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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.373 of 2000

Kailash Ram alias Kailash Minj, son of Budhnath Ram Gond, aged 32 years, Teacher, resident of Village Navatoli, Dhumadand, Police Station Kunkuri, Tahsil Kunkuri, District Jashpurnagar, Madhya Pradesh (now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh) through Police Station Kunkuri, Tahsil Kunkuri, District Jashpurnagar, Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellant	:	Shri Vikash Shrivastava, Advocate
For State/Respondent	:	Shri 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, Chief Justice

4/4/2016

1. The Appellant stands convicted under Section 302 IPC to life imprisonment with fine of Rs.5,000/-, in the event of failure to pay which he was required to undergo five years further simple imprisonment ordered by the Additional Sessions Judge, Jashpurnagar on 11.1.2000 in Sessions Trial No.120 of 1999.
2. The deceased, aged approximately 52 years was the mother of the Appellant. She is alleged to have been assaulted inside the house at night between 22/23.2.1999 leading to her death. Merg, Exhibit P-9 was lodged by PW-6, Muneshwar Ram Gangeshri on 23.2.1999 at about 10:45 A.M on basis of information given by the Appellant himself.
3. The Appellant was arrested on 3.3.1999 and bailed out on 30.3.2006. Due to non-representation on a single date, i.e., 8.8.2014 bail was cancelled and he was taken into custody again on 26.9.2014. Since then he is in custody. The Appellant, on his request has been provided legal assistance

by the High Court Legal Services Committee. Shri Vikash Shrivastava, Advocate nominated by the High Court Legal Services Committee along with the State Counsel has assisted us in final adjudication of the appeal.

4. The Post Mortem Report of the deceased reveals severe abrasions and contusions on different parts of her body, with diffused swelling on the front of the head 5"x3", haematoma below it with fracture of the left side of the parietal bone, swelling of the left side of the chest, fracture of the 6th, 7th, 8th, 9th and 10th ribs on the left side, diffused swelling over right side of the chest and fracture of the 6th, 7th, 8th and 9th ribs on the right side. PW-4, Dr. Shera Toppo who conducted the post mortem on 23.2.1999 opined that the cause of death was due to hemorrhagic shock caused by fracture of ribs leading to lacerated wound over both lungs and fracture of skull bone.

5. Learned Counsel for the Appellant submitted that there was no eyewitness to the occurrence. The entire case of the prosecution is based on circumstantial evidence. To convict on that basis all links forming the chain of circumstances must be intertwined and interlinked so as to lead to the only inescapable conclusion of the Appellant alone being the assailant ruling out any possibility of his innocence. If there exists the remotest possibility of his innocence and the possibility of another being the assailant cannot be completely ruled out, the benefit of doubt must go to the Appellant by acquitting him. Merely because the Appellant may have been at home with his mother cannot lead to an inescapable conclusion that he alone was the assailant. It still remains for the prosecution to establish a *prima facie* case only after which the burden would shift to the Appellant. The prosecution having failed to establish a *prima facie* case, the burden of proof never shifted to the Appellant and he is entitled to acquittal on benefit of doubt. There has been no recovery of any weapon of assault. The deceased was his mother. It stands to reason and is contrary to normal

human behaviour why he would kill his own mother especially when the prosecution has not suggested any motive for the same. Motive is an important factor in a case of circumstantial evidence for corroboration. The Appellant had also taken a plea of alibi proved by his wife DW-1, Sumitrabai that he was not at home on the day of occurrence and had gone to the house of his in-laws. The plea of alibi has not been considered at all. The last submission was that the Appellant was a tribal coming from the lower and poorest strata of society. Both the Appellant and his mother had consumed liquor together. A verbal altercation may have taken place between the mother and son in an inebriated condition which led to the unfortunate assault. The Appellant never intended to kill his mother. Even if drunkenness was no defence, in the nature of the assault, the Appellant cannot be attributed even knowledge of death let alone intention. Mere breaking of ribs may not necessarily lead to death. The cause of death was because of the lungs being pierced by the broken ribs. Death was therefore an indirect result of the assault. If the deceased was also in an inebriated condition, head injury may have been caused due to fall during scuffle between the two of them.

6. Learned Counsel for the State submitted that the Appellant was alone with the deceased at home since the previous evening. There is no defence that any third person had come to the house at any time before the deceased was found dead. PW-2, Anita Kashyap had come to the house of the deceased the previous evening about 5:00pm. She has also deposed the presence of the Appellant alone with the deceased. The witness in her statement under Section 161 Cr.P.C. had mentioned that the Appellant and the deceased would often fight in an inebriated condition. The Appellant had pulled out a bottle of alcohol from his pocket in her presence. PW-1, Ruben Tirky has also proved that the deceased was alone with the Appellant because the latter's wife had gone away to her parents house. PW-5,

Nepalram Bhagat, the Investigating Officer has deposed that he recorded the police statement of PW-2, Anita Kashyap exactly as deposed by her. The deceased who was aged approximately 52 years and was from the weaker sex was assaulted by the Appellant, a fully grown male adult aged about 32 years. The intensity of the assault is proved by the recovery of shoes on his confession which has blood stains on it. The doctor has opined that death was a cumulative result of the breaking of the ribs and piercing of the lungs as also fracture of the skull bone. A tuft of the hair of the deceased was also seized which is evidence of the brutality with which the assault was made even if no weapon was used. The Appellant then smashed her head on the floor or the wall. Even if there was no intention to cause death, the fact that knowledge existed that death may result due to the injuries cannot be denied. The Appellant was living alone with his mother. There is nothing to suggest any third party intervention. The prosecution has established a *prima facie* case against the Appellant. The onus shifted to the Appellant under Section 106 of the Evidence Act to demonstrate and disclose how his mother died a homicidal death in the middle of the night when apart from him there was no other person present. A plea of alibi is an extremely weak defence. One who takes this defence has to lead evidence in support. DW-1, Sumitrabai, wife of the Appellant has simply stated that he was at the house of his in-laws. Being an interested witness, her evidence cannot be safely accepted and relied upon in absence of any independent evidence of a co-villager to lend credibility.

7. We have considered the respective submissions and perused the evidence on record.

8. Merg was lodged by PW-6, Muneshwar Ram Gangeshri based on hearsay evidence from the Appellant. Though the witness attempted to turn hostile he has acknowledged his signature on the Merg, Exhibit P-9. Formal

FIR, Exhibit P-12 was registered on basis of the same. It was only information of a homicidal death which constitutes a crime. The dead body was found inside the house. The evidence on record reveals that since five in the previous evening, the Appellant was alone at home with the deceased who was his mother. Death has taken place in the intervening night. It is not the case of the Appellant that any third person had intruded or was staying in the house and could have committed the offence. The Appellant took a plea of alibi but failed to prove the same. His wife DW-1, Sumitrabai was an interested witness who naturally supported the plea of alibi to save him. In the facts of the case, the Appellant ought to have led independent evidence of a co-villager from his matrimonial house. If the plea has not been considered by the Trial Judge, no prejudice has been caused to the Appellant as he had failed to lead the best evidence without any reason. Additionally no such defence has been taken by him under Section 313 Cr.P.C. The taking of a false plea of alibi with no evidence led when he left home it becomes an additional incriminating factor against him.

9. PW-1, Ruben Tirky has deposed that the Appellant's wife had gone to her village and therefore the Appellant was living alone with the deceased, his mother. The Appellant would consume alcohol and on earlier occasions also had assaulted his mother. The villagers tried to dissuade him and a Panchayat had also been held regarding the same. Significantly, the Appellant cannot be described as an innocent rustic tribal villager. According to PW-1, Ruben Tirky, who was a teacher himself, the Appellant was also a teacher, which signifies a basic level of understanding, capacity to reason and even plan to assault. PW-2, Anita Kashyap, the cousin of the Appellant deposed that he came and informed her at 7 in the morning that his mother had died in the house.

10. The deceased was a 52 years old woman, the mother of the

Appellant, who was aged 32 years. Even if they were tribal and had consumed liquor together, there is nothing to suggest a level of inebriation at which the Appellant was devoid of sanity. Even that cannot be a defence to a charge of murder. There is no direct evidence available. The evidence is circumstantial. If the Appellant was alone at home with his mother, how she died in the middle of night was a fact specifically to the knowledge of the Appellant and the burden was required to be discharged by him under Section 106 of the Evidence Act. The dead body of the deceased having been found in the house, the death being homicidal, the prosecution had established a *prima facie* case. In (2006) 12 SCC 254 (State of Rajasthan v. Kashi Ram) it was observed :-

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd., Re*”

11. Even if he did not have intention to kill his mother, nonetheless considering that he was a teacher, it will attribute to him a level of understanding and knowledge of the causes of the nature of assault made by him upon his aged mother. The tuft of hair found at the place of occurrence, blood on his shoes, fracture of the skull bone and fracture of

several bones of both ribs are sufficient to hold that he definitely had the knowledge that the injuries were likely to cause death. The absence of a weapon of assault is considered inconsequential. Fight between mother and son is nothing abnormal but not when it crosses the limits of civilised human behaviour, the offence cannot be condoned. His maker met her nemesis at his hands.

12. For reasons discussed above we are satisfied that the conviction of the Appellant under Section 302 IPC is not sustainable and is required to be altered to Section 304 Part II. There are no mitigating factors in his favour in so far as the maximum sentence prescribed is concerned. The Appellant is sentenced to 10 years' rigorous imprisonment. He is stated to have completed 8 years and 7 months in custody altogether till now.

13. With the aforesaid modification of the conviction and sentence, the appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE