

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA NO.30 OF 2011

From the judgment and order of sentence dated 29.10.2010 passed by the learned Additional Sessions Judge-cum-Special Judge, Nuapada in Special Act Case No.22 of 2009.

Lalit Rout @ Yadav @ Raju Rout @ ***Appellants***
Yadav & Another

-versus-

State of Odisha ***Respondent***

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode:**

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For Appellants - Mr.Khageswar Behera, Advocate.

For Respondent - Ms.Samapika Mishra,
Additional Standing Counsel.

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K.PANIGRAHI

DATE OF HEARING : 28.10.2022 : DATE OF JUDGMENT:01.11.2022

D.Dash,J. The Appellants, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence passed by the learned Additional Sessions Judge-cum-Special Judge, Nuapada in Special Act Case No.22 of 2009.

The Appellants (accused persons) thereunder have been convicted for commission of offence under sections 302/34 of Indian

Penal Code, 1860 (for short, 'the IPC') and accordingly have been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/-, each with the default stipulation to suffer further rigorous imprisonment for a period of one year.

2. The prosecution case is that some time prior to the date of occurrence i.e. 25.05.2009, Budhiram Meher, deceased was staying with one Tulsiram Meher (P.W.8) of village: Koma in the District of Mahasamund of the State of Chhattisgarh. That Tulsiram is Budhiram's brother-in-law by relation. They then used to take shelter on the verandah of one Rohit Kumar Sahoo (P.W.1) of village Jenjera. The deceased and Tulsiram used to collect scrap materials from the local people in exchange of providing them with ripe mangoes. On 25.05.2009, Budhiram and Tulsiram having as usual collected scrap materials from the people of the nearby area, in the evening around, returned to the place of shelter. It was around 9.30 pm; Rohit Kumar Sahoo returned home and then he had a talk with the deceased-Budhiram. Thereafter, he went into his house. It is said that around 10 pm, Budhiram & Tulsiram were sleeping below a verandah; when these accused persons came and assaulted them by means of Lathi (Badi/Thenga). Hullah being raised, Informant, Rohit Kumar Sahoo went to the roof top, wherefrom he could see the accused persons

abusing the deceased and Tulsiram in obscene language and assaulting them by means of Lathi on their head while giving out that they would kill them. As a result of such assault, the deceased fell on the ground and then Tulsiram ran away from the spot out of fear. Rohit Kumar Sahoo then got down from the roof top and went to the spot, when he saw deceased Budhiram in a serious condition with bleeding injuries on his person. He immediately informed the matter to the Police Officer attached his Junk Police Station. On receiving the information, Police arrived at the spot where Rohit Kumar Sahoo lodged a written report as regards the incident. The same being treated as F.I.R., Junk P.S. Case No. 45 of 2009 came to be registered for commission of offence under section-341/323/294/307/34 of the IPC arraigning Lalit Rout @ Yadav @ Raju Rout @ Yadav and Shankar Rout @ Yadav as accused persons as so named in the F.I.R.

3. The Police then in course of investigation sent the injured persons to the hospital for medical examination, seized the incriminating materials including the Lathi lying at the spot. Budhiram died that night in course of his treatment in the hospital. Inquest was also conducted over the dead body and it was sent for postmortem examination; the spot map was also prepared. The accused persons being arrested were taken to custody. Finally charge-sheet being

submitted placing the accused persons to trial in the Court of law for offence under section-341/307/294/307/302/34 of the IPC and section-3(2)(v) of the Schedule Caste & Tribe (Prevention of Atrocities) Act, 1989, the learned Sub-Divisional Magistrate, Nuapada took cognizance of the offence and after observing the formalities committed the case to the Court of Session, the trial thus commenced where the accused persons stood charged for the above noted offences.

4. In course of trial, the prosecution has in total examined eleven (11) witnesses which include importantly that Informant namely, Rahit Kumar Sahoo (P.W.1), Tulsiram Meher (P.W.8), who had been injured in the occurrence. The Doctors and other witnesses including Investigating officer have also deposed during the trial.

The defence having taken the plea of complete denial has not examined any witness in support of the defence.

The prosecution besides leading the oral evidence by examining above noted witnesses has also proved certain documents as such the F.I.R., Ext.1, postmortem report, Ext.4, injury report, Ext.14/2, seizure list, report of the Chemical Examiner etc.

5. The Trial Court basing upon the evidence of the witnesses as well as the Doctors who had conducted autopsy over the body of deceased and on going through the inquest report as found, the death of

Budhiram to homicidal one. In fact there is no such challenge to the aspect of the case.

Then the Trial Court having proceeded to examine the evidence of other witnesses and side by side documents proved from the side of the prosecution has finally concluded that the prosecution has proved the charge under section-302/34 of the IPC against the accused persons, beyond reasonable doubt they thus have been convicted for the said offences and sentenced as aforestated.

6. Learned Counsel for the Appellants submitted that the appreciation of evidence of the witnesses as well as the documentary evidence as placed from the side of the prosecution has not been properly made by the Trial Court. According to him, there is absolutely no critical examination of all those evidence by the Trial Court and thus the finding holding the accused persons to have murdered the deceased by intentionally causing his death is vulnerable. According to him, the evidence of P.Ws. 1 & 8 being appreciated in a just and proper manner, the conclusion should be that the prosecution has failed to prove its case beyond reasonable doubt as against the accused persons in so far as their role in the occurrence is concerned. He submitted that the evidence of the prosecution witnesses even on their face value give rise to serious doubt in mind as to the complicity of these accused

persons and especially the presence of these accused persons at the spot in assaulting the deceased and P.W.8 under the circumstances is highly suspicious and not free from doubt and thus has not been established beyond reasonable doubt.

7. Learned Additional Standing Counsel supporting the finding of the Trial Court holding the accused persons guilty for offence under section-302/34 of the IPC in furtherance of their common intention committing murder of Budhiram Meher @ Yadav contended that the ocular testimony of P.Ws. 1 & 8 can under no circumstance be held to be doubtful. According to him, those two witnesses have clearly stated the definite role played by these accused persons in assaulting the deceased and Tulsiram. Thus according to him, the Trial Court did commit no mistake in convicting them of the offence under section-302/34 of the IPC.

8. Keeping in view the submissions made; We have carefully read the judgment passed by the Trial Court. We have also perused the evidence of the witnesses; P.Ws. 1 to 11 examined from the side of the prosecution and the documents which have been marked exhibits.

9. In addressing the rival submissions, while sitting over to judge the sustainability of the finding of the Trial Court as to the part played by these accused persons in that incident in assaulting the deceased-

Budhiram which has led to his death; this Court is called upon to proceed to have a critical look into the evidence of all the witnesses.

10. At the risk of repetition, it is stated that the finding of the Trial Court as regards the nature of death of Budhiram being passed on the oral evidence as well as the evidence of the Doctors, P.Ws.4 & 11 which is also not under challenge thus stands.

At this stage, it be further stated that here when the accused persons had been charged for commission of offence under section-307 of the IPC in attempting to commit murder of Tulsiram, P.W.8 in furtherance of their common intention; they have not been convicted for such offence or even lesser offence for the said act on their part in assaulting Tulsiram, P.W.8. When this has been the conclusion of the Trial Court, We deem it proper to start our journey for appreciation of evidence from this point itself as it has the bearing on the matter of appreciation of evidence as to the role of these accused persons in assaulting the deceased.

P.W.8 is claiming to have been injured and for the authorship of the said injuries, the accused persons when were charged for commission of offence under section-307 of the IPC, he is seen to have deposed in Court that both the accused persons assaulted him by means

of Danda (Badi), for which he sustained bleeding and swelling injuries on his right hand arm.

It is not the version of P.W.1 that these accused persons have ever assaulted Tulsiram (P.W.8) to his seeing. The evidence of the Doctors who has examined this Tulsiram on the police requisition in the very night is to the effect that there was no visible external injuries on the person of the P.W.8, Tulsiram. The report has been proved by the prosecution through the Doctor, P.W.11 and marked Ext.15/2. No other witnesses have stated in their evidence relating to the assault caused by the accused persons to this P.W.8. Thus, the witness cannot be said to be a witness of truth in implicating the accused persons to have assaulted him. Therefore, the evidence of P.W.8 has been rightly held by the Trial Court as unsafe to be relied upon.

Having said this, it is to be next found out as to how far the evidence of said witness, P.W.8 is acceptable in respect of the role said to have been played by these accused persons in assaulting Budhiram who has later on died in course of his treatment.

11. As already stated that P.W.8 being projected by the prosecution as the injured witness, the allegations that the accused persons assaulted him in the very incident which took place at that very point of time and in the same place has not been substantiated by his

evidence and thus the charge on that count has failed. The State has not filed any Appeal questioning the acquittal of that charge. He has stated that when they were sleeping below the verandah, the accused persons came and all of a sudden they assaulted Budhiram by means of Lathi (Danda/Badi) and then also assaulted him by Lathi (Danda/Badi) for which he raised hullah which has already been stated. Turning the attention to the deposition of P.W.1, it is seen that he hearing hullah went to the roof top and saw what had happened or was happening. So, when the evidence of this P.W.8 that he was assaulted by the accused persons after they assaulted Budhiram has been held as unsafe to be relied upon, in our considered opinion the previous scene as to the beginning of the incident at the behest of these accused persons falling from the lips of the very witness, P.W.8 would not be safe for acceptance. We are aware of the position that the *falsus in uno falsus in omnibus* has no applicability yet here when We find that this witness has been projected to be an injured witness since has been disbelieved in respect of assault on him by the accused persons as stated by him, his evidence as to the role of the accused persons in assaulting the deceased just prior to that, of which the second part is a continuing or running one is too not believable. The two parts being so inextricable mixed up, here under the fact situation and circumstance, those are not

segregable so as to say that the evidence of P.W.8 in respect of the role of the accused persons in assaulting the deceased can still be believed despite his evidence being held as not believable in so far as the assault by the accused persons on that very witness is concerned.

Thus, We are of the view that the Trial Court ought not to have placed reliance upon evidence of P.W.8 in saying that the prosecution has derived the support from that evidence in proving its case of assault upon the deceased causing bleeding injuries on his person leading to his death by these accused persons who are the authors of the injuries upon the deceased which have proved fatal. In the above premises, We too find that the Trial Court has erred in saying that P.W.8 is the most material witness for the prosecution.

12. When the evidence of P.W.8 is eschewed from consideration in saying that the same is unsafe to be relied upon for the entire incident as the witnesses does not appear to be a witness of truth, now the evidence of P.W.1 is required to be examined. He has stated that hearing hullah when he went to the roof of his house, he saw deceased lying on the ground and his further evidence is that both the accused persons were assaulting. He says that at the time, he has seeing accused Raju holding a thenga and accused Shankar saying to that accused-

Raju not to further assault the deceased. It is stated that when he raised hullah, the accused persons left the spot.

The evidence of P.W.8 is however silent that P.W.1 had ever raised any hullah from the roof top and that he had come down. Thus, from the evidence of P.W.1 although strong suspicion arises as to some role played by accused Raju in assaulting the deceased as he was found standing holding a thenga, no such suspicion however arises with regard to the involvement of accused Shankar in that assault whose implication in the case thus has been found to be a step in the direction of false implication which has its adverse impact on the totality of the evidence.

From the evidence of P.W.3, it is seen that he claims to have seen the accused Raju assaulting the deceased by thenga and accused Shankar then standing nearby, saying to that accused Raju not to assault any more. The intrinsic worth of the evidence of this witness as to his presence and seeing the incident does not get any mark at all when one sees him to have said that during that night around 9.30 pm to 10 pm while he was going to the threshing floor to thresh paddy, he had seen the incident. Common experience goes to show that during such late hour of night in the rural areas threshing operation on the threshing floor is ordinarily not carried out and in fact that too is not so

possible without grand lighting arrangement. Furthermore, it can be seen from the evidence of P.W.10, the Investigating Officer that this witness in his statement before the Police had omitted to state said vital part which has been well proved during cross-examination of P.W.10 that in the statement recorded by him under section-161 of the Cr.P.C. this P.W.3 had not stated to have seen accused Raju assaulting the deceased by means of thenga and he had simply stated that he had seen both the accused persons standing at a little distance from the deceased giving open declaration to kill the deceased. Thus the evidence of P.W.3 falls flat. P.W.6 is not a witness to the occurrence as such.

For the discussion and analysis of the evidence as above, We are thus led to hold that the prosecution has not been able to establish its case beyond reasonable doubt as against the accused persons for the murder of Budhiram and the Trial Court holding the evidence of P.Ws. 1, 3, 4 and 8 as safe to be relied upon has erred in concluding that the accused persons are the authors of the injuries received by the deceased. The Trial Court thus is found to have faulted in so holding when as per the settled law; suspicion however strong it may be cannot take the place of proof and result in a conviction as has been done in this case. Thus said finding of the Trial Court cannot be sustained.

13. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence passed by the learned Additional Sessions Judge-cum-Special Judge, Nuapada in Special Act Case No.22 of 2009 are hereby set aside.

The Appellant No.1 (Accused No.1) namely, Lalit Rout @ Yadav @ Raju Rout @ Yadav being on bail, his bail bonds shall stand discharged. The Appellant No.2 (Accused No.2) namely Shankar Yadav @ Rout being in custody, he be set at liberty forthwith if his detention is not so required in any other case.

Dr.S.K.Panigrahi, J.

I Agree.

***(D. Dash),
Judge.***

***(Dr.S.K.Panigrahi),
Judge.***

Narayan