

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 16 of 2011

From the judgment of conviction and order of sentence dated 20.07.2009 passed by the learned District & Sessions Judge, Kalahandi-Nuapada, at Bhawanipatna in Sessions Case No.88/2008.

AFR Anam Majhi Appellant

-Versus-

State of Odisha **Respondents**

Advocate(s) appeared in this case through hybrid arrangement (Virtual/Physical Mode):-

For Appellant : Mrs. Usharani Padhi, Advocate

For Respondent: Ms. Samapika Mishra,
Addl. Standing Counsel.

CORAM:

MR. JUSTICE D. DASH
MR. JUSTICE SASHIKANTA MISHRA

Date of Hearing :15.12.2022
Date of Judgment : 23.12.2022

SASHIKANTA MISHRA, J. The appellant challenges the judgment dated 20.07.2009 passed by District and Sessions Judge, Kalahandi-Nuapada, at Bhawanipatna in Sessions Case No. 88 of 2008 in convicting him for the

offence under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. The prosecution case, briefly stated, is that one Hemanta Bhoi lodged FIR before Sadar Police Station, Bhawanipatna on 25.03.2008 alleging therein that the accused Anam Majhi had killed his brother, Basanta Bhoi (deceased) by assaulting him with an axe on his head. It was stated that on that day at about 5 p.m., his deceased brother and his friend, Murali Majhi had been to Bhabanipur village. Accused Anam Majhi picked up quarrel with them at Bhabanipur and attempted to assault them, whereupon Murali Majhi ran away from the spot but he could manage to assault the deceased by means of an axe due to which he died. It is further alleged that at that time the brother-in-law of the accused, namely, Sanurjya Majhi restrained the deceased by catching hold of his right hand due to which he could not escape from the spot and taking advantage of the same, the accused could assault him. The informant further stated that upon hearing about the incident from Murali, he and his villagers went to the spot and saw the deceased

lying dead over his bicycle and on enquiry from the village it was revealed that the incident was witnessed by Krushna Chandra Majhi and his wife Shanti Majhi of village Bhabanipur. The FIR led to registration of Bhawanipatna Sadar P.S. Case No. 28 of 2008 under Section 302/34 of IPC followed by investigation. Upon completion of investigation charge sheet was submitted against the accused under Section 302 of IPC and against Sanurjaya Majhi under Section 302/114 of IPC and both were thus put to trial.

3. The accused persons took the plea of denial and false implication.

4. To prove its case, prosecution examined 22 witnesses and exhibited 15 documents and exhibited one material object.

5. Defence did not adduce any evidence, either oral or documentary.

6. Learned trial court, after examining the evidence on record held that there is no evidence against Sanurjaya Majhi but in so far as the appellant Anam Majhi is concerned it was found that the evidence of P.Ws.-2 & 3,

despite the contradictions, was adequate to prove that the accused had inflicted a number of axe blows to the deceased causing his death at the spot. Learned trial court also took into account the evidence relating to discovery of the weapon of offence at the instance of the accused, Anam Majhi as an additional factor to prove the prosecution case. On such analysis of the evidence on record, learned trial court held the accused Sanurjay Majhi not guilty of the offence under Section 302/114 of IPC and acquitted him from the said charges. However, the trial court found the prosecution case against the accused Anam Majhi to be well proved and therefore, convicted and sentenced him as aforesaid.

7. Heard Ms. U. Padhi, learned counsel for the appellant and Ms. Samapika Mishra, learned Addl. Standing Counsel for the State.

8. Ms. Padhi has argued that learned trial court committed error in relying upon the version of P.Ws. 2 and 3 despite the fact that their version is full of contradictions. Ms. Padhi further argues that the so called evidence of leading of discovery is not fool-proof to be

relied upon. Thus, according to Ms. Padhi, if the evidence of P.Ws. 2 and 3 is ignored, there is no other evidence to prove the prosecution case and therefore, the impugned order of conviction is bad in law.

9. Per contra, Ms. Samapika Mishra contends that the contradictions, if at all in the evidence of eye-witnesses, namely P.Ws. 2 and 3 are not such as can materially affect the prosecution case. In any case, the version of P.W.-3 is fully corroborated by the evidence of P.W.-4 relating to assault on the deceased by the accused. Ms. Mishra further submits that the fact of leading to discovery of the weapon of offence at the instance of the accused is fully proved by the evidence of P.Ws. 2 and 4. On such contentions, Ms. Mishra submits that the impugned judgment does not warrant any interference whatsoever.

10. There is no dispute that the death of the deceased was homicidal in nature being caused by a heavy sharp cutting weapon. The autopsy surgeon (P.W.-16) opined that the cause of death was due to injury on the vital organs i.e., head and lung and further that the injuries

were possible to be caused by the weapon, i.e., axe (*tangia*) sent to him by the I.O. He further noted five incised injuries and one laceration on different parts of the body of the deceased. Thus, it is clear that the deceased met with his death because of injuries sustained on the vital parts of his body which in turn were possible to have been caused by a heavy sharp cutting weapon, such as axe.

11. Coming to the ocular evidence, it is stated in the FIR itself that one Krushna Chandra Majhi (P.W.-2) and his wife Shanti Majhi (P.W.-3) had witnessed the incident. P.W.-2 deposed that on the date and time of occurrence he was taking curry from his house to the house of his son-in-law along with his wife and found the accused persons, deceased and one Murali Majhi talking near a kendu tree. While returning after handing over the curry they found accused, Anam chasing Murali but could not catch him and hence returned. At that time, the deceased was walking holding his cycle and accused Anam inflicted one axe blow on the left forehead of the deceased and on different parts of his body and went away to his house.

The deceased died at the spot and co-accused Dhanurjaya was standing at a short distance. P.W.-2 further stated that he reported the matter to P.W.-1. In cross-examination, he reiterated that he and his wife alone had seen the accused Anam inflicting the axe blow. P.W.-3 (wife of the P.W.-2) stated more or less the same thing as P.W.-2 with addition that the brother-in-law of the accused tried to block him by raising his hand but he was hurt by the axe. She further deposed that the first blow was on the head and the second blow on the chest. The above evidence of P.Ws. 2 and 3 was confronted to the I.O. (P.W.-22), who admitted that both of them had not stated before him that at about 1 p.m. they were carrying curry to the house of their son-in-law and on the way found the accused persons, the deceased and one Murali talking and while returning, they found the accused Anam chasing Murali from a distance and could not catch him and returned and that the accused Anam inflicted one axe blow on the face of the deceased and different parts of his body while the deceased was holding his cycle and that the accused Anam went to his house and came up with

one axe and after assault, he ran away with the axe and concealed it inside a straw heap. Since learned counsel for the appellant has referred to above contradictions in the evidence of P.Ws. 2 and 3 we deemed it proper to verify their earlier statements recorded under Section 161 of Cr.P.C. from the lower court case record. Surprisingly, it was found that there are two statements recorded under Section 161 Cr.P.C. of Krushna Chandra Majhi (P.W.-2), both being recorded on 25.03.2008. In one statement he claims to have seen the entire occurrence along with his wife as deposed by him in the Court while in the other he claims to have heard about the incident from one Kartika Nag. It cannot be stated with certainty as to which statement is true so as to be relied upon. While there is no bar in law for the I.O. to record more than one statement of a witness yet if the statements are found to be at variance from each other, that too in material particulars, it would be entirely unsafe to place reliance on the evidence of such a witness, whatever his testimony may be.

12. However, upon reading of the statement of Shanti Majhi (P.W.-3) recorded under Section 161 Cr.P.C. it is found that she had simply stated about going to her son-in-law's house in the evening of the occurrence along with her husband and of seeing the accused assaulting the deceased by means of axe blows on his head repeatedly. There are minor differences in the manner in which she described the offence before the I.O. and before the Court. It must be kept in mind that her Section 161 statement was recorded on 25.03.2008 while she deposed as a witness before the Court on 06.04.2009, i.e. more than a year later. There are bound to be differences as no person is expected to speak parrot-like whatever he or she had stated before police a year before. It would suffice if broadly her testimony matches her earlier statement before the I.O. If the version of P.W.-3 alone is taken into account along with the medical evidence referred hereinbefore along with the evidence of the post occurrence witnesses, who arrived at the spot hearing commotion and saw the deceased lying dead namely, P.W.-4 and P.W.-7, there is no reason to doubt the same.

13. It is further seen that Murali Majhi being examined as P.W.-10 also supported the version of the informant and P.W.-3 in material particulars inasmuch as he deposed that on the date of occurrence, he and the deceased had gone to Bhabanipur to consume liquor and took liquor at the house of Purna where accused Anam also consumed liquor. He further states that accused Anam abused in obscene language to which the deceased objected whereupon the accused caught hold of his (P.W.-10) neck and Madan and the deceased separated him from his clutches. Then Anam ran to his house and P.W.-10 asked his brother-in-law, Madan to subside him but Madan came back from his house with an axe and was trying to inflict one axe blow, but his brother-in-law, Madan obstructed it and that he could ran away. Subsequently, he learnt that Basanta had been murdered. Obviously, P.W.-10 is not an eye-witness to the actual occurrence, but was present at the spot just prior to it and at a time when the accused had already made an attempt to inflict axe blow. This part of the evidence of P.W.-10 has not been discredited in any manner in cross-

examination. As such, the evidence of P.W.-10 only corroborates the version of P.W.-3 regarding the assault.

14. Another witness is P.W.-7, who deposed that he found accused Anam and the deceased were quarreling due to which he intervened and subsided it and went to his home and subsequently, there was commotion that the deceased was murdered. He came out and found Basanta lying dead. He further stated that hearing that accused Anam had killed the deceased, he came out from the house. It was suggested to him that he had not stated as above to the I.O. This was not confronted to the I.O. for which we deemed it proper to peruse the statement of P.W.-7 recorded under Section 161 Cr.P.C. and found that he had given an entirely different version of the occurrence. We therefore, hold that the evidence of PW.-7 is not worthy of credit.

15. Thus, we are left only with the eye-witness account of P.W.-3 as supported by P.W.-10, who is a post occurrence witness apart from the medical evidence. It has been argued that once the evidence of P.W.-2 is discarded on the ground that two different statements of

his were recorded during investigation, it automatically casts a shadow of doubt on the version of P.W.-3 since she also stated to have accompanied her husband P.W.-2. We are not impressed by this argument for the reason that the version of P.W.-2 was rejected because he had given two different statements before the I.O. during investigation but the same, ipso facto, will not operate to falsify the entire evidence of P.W.-3 which, as stated earlier, we have found to be entirely consistent and credible. In other words her positive testimony that she had seen the accused Anam assaulting the deceased repeatedly by means of an axe leading to his death cannot simply be brushed aside. The fact that recording of two different statements of P.W.-2 by the I.O. has weighed upon us to discard his version is at best a question of sanctity of the investigative process, but the same has to be confined to the version of P.W.-2 alone. Had there been no other evidence apart from that of P.W.-2, the matter would have been different but on the face of clear and cogent evidence of P.W.-3 the unreliability of version of P.W.-2 is of no consequence.

16. As regards the evidence relating to leading to discovery of the weapon of offence, it is deposed by the I.O.(P.W.-22) that the accused deposed before him to have concealed one axe at his haystack and that he took the witnesses and him to that place and brought out one axe and produced it before him, which was seized vide seizure list marked Ext.-5. Ext.-4 is the relevant part of the disclosure statement of the accused. P.W.-2 is one of the witnesses to the discovery of the weapon of offence, who identified his signature on the seizure list. However, this Court has already rejected the version of P.W.-2 in toto because of its inherent unreliability. Nevertheless, P.W.-4 also testified that the accused admitted before police that he had concealed the axe in his straw heap and then police seized the axe in his presence though he cannot say if the accused or some other person brought out the axe. He also proved his signature on the seizure list and identified the axe (M.O.-1). So, the only evidence in this regard is that of P.W.-4. If the defence argument is to be taken into account, it would only suggest irregularity in the procedure adopted by the I.O. during the recovery of

the weapon of offence but then for such reason alone, the positive evidence on record cannot be watered down.

17. It is also seen that the weapon of offence (M.O.-1) and the wearing apparels of the deceased were stained with blood of 'A' group which is similar to the blood group of the stains found on the wearing apparels of the deceased. This is evident from the chemical examination report marked Ext.-15. The accused has not given any explanation for the presence of blood stains on the axe and his wearing apparels.

18. Thus, on a conspectus of the analysis made of the evidence on record, the following inferences can be readily drawn.

- (i) The eye-witness, P.W.-3's version is clear, cogent and consistent that the accused killed the deceased by inflicting blows with an axe.
- (ii) The accused gave recovery of the weapon of offence in presence of witness (P.W.-4).
- (iii) The blood stain found on the axe and the wearing apparel of the accused matches with that

of the deceased and the accused has no explanation for the same.

(4) The version of post- occurrence witness, namely, P.W.-4 and I.O. only go to corroborate the version of P.W.-3 in material particulars.

Thus, all the inferences when considered cumulatively go to prove the prosecution case beyond reasonable doubts.

19. Reading of the impugned judgment reveals that learned trial court has appreciated the evidence in the proper perspective and we therefore, fully concur with his findings.

20. In the result, the appeal fails and is therefore, dismissed. The impugned judgment of conviction and sentence is hereby maintained.

(Sashikanta Mishra)
Judge

D. Dash, J. I agree.

(D. Dash)
Judge

Orissa High Court, Cuttack,
The 23rd December, 2022/ A.K. Rana, P.A.