

(2022) 04 OHC CK 0029
In the Orissa High Court
Case No : Criminal Appeal No. 132 Of 2001

Radhakanta Hati And Another

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 05-04-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 300, 302, 304I, 304II

Citation : (2022) 04 OHC CK 0029

Hon'ble Judges : Dr. S. Muralidhar, CJ; R. K. Pattanaik, J

Bench : Division Bench

Advocate : Deepali Mohapatra, J. Katikia

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ.

1. The present appeal is directed against the order of conviction and sentence dated 7th April, 2001 passed by the Additional Sessions Judge, Sonapur in Sessions Case No.15/7 of 2000 whereby both the Appellants were convicted for the offence under Section 302 read with Section 34 IPC for having committed the murder of the deceased Kushadhwaja Hati. Both Appellants were sentenced to imprisonment for life.

2. The prosecution case is that on 5th November, 1999 at around 9 AM, the deceased Kushadhwaja Hati was cutting wood from a mango tree that belonged to him. The accused are have stated to have come there and questioned him about cutting the said tree. The deceased stated that he was cutting his own tree. A quarrel ensued and there was a hot exchange of words between the deceased and the accused. Appellant No.1 is then said to have dealt a tangia (axe) blow on the head of the deceased. The deceased, in order to save his life, ran away from the spot. However, both the Appellants chased him and dealt several blows on the person of the deceased, due to which he sustained several injuries and met an instantaneous death. Appellant No.1 is the nephew and

Appellant No.2 is the son of the deceased through his first wife.

3. On completion of investigation, a charge sheet was laid against the Appellants for the aforementioned offences. They pleaded not guilty and claimed trial.

4. Among the eye witnesses cited by the prosecution are the second wife of the deceased - Champa Hati (P.W.2), their daughter- Phasa Hati (P.W.3) and their minor son - Rasia Hati (P.W.4). P.W.2 is the step mother of Appellant No.2. She clearly stated as under:

"one year 3 months back on a Friday in the month of Kartika at about 9 am while my deceased husband was cutting mango wood and I was then collecting the wood, at that point of time both the accused came near us each holding a tangia and raised protest saying as to why we were cutting the mango tree. When my deceased husband told them that he was cutting his own mango tree fallen to his share this fact enraged both the accused persons and of them accused Radhakanta suddenly dealt a tangia blow on the head of my deceased husband. being so assaulted my husband started running to save his life. Both the accused thereafter chased him and finally killed him by assaulting him with tangia in the field of Raghu Lal."

5. There was virtually no cross-examination of this witness that could throw any doubt on her credibility or veracity. P.W.2 was present with the deceased at the spot collecting mango wood. P.Ws.3 and 4 were tending sheep and buffaloes near to the spot. All three witnessed the assault on the deceased. P.Ws.3 and 4 therefore completely corroborated their mother P.W.2.

6. The three of them consistently spoke about Appellant No.1 (Radhakanta Hati) first assaulting the deceased on his head with tangia. After the deceased started running, both the accused chased him and brutally then assaulted him with the tangia in the field of Raghu Lal.

7. The eye-witness testimonies have been fully corroborated by the medical evidence of the doctor (P.W.6), who conducted the Post-Mortem (PM). He found 12 injuries in the body, all of which were ante-mortem in nature. The cause of death was due to injuries to the brain i.e. injuries 1, 2 and 8.

8. It must be mentioned here that P.W.1 (Govinda Hati), the informant, P.W.8 (Rukuni Hati), P.W.9 (Mohan Karna) and P.W.5 (Saroj Hati) turned hostile and did not support the prosecution.

9. The trial Court found the eye-witness testimonies of P.Ws.2, 3 and 4 to be believable, cogent and sufficient to prove the guilty of the Appellants for the offence with which they were charged. The trial Court accordingly proceeded to hold them guilty of the offence and sentenced them in the manner indicated hereinbefore.

10. This Court has heard the submissions of Ms. Deepali Mohapatra, learned counsel for the Appellants and Mr. J. Katkia, learned Additional Government

Advocate for the State.

11. Ms. Mohapatra submitted that the occurrence took place as a result of a sudden quarrel over the cutting of a mango tree, which led to a heated exchange of words. She therefore tried to bring the case under the ambit of Section 304 Part II IPC by terming it to be a culpable homicide not amounting to murder since it took place under grave and sudden provocation.

12. The Court is unable to agree with the above submissions. Not only did the accused use an axe i.e. a sharp cutting weapon and attack the deceased, who was not posing a threat, on the head, which is the most vital part of the body, but even when the deceased fled, both the accused chased him and inflicted as many as 12 injuries on the body. Several of these deep incised cuts with the axe were on the head.

13. The Supreme Court of India has, in a series of decisions, explained the requirements for conversion of an offence under Section 302 IPC to one under Section 304 Part II IPC. Illustratively, in *Pappu v. State of M.P.* (2006) 7 SCC 391, it was held as under:

".....The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors."

14. In the present case, factor (c) of the four factors enumerated in the above passage, is relevant. The two accused clearly took advantage of being in superior strength to the hapless accused who was fleeing to save his life. The number of blows inflicted clearly point to their having acted in the most cruel and unusual manner, for a seemingly trivial matter like the cutting of wood of a mango tree.

They were merciless in ensuring that the deceased is unable to survive.

15. In *Sukhlal Sarkar v. Union of India* (2012) 5 SCC 703, the Supreme Court explained what could constitute 'grave' and 'sudden' provocation. It was observed:

"10. The meaning of the expressions "grave" and "sudden" provocation has come up for consideration before this Court in several cases and it is unnecessary to refer to the judgments in those cases. The expression "grave" indicate that provocation be of such a nature so as to give cause for alarm to the appellant. "Sudden" means an action which must be quick and unexpected so far as to provoke the appellant. The question whether provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts.

11. Under Exception 1 of Section 300, provocation must be grave and sudden and must have by gravity and suddenness deprived the appellant of the power of self-control, and not merely to set up provocation as a defence. It is not enough to show that the appellant was provoked into losing his control, must be shown that the provocation was such as would in the circumstances have caused the reasonable man to lose his self- control. A person could claim the benefit of provocation has to show that the provocation was grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind.

12. We have critically gone through the evidence of PW 1, the eye witness, and we are of the considered view that the deceased had not provoked the appellant in inviting him to fire from his rifle so as to kill him. The deceased, it may be noted was unarmed. PW 1 was only trying to wake up the appellant so as to do patrolling duty. Assuming that the deceased had slapped and pushed the appellant, such an action of the deceased could not be characterized as grave and sudden, so as to provoke the appellant to fire at the deceased killing him at the spot."

16. In the present case, it was the accused who picked up a quarrel with the deceased and not the other way around. Further, the deceased quite justifiably defended his action of cutting the tree that was on his own land. This cannot be said to have constituted a grave provocation for the two accused to unleash so many fatal blows on the head of the deceased with a sharp cutting weapon like the tangia. The eye-witnesses' testimonies clearly and cogently speak of not just a single blow being delivered to the deceased by both the accused but several blows and on the essential part of the body. When the deceased ran after receiving the first blow on the head, both the accused chased and continued to rain blows on him. Consequently, there is no scope for conversion of the offence for which the Appellants have been found guilty under Section 302 IPC read with Section 34 thereof to the lesser fails of Section 304 Part II or even for that matter Section 304 Part I IPC.

17. The Court is unable to find any infirmity in the impugned judgment of the trial Court. The appeal is accordingly dismissed.

18. The bail bonds of both the accused shall stand cancelled. They are directed to surrender forthwith. If they do not surrender within a period of two weeks, the IIC of the concerned Police Station will immediately take steps to take both the Appellants forthwith into custody to enable them to serve out the remaining sentence.

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