

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 815/2011

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Reserved on: 21st March, 2013
Decided on: 30th May, 2013

TAPAN KUMAR MAJHI Appellant
Through: Ms. Saahila Lamba, Adv.

versus

STATE Respondent
Through: Mr. Manoj Ohri, APP with SI
Satender Kumar, PS Karol Bagh.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellant challenges the judgment dated 21st January, 2011 convicting the Appellant for offence under Section 304 IPC and the order on sentence dated 22nd January, 2011 directing him to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 5000/- and in default of payment of fine to further undergo rigorous imprisonment for three months.

2. Learned counsel for the Appellant contends that the Appellant was in the business of jewellery making and the deceased was the nephew of the Appellant. The deceased was residing in a village of West Bengal with his father and was sent with the Appellant in the month of November to learn the job. The case of the prosecution at best is that since the deceased was not working properly, the Appellant used to give him beatings. There is no evidence that the injuries were caused to the deceased by the Appellant. The

case of the Appellant is that the deceased because of his naughty acts fell down from the stairs causing injuries which led to his death. The learned Trial Court convicted the Appellant merely on the ground that the defence taken by the Appellant was false and in view thereof he was guilty. It is contended that a false defence can at best be an additional link in the chain of circumstances and cannot be used as substantive evidence to convict an accused. Number of prosecution witnesses have been examined. No one has stated that the Appellant ever beat the child or that there used to be quarrel between the Appellant and the deceased. Even on the earlier night, the deceased was taken by the Appellant to PW3 the Chemist where also he had not stated anything against the Appellant. PW10 the father of the deceased had admitted in his cross-examination that after the incident the father of the Appellant and PW10 had gifted land admeasuring 100 sq.yds. to PW10. Thus, in order to grab the property PW10 implicated the Appellant. Despite the fact that his child had died, PW10 neither came for cremation nor made any complaint to the Police. His statement was recorded only after the Police went to his village to examine him. Admittedly, even as per PW2, the child was in constant touch with the father on telephone and the child never made any complaint that he was beaten by the Appellant. The relevant incriminating evidence has not been put to the Appellant and hence the same cannot be used against him. In view of the fact that the chain of circumstances is not complete, the Appellant is entitled to benefit of doubt.

3. Learned APP for the State on the other hand contends that as per the post-mortem report the deceased received as many as 65 injuries. Excessive injuries and the internal extravagation of blood resulted in hemorrhage and

shock causing the death. Pw14 Dr. Srinivasan has proved the post-mortem report Ex.PW14/A with regard to 65 injuries and he has also opined that the injuries were not due to fall. Further the weapon of offence i.e. sandasi (plier) recovered from the Appellant is an instrument used by the jewelers. As per PW14 the injuries on the deceased were possible by the said weapon. The false defence of the Appellant has been used as an additional link. There is sufficient circumstantial evidence against the Appellant to prove the offence beyond reasonable doubt. The silence of the deceased is also attributable to the fact that he came to Delhi only in November 2009 and he died in January, 2010 and thus could not have known the language. Even PW10, the father of the deceased knew only Bengali and thus he was examined before the Court with the aid of an interpreter. A perusal of the site plan shows that the injuries on the parts of the body as stated were not possible by fall. Hence the appeal be dismissed.

4. Heard learned counsel for the parties. On 5th January, 2010 at about 1.20 PM an information was received regarding the death of a man. On reaching the spot, the dead body of a boy aged 12-14 years was found. The Appellant who was present, identified the dead body to be that of his nephew Krishan Majhi, son of Hari Kishan Majhi. Since the body had multiple injuries on all parts, it was sent for post-mortem after taking photograph and visit of the crime team. As per the post-mortem report, there were 65 injuries on the body of the deceased and the cause of death was opined to be hemorrhage and shock from blunt force trauma to the various parts of the body. The injuries on the body of the deceased as per Ex.PW14/A the post-mortem report were:

“1. healed wound in an area of about 2cmx2cm (R) side of forehead over the (R) parital area, slightly elevated with a linear whitish colore bridge of fibrous tissue 1.8cm x 0.1cm, the allevation being caused by underlying fibrous tissue formation in the scalp layers. Impression : healed laceration of the scalp, duration : more than 2 weeks (14 days) old.

2. Healing wound 2cm x 2cm on the (L) side of forehead 1cm above the middle of the (L) eyebrow, there is a legion triangular shaped 0.6 cm x 0.7cm showing loss of layer of skin and reddish granulation tissue at the base, just below left there is a patch of 0.9cm x 0.8 cm with loss of superficial layers of skin, replaced with fibrous tissue hypo pigmentation Impression: healing abrasion, duration about 10-12 days.

3. Healed wound, present in the form of fibrous tissue, smooth and slightly hypo-pigmented present on the (R) temporal frontal region of scalp, 8.5 cm above and 3cm in front of (R) ear lobe 5.5cm above and 1cm behind lateral end of (R) eyebrow. Impression : healed split laceration;. (Haematoma of size of 5cm x 5cmx 0.3cm present in the underling scalp layer of the front temporal region. Duration about 2 weeks old.

4. Linear scratch abrasion 2cm x 0.2cm present on the (L) side of forehead 3cm above and 1.5 cm behind the lateral end of (L) eyebrow; during 5-7 days.

5. Scar squatting abrasion 0.3cm x 0.2cm present on the (L) side of bridge of nose 1cm below the glasella; duration 5-7 days old.

6. Reddish slashed abrasion, 02.cm. X 0.2cm present on the (L) ala of the nose . duration 2-5 days old with haemorrhage in the underlying soft tissue.

7. Erythmatous wound (reddish in colour) 0.5cm x 0.3 cm with loss of superficial layers of skin. Present on the (L) side of face on the (L) cheek(not readable) 2cm below the (L) eye. Impression : burn mark.

8. Healing wound 3cm x 2cm almost rectangular shaped present on the L side of face 1cm outer to the outer angle of (L) eye and just above the zygomatic arch loss of superficial layers of skin, well demarcated margin with a yellowish base. Impression healing abrasion duration about 10-12 days.

9. Healing wound 1.2 cm x 0.3 cm almost oval in shape situated 0.5cm below the outer lower corner of wound no. 8 with loss of superficial layers of skin well demarcated margins and a pale yellowish base of epithelialisation . impression- healing abrasion, duration 10-12 days.

10. Multiple healed linear scratch abrasion present in an area of 5cm x 5cm on the (L) cheek ranging in size 3cm x 0.2cm to 1cm x 0.3cm, present in the form of streaks of whitish fibrous tissue. duration about 12-14 days.

11. Healing wound 1cm x 0.5cm with sloping margins, loss of superficial layers of skin, reddish granulation tissue present at the base. Impression-healing scratch abrasion duration about 12-14 days. Situated on the left cheek 1cm above the angle of mandible.

12. Healing wound 6cm x 3.5cm present on the ® cheek of the face with loss of superficial layers of the skin, well defined margin sloping edges with epithelialization base having reddish brown granulation tissue, open part of the wound shows irregular patches of brownish whitish fibrous tissue, surrounding the wound there are 6 nearly oval shaped patches sized about 0.3cm x 0.2 cm of whitish fibrous tissue. Impression: Burn / scald injury duration about 10 days old. (some portion not readable)

13. Brownish Reddish abrasion 1cm x 0.7cm present on the middle part of (L) half of lower lip, duration about 3-5 days old.

14. Multiple hemorrhagic area about 0.3cm x 0.4 cm present on the lower lip. duration 1-4 days.

15. Healing wound, irregular oval shaped, 3cm x 1cm with wound defined margin (irregular), loss of superficial layers of skin, edges sloping, reddish brown granulation tissue present at the bone. Impression: Burn / Scald injury. Duration: about 10 days old. (situated on the chin area).

16. Multiple abrasion reddish brown in colour about the size of 0.2cm x 0.2cm present around the mouth area; duration 3-7 days old

17. Healing wound in an area of 3cm x 3cm on the (L) side front of neck just above the thyroid cartilage. There are 3 patches showing loss of superficial layers of skin, with reddish white fibrous tissue at the base, sloping edge. Impression: healing abrasion during – 10-12 days old.

18. Multiple healed linear scratch abrasion on the left lower jaw like ranging in size 0.5cm x 0.1cm, 1.5cm x 0.2 cm, (L) present in the form of fibrous tissue whitish in colour, duration about two weeks.

19. Bluish red contusion 2x2mm present in the (L) of neck present above the middle of L clavicle, Duration 1-3 days old.

20. Reddish brown Linear abrasion 1cm x 0.3cm present on the L side front of neck 1.5cm below the middle of Jaw line. Duration 1-3 days old.

21. Healing wound 1cmx1cm, loss of superficial layers of skin, reddish black tissue on either side of it there are linear abrasion about 1cm x 0.2cm with brownish red scalp on the front of parts of (R) shoulders. Impression – healing abrasion duration 7-12 days old.

22. Multiple healing wounds in an area of 5cm x 3 cm present on the top of R shoulders, as patches of whitish fibrous tissue Impression healing abrasion, duration about 14 days

23. Oval shaped wound 1.5 cm in diameter with distinct sharp marks and loss of superficial layers of skin reddish blue in colour. Impression – deep abrasion of scraping of skin on the back of R shoulder Duration 2-7 days old.

24. Multiple pinpoint reddish brownish abrasions in an area of 2cm x 2cm on the outer aspect of upper 1/3rd of (R) arm. Duration 5-10 days old. Impression – caused by sharp painted object

25. Bluish red contusion 16cm x 10cm on the outer aspect of the lower ½ of the (R) arm and elbow with swelling. Impression of blood in the underlying soft tissues and in the inside layers of the arm Duration 1-3 days.

26. Healing abrasions to 2cmx1cm and 1cm x 1cm in sizes, on the outer back (R) pale yellowish brown in colour covered with yellowish like material. Duration 10-14 days old.

27. Healing (abrasion) wounds 0.5cm x 0.6cm, and 1cmx0.5cm back of (R) elbow, yellowish. Duration about 2 weeks old. Impression healing abrasions.

28. Multiple linear scratch abrasions present over the back of (R) forearm , sizes ranging from 5cm x 0.5cm to 3cm x 0.3cm. directed obliquely brownish scale which can be easily separated showing fibrous tissue.

29. scabbed abrasion, reddish brown in colour, present on the back of R hand 3cm below the wrist joint, overlying the fifth metacarpal bone. Duration 3-7 days old.

30. Multiple reddish . Slashed abrasions ranging from 1cm x 0.5cm to 0.5cm x 0.3cm on the back of fingers of R hand.

Duration 3-7 days old. Figure no. 24 to 30 to be defence wounds.

31. Healing abrasion 1cm x 1 cm present on the point of L shoulder almost oval in shape, reddish yellow base, with a linear brownish abrasion 3cm x 0.2cm down and incised lying obliquely downward and inner and front part of it. duration 10 days old.

32. Scalp separating abrasion 1.5cm x 0.5cm on the point of upper 1/3rd of (L) arm. Duration 7-12 days old.

33. Multiple healed abrasion about 0.5cm x 0.3cm in size on the back (L) arm, showing whitish tissue duration more than 2 weeks.

34. Multiple slashed and slab separating abrasion present in an area of 5cm x 4 cm on the back of (L) elbow 4 in nature, brownish,. reddish slab present, one wound showing reddish yellow appethelialization at base reddish, brown duration 7-12 days.

35. Reddish brown scabbed abrasion present on the back of L forearm. 3Cm x 0.5 about 3 cm above the L wrist front almost horizontally placed duration 1-3 days. Injuries no. Sl. no. 33, 34 and 35 appear to be defence wounds.

36. Reddish brown scabbed abrasion present in are of 4cm x 0.8cm present on the outer part of middle 1/3rd of L forearm, duration 1-3 days. (directed obliquely slightly)

37. bluish red contusion 15cm x 10cm on the back and outer aspects of L arm upper ½. blood in the underlying soft tissue duration 1-3 days.

38. Multiple healing wound on the back of middle of R arm sized about 0.5cm x 0.6cm, showing reddish white fibrous tissue. duration about more than 2 weeks old.

39. Two healing wounds present on the lateral aspect of (R) side of chest situated 3cm below and outer to (R) nipple placed horizontally in the form of 2 lines of whitish fibrous tissue about 4cm in length 0.5cm apart and almost parallel to each other. Impression healed incised wound caused by sharp cutting weapon / object . Duration more than 2 weeks old.

40. Multiple pinpoint reddish brown scars separable easily with reddish white fibrous tissue, present in an area of 6 cm in length on the left lower front of abdomen 3cm outer to umbliques. Impression caused by sharp pointed object, duration 10-14 days.

41. Infected scars separated abrasion 2cm x 2cm on the front of left lower abdomen in the inguynal region 2cm below the anterior superior illiac spine reddish yellow appethelialization covered with yellowish pin like material, duration 10-14 days old.

42. Linear scratch abrasion 4cm x 0.2 cm .. horizontally on the lower front of abdomen just below the umbliques. Duration 7-10 days old.

43. Abrasion reddish brown 5cm x 4 cm on the lateral aspect of R hip 2cm below the illacrast duration 3-7 days old.

44. Swelling with bluish red contusion 15cm x 15 cm outer (R) knee joint.

45. Abrasion 6.5cm x 2cm present on the inner part of middle 1/3rd of (R) thigh, 11cm above the knee joint.

46. Abrasion 0.5cm x 0.5 cm with loss of superficial layer of skin, reddish white tissue on the front of R thigh 3.5cm below injury no. 45.

47. Multiple healing / healed wound present all over the front of R leg 1cm x 1 cm to 0.5cm x 0.5 cm white fibrous tissue present. Duration more than 2 weeks.

48. Infected wound nearly circular in shape 1cm in diameter on the front of R leg middle 1/3rd, edges sloping, blue reddish yellow granulation tissue present covered with yellowish tissue like material.

49. Multiple healed/ healing wound present all over front of L leg size ranging from 1cmx1cm to 0.5cm x 0.5 cm white fibrous tissue present duration 72 weeks.

50. Infected wound 5cmx3cm on the front of R ankle appethelialization, reddish yellow granulation tissue at the base edge sloping duration about 2 weeks.

51. Multiple scabbed abrasion, reddish brown present on the dorsum of L foot size ranging from 1cm x 0.5cm to 0.5cm x 0.2 cm. Duration 3-10 days.

52. Infected wound with loss of superficial layer of skin, sloping edge, yellosh appethelialization covered with yellowish pigmentation present on the back of middle 1/3rd of R arm duration 5-14 days.

53. Multiple reddish brown slashed abrasion, 2cm x 2cm to 1cm x 0.5cm present. on the left knee region.

54. Bluish red contusion at the back of both thigh and legs with swelling

55. patterned reddish brown in a 5cm x 2cm on the back R thigh middle 1/3rd shape as depicted below duration 1-5 days old.

56. Reddish brown abrasion 2 x 3 cm on the back of R side of chest 2cm to the R of scapula at the level of lower angle of scapula duration 3-7 days.

57. Multiple pin point reddish brown slashed easily separated with reddish white underlying fibrous tissue present over the back of chest.

58. A healed wound 3cm x 4cm on the back of abdomen in the mid line overlying the spines process first lumber vertebra reddish white present duration 2-3 weeks.

59. Multiple scab separated abrasion with reddish white base size about 0.3cm x 0.2 cm to 1cm x 0.5 cm present on the back of abdomen,. buttocks and sacral region. Duration 10-15 days.

60. A healed wound present in the form of a patch of whitish hypopigmented skin 2cm x 2cm on the inner back of lower 1/3rd of (R) forearm duration more than 2 weeks, Impression healed abrasion. There is a deformity of the underlying bone and shaft of ulna, there is a fracture of the distal 1/3rd of the shaft of ulna, the distal fractured segment displaced. Centered and down ward with respect of the fractured segment. There is presence of soft callus formation around the fracture site. duration about 2-3 weeks old.

61. Bony deformity of the left forearm lower 1/3rd there is a fracture of the distal 1/3rd of shaft of ulna, the distal fractured segment of bone edge displaced downward and backward with respect to the fractured segment. The fracture edge of bone are smooth and rounded and covered with a layer of cartilage. There is presence of soft callous around the fracture site. Duration about 2-3 weeks old

62. Multiple slashed / abrasion, reddish present in an area of 7 x 4cm on the back of lower 1/2 of L forearm ; ranging in size about 0.3cm x 0.2cm to 0.4cm x 0.5cm. Duration 7-12 days old.

63. Healed abrasion in the form of whitish fibrous tissue 2cm x 1cm on the back of L forearm upper 1/3rd duration more than 2 weeks old.

64. Brownish red slashed abrasion 2cm x 1cm on the back of R ankle. Duration 5-10 days old.

65. Multiple healed wound in the form of hypopigmented whitish fibrous tissue size ranging from 1cm x 0.5cm to 0.5cm x 0.3cm on the inner and outer aspects of both ankles. Duration more than 2 weeks.

Multiple healed wounds in the form of streaks of fibrous size 4cm x 0.3cm to 2cm x 0.2 cm present all over the back of both legs. Duration more than 2 weeks old.”

5. A perusal of the injuries and the duration shows that there was a continuous course of maltreatment to the deceased and he was repeatedly beaten. Further the opinion of the Doctor was that the numerous injuries that were found present were at various stages of healing suggesting repeated/ repetitive non accidental trauma. The injuries on the forearm were suggestive of blunt force impact while protecting the head from the blows. Due to these numerous injuries there was extensive loss of blood as there was bleeding into soft tissues and muscles caused by blunt force trauma into the various parts of the body. The loss of blood was sufficient to cause shock and cardiovascular arrest and thus the Doctor opined that the injuries were collectively sufficient to cause death in the ordinary course of nature.

6. Prosecution examined number of witnesses who were the neighbours and persons working with the Appellant. PW1 Nantujana, who was staying on the second floor of the same building stated that the deceased nephew of the Appellant was working as a helper at the shop of the Appellant. He

further stated that 10 days prior to the incident when he visited the shop of the Appellant, he noticed a black spot on his face and when he asked as to what happened, the Appellant replied that some hot oil fell on the face of the deceased. He also stated that on 4th January, 2010 at 11.30 PM, the Appellant called him and he found his nephew, who was ill, lying on the bed and not in a position to speak. The deceased made gestures towards his chest. The Appellant stated to PW1 that the deceased was taken to a Doctor in the morning and on the way he fell down on the stairs and received injuries on the chest. PW1 covered a blanket on the deceased and went to sleep. On the next morning i.e. 5th January, 2010, he found the deceased still sleeping and when he tried to wake him up, he was not responding. A doctor was called, who declared him dead. On the perusal of the statement of PW1, it is apparent that though he had asked the deceased the reason, however every time the reasons were explained by the Appellant and not the deceased, who only spoke in gestures.

7. PW2 Ajay Pratap Singh was working as a helper in another shop in the same premises. He stated that on the second floor of the said premises one Tapan Kumar Majhi was working as a maker of jewellery and Krishan Kumar Majhi his nephew was also working with him as a helper. In his cross-examination he stated that he did not hear cries of the deceased from the second floor of the premises or saw the Appellant harassing or beating the deceased. PW3 Chander Prakash Sharma is running a chemist shop in the neighbourhood. He stated that on 4th January, 2010 at about 8.30 PM when he was present at his shop the Appellant came along with his nephew. The Appellant told that the child had fallen from the staircase. PW3 found

that there was swelling in both the legs of the child and he was wearing half pant. PW3 suggested that the deceased should be taken to the hospital, on which the Appellant stated that he would take the child to the hospital in the morning and that he should give him some medicines. PW3 gave him paracetamol and Diclosodium 50 mg. When PW3 asked the deceased about the injuries he did not say anything and only pointed towards his legs. It is thus apparent that a day prior when the Appellant took the deceased to the chemist shop he was in a serious condition and responded only by gestures. PW4 has also stated on the same lines as stated by PW1. Though number of witnesses have been examined, however none was found present when the actual beating was done. From the testimony of these witnesses it is clear that the deceased was in the custody of the Appellant, who was always present with him and despite injuries being noticed by everybody, no action was taken till the end by the Appellant to provide medical treatment to the deceased.

8. Further PW10 in his statement before the Court through an interpreter stated that his son Krishan Majhi was 14 years old and had studied up to 6th standard. The Appellant had brought his son Krishan Majhi to Delhi on the 14th day of Kartik last year i.e. in the month of November in 2009 for the purpose of site seeing. The Appellant had not brought his son to Delhi for learning the art of jewellery making. He stated that his son used to talk on telephone with him very frequently after every two-three days. It was stated that a day before the death he had spoken to his son and his son stated that the Appellant was torturing him a little. PW10 pacified him and stated that he would be coming to Delhi and would take him back. Thus, from the

evidence on record it has been proved conclusively that the deceased was in the constant care and custody of the Appellant. At the time when the injuries were caused, the Appellant was the only person in whose custody the deceased was living. From the injuries it is evident that there was a continuous course of harassment, and injuries of different dimensions and duration were found on the body of the deceased. The prosecution has discharged its burden by showing that the deceased was working and living with the Appellant and was thus in the custody of the Appellant when injuries were inflicted on him. Thereafter, the onus shifted to the Appellant under Section 106 Evidence Act to prove that the injuries were not caused by him as the facts were especially in the knowledge of the deceased.

9. In *Prabhu Dayal & Ors. Vs. State of Maharashtra (1993) 3 SCC 573* their Lordships held the circumstance of a woman dying in wee hours when nobody else except the family had access was a strong incriminating circumstance. It is thus evident that the onus is on the accused to discharge as the deceased was in his custody and there was no access to anyone else. The Appellant has not discharged the said onus in the present case. Each witness has stated that the deceased was with the Appellant throughout and whenever asked about injuries, the explanation of fall was given by the Appellant.

10. The contention of the learned counsel for the Appellant that the explanation in the statement under Section 313 Cr.P.C. has been used to convict the Appellant is wholly incorrect. The false explanation has only been used as an additional link in the chain of circumstances because the defence of the Appellant was that the deceased was a naughty boy, used to

occasionally hurt himself due to his naughty acts and due to which he fell from the staircase on 3rd January, 2010. As per the medical evidence on record, some of the injuries were as back as 2 weeks old and as per PW14 the injuries could not have been caused by fall from the staircase.

11. In view of the overwhelming evidence against the Appellant, I find no reason to interfere with the impugned judgment of conviction and order on sentence. While moulding the gold and silver into the designs of his choice, the Appellant forgot that a child cannot be put in a cast and moulded like a metal. Appeal is dismissed. Consequently, the application for bail is also dismissed.

(MUKTA GUPTA)

MAY 30, 2013

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