

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 80 of 2013**

- Harish Markandey S/o Poonaram Markandey Aged About 26 Years R/o Village - Khopali, Ps - Utai, Distt. Durg, Present Add. Near The Dewangan Provisional Store Shastri Square, Kelabadi Durg Tah. & Distt. - Durg C.G.

---- Appellant

Versus

- State of Chhattisgarh Through Police Station - Durg, Distt. - Durg C.G.

---- Respondent

For Appellant	:	Shri Vivek Sharma, Advocate
For Respondent-State	:	Shri Ashish Shukla, Dy. AG for the State

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****05/01/2018**

1. This appeal has been preferred against the judgment of conviction and order of sentence passed by learned Third Additional Sessions Judge, Durg in Sessions Case No.154/11 on 02.01.2013, whereby the appellant has been convicted under Sections 452 & 307 IPC and sentenced to undergo R.I. for 1 year & R.I. for 10 years, respectively and to pay fine of Rs.500/-, on both counts with usual default stipulation.
2. As per the prosecution case, on 20.03.2011, the complainant S.K. Hakim (PW-1) had lodged a report that while he was doing job of preparing a cooler in other room his daughter aged about 2 months was sleeping in another room and his wife Malka Begum (PW-2) had went out to throw the water used to wipe the floor, at that time his nephew namely Sheikh Aman came to him and informed that the blood is coming out from the private part

of his daughter. Listening the same he went there immediately and saw that the injury was caused on private part of child of two months and near him the present appellant Harish Markandey, who was dead drunk was standing. Immediately the girl was sent for treatment to the hospital and report was lodged and the case was registered. The injured baby Jeenat was treated and clothes which the baby was wearing at that time, which were stained with blood and one Topaz Blade used in the offence were seized. Subsequently, the statements of the witnesses were recorded and the appellant was arrested and after taking the queries from the doctor and entire investigation, the charge-sheet was filed.

3. During the course of trial the appellant abjured the guilt and claimed to be tried.
4. The prosecution on their behalf examined S.K. Hakim, who is the complainant as PW-1, Malka Begum, mother of the injured as PW-2, Devesh Nirmalkar as PW-3, Sheikh Alim as PW-4, Sheikh Aman as PW-5, Kamlesh Kumar Sahu as PW-6, Sheikh Akbar as PW-7, J.P. Chandrakar as PW-8, I.O. Munnalal (PW-9), J.L. Sahu (PW-10), Dr. Mamta Thakur as PW-11, Kailas Hirwani (Patwari) as PW-12, Dr. Vandana Bhele as PW-13, Dr. Smt. Sarita Minj as PW-14. The trial Court after evaluating the evidence has convicted the appellant as aforesaid. Hence this appeal.
5. Learned counsel for the appellant would submit that this is a case of no evidence and only on the basis of presumption and assumption the conviction has been made. He would further submit that the suspicion however strong cannot take the proof of evidence and submits that the finding of the trial Court would be relevant that the alleged injury is said to not been caused by the blade, which is also affirmed by the doctor,

therefore, if the case of the prosecution was that the injury was inflicted by blade then the entire prosecution story fails. He would further submit that there is no eye witness in this case. As per the prosecution while the appellant entered into the room, the mother of the victim went away, which is completely improbable and unnatural since as per the case of the prosecution if a drunken person enters into the room, then the mother of the child would not go away from there. He would further submit that under the circumstances the prosecution has failed to prove the case beyond reasonable doubt. Accordingly, the conviction may be set aside.

6. Per contra, learned State counsel opposes the argument advanced by the learned counsel for the appellant and would submit that the order of the Court below is well merited, which do not call for any interference.
7. I have heard learned counsel for the parties and perused the documents.
8. S.K. Hakim (PW-1) has lodged an FIR has stated that on 20.03.2011 at about 10-11 am on the day of Holi festival he was repairing a cooler in his house, at that time his nephew Sheikh Aman came there and said that the lower part of his child is bleeding, after hearing the same, he went there immediately and saw that the injury was inflicted on the private part of the baby and she was bleeding and the appellant was standing near the cot by holding a blade on his hand. Thereafter, the police came in PCR van there and the appellant was apprehended, whereas the baby was taken to the hospital. The F.I.R. is marked as Ex. P-1. Reading of the Ex. P-1 also affirms the same fact, wherein the similar incident has been stated. Evidence further proves the place of incident and the map is proved as Ex. P-2, which shows that the other houses are there in the close vicinity. In the cross-examination of this witness, he has stated that he has not seen the

happening of the incident and reached after the incident happened. In the cross-examination he further stated that he has also not seen the blade. According to this witness, when he saw the incident, he shouted at that time the mother of the victim came there and also she saw the incident.

9. The mother of the injured baby Malka Begum (PW-2) has stated that she was cleaning her house, at that time the appellant, who was drunk, wanted to enter into the room. Subsequently, he gave 2 Rs. to her son and asked him to bring a pouch. She further stated that she asked the appellant to go away, but as he was drunk, he did not go away and entered into the room by dashing the door forcefully. She further stated that she wanted to throw away the water of cleaning of floor, which was used for cleaning, at that time the appellant stated that he will teach her a lesson. The witness further stated that having heard that this witness thought that since the appellant was drunk, as such with a thinking that if she goes away from the spot, he will go away himself, therefore, she went and sat in the house of one Pinki, a neighbour. Thereafter, the witness stated that after hearing the noise of her *Jaith* when she went there she saw that her brother-in-law (*Jaith*) was holding the hand of the appellant and her daughter Jeenat was lying in a pool of blood. It is further stated that at that time the accused/appellant stated that he has made a mistake, he may be pardoned. Thereafter, the girl was taken to the hospital, wherein she was subjected to treatment. This witness has also not stated that she has seen the incident.

10. Devesh Nirmalkar (PW-3) has stated that when he went there, the appellant was standing in the room. This witness has also not seen the incident.

11. Sheikh Aman (PW-5), the brother of the victim aged about 12 years had stated that on the date of incident it was holi festival, the appellant went

inside their house and gave him two rupees and asked him to bring Rajshree pouch. When he went out to bring the pouch and came back, he saw that his sister was bleeding and was also unconscious and the appellant had inflicted the injury on the private part of her sister by a blade and the appellant was standing nearby holding a blade. Thereafter he called his Bade Papa i.e. the complainant S.K. Hakim (PW-1), who came there and saw the inflicted injury. In the cross-examination of this witness, he further affirmed the fact that he was sent by the appellant to bring a pouch and when came back, saw that her sister was injured, thereafter, he called his uncle.

12. Kamlesh Kumar Sahu (PW-6) has made the similar statement that after hearing the scream/noise of Sheikh Hakim, he went to the house of Sheikh Hakim and saw that the injured girl was lying on the bed in a pool of blood and the appellant was standing nearby her. This witness has further stated that at the relevant time the appellant was dead drunk and was holding a blade in his hand.

13. The blade was stated to be seized vide Ex. P-6 but Sheikh Akbar (PW-7) has not supported the seizure of the blade and stated that no seizure was made in front of him, though he was signatory to the Ex. P-6. Therefore, the only evidence which comes on record is that of S.K. Hakim (PW-1), Malka Begum (PW-2), Devesh Nirmalkar (PW-3) and Sheikh Aman (PW-5) all of them have stated that when they reached to the room at that time they saw that the appellant was standing there in the drunk condition and the baby girl Jeenat was lying in the pool of blood with an injury on her private parts. The statement of S.K. Hakim (PW-1) would show that after the incident he has stated that when he confronted the appellant about the incident, at that time he confessed to have committed the crime.

14. The evidence of Dr. Mamta Thakur (PW-11) is relevant. She has stated that on 20.03.2011 she had examined a baby girl Jeenat of 2 & ½ months and after examining her she found that both the thighs were stained with blood which had dried up and her valba was found to be peeled/scratched, wherein blood was present. After examining her she further referred the girl for examination by the Gynecologist and gave her report vide Ex. P-11. Ex. P-11 would show that the nature of injury was lacerated wound from vagina to anal verge and at the time of inspection no bleeding was present. She has further stated that along with the girl, the mother was also present but how such injury was sustained she had not explained the cause. This witness further stated that the injury was the outcome of a scratch/peel.
15. Thereafter, Dr. Vandana Bhele (PW-13) has also endorsed the medical report Ex. P-11. In the cross-examination Dr. Vandana Bhele (PW-13) she has stated that the injured baby was sent to the surgical ward, since the injured baby was discharging her excreta from the vaginal part and further explained that in case of abnormality, from the vaginal way excreta may come out. She has further stated that the injury on the body of the victim was not caused from sharp weapon instead it was caused by any hard and blunt object and the lacerated wound was present.
16. Likewise, Dr. Smt. Sarita Minj (PW-14) has stated that the injury was a lacerated wound, which was from vagina to anal verge of size of 4 x 1 cm and it was up to the rectum lumen and the margin of the injury was irregular and excreta was in vagina and according to the doctor it was traumatic recto vaginal fistula. She further stated that the injury which was caused, cannot be caused by the blade. The reason is assigned that the injury caused by the blade are referred as incised wound and the margin would be regular, but in the instant case the margin was irregular.

17. The prosecution therefore has created a doubt about the weapon used for inflicting the injury, but this fact has not been rebutted that at the time of incident the accused was drunk and thereafter he had sent the son of Malka Begum (PW-2) namely Sheikh Aman (PW-5) to bring a pouch and at the relevant time in the room except the baby and the appellant no one was present. Subsequently, when all the persons came there, it was seen that the injury was caused to the baby and the time gap in between was very less, therefore, the circumstances would indicate that when the injury was caused, the appellant was only present in the room and no one was present except him. Furthermore, when he was confronted with his act, he admitted that he has committed wrong and he may be pardoned. Statement of Malka Begum (PW-2) has not been rebutted about the admission of the crime by the appellant. The circumstances also show that at the time of causing the injury, the appellant was only present in the room though there is same ambiguity exists about nature of weapon used as to blade or other thing but the circumstances and the confessional statement goes against the appellant. No plausible explanation has been given by the appellant in his statement given under Section 313 Cr.P.C.

18. Further S.K. Hakim (PW-1) has stated that the private part of the Jeenat was completely cut and heavy bleeding was there, which is also supported by the mother of the injured baby Malka Begum (PW-2) and also corroborated by Devesh Nirmalkar (PW-3) & Sheikh Aman (PW-5). The statement of Dr. Mamta Thakur (PW-11) would show that when the injured baby was taken to them her weight was found to be 4 K.G. and valva of the private part was peeled. In the query report Ex. P-9, the medical officer Dr. Mamta Thakur (PW-11) has stated that the injury was life threatening due to excessive bleeding from the private part, therefore, taking into such fact and

the age of the victim as she was only 2 & ½ months baby, it can be very well assumed that the nature of injury would have caused the death. Further the statement of Malka Begum (PW-2) would show that she has stated that initially the baby was hospitalized for three days at Durg and thereafter for one month she was hospitalized at Raipur Hospital. The said statement has not been rebutted, consequently, it would show that the victim was hospitalized for more than 20 days in the hospital. So the injury caused can be stated to be grievous as defined under Section 320 of the I.P.C.

19. In view of the aforesaid finding, the conviction was made by the Court below that the appellant forcefully entered into the room and thereafter caused the injury, cannot be faulted. Thereby the conviction made under Sections 452 & 307 of the I.P.C. is found to be correct.

20. So far as sentence is concerned, perusal of records shows that the appellant was lodged in jail for 143 days during trial and since after the judgment on 02.01.2013 he is in jail and as such he has suffered the jail sentence of 5 years, 5 months & 7 days. In this case, the prosecution has adduced evidence and the circumstantial evidence primarily exists against the appellant coupled with the confessional statement made before S.K. Hakim (PW-1) & Malka Begum (PW-2). Though it was the case of the prosecution that the injuries were inflicted by blade but the doctors Dr. Mamta Thakur (PW-11), Dr. Vandana Bhele (PW-13) and Dr. Smt. Sarita Minj (PW-14) have not supported the fact that the injury would have been caused by blade, therefore, the suspicion looms large about the weapon used in the incident.

21. Taking into consideration the peculiar circumstances, documents and the facts, relying on the principles laid down by the Supreme Court in the matter

of ***Bappa alias Bapu Vs. State of Maharashtra and Another {(2004) 6 SCC 485}***, I am of the opinion that the ends of justice would be served if the appellant is sentenced to the period already undergone by him as certain questions remain unanswered by the prosecution about nature of weapon used. The prosecution though came out with specific case that injury was inflicted by blade as per the eye witness but the nature of injury inflicted by blade is completely denied by the doctors that it was caused by the blade. Therefore, the suspicion looms large. Therefore, the jail sentence already suffered by the appellant is held as undergone.

22. In the result, the appeal is partly allowed. The conviction imposed upon the appellant under Sections 452 & 307 of the I.P.C. are maintained. The appellant is in jail. The appellant be released forthwith if not required in any other case.

Sd/-

Goutam Bhaduri

Judge

Ashu