
(1978) 09 OHC CK 0009
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Mathuri Mallik and Another

RESPONDENT

Date of Decision : 19-09-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386, 401, 423
Penal Code, 1860 (IPC) — Section 300, 302, 304, 34, 392

Citation : (1978) 46 CLT 455 : (1979) CriLJ 508

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

Bench : Division Bench

Judgement

P.K. Mohanti, J.—The respondents were jointly tried for offences under Sections 302/34 and 454 I. P. C. but Were " convicted u/s 304, Part II read with Section 34 I. P. C, and sentenced to undergo R. I. for six years each. This appeal has been preferred by the State against the order of acquittal on the ground that the trial court erred in not convicting the respondents u/s 302/34 I. P. C. There has been no appeal by the respondents against their conviction u/s 304, Part n read with Section 34 I. P. C.

2. Shortly stated, the prosecution case was that the deceased Bira Mallik had two sons, namely, Bata and Nata. Respondent No. 1 Mathuri Mallik is the son and respondent No. 2 Musa Dei is the wife of Bata. The deceased was living separately from his sons who were also separate inter se. They resided in separate rooms in the same compound. On 27-4-74 a quarrel ensued between the deceased and the accused Musa Dei in course of which they assaulted each other and the matter was reported to the police. On 29-4-74 respondent No. 1 entered into the house of the deceased by scaling over the thatch with the help of a ladder and opened the entrance door. Then both the respondents assault- ed the deceased with a stick and an iron pipe as a result of which he sustained injuries and died.

3. Respondent No. 2 Musa Dei admitted that there was a quarrel between her and the deceased on 27-4-74 and that the matter was reported to the police.

Both the respondents, however, denied having assaulted the deceased on 29-4-74.

4. In order to prove the charges, prosecution relied on the ocular evidence of the two eye-witnesses, namely, P.Ws. 1 and 14 and the dying declaration of the deceased made before P.Ws. 2, 4, 5, 6, 7 and 14. The learned Judge of the court below disbelieved the evidence about the dying declaration but relying mainly on the ocular evidence of P.Ws. 1 and 14 held that the version of the prosecution that the two respondents inflicted the injuries with a stick and an iron pipe on the deceased and those injuries resulted in his death, is true. He, however, held that the respondents had no intention to cause death, but they definitely had the knowledge that the bodily injuries caused by them were likely to cause death and accordingly held them guilty u/s 304, Part II read with Section 34 I. P. C.

5. The learned Additional Standing Counsel appearing in support of the appeal contended that the learned Judge having believed the evidence of the eye-witnesses fell into an error in holding that the respondents had no intention to cause the death of the deceased. He also contended that the conclusion reached by the learned Judge that the offence committed by the respondents is not murder but culpable homicide not amounting to murder is palpably wrong.

Mr. Rahenoma, the learned Counsel appearing for the respondents urged that in view of the fact that the State has preferred an appeal against the order of acquittal of the respondents of the charge u/s 302/34 I. P. C. the whole case is before the appellate court and he is entitled to challenge the conviction u/s 304/34 I. P. C. According to him, the prosecution has failed to establish the charge u/s 302/34 I. P. C.

6. We are of the opinion that the respondents are not entitled to challenge their conviction u/s 304/34 I. P. C. inasmuch as they have not preferred any appeal against the same. This is an appeal under Clause (a) of Section 386 Cr.P.C. (new) which provides for cases of appeal from orders of acquittal and therein the appellate court may reverse such order of acquittal and direct any one of the following: (1) a further enquiry, (2) a re-trial, (3) a committal for trial, or (4) finding him guilty and passing a sentence on him. It is only the order of acquittal which is the subject-matter of this appeal and not the order of conviction. In the case of *The State of Andhra Pradesh Vs. Thadi Narayana*, , the accused was charged under Sections 302 and 392, I. P. C. The Court of Session acquitted him of those charges and convicted him only of an offence u/s 411, I. P. Code. The accused appealed to the High Court against the conviction and sentence, but the State Government did not appeal against the acquittal of the accused under Sections 302 and 392, I. P. Code. The High Court set aside the conviction and sentence u/s 411, I. P. C. and remanded the case to the Court of Session for re-trial of the accused on the charges under Sections 302 and 392, I. P. C. Their Lordships while construing the provisions of Section 423 of the old Cr.P.C. (corresponding to Section 386 of the new Cr.P.C.) observed as follows (at p. 211 of Cri LJ):

In a case where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction it is only the order of acquittal which fails to be considered by the Appellate Court and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal.

The decision referred to above was followed in the case of *Lakhan Mahto and Others Vs. State of Bihar*, . In view of the aforesaid observations of the Supreme Court it cannot now be urged that in an appeal against acquittal preferred by the State, respondents are entitled to challenge their conviction when they have not preferred any appeal against the same. Since they have not availed themselves of the right of appeal, a revision at their instance would be barred, as provided by Sub-section (4) of Section 401, Cr.P.C. It is, however, open to the High Court to act suo motu to prevent a miscarriage of justice. Omission of a convict to prefer an appeal does not debar the High Court from interfering with the conviction suo motu in exercise of its revisional powers. The High Court while assessing the guilt or otherwise of the accused can examine the correctness or otherwise of all the findings of the trial Court. As a Court of Revision the High Court may exercise all the powers vested in an appellate Court u/s 386, Cr.P.C. subject to the restrictions imposed by Sub-sections (2) and (3) of Section 401. That means that the accused should have been given an opportunity of being heard and that the High Court may not convert a finding of acquittal into one of conviction. The revisional powers of the High Court vested in it by Section 401, Cr.P.C. do not, however, create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence, and that the subordinate criminal courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code, in this connection the decisions reported in *Pranab Kumar Mitra Vs. The State of West Bengal and Another*, and *Shailabala Devi Vs. Emperor* may be seen.

Suo motu revisional jurisdiction is to be exercised with extreme care and caution and it would be justified only where the interests of justice demand interference. In the present case, there is no such miscarriage of justice as would demand our interference with the conviction in exercise of our revisional powers. It cannot be said that the order of conviction is so perverse or contrary to the record that to uphold it would be travesty of justice. On merits also we do not find any case for the respondents to claim an acquittal. The direct evidence of the two eye-witnesses clearly establishes that the two respondents are responsible for the injuries which resulted in the death of the deceased.

7. The next question for consideration is whether having regard to the number, nature and location of the injuries and the nature of the weapons used, the learned Judge was justified in convicting the respondents u/s 304/34, I. P. Code or whether the conviction should have been for murder punishable u/s 302/34, I. P. C. as is contended on behalf of the State. On a review of the evidence on the record we are of the view that the offence committed by the respondents is clearly one of murder and squarely comes within clause "Thirdly" of S 300, I. P. C.

8. The clause "Thirdly" of Section 300, I, P. C. requires that the bodily injury must be intended and the bodily injury intended to be caused must be sufficient in the ordinary course of nature to cause death. It is in two parts, the first part is subjective one which indicates that the injury must be intentional and not accidental. The second part is objective, in that, looking at the injury caused, the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death.

9. In *Virsa Singh Vs. The State of Punjab*, , their Lordships pointed out that for the application of clause "Thirdly" of Section 300, I. P. C. it must be first established objectively what the nature of that injury in the ordinary course of nature is. U the injury is found to be sufficient to cause the death, one test is satisfied, Then further it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender, the offence of murder is satisfied.

10. In the case of *Anda and Others Vs. The State of Rajasthan*, , their Lordships while construing the third clause of Section 300, I. P. C. observed as follows (at p. 174 of Cri LJ):

It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury Is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature.

The same view was reiterated by their Lordships in the case of *Kalarimadathil Unni Vs. State of Kerala*, .

11. Let us now apply the above principles to the facts of the present case.| The doctor (P. W. 3) who conducted autopsy over the dead body of the deceased found lacerated injuries, ecchymosis and abrasion over different parts of the dead body. He also found an; ecchymosis on the whole front of the chest wall. Internal examination revealed fracture of the 5th, 6th and 7th ribs on the left side, and fracture of the 4th, 5th and 6th ribs on the right side at mid-clavicular

level, the fractured ends being pushed towards the lungs. There was laceration of the lungs on both sides anteriorly.

In the doctor's opinion, the injury on the front of chest wall was responsible for causing the internal injuries and such injury could be caused by placing the iron pipe, M.O. II, on the chest and some persons putting pressure on it. This injury was fatal. Laceration of the lungs was sufficient in the ordinary course of nature to cause death of the victim instantaneously.

12. Both the eye-witnesses stated to have seen the respondents assaulting the deceased with the lathi (M.O. I) and the iron pipe (M.O. II). P. W. 14 who is a common relation of the respondents and the deceased specifically stated that immediately before the occurrence respondent No. 2 Musa Dei expressed before her daughter that there would be a case of murder and that when the deceased entered into his room and closed the door from inside, respondent No. 1 Mathuri effected his entry into the room by scaling over the wall and respondent No. 2 Musa also helped him by cutting the rope with which a tatti was tied to the room. Then both the respondents entered into the room and committed assault on the deceased. Her evidence shows that the acts of the respondents were pre-planned and they intended to cause the injuries which they actually caused. Having regard to the nature and location of the fatal injury it could not be said to be unintentional or accidental. The doctor opined that the injury on the chest was sufficient in the ordinary course of nature to cause death. There can, therefore, be no doubt that the case comes within clause "Thirdly" of Section 300, I. P. C. In the face of the medical evidence and the direct evidence of the eye-witnesses we fail to see how the learned Sessions Judge came to the conclusion that the acts committed by the respondents amounted to an offence u/s 304/34, I. P. C.

13. It is clear from the evidence of the two eye-witnesses that both the respondents acted with prior concert and actively participated in causing the injuries. Though it is not possible to say who actually caused the fatal injury, the acts of the respondents ultimately resulted in- death. The individual acts having been performed in furtherance of the common intention to cause the injuries, each one of them is responsible for the death of the deceased. Thus the charge u/s 302/34, I. P. C. has been well established against the respondents. The learned Sessions Judge went wrong in acquitting the respondents of the offence of murder and convicting them u/s 304/34, I, P. C.

14. The result, therefore, is that the appeal is allowed and the conviction of the respondents u/s 304/34, I. P. C. is altered to one u/s 302/34, I. P. C. In the facts and circumstances of the case, the lesser penalty provided by law would meet the ends of justice. Each of the respondents is sentenced to undergo imprisonment for life.

S. Acharya, J.

15. I agree.