

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 330 of 2013

1. Dhaniram Baghel S/o Jaydev Aged About 45 Years
2. Smt. Sukari Bai, W/o. Dhaniram, aged about 40 years

Both R/o Village Chhotekawali, P.S. Parpa , Distt. Bastar C.G. , Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through - P.S. Frezurepur Jagdalpur , Distt. Bastar C.G. ,
Chhattisgarh

---- Respondent

For Appellants	:	Shri Praveen Tulsyan, Advocate
For State	:	Shri Santosh Bharat, Panel Lawyer

**D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Rajani Dubey**

Judgment On Board

20/06/2019

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 13.02.2013 passed by learned Sessions Judge, Bastar at Jagdalpur (CG) in ST No.31 of 2012 whereby and whereunder the appellants/accused have been held guilty of commission of offence under Section 302 read with Section 34 IPC and sentenced to undergo life imprisonment with fine of Rs.2,000/-.
2. According to prosecution story, a report was lodged in the police station on 5.2.2012 by Ramdev Baghel (PW1) that in an incident of quarrel, followed by assault, the appellants by using a wooden club, injured Jaydev due to which Jaydev died. After preparing an inquest over the dead body at the spot, it was sent for postmortem which was conducted by Dr.J.L. Dariyo (PW8), who, upon examination of injury, found that the deceased had sustained stab wound in the temporal part under the left ear. However, according to the doctor, cause of death was due to damage caused to the

testicles as it was found crushed. The appellants were arrested and investigation culminated in filing of charge sheet against them. The learned trial Court framed charges. The appellants having abjured guilt were put to trial.

3. In order to prove its case, the prosecution led evidence of as many as three eyewitnesses namely Lakheshwar (PW2), Dhanurjay (PW3) and Ganesh Ram (PW5). Lakheshwar (PW2), however, turned hostile. Dhanurjay (PW3) and Ganesh Ram (PW5) stated in the Court that they had seen the incident in which appellants assaulted the deceased with the help of wooden club (barga), due to which, deceased sustained injury on his head, fell down and died instantaneously. The appellants were examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution and came out with the plea that they are innocent and that they had not committed any offence. No defence witness was examined.
4. Learned trial Court, relying upon the evidence of eyewitness, held the appellants guilty of commission of offence and sentenced them as described above, giving rise to this appeal.
5. Learned counsel for the appellants would argue that the allegation of appellants having assaulted the deceased is not free from doubt because, out of three prosecution witnesses, Lakheshwar (PW2) has turned completely hostile and the evidence of other two witnesses Dhanurjay (PW3) and Ganesh Ram (PW5) is not reliable. According to him, material contradiction has been elicited in the cross-examination of Dhanurjay (PW3) wherein he has stated that he reached the spot after the accused had run away, which means that he had not actually seen the incident and is, therefore, a planted witness. As far as Ganesh Ram (PW5) is concerned, it is contended that his evidence is also liable to be disbelieved because according to diary statement of the prosecution witnesses, they arrived at the spot of incident together, whereas, in their Court statement, they have deposed that they saw the incident while they were in their respective houses, from where, they rushed to the spot. Therefore, there is contradiction in the evidence with regard to manner in which the eyewitnesses arrived at the place of incident and for this reason, their

evidence is liable to be disbelieved. Learned counsel for the appellants raised an important submission, as an alternative one, that even if it is accepted that there was some quarrel between the deceased and the appellants (who are the son and daughter-in-law of deceased), due to some trivial family dispute, it cannot be said that the deceased died due to any fatal injury caused by the appellants on him. Learned counsel for the appellants would submit that the evidence of prosecution witnesses only states that with the help of wooden club, certain assaults were given to the deceased on his head, whereas according to opinion of the doctor, cause of death was damage caused to testicles which were found crushed. He would argue that none of the prosecution witnesses has stated that the deceased was assaulted so as to damage or crush his testicles and the possibility of deceased having sustained this injury while falling on the ground could not be ruled out. Therefore, the appellants could not be convicted for commission of offence of murder but at the most, for causing simple injury sustained by the deceased on his head.

6. On the other hand, learned counsel for the State submits that the eyewitnesses account of Dhanurjay (PW3) and Ganesh Ram (PW5) clearly proves that it is the appellants who had assaulted the deceased with the help of club, on his head. He would argue that the contradiction as pointed out is not a contradiction as such but it can be properly explained in the manner that by the time they could reach the spot, one of the accused had run away. He would further argue that even if witnesses have not clearly spelt out regarding giving assault on the testicles part of the deceased, on preponderance of probability, it may be safely concluded that during the course of assault given by the appellants, the deceased must have also been assaulted on head and private part, leading to damage of the testicles.
7. We have heard learned counsel for the parties and perused the records of the Court below.
8. The prosecution evidence with regard to appellants being the assailants and giving assault with the help of a club is proved from the evidence of Dhanurjay (PW3) and Ganesh Ram (PW5). Dhanurjay (PW3), an eyewitness, has deposed that at about 9:00 pm in the night when he heard noises, he came out of his

house and saw that appellants were assaulting Jaydev with the help of a club, appellant- Dhaniram ran away from spot and other co-accused Sukari Bai was caught red handed at the spot. He has further stated that Jaydev had sustained injury in the temporal part and it was bleeding and he died instantaneously. In the cross-examination, it has been elicited that he had disclosed to the police that he, along with Ganesh and Sukaru, was moving away from the house of deceased. He has also admitted that he disclosed to the police that when he reached the spot, appellants had run away and also admits that they reached the spot after assault had taken place. Taking clue from what has been stated in the cross-examination as mentioned hereinabove, learned counsel for the appellants would stress upon his submission that this witness is a concocted one.

However, upon close scrutiny of his evidence and what has been elicited in his cross-examination, we find that the evidence of this witness does not mean that he had not seen the incident. What he has stated in the examination-in-chief and what has been elicited in his cross-examination are not mutually destructive or inconsistent but are description of the incident at different stages. While this witness claims to have seen the incident, his statement has been that by the time he reached the spot, the appellants had run away, though in the examination-in-chief he says that one of them Sukari Bai was caught at the spot. Doubt, if any, on the evidence of Dhanurjay (PW3) is cleared in view of specific evidence of another eyewitness Ganesh Ram (PW5) who clearly states regarding he having seen the appellants assaulting deceased. According to him, Jaydev was assaulted on his head by a *barga* (club) due to which, it started bleeding and injured fell down. According to him, while appellant – Sukari Bai kept standing, appellant-Dhaniram fled away from the spot of incident and Sukari Bai was caught at the spot. Nothing could be elicited in the cross-examination to doubt his testimony.

9. From the evidence of prosecution, it is proved that the appellants had assaulted deceased with the help of a club on his head and more particularly in the left temporal part which led to some kind of stab injury. Wooden club which is said to be used for commission of offence has not been described in any of the prosecution document or evidence as to whether it had any pointed head. But the injury sustained by the deceased appears to be caused by a pointed weapon resulting in a kind of stab injury. How testicles were crushed has not come in the evidence of prosecution witnesses. Evidence of Dhanurjay

(PW3) and Ganesh Ram (PW5) who claims to have seen the incident, both have stated that appellants assaulted the deceased on his head and that too, with the help of club. None of them have stated that after the deceased fell down or of even before that, the appellants or any of them assaulted the deceased between the legs in a manner that it crushed the testicles. The evidence of Dr. J.L. Dariyo (PW8) also shows that according to him, the testicle injury was a crushed injury. How testicles were crushed is not clear. Therefore, the argument of learned counsel for the appellants that possibility of testicle being crushed either due to fall or due to some other reason cannot be ruled out.

10. We find that in the present case, the appellants are the son and the daughter-in-law of the deceased and the evidence has come that during day hours, there was some quarrel between them and later on, in the evening, the appellants alone came to the deceased and a kind of quarrel took place which went to the extent of giving assault on the head of the deceased.

11. In view of above material on record and in the absence of clear evidence of prosecution as to how testicles of the deceased were crushed, possibility of damage to such fatal part during the course of quarrel, otherwise by way of assault cannot be ruled out. Even if, for the sake of argument, we accept that while giving assault, one blow may have been given between the legs of the deceased resulting in injury to testicles, in our considered opinion, all this could not lead to inference that appellants had an intention to cause death. At the most, the appellants' overt act would not travel beyond the scope and ambit of Section 304 Part-II IPC.

12. In the result, we alter the conviction of the appellants to that under Section 304 Part-II IPC. The appellants have already undergone more than 7 years and 4 months of jail sentence. The sentence part is also reduced to the period already undergone by them with the result that they will be released forthwith.

13. The appeal is accordingly allowed in part.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge