

**ORISSA HIGH COURT, CUTTACK.**

**Criminal Appeal No. 279 of 1997**

*From the judgment and order of sentence dated 04.10.1997 passed by Shri B.K. Nayak, learned Addl. Sessions Judge, Bolangir in Sessions Case No. 111/27 of 1996, under Sections 302/324/34, I.P.C.*

**Rohit Majhi and three others ... Appellants**

## Versus

**State of Orissa** ... **Respondent**

For Appellants : M/s. D. Mishra, D.P. Dhal, A.K. Ray,  
P.K. Routray and K. Rath.

For Respondent : Govt. Advocate.

P R E S E N T:

**THE HONOURABLE MR. JUSTICE L. MOHAPATRA  
AND  
THE HONOURABLE MR. JUSTICE C.R. DASH**

- Date of Judgment : 30.11.2010

**C.R. Dash, J.** Learned trial court found Bhakta Bhoi @ Bhakta Bhue (Appellant No.2), Thakur Singha Bhoi @ Bhue (Appellant No.3), Partha Bhoi @ Bhue (Appellant No.4) and Rohit Majhi (Appellant No.1) guilty of offence under Section 302/34, I.P.C. for having committed the murder of Baidyanath Pradhan and under Section 324/34, I.P.C. for causing hurt to Himansu Sekhar Pradhan (P.W.2).

Each of them was sentenced to suffer imprisonment for life for offence under Section 302/34, I.P.C. and R.I. for six months for the offence under Section 324/34, I.P.C. with the direction that both the sentences are to run concurrently.

The judgment and order of sentence passed in Sessions Case No.111/72 of 1996 by the learned Additional Sessions Judge, Bolangir has been impugned in this appeal.

2. A compendium of the prosecution case is as follows :-

Himansu Sekhar Pradhan (P.W.2) is the son of deceased Baidyanath Pradhan. In the morning of 06.07.1996, he had gone to his land locally known as 'Tali Duli' with two labourers named Kamadev Pradhan (P.W.3) and Balaram Kalsai (not examined) for ploughing the land. At about 8.00 a.m. aforesaid Kamdev Pradhan (P.W.3) and Balaram Kalsai were ploughing the land while Himansu Sekhar Pradhan (P.W.2) was standing on the ridge of the land. At that time Dingar Bhoi (not an appellant but was convicted by the trial court for the offence under Section 323, I.P.C.) came over the aforesaid land being armed with a stick. He prevented (P.W.2) and his labourers from ploughing the land claiming that the land belongs to him. There ensued a verbal altercation between P.W.2 and said Dingar Bhoi. In course of such altercation, said Dingar Bhoi gave a push to Himansu Sekhar Pradhan (P.W.2) and Himansu Sekhar Pradhan fell down on the ground. Thereupon Dingar Bhoi assaulted Himansu Sekhar Pradhan (P.W.2) with the stick. Himansu raised hullah "MARIGALI MARIGALI". Soon thereafter appellants Bhakta Bhoi, Thakur Singha Bhoi, Partha Bhoi and Rohit Majhi came over the land

being armed with deadly weapons. Bhakta Bhoi (Appellant No.2) was holding a 'Tangia', Rohit Majhi (Appellant No.1) and Thakur Singh-Bhoi (Appellant No.3) were holding an iron rod each, Partha Bhoi (Appellant No.4) was holding a 'Thenga'. On their arrival, they assaulted Himansu (P.W.2). On hearing Himansu's shout, his father Baidyanath Pradhan (deceased) also came over the land. No sooner he reached on the land, all the accused persons surrounded him and assaulted him by the respective weapons held by them. At first, Bhakta Bhoi (Appellant No.2), assaulted the deceased Baidyanath Pradhan by means of 'Tangia' causing injuries on his right ear and right forehead. Other appellants joined Bhakta Bhoi (Appellant No.2) in assaulting the deceased. As a result of such assault Baidyanath died at the spot. The appellants and Dingar Bhoi fled from the spot on seeing other persons rushing towards the spot.

P.W.1, who is an eye witness to the occurrence, lodged written report scribed by one Gangadhara (not examined). On lodging of the F.I.R. at Tusra P.S., the case was registered and initial investigation was taken up by the A.S.I. of Police, Bandhapada Outpost (P.W.9), where Station Diary Entry had been made on the basis of written report of P.W.1. On the same day, i.e., on 06.07.1996, the O.I.C., Tusra P.S. (P.W.10) took up the charge of investigation from P.W.9, and on completion of the investigation he submitted charge-sheet against the accused persons on 21.09.1996.

3. Prosecution has examined ten witnesses to prove the charge. P.W.1 besides being the informant is an eye witness to the occurrence. P.Ws. 2 and 3 are the injured eye witnesses. P.W.7 is a

witness to the discovery and seizure of the weapons of offence, i.e., one Tangia and one iron rode on being led by Bhakta Bhoi (appellant no.2) and Thakur Singh Bhoi (appellant no.3). P.W.8 is another son of the deceased and he is a post-occurrence witness. P.W.6 is the constable, who took the dead body for post-mortem examination. P.W.4 is the Medical Officer, who conducted autopsy over the dead body of the deceased Baidyanath Pradhan. P.W.5 is the Medical Officer, who examined P.W.2 on police requisition. P.Ws. 9 and 10 are the Investigating Officers.

The defence plea is one of complete denial. The further defence plea, as found from suggestions to prosecution witnesses is that both deceased and the injured (P.W.2) slipped from the ridge of the land, which had become slippery owing to rain in the morning, and sustained injuries.

4. Learned trial court framed charge against all the accused persons for offence under Sections 148/302/307, I.P.C. read with Section 149 thereof for commission of rioting with deadly weapons and murder of Baidyanath Pradhan and attempting to cause murder of Himansu Sekhar Pradhan (P.W.2) in prosecution of the common object of the unlawful assembly on the date and at the time of occurrence. Accused Dingar Bhoi, (non-appellant) was separately charged under Section 324, I.P.C. for causing hurt to Kamadev (P.W.3). On consideration of the evidence on record, learned trial court held that the prosecution has failed to prove the charge under Sections 148/307/149, I.P.C., so far as the appellants are concerned. Accordingly, learned trial court convicted the appellants for offence

under Section 302/34, I.P.C. for causing murder of Baidyanath Pradhan and for offence under Section 324/34, I.P.C. for causing hurt to Himansu Sekhar Pradhan (P.W.2). Learned trial court further held Dingar Bhoi (non-appellant) guilty of offence under Section 323, I.P.C.

5. Learned counsel for the appellants, taking us through the evidence on record, submits that there being bona fide dispute between the parties over possession of the land and the appellants having acted bona fide for protection of their rights over the property, their conviction under Section 302/34, I.P.C. is bad in law. It is further submitted by learned counsel for the appellants that there being discrepancies in the evidence of the prosecution witnesses, conviction of the appellants under Section 302/34, I.P.C. is not sustainable in the eye of law. He further submits that there being no separate charge under Section 302 read with Section 34, I.P.C. against the appellants so far as the offence of murder is concerned, conviction of the appellants under Section 302/34, I.P.C. is not sustainable in the eye of law.

Learned Addl. Govt. Advocate on the other hand supports the impugned judgment.

6. Admittedly, P.Ws.1, 2 and 3 are the eye-witnesses to the occurrence. Out of them P.W.2 is the injured witness. P.W.3, who was the labourer of P.W.2 and was engaged in ploughing the land, is also asserted to be an injured witness. But learned Trial Court, on consideration of the materials on record, has rightly disbelieved the fact that he (P.W.3) was assaulted by any of the convicts or the non-

appellants. However, there is nothing on record to disbelieve his presence on the scene of occurrence. Learned trial court, on consideration of the evidence of the Medical Officer (P.W.4) and other materials on record, has come to a specific finding that death of deceased Baidyanath Pradhan was a homicidal death. Learned counsel for the appellant fairly does not dispute such a finding. Otherwise also on perusal of the evidence of P.W.4, nature of injuries sustained by the deceased as found from the post-mortem report (Ext.6), situs of such injuries on the person of the deceased and evidence of the prosecution witnesses ruling out accidental fall of the deceased while going on the slippery ridge of the land, we feel inclined to concur with the findings of the learned trial court on this aspect.

7. P.Ws.1, 2 and 3 have supported the prosecution case in substance. Some discrepancies at the fringe are brought out by the learned counsel for the appellants to discredit the testimony of P.Ws.1, 2 and 3. The same discrepancies in the evidence of P.Ws. 1, 2 and 3, which are raised now, were also raised before the learned trial court. We do not propose to go into details of those discrepancies pointed out before us, as learned trial court, in paragraph-15 of the impugned judgment, has dealt in detail with the selfsame discrepancies and has come to the finding that the discrepancies pointed out by the defence are insignificant in nature. Learned trial court, according to us, has rightly taken the view, as aforesaid.

8. Another discrepancy pointed out by the learned counsel for the appellants pertains to discrepancy between ocular testimony

and the medical evidence. It is submitted by learned counsel for the appellants that P.Ws. 1, 2 and 3 have testified about single 'tangia' blow given by Bhakta Bhoi (appellant no.2), but the evidence of P.W.4 is indicative of three incised injuries, i.e., injury nos. (i), (ii), (iii), which are opined to be not possible by one blow and, according to the Medical Officer (P.W.4), for inflicting injury nos. (i), (ii) and (iii) at least three blows by sharp cutting weapons are required.

Taking into consideration the evidence of P.Ws. 1, 2 & 3 in their entirety, the fact situation and the opinion of the Medical Officer (P.W.4), learned trial court, in paragraph-17 of the impugned judgment, has rightly held thus :-

“The evidence of P.W.2 shows that he saw first accused Bhakta Bhoi dealing a tangia blow on the head of his father, whereafter, P.W.2 became unconscious. It is therefore, natural for him not to have seen further assault on his father by the accused persons. The evidence of P.Ws. 1 and 3 cannot, however, be interpreted to mean that accused Bhakta Bhoi dealt only one tangia blow on the deceased. Their evidence rather shows that Bhakta gave a tangia blow on the head of the deceased and then all the accused persons surrounded and assaulted the deceased. They have not spoken specifically that accused Bhakta gave only one tangia blow and no more. They have admitted that they have not counted the number of blows given by each of the accused persons. When 5 accused persons were assaulting the deceased having surrounded him, it was quite natural for the witnesses to be not able to count the number of blows given by the accused persons. Giving of further blows by accused Bhakta by means of Tangia is not ruled out when the witnesses have

not said that after giving the first blow by tangia, Bhakta has not dealt further blows. I, therefore, do not find any discrepancy in the medical evidence and the ocular evidence with regard to the injuries on the deceased and manner of infliction of the injuries.”

On thorough scrutiny of the evidence on record, we do not find any justification to accept the contention of learned counsel for the appellant on the point of discrepancy between ocular testimony and medical testimony for the reasons discussed by learned trial court, as aforesaid, with which we are one in our view.

9. Next contention raised by learned counsel for the appellant is that the appellants came over the disputed land in exercise of their bona fide claim of right and in course of quarrel between the parties the occurrence having happened, conviction of the appellants under Section 302/34, I.P.C. is bad in law. Such a contention is too spacious to be accepted, inasmuch as there is no evidence to show that the defence party members were in possession over the land in question. No evidence has been adduced by the defence to prove such a fact. Even from the cross-examination of the prosecution witnesses, factum of possession of the defence party members has not been elicited. Rather there is evidence to show that when Dingar Bhoi (non-appellant) prevented P.W.2 and his labourers from ploughing the land, P.W.2 asked him to get the land demarcated and possess the same, if it falls under his ownership. There is further evidence to show that when Dingar Bhoi (non-appellant) assaulted P.W.2, he raised shout, and on hearing his shout all the appellants



came over the spot land in a group and mounted the assault on P.W.2 and the deceased, as a result of which the deceased died at the spot and P.W.2 sustained injuries. In view of such positive evidence, contentions raised by learned counsel for the appellants in absence of any evidence to substantiate such contention, merits no consideration.

10. So far as the last contention regarding justifiability of conviction under Section 302/34, I.P.C., when the charge was framed under Section 302/149, I.P.C. is concerned, learned trial court, following the ratio in the case of **Dhanna, etc. vrs. State of Madhya Pradesh**, AIR 1996 SC 2478 having negatived such contention, we do not find any justification to take a different view.

11. In view of our discussions supra, the appeal is devoid on merit and the same is accordingly dismissed. The appellants are stated to be on bail. In view of dismissal of the appeal, the bail granted to the appellants in the appeal is cancelled and the appellants be apprehended and remanded to custody for serving the sentence.

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**L. Mohapatra, J.** I agree.

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