A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA NO.65 of 1995

(In the matter of application under Section 374(2) of the Criminal Procedure Code, 1973.).

Mahendra Bag …. ***Appellant***

-versus-

State of Orissa …. ***Respondent***

For Appellant : ***Mr. A. Mohanty, Amicus Curiae***

For Respondent : ***Mr. S.S. Pradhan, AGA***

CORAM:

JUSTICE G. SATAPATHY

DATE OF JUDGMENT:29.09.2023

G. Satapathy, J.

1. This criminal appeal impugns the judgment passed on 30.01.1995 by the learned Sessions Judge, Sambalpur in S.T. Case No.267 of 1994 convicting the appellant for offence under Section 307 of IPC and sentencing him to undergo Rigorous Imprisonment (RI) for a period of five years.

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2. An overview of facts involved in this case were on 12.10.1994 at about 9.45 PM, PW2 while returning from a cloth shop after making some purchase had a collision with the appellant at Baidyanath Chowk and on this, when PW2 asked the appellant to walk properly on the road, the appellant being annoyed, went to a nearby place and brought out a sword and chased PW2 to assault, but PW2(injured) accordingly ran towards Kansaripada with appellant following behind him by holding a sword, however, the appellant could be successful in reaching near PW2 in front of the residence of Headmaster, Town High School and dealt successive blows on the head and back of PW2 by means of the sword resulting in bleeding injuries on his persons. This incident was witnessed by PW1-Milan Maharana, PW4-Ashok Nepak and PW-5-Jagadish Mahapatra and out of whom, PW1 had unsuccessfully tried to rescue PW2 ending only with receiving injury on his right index finger. Immediate after the occurrence, PWs.1

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and 2 went to the police station and PW2 orally reported the incident and, thereafter, both of them receive treatment at a hospital.

3. On the same date i.e. on 12.10.1994 at about 10.10 PM, PW2, however, lodged FIR against the appellant, which paved the way for registration of Sambalpur Town P.S. Case No.354 of 1994, which culminated in submission of charge-sheet against the appellant for offence under Sections 307/324 of IPC read with Section 27 of Arms Act, but the learned trial Court proceeded against the appellant in the trial by framing charge under Section 307/324 of IPC without assigning any reason for not proceeding against the appellant for offence under Section 27 of Arms Act. This was how the trial commenced in the case.

4. In support of its case, the prosecution examined altogether 6 witnesses vide PWs.1 to 6 and relied upon five documents under Ext.1 to 5 as against no evidence whatsoever by the defence in

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support of its plea of false implication and innocent of the offence.

5. After appreciating the evidence on record upon hearing the parties, the learned the learned trial Court by the impugned judgment, convicted the appellant for commission of offence U/S.307 of IPC and sentenced him to the punishment indicated (supra). The learned trial Court, however, considered the charge under Section 324 of IPC against the appellant as an alternative charge and accordingly, appeared to have ignored to consider such charge against the appellant after his conviction for higher offence U/S.307 of IPC. It appears from the impugned judgment that the learned trial Court had convicted the appellant by mainly relying upon the evidence of eye witnesses PWs.1, 2 and 5.

6. In this case, PW2 being main injured witness-cum-informant, his evidence requires to be scrutinized first in the sequence. The evidence of PW2 transpired that on 12.10.1994 at about 9.30 PM, he

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had a collision with the appellant at Baidyanath Crossing and, accordingly, cautioned him to walk properly on the road, but the appellant brought out a sword and chased to assault him and the appellant accordingly, dealt sword blows on his head and back, as a result he sustained bleeding injuries on his person. It was his further evidence that when PW1 intervened to rescue him, one of the sword blows made by the appellant struck on the tip of the right index finger of PW1 causing bleeding injury to him. In addition to his oral evidence, PW2 had also proved the FIR under Ext.1. Since the evidence of PW2 disclosed PW1 to be an injured, it is considered apposite to examine the evidence of PW1, whose testimony transpired that on 12.10.1994 at about 9.50 PM, the appellant while chasing PW2 with a sword became successful in striking on PW2 by the said sword in front of the house of Headmaster, Town High School and he had also sustained injury on his right index finger while intervening in the matter.

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PW1 had also clearly stated in his evidence that the appellant had dealt strokes by means of a sword on the person of PW2, who had sustained injuries on his head and neck by such assault of the appellant.

7. Mr. A. Mohanty, learned Amicus Curiae has, however, termed PWs.1, 2 and 5 as interested witnesses and he has accordingly submitted not to rely upon the evidence of aforesaid highly interested witnesses. It is also submitted by Mr. Mohanty that the injured in this case was an anti social element, which was clearly reflected in the judgment and the prosecution having not been able to unearth the motive behind the crime, it would not be proper to confirm the conviction of the appellant. Mr. Mohanty, however, has acknowledged the evidence of PWs.1, 2 and 5 led by the prosecution against the appellant, but he has definitely tried to make out a case in favour of the appellant by terming these witnesses as interested witnesses and thereby, he has urged to disbelieve their evidence.

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8. On the other hand, Mr. S.S. Pradhan, learned AGA has, however, strongly urged this Court to rely upon the evidence of these witnesses by terming the evidence of eye witnesses to be independent evidence unconnected with the appellant and the informant-injured. Learned AGA accordingly has drawn the attention of the Court to the evidence of another injured independent witness as well that of PW5 and has prayed to confirm the conviction.

9. The plea of interestedness of witnesses was taken by the defence in the learned trial Court, which on close scrutiny, had rejected such plea by assigning the following reason "as admitted by the said PWs, all of them are not only close friends, but associates of one another and have been entangled in commission of many anti social offences, but what is significant is that their evidences get good amount of corroboration from the evidence of PW3 (Doctor) and PW6 (IO)".

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10. The testimony of PW3 disclosed that PW1 had received one cut injury of size ½″ X ¼″ over his right index finger, which was opined by PW3 to be simple in nature and would have been caused by a sharp cutting weapon. PW3 had also stated in his evidence that he had examined PW2 on police requisition and found one cut injury of size 6′′ in length and 2″ in breadth over the left scapula (back) and one cut injury of size 3″ X ½″ X ½″ over the back of the vertex (head) and the aforesaid injuries were opined by PW3 to be simple in nature and might have been caused by a sharp cutting weapon. PW3 had also stated in his evidence that these cut injuries were possible by means of a sword (Talwar).

11. On coming back to the testimony of PW5, who was another eye witness to the occurrence, it appears that PW5 had not only reiterated the assault made by the appellant on the injured-informant PW2 as well as the other injured PW1 by means of a sword, but also had given a detailed picturesque of

the transaction as to how the appellant attacked and inflicted injuries to PWs.1 and 2 and the reason for such attack. It can neither be denied nor disputed that the defence had not been successful in demolishing the evidence of all these three witnesses i.e. the evidence of PWs.1, 2 and 5 and their evidence not only corroborated to each other in material particulars, but also vividly described the mode and manner of assault by appellant on PWs.1 and 2. It cannot be disputed that the evidence of PW2 was squarely corroborated by Ext.1(FIR) so also by Ext.3. It, however, appears that Mr. A. Mohanty, learned Amicus Curiae has assailed the evidence of PWs.1, 2 and 5 on the ground of interested witnesses, but such contention appears to be the imagination of the appellant and in no circumstance, the evidence of PWs.1 and 5 can be rejected en-bloc merely because they were friends of PW2, but their evidence, however, was strongly corroborated by the medical evidence of PW3. The learned Amicus Curiae has also

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argued that the sword was never seized by the IO, rather one barber knife was seized by him, but such submission merits no consideration in view of the overwhelming oral evidence of PWs.1, 2 and 5 which was supported by the medical evidence of PW3.

12. In the aforesaid circumstance and on meticulous appreciation of evidence of prosecution witnesses together with failure of the defence to impeach the veracity of the evidence available on record and there being ample evidence against the appellant, this Court is of the considered view that the appellant had attacked PWs.1 and 2 and caused injuries to them by use of sharp cutting weapon on the relevant date and time of occurrence, which was the main substratum of evidence against the appellant and the same was squarely established by the prosecution against the appellant beyond all reasonable doubt. At this juncture, this Court, however, noted a fact that the learned trial Court had ignored the charge sought to be established against

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the appellant for offence under Section 324 of IPC by considering it to be an alternative in character, but this Court considers it proper to remind that the appellant was not only allegedly charged for assaulting the informant-injured(PW2), but also injuring PW1, however, the learned trial Court while framing charge had forgotten to frame charge against the accused for injuring PW1, who had made valiant attempt to rescue PW2 in the course of occurrence, but such lapses would not have any effect on the case of prosecution which was already established against the appellant by way of unimpeachable evidence for attacking and assaulting the injured-informant and, thereby, inflicting injuries to PW2.

13. This Court, however, considers it apposite to find out as to whether the act of the appellant established his guilt either for offence under Section 307 of IPC or for any other offences and in the pursuit of such determination, it appears to this Court that neither there was any medical evidence available

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on record to indicate that the injuries sustained by PW2 on the assault of appellant were sufficient in ordinary course of matter to cause death of a person nor was there any evidence on record to disclose any grievous injuries to PW2. There is no cavil of doubt, even without injuring a person, an accused can be made liable for offence under Section 307 of IPC provided there must be evidence against him beyond reasonable doubt establishing his intention to commit the murder of the injured. Hence, the intention plays an important role in prosecution against the accused for commission of offence under Section 307 of IPC.

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14. In common parlance, nature of injuries caused by the offender more than often depict/ reveal the intention of such offender, but they are by themselves not decisive factor to determine the *mensrea* in terms of Section 307 of IPC, however, bodily injuries capable of causing death in ordinary course is one of the relevant consideration for attracting the charge under Section 307 of IPC, which

may of course be attracted even in absence of injuries, if there is unimpeachable evidence that the offender does such act with intention or knowledge and under such circumstances, by which he would have killed the victim, who had survived because the act of the offender failed or missed the target. Reverting back to the evidence on record keeping in view the aforesaid legal principle to find out the requisite intention/knowledge of the appellant for the offence U/S. 307 of IPC, it appears that the learned trial Court in its judgment had explained that inflicting successive blows by means of a sword projects the intention of the appellant to commit murder of PW2 in an affirmative manner, but the ocular testimony of PW2 disclosed that the appellant had dealt blows by means of a sword on his head and back and he had sustained bleeding injuries due to such blows of the appellant on his person. On the other hand, it was the evidence of PW1 to the extent that the appellant dealt strokes by means of the

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sword on the person of the injured Lingaraj, who sustained injuries on his head and back. PW5, however, stated in his evidence that the appellant dealt a sword blow on the head of the injured Lingaraj and second blow with the same sword on the back of the Lingaraj. None of the aforesaid three witnesses had ever whispered about the intention of the appellant to commit murder of the injured which assumes great significance in absence of medical evidence as to the sufficiency of the injuries in ordinary course of nature to cause death of PW2. Had there been any intention on the part of the appellant to commit murder of the injured, he could have given blows to the injured repeatedly by means of the sword, which he was wielding at that time when the injured fell down on the ground and he would not have escaped from the spot. Besides, the injuries found on the injured as per medical evidence were simple in nature, but would have been caused by sharp cutting weapon.

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15. In the backdrop of aforesaid facts and situation coupled with analysis of evidence on record, this Court is unable to subscribe to the view of the learned trial Court that the appellant was having intention to kill the injured, but subsequently, prevented in not achieving the desired result, however, the act of the appellant was squarely covered by the ingredients of offence under Section 324 of IPC and, therefore, the conviction of the appellant is required to be modified for offence under Section 324 of IPC which is punishable with imprisonment of either description up to three years or with fine or with both. It is not in dispute that the appellant was convicted in this case more than 28 years and 6 months back, when he was aged about 25 years. There is also no dispute about the appellant to be involved in other serious cases like dacoity as revealed from the impugned judgment and the appellant, therefore, is not entitled to the beneficial provision of either PO Act or Section 360 of the

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Cr.P.C. Moreover, the appellant was in judicial custody for near about five and half months in this case as revealed from the record, but taking into consideration the nature of injuries sustained by the injured and the act of the appellant, this Court considers that a sentence of Rigorous Imprisonment for one year to the appellant would meet the ends of justice.

16. In the result, the appeal stands allowed in part on contest, but in the circumstance there is no order as to costs. The impugned judgment of conviction and sentence passed by learned Sessions Judge, Sambalpur in S.T. Case No.267 of 1994 are hereby set aside and modified to offence under Section 324 of IPC with sentence of Rigorous Imprisonment of one year to the appellant.

17. Be noted, since the petitioner was directed to be released on bail by an order passed by this Court on 30.03.1995 in this appeal, the bail bond(s) of the appellant is/are hereby cancelled and the

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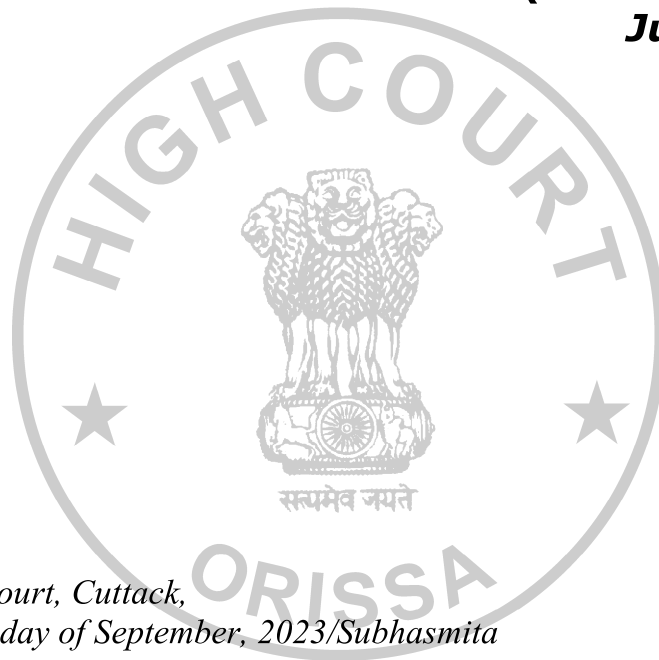
appellant is directed to surrender to custody not later than 1st November, 2023, to suffer the remainder of his sentence, failing which the concerned IIC will take proper steps to commit the appellant to prison.

(G. Satapathy)
Judge



Orissa High Court, Cuttack,
Dated the 29th day of September, 2023/Subhasmita