HIGH COURT OF ORISSA,
CUTTACK

CRIMINAL APPEAL No. 93 of 1995

From the judgment and order dated 10.02.1995 passed by Shri M.R.Mohanty, Ist Additional Sessions Judge, Puri, in S.T. No. 18/89 of 1992 .

Gouranga Khandual & Another ..... Appellants

Versus

State of Orissa ..... Respondent

For Appellants - M/s. B.Panda, D.Panda & S.R. Mohapatra.

For Respondent - Mr. K.K. Mishra
Addl. Govt. Advocate.

PRESENT

THE HON'BLE SHRI JUSTICE PRADIP MOHANTY
A N D
THE HON'BLE SHRI JUSTICE B.K.PATEL

Date of judgment : 22.05.2010

PRADIP MOHANTY, J. There are two appellants in this appeal, namely, Gouranga and Dasha. They have been convicted under Section 302/34 I.P.C. by the learned Ist Additional Sessions Judge, Puri and sentenced to undergo imprisonment for life in S.T. Case No. 18/89 of 1992.

2. The brief fact of the case is that the informant and his deceased brother Krushna had gone to their land for the purpose of harvesting paddy on 12.11.1991. Having harvested paddy, the informant proceeded ahead of his deceased brother. While they were passing through the land of one Laxman Parida, the deceased raised hue and cry 'HANI DELA HANI DELA'. When the informant looked back, he saw appellant-Gouranga dealing blows to his brother by means of a tangia and his brother appellant Dasha was standing near by and exhorting him to slay

the deceased. When the informant rushed towards the deceased, the accused persons/appellants fled away from the spot. Soon thereafter, P.W.4, P.W.7, Daru Parida, Kasinath Swain and others came running to the spot. The informant found the left palm, from little above the wrist joint, of the deceased to have been completely severed and lying nearby. He further found incised wounds accompanied by profuse bleeding on both of his legs and his condition was serious. Thereafter, he shifted the deceased to the hospital and lodged the F.I.R. in Nuagaon Police Station. The case was initially registered under sections 307/326/34 I.P.C. The deceased succumbed to injuries on 13.11.1991 and the case turned to one under section 302/34 I.P.C. On 15.11.1991, both the accused persons surrendered before the Court. The I.O. took them to police custody for their interrogation and ultimately on completion of investigation filed charge sheet whereupon the appellants stood their trial under section 302/34, IPC.

3. The appellants took the plea of denial and false implication. This apart, appellant no.1 pleaded alibi and took the stand that on the date of alleged occurrence he had gone to work for one Chintamani Malik as a field servant. In order to prove the case, prosecution examined as many as 11 witnesses including the Medical Officer and the I.O., and exhibited 20 documents. Defence examined none. The trial court on conclusion of the trial by the impugned judgment convicted and sentenced the appellants as already mentioned herein above.

4. Mr. B.Panda, learned counsel for the appellants assailed the judgment on the following grounds :

i) The F.I.R. story and the story unfolded before the court at the time of trial materially differs;

ii) A new story was introduced by the prosecution to suit the medical evidence;

iii) Oral dying declaration before P.W.7 is not reliable;

iv) The so-called Dying Declaration recorded under Ext.11 is also doubtful and not free from suspicion;

v) Factum of leading to discovery of M.O.I and M.O.II has not been proved by the prosecution;

vi) Non-mentioning of the names of the assailants in the inquest report and the dead body challan creates a doubt on the prosecution case;

vii) Independent and material witnesses have not been examined by the prosecution;

viii) Delay in forwarding the statements of material witnesses and the dying declaration is fatal to the prosecution; and

ix) There are major contradictions appearing in the evidence of the eye witnesses.

5. Mr. Mishra, learned Additional Government Advocate vehemently contended that the dying declaration is genuine. P.W.8, who is an independent witness and responsible officer, deposes to have recorded the dying declaration of the deceased at 3.30 P.M. in presence of the witnesses as requisition was made by the I.O. (P.W.11). Variance of statement of informant by itself is not fatal to the prosecution case. He further contended that the evidence of P.Ws. 4, 5 and 7 is sufficient to convict the appellants under section 302/34, I.P.C. There is no illegality committed by the trial court convicting the appellants under section 302/34, I.P.C.

6. Learned counsel for the parties relied upon the decisions in ***Swarn Singh v. The State***, 1968 (CLT)-187, ***Harihar Ray v. State of Orissa,*** 1986 (1) Crimes 657, ***Ramesh Baburao Devaskar and others v. State of Maharastra,*** 2009 SCC (Cri.) 212, ***Thanedar v. State*** (2002) 22 OCR (SC) 335, ***Sujoy Sen v. State of West Bengal,*** (2007) 3 SCC (Cri.) 47,

State v. Rajkishore, 1991 (1) OLR 289, ***Krushna v. State***, (1992) 5 OCR 529, ***G. Rajan and others v. State of Orissa,*** (2002) 22 OCR-750, ***Nilakantha v. State***, (1996)-11 OCR-62, ***Radha Mohan Singh @ Lal Saheb & ors., etc. v. State of U.P.***, AIR 2006 S.C. 951, ***Podda Narayana and others v. State of Andhra Pradesh***, AIR 1975 SC 1252, ***Darya Singh v. State of Punjab***, AIR 1965 SC 328, ***Kanaksingh Raisingh Rav v. State of Gujurat***, AIR 2003 SC 691, and ***Laxman v. State of Maharastra,*** AIR 2002 SC 2973.

7. Perused the L.C.R. and the decisions cited by the parties. P.W.1 is the informant. In the F.I.R. he stated the place of occurrence and the names of the accused-appellants. He also in the said F.I.R. mentioned the names of the witnesses P.Ws.4 and 7 as well as one Daru Parida and Kasinath Swain. While he was on the way he heard the cry of his deceased brother. P.W.1 in his statement recorded under section 161 Cr.P.C. stated that he was not an eye witness and claimed to have heard about the occurrence from the eye witnesses. The names of those eye witnesses were mentioned in the F.I.R. But in the said F.I.R. he stated to have seen the occurrence. In his evidence in court he stated that while he was cultivating the land at about 10 A.M. the deceased, who was harvesting paddy crops on one plot of land, left for home for his lunch through paddy field in a short-cut way to his village. But he returned to his house with a bullock on a different way. While he was on the way Magiram (P.W.4) and Gadadhar (P.W.5) informed him that his brother was killed by both the accused-appellants near the land of Laxman Parida. On getting information, he rushed to the spot and found his injured brother. His left hand was cut and severed from the wrist joint and there were deep cut injuries on the ankles of his both the legs. They shifted the injured to the Nuagoan Hospital. Thereafter, he rushed to the Police Station and lodged the F.I.R. As per his saying, police drafted the F.I.R. and after the contents therein were explained to him, he put his signature. He specifically stated that though he meant to report that he had heard the incident, but police reduced it as if he had seen the occurrence. He also stated in his chief that so far as the assault to his brother was concerned, he narrated in the manner in which

he had heard it from others. On perusal of the records, it is revealed that the police recorded his statement under Section 161 Cr.P.C. on the next date. In the said statement, he stated to have heard the incident from other witnesses and he was not an eye witness to the occurrence. He specifically stated that P.Ws. 4 and 5 told regarding the incident to him. In cross-examination nothing has been elicited to discredit his testimony. Rather he specifically stated that he heard the same from P.Ws.4 and 5. There is no material to disbelieve the evidence of P.W.1.

According to Mr. Panda, learned counsel for the appellants, the informant changed the F.I.R. story during trial and a new story has been introduced by the prosecution. In the instant case, F.I.R. has been exhibited and P.W.1 in his chief has explained that though he meant to say that he had heard the incident, but the police prepared the F.I.R as if he had seen the occurrence. P.W.1 in his chief specifically stated that he heard the incident from P.Ws.4 and 5. In his statement recorded under section 161 Cr.P.C. he has also stated the above fact. The fact that there is variance between police statement and F.I.R. is not by itself sufficient to throw the case of the prosecution lock, stock and barrel. The first information report is not at all a substantive piece of evidence in the eye of law. It can be used during the course of trial for corroboration and contradiction of the informant. The case of the prosecution is not entirely dependent upon the testimony of the informant. Of course, it is the informant who set the wheels of law on motion by giving the requisite first information. In the instant case P.W.1's oral informantion was reduced to writing by the police. In the F.I.R., P.W.1 stated about the names of the assailants and the eye witnesses and also stated about the injuries on the person of the deceased. Thereby, the case was registered and the I.O. took up the investigation and recorded the statements of the witnesses. After completion of investigation, charge sheet was submitted under sections 302/34 I.P.C. In the instant case, the F.I.R. story and story depicted before the court at the time of trial are almost similar. Therefore, the argument advanced by Mr. Panda that if the F.I.R. story goes, the entire genesis and origin of the occurrence and the case of the prosecution have to be

discarded is not tenable in the eye of law. Rather the evidence of P.W.1 corroborated the F.I.R. story with regard to the names of the assailants and the witnesses. P.W.2 is a witness to the leading to discovery and seizure of the weapons of offence. He specifically stated that Tangia was seized from the house of the accused-appellants. In cross-examination, he also explained the difference between Tangi and Farsa. He explained that Tangi and Farsa are almost same in nature except difference in size. Nothing has been elicited from his mouth by way of cross-examination. P.W.3 is another seizure witness who turned hostile. He admitted that sister of the accused-Gouranga and the sister of the deceased-Krushna had married in one family. There was ill-feeling between appellant-Gouranga and deceased-Krushna and some litigations were also started. P.W.4 who claims to be an ocular witness specifically stated that he heard the cry of the deceased and rushed to the spot along with P.W.5. On reaching the spot, he noticed that appellants-Gouranga and Dasha were assaulting somebody on the land of Laxman Parida by means of axe. Seeing them, accused-appellants fled away from the spot and the deceased was lying in a pool of blood in a half dead condition. Out of fear, they left the spot. They also could not tolerate the scene. He also stated that he met Daru Parida and told him about the incident and also requested him to give some water to the deceased. Out of fear he returned to his house. At 4 P.M. police came and he led the police to the spot where Krushna was lying. But the dead body of Krushna was not there and the police seized some blood-stained earth under seizure list Ext.3 and he put his signature. In cross-examination, he admitted that they saw the incident from 50 cubits and after the departure of the accused-appellants, they proceeded to a little further and saw the deceased was lying there in a pool of blood. Seeing this, they returned back instead of proceeding nearer to Krushna. In cross-examination, he also admitted that there was no difference of opinion between him and the accused-appellants or with Krushna. He also stated in his cross-examination that Daru Parida went to the spot after hearing from them. He also stated that he saw the appellants giving blows with axe as if they were cutting wood and that the sharpen portion of the axe was downward and that each of the appellants was assaulting with two separate axes. Nothing has been elicited by way of

cross-examination to support the defence case. P.W.4 admitted the presence of P.W.5. P.W.5 corroborated the statement of P.W.4 with regard to manner of assault and names of assailants, but he stated that the accused-appellants were holding tangia. In cross-examination, he admitted that the distance between the place where they were working and the place where Krushna was lying would be about 200 to 250 feet and near that there were some bushes. He also admitted in his cross-examination that from the land of P.W.4 the spot was not visible. He admitted that the entire land of Laxman Parida was not surrounded with bushes but there were about 3 to 4 bushes around the land. On scanning the evidence, it is crystal clear that after hearing the hullah he came with P.W.4 and saw the assault from a distance but they did not go to the place of assault. Out of fear he returned back and out of nervousness he lost his sense. Nothing has been elicited through cross-examination to disbelieve his evidence. P.W.6 is the witness to the leading to discovery of weapons of offence under seizure lists Exts.2 and 4. He specifically stated that the tangis were seized in his presence. Nothing has been elicited through cross-examination to belie his testimony. P.W.7 is a post occurrence witness. He stated to have heard the incident from Kasinath and went to the spot. He specifically stated about the spot. He stated that all the relations of the deceased were present when he disclosed that he was assaulted by the accused persons.

8. Non-mentioning of the names of the eye witnesses and the assailants in the inquest report and the dead body challan is not fatal to the prosecution. It is the settled principle of law that the omission of names of the assailants in the dead body challan and the inquest report is not sufficient to put the prosecution out of Court. The provisions for holding of inquest are contained in Section 174 Cr.P.C. providing for 'Police to enquire and report on suicide etc'. The language of the provision is plain and simple and there is no ambiguity therein. An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal, or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the

body appear to have been inflicted. It is for the limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. In ***Podda Narayana v. State of Andhra Pradesh***, AIR 1975 SC 1252, it was held that it is not necessary to enter all the details of the overt acts in the inquest report. Similar view was taken in ***Eqbal Baig v. State of Andhra Pradesh*,** AIR 1987 SC 923. In view of the ratio decided therein, the non-mentioning of name of an eye witness in the inquest report could not be a ground to reject the testimony of a witness. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that inquest witness was not present at the time of commission of offence. The above view has been expressed in ***Radha Mohan Singh @ Lal Saheb & others, etc., v. State of Utter Pradesh***, AIR 2006 SC 951. In view of the above, the argument advanced by Mr. Panda, has no substance and can not be accepted.

9. It is the settled principles of law that in a murder case, it is primarily for the prosecutor to decide which witnesses to be examined in order to unfold the story. The choice of selection of witnesses is with prosecutor, but the selection has to be made fairly and honestly. In the case in hand, prosecution chose to examine two eye witnesses, i.e., P.Ws. 4 and 5 and a post occurrence witness, P.W.7. Therefore, non-examination of Daru Parida is not fatal to the prosecution case.

10. Learned counsel appearing for the appellants contended that the dying declaration was manufactured. On perusal, it is revealed that the dying declaration was recorded by the doctor (P.W.8). Thereafter, the deceased was shifted to Nayagarh Hospital. In the intervening period, the I.O. proceeded to the spot, examined some of the witnesses and recovered the weapon of offence (Farsa). On the next day, he received information about the death of the deceased, proceeded to Nayagarh Hospital, held inquest and sent the dead body of the deceased for post-mortem examination. Thereafter, he proceeded to Nuagaon Hospital and collected

the injury report as well as sealed cover containing dying declaration. Thus, at the time of inquest the I.O. had no knowledge about the recording of the dying declaration. Furthermore, the dying declaration was recorded by the doctor in presence of the witnesses. P.W.8 is a disinterested witness and there is no material to discard the evidence of P.W.8. Rather he corroborated the evidence of P.W.7 and the eye witnesses. There is no contradiction in the evidence of P.Ws. 7 and 8 before whom deceased stated the names of the assailants. P.Ws. 4 and 5 clearly stated that they saw the accused persons assaulting the deceased by means of tangias. On seeing them, accused persons fled away from the spot. The deceased disclosed the names of the assailants before P.Ws. 7 and 8. A certificate has been given by the doctor that the deceased was in a fit state of mind to give the dying declaration. Therefore, there is no material to discard Ext.11, the dying declaration.

11. Learned counsel for the appellants further submitted that the mandate of the Cr.P.C. that it is the duty of the I.O. to forthwith forward the statements recorded under section 161 Cr.P.C. and other documents collected during investigation, has not been followed. But on perusal of the record it reveals that the accused persons surrendered in court. On police requisition, they were remanded to the police custody and thereafter produced before the Court. Since the accused persons/appellants were not forwarded after arrest by the police, they were taken on police remand for interrogation. After interrogation/investigation the I.O. produced them in Court. There was no occasion to produce case diary in court till production of appellants after expiry of police remand. Therefore, the contention raised by the learned counsel is not tenable in the eye of law.

12. In view of the above, there is no doubt that the appellants are the assailants of the deceased. Now, it is to be seen what offence the appellants have committed by assaulting the deceased. In the instant case, there is no evidence that the injuries were on the vital part. The doctor (P.W.8), who treated the deceased, opined that the deceased was in moribund condition due to blood loss. There is also no evidence that with a

view to killing the deceased, the appellants assaulted him or caused such bodily injury which was likely to cause death. Therefore, by applying the ratio decided in ***Karnail Singh v. State of Punjab,*** AIR 1977 SC 893, this Court finds the appellants guilty under Section 326, IPC.

13. In the result, the appeal is allowed in part. The judgment of the trial court convicting the appellants under section 302, IPC is set aside. Instead, the appellants are convicted under section 326 I.P.C. and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.20,000/-(twenty thousand) each in default to undergo rigorous imprisonment for one year.

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Pradip Mohanty, J

B.K.Patel, J. I agree.

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B.K.Patel, J.

Orissa High Court, Cuttack
The 22nd day of May, 2010/***Routray/Alok***