

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1170 of 2013**

(Arising out of judgment/order dated 30.10.2013 in S.T. No.57/2012 of the learned Additional Sessions Judge, Bemetara, District Bemetara)

- Tej Ram S/o Kejuram Nishad, aged about 38 years, resident of village Karamsen, Police Station Nandghat, Civil and Revenue District Bemetara (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through – The Police Station Nandghat, Civil and Revenue District Bemetara (C.G.)

---- Respondent

For Appellant	:	Shri Praveen Das, Advocate.
For Respondent/State	:	Shri Ravindra Agrawal, P.L.

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

Judgment On Board**By Pritinker Diwaker, J****06/10/2017**

This appeal arises out of the judgment of conviction and order of sentence dated 30.10.2013 passed by the Additional Sessions Judge, Bemetara, in S.T. No.57/2012 convicting the accused/appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life with fine of Rs.1000/-, in default of payment of fine amount to further undergo R.I. for two months.

02. In the present case, name of the deceased is Dongraha Nishad. It is alleged that on 07.06.2012 at about 8.00 am, when the appellant was working in his field along with his other family members, deceased reached there on his bicycle, stopped it and started abusing the appellant. He continued to abuse the appellant despite being asked not to do so and then it is alleged that some altercation took place between deceased and appellant's family members in which appellant gave two blows by handle of pit-axe on face and head of the deceased resulting in his death. In the incident, appellant also suffered injury on his head. After the incident, appellant himself had gone to police station. On same day at 11.05 am, merg intimation (Ex.P/1) was lodged by Indra Kumar Nishad (PW/1), son of the deceased. Immediately thereafter at 11.10 am, FIR (Ex.P/2) was registered against the appellant under Section 302 of IPC. Inquest on the body of deceased was prepared on 07.06.2012 vide Ex.P/4 and dead body was sent for postmortem examination to Govt. Hospital, Nawagarh where Dr. K.K. Daheriya (PW/13) conducted the postmortem on the body of deceased and gave his report Ex.P/12 opining the cause of death to be hemorrhagic shock due to lacerated injury on occipital head and base of nose and death was homicidal in nature. On the memorandum of appellant (Ex.P/8), bloodstained handle of pit-axe, clothes and iron masonry instruments were seized vide Ex.P/9, P/10 and P/11 respectively. Seized articles were sent for its chemical examination to FSL and as per its report (Ex.P/22), blood has been found on handle of pit axe, clothes of the appellant as well as clothes of the deceased, however, there is no serological report confirming the

origin of blood group. Appellant was medically examined by Dr. Shashikant Swarnakar (DW/1) who noticed cut injury on left temporal region of the appellant. After investigation, charge sheet was filed against the appellant, his wife (acquitted accused) and three minor children of the appellant. The children of the appellant being juvenile were tried separately by the Juvenile Board, whereas after filing of charge sheet, the trial Court framed the charge against the appellant and his wife under Section 302/34 of IPC.

03. So as to hold the accused persons guilty, the prosecution examined as many as 22 witnesses. Statements of the accused persons were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. That apart, Dr. Shashikant Swarnakar (DW/1) was also examined by the defence to substantiate its case.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record while acquitting accused Yashoda Bai has convicted and sentenced the appellant as mentioned in para-1 of this judgment. Hence, this appeal.

05. Learned counsel for the appellant submits :

(i) That the incident occurred when the appellant was working in his field along with his other family members, the deceased reached there on his bicycle and started abusing the appellant. This abuse continued even when appellant asked the deceased to stop the same, it appears that some altercation took place between family members of the appellant and the deceased and during this the appellant gave blow by

pit-axe on the head of the deceased and deceased also assaulted the appellant but unfortunately the deceased died in the incident.

(ii) That the appellant is a handicap person, his right hand was amputated before the incident and thus question of committing murder of the deceased does not arise.

(ii) That after the incident, appellant himself had gone to the police station which shows his conduct.

(iii) That even if the entire prosecution case is taken as it is, at best the appellant can be convicted under Section 304 Part-II of IPC.

(iv) It has been argued that the appellant is in jail since 07.06.2012, thereby has completed about 5 years and 4 months and, therefore, after converting his conviction into Section 304 Part-II of IPC, his sentence may be reduced to the period already undergone by him.

06. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same.

07. We have heard learned counsel for the parties and perused the material available on record.

08. Indra Kumar Nishad (PW/1) is lodger of FIR (Ex.P/2) and merged intimation (Ex.P/1). He has admitted the fact that right hand of the appellant has been amputated. This witness has also admitted that when he went to lodge report, the appellant was there in the police station and that there was injury on his head and it was informed by appellant that the said injury was caused by the deceased. He states

that the incident occurred between his father and the appellant on a spur of moment on account of witchcraft being allegedly played by the accused. Maha Singh (PW/2) and Santuram Nirmalkar are the witnesses to inquest (Ex.P/4), memorandum of appellant (Ex.P/8) and seizure of handle of pit-axe (Ex.P/9) and clothes of appellant (Ex.P/10). Lakhan Lal (PW/3) is witness to inquest (Ex.P/4). Jaipal Nishad (PW/4), Santosh Yadav (PW/5), Kashiram Nishad (PW/7), Pusadu Nishad (PW/8), Devi Dayal (PW/17), Mukesh Nishad (PW/18) and Tiharu (PW/19) are the hearsay witnesses. Salik Ram (PW/6) is witness to seizure (Ex.P/11) by which some wooden pieces, one bicycle, black colour cap, bloodstained and plain soil seized from the spot. Ballu Ram Sahu (PW/9) turned hostile. Ramswarup Nishad (PW/11), eye-witness to the incident, while supporting the prosecution case has stated that the appellant's field is adjacent to his field and on the date of incident when he along with his wife were working in the field, accused persons were also there working in their field. At the relevant time, deceased was going on his bicycle for his work place, near Bharri school he stopped his bicycle and then some altercation took place between the deceased and the accused persons. He has further stated that the accused/appellant and his four other family members assaulted the deceased by handle of pit-axe. In para 5 of cross-examination, this witness has stated that he does not have good relation with the appellant. In para 7, he has stated that right hand of the appellant has been amputated. This witness has admitted the fact that on account of damaging his field, there was some dispute between him and the appellant. Fagan Bai (PW/12) - wife of PW/11, while

supporting the prosecution case has stated that she along with her husband were working in the field and in the adjacent field appellant was working with his family members. After some time appellant and his family members, after crossing her (this witness) field, came to road side approaching toward Chicholi. At the same time, deceased also reached there on his bicycle and some altercation took place between them. After maarpeet, the deceased fell down, however, she is not aware as to what was the reason for the dispute. This witness has admitted that the right hand of the appellant was amputated and he was carrying a club in his another hand. When this witness was confronted with her diary stated wherein she has stated that deceased was abusing the accused persons, she has stated that no such statement was made by her before the police. She has admitted the fact that relation between her family members and the appellant's family member are not cordial. Dr. K.K. Daheria (PW/13) conducted postmortem examination on the body of deceased and gave his report Ex.P/12 noticing following injuries:-

- (i) Whole face, nose, eyes covered with blood which was dry.
- (ii) Lacerated injury in the size of 1 1/2" x 1" in between both eye at base of nose.
- (iii) Lacerated injury in the size of 10cm x 6cm x 6cm on occipital region of head.

The Doctor has opined that the cause of death was hemorrhagic shock due to lacerated injury on occipital head and base of nose and death was homicidal in nature.

09. Sachin Namdev (PW/20) - Constable and K.P. Banjare (PW/21) -

Inspector, assisted in the investigation. A.K. Bajpai (PW/22) is Investigation Officer who has duly supported the prosecution case. In para 10, he has stated that right hand of the appellant has been amputated and he (appellant) too had suffered injury and he (I.O.) has sent the appellant for medical examination.

10. Dr. Shashikant Swarnakar (DW/1) has stated that he had treated the appellant in Primary Health Center, Temri on 07.06.2012 when he was brought by the police and noticed cut injury on left temporal region.

11. Close scrutiny of the evidence available on record, makes it clear that on 07.06.2012 when appellant and his family members were working in the field, the deceased reached there on his bicycle, stopped and started abusing the appellant. Thereafter, some altercation took place between two and then it appears that both appellant and the deceased assaulted each other. Appellant caused injuries on the head and face of the deceased by a handle of pit-axe resulting in unfortunate death of the deceased. After the incident, the appellant immediately went to police station and this fact has been duly proved by PW/1, who has stated that when he reached the police station, the appellant was already there, and by the Investigating Officer (PW/22). In the incident, appellant had also suffered injury over his left temporal region and the same has also been proved by PW/22 and DW/1, who had treated the appellant in PHC, Temri. The incident was witnessed by PW/11 and PW/12 who have duly supported the prosecution case and stated as to how the quarrel took place. According to postmortem report Ex.P/12, as many as two injuries were

noticed on occipital region and at base of nose and cause of death was hemorrhagic shock due to lacerated injury on occipital region and at base of nose. That apart, a handle of pit-axe was seized by the prosecution at the instance of accused/appellant and as per query report (Ex.P/13), the injuries found on the body of the deceased could have been caused by the said weapon. Considering the given facts and circumstances of the case, in particular the evidence of eye-witnesses PW/11, PW/12, the complicity of accused/appellant in crime in question stands proved beyond reasonable doubt.

12. Now the question which arises for consideration by this Court is whether in the given facts and circumstances of the case, the act of the accused/appellant makes him liable for conviction under Section 302 IPC or it is covered by any of the Exceptions to Section 300 IPC.

13. From the evidence it appears that a quarrel took place between the deceased and the appellant when deceased started abusing him on account of witchcraft being allegedly played by the appellant. The incident took place all of a sudden in a heat of passion without pre-meditation in which appellant gave two blows by a handle of pit-axe on the head and face of deceased resulting in his death. Thus, considering the facts and circumstances of the case giving rise to the incident leading to death of the deceased, we are of the opinion that though the appellant had no intention of causing death of the deceased but taking into account the nature and extent of injury inflicted by him on the deceased on his vital part, which led to his death, it can safely be inferred that the appellant had knowledge that the injury being inflicted by him on the deceased would result in his death. Being so

his act would be covered by Exception 4 to Section 300 IPC i.e. culpable homicide not amounting to murder making him liable for conviction under Section 304 Part-II IPC.

14. The Apex Court on the decision in the matter of **Satish Narayan Sawant V. State of Goa** reported in **(2009) 17 SCC 724** has held in para 40 and 41 as under:

“40. That being the well-settled legal position, when we test the factual background of the present case on the principles laid down by this Court in the aforesaid decisions, we are unable to agree with the views taken by the High Court. As already noted, it is quite clear from the record that there was an altercation preceding the incident. The place of occurrence is a residence inhabited by both the parties and there is no evidence on record that the deceased was armed with any weapon. Initially the appellant-accused also did not have any weapon with him but during the course of the incident he went inside and got a knife with the help of which he stabbed the deceased. PW 7 in his cross-examination has categorically stated that death due to stab injury was in consequence of injury 1 and all other injuries were superficial in nature. So, it was only Injury 1 which was fatal in nature. Factually therefore, there was only one main injury caused due to stabbing and that also was given on the back side of the deceased and therefore, it cannot be said that there was any intention to kill or to inflict an injury of a particular degree of seriousness.

“41. Records clearly establish that there was indeed a scuffle between the parties with regard to the availability of electricity in a particular room and during the course of scuffle the appellant also received an injury which was simple in nature and that there was heated exchange of words and scuffle between the parties before the actual

incident of stabbing took place. There is, therefore, provocation and the incident happened on the spur of the moment. That being the factual position, we are of the considered view that the present case cannot be said to be a case under Section 302 IPC but it is a case falling under Section 304 Part-II IPC. it is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.”

15. The Apex Court on the decision in the matter of **Chinnathaman V. State represented by Inspector of Police** reported in **(2007) 14 SCC 690** has held in para 13 as under:-

“13. It is not the case of the prosecution that the appellant had acted cruelly, in the sense that he had delivered successive blows to the deceased. There was sufficient time and opportunity to the appellant to give repeated blows. It is not the case of the prosecution that the appellant wanted to deliver other blows and that he was prevented from doing so by any person. So there is reasonable ground to believe that after giving the blow the appellant had stopped and not acted cruelly. As noticed earlier, the appellant was doing his work and was not waiting for the deceased to come. On the facts and in the circumstances of the case, this Court is of the opinion that Exception 1 to Section 300 IPC would apply to the facts of the case and the offence committed by the appellant would be one punishable under Section 304 IPC. There is nothing on record to indicate that the appellant had committed culpable homicide amounting to murder by causing death of the deceased with the intention of causing death of the deceased or of causing such bodily injury as was likely to cause his death. Therefore, the provisions of Part II of Section 304 IPC would apply to the facts of the

case on hand. Thus, the appeal will have to be allowed by converting the conviction of the appellant under Section 302 IPC to one punishable under Section 304 Part II IPC.”

16. The other aspect that needs to be examined is whether any compensation is to be awarded in favour of the bereaved family of deceased under Section 357 of the Code of Criminal Procedure, 1973.

17. The Apex Court on the decision in the matter of **Ankush Shivaji Gaikwad Vs. State of Maharashtra**¹ while elaborating the issue has held that while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Cr.P.C. would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

18. In the result, the appeal is partly allowed. Conviction of the

¹ (2013) 6 SCC 770

appellant under Section 302 IPC is altered to Section 304 Part-II IPC and he is sentenced to undergo R.I. for six year with fine of Rs.10,000/-, failing which he shall have to further undergo R.I. for one year.

19. The amount so deposited by the appellant shall be paid to the wife of deceased Dongraha Nishad as compensation in view of Section 357 of Cr.P.C., after due verification.

20. Appeal thus allowed in part.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(Ram Prasanna Sharma)
Judge