

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No. 86 of 2003

Arising out of the judgment and order of sentence dated 17.05.2003 passed by Shri A.K. Das, learned Addl. Sessions Judge, Malkangiri in Sessions Case No. 133 of 1999 (Original S.C. No.279/99 of the Sessions Judge, Koraput, Jeypore), under Section 302, I.P.C.

Somanath Hantal

... **Appellant**

Versus

State of Orissa

... **Respondent**

For Appellant : Mr. B.C. Parija, Advocate.

For Respondent : Mr. Sangram Das, 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 Argument : 15.05.2012

Date of Judgment : 15.05.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 17.05.2003 passed by learned Addl. Sessions Judge, Malkangiri in Sessions Case No.133 of 1999 (Original S.C. No. 279/99 of the Sessions Judge, Koraput, Jeypore), convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. It was 8.00 P.M. on 02.04.1999, a Friday. "Chaitra Parba" was being observed in the spot village on that day. After day-long song and dance, all in the village had already retired for sleep. Kamala Hantal (P.W.3), wife of the deceased, hearing shouts near the house of the appellant ran there to find that the appellant by a 'Sisu Thenga' (rosewood stick) was assaulting her husband Bandhua Hantal (deceased). Meanwhile her co-villager Ramana Pangi (P.W.5) also reached at the spot. They both tried to separate them in vain. The deceased fell down sustaining injuries as a result of the assault by the appellant. On F.I.R. being lodged vide Ext.7, investigation was taken up, and on completion of investigation, charge-sheet was filed implicating the appellant under Section 302, I.P.C.

3. Prosecution has examined eight witnesses to prove the charge, out of whom P.Ws.3 and 5 have been examined as eye-witnesses to the occurrence and the I.O. (P.W.8) including the Medical Officer (P.W.2) are relevant witnesses for our discussion in the appeal.

Defence plea is one of complete denial, but none was examined by the defence.

4. Learned counsel for the appellant submits that there being material contradictions in the evidence of P.W.3 and P.W.5 having ipse dixit testified that she reached the spot after the occurrence, no reliance can be placed on the evidence of the aforesaid witnesses, and the conviction on the basis of the evidence of the aforesaid eye-witnesses is not sustainable in the eye of law. Alternatively, it is contended that all the injuries found on the dead body of the deceased being superficial in nature and the deceased having died of rupture of his spleen, the appellant can, at best, be convicted for the offence under Section 304, Part-II, I.P.C.

Learned Addl. Standing Counsel on the other hand supports the impugned judgment and order of sentence.

5. P.W.5, in her examination-in-chief, has testified that the appellant being armed with a lathi came near the house of deceased Bandhua Hantal and assaulted him by giving lathi blows on his chest and all over his body. She went and intervened. Wife of the deceased was also very much present there when the occurrence took place. Out of fear, she left the spot. In her cross-examination however she has specifically stated that she saw the deceased while he was lying dead after receiving assault; the wife of the deceased was also present there. Further, in paragraph-3 of her cross-examination, she has testified that she heard hulla at the time when she was taking her meal and after taking meal she came out and went to the spot. From such evidence it is clear that P.W.5 has not seen the occurrence of assault. She being attracted by the hulla came to the spot after taking her meal, as she was taking meal by the time she heard hulla, and saw the dead body of the deceased lying after receiving assault. P.W.3, who is none other than the wife of the deceased, has testified that while her husband was present in the house, the appellant being armed with a 'thenga' entered immediately into their house and assaulted her husband by dealing 'thenga' blows on his chest and other parts of the body. She tried to intervene and separate them, but failed. Her husband sometimes thereafter succumbed to the injuries. She has further testified that her husband was assaulted in the backside verandah of their house. She testified to have gone outside after the occurrence to inform the villagers. P.W.3 has not at all testified about presence of P.W.5 or about her (P.W.5's) arrival at the spot after the occurrence. In view of such fact, P.W.5 can only be held to have

corroborated P.W.3 to the extent that she (P.W.5) heard hulla and coming to the spot she saw the dead body of the deceased. She (P.W.5) cannot be held to have seen any part of the occurrence so far as the assault is concerned, and such fact has also been testified by P.W.5 in her cross-examination. So far as P.W.3 is concerned, there is no contradiction in her evidence except the fact that she had not stated before the I.O. that the accused being armed with lathi entered inside their house and assaulted her husband by lathi. On reference to the statement of P.W.3, as recorded by the I.O., we find that in her statement before the I.O. recorded under Section 161, Cr.P.C., instead of saying 'lathi', P.W.3 has stated that the appellant was armed with a "Sisu Katha" (rosewood stick). P.W.3 being rustic and illiterate and she having been examined in Court after about four years of the occurrence, it cannot be held that her testimony in the Court saying the appellant coming to her house being armed with a 'thenga' / lathi, is a contradiction, in as much as any wooden stick of a length, may it be made of any wood, is called a 'lathi' or 'thenga' in common parlance. Nothing has been elicited in the cross-examination of P.W.3 to discredit her sworn testimony. Further, we find no reason for P.W.3 to falsely implicate the appellant, when she herself in her cross-examination has testified that there was no enmity or ill feeling between the appellant and the deceased prior to the incident. P.W.3 is corroborated by the evidence of the Medical Officer (P.W.2) apart from the limited corroboration she gets from P.W.5. The Medical Officer (P.W.2) has found five abrasions on different parts of the body of the deceased, which are opined to have been caused by the weapon of offence produced on seizure by the I.O. (P.W.8). In view of such fact, we do not find any justification to depart from the conclusion arrived at by the learned Trial Court so far as question of guilt of the appellant is concerned,

and we confirm the finding of learned Trial Court to the extent that it was the appellant, who caused death of the deceased by assaulting him with a lathi.

6. Coming to the next contention of learned counsel for the appellant, it is found that P.W.3 ipse dixit has testified that there was no enmity or ill-feeling between the appellant and the deceased. The occurrence happened all of a sudden and the appellant gave four / five blows to the deceased by a lathi, which are opined to have resulted in injuries superficial in nature, in paragraph-5 of the cross-examination of the Medical Officer (P.W.2). The cause of death of the deceased is however haemorrhage due to rupture of spleen, as testified by P.W.2.

7. Regard being had to the nature of injuries which are specifically opined to be superficial in nature by the Medical Officer, situs of the injuries and the weapon of offence used, which is a lathi, we are of the view that the act of the appellant cannot be brought under any of the Clauses of Section 300, I.P.C., but he having used a lathi and having assaulted the deceased all of a sudden by that lathi, he is to be held to have the knowledge that he is likely by such act to cause death of the deceased, though the injuries resulted are opined to be superficial in nature by the Medical Officer. It is the opinion of the Medical Officer (P.W.2) that possibility of rupture of the spleen may be there, if sufficient external force is applied. The evidence is not clear as to whether the deceased was assaulted in a standing position or in a sleeping position or whether he fell down on receiving the assault. It might have so happened that the deceased having fallen down on receiving the assault, might have ruptured his spleen or any of the blows by the appellant on the abdomen with relatively more external force might have caused rupture of the spleen. On analysis of the external injury caused on the dead body of the

deceased, we find that three injuries are on the abdomen, one on the left arm and another on the forehead and all the injuries are opined to be superficial in nature. If the appellant had intention to kill the deceased, he would have selected vital parts of the body of the deceased to mount the assault. In view of the aforesaid facts, we are of the view that the act of the appellant would fall under Part-II of Section 304, I.P.C. and not under Section 302, I.P.C.

8. In view of the above, the conviction of the appellant under Section 302, I.P.C. is modified to one under Section 304, Part-II, I.P.C. The appellant was in custody for more than eight years, as submitted at the Bar, and he is stated to have been released on bail by the order of this Court on 21.07.2008. In view of such fact, the sentence of the appellant under Section 304, Part-II, I.P.C. is confined to the period he has already suffered as U.T.P. He be discharged of the bail bonds executed in the present case.

The appeal is accordingly allowed in part.

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C.R. Dash, J.

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L. Mohapatra, J.

Orissa High Court, Cuttack.
The 15th day of May, 2012. /Parida.