

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No. 1523 of 1998

Bhanwar Sai S/o Dholaram Kanwar, age 40 years, Occupation Agriculture, Resident of Sitapur, District Surguja, Present Address - Kumhadhav, Chandagarh, P.S. Patthalgaon, District Raigarh.

---- Appellant

Versus

State of Madhya Pradesh (Now Chhattisgarh) through Station House Officer, Police Station Patthalgaon, District Raigarh.

---- Respondent

For Appellant	:	Shri Suresh Tandan, Advocate.
For Respondent/State	:	Shri B. Gopa Kumar, Deputy Advocate General.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board

Per Navin Sinha, Chief Justice

10/12/2015

1. The Appellant stands convicted under Section 302 IPC to life imprisonment by judgment dated 18.2.1998 in Sessions Trial No. 157 of 1996 ordered by the Sessions Judge, Raigarh.

2. Merg (Exhibit P/10) was lodged by PW-4, Sorko Ram, father of the deceased Fulmati Bai on 7.6.1996 against the Appellant who was the husband of the deceased stating that the previous evening at about 7:30 pm the deceased was sitting in the open area of the house. The Appellant came and slapped her two-three times and after she fell down assaulted her on the head with a 'Tangi' leading to death. Formal FIR (Exhibit P-11) was registered on the basis of the same. Inquest Report was marked Exhibit P-7. The postmortem (Exhibit P-1) was conducted by Dr. P. Sudhar (PW-1) who opined that death was due to head injury affecting brain, homicidal in nature. There was also fracture of the shaft of the left

humorous bone. On the confession of the Appellant, the 'Tangi' alleged to have been used in the assault was recovered from a pond and sent for Forensic Examination which confirmed presence of blood on it.

3. Learned Counsel for the Appellant submitted that PW-4, Sorko Ram named other co-villagers in the FIR who accompanied him to lodge the Merg but none of them except PW-5, Sukhsai have been examined and who also turned hostile. Referring to the spot map (Exhibit P-9), it was submitted that there were several houses adjacent to that of the witness and their occupants were also named, but none of them have been examined as witnesses. The alleged sole eyewitness (PW-4) Sorko Ram was related to the deceased and was therefore an interested witness. He cannot be therefore considered reliable for conviction on a solitary evidence. Another witness named by PW-4, Master was also not examined. No explanation has been furnished by the prosecution why independent witnesses were not examined. PW-2, Tankadhar has not stated that the memorandum of the Appellant (Exhibit P-4) was recorded in his presence but has only stated having signed it. The possibility of a forced confession cannot be ruled out. The alleged recovery of 'Tangi' (Exhibit P-5) from a pond having 15-16 inches of water with the blood stains intact is highly improbable and suspicious material. In this context non-examination of the Investigating Officer becomes crucial. The Investigating Officer has not been examined and no reason has been furnished for his non-examination. It was next submitted that the Appellant never intended to cause death of the deceased evident from the single assault made by him. If he intended to cause death, he would have surely repeated the assault. The solitary assault was not by the sharp edge of the 'Tangi' as there was no incised wound. The assault was by the blunt side of the 'Tangi' causing lacerated wound which clearly is suggestive of the fact that the Appellant only intended to teach a lesson to the deceased because of her conduct. PW-4, Sorko Ram has acknowledged that it was dark at the time of assault and that he was unable to see in the dark. The possibility that someone else assaulted the deceased and he named the Appellant on mere suspicion

cannot be ruled out and the benefit of doubt must be given to the Appellant. Alternatively, the conviction under Section 302 IPC was not justified and ought to have been at best under Section 304 Part II IPC.

4. Learned Counsel for the State submitted that PW-4, Sorko Ram is a completely truthful and reliable eyewitness. No reason has been assigned by the Appellant why his own father-in-law was deposing against him falsely. The Appellant had led no evidence of enmity between him and the father-in-law. The fact that a single assault was made cannot be a conclusive proof of no intention to cause death. Even a single assault with great intensity if sufficient to cause death will invite conviction under Section 302 IPC. On his confession, the blood stained 'Tangi' was recovered. If the occurrence had taken place inside the house, naturally there will be no eyewitness to the assault except for inmates of the house. PW-4 cannot be discredited only because he was the father of the deceased. The attack was by a deadly weapon on a vital part of the body. No prejudice has been caused to the Appellant by non examination of the Investigation Officer as the confession and recovery lose much of their significance in view of the convincing, reliable and ocular evidence which remains unimpeached.

5. We have considered the submissions on behalf of the parties and perused the evidence on record also.

6. The deceased was wife of the Appellant married approximately fifteen to sixteen years ago. For the last two years, the Appellant and the deceased were living with PW-4, Sorko Ram in his house. It is culled out from the evidence of PW-4 that the Appellant suspected the deceased of having an extra-marital affair with one Choyo Ram and because of which there would often be fights between them. The fateful day was in the summer month of June. At the time of assault, darkness may not have completely set. Even in a dark night there is never pitch darkness and some light from the stars and the moon are always available. The assault did not take place inside the darkness of a room but in an open passage in the house.

There is no evidence with regard to the poor vision of the witness. Even if PW-4 may have had eye sight problems, the possibility of his identifying and recognizing the Appellant from his voice or silhouette as they were living together cannot be ruled out. It is not the case of the Appellant that there was any other inmates in the house apart from him, witness and the deceased. Initially the Appellant assaulted the deceased by slapping her. The possibility of commotion and utterances by the Appellant cannot be ruled out. The witness, PW-4 has stated that the deceased was his only child. If the occurrence has taken place inside the house of the witness, naturally, there would be no independent witness except the inmates of the house. According to the witness, after the Appellant assaulted, he shouted and the adjacent house owners came. Apparently, the adjacent house owners were not witness to the assault. PW-5, Sukhsai who has gone hostile has nonetheless acknowledged that when the witness shouted, he came and saw the deceased lying dead on the ground. This part of his evidence as a hostile witness is nonetheless admissible with regard to the proximity of time when PW-4 shouted and PW-5 arrived at the place of occurrence. PW-4 has also deposed that on the fateful day, the deceased had gone to the market and returned along with Choyo Ram which may have further infuriated the Appellant into committing the assault.

7. Judicial notice has time and again been taken of the fact that in such assaults inside the house, not only will there be no independent witness, the neighbours are also unwilling to get involved in criminal trial for various reasons including their own safety and the desire to stay away from the Court system. Merely because the adjacent house owners have not been examined will not shake the credibility of the evidence of PW-4 who was none other than the father of the deceased and the most interested to ensure that the real assailant of his daughter is brought to book and more so when he was an eyewitness to the assault. The Appellant has not been able to shake the credibility, much less create any doubts with regard to the presence or the evidence of PW-4 as the former being the assailant. Merely

because he was the father of the deceased cannot by itself discredit his evidence and make it unacceptable by putting him in the category of an interested witness.

8. The motive for the Appellant existed because of his suspicion with regard to the fidelity of his wife. The fact that the Investigating Officer has not been examined is considered inconsequential as no prejudice has been demonstrated by the Appellant in that regard.

9. In view of the strong ocular evidence of PW-4 which has remained unimpeached, the fact that the 'Tangi' was recovered from a pond and as was urged presence of blood stains would be doubtful to suspect planting of evidence would not make any difference with regard to the conviction of the Appellant. If ocular evidence is reliable, forensic evidence even if doubtful will not take away the credibility of the ocular evidence.

10. Under Section 313 CrPC, the Appellant has not taken any defence whatsoever and led no evidence in support of his defence or any reason for false implication. But, it is equally true that the Appellant and the deceased were married for about fifteen sixteen years. The prosecution has led no evidence in support of the Appellant suspecting the infidelity of his wife except for a bald suggestion given to PW-4 in that regard. If he suspected the infidelity of his wife and they were living together in the house of PW-4 for the last two years, the Appellant had more than sufficient opportunity for making any murderous assault on the deceased. Additionally, intention is to be gathered from all surrounding circumstances and no direct evidence with regard to the same will be available. If the Appellant intended to kill the deceased, nothing prevented him from using the sharp cutting edge of the 'Tangi' to assault the deceased on the head by causing an incised wound to ensure chances of survival were minimal if not repeating the assault. On the contrary the slapping of the deceased by him initially followed by assault made with the blunt edge of 'Tangi' causing lacerated wound measuring 3cmX1/2cmX1/2cm suggests that the Appellant certainly intended to vent his ire against the deceased

possibly for suspecting her infidelity but did not intend to kill her. The single assault unfortunately affected brain material leading to death. The single assault on the head with no repetition did not even cause any fracture of the skull. The only other injury was fracture of left humerus bone which may have occasioned when the deceased fell down because of the Appellant slapping her.

11. In the nature of evidence led, we find it difficult to uphold that the conviction of the Appellant under Section 302 IPC for intentionally having caused death to classify it as culpable homicide amounting to murder. Considering the entirety of the facts, the relationship between the Appellant and the deceased, long years that the marriage had stood the test of time, the Appellant suspected infidelity of his wife, the making of only one assault and that too not with the sharp edge of the 'Tangi', we are satisfied to convert the conviction to one under Section 304 Part I IPC. The Appellant is stated to have undergone approximately eight years and three months of custody already before being enlarged on bail. In the facts and circumstances of the case, we consider the period already undergone as sufficient punishment.

12. The appeal is dismissed with the aforesaid modification of the conviction and sentence.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE