ORISSA HIGH COURT: CUTTACK

JCRLA Nos.87 of 2007

From the judgment of conviction and order of sentence dated 11.09.2007 passed by Shri A.K. Panda, Additional Sessions Judge (F.T.C.-II), Bhadrak in Sessions Trial Case No.12/166 of 2007/2006.

Duryodhan Pahi ..... *Appellant*

-versus-

State of Orissa ..... Respondent

For Appellant : Mr. Kausik A. Guru, Amicus Curiae

For Respondent : Mr. Gajendra Rout (A.S.C.)

P R E S E N T :

THE HONOURABLE SHRI JUSTICE S.K.MISHRA
AND
THE HONOURABLE MISS JUSTICE S. RATHO

Date of judgment: 07.01.2021

S.K.Mishra, J. This is a case of uxoricide. The convict-appellant-Duryodhan Pahi has been convicted for committing murder of his wife, on 24.04.2006, at about 7 A.M. to 7.30 A.M., under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'the Penal Code' for brevity) by the learned Additional Sessions Judge (F.T.C.-

II), Bhadrak in Sessions Trial No.12/166 of 2007/2006 and sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for two months. The sole appellant assails his conviction.

2. The prosecution alleged that on 24.04.2006 at about 7 A.M. to 7.30 A.M., a quarrel took place between the appellant and his wife in their house with regard to some clothes kept in a box inside the house. When the deceased refused to give the key of the box to the accused, the accused brought out a crowbar to break open the lock of the box. The deceased protested. As a result of which, the appellant became angry and assaulted the deceased by means of the crowbar on her waist and head. As a result of assault, the deceased sustained severe bleeding injuries and died at the spot.

Dusasan Pahi (P.W.1) lodged an F.I.R. before the O.I.C., Bhadrak Rural P.S. A criminal case was registered. S.I. of Police Ramesh Chandra Singh took up investigation of the case. In course of investigation, he examined the informant, eye-witness and other witnesses. He conducted inquest over the dead body of the deceased in presence of witnesses and prepared a inquest report and then sent the dead body for postmortem examination; seized the weapon of offence; collected blood stained earth and sample earth from the spot; seized the wearing apparels of the deceased after postmortem examination. He took steps to record the statement of

the sole witness-Basanti Pahi under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code' for brevity). He also made a query to the Medical Officer and finally dispatched material objects to the State Forensic Science Laboratory, Bhubaneswar for chemical examination. On completion of investigation, finding a *prima facie* case under Section 302 of the Penal Code, he submitted charge sheet against the appellant.

3. The defence took the plea of complete denial to the charge. During his examination under Section 313 of the Code, the appellant denied his complicity in the crime and took the plea that during the course of quarrel, a push and pull was going on between him and the deceased and in course of such push and pull, the deceased dashed against a pillar and died at the spot.

4. In order to bring whom the charge, the prosecution examined 11 witnesses. P.W.2, Basanti Pahi is the solitary eye-witness to the occurrence. P.W.1, Dusasan Pahi is the informant of the case. He happens to be brother of the accused. P.W.3, Surendra Pahi, P.W.4, Padmabati Pahi, P.W.5, Mayadhar Pahi, P.W.6, Sarat Chandra Pahi are witnesses who reached the spot immediately after the occurrence, P.W.7, Ajay Kumar Naik is the seizure witness. P.W.8, Sridhar Naik scribed the F.I.R, P.W.9, Dr. Pradeep Kumar Nayak, Medical Officer, conducted postmortem over the dead body of the deceased. P.W.10, Pravat Kumar Biswal, and P.W.11, Ramesh

Chandra Singh are two Investigating Officers, who conducted investigation of this case.

In addition to examination of witnesses, prosecution has relied upon certain documents marked as Ext.1 to Ext.11 and 6 materials objects marked as M.O.I to M.O.VI.

5. The accused, on the other hand, neither examined any witness nor led any documentary evidence in his defence to prove his case.

6. Mr. K. A. Guru, learned Amicus Curiae appearing on behalf of the appellant does not dispute the findings recorded by the learned Additional Sessions Judge (F.T.C.-II), Bhadrak regarding the homicidal nature of death of the deceased and the complicity of the appellant in commission of the crime. However, he very emphatically argues that this case cannot be held to be a case of murder punishable under Section 302 of the Penal Code. Instead, he argues that the appellant should have been convicted for the offence of culpable homicide not amounting to murder punishable under Section 304, Part-I of the Penal Code. Accordingly, Mr. Guru, learned Amicus Curiae prays to allow the appeal in part by converting the conviction under Section 302 of the Penal Code to one under Section 304, Part-I of the Penal Code. He also argues that since the appellant is in custody for more than 14 years, the period undergone should be awarded to him as punishment. As the appellant is a poor man, who

could not engage any counsel to argue the case in the appellate Court, fine should not be imposed.

7. Mr. G. N. Rout, learned Additional Standing Counsel for the State however submits that conviction of the appellant under Section 302 of the Penal Code is correct and does not require interference by the appellate Court. He urges the Court to dismiss the appeal upholding the conviction of the appellant under Section 302 of the Penal Code and sentence of imprisonment for life.

8. Since, there is no dispute regarding homicidal nature of death of the deceased and complicity of the appellant in commission of the crime, we do not consider it expedient to re-examine the evidence of the prosecution witnesses and come to the conclusion that the learned Additional Sessions Judge has correctly come to the conclusion that the death of the deceased was homicidal in nature and the appellant assaulted the deceased by means of a crowbar.

9. The next question arises before us is that whether this case is culpable homicide not amounting to murder or a case of culpable homicide amounting to murder. The contents of the F.I.R. reveals that on 24.04.2006 at about 7.30 A.M the elder brother of informant, namely, Duryodhan Pahi, the present appellant asked the deceased to give him cloth, which he had brought from Delhi. As a result of which, there was a quarrel between the appellant and the

deceased, as she denied to give the same. She told that after return of their son, Kalindi, the cloth will be handed over to him. Then, appellant tried to forcibly break open the box by means of a crowbar. Then the deceased caught hold of the crowbar. Thereafter, the appellant assaulted the deceased on her waist as a result of which she fell down. Immediately thereafter the appellant gave 7 to 8 blows by means of a crowbar below ear of the deceased. The deceased died.

10. The evidence of P.W.9, Dr. Pradeep Kumar Khuntia reveals that postmortem examination was held on 24.04.2006. He found one lacerated wound of sixe 3'' x 2'' x 1'' present in left parietal bone of skull. The skin and underlined tissues were steered and lacerated. There was fracture of bone with protusion of brain tissue through this injury. He also found that lacerated wound 4'' x 2'' x 1'' present in right temporal area of the skull behind the right ear. So, the doctor found two injuries on the head of the deceased, which belies the statement of the informant in the F.I.R. that 7 to 8 blows were given by means of a crowbar on the head of the deceased. Moreover, there is no injury on the waist of the deceased.

11. Examination of the evidence of sole eye-witness in this case, i.e., P.W.2, Basanti Pahi, reveals that she happens to be the sister-in-law (JAA) of the deceased. The occurrence took place about one year back at about 7 to 7.30 A.M in the house of the accused. At

that time, when this witness was going on the road, she found that a quarrel between the accused and the deceased was going on. Therefore, she stopped there and found that the accused assaulted the deceased by means of a crowbar on her waist for which she fell down on the ground. Thereafter, the accused assaulted by that crowbar on her head for which she sustained bleeding injury and died. When she raised hulla, others came to the spot. She admitted that her statement was recorded under Section 164 of the Code by the Magistrate.

In course of cross-examination, she stated that after hearing the quarrel she saw that the deceased was separating paddy from rice sitting in her house. During the quarrel, the deceased stood up. The accused was also standing in front of the deceased holding a crowbar. After hearing the quarrel, she came to know that they were quarrelling for some clothes which were kept inside the box and the accused was holding the crowbar to break open the box. The deceased tried to snatch away the crowbar from the accused. Thus, it is apparent from the materials available on record that the appellant never made preparation for commission of the offence of murder. The incident took place in a spur of moment due to a petty quarrel between husband and his wife regarding some clothes brought from Delhi and kept inside the box in the house. Appellant asked the deceased to give the clothes. It is the consistent case of the

prosecution that the appellant brought crowbar to force open the box. This Court in the case of ***Rabinarayan Gochhayat vs. State of Orissa***, CRA No.269 of 2000, as per the judgment dated 28.09.2020, after taking into consideration the reported cases of ***Reg. –vrs.- Govinda***; (1877) ILR 1 Bom 342, ***Virsa Singh vs. State of Punjab***; AIR 1958 SC 469, ***Rajwant and another –vrs.- State of Kerala***; AIR 1966 SC 1874, ***State of Andhra Pradesh –vrs.- Rayavarapu Punnayya and Another***; (1976) 4 SCC 382, held that if any of the four conditions, as enumerated below, is not satisfied, then the offence will be culpable homicide not amounting to murder. Those are:-

(i) The act was done with the intention of causing death; or

(ii) with the intention of causing such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm is caused: or

(iii) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinarily course of nature to cause death; or

(iv) With the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and without any

excuse for incurring the risk of causing death or such injury as is mentioned above.

12. There is no material on record to show that the appellant did the act i.e. assault on the deceased with the intention of causing death or with intention of causing such bodily injury as the offender knew to be likely to cause the death of the person to whom the harm is caused, or had the intention of causing such bodily injury sufficient, in the ordinarily course of nature to cause death, or he has knowledge that the act is so imminently dangerous that it must in all probability cause death. The learned Additional Standing Counsel argues that since the appellant assaulted the deceased by means of a crowbar, such an inference has to be drawn. We accept the argument advanced by the learned Amicus Curiae because there is no preparation on the part of the appellant to commit such an offence. Secondly, the crowbar, which he was holding at the time of assault was picked up by him to forcibly open lock of the box containing the clothes. That is the case of the prosecution. So, the incident took place because of a petty quarrel between husband and his wife regarding some clothes and by no stretch of imagination such an act by the appellant can be held to be done with an intention to cause death or such bodily injury intended to be inflicted is sufficient in the ordinarily course of nature to cause death or act is so imminently dangerous that it must in all probability cause death.

13. In that view of the matter, we are not in agreement with the conclusion reached by the learned Addl. Sessions Judge to the effect that the appellant committed an offence of culpable homicide amounting to murder, punishable under Section 302 of the Penal Code. We are of the opinion that this case squarely falls within the exceptions and can be termed as second degree homicide i.e. culpable homicide not amounting to murder punishable under Section 304, Part-I of the Penal Code.

14. In the result, the JCRLA is allowed in part. The impugned judgment of conviction and order of sentence dated 11.09.2007 passed by the learned Additional Sessions Judge (F.T.C.-II), Bhadrak, in Sessions Trial No.12/166 of 2007/2006, convicting the appellant under Section 302 of the Penal Code and sentencing him to undergo imprisonment for life and to pay fine of Rs.2000/- in default to undergo R.I. for two months are hereby set aside. Instead, the appellant is found guilty for commission of offence of culpable homicide not amounting to murder punishable under Section 304, Part-I of the Penal Code. He is convicted under Section 304 (Part-I) of the Penal Code.

15. Accordingly, the appellant-Duryodhan Pahi is sentenced to undergo imprisonment for the period already undergone which is calculated to be more than ten years. Moreover, we are not inclined to impose any fine, as the appellant happens to be an elderly

person aged about 70 years belonging to humble walk of life. Since the appellant has already undergone the sentence, the appellant be set at liberty forthwith, unless his detention is required in any other case.

Accordingly, the JCRLA is disposed of.

The L.C.R. be returned back to the trial court forthwith.

As restrictions are continuing for COVID-19, learned counsel for the parties may utilize the soft copy of this judgment available in the High Court's website or print out thereof at par with certified copies in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020.

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S.K.Mishra, J.

S.Ratho, J. *I agree*

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S. Ratho, J.

Orissa High Court, Cuttack
The 7th January, 2021/**TDTUDU**