

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA No.601 of 2016

(From the judgment of conviction and order of sentence dated 01.10.2016 passed by the learned 3rd Additional Sessions Judge, Cuttack in Sessions Trial Case No.441 of 2013/ 206 of 2013.)

Khira @ Khirod Kumar Ojha *Appellant*

-versus-

State of Odisha *Respondent*

Advocates appeared in the case:

For Appellant : *Mr. Bikash Chandra Parija, Adv.*

-versus-

For Respondent : *Ms. Samapika Mishra, ASC*

CORAM:

MR. JUSTICE D. DASH

DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-02.12.2022

DATE OF JUDGMENT:-23.12.2022

Dr. S.K. Panigrahi, J.

1. The Appellant has preferred this Criminal Appeal, challenging the legality and propriety of the Judgement dated 01.10.2016 passed by the Learned 3rd Additional Sessions Judge, Cuttack in Sessions Trial Case No.441 of 2013/ 206 of 2013 arising out of Mahanga P.S. Case No.56 of

2013 corresponding to G.R. Case No.212 of 2013 of the file of the learned J.M.F.C., Salipur, Cuttack; wherein the learned 3rd Additional Sessions Judge, Cuttack has convicted the Appellant for commission of the offence punishable under Section 302 of the I.P.C. read with sections-25(a)/27 of the Arms Act and thereby sentenced the Appellant to undergo imprisonment for life and to pay a fine of 5000/- (Rupees Five thousand only) and in default, to undergo further R.I. for six(6) months for the offence punishable under section 302 of I.P.C. The Learned Trial Court also sentenced the Appellant to undergo R.I. for 3(three) years and to pay a fine of Rs.5,000/- (Rupees Five thousand only) in default to undergo further R.I. for 2 (two) months for commission of offences punishable under section 25(a)/27 of the Arms Act. The Learned Trial Court also ordered that all the sentences shall run concurrently.

I. FACTS OF THE CASE

2. The case of the prosecution in brief is that on 07.04.2013 at 1.00 P.M, the complainant-one Maheswar Ojha, son of Gangadhar Ojha of Village Badagotha, P.S- Mahanga presented a written report before the IIC, Mahanga, P.S that on the same day at about 10 to 11 A.M, while he as well as some other persons of his village were working in their respective fields, they found one Kunjalata Ojha, wife of

Gagana Ojha of their village, running raising hulla "MARGALI MARIGALI MATE DHARA" and one Khirod Ojha, son of Dharanidhar Ojha (present accused) of their village was chasing her being armed with a Bhujali. The Appellant also assaulted the deceased by means of said Bhujali and inflicted injury at 8-10 places on her body including her head, hand, eyebrow and back as a result of which she lost her senses at the spot with severe bleeding injuries. In the meantime, Gagana Ojha, the husband of Kunjalata and others arrived at the spot and shifted the injured to hospital for her treatment.

3. Based on the report of the Informant, the IIC, Mahanga P.S registered a case vide Mahanga P.S. Case No. 56 dated 07.04.2013 against the Appellant for the commission of the alleged offences punishable under sections 341, 324, 326, 307 of IPC read with Sections-25 and 27 of the Arms Act and directed the S.I to take up investigation of the case.
4. During the course of the investigation, the Appellant was arrested on 07.04.2013 and on the very next day i.e., on 08.04.2013, he was forwarded to the court of the Learned. J.M.F.C., Salipur and thereafter he was sent to Judicial custody. During investigation, the deceased died and after completion of the investigation, the I.O submitted chargesheet against the Appellant for the commission of

offences punishable under sections 302 of I.P.C. and 25/17 of the Arms Act.

5. After receiving the chargesheet, the Learned J.M.F.C, Salipur as per the procedure laid down under section 209 of CrPC., committed the case record to the court of Sessions and subsequently, it was transferred to the learned 3rd Addl. Sessions Judge, Cuttack for trial.

II. SUBMISSIONS ON BEHALF OF THE APPELLANT

6. It is submitted by Learned Counsel for the Appellant that the prosecution has not examined any independent witness and the witnesses who have been examined are related to each other and the impugned Judgment of conviction and sentence was passed by the Learned Trial Court relying on their statements. Moreover, as per the statement of the P. W. 1, one Jhari Das was the scribe of the F.I.R, but the prosecution has not examined Jhari Das to find out the genuineness of the F.I.R.
7. It is contended by Learned Counsel for the Appellant that the eyewitnesses to the occurrence have given a different description of the place of occurrence and there are discrepancies in the depositions of eyewitnesses regarding the murder weapon that was used by the accused towards inflicting injuries on the deceased. Therefore, if the specification of the murder weapon is in dispute, the

infliction of injuries by the Appellant using the said weapon is also in dispute.

8. The recovery of the weapon at the instance of the Appellant is also contradictory and inconsistent. P. W. 1 who is the eyewitness to the occurrence has not stated anything in his evidence that the Appellant threw the weapon in a bush but, in Para-5 of his cross-examination he stated that he took Bhujali from the possession of the accused and kept the said Bhujali on the varanda of his house.
9. The prosecution has measurably failed to prove the guilt of the Appellant beyond all reasonable doubts for which the impugned judgment is liable to be set aside/quashed.

III. SUBMISSIONS ON BEHALF OF THE STATE

10. Per Contra, the Learned Additional Standing Counsel appearing for the State submitted that there is direct evidence available in the case record to implicate the present accused for the alleged crime. He further submitted that besides the informant who is an eye witness to this case, there are co- villagers who are the other eye witnesses, post-occurrence witnesses who have categorically implicated the present accused as the author of the crime and that the versions of those witnesses in respect of the manner and circumstances of the incident and the overt act shown by the accused are coherent to their earlier statements for which

prosecution succeeded in establishing its case beyond all reasonable doubt and hence the accused is liable to be convicted for the charges framed against him.

IV. COURT'S ANALYSIS AND REASONS

11. In order to prove the charges framed against the accused the prosecution has orally examined as many as 15 witnesses out of whom P.W.1 is the uncle of the deceased and the complainant, P.W.13 is the husband of the deceased, P.W.2 is the co-sister-in-law of the deceased, P.W.4 is the brother-in-law of the deceased, P.Ws.3 and 5 to 7 are four co-villagers of the parties, P.W.8 is one Havildar of police who is a witness to the seizure, P.W.9 is the M.O. who had examined the accused, P.W.14 is another M.O. who had conducted autopsy over the dead body of the deceased, P.Ws.12 and 10 are the first and second E.Os. respectively of the U.D. Case instituted on the death of the deceased and P.Ws.11 and 15 are the first and second I.Os respectively of this case. On contrary, no oral or documentary evidence has been tendered by the defence to substantiate his plea.
12. In a case involving murder, the primary point that arises for consideration is whether the death of the deceased was homicidal in nature. The deposition of P.W.14 (Asst. Professor, Deptt. of F.M & T., SCB Medical, Cuttack) reveals

that there were as many as 12 injuries on the body of the deceased and they were all ante-mortem in nature and caused by moderately heavy cutting weapon. The cause of death was haemorrhage and shock due to infliction of multiple injuries. It is pertinent to mention that according to P.W.14, the time of death of the deceased was within 2-6 hours of the post-mortem examination. Peculiarly, according to evidence of P.W.9 (the then M.O, Community Health Centre, Mahanga), the age of injuries sustained by the Appellant were within 6 hours of his examination. Even though, this does not confirm the Appellant's involvement in the incident, it is a relevant fact according to Section 3 and 5 of the Indian Evidence Act, 1872. This enables the Court to draw an inference that the Appellant also sustained injuries around the same time period as the deceased. Moreover, it is also not the plea of the Learned Counsel for the Appellant that the death of the deceased was accidental or suicidal. On the other hand, it has been deposed by multiple witnesses that the Appellant chased the deceased towards the cultivable land and hacked her by means of a sharp cutting weapon and continued the assault even after the deceased fell. Even though there are minor discrepancies in the deposition of the eyewitnesses, if the same is construed in a conjoint manner, a common overview emerges that the

Appellant dealt blows to the deceased by a sharp cutting weapon following which the deceased sustained as many as 12 injuries and consequently, died. There is neither any inference of natural death or otherwise except homicidal death as proved through the medical evidence and also by the complainant and other witnesses. The chain of events leading to the incident is compelling enough to establish the death of the deceased was homicidal in nature and neither there is any iota of doubt nor has any material been produced by the Appellant to dispute the same. Further, the evidence rendered by P.W.11 (the then S.I of Mahanga P.S) & P.W.3 reveals that the weapon was recovered at the instance of the Appellant and this enables the Court to draw an inference that the Appellant was somehow linked to the incident as the specifications of the weapon recovered is similar to the one that was used in inflicting injuries to the deceased. As such in view of the clear, cogent, clinching oral and documentary evidence adduced by the prosecution supported by the medical evidence in respect of the deceased, it is clearly established by the prosecution beyond reasonable doubt that the deceased died a homicidal death.

13. The second issue that needs to be considered is whether the accused appellant was the perpetrator or the author of the homicide. In the instant case, P.W.1 (the Complainant)

categorically deposed that while he was in his cultivable land, adjacent to his house, he heard the scream of the deceased saying “Marigali Marigali” and she was being chased by the Appellant who hacked her repeatedly after she fell down. After witnessing the incident, P.W.1 along with 4-5 other villagers chased the Appellant and caught hold of him. Thereafter, the deceased was taken to Mahanga Hospital. P.W.1 has further deposed that one Jhari Das of Mahanga scribed the report according to his narration and having found the same as correct, he put his signature and submitted to the Police. It is contended by Learned Counsel for the Appellant that the scribe of the F.I.R. has not been examined. No doubt, the non-examination of the scribe of the first information report cannot be a ground to doubt the prosecution case and it can at best be treated as mere irregularity which can be cured if it is otherwise proved. Thus, we conclude that the non-examination of the scribe of the written report namely Jhari Das is not fatal for the prosecution case.

14. The deposition rendered by P.W.1 can be duly corroborated from the eye-witnesses account of P.W.2, P.W.3, P.W.6 & P.W.7. According to deposition of P.W.2, while she was at the tube well point, she saw the Appellant thrashing the son of the deceased in front of the house and left with his son &

wife. Thereafter, about half an hour later, the Appellant returned to the said spot and during that time the deceased was taking bath at the tube well. The Appellant came out of the house with a Bhujali and quarrelled with the deceased. The deceased ran towards the cultivable land out of fear and the Appellant chased her brandishing the Bhujali. After some time, she got the information that the deceased was hacked by the Appellant following which she raised an alarm and the villagers rushed to the place of occurrence. If the depositions and testimonies of P.W.1 & P.W.2 are analysed, it can be construed that there is no material irregularity in their contents/detail and hence, they are duly corroborated and fully admissible.

15. Further, it can be ascertained from the deposition of P.W.3 & P.W.7 that they had also heard the scream of the deceased yelling “Maridela Maridela” & “Maridela Bancha Bancha” while being chased by the Appellant towards the cultivable land. It has been categorically stated by P.W.1, P.W.2, P.W.3, P.W.6 & P.W.7 that the Appellant was armed with a Bhujali while he was chasing the deceased towards the cultivable land. Moreover, all the above-mentioned eyewitnesses have deposed that the deceased fell down while being chased, following which the Appellant inflicted consecutive blows on her. The fact that the deceased was screaming out of fear

while being chased by the Appellant, is not in dispute as the same can be affirmed from the depositions and testimonies of P.W.1, P.W.3, & P.W.7 who were all working in the nearby cultivable lands and heard the scream of the deceased and subsequently, witnessed the Appellant assaulting the deceased.

16. The deposition of P.W.6, in particular, corroborates the statements made by P.W.2 as both the eyewitnesses have categorically deposed that on the relevant day, the deceased was hacked near the tube well following which she ran towards the cultivable land. Even though, P.W.2 has not specifically stated that the deceased was attacked near the tube well, she revealed that the Appellant quarrelled with the deceased near the tube well and chased her towards the cultivable land, brandishing a Bhujali. Thus, it can be affirmed from the depositions and testimonies of P.W.2 & P.W.6 that the place of genesis of the incident was near the tube well and nothing has been brought on record on behalf of the Appellant to dispute the same. Moreover, P.W.3, P.W.4, P.W.6 & P.W.7 have deposed that the deceased was attacked at the back side of her head by the Appellant while she was running towards the cultivable land and due to this blow, she fell down and was then attacked continuously by means of a Bhujali. It was deposed by P.W.4 that the

Appellant was holding a sword whereas, P.W.5 has deposed that the Appellant was holding a knife. Apart from P.W.4 & P.W.5, all the other eyewitnesses account reveal that the Appellant was holding a Bhujali and assaulted the deceased by means of it. In the instant case, considering the manner in which the Appellant assaulted the deceased, it cannot be expected from a lay man to visualize the exact shape and size of the weapon of offence. Often, the description of the weapon of murder depends upon the distance of the eyewitness from the place of occurrence, therefore, it is almost impossible for an eye-witness to depose as to what was exactly used in inflicting injuries by the accused.

17. The evidence of P.W.4 & P.W.6 provides a rather detailed account of the occurrence as they have deposed that the deceased was hacked by the Appellant near the choura and thereafter, near the rube well. The deceased after sustaining injuries from the aforementioned assaults, ran towards the cultivable land where she received another blow at the back of her head following which she fell down. The chain of events as deposed by P.W.4 & P.W.6 corroborates the evidence rendered by P.W.1, P.W.2, P.W.3 & P.W.7 and yields an additional link in the chain of events which unerringly points towards the guilt of the Appellant. If the depositions of all the eye-witnesses are considered in

conjunction by removing the minor discrepancies emanating out of it, a reasonable inference can be drawn that the Appellant chased the deceased from the tube well to the cultivable land and assaulted her throughout the way. Hence, in view of the clear and cogent evidence adduced by the prosecution about the place of occurrence and in absence of any considerable discrepancy as regard to the place of occurrence, the decision of this Court in *Nirakar Behera v. State*¹ that “*where there is considerable discrepancy as regards to the place of occurrence, the accused is entitled to be acquitted*” is not applicable to the facts and circumstances of the present case.

18. Furthermore, the deposition of P.W.1, P.W.3 & P.W.7 reveals that the Appellant attempted to escape after inflicting injuries on the deceased following which he was chased by P.W.1, P.W.3, P.W.7 and few other villagers and was caught at the cultivable land of Govinda Behera. P.W.1 has not stated in his deposition that the Appellant was caught at the cultivable land of Govinda Behera but the said fact can be affirmed from the deposition of P.W.3 & P.W.7. Moreover, the deposition of P.W.7 also reveals that P.W.1 rushed to the place of occurrence and hence, the presence of P.W.1 at the place of occurrence and the depositions and testimonies

¹ 1996 CRI.L.J. 3913

rendered by him are not in dispute, as the same is duly corroborated from the deposition of P.W.7. The act of the Appellant in fleeing, after noticing the villagers approaching the spot of occurrence, reveals his guilty intention and an adverse inference of guilt can be drawn from the said act. In addition to this, the fact that the Appellant was caught at the cultivable land while trying to flee, also confirms his presence at the said spot of occurrence at the relevant time. Therefore, if the Appellant was not involved in the act that resulted in death of the deceased, he ought to have provided some evidence to discredit the version of the eyewitnesses and rebut the presumption. However, nothing has been brought on record on behalf of the Appellant towards disproving his involvement in the death of the deceased and his presence at the spot of occurrence at the relevant time.

19. It has been contended by Learned Counsel for the Appellant that the recovery of the weapon at the instance of the Appellant is also contradictory and inconsistent. P. W. 1 who is the eyewitness to the occurrence has not stated anything in his evidence that the Appellant threw the weapon in a bush but, in Para-5 of his cross-examination he stated that he took Bhujali from the possession of the accused and kept the said Bhujali on the varanda of his house. However, P.W.3 has categorically deposed that the Appellant threw the weapon

of offence in a bamboo bush on being caught and the deposition of P.W.11 reveals that the weapon of offence was recovered at the instance of the Appellant. Therefore, the evidence of P.W.3 & P.W.11 corroborates each other. As per the deposition of P.W.3, the Appellant had thrown the Bhujali in a nearby bamboo bush after being caught and therefore, the knowledge regarding the whereabouts of the weapon of offence was specifically known to the Appellant. Therefore, the recovery of the said Bhujali by P.W.11 at the instance of the Appellant corroborates the statements given by P.W.3. Insofar as the testimony of P.W.1 that the weapon of offence was recovered by him from the possession of the Appellant, is concerned, we are of the view that same cannot be relied upon as the weapon of offence was eventually recovered at the instance of the Appellant by P.W.11. This means that the Appellant had exclusive knowledge regarding the whereabouts of the weapon of offence and this fact is duly corroborated by the deposition of P.W.3 who had stated that the Appellant threw the weapon of offence in a nearby bamboo bush. The entire evidence given by P.W.1 cannot be regarded as false or untrue, merely because his testimony regarding the recovery of the weapon of offence was contrary to that of P.W.3 & P.W.11. The presence of P.W.1 & P.W.3 at the spot of occurrence is not in dispute as

the same can be confirmed from the deposition of P.W.7. Thus, the testimony of P.W.1 is not fatal to the case of the prosecution.

20. It is further submitted by Learned Counsel for the Appellant that the prosecution has not examined any independent witness and the witnesses who have been examined are related to each other and the impugned Judgment of conviction and sentence was passed by the Learned Trial Court relying on their statements. In our opinion, the non-examination of any independent witness is not fatal to the case of the prosecution as the Appellant himself is the deceased's brother-in-law and the brother of P.W.13. There is no justification as to why the eyewitnesses who are both related to the deceased and the Appellant would depose falsely against the Appellant. The depositions and testimonies of the eyewitnesses (relatives) do not suffer from any infirmities as there is no inconsistency in the material particulars of the evidence. Close relationship of witnesses with the deceased or victim is no ground to reject their evidence and here too we do not find any such exaggeration or over anxiousness on their part. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. Moreover, P.W.3, P.W.6 & P.W.7 are the co-villagers of the

deceased and the Appellant and are not related to the either party. The evidence furthered by P.W.3, P.W.6 & P.W.7 have been duly corroborated with the evidence of other eyewitnesses and there is no irregularity in the material particulars of the evidence apart from some minor discrepancies. Further, P.W.3 had categorically deposed that the Appellant threw the weapon of offence in a bamboo bush which, in turn, led to the recovery of the weapon of murder by P.W.11 at the instance of the Appellant. Therefore, we find no force in the aforementioned submission of the Appellant.

21. Moreover, in the instant case, the evidence show that the deceased was unarmed and no such evidence is forthcoming on record to prove that the deceased volunteered any provocation. On the other hand, it is proved beyond reasonable doubt that the Appellant dealt blows to the deceased by means of a Bhujali throughout the chase i.e. from tube well up to the cultivable land and the Appellant attempted to flee only when he noticed the villagers approaching the spot of occurrence. Moreover, the recovery of the weapon of murder at the instance of the accused provides further support to the evidence of the above witnesses narrating the incident.

22. The off shoot of the above discussion is that in the present case, the conjoint interpretation of eyewitnesses' account, recovery of the weapon at the instance of the Appellant and the medical evidence affirms the guilty intention and act of the accused towards committing the murder of the deceased.
23. The result is that this Appeal is without merit and the same is liable to be dismissed. We do so, confirming the judgment of conviction and order of sentence dated 01.10.2016 passed by the learned 3rd Additional Sessions Judge, Cuttack in Sessions Trial Case No.441 of 2013/206 of 2013 arising out of Mahanga P.S. Case No.56 of 2013 corresponding to G.R. Case No.212 of 2013 of the file of the learned J.M.F.C., Salipur.
24. The Appeal is, accordingly, dismissed.

(Dr. S.K. Panigrahi)
Judge

D. Dash, J. I agree.

(D. Dash)
Judge

Orissa High Court, Cuttack,
Dated the 23rd Dec., 2022/B. Jhankar