

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.37 of 2020

CRLA No.416 of 2021

AND

CRLA No.417 of 2021

In the matter of Appeals from the judgment of conviction and order of sentence dated 31st August, 2020 passed by the learned Additional Sessions Judge, Keonjhar, in S.T. Case No.26/53 of 2015.

Basanta Dehury

(In JCRLA No.37/2020)

Mitu Mallik

(In CRLA No.416/2021)

Goutam Penthei

(In CRLA No.417/2021)

....

Appellants

-versus-

State of Odisha

(In all the Appeals)

....

Respondent

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellants

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Mr.Bhabani Sankar Das

(Advocate in all the three Appeals)

For Respondent

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Mr.S.S.Kanungo

Additional Government Advocate

(In all the Appeals)

CORAM:

MR. JUSTICE D.DASH

MR. JUSTICE SASHIKANTA MISHRA

Date of Hearing : 10.03.2023 : Date of Judgment:27.03.2023

D.Dash,J. Since in all these three Appeals, the judgment of conviction and order of sentence dated 31st August, 2020 passed by the learned Additional Sessions Judge, Keonjhar, in S.T. Case No.26/53 of 2015

corresponding to G.R. Case No.1227 of 2014 on the file of the learned S.D.J.M., Keonjhar, has been called in question, those were heard together for being disposed of by this common judgment.

These Appellants (accused persons) with nine others faced the trial for commission of the offence under section 302/450 read with section 34 of the Indian Penal Code, 1860 (for short, 'the IPC'). The Trial Court, has found only these three accused persons guilty of the offence under section 302/450 read with section 34 of the IPC whereas other nine accused persons, who were facing the trial, have been acquitted of those charges. Accordingly, these three accused persons have been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) each in default, to undergo rigorous imprisonment for six months for the offence under section 302 IPC and rigorous imprisonment for five years with fine of Rs.5,000/- (Rupees Five Thousand) in default, to undergo rigorous imprisonment for three months each under section 450 IPC with the stipulation that the substantive sentences are to run concurrently.

2. Prosecution Case:-

On 09.10.2014, the Informant-P.W.1's father, namely, Rajendra Dehury had gone to Block Office for work and there accused Goutam Penthei (Appellant in CRLA No.417 of 2021) quarreled with him and assaulted him causing injury on his face. In the evening, around 7.00 p.m., said accused Goutam and two other accused persons, namely, Bala and Pada Penthei (since acquitted) again came to their house and quarreled with her father. Thereafter, around 9.00 p.m., these three accused persons (Appellants) with others, who have been acquitted,

came there being armed with sword and axe and entered into their house and they then dragged Jemamani, the mother of the Informant from the house to the courtyard and there accused Goutam and Basanta dealt blows on her by means of a sword and tangia on her neck. When the father of the Informant, namely, Rajendra went to rescue his wife Jemamani and tried in that way, the accused persons also dealt blows on him by said weapons. Those accused persons then beheaded Rajendra and Jemamani, carried their heads for some distance and threw those on the road.

On 10.10.2014 around 1 a.m., the daughter of the deceased persons (P.W.1) lodged a report before the Inspector-in-Charge (IIC) of Nayakote Police Station narrating the incident; in further stating that these accused persons with others, having entertained the belief in their mind that her mother, Jemamani was practising witchcraft, were bearing grudge against the members of the family and they, having convened a meeting in the village, had boycotted the family members.

On receipt of the said report (Ext.1), the I.I.C. entered the fact in the Station Diary Book of the Banspal Police Outpost under Nayakote P.S. and sent the same for registration of the case to the Nayakote P.S. The case then being registered, investigation commenced.

The Investigating Officer (I.O.-P.W.16), in course of investigation, examined the Informant (P.W.1) and other witnesses. He visited the spot, found the heads and beheaded bodies lying on the road side and near the house of P.W.1. He held inquest and prepared the report. He then sent those for post mortem and seized the incriminating articles such as sample earth, blood stained earth and broken bangles

etc. and prepared the seizure lists in presence of the witnesses. The accused persons, being arrested in batches, their wearing apparels were seized under seizure lists. The seized incriminating articles were also sent to the State Forensic Science Laboratory, Rasulgarh, Bhubaneswar through Court. On completion of the investigation, final form was submitted placing these accused persons with nine others to face the trial for commission of offence under section 302/450 read with section 34 of the IPC.

3. Learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Keonjhar, having received the final form, as above, took cognizance of the said 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 these accused persons and others.

4. In the Trial, the prosecution has examined in total eighteen (18) witnesses. Out of them, as already stated, P.W.1 is the Informant and she is the daughter of those deceased persons, namely, Rajendra and Jemamani. The aunt of P.W.1 has been examined as P.W.2 when the younger sister of P.W.1 has deposed as P.W.3. The witnesses, such as P.Ws.4, 8, 9 & 11 are the witnesses to the inquest and the elder father of P.W.1 has been examined as P.W.6. The co-villagers have come to the witness box as P.Ws.5, 7, 12 to 15 and 17. The Doctors, who conducted the autopsy over the dead bodies are P.Ws.10 & 18. The I.O. has appeared in the witness box and has been examined as P.W.16. Besides leading evidence by examining the witness, the prosecution has also proved several documents, which have been admitted in evidence and

marked Exts.1 to 47. One axe, knife and saw edge with a handle have been produced before the Trial Court and marked as Material Objects viz:-M.O.I to III.

5. The plea of the defence is that of complete denial and false implication.

6. The Trial Court, on examination of the evidence, having found that Rajendra and Jemamani had met homicidal death, has arrived at a finding that the prosecution has proved the charges under section 302/450 read with section 34 IPC as against these accused persons, namely, Basanta Dehury, Mitu Mallik & Goutam Penthei and accordingly, they have been sentenced as aforesaid. The nine other accused persons, namely, Pada @ Padmabati Penthei, Iswar Mallik, Panchu Mallik, Sukuru Mallik, Pradeep Dehury, Bala @ Balia Pentheir, Guru @ Bijay Mallik, Suresh Mallik and Madan Pradhan have been acquitted with the finding that the prosecution has not been able to establish the charges against them.

At the time of hearing, it was submitted by the learned Additional Government Advocate for the State-Respondent that no Appeal has been filed by the State questioning the acquittal of those nine accused persons in the said trial nor any Appeal has been filed for enhancement of sentence, as has been directed to be served by these accused persons.

7. Learned counsel for the Appellants submitted that the Trial Court ought not to have relied upon the evidence of P.Ws.1, 2, 3, 6 & 7 to hold that the prosecution has established the charges beyond reasonable doubt against these accused persons. According to him, the Trial Court

has not properly appreciated the evidence of these witnesses by taking into account the surrounding circumstances emerging in evidence as also some suspicious and doubtful features surfacing in evidence have been ignored. He, therefore submitted that the conviction against these accused persons is liable to be set at naught.

8. Learned Additional Government Advocate, refuting the above submission, invited out attention to the depositions of those witnesses, i.e., P.Ws.1 to 3, 6 & 7. He pointed out that there is absolute no infirmity in their evidence. He also submitted that there is no contradiction and the evidence of all these witnesses are consistent with one another in so far as the role played by these accused person are concerned that these accused persons had dealt the fatal blows upon the deceased persons and severed the heads from the trunks one after another and carrying those heads, having thrown those by the side of the road, left the place. According to him, with such clear evidence on record, the finding of guilt rendered by the Trial Court as against these accused persons are not liable to be tinkered with.

9. Keeping in view the submissions made, we have carefully read the entire judgment passed by the Trial Court. We have also gone through the deposition of all the witnesses (P.Ws.1 to 18) and have travelled through the documents admitted in evidence and marked Exts.1 to 47.

10. In order to judge the sustainability of the finding of the guilt returned by the Trial Court, which has been impugned in these Appeals, side by side addressing the rival submissions of the parties, we are now

called upon to examine the evidence of those important prosecution witnesses, i.e., P.Ws.1, 2, 3, 6 & 7.

P.W.1 is the daughter of the deceased persons and she is the Informant, who has proved the written report submitted at the Police Station, which has been treated as FIR and admitted in evidence being marked as Ext.1. She is aged about fourteen years as has been assessed by the Trial Court when she claims herself to be of thirteen years old. It is her evidence that her father had been to the market and returned home in the evening. The accused persons came to their house and called her father, namely, Rajendra to go to the rice godown for shifting the rice bags and accordingly, her father went with them to the market. It is stated that her father returned with the bleeding injuries on his face and then he had disclosed that he having been assaulted by the accused persons when was with them, had sustained those injuries. It is her further evidence that all the accused persons then again came to their house and quarreled with her father and they stated that they would not commit any offence further and saying so, they left. It is further stated that they later came back and that time, they dragged her parents, i.e., Rajendra and his wife Jemamani from the house without paying any heed to the request of this witness (P.W.1) and others and thereafter, they assaulted the parents on village road in front of their house. P.W.1 has stated that she was witnessing the occurrence at that time helplessly by standing near the door when the accused persons went on assaulting her parents by means of axe, sword and knife and while so assaulting, they beheaded her parents. When they threatened her and her sister (P.W.3) to kill, she with her sister and younger brother went to the

Police Station in that night and intimated about all said happenings, which being reduced into writing, was treated as FIR (Ext.1). During cross-examination, it has been brought out that at that point of time when accused persons last arrived, she with her brother, sister, parents and aunt (sister of Rajendra) were present in the house. Although, during cross-examination, this witness has been confronted with her previous statement that she had not stated in course of investigation that her father had been taken to the market by the accused persons and on his return, he had disclosed about the occurrence which had taken place there and that she had also not stated that her parents were dragged out of the house and assaulted; these in our view are too minor contradictions to tell upon the veracity of the evidence so as to doubt the entire version of P.W.1 with regard to her presence and witnessing the role played by these accused persons in finally beheading her parents. Furthermore, in view of the last happenings where her parents were beheaded, she having not stated about the prior happenings as to what had been told by her father on his first return with regards to the injuries on his persons etc. are too minor as omissions to be given any importance at all. Those omissions are quite obvious in view of the brutal act of the accused persons, which she being a girl of tender age had to see to her greatest misfortune. In fact, we find that the version of this witness (P.W.1) with regard to the dragging of her parents from the house by these accused persons, mercilessly assaulting her parents in the courtyard and finally, severing their heads and trunks beyond slightest imagination of anybody have remained wholly unshaken. The witness, during cross-examination, has further asserted to have seen the incident

from the beginning till the end. She has successfully withstood the cross-examination on every such material aspect of the last incident where her parents were beheaded. In such scenario, the conduct of this P.W.1 in not raising any hullah, which is commented upon by the learned counsel for the Appellants is rather very much natural. When several persons, being armed, are going on with the spree of killing her unarmed parents before her eyes and other family members, it is not at all expected from this P.W.1 or other family members to raise alarm. Rather the normal reaction would be to be a silent spectator to this ghastly incident being completely aghast and shocked by said acts, which is totally unexpected and unthinkable on her part as if a horror film was being exhibited before her.

11. P.W.2 is the aunt of P.W.1 and she is the sister of deceased Rajendra. She has stated that she was staying in the house of Rajendra, which provides corroboration to the evidence of P.W.1. She says that in that night, when accused persons came by shouting that her deceased brother was practising witchcraft and they entered into their house, thereatened her brother to come out of the house in saying that they would kill them all. It is further stated that her brother Rajendra and his wife Jemamani were then dragged from the house and assaulted by means of sword, axe and knife and subsequently, they were beheaded which is to her total surprise. This witness, during cross-examination, has stated that she could narrate as to which accused assaulted her brother and his wife and in which manner. She has further stated during cross-examination that accused Mitu was holding a knife; accused Basanta was holding a sword; and accused Goutam was holding an axe

and they all assaulted. The defence then expecting further problem being invited has not proceeded in putting anymore question to her. According to her, the actual incident took place in the village road, which is in front of their house, which is also the version of P.W.1. She has also stated that these accused persons were in inimical terms with her brother. What we find that despite cross-examination, the evidence of this witness with regard to all said happenings in the incident and the overt acts done by these accused persons have not been shattered even to the slightest extent. When this witness had not stated as to which accused was holding what weapon, that has rather been elicited during cross-examination and that fortifies the role of these accused persons. It appears that this witness at the earlier stage being not so descriptive has after some time on being so asked could not resist the temptation to tell all those happenings being truthful.

12. Next comes the evidence of P.W.3, who is the daughter of the deceased persons and sister of P.W.1. She was then aged about eleven years. The Trial Court, having tested her and finding her to be understanding the questions and giving rational answers, which have been noted in the deposition, has proceeded to record her evidence. When she had not stated as to the assault part by these accused persons and its manner, that is seen to have been brought out in the cross-examination wherein she has stated that the accused persons assaulted her parents by means of axe, sword and knife. She, being not able to state as to which accused was holding which weapon, in our view, under the circumstance and the way the incident took place within a short span of time does not assume significance at all and that cannot be taken as a

circumstance to doubt the presence of this witness at the time of occurrence in a situation as has happened. On the face of the version of P.Ws.1 & 2, a girl child aged about eleven years, i.e., P.W.3, being not able to mark those minute details and accordingly, state during trial in no way tells upon the credibility of her evidence. Had she rather stated all those details, that would have been commuted upon that she had shown over anxiety. Moreover, it is ordinarily not expected from a girl child of eleven years, who in her own eyes, sees her helpless parents being beheaded in a ghastly manner to mark and give a detailing on the tit bit role played by the accused persons.

13. When the evidence of P.W.6 is gone through, we find that the same is wholly consistent with the evidence of P.Ws.1 to 3 without any variation on material part. He is the elder brother of deceased Rajendra. Interestingly, from this witness, the defence, during cross-examination, has elicited in clear terms that accused Goutam assaulted by means of axe; accused Basanta assaulted by means of sword and accused Panchu and Mitu were then holding knives and other accused persons were holding his brother Rajendra and Jemamani. There arises absolutely no doubt regarding identification of the assailants and this witness has gone to further narrate the situation then that there was no darkness at that time and their houses were having electric connection, which was then going uninterrupted. He has forcefully denied the suggestion that he was not present and has not seen the incident.

14. P.W.7 has stated that the accused persons were suspecting deceased Rajendra and his wife Jemamani of practicing witchcraft. It

has been further stated by her that the accused persons entered into the house of Rajendra and dragged him and his wife and then killed them. Her evidence is also that at the relevant time of incident, P.Ws.1 to 3 and 6 were present in the house. No such material has surfaced during cross-examination of this witness (P.W.7) as well as other witnesses whose evidence, we have already discussed above, to even infer for a moment that they are not the witnesses of truth. The evidence of these witnesses are in our view wholly trustworthy and reliable. They the delay in lodging the FIR in the circumstances is also of no importance to strike upon the acceptability of the evidence of all these witnesses as discussed. The variations with regard to the time given by these witness as to some extent, in our considered view cannot be so viewed to doubt the version of those witnesses, which are otherwise consistent and run in the same vein in so far as the last leg of the incident where the deceased persons, namely, Rajendra and his wife Jemamani were beheaded.

15. On a conspectus of analysis of the evidence hereinabove, this Court finds that the prosecution has proved its case against these accused persons as having committed the murder of Rajendra and Jemamani beyond reasonable doubt and as such, the judgment of conviction and order of sentence dated 31st August, 2020 passed by the learned Additional Sessions Judge, Keonjhar, in S.T. Case No.26/53 of 2015 hereby receives the seal of confirmation.

16. At this juncture, after having held these accused persons guilty in intentionally causing the death of Rajendra and Jemamani by committing house trespass, in addressing the adequacy of sentence,

when we again turn our attention to the obtained evidence as regards the way and manner in which the occurrence took place as well as all the circumstances as have emerged and the part played by these accused persons therein; we are not able to bring ourselves to a position to straight away take a view that the imposed sentence may be adequate. Therefore, with the obtained evidence, despite the fact that the State has not preferred any Appeal for enhancement of the sentence for considering the adequacy of the sentence, in exercise of the revisional power under section 397 read with section 401 of the Code of Criminal Procedure, we propose to issue notice to these accused persons to have their say on the adequacy of sentence and as to why they should not be visited with the sentence of higher degree.

In that view of the matter, while upholding the conviction of the accused persons for committing the offence under section 302/450/34 IPC, notice is hereby given to the learned counsel appearing for the accused persons in Court today to have his submission on behalf of the accused persons as to why the sentence, as has been imposed by the Trial Court upon the accused persons shall not be enhanced. We, also as a measure of abandon caution direct the Registry to immediately send the notice to the Superintendent, District Jail, Keonjhar to be served upon the accused persons as to why the sentence imposed by the Trial Court upon them shall not be enhanced as being not adequate and commensurate the crime committed by them.

It be indicated in the notice that these Appeals would again be listed on 17.04.2023 for hearing on the question of sentence and the service returns be ensured by 31st March, 2023.

List these Appeals before this Bench on 17th April, 2023.

(D. Dash)
Judge

Sashikanta Mishra, J I agree.

(Sashikanta Mishra)
Judge



Basu