

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 854 of 2001**

1. Poyami Bonda son of Bogi Madiya, aged about 40 years, Resident of village Bade Kawloor, P.S. Kodenar, District Bastar, Chhattisgarh.
2. Poyami Hadma son of Hando Madiya, aged about 45 years, Resident of village Bade Kawloor, P.S. Kodenar, District Bastar, Chhattisgarh.

---- Appellants**Versus**

State of Chhattisgarh, through PS Kodenar, District Bastar, Chhattisgarh.

---- Respondent

For Appellants	:	Shri Aditya Khare, Advocate.
For Respondent/State	:	Shri UKS Chandel, Panel Lawyer.

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

Judgment on Board**Per Navin Sinha, Chief Justice****02/03/2016**

1. The present appeal was filed from Jail through the High Court Legal Services Committee on 11.9.2001. None appeared for the Appellant on 27.1.2016 and 26.2.2016. We then requested Shri Aditya Khare, Advocate who is also in the panel of High Court Legal Services Committee to assist us in disposal of the appeal. The Appellants are tribals with limited resources.

2. The Appellants stand convicted under Section 302/34 IPC to life imprisonment with fine of Rs. 200/- in the event of failure to pay which they were required to undergo further six months rigorous imprisonment each ordered by the 1st Additional Sessions Judge, Bastar, dated 23.7.2001 in Sessions Trial No. 242 of 2001.

3. Poyami Dole (PW-2), wife of the deceased lodged FIR (Exhibit P-4) on 18.3.2001 at about 13:30 hours against the Appellants for having assaulted her husband on 16.3.2001 at about 4:00 pm. The Appellants had mortgaged their lands to the deceased for Rs. 600/- and wanted it back. They had threatened to assault on the previous day also with a Tangi but was dissuaded by the witness from doing so. On the fateful day they came and asked the deceased to accompany them for a Panchayat, consumed liquor together at the house of the deceased and then assaulted him.
4. The postmortem report of the deceased (Exhibit P-1) by Dr. Ten Singh Nag (PW-1) disclosed contusion on the lateral aspect of the right hand, right neck, contusion and lacerated wound 1"x1"x0.3" lateral to the left ear, contusion and lacerated wound with irregular margin above the left eyebrow, contusion and lacerated wound with irregular margin above left ear, the nose was depressed and nasal bone fractured. The left ear was crushed and there was combined fracture of the left temporal bone as also fracture of left mastoid bone. The cause of death was attributed to head injury over the left temporal region of the skull only. The time elapsed since death was approximately 72-86 hours and the death was opined to be homicidal in nature.
5. Learned Counsel for the Appellants submits that there is no eyewitness to the occurrence. PW-2, Poyami Dole, wife of the deceased, is not an eyewitness but only saw the Appellants allegedly running away from her house when she returned from the market. The seizure of the clubs alleged to have been used for assault has not been established since there is no FSL report with regard to presence of any blood on it. PW-2, Poyami Dole has made contradictory statements of assault with a *pidha* and stick. She further of having informed the Mukhiya, Mosu who then came with Dhurwa. Both of them have not been examined. The fact that she gave water to the deceased as stated by her in Court was not mentioned in the FIR. Apart from PW-3, Lachchu, no other

independent witness has been examined to prove the alleged extra judicial confession stated to have been made before the panchayat by the Appellants. They did not have the intention to kill the deceased as in that event, they would have done so the previous day itself when they were armed with Tangi. The assault on the second day by Lathis cannot strictly be called a dangerous weapon of offence as it is a normal thing kept by every villager. The Appellant No. 1 also suffered contusions with hard blunt object on the lateral margin of the right eye and on the right side of the forehead. It suggests that either there was a free fight or that the Appellants acted in self defence. The Appellants were poor tribals who had to mortgage their lands for a mere sum of Rs.600/-. The Appellants only wanted their lands to be released. The deceased and the Appellants were therefore well known to each other from before also evident from the fact that they were consuming liquor together at the house of the deceased. There was no pre-existing enmity between the parties. All these facts suggest that the assault was more of an act on the spur of the moment in an inebriated condition rather than motivated and designed strictly with intention to kill. The conviction under Section 302 IPC is not justified in the facts of the case. The Appellants may at best be liable under Section 325 IPC. They are in custody continuously since 20.3.2001. There was a delay of two days in lodging of the FIR which has not been explained.

6. Learned Counsel for the State opposing the appeal submitted that the Appellants were drinking with the deceased in his house. PW-2, Poyami Dole saw them running away from her house and when she went inside she found her husband assaulted and bleeding. There is no reason why the wife of the deceased should be stating falsehood. She would be the most interested witness to ensure that the real culprits are brought to book. The assaults with Lathi by the two Appellants are on and around the head, a sensitive area of the human body. The fact that the deceased suffered more than one injury even though the death may be by one of them only as opined by PW-1, Dr. Ten Singh Nag

cannot be considered in isolation with regard to intention. It has to be cumulatively gathered from the weapon of assault, the portion of the body where the assault was made and repetition of the assault. Motive existed as the Appellants wanted their mortgage lands released without repayment which the deceased was not willing to do. The panchayat where the Appellants made an extra judicial confession has been proved by PW-3, Lachchu who stated that PW-2, Poyami Dole was also present. The latter has corroborated her presence also. The Appellants made an extra-judicial confession in presence of both the witnesses. It is the quality and not the quantity of the evidence which is material. The holding of the panchayat and the extra-judicial confession has not been disputed, and the suggestion that no panchayat was held was also denied in cross-examination.

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

8. It is an undisputed fact that the Appellants and the deceased were tribals. The Appellants had mortgaged their agricultural land for a sum of Rs. 600/- only. They desired their lands back but the deceased wanted them to repay first. On the previous day, the Appellants had come with Tangis. They were dissuaded from assaulting the deceased by PW-2, Poyami Dole. If the Appellants had the intention to kill, nothing prevented them from persisting with their intention on that day. The fact that they easily gave in to the request of PW-2, Poyami Dole, and desisted from assault, makes it difficult to consider that the Appellants had any intention to kill the deceased.

9. The deceased and the Appellants were co-villagers. The very fact of the mortgage and their drinking together at the house of the deceased establishes that they were well known to each other and were on interacting terms. All these clearly suggest that the Appellants harboured no evil designs and intentions to do away with the deceased but were only desirous of getting their lands back by

persuading the deceased to release the same. PW-2, Poyami Dole has also acknowledged in her Court statement that even because of the mortgage there existed no previous enmity or dispute between the parties.

10. But, if the Appellants do not dispute the fact in their cross-examination that they were seen running out of the house of the deceased when PW-2, Poyami Dole walked in and found her husband bleeding coupled with extra judicial confession made by the Appellants in the panchayat establishes that they are the assailants. There is nothing to suggest that the extra judicial confession was not voluntary and cannot be relied upon. PW-2, Poyami Dole is the wife of the deceased. There existed no previous enmity between the parties. It is difficult to accept why she would not be stating the truth and shield the real culprits who assaulted her husband. She in fact would be the most interested witness that the real culprits be brought to book. The Appellants have not denied that they were seen running away from the house. Likewise, the holding of the panchayat and the extra judicial confession by them also stands established by PW-3, Lachchu and PW-2, Poyami Dole. It was rightly submitted that it is not the quantity but the quality of evidence that determines its credibility and reliability. In these circumstances, absence of any FSL report with regard to the Lathis stated to have been recovered from them becomes inconsequential.

11. Delay in lodging of the FIR stands fully explained. In each case the explanation for the delay will have to be considered before coming to any conclusion that delay has vitiated the report giving enough time for embellishments and manipulations. PW-2, Poyami Dole had lost her husband which had its own trauma upon her. The police station was 32 KMs away as deposed by the Investigating Officer, PW-4, V.S. Chandel. In the facts of the case therefore we are satisfied that there was no unreasonable delay in lodging of the FIR. In (2012) 6 SCC 204 (Jitender Kumar v. State of Haryana) it was observed as follows:-

“43. It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The court has to seek an explanation for delay and check the truthfulness of the version put forward. If the court is satisfied, then the case of the prosecution cannot fail on this ground alone.”

12. Apparently, while the three were drinking together, it appears probable that the Appellants insisted for the lands to be returned which the deceased was reluctant to do till he received his money back. All three of them were probably in an inebriated condition and scuffle must have followed upon the same because Appellant No. 1 has also received injuries confirmed in his MLC report, Exhibit P-2 proved by PW-1, Dr. Ten Singh Nag. PW-4, V.S.Chandel, the Investigating Officer has also deposed about having sent Appellant No. 1 for his MLC.

13. We are therefore inclined to take the view that the Appellants never really had the intention to kill the deceased but only desired to get their lands back by if necessary putting the deceased under fear or pressure. It true that the assault was in or around of the head area only, a sensitive part of the human body. But death was not attributable to the contusions caused and on the contrary was exclusively attributable to one head injury alone as deposed by PW-1, Dr. Ten Singh Nag. The Appellants were poor rustic tribals for whom Rs.600/- had considerable meaning and if they mortgaged their lands for a pittance it only shows that it may have been done under extreme compulsion. They were not hardened criminals motivated by the lure of money or vengeful desires of revenge. Compassion within the confines of criminal jurisprudence merits consideration. There is no evidence which one of the Appellants gave the single fatal blow on the head. The following observations in (2014) 3 SCC 366 (Badal Murmu v. State of W.B.) are considered appropriate in the facts of the present case also :-

“16. Before parting we must note certain special features of this case, which distinguish it from other cases. It is an unusual case where a trivial incident led to a murder. The appellants as well as the material witnesses belong to Santhal community. They are tribals. They come from a very poor strata of the society and appear to be untouched by the effect of urbanisation. They live in their own world. They are economically so weak that possession of a hen is very important to them. The deceased Jhore Soren stole a hen, killed it and made a feast out of it. This angered the community and the Village Panchayat penalised deceased Jhore Soren. He was ordered to give a hen to appellant Bhagbat and, in addition, he had to give two handies of liquor. Though, there can be no justification for the appellants' actions, their anger and reaction to the theft of hen must be viewed against the background of their economic and social status. Moreover, we are informed that the appellants are in jail for almost 14 years. Apart from the legal angle, this, in our view, is a case where justice must be tempered with mercy. In the peculiar circumstances of the case, in our opinion, convicting the appellants for culpable homicide not amounting to murder and sentencing them for the period already undergone by them by resorting to Section 304 Part II IPC will meet the ends of justice.”

14. In the entirety of the facts and circumstances of the case, we are satisfied to hold that the offence under Section 302 IPC is not made out and the conviction in the facts and circumstances of the case is required to be altered to one under Section 326 IPC and the Appellants sentenced to imprisonment for 10 years. Since they have already completed more than that period in custody, they are required to be set at liberty if not required in any other case.

15. The appeal is partly allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE