

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 983 of 2001**

1. Kanhaiya S/o Baldu Lodhi, aged about 29 years, Occupation Agriculturist R/o Village Tedhi, Police Station Khamariya, District Durg (C.G.).

---- Appellant**Versus**

1. State of Chhattisgarh, through Police Station Khamariya, District Durg (C.G.).

---- Respondent

For Appellant	:	Shri Raj Kumar Pali with Shri Amit Kumar Sahu, Advocates.
For Respondent/State	:	Shri Pawan Kesharwani, Panel Lawyer.

Hon'ble Shri Justice Gautam Chourdiya**20/09/2019****Judgment On Board**

- 1) This appeal is filed under section 374(2) of Code of Criminal Procedure, 1973 against the judgment of conviction and order of sentence dated 04/10/2001 passed by 2nd Additional Session Judge (F.T.C.) Bemetara, Durg (C.G.) in Session Trial No. 247/1997; whereby the appellant Kanhaiya stands convicted and sentenced as under:-

Conviction	Sentence
U/s. 307 of Indian Penal Code (in short "IPC")	R.I. for 4 years and fine of Rs. 2,000/-, in default of fine additional R.I. for 3 months.

- 2) Case of the prosecution in brief is that on the date of incident i.e. on 09/03/1997 around 06:00 PM accused/appellant Kanhaiya quarreled with Bhadu and Shivilal and also caused them injury. Thereafter, when Rambharosa alongwith cattle of Ishwar was going to the House of Ishwar, the appellant met him on the way and assaulted him with Axe (Tangiya) as a result of which

Rambharosa fell down unconscious. On the report of PW-02 Ashwani, brother of Rambharosa, FIR Ex. P-3 was registered. During investigation dying declaration of Rambharosa Ex. P-2 was recorded, Bhadu and Shivilal were medically examined vide Ex. P-15 and Ex. P-16 respectively. Medical examination of Rambharosa was done vide Ex. P-12 and Ex. P-13. Spot Map was prepared by Halka Patwari vide Ex. P-10. As per Seizure Memo Ex. P-7 one Dhoti was seized from Bhadu. As per Seizure Memo Ex. P-6 plain and blood stained soil from the place of incident, four pieces of wooden log and slippers of Rambharosa were seized. On the Memorandum of accused/appellant Kanhaiya (Ex. P-4) one Axe was seized vide Ex. P-5 which was sent for medical examination and report was received vide Ex. P-14. After due investigation, charge sheet was filed against the accused/appellant Kanhaiya and two more accused namely Balduram and Kamin Bai under sections 341, 307, 323 and 34 of IPC as Balduram and Kamin Bai were also present at the time of incident and had taken part in commission of the offence. However, the Trial Court vide order dated 06/03/1998 discharged accused Balduram and Kamin Bai of the charges under sections 341, 307, 323 and 34 of IPC on the ground that there is no prima facie evidence/material showing their involvement in the commission of the alleged offence. Charge sheet under sections 341, 307 and 323 (in two counts) of IPC were framed against the accused/appellant which were denied by him and he prayed for trial.

- 3) The prosecution in support of its case examined as many as 15 witnesses namely PW-01 Rambharosa, PW-02 Ashwani, PW-03 Mahadev, PW-04 Suresh @ Surendra, PW-05 Ishwar Sahu, PW-06 Angeshwar, PW-07 Dukalha, PW-08 Ramkhelu, PW-09 Arun Kumar Dubey, PW-10 Dr. R.P. Sharma, PW-11 Ishwar, PW-12 J.P. Mishra, PW-13 Janki Prasad, PW-14 Itwari and PW-15 Dr. Prabhat Pandey. The statement of the accused was also recorded under section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence and false implication. No witness was

examined by the accused in his defence.

- 4) Learned Trial Court considering the material available on record by the impugned judgment convicted and sentenced the accused appellant as mentioned above. However, the Trial Court acquitted the accused/appellant of the charges under section 323, 323 and 341 of IPC for voluntarily causing simple hurt to Bhadu and Shivilal.
- 5) Learned counsel for the appellant submits that the Trial Court has not properly appreciated the evidence available on record. He submits that due to old enmity between appellant and Rambharosa, appellant was falsely implicated in this case. No other independent eye witness supported the prosecution case, even injured person Bhaduram and Shivilal were not examined by prosecution in this case and Memo & seizure witnesses have also turned hostile and they have not supported the prosecution case.
- 6) He further submits that looking to the statement of PW-10 Dr. R.P. Sharma, he admitted that injury found on the body of the victim Rambharosa i.e. injury No. 1 and 2 are serious in nature and may cause death of Rambharosa but in his cross examination he admitted he has not mentioned the said fact in his report Ex. P-12. Therefore, there is no any grievous injury caused by the appellant. Section 320 of IPC deals with grievous hurt whereas no such injury was mentioned in Ex. P-12 by the Doctor as mentioned in section 320 of IPC, *eighthly, any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits*. However, no such injury was caused to Rambharosa PW-01 and as per evidence of PW-10 Dr. R.P. Sharma in his cross examination he has stated that in his opinion the victim suffering from injuries No. 1 and 2 cannot be discharged prior to 14 days from his admission. As such the accused/appellant can be held guilty under section 324 of IPC and not under section 307 as has been done by the Trial Court.

- 7) He submits that the appellant has already remained in jail for about 5 months, at the time of incident he was 26 years of age, the incident occurred on 09/03/1997 i.e 22 years ago, there is no criminal antecedent of the appellant and therefore, the appellant may be sentenced to the period already undergone by him.
- 8) On the other hand learned counsel for the respondent/State supporting the impugned judgment and submits that the Trial Court considering the overall evidence available on record has rightly convicted and sentenced the appellant by the impugned judgment which calls for no interference by this Court.
- 9) Heard counsel for the parties and perused the material available on record.
- 10) PW-01 Rambharosa, victim in this case, states that while he was going towards the house of Ishwar alongwith his cattle, the accused/appellant assaulted him with Axe on his head and other parts of the body with intent to commit his murder. He stated that at the time of said incident Ishwar was following him. As per this witness after being assaulted he fell down unconscious and he regained on conscious after 5-6 days in the Hospital at Durg where he remained for 12-13 days and thereafter underwent treatment for 14-15 days in Hospital at Raipur. According to this witness the said incident was witnessed by Mahadev. He states that his statement recorded by Tehsildar vide Ex. P-2. He has proved the seizure of Ex. P-1 and Ex. P-2.
- 11) PW-05 Ishwar Sahu has supported the evidence of PW-01 Rambharosa and stated that he had seen the incident. He states that at the spot PW-07 Dukalha, PW-08 Ramkhelu and PW-03 Mahadev and other villagers were also present. The evidence of PW-01 Rambharosa and PW-05 Ishwar Sahu finds due corroboration from MLC Report vide Ex. P-12 and Ex. P-13 which has been proved by PW-10 Dr. R.P. Sharma. This apart, a prompt FIR was lodged by PW-02 Aswani. Another important aspect of the matter is that the weapon of offence Axe was seized from the possession of the appellant on his memorandum

vide Ex. P-4 and seizure memorandum Ex. P-5. Though the witness to the memorandum and seizure have turned hostile but the Investigating Officer PW-12 J.P. Mishra has duly supported the memorandum and seizure proceedings and therefore in view of section 27 of Evidence Act, the memorandum and seizure stands proved on the basis of unrebutted evidence of Investigating Officer. As per FSL report Ex. P-20 blood was found on the Axe seized from the appellant. True it is that other co-accused Balduram and Kamin Bai have been discharged by the Trial Court on the ground that there is no material/evidence against them of sharing common intention with the present appellant and that no appeal was filed by the State against discharge of the co-accused persons.

- 12) Thus looking to the evidence of PW-01 Rambharosa, the eye witness account of PW-05 Ishwar Sahu which find support from the medical reports Ex. P-12 and Ex. P-13 duly proved by PW-10 Dr. R.P. Sharma as well as the promptly lodged FIR vide Ex. P-3 which has been duly proved by PW-02 Aswani, involvement of the accused/appellant in commission of the assault on the victims stands proved beyond all reasonable doubt.
- 13) Now this Court has to see whether the act committed by the appellant make him liable for conviction under section 307 of IPC or for any lesser offence.
- 14) It is not disputed by the prosecution that in the medical reports Ex. P-12 and Ex. P-13 Dr. R.P. Sharma PW-10 has not mentioned whether the injuries suffered by the victim Rambharosa were grievous in nature and sufficient to cause his death. From perusal of the above medical reports it is seen that no grievous injuries as defined in section 320 of IPC was found on the body of the victim. There is also no evidence to show that the victim was in severe bodily pain or unable to follow his ordinary pursuits during space of 20 days.
- 15) The Division Bench of this Hon'ble Court in the matter of **Jahar Lal V. State of Chhattisgarh** reported in **ILR (2018) CG, 1551**

considering the fact that the accused assaulted the deceased (his mother) in drunken condition upon her intervention into his quarrel with his wife, the fact that medical evidence goes to show that injuries were not inflicted on vital parts, the deceased being old aged failed to sustain the injuries, held the appellant guilty under section 304 Part-II instead of section 302 of IPC.

- 16) In the matter of ***Devi Singh and another V. State of Madhya Pradesh (now Chhattisgarh)*** reported in ***ILR (2018) CG, 1543*** this Court considering the fact that the accused persons assaulted the victim with *Lathi* on his head, the injury was not dangerous to life, only one injury inflicted on the victim came to the conclusion that the accused persons were not having intention to cause death of the victim else they would have assaulted with several blows but they had sufficient knowledge that injury inflicted would cause death of victim and as such held them guilty under section 308 in place of section 307 of IPC.
- 17) Thus considering the facts and circumstances of the case, the manner in which the incident occurred, the nature and extent of injuries suffered by victim Rambharosa, the fact that there is no evidence to show that the appellant assaulted the victim with intention to commit his murder, the evidence of the treating Doctor PW-10 Dr. R.P. Sharma, the provisions of section 320 of IPC and the judgments rendered in the matter of *Jahar Lal V. State of Chhattisgarh (supra)* and *Devi Singh and another V. State of Madhya Pradesh (now Chhattisgarh) (supra)*, this Court is of the opinion that the Trial Court was not justified in holding the appellant guilty under section 307 of IPC at the most he can be convicted under section 308 of IPC for attempting to culpable homicide.
- 18) So far as sentence is concerned the Division Bench of this Court in the matter of ***Santosh Kumar & Another V/s. State of CG.*** Reported in ***2015 (5) CG. L.J. 417 (DB)*** in para 13 referring to the judgment of the Hon'ble Supreme Court in the matter of ***Gurmukh Singh V/s. State of Haryana, (2009) 15 SCC 635***

observed as to what are the necessary factors to be considered for awarding appropriate sentence to the accused. Para 13 of the said judgment reads as under:-

“13. The need for appropriate sentencing under section 302 I.P.C. or section 304 Part II of I.P.C. in the given facts of a case was considered in Gurmukh Singh V/s. State of Haryana as follows:-

“3. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:-

- (a) Motive or previous enmity;*
- (b) Whether the incident had taken place on the spur of the moment;*
- (c) The intention/knowledge of the accused while inflicting the blow or injury;*
- (d) Whether the death ensued instantaneously or the victim died after several days;*
- (e) The gravity, dimension and nature of injury;*
- (f) The age and general health condition of the accused;*
- (g) Whether the injury was caused without premeditation in a sudden fight;*
- (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
- (i) The criminal background and adverse history of the accused;*
- (j) whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;*
- (k) Number of other criminal cases pending against the accused;*
- (l) Incident occurred within the family members or close relations;*
- (m) The conduct and behaviour of the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?*

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.”

- 19) In the present case keeping in view of the aforesaid factors, the fact that the incident occurred from 22 years back, the age of the appellant at the relevant time i.e. 26 years, the appellant has no criminal antecedent as also the injuries and hardship suffered by

the victim, this Court is of the opinion that the ends of justice would be served if the appellant is sentenced to the period already undergone by him which comes to about 5 months and he is directed to pay a fine of Rs. 40,000/- which shall be disbursed as compensation under section 357 of Cr.P.C. to the victim Rambharosa.

- 20) In the result, the appeal is allowed in part. While acquitting the appellant of the charge under section 307 of IPC, he is held guilty under section 308 of IPC and is sentenced to the period already undergone by him. However, he is directed to pay a fine of Rs. 40,000/- which shall be disbursed as compensation under section 357 of Cr.P.C. to the victim Rambharosa in default of payment of fine the appellant shall undergo additional R.I. for 3 months. Since the appellant is reported to be on bail, his bail bonds shall remain in force for a period of six months from today in view of provision of section 437-A of Cr.P.C.

**-Sd/-
(Gautam Chourdiya)
Judge**

Chandrakant