HIGH COURT OF ORISSA; CUTTACK

CRLA NO.49 0F 2002

From the judgment and order of conviction dated 15.7.2002 passed by the learned Additional District and Sessions Judge, Nuapada in S.C. Case No.41/14 of 2001.

Mohan Sabar & others … Appellants

Versus

State of Orissa … Respondent

For Appellant : Mr. Trilochan Nanda
(Amicus Curiae)

For Respondent : Mrs. Saswata Pattnaik,
Addl. Government Advocate

P R E S E N T :

MR. JUSTICE S.K.MISHRA
AND
MISS JUSTICE SAVITRI RATHO

Date of Hearing:24.2.2021& 11.6.2021 and
Date of Judgment: 11.6.2021

S.K.Mishra,J. The appellants have assailed their conviction and order of sentence for the offence under Section 302/34 of the Indian Penal Code (hereinafter referred to as the "Penal

Code" for brevity) by the learned Addl. Sessions Judge, Bhanjanagar in S.C. Case No.41/14 of 2001. The learned Addl. Sessions Judge has convicted them on 15.7.2002 and sentenced them to undergo imprisonment for life.

2. The gravamen of the charges against the appellants is that on 3/ 4.10.2000 in the night the deceased Brajasundar Sabar after taking his dinner went to sleep on a cot in front of his house on the Varandah. He had no foreboding that it was his last night. His wife and children were sleeping inside the room by keeping the doors open. At the dead of the night his wife heard an unusual sound and noticed that the appellants were assaulting her husband by means of an axe (Tabal). At that time his wife could not come outside out of fear. Sometimes thereafter the appellants causing the death of her husband fled away. After this incident the informant called some of the villagers to the spot and lodged an F.I.R. on the next day at 7.15 A.M. at Khariar P.S. Police registered P.S. Case No.112 dated 4.10.2000 for the offence under Section 302/34 of the Penal Code and took up investigation.

3. In course of investigation the Investigating Officer, P.W.14, examined the informant in this case, examined other witnesses, visited the spot, held inquest on the dead body of the deceased, dispatched the dead body for post mortem and arrested the accused. After completion of investigation, the I.O. submitted charge sheet against the

accused for the offence under Section 302/34 of the Penal Code.

4. The defence took the plea of complete denial.

5. In order to prove its case, the prosecution has examined fourteen witnesses. P.W.1 is the informant and P.W.2 is the daughter of the deceased. P.W.9 is the scribe of the F.I.R. P.Ws.3,4 and 5 are the post occurrence witnesses. P.W.6 is the autopsy doctor. P.Ws.7,8 and 13 are the seizure witnesses. P.W.10 is one Kundugutu Sabar who had seen the appellant-Mohan Sabar with an axe prior to the occurrence, P.Ws.11 and 12, the police constables assisted P.W.14 the Investigating Officer of the case.

The prosecution has also relied upon twenty three documents as exhibits and nine material objects. The defence, on the other hand, neither examined any witness nor relied on any documents to prove its case.

6. Mr. Trilochan Nanda, learned Amicus, submits that the learned Addl. District and Sessions Judge, Nuapada has recorded the order of conviction relying upon the sole testimony of P.W.1, the wife of the deceased. He would further submit that there is grave doubt as regards the identification of the accused persons by P.W.1. Admittedly, there was no electricity in the house of the deceased and it was a dark night. P.W.1 has clearly testified in her evidence that it was a dark night. Learned Amicus for the appellants submits that non-mention of the

names of the accused persons in the inquest report casts a serious doubt on the prosecution case. Terming the testimony of P.W.1 being highly unreliable and untrustworthy and the evidence of P.W.2 being highly inconsistent and contrary to the evidence of P.W.1, the learned Amicus would submit that the evidences are discrepant with regard to the exact place of occurrence inasmuch as as per the evidence of P.Ws.1 and 2 that the deceased was sleeping in the Parchi it is not known how the dead body could be detected on the open verandah. It is submitted that the prosecution has not established the exact place of occurrence by cogent and reliable evidence. Learned Amicus would submit that P.W.1 never stated that axe was the weapon of offence. Learned Amicus would submit that the findings of the learned trial court are wholly unreasonable and not plausible both on facts and in law. He would further submit that the order of conviction is highly illegal and improper.

7. Learned Amicus has filed his written note of submission on 23.3.2021. He has stated in his note of argument that F.I.R. was scribed by the Police Officer in the Police Station and the informant, P.W.1, put her L.T.I. on it. The said F.I.R. which was reduced into writing by the Police Officer and P.W.1 had put her L.T.I. has not been brought to records by the prosecution. The F.I.R. which is on record is scribed by P.W.9, Parabu Sabar, which is marked as Ext.15. Learned Amicus has further mentioned in his notes of argument that P.W.9 says in his deposition

that at the time of scribing the F.I.R. on 06.10.2000, P.W.1 was not present in the Police Station. P.W.9 stated that the contents of the F.I.R. was not read over to P.W.1.

8. Learned Amicus has further mentioned that on perusal of the F.I.R. it was seen that the F.I.R. had been lodged on 04.10.2000 and, therefore, on close scrutiny of the evidence it is crystal clear that the F.I.R. lodged at the earlier point of time has been suppressed and the discrepancies in the F.I.R. strike at the root of the prosecution case. Learned Amicus has mentioned in his notes of submission that as per the prosecution P.Ws.1 and 2 are the two eye witnesses to the occurrence. The learned trial court has discarded the evidence of P.W.2 stating that her evidence does not inspire confidence that she was the eye witness to the occurrence.

9. Learned Amicus has further stated in his notes of submission that there has been serious inconsistency between the oral evidence of P.W.1 and the Medical evidence. Learned Amicus would submit that the P.W.1 has developed a new story during the trial. P.W.1 had stated in her deposition that accused Mohan, Durja, Prahalad were assaulting her husband by axe(Tangi) which each of them were holding by their own hands. Accused Durje assaulted her husband on his neck by his axe and her husband fell down.

P.W.14, the Investigating Officer, has stated in his deposition that P.W.1 did not state in her statement that

each of accused persons were armed and accused Durje cut the throat of her husband and other accused persons assaulted by their axe and her husband and fell down on the ground and accused Durje cut the throat. P.W. 2 has also not stated before the I.O. that her father was assaulted and the accused persons ran away from the spot. Learned Amicus has stated that the I.O. said in his deposition that at the time of inquest, no witnesses stated the name of the accused persons to be involved in the crime. Learned Amicus further mentioned that in the recitals of the FIR, the weapon of offence has been described as "Tabil", but in the evidence the weapon of offence has been stated by P.W.1 as Tangi (axe). The prosecution had led no evidence in order to prove that "Tabil" and "Tangi" are the one and same weapon. Therefore, it creates great doubt regarding the weapon of offence. Learned Amicus would submit that the judgment of the trial court is based surmises and conjectures. He would submit that the prosecution has utterly failed to bring home the charges against the present appellants and, therefore, the judgment, order of conviction and sentence passed by the trial court should be aside.

10. The learned Addl. District and Sessions Judge, Nuapada came to the conclusion that the testimony of P.W.1 is so clear, cogent, consistent and reliable that it leaves no room for any doubt about the complicity of the appellants in the crime. The appellants have intentionally caused the grievous injuries on the body of the deceased as

per Ext.3 with their common intention to cause the death of the deceased and those injuries are sufficient in the ordinary course of nature to cause the death of a human being.

11. Learned Amicus in this case has basically assailed the appreciation of evidence by the learned Trial Judge. He also relies heavily on the fact described in the previous paragraphs regarding the suppression of an earlier F.I.R. It is, therefore, appropriate on our part to examine the law relating to appreciation of evidence. It is settled by the catena of decisions as a long judicial practice adopted by the higher Courts that the appreciation of evidence by a Trial Judge, who has the opportunity of observing the demeanor of witnesses while recording their evidence in the Court in presence of the accused and counsel, should not be lightly interfered with by the appellate court who do not have that advantage of observing the demeanor of witnesses.

12. In the case of **Bharwada Bhoginibhai Hirjibhai v. State of Gujarat**; reported in AIR 1983 SC 753, the Hon'ble Supreme Court held that over much importance cannot be attached to minor discrepancies. The reasons are obvious. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is over burdened by the events. The witness could not have

anticipated the occurrence so often has an element of surprise. The mental facilities therefore cannot be expected to be attended to absorb the details. The power of observation differs from person to person. What one may notice, another may not. An object or movement might emboss its image on one persons mind, whereas it may go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross examination made by the counsel and out of nervousness mix up facts, get confused, regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operate an account of fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of defence mechanism activated on the spur of the moment.

13. While examining and appreciating of evidence of P.W.1, who happens to be the widow of the deceased, the fact cannot be ignored that she is not found to have any axe to grind against the appellant. She being the widow of the deceased shall also not implicate some innocent persons in

commission of the crime and thereby letting real culprits go scot free.

14. In the case of State of **U.P. v. M.K. Anthony**; reported in AIR 1985 SC 48, the Hon'ble Supreme Court held that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not permit rejection of the evidence as a whole. If the Court before whom the witnesses, the appellate court which had not the benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may

differ in some details unrelated to the main incident because power of observations retention and reproduction differ with individuals.

15. In the case of **Leela Ram v. State of Haryana and another**; reported in (2000) 18 OCR (SC)34, the Hon'ble Supreme Court held that it is indeed necessary to note that hardly one comes across a witness whose evidence does not contain some exaggeration or embellishment and sometimes in the over anxiety they may give slightly exaggerated account. The Court can shift the chaff from the corn and find out the truth from the testimony of witnesses. Total repulsion of evidence is unnecessary. The evidence is to be considered from the point view of trustworthiness. If this element is satisfied, they ought to inspire confidence in the mind of the court to accept the stated evidence though not, however, in the absence of the same.

16. In the case of **Appabhai and another v. State of Gujurat**; reported in AIR 19988 SC 696, the Hon'ble Supreme Court held that the Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may not be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience

of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witnesses. When a doubt arises in respect of certain facts alleged by such witnesses the proper course is to ignore that fact only, unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses if they are otherwise trustworthy.

17. In the case of **State of U.P. v. Ballabh Das;** reported in AIR 1985 SC 1384, the Hon'ble Supreme Court has examined the law relating to appreciation of evidence of a related witness or interested witness, it has observed that there is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest of or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witness is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence.

18. In the case of **State of Rajasthan v. Teja Ram and other**; reported in AIR 1999 SC 1776, the Hon'ble Supreme Court has held that over insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house the most natural witnesses would be inmates of the house. It is unpragmatic to ignore such natural witnesses and insist on outsiders who would not have seen the occurrence.

19. In applying the aforesaid principles of law in appreciation of evidence, this Court keeps in mind that criminal trial cannot be equated to a mock scene of a stunt film. It is about the real people witnessing the gruesome being committed offences in their presence.

20 Learned Amicus, in this case, has emphasized upon the so called discrepancy between the evidence of P.W.1, P.W.9 and P.W.14-the Investigating Officer regarding the place where the F.I.R. which was prepared and affixed with L.T.I. So there appears to be some confusion regarding this aspect. But from the recorded materials available on record, that is, the F.I.R. itself and the case diary, which was referred by the I.O. at the time of his deposition in the Court, nothing substantially could be brought out to show that actually the F.I.R. was written in the Police Station at first was not registered and suppressed and a second F.I.R. was prepared in village Bijayapur. So only on the basis of some statements during the course of

cross examination of P.W.9 that the F.I.R. was not read over to P.W.1 and in P.W.1's statement that she put her L.T.I. in village Bijayapur, the evidence regarding lodging of the F.I.R. cannot be doubted and cannot be held that the original F.I.R. has been suppressed in this case.

21. The second issue is relating to the spot. The Investigating Officer-P.W.9 in cross examination at paragraph-10 stated that the deceased was sleeping on the open verandah of the case house and the informant was sleeping in 'the parchi' which is adjacent to the verandah and covered up by a roof and the dead body of the deceased was found in the open verandah of a house and there appears to be no discrepancy regarding the same. Moreover, the I.O. has collected the blood stained earth, sample earth, blood stained bed sheet and napkin as per the seizure list Ext.10. It was sent for post mortem examination and it was found that the sample blood stained earth collected from the spot was stained with human blood of Group 'A'. Similarly the bed sheet and napkin seized from the spot were moderately stained with human blood of Group 'A" origin. The said blood group i.e. found on the lungi of the deceased as in the Axes i.e produced in this case on being seized by the I.O. as well as Dhoti and Napkin of two accused persons, which have been seized in this case. So there appears to be no plausible reason to come to a conclusion that there is a discrepancy regarding the spot as put forth by the prosecution in this case.

22. The learned Amicus would further argue that though the prosecution alleges that the appellants gave blows by means of Tabli or Tabal, the prosecution produced two Axes. He argued that Axe and Tabli are two different kind of weapons. We are unable to agree with the same because 'Tabil' is a variety of Axe and the distinction between the two is very minor. Both Tabli and axe have an iron portion with a sharp cutting edge and on the back of it, a handle is appended. The only difference between Tabli and Axe which is known as 'Tangia' in western parts of Odisha is the length of the cutting edge. 'Tabli' generally has wider cutting edge and axe has a smaller cutting edge. But this aspect can be reconciled by the fact that the accused Mohan gave a discovery statement that lead to the discovery and seizure of one of the Axes. The other Axe was seized on production by the accused. Both the axes were found to be stained with deep spurs of human blood of group 'A' human blood was found on the wearing apparels of the deceased. Thus, we are of the opinion that the learned Amicus though advanced his argument in a very attractive manner, there is hardly any reason to accept the same.

23. On the final analysis, we find the evidence of P.W.1 is quite trustworthy having ring of truth. Her evidence is duly corroborated by the objective determination of the spot, which is verandah of their house

where from the I.O. seized blood stained earth etc. Her evidence also gets corroboration from the evidence of P.W.6, the Doctor. The Doctor found incised injury on the dead body of the deceased, in course of post mortem examination, which could have been caused by the axes seized in this case. The recovery of one of the weapon of offence at the instance of the appellant, Mohan Sabar, admissible under Section 27 of the Indian Evidence Act, lends further corroboration by principle of confirmation that the appellants did the deceased to death. The final stand in the case of the prosecution is the result of the chemical examination which supports the case of the prosecution.

24. Thus, in the ultimate analysis we find that the learned Addl. District and Sessions Judge, Nuapada had a clear and perspicacious view of the evidences available on record, he noticing the demeanor of the witnesses while recording their evidence held that the prosecution has proved its case beyond reasonable doubt. There is no plausible or reasonable basis for disturbing such finding of fact which in our opinion are in the line of the various pronouncements of the Hon'ble Supreme Court on this aspect of appreciation of evidence of witnesses in a criminal trial.

25. In the result, the appeal is dismissed. The judgment of conviction and order of sentence passed by the

learned Addl. District and Sessions Judge, Nuapada in S.C. No.41/14 of 2001 are hereby confirmed.

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S.K.Mishra, J

Savitri Ratho,J.

I agree.

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Savitri Ratho, J

Orissa High Court, Cuttack
Dated 11th June, 2021/A.K.Behera.

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S.K.Mishra, J

Savitri Ratho,J.

I agree.

…….
Savitri Ratho, J

Orissa High Court, Cuttack
Dated 11th June, 2021/A.K.Behera.