

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.43 Of 2008

From judgment and order dated 23.04.2008 passed by the Additional Sessions Judge, Rourkela in Sessions Trial No.115/42 of 2001.

Leven Kerketta

.....

Appellant

-Versus-

State of Odisha

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Respondent

For Appellant:

Mr. Laxmi Narayan Patel
Advocate

For State:

Mr. Sonak Mishra
Addl. Standing Counsel

P R E S E N T:



THE HONOURABLE MR. JUSTICE S.K. SAHOO

AND

THE HONOURABLE MR. JUSTICE CHITTARANJAN DASH

Date of Hearing and Judgment: 02.11.2023

By the Bench: The appellant Leven Kerketta faced trial in the Court of learned Additional Sessions Judge, Rourkela in Sessions Trial No.115/42 of 2001 for the offence punishable under section 302 of the Indian Penal Code (hereafter 'I.P.C.') on the accusation that on 02.01.2001, in the house Lodha Khadia (hereafter 'the

deceased'), he committed murder of the deceased intentionally by a lathi causing his death.

The learned trial Court vide impugned judgment and order dated 23.04.2008, found the appellant guilty under section 302 of the I.P.C. and sentenced him to suffer life imprisonment and to pay a fine of Rs.2,000/- (rupees two thousand only), in default, to undergo rigorous imprisonment for one month more.

The Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter the 'F.I.R.') lodged by Anup Kumar Singh (P.W.3), is that from ten years prior to the occurrence, he was staying with his family in village Sitalpada, which is close to the house of the deceased. On 02.01.2001 at about 7.00 p.m., while the informant (P.W.3) was present in his house, he heard a sound of assault and crying voice from the house of the deceased shouting 'MAA GO MARIGALI'. Hearing such shout, P.W.3 came to the house of the deceased and found that the appellant was assaulting the deceased with a lathi. At that time, the wife of the appellant, namely, Tarsila Kerketta (P.W.1) was present in the house of the deceased and the appellant suspecting that the deceased was having illicit relationship with P.W.1, assaulted the deceased as well as P.W.1. On account of such assault, the

deceased sustained serious injuries on his head, leg and P.W.1 also sustained injuries on her hand. P.W.3 requested the appellant not to assault the deceased further.

On the basis of oral report submitted by P.W.3, it was reduced to writing by P.W.15, the S.I. of Police, Uditnagar outpost and the report was sent to Plantsite police station for its registration and accordingly, the Inspector in-charge of Plantsite police station registered the case as Plantsite P.S. Case No.04 dated 03.01.2001 under section 307 of the I.P.C. against the appellant.

As per the direction of the Inspector in-charge of Plantsite police station, P.W.15 took up investigation of the case. During the course of investigation, he examined witnesses, sent the injured (deceased) with requisition to Rourkela Govt. Hospital, Rourkela for his treatment and report. On his requisition, the Scientific Officer (P.W.9) visited the spot for collection of physical clues. The I.O. also visited the spot on 04.01.2001 and though the case was initially registered under section 307 of the I.P.C. but after the deceased succumbed to the injuries on 03.01.2001, the case turned to one under section 302 of the I.P.C. P.W.9 collected the materials like blood stained kantha, blood stained earth and sample earth, six pieces of broken glass bangles, some broken pieces of bark having blood

stains and other incriminating materials as per seizure list (Ext.1) from the spot and came to Rourkela Govt. Hospital, Rourkela where he conducted inquest over the dead body of the deceased in the presence of witnesses and prepared the inquest report (Ext.9) and sent the dead body for post mortem examination with dead body challan with escort party. The appellant was taken into custody and while in custody, he admitted to have committed the murder of the deceased and basing upon his statement, the weapon of offence i.e. lathi (badi) (M.O.I) was seized inside a bush near Sitalpada Nali as per seizure list Ext.12. After the post mortem examination, the wearing apparels and other belongings of the deceased were produced by the constable who had escorted the dead body and those were also seized along with the nail clippings and blood samples under seizure list (Ext.4) by the I.O. The weapon of offence was sent to the Medical Officer who conducted the autopsy for seeking his opinion regarding the possibility of injuries by such weapon of offence and cause of death. The query report (Ext.13) was received from the Medical Officer and the I.O. seized the bed head ticket from the hospital and station diary of Uditnagar outpost as per seizure list marked as Ext.8 and Ext.6 respectively and the material objects were sent for chemical analysis through the S.D.J.M., Panposh and the chemical examination report (Ext.14) was

obtained and on completion of investigation, he submitted charge sheet vide C.S. No.241 dated 02.05.2001 under section 307/302 of the I.P.C. against the appellant.

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 section 302 of the Indian Penal Code on 02.01.2001 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.

Prosecution Witnesses & Exhibits:

4. During the course of trial, in order to prove its case, the prosecution examined fifteen witnesses.

P.W.1 Tarsila Kerketta, who is the wife of the appellant, stated not to have any knowledge about how the deceased died and further stated that the appellant had not assaulted her.

P.W.2 Panda Lakra is a witness to the seizure of blood stained kantha, blood stained earth and sample earth, two broken metallic bangles and some broken barks of lathi as per seizure list Ext.1.

P.W.3 Anup Kumar Singh is a co-villager of the appellant and the informant of this case. He did not support the prosecution case for which he was declared hostile.

P.W. 4 Sukhu Singh is the wife of the informant who stated not to have known anything about the case.

P.W.5 Dr. Subash Chandra Kabi, who was posted as the Asst. Surgeon of Govt. Hospital, Rourkela, collected the blood sample and nail clippings of the appellant and after collection, he handed over the same to the escorting constable Nikhil Kumar Mohanty and proved his report vide Ext.2.

P.W.6 Rupan Minz @ Upun is an independent witness and he did not support the prosecution story for which he was declared hostile.

P.W.7 Poka Minz stated that he neither knew the appellant nor the deceased. He also expressed his ignorance about the occurrence and stated that he did not know if the appellant had in fact murdered anyone by assaulting.

P.W.8 Birasmani Routia is the mother of the deceased and also an eye witness to the incident who supported the prosecution story.

P.W.9 Prasant Kumar Pradhan was posted as the Scientific Officer, D.F.S.L., Rourkela who on police requisition

visited the spot, collected certain clue materials and prepared his report marked as Ext.3.

P.W.10 Kailash Chandra Behera was posted as the A.S.I. of police at Uditnagar outpost who stated to have received a telephonic message from an unknown person that the appellant was assaulting his wife near his house. Thereafter, he entered this allegation in the station diary vide entry no.46 dated 02.01.2001 and informed the matter to Addl. I.I.C. of Udinagar outpost. He is a witness to the seizure of sample blood, nail scrapings on being produced by one Havildar Nikhil Kumar Mohanty as per seizure list Ext.4, one check lungi from the possession of the appellant on being produced by the I.O. as per seizure list Ext.5 so also the station diary of Uditnagar outpost as per seizure list Ext.6.

P.W.11 Siprian Kullu was the police constable attached to Uditnagar outpost who was issued with command certificate on 03.01.2001 to take the dead body of the deceased to the Sub-Divisional Headquarters Hospital, Sundargarh for post mortem examination and after post mortem examination, he handed over the wearing apparels of the deceased as per his report marked as Ext.7.

P.W.12 Bimbadhar Sahu was a pharmacist who is also a witness to the seizure of one bed head ticket from the office of C.D.M.O., Rourkela Government Hospital.

P.W.13 Lathia Oram was the attendant attached to Govt. Hospital, Rourkela who is a witness to the seizure of one bed head ticket from the office of C.D.M.O., Rourkela Government Hospital.

P.W.14 Mangulu Raitia is the younger brother of the deceased who stated that he heard from his mother that the appellant had assaulted his brother by means of a lathi as a result of which he died.

P.W.15 Dillip Kumar Purohit was the I.I.C., Ghasipura police station and he is the investigating officer of the case.

The prosecution exhibited fifteen documents. Ext.1 is the seizure list in respect of blood stained earthen and sample earth, two broken metallic bangles and some broken barks of lathi, Ext.2 is the report of the doctor regarding collection of blood sample, nail clippings of the appellant, Ext.3 is the report of the scientific officer, Ext.4 is the seizure list in respect of sample blood, nail scrapings collected by the M.O. of Rourkela Govt. Hospital before P.W.15, Ext.5 is the seizure list in respect of one check lungi from the possession of the appellant, Ext.6 is

the seizure list in respect of station diary of Uditnagar outpost, Ext.7 is the report of constable (P.W.11) who escorted the dead body for post mortem examination, Ext.8 is the seizure list in respect of one bed head ticket seized from the office of the Rourkela Govt. Hospital, Ext.9 is the inquest report, Ext.10 is the F.I.R., Ext.11 is the statement of the appellant under section 27 of the Evidence Act, Ext.12 is the seizure list in respect of lathi (badi), Ext.13 is the query report received from the medical officer, Ext.14 is the chemical examination report and Ext.15 is the post mortem report.

The prosecution also proved three material objects. M.O.I is the wooden lathi, M.O.II is kantha and M.O.III contains six pieces of barks stained with blood.

Defence plea:

5. The defence plea of the appellant was one of denial. No witness was examined on behalf of the defence.

Finding of the learned Trial Court:

6. The learned trial Court, after assessing the oral as well as documentary evidence available on record, came to hold that the death of the deceased was homicidal in nature. Relying on the evidence of the eye witness (P.W.8), who is none else than the mother of the deceased, coupled with recovery of

weapon of offence (M.O.I) at the instance of the appellant, it came to hold that the prosecution has successfully established that the appellant committed the murder of the deceased and accordingly found him guilty under section 302 of the I.P.C.

Contentions of the Parties:

7. Mr. L.N. Patel, learned counsel for the appellant contended that the evidence of the eye witness (P.W.8), who is none else than the mother of the deceased, is not clinching and that should not have been taken into account for convicting the appellant and since the prosecution case is that the wife of the appellant was found in the bedroom of the deceased at the time of occurrence, which was seen by the appellant and in all probability, there was grave and sudden provocation to the appellant and on the spur of the moment, he assaulted not only the deceased but also his wife (P.W.1). He vehemently contended that the post mortem report indicates only one injury on the head which was proved to be fatal and in view of the surrounding circumstances under which the crime has been committed, even if the evidence of P.W.8 is accepted, then it would not be a case which would attract the ingredients of the offence under section 302 of the I.P.C. but it would squarely fall within the exception 4 of section 300 of the I.P.C. and the liability of the appellant would be one under section 304 Part-II of the I.P.C. Learned counsel

further submitted that the appellant was taken into custody on 05.01.2001 and thereafter, he was released on bail on 07.02.2002 and then he was again taken into judicial custody during the trial on 15.02.2008 and then after pronouncement of the judgment, he preferred this appeal and this Court granted him bail as per order dated 07.03.2012 passed in Misc. Case No.20 of 2010 and as such, the appellant has remained in custody for five years and one month and since the occurrence has taken place in the year 2001 and in the meantime, more than twenty two years have already passed and taking into account the status of the appellant and his age which would be now more than sixty years, the sentence be reduced to the period already undergone.

Mr. P.B. Tripathy, learned Addl. Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the post mortem report has been marked on admission as Ext.15 and as per the opinion of the doctor, the cause of death was due to injury to the vital structure i.e. brain and the doctor has also noticed injuries on other parts of the body apart from the head and only P.W.8 was present when the occurrence took place and she being the mother of the deceased is not expected to spare the real culprit and entangle the appellant falsely and she stated about the

occurrence in detail. In the cross-examination of P.W.8, nothing has been elicited to disbelieve her evidence and at the instance of the appellant, the weapon of offence i.e. lathi (M.O.I) was also seized by the I.O. and therefore, the learned trial Court rightly found the appellant guilty under section 302 of the I.P.C. and the appeal should be dismissed.

Whether the deceased met with a homicidal death?:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let us first see how far the prosecution has proved that the death of the deceased to be homicidal in nature. There is no dispute that the doctor, who conducted the post mortem examination, has not been examined during trial, but on verification of the order sheet of the learned trial Court, it appears that on 18.04.2008, the learned State defence counsel appearing on behalf of the appellant filed a memo admitting the post mortem report and in view of the memo filed by the learned State defence counsel, the learned trial Court marked the post mortem report as Ext.15 and dispensed with the evidence of the doctor. A post mortem report of which genuineness is not disputed by the accused can be read as substantive evidence without formal proof. Sub-section (2) of section 294 of Cr.P.C. covers the post mortem report. Section

294 of Cr.P.C. makes dispensation of formal proof dependent on the accused or the prosecutor not disputing the genuineness of the documents sought to be used against them. Section 294 of Cr.P.C. enables the accused to waive the mode of proof in respect of documents like post mortem report and also by admitting it or raising no dispute as to its genuineness when called upon to do so under sub-section (1) of section 294 of Cr.P.C. In such a situation, sub-section (3) of section 294 of Cr.P.C. enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. It is open to the Court in its discretion to examine the doctor who conducted post mortem examination even though the report is marked on admission and genuineness of the document is not disputed if either party or the Court itself requires some clarification from the doctor on some specific points in the interest of justice. In view of section 58 of the Evidence Act and section 294 of Cr.P.C., once the genuineness of a document filed by the prosecution or the accused is not disputed by the other side, such document may be read as substantive evidence. The post mortem report filed by the prosecution is a document as defined under section 29 of the Indian Penal Code and under sub-section (1) of section 294 of Cr.P.C. such report may be read as substantive evidence in place of or in substitution of the

testimony of the doctor who prepared or issued it, if its genuineness is not disputed by the accused. Therefore, in the case in hand, since the post mortem report (Ext.15) has been marked on admission and the genuineness is not disputed, such report can be read in evidence as genuine.

The post mortem report indicates that the deceased had sustained one abrasion on the lateral angle of right eye, one lacerated wound on the right shoulder 1 c.m. x ½ c.m. x ½ c.m., another lacerated wound below left knee, one circular abrasion near left elbow, one lacerated wound on the right side of the forehead of 3 c.m. x 2 c.m. with linear fracture of 4 c.m. on frontal bone and all the injuries were opined to be ante mortem in nature and age of the injuries were said to be within 12-24 hours of the post mortem examination and the death was opined to be due to injury to the vital structure i.e. the brain. Learned counsel for the appellant has not challenged the post mortem report finding relating to homicidal nature of death of the deceased.

In view of the post mortem report findings, we are of the humble view that the learned trial Court has rightly come to the conclusion that the prosecution has successfully established that the deceased met with a homicidal death.

Analysis of evidence of Prosecution Witnesses:

9. Though P.W.3, the informant lodged the F.I.R. wherein he posed himself as an eye witness to the occurrence but during trial, he has not supported the prosecution case for which he was declared hostile by the prosecution.

P.W.1, the wife of the appellant has also been declared hostile. Other independent witnesses except P.W.8 have not stated anything against the appellant. The star witness examined from the side of the prosecution is none else than the mother of the deceased, who has been examined as P.W.8 and she stated that the wife of the appellant (P.W.1) was sitting near the deceased in her house and at that time, the appellant came there and gave lathi blows to his wife after which she left the place and then the appellant assaulted the deceased on his head by means of a lathi for which the deceased sustained severe bleeding injuries and subsequently he died in the hospital. P.W.8 has specifically stated that she was alone present at that time in her house and had seen the occurrence. She further stated that even though her son shouted and she raised hulla, but nobody turned up and the appellant escaped. In the cross-examination, she has stated that the house of the appellant was situated at a distance of twenty to twenty-five cubits from the house of her

deceased son at village Sitalpada. She further stated that on the previous day of the occurrence in the evening, in village Balughat in the house of her younger son, on the eve of New Year, they enjoyed their drinks and food and the appellant also joined them. She stated that on the date of occurrence, the appellant had come to her house to take handia (country-made liquor). At that time, a dibiri (lamp) was burning in her house and the surrounding was dark. In the further cross-examination, she has further stated that she had seen the assault on the deceased and except herself and her deceased son, none else was present in the house. Nothing further has been brought out in the cross-examination to disbelieve the evidence of P.W.8.

After going through the evidence of the star witness (P.W.8), we find that her evidence inspires confidence and she is a reliable witness and being the mother of the deceased, she is not likely to spare the real culprit and bring accusation against an innocent person. In the case of **Laltu Ghosh -Vrs.- State of W.B. reported in (2019) 15 Supreme Court Cases 344**, the Hon'ble Supreme Court held as follows:

"12. As regards the contention that the eyewitnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an "interested" witness

merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused."

Therefore, even though P.W.8 is the mother of the deceased, since her evidence is clear, cogent, trustworthy and above board, we have no hesitation in accepting her evidence.

Seizure of weapon of offence and query report:

10. The appellant was arrested on 04.01.2001 and it appears from the evidence of the I.O. (P.W.15) that at the instance of the appellant basing on his recorded statement (Ext.11), the weapon of offence i.e. wooden lathi (M.O.I) was recovered from a bush in Sitalpada Nali and the same was seized as per the seizure list Ext.12. The evidence regarding leading to discovery of M.O.I has remained unshaken. After its seizure, M.O.I was sent to the Medical Officer who conducted the post mortem examination to ascertain the possibility of the injuries noticed on the person of the deceased by such weapon and the

query report has been marked as Ext.13 which indicates that the injuries noticed on the body of the deceased as per the post mortem report could be possible by M.O.I. and it further indicates that the injury on the right side of the forehead, the underlying fracture of the frontal bone and the injury to the underlying brain substance were sufficient to cause death of the deceased.

Therefore, in view of the available evidence on record, we are of the view that on account of the assault made by the appellant with the lathi (M.O.I), the deceased sustained injuries as noticed in the post mortem report (Ext.15) which ultimately resulted in his death.

Whether the act of the appellant amounts to murder or culpable homicide not amounting to murder?:

11. Now, the question crops up for consideration whether the act of the appellant would come within the purview of section 302 of the I.P.C. as held by the learned trial Court or in the factual scenario, any of the five exceptions as enumerated under section 300 of the I.P.C. would be attracted.

Exception 4 to section 300 of the I.P.C. states that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue

advantage or acted in a cruel or unusual manner. In the explanation to exception 4 of section 300 of the I.P.C., it is stated that it is immaterial in such cases which party offered the provocation or committed the first assault.

The evidence on record as adduced by P.W.8, the mother of the deceased indicates that during the evening hours on the date of occurrence, inside the bedroom of the deceased, the wife of the appellant was found present and she was sitting near the appellant. It further appears from the evidence of P.W.8 that a dibiri (lamp) was burning in her house at that time and the surrounding was dark. The possibility on the part of the appellant losing his self control and coming under grave and sudden provocation seeing his wife in such a position with the deceased cannot be ruled out. Provocation is some act done by the deceased to the appellant which would cause in any reasonable person. A sudden and temporary loss of self control rendering the appellant subject to passion and might have made him for the moment not master of his mind. Heat of passion clouds man's sober reason. The possibility of raising protest by the appellant to the conduct of his wife (P.W.1) and the deceased and also raising sudden quarrel cannot be ruled out. There is no material of any plan in advance, no premeditation. The act seems to have been done under the influence of some feeling which had an adequate

cause and seems to have taken away from the appellant all control over his actions. Seeing an incident like this i.e. the presence of his wife in the bed room of another person alone and that too almost in darkness, whether the provocation would be grave or one would take it lightly, depends upon person to person, but the objective test is whether a reasonable man is likely to lose his self control as a result of such provocation. The appellant on account of grave and sudden provocation seems to have not only assaulted his wife (P.W.1) may be suspecting her extramarital affair with the deceased first but also on the spur of the moment, he also assaulted the deceased with the lathi which he was holding. Lathi in the hands of a tribal person in the evening hours while going out of the house is not an unusual feature and merely because the appellant came with a lathi to the house of the deceased for taking handia or to search for his wife, it cannot be said that he came there prepared to assault the deceased. Though number of injuries has been noticed on the person of the deceased, but it appears that only one injury was caused to the vital part of the body i.e. the head, which resulted in fracture of the frontal bone and also caused injury to the brain which ultimately resulted in the death of the deceased.

Having regard to the surrounding circumstances and the manner in which the occurrence has taken place, since there

was no premeditation on the part of the appellant to commit the crime and in a fit of anger on being provoked having seen his wife (P.W.1) alone in the company of the deceased in the bed room of the latter at such an hour of the evening and that too almost in darkness, the appellant not only assaulted his wife but also the deceased causing only one injury on the vital part of the body of the deceased with the lathi which he was holding, we are of the view that the exception 4 to section 300 of the I.P.C. would be squarely applicable and the case would fall within the purview of section 304 Part-II of the I.P.C.

Accordingly, the conviction of the appellant under section 302 of the I.P.C. is hereby set aside and the conviction is altered to one under section 304 Part-II of the I.P.C.

As the appellant has remained in jail custody for more than five years at different times in connection with this case and in the meantime, more than twenty two years have already been passed since the date of occurrence and the appellant is more than sixty years of age and he is now on bail, we sentence the appellant to the period already undergone.

12. Accordingly, the Jail Criminal Appeal is allowed in part.

Lower Court's record with a copy of this judgment be communicated to the learned trial Court forthwith for information and necessary action.

Before parting with the case, we would like to put on record our appreciation to Mr. Laxmi Narayan Patel, learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. This Court also appreciates the valuable help and assistance provided by Mr. Priyabrata Tripathy, learned Additional Standing Counsel.

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S.K. Sahoo, J.

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Chittaranjan Dash, J

Orissa High Court, Cuttack
The 2nd November 2023/Sipun

