

**ORISSA HIGH COURT
CUTTACK**

JAIL CRIMINAL APPEAL NO. 83 OF 1998

From the judgment dated 23.02.1998 passed by Sri S.K. Mishra, Addl. Sessions Judge, Rourkela, in Sessions Trial No.110/43 of 1995.

Kandra @ Budhram Sunar
and another

.....

Appellants

Versus

State of Orissa

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Respondent

For Appellants - Miss. Bijaylaxmi Tripathy

For Respondent - Mr. P.K. Khuntia,
Addl. Government Advocate

PRESENT:-

**THE HON'BLE MR. JUSTICE P.K. TRIPATHY
AND
THE HON'BLE MR. JUSTICE PRADIP MOHANTY**

Date of hearing and judgment : 13.03.2007

This appeal has been filed by accused Kandra @ Budhram Sunar and Karmu Sunar challenging to the judgment and order of conviction passed by the learned Addl. Sessions Judge, Rourkela on 23.01.1998 in Sessions Trial No.110/43 of 1995.

2. As it reveals on record, prosecution case is that the deceased-Jiten Sunar, daughter of P.W.1-Jamuna Sahoo, was suspected to be practicing witchcraft. It is alleged that on 3rd July, 1994 at about noon time when the deceased together with her

mother(P.W.1) and aunt(P.W.2) were returning to home from the field, on the village road near the house of accused-Kandra, she was obstructed and detained by accused-Karmu. Accused-Kandra, who was also present there, brought out a bhujali concealed on his backside and dealt a blow to the belly of the deceased. On sustaining that blow when the deceased fell down with bleeding injury, accused-Kandra dealt 2 to 3 successive blows on her and because of such injuries inflicted, the deceased died at the spot. It was alleged in the FIR that in the process of assault on the deceased by accused-Kandra, the other accused, Karmu shared the common intention by holding the hands of the deceased. The informant, the deceased and the accused persons are rustic adivasis. Three other accused persons also faced the trial together with the appellants and they were charged with the offence under Sections 302/109 IPC. In course of trial, prosecution examined P.Ws.1 and 2, as the witnesses to the occurrence and P.W.7, the doctor, who conducted the postmortem examination, and proved the postmortem report(Ext.5) and the opinion report(Ext.6). It also examined other witnesses relating to seizure of the incriminating materials, inquest and other aspect of investigation. The weapon of offence was marked M.O.I.

3. On assessment of evidence, trial court found evidence of P.W.1 to be worthy of credence notwithstanding conduct of P.W.2, who turned hostile to the prosecution, and referring to the medical evidence and finding death of the deceased to be homicidal, learned Addl. Sessions Judge found both the accused persons guilty of the offence under Section 302/34 IPC and sentenced each of them to undergo imprisonment for life. Learned Addl. Sessions Judge also recorded finding that notwithstanding the discrepancies about the participation of accused-Karmu, the evidence of P.W.1 in examination-in-chief so also the narration of events in the FIR (Ext.2) is sufficient enough to prove the accusation against accused Karmu. Learned Addl. Sessions Judge, however, found deficiency of evidence to connect

the remaining three accused persons with the crime as abettors. Accordingly, he acquitted them of the charge under Section 302/109 IPC.

4. Miss. Bijaylaxmi Tripathy, learned counsel for the appellants, argues before us that contradictions in the evidence of P.W.1 together with the conduct of P.W.2 in resiling from her earlier version is sufficient to entertain doubt on the veracity of P.W.1 and that situation should go in favour of the accused persons. In reply, Mr. Khuntia, learned Addl. Government Advocate submits that evidence of P.W.1 is clear and clinching so as to fasten the accusation against accused Kandra and under such circumstance he cannot escape the order of conviction.

5. In view of the aforesaid contention, we asked the parties to place the relevant evidence on record including that of P.W.7 inasmuch as learned Addl. Sessions Judge failed in his duty to address himself first on the question as to whether the deceased suffered a homicidal death. It is indeed a matter of regret that a judicial officer vested with the power of undertaking a sessions trial failed to comprehend such a fundamental position while trying a session case for the offence of murder.

6. We address ourselves to the evidence of P.W.7 and the postmortem report, Ext.5 so also the opinion report, Ext.6. It appears from such evidence that P.W.7 found-

- (i) Cut injury of the size 2 ½" x 1" x depth extending to vertebra on the ventral aspect of the neck.
- (ii) Incised wound of the size 1" x ½" x skin depth, placed on the nape of the neck (front side).
- (iii) Incised wound of the size 1" x 1/3" x skin depth, placed on the lateral aspect of the abdomen at the level of the umbilicus.

According to the opinion of P.W.7, because of the aforesaid injury no.(i) the trachea and major blood vessels of the neck were completely cut and the death of the deceased was due to haemorrhage and shock and cutting of the air-ways. He also opined that all the injuries were ante mortem and such injuries are sufficient in ordinary course of nature to cause death of the deceased. He has also opined that the injuries found on the dead body are possible by M.O.I. There is some controversy, which was confronted in cross-examination, as to whether M.O.I is that weapon of offence. But notwithstanding that, evidence of P.W.7 clearly proves that deceased suffered a homicidal death and, therefore, we record the finding in favour of the prosecution that the deceased suffered homicidal death.

7. Reverting to the contentions raised by the parties, we find that evidence of P.W.1 is clear enough to describe that it was accused Kandra who dealt the blows on the belly and the neck of the deceased by means of a bhujali. She confused regarding identity of M.O.I as that weapon. If that confusion is capitalized, then it may be said that prosecution has not clearly established if M.O.I is the weapon of offence. For that reason, if M.O.I is eliminated, then in the absence of recovery or seizure of any other weapon it may be said that weapon of offence was not spotted and seized. In a case of this nature, non-recovery of the weapon of offence cannot be a ground to excuse the offender, if it is proved clearly on record that he is the author of the injuries. Such a principle has been followed by the trial court and we find no illegality in that approach. Therefore, on assessment of the evidence of P.W.1 we find that her evidence is not only credit worthy but also sufficient to prove that accused Kandra is the author of the injuries which resulted in homicidal death of the deceased. The contradictions between the evidence of P.W.1 in examination-in-chief and cross-examination are regarding the participation of accused Karmu and that aspect of the case shall be dealt with a litter later. Evidence of P.W.2 declining to make any allegation against the

accused persons does not shake credibility of P.W.1. Under such circumstance, notwithstanding the conduct of P.W.2, who turned hostile to the prosecution, evidence of P.W.1 is clear enough to prove that accused Kandra dealt the blows, which resulted in homicidal death of the deceased.

8. Alternatively, Miss. Tripathy argues and learned Addl. Government Advocate does not seriously dispute that evidence against Karmu relating to the allegation of sharing the common intention by holding the hands of the deceased is contradictory and shaky. In fact, in her evidence P.W.1 in examination-in-chief made such an allegation but in para 3 of her deposition she stated that-

“First Karmu came and caught hold me. When Kandra assaulted my daughter, then Karmu caught hold me. First kandra stabbed to the belly of my daughter, as a result she fell down. After she fell down Kandra dealt blow to the neck. Karmu left the spot leaving me and thereafter Kandra cut the neck of my daughter. Kandra stabbed to the belly of my daughter once only.”

P.W.2, as noted above, turned hostile to the prosecution and, therefore, learned Public Prosecutor confronted her with her previous statement and that may project the prosecution case. At such stage, learned Public Prosecutor did not give any suggestion to P.W.2 nor did he confront her with any statement that accused Karmu participated in the occurrence by holding the hands of the deceased. Learned Addl. Sessions Judge did not evaluate the aforesaid fact situation and the evidence and was swayed away by the evidence of P.W.1 in the examination-in-chief so as to record finding that accused Karmu is also responsible for death of the deceased. On proper appreciation of evidence on record, we find that learned Addl. Sessions Judge missed the aforesaid two evidence and, therefore, he committed the mistake. Undoubtedly, due to the confusion, which arises from the evidence of P.W.1, as quoted above, and the evidence of P.W.2, benefit arises in favour of accused Karmu and he is entitled to the benefit of doubt in

respect of the charge under Section 302/34 IPC. We, accordingly, extend the same benefit and acquit him of the charge by setting aside the order of conviction and sentence passed against him.

9. We experience while hearing cases that in the area dominated by the adivasi population the belief of witchcraft and combating the same by taking law into their own hands is a common feature by the persons who feel that they were grossly affected by practice of witchcraft. Accused Kandra is no exception to that feeling and that might have prompted him to commit the aforesaid murder. Therefore, this aspect may be considered by the Government in case there is any application/recommendation for his premature release on completion of 14 years imprisonment. With this observation, we confirm the order of conviction of accused-Kandra and also the sentence of imprisonment for life and allow the Jail Criminal Appeal with respect to accused-Karmu.

10. The Jail Criminal Appeal is accordingly allowed in part. Accused Karmu be set at liberty forthwith if his detention is not required in jail in connection with any other case.

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P.K.Tripathy,J.

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Pradip Mohanty, J.

Orissa High Court, Cuttack
March 13, 2007 / ***Samal***