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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 19 of 2004

Raj Kishor Behera and another ***Appellants***

-versus-

State of Odisha ***Respondent***

Advocates appeared in the cases:

For Appellants : Mr. Devashis Panda, Advocate

For Respondent : Mr. Janmejaya Katikia,
Additional Government Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

**JUDGMENT
23.08.2022**

Dr. S. Muralidhar, C.J.

1. This appeal is directed against an order dated 28th October 2003, passed by the learned Additional Sessions Judge, Deogarh in S.T. Case No.227/19 of 2002, convicting the Appellants for the offences punishable under Sections 302, 147, 149, 341, 324, 428 of Indian Penal Code (IPC) sentencing each of them to undergo:

(i) Rigorous Imprisonment (RI) for life under Section 302 read with 149 of IPC,

(ii) RI for one year for the offence punishable under Section 147 of IPC,

(iii) Simple Imprisonment (SI) for 15 days for the offence punishable under Section 341/149 of IPC.

In addition, the co-accused Benudhar Behera was held guilty for the offence punishable under Sections 147, 341/149 of IPC and 324/149 of IPC and the co-accused Ekadasia Penthei, Jagannath Behera, Purna Behera and Kalia@ Laxmidhar Behera were found guilty for the offence punishable under Sections 147, 341/149 IPC and 323/149 of IPC and sentenced to undergo one year R.I., S.I. for 15 days/ S.I. for six months. The substantive sentences of order against all the accused were directed to run concurrently. The accused Budhu Penthei (Accused No.8) A-8 was acquitted of all the offences.

2. The present appeal has been filed by the two of the six convicted accused persons, i.e., Raj Kishor Behera (Appellant No.1) (A-4) and Ramani Behera (Appellant No.2) (A-5).

Case of the prosecution

3. The case of the prosecution is that on 1st March 2002, at around 8.15pm at village Ratnapur, District Deogarh, the eight accused persons formed an unlawful assembly and pursuant to their common object of such unlawful assembly, wrongfully restrained the deceased Biranchi Behera and his brother Rabi Behera. They

are stated to have assaulted the said two persons and ultimately committed the murder of Biranchi Behera.

4. The case of the prosecution further is that the deceased and his brother Rabi Behera (PW-4) with certain others had grown watermelon at village Ratanpur and the respective cultivators were keeping a watch over it. On 28th February 2002 at midnight, the accused Ekadasia Penthei (A-7) entered the water-melon field of PW-4 for committing theft. This was however witnessed by Siba Pradhan (PW-1) and Belarsen Sahu (PW-3) at whose instance A-7 is stated to have fled away.

5. At 7 am the next morning, i.e., 1st March 2002, A-7 came to the PWs-1 and 3, i.e., Siba Pradhan (PW-1) and Belarsen Sahu (PW-3) and rebuked them in an obscene language which was then brought under control by the deceased Biranchi Behera.

6. In the same night at around 8.15pm, when PW-4 was returning to his house from the watermelon field, all the accused persons being armed with lathis, tangia and knife wrongfully restrained and attacked him and he shouted for help. Hearing his cries, Biranchi Behera came running followed by his wife, Subasini (PW-2) and son, Pratap. PWs 1 and 3 also came running from the watermelon field.

7. On the intervention of Biranchi Behera, the accused Raj Kishor Behera (A-4) dealt an axe blow to him while the co-accused

Ramani Behera (A-5) stabbed him by a knife while others assaulted him by lathis.

8. Later, Rabi Behera (PW-4) came to the rescue of Biranchi Behera but the accused Benudhar Behera (A-3) stabbed him by a knife. The deceased Biranchi Behera due to the axe and knife blows on his head and chest, sustained severe bleeding injuries and fell down. He was taken to the District Headquarters Hospital, Deogarh (DHH) where, in the course of treatment, he succumbed to the injuries the following morning, i.e., 2nd March, 2002. Thereafter, Rabi Behera (PW-4) lodged an FIR (Ext-2) before the Officer-in-Charge (OIC), Kundheigola Police Station, basing on which, the case was registered and investigation commenced.

9. B.K. Parida (PW-8), the OIC of Kundheigola PS rushed to the DHH, Deogarh where he conducted the inquest on the dead body of the deceased and after issuing command certificate and dead body chalan, despatched it for postmortem examination. He also visited the spot, seized the bloodstained and sample earth, prepared the spot map and examined the witnesses. He also conducted seizures in respect of the tangia and knife produced by PW-4. Upon search of the house, PW-8 was able to recover one lathi each from the house of the accused, i.e., Purna Behera, Jagannath Behera and Ekadasia Penthei and seized those articles as well. After receipt of the reports from the State Forensic Science Laboratory (SFSL), Rasulgarh, the charge sheet was filed. The accused pleaded not guilty and claimed trial.

Trial Court judgment

10. In the impugned judgment, the trial Court has, on analyzing the evidence on record of the eight prosecution witnesses and one defence witness, set out the questions to be addressed as under:

"(i) Whether on 1.3.2002 at about 8.15 P.M. the accused persons had formed an unlawful assembly being armed with lathis, tangia and knife at village-Ratanpur?

(ii) Whether the accused persons in prosecution of the common object of such assembly wrongfully restrained the informant-Rabi Behera and his brother-Biranchi Behera?

(iii) Whether the accused persons in prosecution of the common object of such assembly caused hurt to the informant-Rabi Behera and his brother-Biranchi Behera by inflicting lathi blows?

(iv) Whether the accused persons in prosecution of the common object of such assembly inflicted knife and axe blows upon the informant-Rabi Behera and his brother-Biranchi Behera causing injuries? and

(v) Whether accused- Raja Kishore Behera and Ramani Behera in prosecution of the common object of such assembly inflicted axe and knife blows upon the deceased-Biranchi Behera with intent to cause his death which resulted in his death?"

11. The trial Court, while answering the issues, first discussed the report of postmortem examination of the deceased by Dr. M.K. Upadhaya (PW-6) on 2nd March, 2002. PW-6 found the following injuries on the deceased:

"(i) One incised injury over the scalp of size 3" X ½" X 1" starting from lateral and of left eyebrow, backward and obliquely injuring left parietal bone and lacerated the brain matter with haematoma.

(ii) One incised injury over right shoulder injuring the right clavicle bone and right subclavian artery vertically of size 1" X ½" X 1", and

(iii) One lacerated injury over the first inter-costal space injuring the intercostal artery and vein of size 1" X ¼" X 1" horizontally placed anterior aspect of the chest wall."

12. The injuries according to PW-6 were ante-mortem in nature and the death was homicidal due to severe haemorrhage and neurogenic shock. After considering carefully the evidence of PWs-1, 2, 3 and 4, the learned trial Court concluded that the prosecution had failed to bring home the guilt of the accused Budhu Penthei.

13. As far as the incident was concerned, PWs-1 to 4 stated that at around 8.15pm on 1st March, 2002 while PW-4 was returning home for taking food, the said eight accused persons obstructed him on the way and started attacking him, for which he shouted for help. Hearing the shouts, the deceased Biranchi Behera came running followed by his wife Subasini (PW-2).

14. It has emerged from the evidence of PWs-1, 2, 3 and 4 that Ramani Behera (Appellant No.2) stabbed on the chest of the deceased with a knife while Raj Kishor Behera (Appellant No.1) dealt an axe blow on the head of the deceased while others assaulted him by lathis. When PW-4 came to the rescue of his brother and intervened, the accused Benudhar Behera (A-3) dealt a knife blow on his head. The deceased Biranchi Behera was then carried by a bus upto Khajurikhaman and from there by a trekker

to the DHH, Deogarh, where he succumbed to the injuries the following morning.

15. The trial Court concluded that despite PW-2 being the wife and PW-4 being the brother of the deceased, their evidence was clear, cogent and convincing. Relying on the decision in ***Dalip Singh v. State of Punjab AIR 1953 SC 364*** and ***Gangadhar Behera v. State of Orissa 2003 (I) Crimes 28 (SC)***, the relationship of PWs-2 and 4 with the deceased would not affect the credibility of their testimonies.

16. A suggestion was made to PWs-1 and 4 that they along with the deceased were chasing the accused persons to assault them and in course of such chase, the deceased and PW-4 sustained injuries by fall. However, as noted by the trial Court, none of the accused persons took this plea while their statements under Section 313 of Cr PC were being recorded. The injuries on the accused were examined by Dr. Judhistir Sahu (PW-5). Among the accused persons, Doshi@ Ekadasia Penthei (A-7) was shown to have sustained one lacerated injury on the left side of the nose, left thumb and lateral side of the right-side little finger, all of which were found to be simple in nature.

17. The trial Court referred to the decision in ***Sarada Rout v. State (1998) 14 OCR 557***. The trial Court accordingly concluded that all the accused persons except Budhu Penthei were the members of an unlawful assembly and in prosecution of the common object of such assembly, they wrongfully restrained the

informant Rabi Behera (PW-4) and the deceased Biranchi Behera and thereafter A-4 (Appellant No.1) and A-5 (Appellant No.2) inflicted knife and axe blows on the chest and the head of the deceased Biranchi Behera with an intent to kill him while others dealt lathi blows and co-accused Benudhar Behera inflicted knife blow on the head of the informant-PW-4. Consequently, the trial Court proceeded to acquit the accused Budhu Penthei and convicted all the other accused in the manner indicated hereinbefore.

18. This Court has heard the submissions of Mr. Devashis Panda, learned counsel appearing for the Appellants and Mr. Janmejaya Katikia, learned Additional Government Advocate (AGA) for the State.

Submissions on behalf of the Appellants

19. Mr. Devashis Panda, learned counsel appearing for the Appellants submitted as under:

(i) The actual charge of both the Appellants was entirely under Section 302 read with 149 of the IPC, whereas there is no finding of guilt by the trial Court of the convicted accused persons having committed an offence punishable under Section 149 of IPC. Since that charge could not be established and there is no other charge, the matter ought to have ended in an acquittal.

(ii) Relying on the Judgment in ***Nanak Chand v. State of Punjab AIR 1955 SC 274***, Mr. Panda submitted that Section 302 read

with 34 or 302 IPC simpliciter would not be attracted in the present case simply because although eight accused persons were sent up for trial, only two were convicted for the major offence punishable under Section 302 of IPC, whereas the charge under Section 149 was not established.

(iii) It is submitted that the evidence on record did not bring home the guilt of either of the accused. They ought to be extended the benefit of doubt.

Submissions on behalf of the State

20. On the other hand, Mr. Janmejaya Katikia, learned Additional Government Advocate relied on the decisions in ***Kallu@ Masih v. State of M.P. (2006) 10 SCC 313***, ***Hamlet@ Sasi v. State of Kerala (2003) 10 SCC 108*** and ***Nethala Pothuraju v. State of Andhra Pradesh (1992) 1 SCC 49*** to urge that even if ultimately only two of the five minimum persons got convicted for the offence punishable under Section 149 of IPC, the Court would not be powerless to convert the offence to one under Section 302 read with 34 of IPC, so that there is no miscarriage of justice. Reliance is also placed on the decision in ***Chittarmal v. State of Rajasthan (2003) 2 SCC 266*** and ***Virendra Singh v. State of Madhya Pradesh (2010) 8 SCC 407***.

Analysis and reasons

21. The above submissions have been considered. Section 141 of the IPC defines what an unlawful assembly is and reads as under:

“141. Unlawful assembly.— An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

First — To overawe by criminal force, or show of criminal force, 1[the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second — To resist the execution of any law, or of any legal process; or

Third — To commit any mischief or criminal trespass, or other offence; or

Fourth — By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth — By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.— An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

22. Merely being a member of an unlawful assembly attracts punishment under Section 143 IPC. Even if one of the persons in the unlawful assembly of five commits a criminal act, it could be attributed to each of the members of the assembly. Joining an unlawful assembly armed with deadly weapons attracts Section 144 IPC. Section 146 of IPC talks of ‘rioting’ which is mainly use of violence by an unlawful assembly or by any member thereof in

prosecution of the common object of such assembly. In that event, “every member of such assembly is guilty of the offence of rioting.”

23. Under Section 148 rioting after being armed with a deadly weapon or any other weapon which is likely to cause death is punishable with imprisonment of either description for a term which may extend to three years or with fine or with both. Section 149 makes it an offence committed by each of the members of the unlawful assembly, even if one of them commits the offence in pursuance of the common object.

24. In *Nethala Pothuraju v. State of Andhra Pradesh* (*supra*), seven persons were tried for the offence punishable under Sections 147/148/323/379/302 read with 149 of IPC on the allegation of causing the death of the deceased. The trial Court convicted the A-1 to A-6 under Sections 148 and 302 read with 149 of IPC and sentenced them to imprisonment for life. On appeal, the High Court confirmed the conviction and sentence of A-1 to A-3 whereas it set aside the conviction and sentence of A-4 to A-6. The question that arose was whether Section 149 IPC still applies to A-1 to A-3. It was held that once the number was reduced to three, the High Court was in error in convicting them for the offence punishable under Section 148 read with 149 IPC. However, the Court did not stop with that. The Court posed the following question:

“5. The question still remains as to whether the appellants can be convicted under Section 302 read with Section 34 IPC. Both Sections 149 and 34 IPC

deal with a combination of persons who become liable to be punished as sharers in the commission of offences. The non-applicability of Section 149 IPC is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC if the evidence discloses commission of an offence in furtherance of the common intention of them all.”

25. At this juncture, it is necessary to discuss the decision of the Supreme Court in *Nanak Chand* (*supra*) where the question posed was as under:

“5. The principal question of law to be considered is as to whether the appellant could legally be convicted for murder and sentenced under section 302, Indian Penal Code when he was not charged with that offence. It was urged that as the appellant had been acquitted of the charge of rioting and the offence under section 302/149 of the Indian Penal Code, he could not be convicted for the substantive offence of murder under section 302, Indian Penal Code, without a charge having been framed against him under that section. Reliance has been placed on the provisions of the Code of Criminal Procedure relating to the framing of charges, the observations of the *Privy Council in Barendra Kumar Ghosh v. Emperor* [1925] I.L.R. 52 Cal, 197 and certain decisions of the Calcutta High Court to which reference will be made later on. It was urged that for every distinct offence of which a person is accused, there shall be a separate charge and every such charge shall be tried separately except in cases mentioned under sections 234, 235, 236) 237 and 239 of the Code of Criminal Procedure. Section 149 of the Indian Penal Code creates a specific offence and it is a separate offence from the offence of murder punishable under section 302 of the Indian Penal Code. The provisions of sections 236, 237 and 238 of the Code of Criminal Procedure did not apply to the facts and circumstances of the present case. On behalf of the Prosecution, however, it was urged that section 149 did

not create any offence at all and therefore no separate charge was obligatory under section 233 of the Code of Criminal Procedure and that in any event the provisions of sections 236 and 237 of the Code of Criminal Procedure did apply and the appellant could have been convicted and sentenced, under section 302 of the Indian Penal Code, although no charge for the substantive offence of murder had been framed against him.”

26. In *Nanak Chand (supra)*, the trial Court held the charge of rioting not to be proved and convicted the Appellants in that case of the offence under Section 302 read with Section 34 IPC. When this was converted by the High Court in appeal to the offence under Section 302 IPC, a question arose whether Nanak Chand could be so convicted when there was no charge framed for that offence. In *Nanak Chand (supra)*, there was a clean acquittal of all the remaining accused persons other than the one who went in appeal. Therefore, the numbers did not add up to five.

27. However, in the present case, it is not as if the remaining accused were completely acquitted of all the offences. That six of them together formed an unlawful assembly is evident. Unlike, the decision in *Nethala Pothuraju v. State of Andhra Pradesh (supra)*, where there was a clean acquittal of all the remaining accused persons, here there is no such clean acquittal of the remaining accused of all the offences. In that sense, the formation of the unlawful assembly is still proved. It may be that as far as the offence of murder was concerned, only the present Appellants may be guilty thereof. However, the remaining accused along

with the present Appellants still continued to form part of an unlawful assembly i.e., with arms.

28. In *Kallu@ Masih v. State of M.P. (supra)*, the law was explained as under:

“17. The contention that when only four persons are found guilty, there cannot be conviction under Section 149 IPC, has no merit. Section 149 provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Section 141 requires a minimum of five persons for being designated as an “unlawful assembly”.

29. In *Kallu@ Masih v. State of M.P. (supra)*, twenty-seven persons had been sent up for trial. The trial Court acquitted all the twenty-seven. In the appeal filed by the State, leave was granted by the High Court only with regard to five, since they had been specifically named as the persons committing the offence and causing the injuries to the deceased and others. One of the five got the benefit of doubt “though his presence as a member of the group was accepted.” As a result, only four were convicted. The Supreme Court then explained as under:

“19. xxx xx This does not mean that there is no finding that there was an unlawful assembly. When the evidence clearly shows that more than five persons armed with swords, spears, etc. had come to the house of Sadruddin with the common object of causing injury, and injured him, the mere fact that several accused were acquitted and only four are convicted,

does not enable the four who are found guilty to contend that Section 149 is inapplicable. We may also in this context refer to the following observations in *Masalti v. State of U.P. (1964) 8 SCR 133* reiterated in *Triloki Nath v. State of U.P. (2005) 13 SCC 323* (SCR p. 149)

“In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.”

30. Next turning to the decision in *Hamlet@ Sasi and others v. State of Kerala* (supra), the law was explained therein as under:

“17. This Court in *Nethala Pothuraju v. State of A.P. (1992) 1 SCC 49* has held that the non-applicability of Section 149 IPC is no bar in convicting the accused under Section 302 read with Section 34 IPC if the evidence discloses commission of an offence in furtherance of the common intention of such accused. This is because both Sections 149 and 34 IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences. Therefore, in cases where the prosecution is unable to prove the number of members of the unlawful assembly to be five or more, courts can convict the guilty persons with the aid of Section 34 IPC provided that there is evidence on record to show that such accused shared the common intention to commit the crime. While doing so

the courts will have to bear in mind the requirement of Section 34. It is well known that to establish the common intention of several persons to attract Section 34 IPC, the following two fundamental facts have to be established: (i) common intention, and (ii) participation of the accused in commission of the offences. If the above two ingredients are satisfied, even overt act on the part of some of the persons sharing the common intention is not necessary. (See *Jai Bhagwan v. State of Haryana* (1999) 3 SCC 102).

31. Again in *Chittarmal v. State of Rajasthan* (*supra*), the Court explained the distinction between ‘common object’ and ‘common intention’ as under:

“14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre- concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Sections 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section

149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh Vs. King Emperor AIR 1925 PC 1*, *Mannam Venkatadari v. State of A.P. (1971) 3 SCC 254*, *Nethala Pothuraju v. State of A.P. (1992) 1 SCC 49* and *Ram Tahal v. State of U.P. (1972) 1 SCC 136*).”

32. In the present case, it was sought to be argued by Mr. Devashis Panda that the deceased Biranchi Behera was not the original intended target but it was Rabi (PW-4) who was the target and therefore, the intent to kill Biranchi Behera, vis-à-vis, each of the accused persons was not proved. It was argued that Biranchi had intercepted the attack by the accused on Rabi and therefore, Section 302 IPC was not attracted at all.

33. The Court is unable to agree with the above submissions. The injuries on the deceased Biranchi show that the accused did not stop in just inflicting one or two blows but rained a number of blows on him. Clearly, therefore, once they started attacking Biranchi, they did not stop doing so and therefore, the intention to kill him with his having intervened is very much established.

34. In *Virendra Singh v. State of Madhya Pradesh (supra)*, again the distinction between “common intention (Section 34 of IPC)” and “common object (Section 149 of IPC)” was drawn by

referring to a long line of judgments. The relevant extract from the said decision reads as under:

“39. The common intention postulates the existence of a prearranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under Section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver than the one originally designed, during execution of the original plan, should be clear and cogent.”

35. In the present case, the necessity to invoke Section 34 IPC may not arise since the formation of an unlawful assembly is very much there and the acts of one or two of them pursuant thereto has been proved. Merely because the trial Court had acquitted the remaining of the more serious offence under Section 302 read with 149 IPC would not extend to either of the present two Appellants. They have been rightly convicted under Section 302 read with 149 IPC apart from other offences.

36. The prosecution case has rested on the evidence of PWs 1 and 4, both being related to the deceased and, therefore, characterized

as related witnesses. However, that does not mean that if their evidence is trustworthy and consistent, it cannot be relied upon. In ***State of U.P v. Kishanpal (2008) 16 SCC 73*** the Supreme Court explained the legal position as under:

“17....The plea of "interested witness", "related witness" has been succinctly explained by this Court in *State of Rajasthan vs. Smt. Kalki & Anr., (1981) 2 SCC 752*. The following conclusion in paragraph 7 is relevant:

"7. As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

From the above it is clear that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she has derived some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be 'interested'."

37. In the present case, the eye witnesses, one of whom (PW-4) was an injured eye witness have spoken consistently and cogently in describing the manner of commission of the crime in detail. The Court is not persuaded that their evidence is to be discarded merely because they happen to be related witnesses. Moreover, as explained in *Abdul Sayeed v. State of M.P. (2010) 10 SCC 259*, the testimony of an injured eye witness carries more evidentiary value. Further, the eye witness testimonies are fully corroborated by the medical and scientific evidence.

38. Further, the Court is not impressed with the argument that since Rabi Behera was the target of the accused and not the deceased Biranchi, the crime punishable under Section 302 IPC is not attracted. The crime in the instant case fits the description of 'thirdly' under Section 300 IPC and will be culpable homicide amounting to murder. In this the following legal exposition of the Supreme Court of India in *State of U.P. v. Kishanpal (supra)* is relevant:

“61.It is relevant to mention that in *Virsa Singh v. State of Punjab (AIR 1958 SC 465)* Vivian Bose, J speaking for the Court, explained the meaning and scope of clause (3) of Section 300 I.P.C. It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of

injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the inquiry of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

62. The ingredients of clause "thirdly" of Section 300 IPC were brought out by Bose, J. which reads as under:

"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly";

First, it must establish, quite objectively, that, a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

63) The learned Judge explained the third ingredient in the following words (at page 468):

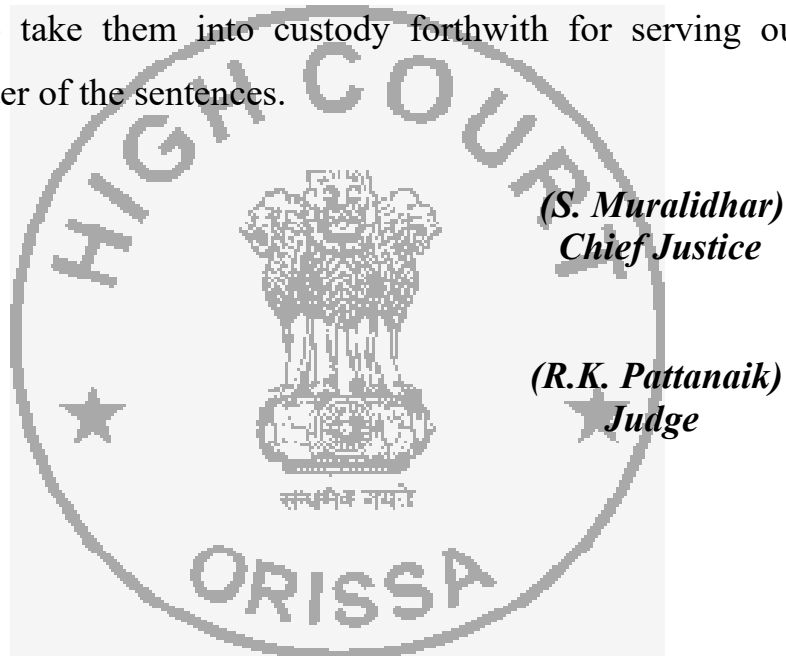
"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but

whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

64. The test laid down by *Virsa Singh case (supra)* for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted. Thus, according to the rule laid down in *Virsa Singh case (supra)* even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point."

39. In these circumstances, the Court is unable to find any error having been committed by the trial Court in convicting the Appellants and sentencing them in the manner indicated hereinbefore.

40. The appeal is accordingly dismissed. The bail bonds of the Appellants are hereby cancelled. They are directed to surrender forthwith and, in any event, not later than 5th September, 2022, failing which, the IIC of the concerned Police Station will take steps to take them into custody forthwith for serving out the remainder of the sentences.



S. Behera/ Jr. Steno