

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 1038 of 2012

- Ekeshwar Sharma, S/o late Krishna Prasad Sharma, aged about 40 years, R/o village Ghuma, P.S. Dhamdha, District – Durg (C.G.)

---- Appellant

Versus

- State of Chhattisgarh, Through Police Station – Simga, District Raipur (now Baloda Bazar-Bhatapara) (C.G.)

---- Respondent

For Appellant	:	Mr. Anand Prakash Sharma, Advocate.
For Respondent/State	:	Mr. Ajit Singh, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

CAV JUDGMENT

Delivered on 29-09-2015

Per I.S. Uboweja, J.

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 31.01.2012 passed by the Additional Sessions Judge, Bhatapara, District Raipur (Now Baloda Bazar - Bhatapara) in Sessions Trial No.30/2010, whereby and whereunder, the trial Court, after holding the appellant guilty for causing homicidal death amounting to murder of deceased - Durga Tiwari and Sushma Sharma and for attempt to murder of Ashish Tiwari, convicted the appellant under Sections 302 (two times) and 307 of the IPC and sentenced him to undergo imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine to undergo additional S.I. for one month (two times) and to undergo R.I. for three years & to pay fine of Rs.500/-, in default of payment of fine to undergo additional S.I. for one month respectively.

2. Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted & sentenced the appellant as aforementioned and thereby committed illegality.
3. As per case of prosecution, appellant / accused is the husband of deceased Sushma Sharma and son-in-law of deceased Durga Tiwari. Injured Ashish Tiwari (PW-2) is the grandson of deceased Durga Tiwari and son of report lodger Jyoti Tiwari (PW-1). In the intervening night of 02.05.2010 and 03.05.2010 at about 1.00 am, when Sushma Sharma, her mother Durga Tiwari and Ashish Tiwari (PW-2) were sleeping in the house of Durga Tiwari, at that time accused/appellant came there and caused fatal injuries to his wife Sushma and his mother-in-law Durga Tiwari and also caused hurt to Ashish Tiwari by weapon like long knife and fled away from the spot. The entire incident was witnessed by Ashish, who went to his mother Jyoti Tiwari (PW-1) and narrated the incident. She went to the place of incident and saw that her mother-in-law, Durga Tiwari and sister-in-law, Sushma Sharma were in a pool of blood in dead condition. She called Manoj Kumar, Inderman and Pardeshi, thereafter, she went to police station, Simga and lodged First Information Report against the accused/appellant, which was registered by S.I. Lallan Singh (PW-15) under Section 302 and 307 of the IPC.
4. Investigating Officer reached to the place of occurrence and after summoning the witnesses vide Exs.P-9 & P-10, inquests over the

dead bodies of deceased Durga Tiwari and Sushma Sharma were prepared vide Exs. P-7 and P-8 respectively. Dead bodies were sent for autopsy to Government Hospital, Simga, where Dr. P.C. Chandan (PW-13) has conducted autopsy on the dead bodies of deceased Durga Tiwari and Sushma Sharma vide Exs.P-23 and P-24 respectively and found the following injuries on the dead body of Durga Tiwari;

- (i) Incised wound of 4.1" x 0.3" x 0.2" below right ear upto bone deep, border of wound is regular;
- (ii) Incised wound of 3.5" x 4" x 0.5" below left ear, border of wound is regular;
- (iii) Right hand index finger and middle finger fractured clotted with blood.

Cause of death was hypovolumic shock due to incised wound over left side neck. Death was homicidal in nature.

On dead body of Sushma Sharma :

- (i) Incised wound of 3.5" x 2.5" x 3" below right ear lateral neck, regular border, carotid artery was cut, bone of neck was visible, blood clot was found near the wound.

Cause of death was hypovolumic shock due to incised wound right cut through carotid vessels. Death was homicidal in nature.

5. During the course of investigation, Merg Intimations were recorded vide Exs.P-1 & P-2. Spot map was prepared vide Ex.P-4. Patwari prepared spot map vide Ex.P-5. Two bloodstained bedsheets, one bloodstained pillow cover from the bed of deceased Durga Tiwari and one bloodstained axe were seized vide Ex.P-11. One bloodstained bed-sheet, one bloodstained pillow from the bed of deceased Sushma Sharma and also two letters were seized vide Ex.P-12. One bloodstained *kathari*, one bloodstained pillow cover from the bed of Ashish Tiwari and one mobile were seized vide Ex.P-13. Bloodstained patches of pavement and plain patches of pavement were seized from the spot vide Ex.P-14. Bloodstained *baniyan* and one T-shirt worn by injured Ashish Tiwari at the time of incident were seized from the spot vide Ex.P-15. Sealed sari and blouse of deceased Durga Tiwari and Sushma Sharma were seized vide Ex.P-27. Seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur vide Ex.P-29. Injured Ashish Tiwari was also examined by Dr. P.C. Chandan (PW-13) vide Ex.P-25 who found the following injuries :
- (i) Incised wound below of right ear neck 1.5" x 1"x 0.5" clothe;
 - (ii) Incised wound below first incised wound of 1"x 1" x 0.5", clotted blood.
6. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'the Code'). During

the course of investigation accused/appellant had taken some poison, he was admitted in serious condition at Chandulal Chandrakar Hospital, Durg for treatment by his relatives and on the request of Station House Officer, Simga vide Ex.P-22 Naib Tehsildar and Executive Magistrate, Durg B.K. Verma (PW-12) recorded dying declaration of the accused/appellant vide Ex.P-21, thereafter accused survived and was arrested by police on 11.05.2010 vide Ex.P-30.

7. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Simga, who in turn committed the case to the Court of Sessions, from where learned Additional Sessions Judge received the case on transfer for trial.
8. In order to bring home the charges of the accused/appellant, the prosecution examined as many as sixteen witnesses. Accused was examined under Section 313 of the Code, in which he denied the circumstances appearing against him and pleaded innocence and false implication in crime in question. He has not presented any defence witness.
9. After providing opportunity of hearing to the parties, learned Additional Sessions Judge has convicted and sentenced the appellant as aforementioned.
10. We have heard learned counsel for both the parties and perused the judgment impugned including the record of court below.

11. Mr. Anand Prakash Sharma, learned counsel appearing for the appellant vehemently argued that conviction of the appellant is substantially based on the evidence of Ashish Tiwari (PW-2), alleged dying declaration (Articles A-1 & A-2) of the accused/appellant, evidence of Naib Tehsildar and Executive Magistrate, Durg B.K. Verma (PW-12) and Dr.Rahul Ranjan (PW-12), but their evidence does not inspire confidence and is not trustworthy. Alleged dying declaration cannot be legally used against the appellant. Injured Ashish Tiwari is a close relative of the deceased, therefore, being an interested witness his testimony cannot be believed. Ashish Tiwari (PW-2) is a child witness, who could be easily tutored.
12. On the other hand, learned State counsel opposing the appeal submits that evidence of aforesaid witnesses are sufficient for drawing an inference that the appellant has caused homicidal death amounting to murder of deceased Durga Tiwari and Sushma Sharma and also attempted to commit murder of Ashish Tiwari. There is enough incriminating evidence to connect the appellant with the crime in question and therefore, by convicting and sentencing the appellant as aforementioned the trial Court has not committed any illegality.
13. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.

14. In the present case, homicidal death of deceased Durga Tiwari and Sushma Sharma as a result of fatal injuries found over their bodies and injuries found over the body of injured Ashish Tiwari have not been substantially disputed on behalf of the appellant. It is also established by the evidence Ashish Tiwari (PW-2), Jyoti Tiwari (PW-1), Inderman (PW-3), Manoj Kumar (PW-4), Pardeshiram (PW-5), Radhelal (PW-6), Pushpa (PW-8), Merg Intimations (Exs. P-1 & P-2), FIR (Ex.P-3), Dr. P.L. Chandan (PW-13), autopsy report (Exs.P-23 & P-24), MLC report (Ex.P-25) that the death of deceased Durga Tiwari and Sushma Sharma were homicidal in nature.
15. In the present case it is not disputed that eyewitness Ashish Tiwari (PW-2), who is an injured witness, is a relative of the deceased. Version of eye-witness cannot be discarded by the Court merely on the ground that such eyewitness appears to be a relative or a friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statement. But where the presence of the eye witness is proved to be natural and his statement is nothing but truthful, disclosure of actual facts leading to the occurrence itself, it will not be permissible for the Court to discard the statement of

such related or friendly witness". (**See Dayal Singh & Ors. Vs. State of Uttar Pradesh, AIR 2012 SC 3046**).

16. Relationship is not a factor to affect credibility of a witness. 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. 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. 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 (see- Harbans Kaur and another -Vs- State of Haryana, 2005 AIR SCW 2074; Namdeo -Vs- State of Maharashtra, 2007 AIR SCW 1835; Sonelal -Vs- State of M.P., 2008 AIR SCW 7988; and Dharnidhar -Vs- State of Uttar Pradesh and Others & other connected appeals, (2010) 7 SCC 759).
17. Therefore, the evidence of eyewitness Ashish Tiwari (PW-2) cannot be thrown away, simply on account of the fact that he is

the relative of the deceased. However, his evidence is to be scrutinized with great care and caution to find out whether it is intrinsically reliable, inherently probable and wholly trustworthy and if found so, conviction can be based even on the statement of such single injured eyewitness.

18. Ashish Tiwari (PW-2) is the star witness of the prosecution, he is an injured eyewitness, he has seen the whole incident, he is also near and dear relative of the deceased and also the appellant. He is a child witness and also a sole eyewitness to the incident, therefore, it is necessary to scrutinize his statement very carefully, not being oblivious of the fact that this witness is a close relative of both the parties.
19. As per submission of counsel appearing for the appellant, Ashish Tiwari (PW-2) is a child witness who could easily be tutored, but the evidence of a child witness cannot be outright rejected on such a ground if it is found to be reliable. As held by the Apex Court in the case of **Panchhi and others vs. State of UP, reported in (1998) 7 SCC 177**, it is not the law that if witness is a child, his evidence should be rejected even if it is found reliable though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring. In the instant case Ashish Tiwari (PW-2) was not a small child, but at the relevant time was a boy of twelve

years studying in 7th class and had sufficient maturity of understanding the things.

20. Ashish Tiwari (PW-2), aged about twelve years at the time of incident, had stated in his examination-in-chief that on the date of incident he was sleeping with his grand-mother deceased Durga Tiwari and aunt deceased Sushma Sharma. At about 1.00 a.m., accused/appellant came inside the house and told that whoever spoiled the life of his son and daughter, he would not spare them. Accused, holding knife and axe, firstly assaulted his aunt, Sushma Sharma over her neck and, thereafter, also assaulted his grand-mother Durga Tiwari over her neck by knife. Then, accused came near his bed and gave blow by axe near his ear. Accused fled from the spot. He tried his level best to awaken the deceased. In the morning, he went to his mother Jyoti Tiwari (PW-1) and narrated the incident, who informed the villagers, went to police station, Simga and reported the incident. He has been cross-examined by the defence at length, but he remained firm in his statement, nothing material could be brought out based on which either his testimony may be discarded or it may be said that he was falsely implicating the appellant in the said incident, his testimony is creditable and trustworthy. In this case sole eye-witness of the incident is Ashish Tiwari (PW-2) whose evidence is found to be cogent and credible and he does not appear to be a tutored witness. His evidence clearly indicates that deceased

Durga Tiwari and Sushma Sharma were murdered by the appellant and Ashish Tiwari (PW-2) was also attempted to murder by the appellant in the house of his grand-mother.

21. Jyoti Tiwari (PW-1), who is mother of injured eyewitness Ashish Tiwari (PW-2), has stated that her son Ashish was sleeping in the house of his grand-mother Durga Tiwari where her sister-in-law Sushma Sharma, wife of accused was also living at the time of incident. On the date of incident at about 5.30 a.m., her son Ashish came to her in injured condition with injury over neck near below the ear, in a pool of blood and stated that accused/appellant came to the house of grand-mother and assaulted his grand-mother and aunt by axe. He further stated that accused had also assaulted her son by axe. She reported the incident at police station, Simga vide FIR (Ex.P-3), Merg Intimations (Exs. P-1 & P-2). She was declared hostile to some extent for not supporting the prosecution. In her cross-examination, she remained intact about hearing and reporting the incident to police.
22. Inderman (PW-3), Manoj Kumar (PW-4) and Pardeshi Ram (PW-5), Radhelal (PW-6) and Pushpa (PW-8) are the witnesses of inquest, they have stated that police was present on the spot and they have seen fatal injuries over the body of deceased Durga Tiwari and Sushma Sharma. They have also accepted signature on inquest Exs. P-7 & P-8. Inderman (PW-3) and Manoj

Kumar (PW-4) are also witnesses of seizure which was seized from spot by the police. Above mentioned witnesses have also stated that axe, clothes, letter and mobile were seized from the spot and seizure memos Ex.P-11 to P-15 were prepared in their presence. They have also admitted their signatures on those documents.

23. Investigating Officer Lallan Singh (PW-15) has also supported the evidence of Inderman (PW-3), Manoj Kumar (PW-4) and Pardeshi Ram (PW-5) by his evidence, therefore, by their evidence documents (Exs. P-11 to P-15) are clearly proved.
24. Vikash Sharma (PW-7) is the witness of seizure (Ex.P-19), who has stated that police has not seized any article from the appellant, but he has admitted his signature on Ex.P-19, which shows that this witness is intentionally not supporting the case of prosecution.
25. Mukesh Shukla (PW-9), is the Patwari who has prepared spot map (Ex.P-5) and has proved it by his evidence.
26. Murlidhar (PW-10) is the witness of Articles A-1 & A-2, but he has not supported the case of prosecution.
27. Naib Tehsildar and Executive Magistrate B.K. Verma (PW-12) who is the witness of document (Ex.P-21), has stated that after receiving of request letter (Ex.P-22) he rushed to Chandulal Memorial Hospital and recorded dying declaration of the appellant before Dr. Rahul Ranjan (PW-11). This evidence is fully

supported by Dr. Rahul Ranjan (PW-11). These witnesses were cross-examined at length, but they remained intact.

28. Court opinion is clear that statement given by the accused/appellant before the Naib Tehsildar B.K. Verma (PW-12) in written form and before Dr. Rahul Ranjan (PW-11) in oral form, may be treated as extra judicial confession, but that cannot be treated and used as dying declaration, because that person is alive who has given the dying declaration (Ex.P-21), therefore, it cannot be considered under Section 32 of the Evidence Act. Naib Tehsildar B.K. Verma (PW-12) and Dr. Rahul Ranjan (PW-11) have clearly proved by their statements that accused/appellant had admitted that he has killed his wife, deceased Sushila Sharma and his mother-in-law, deceased Durga Tiwari, which is also corroborated by the evidence of Ashish Tiwari (PW-2).
29. Investigating Officer, Lallan Singh (PW-15) has proved his investigation regarding the lodging of merg (Exs.P-1 & P-2) and FIR (Ex.P-3), inquest (Exs.P-7 & P-8), spot map (Ex.P-4) and seizure memos (Exs. P-11 to P-15 and P-19).
30. Ashish Tiwari (PW-2) has stated that he was assaulted by accused by axe. He sustained injuries and was examined by Dr. P.L. Chandan (PW-13), who stated that he has found one cut injury of 1.5" x 1" x 0.5" below the right ear and one another injury of 1" x 1" x 5" below that injury. According to him all the injuries were simple in nature, he has proved his examination report

(Ex.P-25). After examination of axe, which was recovered from the spot, Dr. P.L. Chandan (PW-13) has confirmed that the injuries found over the body of deceased Durga Tiwari and Sushma Sharma and injured Ashish Tiwari might be caused by that axe. His statement is also corroborated by the injuries found over the bodies of those persons and the injuries might be caused by the axe which was seized from the spot.

31. To constitute an offence under Section 307 of the IPC two ingredients of the offence must be proved :-

(a) an intention of or knowledge relating to commission of murder; and

(b) the doing of an act towards it, for the purpose of Section 307 of IPC what is the material or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. Prosecution witness Ashish Tiwari (PW-2) has clearly stated that accused/appellant had stated before killing his grand-mother Durga Tiwari and aunt Sushma Sharma that those person who would spoil life of his son and daughter, he would not leave them, thereafter he killed both ladies and also attacked over the neck of this witness, that is a vital part, luckily he survived and

received only minor injury, but his act clearly falls under Section 307 of the IPC.

32. Considering all the facts and circumstances of the case and on minute scrutiny of the entire evidence, we are of the view that learned Additional Sessions Judge, Bhatapara was fully justified in resting conviction of the appellant on the basis of evidence of Ashish Tiwari (PW-2) duly supported and corroborated by the evidence of extra judicial confession, medical evidence and other circumstantial evidence.
33. For the foregoing reasons, we do not find any substance in the appeal. Accordingly, the appeal being devoid of merit is liable to be and is hereby dismissed.

(Pritinker Diwaker)
JUDGE

(I.S. Uboweja)
JUDGE