

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 22-10-2019
Delivered on 06-12-2019

Criminal Appeal No.1022 of 2001

1. Gullu alias Vinay Shankar, S/o. Gauri Shankar Tiwari
age 24 years, Bus Checker R/o. Tahsil Para
Kondagaon Distt. Bastar (CG)
2. Narendra Kumar, S.o. Massuram, age 28 years,
labourer R/o. Naharpara Kondagaon PS Kondagaon
Distt. Bastar (CG)

---- Appellants**Versus**

State of Chhattisgarh, Through Police Station Incharge,
Police Station Pendra, District Bilaspur, Chhattisgarh

---- Respondent

 For the appellant : Shri RN Jha, Advocate
 For the Respondent/State : Shri Ishwar Jaiswal, Panel
 Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. The appeal is preferred against judgment dated 10.10.2001 passed by Special Judge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), 1989/Additional Sessions Judge, Bastar at Jagdalpur (CG) in Session Trial No.156/2001 wherein the said Court convicted both the appellants for the commission of offence under Section 304 Part-II read with Section 34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment

for five years and to pay fine of Rs.1000/-, with default stipulations.

2. In the present case name of the deceased is Budhu Ram. The deceased and his wife namely Tulsi were making bricks. On the date of incident when Budhram was returning from the Court of Kondagaon, on the way the appellants assaulted him near Kopabeda canal by legs and fists which resulted into death of said Budhram. The matter was reported and investigated and the appellants were charge sheeted. After completion of trial, both the appellants were convicted as mentioned above.

3. Learned counsel for the appellants submits as under:-

- (i) There is no eyewitness account of the incident and the case of the prosecution is based on oral dying declaration made by the deceased to his wife Tulsi, but her statement regarding dying declaration is not constant.
- (ii) In the FIR lodged by Tulsi there is no mention that the deceased made oral dying declaration to her and while deposing before the Court she stated that her husband made oral dying declaration, therefore, version of Tulsi is not reliable piece of evidence.

(iii) Other witnesses of the prosecution have not supported the version the prosecution and are contradictory to each other. PW-3 deposed (para 6) that Buddhu told him that he fell down in the canal and that may be reason for the injury sustained by him. Therefore, case of the prosecution against the appellants is not established.

(iv) The trial Court has not evaluated the evidence in its right perspective and he has placed reliance in the matters of **Nattha Vs. Sate or MP reported in JLJ 2003 (2) 144, Gopal Singh And Anr. Vs. State of MP & Anr. Reported in 1972 SCC (Cr) 513 and Mohan Lal Vs. State of MP reported in CGLJ 2015(4) 330.**

4. On the other hand, learned counsel for the State submits that from the oral evidence of Tulsi and the version of the Dr. Santosh Lanhare (PW-5) it is clear that injuries could not be caused by fall and the death of the deceased is homicidal, therefore, case against the appellants is made out and the trial Court has rightly convicted them.

5. Now the question of consideration before this Court is whether the appellants assaulted deceased Budhram. To substantiate the charges, the prosecution has

examined PW-1, Tulsi Bai, PW-2, Mukund, PW-3 Narendra Kuamar Dewangan, PW-4 Ramshankar Shrivasa, PW-5 Dr. Santosh Lahanre, PW-6 Anup Bajpai. Mukund PW-2 and Ramshankar Shrivasa PW-4 have not supported the version of the prosecution.

6. PW-1 Tulsi deposed before the trial Court that it is informed to her that her husband was lying in the canal and on receiving the information she reached to that place and her husband informed her that the appellants assaulted him. This witness has lodged FIR (Ex-P/7).
7. The first question for consideration of this court is whether death of Budharam is homicidal in nature. PW/5 Dr. Santosh Lanhore conducted autopsy of the deceased Budharam on 18-1-2001 at Primary Health Centre, Kondagaon who noticed following injuries on the body of deceased Budharam.
 - I) Both legs and hands extended. Eyes closed. Mouth closed.
 - ii) Head wound was blackish colour on left hand, laterally elbow joint.
 - lii) Head wound on left side of hip joint. Multiple contusion marks were found on whole upper chest. Foul smell coming from body. Rigor mortis present.

8. As per version of this witness, injuries were ante-mortem in nature caused within 24 hours of the examination and nature of death is homicidal. He further opined that death is caused due to injuries on chest which resulted into asphyxia. In cross examination this expert clearly stated that the injuries could not be caused by fall. This witness has categorically stated that the injuries caused on chest and elbow joint could not be caused by fall. Version of this medical expert remained unrebutted and there is no other expert's opinion contrary to the opinion of this witness, There is no reason to discard the opinion of this expert. Accordingly, it is held that death of Budhram is homicidal in nature.
9. The next question for consideration of this court is whether both appellants assaulted deceased Budhram. Tulsi Bi (PW/1) is wife of the deceased. As per version of this witness, when she reached to the spot, where deceased was lying down, she saw injuries on the body of Buddhram who made oral dying declaration that both appellants assaulted him. Version of this witness is unrebutted during cross examination. Again, it is supported by FIR (Ex.P/7) in which she clearly mentioned regarding oral dying declaration made by the deceased against both the appellants that he has been assaulted by both the appellants. Version of this witness is constant right from day of the incident.

10. Learned counsel for the appellants would submit that PW/3 Narendra Kumar Dewangan deposed that deceased informed him regarding his fall near a pond, but version of this witness is entirely different what he stated before the Investigating Officer during investigation. Ex.P.2 is his earlier statement and in the said statement she clearly stated that the deceased made oral dying declaration that both appellants assaulted him. This witness is not constant on his version. As per law laid down by Honorable the Supreme Court in the matter of **Vadivelu Thevar vs. State of Madras, reported in AIR 1957 SC 614**, it is quality of witness and not quantity of the evidence which has to be weighed. As per section 134 of Indian Evidence Act, no particular number of witnesses shall be required to prove the facts of any case. If the evidence of single witness is wholly reliable, it can be safely acted upon while the evidence of number of witnesses who are not reliable, cannot be acted upon. In the present case, PW/3 Narendra Kumar Dewangan has changed his version in different stages and from the medical evidence it is clear tht the injuries could not be caused by fall, therefore, version of Narendra Kumar Dewangan (PW/3) is not liable to be acted upon and same is hereby rejected. Version of Tulsi (PW/1) who is wife of the deceased is wholly reliable because she is constant to her version right from day of the

incident to her statement before the trial Court. Again, it is supported by version of medical evidence that the injuries could not be caused by fall and death of deceased was homicidal in nature.

11. The trial court, after evaluating oral and documentary evidence, recorded finding that it is not a case of murder, but is a case of unnatural death which falls within mischief of culpable homicide and punishable under Section 304 Part II of IPC. Finding of the trial court is based on proper marshaling of the evidence and this court has no reason to record a contrary view. Argument advanced on behalf of the appellant is not sustainable. Conviction of both appellants for commission of offence under Section 304 Part II of IPC is hereby affirmed.

12. Heard on the point of sentence.

The trial Court awarded RI for five years for offence under Section 304 Part II of IPC which cannot be termed as harsh or unreasonable or disproportionate. Sentence part is also not liable to be interfered with and same is hereby upheld.

13. Accordingly, the appeal being devoid of merits is liable to be and is hereby dismissed. The appellants are reported to be on bail. Their bail bonds shall stand cancelled. The trial Court will prepare super-session warrant and issue non-

bailable warrant against the appellants and after their arrest they be sent to jail for serving out remainder of the sentence. The trial Court to submit its compliance report on or before 30-4-2020.

**Sd/-
(Ram Prasanna Sharma)
JUDGE**

Raju