

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 896 OF 2001

Kartik Ram, S/o Jhaduram, aged 47 years, R/o Kochera, P.S. Gurur,
District Durg (C.G.)

... Appellant

Versus

State of Chhattisgarh, through Police Station Gurur, District Durg (C.G.)

... Respondent

For Appellant	:	Mr. D.R. Sharma, Senior Advocate, and Mr. Ashok Das Vaishnav, Advocate.
For Respondent-State	:	Mr. U.K.S. Chandel, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per NAVIN SINHA, C.J.

05/05/2016

1. The Appellant stands convicted under Section 302 IPC to life imprisonment with fine of Rs.1000, in the event of failure to pay which he was required to undergo six months further rigorous imprisonment as ordered on 31.8.2001 by the Additional Sessions Judge, Balod, Durg, in Sessions Trial No. 280 of 2000.
2. The deceased, Chaiti Bai is stated to have been assaulted at 7:00 am on 26.3.2000 and died. The Appellant is alleged to have dragged her inside his house and then assaulted her. The motive according to the FIR, Exhibit P-1, lodged the same day at 9:00 pm by PW-1, Lakhanlal was a fight between the Appellant and the deceased the previous evening. Post-mortem, Exhibit P-6, was conducted the same day by PW-5, Dr. B.R. Kosariya, who found the following injuries on the deceased:-

- (a) incised wound on the frontal head mid, transverse position, clotted blood was present, the frontal bone was cut through 6x3cm in size and had injured the brain matter inside.
- (b) lacerated wound 2x1cm on the base of the nose and fracture on the nose bone.
- (c) left side eye closed, pupil dilated and fixed and right eye cornea ruptured with eyeball collapsed and blood coming out.
- (d) swelling on the right side of the face.
- (e) whole teeth of mouth had fallen down and oozing out of socket.
- (f) The upper palate was ruptured 2x1cm inside.
- (g) bone of upper palate fractured.
- (h) Multiple minor abrasion with clotted blood and left wrist.
- (i) lacerated wound on left side of chin transverse position.
- (j) two contusions on upper left side of chest.
- (k) lacerated wound on left upper eyebrow and inner side bone fractured.
- (l) whole nasal bone medial fracture in pieces.

Death was opined to be homicidal in nature due to cardiac arrest caused due to painful shock, time expired since death was estimated as four to six hours at the time of post-mortem.

3. The Trial Judge held that PW-2, Kumari Duleshwari, aged about 10 years, and PW-3, Chanda Bai, aged approximately 60 years were reliable eye witnesses. The fact that the dead body was found inside the house of the Appellant weighed heavily in the mind of the Trial Judge concluding that the defence evidence by DW-1, Domar Singh and DW-2, Santram that the deceased was assaulted by her husband Johan, in his own house and she ran for safety to the house of the Appellant where she was assaulted again by her husband was not believable. Had it been so the Appellant would definitely have first lodged a police report and even pursued matters before higher authorities if it was not registered.

4. Learned Counsel for the Appellant submitted that the deceased was his sister-in-law married to his own brother, Johan. PW-3, Chanda Bai, had deposed that partition had already taken place between the Appellant and his brothers, Johan and Lakhanlal. The dispute with

regard to boundary was between Lakhanlal and the Appellant. There was no dispute between the Appellant and Johan and thus there existed no motive for the assault. No evidence was led in support of the statement in the FIR of any fight between the Appellant and the deceased the previous evening.

5. A specific defence was taken and evidence of two independent witnesses led that the deceased was assaulted by her own husband when she ran out of her house for safety and entered the Appellant's house. Her husband chased her and assaulted her inside the house of the Appellant. The deceased fell down and died. Varun, son of PW-1, Lakhanlal, who is stated to have informed the latter in the fields about the assault has not been examined even though his statement was recorded under Section 161 CrPC. Similarly, the police statement of Johan was also recorded but he was also not examined as a prosecution witness. No reason has been assigned by the prosecution why these two important witnesses were given up. The latter was a very crucial witness as nobody would be more interested in naming and ensuring that the real culprit was brought to book, being the husband of the deceased.

6. PW-2, Kumari Duleshwari and PW-3, Chanda Bai were not eyewitnesses to any assault by the Appellant. Their testimony that they allegedly saw the Appellant dragging the deceased inside his house by her hair suffers from severe falsity. The latter witness had poor eye sight and had to walk upto the witness box before she could identify the Appellant in the dock. If the deceased was walking behind the witness at a distance, the question of the witness having been able to recognize the Appellant at a distance simply does not arise in view of her poor eye sight. The conduct of the witness was also highly unnatural if she had

actually seen the Appellant catching the deceased by her hair and dragging her inside his house. The normal human reaction would have been to shout for help. The witness would also have gone and informed Johan that the Appellant was misbehaving with his wife. Her statement that she did nothing as she was sanguine that the Appellant would not kill the deceased is a desperate attempt to unsuccessfully explain her unnatural behaviour. If the witness could have come back to the house of the Appellant to see what had happened she could surely have gone to the house of Johan and informed him. She has furnished no explanation why she did not consider it necessary to go and inform Johan.

7. PW-2, Kumari Duleshwari is a minor witness and grand daughter of the Appellant's brother Lakhanlal with whom the Appellant was having a boundary dispute. She has acknowledged having been tutored by her grand father and was deposing as instructed by him. Even if her statement that she ran away after having witnessed the assault is accepted as natural considering her minority, it is evident from the spot map Exhibit P-10, prepared by PW-6, Anil Kumar Patwari that she could not have seen the occurrence inside the house from the bullock cart in the lane along the wall of the house, where she was sitting. The evidence of a minor witness has to be carefully scrutinised and corroboration sought in the facts of the present case. The spot-map shows that after the lane there was a passage from the lane with rooms on both sides followed by an open courtyard, a covered veranda, after which the area where the deceased was assaulted is located. She does not state that she walked through the passage, crossed the courtyard and went on to the veranda to witness the assault. The correctness of the spot-map has been reiterated by PW-1, Lakhanlal also.

8. If PW-2, Kumari Duleshwari and PW-3, Chanda Bai are unreliable eye witnesses that leaves PW-4, Baliram who is the son of PW-3, Chanda Bai, claiming that he saw the Appellant coming out of his house with blood on his '*lungi*' and a '*Kutela*' with blood on it. This witness also does not state that why he did not go and inform Johan, husband of the deceased, if the witness, Appellant, Johan and Lakhanlal were sharecroppers of the same land. The fact that there may be blood on the *lungi* of the Appellant and a *Kutela* with bloodstains on it confirmed in the FSL report, Exhibit P-19 does not automatically lead to the conclusion that he is the assailant without proper appreciation of his defence and the evidence led by him in that regard. The possibility that the blood came on his *lungi* when he may have attended to the deceased cannot be ruled out.

9. PW-1, Lakhanlal, has acknowledged that there were wooden stumps in the area where the assault had taken place on which wood had been stored also. If the deceased came running to the house of the Appellant and after being assaulted by her husband fell down, the possibility of her having suffered the incised wound from the same cannot be ruled out. There has been no recovery from the Appellant of any sharp cutting weapon especially when the Doctor has opined that injury no.1 had been caused by a hard and sharp cutting object only. Curiously, PW-10, Parasram, the seizure list witness, has spoken of recovery of *lathi* from the Appellant and not a *Kutela*. The evidence of the two independent defence witnesses has not been appreciated properly and the Trial Judge has convicted simply on the premise that the dead body lay in the house of the Appellant. In view of the aforesaid it was submitted that the assailant was Johan himself and the Appellant has been falsely implicated.

10. Learned Counsel for the State submitted that the conviction and sentence calls for no interference. PW-2, Kumari Duleshwari and PW-3, Chanda Bai are reliable eye witnesses. They have conclusively established that the Appellant dragged the deceased inside his house after which the dead body has been found inside his house. The former had seen the assault also. It was natural behaviour for her as a child to have gone home out of fear having witnessed the assault. Merely because she was a minor her evidence could not be rejected for that reason. PW-3, Chanda Bai has also explained why she did not inform anyone as she had no reason to believe that the Appellant would kill the deceased. PW-4, Baliram stated that he saw the Appellant coming out of his house with blood on his *lungi* and a *Kutela* in his hand and presence of blood on them has been established in the forensic report. All these materials conclusively establish that the Appellant alone was the assailant. There is no evidence of any third person having entered the house of the Appellant. So long as the Appellant does not explain the presence of blood on his *lungi* it remains an incriminating factor against him. The conviction calls for no interference.

11. Referring to the evidence of PW-1, Lakhanlal, it was submitted that if there were wooden stumps in the area of assault, the possibility that the incised wounds may have been caused by the same cannot be ruled out and the absence of recovery of any sharp cutting weapon from the Appellant is irrelevant. The post-mortem report reveals that the deceased was brutally assaulted by the Appellant. The nature of assault alleged upon the deceased by the defence witnesses on the head, ear and back is not corroborated by the post-mortem report. In cross-examination of PW-2, Kumari Duleshwari, the defence had itself given a

suggestion that the witness ran away when the Appellant held the hair of the deceased.

12. We have considered the submissions on behalf of the parties and applied our mind to the evidence on record also.

13. A charge in a criminal trial has to be proved beyond all reasonable doubts. If any possibility exists that the occurrence may have taken place in any other manner than alleged or that the assailant could be another, benefit of doubt has to be given to the accused. It is the duty of the prosecution under Section 9 of the Evidence Act to lead the best evidence. If such evidence despite its availability is not put forth an adverse inference can well be drawn under Section 114 (g) of the Evidence Act. In (2009) 14 SCC 541 (Mussaiddin Ahmad v. State of Assam) it was observed :-

“11. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act, 1872.....”

Undoubtedly the evidence of Johan could have been clinching if he had assaulted his wife or not when she allegedly ran to the house of the Appellant for safety or was it the Appellant who assaulted her. If his police statement had been recorded, but he was not produced as a prosecution witness, the former also not having been marked an Exhibit becomes irrelevant. He would have been the most interested witness to ensure that the real culprit who assaulted his wife was brought to book. The failure of the prosecution to explain why he was given up as a witness raises serious doubts about the prosecution version of the assault and an adverse inference can well be drawn.

14. The evidence of a child witness cannot be rejected outright for that reason. But in appropriate cases it would be prudent to scrutinise it closely and seek corroboration if there were any doubts regarding the same. Once the conditions are satisfied it can be the basis for conviction also. PW-2, Kumari Duleshwari was the grand daughter of Lakhanlal, brother of the Appellant with whom there was a boundary dispute. The minor witness stated that she was deposing as her grand father had told her to say. The spot map belies her claim that she could have seen the assault inside the house from the bullock cart parked in the lane. There is no independent corroboration of her evidence that she saw the Appellant assaulting the deceased. It will therefore not be safe to rely upon the child witness.

15. Likewise PW-3, Chanda Bai is also unreliable as an eye witness. If she could not recognize the Appellant in the dock from a distance due to poor eye sight until she walked upto him it stands to reason how she could have recognized the Appellant as the person who dragged the deceased when she was walking at a distance ahead of the deceased. Her conduct being against normal human behaviour also raises doubts if she was an eye witness. It is difficult to accept that she saw the Appellant dragging the deceased by her hair and yet did not protest or raise her voice especially when she states that there were several persons near the pond early in the morning. Likewise it is difficult to accept that she quietly walked away sanguine that the Appellant would not kill the deceased after having witnessed such aggressive behaviour on part of the Appellant. The witness claims that she came back to the house of the Appellant but offers no explanation why she did not consider it necessary to go and inform Johan, the husband of the deceased that she was being assaulted by the Appellant. Her repeated

conduct contrary to normal human behaviour raises serious doubts about the credibility of the witness.

16. The two defence witnesses were independent witnesses. The Trial Court has given no cogent reasoning why their evidence was not acceptable except the fact that the dead body was found in the house of the Appellant and that he should have been the first to lodge the police report if the defence version was correct. Merely because the timing of the FIR may have been shown prior to the Roznamcha Sanha, Exhibit P-24 lodged by the Appellant the possibility of manipulation by the prosecution could not be ruled out as Johan and Lakanlal were on one side after the partition and the Appellant alone. The defence version cannot be rejected as fanciful or absolutely unbelievable.

17. PW-1 Lakhanlal, PW-3 Chanda Bai and PW-4 Baliram could well have gone and informed Johan. They furnish no reasons why they did not consider the same necessary. PW-1, Lakhanlal, came to the house of the Appellant, saw the dead body, signed the inquest report accompanied it to the morgue for post-mortem and despite being so interested in the matter did not consider it relevant at all to go and inform Johan. PW-3, Chanda Bai, deposed that there were several others milling around the pond in the morning. Yet no independent evidence has been led. One alarm by her would have been sufficient for one or the other to come from the pond and standby the conduct of the Appellant in Court. Likewise, PW-4, Baliram saw the Appellant coming out of his house with blood on his *lungi* and a *Kutela* on his hand, but there is clearly an omission in this regard in his police statement.

18. The defence witnesses were independent villagers not related to the Appellant. Both of them stated that the deceased was assaulted by her husband pursuant to an altercation in their own house when she ran out of her house to that of the Appellant. Her husband chased her and assaulted her in the house of the Appellant also when she fell down and struck her head on the platform and died. It is not necessary for a witness to mention an assault with precision on any particular part of the body so long as the defence witnesses have stated that the deceased was being assaulted by her husband when she ran out of the house to that of the Appellant was chased and assaulted with a *lathi* which is a hard-blunt substance corroborated by several injuries caused by hard-blunt substance, it would suffice.

19. The fact that the dead body may have been found in the house of the Appellant may raise suspicion against him but cannot be proof. In view of our conclusion that the prosecution has not led any evidence why the husband of the deceased, Johan, was not informed and let alone the same despite his police statement having been recorded he was not examined as a witness as he would have been the best witness, it is not possible to hold that the charge against the Appellant of having been the assailant of the deceased stands proved beyond reasonable doubt. The defence case that the deceased was assaulted in her own house by her husband who chased her and assaulted her in the house of the Appellant also after which she slipped, fell down and died cannot be rejected outright as impossible and fanciful. If there is a slightest of doubt that the possibility of the defence version also exists and the prosecution has not been able to demolish the same, benefit of doubt must go to the Appellant. We are therefore unable to sustain the

conviction of the Appellant. In (1991) 2 SCC 612 (Buta Singh v. State of Punjab) it was observed :-

“8.....When two versions are before the court, the version which is supported by objective evidence cannot be brushed aside lightly unless it has been properly explained.....”

20. The conviction of the Appellant is set aside and the appeal is allowed subject to compliance with the conditions in Section 437-A CrPC.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge