

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 492 of 2011**

Vishnu Harijan S/o Late Awadhram, aged about 33 years, R/o
Kanshabahar, P.S. Chhal, Distt.-Raigarh, Presently R/o. Village Khodari,
P.S. Patana, Distt.-Korea, C.G.

---- Appellant**Versus**

State Of Chhattisgarh through Police Station Patana Distt. Korea (CG)

---- Respondent

For appellant	:	Mr. Pravin Kumar Tulsiyan, Advocate.
For Respondent/State	:	Mr. Chandresh Shrivastava, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Chandra Bhushan Bajpai

C A V JUDGMENT**Per Chandra Bhushan Bajpai, J****25/01/2016**

1. This appeal arises out of judgment and order dated 5-5-2011 passed by the Sessions Judge, Korla (Baikunthpur) in S.T. No. 5/2010 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life. The trial court acquitted him for offence under section 201, IPC
2. Brief facts of the case are that when P.W. 8 Sonkunwar went to *baadi* nearby her house, she saw dead body of a woman beneath shrubs. She immediately left the place and informed the same to her husband P.W. 10 Devsharan. Thereafter P.W. 10 Devsharan informed this fact to P.W. 2 Ramdev, village Kotwar who visited the spot and saw a dead body of woman in naked condition. He was not in a position to identify the woman as it was lying procumbent. Thereafter he went to Police Station Patna and lodged merged intimation Ex. P-2 on 27-9-2009 at about 3.45 pm. Police registered merged regarding death of an unknown woman. Police reached to the spot and after giving notice to witnesses, conducted inquest vide Ex. 4. During inquest, the unknown body of the woman was identified as of Rambai, wife of the appellant. P.W. 2 Devsharan lodged FIR Ex. P-23. Police registered the same at Crime No. 189/2009 under Section 302/201, IPC against unknown person and thereafter the dead body was sent for post

mortem examination. P.W. 3 Dr. A.K. Sharma conducted autopsy and vide report Ex. P-9 noticed following injuries :-

- I. Abrasion on right side face size 2 ½ x 2".
- II. Abrasion on right parietal region and neck size 2" x 1"
- III. Multiple irregular bruise marks seen on left side of chin and neck size 3" x 2" and on front of neck and right side neck irregular bluish mark.
- IV. Multiple bruise mark seen on left side of chest, middle right side of chest. On dissection blood is collected under skin. There is fracture of left clavicle bone, left 2, 3, 4, 5 and 6th ribs. Left side plura and lungs torn and 1, 2, 3, 4 and 5 bone of right side fractured. Stanum bond fractured on middle.
- V. Bruise on left arm, forearm and elbow.
- VI. Bruise and abrasion on right elbow, right arm and forearm
- VII. Multiple bruise on back of shoulder and middle of back.
- VIII. Abrasion on front of right knee size 2" x 1".

The autopsy surgeon opined that cause of death is cardio respiratory arrest and mode of death is homicidal and time passed since death is within 36 to 48 hrs.

3. During investigation, P.W. 12 C.S. Sharma, IO has prepared the spot map Ex. P-7. The accused / appellant was taken into custody. He gave disclosure statement Ex. P-16 on the basis of which police seized one wooden log, one saree with mud from the shrubs near the spot vide Ex. P-7. The wooden log was sent for opinion. P.W. 3 Dr. A.K. Sharma opined that the log sent for examination may cause the same type of injury as noticed on the body of the deceased.. The seized articles were sent for chemical analysis to FSL but the report was not received and produced during trial. Statement of witnesses were recorded under Section 161 of the Cr.P.C. After completion of investigation charge sheet was filed before the Judicial Magistrate first Class, Baikunthpur who in turn committed the case to the Court of Sessions who conducted the trial.
4. In order to prove the guilt of the accused/appellant, prosecution has examined as many as 12 witnesses. The statement of the accused was also recorded under Section 313 of the Cr.P.C. wherein he denied the circumstances appearing against him, pleaded innocence and false implication in the crime in question.

5. No defence witness has been examined by the defence.
6. After providing opportunity of hearing to the parties, learned Sessions Judge convicted and sentenced the appellant as mentioned in para 1 of this judgment.
7. We have heard learned counsel for the parties and perused the record of the court below.
8. Learned counsel for the appellant vehemently argued that there is no eye-witness in the case. There is no report of FSL. Conviction of the appellant is based on the evidence of P.W. 7 Kundan Singh as allegedly he saw the accused/appellant going with the deceased before recovery of the dead body. The witness is a near relative of the deceased. Evidence regarding last seen together is a weak type of evidence. His statement does not inspire confidence. The deceased was not the wife of the accused/appellant. Though witness of memorandum and seizure of articles P.W. 9 Parasram has supported the same but since there is no FSL report adduced in evidence, memorandum and seizure has no relevance. He further argued that it would not be safe to rely on the statement of P.W. 7 Kundan Singh regarding last seen together. Hence it is prayed that as the prosecution has failed to prove the offence beyond all probable doubt, the appellant may be acquitted for the charge of murder. In alternate, it is submitted that on account of dispute all of a sudden, the accused/appellant without pre-meditation on a sudden provocation assaulted the deceased in a heat of passion by a wooden log, therefor at the most the accused/appellant may be convicted for the offence under Section 304-I or 304 Part II, IPC. Hence he may be convicted and sentenced accordingly.
9. Per contra, learned counsel for the respondent/State opposed the arguments advanced by learned counsel for the appellant and submitted that the judgment of conviction and sentence passed by the court below is well founded. P.W. 7 Kundan Singh has remained very firm. Though he has been declared hostile by the prosecution but he has specifically stated that the accused/appellant had kept his niece as wife. Both were residing together. On 26-9-2009 at about 5.00 pm he saw the accused/appellant going along with deceased Rambai. There is no reason to disbelieve the witnesses and the prosecution has proved its case. The appeal may be dismissed.
10. P.W. 1 Manijar has stated in his statement that he along with P.W. 2 Ramdev and other villagers went to spot and saw an unidentified dead body

of a woman. P.W. 2 Ramdev, village Kotwar lodged merger intimation Ex. P-2. He is also a witness of inquest Ex. P-4 and identification memo of the body Ex. P-5, memo of handing over the dead body Ex. P-6 and spot map Ex. P-7. As per this witness, the accused was residing along with deceased Rambai. P.W. 3 Dr. A.K. Sharma conducted post mortem and has opined that cause of death is cardio respiratory arrest and mode of death is homicidal and time passed since death is within 36 to 48 hrs. P.W. 4 Patango Bai has turned hostile and not said anything specific. P.W. 5 Satish Bhagat, constable and P.W. 6 Chitrabhan Singh, constable helped in the investigation and have supported the prosecution case. P.W. 7 Kundan Singh happened to be uncle in relation of the deceased. As per this witness, accused/appellant was living along with the deceased as her husband and one day prior to recovery of the dead body on 26-9-2009, he had seen the accused/appellant along with deceased together thereafter on next day, he saw the dead body which was later identified as body of deceased Ram bai. He has also admitted that when he saw the accused/appellant and the deceased together, they had not returned thereafter. He has further stated in cross-examination that about 2 weeks ago, the deceased had gone for earning her livelihood and returned after 10 to 12 days. P.W. 8 Sunkunwar saw the dead body first and informed her husband and other witnesses. P.W. 9 Parasram and P.W. 10 Devsharan are witnesses of memorandum Ex. P-16 and seizure Ex. P-17. At the instance of accused/appellant, one log and saree were seized. P.W. 10 Devsharan is also a witness of inquest Ex. P-4 and arrest of accused/appellant Ex. P-18. P.W. 11 Navin Datt Tiwari, constable has also helped in the investigation. P.W. 12 C.S. Sharma, the IO has conducted the investigation and has duly supported the prosecution case.

11. Minute examination of the evidence of the witnesses makes it clear that since there is no FSL report in the case, memo Ex. P-16 and seizure Ex. P-17 have no relevance to connect the accused/appellant with the crime. The accused/appellant in his statement under Section 313, Cr.P.C. in reply to question No. 2 and 3 has categorically denied that on 26-9-2009 at about 5.00 pm he was going along with the deceased. While replying to questions No. 16 and 17 the accused/appellant has also denied the fact that the deceased was his wife and both were living together before the incident. P.W. 7 has stated that he saw the appellant a day prior to the date of incident at about 5.00 pm along with the deceased. As per this witness, the accused / appellant kept her niece Rambai as his wife and both were living

together. In cross-examination, this witness has remained very firm and nothing could be elicited so as to discredit his statement. Even there is no denial and suggestion that both were not living as husband and wife. On the other hand, a suggestion was given on behalf of the accused/appellant to this witness that after consuming liquor, the deceased used to throw utensils and used to quarrel with the accused/appellant. There is no reason to disbelieve this witness for the fact that the accused/appellant and the deceased were living as husband and wife and a day prior to the incident, he had seen both going together and thereafter the dead body of the deceased was recovered. The accused/appellant has not offered any explanation as to when he parted with the company of the deceased and also has failed to offer any explanation as to why P.W. 7 Kundan Singh be disbelieved and why he is telling lie. P.W. 2 Ramdev in para 4 of his statement has admitted that the accused/appellant used to live in the house of the deceased but in cross-examination he has denied the fact. No specific question has been asked to him as to how he had stated the fact that the accused /appellant was residing in the house of the deceased. In the considered opinion of this court, there is no reason to disbelieve P.W. 7 Kundan Singh thereby the prosecution has proved the circumstances that both were last seen together and on next day, the dead body of the deceased was found on the spot, which goes to show that it is the accused/appellant who killed deceased Rambai.

12. Now the next question for consideration of this Court is whether the act of the appellant would fall under Section 302 or S. 304-I or 304-II, IPC.
13. From perusal of the medical report of the deceased it is apparent that cause of death is not on account of strangulation. Total injuries have been noticed by the autopsy surgeon and out of them, injury No. 1, 2, 5, 6, 7 and 8 are abrasion, bruise over face, arm, at the back and on right knee therefore the injuries No. 3 and 4 could be fatal. As per memorandum and seizure a log was seized at the instance of accused/appellant. P.W. 7 Kundan Singh has not stated that when he saw the accused/appellant he was carrying some weapon or any club. As per seizure memo Ex. P-17 a wooden log of Arkasia wood was seized as weapon of the offence. There were suggestions to P.W. 7 that the deceased after consuming liquor used to throw utensils and used to make quarrel with the accused/appellant. In view of medical report, there were fractures of left clavicle bone and also of the ribs of both sides. Considering the medical evidence, it is clear that the appellant had intention to cause such bodily injury as is likely to cause death. Further it appears that

both were going together and in a dispute/quarrel between both of them without pre-meditation in a sudden fight in a heat of passion upon a sudden quarrel, the appellant took a Urkasia wooden log from the spot and assaulted the deceased. Therefore, in these circumstances, in our considered opinion, the act of the accused/appellant is covered by Exception 4 of Section 300, IPC i.e. culpable homicidal not amounting to murder and the same is not covered under Section 304 Part II of the IPC and it is covered under Section 304-I of the IPC.

14. In the result, the appeal is partly allowed. Conviction of the appellant/accused under Section 302, IPC is altered to Section 304-I, IPC and he is sentenced to undergo RI for 10 years. He is reported to be in jail. Let him be inside till completion of the sentence imposed upon him with set off benefits.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge