

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No.8 of 2006

(From the judgment and order of sentence dated 27.08.2005 passed by Shri B.K. Chand, learned Ad hoc Additional Sessions Judge (F.T.C.), Baripada in S.T. No. 9/56 of 2005-04, under Sections 302/201/34, I.P.C.)

Maldas Hansda and another ... **Appellants**

Versus

State of Orissa ... **Respondent**

For Appellants : Mrs. Pramila Mohanty, Advocate.

For Respondent : Mr. Sangram Das, Addl. Standing Counsel.

PRESENT :-

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

Date of hearing : 24.08.2012

Date of judgment : 31.08.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 27.08.2005 passed by learned Ad-hoc Addl. Sessions Judge (F.T.C.), Baripada in S.T. No.9/56 of 2005-04, convicting both the appellants for offence under Sections 302/201/34, I.P.C. and sentencing each of them to suffer imprisonment for life and to pay fine of Rs.2,000/- (two thousand) each, in default, to suffer R.I. for six months more for offence under Section 302/34,

I.P.C. and to suffer R.I. for three years and to pay fine of Rs.2,000/- (two thousand) each, in default, to suffer R.I. for six months more for offence under Section 201/34, I.P.C. with direction for concurrent running of the sentences.

2. Malli @ Maina Hansda is the deceased. She was the first wife of appellant no.1 Maldas Hansda, whose second wife is Budhini Singh @ Hansda (appellant no.2). Both the appellants were staying together. The deceased was staying elsewhere. At about 5.30 p.m. on 21.09.2003 deceased Maina Hansda came to the house of the appellants when they were there in the house and quarreled with appellant no.1 Maldas Hansda alleging as to why he is not looking after her (Maina Hansda). Then she (deceased) went away. Appellant no.1 Maldas Hansda, out of anger, followed her holding a bamboo lathi (M.O.-I) and assaulted deceased Maina Hansda near the house of one Chhunu Majhi (not examined). Appellant no.2 Budhuni Singh @ Hansda arrived there. Deceased Maina Hansda had lost her consciousness as a result of the assault. Both the appellants took the deceased to their house. The deceased succumbed to the injuries in the mid night. Both the appellants thereafter buried the dead body in a nearby place across the railway-line with a view to disappear the legal evidence concerning death of the deceased. Neighbourers of the appellants, namely, Jogeswar Kalandi (P.W.6), Chhunu Majhi (not examined), Paban Baskey (not examined), etc. enquired from the appellants regarding the whereabouts of deceased Maina Hansda, but the appellants took the plea that the deceased has gone away in the morning. On 27.09.2003, after about six days of the occurrence some of the villagers grew suspicious and assaulted both the appellants suspecting some foul play by both of them in missing of the deceased. On being assaulted, the appellants confessed to have buried the dead body of the deceased near the railway-line. Someone from the village concealing his identity informed to the P.S. over

telephone regarding murder of the deceased. The S.I. of Police (P.W.14) on being directed by the O.I.C. enquired about the veracity of the phone call. F.I.R. being registered by S.I. of Police (P.W.14), the case was investigated into and on completion of investigation, charge-sheet was filed against the appellants implicating them in offence under Sections 302/201/34, I.P.C.

3. Prosecution examined 17 witnesses to prove the charge, including P.Ws.6 and 7, who are neighbours of the appellants and had seen the assault by the appellants on the deceased on 21.09.2003. P.W.11, who is a co-villager of the appellants, is a witness to the quarrel between appellant no.1 Maldas Hansda and the deceased. P.W.17 is the Medical Officer, who conducted autopsy. P.Ws.13 and 15 are the I.Os., out of whom P.W.13 had submitted charge-sheet on completion of the investigation.

The defence plea is one of complete denial and two Medical Officers were examined by the defence to prove the injuries on the person of appellant no.1 Maldas Hansda.

Learned Trial Court, on consideration of the eye-witness account of P.Ws.6 and 7, evidence of conduct of appellant no.2 so far as seizure of the dead body of the deceased is concerned and other evidence, found the appellants guilty under Sections 302/201/34, I.P.C. and convicted them thereunder.

4. Learned counsel for the appellants submits that there being no evidence relevant and admissible under Section 8 of the Evidence Act and the eye-witness account of P.Ws.6 and 7 being infirm, the conviction of the appellants is not sustainable in the eye of law.

Learned Addl. Standing Counsel on the other hand supports the impugned judgment.

5. Though a number of witnesses have been examined in the case and Exhibits have been proved, it is admitted at the Bar that conviction of the appellants is based on evidence of P.Ws.6, 7, 11 and recovery of the dead body from the place of its burial on being pointed out by appellant no.2 Budhini Singh @ Hansda.

6. It is fairly submitted at the Bar that the I.O. (P.W.15) is designedly silent about recording of statement of any of the appellants under Section 27 of the Evidence Act. P.W.16, who is an independent witness to the factum of recovery of the dead body, has only testified that appellant no.2 Budhini Hansda showed the place of burial while she was in police custody, from where the police recovered the dead body. P.W.15 (I.O.) is however totally silent on this aspect. P.W.6, who is another witness to the factum of such discovery of the dead body, has testified that on the basis of confession by appellant no.1 Maldas Hansda and appellant no.2 Budhini Hansda, the dead body of the deceased was recovered at the instance of appellant no.1 Maldas Hansda, as he led the I.O. and other villagers including himself (P.W.6) to the place where the dead body was buried. The I.O. (P.W.15) on the other hand has testified that on arrest of appellant no.1 Maldas Hansda, he was sent to the District Headquarter Hospital, Baripada with requisition for his medical treatment and he (appellant no.1) was arrested only on 02.10.2003 on his discharge from the hospital. P.W.15 (I.O.) is totally silent on the aspect of recovery of the dead body. Admittedly, both the appellants had sustained injuries. Such fact has been proved by the Medical Officers (D.Ws.1 and 2) and the defence finds corroboration from the evidence of P.Ws.6 and 7, who have testified that on being suspicious about their conduct, the villagers had assaulted the appellants three/four days after the incident of assault by

appellant no.1 Maldas Hansda on the deceased. P.W.14, the S.I. of Police, who was deputed to verify the authenticity of the phone call regarding concealment of a dead body in the spot village, has reported in the F.I.R. that on being assaulted by the villagers, both the appellants had confessed their guilt. Such a fact itself goes a long way to show that the factum of concealment of the dead body in the spot village in the place from where it was disinterred was a known fact by the time investigation was taken up. In view of the designed silence of the I.O. (P.W.15) and contradictions in the evidence of P.Ws.6 and 10 regarding the person at whose instance the dead body was recovered, it is not possible to hold the conduct of appellant no.2 Budhini Hansda to be relevant and admissible under Section 8 of the Evidence Act. It cannot, therefore, be held that the dead body was recovered on being pointed out by appellant no.2 Budhini Singh @ Hansda and her such conduct is relevant under Section 8 of the Evidence Act.

7. Coming to the next piece of evidence, on which learned Additional Standing Counsel relies heavily, it is found that P.Ws.6 and 7 had seen the deceased being assaulted by appellant no.1 Maldas Hansda with a bamboo lathi at about 5.00 / 5.30 P.M. on 21.09.2003. P.W.6 has testified that both the appellants assaulted the deceased by means of a bamboo lathi, for which she fell down on the ground and the appellants took her inside the house. P.W.7 has, however, testified that he found Maina Hansda (deceased) visited the house of Maldas Hansda (appellant no.1); seeing her, appellant Budhini Hansda told her that has she been to the house to be assaulted; thereafter appellant Maldas assaulted the deceased Maina by means of a bamboo stick, and when she fall down, appellants Maldas and Budhini lifted her inside the house. P.W.11 has, however, testified that at the relevant time he found appellant no.1 Maldas and the deceased were quarrelling with each

other and appellant no.1 Maldas was holding a bamboo lathi. Evidence of P.W.6 speaks of assault by both the appellants. Evidence of P.W.7 gives another story of assault by appellant no.1 Maldas Hansda and involvement of appellant no.2 Budhini Hansda in lifting the deceased along with appellant no.1 Maldas Hansda when the deceased fell down on being assaulted by appellant no.1. Evidence of P.W.11, however, speaks of presence of Maldas Hansda with a lathi and the deceased at the spot and it is testified by him (P.W.11) that both of them were quarrelling. P.W.11 is totally silent about presence of appellant no.2 Budhini Hansda.

8. P.Ws.6, 7 and 11 being the co-villagers of the appellants must have found the deceased missing; they did not however open their mouth till investigation was taken up, though they are asserted to have seen the assault on the deceased. Their silence for a long time without any explanation casts serious doubt about their veracity. In view of the nature of evidence, we do not feel persuaded to rely on the evidence of P.Ws.6, 7 and 11, so far as the assault on the deceased, or for that matter their seeing the deceased last in the company of the appellants are concerned.

9. It is an admitted fact that the deceased was staying alone elsewhere and she was not staying in the company of the appellants. Some blood-stained earth was seized from the house of the appellants, but there is nothing on record to show that the blood-stained earth seized from the house of the appellants tallies with the blood of the deceased. Rather the nature of injuries sustained by the deceased, which are bruises, might not have resulted in any bleeding. On the other hand, both the appellants on being assaulted by the villagers had sustained bleeding injuries. The villagers might have assaulted the appellants on being guided by their suspicion, about the

involvement of the appellants in the matter and such suspicion has also percolated so far as the basis of the prosecution case is concerned. The prosecution case, in view of our discussion supra, cannot be held to have been proved beyond reasonable doubt. Accordingly the appellants are entitled to the benefit of doubt.

10. In the result, the impugned judgment and consequent order of sentences are set aside. The appeal is accordingly allowed. Both the appellants be released from custody forthwith, if their detention is not required in any other case.

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L. Mohapatra, J. I agree.

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Orissa High Court, Cuttack.
The 31st day of August, 2012. / *Parida.*