

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRIMINAL APPEAL No.717 of 2016

(From the judgment dated 7th November, 2016 passed by learned Addl. Sessions Judge, Phulbani in S.T. No.09 of 2016)

Madhab Digal and others ***Appellants***

-versus-

State of Orissa ***Respondent***

Advocate(s) appeared in this case:-

For Appellants : Mr. H.B. Dash, Advocate

For Respondent : Mr. Sonak Mishra,
Additional Standing Counsel

**CORAM: JUSTICE B.P. ROUTRAY
JUSTICE CHITTARANJAN DASH**

JUDGMENT

31st October, 2023

B.P. Routray, J.

1. Three Appellants, namely, Madhab Digal, Bipin Digal and Kishore@Narendra Digal have been convicted for commission of offences under Sections 302, 307, 326 read with Section 34, I.P.C. and are sentenced to life imprisonment along with other sentences for offences of attempt to murder and grievous hurt.

2. Two persons namely, Sukru Digal and Sunarjya Digal died in the occurrence. Sukru died at the spot instantaneously and Sunarjya died in the hospital around nine months after the occurrence.

3. Prosecution case sans unnecessary details discloses that on 10.09.2015 when the deceased Sukru had been to attend the call of nature was chased by all the Appellants, who are the three brothers, by means of Tangia carried by each. Sukru ran out of fear and on the way in the oil mill of the other deceased Sunarjya, who happened to be the paternal uncle of Sukru, protested the Appellants to save Sukru. The Appellants also assaulted Sunarjya and he sustained two injuries on his back scapular area. He fell on the ground. Sukru could not be able to escape and fell victim to the hands of the Appellants. The Appellants dealt number of blows on his person resulting his instantaneous death at the spot. The occurrence took place during the evening hour on the village road and the villagers remained silent watchers. After the Appellants left the spot, Sunarjya was taken to his house while the dead-body of Sukru was kept on the village Mandap. But the thirst of Appellants was not quenched by then. They returned after 10 to 15 minutes to the Mandap where the dead-body of Sukru was kept. They danced, confirmed the death and applied blood of Sukru on their forehead and other parts and this time also the villagers watched everything being mute spectators of the scene.

4. The wife of Sukru lodged the FIR under Ext.1, which was registered by P.W.13, the then Officer-in-charge of Phulbani Sadar Police Station. The police took action without delay and in course of investigation, the dead-body of Sukru was sent for post-mortem examination and the injured was referred to District Headquarter Hospital for treatment. P.W.13 prepared the spot map under Ext.10, seized one bloodstained axe lying on the spot along with sample earth

and bloodstained earth and prepared the seizure list under Ext.2. The inquest report in respect of the deceased-Sukru was prepared under Ext.3. The Appellants were arrested on 14.9.2015, i.e. four days after the occurrence. The injured-Sunarjya was examined by the Police on the same day, i.e. on 10.9.2015 under Section 161 of the Cr.P.C. His statement so recorded by the Police has been marked under Ext.18. Other two axes used in commission of offences were seized on production by the Appellants-Bipin and Kishore kept concealed at the back-side of house of one Baikuntha as per discovery lead under Section 27 of the Indian Evidence Act.

5. Upon completion of investigation, charge-sheet was submitted by P.W.14, who took charge of investigation from P.W.13 upon his transfer.

6. The charge was framed on 6th May, 2016 for commission of offences under Sections 302/34, 307/34 and 326/34 of the Indian Penal Code. On the date of framing of charge, deceased Sunarjya was alive. Subsequently he died on 26th June 2016. He died out of injuries sustained in the assault by the Appellants on the occurrence date. But the charge was not altered or modified for death of Sunarjya in the assault. Though the death certificate was produced before the trial court, but the dead body was never subjected to postmortem examination nor did the I.O. proceed to held inquest and to prepare dead body Chalan. The trial court also continued to proceed against the Appellants for such offences they were charged for on 6th may 2016.

7. The prosecution examined fourteen witnesses and amongst them, P.W.1 is the wife of deceased Sukru and P.W.3 to 8 are some of the villagers. They are the eyewitnesses to the occurrence. Furthermore, P.W.12 is the son of deceased Sunarjya, who is also an eyewitness to the occurrence. P.W.10 is the doctor who conducted postmortem examination over the dead-body of Sukru and P.W.11 is the doctor who examined the injuries of Sunarjya. P.W.13 is the initial I.O. who conducted major part of investigation. P.W.14 took charge of investigation subsequently and submitted the charge-sheet.

In addition to oral evidence, prosecution marked several documents under Ext.1 to 22. Ext.1 is the F.I.R., Ext.3 is the Inquest Report, Ext.6 is the Postmortem Report, Ext.8 is the Injury Report, Ext.10 & 19 are Spot Maps and Ext.22 is the Chemical Examination Report.

8. One of the Appellants namely, Kishore Diggal was examined as D.W.1 for defence. Besides the evidence of said D.W.1, no other evidence was adduced in support of defence case.

9. Before delving further, it needs to be mentioned at the outset about a glaring defect committed by the trial court. As stated earlier, two deceased persons were there. Deceased Sukru while died at the spot, deceased Sunarjya survived for nine months after the occurrence and finally succumbed to the injuries on 26th June 2016. It is seen from the body of the judgment of the trial court as well as statements of Appellants recorded under Section 313 Cr.P.C., that, the trial court had complete knowledge of death of Sunarjya subsequent to framing of charge. It is not that the trial court was unaware of the fact of death of

deceased Sunarjya till pronouncement of judgment. As observed in the judgment at para-7, the death certificate of Sunarjya was produced before the trial court and P.W.6, 7 and 12 have categorically stated in their evidences that deceased Sunarjya succumbed to the injuries on 26th June 2016 while undergoing treatment. At question no.8, death of Sunarjya for such injuries sustained by him in the occurrence was also confronted to the Appellants (accused persons) in course of their examination under Section 313 Cr.P.C. But the trial court despite all such materials brought before it did not attempt to modify the charge and rather proceeded in trial for same charges framed on 6th May 2016, which were regarding murder of Sukru and attempt to murder/grievous hurt to Sunarjya. Not only this, but the trial court also proceeded to convict the Appellants under Section 307/326 of the I.P.C. despite knowing that Sunarjya succumbed to the injuries in the meantime. This is a serious mistake committed on the part of the trial court, which cannot be cured by operation of Section 464 & 465 of the Cr.P.C. The charges under Sections 307 and 326 of the I.P.C., which ought to have been altered for murder upon knowledge of the trial court regarding death of Sunarjya, cannot be said to be in conformity with the provision under Section 228 on such subsequent dates after death of Sunarjya without prejudicing the right of the Appellants (accused persons). In the opinion of this Court such error and irregularity in the charge has occasioned failure of justice thereby and in respect of the right of the Appellants for the charges under Section 307/34 and 326/34 IPC. We are therefore of the opinion that the charge under Section 307/34 and 326/34 became invalid upon death of Sunarjya to cause failure of justice. Therefore, the Appellants cannot be convicted

under Section 307/326/34 of the I.P.C. and they are bound to be acquitted therefrom.

10. The rest part of discussion is in respect of charge under Section 302 of the I.P.C. for death of Sukru. In this regard, the point falls for determination is that, whether the Appellants committed death of the deceased in furtherance of their common intention on 10th September 2015 by dealing Tangia (axe) blows.

11. First coming to see the nature of death, he (Sukru) sustained axe injuries on his person as per the opinion of P.W.10- the Postmortem doctor. Out of such injuries, four are incised wounds, i.e. one each on the right forearm and right thigh and two injuries on the right scapula. There are two fracture injuries on right clavicular line and right ulna bone. In the opinion of P.W.10, the death is instantaneous for heavy loss of blood and cutting of large blood vessels. As such, keeping in view such nature of injuries, cause of death and the circumstances narrated by eyewitnesses, it can safely be concluded that deceased Sukuru died homicidal nature of death.

12. With regard to complicity of the Appellants, as per the prosecution case, the Appellants chased Sukru from a point away from the Oil Mill, who ran towards village out of fear. On the way the Oil Mill (Tela Ghana) falls where Sunarjya (other deceased) was present and he protested the Appellants from assaulting Sukru. He was not spared too. P.W.1, the wife of Sukru was present in the Oil Mill as the same belongs to their family. She saw the Appellants assaulted Sukuru jointly by means of tangia on different parts of his body. She has stated specifically that all the Appellants were holding one axe each and

assaulted Sukru on the right side of his person including leg, waist, neck, shoulder etc. Her husband succumbed to the injuries on the spot. The Appellants then left the spot and after dead body of Sukru was removed to village Mandap nearby to the spot, they again came back. This time the Appellants confirmed the death of Sukru and danced there in a barbaric manner to apply the blood of Sukru on their forehead and other body parts inhumanly. Such conduct of the Appellants to confirm death of Sukru by returning to the spot and applied blood of a dead man on their own body parts in dancing posture speaks itself of their intention to commit murder of deceased Sukru.

13. The evidence of P.W.1 is not only corroborated by the evidence of other fellow villagers as eyewitnesses to the occurrences but also was confirmed by presence of blood smears on the wooden handle of the axe and wearing apparels. The villagers Viz. P.W.3, 4, 5, 6, 7 & 8 have stated in a consistent and unequivocal way that all the Appellants chased Sukru on village road and committed his murder by dealing tangia blows. Such evidences of the witnesses including P.W.1 are found unimpeachable during their cross-examination. Further, P.W.12 – the son of Sunarjya, has also added his voice to the versions of such witnesses to speak against the criminality of the Appellants regarding their assault on Sukru and Sunarjya and such inhuman conduct of theirs at village Mandap with the dead-body of Sukru.

14. One of the axes carried by Madhab (Appellant No.1) was left at the spot and recovered as per the seizure list under Ext.4. The other two axes carried by Bipin and Kishore were also recovered upon

leading to discovery given by them while in police custody. The same were kept concealed in the backyard of the house of one Baikuntha. All such weapons of offence were examined by P.W.10 and as per his opinion, the same are sufficiently possible to cause such injuries found on the person of Sukru resultig his death. The opinion of P.W.10 as stated by him in evidence and recorded in the report under Ext.7 has never been rebutted. The chemical examination report under Ext.22 also confirms presence of human blood on all such materials including wooden handle of axe and banyan of Kishore (Appellant No.3).

15. In view of such clear, clinching and unimpeachable evidences of the eyewitnesses and supported by other evidences as stated above inasmuch as the conduct of the Appellants with dead-body of Sukru establishes clear intention of the Appellants to commit murder of Sukru on 10th September 2015 on village road and the Oil Mill. Accordingly, it is confirmed that the prosecution has successfully established the charge of murder of Sukru against all the Appellants beyond all reasonable doubts. Accordingly, the conviction of the Appellants under Section 302 of the I.P.C. and their sentences to life imprisonment with fine of Rs.5,000/- as directed by the trial court is confirmed.

16. Resultantly, the Appeal is disposed of as discussed above.

(B.P. Routray)
Judge

(Chittaranjan Dash)
Judge