

IN THE HIGH COURT OF ORISSA, CUTTACK

Jail Criminal Appeal No.78 of 2005

An appeal from judgment and order dated 16.02.2005 passed by the Adhoc Additional Sessions Judge (F.T.C.), Balasore in Sessions Trial Case No.31/33 of 2002-2001.

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1. Harihara Barik
2. Rabindra Barik Appellants

-Versus-

State of Odisha Respondent

For Appellants:

Mr. D.K. Pani
Amicus Curiae

For Respondent:

Mr. Sonak Mishra
Addl. Standing Counsel

P R E S E N T:

**THE HONOURABLE MR. JUSTICE S.K. SAHOO
AND**

THE HONOURABLE MR JUSTICE S.K. MISHRA

Date of Hearing and Judgment: 12.01.2024

By the Bench: The appellants Harihara Barik and Rabindra Barik faced trial in the Court of learned Adhoc Additional Sessions Judge (F.T.C.), Balasore in S.T. Case No.31/33 of 2002-2001 for offence punishable under section 302/34 of the Indian Penal

Code (hereinafter the 'I.P.C.') on the accusation that on 23.06.2000, in between 09.45 p.m. to 10.30 p.m., in village Nuabazar under Balasore Town police station, in furtherance of their common intention, they committed murder of Damodar Barik (hereafter 'deceased').

The learned trial Court, vide impugned judgment and order dated 16.02.2005, found the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for life and to pay fine of Rs.5,000/- each, in default to undergo rigorous imprisonment for three months.

Prosecution Case:

2. The prosecution case, as per the first information report (hereafter 'F.I.R.') lodged by P.W.9 Anam Chandra Behera, S.I. of Police, Town Police Station, Balasore on 24.06.2000 before the Inspector-in-charge of Balasore Town Police Station, in short, is that he enquired into the Town P.S. S.D.E. No.621 dated 24.06.2000 regarding assault to the deceased, who was admitted in the Headquarters Hospital, Balasore on 23.06.2000 at 11.05 p.m. for head injury due to assault and expired at 12.30 a.m. in the midnight. During enquiry, it came to light that suspecting illicit relationship between the deceased and P.W.8 Parbati Barik, the wife of appellant No.1 Harihara Barik, there was a quarrel on the date of

occurrence and both the appellants assaulted the deceased and the appellant No.2 assaulted the deceased with a 'Tangia'. On the basis of such report, Balasore Town P.S. Case No.150 dated 24.06.2000 was registered under section 302/34 of the I.P.C. against both the appellants.

P.W.13 Akhaya Kumar Das, the Inspector-in-charge of Town Police Station, Balasore registered the case and took up investigation. During the course of investigation, he examined witnesses, proceeded to District Headquarters Hospital, Balasore, found the dead body of the deceased on the verandah of the surgical ward, arranged for guarding the dead body for conducting the inquest and also dispatching the body for post mortem examination. He visited the spot, prepared the spot map (Ext.10), sent the requisition to the scientific team to visit the spot and on the next day, he conducted inquest over the dead body and prepared the inquest report (Ext.4) and sent the dead body for post-mortem examination. The scientific officers visited the spot, collected blood stained earth from the spot so also sample earth and P.W.13, the I.O. seized the same along with one jute rope, one iron rod as per seizure list Ext.1/1. The wearing apparels of the deceased were seized on production by the constable after post-mortem examination as per seizure list Ext.11. The appellant No.2 Rabindra Barik was arrested on

26.06.2000 and his wearing apparels were seized as per seizure list Ext.12, one axe was also seized as per seizure list Ext.2/1. The appellant No.2 was sent for medical examination and thereafter, he was forwarded to the Court. The appellant No.1 Harihara Barik was also arrested on 26.06.2000, his wearing apparels were seized as per seizure list Ext.17 and complying due procedure, he was also forwarded to the Court. The I.O. received the post mortem examination report and made query to the doctor regarding possibility of the injuries sustained by the deceased by the seized weapon and received query report vide Ext.13. He also received the spot visit report of the scientific officer marked as Ext.14, bed head ticket as per seizure list Ext.15. Steps were also taken by the I.O. for sending the exhibits for chemical analysis through the learned S.D.J.M., Balasore and the R.F.S.L. report (Ext.18) was received. On completion of investigation, P.W.13 submitted charge sheet on 22.10.2000 under section 302/34 of the I.P.C. against both the appellants.

Framing of Charge:

3. After submission of charge sheet and complying with the due committal procedure, the case was committed to the Court of Session, where the trial Court framed charge against the appellants as aforesaid. As the appellants pleaded not guilty

and claimed to be tried, sessions trial procedure was resorted to establish the guilt of the appellants.

Prosecution Witnesses, Exhibits and Material Objects:

4. In order to prove its case, the prosecution examined as many as thirteen witnesses.

P.W.1 Ajaya Kumar Prasad, P.W.2 Laxman Kumar Mishra and P.W.4 Rabindra Chandra did not support the prosecution case and were declared hostile by the prosecution.

P.W.3 Dr. Sarat Kumar Ray was the Assistant Surgeon attached to the District Headquarters Hospital, Balasore, who on police requisition examined the deceased and proved his report vide Ext.3.

P.W.5 Sudam Charan Behera is the younger brother of the deceased who stated that the appellant Rabindra did not like to give any share of the landed property to his mother and the same was protested by her (mother of the appellants) and the deceased. The appellants warned the deceased with dire consequences. He further stated that as the deceased used to visit the house of the appellants for which the appellants started doubting the character of the deceased. He also stated that by the time he reached the hospital, the deceased was lying dead.

He is a witness to the preparation of the inquest report vide Ext.4.

P.W.6 Dr. Bhabani Shankar Pani was posted as the Medical Officer, District Headquarters Hospital, Balasore who conducted post mortem examination over the dead body of the deceased and he proved his report vide Ext.5.

P.W.7 Gouranga Chandra Pradhan was working as a constable in the Town Police Station, Balasore. He is a signatory to the inquest report (Ext.4) and the dead body challan vide Ext.6. He took the dead body of the deceased for post mortem examination.

P.W.8 Parbati Barik is the wife of the appellant no.1 Harihara Barik and she is an eye witness to the occurrence.

P.W.9 Anam Chandra Behera was posted as the Sub-Inspector of Police at the Town Police Station, Balasore. He lodged the F.I.R. vide Ext.7.

P.W.10 Santosh Kumar Pradhan was working as an Amin in Tahasil Officer, Balasore. Upon the receipt of requisition from the Tahasildar, Balasore, he conducted survey of the place specified in the requisition. He prepared the map of the spot after conducting the survey, which is marked as Ext.8.

P.W.11 Dr. Deepak Kumar Das Mohapatra was working as an Assistant Surgeon in the District Headquarters Hospital, Balasore. He admitted the deceased and gave him treatment and coming to know that it was a medico-legal case, he informed the matter to the police.

P.W.12 Taramani Barik is the mother of both the appellants who stated that the deceased used to visit their house frequently and she was not supportive of such visit. She also stated that she had cautioned her daughter-in-law (P.W.8) to ask the deceased to avoid coming to their house. She further stated that on the date of incident, the deceased came to her house in an inebriated state and upon seeing him in such a condition, she drove the deceased out of the home. She was declared hostile by the prosecution.

P.W.13 Akhaya Kumar Das was the I.I.C., Town Police Station, Balasore, who was the investigating officer of the case.

The prosecution also proved eighteen documents. Exts.1/1, 2/1, 11, 12, 16 and 17 are the seizure lists, Ext.3 is the medical report, Ext.4 is the inquest report, Ext.5 is the post mortem examination report, Ext.6 is the dead body challan, Ext.7 is the F.I.R., Ext.8 is the survey map, Ext.9 is the xerox

copy of the intimation, Ext.10 is the spot map, Ext.13/2 is the opinion of the doctor, Ext.14 is the spot visit report, Ext.15 is the bed head ticket and Ext.18 is report of S.F.S.L., Rasulgarh.

The prosecution also proved twelve material objects. M.O. I is the shirt of the deceased, M.O.II is the iron rod, M.O.III is the rope, M.O.IV is the axe, M.Os. V and VI are the wearing apparels of the appellant no.1, M.Os. VII and VIII are the wearing apparels of the appellant no.2, M.Os. IX to XI are the blood-stained clothes and M.O. XII is the bandage cotton.

Defence Plea:

5. The defence plea is one of denial. It was pleaded that the deceased had come to the house of the appellants in an inebriated condition and their mother (P.W.12) abused the deceased and while the deceased was running away, he fell down on the railway track and got injured coming in contact with stones and broken glass pieces and P.W.12 shifted him to the hospital.

Findings of the Trial Court:

6. The learned trial Court, after assessing the oral as well as the documentary evidence, came to hold that the evidence of the doctor that the injuries found on the deceased were ante mortem in nature and that the cause of death was due

to injury to the vital organ like brain has remained unshattered. The learned trial Court accepted the evidence of P.W.8, the wife of appellant no.1 Harihara Barik as an eye witness to the occurrence and further held that though P.W.12 did not support the case, it is not fatal to the prosecution case. On the basis of the oral evidence of eye witness P.W.8 and the medical evidence, it was held that the appellants in furtherance of their common intention caused the death of deceased by assaulting him with a rope, iron rod and axe and that the prosecution has been able to bring home the charge against the appellants under section 302/34 of the I.P.C. and accordingly, held them guilty under such offence.

Contention of the Parties:

7. Mr. D.K. Pani, learned counsel appearing for the appellants contended that, out of the two eye witnesses to the occurrence i.e. P.W.8, the wife of appellant no.1 Harihara Barik and P.W.12, the mother of both the appellants, P.W.12 has not supported the prosecution case and she was declared hostile. The only evidence remains is that of P.W.8. The learned counsel further argued that the solitary evidence of P.W.8 is not clinching and trustworthy and there is every chance of her false implication of the appellants as the appellants were suspecting

her illicit relationship with the deceased and were also assaulting her. The learned counsel further argued that in the background of the case, when the deceased was frequently cautioned not to come to the house of P.W.8, which he had defied and in the night of occurrence, again he came for which there was a protest from the side of the appellants, which resulted in a sudden quarrel and during such quarrel, even if it is the prosecution case that the appellant no.2 picked up an axe lying near the fence and dealt a blow on the head of the deceased, it cannot be said that the offence under section 302 of the I.P.C. would be attracted against him and it may be a case of culpable homicide not amounting to murder. Similarly, so far as the appellant no.1 Harihara Barik is concerned, except the evidence of P.W.8 that he assaulted the deceased by fist blows, there is no other material against him and therefore, it cannot be said that the appellant no.1 shared common intention with the appellant no.2, who on his own, went near the fence, brought the axe, which was lying there and dealt a blow on the head of the deceased with the axe and the liability of the appellant no.1 may at best come within section 323 of the I.P.C.

Mr. Sonak Mishra, learned Addl. Standing Counsel, on the other hand, supported the impugned judgment and argued that P.W.8 had no axe to grind against the appellants,

rather when she was coming forward to depose against her husband i.e. appellant no.1 and her brother-in-law i.e. appellant no.2, in a case under section 302 of the I.P.C., it cannot be said that she was trying to implicate them falsely. The learned counsel further argued that there was a suspicion of illicit relationship between P.W.8, the wife of appellant no.1 with the deceased and therefore, the appellant no.2 had every motive to assault the deceased over such issue with an axe that too, on a vital part of the body. It is argued that the doctor, who conducted post mortem examination, has stated that on account of the impact of the blow on the head, there was a fracture of skull bone and the cause of death was on account of massive intracerebral bleeding. He further argued that the evidence of P.W.8 indicates that both the appellants also pressed the throat of the deceased and therefore, in the factual scenario, it can be said that they shared common intention to commit the murder of the deceased and the learned trial Court is quite justified in convicting the appellants under section 302/34 of the I.P.C.

Whether the deceased met with a homicidal death?:

8. Adverting to the contentions raised by the learned counsel for the respective parties and coming to the evidence of the doctors to see whether the prosecution has successfully

established that it is a case of homicidal death or not, we find that P.W.11 Dr. Deepak Kumar Das Mohapatra, who was the Assistant Surgeon of District Headquarters Hospital, Balasore, received the deceased at 11.45 p.m. on 23.06.2000 in an injured condition, admitted and treated him. Since the injury was reported to have been caused due to an assault, he intimated the police in that respect. P.W.6, the doctor attached to the District Headquarters Hospital, Balasore, who conducted post mortem examination over the dead body of the deceased, noticed three stitched wounds on the left eye brow, occipital area and left ear and there was fracture of skull bone and opined that the cause of death of the deceased was injury to the vital organ i.e. brain with massive intracerebral bleeding. He has proved his post mortem report marked as Ext.5. Though questions have been put in the cross-examination that lacerated injury could be caused by fall on a hard surface, but nothing has been elicited in the cross-examination that all the injuries sustained by the deceased including the fracture of the skull bone was possible by fall of the deceased. In view of the evidence adduced by the prosecution, particularly the inquest report (Ext.4), the post mortem report (P.W.5) and the evidence of the doctors (P.W.6 and P.W.11), we are of the view that the prosecution has successfully established that the deceased met with a homicidal

death and the learned trial Court has rightly come to such conclusion.

Appreciation of evidence of eye witnesses:

9. Out of the two eye witnesses examined by the prosecution, the learned trial Court disbelieved the evidence of P.W.12, the mother of the appellants. She has stated that the deceased was the brother-in-law of P.W.8 and he used to visit her house frequently. P.W.12 was not appreciating such conduct of the deceased and she was regularly cautioning her daughter-in-law (P.W.8) to ask the deceased not to come to their house. She has further stated that the appellant no.1 was also not appreciating such frequent visit of the deceased to their house. P.W.12 has further stated that on the date of occurrence, both the appellants were not present in the house and at about 10 p.m., the deceased came to her house in a drunken state for which she abused the deceased and drove him out of the house and the deceased ran away towards the railway track and fell down over the railway track. P.W.12 has been declared hostile by the prosecution and cross-examined with the permission of the Court. In the cross-examination by the defence, however, she has stated that the deceased fell over a place where pieces of glasses, stones and boulders were lying. When the deceased fell down, she found him with serious bleeding injuries for which

she took him to the hospital by a rickshaw. In the hospital, the deceased succumbed to the injuries. Since the evidence of the P.W.12 given in Court that the appellants were not present in the house and they had no role in the death of the deceased was completely contrary to her previous statement made to police during investigation, the learned trial Court has rightly not placed any reliance on her evidence.

The only other eye-witness remains for the prosecution is none else than P.W.8. She has stated that she had married to the appellant no.1 seven years prior to the date of occurrence and was blessed with a son, who was aged about six years and a daughter, who was aged about two years. She further stated that the appellant no.2 was staying with them. She further stated that the appellants were maintaining themselves by taking money from their mother (P.W.12) and when P.W.12 refused to pay money to them, they used to assault her (P.W.12), for which a meeting was convened in their house and the deceased and his brother Sudam Charan Behera (P.W.5) used to attend the meeting on being called by her mother-in-law (P.W.12). She further stated that on the date of occurrence, as she was assaulted by the appellants, P.W.12 called the deceased to their house and when the deceased arrived, both the appellants asked him as to why he had come to

their house and they also abused P.W.12 and the deceased in obscene language to which, the deceased protested. P.W.8 further stated that both the appellants assaulted the deceased by means of a rope and fist blows. Then, appellant no.2 Rabindra Barik assaulted the deceased by means of a small axe on the back side of the head with its sharp side for which he sustained bleeding injury on his head and then the appellants assaulted the deceased and pressed the throat of the deceased. She further stated that the deceased was shifted to Balasore Hospital by her and P.W.12 and the doctor treated the deceased and at about 12 midnight, the deceased expired.

In the cross-examination, P.W.8 has stated that the deceased used to like her and the two appellants were living separately and the appellant no.2 Rabindra Barik was interested to grab the property of the appellant no.1 and there was a meeting between the two appellants and there was no good relationship between them. She further stated that the deceased was helping them in maintaining their family and the appellant no.1 was not in favour of the deceased coming to their house and was suspecting that the deceased was having illicit relationship with her. The appellant no.1 used to ask the deceased not to come to the house. She further stated that she herself and P.W.12 were there in the house at the time of

incident and that she used to ask the deceased not to come to her house. She further stated that since the appellant no.1 was suspecting that she had illicit relationship with the deceased, she was assaulted. She further stated that the assault took place on the verandah of the house and the axe was lying near the fence and after assaulting the deceased, both the appellants threw the axe and left the house.

On carefully analysing the evidence of P.W.8, we find that the relationship between the deceased and P.W.8 as brother-in-law and sister-in-law is not disputed. The evidence on record has also come that the deceased was frequently visiting the house of P.W.8 to which not only the appellant no.1 was protesting but even P.W.8 and P.W.12 were also asking the deceased not to come to their house. Against such backdrop, the deceased came again to the house of the appellants on the date of occurrence in the night hours to which the appellants protested. Though it is stated by P.W.8 that P.W.12 called the deceased to their house, but P.W.12 has not stated in that respect. The evidence further indicates that when both the appellants asked the deceased as to why he had come to their house in the night and they abused the deceased in obscene language, the deceased in turn protested them and thereafter, the assault has taken place. The evidence of P.W.8 has not been

shattered in the cross-examination and her evidence regarding the role played by the appellants in assaulting the deceased, is trustworthy particularly when she is deposing against her husband and brother-in-law in a case of murder.

10. The question that now crops up for consideration is whether the appellants are guilty for commission of murder or they are to be punished for any lesser offence? So far as the role attributed against the appellant no.1 Harihara Barik is concerned, it is stated that he along with the appellant no.2 Rabindra Barik assaulted the deceased with rope and gave him fist blows and then the appellant no.2 picked up the axe, which was lying near the fence and the assault was made on the backside of the head of the deceased with such axe for which the deceased sustained bleeding injury on the head. Though P.W.8 has stated that both the appellants pressed the throat of the deceased, but from the medical evidence, which is adduced by P.W.6, we find no such injury around the neck. However, so far as the appellant no.2 Rabindra Barik is concerned, the evidence has remained unshaken that he not only dealt fist blows to the deceased but also picked up the axe lying near the fence and dealt the blow on the backside head of the deceased. The overt acts committed by the two appellants were quite distinguishable.

In the case of **Surinder Kumar -Vrs.- Union Territory, Chandigarh reported in (1989) 2 Supreme Court Cases 217**, the Hon'ble Supreme Court held, while discussing exception 4 to section 300 of the I.P.C, that to invoke such exception, four requirements must be satisfied, namely,

- (i) it was a sudden fight;
- (ii) there was no premeditation;
- (iii) the act was done in a heat of passion; and
- (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

It was further held that the cause of quarrel is not relevant nor it is relevant as to who gave the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor, but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must have not taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of moment picked up a weapon which is handy and caused injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided that he had not acted cruelly. In the said case, during the quarrel, it is stated that the

appellant Surendra Kumar not only assaulted P.W.2 but also picked up a knife from the kitchen and inflicted three blows to the deceased, one on the shoulder, the other on the elbow and the third on the chest as a result the deceased collapsed to the floor and later died on the way to the hospital. The Court held that taking an overall view of the incident, the appellant would be entitled to the benefit of the exception and accordingly, held him guilty under section 304 Part-I of the IPC.

In the case in hand, we find that there was no premeditation on the part of the appellants to assault the deceased and the quarrel took place all on a sudden when the deceased came to the house of the appellants during the night, even though he was previously told on number of occasions by the appellant no.1, P.W.8 and P.W.12 not to come. The evidence further indicates that the appellants challenged the deceased and abused him to which, the deceased protested. In this factual scenario, from the nature of overt act committed by the appellant no.1 Harihara Barik by giving fist blows to the deceased, it cannot be said that he shared common intention with the appellant no.2 who dealt fatal blow by an axe to the deceased. The nature of overt act committed by the appellant no.1, in our humble view, attracts the offence under section 323 of the I.P.C., accordingly, his conviction under section 302/34 of

I.P.C. is hereby set aside and in turn, he is found guilty under section 323 of the I.P.C.

So far as appellant no.2 Rabindra Barik is concerned, during the course of quarrel, after giving fist blows, it appears that he went to collect the axe, which was lying near the fence and assaulted on the backside of the head of the deceased out of anger as the deceased not only came to their house during the late night but also when they abused him over such issue, he raised protest to such abuse. Since the occurrence happened all on a sudden and it was an unpremeditated act of the appellant no.2 and he seems to have acted in a fit of anger, taking into account the relationship between the parties and the background of the case, we are of the humble view that the ratio laid down by the Hon'ble Supreme Court in the case of **Surinder Kumar** (supra) is squarely applicable in this case. Accordingly, the conviction of the appellant no.2 under section 302/34 of the I.P.C. is altered to one under section 304 Part-I of the I.P.C.

11. In the result, the appellant no.1 Harihara Barik is found guilty under section 323 of the I.P.C. and the appellant no.2 Rabindra Barik is found guilty under section 304 Part-I of the I.P.C.

It is stated by Mr. Pani, learned counsel for the appellants that both the appellants were taken into judicial custody on 26.06.2000 and they were never released on bail during the trial. After filing of this Jail Criminal Appeal, they were directed to be released on bail as per the order dated 04.11.2009 and as such, they have remained in custody for more than nine years and four months. In view of such submission, while convicting the appellants as aforesaid, the sentence of the appellant no.2 Rabindra Behera for his conviction under section 304 Part-I of the I.P.C. is reduced to the period already undergone. The appellant no.1 is sentenced to imprisonment for one month for his conviction under section 323 of the I.P.C., which he has already undergone.

Accordingly, the Jail Criminal Appeal is partly allowed.

Before parting with the judgment, we put on record our appreciation to Mr. D.K. Pani, learned Amicus Curiae for rendering his valuable assistance in arriving at the above decision. We also appreciate Mr. Sonak Mishra, learned Additional Standing Counsel for ably and meticulously presenting the case on behalf of the State. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs. 7,500/- (rupees seven thousand five hundred only).

Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

(S.K. Sahoo, J.)

(S.K. Mishra, J.)

Orissa High Court, Cuttack
The 12th January 2024/Padma

