

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No.710 of 2018 & CRLA No. 219 of 2021

(In the matter of appeals under Section 374(2) of the Criminal Procedure Code, 1973.)

CRLA NO.710 of 2018

Kuna @ Sushant Swain ... Appellant

Mr.S.Mohanty, Advocate

-versus-

State of Orissa

... Respondent

Mr.S.K.Nayak, AGA

***Mr.D.Panigrahi, Advocate
for Informant.***

CRLA NO.219 of 2021

***Narayan Prasad Mallick ... Appellant
@ Kempa @ Guria***

Mr.S.Mohanty, Advocate

-versus-

State of Orissa

... Respondent

Mr.S.K.Nayak, AGA

***Mr.D.Panigrahi, Advocate
for Informant***

CORAM:

HON'BLE MR. JUSTICE D. DASH

HON'BLE MR. JUSTICE G. SATAPATHY

DATE OF HEARING :06.02.2023

DATE OF JUDGMENT:28.03.2023

G. Satapathy, J.

1. Since the appellants in these two appeals being represented by the same learned counsel challenge their conviction and sentence passed by one and the same Court of Sessions in C.T. Case No. 59 of 2014; both the appeals were heard together for better appreciation and to avoid confusion, for their disposal by this common judgment with the consent of the parties.

2. The Appellants (accused persons), in the above two appeals, challenge the judgment of conviction and order of sentence passed on 28.08.2018 by the learned Sessions Judge, Jagatsinghpur in C.T. Case No. 59 of 2014 convicting the appellants for offence punishable U/S. 302/34 of the Indian Penal Code, 1860 (for short, 'the IPC') and sentencing each of them to undergo rigorous imprisonment for life with direction to set off the pre-conviction incarceration period against the substantive sentence of imprisonment, while acquitting the appellants of the charge U/S. 3(2)(v) of Scheduled

Caste and Scheduled Tribe (Prevention of Atrocity) Act, 1989 (for short, 'the SC & ST (POA) Act').

3. The prosecution case in brief is on 23.08.2013 at about 11 P.M. in the night when Somanath Behera(hereinafter referred to as, the "deceased") of village Marichapada was in his house; these accused persons, namely, Kuna @ Susanta Kumar Swain and Narayan Prasad Mallick @ Kempa @ Guria of village Makundpur, who happen to be his friends, called him outside and they talked near the front door of the house. In the course of that, when accused Kuna abused him in filthy language, the deceased resisted and they all proceeded towards 'Chapel' (Thakura Ghara) of village by pushing and pulling each other. The wife of deceased namely, (Itisree Pradhan) then followed them. At that time, the convicts were expressing to set the motor cycle on fire and to lodge a false case against the deceased and saying so, one of the accused set the motor cycle on fire and thereafter, the accused persons took the deceased near the house of Durga Prasad Das by saying that they

would finish him. Accordingly, there the accused Kuna Swain pounced over the deceased by holding his neck in one hand and both the accused persons then attacked the deceased by means of sharp cutting weapons repeatedly. At this time, the mother of the deceased also reached there and the wife and mother of the deceased went on fervently requesting them to leave the deceased, but they did not pay heed to it. When accused Kuna was instructing to cut the neck, so as to not leave the deceased alive any more, the wife and mother of the deceased raised hullah and when the villagers reached at the spot, the accused persons decamped by leaving the deceased lying on the road in a severely injured condition with profuse bleeding. The deceased was then screaming and praying Gadi Gosain (Village God) to save him. He was then telling that the convicts had killed him. The villagers shifted the deceased to hospital wee after some time he succumbed to the injuries.

The wife of the deceased lodged a written report before the Inspector-in-Charge (I.I.C.) of

Jagatsinghpur P.S. at about 1.30 A.M. in the midnight of 24.08.2013 narrating the above incident which was treated as the First Information Report (FIR-Ext.1). On receipt of Ext.1, the I.I.C. registered Jagatsingppur P.S. Case No. 201(31) dated 24.08.2013 and entrusted the investigation to P.W.8-Sri Suchitra Biryra Dash, the Sub-Inspector of Police (I.O.-P.W.8). He, in course of investigation, had examined the informant and witnesses rushed to DHH, Jagatsinghpur and commanded the Constable P.W.10 to guard the dead body and also commanded Havildar and another Constable to guard the spot at village Marichapada. On the same day, P.W.8 conducted inquest over the dead body of the deceased at DHH, Jagatsinghpur and prepared inquest report under Ext.4. He also sent the dead body for post-mortem examination by issuing necessary requisition. He prepared the spot map under Ext.10 on the same day by visiting the place of occurrence. On the same day, P.W.8 also seized the burnt motor cycle, sample earth and blood stained earth with seizure list under Ext.3 so also seized

the wearing apparels of the deceased vide separate seizure list under Ext.11. On 25.08.2013, P.W.8 arrested the accused persons and seized their wearing apparels under separate seizure lists vide Exts. 12 & 13 and forwarded them in custody to the Court after their medical examination as well as collection of their blood sample and nail clippings. The accused Kuna @ Susanta Swain while in custody gave recovery of the knife pursuant to his disclosure statement recorded by P.W.8 by leading to the place where it had been kept concealed. The knife vide separate seizure list under Ext.5 was then seized. Thereafter, P.W.8 obtained the post mortem report under Ext.25 so also the opinion of the doctor about possibility of infliction of injuries on the deceased by the said knife under M.O.I vide Ext. 23. P.W.8 also sent the M.O. VIII and M.O.IX (T-shirt and full pant of the convict Guria @ Narayan Prasad Mallick) and M.O.X and MO XI (check shirt and trouser of the convict Kuna @ Susanta Swain) along with other materials to State Forensic Science Laboratory (SFSL), Bhubaneswar

through Court under forwarding report vide Ext. 20 for chemical examination and received the chemical examination report under Ext.24. Subsequently, the Deputy Superintendent of Police (P.W.7) took charge of the investigation and he after collecting the caste particulars of the accused persons and the informant under Ext.7 and getting the statement of P.W.1 and P.W.13 recorded by learned Sub-Divisional Judicial Magistrate (SDJM), Jagatsinghpur U/S. 164 of Cr.P.C. vide Exts. 2 and 7 submitted the Final Form placing the accused persons for trial for commission of the offences under section 302/34 of the IPC and section 3(2)(V) of the SC & ST (POA) Act,

4. Learned S.D.J.M., Jagatsinghpur, on receipt of the Final Form, took cognizance of the above offences and after observing the formalities, committed the case to the Court of Sessions. That is how the trial commenced by framing the charges for the above offences against the accused persons.

5. In the trial, the prosecution has examined as many as 13 witnesses (P.Ws. 1 to 13) and proved several documents, which have been admitted in evidence and marked Exts. 1 to 26. Material Objects, being proved, those have been marked as MO.I to MO.IX.

The defence, having taken the plea of denial, has examined D.Ws. 1 to 3. Of the witnesses examined by the prosecution, P.Ws. 1 and 13 are the wife and mother of the deceased and they have been projected by the prosecution as eye witnesses to the occurrence, P.Ws. 2 to 5 are post occurrence witnesses, P.Ws. 7 and 8 are IOs, P.W.9 is the doctor conducting PM examination of the deceased and P.Ws. 6 and 10 to 12 are witnesses to the seizures. In the course of trial, the specific plea of the convicts was denial simplicitor.

6. On examination of the evidence, the learned trial Court by the impugned judgment convicted the accused persons mainly by relying upon the evidence of P.W. 1 and P.W.13 and the factum of recovery of M.O.I (blood stained knife) pursuant to the disclosure

statement of accused Susanta @ Kuna as well as the evidence on record that the wearing apparels of both the accused persons had the stains of blood of the deceased. Accordingly, the accused persons have been convicted for the offence under section 302/34 of the IPC and sentenced as afore stated.

7. Mr.S.Mohanty, learned counsel for the appellants (accused persons) has submitted that the learned trial Court has mainly relied upon the evidence of P.Ws. 1 and 13. He submitted that when P.W.1 has stated that accused Kuna dealt blows to the neck of her husband by means of a knife after taking it from other accused Guria, the post mortem report (Ext.25) does not disclose any injury on the neck of the deceased and since the alleged occurrence had taken place at about 11 P.M. in the night and P.W.1 having admitted in cross-examination to have arrived when the deceased was lying and she being unable to say precisely the length and breadth of the weapon of offence, her version ought not to have been taken as trustworthy. He submitted that the

same being the state of affairs in the evidence of P.W.13, her evidence cannot be relied upon to convict the accused persons. It is further argued that accused Kempa is a physically disabled person and thereby, his physical deformity would belie the act attributed to him in assaulting the deceased. Alternatively it was argued that the deceased had forcibly taken away the motor cycle of accused Kuna and both had been to the house of the deceased to take back the said motor cycle which led to a hot exchange of word when deceased refused to hand over the bike and thereby, sudden quarrel ensued and the deceased attacked the accused persons as would be evident from their injury reports and there was sudden fight in a heat of passion upon sudden quarrel which might have resulted in death of deceased and thereby, the act of convicts were squarely covered by exception 4 to Section 300 of IPC for which the conviction of the accused persons for the offence U/s. 302 of IPC is unsustainable and at best the commission would be for the offence U/S. 304-II of IPC.

8. Mr.S.K.Nayak, learned Additional Government Advocate submitted that not only there is evidence of eye witnesses, but also there is clinching circumstantial evidence against the accused persons which is further strengthened by the oral dying declaration of the deceased as available in the evidence on record and, therefore, the conviction of the accused persons for commission of the offence under section 302 IPC be returned by the Trial Court is not liable to be interfered with. He further submitted that the plea of physical deformity of accused Guria having been advanced for the first time in the appeal and for a moment believing the same to be true, it cannot be considered to disbelieve the overwhelming evidence as to his role in the incident.

9. Mr.D.Panigrahi, learned counsel for the informant reiterating the contentions of the learned AGA further submitted that the medical evidence together with serological report complete the chain of events unerringly pointing the guilt of the accused persons in killing the deceased in addition to the eye witness account of P.Ws.

1 and 13 which conclusively establish that the accused persons are the authors of the crime.

10. Proceeding to judge the sustainability of the finding of guilt recorded by the Trial Court against the accused persons in addressing the rival submission, it be first stated that in the instant case, there appears no difficulty in finding that the death of the deceased was homicidal for the reason not being absence of challenge by the defence to such finding of the Trial Court, on the face of the evidence of the doctor-P.W.9 conducting post mortem examination over the cadaver of the deceased, who apart from deposing the nature of injury sustained by the deceased has positively answered the query of the Court that the deceased died a homicidal death, which opinion was never challenged by the defence in any manner, even by suggesting the witness to the effect that the deceased had not suffered homicidal death.

Now, the question comes for consideration as to who was responsible for causing such homicidal death to the deceased. In pursuit of answering such question,

Trial Court has believed the evidence of eye witnesses P.Ws. 1 and 13 as well as has relied upon the circumstantial evidence brought on record by the prosecution to hold the accused persons guilty of the offence of murder of the deceased. The learned counsel for the accused persons, however, advanced some reasoning to consider P.Ws 1 & 13 as post occurrence witnesses and to accept his contention that their evidence are not reliable. Therefore, we would like to examine the evidence of these witnesses. Careful reading of the evidence of P.W.1 goes to show that she has vividly and minutely described the occurrence. What is most important is that P.W.1 has stated in paragraph-02 of her evidence that accused Kuna pounced on the neck of her deceased husband and accused Guria went on inflicting blows on the person of her deceased husband by means of sharp cutting knife and she and her mother-in-law requested both the accused persons not to assault, but they did not pay heed to such request. It is her further evidence that after infliction of blows by the accused

Guria, accused Kuna @ Susanta also assaulted her husband by means of a knife after taking the same from accused Guria and her husband sustained bleeding injuries on his person and when they shouted for help, the sahi people rushed to the spot and seeing them, the accused persons fled away. It is clear from her evidence that the deceased was then unarmed. Although, the defence had challenged the evidence of P.W.1 by cross-examining at length, but she stood firm on the role played by the accused persons in killing the deceased, which has been further explained during cross-examination that the accused Kuna pounced on the neck and accused Guria inflicted blows on the neck of the deceased by knife. It is true that P.W.1 during her cross-examination, has explained her inability to specifically say the size of each injury sustained by her husband. But, that in our view, is not of so significant when the manner of happening of the incident is seen. Although, no injury has been detected on the neck of the deceased, yet the evidence of doctor-P.W.9 discloses that he had noticed

nine incised wounds on the left shoulder joint of the deceased, besides other injuries on the person of the deceased. When a person hits/attacks another by using his hand standing in front of such person, normally the assault by such person would hit on the left side of the victim/injured inasmuch as the right hand would more than often strike on left side of the victim-cum-injured and in this case, number of incise wounds were detected on the left shoulder of the deceased. In this situation, P.W.1, having made some error with regard to the seat of injury, is quite natural. It is, therefore, clear that the challenge to discard the evidence of P.W.1 is not acceptable. P.W.1 has also stated in her evidence that she followed her husband and accused persons and her mother-in-law had also followed her and, therefore, the evidence of her mother-in-law who was examined in this case as P.W.13 is also of much significance.

11. Turning our attention to the evidence of P.W.13, it appears that she has stated in her evidence that she had accompanied the informant (P.W.1) and the

accused persons abused the deceased in obscene language and they killed her deceased son by a sharp flesh cutting knife and the deceased fell on the ground. The defence, having directed scathing cross-examination to this P.W.13, has not been able to demolish the same by eliciting anything running in great variance with the evidence of P.W.1 and on the other hand, the evidence of P.Ws.1 and 13 corroborate each other on the score of the accused persons attacking and inflicting blows by means of a sharp cutting knife. P.W.1 has also proved the FIR under Ext.1 which also in the absence of any such variance to it being noticed in the evidence of P.W.1 provide corroboration to her evidence not only in respect of assault by the accused persons on the deceased, but also as to the presence of P.W.13 during the occurrence.

12. It would not be place to mention here that P.W.2 has stated in his evidence that on 23.08.2013 at about 11 to 11.30 P.M. while he was returning home after attending a feast, he saw a bike on fire and the (deceased) was lying on the road in front of the house of

Debiprasad Das with bleeding injuries and the injured disclosed that the accused persons had assaulted him by means of a knife and the deceased was then screaming offering invocation to the God to save him by saying "GADI GOSAIN GADI GOSAIN MATE RAKHYA KARA". He has further stated that, he along with Deba Sahoo, Debiprasad Das examined as P.W.4 and others had shifted the deceased to D.H.H., Jagatsinghpur. This P.W.4 then has also stated during the Trial, exactly the same as what has been stated by P.W.2.

13. Above being the oral evidence of material witnesses, who are either eye witness to the occurrence or reached at the spot immediately after the occurrence, let us now advert to the other item of evidence. In sequence, the evidence of P.W.1 also transpires that the deceased was screaming for help by saying "MARI GALI MARI GALI GADI GOSAIN MOTE BANCHAI DIA, MOTE KUNA AND GURIA MARI DELE" which means that the deceased was praying to the village God (GADI GOSAIN) to give him life, while stating the accused persons to have

seriously assaulted him. The defence, of course, has made a feeble attempt to contradict this evidence, but the same is otherwise corroborated by the averments made in the FIR. Besides, P.W.2 in his evidence has also stated that the victim disclosed that accused persons namely, Kuna and Guria had assaulted him by means of knife. Similar is the evidence of P.W.4 in this regard as he is found to have stated that the deceased was screaming by saying "KUNA AND GURIA MOTE MARIDELE, GADI GASAIN MOTE BANCHAI DIA". No such material surfaces to raise any doubt in mind that P.Ws. 2 and 4 reached the spot immediately after the assault made by the accused persons. In addition, P.W.2 has also stated in his evidence that he along with P.W.4 and others shifted the deceased to DHH, Jagatsinghpur in an Auto of one Sandeep Mohanty who has been examined as P.W.3 and he has stated in evidence that when he arrived at the spot and enquired from the deceased, it was disclosed by the deceased before him that accused Kuna and Guria had assaulted him. Similarly, P.W.4 has also stated that

P.W.1 disclosed before him that accused Kuna and Guria assaulted the deceased. P.Ws. 1 to 4 in their evidence have stated the presence of each other at the spot at the time of occurrence or short while after the occurrence. P.Ws. 2 to 4 are independent witnesses and they have no axe to grind against the accused and the defence has not been able to bring out any probable reason to show any bias of these witnesses against the accused person. The defence, of course, has tried to contradict P.W.1 with respect to her evidence as to who pounced upon the neck of the deceased, but the IO has affirmatively stated in his cross-examination that although P.W.1 has not stated about Kuna pouncing on the neck of the deceased, she has stated before him that accused Guria pounced on the neck of the deceased. Similarly, the defence has also tried to contradict P.W.3 that on his query, the deceased disclosed before him, but P.W.3 has stated before him about deceased voluntarily disclosing before P.W.3 that accused Kuna and Guria had killed the deceased. It, therefore, cannot be considered to be a valid

contradiction and there may be some amount of error in the evidence of witness like as it has occurred in this case and P.W.3 stating about “on his query” instead of “voluntarily” the deceased disclosed about occurrence that is not a circumstance standing to be considered as significant omission to bring in the ambit of contradiction, more particularly when there is ample direct evidence available against the accused person for the assault on the deceased.

14. Evidence of P.Ws. 1 to 4 clearly suggest about deceased making an oral dying declaration before them attributing the authorship of the crime to the accused persons. There appears no doubt in the mind of the Court that the above evidence of P.Ws. 1 to 4 clearly disclose about the oral dying declaration made by the deceased before them stating that the accused persons had assaulted him, which resulted in his death.

Dying declaration is an exception to the admissibility of hearsay evidence. Since generally hearsay evidence is not admissible, yet judicial notice can be

taken of the fact that a person expecting his death may not speak untruth as to cause of his death. Dying declaration is based on the maxim "nemo moriturus praesumitur mentire" which means "a man will not meet his maker with a lie in his mouth". The dying declaration, when proved alone is sufficient to convict the assailants provided said dying declaration is found to be free from suspicion and it is seen that the deceased having the occasion to speak had stated so without being tutored. Law is also very fairly well settled that any statement made by a person as to his cause of death or as to any circumstance of transaction which resulted in his death is relevant. In this case, of course, a question may also come whether in absence of any certification made by doctor, the oral dying declaration made by the deceased can be taken into consideration. In this regard, this Court feels it profitable to refer the decision in ***Parbin Ali and Another Vrs. State of Assam; (2013) 54 OCR(SC) 809*** wherein in a similar situation where the wife, father-in-law and two others relatives of the deceased had

clearly stated that the deceased had informed about the name of the assailants, the Apex Court after referring to various authorities on the subject has held in paragraph-20 as under:-

" Coming to the case at hand, the wife, the father-in-law and the two other relatives have clearly stated that the deceased had informed them about the names of the assailants. Nothing worth has been elicited in the cross-examination. They have deposed in a categorical manner that by the time they arrived at the place of occurrence, the deceased was in a fit state of health to speak and make a statement and, in fact, he did make a statement as to who assaulted him. Nothing has been suggested to these witnesses about the condition of the deceased. As has been mentioned earlier, PW-4, the doctor, who had performed the post mortem, has not been cross-examined. In this backdrop, it can safely be concluded that the deceased was in a conscious state and in a position to speak. Thus, it is difficult to accept that the wife, the father-in-law and other close relatives would implicate the accused-appellants by attributing the oral dying declaration to the deceased. That apart, in the absence of any real discrepancy or material contradiction or omission and additionally non cross-examination of the doctor in this regard makes the dying declaration absolutely credible and the conviction based on the same really cannot be faulted."

15. In **Laxman Vrs. State of Maharashtra;**
(2002) 6 SCC 710 a Constitution Bench of five Judges of
Apex Court had laid down thus:-

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross examination are dispensed with. Since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The Court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental

condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

16. Moving on to the other item of evidence; the evidence of I.O. is vital. In this case, it transpires from the evidence of I.O-P.W.8 that on the intervening night of 23/24.08.2013, the IIC registered the case, directed him to take up the investigation and on 26.08.2013, he apprehended the accused persons and seized their nail clippings and blood samples. Accused Susanta Kumar Swain is said to have given the recovery of weapon, i.e., M.O.I pursuant to his disclosure statement from the bush near the Store fixed at village Marichapada after making the statement. M.O.I was accordingly seized by P.W.8 under Ext.5. The evidence of I.O further transpires that

M.O.I was sent to Doctor (P.W.9) for opinion about possibility of injuries under Ext.22 on the person of the deceased by its use and accordingly, P.W.9 furnished his opinion under Ext.23. The vital link evidence of P.W.8 is that he having sent the wearing apparels of both the accused persons under M.Os.VIII to XI as also that M.O.I as well as blood stained earth and sample earth to SFSL under a forwarding report of the learned S.D.J.M. vide Ext.20 for chemical examination, the report of the chemical examiner under Ext.24 has come that all those contain the human blood of the same group as that of the deceased. This provides further corroboration to the evidence of those witnesses already discussed.

17. On conspectus of the analysis of all the evidence, as noted, We are of the considered view that the Trial Court has rightly held that the prosecution case as to the role played by these accused persons in the said incident in assaulting the deceased and thereby inflicting injuries upon him which has lead to his death has been established beyond reasonable doubt.

18. Then the next question comes for discussion as advanced alternatively that they can at best be held liable for offence U/S. 304-II of the IPC as their acts to be coming under exception-4 to Sec. 300 of IPC, which speaks about commission of culpable homicide without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. The explanation appended to the aforesaid exception states that it is immaterial in such cases which party offers the provocation or commits the first assault. In this case the evidence transpires that the accused persons were already carrying the weapon of offence MO-I while coming to the house of the deceased which itself against their intention and the evidence that they inflicted around fourteen number of injuries including eleven numbers of incised wounds upon the deceased speaks volume about their said action in a cruel or unusual manner. All these evidence on record when cumulatively viewed with the manner in which the accused persons

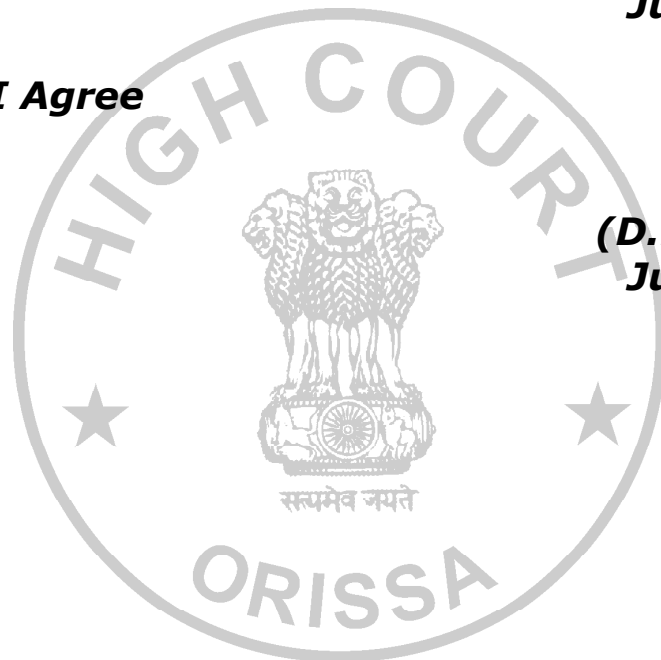
acted in the incident clearly make out a case of culpability under section 302 of the IPC. Therefore, we confirm the impugned judgment of conviction and order of sentence.

19. In the result, both the appeals stand dismissed.

(G. Satapathy)
Judge

I Agree

(D.Dash)
Judge



*Orissa High Court, Cuttack,
Dated the 28th day of March, 2023/Kishore*