

(2002) 11 OHC CK 0012
In the Orissa High Court
Case No : Criminal Appeal No. 101 of 1990

Jagu Malik and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 20-11-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 304, 34

Citation : (2003) 24 OCR 123

Hon'ble Judges : P.K. Misra, J;B. Panigrahi, J

Bench : Division Bench

Advocate : Usharani Bastia, for the Appellant; G.K. Mohanty, Additional Government Advocate, for the Respondent

Judgement

B. Panigrahi, J.—This appeal has challenged the legality, validity and propriety of the order/judgment of conviction passed by the learned Sessions Judge, Phulbani under Sections 302/34 of the Indian Penal Code for commission of murder of one Lonkeswar Mallik.

2. The prosecution case as unfurled in course of trial is as follows:

On 20th July, 1989 both the Appellants along with the deceased went to village "Godamundi Nala" for distilling I.D. liquor. Appellant Jagu Mallik was the sworn friend of the deceased. After a little while, the father of the deceased met Appellant Jagu Mallik on the way. On enquiry made by the father of the deceased, Appellant Jagu's wife impressed upon him that the deceased had gone with her husband for distilling liquor. Although the parents of the deceased waited for the return of their son Lonkeswar, but he did not return. Therefore, on the following morning the parents of the deceased went to the house of Jagu and enquired about the deceased. On being asked, Appellant Jagu replied that after consuming excessive dose of alcohol Lonkeswar could not recover sense and slept on the way. Hearing this, they went in search of Lonkeswar. After covering a distance of two kilometers from their village they found Lonkeswar lying dead

at a place called "Pudusbatta" with severe bleeding injury on his head. They returned to the village and further learnt from P.W. 4 - Drenja Sukamajhi and P.W. 5- Lenjenga Mandalmajhi that in the previous evening both the Appellants killed Lonkeswar by hitting him with stone boulders. Thereafter, the father of the deceased lodged a written report at Subarngiri Out-post and a case was registered. The A.S.I., Subarnagiri Outpost visited the spot on 22.7.1989, held inquest over the dead body of Lonkeswar, sent the same for post-mortem examination, seized three pieces of stones (M.Os. I to III) from the spot containing blood stains. The wearing apparels of the deceased as well as accused were seized and sent for chemical examination. Although blood was traced on the lungi of the Appellant Jillli Mallik, its origin could not be established on account of disintegration. On completion of investigation, charge sheet was submitted against both the Appellants.

3. The plea of the Appellants in the trial Court was one of denial of occurrence and they have claimed to have been falsely implicated in this case just to grab their properties.

4. The prosecution has mainly relied upon the evidence of P.Ws.1, 4 and 5. P.W.1 was the Medical Officer who held autopsy on the dead-body of Lonkeswar and noticed the following injuries:

1. Lacerated wound in 3" x 2" x 1" over left side neck upper part, one inch below the left ear.

2. Lacerated wound 2" x 2" x 1/2 " over the left axilla upper portion.

3. Lacerated wound round in shape 2" diameter 2!12" depth over right arm upper part.

4. Bruise ill-defined over right cheek.

5. Fracture of mandible at left side and middle.

6. Dislocation of left side temporo-mandibular joint.

7. The face in general was compressed. According to P.W. 1, the injuries were ante-mortem in nature and the death was homicidal and might have been caused on account of injuries on the head.

5. P.W. 2, who was the father of the deceased, presented a graphic picture of the prosecution story. From his evidence, it has however, been established that Lonkeswar accompanied Appellant Jagu in the evening of occurrence for distilling liquor. When Lonkeswar did not return in the night, he enquired from Appellant Jagu on the following morning namely 21.7.1989 as to what happened to his son to which Appellant Jagu gave a false impression that the deceased had fallen down on the way due to excessive alcohol drinking.

6. P. Ws. 4 and 5 who claimed themselves to be the occurrence witnesses have stated that at about 6.00 P.M. on the date of occurrence they found the deceased

going with both the Appellants and at "Pudusbata" a quarrel ensued between the deceased and the Appellants. Initially, the deceased Lonkeswar Mallik gave fist blows to Appellant Jillli as a result of which he fell down on the ground. Soon after he got up, he picked up a stone and hit on the back side head of Lonkeswar as a result of which he fell down on the ground. Thereafter Appellant Jagu Mallik gave two blows on the head of Lonkeswar. Seeing this P.Ws. 4 and 5 did not make any attempt to make the deceased free from the clutches of the Appellant, as they apprehended danger to their life. They also did not inform the other villagers as it was late night. On the subsequent morning they disclosed this fact to P.W.2.

7. Miss Bastia, the Learned Counsel appearing for the State defence, has invited our attention to the evidence of P.W.5 that on being threatened by the Police, P.W. 5 deposed such facts in Court as well as during investigation. Thus, P.W.5's evidence cannot be said to be above board, since such statement has been made under duress. Even if we exclude the evidence of P.W. 5, still we are left with the evidence of P.W.4. On a those examination of the evidence of P.W. 4, it is seen that the deceased at the initial stage gave two fist blows and kick blows on the person of Appellant Jillli. Jillli after being assaulted by the deceased fell down on the ground, but after a little while he recovered from it and assaulted on the back side head of the deceased by a stone boulder. Thereafter, Appellant Jagu assaulted the deceased in the same manner. of course, in the evidence of prosecution witnesses nowhere it is stated that there was premeditation or intention of the Appellants to do away with the life of the deceased. All that has emerged was that on account of sudden out-brust of anger, the incident had taken place. It is true that Appellant Jillli in his statement u/s 313, Code of Criminal Procedure did not state to have been assaulted by deceased Lonkeswar. But from the evidence of P.W. 4, it has been established that after the Appellant Jillli assaulted the deceased, the other Appellant Jagu also assaulted the deceased. In this background it has to be considered whether the Appellants had caused murder of Lonkeswar intentionally or the incident had occurred at the spur of the moment without any premeditation. We have already discussed about that, the Appellants did not intend to cause death of the deceased. Intention and knowledge are two different phrases. When a person commits an act, he is presumed to expect the natural consequences. But the from mere fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause the injury of that nature. However, when an accused inflicts a blow with deadly weapon the presumption is that he intended to inflict that injury. In such a situation the Court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. Those circumstances are as follows;

- (i) The weapon used;
- (ii) The degree of force released in wielding it;

- (iii) The antecedent relation of the parties;
- (iv) The manner in which the attack was made, that it is to say sudden or premeditation;
- (v) Whether the injury was inflicted during a struggle or grappling;
- (vi) The number of injuries inflicted and their nature and the part of the body where the injury was inflicted.

8. In this case the Appellant Jagu was friendly with the deceased Lonkeswar. He allegedly invited Lonkeswar for distinction of liquor. On the way, however, Appellant Jillli met them and all of them went to the distillation site. The deceased started bad behaviour with the Appellant Jillli. Therefore, it cannot be said that both the Appellants had any premeditation to do away with the life of the deceased. The Appellants are said to be Adivasis and rustic villagers and they being incensed with anger, must have pelted stones towards the deceased.

9. Therefore, the Appellants are held guilty u/s 304, Part-II of the Indian Penal Code in stead of Section 302 of the Indian Penal Code and are sentenced to undergo R.I. for seven years.