

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1805 of 2019**

- Birbal Netam S/o Ganesh Netam, aged about 25 years, R/o Village Koraba Sargipara, P.S. Devbhag, District Raipur, C.G.

----Appellant**Versus**

- State of Chhattisgarh, Through P.S. Dhamtari, District Dhamtari, C.G.

---- Respondent

For Appellant

Shri Rakesh Pandey, Advocate.

For Respondent/State

Shri Neeraj Mehta, Panel Lawyer

Hon'ble Shri Justice Prashant Kumar Mishra,**Hon'ble Shri Justice Gautam Chourdiya****Judgment on Board by Justice Gautam Chourdiya****10/02/2020**

1. This appeal has been filed by the appellant Birbal Netam challenging the validity, illegality and propriety of the judgment dated 03.08.2010 passed by the Additional Sessions Judge (FTC), Dhamtari, District Dhamtari(CG) in ST No.28/2010 whereby and whereunder the appellant stands convicted and sentenced as under:-

Conviction	Sentence
Under Section 147 of IPC	R.I. for two years
Under Section 148 of IPC	R.I. for three years
Under Section 460 of IPC	R.I. for ten years and fine of Rs.500/-
Under Section 302 read with Section 149 of IPC	Life imprisonment and fine of Rs.500/-
Under Section 427 read with	R.I. for two years.

Section 149 of IPC	In default of payment of fine of Rs.500/-, to further undergo R.I. for 1 month. All the sentences were directed to run concurrently.
--------------------	--

2. As per prosecution, "M" was juvenile, therefore, his trial was separated from all the other accused persons namely- Kheduram Dhruw, Ramesh @ Montu Dhruw, Jethu @ Jogender Dhruw, Vishnu Yadav, Gokul Yadav, Vijay Kumar Dhruw, Santosh Sahu, Sanjay Sahu and Birbal Netam.
3. Accused Santosh Sahu was also acquitted by the trial court in absence of any evidence against him.
4. In this case accused- Kheduram Dhruw, Ramesh @ Montu Dhruw and Vijay Kumar Dhruw filed Cr. Appeal No. 596/2010, accused- Jethu alias Jogendar Dhruw filed Cr. Appeal No.600/2010 and accused- Vishnu Yadav, Gokul Yadav and Sanjay filed Cr.Appeal No.703/2010. Their appeals were partly allowed by the Division Bench this of Court on 13.5.2014 and conviction of accused/appellant Kheduram Dhruw under Section 302/149 IPC was altered into Section 304 Part I IPC and he was sentenced to undergo R.I. for 8 years and fine of Rs.500/-. His conviction and sentence under Sections 147, 148 of the IPC was maintained; and his conviction under Section 460 IPC was also maintained but his sentence was reduced to R.I. for 8 years and fine of Rs.500/-. Conviction of accused/appellants Ramesh alias Montu, Vijay Kumar, Jethu alias Joginder, Vishnu Yadav, Gokul Yadav and

Sanjay under Section 302/149 IPC was altered into Section 336 IPC and they were sentenced to undergo R.I. for three months. Further their conviction and sentences under Sections 148 and 460 IPC were set aside. Their conviction under Sections 147 and 427/149 IPC were maintained and instead of R.I. for 2 years, they were sentenced to undergo R.I. for six months for each offence.

5. Brief facts of the case are that on 31.01.2010, some dispute had taken place between Kheduram Dhruw and Shrawan Kumar(since deceased) on the ground of giving side to the vehicle. Present appellant Birbal Netam was working as Khalasi with Kheduram Dhruw and Kheduram Dhruw along with Birbal Netam and other accused persons namely-Ramesh @ Montu Dhruw, Jethu @ Jogender Dhruw, Vishnu Yadav, Gokul Yadav, Vijay Kumar Dhruw, Santosh Sahu, Sanjay Sahu and juvenile accused "M" had gone to the office of Shrawan Kumar at about 9.00 pm, forming an unlawful assembly armed with deadly weapons having common object to commit murder of Shrawan Kumar after committing house trespass and to damage the property, and in furtherance of common object assaulted him with iron rod, stick, iron pipe, brick and stone. They also caused mischief to Khiyaram by destroying the property motorcycles and other articles. Thereafter, Shrawan Kumar died on the way to Hospital due to the injuries sustained by him. Khiyaram Siloliya(PW1) lodged FIR Ex. P1 to the Police Station. Merg intimation was recorded vide Ex.P2 in Police Station City Kotwali, Dhamtari. After summoning the witnesses vide Ex.P9 inquest was prepared over the dead body of the deceased.

Spot map was prepared vide Ex.P4. During investigation pieces of bricks and stones were seized from the place of occurrence by the Police vide Ex.P5. Blood stains and cement pieces were seized vide Ex.P6. Panchanama of the damaged vehicle was prepared vide Ex.P7. Test Identification Parade was conducted vide Ex.P8 and accused Kheduram Dhurw, Ramesh @ Montu Dhruw, Jethu @ Jogender Dhruw, Vishnu Yadav, Gokul Yadav, Vijay Kumar Dhruw, Santosh Sahu, Sanjay Sahu, Birbal Netam and juvenile "M" were identified. Disclosure statement of Kheduram was recorded vide Ex.P12 and iron pipe was recovered at his instance vide Ex.P13. Ramesh @ Montu made disclosure of stick vide Ex.P14 and same was recovered at his instance vide Ex.P15. Jethu made disclosure statement of wooden plank vide Ex.P16 and same was recovered at his instance vide Ex.P17. Dead body was sent for autopsy to District Hospital, Dhamtari vide Ex.P24 where Dr. Abha Hisikar(PW21) conducted autopsy vide Ex.P45 and she found following injuries :

- (i). Lacerated wound just below the right ear in size 1&1/2 " x 1/2 x bone deep;
- (ii). Right parietal bone of skull with blood clot beneath the scalp with subdural haematoma with intracellular bleeding.

She opined that cause of death was head injury due to fracture of right parietal bone of skull with subdural haematoma and intracellular bleeding leading to shock and coma. She further opined that the death of the deceased could be homicidal or accidental.

6. After recording statements of the witnesses, charge sheet was filed against appellant Birbal Netam and other accused persons under Sections 147, 148, 460, 302/149, 427/149 of the IPC.
7. The learned trial Court framed charges against all the accused persons under Sections 147, 148, 460, 302/149, 427/149 of the IPC. The appellant abjured guilt and prayed for trial. Prosecution examined as many as 22 witnesses. Accused/appellant was also examined. His statement was recorded under Section 313 Cr.P.C. and he took defence that he has been falsely implicated because he is working under another accused and he was not present at the time of offence. He examined defence witnesses Homan Kumar Dhruw(DW1), Kisan Satnami(DW2), Premlal Sahu(DW3) and Govardhan Yadav (DW4).
8. Now, this appeal is considered only on behalf of appellant Birbal Netam, which has been filed in the year 2019.
9. Learned counsel for the appellant submits that case of the appellant Birbal Netam is similar to the case of accused Ramesh @ Montu Dhruw, Vijay Kumar Dhruw, Jethu alias Jogendar Dhruw, Vishnu Yadav, Gokul Yadav and Sanjay, therefore, he is also not liable for the offences under Section 302/149 IPC, Section 304 Part I or Sections 148, 460 of the IPC. He further submits that the appellant has not made any assault on the deceased nor he has destroyed any property and there is no specific allegation against him even then the learned trial court has wrongly appreciated the evidence and convicted and sentenced appellant under the aforementioned Sections, therefore, he is entitled for acquittal of the above charges. He submits that as per

autopsy report vide Ex.P45 and evidence of Dr. Abha Hisikar (PW21), this is a case of single blow found over the head of the deceased. As per evidence of Jasraj Siloliya(PW4), Punaram(PW17), the aforesaid injury has been caused by juvenile offender "M" and iron rod was seized from him vide Ex.P18. Therefore, conviction of the appellant is not sustainable.

10. On the other hand, learned Panel Lawyer appearing for the State opposed the arguments advanced on behalf of the appellant and submits that evidence of Khiyaram Siloliya (PW1), Rajiv Katre(PW2), Bhagirath Siloliya(PW3), Jasraj Siloliya(PW4), Ghanshyam Bhagat(PW5) and Punaram Sen(PW17) is sufficient to hold the conviction of the appellant and the learned Court below has rightly convicted and sentenced the appellant as aforementioned.
11. We have heard learned counsel for the parties, perused the judgment impugned and the evidence on record.
12. In the present case, homicidal death as a result of fatal injury found over the head of deceased Shrawan Kumar has not been substantially disputed on behalf of the appellant. On the other hand, it is also established by the evidence of Khiyaram Siloliya(PW1), Rajiv Katre (PW2), Dr. Abha Hisikar(PW21) and autopsy report Ex.P45 that death of the deceased Shrawan Kumar was homicidal in nature.
13. As regards complicity of the accused/appellant in crime in question, conviction is based on the evidence of Khiyaram Siloliya (PW1), Rajiv Katre(PW2), Bhagirath Siloliya(PW3), Jasraj Siloliya(PW4),

Ghanshyam Bhagat(PW5) and Punaram Sen(PW17), who have shown themselves as eye witnesses. As per their evidence, the appellant along with other accused persons came to the office of the deceased Shrawan Kumar and assaulted him. The deceased Shrawan Kumar received serious injuries and fell down. They identified the accused persons in the T.I.P. but they have not specifically deposed the act attributed to each of the accused, though Jasraj Siloliya(PW4) has deposed in para 8 of his cross-examination that Kheduram and "M"(Juvenile offender) assaulted the deceased Shrawan Kumar. Accused Kheduram was holding pipe and "M" was holding iron rod. Another witness Punaram(PW17) has deposed in para 2 of his evidence that "M" has caused injury by iron rod over the head of Shrawan Kumar(deceased). As per evidence of this witness, the accused persons were holding iron rod, iron pipe and stick but as per evidence of Jasraj Siloliya(PW4), only two persons have assaulted the deceased Shrawan Kumar. As per evidence of Punaram(PW17) only one person "M" has assaulted the deceased. As per evidence of these witnesses, all the accused who reached the spot were not residents of same vicinity. They reached the spot on account of previous dispute with accused-Kheduram with the deceased at 9.00 p.m. i.e. night time, which by itself is sufficient for drawing an inference that there was gathering with a view to take revenge which shows their intention.

14. Formation of unlawful assembly, its common object and causing homicidal death amounting to murder in furtherance of common object

of that assembly, constitution of unlawful assembly are question of fact and the prosecution is required to prove constitution of unlawful assembly and its common object. Unlawful assembly may be constituted at any moment and person may join unlawful assembly at any time, even at the time of causing injury, but the prosecution is required to prove the aforesaid fact by adducing cogent and reliable evidence that the persons have formed unlawful assembly or joined unlawful assembly having its common object for commission of the aforesaid offence. Mere presence as a stranger or of passerby who gathered on the spot to see quarrel or the incident would not make the person liable for formation of unlawful assembly or liable for the commission of offence. Conduct of each member of unlawful assembly before and at the time of attack is relevant consideration. Object of unlawful assembly is a question of fact which has to be determined keeping in view the nature of assembly, arms carried by members, and behaviour of members at or near scene of incident. Mere presence on the spot will not make the persons liable for commission of the offence with aid of Section 149 of the Indian Penal Code.

15. As regards formation of unlawful assembly armed with deadly weapons, homicidal death and motive, undisputedly, formation of unlawful assembly, may be on spot, can be developed at the time of commission of incident and no straight-jacket formula would be possible to ascertain that when the assembly has been formed and

when the assembly has become unlawful, it can be inferred on the basis of evidence and surrounding and attending circumstances.

16. Reaching of the accused to spot at 9.00 p.m. jointly is sufficient to establish the fact that all the accused had formed unlawful assembly. Evidence of Jasraj Siloliya(PW4) and Punaram Sen(PW17) further revealed that accused Kheduram and "M" assaulted the deceased by rod and pipe although Doctor has not noticed the injury but in case of multiple assault on same part, the finding of multiple injuries may not be possible. In case of incident committed by number of persons even then it would not be possible by witnesses to witness each and every act of all assailants but only on the aforesaid ground, their evidence cannot be discarded.
17. In the light of injuries found on the body of the deceased, it would be difficult to hold that all the appellants participated in commission of homicidal death of deceased. As per para 35 of the evidence of Khiyaram Siloliya (PW1), some appellants were pelting stones from outside of the office. Aforesaid evidence reveals that some appellants entered into the office of the deceased and others were pelting stones from outside of office. Evidence of Jasraj Siloliya(PW4) and Punaram Sen(PW17) is sufficient to prove the conduct that Kheduram and Juvenile offender "M" entered into the office of the deceased, they were holding rod and iron pipe and have assaulted the deceased but other appellants have not caused injury to the deceased, though they were pelting stones and thereby causing danger to his life. These evidence shows that although all appellants gathered and formed

unlawful assembly, but initially, object of the unlawful assembly was to teach lesson to the deceased and not causing homicidal death, but during the course of incident, in furtherance of common object of the assembly, accused Kheduram and juvenile offender "M" disassociated themselves and caused fatal injury to the deceased which was not in association with the aforesaid accused. This evidence is sufficient for drawing inference that accused Kheduram and other juvenile offender "M" had committed homicidal death of deceased by rod and pipe that too in the office of the deceased. Other accused were not having knowledge of such common object. Aforesaid facts clearly revealed that accused persons other than Kheduram were not associated in commission of homicidal death, they have pelted stones endangering the life of the deceased. The act attributed to the accused other than Kheduram does not fall within the ambit of Section 302 read with Section 149, 460 & 148 of the IPC, but it falls within the ambit of the offence punishable under Section 336 of the IPC. All accused have caused damage to the property.

18. As regards the question of motive, in case of direct evidence motive loses its importance, even otherwise, motive only aids in criminality and can be inferred on the basis of nature of injury, kind of weapon used, part of the body affected and other similar circumstances.
19. In the present case, as per evidence, accused Kheduram along with others went to the office of the deceased with a view to teach lesson to him, but at the time of incident he along with juvenile offender "M" entered into the office of the deceased and in disassociation with the

other accused committed homicidal death of the deceased by using rod and pipe which shows that they have exceeded their motive. Accused Kheduram was annoyed and on the spur of moment, he has caused injury, but while causing injury by iron rod/iron pipe, he was knowing the result which shows that his act squarely falls within the ambit of Section 304 Part I of the IPC, but does not fall within the ambit of Section 302 IPC.

20. Perusal of record would show that no specific role has been attributed to the present appellant on the basis of which his case can be considered on different footing. He was working as Khalasi with accused Kheduram. The incident took place while Shrawan Kumar driving the Pickup van was returning to home after finishing the work of catering carrying all the articles in the Pickup van, on the way the truck was coming from front side near Sihawa road in front of Classic Bar, which was driven by Kheduram, a quarrel took place between Shrawan Kumar and Kheduram on account of giving side to the vehicle and Birbal Netam who was sitting as Khalasi in the truck, has no role. His presence in the vehicle was but natural. Thereafter, Kheduram along with Juvenile "M" and other accused persons went to the office of Shrawan Kumar in the night at 9.00 pm and assaulted him. PW4- Jasraj Siloliya has specifically mentioned in his statement in para 8 that only juvenile "M" and accused Kheduram assaulted Shrawan Kumar and Shrawan Kumar became unconscious. Looking to the P.M. report and the injuries found over the body of the deceased there is no evidence that any other person has assaulted the

deceased, therefore, case of appellant Birbal Netam is similar to the case of another accused persons except Kheduram.

21. Consequently, we are of the considered view that case of the appellant Birbal Netam is similar to the case of other accused persons except accused Kheduram, whose appeals have already been partly allowed by the Division Bench of this Court and their conviction and sentences have been altered and reduced.
22. Accordingly, the appeal is partly allowed and conviction of the appellant under Section 302/149 IPC is altered into Section 336 IPC and he is sentenced to R.I. for three months. Conviction and sentence of the apellant under Sections 148 and 460 IPC are set aside. However, his conviction under Sections 147, 427 read with Section 149 IPC is hereby maintained and his sentence is reduced to R.I. for 6 months.
23. Vide order dated 3.12.2019, it is apparent that the appellant is in jail since 1.2.2010. The appellant is directed to be released forthwith if not required to be detained in connection with any other offence on his furnishing a personal bond for a sum of Rs.25,000/- with surety of the like sum to the satisfaction of the trial court for his appearance before the higher forum as and when required in view of the provisions of Section 437-A of the Cr.P.C. The bail bonds shall remain in operation for period of 6 months from today.

Sd/
(Prashant Kumar Mishra)
Judge

Sd/
(Gautam Chourdiya)
Judge

sunita