ORISSA HIGH COURT,
CUTTACK

CRIMINAL APPEAL NO. 176 OF 1986

From the judgment dated 04.10.1986 passed by Sri P. C. Panda, Sessions Judge, Kalahandi, Bhawanipatna in Sessions Case No.11 of 1986.

Bijaya Kumar Sahu ..... Appellant

Versus

State of Orissa ..... Respondent

For appellant : M/s H. S. Mishra & N. Misra.

For respondent : Mr. S. Nayak,
Addl. Standing Counsel.

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 11.04.2007

PRADIP MOHANTY,J. This appeal is directed against the judgment and order dated 04.10.1986 passed by the learned Sessions Judge, Kalahandi, Bhawanipatna convicting the appellant under Section 304 Part II I.P.C. and sentencing him to undergo rigorous imprisonment for seven years in S.C. No.11 of 1986.

2. Prosecution case in brief is that on 25.10.1985 at about 10.00 A.M. in the morning, the appellant and co-accused Suratha Kumar Sahu (since acquitted) rebuked one Govinda Chandra Sahu due to some dispute relating to construction of a house. But said Govinda Chandra Sahu did not report the matter to the police as the accused persons belonged to his family. On the same day at about 8 P.M., Falguni Sahu, younger brother of Govinda Chandra Sahu, returned from his father-in-law's house

and went to ascertain the cause of the quarrel that took place in the morning. The informant also followed him. At that time, both the appellant and co-accused were sitting with some goonda type people. All of a sudden, co-accused Suratha Kumar Sahu being armed with a sword came to assault Falguni Sahu, but the sword was snatched away from him. At the same time, the present appellant came armed with a lathi to assault Falguni Sahu, which was also snatched away from him. While coming back, the appellant went to his house, brought a tangia and gave a blow with the same from the backside of Falguni Sahu on his head, as a result of which Falguni Sahu fell down on the ground. However, he got up and went to his house, where he fell down senseless. Thereafter, the informant took Falguni to the police station and gave a written report. On receipt of the same, the Officer-in-charge, Bhawanipatna Town P.S. registered a case under Section 307/34 IPC. But on the next day, i.e., 26.10.1985 at about 1.10 P.M. Falguni succumbed to the injuries at the hospital. After completion of the investigation, charge sheet under Section 302/34 IPC was filed against the appellant and co-accused Suratha Kumar Sahu (since acquitted).

3. The plea of the accused persons was complete denial of the allegation. They also stated that the case has been falsely filed against them. The present appellant took the further plea that he at the time of occurrence, was in his shop situated at Manikeswari Chhak.

4. In order to prove its case, prosecution examined 14 witnesses. P.W.1 is the informant. P.Ws.2, 4 and 5 are ocular witnesses. P.W.9 is the doctor who initially examined the deceased. P.W.12 is the medical officer who conducted postmortem examination over the dead body of the deceased. P.W.14 is the I.O. Defence examined none in support of its plea.

5. Learned Sessions Judge, Kalahandi, Bhawanipatna, who tried the case, by his judgment dated 04.10.1986 while acquitting the accused persons of the charge under Sections 302/34 IPC, convicted the

present appellant under Section 304 Part-II IPC and sentenced him to undergo rigorous imprisonment for seven years.

6. Mr. Mishra, learned counsel for the appellant submits that in order to bring home the charge under Section 304 Part-II IPC, the prosecution must establish that the death of the deceased was homicidal and was caused as a result of the injuries said to have inflicted on his person by the accused-appellant. In the instant case, there is no material that the injuries, which caused the death of the deceased, were inflicted by the appellant. He further submits that the evidence of the doctor (P.W.12) is not definite whether the deceased suffered a homicidal death. He also submits that the FIR (Ext.1) is antedated inasmuch as according to P.W.1, the FIR, which was lodged by him, was marked as Ext.1. Ext.8/2 is the requisition issued by the ASI for examination of the deceased on 25.10.1985. In that requisition, the Station Diary entry is only mentioned and the P.S. case number has not been given. That means, Ext.1 was not in existence by the time requisition was sent for medical examination. Moreover, the FIR reached the court on 28.10.1985. The delay in sending the FIR coupled with the medical requisition gives rise to non-existence of FIR before medical requisition. Mr. Mishra also submits that non-examination of independent witnesses is fatal to the prosecution. According to the prosecution case, at the time of incident, large number of persons were present in the house of the accused persons and they have seen the occurrence. No motive has been proved by the prosecution. The alleged incident, which had taken place in the morning on the date of occurrence, has not been proved. Lastly he submits that major contradictions are there in the statements of the eye witnesses, i.e., P.Ws.1, 2 and 4.

7. Mr. Nayak, learned Addl. Standing Counsel submits that the judgment and order of conviction is legal and there is no infirmity in the said judgment. There are sufficient materials to convict the appellant under Section 304 Part-II IPC. The prosecution has proved the case against the appellant beyond all reasonable doubt. He further submits that though

there are minor contradictions in the evidence of P.Ws.1, 2 and 4, the same does not in any way affect the prosecution case.

8. Perused the statements of the witnesses. P.Ws.1, 2 and 4 are eye witnesses to the occurrence. They are all related to the deceased. But nothing has been elicited from their cross-examination to disbelieve their testimony. It is true that in order to believe the evidence of relations, who are highly interested witnesses, some corroboration is necessary because of their tendency to exaggerate the facts. In such circumstances, the court should examine the evidence with great care and caution. If the witnesses are believable, the evidence of related witnesses should not be discarded. The FIR was lodged immediately after the occurrence wherein it has been clearly stated that accused-appellant gave an axe blow on the head of the deceased, which is corroborated by the evidence of P.Ws.1, 2 and 4. In fact, P.W.1 is the nephew of the deceased and P.W.4 is the brother of the deceased. Their evidence clearly sows that at the time of incident, they were near the spot. In other words, they were very close to the spot when the incident took place. P.W.2 is the wife of the deceased. In para-2 of her evidence she stated that when her husband was coming to her house, the appellant went inside the house, brought an axe and gave a blow from the backside on the head of her husband. There is no material on record to discredit the testimony of P.W.2. P.W.6 is a post occurrence witness. In his cross-examination at para-3 he has admitted that in front of the garage there was a street light. In para-2 of his evidence he has stated that the light was burning at a distance and there was moon light. P.Ws.9 and 12 are the doctors. P.W.9, who examined the deceased initially, has categorically stated that he found one incised wound 8" x 1" x bone deep extending from right mastoid process behind the right ear to the right parietal eminence close to mid line, cutting skin, skull bone and exposing brain matters. P.W.12 conducted the postmortem examination on the dead body and found one incised would measuring 8" x 1" x bone deep extending from the right mastoid region. Both the doctors opined that the said injury

could be caused by a Tangia. The evidence of P.Ws.1, 2 and 4 also gets corroboration from the evidence of P.Ws.9 and 12. Their evidence is consistent and all of them have corroborated each other in material particulars.

9. The next question that arises for consideration is whether death is homicidal or accidental. The evidence of the prosecution witnesses clearly shows that the axe blow was given by the present appellant to the head of the deceased. There is absolutely no evidence that the deceased met with an accident and sustained the injury. In the instant case, the medical evidence supports the version of the eye witnesses. After taking into account the evidence of the eye witnesses together with the medical evidence, it becomes clear that the injury found on the head of the deceased was caused by an axe and the deceased died due to head injury. As such, it becomes absolutely clear that the death of the deceased was homicidal.

10 As to the contention that the FIR has been antedated, the Investigating Officer, P.W.14 in para-13 of his evidence has stated that he had directed the A.S.I. of police to escort the injured and to issue requisition to the doctor, which is a part of investigation. He has also stated that sending requisition is a part of investigation and, therefore, the A.S.I. had taken part in the investigation. P.W.14 in his deposition in Para 17 has stated that during his presence at the police station he drew up formal FIR and asked the ASI to escort the injured immediately to the hospital. There is no evidence that the ASI was in charge of the station diary entry when he left for the hospital for treatment of the injured. From the above, it is crystal clear that the FIR was in existence by the time the requisition was sent to the doctor. The FIR and the evidence of P.W.1 clearly show that soon after the incident the written report was submitted at the P.S. and there is no material to show that the real FIR was suppressed and another FIR, i.e., Ext.1, was registered.

11. In view of the above, this Court does not find any reason to interfere in the above judgment and order of conviction passed by the trial court.

12. Mr. Mishra, learned counsel for the petitioner submits that the incident had taken place more than two decades ago. At the time of occurrence, the age of the appellant was 22 years. He was a young man. The incident occurred due to family dispute and there was no premeditation. Therefore, he submits that a lenient view may be taken and the appellant may be released under Section 4 of the Probation of Offenders Act since he is a first offender.

13. Considering the fact that the deceased and the appellant belong to the same family; that the incident had taken place due to some family dispute and there was no premeditation; and that in the meantime more than two decades have elapsed, while maintaining the conviction of the appellant under Section 304 Part-II IPC this Court reduces the sentence to the period of imprisonment already undergone by him.

14. With the above modification of the jjjjjjjjjjjjsentence, the criminal appeal is disposed of.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
April 11, 2007/ ***Samal***