

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 400 of 2013**

- Dauvaram Nirmalkar S/o Baisakhuram Nirmalkar Aged About 51 Years R/o Doctor Rajendra Prasad, Near Telhanala Khursipar, Distt. Durg C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through The SHo, PS Khursipar, Distt. Durg C.G.

---- Respondent

For Appellant	: Ms. Pragya Pandey, Advocate
For Respondent State	: Shri Subash Yadav, GA

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

Judgment On Board By Manindra Mohan Shrivastava, J.

25/02/2019

As no representation is being made on behalf of the appellant in the present case which is an old matter, we appointed Ms. Pragya Pandey, Advocate, present in the Court, to assist the court on behalf of the appellant, who is in jail.

2. Appellant has been convicted on the allegation of having committed offence under Section 302 IPC and sentenced to undergo imprisonment for life along with fine and default stipulation by the impugned judgment of conviction and order of sentence passed by the

Sessions Judge, Durg in S.T. No. 24/2012.

3. Prosecution story, as is unfolded from the records of the case is that, FIR was lodged in Ex.P-23 as also merg intimation regarding sudden, untimely death in Ex.P-24. In the FIR, it was recorded that the appellant and the deceased resided in one house, though, in different rooms and the deceased, quite often, used to consume liquor and threaten the appellant/FIR informant to go out of the house otherwise he would be killed and that on 26.09.2011, in the morning, deceased had again abused and threatened the appellant to leave the house else he would be killed and, thereafter, in the night, at about 9.00 p.m., Dashrath was found in drunken state and hurling abuses, whereafter, the appellant picked up a small pick-axe kept in his house, came to the room of Dashrath and gave him 10-15 assaults. Similar was the story stated in the merg intimation. According to the police, the appellant himself had reported regarding he having committed the offence. At the spot, dead body of Dashrath was found which was sent for postmortem. Further case of the prosecution was that at the instance of the appellant, a pick-axe, alleged to be used in the commission of the offence, was recovered from a box kept in the house of the appellant, on the basis of his memorandum statement in Ex.P-1. The pick-axe was sent for medical examination. Clothes worn by the appellant were also seized and sent for FSL report. The axe and appellant's shirt was found blood stained.

4. Simultaneously, on the basis of the prosecution case that the appellant attempted to commit suicide by catching hold of live electric wire after killing his own brother, another FIR in Ex.P-25, was also

recorded against the appellant alleging commission of offence under Section 309 IPC. In that case, on the allegation that appellant attempted to commit suicide by catching hold of live electric wire, conviction followed vide judgment dated 26.01.12 in Ex.P-33. The appellant was convicted for the said offence and sentenced 10 days simple imprisonment.

5. Learned trial court relying mainly on the circumstantial evidence that the appellant was residing in the same house with the deceased, yet he failed to explain as to how his brother sustained multiple injuries, he himself stated to have lodged the FIR, the pick axe was allegedly used in commission of the offence was seized from a box from the house of the appellant on his memorandum statement and that the appellants clothes and pick-axe both were found stained with blood and that the appellant had come out with the false explanation with regard to the injury sustained by him by catching hold the live electric wire whereas he accepted that he tried to attempt suicide, held guilty for the commission of the offence under Section 302 and sentenced to imprisonment for life.

6. Counsel appearing for the appellant would strenuously urge before us by submitting that the case of the prosecution is based on certain circumstantial evidence which at the most, could lead to strong suspicion but there is no evidence to translate the said suspicion into truth. It is submitted that the contents of the FIR has been explained by the appellant in his examination under Section 313 Cr.P.C. that the appellant has informed the police that someone had murdered his brother. In any case, it has been argued that the contents of the FIR

could not be used as evidence extra judicial confession against the appellant as the same is said to have been made before the police officer who is said to have recorded the FIR. Next submission is that, though, the appellant and the deceased resided in the same house, evidence has come that both were residing in separate rooms, therefore, there is no burden under Section 106 of the Evidence Act cast on the appellant to explain as to how his brother sustained fatal injury. Counsel for the appellant would further argue that PW-10 Madhu is the niece of the appellant and the deceased both and she resided along with the deceased and in the incident also, she was sleeping with the deceased but she has not involved the appellant which renders the case of the prosecution extremely doubtful in so far as the involvement of the appellant is concerned. It is also argued that the recovery of pick-axe from the house of the appellant on his memorandum statement cannot be treated as an incriminating evidence because there is no live link between the discovery of fact and culpability of the appellant. Lastly, it has been submitted that admission of guilt of attempt to commit suicide would not amount to admission of guilt of alleged commission of murder in the present case and the learned trial court was swayed by such admission made by the appellant in other criminal case in which the appellant was tried for the commission of offence of attempt to commit suicide under Section 309 IPC.

7. On the other hand, State counsel submits that even if there is no direct evidence to prove the involvement of the appellant in the commission of the offence, the proved circumstances of the case, point clearly towards the guilt of the appellant. He would argue that

the appellant and the deceased were residing in the same house, the deceased was found having sustained multiple injuries which ought to have been explained by the appellant because he was the only major member residing in the same house along with the deceased. The pick-axe and the clothes of the appellant were found stained with blood which has not been explained by the appellant. It has also been argued that the FIR Ex.P-25, lodged in the matter of allegation of commission of offence under Section 309 IPC against the appellant also contain the same story that the appellant had killed his brother and thereafter out of his own guilty mind attempted to commit suicide by catching hold of live electric wire. In that case, the appellant admitted his guilt. The explanation offered in the present case therefore, is proved to be false that appellant had sustained burn injuries in his hands, because of accidentally coming in contact with live electric wire, this additionally points out towards the guilt of the appellant. Therefore, conviction of the appellant does not warrant any interference.

8. Present is a case which is based only on circumstantial evidence and there is no direct evidence to involve the appellant in the alleged commission of the offence. Before we proceed to deal with the material on record, we are reminded of settled principles evolved through plethora of decisions of the Supreme Court, one of them being the judgment in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116]**, wherein five golden rules as to when it would constitute proof before conviction could take place on circumstantial evidence, as were laid down by the Supreme Court, is as below:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Therefore, in a case where guilt has to be proved on the basis of circumstantial evidence, chain of circumstances must point towards the guilt of the accused. It should be complete and should be compatible only with the hypothesis of the guilt and not innocence. Keeping in forefront the aforesaid settled legal position, we shall now examine the evidence on record.

9. This case poses an interesting situation. The First Information Report recorded by the police as also merg intimation, are said to be lodged by the appellant and which the appellant admits also in his examination under Section 313 Cr.P.C. It contains that the appellant and the deceased are brothers, they reside together and that the deceased very frequently used to threaten the appellant to run away else he would be killed. On the date of incident also, deceased had

threatened the appellant to leave the house else he would be killed. Deceased was a drunkard, the appellant finally took out the pick-axe from his house and then, repeatedly assaulted the deceased and killed him. With this FIR, the police carried out investigation in which it was found that Dashrath was lying dead in his house which was shared by him with the appellant. Inquest report prepared on the dead body also proves that Dashrath's dead body was found in his own house. Brutal killing of Dashrath is proved from the postmortem report and the evidence of doctor Nohar Prasad Jangde (PW-12) who has deposed before the court that after conducting postmortem he found multiple injuries on the deceased which is described as below :

बाह्य परीक्षण — बाह्य परीक्षण करने पर मैंने पाया कि —

1. शव एक सामान्य कद काठी के युवा पुरुष का था।
2. बांये फ्रण्टो टेम्पोरल क्षेत्र में एक विदीर्ण घाव था जिसका आकार 9.0 गुणित 6.0 गुणित 3.0 सेमी था।
3. बांये आक्सीपीटल लेटरल भाग में एक 5.0 गुणित 6.0 गुणित 4.0 सेमी आकार का एक गहरा घाव मौजूद था।
4. बांये कान से रक्त निकल रहा था।
5. ठूड्डी पर 9.0 गुणित 2.0 सेमी आकार का एक विदीर्ण घाव मौजूद था।
6. मृतक के बांये टेम्पोरल, फ्रण्टल, पैराइटल, लेफ्ट ऑक्सीपीटल लेटरल साइड में अस्थि भंग था।
7. बांये मॅकडबल में फ्रेक्चर था।

A clear opinion was given by the doctor that cause of death was coma as a result of shock in view of injury given on the head and fractures. On this aspect, nothing could be elicited in the cross-examination with regard to nature and extent of injuries. The

suggestion in the cross-examination that the deceased could die because of fall on the iron cot or cause of death was coma as a result of poisoning due to consumption of liquor has been specifically denied.

10. The appellant was residing with the deceased, his own brother, is proved from the prosecution evidence. PW-3 Bhagwati Prasad Nirmalkar, brother of the appellant and the deceased, PW-8 Geeta Bai Nirmalkar, wife of PW-3, PW-9 Kumari Shanti Nirmalkar, niece of the deceased and PW-10 Kumari Madhu Nirmalkar, who is also niece of the deceased, all have stated in their evidence that appellant and the deceased resided in the same house in two different rooms. What has come from the evidence of PW-10 is that she alone used to reside with the deceased. She has stated that in the night of the incident, she was woken up by the police people and was asked not to go to the room of the deceased and to go to call her father. She is the daughter of PW-3 Bhagwat Prasad.

11. Once it is proved that the appellant was residing with the deceased in the same house, no matter in two different rooms, the appellant being the only major member in the household to have explained as to how his brother sustained multiple injuries and died. The appellant failed to explain this, though, the burden was clearly cast on him in view of the Section 106 of the Evidence Act. This constitutes a very strong circumstance pointing towards the guilt of the appellant.

12. Memorandum of the appellant and based thereon, seizure of the pick-axe from a box kept inside the house of the appellant has

been proved by the prosecution. The Investigating Officer PW-15 has deposed that even at the time of lodging the report, the appellant stated that the pick-axe used in the commission of the offence has been kept in a plastic bag and kept in his house in a box. In a recent decision we have held that though such statement given to the police could not be used for the purposes of discovery of fact under Section 27 of the Act, nevertheless, this is relevant to prove the conduct of the accused in the case.

13. There are at least two independent witnesses who have proved that when the appellant was taken to his house, the appellant had taken out a pick-axe kept in the box which was seized vide seizure memo Ex.P-2, to which Manoj Vishwakarma PW-1 and Brijesh Sharma both have supported the seizure. In this case, though the prosecution has come out with the case of recording memorandum, taking into consideration that the place where the pick-axe was kept was already disclosed in the FIR, the memorandum could not be used against the appellant. But then the conduct of the appellant is relevant and admissible under Section 8 of the Evidence Act coupled with seizure of pick-axe from his own house, taken out by the appellant from the box, is also a circumstance pointing towards the guilt of the appellant particularly, when the axe was found stained with blood. True it is, that the blood contained in the axe could not be proved to be that of the origin or the group of the deceased nevertheless, in the present circumstances, considered along with other material on record, certainly the accused ought to have given explanation.

Not only this, the shirt of the appellant was also found stained

with blood and this has also not been explained.

14. In the present case, the appellant in his examination under Section 313 Cr.P.C. came out with an explanation that on the date of incident, he had sustained burn injuries in his hand because of accident but then, we find that another criminal case was registered against him on the allegation of appellant having committed an attempt to commit suicide and on the same set of statement made in the FIR Ex.P-15, the appellant was charged and he admitted his guilt that he attempted to commit suicide. He has also accepted Ex.P-33. But then in the present case, the appellant has sought to explain his burn injury as an accident. In view of his admission of guilt in the other criminal case, this explanation is completely false to the knowledge of the appellant.

15. Offering a false explanation itself is incriminating evidence and provides an additional link to the case of the prosecution pointing towards the guilt of the appellant. This also leads support to the prosecution story that appellant himself has disclosed in the FIR that he attempted to commit suicide by catching hold of live electric wire as a result of which his hands were burnt.

In view of the aforesaid evidence on record, we are of the view that the learned trial court committed no illegality in reaching to the conclusion that it is the appellant and the appellant alone, who must have killed his own brother.

15. Lastly, learned counsel for the appellant argued that even according to the prosecution case, as emerging from the

memorandum statement Ex.P-1, the incident of assault had taken place because the deceased quite frequently used to consume liquor and thereafter hurl abuses and threaten the appellant to leave the house or else he would be killed, which act, was again repeated on the date of incident. Therefore, present is a case where criminal overt act was outcome of sudden and grave provocation and in view of the circumstances, even if it is held that the appellant had assaulted his brother, the conviction of the appellant may be altered to that under Section 304 Part II IPC, by treating present to be a case covered by first exception of Section 300 IPC.

16. We have given our anxious consideration to the submission of the counsel for the appellant. We are, however, unable to accept the submission because even according to what has been contained in the memorandum statement, the incident of quarrel is said to have happened in the morning and it is not a case of sudden provocation. Moreover, in order to attract first exception to Section 300, provocation has to be grave also. To say that, threat given by the deceased to the appellant that he should vacate the house else he would be killed, even if it is accepted to be a case of sudden and grave provocation for committing the offence which is completely absent, it is not a case that in a state of intoxication, deceased started hurling abuses and instantaneously threatened the appellant to vacate the house and then proceeded to assault him. It is not that in the morning this incident had happened. The appellant killed his brother in a very planned manner. When deceased was sleeping in the night, appellant took out a weapon and then went to assault his brother who was sleeping in the house, repeatedly giving multiple injuries. Therefore,

first exception of Section 300 IPC is not attracted. Thus, we do not find any merits, the appeal is dismissed.

On production of copy of this judgment, counsel who appeared in this case for the appellant, having been appointed by this Court, will be entitled to appropriate fee from the legal aid as per schedule applicable in the High Court Legal Aid Committee.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge

