

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 14 OF 2019

From judgment and order dated 02.08.2018 passed by the Sessions Judge -cum- Special Judge, Nabarangpur in Criminal Trial No. 131 of 2017.

Puskar Bisoi

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Appellant

-Versus-

State of Orissa

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Respondent

For Appellant:

Mr. Anirudha Das, Advocate
(Amicus Curiae)

For State of Odisha:

Mr. Manoranjan Mishra
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 11.08.2022

S.K. SAHOO, J. The appellant Puskar Bisoi faced trial in the Court of learned Sessions Judge -cum- Special Judge, Nabarangpur in Criminal Trial No.131 of 2017 for commission of offences punishable under section 302 of the Indian Penal Code and section 3(2)(v) of the SC and

ST (PoA) Act, 1989 on the accusation that on 26.06.2017 at about 8.00 p.m. at village Phatakote under Papadahandi police station, he being not a member of Scheduled Caste or Secheduled Tribe committed murder of Pitambar Jani (hereafter 'the deceased') who was a member of Scheduled Tribe.

The learned trial Court acquitted the appellant of the charge under section 302 of the Indian Penal Code so also under section 3(2)(v) of SC and ST (PoA) Act, 1989, but found him guilty under section 304 Part-II of the Indian Penal Code and sentenced him to undergo R.I. for a period of eight years and to pay a fine of Rs.3,000/- (rupees three thousand), in default, to undergo further R.I. for a period of six months.

2. The prosecution case, as per the first information report lodged by one Subhadra Jani (P.W.3), the widow of the deceased is that on 26.06.2017 about 8.00 p.m. hearing cries of her husband, she along with her daughter Kumari Jani (P.W.4) came out of their house and found

that the appellant was quarrelling with the deceased and during such quarrel, all on a sudden, the appellant gave a push to the deceased, for which the latter fell down on the road, sustained head injury and became senseless. The informant (P.W.3) and her daughter (P.W.4) carried the deceased inside their house and tried to give some water to him but the deceased was found dead.

The first information report was scribed by one Gangadhar Jani and P.W.3 presented the same before the Inspector-in-charge of Papadahandi police station on 27.06.2017, on the basis of which Papadahandi P.S. Case No.111 of 2017 was registered on the same day under section 302 of the Indian Penal Code and section 3(2)(v) of SC and ST (PoA) Act.

P.W.12 who was in-charge of D.S.P., Papadahandi, took charge of investigation of the case as per the direction of the Superintendent of Police, Nabarangpur and during course of investigation, the witnesses were examined, spot map (Ext.7) was prepared,

inquest over the dead body was conducted as per inquest report (Ext.1) and the dead body was sent for post mortem examination. P.W.13 Mr. Arupananda Kar, the Medical Officer of District Headquarters Hospital, Nabarangpur conducted post mortem examination over the dead body and he submitted his report (Ext.12). P.W.12 seized the sample earth and blood stained earth from the place of occurrence as per the seizure list (Ext.9), wearing apparels of the deceased from the escorting constable after post mortem examination under seizure list (Ex.3). The appellant surrendered in the police station on 28.06.2017 whereafter he was arrested and forwarded to Court after medical examination. The wearing apparels of the appellant were seized as per the seizure list (Ext.5), the nail clippings of the appellant collected by the Medical Officer which was produced by the constable was also seized as per the seizure list (Ext.4). P.W.12, the Investigating Officer issued requisition to the Tahasildar, Nabarangpur to obtain caste particulars of the appellant as

well as the deceased. He received the post mortem examination report so also the caste verification report from the Tahasildar and the seized articles were sent to R.F.S.L., Berhampur through the Court for chemical examination and on completion of investigation, P.W.12 submitted charge sheet on 22.10.2017 against the appellant under section 302 of the Indian Penal Code and section 3(2)(v) of SC and ST (PoA) Act.

3. After submission of charge sheet, the case was committed to the Court of Session after following the due formalities. The learned trial Court framed the charges against the appellant as aforesaid and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prove the guilt of the appellant.

4. In order to prove its case, the prosecution examined thirteen witnesses.

P.W.1 Pabitra Khora stated that he was present at the time of inquest and he had seen bleeding on the

head of the deceased and he is a witness to the inquest report vide Ext.1.

P.W.2 Narasingh Kunthar did not support the prosecution case, for which he was declared hostile by the prosecution.

P.W.3 Subhadha Jani is the informant who is a post-occurrence witness and stated that on the date of occurrence, she and her daughter shifted the deceased from the spot to their house thinking that he was alive but he died.

P.W.4 Kumari Jani is the daughter of the informant who is an eye witness to the occurrence and she stated that while she and her mother (P.W.3) shifted the deceased from the spot to their house, he was found dead.

P.W.5 Balaram Harijan stated that about six months back in one night, widow of the deceased was going to the house of the ward member crying and disclosed the incident and as per the request of the ward member, he

went near the shop of the accused wherefrom, he noticed that the deceased was lying in his house.

P.W.6 Madhusudan Bisoi stated that he heard quarrel in between the appellant and the husband of the informant and the deceased succumbed to the injuries.

P.W.7 Laxman Gond was the constable attached to Papadahandi Police station who carried the dead body for post mortem examination. He is also a witness to the seizure of the wearing apparels of the deceased and a command certificate under seizure list Ext.3.

P.W.8 Ratan Naik was another constable attached to Papadahandi police station who had escorted the dead body to Nabarangpur hospital for post mortem examination. He is also a witness to the seizure of wearing apparels of the deceased under seizure list Ext.3.

P.W.9 Baidyanath Bhatra was the constable who had taken the appellant to Papadahandi Hospital for his medical examination as per command certificate issued in his favour. He produced the nail clippings collected by the

Medical Officer in a sealed vial before the I.O. which was seized as per seizure list Ext.4.

P.W.10 Krishnadas Mandal was the constable who produced one sealed vial containing nail clippings of the appellant before the Investigating Officer which was seized under seizure list Ext.4. He further stated about the seizure of wearing apparels of the deceased on his production as per seizure list Ext.5.

P.W.11 Akhaya Kumar Khemndi was the Tahasildar, Nabarangpur who on receipt of the letter from S.D.P.O., Papadahandi regarding furnishing caste particulars of the deceased as well as the appellant, entrusted the matter to the R.I. of Baghsuini circle, who after conducting enquiry submitted his reports and basing on the same, P.W.11 submitted his report (Ext. 6).

P.W.12 Bimal Kant Brahma was the in-charge of D.S.P. of Papadahandi who took charge of investigation as per the direction of the S.P., Nabarangpur and on completion of investigation, he submitted charge sheet.

P.W.13 Dr. Arupananda Kar was the Medical Officer of District Headquarters Hospital, Nabarangpur who conducted post mortem examination over the dead body of the deceased and found no external injury on the body except small contusion over occipital area of the skull. He proved his report vide Ext.12.

The prosecution exhibited thirteen documents. Ext.1 is the inquest report, Ext.2 is the F.I.R., Exts.3, 4, 5 and 9 are the seizure lists, Ext.6 is the report of Tahasildar, Ext.7 is the spot map, Ext.8 is the dead body challan, Ext.10 is the requisition for caste identification report, Ext.11 is the forwarding report, Ext.12 is the post mortem examination report and Ext.13 is the Chemical Examination report.

No witness was examined on behalf of the defence.

5. The learned trial Court after assessing the oral and documentary evidence on record, came to hold that the evidence of the Medical Officer as well as the contents

of the post mortem examination report and the inquest report are not challenged by the defence and it can be safely concluded that the deceased suffered a homicidal death. It was further held that though the witnesses have been cross-examined by the defence, but no substantial materials elicited to discredit their testimony more particularly the evidence of P.Ws.3, 4 and the Medical Officer P.W.13. The learned trial Court further came to hold that the facts established that the deceased died having sustained an injury on his head when the appellant gave a push to him at the spur of moment without any premeditation or any prior deliberation and therefore, the learned trial Court came to the conclusion that Exception 4 to section 300 of the Indian Penal Code would be attracted and accordingly, convicted the appellant under section 304 Part-II of the Indian Penal Code. However, the learned trial Court held that though the deceased belonged to 'Paraja' caste which comes within the Scheduled Tribe community and the appellant belonged to 'Bisoi' caste which comes

within the general community, but there was no intention on the part of the appellant that he being general caste committed the crime against the Scheduled Tribe community person by giving a push to the deceased resulting his death and accordingly, the learned trial Court held that the prosecution has failed to prove the charge under section 3(2)(v) of the SC and ST (PoA) Act.

6. Mr. Anirudha Das, learned amicus curiae engaged for the appellant contended that though in the first information report, it is specifically stated that on account of push of the appellant given to the deceased, the latter fell down on the ground and sustained head injury which resulted in his death but most peculiarly, during course of trial, the prosecution has come forward with a case that the deceased was assaulted by means of weight (Batakara) on the head and thereafter the appellant gave a push to the deceased which resulted in his death. It is further contended that the evidence of the two material witnesses on behalf of the prosecution i.e., P.W.3 and

P.W.4 indicate that both of them came to the spot on hearing hullah, but their evidence is completely discrepant and therefore, it appears that both of them are post occurrence witnesses and the evidence of P.W.4 as an eye witness to the occurrence is not believable. He further submitted that since both P.W.3 and P.W.4 were related to the deceased, they are interested witnesses and therefore, the learned trial Court in view of factual scenario should not have placed implicit reliance on their testimony to convict the appellant. It is argued that the scribe of the first information report has not been examined and even if for the sake of argument, it is accepted that during course of quarrel, the appellant gave a push to the deceased, for which he fell down on the ground and sustained head injury, under no stretch of imagination, it can be said that the same would come within the purview of section 304 Part-II of the Indian Penal Code and therefore, it is a fit case where the benefit of doubt should be extended in favour of the appellant.

Mr. Manoranjan Mishra, learned Addl. Standing Counsel appearing for the State of Odisha, on the other hand submitted that the discrepancies which are there in the evidence of two eye witnesses i.e., P.W.3 and P.W.4 are minor in nature and the discrepancies do not go to the root of the matter or affect the credibility of these two witnesses. It is further submitted that the doctor (P.W.13) who conducted post mortem examination, noticed haemorrhage over the occipital lobe of the brain, the spleen was ruptured and the cause of death has been opined to be haemorrhagic shock on account of the internal injury and the injuries have been opined to be ante mortem in nature and the mode of death was homicidal. Learned counsel further argued that as per the evidence of the Investigating Officer, it was a metallic murrum road and when the accused pushed the appellant, he must have been aware that by such overt act, the deceased is likely to sustain any injury which may be fatal and therefore, the learned trial Court has rightly found the

appellant guilty under section 304 Part-II of the Indian Penal Code and the appeal should be dismissed.

7. The doctor's evidence is to be analyzed first to come to a finding that whether it is a case of homicidal death or not.

P.W.13 conducted the post mortem examination over the dead body of the deceased on 27.06.2017 at District Headquarters Hospital, Nabarangpur and he found no external injury on the dead body except small contusion over the occipital area of the skull. So far as internal injuries are concerned, he found haemorrhage over the occipital lobe of the brain, haemorrhage into the peritoneal cavity, spleen was ruptured. According to the doctor, the cause of death was haemorrhagic shock on account of the internal injury and the injuries were ante mortem in nature and the mode of death was homicidal. He has proved the post mortem examination report vide Ext.12. In the cross-examination, he has stated that haemorrhage over

occipital lobe of the brain may be possible by fall on hard and blunt surface.

Considering the evidence of the doctor so also the inquest report which has been marked as Ext.1, I am of the humble view that the learned trial Court has rightly come to the conclusion that the prosecution has been able to prove that the deceased died a homicidal death.

8. Now, coming to the evidence of two star witnesses on behalf of the prosecution i.e., P.W.3 and P.W.4, it appears that P.W.3 is the informant in the case and the case of the prosecution as per the first information report is that during course of quarrel, the appellant gave a push to the deceased, for which he fell down on the murram road and sustained head injury. P.W.3 has stated that the mother of the appellant called her disclosing the incident and her house and the house of the appellant was intervening with the village road and both she as well as her daughter (P.W.4) came to the spot and found that her husband (deceased) was lying dead having sustained

bleeding injuries on his head and then she and P.W.4 shifted the deceased from the spot thinking him to be alive. However, in the cross-examination, she has stated that when she came to the spot, she found that her husband was lying on the road having sustained injuries on his head and no one was present at that time. P.W.4 on the other hand has stated that the appellant assaulted to the deceased by means of a weight (Batkara) used for weighment in his shop and then threw the deceased on the road. At this juncture, the evidence of P.W.4, the daughter of the deceased is required to be analysed and she has stated that the mother of the appellant called them saying that the appellant was assaulting to the deceased and at that time, she was reading in her house and hearing the same, she immediately proceeded to the house of the appellant where she found that the appellant was assaulting the deceased by means of weight and then P.W.3 followed her and after assaulting her father, the appellant threw him on the ground and then both she and

her mother (P.W.3) shifted the deceased to their house and the deceased was dead at that time. Therefore, the statement made by P.W.3 completely rules out P.W.4 as an eye witness to the occurrence. The evidence of P.W.4 that she had seen the appellant assaulting the deceased by means of weight is not acceptable.

The evidence of P.W.3 and P.W.4 appear to be discrepant in nature in as much as P.W.3 has stated that she came to the spot along with P.W.4 and saw the deceased lying on the ground whereas P.W.4 has stated that she came ahead of her mother (P.W.4) and saw the assault on her father. The assault by means of weight on the deceased by the appellant seems to be a subsequent development in the prosecution case and rightly the learned trial court has also not placed any reliance on the said aspect and came to hold that the deceased died having sustained an injury on his head and the appellant gave push to him at the spur of moment without any premeditation or any prior deliberation. The so-called

weight with which the appellant stated to have assaulted to the deceased has not been seized, therefore, I am of the humble view that there is no clinching material available on record that the appellant assaulted the deceased on his head by means of the weight. However, the evidence given by the prosecution witnesses relating to the push given by the appellant to the deceased is acceptable and it appears that on account of such push, the deceased fell down on the road which was a metallic morrum road and sustained head injury as noticed by the doctor (P.W.13).

The contentions raised by the learned counsel for the appellant that P.W.3 and P.W.4 were related to the deceased and therefore, they are interested witnesses cannot be a ground to discard their evidence. Law is well settled that related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the

Court, it would not be proper to discard their evidence straightaway. 'Related' is not equivalent to 'interested'.

Similarly, non-examination of the scribe of the F.I.R. does not affect the prosecution case and it cannot be a ground to doubt the prosecution case and it can at best be treated as mere irregularity, but if it is otherwise proved, then it can be said that irregularity has been cured.

9. The main crux of the matter for consideration is whether the act of the appellant comes within the purview of section 304 Part-II of the Indian Penal Code as held by the learned trial Court.

Section 299 of the Indian Penal Code defines 'culpable homicide'. In order to constitute an offence of culpable homicide, the prosecution is required to prove the following aspects i.e. the death was caused by doing an act (a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to

cause death. Culpable homicide is murder only when it falls within any of the four clauses that has been mentioned under section 300 of the Indian Penal Code. Culpable homicide is not murder, if it falls within any of the five exceptions mentioned under section 300 of the Indian Penal Code. Section 304 of the Indian Penal Code has two parts i.e., section 304 Part-I, section 304 Part-II. If the culpable homicide is not murder as it falls within any of the five exceptions mentioned under section 300 of the Indian Penal Code, but it is proved that the accused has the intention of causing death, or of causing such bodily injury as is likely to cause death then the offence will come within the purview of section 304 Part-I of the Indian Penal Code. If the accused has no such intention but he has the requisite knowledge that the act is likely to cause death or the act is to cause such bodily injury as is likely to cause death, then the offence under section 304 Part-II of the Indian Penal Code would be attracted. The intention is the state of mind which has to be inferred in the facts and

circumstances of each case and it would depend upon various factors like nature of weapon used, nature of injury inflicted, conduct of the accused prior to the assault and after the assault etc. and act is said to be intentional when it is done with the desire that certain consequences shall follow for a person's act or omission. The intention is thus a subjective consideration. Keeping in mind the four clauses as are mentioned under section 300 of the Indian Penal Code, if the factual scenario is considered, in my humble view, none of the four clauses are attracted. By giving a push to the deceased during course of quarrel, it cannot be said that the appellant intended to cause his death or intended to cause such bodily injury as he knew to be likely to cause death of the deceased. There is no material on record that the injury inflicted was sufficient in the ordinary course of nature to cause death and by giving a push to the deceased, it cannot be said that the appellant knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily

injury as is likely to cause death. When in the factual scenario, none of the four clauses as mentioned under section 300 of the Indian Penal Code are attracted and the act does not come within the purview of culpable homicide as defined under section 299 of the Indian Penal Code, the conviction of the appellant under section 304 Part-II of the Indian Penal Code cannot be sustained in the eye of law. However since due to the push given to the deceased, he fell down on the morrum road and in that process, a small contusion was caused over the occipital area of the skull and there was internal haemorrhage over the occipital lobe of the brain so also haemorrhage to the peritoneal cavity and his spleen was ruptured, it can be said that such hurt endangered the life of the deceased and therefore, it falls under clause 'eighthly' of section 320 of the Indian Penal Code which defines 'grievous hurt'. Therefore, I am of the humble view that the act of the appellant would squarely come within the purview of section 325 of the Indian Penal Code.

Accordingly, the conviction of the appellant under section 304 Part-II of the Indian Penal Code is altered to one under section 325 of the Indian Penal Code. It appears that the appellant is in judicial custody since 29.06.2017 and thus he has already undergone substantive sentence of five years and one month. Since the maximum substantive sentence of imprisonment for the offence under section 325 of the Indian Penal Code is seven years and the appellant has already undergone the substantive sentence of five years and one month by now, in view of the passage of time and the young age of the appellant at the time of occurrence and the surrounding circumstances under which the crime has been committed, the substantive sentence is reduced to period already undergone. In view of the financial condition of the appellant, there is no need to impose any fine on the appellant. The appellant be set at liberty forthwith, if his detention is not required in any other case.

Accordingly, the JCRLA is allowed in part.

Before parting with the case, I would like to put on record my appreciation to Anirudha Das, Advocate, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

Orissa High Court, Cuttack
The 11th August 2022/Pravakar



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S.K. Sahoo, J.