

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.814 of 2012**

- Lakhu @ Loknath S/o Sukhram Aged About 45 Years R/o Village Duganpal , P.S. Kodenar , Distt. Bastar C.G.

---- Petitioner

Versus

- State Of Chhattisgarh S/o Through - Sho., Police Of P.S. Kotwali, Distt. Bastar C.G.

---- Respondent

For Appellant	:	Shri Praveen Tulsyan, Advocate
For Respondent/State	:	Shri Avinash K. Mishra, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Shri Justice Ram Prasanna Sharma

C A V Judgment**06/10/2017**

This appeal is directed against the impugned judgment of conviction and order of sentence dated 27-07-2012 passed by the Second Additional Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.01/2011, whereby and whereunder the appellant has been held guilty for commission of offence under Section 302 of IPC and sentenced to undergo life imprisonment as also imposed fine of Rs.100/- and in default of payment of fine, to undergo additional R.I. for three years.

2. The prosecution story, as unfolded from the impugned judgment and records of the case is that a merg intimation vide Ex.P-4 was lodged by Jalandhar, PW-4 at about 10.25 hours on 18-10-2010 stating that the appellant-Lakhu quarreled with his father at about 7 PM in the evening on 17-10-2010, because the deceased-Nando was not prepared to share goat meat with the

appellant. In the merged intimation, it was further recorded that in the quarrel, the appellant pushed Nando on the ground and gave a kick blow on his chest, due to which, his father started bleeding and later on, died in the house. Having received intimation of death, the police registered an offence under Section 302 IPC against the appellant at the same time. The contents of FIR, Ex.P-5 were similar to what was recorded in the merged intimation, on the basis of intimation given by Jalandhar. Inquest over the dead body was prepared vide Ex.P-8 and the dead body was sent for postmortem on the same day. Dr. Pradeep Baghel, PW-9 conducted postmortem and prepared his report in Ex.P-8. According to the opinion given by the doctor, the cause of death was internal haemorrhage due to rupture of right lung lower lobe and liver. According to the doctor, the nature of death was homicidal in nature and the duration of death was 9 to 10 hours before the time of postmortem. After completion of usual investigation, a charge sheet was filed before the Jurisdictional Magistrate, who in turn, committed the case to the Court of Sessions for trial. On the basis of the material contained in the charge sheet, the learned Sessions Judge framed the charges against the appellant, alleging that the appellant murdered the deceased and thereby committed an offence under Section 302 of IPC. The appellant abjured guilt and he was subjected to trial. In order to prove its case, the prosecution examined as many as 13 witnesses. The appellant was also examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against him in the evidence led by the prosecution. The appellant having denied those incriminating evidence and circumstances, stated in his defence that he was falsely implicated in the case and he is innocent. No defence witness was examined. Relying upon the prosecution witnesses, the learned trial Court held the appellant guilty of commission of offence as described above, giving rise to this appeal.

3. Learned counsel for the appellant argued that the prosecution has failed to prove its case beyond reasonable doubt in as much as there is no eye witness to the incident and the prosecution case of appellant having assaulted the deceased with the stone is not based on any cogent and reliable evidence. Taking further, it was also argued that the story of oral dying declaration given by Nando to his son-Jalandhar, PW-4 was an afterthought, based only on suspicion of involvement of the appellant in the incident, because the appellant allegedly had demanded share of goat meat collected by the deceased-Nando. Further submission is that the evidence of Ghinai, PW-7 is not at all reliable and she is a concocted witness as neither Jalandhar, PW-4 nor Budhru Ram Kashyap, PW-5 speaks of her presence at the spot. Next submission is that no stone allegedly used by the appellant, has been recovered from the spot, which further dilutes the credibility of the prosecution story of the appellant having pulled down the deceased and throwing stone on his chest. Learned counsel for the appellant also submitted that no external injury was found on any part of the body of the deceased and in the cross-examination, the doctor has stated that the nature of internal injury i.e. rupture of right lung lower lobe and liver could be caused due to fall on any hard object. Therefore, the prosecution story becomes highly doubtful that the appellant had caused any injury to the deceased. The first alternative submission is that even if it is held that there was any quarrel between the appellant and the deceased on the issue of sharing of goat meat and the appellant gave kick blow, in the circumstances of the case, it cannot be said that either there was any intention to cause death or knowledge that kick blow would result in death. Therefore, in these circumstances, no case for commission of offence under Section 302 of IPC is made out against the appellant and the appellant at the most is liable to be convicted under Section 323 of IPC. Second alternative submission is that even if it is accepted that the

appellant had knowledge that the deceased had received injuries by falling on a stone, which is likely to cause death, at the most, it would be a case of commission of offence under Section 304-II of IPC. The appellant having already undergone imprisonment for more than 6 years & 4 months before suspension of sentence and grant of bail, the impugned judgment of conviction and order of sentence be altered to that under Section 304-II of IPC for the period already undergone by the appellant.

4. Per contra, learned State counsel would support the impugned judgment of conviction and order of sentence and submit that the appellant was well known to the deceased. Even according to the evidence on record, the deceased was an old man, heavy drunkard and a weak person. Therefore, hitting him hard by throwing stone on the chest clearly proves intention to cause death. It is submitted that the postmortem report, Ex.P-8 fully supports the prosecution story that the cause of death was hemorrhage, due to rupture of lungs and liver, which are vital parts of the body. The appellant acted cruelly by giving blow on the vital parts of the body of the deceased. It is not a case of sudden quarrel or provocation, therefore, no exception under Section 299 of IPC is attracted and therefore, it would be a case of murder and commission of offence under Section 302 of IPC only.

5. Merg Intimation, Ex.P-4 and FIR, Ex.P-5 lodged on 18-10-2010 at 10.25 hours by Jalandhar, PW-4. FIR has been proved by Jalandhar, PW-4, son of the deceased-Nando and V. R. Thakur, PW-13, who was the Investigating Officer and therefore, evidence clearly proves that after the incident, on 18-10-2010, merg intimation was followed by recording of FIR against the appellant. Merg, Ex.P-4 was recorded on the intimation given by Jalandhar, PW-4, in which, it is recorded that a dispute arose between the appellant and the deceased regarding sharing of goat meat and the appellant assaulted the deceased with

the kicks on his chest, due to which, he fell down and started bleeding.

6. Jalandhar, PW-4, son of the deceased Nando, deposed that he was informed by one Balram that his father was lying near a tent and when he reached at the spot, he found that his father was restless. He brought his father home and then his father-Nando informed that in a dispute regarding sharing of meat, the appellant assaulted him and gave kick blow on his chest. Story of oral dying declaration of deceased Nando to his son-Jalandhar, PW-4 finds place in the very first recorded information contained in the merg intimation, Ex.P-4 followed by similar statement of oral dying declaration in FIR, Ex.P-5. Jalandhar, PW-4 has remained firm on his statement regarding his father having given oral dying declaration to him. This witness admits that he had not seen the incident of quarrel nor had seen anybody assaulting his father. There is no suggestion given to this witness that his father has not given any oral dying declaration to him. Moreover, there is nothing elicited in his cross-examination as to why he would falsely implicate the appellant in the alleged commission of offence.

7. Budhru Ram Kashyap, PW-5 has deposed that he had seen that Nando was lying on the ground in front of the house of one Aasman and he informed about the same to Jalandhar, son of Nando, whereafter Jalandhar arrived at the spot and till that time, this witness was standing at the spot and Nando was crying and complaining of pain in his chest. Thereafter, it is deposed that Jalandhar took his father to house. He deposed that he does not know about any quarrel. He is also one of the witness of the inquest and has proved his signature in inquest report, Ex.P-8. In his cross-examination, it has been elicited that he had put his signatures in the documents at Police Station, where FIR was lodged as also put his signatures on the documents in the village and that he does not know as to how Nando died. He has further been elicited that Nando was drunkard and was not taking proper meals and had become weak.

8. The prosecution has relied upon the evidence of Ghinai, PW-7, daughter of the deceased. She claims to be an eye-witness of the incident. In para 2 of her deposition, she has deposed that while she was returning home, after taking feast, on the way, Lakhu intercepted and pushed her father Nando, due to which, he fell down and then he picked up stone and threw the same on the chest of his father. She further deposed that she cried for help, then Jalandhar reached at the spot. By that time, Lakhu had gone inside his house. She has further deposed that she along with her brother Jalandhar picked up their father and brought home. Early morning, her father died. She further deposed that her father did not want to share goat meat with Lakhu, due to which, Lakhu assaulted her father. In cross-examination, a clear suggestion has been given that no stone was thrown on the chest of her father and it has also been elicited that the statement that appellant threw stone on the chest of her father, suffers from omission in her case diary statement, Ex.D-1. This witness has been given suggestion that she is not the eye witness of the incident and telling lie.

9. A close scrutiny of the evidence of this witness Ghinai, PW-7 along with the evidence of Jalandhar, PW-4, Budhru Ram Kashyap, PW-5, Merg Intimation and FIR raises serious doubt with regard to credibility of this witness. In the merg intimation, Ex.P-4 or in the FIR, Ex.P-5 which was lodged soon after the death, by Jalandhar, PW-4, none other than the son of the deceased, there is no mention of the fact that his father-Nando was assaulted in the presence of Ghinai, PW-7. If Ghinai, PW-7 was only eye witness of the incident, as claimed by her, there is no explanation offered by the prosecution as to why merg intimation and FIR did not contain any such fact that Nando was assaulted while going along with Ghinai, PW-7. On the contrary, it would have been natural course of event for the Jalandhar, to have disclosed this fact while giving intimation of death recorded in Ex.P-4 and FIR lodged by him in Ex.P-5.

10. Budhru Ram Kashyap, PW-5 is an independent witness and he deposed that while he was coming towards his house, in front of the house of one Aasman, he found Nando lying on the ground and then he informed Jalandhar, son of Nando. He states that till Jalandhar reached at the spot, he was standing there. This witness also does not talk about the presence of Ghinai, PW-7 at the spot.

Jalandhar, PW-4, son of the deceased-Nando has deposed that he was informed by Budhru Ram Kashyap that his father was lying near tent, whereafter he reached at the spot, picked up his father and brought home. His father informed that he was assaulted by Lakhu, the appellant. This witness nowhere whispers regarding presence of his sister-Ghinai at the time of incident. If Ghinai was the sole eye witness, there was no reason why this witness would not refer to disclosure made by Ghinai also in respect of allegations that the appellant assaulted Nando. In the cross examination, he admits that he had not seen the incident.

11. The prosecution has failed to prove seizure of any stone from the spot. The postmortem report and the evidence of Dr. Pradeep Baghel, PW-9 does not show that the deceased had suffered any external injury. It would be highly improbable that heavy stone was thrown on the chest of a person lying on the ground and there would be no external injury. Postmortem report and the evidence of Dr. Pradeep Baghel, PW-9 does not prove any kind of external injury on the chest of the deceased.

12. Taking into consideration the aforesaid circumstances and the evidence on record, we have no hesitation to hold that Ghinai, PW-7 is only a concocted witness and cannot be relied upon as eye witness of the incident and therefore, conviction cannot be sustained on the evidence of Ghinai, PW-7.

13. The entire case of the prosecution involving the appellant rests only on

the oral dying declaration given by the deceased in front of Jalandhar, PW-4. The story reflected at the very first occasion while giving intimation of death recorded in Ex.P-4 followed by FIR and then uncontroverted testimony of Jalandhar, PW-4 that oral dying declaration given by his father before his death, is that on a petty quarrel for share of goat meat, appellant gave kick blow on the chest of Nando.

The medical evidence proved by the prosecution also supports the story of the deceased having been assaulted by kicks on his chest by the appellant. According to the postmortem report, Ex.P-8 and the evidence of Dr. Pradeep Baghel, PW-9, Nando sustained internal injuries on the lower lobe of his right lungs and liver, which apparently got damaged due to assault resulting in hemorrhage and death.

The defence has not come out with any story of previous enmity between the appellant and the deceased and there is no reason as to why Jalandhar would falsely implicate the appellant in the incident.

14. Therefore, it has to be held that the prosecution has succeeded in proving beyond reasonable doubt that there was quarrel between the appellant and the deceased on a petty issue of sharing of meat collected by Nando and in that quarrel, the appellant assaulted Nando and gave kick blow on his chest, resulting in rupture of right lung and liver, leading to death of Nando.

The moot issue arising for consideration is as to what offence, the appellant had committed.

15. From the evidence of the prosecution, it is clear that the dispute between the appellant and the deceased arose at the spot when Nando was coming to his house with goat meat, the appellant intercepted and insisted Nando to share goat meat which he refused, leading to assault.

The prosecution has failed to prove that the appellant had used any

weapon much less any dangerous weapon to give assault to Nando. The prosecution story that the appellant threw stone on the chest of the deceased has not been proved. Moreover, it does not appear to be a case of repeated assault because in a case of repeated assault on vital part of the body, probably some external injury may appear, though not necessary in all circumstances.

Budhru Ram Kashyap, PW-5 has stated in his cross-examination that Nando was a heavy drunkard and was not taking proper meals, due to which, he was very weak. This evidence is corroborated by the evidence of Ghinai, PW-7, daughter of the deceased, who states that her father was a drunkard. It shows that the health condition of the deceased-Nando was not very sound.

16. In the totality of the aforesaid circumstances, established from the reliable evidence, it appears to be a case of simple dispute leading to fight wherein the appellant assaulted Nando by giving him kick blow on his chest, resulting in rupture of lower parts of right lung and liver, leading to death and that the appellant did not use any weapon like club or stone. In the backdrop of the cause of dispute, it cannot be said that the appellant had either intention to cause death or knowledge that the injury caused by him, is likely to result in death of Nando. According to the prosecution, Nando was drunkard and was not keeping good health.

17. In the ultimate analysis, while rejecting submission of learned counsel for the appellant that the appellant would be liable to be convicted for commission of offence under Section 323 of IPC only, we are fully convinced that the it would only be case of commission of offence of culpable offence not amounting to murder punishable under Section 304-II of IPC and nothing more.

The appellant has already undergone 6 years and 4 months of RI and we are of the considered opinion that the period of sentence already undergone by the appellant would meet the ends of justice to punish sufficiently the appellant

for criminal overt act of having given kick blow on the chest of Nando, resulting in his death.

18. Consequently, this appeal is partly allowed. Conviction of the appellant is altered and the appellant is held guilty of commission of offence under Section 304-II of IPC and sentenced for the period already undergone by him including sentence for default of payment of fine.

As the appellant was released on bail on 01-03-2017, the bail bonds and surety stands discharged. The appeal is accordingly partly allowed.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Ram Prasanna Sharma)
Judge