

HIGH COURT OF ORISSA**Bench : D. Dash and G. Satapathy, JJ.****Date of Decision: 29-02-2024**

Criminal Appeal No. 656 of 2011

ASHU KHILA**Vs.****STATE OF ORISSA****Legislation:**

Sections 498-A/302 and 304 Part-I of Indian Penal Code, 1860 (IPC)

Subject: Criminal appeal against the conviction under Section 302 of IPC, seeking alteration of the conviction to Section 304 Part-I of IPC.**Headnotes:**

Appeal against Conviction and Sentence – Appellant challenges conviction and life sentence for murder under Section 302 IPC, seeks alteration to Section 304 Part-I IPC due to lack of clear intention to kill – Convict had admitted the victim to the hospital after the incident [Paras 6-7, 11-12].

Prosecution's Case and Trial Court's Decision – Deceased set on fire by appellant leading to death after two months – Conviction based on dying declaration and corroborating testimonies – Trial court convicted under Section 302 IPC [Paras 2-5].

Appellant's Plea – Denial of charges and claim of accidental death of the deceased while cooking – Alternative plea of alibi also presented [Para 4].

Dying Declaration and Witness Testimonies – Dying declaration recorded by Executive Magistrate (P.W.10) indicated appellant's role in setting the deceased on fire – Testimonies of P.Ws. 4 to 6 and 10 crucial [Para 5, 9].

Medical Evidence – Deceased sustained 40-45% burn injuries – Death due to septicemia and chronic wasting from burn injuries [Para 10].

Appellant's Conduct and Intention Analysis – Admission of victim to hospital by appellant and discharge on request highlighted – Lack of immediate intention to cause death, but act likely to cause death under scrutiny [Paras 11-12].

Court's Decision – Conviction altered from Section 302 to Section 304 Part-I IPC – Sentenced to Rigorous Imprisonment for ten years considering mitigating circumstances [Para 12-13].

Referred Cases:**Not specified in the judgment.****Representing Advocates:****Mr.S.K.Mohanty for the appellant, Mrs.S.Pattanaik, AGA, for the respondent.****JUDGMENT**

G. Satapathy, J. - The convict by way of this appeal calls in question the judgment of conviction and order of sentence dated 31.10.2011 passed by learned Sessions Judge, Koraput at Jeypore in Criminal Trial No. 93 of 2010 convicting the appellant for offences punishable U/Ss. 498-A/302 of Indian Penal Code, 1860 (in short "IPC") and sentencing him to undergo imprisonment for life for offence U/S. 302 of IPC, while acquitting him of the charge for offence U/S. 498-A of IPC.

2. The prosecution case may be outlined as, one Sakuntala (hereinafter referred to as the "deceased") had married to Ashu Khila (hereinafter referred to as the "convict") and on 25.11.2009 in the night, the convict had set fire to the deceased after pouring kerosene and accordingly, the mother of the convict had admitted the deceased to hospital on 26.11.2009. On this incident, the brother of the deceased P.W.4-Sukru @ Chandra Kuldip lodged a FIR under Ext.4 on 26.11.2009 at about 12.30 P.M. against the convict before P.W.12-Bijayini Singh I.I.C., Damanjodi P.S. who registered Damanjodi P.S. Case No. 42 of 2009 for offence U/Ss. 498-A/307 of IPC and directed ASI of Police P.W.11-Purushottam Swain to investigate into the matter. Accordingly, P.W.11 in the course of investigation, examined the witnesses, issued injury requisition in favour of the deceased to PHC Mathalput, arrested the convict and got the dying declaration of the deceased recorded on 28.11.2009 by Executive Magistrate P.W.-10 Dibya Lochan Mohapatra at bed No. 50, DHH, Koraput under Ext.7. P.W.11, however, handed over the investigation to P.W.12 after recording the statement of the deceased under Ext.15. Accordingly, P.W.12 commenced the further investigation and submitted charge sheet against the convict for offence U/Ss. 498-A/307 of IPC. However, on getting information from P.W.4 about the death of deceased, P.W.12 has successfully prayed to the Court and reopened the investigation, in the course of which, he sent the dead body of the deceased for post mortem examination and accordingly, submitted charge sheet against the convict for offence U/Ss. 498-A/302 of IPC under

which cognizance was taken and the convict faced the trial for such offences after pleading not guilty to the charge.

3. In support of its charge, the prosecution examined altogether 12 witnesses and relied upon the documents Exts. 1 to 15 as well as identified three materials objects under M.O.I to M.O.III as against the sole oral evidence of D.W.I-Roila Khilla by the defence. Of the witnesses examined by the prosecution, P.W.4 is the informant, P.W.10 is the Executive Magistrate who recorded the dying declaration of the deceased, P.Ws. 11 & 12 are the two I.Os. whereas, P.W.8-Dr. Sonali Mishra who had examined and furnished the injury report of the deceased as well as convict and P.W.9-Dr.Niranjan Mishra is the doctor who had conducted post mortem examination over the dead body of the deceased. P.W.4 and P.W.6-Anam Kuldip are the brothers of the deceased and P.W.5-Kamala Kuldip is the sister-in-law of the deceased. P.W.2-Arati Podder and P.W.3-Ramesh Chandra Pradhan are the two police constables and seizure witnesses. P.W.7-Pabitra Kuldip is also a seizure witness. P.W.1-Jisudan Kuldip is the witness to inquest.

4. The plea of the convict in the course of trial was one of complete denial and false implication, but in his statement U/s. 313 of Cr.P.C. the convict took the additional plea of alibi and deceased died while cooking in kitchen.

5. After appreciating the evidence on record upon hearing the parties, the learned trial Court convicted the appellant for offence U/S. 302 of IPC by mainly relying upon the evidence of P.Ws. 4 to 6 and 10 and the dying declaration of the deceased Ext.7.

6. At the outset, Mr.S.K.Mohanty, learned counsel for the appellant has submitted that the appellant is not challenging his conviction on merit, rather he prays for modification of his conviction from offence U/S. 302 of IPC to 304 Part-I of IPC and reduction of the sentence of the convict. Accordingly, Mr.Mohanty has submitted that considering the manner in which the incident had occurred and the role attributed to the convict, the conviction of the convict deserves to be altered since there was no clear cut intention of the appellant to set the deceased on fire, but the same having occurred without premeditation and the convict having himself rescued the deceased and got her admitted in hospital, the conviction of the appellant deserves to be altered to Sec. 304 Part-I of IPC and therefore, the appellant should not be convicted for offence U/S. 302 of IPC. On these submissions, Mr.S.K.Mohanty, learned counsel for the appellant has prayed to modify the conviction of the appellant

to one U/S. 304 Part-I of IPC and alter the sentence of the appellant to the period already undergone since the appellant has already undergone a sentence of imprisonment for near about 14 years.

7. On the other hand, Mrs. S.Pattanaik, learned Additional Government Advocate has submitted that the dying declaration recorded by P.W.10 is indicative of the role played by the appellant in committing the murder of the deceased and when such evidence is considered on the backdrop of plea of alibi as taken by the convict itself demolishes the case of the appellant for modification/alteration of conviction to one U/S. 304 Part I of IPC, rather the act of the convict is squarely covered U/S. 302 of IPC. Mrs. Pattanaik has accordingly prayed to dismiss the appeal.

8. On a careful consideration of the impugned judgment of conviction together with the evidence on record keeping in view the rival submissions, the whole and sole question comes for adjudication before this Court is whether the act of convict can be said to have covered by Section 304 Part-I of the IPC, but not U/S. 302 of IPC. On a close scrutiny of evidence, it indisputably appears that the deceased died after two months six days of the occurrence, when the deceased was set with fire, but the plea of the convict in the course of trial was "the deceased caught with fire accidentally while cooking with a kerosene stove" whereas, the convict took the plea of alibi in his statement U/S. 313 of Cr.P.C. On the contrary, the deceased had made dying declaration before the Executive Magistrate P.W.10 who had recorded the dying declaration of the deceased under Ext.7 which goes to disclose that the convict had set the deceased on fire after pouring kerosene. Besides, it is also elicited from the mouth of P.Ws. 5 and 6 that the convict had got the deceased admitted in hospital. Further, it transpires from the evidence of P.W.8-Dr.Sonali Mishra that on 26.11.2009 at about 5 P.M. on police requisition, she had examined the convict Ashu Khilla and found burn injury blister of size 1" x 1" on right dorsum of hand and the injury was opined to be simple in nature.

9. According to the evidence of P.Ws. 4 to 6, on being asked, the deceased told that the convict set fire to her body after pouring kerosene which remained undemolished by the defence in cross-examination of these witnesses and the above oral dying declaration of the deceased is corroborated by the written dying declaration of the deceased under Ext.7.

10. In the above premises, there appears over whelming evidence against the convict for setting fire to the deceased by pouring kerosene, but the

important fact required to be answered whether the deceased died due to burn injury which was caused after the convict set fire to the deceased and there is reasonable nexus between the death of the deceased and the fire set to her body by the convict. It is also not disputed that the FIR was registered against the convict for offence U/Ss. 498-A/307 of IPC on 26.11.2009, but initially charge sheet was submitted against him for same offences U/Ss. 498-A/307 of IPC on 25.01.2010, and subsequently on receiving written intimation of death of the deceased on 01.02.2010, P.W.-12 prayed the Court successfully to reopen the investigation which culminated in submission of supplementary charge sheet against the convict for offence U/Ss. 498-A/302 of IPC and the convict has accordingly faced the trial for offence U/Ss. 498-A/302 of the IPC. In this context, when the medical evidence is glanced, it appears that P.W.-8 Dr.Sonali Mishra has furnished the injury report of the deceased when she was alive, whereas P.W.9-Dr.Niranjan Mishra conducted autopsy over the dead body of the deceased when she died. According to P.W.8, she noticed second degree burn injuries involving both legs i.e. front and back excluding the lower abdomen, burn injury on left hand front of elbow and burn injury over lower side of back excluding genitalia. P.W.8 has accordingly estimated burn injury of the deceased at 40 to 45% of the body. On the other hand, P.W.9- Dr.Niranjan Mishra has testified in the Court that the cause of death of the deceased was due to shock resulting from septicemia and chronic wasting resulting from ante mortem burn injury involving 55% burn of body surface area. On a close and careful scrutiny of evidence of P.Ws. 8 & 9, it appears that the deceased died out of burn injuries, since neither any suggestion was given to these witnesses by the defence to consider the death to be not on account of burn injuries nor was any cross-examination made by the defence to these two witnesses to suggest that the deceased died not on account of burn injuries. A cumulative assessment of evidence on record, this Court has no hesitation to hold that the prosecution has successfully proved beyond reasonable doubt that the convict set the legs of the deceased to fire after pouring kerosene and the deceased succumbed to such injuries after 65 days of such incident.

11. On advertng to the real issue as advanced by the learned counsel for the appellant that the act of the convict is only covered by Section 304 Part-I of IPC, it appears from the evidence of P.W.8 that patient(deceased) responded well to the treatment, but discharged on request and the injuries were simple in nature. It is her specific evidence that the injury on her person can cause death in natural course, if proper care and treatment is not provided. It is also

admitted in cross-examination of P.W.8 that all the injuries found on the body of the injured(deceased) were superficial in nature and the condition of the patient was stable as per discharge certificate. Similarly the evidence of P.W.9 also transpires that the deceased had second to third degree of burn injuries and the lower limb of the patient(deceased) above the ankle up to thigh were burnt and the burn wounds which were not healed up were not on the vital part of human body of the deceased. It is also specifically stated by P.W.4 that his sister was shifted to Koraput District Headquarter Hospital for better treatment and after fifteen days, he brought her to his own house at village Kumbharguda and the deceased survived for two months. A careful consideration of evidence of P.Ws. 4 and 6 together with P.W.8, there appears no dispute that the deceased was discharged from hospital and brought to the house of P.W.4 on request and the injuries to the deceased were simple in nature and could cause death in natural course if proper care and treatment is not provided, but it appears from the record that the deceased survived for two months in the house of her brother and there is no evidence at all to indicate as to what treatment was provided to the deceased during her stay in the house of P.W.4 for two months which is not only vital, but also indispensable for proof of charge of murder against the convict, especially when the conduct of the convict in admitting the deceased to hospital is very much relevant to rule out his intention to cause death of the deceased.

12. Section 304 of the IPC by itself does not create any substantive offence, but it provides for punishment for culpable homicide not amounting to murder. It provides two different punishments for two different situations which are prescribed therein, but before an accused can be convicted either of the situations for Section 304 of IPC, it must be established that the death was caused by the accused and thereafter, the act of the accused is required to be examined to know that whether the same is covered by culpable homicide not amounting to murder. Once it is established that the culpable homicide is not amounting to murder, the next question comes for consideration is whether the act of the accused is covered U/S. 304 Part-I of the IPC or Part-II of the IPC. True it is that Section 304 Part-I of the IPC not only covers the intention of the accused for causing death, but also it covers the act of causing such bodily injury as is likely to cause death of the deceased. On a harmonious construction of the language used in Section 304 of the IPC, Section 304 Part-I of the IPC can also be attracted, if there was intention on the part of the accused to cause such bodily injury as is likely to cause death

of the deceased. In the case at hand, the evidence disclosing the convict setting fire to the legs of the deceased and the convict getting the deceased admitted in hospital are the two important circumstances which may rule out the intention of the deceased to cause her death which is also strengthened by the admitted fact of the deceased dying after more than two months of the occurrence in her parental home and she was being discharged from the hospital on request. The aforesaid circumstance becomes prominent in view of the admission of doctor P.W.8 that there was possibility of death of the deceased, if proper care and treatment was not provided and the injuries were simple in nature. The aforesaid circumstances may rule out the immediate intention of the convict to cause death of the deceased, but certainly the act of the convict can be attributed to his intention of causing such bodily injury as is likely to cause death of the deceased. Thus, the act of the convict can be considered to be coming within the ambit of Sec. 304 Part-I of IPC. Hence, in the circumstance, the conviction of the convict is modified from Sec. 302 of IPC to Sec. 304 Part-I of the IPC and looking at the mitigating and extenuating circumstance involved in this case, the convict is sentenced to undergo Rigorous Imprisonment for ten years.

13. Resultantly, the appeal stands allowed in part on contest, but no order as to costs. Consequently, the conviction of the appellant is modified from Sec. 302 of IPC to Sec. 304 Part-I of the IPC and he is sentenced to undergo RI for ten years. The conviction and sentence of the appellant are accordingly modified.

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