

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1523 of 2016**

- Umashankar Patel S/o Janakram Patel Aged About 22 Years R/o Village Bhengari, Police Station Gharghoda, District Raigarh, Civil And Revenue District Raigarh, Chhattisgarh.

---- Appellant

Versus

- State Of Chhattisgarh Through Station House Officer, Police Station Gharghoda, District Raigarh, Chhattisgarh.

---- Respondent

For Appellant : Shri Arun Kumar Shukla, Advocate.
For Respondent/State : Ms. Madhu Nisha Singh, Panel Lawyer.

Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Gautam Chourdiya, JJ

Judgment On Board By Prashant Kumar Mishra, J

27/01/2020 :

1. The appellant would call in question the legality and validity of his conviction under Section 302 of the IPC and sentence of imprisonment of life with a fine of Rs.2,000/-, in default of payment of fine, additional RI of 5 months, imposed by the 1st Additional Sessions Judge, Raigarh in ST No.95/2014.
2. The prosecution case, in short, is that during the intervening night

of 12/13.2.2014, the appellant assaulted the deceased namely, Janakram by hands, fists and club, which was informed by him to Jeetram Gautiya at about 7 am in the morning whereafter the deceased was admitted in the hospital where he succumbed to the injuries on 15.2.2014. FIR (Ex.-P/19) registered at 18.15 hours on 13.2.2014 records that on the basis of information received through Rojnamcha Sanha No.7, dated 13.2.2014, the Head Constable proceeded for interrogation to the Community Health Centre (CHC), Ghardhoda, where he was informed by the deceased himself that appellant Umashankar (son of the deceased) dragged him out of the house at 12 in the mid night and abused him by using filthy language. He threatened to kill him and assaulted him over his right eye, left leg and chest by means of club.

3. During his treatment at CHC, Gharghoda, the deceased was treated by Dr. A.K. Minj (PW-7), who submitted his report (Ex.-P/8) finding injuries, (1) swelling and tenderness with blackish eye, (2) bleeding from nose, (3) contusion with pain and, (4) lacerated wound of size 2 x 2 x 0.5 cm on left leg at medial 1/3rd part. All injuries were caused by hard and blunt object. For first injury over right eye, he was referred to Ophthalmologist for expert opinion, and for 2nd, 3rd & 4th injury, it was opined that the

nature may be ascertained after X-ray. This very document records at the middle bottom that X-ray report did not find any abnormality (NAb).

4. After the deceased succumbed to the injuries at 10.40 am on 15.2.2014, the same was reported to the concerned Police vide Ex.-P/1 along with merg intimation lodged by the Ward Boy vide Ex.-P/2. The appellant was taken into custody and his memorandum statement was recorded vide Ex.-P/4, consequent to which wooden stick was recovered from his possession vide Ex.-P/5. In the postmortem report (Ex.-P/7), the autopsy surgeon Dr. V.K. Lakra (PW-6) opined that the deceased died on account of cardio respiratory arrest due to slow bleeding and clotting of blood internally. Time passed within 6-8 hours prior to postmortem. The nature of death, according to circumstantial evidence, homicidal death. The spot map was prepared vide Ex.-P/11 whereas spot Panchanama was prepared vide Ex.-P/12. The dead body inquest was prepared vide Ex.-P/15. There is no FSL report available in the record.
5. In course of trial, the prosecution examined 10 witnesses to bring home the charges. On the basis of evidence available on record, the appellant has been convicted as mentioned above.
6. Learned counsel for the appellant argued that the deceased died

accidental death and the appellant has not committed any crime. He would submit that the oral testimony of the witnesses is full of material contradictions and omissions and there is no proof that the deceased died homicidal death. On the other hand, learned State counsel would support the impugned judgment.

7. Raghav Chandra Vaishnav (PW-1) is the Ward Boy, who informed the police about the death of the injured. He is not a material witness. Ahilya Bai (PW-2) belongs to same family to which the deceased and the appellant belong. She speaks about the oral dying declaration made by the deceased informing that Umashankar has assaulted him. After giving information the deceased slept in the house of this witness and left for his own residence in the morning. Even during cross-examination, she remains firm that the deceased had informed her about the incident. She admits that the deceased sustained injuries over his right eye and left leg. She denies that the deceased sustained injuries due to fall in state of intoxication, however, she admits that the appellant and the deceased had cordial relations.
8. Mahesh Ram Patel (PW-3) admits his signatures over memorandum statement (Ex.-P/4) given by the appellant but he denies that the appellant has disclosed any information to the police. He also denies that any article was recovered from the

appellant, however, he admits his signatures on the seizure memo (Ex.-P/5).

9. Dilkumari (PW-4) is also witness to the oral dying declaration. She fully supports the prosecution. This witness appears to be belonging to the same family though having separate residence in the same Mohalla. Tanuja Patel (PW-5) also appears to be a witness of oral dying declaration but she is not supporting the prosecution.
10. Dr. Vijay Kumar Lakra (PW-6) has proved the postmortem report (Ex.-P/7). Dr. A.K. Minj (PW-7) has proved the injury report (Ex.-P/8) and X-ray report (Ex.-P/9). This witness admits that all the injuries sustained by the deceased were simple in nature. Referring to his query report, he would state that the injuries sustained by the deceased can be caused by hands and fists.
11. Nandram Patel (PW-8), is the Patwari. C.S. Jaiswal (PW-9) and Sushma Chelak (PW-10) are the IOs. Sushma Chelak (PW-10) states that head constable Vijay Gopal had obtained statement of the deceased. Since diary statement of the deceased is not available, therefore, it appears that the statement referred by this witness is information given by the deceased to the Head Constable based on which FIR was registered, because this fact is mentioned in the FIR that it was deceased who informed the

Head Constable about the incident.

12. As regards the fact that the deceased having died after lodging FIR, we are required to dwell on the legal character of the document i.e. FIR as to whether the same is admissible in evidence as dying declaration. In this connection, it is necessary to refer to the judgment rendered by the Supreme Court in the matter of **Dharam Pal & Ors. Vs. State of UP** {AIR 2008 SUPREME COURT 920}, wherein the Supreme Court has observed thus in Para-10:-

“10.....

 It cannot be left out of sight that Raghu also said that the deceased dictated the FIR to the police. In any view of the matter, the report of occurrence was dictated by the deceased himself and the same was read over to him after which he had put his thumb impression on the same. This report is admissible under Section 32 of the Evidence Act as a dying declaration.....

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13. Similarly, in the matter of **Ismail Vs. State of Karnataka** {2000 CRI.L.J. 1994}, the Division Bench of the Karnataka High Court has observed in para-4 as under:-

“4.....

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It is true that as indicated by us earlier the statement recorded by PW.14 has virtually changed complexion from being a complaint or a F.I.R. to a dying declaration but in our considered view, there are no technical compartments which prescribe that a statement or a complaint cannot be treated as a dying declaration if it satisfies all the ingredients. It is true that this is very unusual case but after having carefully considered the law on the point, we are of the considered view that Ex.P.23 has rightly been treated as a dying declaration.”

14. The legal position is therefore well settled that the FIR lodged by the deceased would attain the character and legal status of dying declaration, if the victim dies before his/her examination in the Court.
15. The evidence available in this case, particularly, oral dying declaration made by the deceased to Ahilya Bai (PW-2) and Dilkumari (PW-4) coupled with FIR recorded on his information which is in the nature of dying declaration, it is fully proved that the deceased was assaulted by the appellant and he died in course of treatment on account of said injuries.
16. Although the deceased died out of the injuries sustained by him in a quarrel and Marpeet with his son (appellant Umashanker), but the question to be determined is whether the appellant had any intention or knowledge to commit his murder. This question

would be necessary for determining whether the accused has rightly been held guilty of committing offence under Section 302 of the IPC or his act would fall under category of culpable homicide not amounting to murder punishable under Section 304 Part-I or Part-II of the IPC.

17. When we appreciate the evidence, it seems, as per the evidence of close relative i.e. Ahilya Bai (PW-2), the deceased and the appellant had cordial relations. There is no material in the record pointing out the reasons as to why quarrel took place during the intervening night of 12th and 13th February, 2014. The appellant was not armed although club has been recovered from him, but there is no FSL report nor the deceased has sustained any such serious external injury resulting in his instant death or subsequent death only due to said injury. As per the postmortem report, the deceased died on account of cardio respiratory arrest due to slow bleeding and clotting of blood internally. The autopsy surgeon Dr. V.K. Lakra (PW-6) is not sure about the homicidal death. Instead of basing his final opinion on the basis of finding of postmortem report, this witness says that on the basis of circumstantial evidence the deceased has died homicidal death. The medical expert is required to state about the nature of death on the basis of his own finding and not on the basis of

circumstantial evidence. In the MLC report (Ex.-P/8), the deceased was not found to have sustained any serious injury. The nature of injuries was left to be ascertained after X-ray report, which was submitted vide Ex.-P/9 without finding any abnormality. Thus the deceased did not sustain any grievous injury.

18. In view of the above discussed evidence, it seems that the appellant has committed the act of assault over his father due to sudden emotional outburst, as there is no evidence in respect of motive. The appellant had no intention to commit murder though he had knowledge that if the assault is made on 70 years old person over his chest, it may endanger his life. Thus act would fall under the fourth exception to Section 300 of the IPC, making the offence punishable under Section 304 Part-II of the IPC.
19. Accordingly, the appellant is held guilty of committing offence under Section 304 Part-II of the IPC. The appellant being in jail since 16.2.2014, he has already suffered more than 6 years of imprisonment. Therefore, the jail sentence already suffered by him is found to be adequate enough for the offence committed by him.
20. In the result, the Appeal is allowed in part. Conviction and sentence imposed on the appellant under Section 302 of the IPC

are set aside and he is acquitted of the said charge. Instead thereof, he is convicted under Section 304 Part-II of the IPC and sentenced to the period already undergone by him. The appellant be released forthwith unless required to be detained in any other case, on his furnishing a personal bond for a sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the trial Court. The bail bond shall remain in operation for a period of 6 months as required under Section 437-A of the CrPC. The appellant shall appear before the higher Court as and when directed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge

Barve