ORISSA HIGH COURT
CUTTACK

JAIL CRIMINAL APPEAL NO. 119 OF 1996

From the judgment dated 09.01.1996 passed by Sri J.P.Mishra, Sessions Judge, Mayurbhanj, Baripada, camp at Karanjia in S.T. Case No.68 of 1994.

Laxman Murmu ..... Appellant

Versus

State ..... Respondent

For Appellant - Mr. D. P. Dhal, Advocate.

For Respondent - Mr. A.K. Mishra, Standing Counsel.

PRESENT:-

THE HON'BLE MR. JUSTICE P.K.TRIPATHY

AND

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 07.02.2005

P.K.TRIPATHY, J. This Jail Criminal Appeal is against the order of conviction of the appellant under Sections 449, 302 and 506 Part-II I.P.C. as per the impugned judgment dated 09.01.1996 of the learned Sessions Judge, Mayurbhanj, Baripada, camp at Karanjia.

2. Deceased is the stepmother of the accused-appellant. In support of the allegation of matricide, prosecution stated that the accused having staying with his elder father (father's elder brother) and succeeding to his estate, was still greedy about a share from the landed property of his father (who has been examined

as P.W.2) and in that respect, he was in the habit of picking up quarrel. On the date of occurrence, i.e., on 25.10.1993 at about evening time also he was rebuked by the deceased for catching fish by draining the water from the paddy land of P.W.2. The occurrence took place around 8 p.m. in the night. Accused came and caused a penetrating wound by an arrow and while he was in the process of pressing it deeper by pressing deceased against the door of the house, on shouting by her for help, a neighbour (P.W.1) arrived at the spot, separated the accused from the deceased and in that process the arrow in the hands of the accused also came out from the chest. P.W.1 pushed the accused outside the house, for which, he fell down. Then P.W.3, another neighbour, reached at the spot and wanted to detain the accused. There was brief scuffle between the two and the accused could succeed to escape and flee from the spot of occurrence. At the time of such decamping, he also threatened P.Ws.1 and 3 with dire consequences for their intervention in the above manner. The deceased after being relieved from the clutches of the accused came out from the room, some water was administered to her, but she succumbed to the injury. The local police being intimated, a routine investigation was undertaken and on completion of investigation charge-sheet was submitted.

3. Charge was framed against the appellant for the offences of house trespass with intention to commit the crime punishable under Section 449, I.P.C., murder of Pana Murmu (deceased) punishable under Section 302, I.P.C. and for criminal intimidation against P.Ws.1 and 3 punishable under Section 506, I.P.C.

4. To substantiate the accusation, prosecution examined seven witnesses, including the above noted three witnesses. P.W.5 is the doctor, who conducted autopsy on the dead body of the deceased, P.Ws.6 and 7 are the two police officers participating in the

investigation and P.W.4 is a witness to the seizure of incriminating articles including blood stained earth, wearing apparels, etc.

5. In the trial of the case, accused took the defence plea admitting his presence at the scene of occurrence on the date and time of occurrence, admitting the injury to the chest of the deceased due to piercing of an arrow and admitting her death on that account. In that connection, his explanation was that he had gone to demand a share. His father, i.e., P.W.2 wanted to shot an arrow at him, he went and ensued a tussle with his father to remove the bow and arrow from the hands of his father and then the deceased came and dealt blow on his head and in the whole process the arrow pierced into the chest of the deceased accidentally. In support of the defence plea, he has examined one witness, i.e., D.W.1-Dr. Bhagaban Dixit, who granted an injury certificate relating to the abrasion on the eyelid.

6. On assessment of evidence on record, both oral and documentary, learned Sessions Judge found that the prosecution has proved its case of homicidal death through the evidence of P.W.5 because of the incised wound on the right chest wall above the right breast 1" away from the sternum at 4th rib level with the width of 1½" up to the full thickness of the chest wall piercing the muscle and sternocostal joint into the cavity of the thorax. The doctor also opined that the injury was directed from above downwards. According to the doctor, that injury with the corresponding internal injury was sufficient to cause the death of the deceased in ordinary course of nature. As noted above, the trial court, relying on the evidence recorded the finding that the deceased suffered a homicidal death. Learned counsel for the appellant argues about the improbability of such an injury in the manner in which the blow was alleged to have been dealt by the appellant. However, he does not dispute the homicidal death of the deceased.

7. On being satisfied about the homicidal death of the deceased, the trial court found that the evidence of P.Ws.1, 2 and 3 are sufficient to prove that appellant is the author of the injury and in that respect the defence evidence of right of private defence was not at all proved by him. The trial court also recorded the finding that injury found on the eyelid of the accused being minor and superficial, prosecution cannot be held to be guilty of suppression of material evidence and that injury, as explained by P.Ws.1 and 3, was caused when P.W.1 pushed him and P.W.3 tussled with him to overpower and detain him. The trial court also found thast the plea of right of private defence or the other defence please taken by the accused remained not proved and, therefore, accused is not entitled to any benefit on the basis of such a plea.

8. On the proved facts, the trial judge found that the offences charged are made out. After hearing the accused on the question of sentence, he imposed the sentence of imprisonment for life for both the offences under Sections 449 and 302, I.P.C. and imprisonment for one year under Section 506, Part-II, I.P.C. and directed to run all such sentences concurrently.

9. Learned counsel for the appellant argues that evidence of P.W.2 that accused shot an arrow was never the case of the prosecution and P.W.2 also did not make any such statement before the I.O. The evidence of P.W.2, who is a highly interested witness, the deceased being her husband, should be excluded. He also argues that evidence of P.W.1 that the accused pierced the arrow is not probable because an arrow could not have been pierced with the application of normal human force to such a depth and, therefore, that evidence being improbable is to be eliminated. He further argues that on elimination of the evidence of the aforesaid two witnesses, the evidence of P.W.3 in no way lay out the circumstance under which the occurrence took place and under such circumstance

the plea of the accused cannot be rejected as not proved and if that is applied then the benefit is available to the accused.

10. The aforesaid argument is attractive, but devoid of merit in view of clear-cut evidence available on record. The evidence of P.W.2 is clear enough to show that accused was present besides himself when the deceased sustained injury due to the piercing of the arrow. That fact has not been disputed by the accused in his defence plea. Nonetheless, prosecution is required to prove beyond all reasonable doubt that the arrow was pierced into the chest of the deceased by the accused. The evidence of P.W.1 is sufficient to prove such a fact situation. Under such circumstance, the omission on the part of P.W.2 to state that the arrow was shot from the bow is not a vital omission so as to discard the prosecution case in toto. P.W.2 is the husband of the deceased and at the same time he is also the father of the accused. Therefore, in absence of proof of motive to make a false accusation against the accused, the evidence of P.W.2 is not to be discarded only on the ground that he is a close relative of the deceased. Apart from that, the evidence of P.W.1 relating to the manner of participation of the accused in the occurrence has been sufficiently corroborated by P.W.2 and the post occurrence witness(P.W.3).

11. When the accused took the plea of accidental injury to the chest of the deceased and at the spot of occurrence at the relevant time there was none except himself and P.W.2, he should have proved that fact by adducing acceptable evidence. Accused has not done so. The evidence of D.W.1, as rightly commented by the trial court, is hardly relevant for that purpose when the injury has been explained through the evidence of P.Ws.1 and 3. Therefore, in this case, we find that when the prosecution has proved the case of homicidal death of the deceased because of the overt act committed by the accused, the latter has failed to make out a case in support of the defence plea taken by him or even relating to the case of right of

private defence or a case of culpable homicide not amounting to murder. Under such circumstance, we also do not find any reason to accept the alternative argument of the appellant for his conviction under Section 304, I.P.C.

12. For the reasons indicated above, we confirm the order of conviction and sentence and dismiss the appeal.

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P.K.TRIPATHY,J.

PRADIP MOHANTY,J. I agree.

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PRADIP MOHANTY,J.

High Court of Orissa, Cuttack,
The 7th day of February,2005/**Samal**

7. Learned counsel for the appellant lastly contended that the offence would not attract Section 302, I.P.C., but would come within the ambit of Part-II of Section 304, I.P.C., as the appellant dealt 'Tangia' blows out of sudden provocation and in the heat of passion without any premeditation and without any intention to cause such injury and, thus, the case is covered by Exception-IV to Section 300, I.P.C.

We notice from the evidence on record that for refund of the money, which was borrowed by Padlam Khora (P.W.3), brother-in-law of the deceased, there was some altercation between the appellant and Padlam. At this, the deceased intervened and challenged the appellant. The latter being enraged by such provocation, brought a 'Tangia' and dealt two blows to the deceased, who died instantaneously. There was no premeditation and the appellant at the spur of the moment gave the assaults. Under such circumstances, according to us, the case comes within the ambit of Exception-IV to Section 300, I.P.C. and the appropriate conviction would be under Part-I of Section 304, I.P.C. and not Part-II therefore, as contended by the learned counsel for the appellant.

8. For the foregoing discussions, we alter the conviction of the appellant from one under Section 302, I.P.C. to that under Section 304, Part-I, I.P.C. and sentence him to undergo rigorous imprisonment for ten years.

9. In the result, the appeal is allowed to the extent indicated above.