ORISSA HIGH COURT: CUTTACK

CRIMINAL APPEAL NO. 59 of 2001

From the judgment dated 31.01.2001 passed by Addl. Sessions Judge, Kendrapara in S.T. Case No. 54/569 of 1998.

Bishnu Charan Nayak ..... **Appellant**

Versus

State of Orissa ..... **Respondent**

For Appellant : M/s. Devashis Panda

For Respondent : Additional Government Advocate.

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P R E S E N T :

THE HONOURABLE KUMARI JUSTICE S. PANDA
AND
THE HONOURABLE SHRI JUSTICE S.K.PANIGRAHI

Date of Hearing- **30.09.2020,** Date of Judgment**- 09.10.2020**

S. PANDA, J. :- This Criminal Appeal is directed against the judgment dated 31.01.2001 passed by the learned Addl. Sessions Judge, Kendrapara, in S.T. Case No. 54/569 of 1998 in convicting the present appellant for commission of offence under Sections 302 IPC and sentencing him to undergo Rigorous imprisonment of life.

2. The prosecution case as reveals from the record is that, on 22.02.1998 at about 5.30 P.M. the accused persons picked up quarrel with the deceased wife, namely Kamala Nayak (P.W.5) alleging

destruction of their flower plants by her cattle while she was near the cow shed. During the course of quarrel, the deceased-Purna Chandra Nayak came from his field and protested. At this juncture, accused Pitambar (dead) and accused Bijayananda rushed to Purna and caught hold of him while he was untying the rope from the post to tie the bullock. Accused Rabindra came with a *lathi* and the present appellant, Bishnu Charan Nayak having armed with a '*Balam*' (spear like weapon) came and dealt a stabbing blow on the neck of Purna. As a result of which Purna sustained profuse bleeding injury and fell down. Thereafter the accused left the place and Purna was shifted to District Headquarter Hospital, Jaipur for his treatment where he was declared dead. Autopsy was conducted over the dead body. Son of the deceased Bikash Chandra Nayak (P.W.4) reported the matter at Kandiahat Police Out post at 5.30 P.M. on 23.02.1998. Deceased Purna was the son of Dolagobinda Nayak. Accused Pitambar Nayak (dead), Bidyanath Nayak and Natha Nayak are the brothers of Dolagobinda. Accused Bishnu Charan Nayak and accused Rabindra Nayak are the sons of Pitambar Nayak. Accused Bijayananda Nayak is the son of accused Bishnu.

3. The A.S.I. of Police, Kandiahat (P.W.8) undertook the preliminary investigation and sent the F.I.R. to Aul Police station for its Registration, which was registered as Aul P.S. Case No. 17 of 1998 under Section 341, 302 and 34 IPC. The investigation was entrusted to P.W.8. Thereafter P.W.8 visited the spot, examined the witnesses,

seized blood stained outer portion of the cattle post and clothes, arrested co-accused Pitambar, forwarded him to the court and handed over the charge of investigation to the then O.I.C., Aul Police Station, namely Pradyumna Kumar Jena (P.W.7) who re-examined some of the witnesses, received the case diaries from I.I.C., Jajpur P.S. in Jajpur P.S. U.D. Case No. 14 of 1998 and the post mortem examination report, seized blood stained apparels of the deceased on production by P.W.8, examined P.W.8 and seizure witnesses, arrested the present appellant and forwarded him to the court. P.W.7, thereafter handed over the charge of investigation to his successor P.W.9, who sent the seized clothes and *saree* to State F.S.L. Rasulgarh for chemical examination as per the order of the S.D.J.M., Kendrapara. He submitted the charge sheet on receipt of order from S.P. Kendrapara completing investigation against the appellant, accused Pitambar (dead) showing accused Rabindra and Bijayananda as absconders. Accused Pitambar and Bishnu were committed earlier and charged in S.T. No. 54/569 of 1998. The accused Rabindra and Bijayananda later, on their apprehension and production were committed and charged in S.T. No. 7/61 of 1999. The hearing of both the trials was taken up together, in course of which accused Pitambar died and the case against him stood abated vide order dated 29.06.2000.

4. The plea of the appellant was one of complete denial and false implication due to previous enmity and litigations. The stand of

the appellant was that on 22.02.1998, P.W.4, the son of the deceased assaulted the bullock of the accused Pitambar and when Pitambar protested, P.W.4 assaulted him by means of a *Bhujali* causing bleeding injury on the left hand of Pitambar, in front of the cow shed of the accused. When Purna (deceased) tried to catch hold of P.W.4, he gave a push to Purna who fell down on the iron blade of a plough share kept leaning against the wall of the cowshed of the accused, which pierced on the right side neck of the deceased Purna and caused the injury for which he died.

5. In order to bring home the charge, during trial the prosecution had examined as many as 10 witnesses, which includes P.W.1, said to be an independent eye witness to the occurrence, P.W.2, is the witness to the seizure, P.W.3 is the Medical Officer who had conducted the post-mortem examination over the dead body, P.Ws.4, 5 and 6 are the son, wife and daughter of the deceased and are the eye witnesses to the occurrence, P.Ws. 7, 8 and 9 are the Investigating Officers. P.W.10 is the enquiring officer of the connected U.D. P.S. Case No. 14 of 1998 of Jajpur Town. The Prosecution also exhibited many documents including the FIR under Ext.4 and Post Mortem Report under Ext.3. On the other hand the defence had examined two witnesses, which includes one Banka Bihari Das (D.W.1), said to be the witness to such occurrence and the Medical Officer (D.W.2) who examined accused Pitambar Nayak on his injury.

The defence had also exhibited some documents, which includes injury report of Pitambar Nayak under Ext.A/1.

6. The learned Addl. Sessions Judge came to a conclusion that the prosecution has been able to prove successfully beyond all reasonable doubt that accused Bishnu Charan Nayak has committed murder of Purna Chandra Nayak and accordingly the Court below held the appellant guilty for commission of the offence under Sections 302 IPC and passed the sentenced as indicated above. So far as other accused persons are concerned, the court below acquitted them of all the charges.

7. Learned counsel for the appellant submitted that the impugned judgment is against the weight of evidence on record. The Court below had not taken into consideration the evidence of P.W.1 and D.W.1, the independent witness to the occurrence and reliable corroboration. The court below had only relied on the evidence of highly interested, related and inimical witnesses and convicted the appellant. According to him, there is delay in lodging the F.I.R and also delay in examination of P.Ws. 4, 5 and 6. The same should have been drawn adverse inference. However, the learned Court below relied on their evidence. Therefore, according to him, the impugned judgment of conviction and order of sentence are unsustainable and liable to be interfered with.

8. Per contra, the learned Additional Government Advocate submitted that the Court below had arrived at the finding basing on the evidence of the eye witnesses to the occurrence and also the Post Mortem Report. He further submitted that the statement made in the FIR and as well as the evidences of P.Ws. 4. 5 and 6 corroborates with each other and further the same also corroborates with the Post-Mortem Report. Thus, the impugned judgment of conviction and order of sentence warrants no interference in this appeal. This criminal appeal, therefore, being devoid of merit, is liable to be dismissed.

9. Perused the L.C.R. and went through the evidence on record carefully.

P.W.1, who is the independent witness to the occurrence in his examination-in-chief has stated that on the date of incident he had been to the house of the deceased at Maharakula village and found that the accused persons and the deceased were quarrelling with each other. The cattle of accused Pitambar destroyed the flower plant of the deceased, for which the son of the deceased (P.W.4) assaulted the cattle. Thus there was a scuffle between Pitambar and the son of the deceased. The deceased came there to rescue his son. By that time the accused Pitambar and the complainant Bikash (P.W.4) pushed severely to the deceased during the course of scuffling. As a result of which the deceased fell down on the blade of a plough

share and the blade of the plough share pierced on the throat of the deceased. Thereafter, he (P.W.1) along with P.W.4 and some others, shifted the deceased Purna to the Hospital where he died. In the cross-examination he had deposed that he frequently visits the house of the deceased. The blade of the plough share was lying on the ground with the blade projected upwards. During the course of scuffle P.W.4 gave severe push to his father who fell down on the plough share.

10. P.W.2, who is the witness to the seizure has stated in his cross examination that the blade was stained with blood, which was seized by the I.O.

11. P.W.3, who conducted the Post Mortem over the dead body in the examination-in-chief stated that the cause of death is due to shock, excessive hemorrhage. In the cross examination he deposed that the injury on the neck as mentioned in the P.M. Report can be possible if somebody falls down on the iron portion edgewise on the plough share with required force. The width of the edged of the weapon to be about 2 and half inch. The injury can be caused by only sharp weapon of about 2 and half inches width.

12. P.W.4 who is informant and son of the deceased, has stated that the appellant dealt a blow with a *Balam* on the right side neck region of the deceased. His father was bleeding profusely. P.W.4,

his mother Kamala (P.W.5) and sister Manisa (P.W.6) raised *hulla*, for which the appellant ran away with the *Balam* and thereafter other accused persons also left the spot. Since he was all along in the medical, he lodged the FIR the next day, i.e. 23.02.1998 at 5 P.M before Kandiahat out post. In his cross-examination, he has stated that the *Balam* was of about one and half feet length without handle. He has also stated that he has not specifically named the appellant before the I.O. to have run away with the *Balam*, but stated that all the accused persons ran away with the *Balam*. It was also stated that he was examined by the I.O. Jajpur Police Station on 23.02.1998 at 9.00 P.M. Though the Police Officer took his signature on a piece of paper, he did not know the contents of the said paper. He has admitted to have not stated the material contradiction that there were prior litigation between the deceased family and accused persons; that the villagers came hearing the *Hulla; Balam* was of about one and half feet length without handle; his father became senseless and they have shifted the deceased from the spot to the hospital. He has also stated that 10 days after the occurrence, he was examined by the OIC Aul P.S.

13. P.Ws. 5 and 6 who are the wife and daughter of the deceased corroborated the statement as has been given by P.W.4, with regard to cause of incidence and dealt of blow given by the appellant by means of the *Balam*. They also admitted the long enmity

between the two families. According to P.W.5, about 8 days after the occurrence, she was examined by the Police Officer of Aul Police Station.

14. P.W.8, who undertook the preliminary investigation and submitted the report to the O.I.C., Aul Police Station in his cross examination has stated that he noticed blood stain on the cattle pillars and the agricultural implements kept there. Bhagaban Mallik, Subhransu Das Bankabihri Das were the eye witness to the occurrence. According to him, P.W.4 has stated before him that the occurrence took place at 5.30 P.M. and that the accused persons created *gandagol* with his mother and that accused persons including accused Bishnu caught hold of the deceased from back side and that Subhransu Das and P.W.1 have seen the occurrence. He has produced the record before the learned S.D.J.M. Kendrapara on 25.02.1998 while occurrence took place on 22.02.1998.

15. P.W.9, who took the charge of investigation from P.W.7 on 26.06.1998 and forwarded the seized clothes and *saree* to S.F.S.L., Rasulgarh for chemical examination as per the order of the S.D.J.M., Kendrapara, has admitted in his cross examination that though Bhagaban Mallik was an eye witness to the occurrence, but he had not cited him as a charge sheeted witness.

16. D.W.1, who is the eye witness to the occurrence according to P.W.8, has supported the case of the defence and stated that his house is situated at the south of the house of the parties, intervened by the house of Madhusudan Thatoi. On 22.02.1998 he was present in his house and at about 4.30 P.M. he heard shout from the house of the parties and proceeded there. Sadhucharan Nayak (P.W.2), Bankabehari Nayak (P.W.1) Subhransu Sekhar Das, Bijoy Kumar Thatoi had already reached there. He found P.W.4 was assaulting to the bullock of Pitambar, as a result of which there was bleeding injury on the left eye of the bullock. They protested. The bullock went inside the cowshed of Pitambar. Pitambar abused P.W.4. At that time P.W.4 went inside the house and came back with a *Bhujali* near the cowshed of Pitambar, where Pitambar was standing. P.W.4 dealt a blow by means of the *Bhujali* aiming Pitambar but the blow fell to the thatch of the cowshed and hit on the left hand palm in between the index finger and big finger, as a result of which Pitambar sustained bleeding injury. The father of P.W.4 followed P.W.4 while he came out of the house with *Bhujali*. When P.W.4 tried to give another blow, the deceased caught hold of him. P.W.4 managed to release the hands of his father and gave a push to him, as a result of which his father fell down on a plow share kept near the cowshed. Due to fall the iron portion of the plough share pierced on the right side neck of Purna causing bleeding injury. D.W.1, P.W.1, Subhransu and others shifted

him to Gobindapur hospital. When doctor of Gobindaur hospital refused to treat, they took Purna to Jajpur hospital, where he died. In his presence, P.W.8 collected the plough share blade which was stained with blood, the blood stained barks of the pole and blood stained earth.

17. On close scrutiny of the aforesaid evidences, this Court finds that the materials available on record disclose the presence of P.W.1 and D.W.1, the independent witness at the time of occurrence. The evidence of P.W.1 corroborates with the evidence of D.W.1. with regard to the cause of death. The statement of P.W.1 and D.W.1 gets support from the post mortem report, wherein it has been stated that the injury can be possible if somebody falls down on the iron portion edgewise on the plough share with required force. The injury also two and half inches width which can be caused by the plough share. The evidence of P.Ws. 5 and 6 corroborates with the evidence of P.W.4. However, the prosecution had examined the son, wife and daughter at a belated stage, i.e. in the month of April while the occurrence took place in the month of February, 1998 and no explanation was given for such delay, which was lost sight of by the Trial Court. The court below proceeded with the prosecution only basing on the evidence of P.Ws. 5 and 6, who are admittedly interested, related and inimical witnesses. Such witnesses have also stated with regard to enmity between two families and also the recording of statement after eight to

ten days of the occurrence. According to P.W.8, he had examined one Subranshu Das and Suresh (another son of the deceased) on 23.02.1998 and sent the co accused Pitambr for medical examination pertaining to the injury sustained by *Bhujali* blow of P.W.4 on 22.02.1998. However, they have not been made charge sheeted witness, though they are the eye witness to the occurrence. The documents have not been produced before the Court below immediately, as per the statutory requirement, rather, the same was produced before the learned S.D.J.M on 25.02.1998. No action has also been taken against P.W.4 so far as the assault made by him to one of the co accused, namely Pitambar, who was medically examined on police requisition and the medical report reveals the injury sustained by Pitambar. Such things, speaks the volume regarding the prosecution case. Similarly, P.W.5 in her cross examination has stated that Ex-MLA is the Son-in-Law of her brother, however, he has not consulted with him to influence the local police. The evidence of P.W.4 as discussed above reveals material as well as factual contradictions and not reliable.

18. Taking into consideration the evidences of the witnesses as indicated above and the analysis made above, we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt by holding the appellant to be guilty of commission of offence under Section 302 IPC. Hence, this Court sets aside the impugned

order of conviction and sentence passed by the learned Additional Sessions Judge, Kendrapara in S.T. Case No.54/569 of 1998, so far as the present appellant is concerned and acquits him from the charge under section 302 of the I.P.C. accordingly.

Let the bail bond of the appellant, who is on bail, be cancelled and he be set at liberty, in case he is not required to be under custody in connection with other cases. The Lower Court Records along with copy of judgment be sent forthwith to the Trial Court for necessary action.

The Criminal Appeal is accordingly allowed.

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S. PANDA, J.

S.K. PANIGRAHI, J. I agree.

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S.K. PANIGRAHI, J.

Orissa High Court : Cuttack
The 9th October, 2020/Arun