

ORISSA HIGH COURT: CUTTACK

JCRLA No. 29 OF 2008

(From the judgment and order dtd. 07.08.2007 passed by Shri U.C. Mishra, Sessions Judge, Bolangir in Sessions Case No.136-B of 2004.)

Raisingh Dip

..... Appellant

-Versus-

State of Orissa

..... Respondent

For Appellant :Mr. Jagannath Bhuyan.

For Respondent : Mr. Seikh Zafrullah (Addl. Standing Counsel)

P R E S E N T :-

**THE HONOURABLE MR. JUSTICE PRAMATH PATNAIK
AND
THE HONOURABLE DR. JUSTICE A.K. MISHRA**

Date of hearing & Judgment – 29.02.2020

Dr. A.K. Mishra, J. This is an appeal U/s.383 of the Cr.P.C. preferred by the appellant-convict against the conviction U/s.302 of the Indian Penal Code (in short 'the I.P.C.') and sentence to undergo imprisonment for life and to pay fine of Rs.5,000/- (Rupees five thousand), in default to undergo simple imprisonment for six months vide judgment dated 07.08.2007 in Sessions Case No.136-B of 2004 passed by the learned Sessions Judge, Bolangir.

2. Adumbrated in brief, the prosecution case is that on 17.09.2004 at about 10 A.M. at Dangbahal, the accused-appellant dealt stone blows to deceased-Kuber Pasayat, as a result of which he expired. The son of the deceased on being informed by one Siru Agrawala lodged the F.I.R. at 11.30 A.M. Larambha Out Post, which was resulted into registration of Patnagarh P.S. Case No.136 dated 17.09.2004 U/s.302 of the IPC.

3. In course of investigation, inquest was made so also the post-mortem was conducted by Doctor-P.W.7. Stone was seized and accused was arrested. After completion of investigation, charge-sheet was submitted. The case was committed to the Court of Session. The accused faced charge U/s.302 of the IPC.

4. The plea of defence was denial simpliciter. Prosecution examined 9 witnesses in all and defence examined none. P.W.1, the informant is the son of the deceased. P.Ws.2 and 5 are eye-witnesses. P.W.3 and P.W.4 are declared hostile. P.W.6 is a witness to the inquest report-Ext.3. P.W.7 is the Doctor who proved the post-mortem report-Ext.4. P.W.8, Doctor has collected sample of blood of accused. P.W.9 is the Investigating Officer. The F.I.R., inquest report, post-mortem report, Chemical Examination Report are marked as Exts.1 to 14. Stone is proved as M.O.I.

5. Learned Sessions Judge relying upon the evidence of Doctor-P.W.7 who has proved post-mortem report-Ext.4 found that the death of the deceased was homicidal in nature and accepting the

evidence of eye-witnesses-P.W.2 and P.W.5 convicted the accused U/s.302 of the IPC and passed sentence as stated above.

6. Learned counsel for the appellant-Mr. Jagannath Bhuyan would submit that there is a contradiction between the ocular testimony and medical evidence and in the backdrop of enmity, the eye-witness should not have been believed and the accused should have been given the benefit of doubt.

Learned Addl. Standing Counsel, Mr. Sk. Zafrullah supports the judgment on the grounds stated therein.

7. We, carefully peruse the evidence on record. P.W.1-the informant is the son of the deceased and he has admitted that the accused has initiated a case against them on the allegation of setting fire to his house. This proves a strong enmity between the parties. Enmity is a double edged weapon. It casts a duty upon a Court to scan the evidence with great care and caution.

7.1. P.W.2-eye witness testified that while he along with Govind Pradhan-P.W.4 was manuring the cotton crops heard some altercation between Kuber Tandi of Damkipali and Laba Pasayat of their village. They rushed to the spot and saw the accused assaulting the deceased by means of a stone weighing about 2 Kg. sitting over his chest and they left the spot. In cross-examination he admitted that he did not raise any shout and had not intervened during the occurrence. He had also stated that the accused was assaulting the deceased by the stone repeatedly till his death and the assault continued for about ten minutes.

8. P.W.4 does not support P.W.2 as he stated that he saw the dead body lying on the road. P.W.5-Ex-Gram Rakhi stated that he found that one cycle was lying and the accused sitting over the deceased was assaulting on his face by means of stone. He asked the accused as to why he was killing him. The accused got up, he found the victim as dead. Thereafter he took the accused and the cycle of the accused to the Out Post. During cross-examination he admitted that no other witnesses was present prior to his arrival at the spot and he had seen the face of the deceased which was smashed due to assault by the stone.

8.1. The presence of P.W.2 is ruled out by P.W.5 because P.W.5 had not seen any other person when the accused was assaulting the deceased. Both of them did not get corroboration from P.W.4.

8.2. The presence of eye-witnesses at sport during assault is doubtful. On the other hand, P.W.2 and P.W.5 have stated that they saw the accused smashing the face of the deceased by the stone.

9. Doctor-P.W.7 found the following two injuries:-

- i. Lacerated wound of size 3" x ½ " x 2" over the left ear with fracture of the underline bone, tearing of the brain covering, laceration of brain tissue.
- ii. Small lacerated wound over the right side upper lip.

9.1. In cross-examination, the Doctor admitted that the injuries which he has mentioned in the post-mortem are possible by vehicular accident. Thus, the ocular evidence that the face of the deceased was

crushed by the stone does not get corroboration from medical evidence of P.W.7, rather runs contrary.

9.2. When the evidence is tainted with enmity and does not get corroboration from medical source, it is unsafe to attach credibility to so-called eye-witnesses P.Ws.2 and 5. Added to that the presence of P.Ws.2 and 5 at the spot during assault is mutually excluded by them and both of them do not get corroboration from P.W.4.

10. While the evidence stands in this way, fact remains that there was an altercation at the spot as stated by P.W.2. That part of the story between Kuber Tandi and Laba Pasayat is found not unfolded and thereby the participation of others in course of altercation is not ruled out. This unexplained incident assumes importance when doctor found one injury on left ear and small laceration on right upper lip contrary to eye-witness version.

11. The totality of the evidence in such backdrop is that the eye-witnesses P.Ws.2 and 5 are not reliable and conviction based upon their evidence cannot be sustained, as such the accused is to be given the benefit of doubt of the charge. He is to be acquitted.

12. In the result, the conviction of the appellant U/s.302 of the IPC and sentence passed thereon vide judgement dated 07.08.2007 by the learned Sessions Judge, Bolangir in Sessions Case No.136-B of 2004 are hereby set aside.

13. The appellant be set at liberty forthwith from jail unless he is required in any other case.

14. Accordingly, the appeal is allowed.

15. LCRs. be returned immediately.

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Dr. A.K. Mishra, J.

P. Patnaik, J. *I agree.*

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P. Patnaik, J.