

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 44 of 2015**

1. Amin Raza @ Kallu S/o Abdul Kayyum, Musalman, aged about 29 years,
2. Gous Mohammed @ Bokhi, S/o Shekhawat Ali Musalman, aged about 40 years,

Both resident of village Bhawarahi, Police Station Surajpur,
District Surajpur (C.G.)

---- Appellant.**Versus**

- State of Chhattisgarh Through – The Station House Officer,
Police Station Surajpur, District Surajpur (C.G.)

---- Respondent

For Appellants	:	Shri Arun Kochar and Shri S.A. Ansari, Advocates.
For Respondent/State	:	Shri Vaibhav Goverdhan, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Gautam Chourdiya

Judgment On Board**By Pritinker Diwaker, J****06/08/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 10.12.2014 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Surajpur, in Special Sessions Trial No.34/2013 convicting accused/appellants under Sections 148 and 302/149 IPC & sentencing them to undergo R.I. for one year with fine of Rs.500/- and imprisonment for life with fine

of Rs.2000/- plus default stipulation respectively.

02. Brief facts of the case are that fishing right of Gangoti Dam near Bilaro pond was given to one Parvati Mahila Multi Purpose Society on lease up to year 2018. The members of the said society used to work jointly and keep guard on the pond. On 28.05.2012 at about 12.00 in the night deceased Sukhlal Gond was keeping guard on the said pond. When he heard some noise and reached near the pond, he was abused by the accused persons who entered the said area for committing theft of fishes. It is said that the deceased was assaulted by club, battleaxe, chain, axe and rod as a result of which he sustained number of injuries on his body. After hearing his cries, his wife Tilaso Bai and other persons of the said society reached there, some of them saw the accused persons assaulting the deceased and fleeing from the spot. Injured Sukhlal Gond was lifted on a cot, brought in a hut and taken to Primary Health Center, Baikunthpur from where he was shifted to Mission Hospital, Ambikapur where he was hospitalized for further treatment. The injured was medically examined on 29.05.2012 by Dr. G.D. Baghel who gave his MLC noticing following injuries.

- (i) Incised wound over upper part of occipital region in the size of 5 cm x .5 cm x .5 cm caused by sharp cutting object.
- (ii) Incised wound on left side of lower part of occipital region in the size of 4 cm x 0.5 cm x 0.5 cm caused by sharp cutting object.
- (iii) Incised wound on left side of lower part of occipital region in the size of 2 cm x 0.5 cm x 0.5 cm.
- (iv) Contusion on back of neck in the size of 10 cm x 5 cm

caused by hard and blunt object.

- (v) Multiple contusions in the size of 22 cm x 5 cm, 20 cm x 4 cm and 15 cm x 5 cm over back of chest below left scapular region caused by hard and blunt object
- (vi) Contusion over back of chest and abdomen in the size of 25 cm x 5 cm caused by hard and blunt object.
- (vii) Contusion over lumbar region in the size of 5 cm x 5 cm.
- (viii) Multiple contusions in the size of 5cm x 4cm, 5cm x 5cm and 4cm x 4cm over right supra scapular region caused by hard and blunt object.

03. After about four days, on 01.06.2012 the deceased succumbed to his injuries in the Mission Hospital, Ambikapur. On the basis of information received from the hospital, unnumbered merg (Ex.P/5) was recorded on 01.06.2012 and Numbered merg (Ex.P/19) was recorded on 12.06.2012. In the meanwhile, on the basis of written report (Ex.P/1) dated 29.05.2012 lodged by Tilaso Bai, wife of the deceased, initially unnumbered FIR was registered on 29.05.2012 followed by numbered FIR on 30.05.2012 against accused Bokhi Miyan, Majruddin, Rasid Miyan and Kallu under Sections 294, 506 (B), 307 IPC and 3 (1) (x) & 3 (2) (v) of the Act. After the death of the deceased and recording merg intimations, inquest on the dead body was conducted on 01.06.2012 and dead body was sent for postmortem examination which was conducted on the same day by Dr. Sanjay Singh who gave his report (Ex.P/18) noticing following injuries/symptoms:-

- (i) Eyes and mouth were closed, body was cold, nails were bluish.
- (ii) Rigor mortis were present all over the body.

- (iii) Stitched wound three in numbers were present on head (posterior part).
- (iv) Abrasion of 7 x 4 cm on posterior part of neck.
- (v) Abrasions of 5 x 2 cm and 3 x 2 cm on right scapular region.
- (vi) Contusion of 14 x 5 cm on right side of neck, posterior and interior to right ear.
- (vii) Multiple contusion on back.

The autopsy surgeon opined the cause of death of deceased to be head injury and mode of death coma.

04. Memorandum of accused Amin Raza, Mohd. Mustakim and Gous Mohammad were recorded on 03.06.2012, 06.07.2012 and 16.07.2012 vide Ex.P/13, P/6 and P/11, based on which clubs were seized vide Ex.P/14, P/7 and P/12 respectively. However, there is no FSL report on record in respect of the seized articles.

05. After investigation, charge sheet was filed against accused Amin Raza @ Kallu, Mohd. Mustakim @ Gudda and Gous Mohammad under Sections 147, 148, 149, 294, 506 (B), 302 IPC, 3 (1) (x) and 3 (2) (v) of the Act. Charge sheet was also filed against accused Mohd. Rashid and Majruddin Ansari under the aforesaid Sections showing them to be absconder. After filing of charge sheet, in Sessions Trial No.34/2013, the trial Court framed the charges against accused/appellant Gous Mohammad, Mohd. Mustakin @ Gudda and Amin Raza @ Kallu under Sections 148, 302/149 IPC and 3 (2) (v) of the Act.

06. So as to hold the accused persons guilty, the prosecution examined as many as 17 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.

07. The trial Court after hearing counsel for the respective parties and considering the material available on record while acquitting accused Mohd. Mustakin @ Gudda of the charges under Sections 148, 302/149 IPC, Section 3 (2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short ' the Act') and Amin Raza @ Kallu (A-1) & Gous Mohammad @ Bokhi (A-2) of the charge under Section 3 (2) (v) of the Act, has convicted and sentenced the appellants as mentioned in para-1 of this judgment. Hence, this appeal.

08. Learned counsel for the appellants submits as under:

- (i) That even if the entire prosecution case is taken as it is, the offence under Section 302/149 IPC is not made out against accused Amin Raza @ Kallu and Gous Mohammad and at best, they are liable to be convicted under Section 304 Part-II IPC.
- (ii) That the accused persons appears to have gone to the pond for committing theft of fishes and when they were prevented from doing so, some injuries were caused to the deceased by the accused persons.
- (iii) That there was no intention on the part of the accused/appellants to commit murder of the deceased and it appears that their only intention was to cause some injuries/beating to the deceased to protect themselves and to run away from the spot.
- (iv) Even otherwise there is no evidence as to which of the accused caused which injury to the deceased and further considering the nature

of injuries sustained by the deceased, the accused/appellants cannot be convicted under Section 302/149 IPC.

(iv) That accused/appellants Amin Raza and Gaus Mohammad are in jail since 03.06.2012 and 16.07.2012 respectively, they have already undergone more than six years of jail sentence and, therefore, their sentence may be reduced to the period already undergone by them. Learned counsel has placed his reliance on the decisions of the Apex Court in the matter of **Harish Kumar V. State (Delhi Administration) reported in AIR 1993 SC 973, Sita Ram and Ors V. State of U.P. reported in AIR 1993 SC 350, Jharu and Ors V. State of Madhya Pradesh reported in AIR 1991 SC 517, Jagdish Prasad and Ors V. State of Rajasthan reported in 2017 (2) Cr.C.P. (S.C.) 121 and decision of this Court in the matter of Santosh Kumar & Anr. Vs. State of Chhattisgarh (Criminal Appeal No.669/2010).**

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

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

11. Tilaso Bai (PW/1) is wife of the deceased. She has stated that on the date of incident her husband and other villagers were keeping guard on the fishing pond. At 11.00 in the night, after hearing some noise when her husband deceased Sukhlal, Ramjatan, Balmukund and Ramfal reached the place of occurrence, her husband was being

abused and bearing by the accused persons. After coming to know about the incident, when she reached the place of occurrence, she found her husband in unconscious condition, he was brought in a hut, offered some water and then he disclosed the name of accused persons as assailants. She has further stated that after the incident her husband was taken to Baikunthpur hospital where he remained for two days and started talking. From Baikunthpur Hospital he was referred to Mission Hospital, Ambikapur and after two days of treatment he succumbed to his injuries. It is relevant to note here that the fact of oral dying declaration made by the deceased has not been stated by this witness while lodging the FIR, whereas in her diary statement dated 20.06.2012 she has stated so. In cross-examination, she states that while lodging the written report, she informed that the deceased made dying declaration before her but if the said fact is not recorded in written report and FIR, she could not tell the reason. This witness has also stated that when her husband was performing guard duty, at that time she was in hut and that it was a dark night. In para 9, she has also stated that when her husband was brought in hut, he was unconscious and was not talking to anyone. She has also stated in para 10 that when the police made effort to talk to him, he could not talk and even could not disclose the name of accused persons to the police. She further admits that there were two groups in the village, the accused persons were in one group, whereas the deceased was in another.

12. Ramfal (PW/2), eye-witness to the incident, has stated that he knew the accused persons who were present at the place of

occurrence. When he heard the cries of deceased Sukhlal that some persons were assaulting him, he reached there and saw the accused persons holding club, axe, rod and battleaxe and assaulting the deceased. Thereafter, he also raised cries on which the accused persons fled away from the spot.

13. Balmukund (PW/16) is other eye-witness to the incident and was also a member of the society to whom the fishing right of Gangoti dam was given. He has stated that he was guarding the pond along with deceased Sukhlal, Ramfal (PW/2) and Ramjatan, whereas Nadir Singh, Jawahar, Mainprasad and Neera Bai were in a hut. He has further stated that when he came to know about the accused persons committing theft of fishes, he along with Ramfal and Ramjatan went towards the pond, deceased Sukhlal was ahead of them. Accused persons started assaulting the deceased. After hearing his cries, they rushed towards the spot carrying torch and club in their hands. This witness, in para 10, has stated that normally while keeping guard they carry club but on the date of incident all the persons were having torch in their hands.

14. Dr. G.D. Baghel (PW/5) medically examined injured Sukhlal on 29.05.2012 and gave MLC (Ex.P/8) noticing (i) Incised wound over upper part of occipital region in the size of 5 cm x .5 cm x .5 cm caused by sharp cutting object, (ii) Incised wound on left side of lower part of occipital region in the size of 4 cm x 0.5 cm x 0.5 cm caused by sharp cutting object, (iii) Incised wound on left side of lower part of occipital region in the size of 2 cm x 0.5 cm x 0.5 cm., (iv) Contusion on back of neck in the size of 10 cm x 5 cm caused by hard and blunt object, (v)

Multiple contusions in the size of 22 cm x 5 cm, 20 cm x 4 cm and 15 cm x 5 cm over back of chest below left scapular region caused by hard and blunt object, (vi) Contusion over back of chest and abdomen in the size of 25 cm x 5 cm caused by hard and blunt object, (vii) Contusion over lumbar region in the size of 5 cm x 5 cm, and (viii) Multiple contusions in the size of 5cm x 4cm, 5cm x 5cm and 4cm x 4cm over right supra scapular region caused by hard and blunt object. In cross-examination, he has stated that when the injured was brought in the hospital, he was unconscious and injury Nos. 5, 6, 7 and 8 were not sufficient in ordinary course of nature to cause death of the deceased. He has further stated that death of injured could have been avoided if adequate and timely treatment was made available. This witness has also stated that he did not define the nature of injury Nos. 1, 2 and 3 though it should have been.

15. Dr. Sanjay Singh (PW/9) conducted postmortem examination on the body of deceased and gave his report (Ex.P/18) opining the cause of death to be head injury and mode of death coma. This witness has stated that head injury of the deceased could have been healed if proper timely treatment had been made available to him.

16. Sadan Prasad Yadav (PW/6) is Patwari who prepared spot map vide Ex.P/9. Vijay Singh (PW/7) - A.S.I., C.P. Bada (PW/10) - Inspector and Oskar Minj (PW/14) - Sub Inspector, assisted in the investigation. Prafull Kispotta (PW/8) - Investigating Officer, has duly supported the prosecution case. Shamim Mohammad (PW/11) and Mohd. Yusuf (PW/12) are the formal witnesses. Daud Ali (PW/13) and Tiwari Singh (PW/15) have turned hostile. Devlal (PW/17) is the witness to inquest

made under Ex.P/21.

17. Close scrutiny of the evidence makes it clear that on 28.05.2012 at mid night, when deceased was keeping guard on Bilaro pond near Gangoti Dam, the accused persons, with a view to commit theft of fishes of pond, entered the area. Upon seeing their movements, when the deceased reached there, he was assaulted by them by club. The incident was witnessed by Ramfal (PW/2) and Balmukund (PW/16) who have duly supported the prosecution case and stated as to how the incident took place. Though the eye-witnesses have seen the accused/appellants causing injuries to the deceased but they have not specifically stated as to which injury sustained by the deceased was caused by which of the accused persons. However, from the eye-witnesses account it is clear that all the accused persons actively participated in commission of the crime. Even otherwise, their conviction is with the aid of Section 149 IPC and in order to attract this Section, it is not necessary to prove that each of the accused has assaulted the deceased and what is required is that they acted in furtherance of common object of the unlawful assembly. From the unrebutted evidence of the eye-witnesses it stands proved beyond all reasonable doubt that the accused/appellants had a common object of assaulting the deceased and they acted in furtherance thereof. According to MLC (Ex.P/8) and postmortem report (Ex.P/18), three incised wounds and multiple contusions of different sizes were noticed on occipital region, back of neck and chest & cause of death was head injury and mode of death was coma. That apart, clubs were seized by the prosecution from the possession of accused/appellants.

Considering the given facts and circumstances of the case, in particular the evidence of eye-witnesses PW/2, PW/16, and further considering the statement of PW/1, the complicity of accused/appellants in crime in question stand proved beyond reasonable doubt.

18. Now the question which arises for consideration by this Court is as to what offence has been committed by the accused persons and whether in the given facts and circumstances of the case, they are liable to be convicted for lesser offence.

19. From the evidence it appears that the accused persons, with an intention to commit theft of fishes, entered the area where fishing was done by the society. At the relevant time, the deceased, who was guarding the pond, reached there and when he tried to protest, some quarrel took place between the accused persons and the deceased in which he was beaten by them by club. Further, according to autopsy surgeon, injuries sustained by the deceased were not grievous in nature, no fracture was found on the body of deceased and injuries were not sufficient to cause death of deceased in ordinary course of nature. The autopsy surgeon further opined that head injury of the deceased could have healed if proper timely treatment had been made available to him. That apart, the deceased died after four days of the incident. 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 the accused/appellants had no intention to commit murder of the deceased but their only intention appears to beat the deceased in the heat of passion upon a sudden quarrel. Being so, the

act of the accused/appellants would be covered by Exception 4 to Section 300 IPC i.e. culpable homicide not amounting to murder.

20. 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.”

21. 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.”

22. Thus, keeping in view the aforesaid principle of law, considering the manner in which the assault was made, the fact that the deceased thereafter survived for about four days and the medical evidence, it can safely be inferred that while assaulting the deceased the accused/appellants have no intention to cause his death but definitely had knowledge that infliction of such injuries may result in his death. In this view of the matter, though the accused/appellants cannot be held guilty under Section 302 read with Section 149 IPC but cannot escape their conviction under Section 304 Part-II/149 IPC.

Likewise, there is nothing on record to show that the accused/appellants were armed with deadly weapons. Though it has come in the evidence that the accused/appellants were carrying rod, chain, axe and club but the fact remains that only clubs were seized from their possession and normally in the village club is commonly found with the villagers. Thus, the conviction of the accused/appellants under Section 148 IPC is not sustainable in the eye of law and they are entitled for acquittal of this offence.

23. 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.

24. The Apex Court 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

¹ (2013) 6 SCC 770

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.

25. Keeping in view the aforesaid principles of law in relation to grant of compensation u/s 357 of CrPC, the fact that on account of assault made by the appellants, deceased Sukhlal had an untimely death at the age of 40, causing an irreparable loss to his family, and after affording a reasonable opportunity to the counsel for the appellants to address us on this point and satisfying ourselves as to the financial status of the appellants, we direct each of the appellants to pay compensation of Rs.25,000/- (totaling Rs.50,000/-) to the widow of the deceased within a period of six months from today, failing which they shall have to suffer additional RI for one year.

26. In the result, the appeal is partly allowed. Conviction of the appellants under Section 302/149 IPC is altered to Section 304 Part-II IPC and they are sentenced to undergo R.I. for seven years. In addition thereto, each of them is directed to pay an amount of Rs.25,000/- (totaling Rs.50,000/-) to widow of the deceased as compensation u/s 357(3) of CrPC, failing which they shall have to undergo additional RI for one year. The accused/appellants are acquitted of the charge under Section 148 IPC.

27. The amount so deposited by the appellants shall be paid to the wife of deceased Sukhlal as compensation in view of Section 357 of Cr.P.C., after due verification.

28. A copy of this judgment be forwarded to the concerned trial Court forthwith for its compliance.

29. Appeal thus allowed in part.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Gautam Chourdiya)
Judge