A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.96 of 2023

(An appeal U/S. 383 of the Code of Criminal Procedure against the judgment passed by Shri Bibaswat Gautam, 3rd Addl. Sessions Judge, Balasore in S.T. No.52 of 2019 corresponding to C.T. Case No. 293 of 2018, arising out of Sahadevkhunta PS Case No. 58 of 2018 of the Court of SDJM, Balasore)

Babu Dehuri .... ***Appellant***

-versus-

State of Orissa .... ***Respondent***

For Appellant : ***Mr. S.K.Routray, Advocate***

For Respondent : ***Mr. K.K. Gaya, ASC***

CORAM:

JUSTICE G. SATAPATHY

DATE OF HEARING :30.07.2024
DATE OF JUDGMENT:08.10.2024

G. Satapathy, J.

1. This jail criminal appeal U/s.383 of the Code of Criminal Procedure, 1973 (in short "the Code") is directed against the judgment dated 24.01.2023 passed by the learned 3rd Addl. Sessions Judge, Balasore in ST Case No. 52 of 2019 convicting the appellant for offence U/S. 304-II of IPC and sentencing him to undergo Rigorous Imprisonment for ten years

and to pay a fine of Rs.10,000/-, in default whereof to undergo RI for a further period of six months with direction of set off pretrial detention against the substantive sentence undergone by the convict.

2. The prosecution case in brief is on 11.02.2018 at about 9PM in village Godhibasa, there was quarrel between the convict and his wife Tiki Singh(hereinafter referred to as the deceased) and in the course of such quarrel, the convict being enraged set the deceased on fire by pouring kerosene on her. However, the villagers rescued the deceased and shifted her to DHH, Balasore in an ambulance.

On the aforesaid incident, the Councilor of Ward No. 22 PW1-Kabita Murmu presented a written report before IIC, Sahadevkhunta P.S. at about 00.45 hours on the intervening night 11/12.02.2018. Basing on the written report(FIR) of PW1, Sahadevakhunta P.S. Case No. 58 of 2018 was registered for commission of offences punishable U/Ss. 324/326/307 of IPC with commencement of investigation by PW19-Jagannath Prasad Sahu who in course of investigation examined the informant and other witnesses and

recorded their statement, issued injury requisition to DHH, Balasore for medical examination of the victim, seized kerosene jar, matchbox, dibiri, burnt saree and shawl under seizure list Ext.2. PW19 also arrested the convict and forwarded him to the Court, however, on transfer, he handed over the charge of investigation to the IIC PW18-Sachidananda Giri. On 12.02.2018, the convict expressed inability to take the deceased to Cuttack for better treatment and the deceased continued to remain in DHH, Balasore till 21.02.2018 since PW11-Rina Singh who is the elder sister of the deceased and taking care of her in the hospital expressed her financial inability to shift the deceased to Cuttack and thereafter, PW11 took the deceased to her house at Phuladi, where the deceased unfortunately succumbed to the injuries in the night of 27.02.2018. However, all through the investigation continued and on completion of investigation, PW-18 submitted charge sheet against the convict for commission of offences U/Ss. 498-A/302 of IPC.

3. On finding prima facie materials, the learned SDJM, Balasore took cognizance of aforesaid offences

and committed the record to Court of Sessions. On receipt of record on transfer, the learned 3rd Addl. Sessions Judge, Balasore proceeded with the trial of the case by framing charge against the convict who pleaded not guilty to the charge resulting in trial in the present case.

4. In support of its case, the prosecution examined altogether 19 witnesses vide PWs. 1 to 19 and relied upon seven documents under Exts. 1 to 7 as against the oral evidence of two witnesses vide DWs. 1 & 2. In the course of trial, the plea of the convict was denial simplicitor and false implication.

5. After appreciating the evidence on record upon hearing the parties, the learned trial Court by mainly relying upon the evidence of child witness-cum-PW9 and other evidence concluded that the deceased suffered homicidal death, but the act of the convict is not liable for offence U/S. 302 of IPC, rather the same is liable for offence U/S. 304-II of the IPC. The learned trial Court also did not find the convict guilty of offence U/S. 498-A of IPC while holding him guilty of offence U/S. 304-II of IPC. The learned trial Court, accordingly,

sentenced the convict to RI for ten years and to pay a fine of Rs.10,000/-. Being aggrieved with the conviction and sentence, the convict has preferred this appeal.

6. Mr. S.K. Routray, learned counsel for the appellant while drawing attention of the Court to the evidence of P.W.1 has submitted that since, P.W.1 is inimically disposed of with the convict, she has deposed against him and the prosecution having failed to prove the motive behind crime, the prosecution case is shrouded with mystery and suspicious circumstances. It is further submitted that out of the nineteen witnesses examined in this case, none except P.W.9 has testified in the Court about the occurrence, but even if P.W.9 although appears to be an eye witness, but his evidence cannot be believed since he is a child witness and his testimony is not free from any infirmities as well as inconsistencies. It is also argued that since P.W.9 was examined two months after the occurrence, his evidence cannot be taken into consideration to base conviction of the appellant-convict and that too, when P.W.9 being the step son of the convict must have been tutored to depose against the convict and thereby, his

evidence cannot be taken into consideration to convict the appellant. It is, however, submitted that since the convict was a drunkard and the occurrence being committed while the convict being in an inebriated condition, his conviction is excepted by Section 86 of IPC and no criminal liability can be fastened on the convict. In summing up his argument, Mr. Routray has prayed to allow the appeal by setting aside the conviction and sentence of the convict.

In reply, Mr. K.K. Gaya, learned ASC has submitted that not only the evidence of eye witness to the occurrence-P.W.9 is consistent and credible, but also the other evidence available on record squarely being found relevant under the doctrine of *res gestae*, the guilt of the convict has been well proved by the prosecution and the convict being found in an inebriated condition had committed the crime, but fact remains that the convict himself had taken liquor and therefore, Section 86 of IPC cannot come into the aid of the convict to get him out of the process of legal punishment. Mr. K.K. Gaya, accordingly, has prayed to

dismiss the appeal by confining the conviction and sentence of the appellant.

7. After having considered the rival submissions upon perusal of record, there appears no doubt about the allegation levelled against the convict for setting fire to the deceased by pouring kerosene and the deceased died after some days in consequence to the injury sustained by her. In order to proof such allegation, the prosecution has undoubtedly examined nineteen witnesses, but out of the nineteen witnesses, P.W.9 is the sole eye witness to the occurrence and his testimony transpires that on 11.02.2018 at about 9 P.M., while he was present in his house at the time of incident, his father came in an inebriated state and picked up quarrel with his mother and his father pushed his mother who fell down and thereafter, his father poured kerosene on her mother and set her on fire by means of a matchstick despite his protest. It is undoubtedly true that P.W.9 is a child witness, but before taking his evidence, the learned trial Court has tested his competency to depose evidence in Court by putting certain questions and recording his answers and

the learned trial Court has, accordingly, certified that P.W.9 is a competent witness. Although it is claimed by the convict that P.W.9 is a child witness, but at the time of incident, he might be aged about 15 years, since he himself stated about aged about 16 years as on the date of deposition on 23.05.2019, but the incident took place on 11.02.2018. Nothing has been elicited in his cross-examination to discard his evidence, rather the cross-examination of P.W.9 by the defence lends assurance to his testimony inasmuch as his presence on the date of occurrence was disputed by the convict, but it was elicited in paragraph-6 of his cross-examination that his mother brought him from Balashrama by making an application on the fateful day. The only fact to disbelieve his evidence is his admission about examination by Police after two months, but merely because he was examined after two months, his testimony cannot be discarded on that ground, since it was elicited from PW9 by the defence about the incident to have been committed by the convict in an inebriated condition. Further, the main item of evidence as deposed to by P.W.9 about his

father setting her mother on fire has not at all been demolished in the cross-examination. Furthermore, the other witnesses who reached to the spot immediately after the occurrence are P.Ws. 1 to 7 and 13, whose evidence clearly transpires that on hearing the commotion of P.W.9, they arrived at the spot and found the deceased with burn injuries. The defence has also never disputed about the deceased sustaining burn injuries and her death on account of such injuries. The evidence of P.Ws. 1 to 7 and 13 are considered relevant on the principle of *res gestae* which lays down that the facts though not in issue is so connected with the facts in issue as to form part of the same transaction becomes relevant by itself. The doctrine of *res gestae*, however, is an exception to the general rule of admissibility of hearsay evidence. Further, no dent has been made to the evidence of these eight witnesses to disbelieve their evidence.

8. Although, it is argued that since P.W.1 is inimically disposed of due to political rivalry, her evidence cannot be taken into consideration, but such fact having not been established, it cannot led to any

inference that P.W.1 is inimically disposed of with the convict on account of political rivalry. It is also argued that on the basis of sole testimony of the eye witness, who in this case is a child witness, his evidence cannot be taken into consideration to base the conviction of the convict, but law is very clear that no particular number of witnesses are required to be examined to prove a fact and if the testimony of a single witness is firm, cogent, clear and reliable, his testimony can be relied upon and in this case, P.W.9 has not only stood the test of cross-examination successfully, but also there is no infirmity in his evidence. It is of course true that corroboration to the testimony of child witness may be a measure of caution and prudence, but there is absolutely no rule of law that corroboration of testimony of child witness is absolutely required to act upon such evidence, especially when the evidence is clear, firm, cogent and reliable. In this case not only the evidence of the child witness-P.W.9 is clear, but also is corroborated by the testimony of P.Ws. 1 to 7 & 13 by applying the principle of *res gestae*, who reached to the spot immediately after the occurrence and

reiterated what has been stated by P.W.9 before them and, therefore, it is absolutely correct to say that the evidence of P.W.9 is not only clear and cogent, but also reliable and free from any infirmities and his evidence can be acted upon.

9. One of the arguments as advanced by the learned counsel for the appellant is that since P.W.9 is a related witness, his testimony should be discarded, but unless it is brought in the cross-examination as to how the witness P.W.9 is biased against the convict, it would not be appropriate to discard his evidence on the simple ground that he being the son of the deceased, his evidence cannot be taken into consideration. Moreover, a witness can be called as interested only when he/she derives some benefit from the result of a litigation, which in a criminal case would mean that a witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons and thus, has a motive to falsely implicate the accused, but P.W.9 being the son of the deceased is quite natural for him to remain present at the scene of occurrence and testimony of P.W.9 cannot be

automatically discarded by labeling him as a interested witness or a related witness, rather in a case of a related witness, whose presence at the spot is natural, his testimony can be considered to be true, unless there is evidence to indicate that he is interested to see the conviction of the accused. In this case, no such theory has been propounded, rather the incident of death of the deceased on account of burn injuries has never been disputed by the convict and no reason has been assigned to P.W.9 to implicate the convict falsely. In this situation, the evidence of P.W.9 is not only firm, reliable and free from infirmities, but also can be acted upon. Further, it is also found from paragraph- 5 of the cross-examination of P.W.7-Sujata Murmu that Raja Singh(PW9) has seen the entire incident and he told them that his father has poured kerosene on his mother and set her on fire. This made the evidence of prosecution witness not only reliable, but also credible. It is, however, argued that in absence of motive, the prosecution case would be suspicious, but law is fairly well settled that, in a case of direct evidence, although motive plays an important role, but it pales into

insignificance, especially when there is eye witness account, more particularly when such eye witness's evidence is clear and unambiguous and proves the guilt of the convict.

10. It is, however, a case where the post-mortem on the dead body of the deceased had not been conducted, but death of the deceased on account of burn injuries had never been disputed by the defence and only the defence has set up a plea that the convict is not responsible for the death of the deceased. The evidence on record together with discussions made in the preceding paragraphs makes it ample clear that the deceased died on account of burn injuries and the evidence of child witness PW9 being well supported and corroborated by the evidence of PWs. 1 to 7 & 13 in material particulars, the only conclusion emerges that it was the convict who set the deceased on fire by pouring kerosene and this fact receives ample corroboration from the testimony of the Doctors and the investigating officers with regard to seizure of kerosene jar, match stick and the deceased dying on account of burn injuries. Hence, the prosecution has

established its case that it was the convict who set the deceased on fire on the relevant day leading to death of the deceased later on or in other words, the act of the convict caused the death of the deceased. It was canvassed on behalf of the appellant that the convict being a habitual drunkard and he having committed the act in an inebriated condition, such action of the convict is protected by Sec. 86 of IPC, but the protection of Sec. 86 of IPC would only be available to the offender if he was intoxicated without his knowledge or against his will. In this case, neither there is any evidence nor could the defence produced any material to suggest that the convict was administered with any liquor or intoxicant without his knowledge or will and, therefore, in absence any positive evidence or legal admissible evidence, the protection as available U/S. 86 of IPC cannot be extended to the convict.

11. It is now to be examined whether the act of the convict makes him liable for offence U/S. 304-II of the IPC or for lesser offence. On the admitted evidence, a circumstance may arise in this case that since the deceased was not provided with adequate and proper

treatment, she might have survived had such proper treatment been given to her, but explanation-2 to Sec.299 of IPC makes it very clear that death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented. Hence, in the aforesaid backdrop of law, it can be safely said from an analysis of evidence on record that the convict had caused the death of the deceased. Further, culpable homicide is murder only when it falls within any of the four clauses that are set forth in Sec. 300 of IPC, but culpable homicide is not murder, if it either does not fall within any of the clauses or falls within any of the five exceptions to Sec. 300 of IPC. True it is that all murders are culpable homicide, but not the vice-versa, however, the knowledge to the act of the offender is referable to the third situation of Sec. 299 of IPC, so also Clause-4 of Sec. 300 of IPC, but the same has to be considered on the degree of probability of the act causing death of the deceased. The knowledge to the act of the offender as provided in Clause-4 to Sec.

300 of IPC refers to the act to "imminently dangerous" which itself denotes that such act is not only proximate, but also ultimate and probable cause of death which would take place eventually if it is not practically prevented. In this case, since the knowledge of the appellant is attributable to his act for causing death of the deceased which took place subsequently after some days and that too, without proper treatment to the deceased and, therefore, the act of the convict can be attributed to his knowledge that by such act he was likely to cause death, but the same was without any intention and the bodily injuries which may result in case of burning was within the knowledge of all normal human being and the appellant being a normal human being, he can be attributed with knowledge that his act in all probability or likely to cause death even if such death could have been prevented by extending proper treatment to the deceased. It is, therefore, conscious opinion of this Court that the conviction of the appellant for offence U/S. 304-II of IPC is well justified and deserves to be confirmed in the appeal. Further, looking at the act of the convict and the circumstance

under which it was committed, this Court does not find it a case to award a lenient sentence by reducing the sentence as awarded to the convict-appellant by the learned trial Court.

12. In the result, the appeal sans merit stands dismissed on contest, but in the circumstance, no order as to costs. Consequently, the judgment of conviction and order of sentence as passed by the learned 3rd Addl. Sessions Judge, Balasore in ST Case No. 52 of 2019 are hereby confirmed.

(G. Satapathy)
Judge

Orissa High Court, Cuttack,
Dated the 8th day of October, 2024/Kishore