

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPURCriminal Appeal No. 974 of 1998Appellant : Budhram Yadav

VERSUS

Respondent : The State of M.P.

 For Applicant : Mr. B.D.Badgaiya, Advocate.
 Appellant in person also present.

For Respondent : Mr. Sameer Behar, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****12.04.2017**

1. The appeal is against the judgment of conviction dated 02.04.1998 passed by the Court of Additional Sessions Judge, Korba, in Sessions Trial No.194/87 under Section 304 Part-II & 452 of I.P.C.
2. The record would reveal that one of the appellant Umed Ram has died on 17.06.2006, therefore, the appeal filed by him on 26.06.1998 was dismissed as abated on 20.08.2007, therefore, the appeal is being heard on behalf of the present appellant Budhram.
3. As per the prosecution case, one Kalicharan, S/o. Karam Das was residing with Mahasingh. A report was made on 25.03.1987 that on 16.03.1987 the present appellant Budhram and one other co-accused Umend Badhai has assaulted the deceased by way of fist and by sitting on his chest because of some previous enmity of dispute which took place in between the children of the neighborhood. The report was made by Kalicharan, deceased himself. Subsequently, he was sent to Hospital for treatment after the report on 25.03.1987 and on the next day, he died. Initially the case was registered under Section 452 & 323 of I.P.C., thereafter, after death of Kalicharan, Section 302 was charged. The dead

body of Kalicharan was subjected to post mortem and after investigation, charge sheet was filed against the appellant and the other co-accused under Section 302 read with Section 34 of I.P.C. During course of trial, the appellant/ accused claimed to be tried and denied all the allegations, therefore, the trial commenced.

4. The prosecution on their behalf has examined Mahasingh as PW-9, Mayamati as PW-1, independent witness Budhram as PW-3, Madhusudan David as PW-8, Ram Prasad as PW-12, Constable- Ramchandra Sahu as PW-2, Dr. V.K. Agrawal was examined as PW-4, Dr. Anurag Pandey as PW-10, Dr. Arun Kumar as PW-11, Patwari- Ram Govind Gohil as PW-5, Fulchand as PW-6, Sidar Kali as PW-7, and I.O.- D.S. Gill as PW-13. Out of the witnesses Budhram & Madhusudan David who are the independent witness have not supported the case of the prosecution.
5. Learned trial Court after evaluating the entire evidence on record convicted the appellant under Section 304 Part-II and Section 452 of I.P.C. and sentenced them for three years R.I. and fine of Rs.500/- and in absence of payment of fine, further R.I. of six months was awarded. Being aggrieved thereby, the present appeal.
6. Learned counsel for the appellant would submit that the finding of the Court below is completely perverse, as no evidence is on record to show that because of the assault made by the appellant, death was caused. He further submits that there is no eye-witness and the independent witnesses have not supported the case of the prosecution and only on hearsay evidence and the oral dying declaration, which was made after lapse of more than seven days, the appellants have been convicted, therefore the conviction is completely perverse. He further submits that initially when the deceased was taken to Doctor, he was examined. It was stated that the deceased was suffering with brain fever and collaterally the death was caused because of internal damage of the organ, therefore, the

same cannot be attributed to the appellant and as such he may be acquitted from the charges.

7. On the other hand, learned State counsel supported the case and the order of the trial Court and would submit that the conviction is based on the oral dying declaration and the post mortem report, therefore, the conviction do not require any interference.
8. I have heard the learned counsel appearing for the parties at length and perused the record of the Court below.
9. In the statement, Mahasing (PW-9) stated that while Kalicharan was alone in the house, at that time, Budhram and one Umendram had entered into the house and have assaulted Kalicharan. He has further stated that Kalicharan was assaulted on his chest and abdomen by fist. He further stated that he asked his neighbor Guruji Kharsan and M.David to accompany them to house of Kalicharan and then Kalicharan had disclosed that he was assaulted by the present appellant and one Umendram on his abdomen and chest. Subsequently, Kalicharan was taken to lodged a report to the Police Station and the report was lodged. In the cross examination of this witness, he has stated that before one week of the incident, he was out of the village and after happening of the incident of 4-5 days, he came back to his house, at that time, Kalicharan was in the house. He stated that after 4-5 days of the incident, Kalicharan was brought to the Police Station and this was also informed to Kharsan & David.
10. Mayamoti (PW-1) who is also related to Kalicharan, the deceased, stated that some dispute had taken place in between Kalicharan and Umend & Budhram on account of children but it was subsequently amicably settled also. Thereafter, she went to attend last rituals of her mother at village Nawagarh and came back to Korba at that time Kalicharan had disclosed that he was assaulted by Umend & Budhram.

11. Budhram in this case was examined as PW-3. He stated that at about 8:30 wife of Mahasingh had come and requested to see at his house to Kalicharan. When he went there, he saw that Kalicharan was lying in the cot but he did not say anything and also he was not talking.
12. Madhusudan David (PW-8) who was also named by the other witness PW-9, he stated that Mahasing came to him and requested him to see Kalicharan as he was not well. Thereafter, when he went alongwith B.S. Kharsan to see Kalicharan, the witness saw that Kalicharan was lying on the floor and Mahasing at that time disclosed that Kalicharan is not well and advised him to take him to Hospital. It is further stated that he did not have any conversation with Kalicharan at that time, but Mahasingh had stated that someone had assaulted Kalicharan.
13. The FIR was lodged in this case, which would show that it was lodged on 27.03.1987 for the incident of 16.03.1987. One of the witness Ramprasad (PW-12) who also was related to Kalicharan, the deceased i.e. cousin brother, had stated that when he went to see Kalicharan in the house of Mahasing, Kalicharan told him that Budhram and Umend had assaulted him and thereafter the report was made by Kalicharan itself. In the cross examination of this witness, he stated that after the festival of Holi around 24th & 25th, he was informed about the incident, however, he stated that he has not seen Kalicharan after the Holi.
14. After the FIR, it shows that Kalicharan was referred for treatment to the Hospital. Dr. V.K.Agrawal (PW-4) who had first examined the deceased Kalicharan stated that the patient complaint the pain at abdomen and chest on 16.03.1987 but during examination, no injury was found. Since no injury was found but complaints of pain was made, therefore, for internal examination, he was referred to be examined by any Surgeon and was referred to Bilaspur. Thereafter, at Bilaspur, he was examined by Dr. Anuraj Pandey (PW-10). He stated that on 26.03.1987 one Kalicharan

named person was brought from Korba to District Hospital Bilaspur. He was suffering with brain fever and he died subsequently on 26.03.1987 as per Ex.P-9. Dr. Arun Kumar Balani who conducted the post mortem was examined as PW-11 and as per Ex.P-10 the cause of death was shown as some hole in the duodenum, inflammation in the pancreas and liver was little ruptured and the cause of death was stated due to hole in the stomach and inflammation of the pancreas and the reason of death was shock due to toxemia.

15. The statement and the report of the Doctors would show that swelling was present in both the lungs and had the spot of old T.B. There was a hole in the duodenum but it was healed up and liver was also little ruptured but had also healed up and cause was attributed as natural. It was stated to be in the healing stage. Therefore, evaluating the entire evidence, it would show that there is no eye-witness to the incident. The incident though was stated to be happened on 16.03.1987. The report was made on 25.03.1987. The independent witnesses Madhusudan David (PW-8) and Budhram (PW-3) have stated that when they visited Kalicharan he had not disclosed anything and Budhram has stated that he was not talking at all.
16. The relatives i.e. Mayamoti (PW-1), Mahasingh (PW-9) and Ramprasad (PW-12) have stated the fact that Kalicharan had disclosed that the appellant Budhram alongwith Umend had assaulted him, but the other independent witnesses have not supported. In respect of the injury, further Doctor V.K.Agrawal (PW-4) stated that when he first examined the deceased on primary examination, no injury was found and reference was made for further examination. Dr. Anuraj Pandey (PW-10) stated that when he first examined the deceased Kalicharan, who was brought to the Hospital at Bilaspur on 26.03.1987, he found that deceased was suffering with brain fever. Dr. Arun Kumar Balani (PW-11) who had conducted the post mortem, Ex.P-11, had stated that the death was due to hole in

duodenum, swelling in pancreas and damage of liver. Therefore, if all the evidences are read together, even if, this fact is admitted that the deceased Kalicharan was assaulted, but the said assault led to death causing the injury has not been proved by the prosecution and only on the presumption, the conviction is based that the said assault might have caused the condition for death. The statement of the Doctor (PW-10) who examined the patient, who was brought to the Bilaspur Hospital, have stated that deceased was suffering with brain fever. Consequently, the careful examination of evidence would show that the beating had actually caused hole in duodenum, swelling in pancreas and damage of liver has not directly been proved by the prosecution. The incident was alleged to be of 16.03.1987 but report was lodged on 25.03.1987. The prosecution has failed to prove the delay in lodging FIR and reasons have been assigned. Therefore, taking into evidence cumulatively, in absence of direct nexus of assault which had caused the death has not been clearly established. The evidence and cause of death has left a gap to be fulfilled raising a doubt in case of prosecution.

17. It is a trite proposition of law, that suspicion even if a grave, cannot be accepted as a proof in order to succeed on a criminal charges. The conviction cannot be based on the realm of "may be true" instead it has to be "must be true". The same conjectures and suspicion do not take the place of legal proof. In the totality of the evidence available in the case, the prosecution has essentially failed to prove the direct nexus of death having been caused for the beating made by the accused.
18. In view of the discussion in the foregoing paras and careful scrutiny of the evidence, I am of the opinion that the order of conviction and sentence awarded by the learned Court below cannot be sustained and is hereby set aside. Accordingly, the appeal is allowed.

19. If the appellant is on bail, his bail bond shall continue for a period of six months from today.

Sd/-
(Goutam Bhaduri)
JUDGE

ashok