

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 529 of 2012**

- Hemlal Sahu S/o Pousauram Sahu, Aged about 48 years, R/o Nimora , P.S. Dharsinva, Distt. Raipur C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through - P.S. Dharsinva , Distt. Raipur C.G.

---- Respondent

For Appellant	: Smt. Smita Jha, Advocate
For Respondent /State	: Shri Anand Verma, G.A

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

Judgment On Board By Manindra Mohan Shrivastava, J.

14/01/2019

This appeal is directed against the judgment of conviction and order of sentence dated 08.05.2012 passed by the Sixth Additional Sessions Judge, Raipur in Sessions trial No. 232/2010 whereby the accused/appellant has been held guilty for commission of the offence of triple murder and sentenced to undergo imprisonment for life.

2. Prosecution story, on the basis of which charge sheet was filed and the appellant was tried for commission of offence under Section 302 IPC for triple murder is that Komal Sahu (PW-3), son of deceased Revati came to his house in the afternoon and he heard cries and despite knocks given, the door was not opened. Then he tried to climb

up on the sidewall to reach the terrace and from there he witnessed the incident where the present appellant was found assaulting his mother and also injuring the child Gowri and infant Ishwar. *Dehati Nalishi* i.e. spot FIR was recorded at 18.45 hrs. i.e. within less than 5 hours of the incident vide Ex.P-11. It was followed by numbered FIR at police station vide Ex.P-30. In both *dehati nalishi* and FIR, lodged at the instance of Komal Sahu PW-3, it was stated that the appellant had gone inside the house of the deceased Rewati and gave her assault and also killed two children in the house. Postmortem of Revati, Gouri and Ishwar was conducted vide Ex.P-22, 24 and 26 respectively by Dr. S.N.Manjhi PW-13. The axe alleged to have been used in the commission of the offence was also seized from the house where the incident had happened. On the basis of charge sheet, appellant was charged of having committed the offence of killing Revati, Gowri and Ishwar which the appellant abjured and therefore he was put on trial.

3. Learned trial court, relying mainly on the evidence of doctor proving homicidal death of three persons and the eyewitness account given by PW-3 Komal, held the appellant guilty of commission of offence.

4. Counsel for the appellant argued that in the instant case, evidence of Komal Sahu (PW-3) is liable to be disbelieved because the circumstances emerging from the evidence of the witness and what has been suggested also as the case of the defence, it is witness Komal Sahu, who committed murder of his mother and two children in the house because of a dispute between he himself and his mother. It is argued that one of the defence witness Ganga Prasad has stated

that when he came to the house, he saw some blood stains on the face and clothes of Komal Sahu and upon being asked, Komal avoided to answer. The conduct of PW-03 is quite unnatural that even after having seen the incident of assault, he neither jumped inside the house to save his mother and children nor cried for help nor immediately went to the adjacent houses of his own uncles Vyas Narayan, Shankar, Radhe and Saroj but rather went to a little more distant place where his another uncle Motilal and cousin Devnath were present and there too, he did not make any hue and cry but only informed the matter to Devnath. It is also submitted that he also did not try to take care of the minor child who had suffered injury and instead chose to leave the scene of occurrence to call somebody else which makes his conduct highly doubtful. It is also argued that the axe said to have been used in commission of the offence was recovered from the house where the incident had happened and it appears to be washed by water and also indicates that someone in the house had committed the offence.

5. It is next submitted that according to PW-12, along with Hemlal other three persons were taken to police station for making enquiry which shows that on 23rd July 2010, on which date the incident is said to have been happened, the police was not very clear as to who had committed the offence, that means, Hemlal was involved in the alleged commission of the offence only on the basis of suspicion. The next submission is that the statement of Durgesh Mishra was taken by the police but it was not filed along with the charge sheet and it has been suggested to the Investigating Officer that it was not so done because Durgesh had made allegation against Komal Sahu, her own brother-in-

law. Further submission is that PW-2, father of Teerath Ram Sahu, husband of the deceased Revati Bai and grandfather of Komal Sahu (PW-3) had stated regarding previous enmity. Therefore, apart from needle of suspicion pointing towards Komal Sahu (PW-3) himself, present is a case of false implication more so when the defence witness have clearly stated that at and around the time of commission of offence in the afternoon, the appellant was engaged in rearing fish along with this witness. Counsel for the appellant argued that as Komal Sahu happens to be the relative of the deceased, his evidence is liable to be scrutinized with greater caution and care. Counsel for the appellant also argued that the ocular testimony of PW-3 is that axe was used but the injury was not incised in nature, meaning thereby that only blunt part of the axe was used for giving the assault, therefore, this also renders the ocular testimony doubtful. In support of her submission, learned counsel for the appellant placed reliance upon **2008 (16) SCC 99 (Kapildeo Mandal and Others Vs. State of Bihar); 1991 Suppl. (2) SCC 75 (Gurmej Singh and Others Vs. State of Punjab), 2002 (6) SCC 494 (Toran Singh Vs. State of M.P.) and 1989 Suppl 1 SCC 338 (Mahendra singh Vs. State of Rajasthan).**

5. On the other hand, State counsel would support the judgment of conviction and order of sentence and submit that the doubts which have been created on the testimony of Komal Sahu (PW-3) are not sufficient to either make out plausible and probable case that even Komal Sahu could be the offender or that he had motive to falsely implicate the present appellant. State counsel also argued that the eyewitness Komal was a boy aged 19 years and having seen the

incident of multiple assault on his mother and two children in the house from the terrace, he came out to inform Devnath and Motilal, his cousin and uncle in a nearby place and merely because he chose not to inform any of the uncles in neighborhood, would not mean that he himself was guilty. The incident happened sometimes in the afternoon in and around 2.30 pm and *dehati nalishi* was recorded at the instance of Komal at 18.15 hours which shows that FIR was instantly lodged. The motive for false implication as suggested to the prosecution witness was not so strong that the evidence of eyewitness should be disbelieved.

6. Case of the prosecution rests on the testimony of PW-3 Komal. Komal has deposed in his evidence that on the date of incident he was in the house and after taking his lunch he had gone outside and came back around 2.30, the house was found locked and his nephew Ishwar was heard crying. When he called his mother and door was not opened, he climbed up from the side wall to the terrace and while coming out from the staircase, he saw that appellant was assaulting his mother and having seen him, he ran away from the back door thereafter, he opened the door and informed Devnath whereafter, his uncle Motilal and other persons of the village came to the spot. He has deposed that Hemlal had assaulted his mother on the head, face and has also assaulted Gowri and had thrown her on the floor. He has further deposed that his mother and Gowri were taken in a Metador to the hospital along with some other persons whereafter police arrived at about 6.00 and inquired from him. He has deposed that there was no enmity between Hemlal and his father and they were not in talking terms. He has been subjected to detailed cross-examination, in which,

he has stated that his sister-in-law Durgesh used to feed the child Ishwar in the afternoon at about 12 to 1.30 and deposed that on the date of incident also and his suggestion that she had come, fed the child and again left the house. This witness has been suggested that he himself is the accused and on the date of incident he demanded money from his mother, which she refused, due to which, he committed the offence.

7. Counsel for the appellant strenuously urged on the point that having seen the incident, the natural conduct of the witness, Komal Sahu would have been to save his mother from being assaulted rather than to call others. Upon close scrutiny of the evidence, this argument cannot be accepted because Komal Sahu, a young boy, aged 19 years having seen the incident, in all probability, got frightened and ran away from the spot, to call for help.

8. Evidence of this witness is also sought to be impeached on the argument that he did not raise any alarm. If we look into the evidence of this witness, according to him, when he climbed up on the terrace and was coming down from the staircase, he saw the appellant assaulting his mother and thereafter he came down, opened the door and rushed out for help. It is not that the assailant denied to assault his mother or other two children according to this witness, the assailant having seen him, ran away from the spot. The witness having chosen to first open the door and rush out for help and not crying for help, by itself, does not amount to such an unnatural conduct which should result in disbelieving ocular testimony. The other part of his conduct highlighted to disbelieve his testimony is that though the house where

the incident happened, is adjacent to the house of other four uncles namely Vyas Narayan, Shankar, Radhe and Saroj but the appellant instead of going to their houses, preferred to approach to a nearby building where his cousin Devnath and another uncle Motilal were sitting, renders his testimony doubtful. Certainly, in an event like this, where horrifying scene of mother and children assaulted were seen, the eyewitness to the incident, may react in many ways. It is not that the witness kept quite and did nothing. He has stated in his evidence that he came out of his house, went towards the square where Motilal and Devnath were present, therefore, the appellant went to inform Devnath, his cousin. In para 12 of his cross-examination, he has stated that other houses were closed. Another course of action, open to him was to inform other uncles but then he had chosen Devnath one of his cousin and another uncle Motilal. Whatever has been done, is done instantaneously, not losing time which is clear from the statement of PW-4 Devnath Sahu, his cousin who was sitting in the platform of village square.

9. In order to buttress the submission that the circumstances raise doubt on the role of this witness and probably he was the assailant, evidence of one Ganga Prasad, defence witness has been referred to who has stated in his evidence that when he went to the house of the appellant, he saw blood stains on his face and clothes and upon being enquired, Komal denied to answer. In his cross-examination, he stated that he is the neighbour of appellant Hemlal. If that was so, this witness would have immediately informed the matter to the police because, according to the evidence on record, when the appellants arrived at the spot, Ganga Prasad was also present at the spot

therefore, this appears to be an afterthought defence.

10. The evidence of plea of *alibi* sought to be established from the evidence of DW-1 is that on and around the time of incident, appellant was engaged in rearing fish, also does not rule out any possibility of his presence at the spot. According to DW-1, as has been stated in his cross-examination, the place of incident and *Naala* where fish is reared, it takes about 25-30 minutes to reach by foot. According to PW-3 Komal, the incident happened at around 2.30 p.m. As per the statement of DW-1 Peelaram Sen, the appellant was with him from 10.30. to 2.30 p.m. The proximity of time as stated by PW-3 eyewitness that when the incident happened and the time when the appellant left the company of DW-1 Peelaram Sen renders the story of plea of *alibi* highly doubtful. DW-2 has admitted in her cross-examination that she had not seen the appellant engaged in rearing fish and her statement is based on what was informed to her by the other persons.

11. Evidence of PW-13 Dr. Shivnarayan Manjhi is that the three persons who sustained injury and succumbed to death were assaulted by hard and blunt object. The doctor has deposed in his evidence that when the axe was sent for query he had said that the said injury could be caused by the said axe. The axe contains blunt part and a sharp edged part both. In the cross-examination of this witness nothing has been asked. Why only blunt part was used for assaulting would be relevant had it been a case of a sudden quarrel without premeditation and there being only single injury on the vital part. We have found that all the three persons-one lady and two children had sustained fatal

injury on their head. There was a fracture in the skull of Revati Bai, Gowri and infant Ishwar. When PW-3 saw the appellant, he was assaulting his mother Revati Bai. In this regard, we may usefully refer to one of the decisions cited by learned counsel for the appellant in the case of ***Gurmej Singh Vs.State of Punjab, 1991 Suppl. (2) SCC 75.*** In that case, the credibility of the eyewitness account was sought to be assailed on the submission that according to the prosecution, assailant was armed with *gandasa* and alleged to have given blow and *gandasa* would ordinarily cause incised wound whereas injury was caused by hard and blunt substance. This aspect was examined and it was held that if the evidence of the prosecution explains the situation, the evidence cannot be disbelieved only on this ground.

8. Counsel for the appellants next submitted that according to the prosecution appellant Gian Singh was armed with a gandasi and he is alleged to have given a blow therewith on the chest of the deceased. Ordinarily a gandasi blow would cause an incised wound whereas the deceased had an abrasion 5"x1" on the chest caused by a hard and blunt substance. According to counsel normally when a witness deposes to the use of a particular weapon there is no warrant for supposing that the use of a particular weapon there is no warrant for supposing that the blunt side of the weapon was used by the assailant. In support of this contention counsel invited out attention to two decisions namely, *Hallu Vs. Stte of M.P. (1974) 4 SCC 300:1974 SCC (Cri) 462:AIR 1974 SC 1936* and *Nachhattar Singh Vs. Stte of Punjab, (1976) 1 SCC 750:1976 SCC (Cri) 182:AIR 1976 SC 9651*. In his submission, therefore, the injury found on the chest could not be attributed to Gian singh who is stated to have used the gandasi. We see no merit in this contention for the simple reason that the prosecution witnesses have categorically stated that Gian Singh used the blunt side of the gandasi. If the prosecution witnesses were silent in this behalf the submission of counsel would have carried weight. But where the prosecution witnesses categorically state that the blunt side of the weapon was used there is no room for believing that the sharp side of the weapon which

would be normally used had in fact been used. The observations in the aforesaid two judgments do not lay down to the contrary. In fact in the first mentioned case it is clearly stated that if the prosecution witnesses have clarified the position, their evidence would prevail and not the normal inference. Counsel, however, made a grievance that the prosecution had not tried to elicit the opinion of PW-1 Dr. Malhotra on the question whether such an abrasion was possible by a gandasi blow. According to him, as held by this Court in *Kartarey Vs. State of UP* (1976) 1 SCC 172:1975 SCC (Cri)803:AIR1976 SC 76, it was the duty of the prosecution to elicit the opinion of the medical man in this behalf. PW-1 clearly stated in the course of his examination-in-chief that injuries Nos. 2,3 and 4 were caused by a blunt weapon. It is true that he was not specifically asked if the chest injury could have been caused by the blunt side of the gandasi. It cannot be again said that the prosecution must endeavour to elicit the opinion of the medical man whether a particular injury is possible by the weapon which it is alleged to have been caused by showing the weapon to the witness. In fact the Presiding Officer should himself have elicited the opinion. However, in this case it should not make much difference because the evidence of PWs 2 and 3 is acceptable and is corroborated by the first information report as well as PW-4. If the medical witness had also so opined it would have lent further corroboration. But the omission to elicit his opinion cannot render the direct testimony of PWs 2 and 3 doubtful or weak. We, therefore, do not see any merit in this submission. In fact, if we turn to the cross-examination of PW-1 we find that the defence case was that these three injuries were caused by the rubbing of the body against a hard surface, a version which has to be sated to be rejected.

The witness PW-3 had seen the incident while coming out from the terrace through the stair case which means that he had seen the incident from some distance. It is not his case that only the sharp edged side was used for giving the assaults. Therefore, it cannot be said that the ocular testimony is completely belied from medical evidence.

13. Learned counsel for the appellant has relied upon *Kapildeo Mandal & Others Vs. State of Bihar (2008)16 SCC 99 ; Mahendra Singh Vs. State of Rajasthan 1989 Suppl. (1) SCC 338; Gurmej Singh and Others Vs. State of Punjab 1991 Suppl. (2) SCC 75 and Toran Singh Vs. State of MP 2002 (6) SCC 494.*

In the case of *Mahendra Singh* (supra), the evidence of eye witness was found to be unreliable as, on facts it was found that there was deliberate improvement as regards injuries caused by the accused and further that his testimony in regard to presence of other witnesses at the scene of occurrence and disposal of dead body was found to be thoroughly unacceptable.

In another decision, in the case of *Gurmej Singh and Others* (supra), the credibility of the prosecution witnesses was sought to be impeached on the ground that witness deposed about use of a weapon having sharp side but there was contradiction with the medical evidence.

In the case of *Toran Singh* (supra), it has been observed that the first appellate court was found having not carried out evaluation, analysis or scrutiny of evidence in his proper perspective, objectively and the serious infirmities pointed out by the defence were not met with.

In the case of *Kapildeo Mandal And Others* (supra), the law with regard to appreciation of evidence of ocular evidence vis-a-vis medical evidence was declared as below :

23. It is now well settled by series of decisions of this

Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witness has to get primacy as medical evidence is basically opinionative. [See *Mange v. State of Haryana* (1979) 4 SCC 349 (conviction based on sole testimony of eye-witness); *State of U.P. v. Krishna Gopal and Anr.*, (1988) 4 SCC 302 (in para 24); and *Ramanand Yadav v. Prabhu Nath Jha and Ors.*, (2003) 12 SCC 606 (in para 17)]. But when the court finds inconsistency in the evidence given by the eye-witnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in different perspective by the courts.

26. In another case of *Thaman Kumar v. State of Union Territory of Chandigarh*, AIR 2003 SC 3975 (in AIR para 16), this Court held :

16. "The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightaway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

14. In the present case, the evidence of the sole eyewitness PW-3 Komal Sahu, has been carefully scrutinized and while doing so, this Court has taken into consideration, the medical evidence in view of

what has been held in the case of **Gurmej Singh** (supra). The discrepancies on which reliance has been placed by the defence to seek rejection of eyewitness account given by Komal Sahu, are not of such a nature as to altogether disbelieve the prosecution case. Therefore, the decisions cited by the learned counsel for the appellant is not of any help to the appellant. In the result, the appeal is dismissed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge