HIGH COURT OF ORISSA: CUTTACK

CRA No. 247 of 1999

From the order dated 30.09.1999 passed by Srhi R.S. Misra, 1st Addl. Sessions Judge, Cuttack in S.T.Case No. 221 of 1995.

---

(1) Manguli Rout &
(2) Khagi @ Ekadasi Rout .... Appellants

Versus

State of Odisha .... Respondent

For Appellants - Mr. D. Panda, Advocate

For Respondent - Mr. J. Katikia, Addl.Govt. Advocate

J U D G M E N T

P R E S E N T:

THE HONOURABLE SHRI JUSTICE S.K.MISHRA
AND
THE HONOURABLE SHRI JUSTICE B.P.ROUTRAY

Date of Hearing: 21.12.2020 : Date of Judgment: 23.12.2020

B.P.ROUTRAY, J. Both the appellants have been convicted for commission of offence under Section 302 of IPC and sentenced to undergo imprisonment for life by the learned 1st Addl. Sessions Judge, Cuttack in S.T. Case No. 221 of 1995, which is challenged before us in the present appeal.

2. The brief facts of the prosecution case are that, appellant No.1, Manguli Rout and appellant No.2 Khagi @Ekdasi Rout are two brothers. The deceased, namely, Subash and the informant, Jadunath (P.W.5) while going in a bicycle on 28.6.1994 at about 2.00 P.M. in the village road passing in front of the house of accused persons, they were assaulted by the appellants along with third accused namely, Jhari @ Jharana, the wife of appellant Manguli. It is alleged that Manguli came out suddenly, caught hold the handle of the bicycle and dragged the deceased, who was sitting on the back career of the bicycle. As the deceased fell down, accused Ekadasi being armed with kati came out from the house and started giving blows to the legs of the deceased with that Kati and at that time the accused Manguli also dealt axe blows on the deceased being supplied the axe by the 3rd accused, Jharana. In the meantime, hearing the shout, the informant and some co-villagers namely, Anadi (P.W.4), Brahmani (P.W.2), Bisweswar and others reached at the spot. The deceased being sustained with severe bleeding injuries was shifted to Maniabandha P.H.C. and then was shifted to S.C.B. Medical College and Hospital, Cuttack on the same day where he died in that night. As such, an U.D. Case

was registered at Mangalabag Police Station in connection with the death of the deceased and inquest was held by Mangalabag Police in that U.D. Case. In the meantime, F.I.R. was also registered on 28.6.1994 at 3.15 P.M. in Badamba Police Station on the written report presented by P.W.5, Jadunath.

3. The appellants pleaded 'not guilty' and denied their involvement in the occurrence.

4. Learned trial court, on the evidence of seven prosecution witnesses and seven documents marked as exhibits on behalf of the prosecution, convicted the present appellants for the aforesaid offence of murder while acquitting the 3rd accused, Jhari@Jharana.

5. It is argued by Mr. Panda, learned counsel on behalf of the appellants, inter alia, that there is material discrepancy in the evidence of P.W.5 in view of the statement of P.W.7 (I.O.) that he presented the F.I.R. before him at 2.30 P.M. in the village and that, he has not stated anything about the blows given on the chest and leg by Manguli. Besides, there is omission of confrontation of material evidence to the appellants in their examination under Section 313 of Cr.P.C.

6. On the other hand, Mr. Katikia, learned A.G.A, supporting the conviction of the appellants, has submitted that in view of clinching account of narration of occurrence by the informant and other eyewitnesses viz., P.Ws. 2, 4 & 5, the appellants have been clearly implicated as the assailants of the murder of the deceased and, as such, their conviction by the learned trial court is justified. It is further submitted by him that the learned court below has wrongly disbelieved the evidence of P.W.6, who ought to have been believed in view of his clear endorsement made in the inquest report (Ext.5) at column No.9.

7. On the backdrop of the submissions advanced at the Bar, we carefully perused the impugned judgment as well as the lower court record. As seen from the trial court judgment, much reliance has been placed on the direct ocular evidence of P.W.5 to conclude the guilt on the appellants.

8. A thorough perusal of the evidence of prosecution witnesses reveals that P.W.5 is the eyewitness to the whole occurrence while P.Ws.2, 4 and 6 are stated to be the eyewitnesses to the occurrence in part, who reached at the spot hearing the shout of P.W.5. However, the learned court below

disbelieved the evidence of P.W.6. Basing on such statements of P.Ws. 5, 2 and 4 of eye-witnessing the occurrence, the learned trial Judge convicted these two appellants.

9. Now to examine the evidence of P.W.5, it is seen that he has stated very specifically naming both the appellants as to their role of giving blows on the deceased to inflict grievous bleeding injuries. He has stated at para-3 of his evidence that since Subash fell down on the ground, Ekadasi-appellant No.2 started giving kati blows to his left leg and despite of his request not to assault the deceased, he continued to assault by means of a kati. Further, Manguli, appellant no.1, being handed over an axe by Jharana, dealt axe blows on the person of the deceased on his chest, legs and neck. It is here argued on behalf of the appellants that Jharana being acquitted of the offence and in absence of production or seizure of the axe before the court below, the role attributed to the appellant-1, Manguli in causing the blows on the deceased should be discarded. But in our view, the learned counsel for the appellants is not correct in his submission to discard the evidence of P.W.5 on this aspect. It is true that Jharana has not been found guilty of the offence, but her acquittal does not take away the presence of

axe as a weapon of offence used by the appellant no.1 to cause assault on the deceased. The evidence of P.W.5 regarding specific overt act of Jharana in giving the axe has been disbelieved by the trial court as the same was not supported by the evidence of P.Ws.2 & 4. Of course the axe was not seized in course of investigation which is a lacuna on the part of the Investigating Officer. But such non-seizure and non-production of the axe as one of the weapons of offence has a little impact on prosecution case in view of the clear and clinching evidence of eyewitnesses so also the corroborative medical evidence depicting nature of injuries.

10. Hon'ble Supreme Court in Criminal Appeals No. 1790-1791 of 2019 (decided on 28.11.2019, Jai Prakash vs. State of Utter Pradesh and others), have observed at Para 22 that, "there are also several lapses in the investigation of the case like non-recovery of "empties" fired from the guns on the deceased, non-recovery of fire arms used by the respondents-accused etc. It is well-settled that any omission on the part of the Investigation Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that

such acts or omissions of Investigating Officer should not be taken in favour of the accused. ……..XX…….As pointed out earlier, any act of commission/omission of the Investigating Officer cannot go to the advantage of the accused. ……XX ……”

11. The submissions on behalf of the appellants that, the evidence of P.Ws.2 and 4 of eye-witnessing the occurrence is unreliable, is not found convincing to us, because, perusal of their evidences are found corroborative to the statement of P.W.5 deposed in the Court about narration of their presence at a short distance from the spot of occurrence. Further, P.W.2 is the mother of P.W.4 and she has confirmed in her cross-examination that she was at a distance of 20 cubits from the spot being present in her Bari towards front side of the house of the appellant. What is pointed out by the learned counsel for the appellants to the effect that blows given by means of axe and kati respectively by both the appellants was an omission on the part of P.W.2, is not found correct in view of the explanation given by the I.O. (P.W.-7) at paragraph 6 of his cross examination which is to the extent that said P.W.2, though had not stated that axe and kati were used as weapons by Manguli

and Ekadasi, but she had stated that "Manguli O Ekadasi Subashaku Hanibare Lagichhanti". Similarly, the omissions pointed out on behalf of the appellants, on the part of P.W.4 are not acceptable being confronted with the I.O. (P.W.7). The submission on behalf of the appellants that, there is also omission on the part of P.W.5 on material aspect, is also not found to be correct. It is pointed that the P.W.5 has not specifically stated before P.W.7 that cut blows was given by the appellant Manguli to the chest and the leg, but analysis of statements made by P.W.5 in his evidence and the statement given by P.W.7 at para-7 of his cross-examination by way of confrontation, it reveals that P.W.5 stated before P.W.7 that appellant Manguli gave cut blows to the deceased though had not specifically stated that the blows were given on the chest and neck.

12. Thus, upon scrutiny of the entire evidences brought on record by prosecution, the same reveals a clear, cogent and corroborative narration of the occurrence by the eye-witnesses and the nature of injuries inflicted are also seen supporting their statement. As such we do not find any infirmity in the order of conviction rendered by the trial court against the

appellants. Accordingly, the sentence of Life Imprisonment as imposed by the learned trial court is confirmed.

13. In the result, the appeal is dismissed being devoid of any merit, in view of the discussions made above.

.....
B.P.Routray, J.

S.K.MISHRA, J. **(Concurring)** Having carefully examined the judgment rendered by my Learned Brother, I concur with the conclusion reached by my learned Brother that the appeal should be dismissed. I would, however, like to rely on some judgments of the Hon'ble Supreme Court to support the concurrence.

14. In this case, prosecution case has been criticized and the judgment of conviction and order of sentence has been impugned on the ground that one of the weapon of offences i.e. Axe used by Manguli was not seized by the investigating agency during the course of investigation. In the case of **State of Rajasthan –vrs.- Kishore**: reported in AIR 1996 SC 3035, the Hon'ble Supreme Court has held that irregularity or illegality by the investigating agency during the course of the investigation

would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account. This ratio was also quoted with approval later on in the case of **Leela Ram (D) Through Duli Chand -Vrs.- State Of Haryana And Anr.** : reported in AIR 1999 SC 3717, wherein the Hon'ble Supreme Court held that it is now a well settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case.

14.1. The Hon'ble Supreme Court in the case of **State of Karnataka -Vrs.- K. Yarappa Reddy** (1999) 8 SCC 715, considered that in case of genuineness of the Station House Diary or spuriousness of the same, if the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously. It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation

is illegal or even suspicious, the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to that level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casually for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case.

14.2. In the case of **Gulzari Lal -Vrs.- State of Haryana**: reported in (**2016**) **4 SCC 583**, the Hon'ble Supreme Court has held that "the question raised by the appellant on the issue that no blood stained earth was recovered from the place of crime is not relevant". In the said judgment the Hon'ble Supreme Court further clarified that on this count, the High Court has also noted the laxity on the part of the police and rightfully concluded that the conviction was valid in light of the statements made by the deceased and the witnesses.

14.3. In the case of **Dhanaj Singh @ Shera and Others - Vrs.- State of Punjab:** reported in AIR 2004 SC 1920, the Hon'ble Supreme Court held that "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective".

14.4. In the case of **C. Muniapan and Others –Vrs.- State of Tamil Nadu**: reported in 2010 (9) SCC 567, it has also been discussed by the Hon'ble Supreme Court that "there may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions,

etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation".

15. Defect in the investigation by itself cannot be a ground for acquittal. Investigation is not the solitary area for judicial scrutiny in a criminal trial. Where there has been negligence on the part of the investigating agency or omissions, etc, which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses carefully to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the objects of finding out the truth. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. There may be highly defective investigation in a case. However, it is to

be examined as to whether there is any lapse by the Investigating Officer and whether due to such lapse any benefit should be given to the accused. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. In this context, judgments passed by the Hon'ble Supreme Court in the cases of **Chandrakant Luxman -vrs.- State of Maharashtra**: reported in (1974) 3 SCC 626, **K. Yarappa Reddy** (supra), **Allarakha K. Mansuri –vrs.- State of Gujarat:** reported in (2002) 3 SCC 57 and **C. Muniapan and Others** (supra), are relied upon.

16. In that view of the matter, determination of guilt is an absolute domain of the court having jurisdiction to try the criminal cases. In view of the settled position of law relating to faulty investigation, we are of the opinion that, in view of the clear, cogent and unimpeachable nature of evidence in the shape of narration of eye witnesses, the machinations demonstrated by the investigating officer in conducting the investigation would not result in acquittal of the appellant.

I, therefore, concur with the judgment rendered by my learned Brother.

.....
S.K.Mishra, J.

Orissa High Court, Cuttack
The 23rd December,2020/CRB