

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 723 of 2010

Judgment Reserved on 30-01-2018

Judgment delivered on 20-02-2018

- Kamal Singh s/o. Rajaram @ Rajwa, aged 22 years, student, r/o. Dabrapara North, Police Station Old Bhilai, District Durg (CG).

--Appellant.

Vs.

- State of Chhattisgarh through the District Magistrate, Durg.

--Respondent

For Appellant : Mr. M.P.S. Bhatia, Advocate.
For Respondent/State : Ms. K. Tripti Rao, Panel Lawyer.

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

Per Ram Prasanna Sharma, J.

1. This appeal arises out of judgment of conviction and order of sentence dated 22-9-2010 passed by the Special Judge (Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Durg, in Special Case No. 20 of 2009 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs.25,000/- with default stipulation.
2. In the present case, name of the deceased is Kuleshwar @ Gabbar who was Gond by caste and a member of Scheduled Tribe whereas appellant is not a member of Scheduled Caste or Scheduled Tribe. It is alleged that on 2-2-2009 at about 1.30 pm one Neelkanth Sahu (PW/11), who was proprietor of the grocery shop situated at Dabrapara, North Bhilai -3, reached to his shop and saw that two

boys namely Mangal Singh and Rockey were assaulting the deceased Kuleshwar @ Gabbar by clubs. When he shouted “what are they doing”, both the culprits fled away from the spot. When he reached to the spot, he found that Kuleshwar @ Gabbar was lying dead on the ground. He reported the matter to Police Station, Old Bhilai and *Dehati Nalsi* (Ex.P/6) was written by the police after reaching to the spot. Merg intimation was also recorded and dead body was sent for autopsy which was conducted by Dr. B.N. Dewangan (PW/16) who opined that death is homicidal in nature. First information report was registered as per Ex.P/3 and certain articles were seized on the spot. Upon discovery statement of Mangal Singh, one club was seized and again upon discovery statement of Rockey, one club was seized whereas one shirt was seized from the appellant. As Mangal Singh and Rockey were juvenile, they were tried by the Juvenile Justice Board. Charge-sheet against the present appellant was filed to which he did not plead guilty, therefore, trial was conducted and after completion of trial, the trial Court convicted and sentenced the appellant as mentioned above.

3. Learned counsel appearing for the accused/appellant would submit as under:

- (I) PW/11 Neelkanth Sahu, who had lodged FIR has named only two persons as accused. Presence of the present appellant is not mentioned in the FIR, hence case of the prosecution is doubtful against the present appellant.

- (ii) PW/3 Lachchhan Bai, PW/6 Phuleshwari and PW/7 Pardeshin Bai are not the real witnesses of the incident. The date of incident is 2-2-2009 whereas statements of these witnesses under Section 161 of Cr.P.C., were recorded on 8-3-2009 i.e., after more than one month, therefore, these witnesses are not reliable witnesses and their version cannot be acted upon.
 - (iii) Shirt of the appellant was seized by the Police but there is no FSL report produced before the trial Court and there is nothing incriminating against the present appellant.
 - (iv) Factum of motive and intention is not established against the present appellant, therefore, his conviction is not sustainable.
4. *Per contra*, State counsel supporting the impugned judgment has submitted that the impugned judgment is strictly in accordance with law and there is no illegality or infirmity in it warranting any interference by this Court.
 5. We have heard counsel for the parties and perused the material on record.
 6. To substantiate the charge, prosecution has examined as many as eighteen witnesses.
 7. Dr B.N. Dewangan (PW/16) conducted autopsy of the deceased Kuleshwar @ Gabbar on 3-2-2009 at about 12.05 pm at District Hospital, Durg and found contusion and abrasion in all 12 in numbers. He opined that cause of death is head injury and blood

clot in right frontal bone and brain. He further opined that same is caused by hard and blunt object, since 18 - 24 hours of the examination. As per version of this witness nature of death is homicidal. Version of this witness is unshaken during cross examination and there is no other expert's opinion contrary to the said opinion and there was no reason for the trial Court to disbelieve the same.

8. PW/11 Neelkanth Sahu is a person at whose instance *Dehati Nalsi* (Ex.P/6) was recorded. As per version of Police Inspector K.L. Tandan (PW/18), he recorded *Dehati Nalsi* as per Ex.P/6 upon information given by Neelkanth Sahu. As per Ex.P/6, two boys namely Mangal Singh and Rockey assaulted the deceased Kuleshwar @ Gabbar by clubs. In the said information name of the present appellant is not mentioned as author of the crime. Neelkanth Sahu (PW/11) has not supported the version of prosecution. As per his statement, he saw the dead body of the deceased in front of his shop and *Dehati Nalsi* (Ex.P/6) was recorded by the Police on the spot.
9. PW/3 Lachchan Bai, PW/4 Ramaniya Bai, PW/5 Smt. Jalwati, PW/6 Phleshwari, PW/7 Pardeshin Bai, and PW/8 Ahilya have claimed to be witnesses of the incident and rest of the witnesses have assisted during investigation after registration of first information report. PW/6 Phuleshwari deposed that Mangal Singh assaulted the deceased by club while Rockey and appellant Kamal Singh assaulted the deceased by hands and fists. She deposed in para 7 of her cross examination that she has seen the culprits from

backside because she was fearful and did not go to the spot. She further deposed that she has seen the accused persons fleeing away and that too from backside. She admitted that she has not seen any of the accused from their front side. Now the point to be seen is whether it is safe to act on the statement of this witness, who has not seen the face of any of the accused and stating on the basis of seeing them from backside. In our view when she has not seen the face of any of the person fleeing from the spot, possibility of mistake in identification of accused cannot be ruled out.

10. PW/7 Pardeshin Bai deposed in examination-in-chief that Mangal Singh, Rockey and appellant Kamal have assaulted the deceased, but in her cross examination she deposed that she has not seen the incident and when she reached to the spot, deceased had passed away. As per statement of this witness she has not seen the incident, therefore, her statement is not incriminating against the present appellant. PW/3 Lachchan Bai deposed that Mangal Singh was having club while Rockey and present appellant Kamal Singh assaulted the deceased by hands and fists, but version of this witness is contradicted by version of PW/4 Ramaniya Bai. As per version of PW/4 Ramaniya, present appellant was not present on the spot. As per version of PW/8 Ahilya, she has seen only Mangal Singh who was standing with club. Version of Lachchan Bai is rebutted by version of PW/4 Ramaniya Bai. As per version of PW/4 Ramaniya Bai and PW/8 Ahilya, very presence of the present appellant is doubtful. As already stated, name of the present

appellant is not mentioned in *Dehati Nalsi* (Ex.P/6) recorded just after the incident.

11. Looking to the version of PW/4 Ramaniya Bai, PW/8 Ahilya and what is stated in *Dehati Nalsi*, it would not be safe for us to come to conclusion that present appellant was present on the spot. Considering the entire evidence adduced by the prosecution it is difficult to hold that the appellant was present at the time of incident. Evidence though establishing possession of club by Mangal Singh, but the same cannot be read because Mangal Singh was tried by Juvenile Justice Board and we have no record of the said Board. Cause of death is head injury and there is no iota of evidence that present appellant has caused any injury on the head of the deceased. In absence of incriminating circumstance, finding of the trial Court is not sustainable.
12. Accordingly, the appeal is allowed. Conviction and sentence awarded by the trial Court is set aside. The appellant is acquitted of the charge framed against him. The appellant is reported to be on bail and his bail bonds shall continue for a period of six months as per provisions of Section 437(A) of Cr.P.C. Fine amount, if any paid by him, be refunded.

Sd/-

Sd/-

Judge
(Prasant Kumar Mishra)

Judge
(Ram Prasanna Sharma)

