

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 822 OF 2012

RAJU @ DEVENDRA CHOUBEY

.... APPELLANT

VERSUS

STATE OF CHHATISGARH

.... RESPONDENT

WITH

CRIMINAL APPEAL NO. 867 OF 2013

WITH

CRIMINAL APPEAL NO. 589 OF 2014

WITH

CRIMINAL APPEAL NO. 1781 OF 2014

[Arising out of SLP (Crl.) No. 3737 OF 2014]

JUDGMENT

S. A. BOBDE, J.

1. Leave granted in SLP (Crl.) No. 3737/2014.
2. These appeals are preferred by four accused against the common Judgment of the High Court of Chhattisgarh at Bilaspur,

confirming the Judgment of the Additional Sessions Judge, Bemetara, District Durg, convicting the appellants under Section 302 read with Sections 34 and 120B of the Indian Penal Code [hereinafter referred to as "IPC"] and sentencing each of them to undergo imprisonment for life with a fine of Rs. 1,000/-, and in default, to undergo additional rigorous imprisonment for three months. These appeals have been taken up for disposal together since they arise from a common judgment of the High Court deciding the appeals of the accused.

3. The appellant - Raju @ Devendra Choubey (accused no. 4) has filed Criminal Appeal No. 822 of 2012. The appellant - Mahesh (accused no. 3) has filed Criminal Appeal No. 867 of 2013. The appellant - Beenu @ Chandra Prakash (accused no. 2) has filed Criminal Appeal No. 589 of 2014. The appellant - Smt. Shashi Tripathi (accused no. 1) has filed Criminal Appeal arising out of Special Leave Petition (Criminal) No. 3737 of 2014.

4. PW-1 - Dr. Sharda Prasad Tripathi is the husband of accused Shashi Tripathi. On 25.11.2003, when PW-1 - Dr. Sharda Prasad Tripathi came home from his clinic, found that his daughter-in-law Bhavna Tripathi has been murdered. He lodged a First Information Report (F.I.R.) on 25.11.2003 at about 20:45

hours. The crime was registered. He deposed in court that on 25.11.2003, when he returned home, he found servant Anil Kumar (PW-21) was weeping. When he went inside, he found his daughter-in-law - Bhavna and wife - Shashi lying in the courtyard. Bhavna was dead. Shashi was unconscious. There were numerous injuries, including incised wounds on Bhavna, none on Shashi.

5. After registration of the crime, inquest was conducted over the dead body of Bhavna on 26.11.2003. Post mortem was conducted by Dr. Naresh Tiwari and Dr. M. Deodhar, who gave their report which is marked as Exhibit P/18. Spot map was prepared by the Inquiry Officer (IO); bloodstained cloth of accused Shashi Tripathi was taken into possession along with broken bangles; bloodstained cement mortar and plain cement mortar were also taken into possession. Shashi Tripathi, Mahesh and Binu @ Chandra Prakash were arrested on 29.11.2003. A bloodstained knife was taken into possession. The accused Raju @ Devendra Choubey was taken into custody on 22.12.2003 and a Suzuki motorcycle was also taken into possession.

6. A test identification was conducted by the Executive Magistrate in the Sub Jail, Bemetara on 13.12.2003. A similar

identification parade of Raju @ Devendra Choubey was conducted on 26.12.2003 after his arrest.

7. A sealed packet containing hair found in the grip of the deceased and another sealed packet containing bloodstained cloth of the deceased were taken into possession vide Exhibit P/35.

8. After committal, the Trial Court framed charges under Section 302 read with Sections 34 and 120B of the IPC. The prosecution examined 32 witnesses. No defence witness was examined after the statements of the accused were recorded under Section 313 of the Criminal Procedure Code, 1973.

9. According to the prosecution the accused Shashi Tripathi is the step mother-in-law of deceased Bhavna Tripathi. Bhavna was married to her step son – Jitendra Kumar in July, 2003. Shashi Tripathi used to be annoyed with Bhavna Tripathi on account of some domestic dispute. She engaged the other accused for murdering Bhavna. Bhavna was murdered on 25.11.2003 at about 18:30 hours in the house where she resided with Shashi Tripathi.

10. There is no dispute that Bhavna's death is homicidal. Dr. M. Deodhar, who conducted the postmortem, opined that cause

of her death was neurogenic and hemorrhagic shock. The injuries found on person of the deceased were as follows:

External Injuries:

- (1) incised wound on left scapular region of size 3 cm x 1 cm;
- (2) incised wound on left scapular region of size 4 cm x 1 ½ cm x 1 ½ cm;
- (3) one incised wound on left auxiliary region on the posterior auxiliary region of size 3 cm x 2 cm x 3 cm;
- (4) incised wound on lower costal region left of size 3 ½ cm x 2 cm x 1 cm;
- (5) incised wound on lower costal region right side on right epigastic region of size 3 ½ cm x 3 cm with punctured wound;
- (6) incised wound over right costal region of size 3 cm x 2 cm x 1 cm;
- (7) incised wound on right supra mammary region near middle of size 4 cm x 1 cm x 1 ½ cm;
- (8) incised wound on right supra mammary region lateral aspect of size 3 cm x 1 ½ cm x 1 ½ cm;
- (9) incised wound on radial aspect of left forearm near wrist joint of size 2 ½ cm x ½ cm x ½ cm;
- (10) incised wound on forearm left hand radial side dorsal aspect on lower 2/3rd region;
- (11) incised wound on left forearm middle 1/3rd region, radial side and posterior aspect of size 2 ½ cm x 1 ½ cm x 1 cm;

(12) incised wound on left hand dorsal aspect on 2nd and 3rd metacarpal region of size 2½ cm x ½ cm x 1½ cm;

(13) incised wound on ulna region of left hand on lower 1/3rd region of size 1 cm x ½ cm x 1 cm; and

(14) incised wound over left side of neck, on anterior triangle of size 2 cm x ½ cm x 1 ½ cm.

Internal injuries:

Brain membrane pale; lungs, trachea pale, punctured wound on right and left lungs of size 2 cm x 1 cm, 2 ½ cm and 1 cm x 3 cm; lobe was cut and there was 3 cm punctured wound. Incised wound was also present on the right lobe of size 3 cm x 1/3 cm x 3½ cm. Liver, kidney and spleen were pale. The deceased was carrying fetus of two months."

11. The sole eyewitness was a boy of 13 years of age – Anil Kumar (PW-21), who worked as a servant with the family. Shashi Tripathi had brought him home from Bilaspur. He participated in the identification parade, which was held in Sub Jail, Bemetara, and identified the accused persons in the court by touching them.

12. We have carefully examined the manner in which the identification parade was conducted and the manner in which the boy – Anil Kumar (PW-21) identified the accused in Court and we have no reason to doubt the identification of the accused, which

assumes importance in this case since the boy did not know the accused before the incident.

13. It is Anil Kumar (PW -21), who first informed the head of the family Dr. Sharda Prasad Tripathi (PW-1), the complainant, about the incident, when he came home after closing his clinic. He deposed before the Court that Shashi Didi (accused) brought him to village – Jevra from Bilaspur. He lived in the house of Shashi Didi. He ate his food there and studied in a school. He deposed that Doctor Sahab is her husband and Shivendra and Jitendra are her sons. Jitendra is her step-son and the deceased Bhavna is the wife of Jitendra. She resided with Shashi Didi. Jitendra is a doctor, resided and practiced at Khamaria, whereas his wife resided at Jevra. His brother – Shivendra studies at Calcutta. He referred to Bhavna as Bhabhi. He stated that Shashi Didi and Bhavna sometimes used to quarrel.

14. About the assault, he deposed that Devendra caught Bhavna and Chandra Prakash attacked her with knife 3 to 4 times and she fell down. The incident occurred in the courtyard and Shashi Didi was present in the passage. Mahesh, the fourth accused, was standing outside the house. After the assault,

Chandra Prakash went to the TV room where Shashi Didi had kept some money in a rubber band on the table. The accused – Chandra Prakash had threatened him not to disclose anything about the incident to anyone. Thereafter all the three accused fled from there. He further deposed that Shashi Didi took him upstairs to the terrace and asked him not to disclose the truth to anyone but to say that thieves came into the house and committed the crime. Shashi Didi thereafter started shouting. Then she lay down on the courtyard near Bhavna Bhabhi.

15. This deposition clearly implicates accused Nos. 1, 2 and 4. The picture that emerges is that Shashi Tripathi caused Bhavna to be killed and for this purpose engaged Chandra Prakash (accused No. 2) and Raju @ Devendra Choubey (accused No. 4) by paying them money. She also seems to have had a scuffle with Bhavna, which is apparent from the fact that her hair was found in the grip of the deceased during investigation. It is obvious that accused nos. 2 and 4 did not enter the house to commit a robbery and had a single mission, namely, to kill Bhavana. There is no evidence that they had any previous animosity with the deceased and appeared to have acted as contract killers.

16. The prosecution has found it difficult to pinpoint the motive but Shashi Tripathi's husband Dr. Sharda Prasad Tripathi (PW-1) deposed before the Court that she tried to create a hindrance in the marriage of his son Jitendra since she wanted her daughter Abhilasha to marry him; however, he went ahead with the marriage of Jitendra to Bhavna, whereupon Shashi Tripathi remained silent.

17. The credibility of the evidence of Anil Kumar (PW-21) was attacked by the learned counsel for the appellants, who submitted that the boy is a tutored witness, who has been influenced by the police with whom he spent a lot of time. In fact, he even came to the Court in the company of a police constable after being served summons at Allahabad. The learned counsel submitted that the evidence of a child witness must be carefully scrutinized before acceptance since a child can be easy prey for tutoring and the court must insist on corroboration from other evidence.

18. On a careful perusal of the deposition of this child witness, we have not found any reason why he would have lied. He was brought to the house by Shashi Tripathi (accused), who apparently took care of him and sent to school and gave him

food and residence. He had no grouse against her neither any ulterior motive in identifying the accused, who were not acquainted to him. There was no reason for the sole eye witness - Anil (PW-21) to implicate anybody falsely. Merely because he has been some time in the company of the police at the police station his testimony cannot be discarded as untrue. The incident occurred within the four walls of the house of the accused - Shashi Tripathi and the only witness was the boy - Anil (PW-21). His statement that the accused Chandra Prakash attacked the deceased is corroborated by the recovery of knife from Chandra Prakash. It must be remembered that the boy comes from a rural back ground and was 13 years of age when the incident occurred. His presence in the house is entirely natural and we have no reason to discard his testimony.

19. The learned counsel for the appellants forcefully attacked the conviction of the other accused viz. Mahesh, Chandra Prakash and Devendra Kumar, who admittedly were not known to the child witness Anil Kumar. It was submitted that the test identification parade were delayed and the identification of these accused by the witness in Court was not reliable. It is not possible for us to accept this contention. Mahesh and Chandra Prakash were arrested on 29.11.2003, their identification parade

was conducted on 13.12.2003 - (within a fortnight or so). The accused Devendra Kumar was arrested on 22.12.2003 and his identification parade was conducted on 26.12.2003- (within four days). There is no evidence on record to show that the child witness had an opportunity to see and study the features of the accused between their arrest and test identification parade to enable a tutored identification. In any case, the period between the arrest and the identification parade was not large enough to constitute inordinate delay. The learned counsel for the appellants relied upon the Judgment of this Court in **Budhsen and Anr. Vs. State of U.P.** (1970) 2 SCC 128 where this Court made the following observations:-

"7. Now, facts which establish the identity of an accused person are relevant under Section 9 of the Indian Evidence Act. As a general rule, the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form

of earlier identification proceeding. There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are of the essentially governed by Section 162, Criminal Procedure Code. It is for this reason that the identification parades in this case seem to have been held under the supervision of a Magistrate. Keeping in view the purpose of identification parades the Magistrates holding them are expected to take all possible precautions to eliminate any suspicion of unfairness and to reduce the chance of testimonial error. They must, therefore, take intelligent interest in the proceedings, bearing in mind two considerations: (i) that the life and liberty of an accused may depend on their vigilance and caution and (ii) that justice should be done in the identification. Those proceeding should not make it impossible for the identifiers who, after all, have, as a rule, only fleeting glimpses of the person they are supposed to identify. Generally speaking, the Magistrate must make a note of every objection raised by an accused at the time of identification and the steps taken by them to ensure fairness to the accused, so that the court which is to judge the value of the identification evidence may take them into consideration in the appreciation of that evidence. The power to identify,

it may be kept in view, varies according to the power of observation and memory of the person identifying and each case depends on its own facts, but there are two factors which seem to be of basic importance in the evaluation of identification. The persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before identification and secondly that no mistakes are made by them or the mistakes made are negligible. The identification to be of value should also be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The evidence as to identification deserves, therefore, to be subjected to a close and careful scrutiny by the Court.....”

The observations of this Court undoubtedly lay down the correct law and we have no reason to doubt them. We, however, do not see how the observations help the appellants. In the present case, the child witness has been found to be reliable. His presence is not doubted, since he resided with the family for whom he worked. He had no axe to grind against any of the accused. He became the unfortunate witness of a gruesome murder and fearlessly identified the accused in Court. In his deposition he specified the details of the part which the accused played with reasonable particularity. In such a situation, it is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witness in Court as to the identity of the accused who are strangers to them, in the

form of earlier identification proceeding, as observed by this Court in **Budhsen's** case (supra). This Court has not laid down the requirement in general that all identification parades must be under the supervision of a Magistrate as in **Budhsen's** case (supra). The learned counsel for the appellants also relied upon the Judgments of this Court in **Subash and Shiv Kumar Vs. State of U.P.** (1987) 3 SCC 331, and **Mohd. Abdul Hafeez Vs. State of Andhra Pradesh** AIR 1983 SC 367. The facts and circumstances of the cases are however different and it is not necessary to consider those cases in detail while dealing with the present case. Suffice it to say that those cases do not create any doubt as regards the conviction in this case.

20. Mr. P.C. Agrawala, learned senior counsel for the appellant Mahesh (accused no. 3), vehemently submitted that this accused ought not to have been convicted under Section 302 with the aid of Sections 34 and 120 (B) of IPC. In particular it was submitted that the role attributed to the accused was that he merely stood outside the house. He did not even act as a guard because when the witness Anil Kumar (PW-21) came to the house, he was not even stopped by the accused from entering the house. The learned counsel for Mahesh (accused no.3) relied on several decisions of this Court in **Suresh Sakharam Nangare** Vs.

State of Maharashtra (2012) 9 SCC 249, **Jai Bhagwan** Vs. **State of Haryana** AIR 1999 SC 1083 and **Ramashish Yadav** Vs. **State of Bihar** (1999) 8 SCC 555.

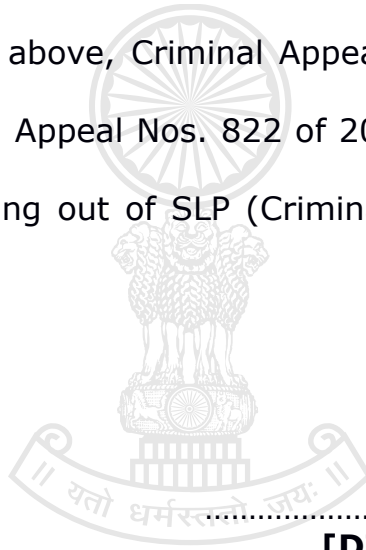
21. It is settled law that common intention and conspiracy are matters of inference and if while drawing an inference any benefit of doubt creeps in, it must go to the accused vide **Baliya** Vs. **State of M.P.** (2012) 9 SCC 696.

22. On a careful conspectus of the facts and the law, we are of the view that the prosecution has failed to prove the guilt of Mahesh beyond reasonable doubt. There is no evidence of his having played any part in the crime. He was merely seen by the witness as standing outside the house when the witness came home. Mahesh did not even act as a guard; he did not prevent Anil Kumar (PW-21) from entering the house. There is no evidence of the formation or sharing of any common intention with the other accused. There is no reference to a third person in the FIR; no evidence that he came with the other accused or left with them. No weapon was seized from him, nor was any property connected with the crime, seized. Having regard to the role attributed to him and the absence of incriminating factors

we find that it is not safe to convict Mahesh of the offence of murder with the aid of Sections 34 and 120(B).

23. We therefore, hold that the accused Mahesh (accused no. 3) in Criminal Appeal No. 867 of 2013 is innocent and the conviction against him is set aside. His bail bonds stand cancelled and sureties are discharged.

24. In view of the above, Criminal Appeal No. 867 of 2013 is allowed and Criminal Appeal Nos. 822 of 2012, 589 of 2014 and Criminal Appeal arising out of SLP (Criminal) No. 3737 of 2014 are dismissed.



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[DIPAK MISRA]

JUDGMENT.....].

[S.A. BOBDE]

NEW DELHI,
AUGUST 21, 2014