

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.62 of 2016

Against the judgment dated 25th August, 2012 passed by the learned Additional Sessions Judge, Fast Track Court, Rourkela in Sessions Trial Case No.118/62 of 2009.

Surendra Munda

.....

Appellant

Versus

State of Odisha

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Respondent

Advocate(s) appeared in this case :-

For Appellant	:	Mr. A.K. Budhia, Advocate
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For Respondent	:	Mr. S.S. Kanungo, A.G.A.
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**CORAM : SHRI JUSTICE S. TALAPATRA
SHRI JUSTICE B.P. ROUTRAY**

JUDGMENT

12th July, 2022

B.P. Routray, J.

1. The Appellant is a life convict. He has preferred the appeal against the judgment of the learned Additional Sessions Judge, Fast Track Court, Rourkela passed in Sessions Trial Case No.118/62 of 2009 convicting and sentencing him for life along with fine of Rs.2000/- for commission

of offence under Section 302 of the Indian Penal Code (for short 'the I.P.C.').

2. One Gumuni Patra is the elder sister of the deceased Dhabaleswar Patra and staying in the house of the deceased in village Sihsadihi under Banei Police Station. On 12th January, 2009 in the afternoon Gumuni and the Appellant were quarreling in front of the house of the deceased. During quarrel, the Appellant fell down as he had drunken at that time and sustained injuries. Then out of anger he went inside his house and brought out an axe (budia). Seeing this, Gumuni ran into the house of the deceased to save her life and the Appellant chased her. Inside the house of the deceased the Appellant could not find Gumuni, but saw the deceased sitting on a cot. The Appellant without finding Gumuni assaulted on the head and neck of the deceased by means of the axe saying as to why he kept his sister in his house who is regularly quarreling with him. He dealt 3-4 blows on the head and neck of the deceased. As a result of the assault, the deceased got severely injured and as other witnesses rushed hearing the shout, the Appellant fled away. The deceased was shifted to the hospital and while undergoing treatment he succumbed to the injuries after one month, i.e. on 11.02.2009.

3. F.I.R. was lodged by the wife of the deceased on the same day of occurrence, i.e. on 12th January, 2009 at about 8.15 PM which was registered as Bonai P.S. Case No.2 dated 12th January 2009, initially for commission of offence under Section 307 of I.P.C. and turned to a case of murder upon death of the deceased subsequently.

4. P.W.15 – Kanhu Charan Behera, the Sub-Inspector of Police took up investigation and arrested the accused without delay, i.e. on the same day of occurrence. He also visited the spot, examined the witnesses and collected sample earth as well as blood stained earth. The Appellant, while in police custody, disclosed the place of concealment of the weapon of offence, i.e. the axe and at his instance the same was recovered. The wearing apparels of the Appellant as well as of the deceased were also seized by P.W.15.

5. The Appellant did not admit the guilt and took the plea of complete denial of prosecution allegations.

6. Prosecution in order to prove their case, examined 15 witnesses and exhibited 14 documents marked as Ext.1 to Ext.14. The wife of the deceased, who is the informant in the case, could not be examined as she

died out of shock during treatment of the deceased in the hospital, i.e. before death of the deceased.

7. No evidence was adduced from the side of the defense.

8. The learned trial court based on the evidence of the eye-witnesses, viz., P.Ws.4, 5, 6 and 13 as well as the evidence of other witnesses including the evidence of the autopsy doctor (P.W.1), treating doctors (P.Ws.2 and 12), convicted the Appellant with the finding that the prosecution has well proved the charge against the Appellant.

9. It is submitted on behalf of the Appellant that the trial court erroneously accepted P.W.4, 5, 6 & 13 as eyewitnesses who are not so but post occurrence witnesses only and therefore, the conviction based on the evidence of such eyewitnesses is not sustainable. It is further contended that the Appellant had no intention to kill the deceased as reveals from the circumstances and as such, this is not a case of murder but is a case of culpable homicide not amounting to murder falling within the ambit of Section 304-II of the I.P.C.

10. Before examining the contentions it needs to be seen at the outset about the nature of death of the deceased which must satisfy as homicidal

as it is a case of murder. In this regard, the evidence of the doctors viz. P.W.1, 2 & 12 are important.

P.W.1 is the doctor who conducted autopsy over the dead body of the deceased. He noticed 4 external injuries on the dead body, which are one bruise of size 3" X ½" over the forehead, one cut wound of size 3" X ½" X ½" over the nape of the neck and two abrasions of size 1" X 1" and 1½" X ½" over left inner and right inner scapular area respectively. All such injuries were old and ante-mortem in nature as per the opinion of P.W.1. The post mortem examination was conducted on 11th February, 2009.

P.W.2 is the doctor who examined the deceased on that same day of occurrence and found three injuries on his person which are two cut injuries of size 5cm X 0.1cm X 0.5cm and 5cm X 2.5cm X 0.5cm respectively and one contusion of size 5cm X 2cm X 1cm. The cut injuries are one each on the scalp and neck and the contusion is on the forehead. This witness has also examined the axe and opined that those injuries are possible by the said weapon. The deceased died on 11.02.2009 at Ispat General Hospital, Rourkela while undergoing treatment and P.W.12 is the Nuro Surgeon treating him. As per P.W.12

the spinal cord of the deceased was completely damaged at C-5 & C-6 level.

Thus Keeping in view such medical evidence and the report of injury (Ext.2) prepared by P.W.2 and the circumstances narrated by the witnesses, it is confirmed that the deceased died homicidal nature of death.

11. The foundation for conviction of the Appellant, as evinced from the discussions made in the impugned judgment, is mainly the evidence of prosecution witnesses No.4, 5, 6, & 13 as well as recovery of the weapon of offence under Section 27 of the Indian Evidence Act at the instance of the Appellant from the thatched roof of the house of the Appellant. On the backdrop of the submission advanced on behalf of the Appellant not to treat P.Ws.4, 5, 6 & 13 as witnesses to the occurrence, it is seen upon scrutiny of their evidence that they all have stated to have reached near the deceased hearing hullah from the house. In this regard P.W.4 has admitted in her cross-examination that having heard the noise of Parabati (wife of the deceased) she went to the spot. Similarly, P.W.5 has stated that having heard the shout of the deceased he and other ladies went to the spot and saw the deceased falling on the ground. P.W.6 has

also stated in the same line that hearing hullah of the wife of the deceased she reached at the spot. But the evidence of P.W.13, sister of the deceased, is clear to the effect that she was an eyewitness to the assault. Nothing adverse could be elicited from her by the defense during cross-examination. Rather she had confirmed her presence at the scene of occurrence by stating that she had come to her brother's house on the occasion of "*Push Purmima*". At the same time, the statements of P.W.4, 5 & 6 are to the effect that they saw the Appellant chasing Gumani (the sister of the deceased) who entered into the house of the deceased and the Appellant following her also entered into the house. Such evidence of those witnesses remains uncontroverted. So even conceding for a moment to the submission of the learned counsel for the Appellant that they are not the occurrence witnesses, still their immediate presence at the crime scene cannot be ruled out because they have seen the Appellate chasing Gumuni and immediately thereafter they reached near the deceased hearing the hullah from the house. Moreover, the statement of P.W.13 regarding her witnessing the assault remains unimpeached. So upon a cumulative assessment of the evidences of P.W.4, 5, 6 & 13, the assault by the Appellant on the deceased cannot be doubted. Therefore, the contention of the Appellant to entirely discard

out the evidence of such witnesses is without merit. Accordingly, it is reiterated that the assault on the deceased by the Appellant through the axe is clearly established beyond unreasonable doubt.

12. Next to examine the other evidence regarding recovery of the weapon of offence i.e. the axe, the same has been duly established from the evidence of P.W.5 as well as the I.O. (P.W.15). But unfortunately said weapon of offence has not been produced by the prosecution before the court and no reason has been assigned thereof for non-production of the same. However, in view of the clear and cogent evidence of P.Ws.4, 5, 6 & 13, non-production of the weapon of offence at the time of trial has no impact on prosecution case.

13. Learned counsel for the Appellant to buttress his submission that this is a case of culpable homicide not amounting to murder, draws our attention to the circumstance that the Appellant was chasing the sister of the deceased and without finding her dealt blows on the deceased out of anger and frustration. As per the submission of the learned counsel for the Appellant, the impact of the injuries were not that serious to cause instant death of the deceased at the spot.

14. Before dealing with the submissions of the Appellant, it is important to have a relook to the nature of injuries inflicted on the body of the deceased. As per P.W.1, the autopsy doctor, the deceased sustained one cut wound, one bruise and two abrasions. P.W.1 has not stated anything about the cause of death and as per him the opinion is reserved as the viscera was sent for examination. According to the statement of P.W.2, the doctor who treated the deceased immediately on the date of assault upon his arrival in the hospital, has found two cut injuries, one each on the scalp and neck, and another contusion. According to him, the cut injury over the scalp and the contusion over the forehead were simple in nature. As per the evidence of P.W.12, the Nero Surgeon of the hospital where the deceased breathed last, he found it is case of traumatic quadriplegia with a complete transection of the spinal cord at C-5 and C-6 level. This P.W.12 has not submitted any report about the treatment of the deceased.

15. To bring a case fall within the ambit of culpable homicide not amounting to murder, it must come within those five exceptions of Section 300 of the I.P.C. In a case where death is resulted by such assault committed without pre-meditation in a heat of passion as

contended to be in the instant case, the associate circumstances leading to such assault are to be scanned minutely.

16. The circumstances reveal from the prosecution case are that, there was a quarrel immediately preceding the occurrence and in course of that quarrel the Appellant sustained injuries, though due to his fault as per prosecution version. But the admitted fact remains that, the Appellant sustained two injuries on his person, which are one cut injury over his scalp and another contusion on his right elbow. This is the circumstance that made him angry and violent to chase Gumuni with the axe. Since Gumuni concealed her and the Appellant could not find her, he settled the score on the deceased by assaulting him with the axe he was carrying. So the assault was not pre-meditated but was the reflection of anger the Appellant had at that time. Thus upon a close analysis of such circumstances and the nature of injuries sustained by the deceased as per the opinion of P.W.2, the treating doctor, where out of three injuries two are simple in nature, we are inclined to bring this case fall within the fold of Part-I of Section 304 of the Indian Penal Code.

17. It is submitted at the Bar that the Appellant is inside custody from the date of occurrence i.e., since 12th January, 2009 when he was

arrested by P.W.15. This is also confirmed on verification of copy of the order-sheets available in the L.C.R. as well as the order-sheets of the present appeal. This means that the Appellant is in custody for more than thirteen years as on date. As such, we modify his conviction to be under Part-I of Section 304 of the I.P.C. and sentence him the period undergone in custody till date. Accordingly it is directed to release the Appellant forthwith if his detention is not required in any other case.

18. The appeal is disposed of as allowed to the above extent.



