Madhya Pradesh High Court
Naresh Singh vs State Of M.P. on 2 May, 2022
Author: Gurpal Singh Ahluwalia

HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

&

RAJEEV KUMAR SHRIVASTAVA J.J.

Cr.A. No. 496 of 2011

Naresh Singh

Vs.

State of M.P.

_____
Shri A.K. Jain Counsel for the Appellant
Shri C.P. Singh Counsel for the State

Date of Hearing : 26-4-2022

Date of Judgment : 02-05-2022

Approved for Reporting :

Judgment

02 - May -2022

Per G.S. Ahluwalia J.

1.

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the Judgment and Sentence dated 4-5-2011 passed by Sessions Judge, Bhind in S.T. No.171 of 2010, by which the Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) Appellant has been convicted under Section 302 of IPC and has been sentenced to undergo Life Imprisonment and a fine of Rs. 1000/- with default imprisonment of 3 months R.I.

2. The necessary facts for disposal of the present appeal in short are that on 10-6-2010 at about 22:40, the complainant Biharilal Kushwaha (father of the Appellant), lodged an FIR that at about 22:00, he was sitting outside his house after having his meals. The wife of his elder son was lying on

a cot whereas his grand daughter Julie was lying on the another cot. His younger son Naresh came along with an axe and scolded his daughter-in-law that not only She objects to consumption of liquor by the Appellant, but is also not ready to marry him, therefore, now he would see that who can save her. Accordingly, the Appellant gave axe blow to her. This witness also came inside the house. His grand daughter also woke up. His daughter-in-law suffered multiple injuries. He and his grand daughter raised an alarm and accordingly, his neighbour Mohammad, Roshan came on the spot. The appellant has ran away. While the complainant was taking his daughter-in-law to the hospital in the marshal jeep of Roshan, She has expired on the way.

3. The police registered the FIR in crime no. 18/2010 for offence under Section 302 of IPC. Spot map was prepared. Blood stained and plain earth were seized from the spot. The Lash Panchnama was prepared and the dead body was sent for post-mortem. Appellant was arrested and blood stained Axe was seized. Blood stained cloths of Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) the Appellant were also seized. Statements of witnesses were recorded. Seized articles were sent to F.S.L. Gwalior. After completing the investigation, charge sheet was filed by the police for offence under Section 302 of IPC.

4. The Trial Court by order dated 11-10-2011 framed charge under Section 302 of IPC.

5. Appellant abjured his guilt and pleaded not guilty.

6. Prosecution examined Bihari (P.W.1), Julie (P.W.2), Safi Mohammad (P.W.3), Roshan (P.W.4), Ramsanehi (P.W.5), Kamal Singh (P.W.6), Kuldeep (P.W.7), Kashiram (P.W.8), Tulsiram (P.W.9), B.K. Mahor (P.W.10), Munna (P.W.11), Rashid Khan (P.W.12), Bachhulal (P.W.13), Munnalal (P.W.14) and Dr. Jitendra Shrivastava (P.W.15).

7. Appellant did not examine any witness in his defence.

8. Trial Court by the impugned Judgment, convicted and sentenced the Appellant for the above mentioned offence.

9. Challenging the Judgment and Sentence passed by the Trial Court, it is submitted by the Counsel for the Appellant that the prosecution has failed to prove the guilt of the Appellant beyond reasonable doubt. It appears that some unidentified person had killed the deceased and the Appellant has been falsely implicated. In the alternative, it is submitted that since, the incident took place all of a sudden, therefore, the act of the Appellant would be punishable under Section 304 of IPC and not under Section 302 of IPC.

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10. Per contra, the Counsel for the State has supported the prosecution case as well as the findings recorded by the Trial Court.

11. Heard the learned Counsel for the parties.

12. Before adverting to the merits of the case, this Court would like to find out as to whether the death of Mithla was homicidal in nature or not?

13. Dr. Jitendra Shrivastava (P.W.15) has conducted the post- mortem of the dead body of the deceased, who found the following injuries :

(i) CHOP WOUND 8 cm x 2 cm x 5 cm deep on posterior part and 2.5 cm deep on anterior part. Present on upper part left lateral surface of neck. Anterior end of wound near left mandibular angle and posterior end of wound near the lip of left mastoid process and slightly above from anterior end. Margins of wound are sharp and regular. Following structures are incised they are skin subcutaneous tissue, muscles of neck left side and large cervical vessels, caused by sharp and cutting object with wide base.

(ii) Incised wound 2.5 cm x0.6cm x whole thickness of lower part of left pinna, horizontal caused by sharp and cutting object.

(iii) CHOP WOUND 5 cm x 2 cm x 6 cm deep on posterior part and 4 cm deep on anterior end margins are clean and smooth. Anterior end near the posterior border of left sternocleidomastoid muscle on left side caused by sharp cutting object with wide base.

(iv) Incised wound 2 cm x linear x skin deep in continuation to injury no. 3 anteriorly continue from anterior end.

(v) CHOP WOUND 6 cm x 2.5 cm x 2 cm on dorsal surface of right hand proximal end of wound at the wrist, dorsal end of wound 2.8 cm proximate from 2 nd metacorpo phalangeal joint.

Cause of death is shock due to excessive hemorrhage from ante-mortem injuries present over body.

Nature of death - Homicidal in nature.

Duration between death and post-mortem examination Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) within 6 to24 hours.

The post-mortem report is Ex. P.21.

14. This witness was cross-examined. In cross-examination, he stated that all the five injuries could have been caused by one weapon. The injuries must have been caused while the deceased was in lying in straight position.

15. Thus, it is clear that the death of the deceased was homicidal in nature.

16. Now the next question for consideration is as to whether the Appellant is the author of the offence or not?

17. Bihari (P.W.1) is the father of the Appellant and father-in-law of the deceased. He has stated that the deceased is the wife of his elder son. This witness was lying in front of the door of his house. It was 22:00. The Appellant, his daughter-in-law and grand daughter Julie were inside the house. Julie came to him and informed that Appellant has killed her mother. Thereafter, he went inside the house and saw that the head of the deceased was already cut. He raised an alarm and accordingly his neighbours came on the spot. Thereafter, information to the police, Ex. P.1 and P.2 was given. FIR is Ex. P.2. Police came on the spot. The post-mortem of Mithla was done and thereafter She was cremated. This witness expressed his ignorance about motive on the part of the Appellant. This witness was declared hostile. In cross-examination by the Public Prosecutor, he admitted that the Appellant is still bachelor and is in habit of gambling. Since, Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) he used to steal the household things, therefore, he was ousted and accordingly, the Appellant shifted to Mumbai and stayed their for 15 years. After coming back, he had become drunkard as well as non- vegetarian. He also admitted that his daughter-in-law and grand daughter used to stop him. He also admitted that on this issue, the Appellant has killed his daughter-in-law. This witness was cross- examined.

18. In cross-examination, he admitted that on the date of incident, every one had their meals together. He admitted that since, he was tired, therefore, he went to sleep outside the house. He admitted that he woke up only when his grand daughter came. He went inside and had seen his injured daughter-in-law. Except the deceased and two grand daughters, there was no other person in the house. Police had come in the night itself. He admitted that on the information given by Julie, he is saying that the Appellant has killed his daughter-in- law.

19. Julie (P.W.2) is the child eye-witness. She has stated that the Appellant is her uncle. The deceased was her mother. At the time of incident, this witness, her sister, her mother (deceased) and the Appellant were inside the house, whereas her grand father (Bihari (P.W.1) was outside the house. Her uncle assaulted on the head of her mother by an axe as a result She died. She woke up, when the Appellant had assaulted her mother. As the Appellant was assaulting her mother, therefore, She got frightened and went outside the house Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) and informed her grand father. After hearing their screams, the neighborers also came on the spot. The Appellant had run away. The deceased was sent to Hospital, but She died on the way. Thereafter, they went to police station and lodged the report. However, this witness could not disclose the motive behind the offence. This witness was declared hostile and was cross-examined by Public Prosecutor.

20. In cross-examination by the Public Prosecutor, She admitted that the Appellant was drunkard and was non-vegetarian and on this issue, this witness and her mother used to stop him. She further admitted that the Appellant was insisting her mother to marry him but her mother was not ready for the same. She further admitted that therefore, the Appellant had killed her mother.

21. This witness was cross-examined by the Appellant. In cross- examination, She admitted that they had common kitchen. She further admitted that after having their meals, her grand father went outside the house for sleeping. First assault was made on the neck of the deceased. As she got frightened, therefore, She did not try to save her. She further stated that She woke up after the first

assault was made. The Appellant had given 5 blows in front of her. She further stated that they have 10 Biswa land. Her father are two brothers. She denied that her mother was insisting that the entire land be given to her, so that She can marry her daughters. She further admitted that the entire crop was being received by her mother. She further stated Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) that her sister was married about 3 months back and the Appellant had come to attend the marriage. She denied that the entire land was given by her grand father to the deceased and the Appellant was also demanding his share. She denied that her grand father was not interested in giving any share to the Appellant. She admitted that they want that the Appellant should go to jail, so that they can get the entire land. Her sister was lying on the third cot. She denied that some unidentified person has killed her mother. She denied that the Appellant was watching TV.

22. Safi Mohammad (P.W.3) has turned hostile.

23. Roshan (P.W.4) has also turned hostile but he has stated that when he reached on the spot, Bihari (P.W.1) was shouting that the Appellant has killed his daughter-in-law.

24. Ramsanehi (P.W.5), Kamal Singh (P.W.6), Kuldeep (P.W.7) have also turned hostile.

25. Kashiram (P.W.8) has stated that on the information given by Bihari (P.W.1) he had written FIR, Ex. P.2. The merg intimation is Ex. P.1.

26. Tulsiram (P.W.9) is a Head Constable. He has stated that Kamal Singh had brought one merg intimation no. 2/10, Ex. P.1 and accordingly he had registered merg intimation no. 18/10 in Police Station Raun, Distt. Bhind. Similarly, Constable Radhamohan Sharma had brought cloths of the deceased from Hospital in a sealed condition which were seized by him vide seizure memo Ex. P.9.

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27. B.K. Mahor (P.W.10) is the investigating officer. He has stated that Kamal Singh had produced FIR, Ex. P.2 registered in crime no. 18/2010 at Police Station Machhand before him and accordingly, he had registered FIR in Crime No. 93/2010 at Police Station Raun, Ex. P.10. He had prepared the spot map, Ex. P.11 on the information of Biharilal. Safina Form, Ex. P.12 was issued and Lash Panchnama, Ex. P.13 was prepared. A requisition for post-mortem, Ex. P.14 was given. On 11-7-2010, blood stained and plain earth were seized from the spot, vide seizure memo Ex. P.15. The statements of witnesses were recorded. Appellant was arrested on 11-7-2010 vide arrest memo Ex. P.16. His memorandum, Ex. P.17 was recorded and a blood stained axe kept under the culvert, was seized vide seizure memo Ex. P.18. Blood stained cloths, which the appellant was wearing were seized vide seizure memo Ex. P.19. The seized articles were sent Forensic Examination. This witness was cross-examined. (Although the FSL report was already received, but it was not marked as Exhibit).

28. In cross-examination, he denied that he had falsely recorded the statements of the witnesses. He had received the diary on 11-7- 2010 at about 1:00 in the night. The original FIR, Ex. P.10 was written by him. The counter copy of FIR was sent to Court. He reached on the spot after about 1

hour of recording of FIR. He had searched for the Appellant in the night and spot map was prepared in the morning. He had not seized the cot, however, had seized the Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) blood lying under the cot. The Appellant had surrendered on his own. He denied that axe was not seized at the instance of the Appellant. He denied that some unknown person had killed the deceased.

29. Munna (P.W.11) turned hostile and did not support the prosecution case.

30. Rasheed Khan (P.W.12) also turned hostile and did not support the prosecution case. Therefore, he was declared hostile and was cross-examined by the Public Prosecution. In cross-examination by Public Prosecutor, he admitted that the Appellant was arrested by the Police, but denied the recording of memorandum of the Appellant as well as the seizure of axe, blood stained cloths from the Appellant.

31. Bachhulal (P.W. 13) has stated that he was informed by his niece Julie that Naresh has killed her mother by causing injuries by Axe. Accordingly, he came to Machhand. He also went to the Hospital in the same police jeep. The Lash Panchnama was prepared. Father of the Appellant had lodged the report. In cross- examination, he stated that the police had never recorded his statement and he is stating before the Court for the first time.

32. Munnalal (P.W. 14), is the witness of seizure of blood stained axe as well as blood stained cloths at the instance of the Appellant. Ex. P.16, P.17, P.18 and P.19 bears his signatures.

33. Thus, the entire case hinges around the evidence of Julie (P.W.2), and Biharilal (P.W.1), Roshan (P.W.4) as well as Bachhulal Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) (P.W. 13) who corroborates the evidence of Julie (P.W.2). Evidence against the Appellant

34. Challenging the evidence of Julie (P.W.2), it is submitted by the Counsel for the Appellant that She is a child witness and there is every possibility of tutoring.

35. Considered the submissions made by the Counsel for the Appellant.

36. Julie (P.W.2) is the minor daughter of the deceased and therefore, her presence at the place of incident is natural. Furthermore, Bihari (P.W.1) who is the father of the Appellant has also stated that Julie (P.W.2), Appellant and the deceased were inside the house, whereas he was sleeping outside the house. Thus, it is clear that the presence of Julie (P.W.2) is proved beyond reasonable doubt.

37. She has specifically stated that after first assault was made, She woke up and saw that the Appellant was assaulting her mother. She immediately rushed outside and informed her grand father, Bihari (P.W.1). Bihari (P.W.1) has also stated that he was sleeping outside the house, when Julie (P.W.2) informed her that the Appellant has killed her mother and accordingly, he went inside the house and found that the deceased was lying in an injured condition. Bachhulal (P.W.13) has also stated that he was informed by Julie (P.W.2) on phone that the Appellant has killed her mother

and therefore, he went to Machhand. Roshan (P.W.4) has also stated that when he reached Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) on the spot, Bihari (P.W.1) was shouting that the Appellant has killed his daughter-in-law. Thus, it is clear that Julie (P.W.2) is a trustworthy and reliable witness.

38. Supreme Court in the case of Bhagwan Singh v. State of M.P., reported in (2003) 3 SCC 21 has held as under :

> 19. The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P.)

39. Supreme Court in the case of Panchhi v. State of U.P., reported in (1998) 7 SCC 177 has held as under :

> According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.
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> 12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P.; Baby Kandayanathil v. State of Kerala; Raja Ram Yadav v. State of Bihar and Dattu Ramrao Sakhare v. State of Maharashtra).

40. Supreme Court in the case of Yogesh Singh v. Mahabeer Singh, reported in (2017) 11 SCC 195 has held as under :

> Testimony of child witnesses Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011)
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> 22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash v. State of M.P., Baby Kandayanathil v. State of Kerala, Raja Ram Yadav v. State of Bihar, Dattu Ramrao Sakhare v. State of Maharashtra, State of U.P. v. Ashok Dixit and Suryanarayana v. State of Karnataka.)

> 23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P.)

41. Supreme Court in the case of Alagupandi v. State of T.N., reported in (2012) 10 SCC 451 has held as under :

> 36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. (Dattu Ramrao Sakhare v. State of Maharashtra and Panchhi v. State of U.P.)

42. Thus, if the evidence of Julie (P.W.2) is considered, then not the cross-examiner could not give any dent to her evidence, but her evidence finds corroboration from the evidence of Bihari (P.W.1) Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) who is the father of the Appellant, Roshan (P.W.4) as well as Bachhulal (P.W.13). Thus, Julie (P.W.2) is a reliable witness and the conviction of an accused can be recorded on the sole testimony of a child witness, provided the Court is convinced that his/her testimony doesnot suffer from any tutoring and the child witness is telling the truth.

43. Further more, Bihari (P.W.1) has stated that he was sleeping outside the house, whereas the Appellant, deceased and Julie (P.W.2) were sleeping inside the house. He was informed by Julie (P.W.2) that the Appellant has killed her mother and when he went inside the house, he saw the deceased with number of injuries. This witness was sleeping outside the door of his house, and he has not stated that any other person had entered inside the house or went outside the house, therefore, the possibility of committing the offence by a stranger is completely ruled out. Further, the Appellant was in the house. Blood stained cloths and axe were seized at his instance.

44. Roshan (P.W.4) has stated that when he reached on the spot, Bihari (P.W.1) was shouting that the Appellant has killed his daughter-in-law. Thus, it is clear that the prosecution has succeeded in establishing that Julie (P.W.2) is a trustworthy and reliable child witness whose testimony finds corroboration from the evidence of Bihari (P.W.1), Roshan (P.W.4) and Bachhulal (P.W. 13).

Whether Blood Stained Axe and Cloths were seized on the disclosure made by the Appellant.

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45. Munnalal (P.W.14) and B.K.Mahor (P.W.10) have proved the seizure of blood stained Axe, as well as cloths on the disclosure made by the Appellant.

Whether the blood stained Axe and Cloths were stained with Human Blood?

46. From order sheet dated 24-12-2010, it is clear that the report of FSL was filed before the Trial Court and a copy of the same was also supplied to the Appellant. From the statement recorded under Section 313 of Cr.P.C., it is also clear that specific questions i.e., no. 40,41,42 were asked in this regard. As per question no.41, the appellant was asked about the presence of blood group A on the Saree of the deceased and as per Question No. 42, the appellant was asked about the presence of Human Blood on the Baniyan, Pant of the Appellant as well as on Saree, Blouse and Petticoat of the deceased. However, it appears that the FSL report was not exhibited.

47. Now the question for consideration is that whether an un- exhibited document can be read against the Appellant/accused?

48. It is well established principle of law that an un-exhibited prosecution document cannot be read against the accused, however, it can be considered if it is in favor of the accused.

49. In the present case, the document which has remained un- exhibited is the F.S.L. report. Section 293 of Cr.P.C. reads as under :

> 293. Reports of certain Government scientific experts.-- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code. (2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report. (3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf. (4) This section applies to the following Government scientific experts, namely:--
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> (a) any Chemical Examiner or Assistant Chemical Examiner to Government;
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> (b) the Chief Controller of Explosives;
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> (c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director , Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

(g) any other Government scientific expert specified by notification, by the Central Government for this purpose

50. The F.S.L. report has been kept in B file of the record and is in Original. The report has been signed by Joint Director, State Forensic Science Laboratory, Gwalior.

51. The Supreme Court in the case of State of H.P. v. Mast Ram, reported in (2004) 8 SCC 660 has held as under :

> 6. Secondly, the ground on which the High Court has thrown out the prosecution story is the report of the ballistic expert. The report of the ballistic expert (Ext. P-X) was signed by one Junior Scientific Officer. According to the High Court, a Junior Scientific Officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court, in our view, is also Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) fallacious. Firstly, the forensic science laboratory report (Ext. P-X) has been submitted under the signatures of a Junior Scientific Officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely overlooked the provision of sub-section (1) of Section 293 and arrived at a fallacious conclusion that a Junior Scientific Officer is not an officer enumerated under sub-section (4) of Section 293. What sub-section (4) of Section 293 envisages is that the court is to accept the documents issued by any of the six officers enumerated therein as valid evidence without examining the author of the documents.

52. Further more, merely because a document has been exhibited, it doesnot mean that its admissibility in law has also been decided. Marking of a document is simply for the purposes of identification.

53. Further more, the copy of the FSL report was given to the Appellant. Appellant never prayed for cross-examination of the Scientific Officer. Supreme Court in the case of Tarajee Khimchand v.

Yelamarti Satyam, reported in (1972) 4 SCC 562 has held that mere marking of an exhibit does not dispense with the proof of documents. Delhi High Court in the case of Sudir Engineering Company Ltd. Vs. Nitco Roadways Ltd. by Judgment dated 23-3- 1995 passed in Suit No. 765 of 1990 has held as under :

> (15) The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of identification. While reading the record the parties and the Court should be able Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) to know which was the document before the witness when it was deposing. Absence of putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious confusion as one would be left simply guessing or wondering while was the document to which the witness was referring to which deposing. Endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an exhibit number can be postponed till the document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit.

54. Thus, in the light of provisions of Section 293 of Cr.P.C., which makes the reports of certain Govt. Scientific Experts admissible, it is held that the FSL report produced by the prosecution can be read against the Appellant, because not only a copy of the same was supplied to the Appellant, but specific questions were also put to him in his examination under Section 313 of Cr.P.C.

55. As per the F.S.L. report, Human Blood was found on the Baniyan and Pant of the Appellant, which has not been explained by him.

56. However, it is always expected that the Trial Court should remain more vigilant at the time of recording of evidence, must ensure that any document, which is otherwise admissible under Section 293 of Cr.P.C., should always be exhibited. Whether Offence under Section 302 of IPC is made out or under 304 of IPC is made

57. It is next contended by the Counsel for the Appellant, that since, the incident took place all of a sudden without any pre-

Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) meditation, therefore, the act of the Appellant would fall within the purview of Section 304 of IPC and not 302 of IPC.

58. Considered the submissions made by the Counsel for the Appellant.

59. In the present case, the motive behind the offence is that the Appellant was drunkard and had become non-vegetarian. The deceased had already lost her husband. The Appellant is the younger-brother-in-law (Devar) of the deceased. He was interested in marrying the deceased, but the deceased did not agree for the same. Further the deceased and Julie (P.W.2) used to object to consumption of liquor and consumption of non-vegetarian food by the Appellant. Therefore, it is

alleged that the Appellant killed the deceased.

60. The Supreme Court in the case of Raj Paul Singh v. State, reported in (2012) 10 SCC 144 has held as under :

> 9. In Narayanan Nair Raghvan Nair v. State of Travancore- Cochin, a three-Judge Bench of this Court speaking through Bose, J. held: (AIR p. 101, para 11) "11. ... It is enough to say that the Exception requires that no undue advantage be taken of by the other side. It is impossible to say that there is no undue advantage when a man stabs an unarmed person who makes no threatening gestures and merely asks the accused's opponent to stop fighting. Then also, the fight must be with the person who is killed."
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> This view on Exception 4 to Section 300 IPC, has also been taken by this Court in Kikar Singh v. State of Rajasthan wherein it has been held: (SCC p. 243, para 9) "9. ... Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) commission must be one of murder punishable under Section 302."
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> Thus, in a case where a man stabs another person, unless it is established that there was some threat from that person to the offender, the court cannot possibly hold that the offender by stabbing that person has not taken any undue advantage or has not acted in a cruel or unusual manner.

61. The Supreme Court in the case of Lavghanbhai Devjibhai Vasava v. State of Gujarat, reported in (2018) 4 SCC 329 has held as under :

> 7. This Court in Dhirendra Kumar v. State of Uttarakhand has laid down the parameters which are to be taken into consideration while deciding the question as to whether a case falls under Section 302 IPC or Section 304 IPC, which are the following:
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> (a) The circumstances in which the incident took place;
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> (b) The nature of weapon used;
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> (c) Whether the weapon was carried or was taken from the spot;
>
> (d) Whether the assault was aimed on vital part of body;
>
> (e) The amount of the force used.
>
> (f) Whether the deceased participated in the sudden fight;

(g) Whether there was any previous enmity;

(h) Whether there was any sudden provocation.

(i) Whether the attack was in the heat of passion; and

(j) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

62. Thus, in order to bring the act of an accused within the purview of Section 304 Part 1 or 2 IPC, the accused must prove that he had neither taken any undue advantage nor acted in the cruel or unusual manner.

63. If the number of Chop wounds and incised wounds caused to Naresh Singh Vs. State of M.P. (Cr.A. No. 496 of 2011) the deceased are considered, then it is clear that the Appellant had not only acted in a cruel manner but he also took undue advantage of the position, specifically when there was no other male member inside the house and the father of the Appellant was sleeping outside the house. Thus, this Court is of the considered opinion, that the act of the Appellant would not fall within the purview of Section 304 of IPC.

64. No other argument was advanced by the Counsel for the Parties.

65. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion that the prosecution has succeeded in establishing the guilt of the Appellant beyond reasonable doubt.

66. Accordingly, his conviction under Section 302 of IPC recorded by the Trial Court is hereby Affirmed.

67. So far as the question of sentence is concerned, the minimum sentence for offence under Section 302 of IPC is Life imprisonment, accordingly, the sentence awarded by the Trial Court doesnot call for any interference.

68. Ex-consequenti, the Judgment and Sentence dated 4-5-2011 passed by Sessions Judge, Bhind in S.T. No.171 of 2010 is hereby Affirmed.

69. The Appellant is in jail. He shall undergo the remaining Jail Sentence.

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70. Let a copy of this judgment be immediately provided to the Appellant, free of cost.

71. The record of the Trial Court be send back along with copy of this judgment, for necessary information and compliance.

72. The Appeal fails and is hereby Dismissed.

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

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