

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on 15.11.2017

Judgment delivered on 18.05.2018

CRA No. 1651 of 2015

- Kariya @ Yashwant Patle S/o Dasheram Patle, aged about 39 years, R/o Village Amartal, P.S. Akaltara, District Janjgir Champa (CG)

---- Appellant

Versus

- State Of Chhattisgarh Through Station House Officer, Police Station Pamgarh, District Janjgir Champa (CG)

---- Respondent

For Appellant	:	Mr. Aneesh Tiwari, Advocate
For Respondent	:	Mrs. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Arvind Singh Chandel

Judgement

Per P. Diwaker, J

18/05/2018

1. This appeal has been filed against the judgment of conviction and order of sentence dated 7.9.2012 passed by the Sessions Judge, Janjgir-Champa, in S.T. No.176/2011 whereby the accused/appellant has been convicted under Section 302 of the Indian Penal Code (for short 'the IPC') and sentenced him to undergo R.I. for Life and fine of Rs.2000/-, in default to undergo additional R.I. for 03 months.
2. In the present case name of deceased is Amarbai, keep of accused/appellant.
3. As per case of the prosecution, the deceased was married to one Saheb Lal and out of the wedlock, three children have born. After the death of her husband, the accused/appellant started residing with the deceased in

her house as her husband. It is stated by the prosecution that on 27.2.2011 at about 4 am accused/appellant had gone to the house of Sanjay (PW-3) and informed that the deceased is not well and she is to be taken to the doctor. When said Sanjay reached the house of deceased, he found her completely burnt, however, this witness and accused/appellant took the deceased to hospital at Pamgarh from where she referred to CIMS, Bilaspur where she succumbed to burn injuries on 1.3.2011. On 1.3.2011 itself intimation was given to the Police Outpost CIMS, Bilaspur vide Ex.P-11. Inquest on the body was conducted vide Ex.P-4 and the body was sent for post-mortem examination which was conducted by Dr. Neeraj Katailiha (PW-10) who noticed burn injuries on different parts of the body of deceased covering approximately 70% area of her body except her head, back of chest, perineum and both sole. The cause of death was assigned by the doctor due to cardio respiratory failure as a result of shock due to burn. Numbered merg (Ex.P-12) was recorded at Police Station Pamgarh on 14.6.2011 and after merg enquiry, FIR (Ex.P-6) under Section 302 of IPC was registered against the accused/appellant on 14.6.2011. During merg enquiry, on 14.6.2011 statement was made by Sundar Kumari Kurre (PW-2) that her mother (deceased) was set on fire by accused/appellant and prior to that they were quarrelling with each other.

4. On completion of investigation, charge sheet under Section 302 of the IPC was filed against the accused/appellant. Charge under Section 302 of IPC was framed by the trial Court against the accused/appellant to which he pleaded not guilty and sought trial. The prosecution in order to bring home the charge levelled against the appellant had examined 10 witnesses in all. Statement of appellant was recorded under Section 313 of Cr.P.C. in which he abjured his guilt and pleaded innocence & false

implication. After hearing the parties, the Court below has convicted & sentenced the accused/appellant in the manner as described above.

5. Counsel for accused/appellant submits that;

- there is absolutely no material to connect the appellant with the crime except the statement of Sundari Kumari (PW-2), who had spoken about the incident after a lapse of more than three months, and therefore on the sole testimony of the said child witness, it is not appropriate to sustain the conviction recorded by the trial Judge.
- Sundari Kumari (PW-2) did not talk about the occurrence to anyone for about three months from the date of occurrence and for the first time on 14.6.2011 she disclosed the fact of her being an eyewitness to the investigating officer. Her keeping silent for such a long period and not disclosing the fact that she was an eyewitness to her brothers & sister, creates a serious doubt her being an eyewitness. Further, the possibility of tutoring Sundari Kumari (PW-2) can also not be ruled out in the present case.
- the deceased was alive for two days and there is no evidence on record to show that the deceased was unconscious throughout. No attempt has been by the prosecution to record dying declaration of the deceased, who was alive for more than two days.
- Once numbered merg was received by Police Station Pamgarh on 26.4.2011, FIR ought to have been registered promptly by the prosecution.
- Mahendra Prasad Tiwari (PW-6), Assistant Sub Inspector, who registered the crime, has investigated the entire matter causing serious prejudice to the trial and as such, the trial stands vitiated on the said serious infirmity in the investigation and therefore the conviction followed by sentence awarded to the appellant deserves

to be set aside. Reliance is placed on the judgments in Megha Singh vs. State of Haryana reported in (1996) 11 SCC 709; Roop Lal Halba v. State of Chhattisgarh reported in 2014 CriLJ 4683 & Shekhar Sonkar v. State of Chhattisgarh reported in 2017 (3) CGLJ 82.

- the deceased caught fire accidentally and thereafter she was taken to the hospital at Pamgarh by the appellant and she died in the course of her treatment on 1.3.2011.
- even if the entire prosecution case is taken at its face value, it is apparent that incident occurred all of a sudden in the spur of moment during the course of altercation which ensued between the deceased and the appellant. Thus, it is difficult to say that there is material to constitute ingredients of offence under Section 302 of IPC and the appellant at best can be held liable for the offence punishable under Section 304 Part I or II of IPC. The appellant is in custody for the last more than 6 years.

6. On the other hand, supporting the impugned judgment learned counsel for the State submits that;

- conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
- after receiving merg intimation on 26.4.2011, merg enquiry was conducted during which diary statement of PW-2 was recorded on 14.6.2011 based on which FIR (Ex.P-6) was registered on the same day against the appellant. Probable explanation was offered by PW-2 for delay in recording of her statement by saying that accused/appellant had threatened her that if she will disclose the incident to anyone, he would kill her also and therefore she kept silent

till 14.6.2011.

- No explanation was sought from PW-2 as to why her diary statement was recorded with such delay nor the investigating officer was questioned about the delay in recording statement of the aforesaid witness and therefore the delay in recording the statement of PW-2 cannot be held to be fatal to the prosecution.
 - from the testimony of PW-3 it is apparent that the accused/appellant was present in the house at the relevant point of time. According to this witness, the appellant came to his house and asked him to accompany him to his house by saying that something had happened to the deceased.
 - Non-recording of dying declaration of the deceased cannot be held to be fatal to the case of prosecution particularly when there is no denial of the fact that the deceased had suffered 70% burn injuries and she was not in a position to give her statement.
 - investigation by PW-6 would not vitiate the trial as no prejudice has been caused to appellant on account of investigation made by PW-6.
7. We have heard counsel for the parties and perused the evidence available on record.
8. Satya Kumari Satnami (PW-1) is the elder daughter of the deceased. She has stated that accused/appellant used to visit the house of her mother (deceased). Her younger sister (PW-2) was residing with the deceased. She informed her that on the fateful night there was a quarrel between the deceased and the accused and during the course of quarrel, the accused set her mother ablaze after pouring kerosene on her. Her sister (PW-2) further informed her that when she tried to raise her voice, accused/appellant gagged her mouth. This witness has clarified that accused/appellant was living with her mother like her husband.

9. Sunder Kumari Kurre (PW-2), a child witness, is the daughter of the deceased and an eyewitness to the incident. Before recording evidence of this witness, the trial Judge has asked some questions to this witness to assess her understanding and intelligence and the answers are at the top of the deposition. This witness has stated that after the death of her father, the accused/appellant was residing along with them in their house. He has further stated that in the fateful night on account of quarrel between her mother and accused/appellant, she woke up and saw that the accused/appellant set her mother on fire after pouring kerosene on her from the earthen lamp. On cries being raised by her, the accused gagged her mouth and threatened her that if she would make noise, then he would burnt her also. She has further stated that she narrated the entire incident to her elder sister, brother-in-law and uncle Bisahu Satnami. This witness had been cross-examined at length but nothing could be elicited in her cross-examination so as to render her evidence doubtful in any manner.
10. Sanjay Kumar Kurre (PW-3) is the neighbour of the deceased. He has stated that on the date of incident at about 4 in the morning he came to his house and told him that his wife (deceased) has fallen sick and he wanted to take her to the doctor and for that purpose he need his help. On this, he went to the house of accused and found the deceased lying in burnt condition. He does not know as to how she caught fire. They took the deceased to Pamgarh hospital for treatment from where they took her to Bilaspur where she breathed her last while undergoing treatment. According to this witness, though he enquired from the deceased but she did not tell anything to him. In the cross-examination this witness has clarified that though accused/appellant is resident of some other village but for the last two years he was residing with the deceased in her house.
11. Firatram Satnami (PW-4) is the brother-in-law of the deceased. He has

stated that from two years prior to the incident, the accused/appellant was residing in the house of deceased. Jawahar Khunte (PW-5) is the witness of seizure memo Ex.P-5 by which one jerry-cane and lamp were seized from the spot. Mahendra Prasad Tiwari (PW-6) is the investigating officer who has duly supported the prosecution case. Bhanu Pratap Kurre (PW-7) is the Patwari who prepared the spot map of Ex.P-1. Mohanlal Rathore (PW-8) is the Head Constable who recorded numbered Merg (Ex.P-12) on 26.4.2011. Puneet Ram Rajat (PW-9) is the Assistant Sub Inspector who registered unnumbered Merg (Ex.P-11) after receiving memo from the hospital vide Ex.P-13. He is also a witness to inquest memo.

12. Dr. Neeraj Kumar Kateliya (PW-10) is the person who conducted post-mortem examination of the body of deceased and found 70% superficial burn over her body. He opined that the deceased died due to cardio respiratory failure due to shock as a result of burn.
13. From perusal of the impugned judgment it is clear that the conviction of accused/appellant rests on sole testimony of eye-witness Sundari Kumari (PW-2), who is 11 years old daughter of the deceased. According to her, on 27.2.2011 at about 12-1 in the midnight, accused/appellant and deceased had started quarrelling and hearing the sound of quarrel, she woke-up and saw that the accused/appellant had set the deceased afire by pouring kerosene on her. She has further deposed that when she tried to raise alarm, the accused/appellant gagged her mouth and threatened her by saying that if she will disclose to anyone then he would kill her. It is not the case where the witness is a close relative of the deceased only, the accused/appellant was also residing with her mother for the last more than year prior to the date of incident. There is nothing on record to show that the relations between accused/appellant and this witness were strained or she had any motive to falsely implicate the accused/appellant.

There is also nothing to show that she had any enmity with accused/appellant or she had any reason to depose falsely against him to get him convicted in order to save the actual culprit. There is nothing on record to even suggest that she deposed as tutored by anyone. Credibility of this witness had also not been shaken during the course of cross-examination. Keeping in view all the aforesaid facts, we do not find any reason to disbelieve her testimony. In our opinion, the prosecution has successfully proved its case and is able to bring home the guilt of the accused that it is he who murdered his wife by putting her on fire by kerosene oil on her.

14. So far as the delay in disclosure of incident by PW-2 is concerned, in the facts and circumstances of the case, the delay was natural. PW-2 was a small child of 11-12 years of age at the time of occurrence. She had seen the cruel behaviour of accused/appellant and she was under threat of being killed. Thus it is clear that the child was scared and could not get out of shock and, therefore, there was delay and that should not be taken as a prime factor to disbelieve the case put forth by the prosecution.
15. That apart, the conduct of accused after the incident was such which connects him with the crime in question. The evidence of Sanjay Kumar Khunte (PW-3) would go to show that on the date of incident the accused/appellant came to his house in the morning at 4 and sought his assistance to take his wife (deceased) to the hospital on the pretext that she has fallen sick. However, when he reached the house of accused/appellant, he found the deceased lying completely burnt in the house. This subsequent conduct of accused/appellant in giving wrong information to this witness for seeking his assistance in taking the deceased to the hospital becomes a clinching circumstance against him in the light of aforesaid evidence of PW-2 and which clearly point an

accusing finger to the appellant and no one else. Further, the place of occurrence was the house where accused and deceased were residing together, therefore, it was the duty of accused/appellant to have given proper explanation as to how and in what circumstances the deceased caught fire. However, in the statement recorded under Section 313 CrPC the accused/appellant has not offered any explanation except a bald defence of denial.

16. It has next been argued by the learned counsel for the accused-appellant that deceased received burn injuries on 27.2.2011 and died on 1-3-2011, but her dying declaration was not recorded. Indeed, it would have been better, had dying declaration of deceased been recorded. But remissness or negligence of the Investigating Officer in not arranging for recording of dying declaration of deceased would not take away the effect of the ocular testimony produced by the prosecution of Sundar Kumari (PW-1), which we have found to be perfectly convincing and trustworthy, proving to the hilt that the culprit was the present appellant and none else. Therefore, non-recording of the dying declaration of deceased does not adversely affect the prosecution case in the face of satisfactory eye-witness account of the incident coming from the mouth of Sundar Kumari (PW-2), daughter of deceased. We, therefore, reject this argument advanced in support of this appeal by the learned counsel for the accused-appellant.

17. Coming to the last submission made by learned counsel for the appellant that the investigating officer being the complainant should not have proceeded with the investigation of the case as there is legal bar to an investigating officer functioning in the dual capacity of the complainant also. Merely because the complainant conducted the investigation, it would not be sufficient to cast doubt on the prosecution version to hold that the same makes the prosecution version vulnerable. What was

important in such a case to see is whether such dual functioning had resulted in prejudice to the accused.

True, the investigation, in the present case, was conducted by the very same police official who had lodged the report, but this fact alone is not sufficient to discard the entire prosecution case particularly when present is a case where conviction of accused/appellant is based upon the testimony of appellant's minor son who had given a graphic description of the entire incident. This apart, no such objection was raised on behalf of accused/appellant at any stage during trial and/or nothing could be pointed out by the counsel for the appellant from the material on record to show that such dual functioning of PW-6 had resulted in prejudice to the appellant or that he was biased or in any way interested in conviction of accused/ appellant or he was to derive any benefit out of the success of the case. The Hon'ble Apex Court while dealing with almost identical issue in many cases including in **Vinod Kumar v. State of Punjab** reported in **(2015) 3 SCC 220** following the judgment reported in **Jeevanantham v. State** reported in **(2004) 5 SCC 230** held that unless the defacto complainant, who also happens to be the investigating officer, is personally biased and prejudiced and personally interested to get conviction to the accused, such contention cannot be sustained.

We have perused the rulings taken support of by learned counsel for the accused/appellant as to the fact that investigation conducted by the complainant right from the beginning is not valid. However, it is not a case where there is no other evidence other than that of the investigating officer. Son of deceased himself has come forward with a specific statement that he saw the accused/appellant setting his mother (deceased) afire by pouring kerosene on her which ultimately culminated into her death. Thus, the facts of the present case and ones relied upon

are quite distinguishable and therefore cannot be made basis for the correct decision of this case. Moreover, the cases relied upon are relatable to the minor offences whereas in the present case one woman has lost her life and therefore it has to be tested on a strict legal touchstone keeping apart the validity of the statement of complainant who ultimately went on to investigate the matter right upto the end.

We, therefore, reject the submission that the investigating officer (PW-6) is also the complainant of this case, which vitiates the entire prosecution case being not tenable.

18. For the foregoing discussions, we do not find any substance in this appeal, the same is liable to be dismissed and is hereby dismissed. Since the accused/appellant is already reported to be in custody, no further direction regarding his arrest etc. is needed.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Arvind Singh Chandel)
Judge

roshan/-