

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No.6 of 2006

(From the judgment and order of sentence dated 28.10.2005 passed by Shri J.K. Dash, learned Ad hoc Additional Sessions Judge (F.T.C.), Baripada in S.T. Case No. 29/74 of 2005, under Section 302/34, I.P.C.)

Deben @ Debendra Munda and another ... **Appellants**

Versus

State of Orissa ... **Respondent**

For Appellants : Mr. Ambika Prasad Ray, 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 : 16.08.2012

Date of Judgment : 31.08.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 28.10.2001 passed by learned Adhoc Addl. Sessions Judge (F.T.C.), Baripada in S.T. No.29/74 of 2005, convicting both the appellants for offence under Sections 302/34, I.P.C. and sentencing each of them to suffer

imprisonment for life and to pay fine of Rs.5,000/- (five thousand) each, in default, to suffer imprisonment for a further period of six months each.

2. The occurrence happened on 31.10.2004(Sunday), at about 6.30 P.M. when deceased Kala Moharana and his brother Niranjana Moharana (P.W.9) were returning to their village in two separate bicycles from Angarpada Hata (weekly market). Near the spot, both the appellants, who had ambushed themselves, suddenly came over and mounted assaults on both deceased and P.W.9. While appellant no.1 Deben @ Debendra Munda assaulted the deceased Kala Moharana with a Bhala (M.O.-I) held by him, appellant no.2 Sunaram Munda assaulted P.W.9 by a 'Thenga'. Throwing the bicycle there, P.W.9 ran for his safety and looking back from a distance, found both the appellants assaulting the deceased. He informed the matter to the villagers including the daughters of the deceased namely, Nilandri Moharana (P.W.3) and Surubudi Moharana (P.W.5) and also the Grama Rakhi namely Karna Bindhani (P.W.2). The villagers coming over the spot, found the deceased lying dead with injuries on his body. P.W.9 lodged report at the police station on the same day. On completion of investigation by P.W.14 in part and then by P.W.15 in part, P.W.15 submitted charge-sheet implicating the appellants under Section 302/34, I.P.C.

3. Prosecution has examined 14 witnesses including the witnesses introduced supra in the preceding paragraph. Besides the aforesaid witnesses P.W.11 is the Medical Officer, who had conducted the autopsy and P.W.10 is the Medical Officer, who had examined P.W.9 on police requisition.

The defence plea is one of complete denial, but none has been examined by the defence.

4. Learned Trial Court, on consideration of the evidence on record and especially the eye-witness account of P.W.9, found both the appellants guilty under Section 302/34, I.P.C. and accordingly recorded the conviction thereunder.

5. Learned counsel for the appellants submits that there being contradictions in the evidence of P.W.9 and the Medical Officer (P.W.11), it is not safe to make the evidence of P.W.9 the sole basis of conviction. Elaborating his submission, learned counsel for the appellants submits that P.W.9 is alleged to have seen appellant no.1 Deben @ Debendra Munda assaulting the deceased Kala Moharana by a 'Bhalla' (M.O.-I); said M.O.-I on production before the Medical Officer (P.W.11) and on being confronted to him, he (P.W.11) opined that the injuries found on the dead body of the deceased cannot be possible by M.O.-I unless it is attached with a long handle. In view of such opinion of the Medical Officer (P.W.11), learned counsel for the appellants wants us to disbelieve P.W.9, who is the sole eye witness in the case. Learned counsel for the appellant also draws our attention to some more peripheral contradictions in the evidence, some of which, if addressed, cannot be held to be sufficient to throw the prosecution case over board.

6. In view of the provision in Section 134 of the Evidence Act, it is admitted at the Bar that plurality of evidence is not the sine-qua-non to sustain a charge in a criminal trial. In the present case, P.W.9, who is admittedly the solitary eye-witness to the case, has been corroborated by the evidence of P.Ws.2, 3 and 5 inasmuch as immediately after the occurrence he (P.W.9) rushed to the village and informed the matter to P.W.2, who is the Grama Rakhi and P.Ws.3 and 5, who are none other than the daughters of the

deceased. Further, P.Ws.3 and 5 have testified that deceased Kala Moharana and their uncle Niranjan Moharana (P.W.9) had gone to the Weekly "Hata" together. P.W.9 has testified that he had seen both the accused persons in the weekly market, but by the time he and the deceased left the "Hata", both the appellants had already left by then. P.Ws.3 and 5 have testified that at about 5.00 P.M. both the appellants returned and hurriedly went somewhere taking with them something from their house in a concealed manner. About one hour thereafter, i.e., at about 6 / 6.30 P.M., P.W.9 rushed to the village to inform about the incident. If we look at the entire evidence of P.Ws.3, 5 and 9 in their entirety, it would be found that both the appellants had come back to their house prior to the deceased and P.W.9 and again they went to the spot where they had ambushed themselves. Conduct of P.W.9 in rushing to the village to inform about the occurrence immediately after the occurrence gets corroboration in material particular, from the evidence of P.Ws.2, 3 and 5. P.W.9 is further corroborated by the Medical Officer (P.W.11) to the extent that the injuries sustained by the deceased were caused by a weapon like M.O.-I, a sharp cutting weapon.

7. Submission of learned counsel for the appellants is to the effect that P.W.9 should be disbelieved on the ground that the Medical Officer (P.W.10), who examined him on police requisition, did not find any external injury on his body. P.W.9 is testified to have been assaulted by appellant no.2 Sunaram Munda by a lathi. On being so assaulted, he (P.W.9) ran for his safety by throwing the bicycle he was riding on the spot. Appellant no.1 Deben @ Debendra Munda having singled out deceased Kala Moharana for the fatal assault, it seems P.W.9 was never the target of the appellants. Appellants also did not chase P.W.9 for further assault when he ran away for his safety. In

such situation, the appellants might not have got chance or scope to attack P.W.9 with the intensity with which they assaulted deceased Kala Moharana. In view of such situation, absence of injury on the person of P.W.9, though he complained of pain over his left hip joint, left thigh on lateral aspect, upper 1/3rd of left leg and pain of whole left side back over scapula in course of his examination by P.W.10, cannot be a ground to disbelieve him. Further at times, assault by lathi may not leave any mark of injury except pain.

8. On the point of inconsistency between the Medical Officer (P.W.11) and the eye witness P.W.9, it is settled law (see **Solanki Chimanbhai Ukabhai v. State of Gujarat**; A.I.R. 1983 S.C. 484) that testimony of eye witness would be preferred to medical evidence unless the medical evidence completely rules out the eye witness version. Generally, the evidence of a Medical Officer is dismissed as opinion evidence. But such evidence relevant under Section 45 of the Evidence Act consists of two parts, i.e., (i) direct evidence and (ii) opinion evidence. Direct evidence is what the Medical Officer saw himself over the corpse / dead body, and opinion evidence is that part of his evidence, which relates to the weapon with which the injuries he saw might have been inflicted, the manner in which the deceased might have sustained the injuries, time since death, the time by which the deceased might have taken food from his death, etc. All these facts are opinion of the particular Medical Officer on the basis of certain indicators. In the present case, direct evidence of the Medical Officer is indicative of the fact that the injury found on the dead body may be caused by weapon like M.O.-I, but his opinion is to the effect that unless the weapon like M.O.-I is fitted with a long handle, the injuries sustained by the deceased may not be possible. Whether the handle fitted to M.O.-I by the time it was produced before P.W.11 was the

same when M.O.-I was used for assault or whether by the time it was produced before the Medical Officer (P.W.11), the handle was already broken in course of assault or in course of transit after seizure, are factors on which there are no materials to throw light. In view of such fact, we do not feel persuaded to accept the contention of learned counsel for the appellants and dismiss the eye witness account of P.W.9 on the basis of opinion by the Medical Officer (P.W.11).

9. In the result, we do not find any merit in the appeal and the same is accordingly dismissed.

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L. Mohapatra, J. I agree.

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