

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No. 36 of 2004

Arising out of the judgment and order of sentence dated 23.12.2003 passed by Shri Prahallad Mishra, learned Ad hoc Additional Sessions Judge (F.T.C.), Bolangir in Sessions Case No. 46-B/7 of 2003, under Sections 302, I.P.C.

Magsira Biswal

... **Appellant**

Versus

State of Orissa

... **Respondent**

For Appellant : Mr. Subhasis Sen, 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 and Judgment : 16.05.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 23.12.2003 passed by learned Ad hoc Additional Sessions Judge(F.T.C.), Bolangir in Sessions Case No. 46-B/7 of 2003 convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The occurrence happened at about 9.00 P.M. on a Saturday during Dushera in 2002 under the jurisdiction of Bolangir Town Police Station.

Rudramani Majhi (deceased) took his dinner and came out to the village lane to the shop of Antaryami Sai (not examined) to take betel. Near about that place appellant Magsira Biswal was shouting at the villagers using obscene words holding an axe. Deceased Rudramani Majhi counselled him to go back to his house. At this, appellant Magsira Biswal gave a blow with the axe he was holding on the head of Rudramani Majhi. Deceased Rudramani Majhi fell down. The appellant continued to give several blows on different parts of his body by that axe and went away. P.W.1 Surekha Majhi, who happens to be the wife of deceased Rudramani Majhi and other villagers including P.Ws. 2 and 6, took Rudramani Majhi to Bolangir hospital. He was admitted in a state of unconsciousness. The Medical Officer attending the injured Rudramani Majhi sent medical report to Bolangir Town P.S. On arrival of the police, Surekha Majhi(P.W.1) lodged the F.I.R. in the hospital. On registration of the case, Sadananda Pujari, S.I., Town P.S. Bolangir (P.W.14) took up investigation. On the next day of the occurrence Rudramani Majhi succumbed to the injuries. On completion of investigation P.W.14 filed charge-sheet implicating the appellant in offence under Section 302, I.P.C.

3. Prosecution has examined fourteen witnesses to prove the charge. P.W.1 Surekha Majhi is the widow of the deceased and she is the sole eye witness to the occurrence. P.Ws. 2 and 6 are the post-occurrence witnesses. P.W.5 is a witness to seizure of the axe (M.O.-I) at the instance of the appellant on the basis of his statement purported to have been recorded under Section 27 of the Evidence Act. P.W.2 and the Medical Officer (P.W.10) are the witnesses to dying declaration of the deceased recorded by the I.O. (P.W.14) on the basis of requisition from the Medical Officer (P.W.10). P.Ws.4 and 7 are witnesses to some seizures. P.W.3 is a witness

to inquest of the dead body of the deceased. P.W.12 is the scribe of the F.I.R. P.W.13 is the Revenue Inspector, who demarcated the spot of occurrence. P.Ws. 8, 9 and 10 are the Medical Officers. Out of whom, P.W.8 conducted autopsy on the dead body of the deceased. P.W.9 sent the death report to the Town P.S. when the deceased succumbed to the injuries on the next date of the occurrence. P.W.10 examined the deceased in injured condition on police requisition and is a witness to recording of his dying declaration. P.W.14 is the Investigating Officer.

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

4. Learned trial court on the basis of evidence on record found the appellant guilty under Section 302, I.P.C. and sentenced him thereunder.

5. Learned counsel for the appellant submits that if evidence of P.Ws. 1, 2 and 6 are taken into consideration in entirety, P.W.1 cannot be believed as an eye witness. It is further contended that the deceased being in coma at the time of his admission in the hospital could not have made the dying declaration and the purported evidence under Section 27 of the Evidence Act is of no avail to the prosecution.

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

6. Admittedly, P.W.1 is the only eye witness to the occurrence. From her evidence it is found that, she had also forbade the appellant from shouting with obscene words just before the occurrence and she had also seen him holding an axe before the occurrence. The spot of the occurrence according to P.W.2 in his cross-examination is at a distance of 15 cubits only

from the house of P.W.1 and the deceased. After taking his dinner the deceased came out of the house to take betel. The betel shop is at a distance of one house apart from the house of the deceased as testified by P.W.1 in her cross-examination. When the deceased came out, he told P.W.1 that he is going to take betel. P.W. 1 is quite emphatic on the fact that she came out and saw the assault by the appellant on her deceased husband. The defence has tried to demolish the evidence of P.W.1 by eliciting from her that the occurrence night was an 'Amabashya night' and by the time of occurrence all in the village had retired to sleep. P.W.1 very emphatically in her cross-examination has explained that she had seen the appellant before the occurrence and even she had asked him as to why he is shouting holding an axe and she (P.W.1) very emphatically told that she could also identify the appellant from his voice as he was shouting. If the injuries sustained by the deceased as found by P.W.10 is taken into consideration, it may be unerringly concluded that the appellant had given 6 / 7 blows by the axe and after the first assault on his head the deceased fell down and the appellant continued to assault. If proximity of the spot of occurrence from the house of P.W.1 and the deceased is taken into consideration which is only 15 cubits, it can be safely held that P.W.1 though was there in the house could have seen the occurrence rushing to the spot. Even if she is disbelieved on the point of her seeing the assault by the appellant on the deceased, the circumstances attending and following the assault as testified by P.W.1 would unerringly show involvement of the appellant so far as the assault is concerned and none else. P.W.1 is amply corroborated by P.W.6, who has testified that hearing the cries of P.W.1 he came out of the house and saw the deceased lying on the ground with bleeding injuries all over his body. There is no cross-examination of P.W.6 on this aspect and such evidence of P.W.6 amply prove

that on seeing the occurrence of assault P.W.1 raised alarm and hearing such alarm and shout P.W.6 came to the spot on being attracted. P.W.2 is another post-occurrence witness, who corroborates P.W.1 in material particular. Hearing hullah he (P.W.2) came out of the house and found the deceased lying on the village lane with blood on his body. Both P.Ws. 2 and 6 also helped in bringing the injured Rudramani Majhi to the hospital. In view of the above, if the evidence of P.W.1 is read along with that of P.Ws.2 and 6 we do not find any justification to disbelieve P.W.1 as an eye-witness to the occurrence.

7. Another clinching evidence by the prosecution is the evidence of dying declaration recorded in presence of P.Ws.2 and 10. P.W.10 is the Medical Officer, who examined the deceased Rudramani Majhi in injured condition and sent requisition to the I.O. to make arrangement for recording his dying declaration. On the basis of such requisition, the I.O. (P.W.14) recorded the dying declaration vide Exhibit-1 in presence of P.Ws. 2 and 10. Both the P.Ws. 2 and 10 has adduced unimpeachable evidence on the factum of recording of dying declaration of the deceased implicating the appellant and such fact is admissible under Section 32(1) of the Evidence Act. The Medical Officer (P.W.10) in his cross-examination has specifically testified that the deceased was not in a state of coma and before recording of dying declaration the deceased had told him the history of the injuries at the time of his admission. Medical Officer (P.W.10) has further certified that the deceased was in good mental state at the time he gave the statement vide Exhibit-1. P.W.10 is corroborated in material particular by P.W.2. There is nothing on record to suggest that there was possibility of tutoring the deceased to implicate the appellant. We would rather say that there is no

foundation of any sort in the evidence of any witness to even suggest possibility of tutoring of the deceased at the time of recording of dying declaration. We therefore, find no justification to reject the dying declaration vide Exhibit-1 on the sole unfounded ground that the deceased was in a state of coma at the time of his admission into the hospital. We feel persuaded to say here that the alleged state of coma of the deceased is on record in the form of a defence suggestion to the Medical Officer (P.W.10) which he has denied and there is no other material to come to a finding that the deceased was in a state of coma till he succumbed to the injuries.

8. Next evidence is the evidence regarding recovery of the axe at the instance of the appellant and admitted into the evidence purportedly under Section 27 of the Evidence Act. P.W.5 is an independent witness to the factum of statement given by the appellant while in police custody. According to P.W.5, the appellant told the police that he had kept the axe in a Nala near Madhiapali. He further told that if he was taken to that place, he would point out the axe. P.W.5 has testified that before he and the police party proceeded to the place of discovery of axe, the aforesaid statement of the appellant was recorded. The appellant thereafter took the police and the witnesses to a near by Nala(stream) and pointed out the place from where the axe (M.O.-I) was recovered by the police personnel. There is nothing in the cross-examination of P.W.5 to discredit his sworn testimony. The evidence of the I.O. (P.W.14) on the point of recovery of the axe (M.O.I) at the instance of the appellant finds full corroboration from P.W.5. We therefore, find no justification to interfere in this aspect. Lastly, learned counsel for the appellant justifies acquittal for absence of motive on the part of the appellant. Such a contention

does not however, commend to us as motive is not always necessary to prove a particular offence.

9. In view of the above, we do not find any reason than to concur the findings arrived at by learned trial court on the point of guilt of the appellant and the sentence recorded by it.

In the result, the appeal is dismissed being devoid of any merit.

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C.R. Dash, J.

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L. Mohapatra, J.