

HIGH COURT OF CHHATTISGARH, BILASPUR

ACQA No. 222 of 2010

- State of Chhattisgarh through Station House Officer, PS Sahaspur -Lohara, District Kawardha.

---- Appellant.

Versus

- Rai Singh s/o. Antram Gond, aged about 30 years r/o. Village Sonjhari, PS Sahaspur-Lohara, District Kawardha (CG).

---- Respondent

For Appellant/State	Mr. R.K. Mishra, Dy. Advocate General
For respondent	Mr. V.C. Ottalwar, Mr. Rajeev Shrivastava and Mr. Malay Shrivastava, Advocates.

Hon'ble Shri Prashant Kumar Mishra,
Hon'ble Shri Ram Prasanna Sharma, JJ

Oral Judgment

Per Ram Prasanna Sharma, J

(13-2-2018)

1. This acquittal appeal is preferred against the judgment dated 28-1-2003 passed by the Additional Sessions Judge (FTC), Kawardha, District Kawardha (CG) (for short, "the trial Court"), Sessions Division Rajnandgaon in Sessions Trial No. 7 of 2001 wherein the said Court has acquitted the respondent from the charges of commission of offence under Sections 450 and 302 of Indian Penal Code, 1860 for commission of house trespass and murder of Jamuna Bai.
2. In the present case, name of the deceased is Jamuna Bai and incident occurred on 9-10-2000 at about 12.00 pm at the residence of

deceased situated at village Sonjhari. As per prosecution case, deceased Jamuna Bai and her daughter-in-law Meenwati were sleeping in the house while other family members had gone out for different reasons. At about 12.00 pm Jamuna Bai woke up and called her daughter-in-law and when she woke up, she found that serious injuries were caused on the body of Jamuna Bai i.e., over left hand, throat, finger and cheek and she was unable to speak. Meenwati informed the incident to the people of locality and on the next day Jamuna Bai informed Sukal Singh (PW/4) by indicating her finger that some maimed person inflicted injuries to her. Further case of the prosecution is that some persons of the locality were called including the respondent, who is a maimed person and Jamuna Bai indicated her finger towards the respondent. Jamuna Bai thereafter succumbed to the injuries. The matter was reported to Police Station Sahaspur Lohara and investigated by the Police Officers. After completion of the investigation, charge-sheet was filed against the respondent to which he did not plead guilty and trial was conducted. After examination of prosecution witnesses, statement of respondent under Section 313 of Cr.P.C., was recorded and after hearing both the parties, the trial Court acquitted the respondent as mentioned above.

3. Learned State counsel submits as under:

- i) There was test identification parade in the village in which the deceased identified the respondent by signs in response to the questions put to her which is admissible under Section 32 of the Indian Evidence Act, 1872 as dying declaration, but the

trial Court erred in holding that there are so many lacunae and the evidence is unsatisfactory.

- ii) Blood stained axe has been seized at the instance of the respondent which is connecting piece of evidence, but the same has been overlooked by the trial Court.
- iii) Evidence adduced by the prosecution unerringly pointed towards the guilt of the respondent, but the trial Court recorded the judgment of acquittal which is liable to be set aside.
- iv) In support of his arguments, he placed reliance on **(1885) ILR 7 Allahabad 385 in the matter of Queen Empress vs. Abdullah.**

4. On the other hand, learned counsel for the respondent would submit that the finding arrived at by the trial Court is based on proper marshaling of evidence and the same is not liable to be disturbed while invoking appellate jurisdiction against judgment of acquittal.
5. We have heard learned counsel for the parties and perused the record.
6. To substantiate the charge, prosecution has examined as many as ten witnesses.
7. Dr. Vinit Shrivastava (PW/3) conducted autopsy of deceased Jamuna Bai on 11-10-2000 and noticed the following injuries on the person of the deceased.

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| (i) | Incised wound 2 ½" X 1" X ½ inch on the face, oblique direction 1 cm inside the right angle of the |
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	mouth, involving upper and lower left mandible and neck, end about later and lower surface of the middle of the right mandible, cutting the underneath bone of the lower jaw causing fracture of the middle of the right mandible. There were 3 teeth (2 incisor and 1 canine) of the right upper jaw and 2 teeth (1 incisor 2 nd and 1 canine) teeth of the lower jaw had been broken. There were laceration of the inner surface of the right side of the upper and lower lip, blood clots present.
(ii)	Incised wound, of 2 ½ X 1 X ½ inch size, muscles deep over antero medial surface of the right arm, oblique direction, blood clot present.
(iii)	Lacerated wound, 1 X ½ X ½ cm, over dorsal surface of the right hand, at the base of the proximal phalanx of the little finger of the right hand.
(iv)	Amputation of the left hand at the level of the wrist cutting the both bone's shaft of the forearm and major vessels. Amputated hand was attached to the forearm by the one inch broad flap of the skin on medial surface of the wrist. Amputation was in oblique direction blood clot was present.

He opined that cause of death is shock due to excessive loss of blood due to cutting of the larger blood vessel of the wrist and other wounds. Death is caused since 12 – 24 hours of examination and all the wound are ante-mortem in nature. Version of this witness is unshaken during cross examination and there is no other expert's opinion in the record contrary to the opinion of the said expert.

8. There is no eye-witness account to the incident. The case of the

prosecution is based on identification/dying declaration made by the deceased through indication of finger. As per version of PW/2 Mahang Singh, PW/3 Sukal Singh, PW/5 Bisahu, PW/6 Meenwati, PW/10 Dilip Kumar, deceased was unable to speak. They further deposed that when they asked as to who inflicted injuries on her body, she indicated her hand towards the respondent.

9. Now the point for consideration is whether hand raised by the deceased towards the respondent is legally admissible evidence as test identification. As per version of this witness, incident happened in the mid-night of 9-10-2000. It is not clear from the evidence whether the deceased had an opportunity to observe the incident and identify the assailant. Before considering identification parade, it has to be established that the victim had an opportunity to identify the assailant at the time of incident. Test identification gives assurance that investigation is proceeding on right lines but the same is not substantive evidence. The substantive evidence of a witness is evidence in the court who identified the culprit at the time of investigation.
10. In the present case, deceased nowhere stated that she had full opportunity to identify the assailant at the time of incident and also to observe the incident. Other witnesses adduced by the prosecution are not the eye-witnesses of the incident, therefore, they cannot identify the assailant in the court. When the witnesses adduced by the prosecution are not eye-witnesses of the incident, they are not fit persons to identify the culprit in connection with commission of crime. As per theory of test identification, the person who identified the

culprit during investigation must enter into the witness box to satisfy the court regarding identification. When deceased died without clarifying that she had identified the assailant at the time of incident, substantive piece of evidence before the court is not available on record regarding test identification and the respondent cannot be connected on the basis of this theory.

11. Next question for consideration is whether criminal liability can be fastened on the respondent to treat the signs as dying declaration and to elevate the signs made by the deceased to the status of dying declaration. As per the evidence, deceased made signs at about 12.00 pm on 10-10-2000. When she made signs, no medical expert was present there. Only some residents of village Sonjhari were present. As per version of Dr. Vinit Shrivastava (PW/3) deceased sustained a number of injuries and as per version of this witness, she was unable to speak. Neither any medical expert has tested her ability to hear before she was making signs nor tested her to ascertain whether she is mentally and physically fit to apply her mind to questions put to her.
12. It is settled principles of law that graver the offence, stricter the proof. The respondent was charged for commission of offence of murder, therefore, the prosecution was under obligation to bring strict prove. Though deceased lost her ability to speak, but she was maintaining her ability to hear in response to the questions put to her properly. It had to be proved that she had responded to the questions not in a state of confusion or out of imagination but she was mentally and physically fit to respond the same and for that opinion of the expert

was required, but no expert was present at the time of making signs by the deceased. As per Section 45 of the Indian Evidence Act, 1872, opinion of the expert is relevant and those who are not experts, their opinion is not relevant. In absence of any expert's opinion at the time of making signs by the deceased, the signs made by her cannot be accepted as dying declaration, even otherwise, all oral and written dying declarations have to go with strict scrutiny, for the simple reason that the person who makes declaration is not available for cross examination. In the present case alleged dying declaration suffers from inherent weakness and confusion has no destination. When there is no complete statement, the court cannot reach to any conclusion on the basis of such signs.

13. Taking into consideration the evidence as a whole, judgment of acquittal rendered by the trial Court is sustainable in the eye of law. Accordingly, the appeal is liable to be and is hereby dismissed.

Sd/-

**Judge
(Prashant Kumar Mishra)**

Sd/-

**Judge
(Ram Prasanna Sharma)**

Raju