

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 458 of 2012

1. Sachin Nagre, S/o Shyamlal Nagre, aged about 24 years, resident of Gaya Nagar, District Durg (CG)
2. Vijay Gond S/o Shri Bahal Gond, aged about 25 years, R/o Rajeev Nagar Durg (CG)

---- Appellants (In jail)

Versus

1. State Of Chhattisgarh Through – Police Station Durg , District Durg C.G.

---- Respondent

For Appellants:
For Respondent:

Shri Arvind Dubey, Advocate
Shri Adil Minhaj, Panel Lawyer.

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

Order On Board By Hon'ble Shri Justice Pritinker Diwaker

13/04/2016

1. This appeal arises out of the impugned judgment of conviction & order of sentence dated 20.4.2012 passed by the 2nd Additional Sessions Judge, Durg in S.T. No.18/2011 convicting the accused/appellants under Sections 302 & 323 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo RI for life & fine of Rs.5,000/-, in default to undergo additional RI for 6 months and RI for 1 year respectively.
2. In the present case name of deceased is Mukesh Sharma. It is alleged that on 26.9.2010 at about 8.15 p.m. during the course of immersion of Lord Ganesh idol a quarrel took place between the accused persons and the deceased in which the accused/appellants had caused injuries to the deceased and when he was taken to the hospital, he was declared brought dead by the doctor. On 26.9.2010 itself at 9.15 p.m. on the basis of

hospital memo (Ex.P-37A) Merg Intimation (Ex.P-13) was recorded and thereafter FIR (Ex.P-33) was lodged by Saraswati Sharma (PW-9), mother of the deceased, against the accused persons including present appellants. Based on this report, offence under Sections 147, 148 & 302 IPC was registered against the accused persons. The Investigating Officer after summoning the witnesses, prepared inquest over the body of deceased vide Ex.P-18 and thereafter sent the body of the deceased was sent for post-mortem examination which was conducted on 27.9.2010 by Dr. N.P. Jangde (PW-16) vide Ex.P-39A and noticed following injuries:-

- Incised wound of 5x3x4cm size at the left side of chest between 45th & 5th rib.
- Incised wound of 5½ x 2x7cm size at left hypochondrium
- Lacerated wound on left eyebrow of 3x1cm size.
- Small abrasion with contusion on the forehead.
- Incised wound of 6x2x3 cm size on the back at right buttock.

The doctor has opined that cause of death was rupture of spleen & injury to head and haemorrhage & shock as a result of injuries to vital organs and the death was homicidal in nature. After completion of investigation, charge sheet was filed against the accused persons under Sections 302, 147 & 148 IPC, however, the Court below has framed the charges under Sections 148, 149, 302 & 323 IPC against the accused persons.

3. In order to convict accused persons the prosecution had examined 17 witnesses. Statements of accused persons were recorded under Section 313 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 Loknath Sahu (DW-1) in their defence.
4. After providing opportunity of hearing to the parties, the trial Court while acquitting co-accused persons from all the charges, convicted and

sentenced the accused/appellants herein as mentioned above.

5. We have heard learned counsel for the parties, perused the judgment impugned and record of the trial Court.
6. Learned counsel for the appellants submits that;
 - conviction of appellants is substantially based on the evidence of Saraswati Sharma (PW-9), alleged eyewitness of incident, but her evidence is neither trustworthy nor inspires confidence and therefore it will not be safe for this Court to uphold conviction of appellants.
 - on the same set of evidence co-accused persons have been acquitted by giving benefit of doubt, therefore, present appellants are also entitled for acquittal.
 - Even if the entire prosecution case is taken as it is, at best the appellants can be convicted under Section 304 Part-II IPC and not under Section 302 IPC, as has been done by the Court below. He further submits that appellants are in jail since 28.9.2010 and therefore after converting their conviction into Section 304 Part-II IPC, they may be sentenced to the period already undergone by them.
7. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the judgment impugned warranting interference by this Court.
8. Heard learned counsel for the parties and perused the material available on record.
9. Ganesh Ram Deshmukh (PW-1) is the witness of seizure memo Ex.P-1 by which bloodstained & plain soil and slipper of the deceased were seized from the spot. Though this witness has not supported the prosecution case and declared hostile but he has admitted his signature over the aforesaid

document.

10. Raja alias Durgesh Yadav (PW-2) is the witness of seizure memos of Ex.P-2 to P-5 by which certain articles were seized by the prosecution. This witness has also not supported the prosecution case and turned hostile, however, he has admitted his signature over the aforesaid documents.
11. Ashwin Thakur (PW-3) is the witness of memorandum statement (Ex.P-7), seizure memos Ex.P-8, P-9 & P-11 and map Ex.P-10. This witness has not supported the prosecution case and turned hostile, however, he has admitted his signature over the aforesaid documents.
12. Daddu Sinha alias Bhagwat (PW-4) is also witness of certain memorandum statements and seizure memos but he has also been declared hostile by the prosecution.
13. Subhash Gupta (PW-5) is the witness of seizure memo Ex.P-4 but he too has not supported the prosecution case and turned hostile.
14. Tinku Patel (PW-6) has not supported the prosecution case and turned hostile.
15. Taran Sharma (PW-7), brother of deceased, is the witness of inquest Ex.P-18.
16. Rajeev Nirmalkar (PW-8) is the witness of inquest (Ex.P-18), memorandum (Ex.P-14) & seizure memo (Ex.P-16), but he has not supported the recovery and recording of memorandum statement of concerned accused.
17. Saraswati Sharma (PW-9) is the mother of deceased and an eyewitness to the incident. She has stated that on the date of incident in the procession of Lord Ganesh's immersion a quarrel took place between the accused persons & the deceased and on reaching the spot, she saw the accused persons assaulting her son. She has further stated that on account of assaults by the accused persons, her son fell down on the ground. She

has further stated that she had not seen the accused persons causing injuries to her son by any sharp-edged weapon but saw them assaulting by kicks etc. She has further stated that she tried to intervene but accused persons had thrown her away. In the cross-examination of this witness, there are material contradictions in the statement of this witness from that of her diary statement & FIR, but her evidence to the effect that accused persons were assaulting the deceased by legs and that she was thrown away by them remained unchallenged.

18. Chhagan Lal Sinha (PW-10) is the Patwari who had prepared the spot map vide Ex.P-35.
19. Gautam Prasad Sharma (PW-13) is the Head Constable who helped in the investigation.
20. V.D. Nand (PW-14) is the investigating officer who has duly proved the prosecution case.
21. H.L. Banjare (PW-15) is the Assistant Sub-Inspector who recorded the merg and FIR.
22. Dr. N.P. Jangde (PW-16) has conducted post-mortem examination on the body of deceased and noticed injuries as described above. According to him, the cause of death was rupture of spleen and injury to the head, haemorrhage & shock as a result of injuries to vital organ and the death was homicidal in nature. He has further stated that injuries suffered by the deceased on his spleen & liver were punctured wound and could have been caused by some sharp-edged weapon. He had also noticed fracture of rib.
23. Jugraj Das Sahu (PW-17) is the another Head Constable who helped in the investigation.
24. Loknath Sahu (DW-1) has not been examined in respect of the present

appellants.

25. Minute scrutiny of evidence makes it clear that on 26.9.2010 at about 20.15 p.m. during the immersion of Lord Ganesh's idol, the appellant along with co-accused persons attacked and assaulted the deceased by sticks & legs and unfortunately the injuries so inflicted resulted in his death. Incident was witnessed by Saraswati Sharma (PW-9), mother of deceased, who had stated that the deceased was lying on the ground and the present appellants were assaulting him by stick & legs. In the cross-examination this witness remained very firm and nothing incriminating could be elicited from her. Her evidence finds corroboration not only from the facts stated in the promptly lodged FIR (Ex.P-33) but also from the medical evidence wherein it has been stated that cause of death was rupture of spleen, injury to heart and haemorrhagic shock due to injury on vital organs. Since nothing has been brought on record by the defence to controvert the stand of the prosecution, this Court does not find any reason to disbelieve statement of eyewitness who had described the incident in a lucid manner.

As regards the acquittal of co-accused persons on the same set of evidence, the trial Court has extended them benefit of doubt on the ground that they have not been identified by eyewitness Saraswati Sharma (PW-9) and apart from that, there was no other cogent and clinching evidence to connect them with the crime in question. Whereas, present appellants were identified by her in the test identification parade conducted in accordance with law. Thus, on the basis of evidence adduced by the prosecution, the complicity of accused/appellants in commission of the offence stands proved beyond all reasonable doubt.

26. Now the question arises for consideration before this Court is whether act of accused/appellants amounts to murder or it falls within any of the Exceptions to Section 300 of the IPC?

27. From the evidence it appears that during the course of immersion of Lord Ganesh idol a quarrel took place between the accused persons and the deceased in which the accused/appellants have assaulted the deceased with legs & sticks causing various injuries on his vital organs like spleen, heart, ribs etc., resulting into his death. Thus, the aforesaid circumstances reveal that all of sudden, in a spur of moment, the appellants had caused injuries to the deceased that too by sticks & legs and as such, act of the appellants is covered by Exception-4 to Section 300 of the IPC i.e. culpable homicide not amounting to murder. However, while causing such injuries, it appears that though the accused/appellants had no intention to cause death of the deceased but having definite knowledge that by their aforesaid act, the deceased may die. That being the position, the accused/appellants are liable to be convicted under Section 304 Part-II of the IPC and not under Section 302 of IPC as has been done by the Court below.

28. Insofar as the conviction of the accused-appellants for the offence under Section 323 IPC is concerned, in the light of un-rebutted evidence of Saraswati Sharma (PW-9) we have no hesitation in affirming the same.

29. In the result, the appeal is allowed in part. Conviction & sentence of accused/appellants under Section 323 IPC are hereby maintained. However, their conviction under Section 302 IPC is altered to Section 304 Part-II IPC and as they are in jail since 28.9.2010, they are sentenced to the period already undergone by them. The appellants are reported to be in jail, therefore, they be set at liberty forthwith if not required to be detained in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(I.S.Uboweja)
Judge

roshan/-