

IN THE HIGH COURT OF ORISSA AT CUTTACK.

CRIMINAL APPEAL No.479 of 2022

In the matter of an application under Section 374(2) of the Criminal Procedure Code, 1973.

Padma Charan Sahu **Appellant**

-Versus-

State of Odisha **Respondent**

For Appellant : Mr. N.N. Mohapatra, Advocate

For Respondent : Mr. S.S. Kanungo,
Additional Government Advocate

CORAM :

HONOURABLE MR. JUSTICE S. TALAPATRA

HONOURABLE MR. JUSTICE M.S. SAHOO

JUDGMENT

Date of Hearing: 11.08.2022

Date of Judgment: 26.09.2022

S. Talapatra, J. This is an appeal by the convict (hereinafter referred to as the 'Appellant') from the judgment and order of conviction and sentence dated 27.07.2016 delivered in Sessions Trial No.70 of 2013 by the Additional Sessions Judge, Chatrapur (Ganjam). By the said judgment, the Appellant has been convicted under Section 302 of the I.P.C. for

committing murder of one Musa Das on 12.06.1999 at about 1 P.M. at village Gandala. Consequent upon the said conviction, the Appellant has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.30,000/- with default imprisonment of 6 (six) months. However, it has been noted clearly that the period of detention as undergone by the Appellant, shall stand set off from the substantive term of imprisonment.

2. Briefly stated the prosecution case is that on 12.06.1999 at about 1 P.M. at village Gandala, the Appellant had brutally assaulted Musa Das (the deceased) with deadly weapon. In the said assault, the deceased received several bleeding injuries. One Manoranjan Das (P.W.1), brother of the deceased informed the police orally of the occurrence. It has been disclosed in the oral report, as filed by Manoranjan Das that, on the day of occurrence at about 1 P.M., his niece, namely, Jalausha Das, the daughter of the deceased informed him that *while she and her father were returning from village Sadasivpur after performing puja at Gramadevati, the Appellant forcibly dragged her father to the street from Panigrahi mango grove*. Having been reported of the said occurrence by the daughter of the deceased, she and informant rushed to the spot and saw the deceased lying dead having bleeding injuries in front of the house of one Sadananda Sahu.

Sadananda Sahu has not been examined in the trial. The informant's another brother, Lingaraj Das, came to the spot and he has stated the police that the Appellant hacked the deceased on several part of his body by a '*Tangia*' for which, the deceased fell down on the ground. Even, thereafter, the Appellant dealt several blows on the face of the deceased by the said weapon and left the place. The deceased succumbed to his injuries at the spot. Initially, the village Choukidar was reported of the occurrence. The village Chowkidar escorted the informant to the police station. On the basis of his oral report, the information was reduced in writing and a specific case was registered being Hinjili P.S. Case No.36 of 1999 under Section 302 of the I.P.C. (corresponding to G.R. Case No.143/1999). The investigation was taken up and the final report under Section 173(2) of the Cr.P.C. was filed before the J.M.F.C., Hinjilicut and the case was committed for trial to the Court of the Sessions Judge, Chatrapur. Following the due process of cognizance, the charge was framed against the Appellant under Section 302 of the I.P.C. to which the Appellant pleaded not guilty and claimed to be tried.

3. In order to substantiate the charges framed under Section 302 of the I.P.C., the prosecution has adduced, as many as 7 (seven) witnesses, including the informant (P.W.1) and his brother (P.W.2) and

also the daughter of the deceased (P.W.3). Apart that, 9 (nine) documentary evidence (Ext.1 to Ext.9) have been introduced by the prosecution. Four material objects (M.O.1 to M.O. IV) are also brought in the evidence. It may be noted that, at this juncture, no evidence was led by the defence after the prosecution evidence was recorded. The Appellant was examined under Section 313(1)(d) of the Cr.P.C. when he reiterated his plea of innocence and claimed that the evidence as laid by the prosecution are all concocted. Having appreciated the said evidence, the trial judge has returned the finding as follows:

“In this case as discussed earlier the P.W.3 is the sole eye witness to the occurrence. Her evidence is found cogent, convincing and credible which is supported by the medical evidence. No doubt she is the daughter of the deceased. In the facts and circumstances of the case, she cannot be termed as an interested witness, rather she is a natural witness to the occurrence which is found wholly reliable. Her evidence, which was found cogent, convincing and credible, can be relied safely to hold the accused guilty in this case without any corroboration from independent source keeping in view of the ration of the Hon’ble Apex Court as stated earlier. In this case the prosecution has also succeeded in bringing some evidence into record as discussed earlier which corroborates the entire

testimony of P.W.3. Her testimony establishes conclusively that on the day of occurrence the accused has dealt murderous assault to the deceased with a deadly weapon axe near his house resulting of his instantaneous death at the spot.”

It has been brought to the notice of the trial judge that, immediately after the occurrence, the Appellant was found absconding. Mere absconding may not be a sufficient ground to hold some one guilty but, if there are other materials showing his involvement in commission of the offence, abscondence immediately after the occurrence can be taken as an incriminating evidence in support of the prosecution case and against the claim of innocence of the accused. In this regard, the trial judge has relied on a decision of the Apex Court in ***Rabindra Kr. Pal @ Dara Singh vs. Republic of India*** reported in (2011) 2 SCC 490. Another report on the same principle has been relied on. In ***Shyamal Ghose v. State of West Bengal*** reported in (2012) 53 OCR (SC) 59 it has been observed by the Apex Court that the absconding by itself may not be a positive circumstance consisting only with the hypothesis of the guilt of the accused, in as much as, an innocent person may even run away for fear of the falsely implicated in a criminal case. But in certain contexts, absconding of the accused not only goes consistent with the

hypothesis of the guilt, but posits a definite pointer towards his guilt. Thus, the trial judge returned the finding of conviction, which is under challenge in this appeal.

4. Mr. N.N. Mohapatra, learned counsel appearing for the Appellant has quite empathetically submitted that P.W.3 who has been considered as the solitary eye witness cannot be trusted by this Court, in as much as, the testimonies of P.Ws.1 and 2 have substantially damaged the element of truthfulness of the testimony of P.W.3. Mr. Mohapatra, learned counsel has argued that in the prosecution case, P.W.3 has been projected, as the solitary eye witness. P.W.3 has stated that she ran away from the place of occurrence when the Appellant started dragging her father toward his village over an issue of outstanding amount realizable from the Appellant relating to liquor business and without wasting a moment, she rushed to the home and informed P.Ws.1 and 2 and after her return to the spot again, she saw the Appellant cutting the neck of his father by an 'axe'. Her both uncles (P.Ws.1 and 2) came there, but the accused fled away from the spot before they had reached. Mr. Mohapatra, learned counsel has laid serious emphasis on the statement of P.W.3 where she had stated that the Appellant started dragging her father at 1 P.M. The occurrence took place at Majhi Sahi in village

Gandala. Mr. Mohapatra, learned counsel then referred to the testimonies of P.Ws.1 and 2 (her uncles). P.W.1 has stated that, having the information from P.W.3, the daughter of the deceased, they rushed to the spot and found the deceased laying dead with bleeding injury on his forehead and face. The accused had already fled away from the spot. In the cross-examination carried out by the defence, as pointed out by Mr. Mohapatra, learned counsel, P.W. 1 has testified that, at that time at about 2 P.M, he was taking lunch in his house during that time *“the daughter of the deceased disclosed the occurrence to me and P.W.2 at a time. She disclosed this fact at 12 noon and according to him, he reached the place of occurrence at about 1 P.M.”* There had been no cross-examination or re-examination by the prosecution with the leave of the Court.

5. P.W.2 has testified in the trial that having the information from P.W.3, he rushed to the place of occurrence and found the deceased lying dead with cut and bleeding injuries on his person. The accused had already fled away from the spot. In the corss-examination, he has testified as follows:

“4. The daughter of the deceased came and narrated the incident to me at about 12 noon. Myself,

P.W.1 and some villagers had gone to the spot. We shall have to go to Badasahi from our house to reach the spot. The occurrence took place at Brahmanasahi inside Majhi Sahi. There are neighbouring houses at the spot. Many villagers were present there by the time we arrived.”

Mr. Mohapatra, learned counsel has succinctly submitted that, no other villagers and the residents of the place in proximity to the place of occurrence were examined by the prosecution as witnesses. P.W.2 has denied the suggestion that, he did not have any knowledge about the occurrence. Mr. Mohapatra, learned counsel appearing for the Appellant has underlined that, P.Ws.1 and 2 have corroborated statement of P.W.3 to the extent that she informed P.Ws.1 and 2. P.Ws.1 and 2 without wavering, have testified in the trial that they rushed immediately after having received the information from P.W.3. P.W.3 has claimed to have seen the occurrence. But both P.Ws.1 and 2 have clearly stated that when they arrived at the spot they did not see the Appellant there. But they saw some villagers at the place of occurrence.

6. Mr. Mohapatra, learned counsel has demonstrated from the record of the evidence that the weapon of offence has been described as ‘Tangia’ somewhere, an ‘axe’ and somewhere as ‘Kati’. The evidence of

the forensic expert, namely, Dr. Padma Charan Sahu (P.W.7) in this regards has some relevance as he has given the details of external injuries that he found on the person of the deceased. Thereafter, during the cross-examination, as carried out by the defence, P.W.7 has testified that injuries found over the body of the deceased may be possible by a single weapon having sharp edge and also pointed end like the weapon 'Kati'. He found Injuries No.i, ii to v, vi, vii, ix, x and xi were caused by sharp cutting moderately heavy weapon and external injuries No.iii, iv and viii were caused by the pointed weapon.

7. According to Mr. Mohapatra, learned counsel, it is apparent from his opinion, which has not been challenged by the prosecution that there was uses of two types of weapons. However, later on, the forensic expert P.W.7 has opined that, all injuries are possible by 'Kati', but none of the witnesses, including P.W.3 have indicated to such weapon. Moreover, weapon of offence was not recovered during the investigation. According to Mr. Mohapatra, learned counsel P.W.3 is a tutored witness or she might have been planted. It is absolutely clear that, she had not seen any part of the occurrence and she had come to the place of occurrence afterwards, but somehow she gathered the information about the occurrence and informed P.Ws.1 and 2. The

incongruity between the testimonies of P.Ws.1 and 2 and P.W.3 cannot be lightly brushed aside, as those are mutually destructive. According to Mr. Mohapatra, learned counsel, if the statements of P.Ws are considered it will be apparent that, the place of occurrence was having many houses its vicinity, but no independent witness has come forward from that Sahi, row of houses to testify, to support the case of the prosecution. Mr. Mohapatra, learned counsel has also submitted that, if the prosecution case is properly studied, it would be apparent that the alleged culpable act was not premeditated and had occurred after sudden quarrel and sudden fight and without any intention of killing. Mr. Mohapatra, learned counsel, has referred to the statement of Witness No.2 (who is P.W.3 in the trial), which was recorded by the S.D.J.M., Chatrapur invoking the provision of Section 299 of the Cr.P.C. The said witness has stated that her mother, uncles and she reached at the spot of occurrence together. It is contended that how that was possible that P.Ws.3 and 5 in the trial had reached the spot of occurrence together and had seen the occurrence, when P.Ws.1 and 2 have clearly testified that they have not seen the occurrence. Mr. Mohapatra, learned counsel, has again shown from the testimony of P.W.3, as recorded by the S.D.J.M., Chatrapur that she stated that, the Appellant used 'Khandasa' i.e. sword

for cutting the neck of the deceased. But the same witness (P.W.3) had deposed in the trial that weapon used by the accused was an 'axe' for cutting the neck of the deceased (see line 29 in Paragraph-3). Mr. Mohapatra, learned counsel has pointed out that, the S.D.J.M., Chatrapur recorded the statement of P.W.5, the wife of the deceased, who had stated that the deceased's neck was chopped by a 'Tangia'. It is contended that there are incongruities in the testimonies of the so called eyewitness and also her testimony stands in contradiction with the forensic expert's testimony so far as the weapon of offence is concerned. Moreover, the improvisation by P.W.3 is apparent, as P.W.2 in the pre-trial recording of the evidence under Section 299 of the Cr.P.C. testified that, she came along with her mother to the spot. But in the trial, her mother P.W.5 has stated that at the relevant point of time, she was at Berhampur and after getting the information of the said occurrence, she came to the spot. The same P.W.5 while testifying in the pre-trial recording of evidence under Section 299 of the Cr.P.C. had stated as follows:

"Since 7/8 (eight) years back at about 12 noon, while I was in my house after my work, my daughter reported me that Padma Charan Sahu pulled him and at this myself, my diara and my Dedhasura along with my

daughter went to the Sahi of Padma Charan Sahu and found the accused cutting my husband's neck by 'Tangia' and we also found my husband dead. On seeing us, the accused entered inside his house and concealed him. My diara reported the matter at P.S. and police searched him."

Mr. Mohapatra, learned counsel has stated that there is no reason to believe any of the prosecution witnesses. Even though, the law permits to rely on them in appropriate cases. But here, exaggeration improvisation and weaving and alteration of new stories in every phase had been introduced. Hence, no reliance can be placed on testimonies of P.Ws.1, 2, 3 and 5. Mr. Mohapatra, learned counsel, therefore, urged this Court that Appellant is entitled to the benefit of doubt. Mr. Mohapatra, learned counsel has relied on a decision of the Apex Court in **Mohar Singh and others v. State of Punjab** reported in **AIR 1981 SC 1578**, where the Apex Court had observed *inter alia* as under:

"5. We have, however, been taken through Ext. P-19, the statement of the deceased Kartar Singh and we find that he has given a very detailed and graphic narration of the entire history of the case, starting from the motive, the enmity and minutest features of the assault excluding the individual acts committed by the appellants. He has also mentioned that the appellants

assaulted him with Kassi. The ocular evidence however is that the deceased was attacked not by Kassi but by spade. In view of the detailed and extremely coherent nature of the dying declaration, we find it impossible to believe that the deceased even if conscious would have made such a detailed statement. We are, therefore, inclined to think that this statement smacks of concoction of fabrication in order to make the present case foolproof. At any rate, we find it wholly unsafe to rely on the dying declaration, particularly, when P.W. 12 did not take the necessary precaution of getting the dying declaration attested by the wife who was stated to be present there or the doctor who was alleged to be present in the hospital. Thus, the dying declaration has to be excluded from consideration. That being the position the only evidence which we are left with consists of the statements of P.Ws. 3 and 4. The evidence of these witnesses also cannot be relied upon. They are in direct conflict with the medical evidence. While both the witnesses categorically state that the appellants assaulted the deceased with spades with which the earth was being dug out either from the sharp or the blunt side, the doctor (P.W. 1) who held the autopsy of the deceased has clearly stated that the injuries could be caused only by a Kassi. No question was put by the prosecution to the doctor whether any or

all of the injuries on the deceased could be caused in the manner alleged by the witnesses i.e. by a spade.

6. In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence. For the reasons, therefore, we are clearly of the opinion that the prosecution case has not been proved beyond reasonable doubt.”

8. In order to repel the contention of Mr. Mohapatra, learned counsel appearing for the Appellant, Mr. S.S. Kanungo, learned Additional Government Advocate appearing for the State has submitted that considering the long time that has been taken for commencement of trial from the date of occurrence, some inconsistencies in the statements of the witnesses are bound to occur. According to Mr. Kanungo, learned Additional Government Advocate, those inconsistencies are not fatal, as the core of the evidence is sufficient and substantive enough to prove the charge. He has also stated that the delay in the commencement is attributable to abscondence of the Appellant. He was arrested in the year 2012 and put to trial whereas the occurrence had taken place in the year 1999. As such, no adverse inference in this regard may be drawn against the prosecution. According to Mr. Kanungo, learned Additional Government Advocate, there is no incongruity in respect of the facts, as

proved by P.W.3 that she was travelling back to their village with her father, who was physically challenged and in the road, they were intervened by the Appellant and there took place a hot altercation over the issue of the outstanding payment in respect of the liquor business. The said outstanding was recoverable from the Appellant and suddenly, the Appellant started dragging her father towards the *sahi* where the house of the Appellant situates. Out of fear and in order to protect her father, she rushed to the house, informed her two uncles and when she returned, she claimed that she had seen the Appellant chopping her father with an 'axe'. Mr. Kanungo, learned Additional Government Advocate has submitted that, even if only the part of transaction as seen by P.W.3 before she had left the place of occurrence is believed, the burden shifts to the Appellant to explain what happened thereafter. It is a well established principle in the Criminal Jurisprudence that the duty of the Court is to separate the grain from the chaff. The entire evidence of P.W.3 cannot be questioned, doubted and branded as unreliable. Her evidence cannot be doubted. That apart, Mr. Kanungo, learned Additional Government Advocate has submitted that, P.Ws. 1 and 2 have in unison stated that they were informed by P.W.3 that the Appellant had attacked the deceased and dragged him towards his

village. Therefore, this part of the evidence cannot be disbelieved. If this part of the evidence is believed, as the same is untainted and reliable. The finding as under challenge in this appeal may not warrant interference, even after cumulative reading of the evidence recorded in the trial. As submitted, if this part is believed, the burden shifts to prove as to what happened thereafter, lies with the Appellant to exculpate him from the charge, but he has not discharged the said burden in tune with the provision of Section 106 of the Evidence Act. Mr. Kanungo, learned Additional Government Advocate has further submitted that, the Appellant's abscondence in the present case is to be treated as the incriminating evidence against the Appellant, as immediately after the occurrence, he fled away from the village. He was arrested after more than 12 years from the date of occurrence till arrested by the police and commencement of the case. Therefore, his involvement cannot be doubted and therefore, the judgment of conviction may not be interfered with.

9. For purpose of appreciating the rival contentions as advanced by the counsel for the parties, it would be apposite for us to have a meaningful survey of the evidence, as laid by the prosecution in the trial. True it is that, the trial Court has believed P.W.3 entirely. There

is no challenge in the appeal as regards the cause of death or the death being homicidal in nature. The dead body of the deceased was found lying in the close proximity of the house of the Appellant. What P.Ws.1 and 2 have testified in the trial has been narrated in detail above, while recording the submission of Mr. Mohapatra, learned counsel for the Appellant. Even the statement of P.W.3 has been referred quite in detail. Be that as it may, we would like to re-visit the testimony of P.W.3, namely, Jalausha Das. P.W.3 has stated in the trial that the deceased had liquor business and there was an outstanding amount against the Appellant. The deceased had asked the Appellant to pay the dues when the Appellant was accompanying them in their journey for a short while. But near the pond of their village (P.W.3's village), the Appellant dragged his father towards his village, thereafter, she has testified as follows:

I immediately came house and intimated the matter to my paternal uncle Manoranjan Das and my elder father Linga @ Lingaraj Das. I thereafter rushed to the spot and found the accused cutting the neck of the deceased by means of an axe. Immediately thereafter my uncles and elder father arrived there. Then the accused fled away from the spot. The occurrence took place on

the village road in front of the house of accused at Majhi Sahi in village Gandala.

In the cross-examination, she had testified that she was returning from the village Sadasivpur during the time from 12 noon to 1 P.M. At that time no person was seen near the village tank and the Appellant dragged the deceased towards his house. She had stated that our house is at a small distance from the village tank. But she had expressed her inability to indicate the exact distance between the place of occurrence and their house. She had further testified in the cross-examination as under:

“7. I intimated the occurrence to my elder father and uncle at a time and thereafter rushed to the spot. I found the accused forcibly cutting the neck of my father by means of an axe. The accused was assaulting the deceased when my uncle and elder father arrived there. By the time, I reached the spot, no other villager was present there.”

She denied her knowledge of whether the police had seized any records relating to the liquor business.

10. Let us now see what the other witnesses have stated about in the trial. P.W.5, Rama Dash (wife of the deceased) has testified that at

about 2 P.M. one Hina Das intimated her that the Appellant committed murder of the deceased by cutting his neck. Immediately, she returned from a faraway place and came to learn about the said occurrence. She is a post-occurrence witness. P.W.6, Sitaram Satpathy was the officer-in-charge Hinjili Police Station at the relevant point of time and he received the complaint from Manoranjan Das (P.W.1) reporting murder of his brother. He registered the case being Hinjili P.S. No.36 of 1999 under Section 302 of the IPC read with Section 3(ii) (v) of S.C. and S.T. (P.A.) Act and he took up the investigation. He identified the complaint and the F.I.R. (Ext.1). He has given a brief narration of how he had conducted the investigation. He had done the inquest and prepared the inquest report (Ext.3). Thereafter, he made arrangement for the postmortem examination of the dead-body. He had seized the wearing apparels of the deceased by preparing the seizure list (Ext.7), in presence of witnesses. He had searched for the accused, but did not find him. As he was transferred from that police station, the investigation from that point was taken over by Mr. Bijaya Kumar Mohapatra, S.I. of police. In the cross-examination, he has stated that, the place of occurrence is situated on a concrete road in the village. Houses of Sadananda Sahu, Simanchal Sahu, Bijaya Das, Simadri Sahu, Ganapati Mahakud and the Appellant

are situated nearby the spot. He had examined some of them, namely, Simadri Sahu, Sadananda Sahu, Simanchal Sahu and Chintamani Sahu. He also seized the blood stained earth and sample earth from the spot on 12.06.1999. He asserted that the distance of the house of the Musa Das (deceased) was about 500 yards away from the place of occurrence. He denied that his investigation was perfunctory. He had also introduced the chemical examination report of the sample collected from the place of occurrence, as Ext.8. P.W.7, Dr. Padma Charan Sahu carried out the autopsy of the dead body of the deceased and he found the following external injuries and internal injuries:

i) *One chopped wound of 17 cm X 5 cm X trachea deep present on the right side of neck 1 cm below the right side neck placed obliquely parallel and lower to the lower boarder of right side mandible starting 1cm below and going forward end 4 cm left to middle line in front of the neck. The margins are clean cut and the angles are acute. The right side of the trachea, pharynx and the right side neck muscles, right carotid vessels and internal jugular vessels were sharply cut. The right angle of mandible was fractured at multiple places.*

ii) *Incised wound 6cm X 1cm X bone deep present at the lower boarder of the centre of symphysis mentis 1cm above the injury no.i.*

iii) *Depressed fracture with ante mortem blood at right maxilla with a puncture wound of size 1cm X 0.5cm X bone deep with surrounding contusion of size 10cm X 5cm present on the right side of fact. Margins punctured wound were irregular and not sharp. This wound was present below the right eye between nose and mandible. Right maxillary bone was fractured into multiple pieces with different size. Right upper canine maxillary tooth also fractured and lost.*

iv) *Two stroke punctured wound of size 6cm X 5cm X bone deep present on anterior aspect of right shoulder joint. The right humerus was fractured into multiple pieces at its head with ante mortem blood. The punctured wound was irregular and not sharp margin.*

v) *Incised would of 2.5cm X 1cm X muscle deep with a tale of scratch of 4cm long present medially and placed on a right infra clavicular space of 1.5cm below the injury no.iv.*

vi) *Cut scratch of size 8 cm long present parallel to and 2cm below to the injury no.v starting from right armpit and going on the right side of the front of chest.*

vii) *Incised wound 1cm X 0.5cm horizontally present on dorsum of left hand starting from ulnar boarder of the hand near left wrist joint going up to middle of middle finger which may be a defence wound.*

viii) *Punctured stab wound 0.5cm X 0.5cm X bone deep with a scratch of 7cm long present on the left arm 7cm below the left shoulder. The scratch extended medially to a punctured wound with margins sharp and circular in shape.*

ix) *Contusion with a cut scratch of an are of 10cm X 2cm present horizontally on the left flank being placed 10cm above the left iliac crest.*

x) *Incised wound 5cm X 0.5cm X skin deep present on the left back horizontally 20cm below the left wing of scapula.*

xi) *Incised wound of 18cm X 0.5cm X skin deep present horizontally on the back of left shoulder.*

xii) *Post mortem paling of skin on the right leg, left front of chest and back of chest present.*

On dissection he found the following internal injuries:

i) *Hyoid bone beneath external injury no.i was intact.*

- ii) *Horizontal fracture of sternum at its junction with 2nd to 3rd ribs and fracture of the 2nd and 3rd ribs in mid clavicular line with ante mortem blood clot on them and intercoastal muscles.”*

We may also reproduce his opinion, which has been recorded as under:

OPINION

- i) *All the injuries except external injury no.xii were ante mortem in nature.*
- ii) *External injury nos.i, ii, v, vi, vii, ix, x and xi were caused by sharp cutting moderate to heavy cutting weapon.*
- iii) *External injury no.iii, iv, vii, were caused by pointed weapon.*
- iv) *External injury no.i alone and in combination with all other injuries are fatal and sufficient to cause death in ordinary course of nature.*
- v) *The cause of death was haemorrhage and shock as a result of above injuries.*

- vi) *The time since death was about 18 to 24 hours prior to the time of postmortem examination.*

P.W. 7 has observed that, the injuries found by him over the dead body of the deceased may be possible by single weapon, having a sharp edge and also a pointing edge, like a “Kati”. We are persuaded to accept the contention as raised by Mr. Mohapatra, learned counsel that P.W.3 may not have seen the entire transaction or even part of it. Even though, she had stated that she saw the Appellant chopping his father by an ‘axe’. Therefore, the discrepancies in respect of the weapon becomes irrelevant as the homicidal death is not challenged by the Appellant at all.

11. We are now to proceed to weigh whether P.W.3 can be believed to infer that of a sudden fight the deceased was attacked by the Appellant by sharp edged and pointed weapon. We have no hesitation to believe the first part of the transaction as witnessed by P.W.3., as the evidence in sequence is available. Therefore, we are inclined to accept the submission of Mr. Kanungo, learned Additional Government Advocate that the Appellant was under obligation to narrate that what happened after the first part of the transaction. Since no explanation has come forth, we are bound to draw an adverse inference against the

Appellant. We are constrained to observe that the innovative submission made by Mr. Mohapatra, learned counsel for the Appellant that this Court should take a judicial notice of the statement of P.Ws.1, 2 and 3 as recorded in the pre trial stage under Section 299 of the Cr.P.C. cannot be accepted for the simple reason that, no contradiction was brought out by the defence during the trial based on those statements, as were recorded during the time of abscondence.

12. Having observed thus, we are of the view that from the evidence, as laid by the prosecution, the charge of murder under Section 302 could not be proved beyond reasonable doubt in as much as the Appellant had committed assault out of sudden quarrel, as stated by P.W.3, causing death. He is entitled to be acquitted from the charge under Section 302 of the I.P.C. Consequently, the conviction and sentence under Section 302 of the I.P.C. are set aside. But in our considered opinion from the evidential materials, the charge under Section 304 Part II of the I.P.C. causing homicide not amounting to murder without having any intention of murder has been proved beyond reasonable doubt. The series of injuries as recorded in the post-mortem report are rampant. Those are indicators of outrage. No formal charge is required to be framed, as the charge under Section 304 Part II of the IPC

is cognate and minor in nature in relation to the charge under Section 302 of the IPC. No further opportunity, the Appellant is entitled to. Hence, we convict the Appellant under Section 304 Part II of the IPC for committing homicide not being murder as there is no evidence of having intention to kill. As consequence of the conviction under Section 304 Part II of the I.P.C., we sentence the Appellant with rigorous imprisonment to the extent that, he has already served out. The default imprisonment is adjusted against a contemplated sentence of fine against the imprisonment, the Appellant has served out. As such, the Appellant be released and set at liberty forthwith, if not warranted in any other case.

13. In the result, the appeal is partly allowed.

14. Send down the LCRs forthwith.

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(S. Talapatra, J.)

M.S. Sahoo, J. I agree.

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(M.S. Sahoo, J.)