

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRIMINAL APPEAL No.70 of 1990

(From the judgment dated 7th March, 1990 passed by the learned Addl. Sessions Judge, Jajpur in S.T. No.178/37 of 1989)

***Baban@Debadatta Acharya and
another***

....

Appellants

-VERSUS-

State

....

Respondent

Advocate(s) appeared in this case:-

For Appellants : Mr. S. Panda, Advocate

For Respondent : Mr. K. Das,
Additional Standing Counsel

CORAM: JUSTICE B.P. ROUTRAY

JUDGMENT
22nd December, 2022

B.P. Routray, J.

1. Present appeal is directed against the impugned judgment of conviction and sentence under Section 304, Part-II read with Section 34 of the I.P.C. passed by the learned Additional Sessions Judge, Jajpur in S.T. No.178/37 of 1989. The Appellants have been sentenced to undergo R.I. for five years and to pay a fine of Rs.2000/-.

2. Prosecution case in brief is that on 20th November, 1988 at about 7.00 P.M., the Appellants committed murder of the deceased-Naba Kishore Nayak. All total ten accused persons faced the trial for

commission of offences under Sections 302/341/323/109/34, I.P.C. and except present two Appellants, others have been acquitted of the charges completely. It is alleged that near Kartikeswar Mandap of village Aanikana a feast was arranged. Some of the accused persons reached at the feast and a scuffle ensued between the informant and those accused persons there, which was pacified by some village gentlemen. After some time then, when the deceased was returning to his house from his field, present two Appellants being armed with one Iron Khadika (spatula) and Badi (stick), who are the sons of one of the accused, namely, Madhaba Acharya, assaulted the deceased near the plum tree in front of the house of Nrusinghacharan Acharya. As a result of the assault, the deceased sustained bleeding injuries and he was immediately shifted to hospital, but died on the way.

3. All total 16 witnesses were examined on behalf of the prosecution and 15 documents were marked in exhibits, besides four material objects. P.Ws.1 to 5 are stated to be the eye-witnesses of the occurrence, P.W.8 is the Doctor, who did postmortem examination of the dead-body, P.W.14 is the Doctor, who treated the deceased initially in the local hospital and referred him to SCB Medical College and Hospital, Cuttack before he died on the way going to Cuttack, P.Ws.11 & 16 are the two Police Investigating Officers. P.W.1 is the informant on whose report Binjharpur P.S. Case No.161 dated 21.11.1988 was registered. P.W.16 took up initial investigation and subsequently P.W.11 completed the investigation and submitted charge-sheet.

4. Defence examined one witness (D.W.1) on their behalf. Defence case is that, on the date of occurrence there was a group clash in the

village between the informant's group on one hand and the supporters of Nrusingha Charan Nayak on the other side. Initially the quarrel ensued due to passing of comments by the informant and others followed by free pelting of stones and brick-bating from both sides resulting death of the deceased and injuries to many others. The further case of the defence is that the Appellants, who are college going students by then, have been falsely implicated in the case.

5. Learned trial court upon scrutiny of the evidence has concluded that the prosecution has failed to establish the charges against other accused persons except the Appellants. Further, the charges under Section 341 read with Section 34, I.P.C. is established against both the Appellants, and the charge for offence under Section 323, I.P.C. is established against Appellant No.2-Chandra@Jatindra Acharya. In the opinion of the learned trial court though death of the deceased is established due to assault made by the Appellants, but considering the circumstances that they have dealt one blow each, the charge of culpable homicide not amounting to murder, for having caused the fatal bodily injury on the deceased, is established. Accordingly, the learned trial court hold both the Appellants guilty for commission of offences of culpable homicide not amounting to murder punishable under Section 304, Part-II read with Section 34, I.P.C. and sentenced them as afore-stated. Learned trial court did not impose any separate sentence on the Appellants for commission of offences under Sections 341/34, I.P.C. and Section 323, I.P.C.

6. Perusal of prosecution evidence reveals that most of the independent witnesses, except P.W.5, as well as the accused persons

belong to same village, namely, Aanikana under Binjharpur P.S. (presently in the district of Jajpur). The learned trial court mostly relied on the evidence of P.W.1 (the informant) and P.W.5. P.W.1 is the cousin brother of the deceased so also P.Ws.2, 3 and 4 are the relatives of the deceased. P.W.5 belongs to another village and was a chance witness passing by the spot of occurrence at the relevant time. The present occurrence i.e. assault on the deceased was preceded by another incident at Kartikeswar Mandap when the accused persons along with some others allegedly confronted the informant and others at Kartikeswar Mandap regarding certain issue that resulted hot exchange of words between the parties. Neither P.W.1 nor P.W.5 have said about presence of the Appellants near the Kartikeswar Mandap in the preceding incident. P.Ws.2, 3 & 4 also have not stated anything about presence of the Appellants at Kartikeswar Mandap.

7. The specific evidences of the eye-witnesses are that, the Appellants were previously present near plum tree when the deceased was crossing it. The conclusive finding upon scrutiny of evidences of P.Ws.1 to 5 by the learned trial court is to the effect that, both the Appellants dealt one blow each on the deceased. Appellant No.1-Debadatta dealt the blow by Iron Khadika and Appellant No.2-Jatindra dealt by means of the stick and the assault took place within twinkling of eye. As per postmortem examination conducted by P.W.8, five external injuries were noticed on the person of the deceased, which are lacerated wounds on the right side of the occipital region of the back of head, abrasion on the left side forehead above the lateral end of left eyebrow, contusion with swelling on the lateral end of left eyebrow,

abrasion on the back of left eyebrow and parallel contusion over the outer aspect of right thigh in the lower 1/3rd portion. All the ten internal injuries are corresponding to the first external injury found on the occipital region of the head. The point needs to be highlighted here is that if both the Appellants dealt one blow each, then how three other injuries on the person of the deceased appeared. This has not been explained by the prosecution.

8. The Iron Khadika produced before the trial court under M.O.I was not sent for chemical examination. Said M.O.I was also not produced before P.W.8 for examination. I mean to say here that the length, size and shape of M.O.I is not described anywhere on record. Iron khadika is generally used as an apparatus for cooking purpose and in a general human perception, it is not that heavy to inflict such a deep and effective injury on the head as mentioned at External Injury No.1 by P.W.8. So in absence of particulars of the weapon brought on record and in absence of examination of the same by the postmortem Doctor, no concrete opinion can be formed that such injury is possible in a single blow by that particular weapon.

9. The other points seen against the case of prosecution that M.O.I was never sent for chemical examination and it was recovered from the house of one of the co-accused, namely, Bhikari Parida, who has been acquitted from all charges. Finding M.O.I from the house of Bhikari Parida does not itself connect its use by Debadatta (Appellant No.1) as a weapon of offence. Prosecution needs to prove the connection on record to implicate the particular accused. Moreover the admitted fact remains that M.O.I was not sent for chemical examination, nor the

same was produced before P.W.8 for examination and none of the Investigating Officers, particularly P.W.16, who seized the same under Ext.4, have stated to have found any bloodstain mark on the same. But the learned trial judge has said that stain of human blood was found on M.O.I. This is a mistake of fact on record. No explanation has been offered by the prosecution for non-sending of the same for examination either by P.W.8 or chemically. This is a grave lacuna left unfilled by the prosecution and sufficient to delink M.O.I as the weapon of offence allegedly used by the Appellant No.1.

10. P.W.1 and 5 have said that Appellant No.2-Jatindra gave the second blow, after Debadatta, by means of a stick on the right side waist and thigh. In the opinion of P.W.8, he found the parallel contusion over lower 1/3rd portion of right thigh. In the opinion of the learned trial judge, this blow given by Jatindra had the cumulative impact with the blow given by Debadatta on the head of the deceased. But no such basis is found in such conclusion arrived by learned trial court keeping in view the nature of injury on the thigh of the deceased. It is important to point out here that no stick has been recovered in course of investigation, allegedly used as a weapon of offence by Jatindra. This again puts a doubt on the credibility of the prosecution version because prosecution has remained complete silent on the same without offering any explanation.

11. As per FIR story, during the preceding occurrence at Kartikeswar Mandap there was a heap of brick bats near the spot. As per the defence story, there was a group clash by pelting stones and brick bats freely from both sides. The nature of injuries noted by P.W.8

is consistent with brick bating and pelting of stones. It is seen from the evidence of P.W.14 that he also examined other witnesses, i.e. Bharat Chandra Nayak (P.W.2), Ramakanta Nayak (P.W.5) and Madan Mohan Nayak (P.W.4) on Police requisition and found each of them suffering with injuries. Though Ramakanta Nayak has tried to explain the injuries found on his person, which has rightly been disbelieved by the learned trial judge, but all such injuries noticed on these witnesses have not been properly explained by the prosecution. So in absence of a satisfactory explanation given from the side of the prosecution with regard to the injuries sustained by the witnesses, the explanation offered by the defence regarding brick bating and stone pelting in the group clash seems more probable.

12. Suppression of cause of injury on the prosecution side always creates doubt in the mind of the court as to the credibility of prosecution version. Sustenance of more injury by the deceased than stated to be inflicted by the Appellants as well as sustenance of injuries by P.Ws.2, 4 and 5 which are not properly explained by the prosecution mars the very credibility of prosecution case on the alleged assault by the Appellants. Conversely, the explanation offered by the defence that there was a group clash where the deceased and other witnesses sustained such injuries is fortified. This otherwise implies towards innocence of the Appellants.

13. All such doubts discussed above are very reasonable to suspect the prosecution case. When such doubts are found reasonable, the benefits thereof goes in favour of the accused persons and therefore, extending the benefits in favour of the Appellants, it is concluded that

the prosecution has failed to establish the charges beyond all reasonable doubts. The impugned judgment of conviction and sentence is thus set aside. The Appellants are held not guilty for the offences and they are acquitted of the charges.

14. The appeal is allowed as above. The bail bonds furnished by the Appellants are discharged.

15. LCR be sent back to the learned trial court without delay.



B.K. Barik/Secretary