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**(1978) 09 OHC CK 0006**  
**In the Orissa High Court**  
**Case No : Government Appeal No. 16 of 1976**

State of Orissa

APPELLANT

Vs

Govind Chandra Biswal and Others

RESPONDENT

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**Date of Decision :** 14-09-1978

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313, 378  
Penal Code, 1860 (IPC) — Section 302, 304, 34

**Citation :** (1978) 46 CLT 613

**Hon'ble Judges :** S. Acharya, J; P.K. Mohanti, J

**Bench :** Division Bench

**Advocate :** Ajit Rath, Addl. Standing, for the Appellant; S.K. Muhanty and A.S. Naidu, for the Respondent

**Final Decision :** Allowed

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## Judgement

S. Acharya, J.—This is an appeal u/s 378 of the Code of Criminal Procedure against the judgment of acquittal passed by the Sessions Judge, Mayurbhanj-Keonjhar, Baripada in S.T. Case No. 89-M of 1974. Respondents Krushna Chandra Biswal and Pratap Chandra Biswal are the sons of Respondent Govinda Chandra Biswal.

2. The prosecution case in short is that Bhagabat Das (P.W. 9) and his father Khudia Das (deceased) took delivery of possession of 5 mans of land in village Nachhipur in execution of a decree of the Court of the Subordinate Judge, Baripada. Since that time P.W. 9 and the deceased used to possess the said land. On 4-4-1974 morning while P.W. 9 was ploughing the said land, the Respondents (hereinafter to be referred to as the "accused persons") along with 10 others went to the said land to forcibly plough the same. On the land, accused Govinda Chandra Biswal asked P.W. 9 as to why he was ploughing the said land. When P.W. 9 replied that he was ploughing the said land as he got delivery of possession of the same under a decree of the Court, the accused persons and his party-men threatened to assault P.W. 9. At this P.W. 9 ran away from that place.

On seeing all that, Puma Chandra Das the brother of P.W. 9, who had come to that place, went back to his house and informed his father Khudia Das about the above incident. Khudia Das immediately went to the said land and found that all the accused persons with their associates were ploughing the said land. At this Khudia Das asked the accused persons as to why they were ploughing the said land, but accused Krushna Chandra Biswal dealt a blow on the right shoulder of Khudia Das with an axe as a result of which Khudia Das fell down on the ground. Thereafter accused Pratap Biswal gave one blow with an axe on the chest of Khudia Das and accused Govinda dealt a few blows with a Bala on the deceased. Thereafter one Biswanath Biswal (not prosecuted) assaulted the deceased with a stick. On seeing this, P.W. 9, who was standing at some distance from the place of occurrence, ran back to the village out of fear and informed some villagers about the said occurrence. Some villagers along with P.W. 9 went to the spot and found the deceased lying dead with bleeding injuries. Thereafter, P.W. 9 lodged information about the occurrence at the Udala P.S. at 4 p.m. the same day. On the said Information, the F.I.R. Ext. was drawn up by P.W. 12, the officer-in-charge of that P.S., and he started investigation into the case. In course of the investigation, accused Govinda Chandra Biswal made the confessional statement, Ext. 8, before P.W. 5, the S.D.J.M. Udala on 8-4-1974. After investigation and commitment proceeding the accused persons stood their trial for an offence u/s 302/34. Indian Penal Code on the allegation that is furtherance of their common intention, they- intentionally caused the death of Khudia Das.

3. All the three accused persons in their statement in the trial Court pleaded not guilty to the charge. Accused Krushna further stated that as the deceased with an axe in his hand chased him he whirled the Tangia in his hand in self defence and ran away from that place, but he did not know if the axe in his hand struck the deceased and caused any injury on him.

4. P.Ws. 4 and 9 are the two eye-witnesses to the occurrence. P.W. 6 is a pre-occurrence witness and P.W. 8 is a post-occurrence witness. P.W. 5 is the Magistrate who recorded the confessional statement, Ext. 8. of accused Govind Chandra Biswal. P.W. 11 is the Doctor who conducted the post-mortem examination. P.Ws. 1, 2, 3, 7 and 10 are formal witnesses of seizure etc. P.W. 12 is the I.O.

5. That the deceased met with an homicidal death is not challenged by the counsel appearing for the accused persons. The deceased had the following external injuries on his person:

1. One incised wound 10" x 2" x brain deep in the" scalp starting from a point I" above the mid eyebrow right side and extending upto the occiput.
2. One incised wound 2 1/2" x 1" bone deep in the right side of the back of the neck 2" posterior to the right ear running obliquely downwards to the neck at the level of 4th cervical vertebrae.
3. One incised wound 2 1/2" x 1" x bone deep in the right side of the back of the

chest at the level of the lower angle of the shoulder blade.

4. One incised wound 5" x 2" x bone deep at the back of the right side of the chest 11/2" below the injury No. 3.

5. One incised wound 2" x 1" x bone deep at the back of the lower one-third of right arm 2" above the elbow. The underlying bone of the right humerus fractured.

6. One incised wound muscle deep in the back of the right arm 11/2" above the injury No. 5.

7. Fracture of the right side of the scalp, frontal, parietal, temporal and part of occipital bones.

8. Fracture of 4th cervical vertebrae.

9. Fracture of the 7th, 9th ribs in the right side.

10. Fracture of the right humerus;

Laceration of the scalp muscles extending from the frontal to the occipital region of the scalp, the underlying bones fractured; dura and membranes were found to be torn and clotted blood with brain matter was coming out of the fractured side.

On dissection the following internal injuries were found in the dead body:

(1) Injury No. 2 revealed laceration of muscles underlying the same and extravassated with blood the 4th cervical spine fractured. The spinal chord was in tact.

(2) Injury No. 3 revealed that the intracostal muscles and the muscles of the back were lacerated. The right 7th rib was fractured obliquely.

(3) Injury No. 4 revealed fracture of the 9th rib at its posterior one-third.

(4) Injury No. 5 revealed laceration of the muscles of the right arm and there was supracondylar fracture.

(5) Injury No. 6 revealed extravassation of the muscles with blood. All the injuries were antemortem and excepting injury No. 6 all the injuries were grievous in nature.

6. On a perusal of the impugned judgment we are convinced that the assessment of the evidence "on the record by the Sessions Judge has been most perfunctory, there" are several errors of record in the impugned judgment and the conclusions made by the Sessions Judge are inconsistent and self-contradictory. A reading of the judgment indicates that the Sessions Judge was out any how to acquit all" the accused persons of the charges framed against them.

7. It is no doubt true that the prosecution case that P.W. 9 and the deceased took

delivery of possession of the 5 mans of land, on which the occurrence took place, in execution of a decree of the Civil Court is not correct. Exts. A, Band C clearly show that in pursuance of the decree dated 2-2-1972 in T. S. No. 76 of 1970 of the Court of the Subordinate Judge, Baripada, accused Govinda Chandra Biswal, accused No. 1, got delivery of possession of the said 5 mans of land on or about the 27th March, 1974 in Execution Case No. 54 of 73 of the said Court. So in this case one has to appreciate the evidence on record on the above basis.

8. The learned Additional Standing Counsel appearing, for the State has fairly and rightly conceded that on the evidence on the record no offence is made out against accused Pratap Chandra Biswal. Accordingly this appeal is not pressed against the said Respondent and it is dismissed so far as it relates to him.

9. P.Ws. 4 and 9 are the only two eye-witnesses to the occurrence. P.W. 4 was declared hostile by the prosecution. It has been held in Bhagwan Singh Vs. The State of Haryana, easel reported that:

Where the Court gives permission to the prosecutor to cross-examine his own witness, thus characterising him as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

The evidence of P.W. 4 about the occurrence proper cannot be relied upon. In his examination-in-chief he tried to support to some extent the case made out by accused Krushna Chandra Biswal in his statement u/s 313 of the Code of Criminal Procedure. He has stated that Khudia Das went to the aforesaid-land with a Bala and Lathi in his hand and when he ran towards accused Krushna Chandra Biswal, the latter whirled one axe which struck on the back side of the neck of Khudia Das as a result of which Khudia Das fell down on the ground. On seeing this, he (P.W. 4) out of fear went away from that place and he did not see accused Govinda or Pratap assaulting Khudia Das. But in his statement under Sections 164 and 161, Code of Criminal Procedure (confronted), he had stated that when Khudia Das fell down on the ground, accused Pratap snatched away the Bali from the hand of accused Govinda and gave two or three strokes to Khudia Das with the said axe. He has further stated in his statement "under Section 161, Code of Criminal Procedure that after Khudia Das fell down on the ground, accused Govinda assaulted him with a stick. In his cross-examination he has stated various other things which he had not stated at any other stage, nor the same finds any corroboration from any other materials on record. Because of his prevaricating and inconsistent statements one cannot place reliance on him. However, his evidence that Khudia Das came to the said land followed by his son Bhagabat, and that Khudia Das then had a Bala and a Lathi with him and he came towards accused Krushna Chandra Biswal, gets corroboration from the evidence of P.W. 9 and to some extent from the judicial confession of accused Govinda, and so that part of the evidence may be relied upon.

10. On the evidence of p. ws. 4, and 9 and the judicial confession of Govinda, it is established beyond doubt that when the accused persons were on the said 5 mans of land the deceased came there armed with a Bala and a Lathi. As stated above, it is well established that in pursuance of the decree dated 2-2-1972 in Title Suit No. 76/70 of the Court of Subordinate Judge, Baripada, the accused persons got delivery of possession of the said 5 mans of land on or about the 27th March, 1974. So the accused persons and their party-men had the right to possess the said land and they were free to exercise their right of private defence of property in accordance with law whenever there was any invasion on their right to possess the said land. Without doubt the stage for the occurrence was set when the deceased and his son P.W. 9 made an attempt to dispossess or to create effective disturbance in the peaceful possession of the said land by the accused persons, and the occurrence took place when the deceased in a challenging mood and posture went near the accused persons when they were on the said land. According to P.W. 9, the accused persons with their party-men were sitting on that land when the deceased went to that place. Nobody can find fault with the accused persons or their party-men for staying on that land as they had obtained possession of the same by virtue of a civil Court decree. P.W. 9 has admitted in his examination-in-chief itself that when his father went to that place he was holding one Bala and a Lathi in his hand. As the accused persons were sitting on their own land the deceased had no justification to go there in that manner.

In view of the past long standing disputes between the parties relating to the possession of the said land and all that had happened just prior to the occurrence, the appearance of the deceased on the said land in challenging mood with a Bala and a Lathi in his band must have caused apprehension in the mind of the accused persons that the deceased came there to oust them from the said land even by application of force by use of the Bala and the Lathi in his hands. Accordingly the accused persons had the right to defend their property and person from such attack. P.W. 9 states that when the deceased went near the accused persons armed with a Bala and a Lathi accused Krushna gave one stroke with the axe in his hand on the back of the deceased as a result of which the deceased fell down on the ground. The evidence of P.W. 9 to the above effect get corroboration from the evidence of P.W. 4 and the incised wounds found on the back of the deceased. But as the accused persons in the facts of this case had the right of private defence of person and property, as they apprehended danger to their property and person since the deceased appeared before them in a challenging mood with a Bala and Lathi in his hand, one cannot find fault with accused Krushna for dealing the said blow on the back of the deceased to disable him from using the said weapons in his hand against the accused persons. In the facts of this case, it cannot also be said that by giving that blow accused Krushna exceeded his right of private defence. There is nothing on record to show that Krushna dealt any further blow on the deceased after he fell down on the ground on receiving the aforesaid axe blow on his back. On the above facts, Krushna

cannot be held guilty for the charge framed against him or for any other minor offence.

11. There is nothing on the record to show that after the deceased fell down on the ground he again got up and made any attempt to attack the accused persons or their party-men in any manner whatsoever. It also sounds improbable that after receiving the aforesaid axe blow on his back and after falling down on the ground, the deceased was capable of getting up to create any further apprehension of danger in the mind of the accused persons. So any further attack on the deceased by any of the accused persons after he fell down on the ground, if established on the evidence on the record, cannot be excused on the ground of their private defence of person or property, and the same has to be punished in accordance with law. P.W. 9 states that after the deceased fell down on the ground on receiving the above mentioned axe blow on his back from accused Krushna, accused Govinda gave three blows in succession with a Bala on the back of the deceased. The evidence of P.W. 9 to the above effect has not been successfully assailed and that gets corroboration from his previous statement to that effect in the F.I.R. and the injuries found on the person of the deceased. Accused Govinda in his confessional statement, Ext. 8 has also admitted that he dealt severe cut injuries on the deceased (hani deli). P.W. 4, the hostile witness, has admitted that at the time of occurrence accused Govinda had a Bala with him. On the said evidence and materials on record, it is established beyond reasonable doubt that accused Govinda caused a few severe cut injuries on the deceased when he was lying injured on the ground. The infliction of the said blows cannot be exonerated or excused on the plea of right of private defence of person and property as stated above.

12. Now it is to be examined as to what offence is made out against accused Govinda for inflicting the said blows on the deceased. The deceased trespassed upon the said land with a valiant attitude possessing lethal weapons in his hand. Govinda must have been highly agitated and upset, due to the defiant, adamant and violent attitude adopted by the deceased even after losing the suit for the possession of the said land and after delivery of the same in favour of the accused persons in execution of the Civil Court decree. So the deceased not only caused apprehension of danger to the person and property of the accused persons but also caused grave provocation sufficient to deprive them of their self control. There is nothing on the record to show that accused Govinda dealt the said blows on the deceased after the lapse of sometime after the deceased fell down on the ground. So one cannot say that accused Govinda had sufficient time to visualise and comprehend the consequences of his act. As he was in a very perplexed and agitated mood, it was also difficult for him to modulate his ways and conduct in a sane and composed manner. So in the facts and circumstances of the case, Govinda cannot be held guilty for the offence of murder but he has to be held guilty of the offence of culpable homicide punishable under the first part of Section 304, Indian Penal Code.

The Court below has not at all directed its attention to this aspect of the matter which is patently evident from the evidence on record. The Court below holds that as the deceased committed criminal trespass on the aforesaid land in a violent manner, accused Krushna in exercise of his right of private defence of person and property was justified in giving an axe blow on the back of the deceased. Having arrived at the said finding the Court below did not proceed to consider the effect of further successive incised injuries, dealt by accused Govinda on the deceased after he fell down on the ground. All the injuries excepting injury No. 64 were grievous and death was caused on account of haemorrhage and shock due to the grievous injuries, and external injury No. 1 was by itself sufficient to cause the death.

On the above considerations accused Govinda is to be held guilty under" Section 304 Part I, Indian Penal Code. Accordingly the order of acquittal in his favour has to be and is hereby set aside. The ends of justice shall be served if he is sentenced to undergo R.I. for 5 years only for his conviction u/s 304. I, Indian Penal Code, and it is ordered accordingly.

13. In the result, the order of acquittal in favour of accused Pratap Chandra Biswal and Krushna Chandra Biswal is upheld and this Government appeal so far as it relates to them is dismissed. But this appeal is allowed in so far as it relates to accused Govinda Chandra Biswal to the extent as stated above.

Accordingly the appeal is partly allowed.

P.K. Mohanti, J.

I agree.

Appeal partly allowed.