

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on 16-07-2020Judgment delivered on 07-10-2020CRA No. 446 of 2014

[Arising out of judgment of conviction and order of sentence dated 26-3-2014 passed by the Second Additional Sessions Judge, Surajpur, in ST No.351 of 2011]

1. Shivmangal Rajwade S/o Devnandan Rajwade Aged About 35 Years R/o Village Saraitikra, PS And Post Darima, Civil And Revenue Distt. Surguja C.G.

At Present R/o Village Latori, Nawapara, PS And Post Jainagar, Civil And Revenue Distt. Surajpur C.G.

---- Appellant

Versus

1. State Of Chhattisgarh Through PS Jainagar, Distt. Surajpur, Chhattisgarh

---- Respondent

For Appellant Mr. Manoj Paranjape, Advocate

For Respondent/State Mr. Gagan Tiwari, Dy. Govt. Advocate

Hon'ble Shri Prashant Kumar Mishra, J.

Hon'ble Shri Gautam Chourdiya, J.

By

Prashant Kumar Mishra, J.

1. Appellant would call in question the legality and validity of the impugned judgment dated 26-3-2014 delivered in ST No.351 of 2011 whereby the Second Additional Sessions Judge, Surajpur, has convicted the appellant for committing

offence under Sections 302 & 307 of the Indian Penal Code (for short 'the IPC') for committing murder of Sana (since deceased) and attempting on the life of injured Islamun Nisha @ Dhaneshwari (PW-1) at about 6.00 pm on 7-6-2011 and has sentenced him to undergo imprisonment for life & RI for 10 years respectively with fine amount and default stipulations.

2. Prosecution case, as reflecting from First Information Report (FIR) (Ex.P/2) and other material, is that the injured PW-1 Islamun Nisha @ Dhaneshwari lodged FIR (Ex.P/2) at 21.30 hours on 7-6-2011 informing the police that on 6-6-2011 she had gone to her sister PW-2 Kayaso's house at village Latori. PW-2 Kayaso's daughter Sana (deceased) and her husband Shivmangal Rajwade (appellant herein) were also residing at village Latori. The deceased was annoyed with her husband as he was not doing any work and was also suspecting her character. At about 3.00 pm in the afternoon of the date of incident the deceased and appellant had gone to their agricultural field for reaping the paddy crop. When they were returning at about 6.00 pm a fight broke out between them whereafter the deceased started fleeing to save herself, but the appellant caught hold of her and caused injuries over her neck by means of sickle. When the informant tried to save the deceased, the appellant also caused injuries over the head, hand & legs of the informant by means of sickle. When the informant started running away, the appellant again attacked over the deceased and caused injuries by sickle. Informant reached to village Lathori trijunction and narrated the incident to Loknath Rajwade & Shyamlal Yadav (both not examined).

3. On receiving the above information, the concerned Police reached the place of occurrence and Naksha Panchayatnama was prepared vide Ex.P/4. Plain soil & bloodstained soil was recovered from the place of occurrence vide Ex.P/5. The appellant was taken into custody and his memorandum statement was recorded vide Ex.P/6 consequent to which an iron sickle was recovered from his possession vide Ex.P/7.
4. The postmortem was conducted by PW-4 Dr. J.S. Saruta and submitted the postmortem report vide Ex.P/8 opining that cause of death is shock due to fracture of skull bone and extradural hemorrhage with excessive hemorrhage; mode of death is homicidal in nature. PW-4 Dr. J.S. Saruta also conducted MLC for the injuries sustained by injured PW-1 Islamun Nisha @ Dhaneshwari and submitted his report vide Ex.P/9. The same Doctor also examined the appellant and submitted his MLC report vide Ex.P/10. PW-4 Dr. J.S. Saruta also examined the sickle and opined that injuries sustained by the deceased can be caused by the seized sickle. His query report is Ex.P/11. The appellant was also sent for radiological examination and the MLC report of the X-ray conducted over the appellant was submitted by PW-4 Dr. J.S. Saruta vide Ex.P/12. Crime detail form was prepared vide Ex.P/13 and the bloodstained clothes of the deceased and the appellant were recovered vide Ex.P/14.
5. After recording diary statements and completing other necessary investigation, charge sheet was filed for offence under Sections 302 & 307 of the IPC. In course of trial the prosecution examined 7 witnesses to bring home the charges whereas the appellant after abjuring the guilt; pleaded

innocence; and false implication, examined one defence witness. Upon appreciation of evidence, the trial Court convicted & sentenced the appellant as mentioned above.

6. Shri Manoj Paranjape, learned counsel appearing for the appellant, would submit that there was no preparation for committing any offence and it was a sudden fight in which the appellant has also sustained injuries, which has not been explained by the prosecution, therefore, the appellant is entitled for acquittal as he was exercising right of self defence. In the alternative, Shri Paranjape would submit that the offence committed by the appellant would amount to culpable homicide not amounting to murder punishable under Section 304 Part II of the IPC, therefore, the appellant is entitled to be released by imposing the sentence which the appellant had already suffered.
7. Shri Gagan Tiwari, learned Dy. Govt. Advocate, appearing for the State, *per contra*, would submit that the appellant has not made any statement pleading right of self defence when he was examined under Section 313 of the Cr.P.C. and the case of the prosecution having rested on the statement of eyewitness it is not a case where the appellant would be entitled to acquittal merely because he has sustained some injuries. Shri Tiwari would also submit that having caused many injuries by a sharp edged weapon to the deceased as well as to the eyewitness, no case for converting the offence from Section 302 of the IPC to Section 304 Part I or Part II of the IPC is made out.
8. The oral evidence of the eyewitness PW-1 Islamun Nisha @ Dhaneshwari narrates that she along with the deceased and

appellant were cutting paddy crop in the evening of the date of incident and at this time the appellant caused injuries over the person of the deceased by means of sickle. When PW-1 Islamun Nisha @ Dhaneshwari intervened and tried to separate them the appellant also caused injuries over her head and hand. She has proved the merg intimation (Ex.P/1) and FIR (Ex.P/2). She has denied the suggestion that she and the deceased had assaulted the appellant by kicks & fist. Despite being cross-examined, this witness remained firm over her statement and would not make any dilution about the genesis of incident and as to how the appellant sustained injuries. This witness has not been suggested that the appellant was exercising his right of self defence.

9. PW-2 Kayaso Bai is the sister of PW-1 Islamun Nisha @ Dhaneshwari and mother of the deceased. This witness was informed about the incident by PW-1 Islamun Nisha @ Dhaneshwari immediately after the occurrence. PW-3 Mohar Lal has proved the dead body inquest (Ex.P/4); seizure memo (Ex.P/5); memorandum statement of appellant (Ex.P/6); and the seizure memo (Ex.P/7).
10. PW-4 Dr. J.S. Saruta has proved the postmortem report (Ex.P/8); MLC report of PW-1 Islamun Nisha @ Dhaneshwari (Ex.P/9); and the MLC report of the appellant (Ex.P/10). He has found the following injuries over the person of the deceased :
 - Rigor mortis present on both upper & lower limb.
 - Eye & mouth are closed and clotted blood present on the face, head, neck and both hands.

- Incised wound present over the occipital region in the size of 6x1x½ cm.
- Fracture of the occipital bone and extradural haemetoma present in the size of 7x3x2 cm.
- Incised wound present on the right side of the neck in the size of 4x2x1 cm.
- Incised wound on the left wrist joint in the size of 5x1x½ cm and fracture of ulna bone present.
- Incised wound present on the right hand in the size of 3x1x½ cm, right forearm in the size of 6x2x1 cm.
- Contusion present in the size of 5x3x3 cm. On cutting clotted blood present on the trachea and below sternum bone.

[all the above mentioned injuries are antemortem].

11. PW-4 Dr. J.S. Saruta also found incised wounds over the head parietal region; over right thumb; and over left middle finger of the injured PW-1 Islamun Nisha @ Dhaneshwari.
12. As per the MLC report of the appellant, PW-4 Dr. J.S. Saruta found pain with swelling over the left ankle joint; incised wound over the left middle and ring finger; and swelling over the hip joint. Movement restricted. Upon radiological examination of the appellant, PW-4 Dr. J.S. Saruta also submitted MLC X-ray report vide Ex.P/12 finding fracture of left ischium bone and left iliosacral joint displacement. Injury is grievous in nature.
13. From the postmortem report and the MLC report of the deceased and PW-1 Islamun Nisha @ Dhaneshwari, it is fully established that the deceased had sustained as many as four

incised wounds out of which two incised wounds were on occipital region and over right side of neck. She had also sustained fracture of occipital bone. Thus, the deceased sustained many injuries on vital part of the body caused by sharp edged weapon. The eyewitness has also sustained incised wounds caused by sharp edged weapon. The nature of injuries caused over the person of the deceased and injured eyewitness can be caused by sickle used by the appellant for causing the injuries. Thus, the medical evidence fully corroborates the statement of eyewitness PW-1 Islamun Nisha @ Dhaneshwari. The FIR (Ex.P/2) was lodged on the same day and the appellant has been named in the FIR, therefore, it is a case fully proved by the prosecution beyond all reasonable doubt and the appellant has rightly been held guilty of causing injuries to the deceased which resulted into her death.

14. We are now required to consider as to whether the appellant is entitled for acquittal on the ground of exercising the right of self defence of his person.
15. The appellant has not raised any defence of right of self defence in his statement under Section 313 of the Cr.P.C., yet it is the duty of the Court to examine the evidence if the appellant has exercised any such right of self defence, which emerges from the evidence available on record.
16. From the narration of incident mentioned in the FIR (Ex.P/2) or in the statement of eyewitness it does not appear that when the dispute started it was the deceased who either initiated the fight or provoked or attacked the appellant with sickle after which the appellant either snatched away the sickle or picked up any weapon to cause injuries to the deceased and thereafter to the injured eyewitness.

17. Merely because the appellant had sustained injuries it would not automatically become the case of exercise of right of self defence. For attracting exercise of such right there has to be admissible evidence on record which clearly suggests that it was the deceased or the eyewitness who was the aggressor having initiated the fight whereafter the accused caused the injuries. In absence of such evidence on record it is difficult to hold that the appellant was exercising right of self defence.
18. There is no general rule that in each and every case where the prosecution fails to explain the injuries on the person of the accused, the prosecution case has to be thrown out. Whenever the accused suffers some injuries the Court has to appreciate the evidence keeping in mind the possibility of a fight between both the parties in which any one of them can be aggressor. If the injuries sustained by the accused is not explained by the prosecution and at the same time there are other weaknesses in the prosecution case then such non-explanation would assume significance, but when there is no other infirmity or weakness in the prosecution case, the injuries on the person of the accused by itself would not make him entitled to be acquitted. Omission of the prosecution to explain the injuries on the person of the accused causes a reasonable doubt on the prosecution case and the same has to be kept in mind while assessing the quality of other evidence putforth by the prosecution during trial. It is this principle which has been reiterated by the Supreme Court in ***Bishna alias Bhiswadeb Mahato and Others v State of W.B.*** (2005) 12 SCC 657 (paras 50 to 64) and in ***Raj Pal and Another v State of Haryana*** (2007) 13 SCC 554 (paras 22 & 23), relied by the learned counsel for the appellant.

19. In ***Bishna alias Bhiswadeb Mahato*** (supra) reference has been made to an earlier judgment of the Supreme Court in ***Amar Malla and Others v State of Tripura*** (2002) 7 SCC 91 wherein it is observed thus in para 9 :

9.....It is well settled that merely because the prosecution has failed to explain injuries on the accused persons, *ipso facto* the same cannot be taken to be a ground for throwing out the prosecution case, especially when the same has been supported by eyewitnesses, including injured ones as well, and their evidence is corroborated by medical evidence as well as objective finding of the Investigating Officer.

20. Non-explanation by the prosecution in respect of the injuries sustained by the appellant may not *ipso facto* fail the prosecution case, but the same would be worth taken note of when we proceed to consider the appellant's submission that the case would fall under Section 304 Part I or Part II of the IPC and not under Section 302 of the IPC.
21. From the contents of the FIR (Ex.P/2) there appears some dispute between the deceased and her husband (appellant) about the work performed by the appellant and his suspicion over the character of his wife. The immediate trigger for the incident was deceased's comment to the appellant for not performing the work properly. Thus, it was a very trivial issue over which the fight began. The appellant has also sustained injuries, which suggests that in course of fight either the deceased or the eyewitness may also have assaulted the appellant. When the appellant repeated the assault on the deceased it may be because of the injuries caused to him in course of fight. Therefore, it is not cruel *per se* which might

be true otherwise if the appellant had not sustained any injuries, but had only caused injuries to the deceased. The deceased was the wife of the appellant, therefore, it is also not a case of strong previous enmity.

22. The incident seems to have occurred during a sudden fight in heat of passion. The weapon used is an agricultural tool carried by the parties to the agricultural field where the incident happened. The appellant did not carry the sickle only with the intent to commit murder of the deceased.
23. Thus, having considered all relevant factors and particularly the observation made by the Supreme Court in para 7 of the judgment rendered in *Lavghanbhai Devjibhai Vasava v State of Gujarat* (2018) 4 SCC 329 we are of the view that present is a case where the appellant can be extended the benefit of Exception 4 to Section 300 of the IPC and sentenced for committing the offence under Section 304 Part I of the IPC.
24. In so far as the offence Section 307 of the IPC is concerned, PW-1 Islamun Nisha @ Dhaneshwari sustained incised wound on parietal region; incised wound on right thumb; and incised wound on left middle finger. There is no material as to the period under which she remained under treatment. Therefore, considering all relevant aspects of the matter and evidence available in the record appellant's conviction under Section 307 of the IPC is maintained, however, the sentence on that count is reduced from RI for 10 years to RI for 5 years.
25. In the result, the appeal is allowed in part. Appellant's conviction under Section 302 of IPC is set aside and instead he is convicted under Section 304 Part I of the IPC. The conviction under Section 307 of the IPC is maintained. The appellant is sentenced to undergo RI for 10 years for

committing offence under Section 304 Part I of the IPC and to undergo RI for 5 years for committing offence under Section 307 of the IPC. Both the sentences shall run concurrently. Fine amount imposed by the learned trial Court on both the counts shall remain unaltered.

26. Accordingly, the appeal is allowed in part, in the above stated terms.

Sd/-

Sd/-

(Prashant Kumar Mishra)
Judge

(Gautam Chourdiya)
Judge

Gowri