

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 876 of 2012

Smt. Ramli W/o Kishan Banjare Aged About 35 Years R/o Village - Erikpal, PS - Parpa, Jagdalpur, Distt. - Bastar C.G. , Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through PS - Fregarpur, Distt. Bastar C.G. , Chhattisgarh

---- Respondent

For Appellant : Shri Vaibhav Goverdhan, Advocate

For State : Shri Anand Verma, Dy. Govt. Advocate

D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava & Hon'ble Mrs. Justice Rajani Dubey

Judgment On Board

10/01/2019

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 27.8.2012 passed by learned First Additional Sessions Judge, Bastar at Jagdalpur in ST No.158 of 2011 whereby and whereunder the appellant has been held guilty of commission of offence under Section 302 IPC and sentenced to undergo life imprisonment with fine of Rs.100/- and in default of payment of fine, additional RI for three months.
2. Prosecution case is that on 17.9.2011, village Kotwar Theeluram Kashyap (PW1) lodged morgue intimation informing death of Kishan Banjare. Soon thereafter, followed registration of FIR at the instance of Theeluram Kashyap (PW1) at 10:35 hrs. Both in the FIR and the morgue intimation, it was recorded that on 16.9.2011, the FIR informant was informed by Ramli (the appellant) that while she was taking meals with her husband, her husband Kishan who was drunken threw the meals making allegation that the appellant takes meals twice, one before the deceased takes and one along with him and started her abusing. According to the informant, he was

also informed by the appellant that after hurling abuses, the deceased picked up heavy stone and threatened to kill her and threw upon her which she escaped. The husband again threw heavy stone to kill her but she again escaped. Thereafter, when husband attempted to pick up an axe which was lying there, she snatched it from his hands and gave assault due to which her husband fell down.

After registration of FIR, inquest over dead body of the deceased was prepared at the spot in the presence of witnesses and dead body was sent for postmortem which was conducted by Dr. M.R. Kashyap (PW8). In the postmortem report, the doctor found one swelling in the middle part of the head, one incised wound on the right parietal region and another incised wound on the right side of the neck. The thumb of right hand was also cut and there were several injuries in the chest on the left side. In addition, there were some bruises. According to the doctor, the cause of death was excessive bleeding due to assault on the parietal part of the head and on the neck. Blood vessels were cut. There was no eyewitness to the incident. Theelu Ram Kashyap (PW1), the Kotwar, was cited as witness of extra-judicial confession.

3. The learned trial Court, relying upon the circumstances of the case and that the deceased died homicidal death because of injury sustained by him in the house and the appellant being the wife in the house but failed to explain as to how her husband sustained fatal injury, held her guilty of commission of offence under Section 302 IPC and sentenced her as described above.
4. Learned counsel appearing for the appellant argued that even if, by application of provision contained under Section 106 of the Evidence Act, an inference could be drawn on account of homicidal death in the house that in all probabilities, the appellant must have assaulted her husband and killed him, in the circumstance of the case, as reflected from FIR, present is a case of exercise of right of private defence by the appellant-wife and even if it is found that she exceeded in exercise of her right of private defence, the conviction could be sustained only under Section 304 Part-II IPC and not under Section 302 IPC. In support of this argument, he placed reliance upon **Suresh Singhal Vs. State** (Delhi Administration) (2017) 2 SCC 737

and **Jagmal and Ors. Vs. State of Rajasthan** (2017) 11 SCC 112.

5. On the other hand, learned counsel for the State submitted that the story of exercise of right of private defence, as stated by the appellant, has not been clearly raised and brought by way of specific defence by the appellant either while cross-examining the witnesses or even in her examination under Section 313 Cr.P.C. He would submit that as the deceased died homicidal death because of assault on his head and neck leading to excessive bleeding, shock and death and the appellant could not establish that there was any other resident of the house, she having failed to establish plea of alibi and she also having failed to explain as to how her husband sustained such injury and died in the house, learned trial Court has committed no illegality in holding the appellant guilty of commission of offence.
6. We have heard learned counsel for the parties and perused the records.
7. Homicidal death of Kishan is proved beyond doubt. Dr. M. R. Kashyap (PW8) who conducted postmortem has clearly proved that number of injuries were found on the body of the deceased. There was swelling found in the head, one cut injury in the neck, stab wound on the chest and some bruises. Right thumb was also cut. The cause of death was excessive bleeding due to injury on the head and the neck, cut injury on the left parietal. There was excessive bleeding leading to shock and death.
8. The appellant was the wife of the deceased. She could not establish any plea of alibi. There was no other member in the family. Therefore, the learned trial Court has committed no illegality in coming to the inference by applying Section 106 of the Evidence Act that it was the appellant who assaulted her own husband.
9. The other issue which arises for consideration is whether the appellant is to be convicted under Section 302 IPC or 304 Part-II IPC. For this purpose, when we look into the FIR and morgue intimation, both of which were lodged by Kotwar Theelu Ram (PW1), the contents of the same are that when the deceased came back to his house and was taking meals in the night, a quarrel arose between husband and wife. According to FIR, the appellant's husband Kishan got enraged, threw away the meals and then

started hurling abuses to the appellant making certain allegation which followed an attempt by him to kill the appellant by throwing heavy stone more than once which she escaped. When the deceased attempted to pick up an axe, the appellant, in order to save her, picked up the axe and started giving assault which led to death of husband- Kishan. Therefore, probable defence of exercise of right of private defence appears to be plausible from what has been stated in the FIR. It has to be noticed that FIR was lodged by Kotwar Theelu Ram (PW1) and according to FIR, he has stated that the entire episode was narrated to him by the appellant herself. True it is that he has turned hostile in the Court regarding he having been informed about the details of incident in the manner as stated in the FIR and has said that the appellant informed him that the deceased sustained injury because of fall on the stone as he was drunken due to which, the trial Court has held that it was not a case of exercise of right of private defence, in the peculiar circumstance of the present case, such defence cannot be said to be wholly improbable particularly when it is contained in the FIR itself. It is not necessary for the accused under all circumstance to take specific defence. The probable defence of the accused can also be inferred from material on record.

10. However, even if the defence of the appellant is accepted that the appellant exercised right of private defence in the circumstance when she found that her husband was bent upon killing her by throwing heavy stone repeatedly on her and thereafter attempting to pick up an axe, we find that present is a case where the appellant exceeded her right of private defence. In a recent decision of the Supreme Court in the case of **Suresh Singhal** (supra), the law with regard to exercise of right of private defence with reference to provision contained in Section 97 IPC was reiterated in the light of earlier decisions of the Supreme Court, as below:-

“21. The right of private defence is contemplated by Section 97 of IPC which reads as follows:-

“97. Right of private defence of the body and of property.— Every person has a right, subject to the restrictions contained in Section 99, to defend—

First — His own body, and the body of any other person, against any offence affecting the human

body;

Secondly—The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.”

22. In *Darshan Singh vs. State of Punjab*, this court laid down the following principles which emerged upon the careful consideration and scrutiny of a number of judgments as follows:-

“58. The following principles emerge on scrutiny of the following judgments:

- (i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.
- (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
- (iii) A mere reasonable apprehension is enough to put the right of self- defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.
- (iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous

with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self- defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

11.If we apply the aforesaid legal position to the facts and circumstances of the present case, we find that the circumstance in which the appellant had picked up axe was in the background that her husband was bent upon killing her but then it is also settled that in exercise of right of private defence, the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property. In the present case, we find that the appellant once started assaulting, she repeated the assault so much so that the husband sustained two injuries on his head and one injury on the neck which proved to be fatal. Therefore, in our considered opinion, present is a case where

the appellant exceeded in exercise of her right of self defence. But then, the exercise of right was in good faith in her own defence and without premeditation and for that reason, the homicide in the present case would not amount to murder in view of Exception -2 to Section 300 IPC.

12. In view of above conclusion, the appellant's conviction is altered to one under Section 304 Part-II IPC. The appellant is in jail since 18.9.2011 and has undergone 7 years and 4 months imprisonment. In these circumstances, we are inclined to impose sentence for the period already undergone by the appellant.

13. In the result, the appeal is partly allowed. Conviction of the appellant is altered to one under Section 304 Part-II and sentenced for the period of 7 years and 4 months i.e. period already undergone by the appellant. The appellant be set at liberty forthwith if not required in any other case.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge