

(1999) 07 OHC CK 0015

In the Orissa High Court

Case No : Jail Criminal Appeal No. 17 of 1996

Guji Dharma Rao alias Raju and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 16-07-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304, 323

Citation : (1999) 17 OCR 153 : (1999) 2 OLR 371

Hon'ble Judges : P.K. Misra, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : P.K. Dhal, D.P. Dhal, A.K. Acharya and R.C. Mohanty, for the Appellant; Additional Government Advocate, for the Respondent

Judgement

P.K. Misra, J.—The two appellants have been convicted u/s 302/34, Indian Penal Code (in short, the "I.P.C."), and sentenced to undergo imprisonment for life. The two appellants are brothers. Deceased is the son of the informant (P.W.1). It is alleged that on 13.4.1994, the deceased had gone to a liquor shop at about 9.30 A.M. At that time both the accused persons came together and shouted that they were searching for the deceased. Thereafter, the deceased was assaulted by the two accused persons and ultimately died on account of the injury caused due to assault by a stone. The aforesaid incident was seen by P.W.3, who was working in the liquor shop and others. P.W. 3 informed P.W.I about the incident and ultimately both of them went to Ichhapur Police Station and orally reported about the incident. The police came to the place of occurrence and opined that the place of occurrence was within the jurisdiction of Golanthara Police Station. Ultimately, a written report was lodged at Golanthara Police Station and P.W.8, the Investigating Officer, after conclusion of investigation submitted charge sheet u/s 302/34, I.P.C.

2. Among others, prosecution examined P.Ws.3 and 4 as the purported eye-witnesses. However, P.W.4 did not support the prosecution case and was declared hostile. P.W.5 is the doctor who conducted post mortem and submitted his report-

as per Ext. 3. He found eight injuries, all contusions and abrasions, on different parts of the body including head and chest. He opined that death was due to shock and haemorrhage and the injuries on the chest and the belly were sufficient to cause the death. The other witnesses were formal witnesses. The trial Court relying upon the evidence of P.W.3 as corroborated by the F.I.R. and the evidence of the doctor found both the accused persons guilty u/s 302/34, I.P.C.

3. In this appeal, it is contended by the learned counsel appearing for the appellants that as per the versions of P.Ws. 1 and 3 they had gone to Ichhapur Police Station and had orally reported about the incident and the police had come to the place of occurrence. It has been submitted that no attempt has been made by the prosecution to prove the earliest information before Ichhapur Police Station and this creates a doubt regarding the subsequent FIR.

It is true that P.Ws. 1 and 3 had gone to Ichhapur Police Station and had orally reported about the incident. However, P.W. 1 has stated that no written report was submitted at Ichhapur Police Station, nor the oral information had been reduced to writing. Event though the Investigating Officer could have ascertained about such reporting, non-examination of any witness from Ichhapur Police Station to prove the earliest statement is of no consequence in the facts and circumstances of the present case. In this context it has to be seen that the accused persons have suggested that a false case has been foisted against them at the instance of one Ullal Belaya. However, such suggestion has been denied by P.W. 1, the informant, as well as P.W. 3, the eye-witness.

4. The learned counsel for the appellants also submitted that the FIR subsequently lodged at Golanthara Police Station cannot be treated to be the FIR and cannot be utilised for the purpose of corroborating the prosecution case. In this context, certain discrepancies have been pointed out. It appears from the evidence of P.W. 8 that a written report submitted by P.W. 1 was treated as the FIR. Such written report in Oriya was admittedly not scribed by P.W. 1, who does not know Oriya. According to P.W. 8, it was stated by P.W. 1 before him that the written report had been scribed by one R.K. Mohapatra, Advocate of Berhampur, though P.W. 1 denies about such scribing by said R.K. Mohapatra, Advocate. In the above back-ground, the learned counsel for the appellant is justified to some extent in criticizing about the evidentiary value of the FIR. However, it has to be kept in mind in this case that the FIR in the present case has not been lodged by any eye-witness. The FIR can corroborate or contradict the maker thereof. In the present case. P.W. 3 has stated about the incident being an eye-witness as he was working in the liquor shop. Though it is suggested by the accused persons that P.W. 3 was a henchman of Ullal Belaya, such suggestion has been stoutly denied. At least, the defence has not suggested any animosity against P.W. 1 or against P.W. 3 directly. Even though the FIR cannot be utilised for corroborating the evidence of P.W. 3, if the evidence of P.W. 3 is otherwise acceptable conviction can be sustained. Though there are some minor discrepancies in the

evidence of P.W. 3, they are of little consequence so as to affect the prosecution case. As per the version of P.W. 3 in Court, the two accused persons came and accosted the deceased. Subsequently, appellant No. 2 gave a boxing blow on the chest and thereafter assaulted the deceased with a stone on the chest. It is further stated by P.W. 3 that appellant No. 1 gave a boxing blow and subsequently put a napkin around the neck of the deceased. It is also apparent from the evidence of P.W. 3 that the deceased had fallen down. The injuries found by the doctor more or less corroborates the statement of P.W. 3. The learned counsel for the appellants had submitted that there are certain omissions and contradictions in the evidence of P.W. 3. In this connection, he submitted that the statement of P.W. 3 had been recorded in Telugu and P.W. 8 was not in a position to indicate the various statements made by P.W. 3. However, the learned counsel for the appellants was permitted to file an English translation of the 161, Cr. P.C. statement. After going through such statement and the evidence of P.W. 3, we do not find any serious omissions or contradictions in the evidence of P.W. 3 so as to discard the same. However, the statement of P.W. 3 recorded u/s 164, Cr. P.C. also does not contradict his statement in Court. Since the evidence of P.W. 3 has received general assurance from the evidence of the doctor, there is no difficulty in accepting the prosecution version relating to the crime.

5. The learned counsel for the appellants submitted in the alternative that even assuming the prosecution case to be true, it cannot be said that an offence u/s 302/34, IPC had been committed. It is no doubt true that both the accused persons came together and left the place together after the incident. However, they had come unarmed. Though it can be said that both of them had common intention to assault the deceased, it cannot be said that the common intention was to kill the deceased. So far as appellant No. 2 is concerned, it cannot be said that he had the requisite intention or the knowledge as required u/s 300, IPC. As already noticed, he had come unarmed. Though in the FIR it is stated that he shouted to kill the deceased, in the evidence it is not stated so by P.W. 3. He started the assault by giving a boxing blow, but subsequently assaulted with stone. In this back-ground it cannot be said that he had the requisite intention, though it is apparent that he had the knowledge that his action in hitting the deceased on chest with a stone was likely to cause death. Keeping in view all these circumstances, it can be said that appellant No. 2 was guilty of an offence punishable u/s 304, Part-II, IPC and not u/s 302.

So far as appellant No. 1 is concerned, it seems that he shared the common intention to assault and participated in the assault itself, but it cannot be said that he had the common intention or shared the requisite knowledge with the other appellant. Thus, appellant No. 1 can be convicted only u/s 323, IPC.

6. Coming to the question of sentence, it appears that the prosecution has not been able to prove any particular motive for the crime. Appellant No. 2 is aged about 30 years. Having regard to the facts and circumstances of the case, we think a sentence of five years" rigorous imprisonment would be sufficient to meet

the ends of justice so far as appellant No. 2 is concerned and a sentence of one year's rigorous imprisonment is sufficient so far as appellant No. 1 is concerned.

7. In the result, the appeal is allowed in part. The order of conviction u/s 302/34, IPC is set aside. Appellant No. 1 Guji Dharma Rao alias Raju is convicted u/s 323, IPC and sentenced to undergo rigorous imprisonment for one year and appellant No. 2 Guji Babeya alias Baleya is convicted u/s 304, Part-II, IPC and sentenced to undergo rigorous imprisonment for five years.

D.M. Patnaik, J.

8. I agree.