

----- Vs. 2224 of 2009 for Quashing the Criminal Proceeding Vide
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Court : Orissa

Decided On : Nov-21-2012

Appellant : -----

Respondent : 2224 of 2009 for Quashing the Criminal Proceeding Vide 1.C.C.
No. 2632 of

Judgement :

ORISSA HIGH COURT, CUTTACK. Criminal Appeal No.328 of 2003 Arising out of the judgment and order of sentence dated 26.04.2002 passed by Shri N.P. Rout, learned Sessions Judge, Dhenkanal in S.T. No.24 of 2001, under Section 302, I.P.C. ----- Sankar Lenka Appellant Versus State of Orissa Respondent For Appellant : M/s. U.C. Mishra, A. Mishra, B.P. Chhualsingh, D.R. Sendha and S. Panda, Advocates. For Respondent : Additional Govt. Advocate. -----

PRESENT: THE HONOURABLE MR. JUSTICE M.M. DAS AND THE
HONOURABLE MR. JUSTICE C.R. DASH

Date of Hearing :

21. 11.2012 Date of Judgment :

21. 11.2012

C.R. Dash, J.This appeal is directed against the judgment and order of sentence dated 26.04.2002 passed by learned Sessions Judge, Dhenkanal in S.T. No.24 of 2001, convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. Sullav Naik is the deceased. He was done to death in the courtyard of co-accused Sambhua Pradhan (since acquitted). As found from the evidence on record, the deceased had come to the courtyard of aforesaid co- 2 accused Sambhua Pradhan in the early morning when there was still darkness. Usha Naik (P.W.1), who happens to be the widow of the deceased, lodged the F.I.R. On the basis of the F.I.R. so lodged, investigation was taken up by P.W.8 Sarat Kumar Rout, A.S.I. of Police attached to Rasol P.S. From him, P.W.7 Pradeep Kumar Mishra, C.I. of Police, Sadar Circle, Dhenkanal took charge of the investigation and tested some witnesses. Ultimately charge-sheet was filed by P.W.5 Mandardhar Sahu, C.I. of Police, Sadar Circle, Dhenkanal, who took charge of the investigation from P.W.7 on his transfer. On completion of investigation, altogether 13 accused persons were sent up for trial, out of whom 12 were acquitted and the present appellant Sankar Lenka was convicted for offence under Section 302, I.P.C.

3. Prosecution has examined eight witnesses to prove the charge. P.Ws.1 and 2, wife and daughter respectively of the deceased are the eye- witnesses to the occurrence. P.W.3, who is a eye-witness, has turned hostile, P.W.4, who is a seizure witness, has also turned hostile, P.W.6 is the Medical Officer, who conducted autopsy over the dead body of the deceased. P.Ws.5, 7 and 8, as introduced earlier, are the Investigating Officers. Defence plea of the appellant is to the effect that hearing the shout of his daughter, he woke up and saw the deceased embracing his (appellants) daughter, who had no clothes on her body and, thus, being enraged, he gave four to five blows by a crowbar and while the deceased fell down, he gave two to four further blows, for which the deceased succumbed to the injuries.

4. Learned Trial Court, taking into consideration the discrepancies in the evidence of P.Ws.1 and 2 and especially the medical evidence relating to the injuries

sustained by the deceased, disbelieved P.Ws.1 and 2 so far as participation of other co-accused persons in commission of the alleged offence is concerned, and acquitted them of the charge. So far as the present appellant is concerned, learned Trial Court found as follows :-

12. .But, however, the person being provoked suddenly should not have assaulted while a man after sustaining injuries fell down powerless. The very intention of assaulting after the deceased fell down sustaining injuries indicates that the accused Sankar had exceeded the right of private defence having an intention to take away the life of the deceased. The manner in which the injuries have been caused on the person of the deceased is so brutal that all will lead to a conclusion that the accused Sankar had the intention to kill the deceased even if the deceased became powerless after sustaining the injuries.

. Holding thus, learned Trial Court found the appellant guilty under Section 302, I.P.C. and sentenced him to suffer imprisonment for life.

5. Learned counsel for the appellant does not question the homicidal death of the deceased and evidence of P.Ws.1 and 2 so far as implication of the appellant is concerned. It is submitted by learned counsel for the appellant that the appellant having remained in custody for about 12 years by now, he intends to confine his argument to conviction of the appellant under Section 302, I.P.C. and the sentence recorded thereunder. He further submits that the offence committed by the appellant falls under Exception 1 to Section 300, I.P.C. and whatever the appellant had done was done under grave and sudden provocation seeing his daughter naked in the arms of the deceased. Such a fact being the specific plea of the appellant, the appellant should have been convicted under Section 304, Part-II, I.P.C. and not under Section 302, I.P.C. Learned Additional Government Advocate on the other hand supports the impugned judgment

6. It is found from the statement of the appellant recorded under Section 313, Cr.P.C. that the appellant has clearly stated that at the relevant time he was sleeping in the Pinda of his house. He woke up hearing the shout of her daughter as MARIGALIMARIGALI. and he saw that the deceased had embraced his daughter and his daughter was stripped naked. He found a crowbar lying near the

spot, and catching hold of the crowbar he gave four / five blows to the deceased. After the deceased fell down, he gave two / four blows more to the deceased and the deceased died at the spot. In the morning, wife of the deceased came and saw her husband lying dead. Such a plea by the appellant cannot be dismissed as after-thought in view of the evidence of P.W.1 in paragraph-11 of her cross-examination and P.W.2 in paragraph-4 of her cross-examination. Both P.Ws.1 and 2 have testified that the appellant had stated such fact during his examination by the police. The I.O. has also admitted to such statement of the witnesses and the appellant before him.

7. The test of grave and sudden provocation. is whether a reasonable man, belonging to the same class of the society as the accused, placed in the situation in which the accused was placed, would be so provoked as to loss his self-control. Before Exception 1 to Section 300, I.P.C. can be invoked, the accused must establish the following circumstances :- (i) There was a provocation, which was both grave and sudden; (ii) Such provocation had deprived the accused of his power of self-control; and (iii) While the accused so deprived of his power of self-control, he had caused death of the victim. In view of the ingredients of Exception 1 to Section 300, I.P.C., the fatal blow should be clearly traced to the influence of passion arising from 5 that provocation and not after the passion had cooled down by lapse of time or otherwise, giving room and scope for premeditation and calculation.

8. Learned counsel for the appellant relies on the case of Hansa Singh vs. State of Punjab, A.I.R. 1977 SC 1801. In that case, the accused appellant on seeing the deceased committing the act of sodomy on his son, lost his power of self-control and it was held to be undoubtedly a grave and sudden provocation for the accused appellant, which led him to commit the murder of assault on the deceased. Honble Supreme Court convicted the appellant under Section 304, Part-II, I.P.C. by reversing the judgment of the Punjab and Haryana High Court.

9. In the present case, the daughter of the appellant is found to be aged about 18 years old. She was seen in naked condition in the arms of the deceased by the appellant, who woke up by hearing the alarming shout of MARIGALIMARIGALI. by

his daughter. Finding a crowbar lying near the spot, the appellant immediately mounted assault on being influenced by the grave and sudden provocation on seeing his daughter in naked condition in the arms of the deceased. Such a sight itself is undoubtedly grave and sudden provocation for the appellant to commit murderous assault on the deceased. On such a situation, it cannot be expected for him to gauge and scale as to whether the deceased had fallen down or his daughter was free of danger.

10. Regard being had to all the aforesaid facts and circumstances, we feel inclined to modify the conviction of the appellant to one under Section 304, Part-II, I.P.C. instead of Section 302, I.P.C., as the case squarely falls under Exception 1 to Section 300, I.P.C. The appellant is accordingly sentenced to 6 suffer rigorous imprisonment for seven years for the offence under Section 304, Part-II, I.P.C. It is stated at the Bar that the appellant is there in custody for about twelve years. If that be so, the appellant be released from custody forthwith, as he has already served the sentence imposed on him under Section 304, Part-II, I.P.C., if his detention is not required in any other case. The Criminal Appeal is accordingly allowed in part. C.R. Dash, J. M.M. Das, J.Orissa High Court, Cuttack. The 21st day of November, 2012. /S.K.Parida.

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