

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 871 of 2011

- Somar Sai, S/o Kendaram Majhwar, aged about 45 years, resident of village Dodhi Tikrapara Chodiya, P.S. Lakhanpur, Dist- Surguja (CG)

---- Appellant

Versus

- State Of Chhattisgarh Through: P.S. Lakhanpur, Distt.-Surguja, C.G.

---- Respondent

For Appellant	:	Shri H.S. Ahluwalia, Advocate
For Respondent	:	Shri Vivek Sharma, Government Advocate

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

Judgement

31/08/2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 14.9.2011 passed by the Additional Sessions Judge, Ambikapur, Surguja in S.T. No.345/10 convicting the accused/appellant under Section 302 of the Indian Penal Code (for short 'the IPC') and sentencing him to undergo R.I. for Life and fine of Rs.1,000/-, in default to undergo additional R.I. for 02 months.
2. In the present case name of deceased is Barati Bai, wife of accused/appellant.
3. The prosecution story, in brief, is that on 26.6.2010 at about 8 in the night there was some quarrel between the accused/appellant and his wife Barati Bai over which it is alleged that the accused/appellant gave a blow of club on the head of the deceased as a result of which she died

instantaneously. FIR (Ex.P-2) was lodged on 27.6.2010 at 1.30 in the afternoon by Ratanram (PW-1), Sarpanch of village, against the appellant under Section 302 IPC. Merg Intimation (Ex.P-1) was also recorded on 27.6.2010 itself at 1.45 p.m. at the instance of Ratanram (PW-1). Inquest was made over the body of the deceased vide Ex.P-6. Body of the deceased was sent for post-mortem examination which was conducted by Dr. P.S. Marco (PW-9) and he noticed following injuries on the body of deceased:-

- Superficial abrasions over right elbow.
- Black imprint abrasion over both thighs
- black discolouration with swelling over right temporal to right side of face. Fracture of right temporal bone.

The doctor has opined that cause of death was head injury leading to fracture of right temporal bone and brain damage and the death was homicidal in nature. On 27.6.2010 itself memorandum (Ex.P-3) of the accused/appellant was recorded in which he made disclosure statement and in pursuance of disclosure statement he got recovered two clubs & stone from his house vide seizure memo of Ex.P-4.

4. On completion of investigation, charge sheet for the offence punishable under Section 302 IPC was filed against the accused/appellant and accordingly the charge was framed against him by the trial Court. The prosecution in order to bring home the charge levelled against the accused/appellant examined 12 witnesses in all. Statement of accused/appellant was recorded under Section 313 of Cr.P.C. in which he abjured his guilt and pleaded innocence & false implication.
5. After hearing the parties, the Court below has convicted & sentenced the accused/appellant in the manner as described above.
6. Counsel for accused/appellant submits that;-
 - it is case falling under Exception 4 to Section 300 IPC and, in any

event, as the appellant had given only a single blow with club, he ought not to have been convicted under Section 302 IPC and his conviction could only be under Section 304 Part II IPC.

- the appellant is already in jail for the last more than seven years and therefore by altering his conviction, he may be sentenced to the period already undergone by him.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
8. We have heard counsel for the parties and perused the evidence available on record.
9. Ratan Ram (PW-1) is the lodger of Merg Intimation (Ex.P-1), FIR (Ex.P-2), memorandum (Ex.P-3), seizure memo (Ex.P-4) & Inquest (PW-5). He has stated that the accused/appellant came to him and confessed before him to have killed his wife by inflicting injuries to her by club.
10. Firdaus (PW-2) is the witness of memorandum (Ex.P-3), seizure memo (Ex.P-4) & Inquest (PW-5)
11. Farharo (PW-3) is a child witness and daughter of accused/appellant and deceased. The trial Judge after satisfying himself that this witness is understanding the questions put to her and that she is answering the questions intelligently, proceeded to record her evidence. This witness has stated that there was a quarrel between her father (accused) had assaulted her mother (deceased) in which he inflicted injuries to her mother by stick & stone. This evidence is not shaken in the cross-examination and in her cross-examination, she has clearly stated that the her father gave three blows of club to her mother. She has denied the suggestion put to him that she had not seen the incident as she used to

sleep at her sister's house.

12. Amroos (PW-4), Shakul (PW-5), Kamal Sai (PW-6) are the witnesses before whom the accused/appellant repeated his confession that he killed his wife.
13. Vidur (PW-7) did not support the prosecution case and turned hostile.
14. Dr. P.S. Marco (PW-9) is the doctor who performed autopsy on the body of deceased and noticed the injuries as described above. This witness has opined that cause of death was head injury leading to fracture of right temporal bone and brain damage. Death was homicidal in nature. The query- whether the injuries present on the body of deceased could be caused by the club & stone produced before him, has been answered by this witness in the affirmative vide Ex.P-15.
15. Gauntiyaram Marabi (PW-10) is the police person who helped in the initial investigation.
16. S.P. Singh Sisodiya (PW-11) is the investigating officer who has duly supported the prosecution case.
17. The case of the prosecution mainly rests on the testimony of Farharo (PW-3), who is child witness, and was aged 6 years when her evidence was recorded. It is well settled by the Hon'ble Supreme Court in catena of decisions that evidence of a child witness must be evaluated carefully, as the child witness may be swayed by what other tell him and is an easy prey to tutoring. The wisdom requires that evidence of child witness must find adequate corroboration before it is relied on.
18. Close scrutiny of evidence makes it clear that on 27.6.2010 the accused/appellant had caused injuries to the deceased by stone & club and because of this assault, she died on the spot. The incident was witnessed by Farharo (PW-3), 6 years old daughter of accused & deceased, who had specifically deposed in her evidence that it is the

accused/appellant who had assaulted the deceased thrice by stone & club as a result of which she died. Evidence of Farharo (PW-3) further gets corroboration from the medical evidence wherein fracture over temple region of the deceased was noticed and according to the autopsy surgeon cause of death was right temporal bone fracture and brain damage.

That apart, before recording evidence of Farharo (PW-3) the Court had asked certain questions to her and after satisfying itself of the fact that she understands the duty to speak truth and is able to rationally answer the questions put to her, it has examined her. Nothing has been brought by the defence in her cross-examination that being aged about six years there was any infirmity in her understanding of facts perceived, her ability to narrate the same correctly or that she was tutored by her grandparents etc. Being so, we have no hesitation in holding that evidence of Farharo (PW-3) inspires confidence and is fully corroborated by the medical evidence and there exists no likelihood of being tutored. It is a settled principle of law that if the statement of child witness is reliable, truthful and is corroborated by other prosecution evidence, the Court can safely rely upon the statement of such witness and can form the basis for conviction as well.

Another piece of evidence against the accused/appellant is the extra-judicial confession made by him before PW-1, PW-2, PW-4 & PW-6. According to these witnesses, on being asked, the accused/appellant made the confession of having killed the deceased. No doubt, the evidence of extra-judicial confession is fragile in nature but once it is established that such confessional statement was voluntary and gets corroboration from the other surrounding circumstances, it regains the credibility of being made basis to arrive at a particular conclusion. Here in this case also the witnesses to extra-judicial confession are independent

witnesses, they had no motivation to tell or lie or concoct evidence. Nothing has been elicited by the defence in the cross-examination of these witnesses that the extra-judicial confession made by the accused was not voluntary or that the witnesses before whom it is said to have been made nurtured any bias or inimical relationship as an indication of motive on their part of attributing an untruthful statement against the accused. In these circumstances, there is no reason to disbelieve the fact that the accused/appellant made a confessional statement that he had killed his wife.

Further, evidence available on record goes to show that accused/appellant was living along with the deceased under the same roof and as per medical evidence, death of deceased was homicidal in nature. Thus there was corresponding burden on accused/appellant to offer explanation as to how his wife died, but in the statement recorded under Section 313 of Cr.P.C. the accused/appellant has not offered any explanation in this regard, except a bald defence of denial.

19. Thus, keeping in mind the evidence of above eye-witness which finds due corroboration from the medical evidence as well, the complicity of accused/appellant in the crime in question stands proved beyond reasonable doubt.
20. Now the question arises for consideration before this Court is whether act of accused/appellant amounts to murder or it falls within any of the Exceptions to Section 300 of the IPC?
21. Evidence available on record reflects that accused/appellant, was suspecting fidelity of his wife and the quarrel between the accused/appellant and his wife often took place. On the date of incident also, there had been a quarrel between them on the said issue and during

the course of said quarrel, the appellant had caused club & stone blows to the deceased which resulted into her death. It is thus apparent that the accused/ appellant had no intention or premeditation on his part to cause such bodily injuries to the deceased which could lead to her death and the incident occurred on the spur of moment and in the heat of passion. However, in the given facts and circumstances of the case, it can be safely inferred that the appellant had the knowledge that the injuries which he is going to cause to the deceased may result in her death. Thus, this Court thinks that the act of accused/ appellant can, at best, be termed as culpable homicide not amounting to murder, which is covered within Exception-IV to Section 300 of the IPC. That being the position, this Court is of the considered opinion that conviction of accused/appellant under Section 302 of the IPC is not based on the correct appreciation of evidence available on record and taking into consideration all aspects of the matter, he can at best be convicted under Section 304 Part-II of IPC.

From the record it appears that the accused/ appellant is in jail since 27.6.2010 and thereby he has completed more than 7 years of imprisonment. In the peculiar facts and circumstances of the case, the interest of justice would be served if he is sentenced to the period already undergone by him.

22. In the result, the appeal is allowed in part. Conviction of the appellant under Section 302 of the IPC is altered to Section 304 Part-II of the IPC and he is sentenced to the period already undergone by him. He is reported to be in jail, therefore, he be set at liberty forthwith if not required to be detained in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.P. Sharma)
Judge

roshan/-