

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ACQA No. 322 of 2010**

- State of Chhattisgarh

----Appellant

Versus

- Md. Yunus, aged about 27 years, S/o Hyder Ali, Caste Muslim, Resident of Katghora, P.S. and Tehsil Katghora, District Korba, Chhattisgarh.

---- Respondent

For Appellant/State	Shri Chitendra Singh, P.L.
---------------------	----------------------------

For Respondent	Shri Anand Kumar Gupta, Advocate.
----------------	-----------------------------------

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Gautam Chourdiya****Judgment on Board by Justice Gautam Chourdiya****24.01.2020**

1. This appeal has been filed by the State against the judgment dated 04.05.2001 passed by 7th Additional Sessions Judge, Bilaspur, C.G. in ST No.456/2000 whereby the respondent/accused has been acquitted of the charge under Section 302 of IPC.
2. Case of the prosecution in brief is that on 27.05.1999, at about 8:00 pm, deceased Sheikh Rafique went to offer prayer at the mosque in Katghora. On the said date, deceased had also invited Maulvi at his house for dinner. Accused Mohd. Yunus Ali assaulted and caused injury on Sheikh Rafique due to previous enmity. PW-5 Sheikh Mustkim, brother of the deceased, reached the place of occurrence and saw the accused assaulting the deceased and fleeing from the place of

occurrence. Thereafter, he informed the incident to father of the deceased PW-6 Sheikh Abdul, who lodged the FIR Ex.P-4 against Yunus on which offence under Section 302 of IPC was registered under Crime No.99/99 against the accused. Merg intimation Ex.P-5 recorded as per the information given by PW-6 Sheikh Abdul. Inquest report Ex.P-6 was prepared in presence of the witnesses. The dead body was sent for postmortem which was conducted on 28.05.1999 at 8:25 am by PW-4 Dr. G.S. Kanwar in which he found the following injuries:-

- (1) One incised wound on left shoulder size 3cmx2cmx2cm deep.
- (2) Three incised wound on left arm 6 inch below left shoulder size 2cmx1cmx1cm, 1cmx1cm and 2cmx2cmx1cm.
- (3) One incise wound below left clavicle on chest size 2cmx2cmx2cm.
- (4) One incised wound above left clavicle 2 inch away from injury No.3 on chest size 3cmx2cmx2cm.
- (5) One incised wound just below right shoulder size 3cmx2cmx2cm.
- (6) One incised wound between right side of neck and right shoulder size 10cmx3cmx2cm.
- (7) One incised wound on back at label of 10th 11th rib size 3cmx2cmx5cm on left side.
- (8) One incised wound on back at label of 5th 6th rib on right side size 3cmx2cmx10cm deep 3cm away from vertebra column.
- (9) One incised wound on 2 inch away from injury No.8 on right side on back size 2cmx2cmx6cm deep.
- (10) One incised wound on back of neck size 2cmx1cmx3cm.
- (11) One incised wound on back interior border of scapula on left side size 2cmx1cmx1cm.
- (12) One incised wound right side of cheek 3cmx1cm.
- (13) One incised wound on right little finger & ring finger size 3cmx2cm.
- (14) One incised wound on left side of lip size 2cmx1cm.
- (15) One incised wound on left index finger 3cmx1cmx1cm.
- (16) One incised wound on right hand just below wrist joint

size 2cmx1cm.

In his opinion the cause of death was hemorrhagic shock due to injury to vital organs i.e. lung and stomach and the duration of death was within 24 hours prior to the postmortem.

3. During investigation, from the place of occurrence one Kishan torch, slipper of deceased and other articles mentioned in Ex.P-7 were seized. As per Exs. P-8 and P-9 plain soil and blood stained soil as well as viscera of deceased were seized. The seized articles were sent for chemical examination as per Ex.P-10 and as per Ex.P-12 human blood was found on item nos. 1, 2 & 3 i.e. soil, torch and full pant. After completing the investigation, the charge sheet for offence under Section 302 of IPC was filed against the accused followed by framing of charge accordingly by the trial Court on which he prayed for trial.
4. So as to hold the accused guilty, the prosecution examined 10 witnesses i.e. PW-1 Saiyyad Hajrat Ali, PW-2 Mohd. Hanif, PW-3 Mobin Hasan, PW-4 Dr. G.S. Kanwar, PW-5 Sheikh Mustkim, PW-6 Sheikh Abdul, PW-7 Sarvinder Singh, PW-8 Arif Mohammad, PW-9 Rasid Mohammad and PW-10 B.P. Dwivedi. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. However, no witness was examined by him in his defence.
5. The trial Court after hearing counsel for the respective parties

and considering the material available on record, by the impugned judgment acquitted the accused of the charge levelled against him.

6. Learned counsel for the State submits that the trial Court has not properly appreciated the evidence of eye-witness PW-5 Sheikh Mustkim, who has categorically stated that he saw the accused making repeated assault on the body and thereafter fled from the place of occurrence. This witness has further deposed that the deceased made oral dying declaration before him. From the evidence available on record, it is clear that there was previous enmity between the accused and the deceased and as such the accused had a strong motive for committing murder of the deceased. However, the trial Court without proper appreciation of the oral and documentary evidence has wrongly recorded a finding of acquittal in favour of accused which is liable to be set aside.
7. Learned counsel for the respondent submits that in this case there is no eye-witness and the accused has been falsely implicated. Neither any weapon nor other articles were seized from the accused. No independent witnesses supported the prosecution case. When PW-5 Sheikh Mustkim brought the dead body of deceased at home, he has not stated that the accused assaulted upon the deceased. He also submits that as per the statements of PW-5 Sheikh Mustkim & PW-6 Sheikh Abdul, they never informed about oral dying declaration made by the deceased in presence of them. They were developing

the new story before the Court regarding oral dying declaration as looking to the statement of IO in this case. In case diary statements of PW-5 Sheikh Mustkim and PW-6 Sheikh Abdul, they never informed regarding oral dying declaration, therefore, the accused has been rightly acquitted of the charge under Section 302 of IPC by the trial Court.

8. We have heard learned counsel for the parties and perused the material available on record.
9. This case is based on the evidence of only two witnesses i.e. PW-5 Sheikh Mustkim and PW-6 Sheikh Abdul. As per the prosecution case only PW-5 Sheikh Mustkim is the eye-witness in this case. At the time of incident, PW-6 Sheikh Abdul was at home.
10. The incident happened at the place mentioned in the map Ex.P-13 which was proved by PW-10 B.P. Dwivedi, I.O. The place of occurrence is mentioned as a densely populated area. The house of Ganga Bai, Godhin, Vijay and Mahalaxmi were mentioned near the place of incident. No independent witness from the place of occurrence was examined by the prosecution.
11. PW-1 Saiyyad Hajrat Ali reached the place of occurrence after hearing that someone has killed Sheikh Rafique and thereafter he reached the home of deceased and found the deceased dead. He further submits that prior to incident he heard about some dispute between the accused and deceased. In cross-examination, he also stated in para 13 that he heard that someone has killed Rafique and when he reached the spot he

saw that no family members of the deceased were present there. This witness has been declared hostile. But none of the family members of the deceased have stated regarding oral dying declaration or that Sheikh Mustkim had seen the accused assaulting the deceased.

12. PW-2 Mohd. Hanif also reached the house of deceased on the same night. He also stated in para 2 of his statement that when he reached the house of Sheikh Rafique at 10 pm for dinner, he found that Rafique was not there. After sometime his brother Sheikh Mustkim (PW-5) brought the dead body of Rafique at home but that time nobody said as to who killed Sheikh Rafique. Even the family members of deceased and Sheikh Mustkim have not stated regarding the assailant. PW-2 Mohd. Hanif has also been declared hostile.

13. PW-1 Saiyyad Hajrat Ali and PW-2 Mohd. Hanif reached the house of deceased just after the incident and dead body was brought by Sheikh Mustkim but both of them have not supported the prosecution case and declared hostile.

14. PW-3 Mobin Hasan has also been declared hostile. He stated in para 8 of his deposition that he had not seen the accused following the deceased while the deceased was going towards his house. He further states that he has also not heard about dispute/quarrel between the deceased and the accused.

15. PW-4 Dr. G.S. Kanwar conducted postmortem on the body of the deceased on 28.05.1999 vide Ex.P-3 and noticed as many as 16 injuries on various parts of body of the deceased as

mentioned in para 2 of this judgment. In his opinion the cause of death was hemorrhagic shock due to injuries to vital organs i.e. lung and stomach and that the duration of death was 24 hours prior to postmortem examination.

16. Now we have to consider the evidence of important witnesses i.e. PW-5 Sheikh Mustkim and PW-6 Sheikh Abdul on which the prosecution case is based.

17. PW-5 Sheikh Mustkim in his diary statement Ex.D-1 has claimed himself to be an eye-witness to the incident. However, no other witness was produced by the prosecution from the place of occurrence as an eye-witness in this case and further there is no witness who states that PW-5 Sheikh Mustkim was seen at the place of occurrence. In his court statement, PW-5 in para 4 states that he left his home in search of the deceased and having heard the sound of screaming when he reached the place of occurrence, he found his brother/deceased lying there in injured condition. On being asked by this witness, the deceased uttered the name of accused Yunus thrice. According to this witness, when he asked the deceased as to who caused the injuries, the deceased again uttered the name of accused Yunus. He states in para 5 that the deceased was crying for help but there was nobody to help him. Thus, looking to the statement of PW-5 Sheikh Mustkim, it cannot be said that any oral dying declaration was made by the deceased before him. In the case diary statement Ex.D-1 of PW-5 Sheikh Mustkim and Ex.D-2 of PW-6 Sheikh Abdul, they have not stated about

the oral dying declaration made by the deceased before PW-5 Sheikh Mustkim. The said fact is also missing in the FIR Ex.P-4 lodged by PW-6 Sheikh Abdul.

18. In Merg intimation (Ex.P-5) and the FIR (Ex.P-4) lodged by PW-6 Sheikh Abdul, he also stated that deceased was found on the spot in blood stained condition and thereafter his brother Sheikh Mustkim (PW-5) brought the deceased with the help of other people to home.

19. Looking to merg intimation (Ex.P-5), there is no specific contention made regarding Sheikh Mustkim being the eye-witness and any oral dying declaration being made before PW-5 Sheikh Mustkim. FIR (Ex.P-4) also does not contain this fact that deceased made any dying declaration to Sheikh Mustkim. The improvement in the evidence of prosecution witnesses PW-5 Sheikh Mustkim and PW-6 Sheikh Abdul, creates a doubt upon their deposition and, therefore, the same cannot be accepted.

20. It is proved by the prosecution that some dispute was there between accused and deceased and motive can be attributed to the accused but no weapon was seized from the accused nor any connecting corroborative piece of evidence is available against him.

21. Now we shall again consider the evidence of PW-5 Sheikh Mustkim with due care and caution as he is the only so called witness of the case and was a chance witness of the incident.

22. As per PW-5 Sheikh Mustkim, in para 4 of his statement, when

he reached the place of occurrence he found his brother/deceased lying on the road and accused running towards the tank and field. Therefore, as per PW-5 Sheikh Mustkim, he has not seen the accused assaulting the deceased as mentioned in his diary statement Ex.D-1 where he stated the accused assaulted the deceased by knife. He also stated in Ex.D-1 statement that his father also reached the place of occurrence but as per the statements of PW-1 Sayed Hajrat Ali, PW-2 Mohd. Hanif and PW-6 Sheikh Abdul, it is clear that PW-6 Sheikh Abdul was not present at the place of occurrence. PW-6 Sheikh Abdul in paras 4 & 5 states that PW-5 Sheikh Mustkim brought the dead body of Rafique to home and at that time he was at home. According to this witness (PW-6 Sheikh Abdul), when the deceased was brought to home, he was breathing slowly and was uttering the name of accused Yunus and after sometime he died. This statement of PW-6 Sheikh Abdul is totally contradictory to the statement of PW-5 Sheikh Mustkim as PW-5 Sheikh Mustkim in para 4 states that the deceased died on the spot itself.

23. The trial Court considering the nature and quality of evidence adduced by the prosecution, contradictions, omissions and improvements in the statements of PW-5 Sheikh Mustkim and PW-6 Sheikh Abdul as compared to their diary statements Ex.D-1 and Ex.D-2 as well as FIR Ex.P-4, considering the defence of the accused and the principles of law laid down regarding admissibility of the evidence of interested witnesses,

inconsistency in the testimonies of the witnesses & delay in examination of the eyewitnesses despite availability in the judgments ***Hari Obula Reddy vs. State of A.P.*** reported in ***AIR-1981 SC 82, Surajmal vs. the State (Delhi Administration)*** reported in ***1979 Criminal Law Journal (Part II) 1087, Arjun and others vs. State of M.P.*** reported in ***1995 J LJ Volume 44, Page No.446, Manzur vs. UP and Suleman vs. State of UP*** reported in ***AIR 1983 SC 259*** and ***Chanchal Kumari vs. Union Territory Chandigarh*** reported in ***AIR 1986 SC 752*** has held that the prosecution has failed to prove its case beyond all reasonable doubt against the accused/Mohd. Yunus and accordingly acquitted him of the charge under Section 302 of IPC. This Court on close scrutiny of the entire evidence available on record finds no illegality or perversity in the findings recorded by the trial Court calling for interference by this Court.

24. In the result, the appeal filed by the State being without substance is liable to be dismissed and is, accordingly, dismissed.

Sd/-
Prashant Kumar Mishra
Judge

Sd/-
Gautam Chourdiya
Judge