

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 172 of 2014**

1. Petu Alias Nilesh Masih And Ors. S/o Shail Masih Aged About 20 Years R/o Village Ganeshpur, PS Simga, Distt. Baloda Bazar C.G. ,
2. Chunti @ Shailesh Masih S/o Shail Masih Aged About 22 Years R/o Village Ganeshpur, Ps Simga, Distt. Baloda Bazar C.G.
3. Surendra @ Mithun S/o Baratan Isai Aged About 30 Years R/o Village Ganeshpur, PS Simga, Distt. Baloda Bazar C.G.

---- Appellants**Versus**

- State Of Chhattisgarh Through Ps Simga, Distt. Baloda Bazar C.G. ,

---- Respondent

For appellants	: Smt. Kiran Jain, Advocate
For Respondent/State	: Shri Anil Pillai, Dy.A.G.

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Judgment on Board by Manindra Mohan Shrivastava,J.**26/11/2018**

This appeal is directed against the impugned judgment of conviction and order of sentence dated 7th February 2015 passed by the Additional Sessions Judge Bhatapara, district Baloda Bazar in S.T. No. 34/2012 whereby and whereunder appellants have been held guilty of the commission of the offence and sentenced as below :

<u>Offence</u>	<u>Punishment</u>
U/s. 302/34 IPC	Imprisonment for life and fine of Rs. 2,000/- each with default stipulation.
U/s.323 IPC	Fine of Rs. 500/- each with default stipulation
U/s. 323 IPC	Fine of Rs. 500/- each with default stipulation.

U/s. 323 IPC	Fine of Rs. 500/- each with default stipulation

2. According to the prosecution story, on 07.06.12, at about 8.00 p.m. in the evening, appellant Petu went to the betel shop of Anila (PW-2) and demanded cigarette, which she denied stating that the shop is closed due to marriage in the family. It is said that thereafter Petu came back along with his brother Chunti and maternal uncle Surrendra, armed with clubs and all of them started hurling abuses which resulted in open fight from both the sides. It is further alleged that when Suraj, one of the relative who had come to the marriage, sought to intervene, *lathi* blows were given on his head which proved to be fatal and Suraj later on, died having succumbed to the injuries.

Postmortem report prepared by Dr. S.K.Bagh (PW-14) revealed that there were number of injuries on the head of the deceased resulting in sub-dural hemorrhage and hematoma leading to comma and death. After completion of investigation, Charge sheet was filed and charges were framed for alleged commission of the offences.

3. In order to prove its case, the prosecution examined number of witnesses. Out of them PW-1, PW-2, PW-3, PW-5, PW-7, PW-9 and PW-10 were examined as eyewitnesses. They all deposed in the court that they had seen the incident in which fight had taken place and when Suraj came in to intervene he was assaulted with the help of club as a result of which, he sustained head injury.

Appellants raised their defence that there was a free fight and that they were assaulted and sustained injury and it is the other party, who was the aggressor. Two defence witnesses namely, Sheelmani (DW-1) and Devnarayan Sahu (DW-2) were examined. The injury reports of the appellants were also produced during trial, marked as Ex.D-1, D-3 and D-4.

4. Learned trial court, however, relying upon the prosecution case, held that the prosecution succeeded in proving murder of Suraj by appellants and held that all of them shared common intention to cause death of Suraj and thereby convicted them for commission of the offence under Section 302 read with Section 34 IPC.

5. Counsel for the appellants confined his submission only on the aspect as to whether, on the face of the prosecution evidence, trial court was justified in law in convicting the appellants for commission of offence under Section 302/34 IPC as the evidence proves that it was a case of free fight and in fact the appellants had been fighting with Prashant and his mother Anila and not with Suraj and it is only when Suraj sought to intervene, without any premeditation, in the heat of passion and sudden fight, Suraj sustained injury. According to him, even if the entire case of the prosecution witnesses is accepted as it is, present is a case covered under Exception 4 to Section 300 IPC and at the most, would lead to commission of offence and conviction for culpable homicide not amounting to murder under Section 304 IPC. He would submit that the appellants have undergone more than six years and four months of imprisonment. He would, therefore, pray for alteration of conviction of the appellants, under Section 304 Part II IPC and sentence for the period already undergone by them.

6. Learned State counsel on the other hand, argued that, even though the prosecution evidence, as deposed by the eyewitnesses, is that a dispute arose at the spot and fight has also taken place, the manner in which Suraj was inflicted with *lathi* blows repeatedly on his head, proves the common intention of the appellants to murder Suraj and merely because initially the fight did not start with Suraj, it would not mean that there was no intention to cause death. He would submit that as number of injuries were found on the head of the deceased, the accused/appellants have acted in a cruel manner.

7. We have heard counsel for the parties and perused the records.

8. The entire case of the prosecution with regard to the alleged criminal act on the appellants is based on ocular testimony of as many as seven eyewitnesses. In the light of the submissions which have been made by counsel for the appellants confined only on the aspect of alteration of conviction, we shall examine the evidence.

9. Praveen Kosare (PW-1) has deposed that appellant Petu had come to the shop of Anila demanding cigarette which was denied on account of marriage. Thereafter, Petu started hurling abuses and went to his house and then after sometime, he returned along with his brother Chunti and Uncle Surrendra, armed with clubs. This witness then deposes that, thereafter, they all started abusing his aunt, sister-in-law and elder brother. When he and Suraj (deceased) intervened and warned the appellants not to abuse, the appellants, who were intoxicated, assaulted, in which, Petu gave a blow on the head of Suraj. This witness states that he sustained head injury and while intervening Sunita and Nagma also sustained injury.

In cross-examination, this witness states that mother of Petu and Chunti namely Shailmani also arrived at the spot and also admitted that at the time of fight, Nagma, Sonu @ Nitesh, Sukha Masih, Prabhat Masih, Anita Masih and Rukmani Masih had also come. This witness further admits that their party also hurled abuses and there was scuffle between the two groups. This witness admits that at the time of incident, Suraj was intoxicated.

10. Anila Masih (PW-2) had also deposed that when Petu came to her shop to demand betel and upon being denied on the ground that the shop was closed, he started abusing her son Prashant and, thereafter, came back to the spot along with brother Chunti and uncle Surendra armed with club and then fight begins with Prashant. According to this witness, she could not

say who assaulted him but Pintu @ Suraj had sustained head injury. In her cross-examination, she admits that fight started between the two groups and scuffle had taken place. She has also admitted that the incident of quarrel started all of a sudden.

11. Nagma (PW-3), the third eyewitness had also repeated similar story as stated by PW-1 and 2 in so far as the genesis of the dispute is concerned and she has stated that one of the accused Surrendra assaulted Suraj on his head. In her cross-examination, she admits that when she reached the spot of incident, a quarrel between mother and Petu and her sister-in-law Sunita was going on. She further admits that there was scuffle between the two groups.

12. The evidence of Gladwin (PW-5), Rukmani (PW-07), Sunita Masih (PW-9) and Prashant Masih (PW-10), which we have gone through, makes out that on account of demand of cigarette /betel made by Petu from Anila (PW-2) which was refused, dispute arose and thereafter, Petu came back, went to his house and soon thereafter returned along with other two accused Chunti and Surendra and then, it is said, that assault was given. From the evidence of this witness, it has also come that the dispute between Anila and her son Prashant on one side and the appellants on the other side had sparked fight. Further evidence which has come on record is that a scuffle had taken place between the two groups which only proves that a free fight had taken place. The prosecution evidence also proves that Suraj was assaulted only when he intervened in the dispute between the appellants on the one side and Anila and her son Prashant on the other.

Two defence witnesses namely Sheelmani (DW-1) and Devnarayan Sahu (DW-2) have also been examined by the defence and the witnesses deposed that at the place of incident, the other party was the aggressor and the appellants were assaulted. The injury report of the three appellants have

also been led by the defence as Ex.D-1, D-3 and D-4 which shows presence of some injury on the appellants.

13. In the totality of the circumstances and the evidence which have come on record, as is proved, is that, for a petty dispute between Anila and her son Prashant on one side and the appellants on the other, a free fight had taken place at the spot in the presence of number of persons in which both sides sustained injuries. The prosecution evidence is that the incident of fight started all of a sudden at the spot. What is relevant to note is that according to the prosecution witness, the dispute was between Anila (PW-2) and her son Prashant, on the one side and the appellants on the other, an occasion arose to assault Suraj, only when the dispute was intervened by Suraj.

14. From the aforesaid set of evidence, we find that present is a case where the appellants gave assault to Suraj which was without premeditation and it was a case where this all happened all of a sudden, in a quarrel and the fight resulted in various injuries to both the sides. Prosecution witnesses PW-1, 3 and 9 namely, Praveen Kosare, Nagma and Sunita Masih have also sustained injuries. Appellants have also sustained injuries. Deceased unfortunately suffered number of injuries on his head and succumbed to death.

Though learned counsel for the State argued that it would be a case of cruel act on the part of the appellants, taking into consideration the entirety of the circumstances, nature of weapon used and that there was one fracture injury and sub-dural hematoma, it could not be categorized as a case where the appellants could be said to have otherwise acted in a cruel manner within the scope and ambit of Exception 4 of Section 300 IPC. The blows were only *lathi* blows.

15. In view of above analysis of the evidence on record, we are of the

view that present is a fit case where Exception 4 to Section 300 IPC would be squarely attracted and, therefore, it would be a case of culpable homicide not amounting to murder, punishable under Section 304 Part II IPC.

16. We are accordingly inclined to alter the conviction of the appellants to that under Section 304 Part II IPC.

In the totality of the circumstances and the nature of weapon used, injury sustained and that the appellants have also sustained injury, in our opinion, interest of justice would be served if the appellants are sentenced for a period of seven years.

17. In the result, this appeal is partly allowed. Appellants conviction is altered to one under Section 304 IPC with a sentence of seven years. Appellants are in jail and stated that they have already completed more than six years and four months of imprisonment. As we have imposed sentence of 7 years, the appellants shall undergo remaining part of sentence unless entitled to be released by granting benefit of remission. As far as the conviction under Section 323 IPC is concerned, it is on the allegation of assaulting other injured, the conviction is maintained, of course, shall run concurrently.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge