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IN THE HIGH COURT OF ORISSA AT CUTTACK
JCRLA No.01 of 2014

Biju Biswal

.... ***Appellant***
Mr. G.K.Nayak, Advocate

-versus-

State of Odisha

.... ***Respondent***
Mrs. S. Patnaik, AGA

CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH

Judgment Dated 05.09.2022

Chittaranjan Dash, J

1. This Appeal is directed against the Judgment and order dated 28th March, 2005 passed by the learned Adhoc Additional Sessions Judge, (FTC.II), Keonjhar in S.T. Case No.02/11 of 2004 arising out of G.R. Case No.575 of 2003 in connection with Telkoi P.S. Case No.57 dated 14.07.2003 under Section 383 of the Criminal Procedure Code, 1973 at the behest of the Appellant. The learned trial court having found the Appellant guilty for the offence under Section 302 of Indian Penal Code ('IPC') and under Section 27 (3) of the Arms Act, sentenced the Appellant to imprisonment for life and fine of Rs.5000 for the offence under Section 302 IPC and in default to undergo rigorous imprisonment for one year and further sentenced to undergo rigorous imprisonment for two years for the offence under Section 27(3) of Arms Act, directing both the sentences to run concurrently subject to the provisions of Section 428 of Cr.P.C.

2. Succinctly, the case of the prosecution hereinafter as revealed from the case record is that the Appellant Biju Biswal got married to one Dukhi Sahoo, the sister of Ratha Sahoo (for brevity called the “deceased”). The couple was blessed with a girl child after about 7 years of their marriage. It was further revealed that soon after the birth of the child, the Appellant got married another woman namely “Rama” treating her as 2nd wife and started ill treating and neglecting the first wife. The first wife, being aggrieved by the action of the Appellant approached her brother (the deceased) complaining against the Appellant. The deceased Ratha Sahoo, in turn took the matter to the village “Punch” who advised the Appellant to maintain both the wives equally.

3. As there was no improvement in the treatment of the first wife by the Appellant, Ratha Sahoo placed the matter time and again before the village “Punch” which enraged the Appellant. Being annoyed, the Appellant bore a grudge against the deceased. On the decision of the “Punch” some days prior to the occurrence, the Appellant was ex-communicated for not adhering to the “Punch’s” advice. It is also alleged that being aggrieved, the Appellant hurled an open threat before his first wife Dukhi Sahoo to do away with the life of her brother Ratha Sahoo.

4. In a sequel to such threat, on the date of occurrence i.e. on 14th July, 2003 during the day time being armed with a country made gun, axe and bow the Appellant left his house with a declaration to kill Ratha Sahoo. Having proceeded to the house of Ratha Sahoo he found the latter (the deceased) taking meal with his field servant Kumar

Dehury in the verandah of his house. Seeing the deceased, the Appellant, stating “you are holding meeting against me, today I shall kill you by this gun” fired from the gun held by him that hit the chest of the Appellant. The pellet struck at the left arm and pierced through the body and came out through the right side chest wall of deceased Ratha Sahoo. The Appellant thereafter left the spot threatening that he would wipe out the entire family members. Being injured by the gun shot the deceased fell down on the spot and succumbed to the injuries.

5. The incident having been reported in writing by the brother of the deceased at Telkoi Police Station, the law was set in motion upon registration of P.S.Case No.57 of 2003 and the investigation commenced. In course of the investigation, the Investigating Officer (I.O) visited the spot, held inquest over the dead body of the deceased, seized the blood stained earth, sample earth and pellet from the spot besides the wearing apparels of the deceased. Upon completion of investigation, the I.O. having found prima facie case against the Appellant for the offence punishable under Section 302 IPC read with Section 27 of Arms Act, submitted a charge sheet before the appropriate Court.

6. The plea of the Appellant before the learned Court below was one of complete denial. He claimed trial. 17 witnesses, in all, got examined by the prosecution to bring home the charges against the Appellant. The defence examined no witness.

7. PW-1 was the informant and the brother of the deceased. At the relevant time he was taking meal in his own house situated at a

distance of 6 to 8 cubits from the spot of incident. P.W.2, Kamar Dehuri was a labourer engaged in the field of the deceased and at the relevant time he was taking meal along with the deceased in the veranda of the house of the deceased. P.W.3 was a co-villager of the deceased and witness to the inquest held on the dead body of the deceased. P.W.4 and 5 were also the brothers of the deceased, and post occurrence witnesses who having come to know about the incident came to the house of the deceased and witnessed the inquest held on his dead body.

8. P.W.6 was the wife of the deceased. Deposing about the incident she stated that at the relevant time her husband was taking meal along with their field servant Kamara Dehuri in the verandah of their house and she served them the food. She further stated that on the advice of her husband she having served food went to their grocery shop situated at a distance of 10 to 12 cubits from the house to give rice to Mami Mahakud in lieu of her wages for her engagement as their field servant. According to P.W.6 while she was proceeding to the shop, she saw the accused Biju Biswal coming to their house with a gun, axe and bow and reaching near her husband, threatened her husband saying “*tu para meeting karuchhu tote maridebi*”. Saying so, he fired at her husband from the gun. The bullet hit the left arm and pierced through the body and came out of the right side waist of the body of her husband. Due to the gunshot injury her husband died at the spot.

9. P.W.7 is Mami Mahakud who deposed to the incident akin to the prosecution story in consonance with the version of P.W.6 being an

ocular witness. P.W.8, a teacher by profession was a witness to the circumstance who is simply stated to have seen the Appellant proceeding in the village road being armed with an axe and a gun. Later he came to know that the Appellant had killed Ratha Sahoo by gunshot. P.W.9, a priest by profession too stated in the same vein as that of P.W.8. He claimed to have seen the Appellant coming towards the village being armed with gun and arrow and learnt later that the Appellant had killed Ratha Sahoo by a gunshot.

10. P.W.10 is a witness to the seizure. P.W.11 is the wife of the Appellant namely Dukhi Biswal. In her sworn testimony she deposed that the Appellant was her husband and the deceased was her elder brother. She further stated that while her parental house is situated in a hamlet Sarei, her husband's house is in another hamlet at a distance of about 2 kilometers. According to her, the occurrence took place about one and half years back (from the date of her evidence) in the noon. The second wife namely Rama who too was staying in the precincts of the same house was engaged in cooking. She further stated that the Appellant being armed with a gun, axe and bow left the house saying that he will finish Ratha Sahoo (her elder brother) today and proceeded towards her parental house. Although she followed him stealthily, by the time she arrived, her brother was already murdered by the Appellant, as heard from Kamar Dahuri, the field servant.

11. P.W.12 was a co-villager and was the head of the community at the relevant time. He too stated that the Appellant had married Dukhi about 12 years back and was blessed with a child after about

7 years of the marriage and thereafter married again. He further stated that there was a frequent quarrel between both the wives of the Appellant and that at the instance of Ratha Sahoo a meeting was held in their community where villagers of three adjoining villages attended it. Such meetings were frequently held since the Appellant was not adhering to the decision of the community. He too had heard that the Appellant had killed Ratha Sahoo ultimately by gunshot.

12. P.W.13 was also a co-villager and was the Secretary of the community at the relevant time. According to him on many occasions on the request of P.W.11, meetings of the community were convened but since the Appellant did not abide by the advice, the community kept silent. P.W.14 was the doctor who conducted post mortem examination over the dead body of the deceased. P.W.15 was a constable who was commanded to guard the dead body of the deceased on the date of occurrence. P.Ws 16 and 17 respectively were the IOs.

13. The evidence of PWs-2 and 7 as independent eye witnesses was crucial for the prosecution as was the medical evidence of the doctor who conducted the post mortem examination of the deceased.

14. On an analysis of the evidence of the witnesses, particularly PWs-2 and 7, and the circumstances appearing at the relevant time of incident coupled with the nature of injuries and the weapon used, the learned trial court held the Appellant to be the perpetrator of the crime

and found him guilty for committing the murder of the deceased. He was sentenced in the manner as stated above.

15. The learned counsel for the Appellant assailed the impugned judgment, *inter alia*, on the ground that there are discrepancies in the evidence of the witnesses and the learned trial court ought not have relied upon the said evidence being not clear, cogent, consistent and trustworthy. He further submitted that taking note of account of the entire gamut of evidence, the whole case of the prosecution even if admitted for the sake of argument to be true, would at best give rise to a case to be brought within the ambit of the offence punishable under Section 304 (II) I.P.C since there is an element of sudden provocation and absence of pre-meditation on the part of the Appellant who simply was holding a gun, ordinarily used for the purpose of hunting birds.

16. Per contra, the learned AGA took the Court through the evidence minutely and contended that the testimonies of none of the PWs could be shaken by the defence. It was consistent in every respect. The eye witness testimonies were trustworthy and fully corroborated by the medical evidence. It was accordingly submitted that the trial Court was right in proceeding to convict the Appellant for the offence punishable under Section 302 IPC read with Section 27 of the Arms Act.

17. In view of the contentions of the learned counsels for the parties, we are called upon to reassess the evidence of the witnesses on record. This being a murder case, the foremost duty of the court is to find out if the deceased died a homicidal death. In this context, the evidence led by PW-14, the doctor who conducted the post mortem

examination being in consonance with the post mortem report proved vide Ext.5 assumes utmost importance. It is clear from the consistent version of the witnesses both ocular and circumstantial that the death of the deceased occurred by gunshot injuries. P.W.14, the Doctor who conducted the post mortem examination found the injuries to be ante mortem in nature and sufficient to cause death in ordinary course of nature. He further opined that the cause of death was due to shock and hemorrhage due to the fire arm injuries to the vital organs like pleura, liver, stomach and right kidney of the deceased. According to him the time since death was within 24 to 36 hours at the time of post mortem conducted by him on 15th July, 2003. It is also opined by the Doctor that the injuries sustained by the deceased were homicidal and due to the gunshot fired from a very close distance.

18. A feeble attempt, however, was made by the defence, in the course of the trial, attributing the death of the deceased to be one out of an explosion of bomb but failed in every count as no foundation of such plea could be laid. Further, nothing could be elicited neither as to any circumstance leading to the explosion of a bomb nor as to the nature of injuries arising out of such eventuality. Also, nothing material could be elicited from the Doctor by the defence in cross-examination. Rather the reply of the doctor during the cross-examination reinforced his opinion as to the cause of the death as well as the nature of injuries sustained leading to the only conclusion that the death of the deceased was due to the gunshot injuries on the vital parts and was homicidal in nature. Consequently, the medical evidence led by the prosecution before the learned trial court could not be assailed by the Appellant.

Even otherwise, the Appellant too has not challenged the nature of death of the deceased in this appeal.

19. Coming to the merits of the case, we have perused the impugned judgment of the trial Court along with the documents in the case record. As stated above, versions of all the witnesses are in tune with each other pointing to the death of the deceased as a result of the gunshot injury caused by the Appellant. The evidence of the two vital witnesses i.e. PWs-2 and 7 lend assurance that they are truthful, independent and reliable.

20. PW-2 Kumar Dehury in his evidence categorically stated that on the relevant day at about noon he along with the deceased Ratha Sahoo were taking meals on the veranda of the house of Ratha Sahoo. He further stated that the Appellant being armed with country made gun came there and said the deceased "*au kete meeting mo nare karibu.*" Saying so, he immediately fired from his gun aiming to the deceased. The bullet struck on the left hand arm of the deceased and passed through the body and came out on the right side waist causing bleeding injuries. PW-2 also stated that at the relevant time, he was at a distance of 2 to 3 cubits and was sitting facing the deceased and that after firing, the accused immediately escaped from the spot. In the course of cross-examination the testimony of this witness could not be shaken in any manner. Nothing material could also be elicited in favour of the defence.

21. Similar is the evidence of PW-7 Mami Mahakud, who was also present at the scene of occurrence at the relevant period. According to her, about one and half years back during plantation season at about

12 noon she had been to the house of Ratha Sahoo to collect rice in lieu of her wages she was due for being engaged in the field of the deceased. According to her, when she and PW-6 Nua Sahoo, the wife of deceased Ratha Sahoo were proceeding towards the grocery shop of Ratha Sahoo at that time, the accused fired from his gun aiming at Ratha Sahoo; hearing the sound of firing, out of fear, she left the place; that due to that gunshot, Ratha Sahoo died. This witness spoke consistently with her earlier statement U/s 161 Cr.P.C and remained firm despite being subjected to extensive cross-examination by the defence.

22. Admittedly, there is nothing on record with regard to the seizure of gun. However, with the prosecution having proved beyond reasonable doubt that the death of the deceased was homicidal on account of gunshot injuries, the non-recovery of the weapon of offence would not weaken the case of the prosecution. In ***Mritunjoy Biswas v. Pranab alias Kuti Biswas AIR 2013 SC 3334*** it was held by the Supreme Court that when there is ample unimpeachable ocular evidence corroborated by medical evidence, mere non-recovery of weapon does not affect the prosecution case.

23. Learned Counsel for the Appellant sought to suggest that the death occurred as a result of sudden provocation and there was absence of pre-meditation. In this context, the following observations in the decision of the Supreme Court in ***Kikar Singh v. State of Rajasthan 1993 (3) SCR 696*** are relevant:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in

the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is accepted and the offences committed would be one of murder.”

24. On the touch stone of the principle enunciated hereinabove when the case in hand is examined, there is no iota of evidence to characterize the case either as one committed without premeditation or in a sudden fight in the heat of passion. It is also not a case of sudden quarrel where the offender has not taken undue advantage and where the accused has not acted in a cruel or unusual manner. Conversely, there is abundant material to show the Appellant to be armed with weapons while the deceased was unarmed and that there

was no provocation of any nature from the side of the deceased since the Appellant having reached the house of the deceased hurled a threat and fired from the gun giving no inkling to any one present there as to what would transpire. The attack by the Appellant was cruel in as much as the deadly weapon was used against the unarmed man who was shot point blank with the knowledge that it would be likely to cause death and thereby the Appellant took undue advantage. In essence, therefore, none of the ingredients necessary to bring the case under exception 4 of Section 300 IPC could be shown to exist by the defence.

25. In sum, the cogent and unimpeachable ocular evidence and the overall facts and circumstances makes it clear that the prosecution has proved its case beyond all reasonable doubt and the learned trial court has committed no error in convicting and sentencing the Appellant, as above, holding him guilty of the murder of the deceased by intentionally causing his death by the use of a fire arm.

26. The JCRLA accordingly stands dismissed being devoid of merit. The bail bond is hereby cancelled. The Appellant is directed to surrender forthwith and, in any event, not later than 20th September, 2022 failing which the IIC concerned will take steps to take him into custody to serve out the remainder of his sentence.

(Chittaranjan Dash)
Judge

(Dr. S. Muralidhar)
Chief Justice