

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURCRA No. 514 of 2019

1. Johan Khakha S/o Late Lohara Uraon, Aged About 50 Years
R/o Village - Kandari, Police Station Chando, District
Balrampur-Ramanujganj, Civil And Revenue District
Balrampur-Ramanujganj Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through Police Station Chando District
Balrampur - Ramanujganj Chhattisgarh.

---- Respondent

For Appellant

Shri Manoj K. Sinha, Advocate

For Respondent/State

Shri Ashish Gupta, Panel Lawyer

Hon'ble Shri Prashant Kumar Mishra, J.Hon'ble Shri Gautam Chourdiya, J.Judgment on BoardByPrashant Kumar Mishra, J.9-9-2019

1. The appeal is posted for hearing on I.A.No.1 for suspension
of sentence and grant of bail to the appellant, however, with
the consent of learned counsel for the parties, we have heard
the appeal itself on merits.

2. Appellant has been convicted for committing offence under Section 302 of the Indian Penal Code (for short 'the IPC') for committing murder of his wife namely; Fudan Bai (since deceased) at about 10.00 pm on 27-12-2016. Appellant's son Manoj Kumar (PW-1) lodged First Information Report (FIR) (Ex.P/2) at 10.20 am on 28-12-2016 that he and his younger brother Ganesh (PW-2) had gone to their relatives' house in a different village and his parents were alone in the house on the date of incident. When they returned at about 12'O clock in the night and he was having dinner in the kitchen, Ganesh informed him that their mother (deceased) is bleeding from her head and is not moving. The informant and Ganesh went and tried to awake the deceased, but she did not respond. In the morning they found that she has died. They informed the villagers. At 8.00 am the appellant reached their house and made extra judicial confession that he has assaulted the deceased 3-4 times by means of wooden *peedha*.
3. In the postmortem examination (Ex.P/20) proved by Dr.Arun Kumar (PW-8) the deceased was found to have sustained (1) fracture of left ribs 1, 2, 3 & 4; (2) lacerated wound over occipital area of skull; (3) lacerated wound behind left ear; and (4) haematoma below left eye. She died out of hypovolumic shock due to internal hemorrhage.

4. During interrogation, the appellant gave his memorandum statement (Ex.P/6) pursuant to which the wooden *peedha* was recovered vide Ex.P/7.
5. PW-1 Manoj Kumar is the informant. He has proved FIR (Ex.P/2) and the merg intimation (Ex.P/1). He has not supported the prosecution on the issue of extra judicial confession, however, PW-2 Ganesh, another son of the deceased and the appellant, has supported the prosecution in respect of extra judicial confession in para 3 of his cross-examination. PW-3 Kisun has turned hostile, but has supported the prosecution by admitting his diary statement (Ex.P/9). The wooden *peedha* was found to be bloodstained during FSL examination, the report of which has been proved as Ex.P/19.
6. Reading the evidence of PW-2 Ganesh along with FSL report (Ex.P/19) and for the fact that the appellant and the deceased alone were in the house at the time of incident and the appellant being the husband of the deceased was under obligation to disclose the fact within his exclusive knowledge which he has failed to do, presumption arises of his complicity in the crime. In absence of any explanation by the appellant the principle under Section 106 of the Evidence Act

would apply against the appellant specially when it is a case of house murder by the husband killing his wife.

7. In the matter of *Suresh & Another Vs. State of Haryana* {(2015) 2 SCC 227}, the Supreme Court has held that under Section 106 of the Evidence Act it is for the person concerned to prove any especial fact within his knowledge and if such especial fact is not disclosed, an adverse inference can be drawn.
8. We are now required to consider whether in view of the proved facts giving the genesis of the incident the appellant would be guilty of committing culpable homicide or he would be guilty of any lesser offence punishable under Section 304 Part I or Part II of the IPC.
9. The law as to when offence under Section 302 of IPC can be converted into one under Section 304 Part-I or Part-II of IPC is now well settled.
10. In the matter of *Lavghanbhai Devjibhai Vasava Vs. State of Gujarat*, (2018) 4 SCC 329, the Supreme Court has referred to its earlier decision in the matter of *Dhirendra Kumar Vs. State of Uttarakhand*, 2015 SC OnLine SC 163, to delineate the parameters which are to be taken into consideration while

deciding the question as to whether a case falls under Section 302 or under Section 304 of IPC. The said parameters are reproduced hereunder :-

- (a) The circumstances in which the incident took place;
- (b) The nature of weapon used;
- (c) Whether the weapon was carried or was taken from the spot;
- (d) Whether the assault was aimed on vital part of body;
- (e) The amount of the force used;
- (f) Whether the deceased participated in the sudden fight;
- (g) Whether there was any previous enmity;
- (h) Whether there was any sudden provocation;
- (i) Whether the attack was in the heat of passion; and
- (j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.”

11. In an extremely recent judgment rendered by the Supreme Court in the matter of ***Rambir Vs. State of NCT, Delhi (Criminal Appeal No.839 of 2019 decided on 6.5.2019)***, the following has been held in para 14 :

“14. Having regard to evidence on record, we are of the view that the case of the appellant falls within Exception 4 to Section 300 IPC. Further, the judgment in the case of ***Surinder Kumar v. Union Territory, Chandigarh, (1989) 2 SCC 217***, also supports the case of the appellant. In the aforesaid case, the knife blows were inflicted in the heat of the moment, one of which

caused death of the deceased, this Court has held that accused is entitled to the benefit of Exception 4. In the aforesaid judgment, this Court further held that in a sudden quarrel, if a person, in the heat of the moment, picks up a weapon which is handy and causes injuries one of which proves fatal, accused would be entitled to the benefit of Exception 4. We are of the view that the said judgment supports the case of the appellant and further having regard to evidence on record we are of the view that all the four ingredients which are required to extend the benefit of Exception 4 to Section 300 IPC, apply to the facts of the case on hand. Since the occurrence in sudden quarrel and there was no premeditation, the act of the appellant-accused would fall under Exception 4 to Section 300 IPC. As such, the conviction recorded against the appellant under Section 302 IPC is liable to be set-aside and is accordingly set-aside and the conviction of the appellant-accused under Section 302 IPC is modified, as the one under Section 304 Part II, IPC and we impose a sentence of 10 years' simple imprisonment on the accused.”

12. Statement of PW-2 Ganesh and the contents of FIR proved by PW-1 Manoj Kumar, both sons of the appellant and the deceased, would prove beyond doubt that at the time of incident the appellant reached his house in an inebriated condition to which the deceased objected by saying that why has he reached the house in a drunken condition. On this the appellant became enraged and picked up wooden *peedha*,

which is used for squatting while taking meals in the house. The incident occurred in a heat of passion without premeditation. There is no evidence that the appellant was not having cordial relation with his wife and was intending to eliminate her. The appellant did not intend to commit murder of his wife. He might have knowledge that assaulting the deceased fiercely and forcibly by means of wooden *peedha* may cause her death, but he has no intention to commit murder, therefore, in our considered view, the act committed by the appellant would amount to culpable homicidal not amounting to murder punishable under Section 304 Part II of the IPC.

13. Accordingly, we allow the appeal in part. Conviction and sentence imposed on the appellant under Section 302 of the IPC are hereby set aside and instead he is convicted under Section 304 Part II of the IPC and sentenced to undergo RI for five (5) years.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Gautam Chourdiya)
Judge

Gowri