

HIGH COURT OF CHHATTISGARH AT BILASPUR**Criminal Appeal No. 571 of 2014**

Aagarsai S/o Shri Bholaram, Aged about 52 years,
R/o Village Madneshwarpur, Police Station
Ramanujnagar, Distt. Surajpur, Civil and Revenue
Distt. Surajpur, Chhattisgarh.

---Appellant

Versus

State of Chhattisgarh, through Station House
Officer, Police Station Ramanujnagar, Distt.
Surajpur, Chhattisgarh.

---Respondent

For Appellant :- Mr. Shakti Raj Sinha, Advocate
For State :- Mr. Animesh Tiwari, Dy. A.G.

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Arvind Singh Chandel
Judgment on Board

21/10/2021

1. This criminal appeal is directed against the
impugned judgment of conviction and order of
sentence dated 20/02/2014 passed by learned
Second Additional Sessions Judge, Surajpur in
Sessions Trial No. 532/2011 whereby the
appellant/accused has been convicted for offence
under Section 302 of the IPC and he has been

sentenced to life imprisonment and fine of Rs. 500/-, in default of payment of fine amount, further imprisonment for one month.

2. The case of the prosecution, in brief, is that on 07/10/2011 at about 8:00 A.M., Tilaso bai, who is the wife of the complainant Bhaiyalal, went towards her field for cutting pulses when the present appellant/accused, who was also going towards the field for grazing cattle, assaulted Tilaso bai with the help of a bamboo stick due to which she fell to the ground and on account of sustaining injury, she became unconscious. The said incident was informed by P.W. - 2 Sunil Bargah to P.W. - 1 Bhaiyalal, husband of Tilaso bai, who immediately took Tilaso bai to Ramanujnagar Hospital from where she was further referred to Ambikapur Hospital but due to severe injury on the back of her neck, she succumbed to death on the way.

3. On the same day, i.e. 07/10/2011, at the instance of Bhaiya lal (P.W. -1), husband of the deceased, merger intimation (Ex. P/1) was registered and First Information Report (Ex. P/2) was lodged at Police Station Ramanujnagar, Distt. Surajpur and offence under Section 302 of the IPC was

registered against the present appellant/accused Aagarsai and thereafter, the wheels of investigation started running. Inquest report (Ex. P/4) was prepared in the presence of four witnesses and pursuant to the memorandum of the appellant/accused (Ex. P/6), the bamboo stick was recovered from him vide Ex. P/7 in the presence of the witnesses. The dead body of the deceased was sent for postmortem and as per the postmortem report (Ex. P/13), the cause of death is shown to be shock due to internal hemorrhage and the nature of death is said to be homicidal. After due investigation, charge sheet was filed against the appellant/accused by the jurisdictional police for offence under Section 302 of IPC. The appellant/accused abjured guilt and entered into defence.

4. In order to bring home the offence, the prosecution examined 11 witnesses and exhibited 14 documents. Statement of the appellant/accused was recorded under Section 313 of CrPC wherein he denied guilt, however, he examined none in his defence.

5. Learned trial Court, after appreciating the oral and documentary evidence on record, convicted the

appellant for offence under Section 302 of the IPC and awarded sentence as mentioned hereinabove against which this appeal has been preferred by the appellant/accused questioning the impugned judgment of conviction and order of sentence.

6. Mr. Shakti Raj Sinha, learned counsel for the appellant, would submit that the trial Court has committed illegality in holding P.W.- 2 Sunil to be an eyewitness as though he is said to have informed about the incident to P.W.- 1 Bhaiyalal, but he did not inform about the same to any other person except for making statement before the Police for the first time under Section 161 of CrPC, which is quite unnatural and therefore, his statement does not inspire confidence. He cannot be held to be an eyewitness and the conviction of the appellant could not have been recorded upon the testimony of P.W.- 2 Sunil. Alternatively, he would submit that from the statement of P.W.- 2 Sunil, it is quite apparent that the appellant assaulted the deceased Tilasobai in the back portion of her body (non-vital part) by which it can be said that the appellant assaulted the deceased without any intention of

causing death, therefore, this case would be attracted under Section 304 Part II of the IPC and since the appellant is already in jail from 08/10/2011 i.e. for about ten years, taking the period already undergone, his conviction is liable to be altered under Part II of Section 304 IPC.

7. Mr. Animesh Tiwari, learned Deputy Advocate General for the respondent/State, would firstly submit that P.W. -2 Sunil is a natural eyewitness and he cannot be branded for making false statement before the Court as having seen the incident of assault himself, out of fear, he decided not to inform about the said incident to any other person except for Bhaiya lal (P.W. -1), husband of deceased and made correct statement before the Police for the first time under Section 161 of CrPC. Secondly, he would submit that since there was previous enmity between the two brothers namely Bhaiya lal and Aagarsai, the appellant Aagarsai assaulted Tilaso bai, wife of his brother Bhaiya lal, therefore, it cannot be held that there was no intention of causing death. As such, the instant case would not fall within Part II of Section 304 of IPC and this appeal deserves to be dismissed accordingly.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
9. The first submission made by learned counsel for the appellant is that P.W.-2 Sunil cannot be held to be an eyewitness as he did not inform about the incident to any other person except for Bhaiya Lal, husband of the deceased, who registered merged intimation (Ex. P/1) and thereafter, lodged the First Information Report (Ex. P/2) against the appellant and Sunil (P.W.-2) made his statement before the Police for the first time under Section 161 of CrPC naming the accused, therefore, he is not a natural witness.
10. P.W.-2 Sunil was subjected to cross-examination wherein he has clearly stated in paragraph 2 that he informed about the incident to P.W. -1 Bhaiyalal and on account of fear, he did not inform about the name of the accused who assaulted Tilaso bai and made his statement before the Police for the first time. The said conduct and behaviour on the part of P.W.-2 Sunil is quite natural considering that the person

having witnessed such incident of assault and having reported about the same to the near relatives of the person who has suffered assault would not naturally inform about the name of the accused on account of fear. The fact remains that P.W.-2 Sunil recorded his statement before the Police for the first time under Section 161 of CrPC on the date of the incident itself i.e. on 07/10/2011 and promptly made statement to the police for which he was also subjected to cross-examination, but he maintained his statement, therefore, it cannot be held that merely because P.W.-2 Sunil did not inform about the name of the accused, he cannot be held to be an eyewitness. Accordingly, the said submission made by learned counsel for the appellant is hereby rejected.

11. Now coming to the next submission made by learned counsel for the appellant that the appellant/accused did not assault the deceased with the intention of causing death, therefore, this case is covered by Section 304 Part II of IPC.

12. From a careful perusal of the statement of Dr. D.K. Vishwakarma (P.W.-11), it is quite vivid that the deceased suffered injury in the back of

her neck and the back portion of her body and pursuant to the memorandum statement (Ex. P/6), seizure of bamboo stick has been made from the appellant/accused and the Doctor (P.W.-11) has clearly opined in the postmortem report (Ex. P/9) that the injury suffered by the deceased has been caused by bamboo stick which has been recovered from the appellant, as such, it is fully established that the death of the deceased was homicidal in nature. Even otherwise, it has not been seriously disputed by learned counsel for the appellant that the death of the deceased is not homicidal in nature.

13. Now coming to the question as to whether Section 304 Part II of the IPC is attracted in the instant case. It is well settled law that to make out an offence punishable under Section 304 Part II of the IPC, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew that such act of his is likely to cause death. (See: **State v. Sanjeev Nanda**¹)

14. In the instant case, it is quite vivid that the prosecution has fully proved the death of Tilasobai and it is quite apparent and

¹ (2012) 8 SCC 450

established that the appellant/accused has caused the death of Tilaso Bai as he assaulted her with the help of a bamboo stick due to which she suffered injury on the back of her neck and while taking her to the hospital, she succumbed to death which has also been proved by Dr. D.K. Vishwakarma (P.W.-11) and which the appellant/accused also knew that his act is likely to cause death but the question is whether the assault was made without any intention of causing death.

15. A careful perusal of the statement of Sunil (P.W.-2) would show that the injury was caused by bamboo stick which has been recovered from the appellant. The statement of Dr. D.K. Vishwakarma (P.W.-11) clearly shows that the bamboo stick which has been recovered from the appellant/accused is 193 cms long and 5 cms wide and it weighs about 300 gms and the injury was caused in the back portion of the body of the deceased. He has also stated that the deceased sustained two external injuries and one internal injury wherein her 5th and 6th cervical vertebra was fractured and the cause of death is shock due to severe injury in her neck.

16. Thus, in view of the fact that a bamboo stick was used by the appellant/accused for assaulting the deceased and the injury was caused in the back of her body (non-vital part), we are of the opinion that the appellant/accused did not have any intention of causing death to the deceased. Therefore, the act committed by the appellant/accused falls under Section 304 Part II of the IPC and accordingly, we alter the conviction of the appellant for offence under Section 304 Part II instead of offence under Section 302 of IPC. Since the appellant/accused has remained in jail from 08/10/2011, we hereby award that the period of sentence already undergone by the appellant/accused will be sufficient and he be released from jail forthwith, if not required for any other case.

17. Accordingly, this criminal appeal is allowed to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Arvind Singh Chandel)
Judge