

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 1110 OF 2003

Balaram, S/o Shri Beganram, aged about 40 years, occupation-Agriculturist, R/o Village Kandrai, P.S. Jainagar, District Surguja (C.G.)

... Appellant

Versus

The State of Chhattisgarh, through P.S. Jainagar, District Surguja (C.G.)

... Respondent

For Appellant	:	Mr. Sushil Dubey, Advocate.
For Respondent-State	:	Ms. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per NAVIN SINHA, C.J.

03/03/2016

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 two months further rigorous imprisonment as ordered on 30.8.2002 by the Second Additional Sessions Judge (F.T.C.), Surajpur, in Sessions Trial No. 62 of 2000.

2. The husband of the deceased, PW-1, Ram Somar lodged FIR Exhibit P-11, on 16.9.1999 at 8:45 hours with regard to an assault on his wife the same day at about 5:30 pm naming the Appellant as accused. The MLC of the injured, Exhibit P-8, conducted by Dr. Kamlesh Kumar Tamrakar, PW-9 found an incised wound on the left side of the skull 10x4cm with the brain matter spilling out of the injury. The injured was unconscious and was not responding to even deep stimuli. X-ray was advised as he suspected fracture of the skull bone.

PW-13, Dr. N.P. Sharma of the District Hospital, Ambikapur, who attended to the injured at the hospital found that skull bone was fractured and pieces of brain material were spilling out. She remained under his treatment for 30 days and ultimately her relatives took her away on 16.10.1999 as they were unable to afford further treatment. The injured was deceased on 24.10.1999. The witness had also observed that even if proper treatment had been made available and the injured had survived, she would be in a vegetative state. The post mortem of the deceased was conducted by Dr. I.D. Gupta, PW-14, on 25.10.1999. The brain matter was spilling out like liquid, the parietal bone was fractured 3x1/2 inches in two parts.

3. Learned Counsel for the Appellant submitted that there is no eyewitness to the occurrence. The recovery of the *tangi* allegedly used for assault has not been proved in accordance with law as PW-5, Narsingh Narayan Singh and PW-13, Paleshwar Ram had denied that the Appellant ever made any confession or that recovery was made in their presence. There is no FSL report with regard to presence of blood on the *tangi* even though it was sent for forensic examination. The giving of a single blow only was evidence that there was no intention to cause death. Reliance in support was placed on 2008 (2) CGLJ 341 (Chandrika Roa Maratha v. State of C.G.), 2015 (2) CGLJ 52 (Rajkumar @ Khorwa v. State of M.P. (now C.G.) and 2011 (3) CGLJ 295 (Ganesh Ram v. State of C.G.). The deceased died one month eight days later which manifests that death was primarily due to absence of proper medical treatment and not the assault. PW-6, Merli Bai, deposed that she was informed by her grand-daughter, Fulki Bai that the Appellant had assaulted. But Fulki Bai has not been examined by the prosecution. It was lastly submitted that there are material omissions in the Court

statements of PW-3, Kuntibai as compared to her police statement. The witness was therefore unreliable to accept her plea of identification by voice of the Appellant. Likewise her claim of an extra-judicial confession by the Appellant is also wholly unreliable as it is not clear if it was made to the witness directly and if the witness overheard it who all were present and to whom was it made. PW-3, Kuntibai, was an unreliable witness for an additional reason that she was an interested witness in view of her statement in cross-examination that both her husband and PW-1, Ram Somar, did not get along with the Appellant who was their brother. If previous enmity existed, the evidence of PW-3, Kuntibai, has to be considered with caution. Reliance was placed on 2015 (4) CGLJ 370 (Mangal v. State of C.G.) and 2013 (3) Crimes 418 (C.G.) (Tula Ram v. State of C.G.) that extra-judicial confession was weak evidence and it would be unsafe to make it the basis for conviction.

4. Learned Counsel for the State submitted that there can hardly be direct evidence of intention. It has to be culled out collectively from several factors such as motive, the weapon of assault, the circumstances in which the assault is made and the manner and intensity of assault. Referring to Section 299 *Explanation* (2) it was submitted that even if the deceased would have survived by medical treatment that can be no defence to a charge of culpable homicide especially if she would have been reduced to vegetative state. Culpable homicide would be a murder under Section 300 *thirdly* if it was done with an intention of causing a bodily injury to any person and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The splitting up of the parietal bone and the incised wound 10x4cm with the brain matter spilling out, the weapon of assault being a *tangi*, nothing further is required to demonstrate

intention. Both PW-5, Narsingh Narayan Singh, and PW-15, Paleshwar Ram, have acknowledged their signature on the confession and recovery of the *tangi* pursuant to the same. If recovery has been proved in accordance with law, mere absence of an FSL report cannot lead to doubting the recovery itself. It was lastly submitted that PW-3, Kuntibai, is absolutely consistent in her police statement and court deposition in material particulars. There are no omissions to discredit her evidence. Identification by voice is acceptable evidence for which reliance was placed on AIR 1965 SC 712 (Kirpal Singh v. State of U.P.). Extra-judicial confession by the Appellant as deposed by PW-3, Kuntibai, was also invoked in finality of the accusation.

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

6. The undisputed facts emerging are that the Appellant is the own brother of PW-1, Ram Somar. PW-3, Kunti Bai, is the wife of Thakur who is again the own brother of PW-1, Ram Somar and the Appellant. The evidence which has transpired is that the Appellant was issueless. His parents had gifted a major part of the land to PW-1, Ram Somar much to the dislike of the Appellant. It provided the motive for the Appellant to make the assault. Though they belonged to one family they lived in separate houses in the same area. On 17.9.2009, PW-3, Kuntibai, in her police statement said that she had gone to the well to collect water when she heard the Appellant shouting filthy abuses at the deceased and saying that he would kill her 'today'. She then heard the children of the deceased crying and went inside the house to find the deceased lying on the ground bleeding and that the Appellant had run away.

7. The Appellant was taken into custody and his confession recorded, Exhibit P-4, leading to recovery of the *tangi*, Exhibit P-5. PW-5, Narsingh Narayan Singh, spoke of police pressure with regard to Exhibit P-3, regarding seizure of bloodstained earth and tarpaulin. In his cross-examination he acknowledged his signature on the confession, Exhibit P-4, and the recovery of the *tangi* on basis of the same, Exhibit P-5, confirming that he had not signed on blank paper. Likewise, PW-15, Paleshwar Ram, acknowledged that he was educated up to Class-7 and would not sign any paper without reading them. He also acknowledged his signature on the confession and the seizure. The Investigating Officer, Gendan Lal Srivastava, PW-11 also proved the confession and recovery. If the seizure of the *tangi* has been proved in accordance with law, the mere fact that there may be no FSL report will not make the seizure itself doubtful especially when PW-9, Dr. Kamlesh Kumar Tamrakar who carried out the MLC opined that the injury found on the deceased was possible with the *tangi* seized.

8. A similar issue fell for consideration in (2012) 9 SCC 532 (Gajoo v. State of Uttarakhand) when it was observed that the recovery having been proved in accordance with law the absence of a serologist report with regard to the blood was a defect in investigation which could not inure to the benefit of the accused observing as follows :-

“19. Now we turn to the last submission on behalf of the accused that no serologist report was obtained in relation to the daranti, Ext. 2 and bloodstained pyjama, Ext. Ka-5, and therefore, the prosecution case should fail. This argument does not impress us at all. No doubt both these exhibits were not sent to the laboratory for obtaining the serologist's report, but the absence thereof per se would not give any advantage to the accused. This is merely a defect in investigation. A defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the court. PW 5 has duly

proved the recovery of daranti, Ext. 2 and the bloodstained pyjama, Ext. Ka-5 and has duly stood the test of cross-examination in the court. Both these articles were recovered by the Investigating Officer Brahma Singh, PW 6 and the recoveries have been duly established before the court. The recoveries having been proved and the case of the prosecution being duly supported by two eyewitnesses, PW 2 and PW 3 and two witnesses, PW 4 and PW 5 who were present immediately after the occurrence, have proved the case of the prosecution beyond any reasonable doubt."

9. There can hardly be direct evidence of intention. It is necessarily to be culled out collectively from all surrounding circumstances such as the environment in which the assault is made, the weapon used for the assault, the capacity of the parties to resist and also the manner or intensity with which the assault is made. In the present case the single assault made by the Appellant was so severe that it caused an incised wound 10x4cm on the head leading to the spilling out of brain material and fracture of the parietal bone into two. It is not compulsory that there must necessarily be more than one assault to decipher intention to kill. The single assault made with a dangerous weapon and the intensity of the assault makes it evident that the intention was to kill sufficient to invoke Section 302 IPC. The reliance by the Appellant on Chandrika Rao Maratha (supra), Rajkumar @ Khorwa (supra) and Ganesh Ram (supra) are misplaced in the facts of the present case. In the former there was a lacerated wound 1x1/2 inches muscle deep in the mid line near occipital protuberance made in the heat of passion without premeditation. In the latter it was a single knife blow in the stomach area. In the last the assault was made on the spur of the moment by the blunt edge of the *tangia*.

10. Section 300 *thirdly* stipulates that if the intention was to cause the same body injury which was inflicted and that injury was sufficient in the ordinary course of nature to cause death it would amount to murder. That a single blow could also invite the offence under Section 302 IPC was considered in (2004) 12 SCC 546 (State of Rajasthan v. Dhool Singh observing as follows :-

“13.....Here again we cannot agree with the finding of the High Court. The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. In the instant case it is true that the respondent had dealt one single blow with a sword which is a sharp-edged weapon measuring about 3 ft in length on a vital part of the body, namely, the neck. This act of the respondent though solitary in number had severed sternocleidal muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury in our opinion not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim.....”

11. The evidence of PW-3, Kuntibai is crucial for adjudicating the guilt or innocence of the Appellant in absence of any eye witness or other circumstantial material. It has to be borne in mind that she belonged to the family of the Appellant living in the same locality and were thus obviously familiar with each others voice. The spot map, Exhibit P-13 proved by the Investigating Officer, PW-11 Gedanal Shrivastava, lends credence to the police statement of PW-3, Kuntibai that she was at the well collecting water when she heard the Appellant shouting and abusing the deceased that he would kill her ‘today’. She then heard the

children of the deceased crying, ran towards the house by which time the Appellant had run away and saw the deceased lying injured on the ground. The witness therefore recognised the assailant by voice. In her court statement, PW-3, Kuntibai, reiterated that she was at the well fetching water when she heard the children of the deceased crying and on going inside the house found the deceased lying on the ground with the brain material spilling out. When her mother-in-law returned she told her that the Appellant had run away. The evidence of a witness, especially a rustic witness, cannot be weighed in a golden scale. The evidence of a witness has to be read and understood collectively as a whole to understand the same and it cannot be considered by culling out lines individually for consideration as observed in (2013) 11 SCC 688 (Radhakrishnanagesh v State of Andhra Pradesh). The kernel of the evidence that emerges is that while the witness was collecting water she heard the Appellant shouting and abusing the deceased and that he would kill her 'today' after which she went inside but did not find the Appellant who had run away and saw the deceased lying injured and bleeding on the ground.

12. That identification by voice especially when the accused was known to the witness since earlier was first noticed in Kirpal Singh (supra) observing as follows:-

"4. ...It is true that the evidence about identification of a person by the timbre of voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. But the appellant was intimately known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop....He asserted however that he was able to recognise the appellant and his two brothers from there 'gait and voice'...."

13. In AIR 1999 SC 1481 (Kedar Singh & Others v. State of Bihar) it was observed that even in a dark night identification was possible inter alia by voice too.

14. In 2004 (11) SCC 567 (Kishnia & Others v. State of Rajasthan) conviction was sustained on identification by voice at night due to previous acquaintance between the witness and the accused.

15. In 2008 (14) SCC 495 (Inspector of Police, Tamil Nadu v. Palanisamy @ Selvan) it was again observed that in cases of previous acquaintance identification by voice at night was a distinct possibility.

16. In 2008 (11) SCC 425 (Dalbir Singh v. State of Haryana) it was again observed that even an ocular identification at night was difficult but if the person was acquainted and related to another, identification inter alia by voice was sustainable.

17. In view of our conclusion that there is no material omission between the police statement and court statement of PW-3, Kuntibai, and her identification of the Appellant by voice due to close acquaintance, even if the witness had not eye witnessed the assault by the Appellant and reached there after he had run away, that cannot be considered sufficient to hold paucity of evidence or unreliability of the witness to grant acquittal.

18. Extra-judicial confession is undoubtedly generally considered as weak evidence and is normally relied upon as corroborative material. In view of our conclusion with regard to identification of the Appellant by voice, it gets fortified by the corroborative material of the extra-judicial confession by the Appellant referred to by PW-3, Kuntibai.

19. In conclusion, we find no merit in the appeal and it is dismissed. The Appellant is in custody. He shall serve out his remaining period of sentence.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge

sharad*