IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA No.222 of 2001

(From the judgment and order dated 17.10.2001 passed by learned 2nd Addl. Sessions Judge, Cuttack in S.T Case No.1 of 221 of 2000)

Prafulla Kumar Dehury and Ors. ... **Appellants**

-versus-

State of Odisha ... **Respondent**

Advocates appeared in the case through hybrid mode:

For Appellants : Mr. B.B.Routray, Advocate

-versus-

For Respondent : Ms. Subhalaxmi Devi, A.S.C.

CORAM:

THE HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK

THE HONOURABLE MR. JUSTICE SASHIKANTA MISHRA

Date of hearing-10.03.2026 Date of Judgment-19.03.2026

Sashikanta Mishra,J. The appellants faced trial for murder in S.T. Case No. 221 of 2000 in the Court of

learned Second Additional Sessions Judge, Cuttack and were convicted under Sections 302/34 of IPC and sentenced to imprisonment for life. Be it noted that another person namely, Bimala Dehury also faced trial in the connected case, being S.T. Case No. 442 of 2000 but by the same judgment, she was acquitted.

2. Prosecution case, briefly stated, is as follows:

The occurrence took place on 27.01.1999 at 7 a.m. in village Nuasolabandha. It so happened that on the previous night around 8 p.m., there was pelting of stones on the house of the informant Sabar Nayak. The identity of culprits could not be ascertained. On the next morning at about 7 a.m., while Sabar Nayak, his nephew Jeevan Nayak (deceased) and several villagers were discussing about the stone-pelting incident, accused Prafulla Kumar Dehury (appellant No. 1) suddenly rushed to the spot holding an axe and assaulted the deceased with it, causing grievous injury on his head. As a result, the deceased lost consciousness. After attending to the deceased, the informant went to Kanpur Police Station and submitted a

written report. Basing on such report, P.S. Case No. 4 of 1999 was registered under Sections 341/307/506 IPC followed by investigation. In course of investigation, the deceased, who was referred to Cuttack for treatment, succumbed to the injury. As such, the case turned to Section 302 of IPC. Upon completion of investigation, charge-sheet was submitted against all the three appellants.

3. The defence, apart from taking the plea of denial, took the specific stand that the deceased had assaulted accused Prafulla and fell down on rocks while running away, resulting in injury on his head. The appellants were falsely implicated.

4. To prove its case, prosecution examined 7 witnesses and proved 11 documents and 3 material objects. On the other hand, defence examined 2 witnesses and exhibited 3 documents.

5. The trial Court, after analyzing the evidence on record, found that the prosecution case was well-established against the accused persons. Relying on the

evidence of P.Ws.1, 2 and 3 along with medical evidence, the trial Court held that it was amply proved that accused Pratap and accused Pankaj caught hold of the deceased while accused Prafulla dealt a Tangia blow on his head, which ultimately led to his death. The trial Court disbelieved the defence evidence on the ground that even if it was accepted, it only proves that any injury sustained by the accused would have arisen during the occurrence. The trial Court, however, did not find any evidence to prove the prosecution allegation that accused Bimala had instigated Prafulla to assault the deceased. Thus, while acquitting Bimala, the trial Court convicted the other three accused persons and sentenced them as already stated hereinbefore.

6. Heard Mr. B.B.Routray, learned counsel for the appellants and Ms. Subhalaxmi Devi, learned ASC for the State.

7. Mr. Routray assails the impugned judgment on the following grounds:

(i) Though it is stated by the prosecution witnesses that there was a huge gathering, yet no one came forward to prevent appellant No.1 from assaulting the deceased as alleged, which is not believable.

(ii) P.W. 2 admitted that by the time he rushed to the spot the assault was already over and therefore, he could not have been treated as an eye-witness.

(iii) Though the witnesses stated that a Tangia was used to commit the offence, yet a Farsa was sent for examination by the doctor.

(iv)There was a counter-case against the deceased and one Tuku Rana which suggests false implication in the present case.

(v) The names of accused Pratap and Pankaj do not find place in the FIR or in the first 161 statement of the informant, which shows that they were subsequently implicated after due deliberation.

(vi) The occurrence took place because of quarrel between the parties and therefore, cannot be

treated as 'murder' within the meaning of Section 300 of IPC.

8. Per contra, Ms. Subhalxmi Devi would submit that P.Ws.1, 2 and 3 clearly stated that they had seen the occurrence being present nearby and described it vividly. Their evidence remained unshaken in cross examination. The ocular evidence is fully corroborated by medical evidence. Even assuming that there was a tussle, accused Prafulla was not a party to the same and therefore, the benefit of Exceptions 1 and 4 of Section 300 cannot be given to him.

9. We have given our anxious consideration to the rival contentions and have also analysed the evidence on record. It is seen that there are three eye-witnesses to the occurrence-P.Ws.1, 2 and 3. All of them have unequivocally stated that on the date of occurrence in the morning, when the deceased asked accused Pankaj about the pelting of stones, he admitted and threatened to do so also in future. This was followed by a tussle between the deceased and

accused Pratap, who gave the deceased 2 to 4 slabs. At that time, accused Prafulla, who was standing nearby with a Tangia rushed towards the deceased and dealt a blow on the left side of his head. All these witnesses were cross-examined at length but nothing was elicited thereby to discredit their version. It is further borne out from the evidence that the deceased first received treatment at Kanpur Hospital, where his injury was dressed up and he was referred to Sub-divisional hospital, Athgarh. He was further referred to Cuttack for treatment, where he succumbed. The autopsy surgeon found a cut injury on the left side of head along with other injuries over the body. He opined that the cause of death was due to cranio-cerebral injury. He also opined that the injury to the head would have been caused by the weapon produced before him (M.O.1). The above, in short, is the prosecution case against the accused persons.

10. Having observed as above, we shall now proceed to consider the rival contentions listed hereinbefore.

It is argued that there was a huge gathering during the assault but no one came forward to prevent the occurrence, for which the prosecution eye-witness accounts should be disbelieved. We do not agree for the reason that the occurrence appears to have taken place within a short period of about 5 minutes as per the version of P.W. 2 . Others may not have had the time to react. Even otherwise, accused Prafulla being armed with Tangia and in an apparently belligerent mood, no one would also have dared to come forward out of fear. Only for such reason therefore, the eye-witness accounts cannot be brushed aside.

11. As regards the possibility of P.W. 2 having seen the occurrence, we find that he clearly stated that at the relevant time when he was cleaning his teeth in front of his house, one Kalinga Nayak, accused Pankaj and accused Pratap and others were warming their bodies while sitting around a fire. The deceased arrived there and enquired from the above-named persons as to who pelted stones on the previous night. To this, accused Pankaj threatened of

committing graver offences in future and accused Pratap gave 3 to 4 slaps to the deceased. Accused Prafulla then took a Tangi and rushed towards the deceased and assaulted him.

In cross-examination, he reiterated that he was brushing his teeth at the time of occurrence and that the assault took place within 5 minutes. He stated that by the time he rushed to the spot, the assault was already over. We have referred to the spot map marked Exhibit-9. We find that the spot is on the road in Nuasolabandha village, which consists of rows of houses on both sides. The names of all the 14 house owners have been specifically mentioned in Exhibit-9. Significantly, the house of P.W. 2 (Gobardhan Nayak) does not find place in his said list. So his statement that he was brushing his teeth in front of his house becomes doubtful and that his house was about 15 to 20 cubits away from where the deceased was assaulted also becomes doubtful. In such a situation, it is difficult to treat P.W. 2 as an eye witness.

12. It has been urged that there is confusion as regards the exact weapon used. According to the witnesses, a Tangia was used but no Tangia was recovered, rather a Farsa and sent to the medical officer for his opinion. The opinion of the medical officer is marked Exhibit-4. Perusal of Exhibit-4 reveals that the doctor has described the weapon as 'Tangia (Farsa)' and has also mentioned its dimensions.

It is argued that the weapon of offence seized by the I.O. and proved in the Court as M.O.1 is a Farsa, whereas according to the witnesses, the accused used a Tangia to assault the deceased. Reading of the evidence of the witnesses shows that none of them has stated about any Farsa being used. The I.O. (P.W.7) describes the M.O.1 as Tangia in Exhibit-6. The seizure list also mentions the weapon as Tangia. Though there is some discrepancy in this regard, yet we are not inclined to place much importance on the same because the dimension of the weapon has been described in Exhibit-6. That apart, the Doctor (P.W.5) described the weapon in his opinion vide

Exhibit-4 as 'Tangia (Farsa)'. It is common knowledge that both Taniga and Farsa are sharp cutting weapons though the length of the handle and that of the blade may differ. Even accepting the defence argument as above, it will not take away the evidence of assault by a sharp cutting weapon like Tangia/Farsa.

13. It is next argued that the occurrence had been arisen out of a quarrel wherein both parties were engaged in assaulting each other, which is evidenced by the fact that a counter-case was lodged against the deceased and his associate. Therefore, the trial Court could not have brushed aside the same. It is also urged that the trial Court committed manifest error in completely discarding the defence evidence.

After going through the evidence, we find considerable force in the above contention inasmuch as the I.O. (P.W.7) admitted in cross-examination that Kanpur P.S. Case No. 5 /1999 is a counter to this case, where FIR was lodged on 27.01.1999 at 9.45 a.m. and that Jiban Nayak (deceased) and Tuku Rana are the accused persons. Pankaj Dehury

(appellant No.2) is the complainant in the said case. He also admitted that accused Prafulla Dehury was sent for medical examination in the said case and was referred to SCB Medical College by the Medical Officer at Kanpur PHC. It is significant note the further admission of the I.O. that he did not collect the injury certificate of Prafulla Dehury in the counter case and could not assign any reason for such omission.

14. Reading of the impugned judgment reveals that the trial Court has in fact completely brushed aside the above evidence by holding as follows:

> *"Of course, there is no cogent circumstance available from the materials on record that the deceased had ever caused any harm to the accused persons for which a counter case as per the FIR under Ext. B could be lodged. It is quite apparent and possible that the accused persons in order to get rid of the rigours of the present case, they have filed counter case to save their skin. Even if there was any injury on the person of any of the accused persons, the same can be explained to have been caused during the course of occurrence where there was tussle between the accused persons and the deceased.*
>
> *Therefore, the evidence of the defence witnesses (D.W 1 & 2) cannot be accepted to be true in view of the material evidence even though they state that the deceased died being fallen on a boulder. That part, the documentary evidence in Exts. A, B and C also do not help the defence in any manner whatsoever, to prove the innocence of the accused persons."*

The defence has examined two witnesses who have also stated about the counter case.

15. It is trite law that defence evidence is to be appreciated on the principle of preponderance of probability and not on the strict parameters of beyond reasonable doubt. The Court has to see if a plausible defence has been made out or not. From the reasoning of the trial Court as extracted hereinbefore, it can be seen that the trial Court has discarded the defence evidence on surmises and conjectures without citing any cogent reason for not accepting the same. It is not a question of proving the innocence of the accused persons beyond doubt, but whether a plausible defence is set up or not. Therefore, the documents marked Exhibits A, B and C assume importance in consideration of the defence plea that the occurrence had arisen out of a mutual fight. This changes the whole scenario. We are therefore of the view that the trial Court committed manifest error in not placing due

importance on the evidence relating to the counter case wherein accused Prafulla was also injured.

16. Now, coming to the most important ground that the prosecution story, as laid, is an exaggerated version of what exactly transpired, we find that the FIR was lodged by P.W.1 on 27.01.1999 at 9.15 a.m. He named only accused Prafulla Dehury as having assaulted the deceased by means of a Taniga. The names of the other two accused persons are conspicuously absent. P.W.1 was examined by the I.O. on 28.01.1999 and his statement was recorded under Section 161 of Cr.P.C., which is on the next date of the occurrence. Though he referred to the altercation between the deceased and accused Pankaj and accused Pratap, he specifically named only Prafulla Dehury as having assaulted the deceased by means of a Tangia. Even in the FIR, he did not whisper a word about the involvement of accused Pratap and accused Pankaj. While deposing in the Court however, he improved upon his original version. Defence has tried to take mileage of this apparent improvement in the version of the informant. We

find considerable force in the defence argument. This is a case where the informant lodged FIR in writing himself claiming to be an eye witnesses. There is no reason why he would not mention the names of all persons involved in the occurrence but name only one of them. In his initial statement recorded under Section 161 of Cr.P.C. also, he did not name the other two accused persons. Defence, while cross-examining him, drew his attention to such omission, but he denied. The I.O. however, admitted in his cross-examination about such omission. This raise a reasonable doubt. While we agree with the contention raised by the State counsel that FIR is not supposed to be an encyclopedia, yet it is settled law that omission of important facts affecting the probabilities of the case is relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. This was held by the Supreme Court in the case of ***Ram Kumar Pandey v. State of M.P.***[1], wherein the following observations would be relevant:

[1] (1975) 3 SCC 815

> *“**9.** No doubt, an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known up to 9-15 p.m. on March 23, 1970, were bound to have been communicated. If his daughers had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR We think that omissions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.”*

17. In the case of ***Anmol Singh v. Asharfi Ram & Ors.***[2]**,** the Supreme Court upheld the acquittal of the accused persons on a similar ground that the version in the FIR was different from the version given in the Court. The above omission assumes significance in the present context because as stated earlier, the occurrence arose out of mutual quarrel involving both parties. Therefore, in the absence of a cogent explanation being offered regarding the omission to name all the accused persons at the first instance, their subsequent implication becomes doubtful and difficult to accept.

18. Having thus dealt with the grounds of challenge to the impugned judgment as raised by the defence, we shall now

[2] 1998 SCC (Cri) 369

proceed to deal with the ultimate finding of the Court regarding guilt of the accused persons. As stated earlier, there is acceptable evidence of a counter-case being lodged at the instance of the accused persons against the deceased and also some evidence of accused Prafulla having received injury. This lends considerable weight to the supposition that the parties assulted each other in course of a mutual quarrel/altercation.

The genesis of the dispute seems to lie in the incident of pelting of stones at the house of the informant on the previous night. There is nothing in the evidence to show that accused Prafulla harbored any ill-will against the deceased prior to the occurrence. We accept the evidence that in course of altercation between the deceased and the other two accused persons, accused Prafulla suddenly rushed towards the deceased and assaulted him by means of an axe causing injury which ultimately led to his death. The assault was obviously not pre-planned but arose suddenly in the heat of the moment. However, fact remains that he assaulted the deceased with the axe on his head

causing a cut injury grievous enough to kill him. This shows his intention to cause bodily injury sufficient to cause death along with knowledge of the same. Exception 4 to Section 300 reads as follows:

> *"Exception 4.—Culpable homicide is not murder if it is committed without premeditation 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."*

We are convinced that the case squarely falls under Exception- 4. We do not accept the prosecution argument in this regard. In the case of ***Gurmukh Singh v. State of Haryana***[3], the Supreme Court held as follows;

> *"**23.** These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:*
> *(a) Motive or previous enmity;*
> *(b) Whether the incident had taken place on the spur of the moment;*
> *(c) The intention/knowledge of the accused while inflicting the blow or injury;*
> *(d) Whether the death ensued instantaneously or the victim died after several days;*
> *(e) The gravity, dimension and nature of injury;*
> *(f) The age and general health condition of the accused;*

[3] (2009) 15 SCC 635

> *(g) Whether the injury was caused without premeditation in a sudden fight;*
> *(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
> *(i) The criminal background and adverse history of the accused;*
> *(j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;*
> *(k) Number of other criminal cases pending against the accused;*
> *(l) Incident occurred within the family members or close relations;*
> *(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?*
> *These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused."*

19. From what has been narrated above, we are unable to persuade ourselves to treat the act of accused Prafulla as murder, rather it would be a case of culpable homicide not amounting to murder punishable under Section 304 Part 1 of IPC. As regards the conviction of the other accused persons, we hold that there being evidence of improvement in the prosecution case to implicate them, their conviction cannot be sustained.

20. From the conspectus of the analysis of evidence, contentions raised and the discussion made, we hold that

the impugned judgment warrants interference by way of modifying the conviction of accused Prafulla from murder to culpable homicide not amounting to murder. We further hold that the conviction of accused Pratap and accused Pankaj cannot be sustained and is therefore, set aside to such extent.

21. In the result the appeal is allowed in part. The impugned judgment is modified in the following manner:

i) Accused Pankaj and accused Pratap are held not guilty and are therefore, acquitted of the charges. They being on bail, their bail bonds be discharged.

ii) Accused Prafulla is held guilty of commiting culpable homicide not amounting to murder and is therefore, convicted under Section 304 Part 1 IPC. The incident occurred in the year 1999, that is, 26 years ago and arose out of a mutual assault wherein the accused also sustained some injury. He was in custody for some period during trial. We are therefore of the view that ends of justice would be best served if he is sentenced to 7 years rigorous imprisonment with the usual set-off. His bail

bonds stands cancelled and he shall be taken into custody forthwith to serve the remaining part of the sentence, if any.

....
Sashikanta Mishra, J.

Manash Ranjan Pathak, J. I agree.

....
(Manash Ranjan Pathak,J.)

High Court of Orissa, Cuttack.
Deepak