

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.31 of 2011

From the judgment of conviction and order of sentence dated 24.03.2003 passed by the learned Additional Sessions Judge, Angul in Sessions Trial No.77 of 2002 (16 of 2002).

Aru @ Arabinda Bhoi & Another ***Appellants***

-versus-

State of Orissa ***Respondent***

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

For Appellants - Mr.Ramesh Ch. Moharana
(Advocate)

For Respondent - Miss.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, have called in question the judgment of conviction and order of sentence dated 24.03.2003 passed by the learned Additional Sessions Judge, Angul in Sessions Trial No.77 of 2002/16 of 2002 arising out of G.R. Case No.269 of 2001) on the file of the learned S.D.J.M., Athamallick. The Appellants (accused persons) thereunder have been convicted for commission of offence under section 302 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly, they have been sentenced to undergo imprisonment for life.

2. The prosecution case, in short, is that on 22.11.2001 around 7.00 p.m., Dhruba Dip had been to the house of Satyabhama Sahu (P.W.1). It is stated that seeing the deceased proceeding towards the house of Satyabhama, the accused persons, namely, Aru and Abhaya followed him. Sometime thereafter, the deceased was found lying with injuries on the way. He then told before then that while coming on the way, he had been assaulted by the accused persons by means of lathi on account of previous enmity. The deceased was taken to the Athamallick Hospital where in course of treatment, he succumbed to the injuries.

3. The information in writing, being given by one Mithila Dip, who happens to be the wife of the deceased (P.W.3), the Officer-in-Charge of Athamallick Police Station registered P.S. Case No.75 of 2001 for the offence under section 302/34 IPC.

In course of investigation, the Investigating Officer (P.W.10) examined the Informant and other witnesses, seized the incriminating articles, got the post mortem examination over the dead body of the deceased conducted on police requisition after holding inquest over the dead body. The incriminating articles, being sent for chemical examination through the Court, the report has been obtained. Finally, on completion of investigation of the case, the accused persons were placed to face the trial for commission of offence under section 302/34 IPC.

4. The charge sheet having been received, learned S.D.J.M., Athamallick, after observing the legal formalities, committed the case to the Court of Sessions and that is how the Trial against the accused persons commenced by framing the charge for the above offences.

The prosecution, in order to establish the charge against the accused persons, has in total examined 11 witnesses, which include the

Informant (wife of the deceased-P.W.3), two other relations of the deceased, i.e., P.Ws.2 & 3 and three other independent witnesses. The Police Officer, investigating the case, has been examined as P.Ws.10 and 11. Besides the above, from the side of the prosecution, the FIR (Ext.2), inquest report (Ext.1), post mortem report (Ext.12), chemical examiner's report (Ext.10) and other documents such as seizure list, spot map etc. have been proved.

The defence has not examined any of the witness nor proved any document in support of the defence of denial and false implication.

5. The Trial Court, upon examination of the evidence and their analysis, at its level, first of all has found the death of the deceased Dhruba Dip to be homicidal in nature. This has been amply proved by the prosecution through the witnesses as well as the report of the doctor which has been admitted in evidence and marked Ext.12 that the deceased met his death on account of the injuries sustained by him. The defence has also not challenged this aspect.

The Trial Court has accepted the evidence of the prosecution witnesses that those witnesses having asked the deceased, he had disclosed the names of these accused persons as his assailants. With such evidence, taking into account the other evidence available on record that these accused persons had followed the deceased on the relevant date and time, the Trial Court has recorded the conviction against the accused persons holding them guilty of committing the murder of Dhruba Dip by intentionally causing his death and accordingly, the accused persons have been visited with sentence as aforesaid.

6. Learned counsel for the Appellants submitted that here the prosecution is not coming to adduce any direct evidence to connect the

accused persons with the commission of offence and reliance is placed upon the evidence of P.Ws.1, 2, 3, 5 and 9 to prove the fact that the accused person had assaulted the deceased, which had led to his death and they say to have been so told by the deceased while in an injured condition on being asked. He submitted that the evidence of these witnesses are full of discrepancies and they also differ and do not tally on material particulars. He, therefore, submitted that the Trial Court should not have found the evidence those witnesses to be reliable and safe to base the conviction as recorded. It was submitted that the judgment of conviction, in the present case, is not a legal conviction but a moral one simply finding the evidence to be there that the deceased and these accused persons were in inimical terms for quite some time prior to the incident.

7. Learned counsel for the State supported the finding of the Trial Court in holding the accused person guilty under section 302 IPC for having murdered Dhruba Dip. He submitted that the evidence of prosecution witnesses are consistent on the score that the deceased, while in an injured condition, had stated before the witnesses about the authorship of the injuries received by him and that too is very natural when it was so asked by the witnesses. He, therefore, submitted that all of a sudden, when there was no time for the deceased to think over the matter of falsely implicating the accused persons, he having implicated them as his assailants, the Trial Court did commit no mistake in accepting the same to be true so as to base the conviction upon that oral dying declaration.

8. Keeping in view the submissions made, We have carefully read the judgment passed by the Trial Court. We have also perused the evidence both oral and documentary let in by the prosecution.

9. The nature of death of the deceased has been proved to be homicidal and there is no challenge on that score.

10. The question before us is as to how far the prosecution has established its case against the accused persons that it is they, who had assaulted the deceased, which has led to his death. The prosecution, in order to prove that fact, relies upon the oral evidence as to the declaration/statement said to have been made by the deceased when he was lying in an injured condition as admittedly no such dying declaration has been recorded in writing right from the time the deceased sustained the injury till his death. It be stated at this stage that when the prosecution has come forward to examine the witnesses in projecting the case that before them, the deceased had disclosed that it is the accused persons, who had assaulted him by means of lathis, no such explanation is tendered as to why or for what reason no attempt had ever been made during the period when the deceased was lying at the spot in an injured till his death to reduce his declaration/statement to the effect in writing, especially the injured Dhruba Dip being taken to Athamallick Hospital for treatment when it is not stated by the prosecution that by the time of his arrival in the Hospital, he had lost his sense and was not in a condition to speak for which no such declaration/statement of the deceased has been recorded in the Hospital where the Doctor treated the deceased. Nothing being so noted in the bed-head ticket of the Hospital, has been proved or it is shown in any other contemporaneous document coming into being during the treatment of the deceased.

From the above, a doubt arises in mind on the evidence of P.Ws.1, 2, 3, 5 and 9 when they say that the deceased had told before them that the accused persons had assaulted him and that has resulted the injuries on his person. But even though that is no ground to totally discard the evidence of those witnesses, yet for that void created, the evidence of those witnesses would stand for stricter scrutiny and examination to find out as to whether those successfully pass through the legal tests in saying that the result returned by the Trial Court thus would stand or fail.

11. As per the prosecution case, the incident has taken place on 22.11.2001 around 7.00 p.m. The FIR has been lodged at 11.15 pm by none other than the wife of the deceased examined in the trial as P.W.3. The version in the FIR (Ext.2) is that when she was in her house, one Tikei Sethi and Jateneswar Bhukta (P.W.9) brought her husband inside the house and then he was in an injured condition. It has been mentioned in the FIR that from Tikei and P.W.9, she (P.W.3) learnt that her husband was lying on the side of the road in an injured condition. It has been further stated that the husband then was groaning. It has been indicated in the FIR that on being asked, the deceased then told that when he was returning after completing the work in the field of Sridhar Bhokta, on the way, near the house of P.W.1, the accused persons, who were hiding their presence somewhere nearby, suddenly appeared and assaulted him by lathi causing injury on his head and hand resulting his fall and they had also kicked on his belly and by means of lathi had put pressure on that part too. The FIR further finds mention that the deceased told before the Informant that he could identify the assailants in the moonlight.

The evidence of P.W.3 does not, however, find all the detail narratives as have been given in the FIR (Ext.2).

Her evidence is that Dhurba was lying on the road with injury near the house of Satyabhama and was able to talk being in sense and Dhurba on being asked told that the accused persons assaulted him with lathi and then he asked her and others to remove him to the hospital. So, when it has been specifically stated in the FIR that Dhurba was brought inside the house by two persons, namely, Tikei and P.W.9 and there he disclosed all those facts as to the happenings in the incident, as to how he sustained injuries and who are the authors of said injuries, there, however, appears a sharp departure as to the place as it is said that said disclosure/statement was made by the deceased when he was lying on the side of the road in an injured condition. This witness is also not stating that when her husband was taken to the Hospital, he was not in a condition to speak or that on the way, he lost the sense or that he had told before the Doctor about the said fact. So, the evidence of this witness (P.W.3) that the deceased had declared before her about the complicity of the accused persons in causing the injuries upon him is found by us as not safe to be acted upon. It further be stated that when her evidence is that the deceased told before "US", she is not stating as to who is/are the other/others.

Coming to the evidence of P.W.1, he, after telling that there was some enmity between the accused, Aru and Dhurba, has stated that it was around 7.00 p.m., he heard the sound of assault and came out of his house and saw accused Aru running away. He is not stating about the other accused at all either about his presence nor doing anything at that scene in the nearby place. It is further stated that thereafter, Gaya and Tikei came to his house and told that Dhurba was lying with bleeding

injury. The conduct of this witness clearly appears to be unnatural that when he heard about the sound of assault and saw accused Aru running away from the place, he expressed no such anxiety even to know as to actually what had happened and to know that who assaulted whom or why was the sound for. This bears significance as the witness says to be in know of the thing that accused Aru and deceased Dhruba were not in good terms. He has remained silent and choosen even not to move out of his house in waiting till others came and said him about that. From this, it can be inferred that this witness is not a witness of truth. Under the circumstance, being a co-villager, the witness remaining totally so non-responsive, itself creates a doubt in the mind while proceeding to accept the version of the witness. Be that as it may, he next states that hearing from Gaya and Tikei, he went to the spot with water and saw the deceased Dhruba lying with bleeding injury and being asked, he told that accused Aru and Abhay assaulted him with lathi and thereafter it his evidence that Gaya and Tikei took Dhruba to his house. Interestingly, when it is said that the witness went to the spot, which is exactly the spot is not stated by this witness. Next when he says that this disclosure was made by Dhruba in presence of Gaya and Tikei, no person named as Gaya and Tikei has been examined from the side of the prosecution nor it is said that any witness examined have such nick names. The witness, during cross-examination, appears to have made further exaggeration as he says that he saw accused Aru dealing blow on the deceased when he came out of the house and then he saw the other accused running away. The evidence of this witness thus falls far short of the standard to safely pass through the test of reliability and thus, We are unable to put on it, the seal of "Acceptance".

P.W.2, who is the nephew of Dhruba states that Tikei told him that Dhruba was lying on the road with injury and they brought him. He states that the Dhruba, being asked, stated the accused persons to be the assailants as to have assaulted him by lathi on his head and chest. This witness states to have taken Dhruba to the Hospital. He is not stating that in the Hospital, Dhruba was not in sense or even not stating as to how much time before the death, he stopped talking. His evidence is also not clear as to at which place Dhruba made such disclosure and whether then P.W.3 was present. He is also not stating that whether at that time, Tikei and Gaya were present as said by P.W.1. It may be stated that when P.W.3 states that Tikei and Jatna brought her husband, this witness is stating that Tikei and Jogendra brought the deceased and there remains no clarification as to if Jatna and Jogendra are one and the same person. This being the evidence falling from P.W.2, the evidence from the lips of P.W.5 stands that when he went to the house of Dhruba being called by P.W.3, Dhruba told him to have been assaulted by the accused Aru and Abhaya with lathi. This witness is not stating as to what was the time when he went to the house and so asked the deceased. The prosecution case, as projected, is seen to be suffering from some inherent improbabilities as it portrays a picture as if these witnesses came one by one and then went on asking the deceased every time and the deceased went on replying the same to those witnesses at different point of time which itself in that situation and health as well as bodily condition of Dhruba is quite unnatural for being so accepted. Such happenings appear to be inherently improbable when, We consider that a man lying with bleeding injuries on all over his body and groaning from the beginning, would be going on replying to the questions posed

by several persons that too several times in stating the authorship of the injuries received by him.

With such state of affair in the evidence, We are not in a position to say that the witnesses examined from the side of the prosecution to prove the complicity of these accused persons are reliable and their evidence that the deceased had stated before them that he had been assaulted by these accused persons is thus not believable. Having said as above, We hold that the judgment of conviction and order of sentence, impugned in this Appeal, are liable to be set aside.

12. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 24.03.2003 passed by the learned Additional Sessions Judge, Angul in Sessions Trial No.77 of 2002/16 of 2002 are hereby set aside.

The Appellants (accused persons) being on bail by order dated 19.04.2012 passed by this Court in Misc. Case No.95 of 2011, their bail bonds shall stand discharged.

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

Dr.S.K Panigrahi, J I agree.

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