IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No. 115 Of 2004

From the judgment and order dated 06.08.2004 passed by the Sessions Judge, Bolangir in Sessions Case No. 86-B of 2002.

Prasad Bariha ..... Appellant

-Versus-

State of Orissa ..... Respondent

For Appellant: - Mr. Hemanta Ku. Tripathy

For Respondent: - Mr. Dillip Kumar Mishra (Addl. Govt. Advocate)

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

AND

THE HONOURABLE MR. JUSTICE B.P. ROUTRAY

Date of Hearing & Judgment: 29.02.2020

By the Bench The appellant Prasad Bariha faced trial in the Court of learned Sessions Judge, Bolangir in Sessions Case No. 86-B of 2002 for commission of offences punishable under sections 323/506/302 of the Indian Penal Code for committing murder of Parsuram Bariha (hereinafter 'the deceased').

The learned trial Court vide impugned judgment and order dated 06.08.2004 though acquitted the appellant of the charges under sections 323 and 506 of the Indian Penal Code but found him guilty under section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

2. The prosecution case, as per the first informant report lodged on 27.01.2002 by one Smt. Samari Bariha (P.W.1) before the officer in charge of Patnagarh police station is that on that day at about 8.00 a.m., the deceased who was her younger son was guarding the cotton crop grown in the field and P.W.8 Giridhari Bariha was also with him. At that point of time, the appellant Prasad Bariha came there and had some conversation with the deceased and all on a sudden, the appellant assaulted the deceased by means of a bamboo stick on his head and after the deceased fell down on the ground, the appellant also assaulted on the chest of the deceased by means of a stone. P.W.8 ran away from the spot and came to the house of the deceased and intimated about the occurrence. It is the further prosecution case as per the first information report that Budu Sahu (P.W.2) and Seshadev Sahu (P.W.3) who were there at the spot, intervened while the occurrence was going on but they were also threatened by the appellant with dire consequences.

When P.W.1 reached at the spot, she found the deceased was lying on the ground with bleeding injuries. Immediately the deceased was shifted to Patnagarh hospital where he was hospitalized.

On the basis of the first informant report lodged by P.W.1 Samari Bariha, the officer in charge of Patnagarh police station registered Patnagarh P.S. Case No.13 of 2002 on 27.01.2002 for offences punishable under sections 341/323/307 of the Indian Penal Code and S.I. N.K. Nanda, who was attached to the Patnagarh police station was entrusted by the officer in charge to investigate into the matter, who during course of investigation, issued injury requisition for the deceased who was then in an injured condition, visited the spot and also sent requisition for recording the dying declaration but the same could not be possible as the deceased was then in an unconscious state. Blood stained earth and sample earth were seized from the spot under seizure list (Ext.1). The weapon of offences i.e. stone as well as bamboo stick was also seized. The appellant was taken into custody and sent for medical examination. On 28.01.2002 P.W.11 Suresh Chandra Mishra took over charge of investigation from S.I. N.K. Nanda. When the deceased died during course of his treatment at Patnagarh hospital, inquest was held and

inquest report was prepared vide Ext.3. Thereafter, the dead body was sent for post mortem examination and P.W.12 Durgadutta Das, Asst. Surgeon attached to S.D. Hospital, Patnagarh conducted post mortem examination and prepared his report Ext.12. The statements of the witnesses were recorded. The seized articles were sent for chemical analysis and ultimately on completion of investigation, charge sheet was submitted.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court charged the appellant under sections 323/506/302 of the Indian Penal Code on 20.02.2003 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, the prosecution examined as many as fourteen witnesses.

P.W.1 Samari Bariha is the mother of the deceased and she is the informant in the case.

P.W.2 Budu Sahu, P.W.3 Seshadev Sahu, P.W.7 Jasobant Bariha as well as P.W.8 Giridhari Bariha claimed to be the eye witnesses to the occurrence.

P.W.4 Sahadev Bariha, P.W.5 Arabinda Rana, P.W.6 Mini Bariha, P.W.9 Keshab Bariha are the post occurrence witnesses.

P.W.10 Bhubaneswar Sahu is the witness to the inquest report.

P.W.11 Sukesh Chandra Mishra is the investigating officer in the case.

P.W.12 Durgadatta Das was the Assistant Surgeon attached to S.D. Hospital, Patnagarh who conducted post mortem examination on 28.01.2002 and proved his report vide Ext.12. On receipt of the query made by the investigating officer relating to the possibility of the injuries sustained by the deceased by the seized bamboo stick as well as stone, he gave his opinion vide Ext.13.

P.W.13 Paramananda Jashi is the scribe of the first information report.

P.W.14 Bhimasan Meher was the Assistant Surgeon attached to the S.D. Hospital, Patnagarh who examined P.W.5 on police requisition but found no external injury on his body.

The prosecution also exhibited fifteen documents. Exts.1, 2, 5, 7, 8, 9 and 10 are the seizure lists, Ext.3 is the inquest report, Ext.4 is the written report (F.I.R.), Ext.6 is the report of R.I. with map, Ext.11 is the chemical examiner's report, Ext.12 is the post mortem report, Ext.13 is the opinion of the doctor to the query, Ext.14 is the medical examination report of P.W.5 and Ext.15 is the collection of sample hair of the accused by the doctor.

The prosecution also proved two material objects. M.O.I is the lathi and M.O.II is the stone.

The defence exhibited one document i.e. Ext.A, the injury report of the accused.

5. The defence plea of the appellant was one of denial and it was pleaded that since the witnesses were against him, they have deposed falsehood.

6. At the outset, it is to be considered whether the deceased had met with a homicidal death or not. Apart from the inquest report, the prosecution has adduced the evidence of P.W.12, who conducted post mortem examination and he has stated that he noticed four injuries on the person of the deceased and the probable cause of death was on account of

head injury and there was severe brain hemorrhage. He has proved the post mortem report as Ext.12. Nothing has been elicited in the cross-examination by the defence to impeach the veracity of this witness.

Mr. Hemanta Kumar Tripathy, learned counsel for the appellant has also not challenged about this aspect regarding homicidal death of the deceased. Therefore, on the basis of the available material on record, particularly in view of the evidence of P.W.12 and the post mortem report Ext.12, we are of the view that the deceased had met with a homicidal death.

7. So far as the eye witnesses are concerned, it is the prosecution case that P.W.8 was with the deceased from the beginning in the cotton crop field. P.W.8 has stated that the appellant came there and wanted to know the way to village Debarha and when the deceased told him that he had already passed the said village, the appellant disbelieved it and thereafter assaulted the deceased by means of bamboo stick and stone. He further stated that out of fear, he ran away from the spot and informed the fact to P.W.1, the mother of the deceased. This witness has identified the bamboo stick which was used by the appellant in assaulting the deceased as M.O.I. In the cross-examination, P.W.8 has stated that he had no prior acquaintance

with the appellant and he marked the appellant dealing stone blow on the chest of the deceased but he had not seen the assault on the deceased by the means of stick.

The learned counsel for the appellant contended that since the witness is a child witness and no specific question has been put to him to arrive at a conclusion that he is a competent witness, his evidence should not been accepted. He further contended that since the witness is lying in part inasmuch as even though he has not seen the assault on the deceased by means of a stick as has been elicited in cross-examination, since he is stating about such assault in the chief examination and there is no specific material that any of the injuries sustained by the deceased is possible by stone, the evidence of the witness should be discarded.

Mr. Dillip Kumar Misra, learned Additional Government Advocate, on the other hand submitted that not only the weapons were seized during course of investigation and those were sent for chemical analysis but also the chemical examination report indicated that those were containing the blood of human origin of group 'B' which is also the blood group of deceased. The doctor has specifically gave his opinion to the query made by the investigating officer that the injuries

sustained by the deceased are possible by bamboo stick as well as stone and his opinion has been marked as Ext.13. He argued that the learned trial Court has recorded that P.W.8 is a competent witness and the evidence of P.W.8 has not been dislodged in the cross-examination.

On perusal of the post mortem report, it appears that the deceased had sustained as many as four lacerated injuries i.e. one on the left eye brow, one on the parietal bone, one on the medial to the left nipple line and the last one on the knee joint and the post mortem report indicates that the death was caused on account of head injury pursuant to the injuries on brain matters and severe brain haemorrhage. On perusal of the opinion given by the doctor, it appears that he has given his opinion that the injuries sustained by the deceased are possible by bamboo stick and stone which were produced by the constable along with the query made by the investigating officer.

So far as the child witness is concerned, section 118 of the Evidence Act states that a child is a competent witness provided that he understands the questions put to him and is in a position to give rational answers to such questions. It is the duty of the Court while assessing the evidence of a child witness to see whether the child understands the duty of speaking the

truth. The Court should make necessary examination of the child witness by putting a few questions in order to find out whether the witness is intelligent enough to understand what he had seen and afterwards to inform the Court thereof and also give his opinion that why it thinks that the child is a competent witness. However, if the satisfaction of the trial Judge has been recorded that the child understood the duty of speaking truth, merely because the formal questions put to the said witness have not been recorded on the deposition sheet, it would not vitiate the evidence of the child witness as such. The evidence of a child witness should be scanned carefully and if no flaws or infirmities are found therein then there is no impediment in accepting his evidence. In the case in hand, the learned trial Judge has mentioned that the age of the child witness is thirteen to fourteen years and that he knew the implication of law and therefore, he is a competent witness. Nothing has been brought out by the defence to show that the child is unable to give any rational answers or he is not a competent witness. Therefore, we are not inclined to accept the submission made by the learned counsel for the appellant that P.W.8 should not have been treated as a competent witness. Even though the version of P.W.8 in the chief examination that he had seen the assault on

the deceased by means of a stick appears to be shaky as he has specifically stated in the cross-examination not to have seen the assault on the deceased by stick but so far as his statement relating to the assault on the deceased by means of a stone is concerned, it has remained unchallenged. P.W.8 has specifically stated that the appellant dealt a stone blow on the chest of the deceased and the post mortem report indicates that there is corresponding injury on the chest of the deceased.

Therefore, in our humble view, the learned trial Court has rightly accepted the version of P.W.8 as an eye witness to the occurrence.

So far as the other eye witnesses are concerned, P.W.2 Budu Sahu has stated that hearing hulla of P.W.8, he came running to the spot and found the appellant assaulting the deceased by means of a bamboo stick and stone and by then the deceased was lying on the ground. In the cross-examination, it has been elicited that when P.W.2 reached at the spot, the appellant was assaulting the deceased, who was lying on the ground and his face was upward. Though this witness has stated that he could not say how many stick blows were dealt by the appellant to the deceased and what was the size of the stone used by the appellant but on the basis of such materials elicited

in the cross-examination, the evidence of P.W.2 cannot be discarded.

So far as P.W.3 is concerned, he has specifically stated that on hearing hulla, he saw the appellant assaulting the deceased by means of a bamboo stick and he then ran to the spot and wanted to intervene but the appellant ran towards him to assault and then the appellant ran away from the spot with the bamboo stick and stone. In the cross-examination, P.W.3 has specifically stated that he had seen the appellant assaulting the deceased on his head and nothing has been elicited in the cross-examination further to discard such evidence.

Coming to the evidence of P.W.7, he has stated that he had seen the appellant assaulting the deceased by means of a stick and thereafter he and others protested the appellant who ran away from the spot. In the cross-examination, it has been elicited that the appellant assaulted the deceased on his head. Of course, this witness has not stated to have seen any assault by the appellant by means of a stone.

The cumulative effect of the evidence of these four eye witnesses i.e. P.W.2, P.W.3, P.W.7 and P.W.8 is that on the date of occurrence, the appellant assaulted the deceased by

means of a bamboo stick and stone which gets corroboration from the evidence of the doctor (P.W.12) who has not only conducted the post mortem examination but also gave his opinion regarding possibility of the injuries sustained by the deceased by means of bamboo stick and stone. Therefore, the prosecution has successfully proved that it was on account of assault by the appellant with the weapons i.e. stick and stone that the deceased had sustained the injuries as noticed in the post mortem report and subsequently died.

8. Now the question crops up for consideration whether the offence is coming within the purview of section 302 of the Indian Penal Code or not.

In case of **State of Andhra Pradesh –Vrs.- Rayavarapu Punnayya reported in A.I.R. 1977 SC 45,** it is held as follows:-

> "21. From the above conspectus, it emerges that whenever a Court is confronted with the question whether the offence 'murder' or 'culpable homicidal not amounting to murder' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of

> another. Proof of such casual connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie in the affirmative, the stage for considering the operation of section 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder' punishable under the first or the second part of section 304, depending, respectively, on whether the second or the third clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of section 304, Penal Code".

On scanning the evidence of the witnesses, it appears that the occurrence happened all on a sudden when the appellant while passing through the cotton crop field and asked the deceased about the address of a particular village. When the

deceased gave his reply, the appellant doubted that the deceased had given him a wrong answer and on account of that, all on a sudden in a fit of anger he assaulted the deceased. There was no premeditation behind the commission of the crime. On perusal of the post mortem report and the evidence of the doctor (P.W.12), it appears that though the deceased had sustained four injuries but none of the injuries has been opined to be sufficient in ordinary course of nature to cause death. Number of wounds caused during the occurrence is not always a decisive factor. When the occurrence happened all on a sudden and evidence relating to the motive of the appellant to commit the murder of the deceased is lacking in the case and there is no evidence that any of the injuries sustained by the deceased is sufficient in ordinary course of nature to cause death, we are of the view that the case would come within the purview of section 304 Part-I of the Indian Penal Code and not under section 302 of the Indian Penal Code.

Accordingly, we set aside the conviction of the appellant under section 302 of the Indian Penal Code and instead the appellant is convicted under section 304 Part-I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years.

It is stated at the Bar that the appellant has already remained in custody for eighteen years since 2002 as he was not granted bail either during trial or during pendency of the appeal. In view of the sentence passed by us, the appellant shall be set at liberty forthwith, if he is not required to be detained in any other case.

Accordingly, the Jail Criminal Appeal is allowed in part.

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S. K. Sahoo, J.

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B.P. Rourtray, J.

Orissa High Court, Cuttack,
Dated the 29th February, 2020/RKM/Sukanta