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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1129 of 1999**

1. Radheshyam S/o Shiv Acharya Pandey, aged about 42 years
 2. Virendra Kumar Tiwari S/o Raja Ram Tiwari, aged about 32 years
- Both resident of Kapa Lodhipara Police Station Civil Line Raipur,
District Raipur

---- Appellants

Versus

State of Madhya Pradesh through District Magistrate, Raipur

---- Respondent

Criminal Appeal No. 1397 of 1999

Santu S/o Jitu Yadav, aged about 25 years, Servant/Labourer, Resident
of Kapa Lodhipara, P.S. Civil Lines, Raipur, M.P.

---- Appellant

Versus

State of Madhya Pradesh

---- Respondent

For Appellants	:	Smt. Indira Tripathi and Shri Rakesh Pandey, Advocates for the respective Appellants
For Respondent/State	:	Ms. Smita Ghai, Panel Lawyer for the State/Respondent

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V JUDGEMENT**Per P. Sam Koshy, Judge :****18/11/2015**

1. These two Criminal Appeals arise out of a judgment of conviction dated 15.04.1999 under Section 302 IPC for life imprisonment, passed by the Special Judge, Raipur in Sessions Trial No. 346 of 1991.
2. The prosecution story in brief is that on 08.07.1991 at around 7 a.m. complainant Kala Bai (PW-12) was working in the dairy of Appellant Radheshyam, had a quarrel with another worker i.e. Appellant Santu Yadav of

the same dairy. As per the prosecution, after the quarrel, complainant Kala Bai went home and informed her husband Ganpat (the Deceased) and daughter Ganesiya Bai (PW-14). Thereafter, the complainant along with her husband and daughter reached the dairy where it is said that the accused persons assaulted the complainant and her husband Ganpat with fists, blows, kicks, lathi and iron rod. In the process, husband of the complainant received grievous injuries leading to his death. The complainant and her daughter are said to have taken the body of the Deceased immediately to the hospital where he was declared to have been brought dead. Accordingly, Dehati Nalishi was lodged at around 7.30 a.m. on the same day based upon which the Police registered an FIR in Crime No.580/91 for the offence under Section 302/34 IPC. The body of the Deceased was sent for postmortem which was conducted on the same day by Dr. D. C. Jain (PW-6) vide Ex.P-6 and in the course of Postmortem the doctor found following injuries on the body of the Deceased:

- i) Contusion 4"x1" right forearm mid portion
- ii) Contusion 4"x1" left forearm mid part
- iii) Contusion 3"x2" left fronto parietal region
- iv) Contusion 2"x1" Mid frontal region scalp
- v) Contusion 6"x1" chest mid

3. In addition to the above injuries, it was found that the 3rd, 4th, 5th and 6th left ribs of the Deceased had fractured on account of which the heart got ruptured causing the death. The doctor opined that the cause of death was syncope due to rupture of heart and the nature of death was homicidal.

4. After investigation, the matter was put to trial before the Special Judge, Raipur. The prosecution examined 15 witnesses and there was no witness on behalf of the defence. In all seven persons were prosecuted out of which four persons namely Rakesh Tiwari, Munna @ Rajesh, Raju @ Sunil and Lalita W/o Appellant Santu were acquitted, however, the present Appellants Radheshyam and Virendra Kumar Tiwari in Criminal Appeal no. 1129/99 and

Appellant Santu in Criminal Appeal no.1397/99 were convicted for the offence under section 302 IPC and sentenced to imprisonment for life.

5. Counsel for the Appellants submitted that the finding of the trial Court is totally perverse and contrary to the evidence on record. It was contended that none of the prosecution witnesses have supported the case of the prosecution independently establishing the charges levelled against them yet the Trial Court has found the charges to have been proved leading to perversity. It was contended that the Deceased in fact had not died because of the alleged assault made by the Appellants rather it is a case where the Deceased himself having fallen down received injuries on his ribs leading to his death which stands established from the evidence which has come before the Court particularly the evidence of PW-12 the widow and PW-14 the daughter of the Deceased and the evidence of PW-6, the Doctor who supports the fact that the injuries to the ribs leading to death could also happen by fall. It was argued that the Appellants never had any enmity with the Deceased and that the entire case of the prosecution even if taken into consideration would establish that there was no such occasion which had arisen by which the Appellants or for that matter all the accused persons would get together to assault the Deceased with an intention of eliminating him. The alleged prosecution story itself would reveal that there was only a trivial issue giving rise to an altercation between PW-12 the widow of the Deceased and one of the Appellants namely Santu. It was contended that if the prosecution story is to be accepted, even then it would clearly establish that there was no occasion for the Appellants Radheshyam and Virendra Tiwari to get involved in the fight as there was no reason whatsoever for them to assault the Deceased particularly when the Appellant Radheshyam was in fact the employer of PW-12 for the last many years and that there was no previous enmity, grudge or for that matter any issue on which the Appellants intended to take revenge upon the Deceased. Rather it is a case

where Appellants Radheshyam and Virendra had gone to the Police Station for reporting the matter and therefore they have been falsely implicated. It was further argued that the Court below under the same set of facts and evidence has acquitted the other similarly placed accused persons against whom also there were similar and identical allegations and charges, however, the Court below has wrongly found the Appellants to be guilty of having committed the offence under Section 302 IPC. It was also argued that except for the injuries on the chest whereby the 3rd, 4th, 5th & 6th left ribs of the Deceased got fractured piercing the left lung and heart, there were no major external injuries on the entire body of the Deceased which also creates doubt as to whether the Appellants, in fact, had assaulted the Deceased with an intention to kill. Under the given facts and circumstances of the case, counsel for the Appellants submitted that both the Appeals deserve to be allowed and the judgment of conviction deserves to be set aside acquitting the Appellants from the charges levelled against them.

6. Counsel for the Appellants further argued on the point that the statements of the prosecution witnesses recorded by the Police Authorities during investigation should not be accepted as a substantive piece of evidence and it is the Court statements which have to be given more weightage. In this context, counsel for the Appellants relied upon AIR 1960 SC 490 (State of Delhi v. Shri Ram Lohia), AIR 1976 SC 294 (Sat Paul v. Delhi Administration) and (2010) 6 SCC 736 (Baij Nath Sah v. State of Bihar). It was also argued that the prosecution has not been able to establish as to who inflicted what injury on the deceased and therefore it cannot be said that all the Appellants would be liable to be convicted for the offence under Section 302 IPC. On the question of individual overtact on the part of the accused persons not being established, counsel for the Appellants relied upon the decisions of the Supreme Court passed in (2009) 10 SCC 773 (Pandurang Chandrakant Mhatre and others v. State of Maharashtra), (2003) 3 SCC 37

(Bhimrao alias Ramesh Pandhari Bhade and others v. State of Maharashtra) and 2011 (2) C.G.L.J. 470 (Sonau & others Vs. State of M.P. (Now C.G.).

7. Per contra, counsel for the State taking us through the Judgment under appeal as well as the evidence on record tried to emphasize the fact that though the alleged eye-witnesses have turned hostile and there being no independent witness to support the case of the prosecution, yet from the departmental witnesses particularly that of the Investigating Officer, the doctor and also from the evidence of the prime witnesses though who have turned hostile it has been clearly established that immediately after the incident, the widow of the Deceased had gone to the Police Station and lodged the Dehati Nalishi. Thereafter, the 161 Cr.P.C. statement of the witnesses were recorded on the same day wherein the statement made in the original complaint stands affirmed. State counsel referring to the evidence of the prosecution witnesses particularly the alleged eye-witnesses who have acknowledged of having gone to the Police Station immediately after the incident and lodging a report submitted that the Court below has rightly found that the charges levelled against the Appellants stand proved and established and do not warrant any interference. As a consequence, the State counsel prayed for rejection of the Appeals.

8. Having considered the rival contentions put forth by the counsel for the Appellants as well as the State and on perusal of the records certain admitted facts of the case emerge which are:

- (a) the incident occurred on 08.07.1991 at around 7 a.m.,
- (b) the incident occurred because of a trivial dispute specifically between the widow of the Deceased PW-12 and the Appellant Santu and his wife on the cleaning and throwing of cow dung,
- (c) the place of incident was the diary farm of Appellant Radheshyam,
- (d) the widow of the Deceased and the Appellant Santu admittedly were employees working under Appellant Radheshyam and
- (e) the death of the Deceased occurred because of rupture of left lung and heart caused on account of fracture of 3rd, 4th, 5th & 6th left ribs of the Deceased.

9. Derharam (PW-1) is the Patwari of the village where the incident took place. He had visited the place of occurrence and prepared Spot Map Exhibit P-1. This witness has deposed before the Court that Exhibit P-1 was prepared by him in the presence of PW-14 Ganesiya Bai, the daughter of the Deceased. PW-6, Dr. D. C. Jain had conducted the Postmortem and submitted the report exhibit P-6. During the course of postmortem he found the Deceased to have received six injuries on the body as has been mentioned in paragraph-2 of this judgment. In addition, he had also found the 3rd, 4th, 5th and 6th left ribs fractured and left lung as well as heart ruptured. He has specifically deposed that the death was because of the rupture of left lung and heart. He has also accepted of having given reply to the query put forth by the Police during investigation in respect of the seized lathi and rod accepting the fact that the injuries sustained by the Deceased could be caused by the said lathi and rod. This witness, however, to a question during cross examination has stated that the injuries sustained could also occur because of falling on hard rocky and stony surface with force. PW-7, Kunwariya Bai who is one of the daughters of the Deceased is a witness to the Panchnama of the body of the Deceased. Except for accepting her signature put on the Panchnama PW-7 has not supported the case of the prosecution in any manner in establishing the fact that the Deceased i.e. her father had died because of the assault made by the Appellants. This witness was declared hostile and even during cross-examination much could not be extracted from her. PW-8, Durga Prasad is a witness to the seizure proceeding conducted by the Police. This witness has not supported the case of the prosecution and has been declared hostile. PW-9 Ganesh, the son of the Deceased also has not supported the case of the prosecution and has totally denied in respect of the earlier statement which he had given before the Police during investigation. However, all these witnesses have accepted of signing the Statements and the Panchnama as the case is.

10. The two prime eye witnesses PW-12 and PW-14 namely Smt. Kalabai, widow of the Deceased and Smt. Ganeshia Daughter of the Deceased have also turned hostile. In their court statement they have stated that they have not seen any fight at the place of incident and that the Deceased suddenly fell down. Both these witnesses have, however, admitted to have given the police statement Exhibit P-14 and P-16 respectively. In their evidence they have accepted the fact that on the date of incident PW-12 Kalabai had a fight with the Appellant Santu and subsequently PW-12 had come home and told this to her husband who immediately rushed to the dairy where PW-12 use to work along with Appellant Santu between whom there was a fight. This fact by itself establishes and proves the place of incident, the cause of fight and the date of incident. Both these witnesses have also proved the fact that PW-14, the daughter of the Deceased had also followed the Deceased to the place of incident on the said date.

11. PW-15 is the I.O. who in his evidence has categorically stated that he has recorded the Merg intimation, the report thereafter and also recorded the statements of the material witnesses on the same day exactly as stated before him and that he has not added, modified or subtracted anything in the statements of the prosecution witnesses. The defence has also not been able to extract anything from the cross examination of PW-15 by which his statement could be doubted.

12. Thus, with evidence of the prime prosecution witnesses PW-12 and PW-14, who in their evidence have admitted about the date of incident, the place of incident, the death of the Deceased at the place of incident and going to the Police Station immediately for lodging the report, these facts stand proved by the prosecution. Further, the Merg intimation Exhibit P-16 lodged by PW-12 and proved by PW-15 immediately after the incident stands

proved. The report of the Merg Intimation also stands fully substantiated and supported in the 161 Cr.P.C. statements of the prosecution witnesses recorded on the same day.

13. The entire evidence of the prime witnesses PW-12 & PW-14 does not disclose any material whereby the defence has been able to bring out a reason as to why the Appellants or for that matter the accused persons have been implicated in the present case. PW-15, the Investigating Officer in his evidence has categorically stated that he has not added, modified and amended the version of the prosecution witnesses and has correctly recorded the statements as per the version narrated by the respective witnesses. The testimony of the Investigating Officer under no circumstances and for no good reasons could be disbelieved and discarded merely because PW-12, PW-14 and some other prosecution witnesses have turned hostile and have not supported the case of the prosecution. That would not in the circumstances lead to the natural conclusion that the Appellants were innocent. In the cross-examination of the prosecution witnesses also there is no material to show that the Police Authorities were having some sort of enmity or vengeance with the Appellants for which they have been falsely implicated.

14. The Supreme Court by now in a catena of decisions have laid down the proposition that in a given situation even though the prosecution witnesses have been declared hostile yet the same by itself would not mean that the Appellants are innocent. It has also been enunciated by the Supreme Court that the Courts must carefully analyse the evidence of the hostile witnesses and see whether the part of the evidence which is consistent with the prosecution case is acceptable or not and on scrutinizing the evidence if the Courts find that there is sufficient material in the evidence of the hostile witnesses corroborating and supporting the case of the prosecution, it would be sufficient to bring home the guilt of the accused even if the witnesses have been declared hostile. The Court cannot shut its eyes to the realities like the

offence in the instant case and would endeavour to evaluate the evidence on record. It is the duty of the Courts to scan the evidence tested on the anvil human conduct and reach to a conclusion whether the evidence brought on record even on the witnesses turning hostile would be sufficient to bring home the commission of the crime. The fact that the witnesses have resiled from their earlier statements made in the course of investigation puts the Court on guard and cautious the Court against acceptance of such evidence without satisfactory corroboration. Reference can be made to (1997) 6 SCC 514 (State of Gujarat v. Anirudhsing and another), (2004) 13 SCC 134 (Ram Swaroop and others v. State of Rajasthan), (2007) 13 SCC 31 (Ramappa Halappa Pujar and others v. State of Karnataka) and (2006) 9 SCC 247 (Surender Singh v. State of Haryana).

15. Thus, from the total facts and circumstances of the case and on evaluation of the entire records it is clearly established that PW-12, Kala Bai immediately after the incident had rushed to the Police Station for lodging a report which was also promptly recorded and on the very same day statements of the most of the witnesses were recorded. Though the date of incident is 08.07.1991 yet the statements of the prosecution witnesses were recorded in the Court after about seven years and as such, there was sufficient time in between for the defence to win over the prosecution witnesses. Taking into consideration the contents of the Merg intimation, the FIR, the statement of the eye witnesses PW-12 and PW-14 to the extent of an altercation taking place between PW-12 and Appellant Santu, the Deceased and PW-14 immediately rushing to the place of incident and thereafter death of the Deceased followed by prompt lodging of the FIR, the incident is proved and established from the evidence of PW-12 and PW-14. Further, from the evidence of PW-15, the Investigating Officer, the case of the prosecution stands proved to the extent that the defence has failed to extract any material from the evidence of PW-15 by which his trustworthiness and credibility

should be doubted. Thus, the finding of the Court below in holding that the prosecution has been able to prove its case does not warrant any interference as there is no infirmity or misappreciation of evidence nor can it be said that the finding of the Court below is perverse and contrary to the evidence on record.

16. Coming to the merits of the case if we take into consideration the entire version of the prosecution as it is, it reflects that the entire incident occurred on a trivial issue of cleaning of cow dung in the dairy of Appellant Radheshyam that too between Appellant Santu and PW-12. In the process, Appellant Santu put a rope around the neck of PW-12 and tried to pull her but she somehow releasing herself went home and informed the incident to her husband i.e. the Deceased Ganpat and daughter Ganesia PW-14 who in turn rushed to the spot and in the course of heated altercation the Appellants are said to have assaulted the Deceased with lathi, iron rod, fists and kicks. When we look into the evidence of PW-6, the Doctor, it reflects that he has specifically in his cross-examination has said that the injuries sustained by the deceased could have been caused also by falling on a rocky and stony surface with a great force. This aspect is totally missing from the statements of the eye-witnesses who after having gone hostile only say to have seen the deceased falling. However, simply falling down would not cause such grievous injuries of fracture of 3rd, 4th, 5th and 6th left ribs perforating the left lung and heart. The record clearly shows the fact that whatever external injuries the Deceased had sustained were only contusions at different part of his body but the serious injuries sustained by him were the internal injuries that of the fracture of 3rd, 4th, 5th and 6th left ribs. From the record it would also reveal that the death of the Deceased was not because of fracture of ribs but because of piercing of the fractured ribs into lung as well as heart of the Deceased as is evident from the postmortem report. From the factual details that could be gathered from the records it would appear that on the issue of

cleaning of cow dung from the dairy there was initially a heated exchange of words between Appellant Santu and PW-12 and when the latter intimated this to her husband and PW-14, they also went to the place of incident and again there appears to have been an altercation between the two sides and in the process, the Appellants got together and assaulted the Deceased. Though the prosecution itself has tried to establish the fact that the accused persons were armed with iron rod and lathi yet there was no major external injuries on the Deceased whereas the injuries by which the Deceased died were because of piercing of the fractured ribs into lung and heart of the Deceased.

17. So far as the three judgments i.e. AIR 1960 SC 490, AIR 1976 SC 294 and (2010) 6 SCC 736 cited by the counsel for the Appellants in respect of the issue of evidenciary value of the statements of the witnesses recorded during the Police Investigation are concerned, the same would not be applicable in the present case in its factual background for the reason that those judgments pertain to the statements of the witnesses recorded under Section 164 Cr.P.C. whereas in the instant case the statements of the witnesses have been recorded under Section 161 Cr.P.C. In the instant case, the Merg Intimation, FIR and the statements of the relevant witnesses were recorded on the date of incident itself and that there is no contradiction or any sort of variation in the statements so recorded when compared to the statements made by the witnesses during the course of trial after about a period of seven years. Thus, these judgments cited by the counsel for the Appellants are easily distinguishable.

18. As regards the three judgments i.e. (2009) 10 SCC 773, (2003) 3 SCC 37 and 2011 (2) C.G.L.J. 470 cited by the counsel for the Appellants in respect of individual overtact not being established, the ratio laid down by the said judgments also would not be applicable in the instant case as those were the cases where the charge and conviction against the accused persons were

under Section 149 IPC but in the instant case the Appellants have already been acquitted of the charge under Section 149 IPC and have been convicted only for the offence under Section 302 IPC. Even otherwise, on the merit also, if the FIR and the 161 CrPC statement of the prosecution witnesses are taken into consideration, it give the details of the individual overtact of the respective accused persons and there is specific allegations of assault made against each of the accused Appellants. The facts of the present case is quite different from the three judgments relied upon by the counsel for the Appellants and the same would not come to the rescue of the Appellants in any manner.

19. The evidence which has come on record does not reflect that the Appellants at any point of time had a premeditation for murdering the Deceased. In fact, the Deceased was not at all present at the place of incident and he had joined latter on when he was informed by his wife PW-12 about the fight that she had with Appellant Santu. From the record it also reveals that the assault made by the accused persons was not with an intention of causing damage to the lung and heart but incidentally in the course of assault, the ribs got fractured and perforated the left lung and heart resulting in death. Thus, it can be said that the death of the Deceased was not because of the assault made by the Appellants but it was the piercing of the fractured ribs into the lung and heart leading to excessive bleeding that caused death which cannot be directly attributed to the assault made by the Appellants. The case can be said to be one which would fall within the ambit of fourth exception to the definition of murder under Section 300 IPC as there was no premeditation of murdering the Deceased on the part of the Appellants and that the act committed by the Appellants was with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death bringing the case against the Appellants under Section 304 Part-II IPC.

20. The Supreme Court in the case of **Khuman Singh v. State of Madhya Pradesh** reported in **(2005) 9 SCC 714** in somewhat similar circumstances where there was no premeditation on the part of the Appellant and the quarrel arose from a trivial issue and further that though there were fractures on the body yet the death was caused because of the rib bone puncturing the liver had converted the conviction of the Appellant therein under Section 302 to one that under Section 304 Part-II of IPC. Similar view has also been taken by the Division Bench of this Court in Criminal Appeal No. 682 of 2000 decided on 12.01.2015 relying upon the same judgment of the Supreme Court in the case of Khuman Singh (Supra).

21. From the given facts and circumstances of the case and also following the judgments cited herein above we are of the opinion that the conviction of the Appellants in the instant case under Section 302 IPC is not proper and justified and in stead, they are found guilty of the offence under Section 304 Part-II of IPC. Accordingly, the Appellants are held guilty for the offence under Section 304 Part II/34 of IPC and are convicted under the said Sections.

22. So far as the sentence part of the Appellants is concerned, if we take into consideration the entire factual matrix, what is evident is the fact that at the time of incident Appellants Radheshyam and Virendra Kumar Tiwari in Criminal Appeal No.1129/99 were aged about 42 and 32 years respectively and by now almost 25 years have passed and they must have reached the age of about 67 and 57 years respectively. True it is that the Appellants have remained in custody only for a few months and the punishment under Section 304 Part II is extendable to a period of ten years. But, considering the age of the Appellants as well as the fact that the incident had occurred almost a quarter of century ago and the entire incident occurred because of a trivial issue and also keeping in mind the fact that the Appellants were not premeditated for committing the said offence coupled with the fact that from

1991 onwards the Appellants have undergone much trauma and agony on litigation firstly before the Trial Court which culminated in their conviction and later on leading a life of uncertainty pending the Criminal Appeals before this Court for almost last 16 years which itself is a sort of punishment, this Court is of the opinion that the imprisonment for a period of five years would be sufficient sentence looking into the overall factual matrix of the case. Accordingly, the Appellants are sentenced with rigorous imprisonment for a period of five years.

23. Resultantly, both the Appeals i.e. Criminal Appeal No.1129 of 1999 and Criminal Appeal No. 1397 of 1999 are allowed in part. The Appellants are acquitted of the charge under Section 302 of IPC but they are convicted under Section 304 Part II/34 of IPC and sentenced to undergo rigorous imprisonment for five years. The Appellants are reported to be on bail, their bail bonds stand cancelled and they are directed to be taken into custody forthwith to serve out the remaining part of the sentence.

24. Both the Appeals are disposed with the above modification of conviction and sentence.

Sd/-

(Navin Sinha)

CHIEF JUSTICE

Sd/-

(P. Sam Koshy)

JUDGE