

(2010) 11 CHH CK 0036
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 594 of 1993

Dukalu and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116(3), 151
Penal Code, 1860 (IPC) — Section 148, 149, 302, 449, 460

Citation : (2011) 1 CGLJ 446 : (2011) CriLJ 1548

Hon'ble Judges : Rajeev Gupta, C.J.; Sunil Kumar Sinha, J

Bench : Full Bench

Judgement

Sunil Kumar Sinha, J.—This appeal is directed against the judgment dated 15th of May 1993 passed in Sessions Trial No. 153/92 by the First Additional Sessions Judge, Raigarh.

2. By the impugned judgment, the Appellants have been convicted and sentenced in the following manner with a further direction to run the sentences concurrently:

Conviction 148 IPC Sentence

under Section 148 IPC R.I. for 1 year

under Section 149 IPC R.I. for 5 years and fine of

under Section 449 IPC Rs. 100/- in default R.I. for

under Section 460 IPC 1 month in each count.

under Section 302/149 IPC R.I. for life and fine of

under Section 302/149 IPC Rs. 100/-, in default R.I. for

1 month (in two counts)

3. Appellant No. 1-Dukalu died during the pendency of the appeal, therefore, the

appeal filed on behalf of Appellant No. 1 has been dismissed as abated.

4. The facts, briefly stated, are as under:

Appellant No. 1-Dukalu and deceased-Kirtanram were real brothers. The other Appellants are sons of Appellant No. 1. The Appellants were residing separately in village Semipali. Deceased-Kirtanram was also re-siding separately in the same village. They had ancestral property belonging to their father Mohnoram. Mohnoram had given his entire lands to Appellant No. 1-Dukalu. However Kirtanram got the lands of his share in partition through Court. Kirtanram was issueless. Belmati Bai (another deceased) was the first wife of Kirtanram. When Belmati did not get child. Kirtanram brought Surubail (P.W. 6). who was living with them as his second wife. There was no issue from the second wife also. Kirtanram started selling his property. The Appellants were unhappy with the said act of deceased-Kirtanram. Even in one of the sale-deeds, son of Appellant No. 1 had filed objection in the mutation proceedings. Proceedings under Sections 151, 107 and 116(3), Code of Criminal Procedure were also drawn in the year 1998 on account of dispute between the two families. On a previous incident, deceased-Kirtanram has also filed a criminal complaint in the Court of Judicial Magistrate First Class against Appellant No. 1 and Appellant No. 4 which was fixed for hearing on 27-8-1991. The case of the prosecution is that in the intervening night of 13th-14th July, 1991. the Appellants made an unlawful assembly, participated in rioting with deadly weapons, and in furtherance of the common object of the said assembly, committed lurking house trespass and entered into the house of the deceased and committed murder of Kirtanram and his first wife Belmati Bai. This was done with the intention that Kirtanram would not be able to sell more property and after the death of Kirtanram and his first wife, they would get entire property in reversioner's right. The incident was witnessed by Surubali (P.W. 6-second wife of deceased Kirtanram). The Appellants, firstly tied the hands and legs of Surubali (P.W. 6) by saree. They also poured cloths in her mouth, and thereafter they committed murder of two deceased persons. After departure of the Appellants from the place of occurrence. Surubali any how got her saree untied by using her teeth and immediately rushed to the villagers namely Nagaram, Shokilal (P.W. 1), Dinbandhu, Rajendra Kumar and Hari Prasad etc. Shokilal (P.W. 1) lodged the First Information Report (Ex. P/1) in the concerned police station. Merge intimations (Exs. P/2 and P/25) were also lodged by Shokilal. the Investigating Officer reached to the place of occurrence. After giving notices (Exs. P/14 and P/15) to the Panchas. inquests on the bodies of the deceased persons were prepared under Exs.-P/16 and P/17. Hands of deceased Kirtanram were tied with loongi. He had received multiple injuries. His dead body was lying in the courtyard of the house. The dead body of Belmati Bai was also lying in the courtyard just at a distance of 5 feet from the dead body Kirtanram. Her both legs were tied by a toliya. One danda was found inserted in the mouth of deceased Belmati Bai. She had also received multiple injuries. The dead bodies were sent for their post-mortem to Government Hospital. The post-mortem examinations were conducted by Dr. B.K. Jha (P.W. 12). He noticed following

injuries on the body of deceased-Kirtanram:

- (i) Lacerated wound 1 inch x 1/4 inch on the left tibia;
- (ii) Mark of ecchymosis 6 inch x 1 inch on left flank of abdominal region;
- (iii) Mark of ecchymosis 5 inch x 1 inch on the right hypo-chondrium;
- (iv) Lacerated wound 1 inch x 1/4 inch on the left parietal zone of scalp;
- (v) Lacerated wound 2 inch x 1 inch on left ear pinna. Hyamatoma present;
- (vi) Hyamatoma 2 inch x 2 inch on left parietotemporal region;
- (vii) Hyamatoma 6 inch x 4 inch on left shoulder region;
- (viii) Ecchymosis 2 inch x 1 inch on left forearm and
- (ix) Ecchymosis 3 inch x 1 inch on right side of chest.

On internal examination, blood clots were found in the scalp. There were blood clots in the brain in left temporal and occipital zone. The Autopsy Surgeon opined that the cause of death was coma, caused by injuries received on the scalp which damaged vital centres of the brain and caused hemorrhage and it was homicidal in nature. The post-mortem report of Kirtanram is Ex.-P/22.

Dr. Jha (P.W. 12) also found following injuries on the body of deceased-Belmati Bai:

- (i) Lacerated wound 1 inch x 1/2 inch on the frontal bone;
- (ii) Lacerated wound 2 inch x 1 inch on the right parietal bone;
- (iii) Lacerated wound 2? inch x 1 inch on right parietal bone overlapping injury No. (ii);
- (iv) The two incisors and one of the right upper canine tooth were broken. The sock ets were red and inflamed. Ecchymosis 2 inch x 1 inch inside the mouth;
- (v) Ecchymosis 2 inch x 1 inch on the left forearm in mid region.

On internal examination, there was hemorrhage in the brain, it was congested. All the injuries were ante-mortem. According to Dr. Jha, the cause of death was coma due to injuries to the vital centres of the brain and haemorrhage in the brain. The death was homicidal in nature. Post-mortem report of Belmati Bai is Ex.-P/23.

Various articles belonging to the deceased persons, blood stained soil, plain soil and dandas were seized from the place of occurrence. 3 teeth said to be that of Belmati Bai were also seized from the place of occurrence. In further investigation, the cloths of the Appellants were also seized. The seized articles were sent for their chemical examination to Forensic Science Laboratory, Sagar vide Ex. P/29, from where, a report Ex. P/31 was received. According to the

F.S.L. report, blood stains were found on cloths of the accused persons and various articles belonging to the deceased and on the dandas.

After completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate First Class, Dharamjaigarh, who in turn committed the matter to the Sessions Court, Raigarh, from where, it was received on transfer by the First Additional Sessions Judge, Raigarh, who conducted the trial and convicted and sentenced the Appellants as aforementioned.

5. The conviction of the Appellants is based on the sole testimony of Surubali (P.W. 6).

6. Mr. Abhay Tiwari, learned Counsel appearing on behalf of the Appellants, argued that Surubali (P.W. 6) was the wife of the deceased, therefore, she was an interested witness and the conviction based on the sole testimony of Surubali (P.W. 6) cannot be sustained.

7. On the other hand, Mr. Jameel Akhtar Lohani. learned Panel Lawyer appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Sessions Court.

8. We have heard the learned Counsel for the parties at length and have also perused the records of the sessions case.

9. In Harbans Kaur and Another Vs. State of Haryana, , the Supreme Court held that there is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused.

10. In Namdeo Vs. State of Maharashtra, the Supreme Court held that a witness who is a relative of deceased or victim of the crime cannot be characterized as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or other convicted due to animus or for some other oblique motive. The Supreme Court also observed that a close relative cannot be characterized as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

11. In Sonelal Vs. State of M.P., , the Supreme Court again said that merely because the eye-witnesses are family members their evidence cannot be parse discarded. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false

implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

12. In *Dharnidhar Vs. State of U.P. and Others*, the Supreme Court further reiterated that there is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before Court. The Supreme Court held that a close relative of deceased does not, *per se*, become an interested witness. An interested witness is one who is interested in securing conviction of a person out of vengeance or enmity or due to disputes and deposes before Court only with that intention and not to further cause of justice. However, version of interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same. When their statements find corroboration by other witnesses, expert evidence and circumstances of case clearly depict completion of chain of evidence pointing out guilt of accused, then statements of so-called "interested witnesses" can be relied upon by Court.

13. Therefore, this argument cannot find favour that the testimony of P.W. 6 cannot be relied on, only on the ground that she was the wife of the deceased. However her evidence is to be scrutinized with due care and caution and if her evidence is found credible in appreciation, the conviction can well be based on her sole testimony.

14. Now we shall examine the evidence of Surubali (P.W. 6).

15. Surubali (P.W. 6) is the second wife of deceased-Kirtanram. She deposed that on the fateful night, the Appellants entered into their house from the back door. They were armed with dandas. Appellant-Nandram and Shriram tied her and poured cloths in her mouth. Other Appellants tied the deceased persons and thereafter all of them assaulted the deceased persons by lathis on their heads. The deceased persons died instantaneously. Appellant-Dukalu was saying his sons that there is no property on her name (on the name of P.W. 6), therefore don't kill her. Therefore, the Appellants left her and ran away from the place of occurrence. She any how untied her hands and feet by using her teeth and rushed to the house of Naga and thereafter she rushed to the house of Dubraj. She narrated the entire story to these persons and other villagers including Shokilal (P.W. 1). Shokilal (P.W. 1) went to lodge the FIR (Ex. P/1). She has also deposed about the previous litigations and further that they are issueless.

16. Though Surubali (P.W. 6) has been put to lengthy cross-examination by the de-fence but the defence has not been able to elicit any such circumstance on which either her testimony may be discarded or it may be said that she is falsely implicating the Appellants in crime in question. The version of Surubali (P.W. 6) is corroborated by the contents of the FIR (Ex. P/1) which was promptly lodged by Shokilal (P.W. 1) who was duly briefed by Surubali (P.W. 6) in the night itself. It contains the names of all the 6 Appellants. It also contains the details about incident. Shokilal (P.W. 1) has been declared hostile as he has not truly supported the case of the prosecution. Though he admitted to lodge the FIR (Ex.

P/1) but he added that Surubali (P.W. 6) did not tell him the names of the assailants in the night. The learned Sessions Judge held that the FIR (Ex. P/1) was duly proved by the person who recorded it. On appreciation, the Sessions Judge held that the testimony of Shokilal (P.W. 1) was not reliable. It was held that in the facts and circumstances of the case, the testimony of Surubali (P.W. 6) cannot be discarded on the unreliable testimony of Shokilal (P.W. 1). who turned hostile after lodging the FIR (Ex. P/1).

17. Surubali (P.W. 6) was one of the in-mates of the house. In absence of any evidence to the contrary her presence in her own house in the late night cannot be doubted. She was a natural witness. We find that the version of Surubali (P.W. 6) is duly corroborated by the medical evidence. She has deposed that the Appellants had assaulted the deceased persons by dandas. The Autopsy Surgeon also found the above injuries on the bodies of the deceased persons. These injuries could be caused by hard and blunt object like danda which was used by the Appellants as deposed by Surubali (P.W. 6).

18. In the above facts and circumstances, the sole testimony of Surubali (P.W. 6) was fully reliable. We do not find any infirmity in the evidence of Surubali (P.W. 6). The finding recorded by the Sessions Court that the Appellants entered into their house and they participated in assaulting the deceased by deadly weapons resulting to their death can-not be said to be unjustified.

19. On due consideration, we find that punishment awarded by the Sessions Court is not in proper manner. The Sessions Court has punished the Appellants u/s 149, IPC. Section 149, IPC does not create any offence. In fact, it makes a member of an unlawful assembly liable for the offences committed by other members. The object of the section is to make it clear that an accused person whose case falls within the section, cannot put forward the defence that it was not his hand that inflicted the hurt or the grievous hurt, when the offence was committed by a member of an unlawful assembly. That is to say that Section 149 creates no substantive offence and separate punishment under this Section cannot be awarded. The learned Sessions Judge has awarded separate punishment u/s 149, IPC. Therefore, we set-aside the sentence awarded by the Sessions Judge u/s 149, IPC.

20. The learned Sessions Judge has also punished the Appellants Under Sections 449 and 460, IPC. Section 449 relates to house-trespass in order to commit offence punishable with death and provides that whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with imprisonment for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine. Section 460 provides about the liability of all persons jointly concerned in lurking house-trespass or house-breaking by night and the punishment, where death or grievous hurt caused by one of them. It provides that if, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to

any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment for life. or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. We find that the element of house-trespass is common in both the Sections and Section 460 has large ambit. In Section 449 actual commission of offence punishable with death is not required and if the house-trespass is proved in order to commit such offence, the accused persons would be liable for punishment u/s 449, whereas, in Section 460 if a person guilty of lurking house-trespass or house-breaking in night voluntarily cause or attempt to cause death or grievous hurt to any person then every person jointly concerned in committing such lurking house-trespass in night shall be liable for punishment. Section 460 lays down a principle of constructive liability. It would be applicable in a situation when a number of person commit lurking house-trespass by night or house-breaking by night and any of them, at the time of committing the above act, voluntarily causes or attempts to cause death or grievous hurt. In such a case there would be no necessity to ascertain the identity of the person who caused or attempted to cause death or grievous hurt. However the particular accused causing death would not escape the liability for punishment u/s 302, IPC. In the present case, the Appellants have been held responsible for causing death of the 2 deceased persons with the aid of Section 149, IPC. It is not a case in which at the time of committing lurking house-trespass by night any one of the Appellant caused death of the deceased person and liability has to be fastened on the principle of Section 460. In the facts and circumstances of the case, if all the Appellants were held liable for punishment u/s 302 with the aid of Section 149, IPC on the principles of common object of the unlawful assembly, of which they were the members, it was not necessary to punish them separately u/s 460. IPC and punishment of the Appellants u/s 460, IPC. in the facts and circumstances of the case, also requires to be set-aside.

21. Therefore, while confirming the conviction and sentences awarded to the Appellants Under Sections 148, 449 and 302/149. IPC (in two counts), we set-aside the conviction and sentences awarded to them u/s 460. IPC, and we also set-aside the sentence awarded to them u/s 149, IPC.

22. The appeal is allowed to the extent indicated above. As stated above, Appellants 2 to 6 are on bail. Their bail bonds are cancelled and sureties stand discharged. Appellants 2 to 6 are directed to surrender immediately to undergo the remaining sentences imposed against them.