

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.982 of 2014**

- Jembo @ Jamura@Suraj Naag S/o Gorkha Naag Aged About 30 Years By Satnami By Occupation Service, R/o Danteshwari Ward Bailabazar Jagdalpur Distt. Bastar C.G. , Chhattisgarh

---- Petitioner**Versus**

- The State Of Chhattisgarh S/o Through Police Station Bodhaghat Distt. Bastar , Chhattisgarh

---- Respondent**CRA No. 1203 of 2014**

1. Kishore @ Babu @ Tichar Bhatra S/o .Shri Patro Bagh Aged About 29 Years R/o. Danteshwari Ward Baila Bajar Jagdalpur, Cvil And Rev. Distt. Bastar C.G., Chhattisgarh
2. Alvin Johan @ Golu S/o Adam John Aged About 25 Years R/o. Danteshwari Ward Baila Bajar Jagdalpur, Cvil And Rev. Distt. Bastar C.G., District : Bastar(Jagdalpur), Chhattisgarh
3. Dinesh Lahare S/o Late Ghasiram Lahare Aged About 25 Years R/o. Baila Bajar Danteshwari Ward Jagdalpur, Bastat C.G., District : Bastar(Jagdalpur), Chhattisgarh

---- Appellants**Versus**

- State Of Chhattisgarh Through Sho,p.S. Bodhghat, Jagdalpur, Distt.Jagdalpur C.G., Chhattisgarh

---- Respondent**Cr.A.No.982 of 2014**

For Appellant : Smt. Savita Tiwari, Advocate
 For Respondent/State : Shri Anand Verma, Dy. Govt. Advocate

Cr.A.No.1203 of 2014

For Appellants : Shri Tarun Dansena, Advocate appearing on behalf of Shri Jitendra Gupta, Advocate
 For Respondent/State : Shri Anand Verma, Dy. Govt. Advocate

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Ram Prasanna Sharma

Order on Board

Per Manindra Mohan Shrivastava, J.

22/02/2019

1. This order shall govern disposal of Criminal Appeal No.982 of 2014 and Criminal Appeal No.1203 of 2014 as both appeal arises out of common judgment.

2. These two appeals (Criminal Appeal No.982 of 2014 and Criminal Appeal No.1203 of 2014) are directed against the impugned judgment of conviction and order of sentence dated 22-08-2014 passed by the Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.121/2013, whereby and whereunder the appellants have been held guilty for commission of offence under Section 302/34 & 324/34 of IPC and sentenced them, as described below-

Section-302/34 of IPC	Life Imprisonment and fine of Rs.1,000/-, in default of payment of fine, additional R.I. for two months
Section-324/34 of IPC	Rigorous Imprisonment for three years and fine of Rs.500/-, in default of payment of fine, additional R.I. for one months

All the sentences were ordered to run concurrently.

3. Prosecution story, as unfolded from the impugned judgment of conviction and order of sentence, is that Sanju, PW-8 received phone call from his brother Mishrilal that some kind of dispute is going on between him and the appellants, whereafter, Sanju, PW-8 reached at the spot and he found that his brother was being assaulted. When Sanju tried to save his brother, he was also assaulted. In that assault, Mishrilal sustained head injury and he was operated also, but he eventually succumbed to death, after 14 days.

A spot FIR was taken by the police at the instance of Sanju, PW-8 on the date of incident, which was recorded in Ex.P-6 on 25-08-2013 at 10.30 PM. On that basis, numbered FIR in Ex.P-9 was registered in the police station. The injured was taken to the hospital, where surgery was performed by Dr. Rajesh Jain, PW-14. Later on, Mishrilal died and postmortem was conducted by Dr. S. K. Bagh, PW-11, who found head injury and other injuries. Upon examination, the doctor found that the deceased had sustained injury, which was homicidal in nature. The investigation eventually culminated in filing of charge sheet against the appellants on the allegations that the appellants assaulted Mishrilal with an intention to cause death, in which incident, Mishrilal died and Sanju, PW-8, brother of the deceased also sustained stab injury. The learned trial Court framed charges against the appellants alleging commission of offence under Section 302/34 & 324/34 of IPC. The appellants abjured guilt and demanded trial. In order to prove its case, the prosecution examined as many as 15 witnesses.

Case of the prosecution was mainly based on the evidence of eye-witness account given by the injured witness, Sanju, PW-8 and Smt. Pushpa Lal, PW-9, wife of the deceased, who claimed to have reached at the spot, after receiving information. The learned trial Court, though held the appellants guilty of commission of offences of murdering Mishrilal and injuring Sanju. The appellants were convicted on the allegation that they shared common intention. The learned trial Court held the appellants guilty of commission of offence of murder of Mishrilal and injuring Sanju and sentenced them, as described above, giving rise to this appeal.

4. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant argued that in the

present case, the appellants were not the aggressors, but it was only when Sanju arrived at the spot with iron pipe in his hand, the incident of fight had begun, in which, without premeditation and in a sudden fight, couple of injuries were given to Mishrilal, as a result of which, he unfortunately died after few days, despite surgery performed. According to the learned counsel for the appellant, what has been stated by Sanju, PW-8 and Smt. Pushpa Lal, PW-9, particularly the contents of Dehati Nalishi proved by Sanju, PW-8 is that this incident was of sudden fight. The appellants were not holding iron pipe, but Sanju reached at the spot along with iron pipe, then the appellants snatched iron pipe and then, it is said that the blow was given to Mishrilal. Therefore, in the circumstances, even if it is accepted that the appellants gave assault on Mishrilal, the offence would not travel beyond Section 304 Part II of IPC, because there was no intention to cause death and at the most, knowledge could be attributed to the appellants. In support of his submission, learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of **Ahmed Shah and another vs. State of Rajasthan**¹, **Harish Kumar vs. State (Delhi Administration)**² and decisions of this Court in the case of **Rameshwar and another vs. State of Madhya Pradesh (now Chhattisgarh)**³ & **Mannu Satnami and others vs. State of Chhattisgarh**⁴.

5. On the other hand, learned State counsel would support the impugned judgment of conviction and order of sentence by submitting that in the present case, the incident happened when Mishrilal was surrounded by the appellants. Mishrilal called his brother for rescue and when his brother Sanju, PW-8 came, both Mishrilal and Sanju were assaulted. He would argue that, though, iron pipe was held by Sanju, after snatching it, repeated injuries were given on the face

1 (2015) 3 SCC 93

2 1993 Cr.L.J. 411

3 Cr.A.No.777/1998, decided on 09-12-2013

4 Cr.A.No.313/2009, decided on 20-03-2014

and head of Mishrilal. Sanju was also assaulted and stabbed with knife by the appellants. The postmortem report and the examination of injury proves that there were multiple injuries on the face and head of Mishrilal and head injury was given with so much force that fractured bone pierced inside and resulted in haematoma, which eventually led to death, though with intervention of surgery, to set right the compressed fractured bone. He would further argue that conviction of the appellant under Section 302 of IPC is justified because, it is not a case of sudden fight, but one sided assault given by the appellants on the deceased.

6. We have heard learned counsel for the parties and perused the records.

7. The involvement of the appellants in the alleged act of assaulting the deceased-Mishrilal and also to Sanju, PW-8, is proved from the eye-witness account of injured witness-Sanju himself. This witness has clearly deposed in his evidence that he received a phone call from his brother Mishrilal that he has been surrounded by the appellants and they are quarreling with him and upon receipt of this information, he reached the spot and found that his brother was being assaulted. One of the appellants-Jambura, assaulted on the head of his brother-Mishrilal. He deposed that Elwin, Babu and Dinesh Lahre were holding long sized knife in their hands and they were also assaulting the deceased with the help of knife and when he reached at the spot to rescue his brother, the appellants also assaulted him and they gave blow on his head, shoulder and waist by such weapon, due to which, he sustained injury and fell unconscious at the spot. Suggestion given in his cross-examination that he had carried iron pipe with him at the spot, has been denied. Suggestion that he himself assaulted his brother, has also been denied. Suggestion that when he reached at the spot, he challenged the accused-appellants, has been denied. He has deposed that when he reached at the spot, the appellants assaulted his brother.

The evidence of this witness of he reaching the spot and witnessing the incident of assault, is reliable, because he himself is the injured witness. Sanju, PW-8 was medically examined and Dr. Mahendra Prasad, PW-15, who examined the injury of Sanju, has stated that Sanju sustained two stab injuries in the waist and scratch was also found under the eyes. The doctor has opined that the said injury was caused within three hours from the time of his examination. The suggestion that such injury could be caused on account of fall from the motorcycle, has been denied. Therefore, we have no doubt that Sanju was present at the spot and had seen the incident.

8. Smt. Pushpa Lal, PW-9, wife of the deceased, also states that upon receiving information from Sanju that quarrel is going on between the appellants and her husband, she also went to the spot and there, she found that Sanju was lying unconscious and her husband was being assaulted. When she tried to rescue her husband, she was slapped and after assaulting her husband, all the accused ran away from the spot. Suggestion that she had not seen the incident, had been denied. We do not find any material contradiction or omission, which could cast doubt that this witness was not present at the spot. What actually happened at the spot is required to be noticed, on the basis of the evidence and other records/material on record.

9. Lodging of spot report immediately after the incident at the instance of Sanju, PW-8 is proved by the prosecution itself. Sanju, PW-8 has also stated regarding giving report in Ex.P-6. If we look into the contents of Dehati Nalishi, Ex.P-6, we find that what has been recorded therein is that when Sanju received information over mobile phone from his brother that the appellants were quarreling with him, this witness went to the spot. He says that when he reached at the spot and challenged the appellants, they were found abusing his brother, then appellants stated that now his brother has come, so he would be

killed and then he was caught hold of by Dinesh and Golu and iron pipe held by him, was snatched, he was stabbed by knife on his buttocks and thighs by Dinesh. Babu and Jamura started assaulting his brother with the iron pipe and injured him. From this Dehati Nalishi, which was recorded at the spot, immediately after the incident, which Sanju admits having stated and police having recorded and what comes out is that when Sanju had reached at the spot over motorcycle, he was holding iron pipe in his hands and it is this iron pipe, which was snatched from the hands of Sanju and used for repeated assault on the face and head of his brother-Mishrilal and when Sanju tried to rescue his brother, he was stabbed repeatedly by knife.

10. If we appreciate the evidence of Sanju in the background of what he has recorded in the spot FIR recorded at his instance, we find that genesis of the dispute appeared to be some kind of quarrel going on between Mishrilal and the appellants, which was informed by Mishrilal to his brother-Sanju. After that, Sanju reached at the spot with iron pipe in his hand and when he questioned the appellants as to how his brother was being abused, iron pipe was snatched from his hands. It is relevant to note that Sanju was not assaulted with iron pipe, but he was assaulted with knife on more than one place of his body. Assault is given to Mishrilal, when he sought to rescue his brother-Sanju, who was repeatedly stabbed. From this evidence, we find that Mishrilal was fighting or assaulting the appellants, but Mishrilal sustained injuries, when he tried to rescue his brother. The iron pipe, which was brought by Sanju, who reached at the spot, was used for giving repeated assault on Mishrilal.

11. The MLC report of Mishrilal in Ex.P-30 proved by Dr. Mahendra Prasad, PW-15, his evidence before the Court proves that there were three head injuries, in which, two on parietal and one on occipital part. One injury on the nose and one contusion under the eyes and one injury on the knee. We would

thus find that all these injuries, of which at least three in number, were caused by hard and blunt object, as has been deposed by the doctor. This shows that the iron pipe, which was snatched from the hands of Sanju, was used for giving repeated assaults on the head of Mishrilal.

12. In the light of aforesaid injury, if we look into the evidence of Dr. S. K. Bagh, PW-11, who conducted postmortem of the deceased, we find that the incised wound was found on the head and in the initial examination, Dr. S. K. Bagh, PW-11 found that there was redness in the parietal and temporal part, fracture of bone, contusion of brain and subdural bleeding in the left parietal lobe, there was fracture at the base of the skull. Dr. S. K. Bagh, PW-11 opined that the cause of death was multiple injury leading to cardiac arrest.

As the injured Mishrilal was initially admitted in the hospital and surgery was also performed and ultimately the injured succumbed to death on 14th day, an argument has also been raised that the intervention of surgery and death after 14 days, would only lead to inference that the injury found on the head was not likely to cause death. To appreciate this submission, we have carefully gone into the nature of injuries sustained by the deceased. As referred to above, there were multiple injuries on the head and the said injuries were given with so much force that there was subdural hemorrhage found and even the base of the skull was broken. The brain of the deceased was also damaged. No doubt, the surgery was also performed, which might have shown signs of improvement, but ultimately, Mishrilal succumbed to death.

The argument that as death of Mishrilal had occurred after few days and not instantaneously, only knowledge could be attributed and no intention to cause injury likely to cause death, is not acceptable. Merely because, the death did not take place instantaneously, but after some time or few days, by itself, is not sufficient to reach to the conclusion that the injury in ordinary course of

nature, was not likely to cause death. The evidence of the doctor, which has already been referred to above, sufficiently indicates the gravity of injury. The internal part of the head, which consisted of brain matter, was badly damaged. Subdural hemorrhage itself denotes that assault was with great force and it was not superficial in nature. If the base of the skull was found broken, it is difficult to accept the argument that the injury was not given with force. Merely because, an attempt was made to save the life by performing the surgery, does not mean that the injuries cannot be said to be sufficient to cause death. The decisions, which have been cited before us, particularly in the case of **Harish Kumar, Mannu Satnami and Rameshwar** (supra), the nature of internal injury was not to the extent as has been found by us in the present case. Unless, there is material on record to reach to a logical conclusion that cause of death was not the injury, but for some other reason, in the present case, particularly taking into consideration the kind of internal brain injury sustained by the deceased, we are not inclined to accept the submission that the injury, in ordinary course of nature, was not likely to cause death.

13. Whether present would be a case covered under Part-I or Part-II of Section 304 of IPC, would essentially depend upon whether the appellants caused injury intentionally or it was a case of mere knowledge. This again is a matter of drawing inference based on number of circumstances, overt act, genesis of dispute, nature of weapon used, number of assaults as also the part of the body, which was chosen for giving assault. Mishrilal sustained number of head injuries given with so much force, obviously because, weapon was used was iron pipe and giving repeated assault with great force by iron rod, clearly manifest intention to cause injury, which in ordinary course of nature, was likely to cause death and thus intention, will renders the assailants liable for commission of offence under Part -I and not under Part-II of Section 304 of IPC.

It is not a case that in a heat of moment, suddenly one injury was given on the head by ordinary club, which eventually led to death of the deceased. Repeated assaults chosen and choosing the head only and for that assault, using the weapon like iron pipe, which is quite heavy as compared to any bamboo stick, with so much force that the base of the skull is found broken, leads to only inference that it was clearly intended. The intention of the accused-appellants and the injury, which in ordinary course of nature, is likely to cause death, brings the case within Part-I and not under Part II of Section 304 of IPC, as has been argued by learned counsel for the appellants.

14. An argument has also been raised that the incident of quarrel followed by fight had taken place, in which, assault was given on Mishrilal by only one of the accused and all of them did not assault, and therefore, sharing of common intention could not be inferred. We have gone through the evidence of eye-witnesses. Number of injuries sustained by Mishrilal and the criminal overt act committed by the appellants, who were engaged in assaulting not only the deceased, but also his brother. While giving assault to the deceased, the iron pipe has been used, by which, forceful assault has been given repeatedly on the head, at the same time, brother of the deceased-Sanju was picked up for assault and knife was used for assaulting his brother-Sanju, PW-8, when he tried to rescue his brother-Mishrilal and then, Mishrilal was assaulted, when he tried to rescue his brother-Sanju. This act of the appellants clearly renders them liable for commission of offence on the basis of they all having shared common intention to cause death of Mishrilal, in which, Mishrilal sustained heavy blow on the head and Sanju sustained knife injury. Since Sanju, PW-8, though having suffered stab injury, survived and there is no evidence by the prosecution that said injury was likely to cause death, the appellants have been convicted under Section 324 of IPC for having assaulted Sanju.

15. As far as death of Mishrilal is concerned, sharing common intention to cause death of Mishrilal is clearly reflected from the act of the appellants. It is a case, where the appellants had already gathered and surrounded Mishrilal on the road and his younger brother had also reached at the spot, upon receiving phone call.

16. In view of the aforesaid consideration, though we are not inclined to uphold the conviction of the appellants under Section 302 of IPC, in our opinion, the appellants are liable to be convicted for commission of offence under Section 304 Part I of IPC. In the circumstances, we are inclined to impose sentence of 8 years on the appellants. The appellants conviction under Section 324 of IPC remains intact. The appeal is accordingly partly allowed.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Ram Prasanna Sharma)
Judge