

IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

JCRLA No.17 of 2013

Bansidhara Nayak

....

Appellant

Ms. Anupama Nayak, Advocate

-Versus-

State of Odisha

....

Respondent

Mr. J. Katikia, AGA

CORAM:

THE CHIEF JUSTICE

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT: 17.08.2022

R.K. Pattanaik, J

1. Instant Appeal is filed by the Appellant questioning the legality and judicial propriety of the impugned judgment dated 6th July, 2012 promulgated in C.T. No.87 of 2010 by the learned Sessions Judge, Nabarangpur for having been convicted under Section 302 I.P.C. and sentenced to undergo rigorous imprisonment for life and pay a fine of Rs.5,000/- in default to undergo R.I. for a period of one year.

2. An F.I.R. was lodged on 10th May, 2010 by the Informant alleging that the Appellant father assaulted the victim (mother) by means of an axe, as a result of which, she died on the spot, consequent upon which, G.R. Case No.242 of 2010

was registered under Section 302 I.P.C. and on completion of investigation, he was chargesheeted for having caused murder of his wife. Then, the Appellant was committed to the learned court below for trial. The prosecution led evidence during the trial. The Appellant did not lead any evidence in support of his defence, rather, pleaded innocence and false implication. The learned court below finally held the Appellant guilty under Section 302 I.P.C. and accordingly, sentenced and convicted him thereunder followed by a sentence of life imprisonment and fine.

3. Learned counsel for the Appellant contended that the court below relied upon the evidence of P.Ws.2 and 7 despite the fact that both of them could not have witnessed the alleged incident. It is further contended that as per the testimony of P.W.7, the Appellant had no previous quarrel with the deceased but appeared to have committed the alleged overt act under a sudden provocation without any intention to commit murder of the deceased and therefore, it would be a case falling under Section 304 Part-II I.P.C. While contending so, the learned defence counsel cited a decision of this Court in the case of *Narsingha Bisoi v. State 1986(II) OLR 313*. It is submitted that since the Appellant did not have any issue with the deceased wife and without any premeditation rather in a fit of anger caused the assault, the learned court below ought to have convicted him under Section 304 Part-II I.P.C. instead of

Section 302 I.P.C. as in a similar case, this Court did take such a view in the decision (supra).

4. On the contrary, the learned AGA submitted that it is a clear case of murder with the requisite intention on the part of the Appellant or at least having the knowledge that such an assault would certainly cause death of the deceased wife. In this regard, learned AGA referred to the evidence of P.Ws.2 and 7, who are the sons of the Appellant and said to have witnessed the incident during which the deceased was assaulted with successive blows by means of an axe. It is further submitted that an offence under Section 304 Part-I I.P.C. is not made out vis-à-vis the Appellant considering the fact that successive blows have been given with the weapon of offence clearly suggesting that it was with the intention or knowledge to cause murder of the deceased. A decision of the Apex Court in the case of *Bipin Kumar Mondal v. State of West Bengal (2010) 12 SCC 91* is cited to contend that appreciating the evidence in its entirety, a clear case of murder is proved and established against the Appellant and therefore, the decision of the learned court below should not be interfered with. The learned AGA contended that the testimony of P.Ws.2 and 7 are sufficient to prove the incident since they were present at the spot which also stands corroborated by medical evidence. Thus, the contention of the State is that the Appellant is the perpetrator of the crime and

responsible for the alleged murder of the deceased and hence, the order of conviction is absolutely justified.

5. As earlier mentioned, the Appellant pleaded not guilty and claimed that he has been falsely framed for the murder of his wife.

6. The prosecution examined eleven witnesses, exhibited number of documents besides the F.I.R. and also the material objects including the weapon of offence. The prosecution predominantly relied upon the evidence of P.Ws. 2 and 7 who are the ocular witnesses and were present nearby and reached at the spot during the time of the assault. P.Ws. 9 and 10 are the I.Os. P.W.11 is the doctor, who conducted the *post mortem* examination over the body of the deceased. The other witnesses have either proved the seizure of the weapon of offence and other incriminating items collected by the I.Os. or happened to have reached the spot after P.W.2 raised hue and cry witnessing the murderous assault by the Appellant. To find out and ascertain whether the Appellant is the author of crime, the Court shall have to examine and analyze the prosecution evidence.

7. The defence contends that offence of Section 304 Part-II I.P.C. is made out considering the evidence on record which is objected to by the State on the ground that taking into account the manner of assault and the extent of injuries which proved fatal without any doubt makes out a case of murder. Whether,

it is a case of murder or culpable homicide not amounting to murder, the same is to be determined referring to the prosecution evidence.

8. The expression 'culpable homicide' is defined in Section 299 I.P.C. The essential prerequisite of the offence is the death of a person accompanied by intention or with the knowledge. On a comparative study of Section 299 I.P.C. and Section 300 I.P.C. which has been lucidly explained by the Supreme Court in the case of ***R. Punnyaya v. State AIR 1977 SC 45*** is that the question, whether, it is culpable homicide or murder has to be considered by finding out if the alleged act of the accused caused death to someone and if it is a case of culpable homicide as defined in Section 299 I.P.C. then if the facts proved bring the case within the ambit of any one of the four categories contained in Section 300 I.P.C. and if answer to the above question is in the negative, the offence would be culpable homicide punishable under Section 304 I.P.C. but if the answer is in the affirmative, unless the case falls in any of the exceptions enumerated in Section 300 I.P.C., it would be an offence of murder. Where an accused caused death by doing an act with the intention to cause bodily injury and the injury happens to be one which is likely cause death, he would be held guilty of culpable homicide. In so far as the knowledge of the accused is concerned, the Supreme Court in ***Chamra Budhwa v. State AIR 1954 SC 652*** held that the act

if was done with the knowledge that it was likely to cause death but without any intention to cause death or such bodily injury as was likely to cause death, considering the fact that the fatal injury was inflicted on a vital part of the body of the deceased, it would be an offence of murder. In ***Afrachim Seikh v. State AIR 1964 SC 1263***, the Apex Court held that the term 'knowledge' appearing in Section 299 I.P.C. pertains to the likelihood of death. The distinction in that regard has been well illustrated in the celebrated judgment of ***Reg v. Govinda (1877) ILR Bombay 342***, wherein, it has been explained that in the case of culpable homicide, death is probable, whereas, in murder, it is certain. If the assault is likely to cause death, it would be culpable homicide other than murder but where the knowledge is that by such an assault, the death is imminent, an offence of murder is committed. It entirely depends on the facts and circumstances of each particular case which determines as to what offence has been committed. If any one of the clauses of Section 299 I.P.C. read with exceptions of Section 300 I.P.C. is shown to apply to a given case, in such an event, only an offence of culpable homicide not amounting to murder is said to be committed. The exceptions of Section 300 I.P.C. are if the act is committed (i) on account of a sudden and grave provocation, for which, the offender was deprived of the power of self-control; or (ii) while exercising right of private defence without premeditation and intention of doing more harm than is necessary for the purpose of such

defence; or (iv) without premeditation in a sudden fight in the hit of passion upon a sudden quarrel, however, without having taken undue advantage or acted in a cruel or unusual manner. The case of the Appellant if at all falls in any of the above exceptions (i), (ii) or (iv) of Section 300 I.P.C. is to be meticulously examined.

9. P.W.1 is the scribe of the F.I.R. i.e. Ext.1 and while being examined deposed that on the instruction of the P.W.2, he drafted it. P.W.1 was cross-examined but nothing emerged to discredit him. It appears that P.W.2 informed P.W.1 about the incident later to which he drafted Ext.1. P.W.2 is one of the sons of the Appellant and he deposed that at the relevant point of time, the deceased was in her kitchen and she raised alarm for which he rushed and found that the Appellant assaulting her by an axe and the blows landed on the back side of neck and shoulder. P.W.2 further deposed that the Appellant had given blows by the time he reached at the spot and witnessed two more blows being received by the deceased. According to P.W.2, the Appellant threatened to kill him by showing said axe and for the alleged assault, the deceased died instantly and having witnessed the incident, he shouted to which P.W.7 and other villagers arrived. As per P.W.2, his mother had requested the Appellant to compromise a dispute in an atrocity case and during that time, the incident happened as the latter got enraged. In cross-examination, P.W.2 elicited

that he did not enter into the kitchen and remained near its door and raised *hulla* by informing others that his mother was murdered by the Appellant. It was further elicited by P.W.2 that nobody from outside can witness things happening in the kitchen and on such a revelation, the learned defence counsel suggested that the witness could not have noticed the incident either. From P.W.2's evidence, it is however made to appear that after the deceased having raised alarm, he rushed to the spot and witnessed the assault. Further P.W.3 reached at the spot and found the deceased lying dead on the floor of kitchen and the Appellant was standing by her side. According to P.W.3, the Appellant brandished the axe and threatened them to kill. According to P.W.3, police arrived and till that time the Appellant was in the kitchen and the police removed the weapon of offence held by him. P.W.3 proved the seizure list with respect to the axe as Ext.3. In cross-examination, P.W.3 reiterated the above facts as to how he rushed to the spot and found the presence of the Appellant and also the dead body of the deceased besides the seizure of the weapon of offence. Similar is the evidence of P.W.4, who along with P.W.3 and others had moved to the spot. P.W.4 deposed that he noticed about five injuries on the back side of neck and shoulder of the deceased. Though P.W.4 was cross-examined but nothing could be elicited to shake his testimony. P.W.7 is the other son of the Appellant and he deposed that his father committed murder of the deceased inside the kitchen and witnessed

blows being given by an axe. P.W.7 also claimed that the Appellant threatened him and others by brandishing the axe. The above witness was cross-examined fully but it yielded nothing in favour of the defence. P.W.9 is the I.O. who conducted the investigation. P.W.10 as successor of P.W.9 submitted the charge-sheet against the Appellant. P.W.9 was elaborately cross-examined by the defence and again nothing could be found to shake his credibility. P.W.9 deposed that he on reaching the spot found presence of the Appellant and he had removed the axe from his hand. P.W.11 who conducted *post mortem* examination over the dead body found the following injuries:

External injuries:

- i) sharp cut at the nape of the neck below the right side ear of size 10 cm x 1 cm x 3 cm;
- ii) sharp cut injury over shoulder of size 2 cm x 2 cm x 2 cm;
- iii) sharp cut injury at the back of the neck of size 10 cm x 1 cm x 3 cm;
- iv) sharp cut injury over back 4 cm. below the neck of size 12 cm x 2 cm x 2 cm; and
- v) sharp cut injury over back 6 cm below the neck of size 6 cm x 2 cm x 2 cm.

Internal injury:

- i) brain stem is haemorrhagic and edematous; and
- ii) external carotid artery and jugular vein of right side disrupted

P.W.11 opined the cause of death due the hemorrhage inflicted by means of a heavy sharp edged weapon and proved the P.M. report as Ext.11 and further deposed that after a query received from the I.O. on 11th May, 2010, he examined the weapon of offence and also formed opinion that the external injuries found on the body to have been possibly inflicted by the same and are sufficient in ordinary course of nature to cause death. P.W.11 proved the weapon of offence as M.O.I and the query report as Ext. 9/1. A suggestion was put to P.W.11 by the defence that such injuries could be possible by someone falling from a tree over a sharp edged object but it was denied. Ext.11 suggests that the deceased had number of sharp cut wounds and all are *ante mortem* in nature. There is no denial to the fact that the death is homicidal in nature. It is claimed by the defence that in a fit of anger or on suddenly being provoked by the deceased, the Appellant committed the overt act. But, nothing has been deposed about any such provocation as P.Ws.2 and 7 were not physically present prior to the assault. The motive of the Appellant for the alleged assault is anticipated by P.W.2 and 7 since the deceased was requesting him to compromise the atrocity case. In any case, P.Ws.2 and 7 directly witnessed the assault. According to P.W.2, he himself witnessed couple of blows being given by the Appellant which stood corroborated by P.W.7. The above claim of P.Ws.2 and 7 received corroboration from P.Ws. 3 and 4, who had rushed to the spot shortly after the incident

and they also found the presence of the Appellant holding the axe and the deceased lying dead on the ground with injuries. Not only that, P.Ws.3 and 4 deposed that the Appellant threatened all of them with dire consequences by brandishing the axe if anyone challenged him. The recovery of the weapon of offence is deposed by P.Ws.2, 3, 4 and 7 besides P.W.9, who claimed to have snatched it from the hand of the Appellant, who was still standing inside the kitchen by the time when he reached. From the above, the involvement of the Appellant is established without any doubt. P.Ws.2 and 7 are none other than the sons of the Appellant and they did not have any reason to falsely implicate him and that too when, as a result of the assault, their mother died. The learned AGA referring to the decision of the Apex Court in ***Bipin Kumar Mondal*** (supra) contended that in a similar case, the evidence was considered as natural, probable and convincing. In the present case, P.Ws.2 and 7 are the sons of the Appellant and they have witnessed the occurrence and others reached at the spot soon thereafter. P.Ws.3 and 4 were informed about the assault by P.Ws.2 and 7 and all were threatened by the Appellant. The entire incident narrated by P.Ws.2 and 7 supported by P.Ws.3 and 4 clearly points finger towards the Appellant.

10. The next consideration would be whether the Appellant is guilty of murder or culpable homicide not amounting to

murder which is claimed by the defence claiming that he caused the assault on sudden provocation. As discussed earlier, the essential ingredients of Section 299 I.P.C. read with Section 300 I.P.C. are required to be proved so as to bring the case within the purview of any of the exceptions. Even assuming that the Appellant had no intention, as the evidence of P.Ws.2 and 7 reveal that he had no issues with the deceased wife prior to the incident, or reacted on a provocation, even then also, the knowledge as to the consequence of the assault would determine the nature of offence committed by him. The assault by the Appellant was by means of a sharp edged weapon. From Ext.11, it appears that about five sharp cut injuries were found on the body of the deceased on her neck and shoulder with grievous internal injuries. The above injuries proved to be fatal and caused instant death of the deceased. The Appellant who carried out the assault cannot be said to have had no idea or knowledge that by such weapon of offence, death would not be caused when the blows were received on the neck and shoulder of the deceased. As per Exception (iv) to Section 300 I.P.C., a culpable homicide would not be held as murder if it was committed without any plan or premeditation in a sudden fight or heat of passion and without *having taken undue advantage or acted in a cruel or unusual manner*. The expression italicized above is to be read conjointly with the rest part of Exception (iv), which means, if there was any

assault and a death result which is committed under sudden provocation or in a fit of anger, the offender must not have taken undue advantage or acted in a cruel manner. In the present case, the Appellant even assuming that he lost his self-control on being provoked by the deceased which might be due to the reason stated but considering the blows by the weapon of offence and the extent of injuries received by her, it cannot be said that he had no knowledge about the consequence and further did not act in an unusual manner. Rather from the evidence of P.Ws.2 to 4 and 7, it appears that the Appellant by means of an axe either with the intention to cause death of deceased or without, or having the knowledge that by such an assault on the vital parts of the body of the deceased, it would in all probability cause her death, carried out the assault which in the opinion of the Court cannot be held as an act of culpable homicide not amounting to murder, since it does not fall in any of the exceptions specified in Section 300 I.P.C. Rather on appreciation of the evidence, the Court finds that either the intention was developed by the Appellant at the spot itself or he committed the overt act knowing the consequence that it is certainly to cause death of the deceased. So the claim of the defence that the Appellant committed an offence of culpable homicide under Section 304 Part-II I.P.C. is misconceived. In so far the decision of this Court in *Narsingha Bhoi* (supra) is concerned, which has been relied upon by the defence, it was found in that case that

the accused and deceased had picked up quarrel and all on a sudden, the former stabbed the latter and therefore, it was held that an offence of Section 304 Part-II I.P.C. was committed. However, the above decision does not fit to the present case, which is not at all a case of provocation, as the Appellant not only lost temper but also grossly exceeded in his conduct by assaulting the deceased in a cruel manner fully aware of the consequence. One more decision of the Supreme Court in the case of *Litta Singh and another v. State of Rajasthan (2013) 55 OCR (SC) 695* is placed reliance on by the learned defence counsel. But in that case, it was held that there was no premeditation or any evidence of plan or preparation to carry out the assault with intention to kill the deceased and under such circumstances, conviction under Section 302 I.P.C. was held not sustainable and was turned to one under Section 304 Part-II I.P.C. The above decision cannot render any assistance to the defence. To sum up, it has to be concluded that the Appellant is guilty of murder and the court below rightly appreciated the material evidence and correctly arrived at a conclusion regarding his guilt. In other words, findings of the learned court below and the order of conviction vis-à-vis the Appellant suffers from no legal infirmity and hence, calls for no interference.

11. Accordingly, it is ordered.

12. In the result, the appeal stands dismissed. As a logical corollary, the impugned judgment dated 6th July, 2012 in C.T. No.87 of 2010 passed by the learned Sessions Judge, Nabarangpur is hereby affirmed.

(R.K. Pattanaik)
Judge

(Dr. S. Muralidhar)
Chief Justice

U.K. Sahoo

