

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 927 of 2008

Ujeram Rathiya S/o. Khuluram Rathiya, Aged about 66 years, R/o. Village Rajkot Chauki, Rairumakhurd, Thana Dharamjaigarh, District Raigarh (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through Station House Officer, Thana Dharamjaigarh, District Raigarh (C.G.)

---- Respondent

For Appellant	:	Mr. Rajkumar Pali, Advocate.
For Respondent/State	:	Mr. Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Ram Prasanna Sharma

Judgment on Board by Pritinker Diwaker, J.

11.09.2017

1. This appeal has been filed against the judgment of conviction and order of sentence dated 25.09.2008 passed by the Sessions Judge, Raigarh District Raigarh (C.G.) in Sessions Trial No. 137 of 2007, convicting the accused/appellant under Section 302 of the IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default of payment of fine amount to further undergo R.I. for six months.
2. As per prosecution case, on 28.08.2007 deceased Sakharam came to the house of appellant along with two other persons namely Raghu Rathiya (PW-2) and Lohari Ram (PW-12), a deaf & dumb, and all of

them had consumed liquor in the house of the appellant. It is said that on account of damage caused to the crop of accused/appellant by the cattle of deceased, some dispute cropped up between deceased and accused and they started quarreling with each other. Raghu Rathiya (PW-2) intervened and sent the deceased back to his house. After some time the deceased again started hurling abuses at the accused from his house which annoyed the accused and he assaulted on the neck of the deceased by a crowbar as a result of which the deceased died on the spot itself. Unnumbered merged intimation was recorded on 29.08.2007. Unnumbered FIR (Ex.P-9) was also recorded on the same day. Numbered FIR (Ex.P 9A) was registered against the appellant under Section 302 of the IPC. Inquest on the body of the deceased was conducted on 29.08.2007 vide Ex.P-5. Dead body was sent for postmortem examination which was conducted by Dr. B.L. Bhagat (PW-8) on 30.08.2007 vide Ex.P-8 and he noticed the following injuries;-

- (i) Incised wound at the upper part of left side of neck of 20cmx 9cmx8cm in size, clotted blood in and around the wound, margins were regular. Underlying bone fractured.
- (ii) Incised wound at the upper part of lateral aspect of left upper arm of 12cmx5cmx4 in size.
- (iii) Incised wound at the left upper arm in same size just 3 cm below injury No.2 of 10cmx3cmx2cm in size. Margins are regular.
- (iv) Incised wound at the post aspect of upper part of left upper arm of 5cmx6cmx5cm in size.
- (v) Incised wound at the middle of left upper arm of 5cmx4cmx4½ cm in size.

The doctor opined that cause of death of the deceased was syncope as a result of excessive hemorrhage caused by hard and sharp edged object and the death was homicidal in nature. Pursuant to information given by the accused, one crowbar was seized from the house of appellant vide Ex.P-6. Seized articles were sent for chemical examination to the FSL from where report of Ex.P-16 was received according to which the crowbar was stained with blood, however, there is no serological report confirming the origin of blood.

3. After completion of investigation charge sheet was filed under Section 302 of the IPC against the appellant and accordingly the charge was framed by the trial Court against him.
4. In order to prove the guilt of accused/appellant in the crime in question, the prosecution has examined 13 witnesses. Statement of accused/appellant was recorded under Section 313 of the Cr.P.C in which he abjured his guilt and pleaded innocence and false implication. He examined one witness in his defence.
5. After hearing the parties, the Court below by the impugned judgment convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment. Hence, this appeal.
6. Counsel for the accused/appellant submits that the trial Court has committed error in placing reliance on the testimony of deaf and dumb witness i.e. Lohari Ram (PW-12), particularly when the trial Court itself was of view that the witness is not understanding the questions put to him. He further submits that the procedure adopted for recording the statement of PW-12 is also not proper. It has been further argued that one blood stained crowbar is said to have been seized at the instance of

the appellant but in absence of serological report proving the origin of blood, the FSL report (Ex.P-16) is of no consequence.

7. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of accused/appellant is strictly in accordance with law and there is no illegality and infirmity in the same.
8. Heard the counsel for the parties and perused the material available on record.
9. Lohri Ram (PW-12) is an eye-witness of the incident. He appeared in the Court with Thakur Prasad (PW-10). On being said by Thakur Prasad (PW-10) that he understands the signs of Lohri Ram(PW-12), the Court proceeded to record evidence of Lohri Ram (PW-12). According to Lohri Ram (PW-12) he knows the accused/appellant. This witness puts his hand on the neck and shoulder to show the assault by these gestures and fingers at the accused/appellant to be the assailant. This witness is gesticulated to have led Thakur Prasad to the spot. As the witness was not expressive, it was observed by the trial Judge that he was unable to understand the other questions. In the cross-examination, the witness through gesture admitted that they consumed liquor and there was no light at the place of occurrence. However, the witness was unable to explain as to how far he was standing at the time of occurrence.
10. Thakur Prasad (PW-10) through whom Lohri Ram (PW-12) was examined has nowhere stated that he understands the signs expressed by Lohri Ram (PW-12). He has stated that Lahori Ram (PW-12) informed him about the incident.
11. Mahero Bai (PW-11) is the wife of deceased who has stated that on the basis of signs, Lohri Ram (PW-12) informed her that the deceased had

been killed. In the cross-examination she has admitted the fact that on the date of incident Lohri Ram(PW-12) and her husband had consumed liquor. She has further admitted that prior to that incident Lohri Ram (PW-12) never disclosed to her anything though she used to have talk with him. It is relevant to note here that Thakur Prasad (PW-10) and Mahero Bai (PW-11) had nowhere stated that they were well versed with the signs and gestures of Lohri Ram (PW-12).

12. Dr. B.L. Bhagat (PW-8) is the witness who conducted postmortem examination on the body of the deceased and noticed the injuries as described above. According to this witness, the cause of death was syncope due to excessive hemorrhage caused by hard and sharp edged object and the death was homicidal in nature.
13. Raghu Rathiya (PW-2) and Tara Singh (PW-3) are the witnesses of inquest and seizure. Anandram Sidar (PW-4) is Patwari who prepared the spot map vide Ex.P-7. S.S. Khan (PW-6) is the investigating officer who has duly supported the prosecution case. He has stated that he recorded the statement of Lohri Ram (PW-12), a deaf & dumb, on the basis of clarifications given by the villagers as to the signs and gestures made by Lohari Ram (PW-12).
14. Conviction of accused/appellant is solely based on the testimony of deaf and dumb witness i.e. PW-12 Lahori Ram. In order to properly appreciate the facts of case, the provisions of Section 119 of the Indian Evidence Act, 1872 are relevant and reproduced as under :-

"119. Dumb witnesses.- A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by sign; but such writing must be written and the signs

made in open Court. Evidence so given shall be deemed to be oral evidence."

From a bare perusal of Section 119 of the Evidence Act it is clear that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

15. A Division Bench of the Kerala High Court in **Kadungoth Alavi v. State of Kerala** reported in **1982 Cri.LJ 194** dealing with the question of statement of deaf and dumb witness to be recorded by somebody else, referring to the Calcutta High Court's case reported in **Ah Sai vs. Emperor 1926 (27) CriLJ 805**, observed as follows:

"If somebody else is available, it is better the services of a person who is a witness in the case is not made use of to interpret his evidence or to converse with him. In *Ah Soi v. King Emperor* AIR 1926 Cal 922 : 1926 (27) Cri LJ 805, it has been held that a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the side of the prosecution in the Sessions trial should not be chosen as interpreter. The Calcutta High Court said that this is opposed to the elementary ideas of justice."

In **State of Rajasthan v. Darshan Singh @ Darshan Lal** reported in **2012 (2) RCR (Criminal) 987**, the deaf and dumb person was a witness and the signs given by the said witness were interpreted by

the relative witness. In those circumstances, the Hon'ble Apex Court reached to the conclusion that under those circumstances, it is unsafe to rely upon the testimony of the witness who has appeared through interpreter.

16. Thus, before recording the statement of deaf and dumb witness, the Court is required to ascertain that he/she possesses the requisite amount of intelligence, and that he understands the nature of oath. Not only this, but it is also required to record the satisfaction to that effect. The court is required to ascertain, if the witness either by writing or sign can make intelligible of what he has to speak. If he is able to communicate his statement perfectly by writing, it will be more satisfactory method of taking evidence. When such a witness is not able to write, then he can make sign showing what he wants to say. If it is by signs, those signs must be recorded and not only the interpretations of those signs. It is necessary to enable the appellate court to know whether the interpretation of the sign is correct or not. It is not safe for a court to embark upon the examination of a deaf and dumb witness on his own without the help of an expert or a person familiar with his mode of conveying ideas to others in day-to-day life. However, such a person should not be an interested person, who had participated in the investigation and who is also a witness in the same trial.
17. In the light of above, if we examine the evidence available on record, it is clear that the trial Court before recording the statement of this witness neither made any effort to ascertain prelims like his intelligence, understanding of oath, capacity to communicate by writing nor made any arrangement for an expert and proceeded to record statement of PW-12, deaf and dumb witness. It is not in dispute that PW-10 Thakur

Prasad is the son-in-law of the deceased, he participated during the investigation and also appeared as a witness in the same trial. Admittedly, the signs and gestures made by the deaf and dumb witness i.e. PW-12, had been interpreted by Thakur Prasad (PW-10) and on the strength of which the statement of the said witness was recorded. Thus, on this count alone, the evidence of PW-12 Lahori Ram is not admissible in evidence because the possibility of manipulating the things in favour of the prosecution by the interpreter i.e. PW-10 being the person interested in the success of the case cannot be ruled out. Under such circumstances, we are of the view that the trial Judge having not taken the requisite precautions in recording the statement of a deaf and dumb witness, rendered the statement of PW-12 inadmissible. Thus, conviction of the appellant under Section 302 of IPC cannot be sustained on the testimony of Lahori Ram (PW-12) alone.

18. As far as the recovery of bloodstained crowbar at the instance of accused/appellant is concerned, true it is that the said crowbar was found to be stained with blood in the chemical analysis but in absence of serological report opining the origin of blood that too of the group of the deceased, mere recovery of bloodstained crowbar at his instance is not sufficient to link him with the commission of offence of murder, particularly in absence of any other corroborative piece of evidence.

19. In ***Kansa Behera Vs. State of Orissa, AIR 1987 SC 1507*** while dealing with recovery of bloodstained articles the Supreme Court held as under:

“11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the

blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.”

20. Thus, considering the evidence adduced on behalf of the prosecution, we are of the view that there is no conclusive piece of evidence establishing guilt of accused/appellant in the commission of offence beyond reasonable doubt and being so, the benefit of doubt has to go to accused/appellant.
21. Accordingly, the appeal is allowed. Conviction and sentence of accused/appellant under Section 302 of IPC are hereby set aside and he is acquitted of that charge by extending him benefit of doubt. The appellant is reported to be on bail. His bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Ram Prasanna Sharma)
JUDGE