

**ORISSA HIGH COURT  
CUTTACK**

**GOVERNMENT APPEAL NO.33 OF 1987**

From the judgment dated 04.12.1986 passed by Sri N. Sengupta, Sessions Judge, Mayurbhanj-Baripada camp Karanjia in Sessions Trial No.117 of 1985.

State ..... Appellant

Versus

Kaira Ho ..... Respondent

For appellant : Addl. Govt. Advocate

For respondent : Mr. S. Lal.

**PRESENT :**

**THE HONOURABLE SHRI JUSTICE P. K. TRIPATY  
AND  
THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY**

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Date of hearing and judgment : 10.11.2006  
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Challenge in this appeal is to the judgment rendered by the Sessions Judge of Mayurbhanj-Baripada camp Karanjia in S.T. No.117 of 1985. By the said judgment, the respondent, though convicted under section 304-A IPC, was acquitted of the charge under Section 302 IPC.

2. The case of the prosecution is that houses of the deceased and the respondent situate side-by-side. Cattle of the respondent used to stray into the bari land of the deceased and damage the crops raised therein. On 20.12.1984 the cattle of the respondent

entered into the bari land of the deceased and damaged the crops of the deceased. Deceased asked the respondent to see that his cattle do not stray into his bari land any further, but the respondent gave an evasive reply and was not in a mood to keep his cattle under control. In the afternoon, the cattle of the respondent again strayed into the bari land of the deceased. He drove them out and went to the house of the respondent to tell him not to repeat the same. But the respondent instead of listening to him, brought a split wood and hit on the head of the deceased. On receiving the blow, deceased became unconscious and fell down on the ground. It is the further case of the prosecution that while deceased was proceeding towards the house of the respondent he was followed by his wife(P.W.2) and son(P.W.1). After the deceased fell down in front of the house of the respondent, he was lifted and brought home. Next morning, he was taken to Tahkurmunda P.H.C. where he succumbed to the injuries he had sustained. Inquest was held and post-mortem examination conducted over the dead body. After closure of investigation charge-sheet was laid against the respondent for the offence under Section 302 IPC.

3. Plea of the respondent was complete denial. His specific plea was that due to enmity a false case has been foisted against him.

4. In order to substantiate the charge, prosecution examined seven witnesses and relied on thirteen exhibits. Defence examined none in support of its plea.

5. Learned Sessions Judge, who tried the case, by the impugned judgment dated 04.12.1986 acquitted the respondent of the charge under Section 302 IPC. He, however, convicted the respondent for commission of offence under Section 304-A IPC and sentenced him to undergo rigorous imprisonment for one year. The State has preferred this appeal against the order of acquittal of the respondent of the charge under section 302 IPC.

6. Mr. Khuntia, learned Additional Government Advocate, submits that there cannot be any doubt that death of the deceased was homicidal in nature, evidence of both P.Ws.1 and 2 is very clear, cogent,

consistent and unimpeachable, there is no material to disbelieve their evidence, facts and circumstances of the present case do not attract the provisions of Section 304-A IPC and the trial court by recording an order of conviction of the respondent under Section 304-A IPC instead of section 302 IPC has committed grave illegality.

7. Mr. Lal, learned counsel for the respondent, on the other hand, supports the impugned judgment and submits that the impugned judgment of the trial court is based on proper appreciation of evidence on record. The trial court has not committed any illegality, irregularity or manifest error in rendering such judgment. That apart, the scope of interference with an order of acquittal is very limited.

8. Perused the judgment, deposition of witnesses and other materials available on record. P.Ws.1 and 2 are said to be the eye witnesses to the occurrence. P.W.1 is the son and P.W.2 is the widow of the deceased. They being close relatives of the deceased, their evidence is to be scanned with utmost care and caution. Admittedly, there was land dispute and inimical relationship between the deceased and the respondent. Undisputedly, the deceased went to the house of the respondent in the evening and there was exchange of words between them over damage of crops by the cattle of the accused-respondent. P.W.1 has specifically admitted that he did not see the actual assault. He saw the incident after his father fell down on the ground with the injury. As such, he cannot be termed as an eye witness to the assault. Thus, the only eye witness available in this case is P.W.2. She witnessed the occurrence by standing in front of her house. Admittedly, P.W.2 and the accused-respondent were known to each other before and when there was exchange of words, it was quite natural for her to identify the accused-respondent even by less vision. In view of the above, there is no doubt that the accused-respondent is the author of the injury sustained by the deceased. That is also the unchallenged factual finding recorded by the trial court.

9. The next point for consideration is whether in the facts and circumstances of the case the act committed by the accused-respondent comes within the ambit of Section 302 IPC. From the evidence on record, it is clear that it was the deceased who went to the house of the accused-respondent and it was he who questioned the accused-respondent about his behaviour. There is no evidence or even an indication about the intention of the accused-respondent to kill the deceased. This is a case where the deceased himself started the provocation. That apart, a solitary blow by a split wood was given by the accused at the spur of moment. Under such circumstance, the accused-respondent cannot be held guilty under Section 302 IPC and, therefore, there is nothing to disagree with the order of acquittal. But the trial court has gone wrong in convicting the accused-respondent of the offence under Section 304-A IPC inasmuch as the facts and circumstances of the instant case do not establish the ingredients of that section. Section 304-A says that whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished. There is no material on record to show that the death of the deceased was due to any rash or negligent act of the accused-respondent. The manner in which the incident had taken place, as already indicated, suggests that the accused-respondent is liable for culpable homicide punishable under Section 304 Part-II IPC. Accordingly, the conviction of the accused-respondent is altered to Section 304 Part-II IPC.

10. It is stated by Mr. Lal, learned counsel for the respondent, that the occurrence took place way back in 1984 and, in the meantime, the accused-respondent has become 75 years old. Therefore, he may be leniently dealt with. Considering the said submission, this Court feels that the interest of justice will be best served if the accused-respondent is sentenced to the period of imprisonment already undergone; and it so directs.

11. In the result, this Government Appeal is allowed in part by confirming the order of acquittal under section 302 IPC but modifying

the conviction of the respondent from one under section 304-A IPC to that under section 304, Part-II, IPC. Because of the exceptional circumstance of lapse of over three decades and sufficient oldness of the respondent, he is sentenced to the period of imprisonment already undergone.

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**P.K.TRIPATHY, J.**

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**PRADIP MOHANTY, J.**

Orissa High Court, Cuttack  
November 11, 2006/ ***Samal***