

**ORISSA HIGH COURT
CUTTACK**

**CRLREV NO. 441 OF 2002
AND
CRLLP NO. 52 OF 2003**

From the judgment dated 08.11.2002 passed by Sri J.N. Panda, Addl. Sessions Judge, Bhanjanagar-Aska Circuit at Aska in Criminal Appeal No.19 of 2000 modifying the judgment dated 23.11.2000 passed by Dr. D.P. Choudhury, Assistant Sessions Judge, Aska in Sessions Case No.24 of 1996/Sessions Case No. 265 of 1996 GDC.

CRLREV NO. 441 OF 2002

Jaga Das and others	Petitioners
	Versus	
State of Orissa	Opp. Party

For petitioners : M/s D.K. Mishra, G.K. Nayak,
K.B. Kar & B.K. Nayak.

For opp. party : Mr. S. Behera,
Addl. Government Advocate

CRLLP NO. 52 OF 2003

State of Orissa	Petitioner
	Versus	
Jaga Das and others	Opp. Parties

For petitioner : Mr. S. Behera,
Addl. Government Advocate

For opp. parties: M/s D.K. Mishra, G.K. Nayak,
K.B. Kar & B.K. Nayak.

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 20.03.2007

PRADIP MOHANTY, J. Both the aforesaid matters arise out of the same judgment. Therefore, they were heard together and are disposed of by this common judgment.

2. Petitioners in CRLREV No.441 of 2002 as accused were facing trial before the Assistant Sessions Judge, Aska in Sessions Case No.24 of 1996/Sessions Case No.265 of 1996 GDC being charged under Section 307/34 IPC. On conclusion of trial, the trial Judge by its judgment dated 23.11.2000 found them guilty under Section 307/34 IPC and sentenced each of them to undergo rigorous imprisonment for three years and to pay a fine of Rs.2000/-, in default to undergo rigorous imprisonment for three months. Against the said judgment of conviction and sentence, they preferred appeal before the learned Addl. Sessions Judge, Bhanjanagar-Aska, Circuit at Aska which was registered as Criminal Appeal No.19 of 2000. The appellate court after hearing the parties, by its judgment dated 08.11.2002 acquitted them of the offence under Section 307/34 IPC but convicted them under Section 326 IPC and sentenced each of them to undergo rigorous imprisonment for six months and to pay a fine of Rs.1000/-, in default to undergo simple imprisonment for one month subject to set off. Aggrieved, the accused persons have filed CRLREV No.441 of 2002. On the other hand, State has filed CRLLP No.52 of 2003 for leave to appeal against the judgment of the lower appellate court and for confirmation of the conviction and sentence passed by the trial court.

3. Case of the prosecution is that on 04.11.1995 at about 5 .00 p.m. the injured Nabina was proceeding in a Luna with one Gadadhar Patnaik. While so going, near Bauri Sahi Chhaka, the accused persons came to the road and surrounded him for which the injured could not proceed further. Accused Mochia gave kati blows to his right hand and right leg. Accused Madhia also assaulted by kati to the left hand and left leg of the injured. The injured fell down on the road. Then other accused persons assaulted him by thenga. The injured screamed for help whereupon his father rushed to the spot and came to his rescue. Receiving the injuries, the injured lost his senses. Thereafter, the father of the injured

removed him to M.K.C.G. Medical Hospital, Berhampur. On getting information, OIC, Patrapur P.S., who is the I.O., reached at the hospital in the same night, received the FIR, issued requisition for medical examination of the injured and examined the witnesses including the injured. On receipt of the injury report along with x-ray report and on closure of investigation, police submitted charge sheet against the accused persons under Sections 307/34 IPC.

4. The plea of the accused persons is complete denial of the allegations. In their statement recorded under Section 313 Cr.P.C. they took a specific plea that they have been falsely implicated in the case due to previous enmity and political rivalry with the injured and his father.

5. In order to prove its case, prosecution examined ten witnesses including the injured, doctors and the I.O. and proved five documents. The accused persons examined none in support of their plea.

6. Learned Asst. Sessions Judge, who tried the case, by his judgment dated 23.11.2000 convicted the accused persons under Sections 307/34 IPC and sentenced each of them to undergo rigorous imprisonment for three years and to pay a fine of Rs.2000/- in default to undergo rigorous imprisonment for three months with the finding that the intention of the accused persons is well proved. Against that judgment and order of conviction and sentence, they preferred appeal before the learned Addl. Sessions Judge, Bhanjanagar-Aska, Circuit at Aska which was registered as Criminal Appeal No.19 of 2000. The appellate court after hearing the parties by its judgment dated 08.11.2002 acquitted them of the offence under Section 307/34 IPC but convicted them under Section 326 IPC and sentenced each of them to undergo rigorous imprisonment for six months and to pay a fine of Rs.1000/- in default to undergo simple imprisonment for one month subject to set off.

7. Mr. Kar, learned counsel for the accused persons submits that the FIR was antedated, because although it is the case of the prosecution that the father of the injured handed over the FIR to the I.O. at the hospital on the very same day, it was sent to the Magistrate on

13.11.1995. The I.O. has not taken any step to seize the weapon of offence and the Luna in question. Most of the material/eye witnesses to the occurrence have been withheld by the prosecution. Though the injuries sustained by the injured were due to his falling from the Luna, the same have been taken as the injuries caused as a result of the assault by the accused persons, thereby medical evidence is found to be discrepant from the ocular evidence. He further submits that both the trial court and the appellate court have not considered the accident part and no finding has been given by the courts below to that effect.

8. Mr. Behera, learned Addl. Government Advocate submits that the order of the appellate court is illegal in acquitting the accused persons of the offence under Section 307/34 IPC and there is no scope for convicting the accused persons under Section 326 IPC. The finding of the learned Addl. Sessions Judge is illegal and there was no reason to interfere with the judgment of the trial court since the ingredients of the offence under Section 307 IPC were well established.

9. Perused the LCR and the judgments of the courts below. Basing upon the evidence of P.W.1, the appellate court came to a conclusion that the case is under Section 326 IPC and not under Section 307 IPC. It came to the conclusion that the accused persons had not given any blow to the vital parts of the body with deadly weapons. The assault, as stated by the injured, was given by means of a Kati and thenga. Therefore, while acquitting the accused persons of the offence under Section 307/34 IPC, it convicted them under Section 326 IPC. The learned Addl. Sessions Judge has also not discussed anything about the accident part and came to a conclusion that the injuries sustained by the injured were by mixture of assault as well as due to his fall on rough surface from the Luna in question. But he has not specifically discussed which injuries were caused due to assault and which were due to accident.

10. In view of the above, this Court sets aside the order of the appellate court and remits the matter back to the appellate court for rehearing after giving notice to the accused persons and the State. The

entire exercise shall be completed within a period of six months from the date of receipt of the LCR.

11. The revision and the CRLLP are disposed of accordingly. LCR be sent back forthwith.

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PRADIP MOHANTY,J.