

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 830 of 2010**

- Jain Kumar Sahu S/o Charan Sahu, aged about 27 years, R/o village - Bhoring, P.S. Tumgaon, District Mahasamund.

---- Appellant**Versus**

- State Of Chhattisgarh Through – P.S. Tumgaon, District Mahasamund (C.G.)

---- Respondent

For Appellant.	:	Shri Goutam Khetrapal, Advocate.
For Respondent/State	:	Shri Arun Sao, Dy. A.G.

**Hon'ble Shri Justice Rajendra Chandra Singh Samant &
Hon'ble Shri Justice Anil Kumar Shukla**

Judgment On Board**By R.C.S. Samant, J.****01/06/2017**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 09.11.2010 passed by Sessions Judge, Mahasamund in S.T. No.26/2010 convicting the accused/appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life with fine of Rs.10000/-, plus default stipulation.

2. The prosecution case in brief is that deceased Saraswati Bai was second wife of the appellant and had two daughters out of their wedlock. In the night intervening 31-03-2010 and 01-04-2010 at about 1.30 am, appellant went to Kantu Ram Sahu (PW/1), Laxawantin Bai

(PW/6) and Netram (PW/8) and informed them that deceased Saraswati Bai has self-immolated and while he was trying to extinguish the fire he also suffered burn injury over his hand. These witnesses went to the house of appellant and found deceased lying on the floor in burnt condition. Deceased was immediately taken to District Hospital, Mahasamund where primary aid was given and looking to her serious condition, she was referred to Medical College Hospital, Raipur and an information (Ex.P/4) thereof was sent to City Kotwali, Mahasamund. On the request of P.S. Kotwali, Mahasamund, deceased was medically examined vide Ex.P/3 wherein it was reported that deceased had sustained 100 % burn injury. Deceased was brought dead in Dr. B.R. Ambedkar College Hospital, Raipur on 01.04.2010 at 7.00 am. An information Ex.P/17 was immediately dispatched to Police Station, Moudahapara, based on which unnumbered merg Ex.P/15 was recorded on 01.04.2010 at 10.25 (whether it is AM or PM has not been mentioned in the merg). Inquest over the body of deceased was conducted vide Ex.P/18 and dead body was sent for postmortem examination to Ambedkar Hospital, Raipur where Dr. Ulhas Gonnade (PW/9) conducted autopsy on the body of deceased and gave his report Ex.P/20 opining the cause of death to be syncope due to burn injury.

A written complaint Ex.P/10 was lodged by Laxawantin Bai (PW/6). On the basis of merg inquiry and this written complaint, FIR (Ex.P/9) was lodged in Police Station, Tumgaon by Bharti Markam (PW/5) registering the offence under Section 302 IPC against the appellant. Conducting investigation, one panchanama (confession

panchanama) Ex.P/1 was prepared in presence of witnesses and same was seized vide seizure memo Ex.P/2. Togendra Singh Thakur (PW/4) - Patwari prepared spot map vide Ex.P/8. One spot map was separately prepared by the Investigating Officer vide Ex.P/11. Some burnt articles were seized from the spot vide seizure memo Ex.P/13 and seized articles were sent for its chemical examination to FSL, Raipur but no report thereof was obtained. Statements of the witnesses were recorded under Section 161 of Cr.P.C. On completion of investigation, appellant was charge-sheeted.

3. Charge under Section 302 of IPC was framed against the appellant. Appellant denied the charge and prayed for trial. Prosecution has examined as many as 12 witnesses. On examination under Section 313 of Cr.P.C., appellant denied all the incriminating circumstances and evidence against him and pleaded innocence and false implication. It was submitted that deceased was mentally retarded and used to quarrel with appellant as he had kept his father with him, which was objected by the deceased and she used to leave him and go to her maternal home very often. In defence, he examined one Vijay Kumar Markandey as DW/1. After affording opportunity for adducing evidence to the parties and hearing arguments, the impugned judgment has been passed convicting and sentencing the appellant as mentioned in para 1 of this judgment.

4. The grounds in this appeal are that the conviction of the appellant by the trial Court is bad in law and not based on legally admissible evidence. The prosecution has failed to prove motive of appellant to commit murder of the deceased. The prosecution

witnesses Kantu Ram Sahu (PW/1), Dr. Ghanshyam Chandrakar (PW/2) and Laxawantin Bai (PW/6) are not reliable witnesses and that there is contradiction and omission in their statements, thus, the same could not have been made basis, which has been relied upon by the trial Court for convicting the appellant. There is no ocular evidence of the incident and case is purely based only on circumstantial evidence being not complete in the chain of event. Dr. Ulhas Gonnade (PW/9), who conducted postmortem examination on the body of deceased, has not opined as to whether the death is homicidal, accidental or suicidal. The evidence of oral dying declaration is not reliable as the contents of the same given by the witnesses are self contradictory. On the basis of aforesaid grounds, it is prayed that the impugned judgment may be set aside.

5. It is also submitted by counsel for the appellant that the case has been concocted by Dr. Ghanshyam Chandrakar (PW/2) by making it a case of oral dying declaration, which is not supported by the document (MLC report) written by him i.e. Ex.P/3. Laxawantin Bai (PW/6) is mother of the deceased, she has made the written complaint (Ex.P/10), which shows her inter to implicate the appellant in the crime in question. The time mentioned in the merg intimation Ex.P/15 is 10.25 without making it clear as AM or PM. It raises doubt as Ex.P/16 an information sent by Dr. B.R. Ambedkar Hospital, Raipur to Incharge, Police Station, Medical College Hospital, Raipur mentioning that the appellant was admitted for treatment at 5.30 pm whereas Ex.P/17 is an information of death of deceased by Dr. B.R. Ambedkar Memorial Hospital, Raipur to Police Station, Moudahapara, which mentions the

time as 7.00 am on 01.04.2010. The mere intimation recorded by Police Station, Tumgaon is not exhibited but as per the document in the paper book the time has been recorded as 10.30 pm and the time of recording FIR (Ex.P/9) is 10.35 pm. These are the discrepancies in the documents and if the time mentioning is seen, it shows impossibility of situation that how these documents would have travelled from Police Station, Moudahapara to Police Station, Tumgaon in a very short span of time. Thus, it is submitted that the case is concocted against the appellant by the interested prosecution witnesses, therefore, the appellant is very much entitled for benefit of doubt.

6. It is submitted by the learned counsel for the State that it is not in dispute that the deceased was wife of the appellant and as per the statements of Kantu Ram Sahu (PW/1), Laxawantin Bai (PW/6) and Vijay Kumar Markandeya (DW/1), relation between the deceased and her husband (appellant) were not cordial before the incident. Secondly, it is a clear case of house murder where the appellant, being the inmate, is under obligation to explain as to how the deceased died. It is next submitted that the first medical examination of deceased made under Ex.P/3 by Dr. Ghanshyam Chandrakar (PW/2) and the intimation sent to Police Station, City Kotwali, Mahasamund Ex.P/4 are relevant as at the initial stage it disclosed that the deceased gave statement that she was burnt by her husband (Appellant). Further, the oral dying declaration has been supported by Kantu Ram Sahu (PW/1), Dr. Ghanshyam Chandrakar (PW/2), Laxawantin Bai (Pw/6) and Netram (PW/8). Defence witness Vijay Kumar Markandey (DW/1) has also

made a statement in his cross-examination that on being asked, the deceased stated that she was burnt by father of Pooja, who is daughter of appellant and the deceased. Hence, there is no scope for intervention in the impugned judgment.

7. In reply to the argument of State counsel, it is submitted by counsel for the appellant, that as per the spot map Ex.P/11, it appears that the house in question was also shared by father of the appellant, hence, the appellant was not the only inmate of house, thus, there is no burden on the appellant to explain under Section 106 of Evidence Act. Further it is submitted that Dr. Ghanshyam Chandrakar (PW/2) while examining the deceased vide Ex.P/3 has reported the smell of kerosene, whereas Dr. Ulhas Gonnade (PW/9), who conducted the postmortem examination has not made any statement about the smell of kerosene coming from the body of deceased. Under these circumstances, it is submitted that the prosecution has not succeeded in proving its case beyond reasonable doubt and the benefit of doubt may be extended to the appellant.

8. Considering the grounds in an appeal, submission made by learned counsel for the appellant and the State counsel, the question for determination in the case is whether the prosecution has been able to prove its case beyond reasonable doubt or not.

9. We have perused the evidence of prosecution, defence witness and all the material available on record.

10. It is not disputed that the deceased Saraswati Bai died of burn injury. Dr. Ulhas Gonnade (PW/9) who conducted postmortem examination on the body of deceased has stated accordingly in support

of his report Ex.P/20, which is not under challenge. It is also not in dispute that the deceased was the wife of appellant and she suffered burn injury at the place of residence which was shared by herself and the appellant.

11. There is no eye witness to the incident. It was very firstly informed by the appellant himself to Kantu Ram Sahu (PW/1) who has stated that on the date of incident, the appellant came to him at about 1.30 am in the night and informed that his wife has self immolated herself and appellant had also suffered burn injury on his hand while trying to extinguish the fire. Thereafter, he (this witness) went to the house of deceased and saw her in burnt condition. This witness has not stated in accordance with his previous statement and on this point he was declared hostile. Leading question was put to this witness by the prosecution in which he replied to the suggestion that deceased was lying on the floor in burnt condition, who (deceased) on seeing him said that she was set on fire by father of Pooja that is the appellant. He has also stated that the appellant admitted the fact in his presence that he had set her wife on fire but later on he amended his statement by stating that the appellant made this statement in presence of police, hence, this statement of extra-judicial confession cannot be taken into consideration. He has further stated that the appellant and the deceased used to quarrel frequently and that a panchanama Ex.P/1 was seized vide seizure memo Ex.P/2. In cross-examination by defence, he has made statement that in his presence the appellant has given statement that the character of his wife (deceased) was not good and this was the reason for quarrel between them. Although, he

has given this statement in the police station. He has further reiterated that the deceased had made the statement that she was set on fire by father of Pooja that is the appellant but the appellant was stating that it is she who herself set her on fire and not he. While going through whole statement of this witness about appellant coming to inform the incident and on arriving at the house of appellant seeing the deceased in burnt condition is totally un-rebutted. His statement about oral dying declaration of the deceased came as reply to the leading question by the prosecution. Although, the same is reiterated in his cross-examination, it shall be taken into consideration if it is corroborated by the statement of other witnesses.

12. Laxawantin Bai (PW/6) is mother of the deceased and resident of same village. She has stated that her daughter deceased Saraswati Bai and the appellant used to quarrel frequently and for this reason deceased had come to her house and stated that she does not want to go back. Just a day prior to the incident the appellant came to take deceased with him and even on refusal by the deceased she was taken by the appellant and the incident took place in the next night. She has also stated that the appellant came to her house in between 12.00 - 1.00 at night and informed that deceased has set herself on fire. Thereafter, she went to the house of appellant and saw the deceased lying in the burnt condition and was speaking a little. In her presence, Sarpanch and Kotwar asked the deceased as to who has burnt her to which she replied that it was father of Pooja that is the appellant. She has further stated about submission of written complaint Ex.P/10. In cross-examination by defence, her statement

and examination-in-chief has remained un-rebutted and she has reiterated that deceased made this statement that she was set on fire by the appellant.

13. Netram (PW/8) - Kotwar was in company of Laxawantin Bai (PW/6) when deceased made such statement. He has stated that on being asked the deceased said "father of Pooja - father of Pooja". Thereafter, the deceased was moved to hospital. In cross-examination, he has reiterated the same incident that the deceased said only this word "father of Pooja - father of Pooja".

14. Vijay Kumar Markandey (DW-1) has stated that when he went to the place where deceased was lying in open condition, squirming due to burn injury and was saying "father of Pooja - father of Pooja". In cross-examination, he has stated that it was asked from the deceased that as to who has set her on fire and that deceased was only saying "father of Pooja - father of Pooja". Thus, the statement made by the deceased appears to have come with reference to the question put to her as to who was the person to set her on fire. Hence, defence witness does not support the defence in any manner, on the contrary, his statement supports the statement of the prosecution witnesses. Hence, the evidence of oral dying declaration brought by the prosecution against the appellant seems to have been established and proved which does not suffer from any infirmity.

15. Dr. Ghanshyam Chandrakar (PW/2) has stated that he had examined the deceased who was brought in the burnt condition. On his asking, the deceased replied that it was her husband who has set her on fire and had also stated that she is having pregnancy of four

months and that her husband was pressuring for divorce. This statement has been made on the basis of MLC report (Ex.P/3). It is argued by counsel for the defence that Ex.P/3 does not mention the fact as made by Dr. Ghanshyam Chandrakar (PW/2) before the Court. On perusing Ex.P/3, it appears that although it is written that "history given by (homicidal) and that she was having pregnancy of four months and her husband was forcing for divorce. Though rest of the statement is omitted but he is the same person who sent intimation Ex.P/4 to the City Kotwali, Mahasamund and Ex.P/4 clearly mentions that "herein one case admitted just now as 100 % homicidal burn by husband". This intimation supplements the statement of Dr. Ghanshyam Chandrakar (PW/2), hence, argument raised in this respect has no force.

16. Considered on the argument submitted about discrepancies in recording various documents by Police Station Moudahapara, Police Station, Tumgaon and the Medical College Hospital, Raipur. The first document is Ex.P/4 in this case. It is the information sent to Police Station, City Kotwali in the morning of 01.04.2010 at 4.30 am. The request for MLC examination was sent by Police Station, Mahasamund to the same Doctor (PW/2) and on the basis of this, MLC (Ex.P/3) was recorded by Ghanshyam Chandrakar (PW/2). Thus, it appears that Ex.P/3 is anti-timed. Even then Ex.P/4 has the relevance which cannot regarded to be anti-timed. Deceased was referred to Medical College Hospital, Raipur and she was brought dead at about 7.00 am of 01.04.2010 referring which Ex.P/17 the intimation was sent to Police Station, Moudahapara, on the basis of which, merg intimation Ex.P/15

has been recorded at P.S. Moudahapara. The time mentioned for recording merg intimation is 10.25 without mentioning AM or PM, which is being disputed by the defence. Referring to the other procedures conducted with respect to merg inquiry, this dispute can be resolved. The time of inquest recorded in inquest report (Ex.P/18) is 2.50 pm. Pulak Bhattacharya (PW/10) - Executive Magistrate has conducted this inquest procedure. He has not mentioned any time of conducting this procedure and neither any question was put to this witness by the prosecution in this respect. Later on, postmortem examination on the body of deceased was conducted by Ulhas Gonnade (PW/9) vide Ex.P/20 and the time mentioned for postmortem is 4.30 pm on 01.04.2010. This postmortem examination has been conducted on the request of Police Station, Moudahapara. Chronology of this procedure makes it clear that the time in merg intimation mentioned as 10.25 is ante-meridian (AM), hence, no doubt is left about time of recording the merg intimation Ex.P/15.

17. Further, appellant was also admitted in Dr. B.R. Ambedkar Memorial Hospital, Raipur for burn injury on 01.04.2010 at 5.30 pm regarding which one information Ex.P/16 was sent to Police Station, Moudahapara. Numbered merg intimation sent to Police Station, Tumgaon is not exhibited but the FIR (Ex.P/9) is exhibited, which mentions the time of recording FIR as 22.35 pm on 01.04.2010.

18. Taking into consideration the above chronology, there remains no doubt regarding intimation given by the medical officer and the intimation recorded by the Police Station, Moudahapara and Police Station, Tumgaon in such order, which do not raise any doubt and

there is sufficient time gap in recording each of these documents. Hence, there is nothing unnatural or unreliable and it does not raise any doubt as alleged by the defence that the case has been concocted. Thus, the argument advanced by learned counsel for the appellant in this behalf is found to have no force.

19. Further the argument submitted with regard to the injury to the appellant has not been explained by the prosecution is taken into consideration.

20. Reliance is placed on the decision in the matter of **Mohar Rai Vs. State of Bihar**¹ in which it was held by Hon'ble the Supreme Court in para 6 that in case where the accused is injured then it is the duty of the prosecution to explain those injuries. Reliance is also placed on the decision in the matter of **Jawahar Lal @ Mullu Vs. State of Chhattisgarh**² wherein this High Court relying on the decision in the matter of **Madho Singh Vs. State of Rajasthan**³ held that the accused cannot be convicted merely on suspicion howsoever strong it may be.

21. This argument has been opposed by the State counsel submitting that the incident took place in the privacy of house of the appellant and it was his burden to explain as to who has caused the incident and how the deceased sustained burn injury. Although, it is mentioned in the spot map Ex.P/11 that the house of the appellant was shared by his father Charan but none of the prosecution witnesses have made any statement in this regard. Neither any question was put by defence, as to the house of the appellant and the deceased being shared by his father at the time of incident. On the contrary, there is no

1 1968 Law Suit (SC) 76

2 2015 Law Suit (Chh) 246

3 2003 1 SC 473

such statement to show that father of appellant was even present at the time of incident. Hence, it leaves no doubt that in this particular case the incident that took place in the house of deceased needed to be explained by the appellant himself. That apart, there is no mention in the statement of appellant recorded under Section 313 of Cr.P.C. as to how he suffered burn injury. On the contrary, the evidence of prosecution witnesses which relied upon by the appellant in defence is that he was trying to extinguish the fire on the body of deceased which resulted in burn injury on his hand. This version of defence of appellant that he was trying to extinguish fire on the body of deceased has not been supported by any of the witnesses except the statement made by himself which shows his presence when deceased was burning. On the contrary, the statement and the evidence of oral dying declaration brought by the prosecution has relevance and has presumptive value under Section 32 of the Evidence Act. For this reason, the argument advanced on this point is not acceptable.

22. Another point of argument of the defence is that the examination of deceased by first Doctor Ghanshyam Chandrakar (PW/2) vide Ex.P/3 mentions smell of kerosene coming from the body of deceased, whereas there is no mention of smell of kerosene in postmortem report Ex.P/20 conducted by Ulhas Gonnade (PW/9). Non mentioning of smell of kerosene by the doctor conducting autopsy cannot be fatal to the prosecution case. Further, no question was put to Dr. Ulhas Gonnade (PW/9) in cross-examination regarding presence of smell of kerosene on the body of deceased. Thus, this submission made by the defence is immaterial which cannot be made a basis to doubt the

prosecution case.

23. The instant case is totally based on the evidence of oral dying declaration and the circumstances co-related. Rest of the witnesses examined by the prosecution are related to investigative procedure and requires no discussion.

24. In view of the aforesaid analysis and after closely scrutinizing the evidence of prosecution and the defence taken, we are of the considered opinion that the trial Court while convicting and sentencing the appellant has not committed any error of law. Consequently, the appeal preferred by the appellant is bereft of any substance, the same is liable to be and is hereby dismissed. The appellant is reported to be in jail, therefore, no further order etc is needed.

25. Appeal is thus dismissed.

Sd/-

(R.C.S. Samant)
Vacation Judge

Sd/-

(Anil Kumar Shukla)
Vacation Judge