

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 34 of 2007

Mansingh Khillo

.....

Appellant

Mr. P.C. Behera, Advocate

-versus-

State of Orissa

.....

Respondent

Ms. S. Patnaik, AGA

CORAM:

JUSTICE S. TALAPATRA

JUSTICE SAVITRI RATHO

ORDER

28.11.2022

Order No.

12.

1. This matter is taken up through hybrid mode.
2. Heard Mr. P.C. Behera, learned counsel appearing for the Appellant and also heard Ms. S. Patnaik, learned Additional Government Advocate appearing for the State.
3. By means of this appeal, under Section 374(2) of the Cr.P.C., the judgment and order of conviction and sentence dated 25.10.2006 delivered in Criminal Trial No.24 of 2006 by the Sessions Judge, Koraput, Jeypore has been challenged, primarily on two grounds viz. (1) death of the victim, namely, Radhamani Khora has not been proved to be murder and (2) intention to kill the victim is not apparent in the evidence to bring the offence within the category of murder.

4. Briefly stated the prosecution case is that, Mono Khora (P.W.1) informed the police that the Appellant struck blow by the blunt side of the Tangia on the head of the deceased, in an incident when a few girls were taking away or eating the maize by the side of the field of the Appellant. There is no dispute that the deceased succumbed to the single injury. On the basis of that information, lodged on 25.03.2007 by P.W.1, a police case being Kundra P.S. Case No.65 of 2005 was registered under Section 302 of the IPC and investigated. After the investigation was complete, the final police report, under Section 173 (2) of the Cr.P.C. was filed sending the Appellant to face the trial, for committing murder of Radhamani Khora. After taking cognizance, the Sessions Judge, Koraput, Jeypore framed the charge under Section 302 of the IPC to which the Appellant pleaded not guilty and claimed to be tried in accordance with law.

5. The prosecution in order to substantiate their case, adduced 10 witnesses, including the informant (P.W.1) and the postmortem doctor (P.W.9). That apart, they adduced a series of documents (Ext.1 to Ext.17) in support of the charge. The material objects *viz* axe and frock were admitted in the evidence respectively as M.O.I and M.O.II. It may be noted that the wearing apparels of the deceased and the wearing apparels of the Appellant were also seized by the police and those were admitted in the evidence. On closure of the prosecution evidence, as recorded by the trial Judge, the

Appellant was asked to respond to the incriminating materials, as surfaced against him. During that examination under Section 313 (1) (b) of the Cr.P.C., the Appellant reiterated his innocence. However, on appreciation of the evidence, the Sessions Judge, by discarding the plea of innocence, held that the charge under Section 302 of the IPC has been proved to the hilt. It has been observed as follows:

“On appraisal of evidence on record, I have no hesitation to hold that the prosecution in this case has proved beyond reasonable doubt that the accused committed murder of the deceased and as such he is liable for conviction under Section 302 I.P.C.”

6. Mr. Behera, learned counsel for the Appellant has succinctly submitted that the Sessions Judge has failed to appreciate the evidence appropriately. The circumstances in which the transaction of offence took place was completely overlooked. It has been contended that, if the evidence of P.W.1 is believed, it would come to the fore that those children including the daughter of the Appellant were taking away the maize and on the spur of the moment, the Appellant got furious. Radhamani Khora (the deceased) came and got engaged in altercation with the Appellant. Suddenly, the Appellant dealt a blow with the blunt side of the Tangia on the head of Radhamani. Mr. Behera, learned counsel has further

submitted that on analyzing that very action it would be apparent that there was no intention to kill Radhamani. It was in sudden excitement, the said blow was dealt. Section 300 of the IPC made the exceptions when the culpable homicide is not murder. It has been provided in Section 300 of the IPC that if the death is caused or done with intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, then such homicide is murder. But the exception as carved out in Exception-4 is relevant in the present context. It provides that the culpable homicide is not murder, if it is committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. In the present case, it is the prosecution case that as the children were taking away the maize and Radhamani came forward in their support, there was sudden quarrel between Radhamani and the Appellant. According to learned counsel for the Appellant, for interplay of the exception, as noted before, the finding of the trial Judge is rendered perverse for non-appreciation of the circumstances in which the transaction of the offence took place.

7. In *Mahesh vs. State of M.P. : (1996) 10 SCC 688* , the Apex Court has carved out the principle as regards the said exception holding that *when the death took place by giving a single blow with a pharsa as a result of sudden fight [which*

broke out] when the deceased objected to the grazing of the cattle and the assault took place without any pre-meditation, Exception 4 to section 300 is attracted and hence, the conviction of the accused is only sustainable under Section 304 Part-I or Part-II, but not under Section 302 of the IPC.

8. Ms. S. Patnaik, learned Additional Government Advocate has fairly submitted that there was no inimical relation between the Appellant and the deceased and the witnesses failed to shed light on why all on sudden, the Appellant had struck the blow on the head of the deceased, but the blow was dealt on the head, which is a vital part of the body. As such, the finding of the Sessions Judge may not be disturbed.

9. On appreciating the rival contentions, we find that P.W.9, the autopsy doctor has also stated that there only one lacerated injury having the size of 7 x 5 x 12 cm was found. For that injury, the brain was damaged and there was haemorrhage. That injury was the cause of death. For this purpose when the records were scrutinized, our attention was attracted to the testimony of P.W.2, the brother of the deceased. P.W.2 testified that *“When they were eating corns, then the accused dealt a blow by a tangia on the head of my sister Radhamani. Blood oozed out from her head. She fell down on the ground.”* He has also stated that no other persons were present at the spot when the accused dealt the Tangi blow on his sister. He reported the occurrence to the villagers.

10. In the First Information Report, it is found that P.W.5, Nila Khora had informed him [P.W.2] that his sister was assaulted by the Appellant by a Tangia by dealing a blow on her head and she was lying dead in the place of occurrence. It has been stated in the F.I.R. that, his eldest daughter had seen the occurrence. But in the trial, P.W.5 turned around that statement. But the elder daughter of P.W.1 whose maturity was put to test for ascertaining her competence and only thereafter, her statement was recorded. She stated that, one day in the morning her sister Radhamani had been to Melana Ghora of the Appellant. When they were eating corns, the Appellant dealt a blow by Tangia on the head of her sister, Radhamani. She died on the spot. She has also stated that no other person was present at the spot when the Appellant dealt the Tangia blow on her sister. She claimed to have disclosed the occurrence to her parents. P.W.3, Lada Khilo, who is the first cousin of the Appellant has stated that, when P.W.3 was in his veranda and was thrashing paddy, he saw the Appellant picking up the small Tangia and giving a blow on the head of the deceased. P.W.4, Rasu Khilo has stated in the trial that the Appellant is his elder brother. The occurrence took place on a Sunday at about 8 A.M. On the day of occurrence, his brother went to Melano Ghora of their house. Then Radhamani and her sister were eating the corns near their Melano Ghora. He picked up the Tangia and dealt blow on the head of

Radhamani. She fell down. She sustained bleeding injury and then P.W.4 left the spot crying.

11. On appreciation of the entire evidence, it appears to us that there was sudden fight, the Appellant did strike a blow in the heat of passion on the head of the deceased. If the pieces of the evidence are put in series, it would appear that, as the deceased and few children were taking away the maize, the Appellant got infuriated. Ms. Patnaik, learned Additional Government Advocate has correctly submitted that not a single witness has come forward to state that there was any animosity between the Appellant and the deceased. On seeing that his maizes were being taken by the children, he got infuriated and as Radhamani was the elder, he struck the blow on her head. That single blow caused the death of Radhamani. According to us, in absence of intention of causing death, the 3rd illustration below Section 300 of the IPC cannot be applied in the case in hand. The said provision has been already referred. The primary requirement to prove a murder is to prove the intention of causing the bodily injury with knowledge that injury will cause death. We do not find any cruel behaviour in causing the injury. It was a single blow by the blunt side of Tangia and thereafter, the Appellant did not indulge in any further assault. On a keen reading of Exception 4 of Section 300 of the IPC, it would be apparent that, culpable homicide is not a murder if it is committed without premeditation in a sudden fight and in the heat of passion

upon a sudden quarrel. Therefore, if once the culpable homicide is proved to have been caused without meditation and in the heat of passion, that cannot be brought within the definition of murder to be punished under Section 302 of the IPC.

12. Intention is a state of mind which has to be inferred from the facts and circumstances of each case particularly from the nature of the weapon used and how it was used, and from graveness of the injuries inflicted. When the Appellant armed with an axe [Tangia] caused only one incised injury, which caused damage to the internal organs of the body, it would be difficult to determine, at the first blush that the accused cannot be convicted under Section 302 of the IPC. It would require further test, which is usually called the circumstantial test. The nature of injury, the part of the body where the injury is caused, the nature of weapon used in causing such injury. Those are the indicators to the fact whether the accused caused the death of the deceased with an intention of causing death or not. (*See State of Rajasthan v. Dhool Singh: AIR 2004 SC 1264*). In the present case we found from the testimony of P.W.9 that for the said single blow the brain got damaged and according to P.W.9 that caused the death. But by carrying out the circumstantial test, we find that except the eating of the maize by the children and by the deceased there is no other circumstance to be considered for the present purpose. The prosecution also did

not bring on evidence the details of the circumstances. By way of truncated presentation of the circumstances, the benefit is sought to be derived against the Appellant. But the indicators are eminent. There is no direct evidence that there was sudden provocation or sudden fight. The said assault on the head of the deceased was made out of extreme anger. Taking away maizes from the field infuriated the Appellant. This can therefore be safely presumed from the circumstances as brought on evidence. According to us, the culpable homicide is not a murder. Therefore, the act of the Appellant is to be brought under Section 304 Part-I of the IPC, as there are evidentiary materials to prove that the Appellant has committed culpable homicide, not murder, inasmuch as the bodily injury that was inflicted by the Appellant in the ordinary course is likely to cause death. Thus, the Appellant is acquitted from the charge under Section 302 of the IPC. The judgment of conviction and the order of sentence under Section 302 of the IPC are consequentially set aside. As we have already observed that there are adequate materials to hold the offence as committed by the Appellant is punishable under Section 304 Part-I of the IPC. As such, acquittal is not permissible. Now, we would take recourse to Section 222 of the Cr.P.C. for returning our finding for conviction of the Appellant under Section 304, Part-I of the I.P.C. without framing formal charge, as the offence is cognate and minor in relation to the offence punishable under Section 302 of the

IPC. We hold that the charge under Section 304 Part-I has been well proved by the prosecution. As such, we sentence the Appellant to suffer the maximum imprisonment, as we do not think it is a case for the life imprisonment, of 10 years and to pay fine of Rs.10,000/-. In default of making a payment of fine, the Appellant will suffer one year simple imprisonment for non-payment of fine. As it has been stated at the bar that, the Appellant has already undergone imprisonment for 17 years two months, the Appellant shall be set at liberty forthwith, if he is not warranted in any other case.

13. Hence, the impugned judgment and order of conviction and sentence are interfered with in terms of the above.

14. The appeal stands allowed partly.

15. Send down the LCRs, if still lying with the Registry.

(S. Talapatra)
Judge

(Savitri Ratho)
Judge