

**ORISSA HIGH COURT : CUTTACK**

**CRLA NOS. 361, 407, 420, 422 & 444 OF 2005**

From a Judgment dated 23.08.2005 passed by Shri A.K. Behera,  
learned Ad hoc Additional District & Sessions Judge (FTC-III), Cuttack  
in S.T. Case No.417 of 2003.

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**In CRLA 361/2005**

Yendava Jagannath Rao @  
Y. Jagannath Rao

..... Appellant

- Versus -

State of Orissa  
Respondent

.....

For Appellant : M/s. D. Panda, Dr. D.P. Dhal,  
A.K. Parida & A.K. Budhia.

For Respondent : Government Advocate

**In CRLA 407/2005**

Gaba Nandi

..... Appellant

- Versus -

State of Orissa

.....

Respondent

For Appellant : M/s. J. Rath, P.K. Tripathy &  
K.C. Baral.

For Respondent : Government Advocate

**In CRLA 420/2005**

Rama Chandra Das

..... Appellant

- Versus -

State of Orissa

.....

Respondent

For Appellant : M/s. Bijan Ray, Sr. Advocate,  
P.K. Sahoo, B.B. Mohanty,  
S.S. Mallik, P.K. Behera,  
U.C. Dora, H.P. Ojha, S. Pal,  
P.K. Sahoo, Gobinda Das.

For Respondent : Government Advocate

**In CRLA 422/2005**

Belu @ Surendra Kumar Das ..... Appellant

- Versus -

State of Orissa ..... Respondent

For Appellant : M/s. D. Panda, S.S. Ray,  
R.K. Nayak & R. Panda.

For Respondent : Government Advocate

**In CRLA 444/2005**

Akhaya Das ..... Appellant

- Versus -

State of Orissa ..... Respondent

For Appellant : M/s. D. Nayak, M. Mohanty,  
R.K. Pradhan, B. Rout,  
S.K. Jafarulla & P.S. Nayak.

For Respondent : Government Advocate

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**Decided on 29.10. 2011.**  
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**P R E S E N T :**

**THE HONOURABLE SHRI JUSTICE B.P. DAS  
A N D  
THE HONOURABLE SHRI JUSTICE M. M. DAS**

***M.M. DAS, J.***

The appellants in all the aforesaid appeals have challenged the order of conviction and sentence dated 23.08.2005 passed against them in Sessions Trial Case No.417 of 2003 by the

learned Ad hoc Additional Sessions Judge, Fast Track Court No.III, Cuttack.

2. The prosecution case in short is that on 25.04.2001, the informant Kabita Patnaik, P.W.5, while sitting with her family members, at about 1.30 P.M., an unknown young boy came to her house and knocked the door. On opening the door, the informant found that an unknown young boy, aged between 20 to 25 years, thin built, black complexion, was standing outside. On seeing her, he enquired as to whether her husband Raimohan Patnaik was there at home. On being informed by the informant that her husband has gone to office, who was working as a Senior Clerk in the Bureau of Statistics at Bhubaneswar, the said unknown boy told the informant that “Raimohan Patnaik KU KAHIDEBE SE ASILE, MUN TAKU HANIBI”. The informant thereafter asked him as to why he is speaking like that. But he only repeated the same and told her to inform Raimohan. On asking about his identity, he told that he is “Gaba” and staying at Rausapatna near Durgaghar. He again came after half an hour and enquired as to whether Raimohan has returned. On being told in the negative by the informant, repeating his earlier threatening, he went away. At about 10.00 P.M. in the night, when the husband of the informant returned, she informed him about the unknown boy identifying himself as “Gaba”, who came to their house and gave the threatening. She, therefore, asked her husband to give

information to the police, to which, her husband said that he will inform the police in the next morning, as it is late night. On the next day morning, as usual, the husband of the informant, i.e., Raimohan, woke up at 5.00 A.M. and after taking his bath, went to have DARSHAN of Lord Shiva and Hanuman in the temples nearby, which was his regular habit. At about 7.30 A.M., two unknown persons came to the house of the informant in a Luna and informed her that one black complexion unknown person having short height wearing spectacles, who stays in that house, has been injured by gunshot and lying in a pool of blood in front of the gate of one Gourahari Mukherjee, a retired Engineer at Kesharpur. On such information, the informant being frightened and awestruck along with her sister-in-law Minarva Patnaik and her maid-servant Malli, went to the spot and heard from the local people that the injured has been shifted to the S.C.B. Medical College & Hospital, Cuttack. She lodged a written information stating the above facts in the Dargha Bazar Police Station at 8.20 A.M. On receipt of the written report, P.S. Case No.30 dated 26.04.2001 was registered under Sections 326/307/120-B/34 IPC read with Sections 25 & 27 of the Arms Act by the I.I.C. and the S.I., B.C. Nayak was given the charge of the investigation of the case. S.I., B.C. Nayak thereupon proceeded to the spot, prepared the spot map, seized the blood-stained earth and sample earth from the spot by preparing seizure list, which was sent under requisition to the

Scientific Officer, D.F.S.L. He also examined the witnesses and recorded their statements. A Constable was posted by him to guard the spot and then, he proceeded to the S.C.B. Medical College & Hospital, Cuttack. He was informed by the Medical Officer at Casualty of S.C.B. Medical College & Hospital, Cuttack that Raimohan is unconscious and undergoing treatment. The Medical Officer also informed that the recording of dying declaration is not possible, as the patient was unconscious. Prior to the arrival of the S.I., Sri B.C. Nayak, S.I., Maguni Charan Das of Purighat Police Station had also submitted a requisition to the Medical Officer in-charge of the Casualty for recording the dying declaration of the injured, as the I.I.C., Gurdas Kundu of Purighat Police Station along with him shifted Raimohan to S.C.B. Medical College & Hospital, Cuttack in a police jeep and admitted him to the Casualty department. S.I., Sri B.C. Nayak also recorded the statement of the informant, received the Casualty memo from the Medical Officer regarding death of the injured Raimohan, who succumbed to the injuries. The case was converted to one under Section 302 IPC instead of Section 307 IPC and the Superintendent of Police, Cuttack as well as the S.D.J.M., Sadar, Cuttack were given intimation. Inquest was held in presence of the witnesses and an inquest report was prepared and then the dead body was despatched for post mortem examination under a dead body challan. S.I., Sri B.C. Nayak also during the course of investigation,

seized a fired cartridge, which was handed over to him by the Medical Officer, under a seizure list. Thereafter, being directed by the Superintendent of Police, Cuttack, he handed over the charge of investigation to Inspector Pravakar Mohanty, who was the Inspector In-Charge of Dargha Bazar Police Station. The said Investigating Officer during his investigation, conducted various enquiry at Old Rausapatna about the character of the deceased and ascertained that the deceased was an informer of the Crime Branch and prior to the incident, the accused persons Gaba Nandi, Akhaya Kumar Das, Y. Jagannath Rao and Ashok Kumar Jayswal were moving near the place of occurrence with a red colour Hero Honda Motor Cycle and a Scooter. He seized the blood-stained cloth of the deceased and another fired cartridge, which was recovered from the body of the deceased by the Medical Officer, conducting autopsy over the dead body, from the Havildar Sri M.S. Palai, who returned to the Police Station from the hospital after the post mortem examination was over. Thereafter, he proceeded to the spot and searched for the accused persons. He conducted raid and found accused Y. Jagannath Rao, Akhaya Das and one Paramananda Das as well as Gaba Nandi moving about at Old Rausapatna. They were apprehended and examined by him and they lead the police along with the witnesses to an open courtyard of a wine shop named as 'King N Kings' at Shiba Bazar under Purighat Police Station and gave recovery of one old Bajaj

Chetak Scooter bearing Registration No.OR-A-2200, a Hero Honda Motor Cycle bearing Registration No.OR-05-J-4929. The accused persons, who were arrested, were forwarded to the court of the learned S.D.J.M. (S), Cuttack. On 01.05.2001, the Ballistic Expert's report was received. Thereafter, the accused Surendra @ Belu and Rama Chandra Das, who were in jail custody in Circle Jail, Choudwar, were interrogated by the Investigating Officer and attempt was made to apprehend the accused Ashok Jaiswal, who was not traced. Post mortem report was collected by the I.O. The Bed Head Ticket of the deceased was also seized under a seizure list. On being directed by the D.I.G. of Police, the charge of investigation was handed over to Sri Ram Krupa Patnaik, D.S.P. The said Sri R.K. Patnaik, after taking over the charge of investigation, visited the spot, reexamined the witnesses, gave requisition to the R.T.A., Cuttack to furnish the information regarding ownership of the seized Scooter and Motor Cycle, examined the accused persons and also sought for sanction from the District Magistrate & Collector through the Superintendent of Police, C.I.D., Cuttack to prosecute the accused persons under Sections 25 & 27 of the Arms Act. He thereafter obtained such sanction, received the information from the R.T.A., Cuttack that the Scooter is in the name of one Khageswar Sahu of Rausapatna and the Motor Cycle is registered in the name of one Krushna Chandra Das of Rausapatna. He has also examined the

witnesses, conducted the T.I. Parade and after completion of the investigation, submitted the charge sheet against the accused appellants.

3. The further case of the prosecution is that on the information of the deceased Raimohan that Surendra @ Belu and Rama Chandra Das are carrying on illicit liquor business, their places of business and house were raided and they were arrested and were in custody. There was a conspiracy between the said Surendra @ Belu and Rama Chandra Das and the other accused persons to eliminate Raimohan, as on account of his information, the said two accused persons were arrested for carrying on illicit liquor business.

4. The plea of the accused persons was of complete denial of the prosecution case. The accused appellants Y. Jagannath Rao, Akhaya Das and Gaba Nandi were charged under Sections 302/34 IPC. Accused Y. Jagannath Rao was also charged for commission of offence under Section 27 of the Arms Act and all the accused persons were also charged for the offence under Section 120 – B IPC.

5. The prosecution has examined 31 witnesses, out of whom, P.W.5 was the wife of the deceased, who is the informant and P.W.4 is the sister of the deceased, who accompanied the informant to the spot on the fateful day. The other relatives of the deceased, i.e., the mother, nephew and agnatic nephew were examined as P.Ws. 21,



8 and 1. P.W.9 is the maid-servant, who accompanied the informant to the spot on the date of occurrence. P.Ws. 6, 7, 16, 20 & 11 are seizure witnesses with regard to the seizure of the Scooter, Motor Cycle, bullets, fired cartridge and other articles. P.W.13 is the registered owner of the scooter. P.Ws. 14 & 7 are also the seizure witnesses. P.W.8 Maguni Charan Das, S.I. of Police and P.W.22, Gurdas Kundu, I.I.C. were Police Officers, who shifted the injured to the S.C.B. Medical College & Hospital, Cuttack where he succumbed. P.W.12 is the Havildar, who accompanied the dead body for post mortem examination. P.W.23 is the Doctor, who treated the deceased in the Casualty and the other P.Ws. are the Senior Assistants of R.T.A., a lady Constable, who scribed the statement of one Rakesh Kumar Dutta, the D.F.O., Athagarh, who proved the institution of a forest case against the accused Surendra @ Belu and P.W.24 is the Doctor, who conducted the post mortem.

6. It may be noted here that there are no eye witnesses to the occurrence. It is clear from the post mortem report that there were gun shot injuries at the vital parts of the body found on the dead body of the deceased, which were ante-mortem in nature, fresh in duration and consistent with gun shot injuries on rifle fire arm from a close distance and death was due to shock and hemorrhage, as a result, injuries to the head and trunk. The doctor also opined that the

death was about three hours prior to the time of conducting the post mortem examination.

7. In the circumstances of the case, the most vital evidence adduced by the prosecution is P.W.22, namely, Gurdas Kundu, who was the I.I.C., Purighat Police Station and who shifted the injured Raimohan from the spot of occurrence to the S.C.B. Medical College & Hospital, Cuttack along with P.W.18 Sri Maguni Charan Das, S.I. of Police.

8. The prosecution has proved by the statement of the informant as well as other witnesses that the deceased Raimohan in the morning on the date of occurrence, went to the temple and they were informed that the deceased has been fired at. The F.I.R. has been proved by the informant P.W.5. P.W.22 Gurdas Kundu, I.I.C., stated in his evidence that on being informed, he along with the S.I., Maguni Charan Das went to the place of occurrence in a police jeep immediately. On arriving at the spot, he found that the deceased Raimohan was lying in a pool of blood in front of the gate of Gourahari Mukherjee, a retired Engineer. He shifted Raimohan to the S.C.B. Medical College & Hospital, Cuttack in the police jeep for his treatment. On the way, he enquired from Raimohan with regard to the persons, who committed the crime. To his query, Raimohan replied that he was a police informer and had given information to the Crime Branch Officer regarding illicit liquor business carried on by Surendra

@ Belu and Rama Chandra of Old Rausapatna. Basing on his information, the Crime Branch conducted raid and registered cases against both the persons and their associates and both of them were arrested and were in custody. Due to this reason, there was serious threat on his life and the entire liquor trade was stopped. They engaged people to kill him and for that reason, his associates fired on him. He has also stated that Raimohan was conscious and in a fit condition, when he told him as above. P.W.23, who was the Casualty Medical Officer on the date of occurrence, has stated that at the time when Raimohan was admitted, he was gasping and was unconscious, which in medical terminology is said to be in low condition.

9. P.W.24 is the Doctor, who conducted the post mortem. In his examination in court, he has stated that according to Modi Jurisprudence, a person can survive several gun shot injuries if those injuries do not involve the vital part and he can talk. No doubt, he has found gun shot injuries on the head, but he has also stated that the dissected features show fractured to the skull and fracture of skull has no relation to fatality or vitality of a person and it indicates only the amount of trauma applied to the head. From the seizure list marked Ext.3 showing seizure of the old Bajaj Scooter bearing Registration No.OR-OA-2200, which is signed by the accused appellant Gaba Nandi, who led to discovery of the said Scooter, it is revealed that under the heading "circumstances of seizure", it was

recorded that the accused Gaba Nandi, while in police custody, in presence of the witnesses, stated that accused Akhaya Das informed him that Surendra @ Belu from Choudwar jail, has called for him. Accordingly, he went to Choudwar jail on 24.04.2001 at about 12.00 noon and met accused Surendra @ Belu, enquired from him as to why he called for him. Surendra @ Belu told him that Raimohan Patnaik has put him and his brother inside the jail custody for which, he must be taught a lesson. He further told him that he will pay good money to him. He should go and meet the accused Akhaya Das and according to his instruction, he shall act. He paid him Rs.100/-. He has stated before the police, as recorded in the said seizure list that on returning, he met accused Akhaya, Jaga Rao and Ashok Behari. As per their instruction, he went to the deceased Raimohan's house on 25<sup>th</sup> April and gave the threatening. Further, as per their instruction, on 26<sup>th</sup> April in the morning, in the Scooter, which was given to him by the accused Akhaya, he carried Raimohan from near the Devighar of their Sahi to Kesharpur. The moment Raimohan was left there, Akhaya and Jaga Rao came in a motor cycle to the spot, stopped the motor cycle near Raimohan and Jaga Rao took out the pistol and fired one shot at his head. He thereafter, went away along with the scooter, which he kept at the place where, it was recovered in presence of the witnesses. Accused Akhaya Das has also given such statement, which was recorded in the seizure list Ext.4 under which, the motor cycle

was recovered and seized, the said accused Akhaya having led to discovery of the same.

10. The learned trial court having analyzed the above evidence and other evidence produced, came to the conclusion that the prosecution has proved the charges under Sections 302/120-B IPC and under Section 27 of the Arms Act against the accused Y. Jagannath Rao, under Section 302/34/120-B IPC against accused persons Akhaya Das and Gaba Nandi and under Sections 302/120-B IPC against accused Surendra @ Belu and Rama Chandra Dash and found them guilty of the said charges and recorded the conviction for the said offences. Hearing on the question of sentence, the learned trial court has sentenced all the accused persons for the respective charges for which, they faced the trial, for life without any separate sentence for the offence committed under Section 27 of the Arms Act.

11. The learned counsel for the appellants vehemently urged that the learned sessions court could not have recorded the conviction basing on the nature of evidence adduced by the prosecution, more specifically, could not have relied upon the so called dying declaration of the deceased given before P.W.22 stated to have been given at the time when he was being carried by P.W.22 and P.W.18 in the police jeep to the S.C.B. Medical College & Hospital, Cuttack. The learned counsel further submitted that the trial court could not have believed the evidence adduced for proving the charge

under Section 120-B IPC against the accused Surendra @ Belu and Rama Chandra Das. It was strenuously urged that the so called dying declaration having not been recorded by the Doctor or the Magistrate, the said evidence should have been discarded by the sessions court.

12. With regard to the charge of conspiracy, it was also urged that there being absence of any independent witness in support of the charge of conspiracy involving the accused Surendra @ Belu and Rama Chandra, benefit of doubt should have been extended to them and they should have been acquitted of the charges framed against them.

13. The Public Prosecutor, on the contrary, submitted that there is no dispute that the deceased Raimohan died on account of gun shot injuries, which amounts to the offence of culpable homicide amounting to murder. With regard to the involvement of the accused appellants in the crime, he submitted that under the peculiar circumstances of the case, considering the condition of the deceased, when he was being carried to the hospital by P.Ws. 22 and 18 in the police jeep, the statement given by the deceased before P.W.22 amounts to a dying declaration and is admissible in evidence under Section 32 of the Indian Evidence Act. In the fact situation of the case, such evidence cannot be left out of consideration, just because of the exception provided in sub-section (2) of Section – 162 Cr. P.C. He further submitted that it is a well settled position of law that

conspiracy is always hatched in secrecy and there cannot be always direct evidence with regard to such conspiracy. But if there is evidence to show that the accused persons conspired to commit an offence and the offence has been committed, all such accused persons are liable to be convicted for such offence under Section 120 – B IPC.

14. The Supreme Court in the case of ***Dalip Singh & others v. State of Punjab***, A.I.R. 1979 SC 1173, with regard to admissibility of dying declaration recorded by a police officer during investigation and its evidentiary value, relying upon its earlier decision in the case of ***Mannu Raja v. State of Madhya Pradesh***, A.I.R. 1976 SC 2199 held that although a dying declaration recorded by a police officer during the course of investigation is admissible under Section 32 of the Indian Evidence Act, in view of the exception provided in sub-section (2) of Section 162 Cr. P.C., 1973, it is better to leave such dying declaration out of consideration unless the prosecution satisfies the court as to why it was not recorded by the Magistrate or by the Doctor. In the case of Mannu Raja (supra), the Supreme Court observed that the practice of the Investigating Officer himself recording a dying declaration during the course of investigation, ought not to be encouraged, but by that, it is not meant to suggest that such dying declarations are always not trustworthy. The Supreme Court led emphasis that better and more reliable methods of recording a dying declaration of an injured person, should

be taken recourse to and the one recorded by the police officer may be relied upon, if there was no time or facility available to the prosecution for adopting any better method. *(emphasis supplied)*

15. In the case of ***Charipalli Shankararao v. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad*** A.I.R. 1995, SC 777 with regard to dying declaration and its admissibility under Section 32 of the Indian Evidence Act, the Supreme Court held as follows :-

“It is not the requirement of law that the person making the dying declaration should make an elaborate and exhaustive statement so as to cover each and every aspect of the incident and narrate the whole history of the case. Thus, where the death of deceased caused due to burn injuries and the medical evidence showing that the deceased suffering 90 per cent, burns and have been under a severe stress and agony, the detailed statement covering the minutest details could not be expected from the declarant and, therefore, the statement of the declarant that it was accused alone who poured kerosene oil and set her body on fire by lighting match stick does not suffer from any infirmity so as to render it doubtful or unworthy of reliance.”

16. In the case of ***Prakash v. State of Madhya Pradesh***, A.I.R. 1993 SC 65, the Supreme Court, while considering the admissibility of a dying declaration held that where the deceased victim knew the assailants and gave their names to his family members at the first opportunity, such dying declaration can be relied upon. It is also a settled position of law that if the court is satisfied



that a dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction of such a dying declaration, even if there is no corroboration. As early as in 1958, the Supreme Court in the case of ***Khushal Rao v. State of Bombay*** A.I.R. 1958 SC 22 considering the admissibility of a dying declaration in the said case, laid down that once the court has come to the conclusion that the dying declaration was the truthful version, as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

17. In the instant case, there is absolutely no reason as to why the statement of the deceased prior to his death, while being carried to the hospital, given before P.W.22, should be disbelieved. The said statement of the deceased is free from any effort from any quarters to prompt him to make the same. We, therefore, hold that such dying declaration is admissible into the evidence under Section 32 of the Indian Evidence Act and does not require any corroboration and even the conviction can rest on such statement alone. But in the instant case, we also find that accused Gaba and Akhaya , who led to discovery of the scooter and motor cycle, though in police custody, have also stated that they committed the crime on being instructed and paid by accused Surendra @ Belu, who was in custody along with his brother accused Rama Chandra and who stated before them

during conversation at the jail that it was due to Raimohan, they are in custody and Raimohan should be taught a lesson and paid money to accused Gaba saying that he will be paid his dues, if he works according to the instruction given to him by accused Akhaya. It is a settled position of law that evidence of acts and statements of co-conspirators in pursuance of conspiracy could be taken into account. The reason for the accused persons to conspire is well founded by the evidence of P.W.28 Sri Rama Krupa Patnaik, who testified that during his investigation, on verification of record, he found that accused Belu was sent up in a series of cases, which is mentioned in the Case Diary dated 30.09.2001. He was also sent up in Cuttack District Forest Range Office Non-F.I.R. No.23 dated 22.09.2000 under Section 27 of the Orissa Forest Act and deceased Raimohan was a prosecution witness in some of the cases.

18. Considering all the evidence adduced by the prosecution, even though there is no direct evidence available, we find that the chain of circumstances is complete to show that there was a conspiracy between all the appellants to eliminate Raimohan (deceased), consequent to which, Raimohan was brutally shot dead in the early hours of 26<sup>th</sup> April, when he was going to have a DARSHAN of the deities in his own Sahi.

19. We, therefore, find that the learned Ad hoc Additional Sessions Judge, Fast Track Court No.3, Cuttack has correctly

appreciated the evidence adduced by the prosecution and rightly found the accused appellants to be guilty of the offence for which, they were charged and passed the sentences, as stated earlier. We, therefore, find no reason to interfere with the judgment passed by the learned Ad hoc Additional Sessions Judge, Fast Track Court No. III, Cuttack and confirm the convictions and sentence passed against the accused appellants.

20. In the result, therefore, all the aforesaid appeals stand dismissed. Accused persons, who are on bail, be brought to custody to serve the sentence.

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***M. M. Das, J.***

**B.P. Das, J.** I agree.

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**B.P. Das, J.**

***Orissa High Court, Cuttack.  
 October 29<sup>th</sup>, 2011/Biswal.***



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