

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 947 of 2003

1. Ram Bharose, s/O Jagdev Nishad, aged about 23 years.
2. Jagdev, S/o Gangu Ram Nishad, aged about 50 years.

Both residents of village Kodapara, P.S. Bhatapara, District Raipur (CG)

---- Appellants

Versus

- The State Of Chhattisgarh, through PS Bhatapara, District Raipur (CG)

---- Respondent

For Appellants	:	Shri G.P. Kurre, Advocate
For Respondent	:	Shri Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

P. Diwaker, J

09/08/2017

1. Present appeal is directed against the judgment dated 29.7.2003 passed by the 1st Additional Sessions Judge, Baloda Bazaar in Sessions Trial No.389/2002 convicting the accused/appellants for the offence punishable under Sections 302, 201, 506 Part II of the Indian Penal Code (for short 'IPC') and sentencing each of them to undergo RI for life & fine of Rs.1000/-; RI for 2 years & fine of Rs.500/- & R.I. for 2 years, with default stipulations, respectively.
2. In the instant case, the name of the deceased is Gendram Kewant, who in relation elder brother of accused/appellant No.1.
3. As per case of the prosecution, the deceased used to consume liquor and

used to hurl abuses. On 20.7.2002 at about 10 in the night the deceased after consuming liquor hurled abuses and started demolishing the roof of the accused/appellant No.1, who was at that time sleeping in his house along with his wife. After some time, on hearing screams of his wife, who went out for urination, accused/appellant No.1 came out of his house and saw that the deceased had caught hold of hand of his wife. Seeing this, he got angry and firstly assaulted the deceased by hands & fists and thereafter he along with his father i.e. accused/appellant No.2 herein and brother (juvenile), committed murder of deceased by inflicting axe & club injures. It is further case of the prosecution that after committing murder of the deceased, the accused/appellants laid the body of deceased in front of his house. Next day morning i.e. on 21.7.02, merg intimation was given by accused/appellant No.2 to the police and after enquiry a Dehati Nalishi (Ex.P-8) was registered on 21.7.2002. On the same day, FIR (Ex.P-9) was registered against the accused persons under Sections 302/34 & 201 IPC. Inquest on the body of deceased was conducted on 21.7.02 vide Ex.P-2. Body of the deceased was sent for post-mortem examination which was conducted by Dr. S.S. Bajpai (PW-14) and he noticed following injuries;-

- Lacerated wound of 1"x1" size on middle of leg leg.
- Incised wounds, 2 in numbers, of 4"x 2 ½" x muscle deep. Both the wounds were on the same place at a distance of 1".
- Incised wound of 1" x ½" x muscle deep on dorsum of left hand in between index & middle finger kunckle.
- Seven blackish abrasions over anterior and lateral aspect of left thigh and 6-7 same contusions over anterior and lateral aspect of right thigh. All are 4" to 6" long.
- Six blackish contusion of 1"x9"x1" on abdomen above and below the umbilical, placed transverse to obliquely.
- 6-7 contusions (blackish) 4" to 6" x 1" on each side of chest wall in auxillary line (both sides).
- 7 to 8 blackish contusion of 3" to 5" long

- Multiple abrasions of various sizes on whole back, over outer aspect of both upper arm. 5- 6 blackish contusion of 3" x 4".
- Contusion on left side of forehead of 2" x 2".
- Lacerated wound of 3" x 2" x bone deep over occipital region.
- Lacerated wound of 3" x 1" x bone deep on right parietal region.
- Lacerated wound of 1½" x 1" x bone deep on left zygomatic bone.

The cause of death assigned by the autopsy surgeon was shock due to multiple injuries and injury to liver & lungs and the death was homicidal in nature. During the course of investigation, accused/appellant No.1 made disclosure statement on 21.7.2002 at 17.20 hrs vide Ex.P-20 regarding the axe that the same was kept in the hay bale of his house, same was seized at his instance vide Ex.P-21. Accused/appellant No.2 also made disclosure statement vide Ex.P-18 regarding the club and the same was recovered at his instance vide Ex.P-19. Other co-accused Bhorasa had also made disclosure statement vide Ex.P-16 regarding axe & club and the same were recovered at his instance vide Ex.P-17. Statements of witnesses were recorded in the course of investigation.

4. After completion of investigation, charge sheet against the accused persons was filed under Sections 302, 201, 34 IPC. The trial Court framed the charges under Sections 302, 201 & 506 Part II of IPC against the accused persons. As accused Bharosa was juvenile at the time of incident, therefore, his case was sent to the Juvenile Justice Board for trial. The prosecution in order to bring home the charges levelled against the accused persons examined 15 witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing counsel for the parties, the trial Court by the impugned judgment convicted and sentenced the accused/appellants in the manner as described above.
6. We have heard learned counsel for the parties and perused the material

available on record including the impugned judgment.

7. Counsel for the appellants submits that the prosecution has not been able to prove the culpability of accused/appellants under Section 302/34 of IPC beyond reasonable doubt as the alleged act was done in exercise of right of private defence of person i.e. to save modesty of wife of accused/appellant No.1. Alternatively, it is submitted that if this Court reaches to the conclusion that the right of private defence is exceeded, then their alleged act comes within the purview of Exception 2 to Section 300 of IPC punishable under Section 304 Part II of IPC. He further submits that the appellants had already remained in jail for about more than five years, therefore, while converting their conviction under Section 304 Part II of IPC, they may be sentenced to the period already undergone by them.
8. On the other hand, counsel for the respondent-State supports the impugned judgment and submits that the manner in which the victim has been assaulted, the intention on the part of accused/appellants to cause his death is writ large. He further submits that plea of right of private defence of person was never put forward by the appellants in the trial Court and in the statement recorded under Section 313 CrPC they have simply pleaded their innocence and false implication.
9. Amit Kumar (PW-1) & Chaituram Gurre (PW-2) are the witnesses of inquest (Ex.P-2). Dharmendra Singh (PW-3) did not support the prosecution case and turned hostile.
10. Ishwari Bai (PW-4), wife of accused/appellant No.1, has stated that on the date of incident the deceased came to their house after consuming liquor and started beating the doors by axe. He was saying to come out. She has further stated that about 1½ hour thereafter when she went out for urination, the deceased caught hold of her hand whereupon she raised alarm and on hearing her screams, her husband came there. Seeing her

husband (accused/appellant No.1), the deceased assaulted on his hand by axe. Her husband made a call to his father & brother for saving him and pursuant to his call, his father & brother rushed there. She has further stated that her father-in-law & brother-in-law offered water to the deceased and thereafter took him to his house and make him sleep. Next morning she came to know that the deceased had died. This witness has stated that she does not know as to how deceased received injuries. At this stage, she has been declared hostile and in answer to the questions asked by the Assistant Public Prosecutor, she has admitted that there was a quarrel between the accused persons and the deceased.

11. Jhagruram Sahu (PW-5), Dilip Kumar Sahu (PW-6) & Ramkishan Jangde (PW-8) & Ajit Patle (PW-10) are the police persons who helped in the initial investigation. Shankar Lal Verma (PW-7) is the Patwari who prepared the spot map of Ex.P-10. Jhagludas (PW-9) is the village Kotwar and witness of seizure memo Ex.P-11.

12. Indar bai (PW-11) is the wife of deceased. She has stated that it is the accused persons who have committed murder of her husband by inflicting grievous injuries to him. She has further stated at time of quarrel she was inside his house and could not come out due to fear. Though this witness has been declared hostile but in the cross-examination by the Assistant Public Prosecutor she has stated that on the fateful night she saw in the light of battery that accused/appellant No.1 was assaulting her husband by hands & fists. She has further stated that accused/appellant No.1 went inside his house, came back with axe and started assaulting her husband mercilessly by axe. She has further stated that the accused persons had asked her to inform the police that her husband died due to consumption of liquor and threatened her also by saying that if she will disclose to anyone then they would cut her also. Due to this fear, she did not disclose

anything to the police.

13. Sitaram Sahu (PW-12) is the witness of inquest (Ex.P-2) and memorandums (Ex.P-16, P-18 & P-20) and seizure memos (Ex.P-17, P-19, P-21, P-22 to P-26 & P-28).
14. Dr. S.S. Bajpai (PW-14) is the person who had conducted post-mortem examination over the body of deceased and noticed the injuries as described above. According to this witness, cause of death was shock due to multiple injuries including injuries to lungs & liver and death was homicidal in nature.
15. Kiran Gupta (PW-15) is the investigating officer who has duly supported the prosecution case.
16. Close scrutiny of the evidence on record makes it clear that though there is no direct evidence to the incident but this version of PW-4 that on the date of incident a quarrel took place between the accused/appellants and the deceased on account of holding of her hand by the deceased while she was going to urinate; the deceased ensanguined in that quarrel and after the quarrel, the accused/appellants laid the deceased in front of his house, is sufficient to hold that it is the accused/appellants who had caused grievous injuries to the deceased by club & axe on 20.7.2002 at 11.30 in the night which resulted in his death. It has also come in the evidence of PW-11 that it is the accused/appellants who laid her husband (deceased) in her house and also threatened her by saying that if she would disclose this fact to anyone then they will cut her also. This apart, on the basis of disclosure statements (Ex.P-18 & P-20) made by accused/appellants, one club & axe were recovered vide seizure memos Ex.P-19 & Ex.P-21 respectively and FSL report (Ex.P-14) proves presence of blood on the weapons so seized. There was no explanation by the accused/appellants of the circumstance in which the bloodstains

had appeared on club & axes seized at their instance. According to the medical evidence, the cause of death of deceased was shock due to multiple injuries to vital organs including lungs & liver caused by hard & sharp object. Furthermore, the query put to the doctor as to whether the injuries found on the body of deceased could be caused by axe & club seized from the possession of accused/appellants has been answered by the doctor in affirmative vide Ex.P-30. Therefore, the above fact of recovery of bloodstained weapons of offence etc. on being pointed out by the accused/appellants is an additional link to prove their guilt. Thus, on the basis of aforesaid evidence, the complicity of accused/appellants in commission of the offence stands proved beyond reasonable doubt.

17. Coming to the submission of counsel for the accused/appellants that whatever act was committed by the appellants, that was in exercise of right of private defence of person.
18. It is true that the appellants have not put forward the plea of right of private defence in their statements under Section 313 CrPC and simply denied their involvement in the crime in question. The question which arises for consideration is whether this omission on the part of the accused/appellants preclude them from taking the plea now in this appeal? In our considered opinion, an omission on the part of the accused to specifically set-up the plea of private defence does not preclude him from raising it even for the first time in an appeal, if he is able to show from the prosecution evidence and other materials on record that he acted in private defence. It is open to the accused to deny commission of the criminal act attributed to him and his presence on the spot. At the same time, it is also open to him to show from the record of the case that if he did the criminal act assigned to him, he did it in the exercise of the right of private defence of person or property. Thus, the plea of right of private

defence cannot be denied to the accused if available to him, simply on the ground that he did not specifically put it forward during trial where he pleaded innocence and false implication only.

19. Now it is to be seen whether in the given facts and circumstances of the case the right to private defence was available to the accused/appellants or not? In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his/her safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered.

20. As could be seen from the aforesaid discussion and the evidence on record that it is the deceased who had gone to the place of occurrence with axe in the night at about 10, beaten the doors of accused/appellant No.1 by axe, attempted to damage the roof of his house and when wife of accused/appellant No.1 went out for urination at about 11 in the night, the deceased caught hold of her hand with intent to outrage her modesty and therefore there was scuffle between the deceased and accused/appellants and in that process they inflicted axe & club injuries to the deceased which resulted in his death. In these circumstances, we find substance in the plea of right of private defence of person by accused/appellants. However, despite the fact that the injuries were caused by the accused/appellants after the scuffle in order to protect PW-4, wife & daughter-in-law of accused/appellants, the extent of injuries caused on the vital parts (liver & lungs) of the body of the deceased with deadly weapons like axe, cannot be said to be justified for the reason that the accused were three in numbers (juvenile accused), the deceased was drunk and as such they had all the opportunity to drive him away by causing such amount of injuries necessary to protect PW-4 and thereby they could have

avoided death of the deceased. Thus, the accused/appellants have exceeded the right of private defence. But this fact cannot be lost sight of the fact that the incident occurred in the spur of moment, in the heat of passion and the assaults were not intentional and premeditated. Consequently, this Court is of the considered view that the accused/appellants had exceeded the right to private defence and being so, their case comes within the purview of Exception 2 to Section 300 of IPC i.e. culpable homicide not amounting to murder. Further considering the manner in which they assaulted the deceased, it can safely be inferred that they had no intention to commit murder of the deceased, as observed above, but had the knowledge that infliction of such injuries on the deceased would result in his death. This being the position, they are liable to be convicted under Section 304 Part II of IPC and not under Section 302 IPC as has been done by the trial Court.

21. As regards the sentence, considering the fact that the accused/appellants have already remained in jail for a period of more than five years and the incident had taken place in the year 2002 i.e. about 15 years have elapsed since then, we feel that it will be in the interest of justice to sentence the appellants to the period already undergone by them.
22. In the result, the appeal is partly allowed. While maintaining conviction & sentence of appellants under Sections 201 & 506 Part II of IPC, their conviction & sentence under Section 302 IPC is hereby set aside and they are convicted under Section 304 Part II of IPC and sentenced to the period already undergone by them. Accused/appellants are directed to deposit an additional sum of Rs.5,000/- each with the concerned trial Court within a period of six months from today, failing which they shall have to suffer jail sentence of rigorous imprisonment of one year. The amount so deposited shall be paid as compensation under Section 357 (3)

of Cr.P.C. to the legal heirs/representative of the deceased by the trial Court after due verification.

23. The appellants are already on bail. Their bail bonds are discharged.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(RP Sharma)
Judge

roshan/-