

(2017) 12 OHC CK 0028

In the Orissa High Court

Case No : 49 of 1992

Balmunda Ganta and others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 14-12-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 394\(2\)](#) - Abatement of appeals
[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 3](#)

Citation : (2017) 12 OHC CK 0028

Hon'ble Judges : S.K. Sahoo

Bench : SINGLE BENCH

Advocate : Satyabrata Pradhan, Priyabrata Tripathy

Final Decision : Allowed

Judgement

1. In pursuance of the order dated 15.12.2016, Mr. Priyabrata Tripathy, learned Addl. Standing Counsel on instruction from the Inspector in charge, Seskhal Police Station placed the enquiry report dated 09.01.2017 which indicates that the appellant no.2 Bhursamunda @ Busamunda Ganta expired in the year 2003 and the appellant no.1 Balmunda Ganta expired in the year 2007 and appellant no.3 Premananda Pani is alive. In view of such report furnished by the I.I.C., Seskhal Police Station, as per the provisions under section 394(2) of Cr.P.C., this appeal in respect of appellants nos.1 and 2 stands abated.

2. The appellants Balmunda Ganta, Bhursamunda @ Busamunda Ganta and Premananda Pani faced trial in the Court of learned Sessions Judge, Koraput, Jeypore, camp at Rayagada in Sessions Case No.260 of 1991 for the offence punishable under section 302 read with section 34 of the Indian Penal Code on the accusation that on 13.02.2991 at about 4.00 p.m., they in furtherance of their common intention committed murder of Jumburu Puala (hereinafter "the deceased") in village Sandhubadi. The learned trial Court vide impugned

judgment and order dated 06.02.1992 found the appellants guilty under section 304 Part-II read with section 34 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for four years.

3. The prosecution case as per the first information report lodged by one Irana Puala (P.W.1) before the Inspector in charge, Rayagada Police Station is that on 13.02.1991 at about 4.00 p.m. while the deceased, who is the son of the informant, was returning home from his father-in-law's house, on the way near village Sandhubadi, the appellants assaulted him by means of fists and kick blows for which he died. It is further stated in the first information report that the assault was seen by two co-villagers of the informant, namely, Puala Pedeya (P.W.7) and Mali Puala (P.W.9). The informant was informed about the death of the deceased by P.W.9 and accordingly, the informant and others rushed to the spot and found the dead body lying in village Sandhubadi.

On the basis of the written report submitted by the informant before the A.S.I. of Police attached to Seskhal outpost namely S. Venkatswamy (P.W.10), station diary entry was made and the written report was sent to Rayagada Police Station for formal registration, on receipt of which Rayagada P.S. Case No.53 of 1991 was registered under sections 302/34 of the Indian Penal Code by the Inspector in charge of Rayagada police station who entrusted P.W.11 Braja Mohan Das, S.I. of Police attached to Rayagada Police Station to take up investigation. P.W.11 visited the spot, examined the eye witnesses and other witnesses, held inquest over the cadaver of the deceased, prepared inquest report (Ext.4). The dead body challan was prepared and the dead body was escorted for post mortem examination to the Sub-Divisional Hospital, Rayagada. P.W.3 Dr. Narahari Behera conducted the post mortem examination and submitted his report (Ext.2). P.W.11 arrested the appellants and forwarded them to the Court. He seized the wearing apparels of the deceased being produced by the constable under seizure list Ext.5, received the post mortem examination report and on completion of investigation, submitted charge sheet on 14.05.1991 under sections 302/34 of the Indian Penal Code against the appellants.

4. The defence plea is one of denial.

5. During course of trial, in order to prove its case, the prosecution examined eleven witnesses. P.W.1 Irana Puala is the informant of the case and he is the father of the deceased.

P.W.2 Siman Puala is a post occurrence witness, who stated to have seen the dead body lying the village Sandhubadi.

P.W.3 Dr. Narahari Behera conducted the post mortem examination of the deceased on 16.03.1991 and proved the post mortem report (Ext.3).

P.W.4 Dambarudhar Jena is the constable who escorted the dead body for post mortem examination.

P.W.5 Sankha Puala is a witness to inquest who proved the inquest report (Ext.4).

P.W.6 Bagi Mandangi is a witness to the seizure of wearing apparels of the deceased vide seizure list Ext.5.

P.W.7 Puala Pedeya and P.W.9 Mali Puala are the eye witnesses to the occurrence.

P.W.8 Andi Puala is the widow of the deceased, who stated that on the date of occurrence, the deceased went to his father-in-law's house situated in village Tambulbai but he did not return back and she got information from P.W.9 about the death of the deceased.

P.W.10 S. Venkatswamy was the A.S.I. of Police attached to Sashikhal outpost, who received the written report from P.W.1 and sent it to Rayagada Police Station.

P.W.11 Braja Mohan Das was the Sub-Inspector of Police of Rayagada Police Station and he is the Investigating Officer of the case.

The prosecution exhibited seven documents. Ext.1 is the written report (F.I.R.), Ext.2 is the post mortem report, Ext.3 is the command certificate, Ext.4 is the inquest report, Ext.5 is the seizure list, Ext.6 is the spot map and Ext.7 is the dead body chalan.

The prosecution also proved two material objects. M.O. I is the towel and M.O. II is the underwear.

6. The learned trial Court in the impugned judgment has been pleased to hold that the death of the deceased was neither accidental nor suicidal but it was homicidal. It was further held that both the eye witnesses, P.Ws.7 and 9 directly implicated the accused persons in killing the deceased in the manner they have stated in their deposition. It was further held that the accused persons have not used any lethal weapon to cause the death of the deceased but there is convincing evidence that they were going on assaulting the deceased by their hands and legs indiscriminately on different parts of the body of the deceased in spite of his appeal to them not to assault further and they continued to assault for which the deceased fell down there. The learned trial Court further held that the occurrence took place on a Wednesday and the matter was reported on the next date and all the witnesses were examined on the next day of occurrence and therefore, there is no unreasonable delay in lodging the F.I.R. or in examining the principal witnesses. The learned trial Court further held that there are ample evidence to show that the accused persons were indiscriminately giving fist blows to the deceased till he fell down and they had common intention to assault the deceased and accordingly, the learned trial Court was of the opinion that the case comes under sections 304 Part II/34 of the Indian Penal Code instead of sections 302/34 of the Indian Penal Code.

7. Mr. Satyabrata Pradhan, learned counsel appearing for the appellant no.3 contended that the evidence of P.Ws.7 and 9, who are the two eye witnesses to the occurrence that the appellants dealt number of fist blows and kicks to the deceased does not get corroboration from the post mortem examination report. He further contended that only one injury has been noticed on the left

temporomandibular joint region of the deceased, which has resulted in causing injury to the brain and consequential death of the deceased and no weapon was used in the assault of the deceased and therefore, there cannot be any knowledge that the injury caused is likely to cause death of the deceased and thus the offence will not come within the definition of culpable homicide not amounting to murder and therefore, the conviction of the appellant no.3 under section 304 Part II of the Indian Penal Code should be set aside. Mr. Priyabrata Tripathy, learned Addl. Standing Counsel on the other hand supported the impugned judgment and contented that since the statements of the eye witnesses have been accepted by the learned trial Court and the death has been opined to be homicidal in nature, therefore, the impugned judgment and order of conviction of the appellant no.3 calls for no interference.

8. There is no dispute that the entire prosecution is mainly based on the evidence of three witnesses i.e. the doctor P.W.3 and the two eye witnesses P.Ws.7 and 9. P.W.3 conducted post mortem examination on 16.02.1991 and he has stated in his evidence as follows:- 1. Body was swollen. Foul smelling. Eyes forced out of the sockets. Tongue protruded between the teeth. Lips swollen and oedematous. Abdomen distended. Penis and scrotum enormously swollen. Formation of blisters over the abdomen, thigh, legs and other parts of the body. Flies were attached to the dead body. Hairs were loose. Loosened rectum and stool coming out of the rectal wall. Discharge of semen on the penis.

2. Bruise of size 3" in diameter on the left temporomandibular joint region and cephalohematoma of size 1 1/2" diameter below the site of injury and there was contusion of brain below the injury site.

3. Scrotum and penis swollen and on cut section, there was gas and testis were small and pale. No injury seen over the scrotum or penis.

4. Stomach empty, dark and red patches in the posterior wall.

5. Intestine inflated with gas and dark patches over the mucus membrane.

6. Spleen soft and palpy.

7. Heart soft and flabby.

8. Lungs bullae under the dural membrane.

9. The body was in the process of decomposition.

The doctor has opined that the injuries were ante mortem in nature and the death was due to the injury to the vital organ, i.e. brain and the injuries were sufficient in ordinary course of nature to cause the death. He has proved the post mortem report, Ext.2. The doctor has further stated that he had not seen any injury on the scrotum or penis as the dead body was highly decomposed. He further stated that it was not possible to know if there was any injury on the scrotum or on the penis because the body was highly decomposed. He has further stated that ordinary bruises can be caused by falling down, but the injury

in Ext.2 is not possible by falling down from a ridge and if a person slips down while going on a ridge and the head portion dashes violently against a big stone then only injuries in Ext.2 can only possible.

On a careful perusal of the post mortem report, it appears that except one external injury on the left temporomandibular joint region, the doctor has not noticed any other external injury. The injury no.2 which is a bruise on the left temporomandibular joint region has caused cephalohematoma and also contusion of the brain below the injury site and it was opined to be sufficient to cause death in ordinary course of nature. The finding of the learned trial Court that the death of the deceased was homicidal, has not been seriously challenged by the learned counsel for the appellant and otherwise also, on the basis of the materials available on record, particularly, the post mortem report, inquest report, evidence of the doctor (P.W.3), I am of the view that the prosecution has successfully established that the deceased died a homicidal death and on that score, the finding of the learned trial Court is quite justified.

9. Coming to the evidence of the two eye witnesses, PW.7 has stated that on the date of occurrence, he along with the other villagers threw the dead body of Tromba Budha in the burial ground and then the villagers went to village Domba Handi to take liquor and he along with P.W.9 went to that village for smoking and while they were returning smoking tobacco, they found the appellant no.2 was dealing fist blows to the deceased near village Sandhubadi. The appellant no.2 called the other two appellants and they immediately joined him and all the appellants assaulted the deceased by giving fist blows. He has further stated he as well as P.W.9 protested the appellant no.1, but the later dealt a fist blow on his chest for which he returned back and then he saw that the appellant no.1 and appellant no. 3 caught hold the hands of the deceased and dealt fist blows on the face and other parts of his body by means of their other hands and they also dealt kick blows to the deceased. The deceased was telling the appellants to leave him and not to kill him but the appellants continued to assault him for which the deceased fell down on the ground and then the appellants left the spot. Though P.W.7 has been cross-examined at length but nothing substantial has been elicited so as to disbelieve his testimony. P.W.7 has stated in the cross-examination that the deceased was his agnatic brother so also P.W.9. He has denied to the suggestion put forth by the defence that all of them were drunk and the deceased died while he was with them and a false case has been foisted against the appellants. P.W.9 has also stated that he along with P.W.7 went to purchase tobacco leaves for smoking and while they were returning, they found that the deceased was being assaulted by the appellants and when they interfered, the appellant no.1 dealt a fist blow on the chest of P.W.7. The deceased requested the appellants not to assault him, but the appellants continued to assault him by giving kick blows. When the deceased fell down, the appellants fled away. Nothing has been elicited in the crossexamination of P.W.9 so as to disbelieve his evidence. In the cross-examination, P.W.9 has stated that all the appellants assaulted the deceased indiscriminately all over his body by

hands and legs.

Therefore, I find that the two eye witnesses, i.e. P.W.7 and P.W.9 corroborate each other relating to the assault on the deceased by the appellants by fists and kick blows. So far as the indiscriminate assault by the three appellants is concerned, even though the medical evidence is silent in that respect and only one external injury was noticed but it cannot be lost sight of the fact that the post mortem was conducted three days after the occurrence and by that time the body was highly decomposed and had swollen and blisters had been formed over the abdomen, thigh, legs and other parts of the body and even the scrotum and penis were also swollen and the doctor has stated that it was not possible to know if there was injury on the scrotum or on the penis due to high decomposition of the body. Therefore, non-noticing of the other external injuries corresponding to the kicks and fist blows dealt to the deceased apart from the injury no.2 is not a factor to disbelieve the evidence of the two eye witnesses.

10. The only question now remains for consideration in this appeal is whether the learned trial Court was justified in convicting the appellant no.3 under section 304 Part II of the Indian Penal Code. The learned trial Court in paragraph 14 of the impugned judgment formulated the point for consideration as to whether the appellants had intended to kill the deceased or that they had knowledge that their giving fist blows and kicks indiscriminately on different parts of the body of the deceased would cause his death. Without answering the point, the learned trial Court has simply observed that the deceased was a member of Scheduled Tribe and the accused persons are the members of Scheduled Caste and they were illiterate and rustic villagers and further held that considering the facts and circumstances, it is a case under section 304 Part II read with section 34 of the Indian Penal Code.

Section 304 of the Indian Penal Code prescribes punishment for culpable homicide not amounting to murder. In which cases, the culpable homicide is not murder, the same has been enumerated under the five exceptions to section 300 of the Indian Penal Code. So far as section 304 Part II of the Indian Penal Code is concerned, if it is proved that it is a case of culpable homicide not amounting to murder as per any of the five exceptions enumerated under section 300 of the Indian Penal Code and it is further proved that there was no intention to cause death or no intention of causing such bodily injury as is likely to cause death but the act was done with the knowledge that it is likely to cause death or with knowledge to cause such bodily injury as is likely to cause death then only section 304 Part II of the Indian Penal Code will be attracted.

After formulating the points, it was excepted of the learned trial Court to give finding in that respect taking into account the broad features of the case, but the learned trial Court has failed in that respect and abruptly came to the conclusion. Every conclusion must be based on sound reasoning and established legal principles and cannot be arrived at in a casual fashion.

From the evidence of the eye witnesses and the post mortem report finding, it is very clear that no weapon was used to assault the deceased and he was only assaulted with kicks and fist blows. No motive behind the crime has been established. The assault resulted in causing injury no.2 on the left temporomandibular joint region which has also caused cephalohematoma and contusion of the brain below the injury site which proved to be fatal according to the doctor. Due to high decomposition of the body, no other injuries could be noticed.

In case of Lal Mandi -Vrs.- State of West Bengal reported in 1995 Criminal Law Journal 2659, the Hon"ble Suprme Court held as follows:-

"8. The only consistent evidence that emerges from the testimony of P.W.2, P.W.5 and P.W.8 is that the appellant gave a kick to the deceased at the house of Man Singh. According to the post mortem report, the deceased had four incised wounds besides a lacerated wound and fracture of ribs. The fracture of ribs of the deceased is attributed to the appellant and his co-accused. The appellant can, thus, be fastened with the liability of an offence under Section 325/34 IPC only. The evidence on the record does not justify the conviction of the appellant for offences under Section 302/34 IPC and Section 201 IPC. We accordingly set aside his conviction and sentence for the offences under Section 302/34 IPC and 201 IPC and instead find him guilty of an offence under Section 325/34 IPC and sentence him to suffer rigorous imprisonment for the period already undergone by him. This appeal, therefore, succeeds to the limited extent as noticed above."

In case of Bhup Singh and Anr. -Vrs.- State of Haryana reported in JT 2002 (8) SC 230, it is held as follows:-

"4. During the pendency of the appeal, Bhup Singh-appellant No. 1 is stated to have died and appeal filed by him stands abated. Hence, appeal filed by Bhagmal-appellant No. 2 alone remains for consideration. What is necessary is to examine the role played by Bhagmal in the case and as to nature of offence committed by him. It is no doubt true that the injury inflicted by Bhup Singh on Prem Singh was with great severity by using a lathi whereas Bhagmal held Prem Singh when Bhup Singh inflicted injuries. Though, the witnesses stated that both of them had come on the scene with lathis, yet Bhagmal did not use the lathi at any stage of the incident. All that is stated against him is that he held the deceased Prem Singh when injuries were inflicted by Bhup Singh and, thereafter, he gave several fist and kick blows on various parts of the body of Prem Singh. The High Court stated that the medical evidence disclosed these facts. However, either in the post mortem report or in the evidence of the doctor, there is nothing to show that there had been any fist and kick blows upon the body of Prem Singh (deceased). Thereby, we cannot draw an inference that Bhagmal-appellant No. 2 intended that the said Prem Singh should be murdered or he used any weapon in any manner to give that indication, whatever may be intentions of Bhup Singh. In the circumstances, we think Bhagmal intended only to cause injuries to Prem Singh so that the deceased may be alerted to behave himself, and we cannot

state that Bhagmal had caused injuries with intention to murder him or he shared the common intention with Bhup Singh to kill the deceased. Hence, the findings of the High Court that Bhagmal intended to kill Prem Singh in concert with Bhup Singh so as to hold that he had common intention with him is not justified.

5. In the result, we set aside the conviction of appellant No. 2 under section 302 read with 34 IPC and sentence rendered by the High Court and restore that of the trial Court under section 325 IPC."

In case of K. Malles Rao -Vrs.- State reported in 1985 (I) Orissa Law Reports 497, it is held as follows:-

"6. In the instant case, all that the appellant did was that he dealt some fist blows and kicks on the person of his wife after a sudden quarrel. In the circumstances in which the appellant had been placed and regard being had to the acts committed by him, the application of the fourth clause of Section 300 was grossly misconceived. The appellant could not be attributed with the intention to cause the death of the deceased. It could not also be said that he had the knowledge that by his act, he was likely to cause the death of the deceased. In the absence of proof of intention or knowledge, the offence committed by a person would be voluntarily causing grievous hurt or hurts, as the cause may be. As there had been rupture of the liver which resulted in the death of the deceased, it would be legal, reasonable and appropriate to hold that the appellant had voluntarily caused grievous hurt to the deceased punishable under Section 325 of the Code.

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8. In the result, the appeal is allowed in part. The order of conviction and sentence passed against the appellant under Section 302 of the Indian Penal Code is set aside and in lieu thereof, he is convicted under Section 325 of the Indian Penal Code and sentenced there under to undergo imprisonment which he has already undergone. The appellant be set at liberty forthwith."

In view of the factual scenario, it is very difficult to arrive at a conclusion with reasonable certainty that the act was done with the knowledge that it is likely to cause death or with knowledge to cause such bodily injury as is likely to cause death. There is no clinching material that it is a case of culpable homicide as defined under section 299 of the Indian Penal Code. Once it goes out of the purview of section 299 of the Indian Penal Code, automatically section 304 Part II of the Indian Penal Code will not be attracted. However, since the nature of injury caused on the left temporomandibular joint region of the deceased and its effect squarely comes within clause "eighthly" of section 320 of the Indian Penal Code which defines "grievous hurt", I am of the view that the offence will fall under the purview of section 325 of the Indian Penal Code.

11. Therefore, the order of conviction of appellant no.3 Premananda Pani under

section 304 Part II/34 of the Indian Penal Code is set aside, instead he is convicted under section 325 of the Indian Penal Code. It appears from the record that the appellant no.3 after arrest was produced before the learned S.D.J.M., Rayagada on 19.02.1991 and he was remanded to custody and he was released from custody on 24.07.1991 as per the order of this Court and then he was again taken into custody on the date of pronouncement of the judgment i.e. on 06.02.1992 and as per the order of this Court dated 19.02.1992, he was released from custody on 13.03.1992. Taking into account the total period of pre-trial and post-trial detention, the appellant no.3 is sentenced to undergo imprisonment, which he has already undergone. Accordingly, the criminal appeal is allowed in part.

Before parting with the case, I would like to put on record my appreciation to Mr. Satyabrata Pradhan, the learned counsel engaged for the appellants for his effort in arguing the matter and he shall be entitled to his professional fees which is fixed at Rs.2,500/-.

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