

**State Vs. Megha Tirkey**

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**SooperKanoon Citation :** [sooperkanoon.com/534985](http://sooperkanoon.com/534985)

**Court :** Orissa

**Decided On :** Oct-28-2002

**Reported in :** 94(2002)CLT713

**Judge :** P.K. Tripathy, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 401; Indian Penal Code (IPC) - Sections 302 and 304

**Appeal No. :** Suo Motu Criminal Revision No. 367 of 1997

**Appellant :** State

**Respondent :** Megha Tirkey

**Advocate for Def. :** D.P. Dhal, Adv., ;D.K. Das, S.K. Gupta, A.R. Mohanty, P.K. Routray and D.K. Patnaik

**Advocate for Pet/Ap. :** Addl. Standing Counsel

**Judgement :**

**P. K. Tripathy, J.**

1. In course of inspection of the Court of Addl. Sessions Judge, Rourkela by an Honourable Judge of this Court the case record of Sessions Trial No. 187/55 of 1995 was perused and it was noticed that though the accused/opposite party

Megha Tirkey was arrested followed with submission of charge-sheet under Section 302, IPC but at the stage of consideration of charge trial Court instead of framing charge under Section 302, IPC framed charge for the offence under Section 304, IPC. The Hon'ble Inspecting Judge on perusal of the materials on record formed opinion that materials in the Case Diary was sufficient to frame charge for the offence under Section 302, IPC and therefore, the order of conviction against the accused for the offence under Section 304, IPC should be considered and if required, it be interfered with by exercising the revisional jurisdiction with a direction for trial of the case for the offence under Section 302, IPC. In that context, at the stage of argument both learned counsel for the State and learned Counsel appearing for the accused/opposite party referred to the provisions in Section 300, Cr.P.C. and a host of decisions in support of their contention for interference / non-interference with the judgment of conviction. While learned Standing Counsel Mr. Aswini Kumar Mishra prayed for retrial or alternatively for enhancement of sentence on due notice to the accused, Mr. D. P. Dhal, learned counsel for the accused argued that neither of the courses suggested by the State is acceptable in this case.

2. A glimpse of the factual aspect will be appropriate to consider the legal issue. As ascertainable from the case diary and the statement of Hauri Tirkey (P.W. No.

3) Samara Tirkey (hereinafter referred to as 'the deceased') was her husband. Jayaram Tirkey (P.W. No.

1) is the younger brother of the accused. House of the accused situates at a distance about 50 yards from the house of the deceased and there is a tube well near the house of the deceased. It is the case of the prosecution that there was land dispute between the accused and the deceased and on 25.6.1995 misbehaviour was shown by the deceased to the wife of P.W. No.

1. On 26.6.1995, at about 5 P.M., P.W. No. 1 came to the house of the deceased and ascertained from her (P.W.

3) if the deceased was in his house. At that time, holding a lathi accused was standing at the tube well. The deceased was being not in the house P.W. No. 3

made such a statement to P.W. No.

1. Without believing her P.W. No. 1 went and intimated to the accused. The latter remained standing there with the lathi. Soon thereafter deceased in a drunken condition arrived at his house. P.W. No. 3 cautioned him not to go near the accused. But when the deceased went near the tube well accused dealt lathi blows. On sustaining the lathi blow on his head, deceased fell down with a bleeding injury and thereafter, accused dealt lathi blows to his chest. P.W. No. 3, came for his rescue and accused also dealt a lathi blow to her. Thereafter, the deceased and P.W. No. 3 were brought to Kumarmunda P.H.C. for treatment. Condition of the deceased being serious, after attending to him medically, the Doctor (P.W. No.

8) advised for shifting the deceased to Rourkela Govt. Hospital. As per the report of the Medical Officer of Government Hospital, Rourkela (P.W. No.

10) deceased succumbed to the injury at 2 P.M. on 27.6.1995. It reveals from the post-mortem report (Ext.

7) that out of the four external injuries the injury No. 4, i.e., fracture of ramus of left side mandible was grievous. On dissection it was also found by the Doctor that the brain membrane was congested, there was a subdurai haematoma over the left parietal lobe, brain was congested and also other vital internal organs like lungs, liver, spleen, kidney were all congested. The Doctor (P.W.No.

8) opined that death was due to coma resulting from injury to brain and scalp bones and the injuries were ante-mortem in nature.

3. Prima facie evidence to the aforesaid effect was plentifully available and therefore, police submitted charge-sheet for the offence under Sections 302/323, IPC for the murder of the deceased and causing simple hurt to P.W. No. 3. After commitment of the case when learned Additional Sessions Judge considered the question of charge, learned Additional Sessions Judge recorded that :

'After hearing submissions of both sides, in this behalf and on consideration of the materials available in the case diary, I find there is no sufficient material to frame charge under Section 302, IPC but there are sufficient materials against the

accused for presuming that he has committed the offence under Section 304, IPC and 323, IPC.'

The reason for taking such a view is conspicuously silent in the aforesaid order.

4. It is not disputed at the Bar that at the stage of consideration of charge it is required for the trial Court to peruse the material in the case diary and to take a prima facie view what offences are made out and to frame charge accordingly. If the materials on the case diary reveals of two distinct offences of the same nature then it is appropriate to frame charge for more grievous offence or to frame charge for both the offences distinctly and separately. That being the settled position of law and the prosecution case stands in the manner indicated above, therefore, there is no hesitation to record a finding that learned Additional Sessions Judge, Rourkela went wrong in framing charge for the offence under Section 304, IPC by declining to frame charge under Section 302, IPC for no reason explained in the order passed under Section 228, Cr.P.C.

5. A Judicial Officer before being posted as Addl. Sessions Judge gets the experience of conducting Sessions cases as Assistant Sessions Judge. Therefore, in this case, it cannot be said that the concerned Presiding Officer had no requisite experience to deal with a matter relating to consideration of charge and to pass appropriate legal order under Sections 227 and 228, Cr.P.C. correctly. When the accused was not charged for the offence under Section 302, IPC and in stead he was charged for the offence under Section 304, IPC, it was incumbent on the trial Court to explain the circumstance and to reflect the same in the order as to What was the reason or lack of evidence not to frame charge for the offence under Section 302, IPC. This Court finds no reasonable excuse for the concerned Presiding Officer to commita blunder in the above indicated manner. If the said Judicial Officer has not yet been confirmed in the cadre of O.S.J.S. (S.B.), then before confirming him in that cadre his performance be thoroughly verified and in the event of finding glaring deficiency in his performance, as in this case, then he may be kept on Probation for a further period as would be deemed just and proper by the High Court, If he has already been confirmed in that cadre, then his performance thoroughly be verified before giving him promotion to the higher

scale.

6. Circumstance relating to framing of a charge for a lesser offence, in this case also exhibits apathy shown by the prosecution to the issue involved. When Section 225, Cr.P.C. mandates that prosecution is to be conducted by a Public Prosecutor therefore a victim has no access to participate in the proceeding at the stage under Sections 227 and 228, Cr.P.C. An offence exclusively triable by the Court of Session undoubtedly involves a serious as well as heinous offence. State is the protector of all Civilians and action taken against criminals. In the existing Criminal justice delivery system matter relating to dealing with the criminals and prosecuting them solely/mostly remains with the investigating and prosecuting agency. Inefficiency or apathy by any of them in any manner will result in failure of criminal justice delivery system. In such situation though Courts should not be mute spectator, yet, Courts have to act within the limits of law. Be that as it may, the State cannot ignore its initial but the important role of investigating into a case and prosecuting the case against the offender properly. The State Government should gear up that system so properly that an injustice of the present type is taken care of by the State by immediately bringing such fact to the notice of higher forum in the adjudicatory process. A copy of this observation be sent to the Government of Orissa for appropriate action in that respect.

7. When the matter stands thus, it is for this Court to consider whether it is a fit case for re-trial. For that though the provision in Sub-sections (1) and (2) of Section 300, Cr.P.C. have been pressed into service by the accused and the prosecution respectively in support of their respective stand, but on perusal of the evidence on record this Court finds that a deliberation on the said two provisions of law is not necessary to dispose of this criminal revision. In that connection this Court finds that out of 12 witnesses who were examined in the case, P.Ws. 1 to 7 are the witnesses to the occurrence. As noted above, P.W. No. 3, who is the wife of the deceased has only supported the prosecution whereas the other witnesses while in the witness box of the trial Court, they did not support the prosecution either for an offence under Section 302 or 304, IPC. All the aforesaid witnesses except P.W. 3 were declared hostile and the prosecution put leading questions in a most casual manner by simply confronting their previous statement made before

the Investigating Officer. Therefore, such evidence of those witnesses are of no assistance to decide the case. Evidence of P.W. 3 read with the evidence of the doctor (P.Ws. 8 and 10) who granted treatment as well as conducted post-mortem are relevant for consideration in that respect besides the injury report Ext. 5 and post-mortem report Ext. 7. On a conjoint reading of the aforesaid evidence this Court finds that save and except stating by P.W. 3 that the accused dealt lathi blows to her husband nothing has been stated by her about the grievousness of that injury or the intention of the accused. Keeping in view the provision in Section 300, read with Section 299, IPC, though the intention and knowledge both are attributable for consideration of offence of murder or the culpable homicide which amounts to murder, but in the evidence of the doctors it is conspicuously silent as to what was the gravity of the injury so as to contribute to the death. Doctors have said in their evidence that death was due to coma and coma occasioned due to injury to the brain. When the matter stands at that and the fact remains that the accused after having suffered a conviction and sentence of five years rigorous imprisonment has already served the sentence, this Court does not find it a fit case for ordering for re-trial by invoking the provision in Sub-section (2) of Section 300, Cr.P.C, Thus, the Suo Motu Criminal Revision is disposed of accordingly without interfering with the order of conviction and without directing for a re-trial of the accused.