

**ORISSA HIGH COURT,
CUTTACK**

CRIMINAL APPEAL NO. 47 OF 1990

From the judgment dated 22.12.1989 passed by Sri G.S. Rao, Sessions Judge, Dhenkanal in Sessions Trial No.19 D of 1987.

Kollah Dehuri
Appellant

.....

Versus

State

.....

Respondent

For appellants : Mr. Sangram Kumar Sahoo

For respondent : Mr. S.C. Mishra,
Addl. Standing Counsel

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing & judgment : 12.11.2008

PRADIP MOHANTY, J. This appeal is taken up for hearing, as the learned counsel for the appellant at the outset submitted that other co-accused persons have not preferred any appeal.

2. The appellant in this appeal has challenged the judgment and order dated 22.12.1989 passed by the learned Sessions Judge, Dhenkanal in Sessions Trial No.19 D of 1987 whereby he has been convicted under Section 304 Part-II IPC and sentenced to undergo rigorous imprisonment for seven years, under Section 325 IPC and sentenced to undergo rigorous imprisonment for three years and under Section 323 IPC

and sentenced to simple imprisonment for six months; all the sentences to run concurrently.

3. The case of the prosecution is that on 15.10.1986 at about 2.30 PM due to previous quarrel the appellant along with three others assaulted the deceased Kesab Behera with lathi, kick and fist blows. Present appellant gave axe blows on the head and chest of the deceased. Then all of them carried the deceased to the house of one Hari Naik and laid him on his verandah. Soon thereafter when the informant, who is the brother of the deceased, was returning to the village, co-accused Dina Naik assaulted him by a lathi, tied with a napkin and dragged him to the front of the house of Hari Naik. There he saw his brother Kesab Behera lying with injuries and seeing him the latter disclosed that he had been assaulted by the present appellant and co-accused Maheswar with axe and lathi. Thereafter, the deceased was carried in a cart to Kishorenagar P.S. The informant also went to the said P.S. and lodged FIR. The deceased and the informant were sent to Kisornagar Hospital for examination. As the condition of the deceased was serious, the doctor referred him to V.S.S. Medical College, Burla. But the relations of the injured refused to remove him to any other hospital and on the same day, i.e., 16.10.1986 at about 5.45 P.M. the deceased succumbed to the injuries. The case was originally registered under Sections 342/325/323/34 IPC and after the death of the deceased it turned to one under Section 302 IPC.

4. The defence plea was one of complete denial of the allegations.

5. In order to prove its case the prosecution examined as many as 10 witnesses including the doctor and the I.O. and proved 20 documents in evidence. The defence also, in support of its plea, examined two witnesses.

6. The learned Sessions Judge, Dhenkanal, who tried the case, by his judgment dated 22.12.1989, though acquitted the present appellant and the co-accused persons of the charge under Section 302 IPC,

convicted him under Section 304 Part-II IPC and sentenced him to undergo rigorous imprisonment for seven years. He also convicted the present appellant and co-accused persons under Section 325 IPC and sentenced them to undergo rigorous imprisonment for three years and under Section 323 IPC and sentenced them to undergo simple imprisonment for six months and directed that the sentences are to run concurrently.

7. Mr. B. Mohanty on behalf of Mr. S.K. Sahoo, learned counsel for the appellant, submits that there are major contradictions in the evidence of P.Ws.4 and 5 and as such the trial court should not have held that the present appellant gave fatal blow to the backside of the head of the deceased which caused his death. He also submits that P.W.4, the mother of the deceased, and P.W.5, the sister of the deceased, developed the prosecution story from stage to stage. P.W.5 in her evidence specifically stated that appellant gave three farsa blows to the deceased on his head and chest and Maheswar snatched away the axe from the appellant and also assaulted the deceased. P.W.5 has not stated the above fact to the I.O. and developed the story in court, which has been confronted to the I.O. (P.W.10). In the FIR, the informant specifically stated that Maheswar Dehury (acquitted from the charge under Section 302 IPC) has assaulted the deceased on his head. P.Ws.2, 4 and 5 are interested witnesses and major contradictions are therein their statements. Therefore, the order of conviction under Section 304 Part-II IPC against the present appellant cannot be sustained.

8. Mr. Mishra, learned Addl. Standing Counsel, on the other hand, strenuously urged that there is no material to interfere with the impugned judgment of conviction and sentence. P.Ws.4 and 5 are witnesses to the occurrence and they specifically implicated the present appellant to have given the fatal blow to the deceased with the axe. The deceased had also made dying declaration before P.W.2 implicating the present appellant.

9. Perused the LCR. The trial court has based the conviction of the present appellant upon the evidence of P.Ws.4 and 5 and

the dying declaration made by the deceased before P.W.2, the informant and also P.W.6 Laxmi Behera. In the present case, certain special features create considerable doubt regarding the veracity of the aforesaid evidence. According to P.W.4, the mother of the deceased, all the four accused persons assaulted the deceased and the present appellant dealt a blow by the blunt side of an axe to the cheek of the deceased. P.W.5, the sister of the deceased and another ocular witness, stated that the present appellant dealt three farsa blows to the deceased on his head and chest. The accused Maheswar snatched the axe from the present appellant and assaulted the deceased on the head. P.W.2, brother of the deceased, who is a post occurrence witness specifically stated that the deceased disclosed before him that Kollah, the present appellant and Maheswar assaulted him with the blunt side of axe and lathi. P.W.6, another sister of the deceased stated that the deceased told that the present appellant assaulted him with a piece of wood and trampled over his chest and that accused Maheswar dealt farsa blows on him. If the evidence of all the aforesaid witnesses is taken into consideration, it creates considerable doubt in the mind of this Court regarding the veracity of their evidence. In the instant case, no incised or cut injuries were found on the deceased. In the FIR also the informant has not whispered a single word about the assault by the present appellant to the deceased with an axe. He specifically stated that accused Maheswar Dehury has assaulted the deceased. So far as the evidence of P.W.2 is concerned with regard to assault him by all the accused persons there is no material to disbelieve him. This P.W.2 was examined by the doctor (P.W.3) immediately after the occurrence and P.W.3 found those injuries on the body of P.W.2. There is also no dispute that the accused persons assaulted both the deceased and the injured(P.W.2) with lathi and fist blows. Looking to all the circumstances, this Court is of the view that the conviction of the present appellant under Section 304 Part-II IPC cannot be sustained. But so far as his conviction under Section 325 and 323 IPC is concerned, there is no reason to interfere with the same. Thus, this Court sets aside the

conviction of the appellant under Section 304 Part-II IPC and maintains the conviction under Sections 325 and 323 IPC. Counsel for the appellant submits that the appellant has remained in custody for about one year and 12 days. He prays for reduction of the sentence. More than twenty years have elapsed from the alleged date of incident and the present appellant has already remained in custody for more than a year. Therefore, this Court modifies the sentence of the appellant under section 325 IPC to the period of imprisonment already undergone along with a fine of Rs.10,000/- in default to undergo rigorous imprisonment for six months. The sentence of six months' simple imprisonment passed under section 323 IPC is maintained. The substantive sentences passed against the appellant under sections 323 and 325 IPC shall run concurrently.

10. In the result, the criminal appeal is allowed in part to the extent indicated above.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
November 12, 2008/ *G.D. Samal*