

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.923 of 2019

From the judgment of conviction and order of sentence dated 21st September, 2017 passed by the learned Sessions Judge, Kalahandi, Bhawanipatna in C.T. No.41 of 2014 (Sessions).

Saiba Majhi

....

Appellant

-versus-

State of Orissa

....

Respondent

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

For Appellant

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Sk. Zafarulla
(Advocate)

For Respondent

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Mr.S.S. Kanungo
Addl. Government Advocate

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K. PANIGRAHI

Date of Hearing : 19.12.2022 : Date of Judgment:23.12.2022

D.Dash,J. The Appellant, in this Appeal, assails the judgment of conviction and order of sentence dated 21st September, 2017 passed by the learned Sessions Judge, Kalahandi, Bhawanipatna in C.T. No.41 of 2014 (Sessions) arising out of C.T. Case No.52 of 2014 corresponding to Biswanathpur P.S. Case No.2 of 2014 in the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Bhawanipatna.

The Appellant (accused) thereunder has been convicted for committing the offence under section 302 of the Indian Penal Code,

1860 (for short, 'the IPC') and accordingly he has been sentenced to undergo imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand) in default to undergo rigorous imprisonment for six months.

2. Prosecution Case:-

On 16.01.2014 at about 10.15 a.m, Tekera Majhi (Informant-P.W.1) submitted a written report before the Inspector-in-Charge of Biswanathpur Police Station stating therein that on 15.01.2014 around 6.00 p.m. when he was taking dinner in his house, he heard the cry outside, near the house of the accused, who is his neighbour. When he came out of the house, his younger brother Mangala Majhi being asked about the reason of such cry, told that his elder brother Dhobla Majhi (deceased) was killed by this accused Saiba Majhi in front of the place of worship of the village deity, which is common know in the villager as "DHARANI". He immediately rushed to the spot by focusing the torchlight, found his elder brother Dhobla lying dead. He then went to the local Grama Rakhi to inform about the said fact and requested him to watch the dead body. On the next morning, he came to report the matter at the Police Station.

On receiving the written report from the Informant (P.W.1), the IIC of Biswanathpur Police Station (P.W.15) immediately registered P.S. Case No.2 of 2014 and took up investigation.

3. In course of investigation, the Informant (P.W.1) being examined first, then the statements of other witnesses were recorded upon their examination by the Investigating Officer (P.W.15). He then visited the spot and prepared the spot map. One tangia stained with blood lying near the spot was also seized in presence of witnesses. He also seized

the sample earth and blood stained earth and thereafter, the wearing apparels of the deceased and accused have been seized. After holding the inquest over the dead body of the deceased, the dead body was sent for post mortem examination. The accused, being apprehended was forwarded in custody to Court. The incriminating articles were sent for chemical examination through Court. On completion of the investigation, the Investigating Officer (P.W.13), who had taken charge of the investigation from the first Investigating Officer (P.W.15) submitted the final form placing the accused for the trial for commission of offence under section 302 IPC.

Learned S.D.J.M., Bhawanipatna, on receipt of the above report, having taken cognizance of the offence, after observing all the formalities, committed the case to the Court of Sessions for Trial. That is how the trial commenced against this accused by framing the charge for the above offence.

4. In the Trial, the prosecution has examined in total fifteen (15) witnesses. Out of whom, as already stated, P.W.1 is the Informant and he happens to be the younger brother of the deceased. Two persons of neighbouring village have been examined as P.Ws.2 & 3 since they had accompanied P.W.1 to the Police Station for lodging the FIR and P.Ws.4 & 5, namely, Lingaraj Majhi & Laxman Majhi respectively have been examined from the side of the prosecution as the eye witnesses to the occurrence. The witness to the seizure of incriminating articles is P.W.6 and the wife of the deceased, who is a post occurrence witness is P.W.7. Another post occurrence witness is P.W.8. The Home Guard, who has informed about the incident and had also witnessed the seizure

of the wearing apparels of the deceased and accused and other materials has come to the witness box as P.W.9. The scribe of the FIR has been examined as P.W.10 whereas P.W.11 is the Doctor, who had conducted the post mortem examination over the dead body of the deceased. The Police Constable, who had accompanied the Investigating Officer and was present during the inquest held over the dead body of the deceased is P.W.11. P.W.15 is the first Investigating Officer, who had conducted the major portion of the investigation and the second Investigating Officer, who took charge from P.W.11 is P.W.15 and submitted the Final Form is P.W.13.

Besides the oral evidence, being piloted through the above witnesses; the prosecution has also proved certain documents, which have been admitted in evidence and marked Exts.1 to 14. Important, out of those are the FIR marked Ext.1, the inquest report (Ext.2/1) and Ext.8 is the post mortem report whereas Ext.12 is the chemical examination report.

5. The plea of the defence is that of complete denial and false implication. From the side of the defence, the accused examined himself as D.W.1.

6. The Trial Court, upon examination of the evidence of P.W.11, the Doctor, who had conducted the autopsy over the dead body of the deceased and submitted his report (Ext.8) as also the other witnesses including P.W.15 and P.W.11 and the inquest report, has come to a conclusion that the death of the deceased was homicidal in nature. In fact, there is no dispute on that score from the side of the defence. On going through the evidence of the Doctor (P.W.11), who had held the

post mortem examination over the dead body of the deceased and his report (Ext.8) containing the opinion that the injuries were anti mortem in nature being on the vital part of the body, i.e., head and possible to have been caused by axe, We find that the deceased met the death because of the injuries sustained over the left fronto parietal region of scalp, 3 cm above left ear of size of 8 cm X 3 cm X 4 cm with corresponding internal injuries.

Having said, as above, the Trial Court, upon examination of evidence and their analysis, has found the evidence of P.W.5 to be free from any suspicion and wholly reliable in respect of the act committed by the accused in inflicting the fatal blow by an axe on the head of the deceased resulting his instantaneous death and further noticing the other evidence tending to corroborate the same, the accused has been held guilty for intentionally causing the death of the Dhobla.

7. Sk.Jafarullah, learned counsel for the Appellant submitted that the prosecution case is founded upon the evidence of P.Ws.4 & 5, who have been projected as the eye witnesses to the occurrence. He submitted that although these two witnesses (P.Ws.4 & 5) have stated to have seen the incident when the accused came and dealt the blow on the head of the deceased by means of an axe which he was carrying, it would not be safe to rely upon their evidence when the evidence of the Informant (P.W.1) is seen, who has not only had not so stated in the FIR that these two witnesses had seen the incident but also is silent during the trial on that score. He further submitted that the conduct of these two witnesses, being wholly unnatural in the sense that when they say to have seen the incident happening in their presence and regarding the

role of this accused in dealing the fatal blows on the head of the deceased, they have not gone to disclose the incident to anyone in the village during that night and it is only on the next morning, on arrival of the Investigating Officer, they have so stated when their statements have been recorded to that effect. It was also submitted that the evidence of P.W.7, being to the effect that he came to know about the role of the accused in causing the death of the deceased by giving blows on his head, those P.Ws.4 & 5 are not coming forward to say that they had ever so disclosed before P.W.7. He, therefore, contended that these two witnesses (P.Ws.4 & 5) are got up witnesses and are not trustworthy so as to be relied upon to fasten the guilt upon the accused for committing the murder of Dhoba. He thus submitted that it being unsafe to place any reliance upon the evidence of P.Ws.4 & 5, the accused is not liable to be held guilty for commission of offence under section 302 IPC. In the alternative, he submitted that keeping in view the surrounding circumstances that the deceased and accused were having some difference and that the accused had given solitary blow on the head of the deceased even though it is on the vital part of the body by an axe, yet it cannot be said that the accused had intended to cause the death and had given the blow in achieving that end.

8. Mr.S.S.Kanungo, learned Additional Government Advocate for the Respondent submitted that there is absolutely no material available on record to disbelieve the evidence of P.Ws.4 & 5, who are the eye witnesses to the occurrence as their presence cannot be doubted under any circumstance as there no circumstance running adverse to that, stands out in evidence. Placing the evidence of P.Ws.4 & 5, he

contended that there is no such noticeable contradiction in their evidence so as to cast any doubt in their testimony as to their presence at the relevant time of the occurrence in watching the role of the accused who having suddenly appeared at the scene of the occurrence, to their utter surprise straightway dealt the blow as if all those meticulously planned before hand and went away. He submitted that merely because these two witnesses, have not stated to have immediately told to others and that too when it has not been asked by the defence as to if they had disclosed about the incident before any other villager immediately, the same cannot at all be taken as such an unnatural conduct on their part to doubt their testimony which are otherwise wholly believable and acceptable. He submitted that these two witnesses (P.Ws.4&5) are wholly trustworthy witnesses and their evidence are wholly believable as nothing has come to surface from evidence in putting any dent on any such score. He further submitted that there being no cross-examination on the score that these two witnesses, had met that P.W.7 at no point of time, the evidence of P.W.7 that she was told by these two witnesses about the incident rather stands to corroborate the evidence of P.Ws.4 & 5 and that is not at all a ground to suspect them in saying that they having not seen the actual happening of the incident are coming forward to so depose when also no such even normal reason arises in the mind that they were having any anxiety to falsely implicate this accused so as to screen the real offender.

9. Keeping in view the submissions made, We have carefully read the impugned judgment passed by the Trial Court. We have also

travelled through the depositions of the witnesses (P.W.1 to P.W.15) and have perused the documents such as Ext.1 to Ext.14.

10. In the instant case, the prosecution, in order to bring home the charge against the accused that it is he, who had dealt the blow on the head of the deceased by means of an axe which has led to his death almost instantaneously, relies upon the ocular testimony of P.Ws.4 & 5. They have been examined from the side of the prosecution in deposing that they had seen the incident which took place in their presence when they were with the deceased at the relevant time. The incident took place in between 6.00 to 6.30. p.m. and the FIR (Ext.1) has been lodged on the next morning around 10.15 a.m. It is very much mentioned in the FIR by the P.W.1 that these two witnesses (P.Ws.4 & 5) had seen the incident. The FIR (Ext.1) has been proved through the Informant (P.W.1). There is no cross-examination in the direction of testing the veracity of the narrations made in the said FIR with regard to the presence of P.Ws.4 & 5 at the time of happening of the incident. P.W.1 although has not deposed in Court to have mentioned in the FIR as regards the presence of P.Ws.4 & 5 to have seen the incident, here when the FIR averments remain unchallenged as the defence has not so put the narration in the FIR with regard to the presence of P.Ws.4 & 5 to test during cross-examination, advantage cannot be taken in showing that P.Ws.4 & 5 are the got up witnesses; more so, when no such reasons or circumstances emerge from the evidence in showing their anxiety to falsely implicate the accused as the author of the crime in order to screen the real offender and help that real offender escape. Carefully examining the evidence of P.Ws.4 & 5, we find that they are natural

witnesses. They state that they were very much present near the spot when the accused came with the axe and gave a blow by means of the same on the head of the deceased.

Coming to the evidence of P.W.4, it is seen that after having seen the incident, he has clearly stated to have left the spot out of fear, which looking at the manner in which the incident took place causing total surprise and was wholly unexpected and never thought of, certainly stands to be accepted as most of the persons in that situation react like that as the common experience goes. Therefore, he having not immediately disclosing before other villagers about the incident is of no such significance to term his conduct in that way to be unnatural. Except the above, there is absolutely no other material has surfaced to throw any doubt on his testimony.

P.W.5 has stated that accused Siba came and dealt axe blow on the left side of the head of the deceased and fled away from the spot by throwing away the axe. The defence, despite cross-examination, has either been able to impeach his version in any manner. The evidence of the Doctor also provide support to the evidence of P.Ws.4 & 5 not only with regard to the seat injury upon the deceased but also with regard to the weapon used in causing that vital injury. When it is stated by these witnesses that the accused left the place throwing the axe, P.W.15 has seized the same during his spot visit immediately after lodging of the FIR. This also lends corroboration to their evidence. These two witnesses (P.Ws.4 & 5) have been examined by P.W.15 in course of investigation just on his arrival at the spot after receiving the FIR (Ext.1) and registration of the case as there is no such delay in that. Even if for a moment, it is taken that these two witnesses (P.Ws.4 & 5) had not

disclosed about the incident to anybody else in the village during that night, the facts and circumstances, which emerge from the evidence being viewed in their totality, we do not find any reason to say their conduct under the unexpected happening that too a man instantly dying in their presence in a cruel manner as such to completely disbelieve them in taking a view that they having not seen the incident, had stated before the I.O. (P.W.15) and then in Court as regards the complicity of the accused both as the author and executor.

The evidence of P.W.7, who is the wife of the deceased is to the effect that P.Ws.4 & 5 had told her about the role sudden and cruel of the accused in the incident by inflicting the blow on the head of the deceased. In addition to the above, we find that the axe seized in the case having been examined by the Doctor, his evidence stands that the injuries noticed by him on the head of the deceased was possible of being caused by the reverse side of the axe (M.O.I) which he had examined and so reported on a query being made by the I.O with reference to the notings in the post mortem report (Ext.8) as to the details of the size, shape and seat of the fatal injury.

In view of the discussion of the evidence, as made hereinbefore, We are of the considered view that the prosecution has successfully proved the charge against the accused beyond reasonable doubt that the accused was the author of the injury sustained by the deceased on his head by causing the same by means of the axe (M.O.I) using its reverse side.

11. Addressing the alternative submission of the learned counsel for the Appellant that even accepting the prosecution version and the role of

the accused, it cannot be said that he had committed the offence under section 302 IPC and it would, at best, be a case under section 304-I IPC, we here find from the evidence of P.W.4, who has already been held to be a trustworthy witness and his evidence has been found by us to be reliable that when P.W.5 and the deceased were sitting in front of Dharani Pitha of their village and were talking with each other about the Pousa Purnima, all of a sudden, accused approached the deceased and no sooner he arrive, he dealt the axe blow on the head of the deceased just above the ear and the version of P.W.5 is wholly at par with that of P.W.4. They have stated that the deceased, sustaining the injuries on his head, instantaneously met his death when P.W.4 going to describe the aggression on the part of the accused, has stated that the impact of said solitary blow by the axe, was such that the wooden handle of the axe was thus broken and it hit on his (P.W.4's) the forehead.

The evidence of the Doctor (P.W.11) is to the effect that the reverse side of the axe being made to use, the injury has been caused when judicial notice of the fact can be taken that said side being flattened, the inference can be well drawn that the person using that side for causing the injury, had taken no chance of missing the hit at any cost which may so happen in case the blow is given on the sharp side of the axe, since the seat chosen is head which is bony surface. The deceased, at the relevant time, was unarmed and there was no altercation at all prior to the incident between the accused and the deceased. Taking a cumulative view of circumstances, which have emerged from the evidence, when the death of the deceased has been instantaneous by the impact of that sole blow on the head by means of a dangerous weapon, which being heavy, yet easy for proper handling as desired by the holder

because of its long and strong handle; we are unable to subscribe the submission of the learned counsel for the Appellant (accused) that for the act committed by the accused, he would not be liable for the offence under section 302 IPC.

12. On the conspectus of the analysis of the evidence made hereinbefore, this Court finds that the judgment of conviction in convicting the Appellant (accused) under section 302 IPC by holding the prosecution to have proved the charge against the Appellant (accused) beyond reasonable doubt has to sustain as also the order of sentence.

13. In the result, The Appeal stands dismissed. The judgment of conviction and order of sentence dated 21st September, 2017 passed by the learned Sessions Judge, Kalahandi, Bhawanipatna in C.T. No.41 of 2014 (Sessions) are hereby confirmed.

(D. Dash)
Judge.

Dr. S.K. Panigrahi I agree.

(Dr.S.K. Panigrahi)
Judge.

Basu