

ORISSA HIGH COURT CUTTACK

CRIMINAL APPEAL NO.61 OF 2005

From the judgment dated 18.12.2004 passed by Sri S.K. Ray, C.J.M.-cum-Asst. Sessions Judge, Kalahandi, Bhawanipatna in S.C. No.14 of 2003 (S.C. 24 of 2003 of Kalahandi District Court).

Maheswar Tandi & another Appellants

Versus

State of Orissa Respondent

For appellants : M/s A.K.Nanda,
S.K.Bhanjadeo and
P.C. Nag.

For respondent : Mr. S. Mishra,
Standing Counsel, and

M/s S.N. Mishra (1),
B.Dash, B.N. Mishra and
N.K. Das.
(for informant)

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 07.02.2007

PRADIP MOHANTY, J. This appeal is directed against the judgment and order of conviction dated 18.12.2004 passed by the learned C.J.M.-cum-Asst.

Sessions Judge, Kalahandi, Bhawanipatna in S.C. No.14 of 2003 (S.C. 24 of 2003 of Kalahandi District Court).

2. The case of the prosecution is that on 14.10.2001 at about 8.00 a.m. when the injured Arakhita Naik(P.W.13) and his wife-Anjana Naik(P.W.6), who are respectively father and mother of the informant (P.W.5), were going to Beheramunda, both the appellants all on a sudden arrived at the spot and assaulted the injured by the back side of a tangia on his left leg, as a result of which he fell down. Thereafter, appellant no.1-Maheswar pounced upon the injured and his son, appellant no.2, assaulted the injured by means of a knife on his head, back and leg. When the wife of the injured raised shout, the informant and his brothers reached the spot and both the appellants fled away from the spot. On being reported by P.W.5, the police registered a case, proceeded with the investigation and after completion of the same submitted charge sheet against the appellants under Sections 307/325/341/34 IPC.

3. The plea of the appellants was complete denial of the allegations. Their stand was that due to political hostility, a false case has been instituted against them.

4. The prosecution, in order to prove its case, examined as many as 15 witnesses. The appellants also examined one witness to substantiate their plea. .

5. The learned C.J.M.-cum-Assistant Sessions Judge, Kalahandi, Bhawanipatna, who tried the case, by his judgment dated 18.12.2004 found the appellants guilty for commission of the offences punishable under Sections 341/325/307/34 IPC and convicted them thereunder. He sentenced each of the appellants to undergo rigorous imprisonment for nine years and to pay a fine of Rs.50,000/-(fifty thousand) in default to undergo rigorous imprisonment for a further period of three years under Section 307/34 IPC. He also sentenced them under Section 341/34 IPC to undergo simple imprisonment for one month

and directed that the sentences should run concurrently. He also directed that in case the fine amount was realized, the same should be paid to the injured-Arakhita Naik as compensation. No separate sentence was, however, imposed for the offence under Section 325/34 IPC, as according to the trial Judge, Section 307/34 IPC covers the offence under Section 325/34 IPC.

6. Mr. Nanda, learned counsel for the appellants, vehemently contends that the trial court has failed to appreciate the evidence of the defence to the effect that civil disputes were pending and there existed political hostility between the parties at the time of occurrence. There is material variance between the statements of the prosecution witnesses. The independent witnesses, who have been examined by the prosecution, have not supported the prosecution case.

Mr. Mishra, learned Standing Counsel, on the other hand, submits that the evidence of the injured-P.W.13 is corroborated by the doctor-P.W.3 and the eye witnesses- P.Ws.6, 12 and 14. There is no illegality or irregularity in the impugned judgment and order of conviction passed by the trial court warranting interference by this Court.

7. Perused the impugned judgment, deposition of the witnesses and the exhibits. P.Ws.1, 4 and 10 are independent witnesses, who did not support the prosecution case. But, they were neither declared hostile nor was any leading question put to them. P.W.2 is the A.S.I., who issued the injury requisition to the Medical Officer, District Headquarters Hospital, Bhawanipatna. P.W.3 is the doctor, who examined the injured immediately after the occurrence. He opined that injury nos.2 and 7 were grievous in nature and other five injuries were simple in nature. He specifically stated that all the injuries can be possible by hard and blunt object. P.W.5, the informant, is one of the sons of the injured. He specifically stated in his examination-in-chief that while working with his brothers in their field, he heard cries of his mother and immediately rushed to the spot with his brothers. By the time they reached the spot,

his father had become senseless and the appellants had already fled away. From this statement it is clear that P.W.5 is not an eye witness but a post occurrence witness. P.W.6 is the wife of the injured who claims to have seen the occurrence. She has stated in her evidence that the appellants all on a sudden came and assaulted her husband by means of tangia and knife on his leg, head and back and fled away from the spot. When her husband fell down and shouted for help, she also shouted and called her sons. She admitted in her cross-examination that there was some dispute between her husband and appellant no.1-Maheswar. P.W.12 is another son of the injured. He came to the spot along with his other brothers after he heard hullah of his mother and shifted the injured to Bhawanipatna hospital. P.W.13 is the injured himself. He deposed that appellant no.1-Maheswar caught hold of him and appellant no.2-Jitendra dealt a blow by a stone and also assaulted him by the back side of a tangia on his head causing bleeding injury. Assault was also given to his left thigh. He stated that his wife was present at the spot. He also specifically admitted that some disputes were pending in the civil court. P.W.14 is the daughter of the injured and is also a post occurrence witness. She reached the spot after receiving information from a lady of her village. Her mother told her about the assault by the appellants. P.W.15 is the I.O., who visited the spot, investigated into the matter and seized one knife from the house of Maheswar. On completion of investigation, he submitted charge-sheet under Sections 341/325/307/34 IPC. D.W.1 examined on behalf of the appellants is the son-in-law of the brother of the injured. He has stated that appellant no.1-Maheswar was present in his house and was instructing him about breaking of stones to be used for flooring of his house. He has further stated that appellant no.2-Jitendra was not there at the time of occurrence and he had been to Assam.

8. In order to prove a case under Section 307 IPC two ingredients are required to be satisfied. Firstly, an evil intention or knowledge and secondly, the act done with such intention or knowledge

which would amount to murder. The intention to commit the offence of murder means that the person concerned has the intention to do certain act with necessary intention or knowledge contained in Sec.300 IPC. In the instant case, prosecution has failed to prove such intention or knowledge, which is likely to cause death of the injured. Section 307 would apply even if no hurt is caused. A person is criminally responsible for the attempt to commit murder when with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence and when the completion of the offence is prevented by some cause independent of his volition. The nature of the injury caused may give some assistance in coming to a finding as to the intention of the accused but such intention may also be deduced from other circumstances and may be ascertained in some cases without reference to actual wounds. In the case at hand, the injured himself stated in his evidence that appellant no.2 dealt a blow by a stone and appellant no.1 only caught hold of him. Subsequently, he stated that appellant no.2 assaulted him by the back side of a tangia on his head causing bleeding injury. If appellant no.2 had the intention to kill him, he would not have assaulted by the back side of the tangia. There is no material to hold that appellant no.2 had the intention or knowledge to kill the injured. There is also no contrary material that appellant no.2 had the intention to kill the injured but he was prevented by the injured or by any other person from doing so. P.W.3, the doctor, who examined the injured, stated that out of the injuries, injury nos.2 and 7 were grievous. He also opined that the injuries can be possible by hard and blunt object and all the injuries can be possible by fall. In view of the above evidence, it is crystal clear that the act done by appellant no.2 cannot come under the purview of Section 307 IPC. At best, it may come under Section 324 IPC.

9. It is gathered from the evidence of P.W.13-injured that when appellant no.1-Maheswar caught hold of him, appellant no.2, at the

first instance, gave a stone blow and later on gave blows by the back side of the tangia, as a result of which, he sustained injuries. According to the Doctor, two of the injuries were grievous in nature. Therefore, the trial court has rightly convicted appellant no.2 under Section 325 IPC.

10. There is no evidence on record that appellant no.1 assaulted P.W.13 or caused any hurt to him. Therefore, he cannot be held liable for the offence under section 307/325 IPC. There is also no material that appellant no.1 facilitated appellant no.2 to assault P.W.13 and that the act was committed in furtherance of common intention of both the appellants. As such, the mischief of section 34 IPC is not attracted in this case.

11. So far as the conviction and sentence of the appellants, as awarded by the trial court, under section 341 IPC is concerned, this Court does not find any illegality or irregularity in the same.

12. In view of the above discussions, this Court acquits both the appellants of the offence under Section 307 read with section 34 IPC. This Court also acquits appellant no.1 of the offence under section 325 IPC. However, this Court holds appellant no.2 guilty of the offence under sections 324/325 IPC and convicts him thereunder. He is sentenced to undergo R.I. for one year and pay a fine of Rs.2,000/- (two thousand), in default R.I. for three months, for the offence under section 324 IPC, and undergo R.I. for two years and to pay a fine of Rs.5000/- (five thousand), in default R.I. for six months, for the offence under Section 325 IPC. The conviction and sentence of the appellants under section 342 IPC, as awarded by the trial court is confirmed. All the sentences shall run concurrently. The fine amount, if realized, shall be disbursed to the injured.

13. In the result, the appeal is allowed in part as indicated above.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
February 7, 2007 / ***Samal***