the Investigating Officer Puniram Kaushik (PW/15). The contents of the FIR show that according to the FIR informant, he was one of the eye-witnesses of the incident and that he had seen the incident of assault given to the deceased by the three appellants. But when this witness was examined in the Court, he has been controverted with his diary statement (Ex.D/1) and has admitted that this fact that "he had seen the incident of assault" was not disclosed by him to the police. Having perused his diary statement (Ex.D/1), we also find that he does not claim to be an eye-witness of the incident, but according to him, when

he reached to the spot, deceased Ramnath Kashyap was lying over there. Therefore, the evidence of this witness, as the eye-witness of the incident, is doubtful. Kuteli Bai (PW/6), the mother of the deceased, though, claims to be an eye-witness of the incident, she has been confronted with her diary statement (Ex.D/2) that there is complete omission in her statement regarding she having seen the incident and she could not explain as to why this fact has not stated by her to the police at the time when her statement under Section 161 Cr.P.C. was being recorded.

10. We, thus, find that as far as eye-witness account is concerned, the evidence of Teras (PW/5) and Kuteli Bai (PW/6), both are doubtful.

11. The prosecution case hinges around the evidence of oral dying declaration said to be given by the deceased to as many as four persons, who are Mohan Lal (PW/2), his own father, Teras (PW/5) and mother Kuteli Bai (PW/6) and villager Fandulal (PW/9).

12. We shall now examine whether the evidence of oral dying declaration is reliable or not because, learned counsel for the appellants have joined on this issue by submitting that deceased Ramnath Kashyap had sustained multiple injuries at the spot of incident and his spleen was completely ruptured and the Doctor (PW/10) has opined that in such cases, injured is unable to speak and death is instantaneous.

13. Teras (PW/5), in his FIR, does not claim to have heard the deceased giving a dying declaration regarding involvement of the present appellants. He claims to be an eye-witness and for the reason

stated herein above, this appears to be doubtful that he was eye-witness. In the Court, this witness has deposed that after the incident when he was informed by Fandu then he ran towards the spot and he was followed by his brother Mohan Lal and sister-in-law Kuteli Bai. When he reached and went near Ramnath Kashyap, where Kuteli Bai also reached, then upon being asked by Kuteli Bai, deceased Ramnath Kashyap disclosed that he was assaulted by the appellants, which he also heard. However, this witness has been confronted with the FIR lodged by him that in the FIR this fact was not disclosed by him that an oral dying declaration was given in the presence of Ramnath, upon being asked by Kuteli Bai in his presence. We also find that even in the diary statement, this witness has stated regarding giving of oral dying declaration by Ramnath Kashyap while he was being taken to hospital, in a vehicle. Therefore, the place where oral dying declaration was given, and the person, on whose query such statement was made, there is contradiction in the evidence of Teras (PW/5).

14. We shall now look into the evidence of Mohan Lal (PW/2) and Kuteli Bai (PW/6), who are the father and the mother of the deceased, respectively.

15. At the outset, we notice that the statements of these two witnesses have been doubted on the ground that the case diary statements of these witnesses were recorded after 90 days of incident. Mohan Lal (PW/2), the father of the deceased, though, states that the deceased had disclosed regarding the involvement of the appellants, so as to constitute an evidence of oral dying declaration, in his cross-examination, he states that his case diary statement was recorded

after about 90 days. He states that, though, on the very next day of the incident, police people had come but his statement was not taken.

Kuteli Bai (PW/6), who claims to be witness of oral dying declaration, has stated in her cross-examination that police had taken two statements. The first statement was taken on next day after the incident and another statement, according to her, was taken after 4-5 days.

16. According to Puniram Kaushik (PW/15) – Investigating Officer, 161 Cr.P.C. statement of Mohan Lal (PW/2) and Kuteli Bai (PW/6) were recorded after 90 days. Neither Mohan Lal (PW/2) nor Kuteli Bai (PW/6) nor Investigating Officer have explained as to why their statements were recorded after such a long time particularly when the statement of Teras (PW/5) was recorded on the very next day. Moreover, according to Kuteli Bai (PW/6), one statement was recorded on the next day of the incident and another statement was recorded after 4-5 days of the incident. The case diary statement of Kuteli Bai (PW/6), which has been brought during trial, is one recorded after 90 days. In the case of **Sudarshan (supra)**, the Supreme Court found that there was unexplained delay of about 77 days in recording the diary statements of the important prosecution witnesses and that this factor would shake the credibility of the witness. Similar is the view taken by this Court also in the case of **Ram Prasad (Cr.A.No.730/2008)**, wherein relying upon the earlier judgment of Supreme Court in the case of **Surajit Sarkar v. State of West Bengal⁵**, and **Ganesh Bhavan Patel v. State of Maharashtra⁶**, it has

⁵ 2013 (2) SCC 146

⁶ 1978 (4) SCC 371

been held that the witnesses whose statements were recorded after long time, though, they were very much available in the village and yet delay remaining unexplained, would affect the credibility of testimony of these witnesses. We consider it relevant to refer to pertinent observations made by their Lordships in the Supreme Court in case of **Ganesh (supra)** in para 40 thereof as under:-

“40. The learned counsel for Surajit Sarkar relied upon Ganesh Bhavan Patel (Supra) to contend that the delayed examination of PW 7 Sanatan Sarkar throws some doubt on his presence at the place of occurrence. In that case, there was a delay of a few hours by the investigating officer in examining the eyewitnesses and it was observed : (SCC p.376, para 15)”

“15.... Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced.”

17. One of the witnesses of the prosecution namely Fandulal (PW/9), when examined by the prosecution, stated regarding oral dying declaration having been given before him by the deceased, soon after the incident. But, then this witness, in his cross-examination, has turned hostile completely. On all aspects of the case of the prosecution, he has not supported the prosecution case. According to him, deceased Ramnath Kashyap was lying on the ground but he was not able to speak. We have noticed that this witness was cross-examined

after a long gap. This witness was examined and, thereafter, as we see from the records of the case, the case was adjourned from time to time and the cross-examination took place after one year. The witness turned hostile. In this situation, we cannot rely upon the evidence of this witness regarding what was stated by him in examination-in-chief unless the same is sufficiently corroborated from any other clinching and reliable evidence of oral dying declaration. Having noticed contradictions and omissions in the case diary statements and the Court statements of Mohan Lal (PW/2), Teras (PW/5) and Kuteli Bai (PW/6) with regard to oral dying declaration, we have found that the evidence of oral dying declaration is not free from doubt. Dr. (Ms.) Anveeta Dhruw (PW/10), in her cross-examination, has stated that in cases of such injury caused to spleen, the victim is unable to speak and death is instantaneous. In the present case, deceased Ramnath Kashyap had sustained multiple injuries and, therefore, it can safely be inferred that he must be bleeding very fast at the spot. The evidence of Dilip Kumar (PW/1), Mohan Lal (PW/2), Teras (PW/5), and Kuteli Bai (PW/6) only prove that all of them were informed by Fandulal (PW/9) and, only thereafter, they all claim to have reached at the spot. The evidence of oral dying declaration is said to be either at the spot or while the deceased was being taken to the hospital, in a vehicle. The individual statements of the witnesses with regard to place where oral dying declaration was given, itself, is contradictory and their statements, when compared to each other, are also contradictory with regard to the place where the oral dying declaration was given. Moreover, the evidence also shows that when Fandulal (PW/9)

informed Mohan Lal (PW/2), Teras (PW/5) and Kuteli Bai (PW/6), all reached at the spot. It is, then, said that a vehicle was arranged from another village and then deceased was kept in the vehicle and taken towards the hospital. Heera Lal (PW/11), the uncle of the deceased, has also stated that while he was going to the hospital along with other persons in the vehicle, Ramnath Kashyap was not speaking.

18. The aforesaid gamut of evidence led cumulatively, raised serious doubt with regard to the prosecution story as to whether the deceased was at all in a position to speak at the time when his relatives reached at the spot and when he was being taken to the hospital in the vehicle. The prosecution was required to lead clinching evidence in this regard.

19. Learned counsel for the appellants have cited other decisions with regard to the importance of the spot map by submitting that the place of incident was a public place and the prosecution witnesses namely Dilip Kumar (PW/1), Mohan Lal (PW/2), Teras (PW/5) and Fandulal (PW/9) have stated regarding presence of Ram Khilawan, Fando, Banwari, Manharan, Anand and Lalit Sahu. In the FIR, name of Santosh Kashyap was also mentioned. All these were not related witnesses but independent witnesses but none of them have been examined by the prosecution. When Investigating Officer Puniram Kaushik (PW/15) was confronted with this aspect, he could not explain as to why these persons were not examined. This also raises doubt over the fairness of the investigation in the present case. The incident happened in an open place and the number of witnesses disclosed some other independent witnesses. Non examination of those witnesses also adds to the doubt in the case of the prosecution.

20. In this regard, we wish to refer to certain observations made by the Supreme Court on this aspect of failure on the part of the prosecution and investigation machinery to examine independent witnesses, in the matter of **Pratap Singh v. State of Madhya Pradesh**⁷, in para 18 thereof as under:-

“18. The High Court, in our opinion, further committed an error in not drawing an adverse inference for non-examination of Shivrajsingh and Motiram. It was for the prosecution to prove its case. Even if in the first information report their names were not disclosed but if during investigation materials came to the notice of the investigating officer that apart from Mangal Singh two other witnesses had also witnessed the occurrence, he was duty-bound to show the places wherefrom they had witnessed the occurrence in the site plan prepared by him and also record their statements under Section 161 of the Code of Criminal Procedure. We do not see any reason as to why adverse inference should not have been drawn for non-filing of the said statements before the Court along with the charge-sheet. We have noticed hereinbefore the adverse remarks made as against the investigating officer. The High Court may or may not be correct in making those remarks but we only intend to point out that a site plan is not prepared at the instance of the witnesses but is done as a part of the investigation. If a site plan has been prepared and if during the investigation it has been brought to the notice of the investigating officer that there were some other witnesses whose evidence would be material for the purposes of proving the prosecution case, namely, witnessing the occurrence by two independent witnesses; we do not see any reason why evidence of

7 (2005) 13 SCC 624

such witnesses should not have been recorded. It is correct that it is the duty of the investigating officer to produce the said statements with the charge-sheet but, if the same had not been done, the benefit thereof must be given to the defence and not to the prosecution. The High Court therefore in our opinion committed a serious error in this behalf. Non-examination of the seizure witnesses also, in the peculiar facts and circumstances of the case, was of some significance. The learned Sessions Judge made comments about the non-examination of the seizure witnesses only for the purpose of showing that the investigation in the matter might have been partisan in nature at the hands of PW 7. The High Court on the one hand made adverse comments against the conduct of the investigating officer but on the other hand placed strong reliance on his evidence alone for the purposes of believing that several material objects including the weapons of offence viz. lathi and barchhi were recovered in accordance with law.”

21. We find that in the present case, the memorandum witnesses and the witnesses of seizure namely Dilip Kumar (PW/1) and Fandulal (PW/9), both have not supported the prosecution case, though, the same has been proved by the Investigating Officer. Though, it is not a rule of thumb that in order to lay credence to the prosecution case regarding recording of memorandum and seizure, it must necessarily be supported by the independent witnesses and in appropriate cases, it has been consistently held, the evidence of the Investigating Officer could be relied upon, with the series of infirmities in the case of the prosecution, which we have noted herein above, the doubt over the

case of the prosecution is further reinforced as the independent witness of memorandum and seizure have not supported the prosecution case. There is no evidence of FSL led by the prosecution that the knife contained blood stains, much less that of the group and origin of the deceased.

22. All the aforesaid discrepancies in the prosecution case, lead to serious doubt with regard to the involvement of the present appellants in the alleged commission of offence and, we are duty-bound to hold that the benefit of doubt must go to the accused and not to the prosecution.

23. We, accordingly, do so. The appellants are entitled to be acquitted by giving benefit of doubt. The aforesaid appeals are accordingly allowed. The impugned judgment of conviction and order of sentence is set aside and the appellants are acquitted of the charge levelled against them by giving them benefit of doubt. The appellants are in jail. They be set at liberty forthwith, if not required in any other case.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge