

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1145 of 2014**

- Dhansay Kodaku S/o Jagan Kodaku Aged About 42 Years R/o Village Uliya, Thana - Rajpur, Civil And Rev. Distt. - Surguja, Ambikapur C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through The Distt. Magistrate, Ambikapur Distt. - Surguja C.G.

---- Respondent

For Appellant	:	Shri R.V.Rajwade, Advocate
For State	:	Shri Anand Verma, Dy.G.A.

D.B.- Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Order On Board****08/03/2019**

This appeal is directed against impugned judgment of conviction and order of sentence dated 21/04/2010 passed by learned Sessions Judge, Surguja (Ambikapur), Chhattisgarh in Sessions Trial No.140/2008 whereby and whereunder, the appellant has been held guilty of commission of offence and sentenced as described below -

	<u>Conviction</u>	<u>Sentence</u>
1.	U/s 302 of IPC	Life imprisonment with fine of Rs.2000/- (in default of payment of fine, additional R.I. of 6 months)

2. The prosecution case is that the appellant and the deceased were real brothers and it is alleged that the appellant assaulted his brother – Vishwanath. An

FIR was lodged in the police station in Ex.P/2 by Sukhni Bai (PW1). When the dead body was sent for post mortem, Dr. Rajesh Bhajgawli (PW6) conducted post mortem and found scratch injuries on various parts of the body. Upon examination of internal parts however, a bruise in the left tempo parietal part was found. There was hemorrhage on the left and right side of the brain. The opinion was that death was caused due to injuries sustained in the right side of the brain. The appellant was tried for alleged commission of offences.

Learned Trial Court, relying on the eye witness account of Sukhni Bai (PW1) – wife of the deceased and the medical evidence, injury and cause of death, held the appellant guilty of commission of offence of murder of his own brother – Vishwanath and sentenced life imprisonment.

3. Learned counsel for the appellant argued that the evidence of Sukhni Bai (PW1), wife of the deceased does not inspire confidence, particularly because she has given contradictory statement with regard to what was witnessed by her. It is next argued that the evidence on record also proves that the appellant had taken his injured brother – Vishwanath to his own house where he was being treated. No report was immediately lodged after the incident but it was only after Vishwanath died that report was lodged. Therefore, the prosecution story is rendered doubtful.

As an alternative submission, it has been advanced that even if what has been stated by the prosecution witness is taken on its face value, all that emerges is that at the spot, a quarrel had taken place between the wife of the deceased and the appellant in which, the deceased intervened. There is no allegation of appellant having used any dangerous weapon and in view of the evidence of Sukhni Bai (PW1), as stated in her cross-examination, the possibility of deceased having sustained injury during simple *marpeet* with his brother, but on account of fall, cannot be ruled out. There was no intention to cause death because according to the prosecution case itself, the appellant had taken his brother for treatment in his

house. Therefore, the case of the prosecution and the criminal overt act would not travel beyond the scope of Section 304-II IPC. He submits that the appellant has remained in jail since 20/03/2008 and has completed almost 11 years.

4. On the other hand, learned State counsel supports the judgment of conviction and order of sentence by submitting that the evidence of Sukhni Bai (PW1) is emphatic that the appellant assaulted his own brother by throwing him on the ground and then assaulting with a heavy stone. The nature of injury sustained by the deceased on his temporal part by this stone, in ordinary course of nature, was sufficient to cause death. He submits that the appellant fully knew that if assault is given on head, death could be caused. There were number of injuries found on the body of the deceased. Therefore, conviction of the appellant does not warrant any interference.

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

6. We shall first advert ourselves to the evidence of Dr. Rajesh Bhajgawli (PW6), who conducted postmortem and stated regarding number, nature and extent of external and internal injuries revealed in the postmortem.

The evidence of the doctor proves that all the external injuries, (except one), nine in number, were scratches found on various parts of the body. One of the injuries, injury No.10, is said to be redness under the left eye. There was no external grievous injury found on any vital part of the body. There is no external injury found on the head.

However, it is only the internal examination which revealed a bruise on left tempo parietal part stained with blood and hemorrhage both on left and right side of the brain. The opinion of the doctor, as proved in his evidence, is that cause of death was excessive bleeding and also because of the internal injury sustained on the right

part of the brain.

From the aforesaid nature and characteristic of internal injury, it is apparent that the deceased suffered internal hemorrhage which could be caused due to a blow on his head. We also notice that even according to the doctor, the death could either be homicidal or accidental.

7. Sukhni Bai (PW1), wife of the deceased, claiming herself to be eyewitness of the incident, has stated that Dhansay i.e. the appellant was beating her by calling her a Witch, due to which, she ran away and while she was coming along with her husband, on way, the appellant came in and threw her husband on the ground, assaulted with legs and stone. According to her, her husband received injury in his neck and the incident was also witnessed by Vifna and Jehna. In her cross-examination, however, she admits that she was declared a Witch by her father-in-law and by the appellant. She further deposed that she abused her father-in-law and then the appellant, as to why she abused her father, gave her two slaps due to which, she ran towards her house. At this stage, the appellant also gave 2-3 slaps to her husband and while running away, she saw this. She further deposes that she had not seen the entire incident of fight between them. Importantly, she admits that she had not seen her husband assaulted by stone.

Therefore, the evidence of wife of the deceased shows the genesis of dispute and that all of a sudden, there was a quarrel in which, her husband was slapped by the appellant.

8. Vifna Kodaku (PW2) has been declared hostile as she has not supported the prosecution case as witness of the incident.

Jehna Ram (PW3) has also not supported the case of the prosecution as eyewitness.

It is important to note that Sukhni Bai (PW1) has stated that the incident was

seen by Vifna and Jehna but they have not supported the prosecution case.

Evidence has also come on record that after the incident happened, the appellant took his brother (the injured Vishwanath) to his own house for treatment. This has been stated by Sukhni Bai (PW1) as well as Parmeshwar Kodaku (PW7).

9. There is no categoric evidence led by the prosecution that the appellant used stone to give assault on the deceased. The deceased was not found having sustained any external head injury but whatever injury was found, it was internal in nature. This also rules out use of stone. We notice that Dr. Rajesh Bhajgawli (PW6) has stated in the cross-examination that a bruise found on the left tempo parietal part could be caused due to fall on the stone. Even according to the doctor, nature of death would be homicidal or accidental.

10. Thus, in the totality of the evidence which has come on record, all that is proved is that the appellant and his father started making allegation against the wife of the deceased that she is a Witch, which led to quarrel between the appellant and the deceased and there were exchanges of slaps and in that fight, the deceased sustained internal injuries on the head which led to his death. Even if the prosecution case is accepted that the appellant had given a stone assault, in the absence of any external injury on the head, it is difficult to accept that the assault was with a great force, however, it led to internal hemorrhage and death. We also notice that even according to the prosecution evidence, immediately after the incident, the appellant had taken the deceased, his own brother, to his house and kept him there for treatment. This certainly shows that there was no intention to cause death. The incident happened all of a sudden during quarrel. The deceased was given local and homely treatment and not immediately taken to the hospital. There was delay in taking him to the hospital. Taking into consideration all these aspects, in our considered opinion, the criminal overt act of the appellant would

render him liable only for culpable homicide but not amounting to murder.

11. Accordingly, the conviction of the appellant is altered to that under Section 304-II IPC. The appellant has undergone almost 11 years of R.I. which is more than maximum sentence of 10 years for commission of offence under Section 304- II IPC. Therefore, the appellant be set at liberty forthwith. The appeal is accordingly partly allowed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge