

ORISSA HIGH COURT: CUTTACK

CRLREV No. 994 of 2013

(An application under Section 401 read with Section 397 of Cr.P.C. against the judgment passed on 20.08.2013 by the learned Addl. Sessions Judge, Bhanjanagar.

AFR Lingaraj Sethi and another Petitioners

-Versus-

State of Odisha Opp. Party

Advocate(s) appeared in this case:-

For Petitioner	:	M/s. A.R. Dash, B.N. Mohapatra, K.S. Sahu, & L.D. Achari, Advocates
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For Opp. Party	:	Mr. A. Pradhan, Additional Standing Counsel
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JUSTICE SASHIKANTA MISHRA

ORDER

22nd April, 2022

SASHIKANTA MISHRA, J. In the present revision the petitioners seek to challenge the judgment dated 20.08.2013 passed by learned Addl. Sessions Judge, Bhanjanagar in Criminal Appeal No. 03 of 2007, whereby the judgment dated

15.09.2006 passed by Asst. Sessions Judge, Bhanjanagar in Sessions Case No. 74 of 2002 was confirmed. By the aforementioned judgment, learned Asst. Sessions Judge (Trial Court) convicted the petitioners for the offence under Sections 323/326/307/34 IPC and sentenced them to undergo R.I. for five years and to pay fine of Rs.5,000/-, in default, to undergo R.I. for six months for the offence under Section 307 of IPC and R.I. for three years and to pay a fine of Rs.1,000/-, in default to undergo R.I. for two months for the offence under Section 326 of IPC and R.I. for six months and fine of Rs.500/-, in default to undergo R.I. for two months for the offence under Section 323 IPC. All the aforementioned offences were directed to run concurrently.

2. The prosecution case, in brief, is that on 08.05.2002, at about 8 p.m. when the informant and his father were present in their house and were discussing about the marriage of their daughter, the petitioner-Lingaraj Sethi being armed with a *tangia* and the petitioner-Krushna Sethi armed with a lathi came to the spot and abused

them in obscene language and demanded to know as to why they were discussing about him. Thereafter, the accused-Lingaraj Sethi dealt a blow with the *tangia* on the neck of victim, Daya Sethi and accused-Krushna dealt a blow with lathi on the hand of the said Daya Sethi. As a result of the injury, the victim sustained severe bleeding injuries. Since some villagers arrived, the petitioners fled away. The informant, Abhi Sethi lodged FIR before OIC, Buguda Police Station leading to registration of P.S. case and investigation was taken up. After completion of investigation, charge sheet was submitted against the accused persons for the aforementioned offences.

The accused took the plea of denial.

Prosecution examined as many as 14 witnesses including the informant, Abhi Sethi as P.W.-1 and injured, Daya Sethi as P.W.-4. Besides, the doctor, who had examined the injured after the occurrence and the I.O. were also examined as witnesses. Defence did not examine any witness, but proved certain documents from its side, which were marked as Exts. A, B and C.

The trial court after analyzing the evidence adduced by the prosecution held that the offence under Sections 341 and 506 are not made out. However, in so far as the offences under Sections 323, 326, 307 and 294 are concerned, the evidence clearly establishes the commission of the same. As such, the trial Court while acquitting the accused persons of the offence under Section 341/506 of IPC, convicted them for the offence under Section 323, 326, 307 and 294 of IPC and sentenced them as aforesaid. The petitioners carried the matter in appeal to the Court of Session, which was heard and disposed of by learned Addl. Sessions Judge. Several grounds were raised before the learned lower appellate Court but it was held that there was no infirmity or irregularity in the judgment of conviction and sentence passed by the learned trial Court and therefore, the order of the trial Court was confirmed.

Feeling further aggrieved, the petitioners have approached this Court in the present revision.

3. Heard Mr. A.R. Dash, learned counsel for the petitioners and Mr. A. Pradhan, learned Addl. Standing Counsel of the State.

4. In assailing the impugned judgments, Mr. Dash contends that both the courts below have failed to appreciate the fact that there is clear evidence regarding previous enmity between the parties and hence the possibility of false implication could not have been ruled out. Secondly, learned courts below have failed to appreciate the material discrepancies and inconsistencies in the evidence of the informant and the injured which create a strong doubt in the case of the prosecution. It is also contended that the material objects were never seized or sent for chemical examination to establish the case of the prosecution that the blood stains present in the said weapons related to human blood. It is also argued that even assuming the case of the prosecution on its face value, the offence under section 307 of IPC is not made out, inasmuch as there is no proof of any premeditation or intention on the part of the accused persons to kill the

injured.

5. On the other hand, Mr. Pradhan, learned Addl. Standing Counsel has supported the impugned judgments by contending that the findings of the trial Court are based on evidence on record and the so-called discrepancies pointed out by the defence are too minor to be taken note of. It is further contended that in so far as the evidence relating to prior enmity is concerned, the same by itself cannot wash away the clear and cogent evidence regarding commission of the offence against the injured victim by the accused persons. On the ground that the M.Os. were not sent for medical examination, it is argued that it was never the defence case that the blood stains were not human. Moreover, when the evidence of assault is there and the material object which is the weapon of offence was produced in the Court, there is no reason to discard the evidence only because the weapon of offence was not sent for chemical examination. On the question of absence of premeditation or intention to kill the injured victim, Mr. Pradhan contends that on the face

of clear evidence that the accused persons came to the spot being armed with deadly weapons and also assaulted the injured on the vital part of his body and there being evidence that such injuries are likely to cause death, the offence under Section 307 is automatically made out.

6. A perusal of the lower Court record reveals that the prosecution had examined as many as 14 witnesses, out of whom P.W.-1 is the informant and P.W.-4 is the injured victim. In so far as the other witnesses are concerned, as many as six witnesses turned hostile during trial and hence their evidence was not found to be useful to the case of the prosecution by the trial Court. In so far as the remaining eight witnesses are concerned, apart from P.Ws. 1 and 4 there are two other persons who claim to have arrived at the spot after the occurrence and also claimed to have seen the accused persons assaulting the injured. They are P.W-10 and P.W.-11.

7. A reading of the evidence of P.W.-1 shows that he has vividly described the occurrence as stated in the FIR lodged at the earliest possible opportunity after the

occurrence. The so-called inconsistencies and discrepancies as well as the contradictions in his evidence pointed out by learned counsel for the petitioners are not such as to discredit his entire testimony. As it appears, P.W.-1 has withstood the test of cross-examination or rather detailed cross-examination by the defence and nothing has been elicited from his mouth so as to discredit his sworn testimony. In so far as the P.W.-4, the injured is concerned, he has also described the occurrence, as reported in the FIR. He was also cross-examined at length but nothing substantial was brought from out from his mouth so as to view his testimony with suspicion. It is also evident that there was prior civil dispute between the parties and also a criminal case, wherein the accused, Krushna was the informant while the present informant and his father (P.W.-4) were the accused. Both P.Ws. 1 and 4 have admitted such fact in their cross-examination. However, in view of their clear evidence regarding the occurrence, which is corroborated by the medical evidence as well as the evidence of P.Ws. 10 and 11, there is no

reason to hold that they were deposing falsely as a counterblast to the case instituted against them at the instance of the accused persons prior to the occurrence. Law is also well settled that the plea of prior enmity can be a double-edged weapon, inasmuch as if the occurrence is otherwise proved by medical evidence or otherwise, it would not be not prudent to expect a person to falsely implicate some other person and thereby allow the actual offender to escape. Therefore, the plea raised by the accused is not acceptable.

8. Apart from the evidence of P.Ws. 1 and 4 regarding the presence of injuries on the body of the injured, there is clear-cut evidence of the doctor, who was examined as P.W.-14. He clearly described the injuries as follows:

- “Injury No1: One cut injury of 5”x ½ x ½” over front of chest and left side of neck extending from 1” above medial end of left clavical bone. Two medile of storunum bone with bleeding.*
- Injury No.2: One fracture of medial end of left clavical bone below the above injury.*
- Injury No.3: One continusion 3”x1” over left arm.”*

The MO-1, which is the axe used in the occurrence,

was sent to P.W.-14 for his opinion. After examining the same, he had clearly opined that the injury at serial no.1 was possible to be caused by such weapon. It has been feebly suggested by defence during cross-examination of P.W.-4 that the injuries were caused because of fall from bullock cart, yet the same is not at all convincing because such a suggestion was given out of blue without creating any background for the same. It is needless to mention that if the defence sets up a specific plea, the same must be reflected in the cross-examination of the prosecution witnesses. A solitary suggestion given to a witness cannot be taken note of unless the background thereof is created. Therefore, the plea of false implication as well as of the injuries caused due to fall from bullock cart falls to the ground. As regards non-sending of the material objects for chemical examination, it is seen that though such a plea has been taken, yet the same was also never suggested to the prosecution witnesses by the defence during cross-examination. Significantly, it was not even suggested to the doctor during cross-examination that the blood stain

found on the axe was not of human blood. Evidently, the plea so raised by the accused is just an after thought and hence, not acceptable.

9. As regards the argument that the offence under Section 307 of IPC is not made out from the evidence on record, it is seen that the prosecution was able to prove that the accused persons came to the spot being armed with an axe and lathi respectively and also assaulted the injured causing bleeding injury on the left side of his neck and a fracture injury on his left arm. There is also clear evidence that there was previous enmity between the parties including a criminal case instituted against the informant and his father (injured) at the instance of the present accused persons. The question is, can it be said from the evidence that the petitioners had come to the spot and had assaulted the injured with a definite intention to do away with his life. While the prosecution would contend that the site of the injuries and the nature of the weapon used for causing them are vital indicators of such an intention, learned counsel for the petitioner on

the other hand, argues that at best it would be an intention to cause an injury but not an intention to kill.

10. Law is well settled that intention is a mental condition that can to be inferred not only from the nature and site of the injuries and the weapon of offence used but also from the surrounding circumstances. In the instant case it is established that the accused persons came to the spot and first abused the informant and his father and then accused, Lingaraj Sethi dealt a blow with an axe on the neck of the injured while accused Krushna dealt a blow with a lathi on his arm. Significantly, there was no further assault. Though it is stated in the FIR that the matter subsided and the accused persons left the spot by threatening that they would kill the injured the next time when the villagers arrived at the spot yet, this part of the evidence has not been corroborated by any independent witness. Be that as it may, fact remains that there was only one blow by accused Lingaraj Sethi though on the neck of the deceased and similarly there was a single blow given by accused Krushna with a lathi on the arm of the

injured. Had there been a definite intention to kill the injured, the accused persons obviously would not have left the place after dealing only one blow, rather it would be reasonable to suppose that they would have continuously assaulted the injured causing even more grievous injuries. Significantly, the injury no. 1 and 3 are simple in nature. That apart, if it was the intention to kill the injured, the accused persons could have not only continued with the assault but also would have caused injuries on other vital parts of the body, which they did not, rather the evidence unerringly shows that they left the place after dealing only one blow each. So, from this, a definite intention or premeditation is difficult to presume or infer. To the above extent therefore, this Court is inclined to accept the contentions raised by learned counsel for the accused persons. After independently assessing the evidence on record this Court is of the view that though there was a clear case of assault yet, the evidence on record do not definitely suggest an intention to kill on the part of the accused persons. Therefore, the judgment of conviction

under Section 307 does not appear to be justified.

11. However, this Court finds nothing wrong in the order of conviction under Section 326 of IPC is concerned. So also, this Court finds no infirmity much less illegality in the order of conviction in respect of the offences under Sections 323 and 294 of IPC. However, as already discussed, this Court cannot agree with the order of conviction in so far as it relates to the offence under Section 307 of IPC. To the above extent therefore, the impugned order deserves to be modified.

12. On the question of sentence, it is submitted by learned counsel for the petitioner that learned Court below should have considered the fact that the occurrence had arisen out of a prior dispute and at the spur of the moment. Further, the accused persons are related to the injured and the informant being of the same family. That apart, the occurrence took place more than 20 years back and presently both the accused persons are of advanced ages. Therefore, considering all these aspects, the accused persons should have been released as per provisions of the

Probation of Offenders Act, 1958.

13. Mr. Pradhan, on the other hand argued that the offence being clearly proved and the learned trial Court having considered all the circumstances before sentencing the accused persons, there is no justification for interfering therewith.

14. As it appears, petitioner no.1 was aged about 55 years and petitioner no.2 was aged about 60 years at the time of the occurrence, i.e., in the year 2002. Twenty years have elapsed in the meantime, thus, both of them are now aged 75 and 80 years respectively. That apart, there is no evidence that the accused persons have any criminal antecedents to their names. This Court is therefore of the considered view that sending them to prison to serve the remaining part of their sentence at this belated stage would be too harsh. Hence, this Court is of the considered view that ends of justice would be best served if the accused persons are released as per the provisions of the Probation of Offenders Act, 1958.

15. In the result, the Criminal Revision is allowed in

part. The impugned order passed by the trial Court in convicting the accused persons for the offence under Section 307 of IPC is set aside, but the same in so far as it relates to the offences under Sections 323/326 of IPC is confirmed. Further, the sentence passed by the trial Court is modified to the extent and that instead of undergoing imprisonment and paying fine as ordered by the trial Court, the accused persons shall be released as per the provisions under Section 4 of the Probation of Offenders Act, 1958. For the above purpose, the accused petitioners are directed to appear before the trial Court on 15th May, 2022 to receive further instructions. In the event the petitioners do not appear on the date fixed, necessary orders shall be passed by the trial Court to commit them to prison to serve the remaining part of the sentence as originally passed.

16. The CRLREV is disposed of accordingly.

Sd/-

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 22nd April, 2021/ A.K. Rana