

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA NO.730 OF 2011

From the judgment of conviction and order of sentence dated 24.11.2011 passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.40 of 2010 arising out of G.R. Case No.45 of 2010, T.C. No.475 of 2010 of the Court of learned S.D.J.M., Rairangpur.

Gane @ Anpa@ Ganesh Besra & Another ***Appellants***

-versus-

State of Odisha ***Respondent***

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode:**

<i>For Appellants</i>	:::	Ms. Bijay Laxmi Tripathy, Advocate.
<i>For Respondent</i>	:::	Mr. S.K. Nayak, Addl. Government Advocate.

CORAM: ★
MR. JUSTICE D.DASH
DR. JUSTICE S.K.PANIGRAHI

DATE OF HEARING :14.11.2022 : DATE OF JUDGMENT:18.11.2022

D.Dash,J. The Appellants namely, Gane @ Anpa@ Ganesh Besra and Demka @ Arjun Besra by filing this Appeal, have challenged the judgment of conviction and order of sentence dated 24.11.2011 passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No.40 of 2010 arising out of G.R. Case No.45 of 2010, T.C. No.475 of 2010 of the Court of learned Sub-Divisional Judicial Magistrate, (SDJM), Rairangpur.

By the same, these Appellants (accused persons) have been convicted for commission of offence under section-302/506/34 of the Indian Penal Code (for short 'the IPC') and sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for one year for offence under section-302 of the IPC, without imposition of any separate sentence for offence under section-506/34 of the IPC with further direction that realized fine shall be paid to the sons of the deceased towards compensation.

2. The prosecution case is that on 08.02.2010 at about 11 am, deceased (Sita Besra), the mother of Narayan Besra, (Informant-P.W.1) was engaged in work in their threshing floor situated in Talasahi of their village Gopalpur. Informant namely, Narayan Besra, (P.W.1) was absent in his house and he had gone to another village namely, Bargimara to meet his relations. His other brother namely, Jitray Besra (P.W.5) was present in the house and taking rice.

It is stated that accused, Demka @ Arjun came to P.W.5 and asked him the where about of his brother, Narayan (P.W.1) and their mother (deceased). P.W.5 then replied that both were absent in the house. The accused persons numbering five(5) i.e. these Appellants and Jugal Kishore Besra @ Jugu, Sundar @ Arjun Besra, Raisen @ Ganesh Besra proceeded towards the threshing floor. Accused Gane @

Anpa@ Ganesh cut the head of the deceased and separated the same from the trunk by means of a kitchen knife (Paniki-M.O.-I) as she was suspected to have practised witchcraft causing prolonged illness of his wife who ultimately died while under treatment. Having murdered the deceased, the severed body without the head was left at the spot i.e. at the threshing floor and accused Gane @ Anpa@ Ganesh took away the cut head of the deceased being wrapped with a banion and also took away the kitchen knife (Paniki) used for such cutting. That accused-Gane @ Anpa@ Ganesh then left the place, and straight way went to the Police Out Post at Hatabadada. He produced the cut head of the deceased and that kitchen knife (Paniki-M.O.-I) before the Centry Constable (P.W.17), who was then present at the Out Post. That accused Gane @ Anpa@ Ganesh was immediately kept under Police Lockup (Hazat) and the Assistant Sub-Inspector of Police in-charge of the Out Post was called. The Officer-in-Charge of Rairangpur Rural Police Station (P.W.18) under whose jurisdiction the Out Post situates was too intimated about the said incident. He rushed to the place and after about an hour, the Informant (P.W.1), Narayan Besra came to the Police Out Post and lodged a written report scribed by one Dillip Murmu (P.W.8). The Officer-in-Charge of Police Station then immediately registered the case.

In course of investigation, the Investigating Officer (P.W.18) visited the spot; prepared spot map, held inquest over the dead body and the cut head and prepared the reports. The dead body with the head severed from the trunk has been sent for postmortem examination by issuing necessary requisition. The witnesses including Informant (P.W.1) were examined and the incriminating articles were seized followed by preparation of seizure lists. In view of the transfer of the Investigating officer, P.W.18, his successor-in-office, P.W.16 took charge of the same. The accused persons being arrested were forwarded to the Court. The incriminating articles were sent for chemical examination through Court and finally on completion of investigation, the accused persons (5 in number) were placed for facing the trial for commission of offence under section-302/506/34 of the IPC.

3. Learned Sub-Divisional Judicial Magistrate, Rairangpur having taken cognizance of the above noted offences after observing the formalities committed the case to the Court of Sessions. That is how the trial commenced by framing charge against all the accused persons for the offence under section-302/506/34 of the IPC.

4. During the trial, the prosecution has examined eighteen (18) witnesses. As already stated, the first witness is the Informant-P.W.1,

who happens to be the son of the deceased and other son of the deceased is P.W.5. The scribe of the F.I.R. who happens to the son-in-law of the deceased has been examined as P.W.8. The inquest witnesses are P.Ws.2, 12, 15 and 17. P.Ws. 4 and 10 have been examined to prove the seizure of the incriminating articles. The Medical Officer, who held postmortem examination over the dead body of the deceased had also the occasioned to examine the weapon sent to him by the Investigating Officer to give his opinion with reference to the injuries found on the dead body of the deceased, has been examined as P.W.11. The independent witnesses have been examined as P.Ws.9, 13 and 14. As already stated P.W.16 and 18 are the two Investigating Officers.

5. The defence case is that of complete denial and false implication. However, from the side of the defence, no such witness has been examined. The prosecution in support of its case has also proved several documents, more importantly the F.I.R., Ext.1 inquest reports, Exts.2, 5 & 12, Postmortem reports, Exts. 7 and 7/2 and seizure lists etc.

6. In the trial faced by the five (5) accused persons, only these two have been convicted namely, Gane @ Anpa @ Ganesh and Demka @

Arjun for the offence under section-302/506/34 of the IPC and other three(3) accused persons as named above have been acquitted.

The Trial Court having discussed the evidence of the Doctor (P.W.11) and other evidence and on going through the relevant reports Exts.7 and 7/2 has held the nature of death of the deceased to be homicidal. In fact this aspect was not challenged by the accused persons in the trial and that also they do not do here before this Court in this Appeal. The evidence of the Doctor (P.W.11) being clear and his report being free from any such ambiguity and when those being taken with other evidence of the witnesses do not create any such confusion in mind, this Court is wholly in agreement with the said finding of the Trial Court as to the nature of death of the deceased.

7. Learned Counsel for the Appellants submitted that the evidence on record are wholly insufficient to conclude beyond reasonable doubt that these two accused persons who have been convicted by the trial Court had played any role in severing the head of the deceased by means of Paniki-M.O.-I and thus separating the head and trunk. She submitted that, the Trial Court did commit grave error in holding that the prosecution has established the charges against these two accused persons beyond reasonable doubt. According to her, no such believable evidence has come to surface during the trial that it is these two

accused persons who had cut the head of the deceased through and through and simply for the reasons that accused Gane @ Anpa@ Ganesh carried the head of the deceased and produced it at the Police Out Post, he cannot be said to have caused said severance of the head and body of the deceased. It was submitted that the prosecution by leading any such believable evidence has not over-ruled the possibility that the accused Gane @ Anpa@ Ganesh having seen the cut head lying at the place might have taken it to the Police Out Post for the law to be set in motion to find out after the culprit and bring him into book and that should not have been taken as a circumstance as against the accused and for that solitary/ singular conduct of the accused-Gane @ Anpa@ Ganesh, he should not have been held guilty of offence under section-302 of the IPC. She further submitted that so far the other accused namely, Demka @ Arjun is concerned, there is absolutely no material on record as to his criminal liability. It was submitted that even though that accused-Demka was fond for some time with the co-accused, from that no definite conclusion can be arrived at that, he acted in inference of the common intention of both the accused persons in causing the murder of the deceased by intentional causing the death. She, therefore, submitted that the finding of guilt returned by the Trial Court as against the accused persons cannot be sustained. In support of

the same, she has invited our attention to the depositions of the relevant witnesses in demonstrating before us as to how those are not believable and thus cannot form the foundation of the guilt of the two accused persons.

8. Learned Counsel for the State, on the contrary, while supporting the finding of the Trial Court have highlighted the fact that the conduct of the accused-Gane @ Anpa@ Ganesh in carrying the freshly cut head of the deceased wrapped with his banion and going all the way from village to the Police Out Post and then depositing the same with the Centry Constable (P.W.17) is itself enough to hold him to be the perpetrator of the crime, when he in no way comes forward to offer any such explanation as to how a freshly cut human head i.e. of the deceased came to be held by him and why he had carried the same all the way from village to the Police Out Post. He submitted that the prosecution having proved that the accused-Gane @ Anpa@ Ganesh was carrying the head of the deceased and walked down, all the way, from the village to the Police Out Post and there he handed over the said severed head to the Centry Constable, the accused-Gane @ Anpa@ Ganesh having been shouldered with the burden of proof since has not provided/offered any such explanation, the provision of section-106 of the Evidence Act coming into full play, the conviction

of that accused has to be maintained. He further submitted that during the period, when that accused-Gane @ Anpa@ Ganesh carrying the freshly cut head of the deceased being wrapped with his banion, was going and with whom the other accused namely, Demka @ Arjun being found, he has to be held guilty for commission of offence under section-302 of the IPC with the aid of section-34 of the IPC.

9. Keeping in view the submissions made; We have carefully read the judgment passed by the Trial Court. We have also extensively travelled through the evidence adduced by the prosecution witnesses (P.W.1 to P.W.18) and the documents admitted in evidence and marked Exts.1 to 13 from the side of the prosecution have been perused.

10. In order to determine the complicity of these two accused persons before us in addressing the rival submissions and accordingly judge the sustainability of the finding of conviction returned by the Trial Court as against the accused persons, We are called upon to bestow our attention on the evidence of the witnesses examined from the side of the prosecution.

11. The Informant in the present case is the son of the deceased, who is not an eye witness. His written report which has been admitted in evidence and marked Ext.1 (F.I.R.) is also clear that he being not in

the village, on return, he came to know about the incident that accused-Gane @ Anpa@ Ganesh who happens to be the son of his elder father had cleanly cut the head of his mother by sharp kitchen knife (Paniki-M.O.-I). It has been stated in the F.I.R. that accused-Gane @ Anpa@ Ganesh was suspecting his mother to have been practicing witchcraft and he was also entertaining a belief in mind that the death of said accused after prolonged illness and suffering from fever was due to his mother's playing black magic upon her. The Defence without denying the above just seeks to take advantage of the evidence as to the suspicion entertained by the accused persons as the reason / basis of false implication.

P.W.5 is the other son of deceased and brother of the Informant-P.W.1. His evidence is to the effect that when he was taking rice, accused Demka @ Arjun came and asked him as to the whereabouts of his brother-Narayan (P.W.1) and then he too asked the whereabouts of his mother which he disclosed. It is stated that when he told accused Demka @ Arjun that his mother had gone to the threshing floor, said accused went to the backside of the house and then the other four (4) accused persons which include accused-Gane @ Anpa@ Ganesh went towards the village road. He has stated that when after taking rice, he came out of his house, he saw accused-Gane @ Anpa@ Ganesh was

carrying the cut head of his mother as well as the kitchen knife (Paniki-M.O.-I); and then other four accused persons were following him. It is next stated that then accused-Demka told him that they would murder him if he would be reporting the matter at the Police Out Post. The witness (P.W.5) being cross-examined, We find that his evidence that accused-Gane @ Anpa@ Ganesh was seen by him carrying the cut head of his mother and the kitchen knife (Paniki-M.O.-I) has in no way been shaken nor any such other doubtful feature has emanated thereof so as to disbelieve him and discard the version that he had seen the accused-Gane @ Anpa@ Ganesh to be holding the cut head of his deceased-mother and the kitchen knife (Paniki-M.O.-I). This witness has been examined by the Police on 08.02.2010 i.e. on the very day of the occurrence and his age is around 12 years. From this judicial notice of the fact and common experience can be taken that ordinarily a child would not lie and on this score, about a person carrying his mother's cut head, his memory would not at all betray. In so far as the role of accused-Demka @ Arjun is concerned, his version is that then said accused told him that they had killed his mother on that day. But at the same time, it has been proved that he had not so stated before the Investigating Officer (P.W.18). The witness has been confronted with the same during his cross-examination. Although, he has denied to

have not implicated accused-Demka @ Arjun in that manner in her earlier version before the Investigating Officer; the Investigating officer who had recorded his statement under section-161 of the Cr.P.C.; has stated that it was not so said by him. During his cross-examination, he has stated as under:-

“It is a fact that P.W.5-Jitray Besra has not stated before him that accused-Demka @ Arjun had told that they had killed the mother on that day.”

12. The witness being examined by the Police on the very day of incident all the happenings when were supposed to be musing in his memory, but then he having not stated anything about accused-Demka @ Arjun at the first opportunity; his evidence during trial after few months has to be taken to be an afterthought or development being tortured or so since all the possibility so remains in view of the prevailing ill-feeling to somehow implicate the said accused-Demka @ Arjun. Except this evidence of P.W.5 in respect of the role of accused-Demka @ Arjun, We find that no other evidence is available on record. The Trial Court relying upon the evidence of P.W.5 that since accused-Demka @ Arjun had threatened him that if he would be disclosing the incident to the Police, he too would be murdered, has taken the view that his common intention with the accused-Gane @ Anpa@ Ganesh Besra is proved that they wanted to eliminate the deceased and that

was the common intention that they were sharing and as such has gone to say that they had done the deceased to death by acting in furtherance of common intention by drawing an inference. Although it has not been so clearly stated but from the ultimate conclusion of the Trial Court in holding this accused-Demka guilty by relying upon that P.W.5, it has perhaps been taken that accused-Demka acted in furtherance of common intention with the other accused namely, Gane @ Anpa @ Ganesh in causing the murder of the deceased. The Trial Court has however totally lost sight of such important feature in the evidence of P.W.5 that it is his later introduction / development in so far as implication of the accused-Demka @ Arjun is concerned, when he had not whispered a word about that role of the accused-Demka @ Arjun after the actual incident while accompanying that accused-Gane @ Anpa@ Ganesh then coming by holding the cut head of his mother and kitchen knife (Paniki-M.O.-I). The evidence of P.W.5 even is believed for a moment that the accused-Demka @ Arjun initially had asked him the where-about of the deceased when he does not further say that he had accompanied that accused-Gane @ Anpa@ Ganesh and has said that accused-Gane @ Anpa@ Ganesh went with three others on one way and accused-Demka @ Arjun towards backside of the house, that is quite significant to be taken note of as it demolishes the

theory of his acting in furtherance of common intention with accused-Gane @ Anpa @ Ganesh in eliminating the deceased. So, when even other three accused persons have been acquitted by the Trial Court which has not been challenged by the State, in our view this accused-Demka @ Arjun ought to have been at least placed at par with them. Accordingly, We hold that the conviction of the accused-Demka @ Arjun Besra holding his guilt for commission of the offence under section-302/506/34 of the IPC does not stand to legal scrutiny and as such cannot be sustained.

13. Having said above, let's now proceed to have a relook at the evidence in so far as the guilt of accused-Gane @ Anpa @ Ganesh is concerned. The evidence of P.W.5 is clear that he had seen this accused carrying the cut head of his mother and kitchen knife (Paniki-M.O.-I). Witnesses have stated that trunk of the body of the mother of P.W.5 was lying on the threshing floor where in fact, P.W.18 has held the inquest by joining the cut head. It is the evidence of the Centry Constable-P.W.17 that on that day around 10 to 11 am when he was on duty at the Police Out Post, the culprit carrying severed head of a female came to the Out Post and finding this, he immediately kept him in police hazat and that culprit then kept the severed head on the floor. The A.S.I. of Police being called to this witness has held the inquest

over the severed head and then carrying the severed head, they went to the spot.

P.W.18, the initial Investigating Officer has stated that having received the information, he immediately rushed to the Police Out Post and found accused-Gane @ Anpa@ Ganesh sitting there with the cut head and kitchen knife (Paniki-M.O.-I) and thereafter, the P.W.1 arrived and presented the written report. Although that P.W.17 had not identified the accused-Gane @ Anpa@ Ganesh to be the person who have arrived at the Police Out Post with the severed head, the evidence of P.W.18 is clear that it was accused-Gane @ Anpa@ Ganesh. Even though, We are not relying the evidence of P.W.5 in so far the implication of accused-Demka @ Arjun is concerned, that itself is no ground to disbelieve/ discard the evidence of P.W.5 as to what he had stated in respect of accused-Gane @ Anpa@ Ganesh. The principle *falsus in uno falsus in omnibus* has no applicability and for the discussion already made, We find absolutely no difficulty in saying that the evidence of P.W.5 on these two aspects is separable and segregable and those two are not found to be so extricably mixed up in posing any hurdle before us to separate the grain as above from the chaffs.

In so far as this proven fact that accused-Gane @ Anpa@ Ganesh had carried the severed head of the deceased from the spot to the Police Out post and that was taken from his possession by the Police Officer, no such explanation has been tendered by him and his conduct expressing anything as to his non-involvement does not so emerge. His answer to the question put during his examination under section-313 of the Cr.P.C. runs in a general manner that the same is false.

The prosecution having affirmatively proved beyond reasonable doubt that accused-Gane @ Anpa@ Ganesh was carrying the severed head of the deceased and walked down all the way from the village to the Police Out Post where he handed over to the Centry Constable (P.W.17); following that the accused has offered no explanation for how or where he came into possession of the severed head of the deceased which was taken by the Police from him for onward action. The provision of section-106 of the Evidence Act, 1872 thus comes into full play in holding accused accountable.

14. Section-106 of the Indian Evidence Act, 1872 can be quite tricky; it imposes an obligation upon the accused to provide an explanation with respect to an occurrence against which he might have the “special knowledge”. The rule can be summarised that the initial

burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, the prosecution is exempted to prove exact happening of an event where the accused himself would have the special knowledge of the incident and thus would have the burden of proof as per section-106 of the Evidence Act, 1972.

Therefore, circumstances surrounding the incident, like the accused carrying the severed head of the deceased, non-explanation of the death of the deceased, non-explanation as to how the accused came to possess the severed head of the deceased and at which place and as to how and what was the reason for the accused to come by carrying the same all the way from the village to the Police Out Post coupled with the strong belief that the accused-Gane @ Anpa@ Ganesh was carrying in mind that the deceased was responsible for the death of his wife by practising witchcraft lead to a presumption of guilt.

To recapitulate the foregoing; what lies at the bottom of various rules shifting evidential burden of introducing evidence in proof of one's case as opposed to the persuasive burden or burden of proof i.e. of proving all the issues remaining with the prosecution and which never shifts is the idea that it is impossible for the prosecution to give wholly convincing evidence of certain issues from its own and it is

therefore for the accused to give evidence of them if he wishes to escape. Positive fact must always be proved by the prosecution but the same rule cannot always apply to negative fact. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused.

In the language of Prof. Glanville Williams “*all that the shifting of the evidential burden does at the final stage of the case is to allow the Jury (Court) to take into account the silence of the accused or the absence of the satisfactory explanation appearing from his evidence.*”

In the given case, the accused being found in the possession of severed head of the deceased, in the surrounding circumstances as aforesaid which have been proved beyond reasonable doubt, it is for him to explain the fact of the incident, the same being in his exclusive knowledge. The probable argument in defence that having seen the severed head lying at the place, the accused might have taken it to the Police Out Post for the law to be set in motion in finding out the culprit, here would not hold the water. When the natural reaction of a person seeing the severed human head would be the utter shock and dismay; We too find no evidence that the accused had caused any hue and cry and informed other neighbours about it or having gone to call them to decide further course of action.

15. With these above, We also find the evidence of the prosecution to be acceptable on the score that said accused-Gane @ Anpa@ Ganesh was having the reason to eliminate the deceased as it was in his mind that the deceased was responsible for the death of his wife by practising witchcraft. We also find from the evidence of P.W.5 that he with other accused persons had gone to their house in search of the deceased and the time gap between their returning from the house and this accused-Gane @ Anpa@ Ganesh seen with the severed head of the deceased and kitchen knife (Paniki-M.O.-I) as stated by P.W.5 is not that long. Therefore, in our considered view, the case as against Gane @ Anpa@ Ganesh to be the person to have severed the head of the deceased from the trunk by cutting through and through by that kitchen knife (Paniki-M.O.-I) which he was then holding has been proved by the prosecution beyond reasonable doubt. It be also stated that said kitchen knife (Paniki-M.O.-I) having been seized and examined by the Doctor, his evidence and opinion also stand that the cutting of head from the body with the same is possible.

Therefore, in our view, all these circumstances, fully established are of such conclusive nature and tendency that they make the chain so complete as not to leave any reasonable ground for any conclusion, consistent with innocence of this accused-Gane @ Anpa @ Ganesh

which shows that in all human probability the death of the deceased must have been caused by said accused.

For the aforesaid discussion and reasons; We hold that the prosecution has established the charge under section-302 of the IPC against the accused-Gane @ Anpa @ Ganesh and as such he is liable to be held guilty for commission of offence under section-302 of the IPC and convicted thereunder.

16. In the wake of aforesaid, the Appeal is allowed in part. In so far as the Appellant, accused-Demka @ Arjun Besra is concerned, his conviction under section-302/506/34 of the IPC is hereby set aside and he is acquitted of the said charges. He being on bail, his bail bonds shall stand discharged.

The Appellant, accused-Gane @ Anpa @ Ganesh is convicted for the offence under section-302 of the IPC and accordingly, he is sentenced to undergo imprisonment for life.

**(D. Dash),
Judge.**

Dr.S.K. Panigrahi, J. I Agree.

**(Dr.S.K. Panigrahi),
Judge.**