

(2023) 05 OHC CK 0085

In the Orissa High Court

Case No : Criminal Appeal Nos. 9, 73, 444 Of 2018

Banguru @ Sudarsan Nayak

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 05-05-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 374(2)

Indian Penal Code, 1860 — Section 34, 302, 304I, 304II, 323, 325, 341

Citation : (2023) 05 OHC CK 0085

Hon'ble Judges : D.Dash, J;Dr. S.K. Panigrahi, J

Bench : Division Bench

Advocate : Pulakesh Mohanty, Niranjana Lenka, Lalitendu Bhuyan, Sitikant Mishra

Final Decision : Disposed Of

Judgement

D.Dash,J

1. Since in all these three Appeals, the judgment of conviction and order of sentence dated 21st December, 2017 passed by the learned Sessions Judge, Mayurbhanj, Baripada, in S.T. Case No.15 of 2013 corresponding to G.R. Case No.157 of 2011 (C.T. No.583 of 2012) arising out of Kaptipada P.S. Case No.50 of 2011 on the file of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Udala, has been called in question, those were heard together for being disposed of by this common judgment.

These Appellants (accused persons) faced the trial for commission of the offence under section 302/34 of the Indian Penal Code, 1860 (for short, 'the IPC'). The Trial Court, has found the accused persons guilty of the offence under section 302 of the IPC. Accordingly, these accused persons have been sentenced to undergo imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand) each in default, to undergo rigorous imprisonment for two (2) months for the offence under section 302 IPC.

2. Prosecution Case:-

On 04.06.2011 around 7.00 p.m., when Birendra Mohanty (deceased), who is the husband of Mandakini Mohanty (Informant-P.W.1) was returning home near the rice godown situated at Gandhi Chhak of Kaptipada, those accused persons, who used to work in the shop running in the name of "Jhinkeswar Sweet Stall", appeared and attacked him. Birendra, receiving said injuries, was taken to Community Health Centre (CHC), Kaptipada. His condition when became serious, as advised by the treating Doctor of Kaptipada Hospital, was taken to S.C.B. Medical College & Hospital, Cuttack. The incident, having taken place on 04.06.2011, Mandakini (Informant-P.W.1), the wife of Birendra presented a written report with the Officer-in-Charge (OIC) of Kaptipada Police Station on 06.06.2011 at around 10.30 p.m. It is stated that as the members of the Kaptipada Bazar Committee took time for settlement of the dispute with the accused persons and as they failed because the accused persons remained as absconders, there was the delay in presenting the report. In the report, it had been said that the deceased was battling for life. The O.I.C., receiving the said report, immediately registered the case for commission of the offence under section 341/323/325/34 of the IPC and directed one Assistant Sub-Inspector of Police (ASI) attached to the Kaptipada P.S. to take up investigation. The Investigating Officer (I.O.-P.W.23), in course of investigation, examined the informant (P.W.1) and visited the spot. He also prepared the spot map (Ext.8) and examined other witnesses at the spot. He then sent the injury requisition to the Medical Officer, Kaptipada CHC. On 07.06.2011, receiving the information from Mangalabag Police Station regarding the death of Birendra during his treatment in the S.C.B. Medical College & Hospital, Cuttack, he searched for the accused persons but did not find them and on 09.07.2011, he received the record of the U.D. case registered at Mangalabag Police Station. The case, having thus turned to one under section 302 of the IPC, the charge of investigation was handed over to another Sub-Inspector of Police (S.I.-P.W.22), who on completion of the investigation, submitted the Final Form placing the accused persons to face the trial for commission of offence under section 302/34 of the IPC.

3. Learned S.D.J.M., Udala, having received the Final Form, as above, took cognizance of the said offences and after observing the formalities, committed the case to the Court of Sessions. That is how the trial commenced by framing the charges for the above offences against these accused persons.

4. In the Trial, the prosecution has examined the wife of the deceased, who is the informant, as P.W.1. A person, who runs betel shop in Kaptipada Bazar, has come to the witness box as P.W.2. The daughters of the deceased and informant have been examined as P.Ws.3 & 4. The independent witnesses are P.Ws.5, 6, 14 & 17 whereas P.Ws.7, 10, 12 & 13 are the witnesses to the so-called confession made by the accused persons in a meeting and their undertaking to meet the treatment expenses of the deceased. Two person, who run a saloon near the rice godown of Kaptipada Bazar, have been examined as P.Ws.8 & 9 whereas the owner of that Sweet Stall is P.W.11. P.W.16 is a witness to the occurrence. The Doctor of SCB Medical College & Hospital, Cuttack, who had conducted the post

mortem examination over the dead body of the deceased is P.W.20 and the Doctor of Kaptipada CHC, who had initially examined the deceased and submitted the injury report is P.W.21. P.W.24 is a nephew of the deceased whereas the I.Os have come to the witness box as P.Ws.22 & 23.

Besides leading the evidence by examining the above witnesses (P.Ws.1 to 24); the prosecution has proved several documents, which have been admitted in evidence and marked Exts.1 to 8. Out of those, the important ones are the FIR (Ext.1) whereas the inquest report is Ext.2 and the post mortem report is Ext.5. The injury report is Ext.6 and the spot map has been admitted in evidence and marked as Ext.8.

5. The plea of the defence is that of complete denial and false implication. The accused persons have, however, not examined any witness on their behalf in support of the plea nor have they proved any document.

6. The Trial Court, having examined the evidence of the Doctor (P.W.21), who had initially examined the deceased at Kaptipada CHC and his report, i.e., Ext.7 as also the evidence of the Doctor, who has held autopsy over the dead body of the deceased and has proved his report (Ext.5), has arrived at a conclusion that the death of Birendra was homicidal in nature. In fact, this aspect of the case was not under challenge before the Trial Court and that is also the situation before us.

It has been clearly deposed by the Doctor (P.W.21), who had initially examined the deceased shortly after the incident that he had noticed three blunt injuries on the upper arms, right; left shoulder and over the neck and he then finding the condition of the deceased to be serious, had referred the matter to S.C.B. Medical College & Hospital, Cuttack where Birendra died in course of his treatment. The evidence of the Doctor, who had conducted the post mortem examination over the dead body of Birendra, i.e., P.W.20 is clear on the score that he had noticed an abrasion of the size of 2 X 1 cm on the dorsum of right great toe with brownish scab formation and on dissection he had noted gross contusion of pre-vertebral and para vertebral muscles and fascia at lower cervical segment with collection of haematoma at site tissue spaces, C-7 vertebra to be fractured and interiorly dislocated in relation to C-6 of the body with the underlying spinal cord being swollen, bruised and edematous for a length of about 5 cm underneath C-7 of the body.

His positive evidence is that the cervical injury has been fatal and it can cause the death in ordinary course of nature. With such evidence on record, we find absolutely no difficulty in according our agreement with the finding of the Trial Court as to the nature of death of the deceased Birendra.

7. Learned Counsels for the Appellants (accused persons), from the very beginning, instead of impeaching the finding of the Trial Court that the accused persons had assaulted the deceased, which has ultimately led to his death, confined their submission as to modification of the conviction to one under

section 304 Part-II of the IPC and thus appropriate reduction of sentence. They submitted that even accepting the prosecution evidence as placed, the accused persons could at best be said to have committed the offence under section 304 Part-II of the IPC but not under section 302 of the IPC. Inviting the attention of this Court to the evidence on record as to how the incident began and culminated as have been deposed to by the witnesses, they submitted that the entire evidence let in by the prosecution if are accepted on their face value, it would be clear that for the act done by the accused persons, they could be held guilty for commission of offence under section 3041 Part-II of the IPC and not under 302 of the IPC. In this connection, they have invited our attention to the depositions of all the witnesses including the Doctor who had conducted the post mortem examination, i.e., P.W.20.

Having placed the fact and circumstances leading to the incident, the happenings in the said incident and the role attributed to the accused persons as to have been played as against the deceased, they submitted that the Trial Court has fallen in error in convicting the accused persons for the offence under section 302 of the IPC and sentencing them thereunder. They accordingly prayed for modification of the order of conviction and award of appropriate sentence commensurate the crime.

8. Learned Counsel for the State refuting the above submission, contended that the facts and circumstances which have emerged in the evidence of the witnesses who had seen the incident and also those who had arrived thereafter, being viewed with the evidence of the Doctors (P.Ws.20 & 21), the Trial Court has rightly convicted the accused under section 302 of the IPC.

9. Keeping in view the submissions made, we have carefully read the entire judgment passed by the Trial Court. We have also gone through the deposition of all the witnesses (P.Ws.1 to 24) and have travelled perused the documents admitted in evidence and marked Exts.1 to 8.

10. Proceeding straight way to address the submission of the learned counsels for the accused persons, which concern with the modification of the conviction, let us first of all have a glance at the evidence of P.W.1, the wife of the deceased. She has stated that having gone to Kaptipada CHC, when she asked her husband regarding the incident, he had told that the accused persons being under intoxication by taking liquor, dashed him for which altercation started between him on one hand and the accused persons on the other and that was followed by tussle amongst them and he then had stated that the accused persons having lifted him and threw on the ground and then assaulted by stone.

The evidence of this witness do not reveal as to what was her husband's statement that which accused dashed him first and then who did what and other details. It reveals from the evidence of P.W.1 that her husband described the incident especially as to the role played by the accused persons therein in an omnibus manner. The same is the evidence of P.W.2 that the deceased told him

that all the accused persons dashed him and there was an altercation and then he stated that the accused persons assaulted on his back bone with stone. He is not stating the fact as to what P.W.1 stated that about the deceased telling her that the accused persons, having lifted the deceased, had also thrown him. P.W.3, the daughter of the deceased has stated that her father had told her that accused persons assaulted him whereas another daughter of the deceased (P.W.4) has stated that her father had disclosed before her to have been assaulted by these accused persons and they had lifted and thrown him and thereafter assaulted him on his back bone by means of stone. It is also the evidence of P.W.7 that the deceased in an omnibus manner stated to have been assaulted by these accused persons. The eye witness to the occurrence is P.W.16, who has stated to have seen the accused persons assaulting the deceased seriously and then to have left the place. The above, being the evidence of the eye witness and the witnesses, who have heard about the incident from the deceased, when we approach the evidence of the Doctor (P.W.20), who had conducted the autopsy over the dead body of the deceased, it is seen that he had not only one abrasion that too on dorsum of right great toe and that injury although is said to be ante mortem in nature, according to him is not fatal. His evidence is that the deceased met his death on account of shock following the spinal injury to the neck. He has deposed that the internal injury on the neck could have been caused due to sudden movement of vertebral column resulting in bending of the spine. But his evidence is again that if a person, while going on the road, falls on the front side by stumbling, the spinal injury may be possible.

The prosecution has not shown through evidence any such motive behind the crime and it is also not stated that the accused persons had any prior enmity and thus were having the axe to grind against the deceased or were in a mood to take revenge. They state that the accused persons were intoxicated. The incident is said to have arisen when there was a dash between one of the accused persons and the deceased while crossing the road and there being an altercation, thereafter, it is stated in an omnibus manner that the accused persons assaulted the deceased. Only one external injury has been noticed on the dead body of the deceased and no corresponding internal injury found by the Doctor (P.W.20) during post mortem examination.

Taking a cumulative view of all these above circumstances emanating from the entire evidence, as discussed; this Court is of the view that the offence could be properly categorized as one punishable under section-304 Part-II of the IPC and, therefore, we are of the considered opinion that for the role played by these accused persons, they would be liable for conviction under section 304-II of the IPC.

In that view of the matter, the conviction is altered to one under section 304-II of the IPC and accordingly, the Appellants Banguru @ Sudarsan Nayak, Dilu Das @ Sibani Das, Dama @ Damadar Pradhan are sentenced to undergo rigorous imprisonment for a period of seven (7) years and pay fine of Rs.5,000/- (Rupees

Five Thousand) in default to undergo rigorous imprisonment for six (6) months which would be just and proper and meet the ends of justice. The fine, being realized, be paid to the Informant-P.W.1 (wife of the deceased) towards compensation.

11. With the above modification of the judgment of conviction and order of sentence dated 21st December, 2017 passed by the learned Sessions Judge, Mayurbhanj, Baripada, in S.T. Case No.15 of 2013, these Appeals stand disposed of.

Since the Appellants (accused persons), namely, Banguru @ Sudarsan Nayak, Dilu Das @ Sibani Das & Dama @ Damadar Pradhan are on bail, they are directed to surrender before the Trial Court within two weeks hence to receive further instruction in serving out the remaining sentence, if any.

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