

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 167 of 2012

- Jai Prakash Dubey S/o Syamacharam Dubey, aged about 34 years, R/o Village Bhulsikala, Kumharpara, P.S. Kusmi , Distt. Surguja C.G.

---- Appellant

In Jail

Versus

- State Of Chhattisgarh through Police Station Kusmi, District Surguja (CG)

---- Respondent

For appellant : Shri AK Yadav, Advocate.
For Respondent/State : Shri Rahul Tamaskar, PL.

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

Judgment On Board by Justice Pritinker Diwaker

07/04/2016

This appeal arises out of the judgment of conviction and order of sentence dated 14.11.2011 passed by the II Additional Sessions Judge, Ambikapur, Distt. Surguja (CG) in S.T.No.237/2010 convicting the accused/appellant under Sections 302 and 201 of IPC and sentencing him to undergo imprisonment for life, pay a fine of Rs.1000/- and RI for five years, pay a fine of Rs.500/- with default stipulations respectively.

02. As per prosecution case, deceased Babita Devi, wife of the accused/appellant, was having illicit relations with one Janardan and on account of that on 4.3.2010 at 6.30 am the accused/appellant committed murder of Babita in his house by causing as many as 16

axe injuries on various parts of her body. The incident was witnessed by PW-3 Sourabh Kumar Dubey, son of the appellant and the deceased. Dehati merg (Ex.P/11) was lodged on 4.3.2010 at 9.20 am by PW-15 Ganesh and thereafter, merg intimation Ex.P/21 was recorded on the date date at 3.10 pm. FIR (Ex.P/22) was registered against the accused/appellant on 4.3.2010 at the instance of PW-15 under Section 302 of IPC. Thereafter, inquest over the dead body was prepared vide Ex.P/7 and then the body was sent for postmortem examination, which was conducted by PW-12 Dr. Smt. Shashikala Toppo on 4.3.2010 vide Ex.P/23 wherein she noticed as many as 16 injuries including seven lacerated wounds and depressed fracture of left frontal bone of skull. In her opinion, the cause of death was hypovolumic shock due to excessive hemorrhage on account of injury to vital internal organ and head. After investigation charge sheet was filed against the appellant and co-accused Shashank Dubey under Section 302, 120B of IPC. However, the trial Court framed charges under Sections 302, 201 of IPC against the appellant and under Section 120B of IPC against co-accused Shashank Dubey.

03. So as to hold the accused/appellants guilty, the prosecution examined as many as 15 witnesses. Statements of the accused persons were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment while acquitting co-accused of the charge under Section

120B of IPC, convicted and sentenced the appellant as mentioned in para-1 of this judgment.

05. Learned counsel for the appellants submits as under:

- that eyewitness to the incident PW-3 Sourabh Kumar Dubey has not supported the prosecution case and has been declared hostile.
- that father and sister of the deceased have also not supported the prosecution case.
- that most important witness of the prosecution Pradeep has not been examined by the prosecution.
- though as per FSL report, blood was found on Articles C & D i.e. axe seized from the spot and full pant of the appellant, but in absence of serologist report, the same cannot be used against the appellant.
- even if the entire prosecution case is taken as it is, at best the appellant can be convicted under Section 304 Part I or II of IPC because the incident occurred in the heat of passion, upon a sudden provocation, without any premeditation, when the appellant saw his wife/deceased in an objectionable position with Janardan Tiwari. Further, as the appellant has already remained in jail for about six years, after converting his offence under Section 304 Part I or II, he may be sentenced to the period already undergone by him.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

- that PW-3 has though been declared hostile but has partially

supported the prosecution case and stated that the appellant killed the deceased by causing her club injury.

- that present is a case of house murder, wife of the appellant died after sustaining as many as 16 injuries, appellant was the only inmate of the house and as such, was under an obligation to offer satisfactory and plausible explanation in his statement under Section 313 of Cr.P.C. as to how his wife suffered those injuries and succumbed to the same. However, instead of offering such an explanation, he has merely stated that he has been falsely implicated, a conspiracy was hatched by sisters of the deceased to conceal the factum of illicit relation of the deceased with one Janardan and commission of her murder by the said Janardan.
- even though in the serological report, samples have been found to be disintegrated, but in FSL report it has come that in the full pant and axe, blood was found and the appellant has failed to offer any explanation in his statement under Section 313 of Cr.P.C. as to how his full pant was found to be stained with blood.
- that even in absence of serological report, FSL report can be used against the appellant as a corroborative piece of evidence, apart from other evidence as mentioned above.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-3 Sourabh Kumar Dubey, son of the appellant and the deceased, who was cited as eyewitness, has stated that previously he

was residing at Ambikapur along with his father and mother, his mother used to take sleeping pills and on one occasion she had consumed about 25 pills. He has stated that on the date of incident he got scared and went to call his uncle (acquitted accused). When this witness was asked as to why he got scared, he clarified that he got scared because of death of his mother and further stated that he does not know as to who killed her. At this stage, he was declared hostile. However, in para-2, he has stated that on that day, his mother was running away, then there was quarrel between his mother and father, his father/appellant dragged her inside the house from near the house of one Pradeep. However, it is incorrect to say that the appellant gave a blow of axe on her head. He has then stated that the appellant gave a blow of club to the deceased as a result of which she died. In para-3 he has stated that a day prior to the incident, Janardan had come to their house and stayed in the night and further, he has stated that it is Janardan who killed his mother by axe.

09. From his evidence it is clear that the defence has not cross-examined this witness in respect of his statement made in para-2 where he has stated that the accused/appellant killed his mother by causing club injury. Even in para-5 he has stated that the appellant once assaulted the deceased with club on her leg.

10. PW-1 Gorakhnath Tiwari, father of the deceased, has stated that after two years of marriage, the accused/appellant and his family members used to harass and torture the deceased, they never permitted her to provide better education to her two sons. However, this witness was declared hostile. In cross-examination, he admits that

in 2009 the deceased had lodged a report against the appellant and his family members regarding threatening of life being given by the appellant to her.

11. PW-2 Amita Tiwari, sister of the deceased, has stated that there used to be quarrel between the appellant and the deceased, however, she was also declared hostile. PW-4 Smt. Rahmait and PW-5 Sushil, have turned hostile. PW-6 Ramsharan Suryavanshi, Patwari, prepared the spot map Ex.P/5. PW-7 Madhu Pandey, sister of the deceased, has stated that there used to be quarrel between the appellant and the deceased. A day prior to the incident, in the night the deceased made a missed call to her from her husband's mobile and on her calling back, the deceased informed her that the appellant is quarreling with her. She has stated that on the next morning, son of the deceased Sourabh Dubey made a call on her cell phone and informed that in the night the appellant was pressing neck of his mother/deceased and on seeing him, he left her and when she asked the deceased on phone about the said incident, she confirmed it. PW-8 Pushnath and PW-9 Ramsharan are witnesses to memorandum Ex.P/8 of the appellant and seizure Ex.P/10 of appellant's vest and full pant. Though they have been declared hostile, but admitted their signatures on the documents. PW-10 Amanual Ekka, investigating officer, has duly supported the prosecution case. PW-15 Ganesh is the informant at whose instance Dehati merg, merg intimation and FIR were registered.

12. PW-12 Dr. Smt. Shashikala Toppo conducted postmortem on the body of the deceased vide Ex.P/23 and noticed following injuries:

(i) lacerated wound in left front temporal region size 4.5 cm x 3 cm x 2.5 cm,

- (ii) lacerated wound on left ear lobe size 3 cm x 1 cm x with whole thickness,
- (iii) lacerated wound in right frontal region of skull size 2 cm x 1 cm x 0.5 cm,
- (iv) lacerated wound at vertex region of skull size 5 cm x 1 cm x 0.6 cm,
- (v) lacerated wound in right side of angle of mouth size 1 cm x 0.3 cm x 0.3 cm,
- (vi) lacerated wound in chin size 4 cm x 0.5 cm x 0.50 cm
- (vii) contusion bluish colour in right temporo-mandibular region (right cheek) size 12 cm x 4 cm,
- (viii) contusion in right lateral side of neck size 4" x 2.5",
- (ix) lacerated wound in right side of occipital region of skull size 1 cm x 0.5 cm x 1 cm,
- (x) contusion blue colour at lateral side of left eye size 2 cm x 1.5 cm,
- (xi) contusion blue colour at left mastoid region to left lateral side of neck size 4 cm x 3 cm,
- (xii) multiple tiny contusion blue colour in whole right arm,
- (xiii) contusion in right hand just above right thumb blue colour size 6 cm x 4 cm,
- (xiv) contusion marrowish blue colour at right shoulder to right scapular region size 6" x 3",
- (xv) contusion blue colour at left shoulder size 4 cm x 3 cm,
- (xvi) contusion at upper chest 5 cm x 3 cm,

All the injuries are due to hard and blunt object, duration of injuries are within 24-48 hours and they are ante-mortem in nature.

On dissection of head and neck: Injury No.(i) to (xi) (a) dissection below scalp extradural haemorrhage present at occipital region of skull/head to right temporal region and up to lateral side of whole back of neck, there was huge and thick blood clot present size about 5" x 6".

(b) below skin of right cheek and right temporal region, huge blood clot

present size about 4" x 2.5",

(c) there is depressed fracture of left frontal bone of skull size about 2" x 1.5"

(d) below skull bone membrane was intact.

(e) below membrane there was mild blood clot present at left lobe of brain.

On dissection of contused area of other part of body (injury No.12 to 16), below skin of contused area, there was blood clot present at tissue.

In her opinion, the cause of death was hypovolumic shock due to excessive hemorrhage on account of injury to vital internal organ and head. She had also examined the weapon of offence axe and opined that the injuries suffered by the deceased could be caused by the said weapon.

13. Close scrutiny of the evidence makes it clear that there used to be quarrel between the accused/appellant and the deceased frequently, and the appellant used to suspect the chastity of his wife/deceased. It has come in the evidence that on 4.3.2010 when he was in the house along with his son and the deceased, in the early morning he committed murder of his wife by causing her 16 injuries. Eyewitness to the incident PW-3 Sourabh Kumar Dubey, son of the appellant and the deceased, has though not fully supported the prosecution case, does not say that the appellant gave axe blow on the head of the deceased, but he does state that the appellant gave a blow of club on the head and leg of the deceased. He has further stated that on account of said blow, the deceased died.

14. It is a well settled principle of law that evidence of the hostile witnesses should not be excluded from the zone of consideration outright, the Court can rely upon evidence of such witness to the extent

it supports the prosecution case, inspires confidence and finds corroboration from other evidence.

15. Another aspect of the case is that the appellant was the only inmate of the house along with the deceased and as such, the present case being a case of house murder, the appellant was under legal obligation to offer plausible and satisfactory explanation as to how his wife died in the house after being assaulted in such a brutal manner. When an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it is extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon. In such cases, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house can not get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer any explanation.

16. In the case in hand, though the accused/appellant has stated in his statement under Section 313 of Cr.P.C. that he has been falsely

implicated, a conspiracy was hatched by sisters of the deceased to conceal the factum of illicit relation of the deceased with one Janardan and commission of her murder by the said Janardan, but he has not specifically denied his presence in the house when the offence was committed. Further, his presence at the scene of occurrence stands proved from the evidence of his son PW-3. Therefore, his failure to explain the said circumstance, coupled with the motive attributed to him, points towards his guilt.

17. Yet another important aspect of the case is that on the disclosure statement of the appellant, his full pant was seized and as per FSL report, the same was found to be stained with blood and likewise, blood was also found on the axe seized from the spot. Though as per serological report, origin of the blood could not be determined due to disintegration of blood on the articles, but this itself is not sufficient to discard the aforesaid incriminating circumstance against the appellant, particularly when he has not offered any explanation in his statement under Section 313 of Cr.P.C. as to how blood was found in his full pant except making bald denial of the said circumstance.

18. Thus, having considered all the circumstances together, in light of conduct of the appellant and the motive attributed to him, his failure to explain the incriminating circumstances in his statement under Section 313 of Cr.P.C., we are of the opinion that the prosecution has been successful in proving guilt of the appellant on the basis of circumstantial evidence beyond reasonable doubt.

19. We find no substance in the argument of the appellant that in the

facts and circumstances of the case, act of the appellant, at best, makes him liable to be convicted under Section 304 Part I or II of IPC. Considering the nature and extent of injuries that the deceased suffered as many as 16 injuries, including seven lacerated wounds and depressed fracture of left frontal bone of skull, and further, that it is not the defence of the appellant that he after seeing the deceased in an objectionable position of Janardan Tiwari, assaulted her which unfortunately resulted in her death, it cannot be said that the appellant had no intention of committing her murder or had not even knowledge that the injuries being inflicted by him on the deceased would result in her death. Being so, his conviction under Section 302 of IPC cannot be faulted with and the same deserves affirmation.

20. In the result, the appeal fails and is, accordingly, dismissed. As the appellant is already in jail, no further order regarding his surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S. Uboweja)

Judge