NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 400 of 2015

Madan Lal Sahu, S/o. Mahettar Sahu, Aged About 23 Years, R/o. Uparwara, P.S.- Rakhi, Civil And Revenue District Raipur, Chhattisgarh.

---Appellant

Versus

State Of Chhattisgarh, Through District Magistrate, Raipur, District Raipur, Chhattisgarh.

---Respondent

For Appellant :- Mrs. Indira Tripathi, Advocate
For State/Respondent :- Mr. Sudeep Verma, Dy. Govt. Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Radhakishan Agrawal

Judgment On Board
(17.07.2023)

Sanjay K. Agrawal, J.

1. This criminal appeal preferred by the appellant under Section 374(2) of Cr.P.C. is directed against the impugned judgment dated 13.03.2015, passed by the learned Additional Sessions Judge (F.T.C.), Raipur, District Raipur, in Sessions Trial No.141/2014, by which the appellant herein has been convicted for the offence under Section 4 of the Chhattisgarh Tonhi Pratadna Adhiniyam and under Section 302 of Indian Penal Code and sentenced as under :

CONVICTION		SENTENCE
U/s. 4 of C.G. Tonhi Pratadna Adhiniyam, 2005.	:	Rigorous imprisonment for 1 year and fine of Rs.500/-, in

		default of payment of fine, additional rigorous imprisonment for 1 month.
U/s. 302 of Indian Penal Code	:	Life imprisonment and fine of Rs. 1000/-, in default of payment of fine, additional rigorous imprisonment for 2 months.

2. Case of the prosecution, in brief, is that on 05.03.2014 at about 8:30 a.m., at village Uparwara, Police Station- Rakhi, the present appellant along-with four acquitted co-accused assaulted Dulai Sahu (now deceased) by axe and other sharp edged instrument, by which she suffered grievous injuries and died; thereby, offences have been committed. Further case of the prosecution is that Mahettar Ram Sahu, acquitted co-accused and the deceased's husband Hari Ram Sahu both were brothers and the wife of appellant herein fell ill, for which appellant suspected that witchcraft has been played by Dulai Sahu and on that count, dispute arose between the deceased and appellant and on the fateful day, the appellant is said to have assaulted the deceased by sharp edged weapon, by which she suffered grievous injuries and died. Thereafter, FIR was lodged vide Ex.P-21, inquest was conducted vide Ex.P-3 and dead body was sent for post-mortem, which was conducted by Dr. S.K.Bagh (PW-13), who proved the post-mortem report Ex.P-39, in which cause of death was due to hemorrhage and shock as a result of neck injury and death was homicidal in nature. Pursuant to memorandum statement of the appellant Ex.P-5, axe was seized vide Ex.P-8, which was sent for

examination to FSL along-with other seized articles and in the FSL report (Ex.P-38), human blood was found on the seized articles and even on the axe and cloths, human blood of B+ group was found. After due investigation, five accused persons were charge-sheeted for the aforesaid offence before the jurisdictional criminal court, which was ultimately committed to the Court of Sessions for hearing and disposal in accordance with law, in which only the appellant herein was convicted and other four accused persons were acquitted from the charges. The appellant herein abjured his guilt and entered into defence stating that he has not committed any offence and he has been falsely implicated.

3. In order to bring home the offence, prosecution examined as many as 14 witnesses and exhibited 40 documents and the appellant-accused in support of his defence has neither examined any witness nor exhibited any the document.

4. The trial Court, after appreciation of oral and documentary evidence on record, convicted the appellant herein for the offence under Section 4 of Chhattisgarh Tonhi Pratadna Adhiniyam and under Section 302 of Indian Penal Code and sentenced him as mentioned in the opening paragraph of the judgment against which the present appeal has been preferred.

5. Mrs. Indira Tripathi, learned counsel for the appellant would submit that, at the most, offence under Section 304 Part-II of I.P.C. is made out against appellant, as appellant and deceased were close relative and there was no premeditation on the part

of the appellant to cause death and only on the pretext of playing witchcraft, appellant is said to have assaulted his *Taiji* deceased Dulai Sahu, by which she suffered grievous injuries and died. As such, the case of appellant would fall under Exception 4 to Section 300 of I.P.C. and the alleged offence is liable to be converted to Section 304 Part-II of I.P.C. and appellant be sentenced for the period already undergone, as the appellant is in jail since 05.03.2014 and other similarly placed co-accused have already been acquitted by the trial Court.

6. Mr. Sudeep Verma, learned State counsel, would support the impugned judgment and submit that the prosecution has been able to bring home the offence beyond reasonable doubt and learned trial Court has rightly convicted the appellant herein for the aforesaid offence and therefore, the appeal deserves to be dismissed.

7. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

8. The first question for consideration as to whether the death of deceased Dulai Sahu was homicidal in nature, has been answered by the trial Court in affirmative relying upon the post-mortem report Ex.P-39 proved by Dr. S.K.Bagh (PW-13), which in our considered opinion is a correct finding of fact based on evidence available on record, it is neither perverse nor contrary to the record and accordingly, we hereby affirm the said finding.

9. Now, the next question for consideration is, whether the appellant has assaulted the deceased by which she suffered grievous injuries and died ?

10. Considering the fact though the eye-witnesses Santosh Sahu (PW-2), Kajuram Sahu (PW-4), Hariram Sahu (PW-5) and Ku. Aarti Sahu (PW-14) have turned hostile and they have not supported the case of the prosecution, but pursuant to memorandum statement of the appellant, axe has been seized on which human blood has been found in the FLS report (Ex.P/38) and on the cloths of the deceased also, human blood of B+ group has also been found and, as such, the prosecution has been able to prove that the appellant had assaulted the deceased on the pretext of playing witchcraft, by which the wife of appellant suffered serious ailment. As such, the trial Court has rightly held that it is the appellant who had caused injuries to the deceased by which she died.

11. Now, the question would be whether the case of the appellant would fall under Exception 4 to Section 300 of IPC and, as such, his conviction can be altered either to Part-I or Part-II of Section 304 of IPC, as contended by learned counsel for the appellant ?

12. In order to consider whether the case of the appellant is covered under Exception 4 to Section 300 of IPC, it would be appropriate to notice the decision rendered by the Supreme Court in the matter of **Sukhbir Singh v. State of Haryana**[1] wherein it has been observed as under :-

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1 (2002) 3 SCC 327

> "21. Keeping in view the facts and circumstances of the case, we are of the opinion that in the absence of the existence of common object Sukhir Singh is proved to have committed the offence of culpable homicide without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and did not act in a cruel or unusual manner and his case is covered by Exception 4 of Section 300 IPC which is punishable under Section 304 (Part I) IPC. The finding of the courts below holding the aforesaid appellant guilty of offence of murder punishable under Section 302 IPC is set aside and he is held guilty for the commission of offence of culpable homicide not amounting to murder punishable under Section 304 (Part I) IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5000. In default of payment of fine, he shall undergo further rigorous imprisonment for one year."

13. The Supreme Court in the matter of **Gurmukh Singh v. State of Haryana**[2], has laid down certain factors which are to be taken into consideration before awarding appropriate sentence to the accused with reference to Section 302 or Section 304 Part II, which state as under :-

> "23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen for its special perspective. The relevant factors are as under :
>
> (a) Motive or previous enmity;
>
> (b) Whether the incident had taken place on the spur of the moment;
>
> (c) The intention/knowledge of the accused while inflicting the blow or injury;
>
> (d) Whether the death ensued instantaneously or the victim died after several days;
>
> (e) The gravity, dimension and nature of injury;

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2 (2009) 15 SCC 635

> (f) The age and general health condition of the accused;
>
> (g) Whether the injury was caused with premeditation in a sudden fight;
>
> (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
>
> (i) The criminal background and adverse history of the accused;
>
> (j) Whether the injury inflicted was not sufficient in the ordinary course of nature death but the death was because of shock;
>
> (k) Number of other criminal cases pending against the accused;
>
> (l) Incident occurred within the family members or close relations;
>
> (m) The conduct and behaviour of the accused after the incident.
>
> Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment ?
>
> These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.
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> 24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."

14. Likewise, in the matter of **State v. Sanjeev Nanda**[3], their Lordships of the Supreme Court have held that once knowledge that it is likely to cause death is established but without any intention to cause death, then jail sentence may be for a term which may extend to 10 years or with fine or with both. It is further been held that to make out an offence punishable under

3 (2012) 8 SCC 450

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.

15. Further, the Supreme Court in the matter of **Arjun v. State of Chhattisgarh**[4] has elaborately dealt with the issue and observed in paragraphs 20 and 21, which reads as under :-

> "20. To invoke this Exception 4, the requirements that are to be fulfilled have been laid down by this Court in Surinder Kumar v. UT, Chandigarh [(1989) 2 SCC 217 : 1989 SCC (Cri) 348], it has been explained as under :(SCC p. 220, para 7)
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> > "7. To invoke this exception four requirements must be satisfied, namely, (I) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor its I relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."
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> 21. Further in Arumugam v. State [(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130], in support of the proposition of law that under what circumstances Exception 4 to Section 300 IPC can be invoked if death is caused, it has been explained as under : (SCC p. 596, para 9)
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> > "9. …. '18. The help of exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue

4 (2017) 3 SCC 247

> advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provisions means "unfair advantage".

16. In the matter of **Arjun** (supra), the Supreme Court has held that when and if there is intent and knowledge, the same would be case of Section 304 Part-I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then same would be a case of Section 304 Part-II IPC.

17. Further, the Supreme Court in the matter of **Rambir v. State (NCT of Delhi)**[5] has laid down four ingredients which should be tested for bring a case within the purview of Exception 4 to Section 300 of IPC, which reads as under:

> "16. A plain reading of Exception 4 to Section 300 IPC shows that the following four ingredients are required:
>
> (i) There must be a sudden fight;
>
> (ii) There was no premeditation;

5(2019) 6 SCC 122

> (iii) The act was committed in a heat of passion; and
>
> (iv) The offender had not taken any undue advantage or acted in a cruel or unusual manner."

18. It is stated at the Bar that village Uparwara, Police Station Rakhi is backward area and it is a fact of common knowledge that the appellant and the deceased belonged to under-developed community and most of them are illiterate and they believe in superstitions. It is a common phenomena in the community dominated areas that they practice magic and many other type of witchcrafts to achieve their object whether good or bad. They hold many superstitions responsible for any misfortune and mis-happenings in their life and sometimes they became revengeful for no other reason but for their own doubts that someone is playing witchcrafts on them or something wrong had been happened in their family or life due to witchcrafts played by someone. Many a time, on the basis of their suspicion, they declare some woman as a witch and even their Panchayat passes weird/hippocratic orders against them

19. Reverting to the facts of the present case in light of the aforesaid principles of law laid down by their Lordships of the Supreme Court, it is quite vivid that there was no premeditation on the part of the appellant to cause death of the deceased, but since the appellant was suspecting that his wife was suffering serious ailment on account of witchcraft played by deceased Dulai Sahu and he had developed a plea of anger/protest, by which he assaulted the deceased. Considering the nature of injury, there was no intention to cause death but the appellant must have

had knowledge that the injury caused by him to deceased is likely to cause death and the appellant had not taken any undue advantage and has not acted in unusual manner; as such, the case of the appellant would fall under Exception 4 to Section 300 of I.P.C.

20. In view of the above, the impugned judgment of conviction and order of sentence as awarded by the trial Court for offence punishable under Section 302 of I.P.C. is hereby set aside. The conviction of appellant for offence punishable under Section 302 of I.P.C. is altered to Section 304 Part-II of I.P.C. and the appellant is sentenced to the period already undergone, as he is in jail since 05.03.2014 i.e. more than 9 years; however, the conviction and sentence under Section 4 of the Chhattisgarh Tonhi Pratadna Adhiniyam and fine amount as imposed by the trial Court are maintained. Accordingly, we direct that appellant be released forthwith from jail, unless he is required in any other offence.

21. In view of the above, this criminal appeal is partly allowed to the extent indicated herein-above.

22. Let a certified copy of this judgment along with the original record be transmitted to the trial Court concerned for necessary information and action, if any. A certified copy of the judgment may also be sent to the concerned Jail Superintendent forthwith wherein the appellant is suffering the jail sentence.

Sd/-	Sd/-
(Sanjay K. Agrawal)	**(Radhakishan Agrawal)**
Judge	**Judge**

Aks