

ORISSA HIGH COURT, CUTTACK

JCRLA NO. 65 OF 2004

From the judgment dated 08.04.2004 passed by Shri J.J.Patra, learned Addl. Sessions Judge, (Fast Track Court), Chhatrapur (Gm) in Sessions Case No.27/2003/S.C. No. 330/2003(GDC).

Kabi Das Appellant

Versus

State of Orissa Respondent

For Appellant - Mr.H.B Dash.

For Respondent - Mr. Sk. Zafarulla,
Addl. Standing Counsel

PRESENT:

**THE HON'BLE KUMARI JUSTICE SANJU PANDA
AND
THE HON'BLE SHRI JUSTICE B. P. Ray**

Date of hearing & judgment : 25.06.2014

B.P.Ray, J. The appellant has filed this appeal challenging the judgment and order of conviction and sentence dated 08.04.2004 passed by the learned Additional Sessions Judge, Fast Track Court, Chhatrapur convicting him under Section 302 I.P.C. and sentencing him to undergo imprisonment for life and to pay a fine of Rs.100/-, in default, to undergo imprisonment for six months in Sessions Case No.27/2003/S.C.No.330/2003(GDC) for having committed murder intentionally and knowingly caused death of the deceased.

2. The prosecution case, in nutshell, is that two years old boy of the appellant-accused was suffering from fever and he was

admitted to the hospital (P.H.C, Kodala) for treatment. He died on 03.03.2003. The appellant-accused was under the impression that the deceased Uddhab Nahak had applied black magic against his son and had killed him. Therefore, the appellant-accused assaulted the deceased by means of a kati and the deceased succumbed to the injuries on 03.03.2003. The incident occurred on 03.03.2003 at about 7 P.M. and the F.I.R. was lodged at Kodala police station on 04.03.2003 and the police registered the case under Section 302 I.P.C., arrested the appellant-accused and after due investigation filed charge-sheet against him.

3. The plea of the appellant-accused is one of complete denial.

4. In order to bring home the charge, prosecution has examined as many as eight witnesses, out of whom, P.Ws 4 and 5 are eye witnesses to the occurrence and P.W.5 is the informant and son of the deceased. P.W.3 is a post-occurrence witness as well as a witness to the seizure, Ext-5. P.W.7 is the doctor, who conducted autopsy and P.W.1 is the inquest witness to the Ext-1. P.W.2 is the Police Constable, who accompanied the dead body to the Medical Officer and had identified the same at the time of the post-mortem. P.W.8- Dasarathi Sethi is the Investigating Officer and P.W.6 is another Investigating Officer, who submitted the charge-sheet.

5. The prosecution has relied upon the evidence of P.Ws 4 and 5, who are eye witnesses to the occurrence.

P.W.5 is the informant and son of the deceased. He has stated that on the date of occurrence at about 7 P.M., he along with his father deceased and his mother were present in the thrashing floor which is situated just in front of their house being intervened by road and he and his mother were engaged in thrashing work of green gram and the father was bringing straw for the cattle. At that time the appellant-accused suddenly entered in to the thrashing floor through the main gate holding a kati in his hand and assaulted his father by giving successive blows, as a result of which, the deceased sustained injuries on his face and head, fell down and succumbed to the injuries. After giving successive blows, the appellant-accused fled away. P.W.5 has further stated that he went to home and brought water and while administering water to his father-deceased, he succumbed to the injuries. P.W.5 presented the F.I.R vide Ext-7 before the police station. P.W.5 has also explained the delay in lodging the F.I.R saying that he was not in a proper state of mind seeing the assault on his father-deceased.

P.W.4 also arrived at the spot and is an eye witness to the occurrence. He has corroborated the version of P.W.5 in material particulars.

6. We have gone through the evidence of P.Ws,4 and 5 and the doctor P.W.7, who conducted autopsy on the dead body of the deceased . On close scrutiny of the evidence of the P.Ws, 4 and 5, nothing has been elicited to disbelieve the fact that they are not the eye witnesses to the occurrence.

7. On perusal of the post-mortem report, the following injuries were found on the dead body of the deceased:

- i. One incised wound of size 4" x 1¼" x brain deep running obliquely through the right occipital bone ½" behind the back of the ear lobula up-wards. The brain matter was visible through the wound;
- ii. A stab injury of 1" x 1/4" x brain deep 1" away from outer angle of right eye."

Even though the learned counsel for the appellant-accused tried to assail the ground which is not supported by reliable evidence, we find that the doctor has opined the death was due to shock and haemorrhage resulting from injuries on the vital organ, like brain. Since we do not find any infirmity in the evidence of P.W.7 so as to establish the guilt of the appellant, the evidence of P.Ws. 4 and 5 cannot be brushed aside as they are eye witnesses to the occurrence and particularly when, P.W.5 is the son of the deceased.

8. On a close scrutiny of the evidence P.W. 5 (Congress Nahak), it appears that the father (deceased) of P.W.5 was present in the thrashing floor and was bringing straw and the deceased was unarmed. He was taken by surprise. The occurrence witness P.W.5 tried to pacify the appellant but he did not pay any heed thereto. The deceased was given two blows. Therefore, we are of the considered view that the case would come within the purview Section 304, Part-I, I.P.C since the appellant was upset over the death of his son which he suspected to be a witchcraft made by the deceased. Therefore, he might have lost his balance and even though doctor has opined that the injuries were sufficient in ordinary course of nature to

cause death, in our considered view without pre-mediation, due to the sudden fight between the appellant-accused and the deceased under heat of passion, the deceased was assaulted. Therefore, the offence committed by the appellant-accused does not come under Section 302, I.P.C, but it comes within the mischief of Section 304, Part-I, I.P.C and the appellant is liable to be convicted under Section 304, Part-I, I.P.C.

9. In the result, the impugned judgment and order of conviction dated 08.04.2004 passed by the learned Additional Sessions Judge, Fast Tract Court, Chhatrapur, in Sessions case No.27/2003/S.C. No.330/2003 (GDC) is set-aside and we convert it to Section 304, Part-I, I.P.C and sentence the appellant-accused to undergo R.I for ten years thereunder.

It appears from the order of this Court dated 30.11.2010 that the appellant-accused had already remained in custody for more than seven years till that date, when he was allowed to be released on bail. In view of the above, the bail bond be cancelled and the appellant-accused shall surrender to the custody to serve the rest part of the sentence imposed.

10. In the result, the appeal is allowed in part.

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S.Panda, J.

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B. P. Ray, J.

Orissa High Court, Cuttack
Dated 25th June, 2014/B/L

