

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.820 of 2004****Order Reserved on 19.05.2017****Order Delivered on .07.2017**

1. Humeshwar @ Dhodhiya, S/o Shri Vishwanath Nai, aged about 45 years, Occupation Agriculture, R/o Village Latori, P.S. Lakhanpur, District Surguja (CG).
 2. Manmati @ Dhodhin, W/o Humeshwar Nai, aged about 40 years, Occupation Household, R/o Village Latori, P.S. Lakhanpur, District Surguja (CG).
- Appellants**

Versus

State of Chhattisgarh, through Police Station Lakhanpur, District Surguja (CG).

----Respondent

For Appellant : Mr. Shakti Raj Sinha, Advocate
 For State : Mr. Avinash K. Mishra, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Rajendra Chandra Singh Samant
CAV JUDGMENT

Per R.C.S. Samant, J.**10.07.2017**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 19.08.2004 passed by the Learned First Additional Sessions Judge, Ambikapur, District Surguja in Sessions Trial No.134 of 2004 whereby and whereunder the Learned First Additional Sessions Judge has convicted the appellant No.1-Humeshwar @ Dhodhiya and appellant No.2-Manmati @ Dhodhin for the offence punishable under Section 302 of the Indian Penal Code (for short 'IPC') and sentenced each of them to undergo imprisonment for life and to pay fine of Rs.500/- each with default

stipulation.

2. The case of the prosecution, in brief, is that the appellants along with their son Bablu @ Mahesh resided in village Latori. On 09.01.2004 at about 11:00 pm in the night, deceased Jokhuraam came in front of the appellants' house and started pelting stones and tried to break the door of their house. Appellant No.2-Manmati @ Dhodhhin came out of her house then deceased Jokhuraam hit her with stone, on account of which the appellants and their minor son Bablu @ Mahesh assaulted him with clubs and fists and injured him. Jagru Das (PW-2) has witnessed the incident and informed Karlu Ram (PW-1), the son of deceased Jokhuraam, who brought his injured father Jokhuraam to his residence. On 10.01.2004 in the morning Karlu Ram (PW-1) and Jagru Das (PW-2) took the injured Jokhuraam from village Latori to village Lakhanpur where First Information Report (Ex.P-1) was lodged at the Lakhanpur Police Station and the offence punishable under Section 307 of IPC was registered against the appellants and their son co-accused Bablu @ Mahesh. Thereafter, the injured Jokhuraam was sent for medical treatment at Lakhanpur Government Hospital and he died after some time on 10.01.2004. On receiving information of death of deceased Jokhuraam from hospital Lakhanpur, offence under Section 302 of IPC was registered against the accused persons and thereafter Merg intimation (Ex.P-20) was recorded on the same day on 10.01.2004 at 9:00am. Inquest on the dead-body of Jokhuraam was conducted vide Ex.P-3. Dr. P.S. Kerketta (PW-6) conducted postmortem examination on the body of the deceased vide Ex.P-13, in which he opined that the death was homicidal in nature which resulted

due to ante-mortem head injury.

3. While conducting investigation, Spot Map Ex.P-4 and Ex.P-4A were prepared. At the instance of appellant No.1-Humeshwar @ Dhodhiya vide his memorandum Ex.P-5, one bamboo club was seized, vide Ex.P-8. At the instance of appellant No.2-Manmati @ Dhodhin, vide her memorandum Ex.P-6, one bamboo club was seized, vide Ex.P-9. During the course of investigation, some bloodstained and natural soil was seized vide Ex.P-7 and vide Ex.P-10 one bloodstained shawl of accused Manmati and vide Ex.P-11 one bloodstained towel (gamchha) of accused Humeshwar were recovered and seized. Seized clubs were examined by Dr. P.S. Kerketta (P.W.-6), who has reported vide Ex.P-14 that the injuries caused to the deceased may have been caused by these articles. Appellant No.2-Manmati @ Dhodhin was also examined for the injuries caused to her vide Ex.P-16 by Dr. P.S. Kerketta (P.W.-6) who reported that the simple injuries caused to her were caused by some hard-blunt object. A spot map of the place of incident was prepared by Investigating Officer vide Ex.P-18. Clothes of the deceased preserved during postmortem examination were seized vide Ex.P-19. Seized articles were sent for FSL examination. FSL report is Ex.P-29. Statements of the witnesses were recorded under Section 161 of CrPC.

4. Appellants were charge-sheeted, whereas co-accused Bablu @ Mahesh being juvenile was prosecuted before the Juvenile Court. The trial Court framed charges under Section 302 read with Section 34 of IPC against the accused persons. They denied the charges levelled

against them and prayed for trial. The prosecution examined 9 witnesses in support of their case. On being examined under Section 313 of the CrPC., denying all the incriminating evidence against them by the prosecution, the accused persons pleaded innocence and false implication. In defence appellant No.1- Humeshwar has pleaded that there was a dispute of property between the parties and in defence appellant No.2-Manmati has pleaded that the deceased Jokhram caught hold her hand with an intention to outrage her modesty and on her raising alarm, her son came to her rescue and when they both tried to push the deceased Jokhram out of their house he collided with the wall and the door-frame of the door of their house and got injured himself. Three witnesses were examined in defence.

5. After hearing learned counsel appearing for the parties, the trial Court by judgment impugned, has convicted and sentenced the accused/appellants as mentioned in the opening paragraph of this judgment. Hence, this appeal.

6. The grounds in the appeal are that the appellants have been erroneously convicted by the trial court without there being any basis of reliable evidence of the prosecution. The prosecution has failed to prove its case beyond reasonable doubt. There is no eye-witness in this case. The whole case is based on the statement of Bikul Das (PW-4) whose statement is unreliable. The statements of witnesses Karlu Ram (PW-1), Jagru Das (PW-2) and Jaishri Das (PW-3) are not legally admissible. The conviction is based on conjectures and surmises. It has been therefore prayed that the appellants be acquitted

of charge levelled against them.

7. It is submitted by the learned counsel for the appellants that the trial Court has failed to appreciate the fact that the appellants have exercised their right of private defence. The deceased Jokhuraam had come to the house of the appellants with an intention to outrage the modesty of appellant No.2-Manmati which gave rise to the cause of this incident. It is also submitted that the evidence of the prosecution witnesses specially the alleged eye-witness Jagru Das (P.W.-2) is unreliable. The appellants are entitled for acquittal.

8. Learned State Counsel opposed the grounds and arguments submitted on behalf of the appellants. He submitted that the prosecution proved his case beyond reasonable doubt and there is no scope for intervention in the impugned judgment passed by the trial Court.

9. Looking to the submissions made by the learned counsel for the parties in the arguments, it appears that there is a change in the stand of the appellants/accused persons. Right to private defence was not specifically pleaded before the trial Court, even then there is some evidence on record on the basis of which this plea of defence can be considered.

10. Hence, the question for determination in this appeal is, whether the appellants have exercised their right to private defence while deceased Jokhuraam is alleged to have made sexual assault on appellant No.2-Manmati and thus, this is a case under exception?

11. The next question for determination in this appeal is, whether the appellants/accused persons have exceeded their right to private defence by causing death of deceased Jokhuraam?

12. Heard counsel for the parties and perused the evidence of the witnesses and the materials available on record.

13. The case of the prosecution is based on eye-witness account as well as evidence of extra-judicial confession. Jagru Das (PW-2) stated that on the date of incident when he was sleeping at his home at about 10-11 pm he heard some shouting of Jokhuraam in his neighborhood where the appellants have their residence. He went to the place of incident and saw that the appellants and their son Bablu were engaged in assaulting Jokhuraam. He tried to intervene even then the appellants and their son did not stop. He saw injury of Jokhuraam on his head and informed about the incident to Karlu Ram (PW-1). Karlu Ram (PW-1) and his brother Shankar Ram came to the place of incident and took their father to the place of their residence. In his cross-examination, there is no such statement to disbelieve what he has stated in his examination-in-chief. He denied of having any knowledge that the deceased Jokhuraam was trying to outrage the modesty of appellant No.2-Manmati.

14. Bikul Das (PW-4) also arrived at the place of incident after hearing the communication and saw Jokhuraam lying in injured condition where the appellants stood armed with clubs. His father Jagrudas was scolding the appellants who then left the spot. He is not an immediate eye-witness, but he is a witness of the circumstance

immediately after the incident when he saw the injured Jokhuraam and the presence of the appellants on the spot which had remained intact in the cross-examination. Some discrepancy compared to his previous statement Ex.P-3 has been established, which is of no significance.

15. Karlu Ram (P.W.-1) has stated that when he was sleeping in his house he was waken up by Jagru Das (PW-2) and informed that the appellants and their son Bablu had assaulted his father with clubs who is lying injured at the door of his (PW-2) house. On this information, he along with his brother Shanker Ram went to the place of incident and found their father lying in injured condition and he was bleeding. His father told them that the appellants and their son assaulted and injured him with clubs. He could not make any arrangement to take his father to the police station at night and after making arrangement in the next morning when he was taking his father to Lakhanpur Police Station the deceased died on the way. He then again went to the Lakhanpur Police Station next day and lodged a report vide Ex.P-1. In the cross-examination, his statement remained unrebutted. No question was put to him to rebut the statement about the oral dying declaration made by deceased Jokhuraam. He has denied the suggestion given by the defence that the deceased had entered into the house of the appellants with an intention to outrage the modesty of appellant No.2- Manmati.

16. Jaishri Das (PW-3) is the village Kotwar, who had informed about the incident. He accompanied Karlu Ram (PW-1) to the Police Station, Lakhanpur. He has also stated that on his asking Jokhuraam

told him that the appellants and their son Bablu had assaulted him with clubs. He has denied adverse suggestion given by the defence in his cross-examination and stated that the deceased Jokhuraam was not unconscious and he was speaking. No question was put to him in cross-examination regarding the rebuttal of oral dying declaration of Jokhuraam.

17. Mungeshwar (PW-5) is the witness of memorandum and seizure. He has stated that in the presence of policemen the appellant No.2-Manmati told that the deceased had tried to rape her in the night of the incident, because of which her son Bablu @ Mahesh had assaulted him. He has not supported the case of the prosecution regarding the memorandum, recovery procedure and declared hostile.

18. Sub-inspector Mohsin Khan (PW-9) has conducted the investigation and proved the investigating procedure. Memorandum and seizure do not hold much importance as compared to that of eye-witness account of the spot of incident. He has witnessed that the appellants were armed with clubs, which is sufficient evidence about possession of weapon of assault at the time of incident.

19. Dr. P.S. Kerketta (PW-6) is the doctor who has conducted the postmortem examination on the body of the deceased on 10.01.2004 and found the following injuries:

- i) Lacerated wound over left forehead in the size of 2" x 1" in the chest.
- ii) Three wound in the size of 3" x 2", 4" x 2" all skin deep on left temporal region.
- iii) One wound in the size of 2" x 1" skin deep on the left occipital region.
- iv) Multiple fracture on temporal bone. Rupture of meninges and

presence of big coagulated blood which was the result of cerebral hemorrhage.

According to him, some of the injuries were homicidal in nature sufficient to cause death. Vide Ex.P-12, he opined that the death of deceased Jokhuraam was homicidal in nature.

20. After analyzing, scrutinizing and considering the evidence of prosecution witnesses, it is apparently clear that the death of deceased Jokhuraam had occurred due to injury caused to him on his head by the appellants. In support of the plea raised, in defence Appellant No.2-Manmati (DW-1) has examined herself. She has stated that at the time of incident the deceased Jokhuraam entered into her house and pushed her on the ground and tried to rape her and on her crying, her son Bablu came to intervene and stopped Jokhuraam and she pushed him out from her house and while pushing him out of her house, the deceased collided with wall and door frame and then he got injured himself. She tried to lodge a report against Jokhuraam but before that Jokhuraam died. In the cross-examination she has stated that her report was not written by the Police Officer, even then she did not approach the concerned Superintendent of Police to make a complaint in this respect. She denied the suggestions given by the prosecutor.

21. Goutam (DW-2) has stated that he arrived on the place of the incident after the incident was over. He was narrated by appellant No.2-Manmati that Jokhuraam was trying to rape her. Similar is the statement of Jagdev Prasad (DW-3).

22. Sub-inspector Mohsin Khan (PW-9) has admitted in his cross-examination that appellant No.2-Manmati was also got medically examined as she had suffered injuries, but he has specifically denied that appellant No.2-Manmati had come to the police station to lodge a report and he refused to lodge her report. During investigation, he was never informed by any witness that the deceased Jokhram had tried to outrage the modesty of appellant No.2. None of the prosecution witnesses have admitted in the cross-examination that the deceased was trying to outrage the modesty of appellant No.2-Manmati, neither is there any admission of the Investigating Officer.

23. Under these circumstances, the evidence of the defence has not formed sufficient cause to raise any reasonable doubt in this case. Just making an allegation is not sufficient. The requirement for the defence is to prove its case on the basis of preponderance of probabilities. Perusing the evidence of the defence, it cannot be said that any preponderance is established or any probability can be considered on such statement. Hence, it is held that the appellants though raised the plea of their right to private defence but they have failed to prove it.

24. Considering all the facts and circumstance in this case and after close scrutiny and analysis of the evidence of prosecution, we are of the considered opinion that the appellants acted to assault the deceased Jokhram with clubs, which caused him fatal injuries and the same resulted in his death.

25. Now, the question arises in this appeal is, whether this is a case

of culpable homicide amounting to murder?

26. Looking to the facts and circumstances of the case, it is apparent that it was the deceased Jokhuraam who had been to the place of the appellants. It is not clear that what was the reason of the dispute and reason for the assault. Although no admission was made by any prosecution witnesses that the deceased Jokhuraam intended to outrage the modesty of appellant No.2-Manmati or tried to rape her, but the circumstance which exists, gives weight to the defence plea to this extent that deceased caused injuries to appellant No.2. It is true that appellant No.2-Manmati had suffered simple injuries and she was examined by Dr. P.S. Kerketta vide Ex.P-16. It is alleged that the injuries were caused to appellant No.2-Manmati by deceased Jokhuraam. There is no explanation to the injuries caused by appellant No.2-Manmati by the prosecution side. For this reason, the theory put-up by the defence cannot be ruled out. Although, Jagru Das (PW-2) is the witness of incident of assault, but he has also not stated anything as to what transpired between the appellants and the deceased before the incident took place. Hence, there seems to be possibility of two views which can be taking into consideration.

27. The submissions and pleas of the defence can be accepted that the incident of assault started while exercising the right of private defence. But, looking to the result that the deceased Jokhuraam has expired, it is also clear that the appellants exceeded their right to private defence. This brings the case against the appellants under one of exceptions of Section 300 of IPC, which is punishable under Section

304 of IPC and not under Section 302 of IPC. Further considering the facts and circumstances and evidence in this case, it is found that there is nothing to suggest in the evidence of the prosecution that the appellants intended to cause death of the deceased Jokhuram, for the reason that only clubs were used to cause him injuries although the injuries were caused on his head. Hence, on the basis of this finding it is held that it is a case under Section 304 (Part-II) of IPC.

28. On the basis of the foregoing discussions and reasons as mentioned above, there is a partial need of intervention in the impugned judgment with respect to the conviction and sentence against the appellants. Hence, this appeal is allowed in part. The conviction and sentence awarded by the trial Court against the appellants under Section 302 of IPC is set-aside and instead of that, both the appellants are convicted under Section 304 (Part-II) read with Section 34 of IPC and are sentenced with imprisonment of seven years along with fine with default stipulation as levied by the trial Court.

29. The appellants are on bail. Their bail-bonds stand cancelled. They are directed to surrender forthwith and/or be taken into custody for serving out the remaining part of their sentence. The period of custody already undergone by them shall be adjusted with this substantive sentence awarded to them.

30. With the aforesaid modification of conviction and sentence, the appeal stands allowed in part and disposed of accordingly.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.C.S. Samant)
Judge