HIGH COURT OF ORISSA,
CUTTACK

JAIL CRIMINAL APPEAL No.243 OF 1998

From the judgment and order dated 30.06.1998 passed by Shri Harish Chandra Mohapatra, Additional Sessions Judge, Jeypore-Koraput in Sessions Case No.66 of 1997.

Damburu Gadaba ..... Appellant

Versus

State of Orissa ..... Respondent

For Appellant - Mr. Gokulananda Sahu

For Respondent - Mr. J.P. Pattnaik,
Addl. Government Advocate

PRESENT

THE HON'BLE SHRI JUSTICE PRADIP MOHANTY
A N D
THE HON'BLE SHRI JUSTICE B.P.RAY

Date of hearing & judgment : 26.02.2010

PRADIP MOHANTY, J. In this appeal from jail, the appellant seeks to assail the judgment and order dated 30.06.1998 passed by the learned Additional Sessions Judge, Jeypore in Sessions Case No.66 of 1997 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. Case of the prosecution, as unfolded during trial, is that on 01.01.1997 at about 9.30 PM when the deceased Archita Gadaba, who is the informant's father's younger brother, was washing his hands after taking the night meal, the appellant started quarrelling with him and threatened to kill him. Saying so, the appellant assaulted on the head of the deceased by means of an axe

with which he was then armed causing severe bleeding injury. Due to such assault, deceased fell down on the floor and became senseless. The informant and others then shifted the deceased to Rabanaguda PHC in that unconscious state. As the deceased did not regain his sense, the informant lodged FIR in Borigumma Police Station. The case was initially registered under section 307, IPC. But as the deceased succumbed to the injury it was turned to one under Section 302, IPC, investigation was taken up and after its completion charge-sheet was submitted against the appellant under section 302, IPC.

3. Plea of the accused is one of complete denial of the allegation.

4. In order to prove the charge under Section 302, IPC, the prosecution examined as many as 16 witnesses including the doctor and the I.O. and exhibited 22 documents. Defence examined none.

5. The learned Addl. Sessions Judge, who tried the case, convicted the appellant under Section 302, IPC and sentenced him to undergo imprisonment for life basing upon the evidence of P.W.11, the sole eye witness, as well as the leading to discovery.

6. Mr Sahoo, learned counsel appearing for the appellant assails the judgment on the following grounds:

(i) P.W.11, who is said to be the only witness to the occurrence, was the wife of the deceased and as such is an interested witness and she tried to develop the story in court.

(ii) Leading to discovery has not been proved by the prosecution by adducing cogent evidence.

(iii) Seizure list (Ext.3) has not been proved by the prosecution.

(iv) It is alternatively argued that even if it is proved that the deceased died due to the assault given by the appellant, the appellant can only be convicted under Section 304 Part-I, IPC, since he allegedly gave one stroke to the deceased and no motive has been proved by the prosecution.

7. Mr. Pattnaik, learned Addl. Government Advocate vehemently contends that evidence of P.W.11 is clear, cogent and convincing that the appellant assaulted the deceased. There is no material to disbelieve her evidence, even though she was the widow of the deceased. While appellant was in custody he led the police as well as the witnesses to the place of concealment and gave recovery of the weapon of offence. Therefore, there is no illegality committed by the trial court convicting the appellant under section 302, IPC.

8. Perused the LCR. Considering the rival contentions made by the parties, this Court scrutinized the evidence of the witnesses. In the instant case, P.W.10 is the informant who lodged FIR before Boriguma Police Station immediately after shifting the deceased to the PHC. He specifically stated that on 01.01.1997 at about 9.30 PM after taking meal he was asleep. He heard the shout of Gorimani (P.W.11) and came out of his house. By the time he reached the spot, P.W.3 and P.W.1 were present and he saw deceased Archit lying in front of the courtyard of P.W.3 sustaining profuse bleeding injury on his head. Wife of the deceased (P.W.11) told him that the appellant had assaulted her husband by means of a tangia on his head. Thereafter, other villagers came. The injured was shifted to the PHC. Till next day, the deceased did not regain his sense. So, he lodged the FIR. Thereafter the deceased succumbed to the injury at 5.00 PM on 02.01.1997. He proved the FIR (Ext.7). On 03.01.1997, the I.O. in his presence held inquest over the dead body of the deceased, prepared inquest report vide Ext.1 and took his signature thereon. In cross-examination, nothing has been elicited

to disprove his testimony. The statement of P.W.10 gets corroboration from the FIR. P.W.11 is the only occurrence witness. She is the widow of the deceased. She specifically stated that on the date of occurrence at about 9.30 PM her husband after taking his dinner was washing his hands on his verendah and she was near him. At that time, the appellant taking liquor came towards their house, shouted as well as threatened her husband and dealt a tangia blow on his head. As a result, her husband sustained profuse bleeding injury and fell down in front of the courtyard of Kamal Lochan (P.W.3). Thereafter, appellant ran away from the spot with the tangia. When she raised cry, P.Ws.1, 3 and 10 rushed to the spot immediately and she narrated the occurrence before them. After the assault, her husband was unconscious and she with the help other villagers shifted him to Rabanaguda PHC for treatment. On the next day evening her husband died in the hospital. She also identified M.O.I as the weapon of offence used by the appellant. In cross-examination, she specifically stated that appellant gave one blow with M.O.I to the head of the deceased by its sharp side and thereafter ran away from the spot with the tangia. She admitted that at the relevant time except her daughter (aged about 5 to 6 years) and husband, nobody was present. Nothing has been elicited through cross-examination to discredit her evidence. P.W.1 is a co-villager who stated about the relationship of the deceased and the appellant. She specifically stated that appellant was the nephew of the deceased and her house situates near the house of the appellant and the deceased. On the date of occurrence, while she was sleeping inside her house with her children, hearing the shout of P.W.11 (wife of the deceased) she came out of the house and saw the deceased lying in the courtyard of Kamal Lochan sustaining bleeding injury. By that time, P.Ws.3 and 10 as well as other villagers had come to the spot. P.W.11, the wife of the deceased, told them that appellant had assaulted her husband by means of a tangia and fled away from the spot. The injured was shifted to Ramanaguda PHC and on the next

date at about 5.00 PM the deceased died in the said hospital. In cross-examination, she admitted that when she reached the spot, wife of the deceased was there and there was no other person. A suggestion was given by the defence that while she reached the spot, P.W.10 was inside her house, but she denied the same. P.W.2 is another co-villager and a post occurrence witness. He supported the version of P.W.1. Nothing has been brought out by the defence through cross-examination to disbelieve him. P.W.3 is yet another co-villager who reached the spot immediately after the occurrence. He also supported the version of P.W.1. P.W.4 is a witness to the seizure of blood stained earth. He stated that on 02.01.1997 police arrested the accused, and while in police custody the appellant produced the tangia in question which was seized by the I.O. in his presence. P.W.5 is another seizure witness. He also corroborated the statement of P.W.4. He specifically stated that the accused while in police custody led the witnesses and the police to his house, brought out the tangia in question from inside his house and produced the same before the I.O. The I.O. seized the same and prepared the seizure list Ext.3. He also put his signature in the said seizure list. He specifically stated that before production of the axe, appellant after confessing his guilt led them to his house and gave recovery of the tangia in question. The I.O. also recorded the statement in Ext.4 and he put his signature thereon. He is also a witness to the seizure of the wearing apparels of the appellant and identified M.O.I (tangia) seized by the I.O. In cross-examination nothing has been elicited from his mouth to demolish his evidence. P.W.6 is another seizure witness. P.W.7 is another co-villager and a post occurrence witness who supported the version of P.Ws.1 and 3. P.Ws.8 and 9 are witnesses to the seizure of bed head ticket. P.W.12 is the police constable and a witness to the inquest. P.W.13 is the Circle Inspector of Police. On 21.01.1997 he took charge of the investigation from the S.I. of Police, received chemical examination report (Exts.11 and 12) and submitted final form against the

appellant. P.W.14 is the Medical Officer, Rabanaguda PHC. He deposed that he treated the deceased and also advised to shift him to the Sub-Divisional Hospital, Jeypore. On 02.01.1997 at 5.30 PM the deceased succumbed to the injuries. He opined that the deceased was unconscious. The injuries seen on the body of the deceased were possible by M.O.I. Nothing has been elicited by way of cross-examination to belie his testimony. P.W.15 is the Medical Officer, Sub-Divisional Hospital, Jeypore, who conducted autopsy over the dead body of the deceased and found a sharp cutting injury in front parietal region of the right side of the scalp of size 1 cm length, 1 cm breadth and bone depth. On opening the scalp there was fracture of the frontal bone of the scalp. Cause of death was due to injury to the brain causing laceration of the fronto parietal region and haemorrhage with shock. He also opined that the injury was caused by a sharp cutting weapon. He proved the post-mortem report Ext.19. P.W.16 is the investigating officer who registered the case, investigated into the matter and handed over the charge of investigation to the C.I. (P.W.13). He specifically stated that on 02.01.1997 he arrested the accused. On the same day, while in custody the appellant led him to the place of concealment and gave recovery of the weapon of offence which he seized vide seizure list Ext.3. He also proved the statement of the appellant recorded by him vide Ext.4 when the appellant led him to the place of concealment and gave recovery of M.O.I. On the same day, he also seized the wearing apparels of the appellant in presence of the witnesses vide Ext.5. He also conducted inquest over the dead body vide Ext.1 and put his signature thereon marked Ext.1/3. He also seized the bed head ticket vide Ext.6. He specifically stated that the occurrence took place in front of the house of Kamal Lochan (P.W.3). The house of the deceased is 15 feet away from the house of P.W.3. The house of the appellant is closure to the house of P.W.3.

9. From the above analysis of the prosecution evidence, this Court comes to the conclusion that evidence of P.W.11 is clear, cogent and consistent. There is no material to disbelieve his evidence. His evidence is corroborated by the post-occurrence witnesses (P.Ws.1, 3 and 10). The medical evidence also supports the version of P.W.11 with regard to assault.

10. So far as leading to discovery is concerned, law is well settled that following conditions are necessary to be proved for application of section 27 of the Evidence Act:

(i) the fact of which evidence is sought to be given must be relevant to the issue.

(ii) the fact must have been discovered in consequence of some information received from the accused.

(iii) The person giving information must be accused of the offence; and

(iv) he must be in custody of police.

P.Ws.4 and 5 both proved Exts.3 and 4 with regard to leading to discovery. It has been proved by them that while appellant was in police custody he made a statement, led the police as well as the witnesses to the place of concealment and made discovery of the weapon of offence which was recovered by the police. P.W.5 and the investigating officer (P.W.16) have also proved the relevant statement of the accused under Ext.4. There is no material to disprove Exts.3 and 4. Therefore, all the conditions necessary for application of Section 27 of the Evidence Act have been fulfilled by the prosecution.

So, basing on the evidence of P.W.11 coupled with the medical evidence and leading to discovery, it can be safely concluded that appellant is the assailant of the deceased.

11. Now, it is to be seen whether the act committed by the appellant comes within the ambit of section 302, IPC or section 304 Part-I, IPC. In the instant case, the appellant gave one blow to the head of the deceased by a tangia. The doctor has also not opined that injury on head was sufficient in ordinary course of nature to cause death of the deceased. Therefore, by applying the ratio decided in ***Bharat Murmu & Ors v. State of Orissa***, 2008 (39) OCR 554, this Court converts the conviction of the appellant under section 302, IPC to one under section 304 Part-I, IPC and sentences him to undergo rigorous imprisonment for ten years.

It is stated at the Bar that the appellant is languishing in custody from the date of arrest and by now has already served out more than ten years. If that be so, the appellant Dambaru Godaba be set at liberty forthwith, unless his detention is required otherwise.

12. The Jail Criminal Appeal is disposed of accordingly.

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PRADIP MOHANTY,J.

B.P.RAY, J. I agree.

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B.P.RAY, J.

Orissa High Court, Cuttack
*The 26th February,2010****/G.D.Samal***