

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No. 95 of 2000

From the judgment and order of sentence dated 31.01.2000 passed by Shri G.B. Patnaik, learned Addl. Sessions Judge, Balangir in Sessions Case No.61/11 of 1998, under Section 302, I.P.C.

Sinema Behera ... **Appellant**

Versus

State of Orissa ... **Respondent**

For Appellant : Miss Madhusmita Sahani, Advocate.

For Respondent : Addl. Standing Counsel.

P R E S E N T:

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

Date of Hearing : 24.11.2010 Date of Judgment : 24.11.2010

1. This appeal is directed against the judgment dated 31.01.2000 passed by learned Addl. Sessions Judge, Balangir in Sessions Case No.61/11 of 1998, convicting the appellant for commission of the offence under Section 302, I.P.C. and sentencing her to suffer imprisonment for life.

2. Case of the prosecution is that on 27.01.1998 at about 10 a.m. the deceased Padma Behera, wife of Pandaram Behera and her father-in-law as well as the present appellant were quarreling over a small matter in front of their house. The appellant, who was holding a 'gadu' made of Aluminium, suddenly got annoyed and dealt four to five blows by means of the said 'gadu' on the head of the deceased by holding her hair. Due to such assault the deceased sustained injuries on her head. When she was being taken to the hospital for treatment, she succumbed to the injuries on the way. On this allegation F.I.R. having been lodged at police station, investigation was taken up and on completion of the investigation, charge-sheet was submitted against the appellant for the offence under Section 302, I.P.C.

3. The prosecution, in order to prove the charge, examined ten witnesses, out of whom P.Ws. 1 to 4 and 6 are eye-witnesses to the occurrence. P.Ws. 7 and 8 are post-occurrence witnesses and P.W.5 is a witness to the seizure of weapon of offence ('gadu'). P.W.9 is the doctor, who conducted the post-mortem examination on the dead body of the deceased and P.W.10 is the Investigating Officer.

The defence plea is one of complete denial to the prosecution allegation.

4. Appellant in his statement recorded under Section 313, Cr.P.C. stated that the deceased had committed suicide by taking poison. Learned trial court accepting the evidence of the eye-witnesses, found the appellant guilty of the charge and convicted him for commission of the offence under Section 302, I.P.C.

5. Learned counsel appearing for the appellant assailing the impugned judgment, submitted that even if the version of the eye-witnesses with regard to the assault is accepted, the appellant having used an aluminium 'gadu' for assaulting the deceased and the deceased having sustained only one injury on her head, the appellant could not have been convicted for commission of the offence under Section 302, I.P.C. and the appellant can only be liable to be punished under Section 304, Part-II, I.P.C.

Learned counsel for the State in support of the impugned judgment submitted that the eye-witnesses are consistent in their statement that the appellant assaulted the deceased on her head by means of an aluminium 'gadu' and the evidence of the said eye-witnesses are corroborated by the medical evidence. In view of the above, there is no reason for this Court to interfere with the impugned judgment.

6. We have carefully examined the evidence adduced on behalf of the prosecution. P.W.1 is an eye-witness to the occurrence and he has stated in his deposition that at the time of occurrence he was coming from his house and saw the appellant assaulting the deceased on her head by means of an aluminium 'gadu'. The deceased sustained bleeding injuries and requested him to take care of her. Thereafter this witness left for Balangir and after coming back from Balangir he learnt that the deceased has expired.

P.W.2 in her deposition has stated that in the morning of the date of occurrence she was standing in front of her house and saw the appellant assaulting the deceased on her head by means of a

‘gadu’ on the village ‘danda’. Due to such assault, the deceased had sustained bleeding injuries on her head.

P.W.3, another eye-witness to the occurrence has stated that she saw the incident while standing in front of her house and she has specifically stated that the appellant assaulted the deceased on the left side of her head by means of an aluminium ‘gadu’ four to five times, as a result of which the deceased sustained injuries on her head. Similar is the evidence of P.Ws.4 and 6.

On an analysis of the evidence of these eye-witnesses to the occurrence, we find that there is nothing to disbelieve their testimony and, therefore, learned Sessions Judge was justified in arriving at a conclusion that it was the appellant, who assaulted the deceased by means of an aluminium ‘gadu’ on her head.

7. Coming to the question as to whether the appellant is liable for conviction under Section 302, I.P.C. or not, we find that no eye-witness to the occurrence has stated that the appellant assaulted the deceased by means of said aluminium ‘gadu’ four to five times on her head. P.W.9, who conducted the post-mortem examination, found only one lacerated injury over the left side skull of the deceased and on dissection it was found that there was a fracture of the bone underneath the injury and the cause of death could not be clearly opined, but the approximate cause of death was due to injury and hemorrhage to the vital organ. It also appears from the evidence of the eye-witnesses that there was a quarrel between the deceased and the appellant immediately prior to the assault. Under such circumstance, we find sufficient force in the contention of the learned

counsel for the appellant that the offence was not to be one under Section 302, I.P.C. Considering the circumstances under which the appellant assaulted the deceased and the fact that there was only one lacerated injury on the head of the deceased, we are of the view that due to such quarrel between the deceased and the appellant, in a fit of anger the appellant assaulted the deceased instantly by means of the said aluminium 'gadu' on her head. Though the appellant had knowledge that such injury may cause death, he appears to have no intention to cause death of the deceased.

8. For the reasons stated above, we find that the appellant is only liable for conviction under Section 304, Part-II of the I.P.C. We accordingly set aside the impugned judgment of the learned trial court in convicting the appellant under Section 302, I.P.C. but found her guilty of the offence under Section 304, Part-II, I.P.C. and accordingly sentence her to suffer rigorous imprisonment for seven years. Since we find that the appellant Sinema Behera is in custody for more than ten years by now, she be set at liberty forthwith, unless her detention is required in any other case.

The Jail Criminal Appeal is accordingly allowed in part.

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L. Mohapatra, J.

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C.R. Dash, J.

Orissa High Court, Cuttack.
The 24th day of November, 2010. /*Parida*.