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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1556 of 2015

{Arising out of judgment dated 29-9-2015 in Sessions Trial No.338/2013 of the 3rd Additional Sessions Judge, Ambikapur}

Judgment reserved on: 12-10-2022

Judgment delivered on: 2-11-2022

Tihar Say @ Guddu, S/o Kalapnath, aged about 35 years, R/o Village Hansdand, Thana Lakhanpur, Distt. Sarguja (C.G.)

(In Jail)
---- Appellant

Versus

State of Chhattisgarh, Through Police Station Lakhanpur, Distt. Sarguja (C.G.)

---- Respondent

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For Appellant: Mr. Samir Singh, Advocate.
For Respondent/State: Mr. Animesh Tiwari, Deputy Advocate General and Mr. Sudeep Verma, Deputy Govt. Advocate.
*Amicus Curiae*: Ms. Aditi Singhvi, Advocate.

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**Hon'ble Shri Sanjay K. Agrawal and**
**Hon'ble Shri Deepak Kumar Tiwari, JJ.**

C.A.V. Judgment

**Sanjay K. Agrawal, J.**

1. This criminal appeal under Section 374(2) of the CrPC preferred by the appellant is directed against the impugned judgment dated 29-9-2015, by which the appellant has been convicted under Sections 302 & 307 of the IPC and sentenced to undergo

imprisonment for life & pay a fine of ₹ 500/-, in default of payment of fine to further undergo simple imprisonment for one year and to undergo rigorous imprisonment for five years & pay a fine of ₹ 500/-, in default of payment of fine to further undergo simple imprisonment for one month, respectively.

2. Case of the prosecution, in brief, is that on 22-8-2013, at about 10-11 p.m., at Village Hansdand, Khutenpara, under Police Station Lakhanpur, District Surguja, the appellant entered into the house of Budhram (since deceased) and firstly assaulted Jhunni Bai, wife of Budhram, by iron axe by which she suffered injuries which were sufficient to cause death and thereafter, caused the murder of Budhram and thereby committed the offence. Further case of the prosecution, in brief, is that on the fateful day, the deceased and his wife were lying in front of their house as their two sons had not returned home from work and therefore they did not close their doors and were waiting for them to come and meanwhile, at 10 O' clock in the night, the appellant came by pushing the door and asked for liquor / tobacco from Jhunni Bai (PW-2) to which she said that she did not have the same then the appellant chased her and assaulted her in the courtyard by which she became unconscious and thereafter, the appellant came back and assaulted her husband Budhram on his head, neck and back portion of the body by which he suffered injuries and he was hospitalized where

he died on 30-8-2013. It is also the case of the prosecution that on hearing the cries of Budhram and his wife Jhunni Bai, Patango (PW-3) reached to the spot, as she is the neighbour, and on bearing asked, Budhram informed her that Tihar Sai has assaulted him and his wife, which she informed to Uddesh Ram (PW-1) and then Uddesh Ram (PW-1) reached to the spot and thereafter, on the report of Uddesh Ram (PW-1), morgue was registered vide Ex.P-6 on 30-8-2013. Injured Jhunni Bai (PW-2) was sent to Community Health Centre, Lakhanpur where she was medically examined vide Ex.P-12, which has been proved by Dr. Om Prakash Prasad (PW-5). Naksha Panchayatnama was prepared vide Ex.P-16. Dead body of deceased Budhram was sent for postmortem examination and postmortem was conducted by Dr. Binod Kumar. On the memorandum statement of the appellant vide Ex.P-8, bloodstained iron axe was seized vide Ex.P-10 and other articles were also seized. Statements of the witnesses were recorded under Section 161 of the CrPC..

3. Upon due investigation, charge-sheet was filed against the appellant for offence under Sections 302 & 307 of the IPC before the jurisdictional criminal court which was committed to the Court of Sessions for hearing and disposal in accordance with law.

4. The trial Court has framed charges under Sections 302 & 307 of the IPC against the appellant and proceeded on trial. The

accused / appellant abjured guilt and entered into trial. The prosecution in order to bring home the offence examined as many as 10 witnesses and exhibited 19 documents Exhibits P-1 to P-19. One document Exhibit D-1 i.e. the statement of injured Jhunni Bai recorded under Section 161 of the CrPC has been exhibited on behalf of the defence. Statement of the appellant was recorded under Section 313 of the CrPC in which he abjured guilt and pleaded innocence.

5. Dr. Binod Kumar who conducted postmortem could not be examined as he was present before the Court on 16-2-2015, but on that day, the Presiding Officer was on leave and thereafter, on 17-8-2015, counsel for the accused made no objection to the postmortem report and on that basis, the court held the death to be homicidal in nature.

6. The trial Court after completion of trial and after appreciating oral and documentary evidence on record, convicted the appellant under Sections 302 & 307 of the IPC and sentenced him to undergo imprisonment for life and other sentences as noticed in the opening paragraph of this judgment against which this appeal under Section 374(2) of the CrPC has been preferred by him.

7. Mr. Samir Singh, learned counsel appearing for the appellant, would submit as under: -

    1. Death of the deceased has not been proved to be homicidal

in nature in view of the fact that Dr. Binod Kumar who conducted postmortem has not been examined before the court and on the basis of the alleged no objection made on behalf of the accused on 17-8-2015 to the postmortem report, it cannot be held that the prosecution is relieved of its responsibility to prove the postmortem report by calling the doctor and examining him before the court. As such, death of the deceased has not been proved to be homicidal in nature.

2. The appellant has only been convicted on the basis of the statements of Uddesh Ram (PW-1), injured Jhunni Bai (PW-2) & Patango (PW-3), whereas Jhunni Bai (PW-2) was firstly alleged to have been assaulted by the appellant and thereafter, she became unconscious, therefore, her statement cannot be relied upon to hold that the appellant is the author of the crime and furthermore, Patango (PW-3) to whom deceased Budhram had given oral dying declaration is not reliable piece of evidence, as the deceased remained in hospital from 22-8-2013 to 30-8-2013 till his death, but, investigating officer A. Toppo (PW-8) has clearly stated that though Budhram remained hospitalized for nine days, but he was not in a position to record his dying declaration, therefore, the alleged oral dying declaration given to Patango

(PW-3) is not reliable and does not inspire confidence and is not worthy of credence and as such, it is liable to be rejected.

3. Both the witnesses of memorandum statement Ex.P-8 namely Umresh Tirkey (PW-9) & Nahar Singh (PW-4), pursuant to which recovery of the weapon of offence iron axe has been made vide Ex.P-10, have not supported the case of the prosecution, as such, memorandum and seizure have also not been proved beyond reasonable doubt and the FSL report is not available on record to connect the appellant with the offence in question, therefore, conviction of the appellant is unsustainable and bad in law.

8. Mr. Animesh Tiwari, learned State counsel, would support the impugned judgment and submit that since the counsel appearing for the appellant in the trial Court admitted the postmortem report duly recorded in the order sheet dated 17-8-2015, therefore, by virtue of Section 294(3) of the CrPC, postmortem report has to be read as evidence in trial and no dispute can be raised at the appellate stage by counsel for the appellant. He would further submit that the evidence of Uddesh Ram (PW-1), injured Jhunni Bai (PW-2) & Patango (PW-3) inspires confidence, particularly Patango (PW-3) to whom the deceased has made oral dying declaration that it is the appellant who has caused injury to him and to his wife Jhunni Bai and even Jhunni Bai (PW-2) has maintained

her version before the trial Court despite lengthy cross-examination and as such, the appeal deserves to be dismissed.

9. Ms. Aditi Singhvi, learned *amicus curiae*, has submitted that the postmortem report itself is not a substantive piece of evidence and examination of doctor before the court is necessary to prove the postmortem report. She further submits that mere marking of document would not dispense with the proof of document. She would rely upon the decision of the Supreme Court in the matter of **Ghulam Hassan Beigh v. Mohammad Maqbool Magrey and others**[1] and also upon the Full Bench decision of the Karnataka High Court in the matter of **Boraiah @ Shekar v. State By Ramanagaram Police**[2] to buttress her submission.

10. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

11. Now, the following three questions would arise for consideration: -

    1. Whether the death of the deceased is homicidal in nature and that has duly been established by the prosecution?

    2. Whether the appellant is the author of the crime in question for offence under Section 302 of the IPC?

    3. Whether conviction of the appellant for offence under Section 307 of the IPC is justified?

1 2022 SCC OnLine SC 913
2 2002 SCC OnLine Kar 689

**Homicidal nature of death of the deceased: -**

12. It is well settled law that in order to convict an accused under Section 302 of the IPC, the first and foremost aspect to be proved by the prosecution is the homicidal death and if the evidence on record produced by the prosecution falls short of the proof of homicidal death, the accused cannot be convicted under Section 302 of the IPC. {See **Madho Singh v. State of Rajasthan**[3] and **Chandrapal v. State of Chhattisgarh**[4] (paragraph 19).}

13. The appellant is said to have assaulted deceased Budhram on 22-8-2013 in between 10 p.m. and 11 p.m. and he was hospitalized for nine days and ultimately, he died on 30-8-2013, whereas wife of the deceased injured Jhunni Bai (PW-2) remained hospitalized for two months. Postmortem of deceased Budhram was conducted by Dr. Binod Kumar on 30-8-2013 and according to Dr. Binod Kumar, Medical Officer, Community Health Centre, Lakhanpur, mode of death was coma, cause of death was head injury and nature of death was homicidal. In order to prove the postmortem report, from time to time, summons were issued to Dr. Binod Kumar, who conducted postmortem on the dead body of deceased Budhram, but ultimately, warrant of arrest was issued to him and ultimately, he appeared before the trial Court on 16-2-2015 for his examination, but unfortunately, on that day, the learned trial

3 (2010) 15 SCC 588
4 2022 SCC OnLine SC 705

Judge was on leave, therefore, he could not be examined, but thereafter, on 17-8-2015, summons issued to him returned un-served and the trial Court recorded the following order in the order sheet: -

> 17/08/15 राज्य द्वारा श्री राजेश तिवारी, अतिरिक्त लोक अभियोजक ।
>
> आरोपी अभिरक्षा से पेश । बचाव अधिवक्ता श्रीमती मानो शर्मा उपस्थित ।
>
> प्रकरण अभियोजन साक्ष्य हेतु नियत है ।
>
> अभियोजन साक्षी अनुपस्थित । साक्षियों को जारी समंस तामिल, अदम तामिल बाद वापस प्राप्त नहीं । बचाव अधिवक्ता के द्वारा डॉक्टर का पी एम रिपोर्ट स्वीकार्य किया गया । अभियोजन के द्वारा अपना साक्ष्य समाप्त घोषित किया गया । अतः प्रकरण अभियुक्त कथन हेतु नियत किया जाता है
>
> प्रकरण वास्ते अभियुक्त कथन ।
>
> दिनाँक–24/08/15

14. A careful perusal of the order sheet would show that counsel for the accused has admitted the postmortem report and in that view of the matter, the prosecution has declared the evidence of the doctor, who conducted postmortem, closed and proceeded with the matter and after hearing, ultimately, the trial Court has convicted the appellant holding the death of the deceased to be homicidal in nature.

15. The trial Court in its judgment, paragraph 8, held the death of the deceased to be homicidal in nature relying upon the postmortem report and further held that since the postmortem report Ex.P-18 has been admitted by counsel for the accused before the trial

Court, therefore, the postmortem report Ex.P-18 holding the death to be homicidal is proved and it has been accepted by the trial Court.

16. Now, the question is, whether the procedure followed by the trial Court in which counsel for the accused has admitted the postmortem report which has been relied upon by the trial Court to hold that death of the deceased was homicidal in nature, is correct?

17. At this stage, it would be appropriate to notice Section 294 of the CrPC to decide the issue raised before the court. Section 294 of the CrPC states as under: -

> "**294. No formal proof of certain documents.**—(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.
>
> (2) The list of documents shall be in such form as may be prescribed by the State Government.
>
> (3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:
>
> Provided that the Court may, in its discretion, require such signature to be proved.

18. The object in enacting this provision (Section 294 of the CrPC) is

to shorten the proceedings. It provides the mode or manner in which the documents relied upon by the prosecution and defence can be proved without any formal proof thereof. The proviso, however, gives discretion to the court to call for the proof of the signature on the documents.

19. By virtue of sub-section (1) of Section 294 of the CrPC, before a document can be read in evidence under Section 294, the pleader for the prosecution / accused shall be called upon to admit or deny the genuineness of each such document. Where such requirement is not complied with and counsel is not called upon to admit or deny the genuineness of such document, the document cannot be held to be proved and admissible in evidence. Where the genuineness of the document, by virtue of sub-section (3) of Section 294 of the CrPC, filed by one party is admitted by the other party, the document can be read as substantive evidence by the Court.

20. In the instant case, the question is about the postmortem report which is an extremely relevant and most important document in a trial for murder both for the prosecution and the defence. In our considered opinion, such a document should not be admitted in evidence mechanically only for the sake of empty formality, but if taken in evidence it should be meaningful and purposeful. In case of postmortem reports, the right person for substituting in place of

the doctor author would be a doctor competent to reply the questions to be put on behalf of both the prosecution and the accused, or a witness having technical knowledge only can be said to be the competent person to even say about the writings of the doctor who had written out such report for admitting it in evidence.

21. In the matter of **Akhtar and others v. State of Uttaranchal**[5], the Supreme Court has held that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-section (3) of Section 294 of the CrPC. It was further held that the postmortem report, if its genuineness is not disputed by the opposite party, the said postmortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.

22. In the matter of **Shamsher Singh Verma v. State of Haryana**[6], it has been held by the Supreme Court that the object of Section 294 of the CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence and observed in paragraph 14 regarding the procedure to be followed under Section 294(1) of the CrPC as under: -

> "14. In view of the definition of "document" in the

5 (2009) 13 SCC 722
6 (2016) 15 SCC 485

> Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document. It is not necessary for the court to obtain admission or denial on a document under sub-section (1) to Section 294 CrPC personally from the accused or complainant or the witness. The endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of Section 294 CrPC. Similarly on a document filed by the defence, endorsement of admission or denial by the Public Prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the counsel for the complainant in respect of document filed by the defence."

23. In the matter of **Vijender v. State of Delhi**[7], the Supreme Court has held that in view of Section 60 of the Evidence Act, 1872, the prosecution is bound to lead the best evidence available to prove a certain fact, that too to prove the fact of homicidal death, and observed as under: -

> "19. It passes our comprehension how the trial Judge entertained the post-mortem report as a piece of documentary evidence on the basis of the above testimony of a clerk in spite of legitimate objection raised by the defence. In view of Section 60 of the Evidence Act, referred to earlier, the prosecution is bound to lead the best evidence available to prove a certain fact; and in the instant case, needless to say, it was that of Dr. U.C. Gupta, who held the post-mortem examination. ..."

24. Similarly, in the matter of **Munshi Prasad and others v. State of**

7 (1997) 6 SCC 171

**Bihar**[8], their Lordships of the Supreme Court have clearly held that postmortem report is not a substantive evidence but it is the doctor's statement in court, which has the credibility of a substantive evidence, and it was observed pertinently as under: -

> "6. ... Post-mortem report is prepared by the doctor who held the post-mortem examination on the body of the deceased Indrasan Prasad and his findings have been recorded therein. The document by itself is not a substantive evidence but it is the doctor's statement in court, which has the credibility of a substantive evidence and not the report, which in normal circumstances ought to be used only for refreshing the memory of the doctor witness or to contradict whatever he might say from the witness box. ..."

25. Very recently, the Supreme Court speaking through J.B. Pardiwala, J. in **Ghulam Hassan Beigh** (supra) held that the postmortem report of the doctor is his previous statement based on his examination of the dead body, it is not substantive evidence, the doctor's statement in court is alone the substantive evidence and the postmortem report can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness-box under Section 145 of the Evidence Act and observed as under: -

> "31. ... The post mortem report of the doctor is his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in court is alone the substantive evidence. The post mortem report can be used only to corroborate his statement under Section 157, or to refresh his memory

8 (2002) 1 SCC 351

> under Section 159, or to contradict his statement in the witness-box under Section 145 of the Evidence Act, 1872. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. ..."

26. In the matter of **Jagdeo Singh and others v. State**[9], Division Bench of the Allahabad High Court has held that Section 294 of the CrPC does not refer to a document which, even if exhibited, cannot be read in evidence as a substantive piece, and observed as under: -

> "11. Section 294 is a new provision contained in the Cr.P.C. of (1974). It provides for the admission in evidence of certain documents without formal proof. It requires each party to produce a list of documents and requires the opposite party to admit or deny the genuineness of all or any of those documents. Where the genuineness of any document is not disputed, such document can be read in evidence without proof of the signature of the person by whom it purports to be signed. The Court can, however, in its discretion, require such signature to be proved. A bare reading of the aforesaid section would reveal that it contemplates reading in evidence, upon admission about genuineness by the opposite party, only such documents which, when formally proved, speak for themselves. It does not refer to a document which, even if exhibited, cannot be read in evidence as a substantive piece."

It was further held by their Lordships of the Division Bench that postmortem report by itself proves nothing as it is not a substantive piece of evidence and observed as under: -

9 1979 Cri.L.J. 236

> "12. The notes of post-mortem examination, popularly known as post-mortem examination report, are nothing but a contemporaneous record prepared by a Medical Officer, while performing the post-mortem examination of a dead body. It summarises the salient features observed by the medical man in the course of autopsy on which features he bases his own opinion as to the cause of death. Post-mortem report by itself proves nothing as it is not a substantive piece of evidence. It is only a previous statement of the doctor based on his examination of the dead body. It is the statement of the doctor made in Court which alone is the substantive evidence. The post-mortem report can be used to corroborate the statement of the doctor concerned under S. 157 of the Evidence Act. ..."

Their Lordships relying upon the earlier decisions in the matters of **Bechan Prasad v. Jhuri**[10], **Rangappa Goundan v. Emperor**[11], **Teja Singh v. State**[12], **Loku Basappa Pujari v. State**[13] and **Hadi Kirsani v. State**[14] have held that a postmortem report by itself is not a substantive piece of evidence and before it can be used to corroborate the doctor concerned, there must be deposition of the doctor in the witness-box, and observed in paragraph 18 as under:-

> "18. In the face of this legal position exhibiting of post-mortem report under Section 294 CrPC (new) is not permissible and even if such an exhibiting has been done the report itself cannot be used as a substantive piece of evidence until and unless the doctor concerned has been examined in Court."

27. Reverting to the facts of the case in light of the aforesaid principles

10 AIR 1936 All 363
11 AIR 1936 Mad 426
12 AIR 1951 Pepsu 1
13 AIR 1960 Bom 461
14 AIR 1966 Ori 21

laid down by their Lordships of the Supreme Court in **Ghulam Hassan Beigh** (supra), **Vijender** (supra) and **Munshi Prasad** (supra), it is quite vivid that the postmortem report of doctor is only his previous statement based on his minute examination of the dead body of the deceased and it is not a substantive evidence unless the doctor who conducted postmortem is examined before the court to prove the facts mentioned in the postmortem report and postmortem report should be in corroboration with the evidence of eyewitnesses and cannot be an evidence sufficient to reach the conclusion for convicting the appellant (see **Balaji Gunthu Dhule v. State of Maharashtra**[15]).

28. In **Boraiah @ Shekar** (supra), Full Bench of the Karnataka High Court has emphasized the need for following the procedure under Section 294(1) of the CrPC. It has been held that the party seeking to avail the benefit of Section 294 of the CrPC should file a list containing the particulars of every such document and shall call upon the other side to admit or deny the genuineness of each such document. Only where the genuineness of any document is not disputed, such document may be read in evidence in any enquiry or trial without the proof of the signature of the person to whom it purports to be signed. It was further held that there must be something on record to show that either the prosecution or the defence was called upon to admit or deny the genuineness of

15 (2012) 11 SCC 685

certain document and it is only where the genuineness of the document is not disputed, such document may be read in evidence without the proof of the signature of the person to whom it purports to be signed. It was also held that Section 294 of the CrPC dispense with only the proof of the signature of the person to whom it purports to be signed and that being so, there must be enough indication in the record to show that the party against whom a document is sought to be put was called upon to admit or deny the genuineness of such document. However, the following word of caution was issued by their Lordships in paragraph 11 of the report: -

> "11. ... We may however add a word of caution that the medical evidence in a criminal case is of utmost importance as the correctness of both ocular and circumstantial evidence produced by the prosecution is tested on the touchstone of the medical evidence. Therefore even if the genuineness of the Post Mortem report is not disputed by the accused and the report is read as substantive evidence in the case, it may still be necessary to examine the doctor concerned to clarify his opinion mentioned in the PM report or to obtain his opinion on questions of medical nature if the Court feels it absolutely necessary to clarify the questions of a medical nature which may be involved in the case by calling the doctor who has issued the PM report in order to arrive at a correct decision in the case. This may be done by the trial Court by examining him under Section 311 Cr. PC."

29. Reverting to the facts of the case finally in light of the aforesaid parameters, it is quite vivid that in the instant case, the trial Court

has made an endeavour to secure the presence of Dr. Binod Kumar, who conducted postmortem, and also succeeded in securing his presence as he appeared pursuant to the warrant of arrest issued against him, on 16-2-2015, but unfortunately, on that day, the learned Presiding Judge was on leave and when the matter was posted on 17-8-2015, again the said medical witness did not appear for the reasons recorded in the order sheet and all of a sudden, learned counsel for the accused admitted the postmortem report and taking that admission on record, the postmortem report was exhibited as Ex.P-18 and accepting the nature of death as homicidal, the trial Court held that the death of deceased Budhram was homicidal in nature.

30. In view of legal analysis, we are unable to persuade ourselves to accept the procedure followed by the trial Court while recording the admission of the accused to the postmortem report. No such procedure as envisaged under Section 294 of the CrPC was followed at the appropriate stage and Dr. Binod Kumar, whose presence was competently secured and he appeared before the Court on 16-2-2015, could not be examined for the absence of the Presiding Judge and he was again subjected to presence on 17-8-2015, but on that day, he could not appear on account of non-service of summons, on 16-2-2015 the Judge In-charge did not take pain to give the next date for examination of such an

important medical witness, which we do not approve and in future, we expect the Judge in-charge to give a next date, particularly to a doctor witness, to examine him to avoid this sort of difficulty faced herein. However, anyhow, counsel for the accused admitted the postmortem report and the Court proceeded further and on the basis of that admission, death of the deceased was proved to be homicidal in nature. Whereas, the procedure envisaged in Section 294(1) of the CrPC ought to have been followed by the trial Court, if any, and once the trial Court has not followed the procedure envisaged under Section 294(1) of the CrPC, at the verge of conclusion of trial, it could not have resorted to that procedure to the detriment of the accused and could not have dispensed with the examination of doctor only on the basis of alleged admission on the part of the accused to the postmortem report Ex.P-18.

31. As held by the Supreme Court in **Ghulam Hassan Beigh** (supra), **Vijender** (supra) and **Munshi Prasad** (supra), the postmortem report of the doctor is his previous statement based on his examination of the dead body, it is not substantive evidence and the doctor's statement in court is alone the substantive evidence.

32. In that view of the matter and further, the procedure envisaged in Section 294 of the CrPC having not been followed and the alleged admission of the accused to the postmortem report is not in

accordance with law, the trial Court ought to have examined the doctor to prove the postmortem report Ex.P-18 and in absence of examination of doctor witness who held the postmortem over the body of deceased Budhram, there is no medico legal evidence that deceased Budhram died to the injuries which the appellant was allegedly shown to have inflicted upon his person. Therefore, relying upon the postmortem report and further on that basis holding the death to be homicidal in nature, the trial Court went wrong in holding the death of the deceased to be homicidal in nature.

33. Furthermore, the appellant has been convicted on the basis of the oral dying declaration given by deceased Budhram to Patango (PW-3), as she has informed to the Court that on cry of the deceased, she went inside the house of the deceased where deceased Budhram was lying injured and he informed her that it is Tihar Sai – the appellant herein, who has caused injury to him, and thereafter, the deceased has informed the incident to Uddesh Ram (PW-1) and Uddesh Ram (PW-1) was also informed by Patango (PW-3), but immediately, thereafter, the deceased was taken to hospital and he remained hospitalised up to 30-8-2013, but till then he was not in a position to give oral dying declaration as stated by investigating officer A. Toppo (PW-8), as he was unconscious.

34. In the matter of **Darshana Devi v. State of Punjab**[16], with regard to oral dying declaration, their Lordships of the Supreme Court have held that an oral dying declaration can form basis of evidence in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence.

35. Similarly, in the matter of **Arun Bhanudas Pawar v. State of Maharashtra**[17], it has been held by their Lordships of the Supreme Court that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination.

36. Furthermore, the Supreme Court, in the matter of **Walkhom Yaima Singh v. State of Manipur**[18], has held that there can be no dispute that the dying declaration can be the sole basis for conviction, however, such dying declaration has to be proved to be wholly reliable, voluntary and truthful and further that the maker thereof must be in a fit medical condition to make it. It has also been held that oral dying declaration is a weak kind of evidence.

37. Following the principles of law laid down in **Darshana Devi** (supra), **Arun Bhanudas Pawar** (supra) and **Walkhom Yaima Singh** (supra), we find that the oral dying declaration is not trustworthy and free from blemish and does not inspire confidence as, as per the statement of A. Toppo (PW-8), though the deceased remained

16 1995 Supp (4) SCC 126
17 (2008) 11 SCC 232
18 (2011) 13 SCC 125

hospitalized for eight days, but he was not able to make any dying declaration as his health condition was not good. In that view of evidence, we reject the evidence of oral dying declaration based on the evidence of Patango (PW-3).

38. In that view of the matter, particularly, the witnesses of memorandum & seizure namely Nahar Singh (PW-4) & Umresh Tirkey (PW-9) have not supported memorandum & seizure and more particularly the weapon of offence axe by which the injury is said to have been caused has not been sent for forensic examination to prove that the said axe was used as the weapon of offence and human blood has not been found to be proved on the same and in view of the fact that death of the deceased has not been proved to be homicidal in nature, we are of the opinion that it would be unsafe to convict the appellant under Section 302 of the IPC. Accordingly, conviction of the appellant under Section 302 of the IPC deserves to be and is hereby set aside. However, in view of the statement of injured Jhunni Bai (PW-2) and that she remained hospitalized for two months, we find that the appellant's conviction under Section 307 of the IPC is well merited.

39. Consequently, conviction and sentences imposed upon the appellant under Section 302 of the IPC are set aside and he is acquitted of the said charge. However, his conviction under Section 307 of the IPC is maintained. He is in jail. He be released

if his detention is not required in any other offence.

40. The appeal is partly allowed to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Deepak Kumar Tiwari)
Judge

Soma