

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.912/2009

Bangalu, s/o Shri Thibaru (wrongly mentioned as 'Thilaru' in order impugned), aged about 45 years, Caste-Muriya, Occupation-Agriculturist, R/o village Ghatsargipal, P.S. Parpa, Tahsil Jagdalpur, District Bastar (C.G.)

APPELLANT
(In Jail)

Vs

State of Chhattisgarh, through Police Station Frazerpur, District Bastar (C.G.)

RESPONDENT

&

Criminal Appeal No.278/2010

Jhitru, son of Bhursu, aged 50 years, Caste-Muriya, Occupation-Agriculturist, R/o village Ghatsargipal, P.S. Parpa, Tahsil Jagdalpur, District Bastar (C.G.)

APPELLANT
(In Jail)

Vs

State of Chhattisgarh, through Police Station Frazerpur, District Bastar (C.G.)

RESPONDENT

For the appellants:	Mr. Avinash K Mishra & Mr. Neelkanth Malviya, Advocates.
For the respondent:	Mr. Ashish Shukla, Govt. Advocate.

DB: Hon'ble Mr. Justice Pritinker Diwaker
Hon'ble Mr. Justice I.S. Uboweja

Judgment on Board

06.07.2015

Per P. Diwaker, J.

1. As these criminal appeals arise out of the common judgment dated 03.12.2009 passed by the 1st Additional Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.43/2009, they are being disposed of by this common judgment.
2. Appellants have been convicted under Sections 302/34 & 323/34 of the Indian Penal Code (for short "the IPC") and sentenced to undergo R.I. for life & fine of Rs.500/-, in default to undergo additional R.I. for 06 months and R.I. for 01 year respectively.

3. As per the prosecution case, on 08.01.2009 at about 10.05 p.m. FIR (Ex.P-1) was lodged by Bodki Bai (PW-1) alleging in it that on the fateful day at about 6.00 to 6.30 p.m. she was returning to her house after participating in Goverdhan pooja, on the way she met accused/appellant Bangalu who was carrying her grandson in his lap. She offered some eatable to said child which accused/appellant Bangalu objected and assaulted her by wooden stick. Her son Kailash (since deceased) intervened by saying asto why he is beating her mother on which accused/appellant Bangalu started abusing filthily and took out knife from his attire and caused injury on the neck of Kailash. The incident was witnessed by Ramchand, Sukhram, Pilaram, Raghu & Laxmi. While the deceased was being taken to the hospital, on the way he succumbed to the injury. Based on the FIR, Merg was recorded vide Ex.P-20. The Investigating Officer after summoning the witnesses vide Ex.P-2, prepared inquest over the body of deceased vide Ex.P-3. Spot map was prepared vide Ex.P-4. Post-mortem on the body of the deceased was conducted on 09.01.2009 vide Ex.P-12 by Dr. Shyam Sunder Tekam (PW-4) who noticed one incised wound on the left side of neck of the deceased and according to him, cause of death was shock & coma due to excessive haemorrhage and the death was homicidal in nature. Statement of Bodki Bai (PW-1) under Section 161 of Cr.P.C. was recorded on 09.10.2009 and statements of Bodki Bai (PW-1), Laxmi Bai (PW-2) & Ramchand (PW-3) under Section 164 of Cr.P.C. were recorded on 02.03.2009 wherein Bodki Bai (PW-1) & Laxmi Bai (PW-2) have stated that it is accused/appellant Jhitru who had caused injury on the neck of deceased by knife, whereas Ramchand (PW-3) has stated that he was informed by Bodki Bai (PW-1) that it is accused/appellant

Jhitru who had caused injury on the neck of deceased.

4. After completion of investigation, charge sheet was filed against the accused/appellants and charges were framed against them under Sections 302/34 & 323/34 of the IPC.
5. So as to hold the accused/appellants guilty, the prosecution has examined 08 witnesses. Statements of the accused/appellants were recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case and pleaded innocence & false implication. They have also examined two witnesses namely Mahendra Yadav (DW-1) & Aarti (DW-2) in their defence.
6. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellants as mentioned in Para-2 of this judgment.
7. Mr. Mishra, learned counsel for accused/appellant Bangalu submits as under:
 - (i) that all the important witnesses examined by the prosecution, except the official witnesses, were not aware with Hindi language and the documents have been recorded in Hindi language by taking help of some persons who were present there.
 - (ii) that, even Head Constable Sudharshan Dubey (PW-8), recorder of FIR, was not well-versed with Halbi language and it appears that while recording FIR he committed mistake and had shown accused/appellant Bangalu as assailant, whereas in other documents including statements of prosecution witness recorded under Section 161 & 164 of Cr.P.C. it

has come that it is accused/appellant Jhitru who was the assailant and accused/appellant Bangalu was only present on the spot.

(iii) that, FIR cannot be read in isolation and this Court has to consider statements of witnesses recorded under Sections 161 & 164 of Cr.P.C. from which it is apparent that the assailant was accused/appellant Jhitru and not accused/appellant Bangalu.

(iv) that, even if the entire prosecution case is taken as it is, at best accused/appellant Bangalu can be convicted under Section 323/34 of the IPC for causing injury to Bodki Bai (PW-1).

(v) that, accused/appellant Bangalu is in jail for the last more than five years & five months and thus he has already served maximum sentence provided under Section 323 of the IPC.

8. Mr. Malviya, learned counsel for accused/appellant Jhitru submits as under:-

(i) that, in the FIR no role whatsoever has been attributed to this accused and it is accused/appellant Bangalu who had committed murder of the deceased.

(ii) that, in the merge intimation also accused/appellant Bangalu has been shown as assailant and not accused/appellant Jhitru. Likewise, in the spot map (Ex.P-3), which was recorded on 09.01.2009, name of the assailant has been shown as 'Bangalu' and not 'Jhitru'.

(iii) that, even if the entire prosecution case is take as it is, at best accused/appellant Jhitru is liable to be convicted under Section 304 Part-I of the IPC because he had no intention to commit murder of the deceased and the incident had taken place all of a sudden and it is alleged that in the process of quarrel, accused/appellant Jhitru took out knife and caused single injury on the neck of the deceased.

9. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellants is strictly in accordance with law. He further submits that role of both the appellants have been stated by the prosecution witnesses and there is no illegality or infirmity in the judgment impugned warranting interference by this Court. He further submits that as the main witnesses were not conversant with Hindi language and were speaking Halbi and while recording their statements, in particular FIR lodged by Bodki Bai (PW-1), assailant has been shown as 'Bangalu' in place of 'Jhitru' but if the statements of Bodki Bai (PW-1) recorded under Sections 161 & 164 of Cr.P.C. are seen, it is apparent that it is accused/appellant Jhitru who was the main assailant, whereas accused/appellant Bangalu had caused injury to Bodki Bai (PW-1).
10. Heard learned counsel for the parties and perused the material available on record.
11. Bodki Bai (PW-1) has stated in her Court statement that accused/appellant Jhitru is her uncle-in-law, whereas accused/appellant Bangalu is her brother-in-law. She has stated that on the date of incident while she was returning to her house after performing Goverdhan pooja, on the way she met with accused/appellant Jhitru, who was carrying his grandson in his lap, she offered some eatables to his grandson which was objected by Jhitru and he assaulted on her head by stick. She has further stated that her son Kailash, who was also present there, asked accused/appellant Jhitru a to why he is beating his mother whereupon accused/appellant Bangalu caught hold her son and accused/appellant Jhitru took out knife and caused injury on the neck of her son. She started shouting and on hearing her cries, other villagers namely Raghu,

Pilaram & Laxmi came there. The deceased was taken to the Maharani Hospital where he died. She has further stated that thereafter she had lodged FIR (Ex.P-1) and when the Court had shown her FIR, she has clarified that in the FIR she had mentioned name of accused Jhitru as the assailant. In the cross-examination also she has reiterated that while lodging FIR, she had shown accused/appellant Jhitru as assailant and if the same is not recorded then she could not tell reason. She has admitted the fact that at an earlier occasion on the report of accused/appellant Bangalu, a criminal case was registered against deceased Kailash but she has denied the fact that deceased Kailash was in the habit of quarrelling with the villagers.

12. Laxmi (PW-2) has stated that upon hearing cries of Bodki Bai (PW-1), when she came on the spot, she saw the deceased in injured condition. The incident had taken place opposite to the house of accused/appellant Bangalu and she saw accused/appellant Jhitru running away from the place of occurrence. Accused/appellant Bangalu had also left for his house. While improving in the Court, she has stated that deceased Kailash had informed her that it is accused/appellants who had caused injury to him. In the cross-examination she has admitted that she had informed the police that the deceased had informed names of the assailants, however, if the same is not recorded in her police statement (Ex.D-1) then she could not tell reason.
13. Ramchand (PW-3) has stated that upon hearing cries, he reached to the place of occurrence and saw the deceased lying in injured condition and that he was bleeding. He has stated that it is the deceased who informed him that accused/appellant Bangalu caught hold him and accused/appellant Jhitru had caused knife injury to him. However, in the

cross-examination he has stated that he has informed the police that the entire incident was narrated to him by injured Kailash, however, if the same is not recorded in his police statement (Ex.D-2) then he could not tell reason.

14. Dr. Shyam Sunder Tekam (PW-4) conducted post-mortem on the body of the deceased vide Ex.P-12 and noticed following injury:-

- Rigor mortis was present in both upper & lower limbs.
- Eyes were semi open. Mouth closed.
- Incised punctured wound on left side of neck having breadth of 1"x0.5" & depth of 2".

As per opinion of the doctor, cause of death was shock & coma and the death was homicidal in nature.

15. Sukhram (PW-5), who is the witness of memorandum (Ex.P-6) & seizure (Ex.P-7 & P-11), has turned hostile. Pilaram (PW-6) reached to the place of occurrence after hearing cries and he has stated that he was informed about the incident by Bodki Bai (PW-1). Devendra Dubey (PW-7) is the Investigating Officer and has duly supported the prosecution case. This witness has also recorded case diary statement of Bodki Bai (PW-1) on 09.01.2009. He has stated that while recording case diary statement of Bodki Bai (PW-1), she had informed him that while lodging FIR, on account of nervousness, she could not disclose name of Jhitru as the assailant.

16. Sudarshan Dubey (PW-8), Head Constable of Police Station Parpa who recorded FIR (Ex.P-1) & Merg (Ex.P-20), has stated that Bodki Bai (PW-1) all alone came to the police station for lodging report and at that time she was a bit perturbed. She was speaking Halbi language and as he was not well-versed with Halbi, a local language, he recorded FIR

with the help of Translator, but this fact has not been mentioned in the FIR. He has further stated that after recording FIR, he made roznamcha sanha and merg intimation (Ex.P-20) was recorded.

17. True it is that in the FIR (Ex.P-1) & Merg (Ex.P-20) it has been recorded that it is accused/appellant Bangalu who had caused injury to the deceased but from the statements of Bodki Bai (PW-1) recorded under Section 161 & 164 of Cr.P.C., it is very clear that name of assailant has been mentioned by her as accused/appellant Jhitru and accused/appellant Bangalu is alleged to have been present on the spot. From the evidence available on record it is also apparent that the person who recorded FIR (Ex.P-1) has admitted the fact that as he is not well-versed with Halbi language, therefore, he recorded FIR with the help of Translator. Even the Court statements of the witnesses were recorded with the help of official translator and in the Court statement while showing accused/ appellant Jhitru as assailant, Bodki Bai (PW-1) has categorically stated that while lodging FIR (Ex.P-1) also she had disclosed to the police that it is accused/appellant Jhitru who had assaulted the deceased by knife and if the same is not recorded in her police statement (Ex.D-1) then she could not tell reasons. However, during recording of evidence, this witness has not been confronted from her statements recorded under Section 161 & 164 of Cr.P.C. Laxmi (PW-2) & Ramchand (PW-3) have also stated that when they reached to the place of occurrence, they saw the deceased lying in injured condition.
18. From the evidence of Bodki Bai (PW-1) and limited cross-examination of this witness, it is apparent that on 08.01.2009 when Bodki Bai (PW-1) tried to give some eatable to the grandson of accused/appellant Jhitru

whereupon Jhitru assaulted her by stick which was objected by deceased Kailash then accused/appellant Jhitru took out knife and caused single blow on the neck of deceased which has resulted into his death. True it is that some of the witnesses may have improved in the Court while deposing that accused/appellant Bangalu first caught hold of the deceased and then other accused/appellant Jhitru caused knife injury to him but merely on the basis of this improvement their entire statement cannot be discarded or ignored and this Court has to see that in the incident deceased Kailash was murdered and as per statement of the rustic villager namely Bodki Bai (PW-1), it is accused/appellant Jhitru who caused injury resulting into death of the deceased. From the record and the evidence, it is also apparent that Bodki Bai (PW-1), Laxmi (PW-2) & Ramchand (PW-3) were not acquainted with Hindi language and their statements in the Court were recorded with the help of official translator and even at the time of lodging of FIR (Ex.P-1), the investigating officer had taken help of the translator. In these circumstances, only accused/appellant Jhitru can be held guilty for killing of deceased Kailash.

19. As regards accused/appellant Bangalu, only one witness namely Bodki Bai (PW-1) has stated against him that firstly he had assaulted her and thereafter caught hold of the victim while being assaulted by accused/appellant Jhitru, but she did not stick to her version as at one place she has stated one thing and at the other some thing quite different and being so she cannot be termed to be a reliable witness to ensure conviction of this accused under Sections 302/34 or 323/34 of the IPC and he is entitled for acquittal of the charges by giving benefit of doubt.

20. Now the next question arises for consideration of this Court is as to whether accused/appellant Jhitru is liable to be convicted under Section 302 or 304 Part-1 or 304 Part-II of the IPC. From the evidence adduced on behalf of the prosecution, it is evident that the incident took place all of a sudden in the heat of passion without there being any pre-meditation and in sudden quarrel accused/appellant Jhitru had caused single knife blow to the deceased and as such, act of accused/appellant Jhitru is covered by Exception-4 to Section 300 of the IPC i.e. culpable homicide not amounting to murder. However, considering the nature of injury caused by accused/appellant Jhitru on the vital part of deceased, it is apparent that accused/appellant Jhitru had intention of causing such bodily injury as is likely to cause death of the deceased, therefore, the act attributed to accused/appellant Jhitru squarely falls within the purview of Section 304 Part-1 of IPC and not under Section 302 of IPC.

21. In the result;

- Cr. A. No.912/2009 is allowed. Conviction of appellant -Bangalu under Sections 302/34 & 323/34 are hereby set aside. This appellant is reported to be in jail, he be released forthwith if not required to be detained in connection with any other offence.
- Cr. A. No.278/2010 is partly allowed. Conviction of accused/appellant -Jhitru under Section 323 is hereby set aside, however, his conviction under Section 302 of IPC is altered to Section 304 Part-1 of the IPC and he is sentenced to undergo R.I. for 10 years. Since this appellant is already in jail, no further order is required in respect of this appellant.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(I.S. Uboweja)
Judge

roshan/-