IN THE HIGH COURT OF ORISSA, CUTTACK

Criminal Appeal No. 195 of 1988

From the judgment and order dated 21.07.1988 passed by Sessions Judge, Dhenkanal in S.T. Case No.53-D of 1986.

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1. Nitya @ Nityananda Behera
2. Madhia @ Madhaba Behera …… Appellants

-Versus-

State of Orissa …… Respondent

For Appellants: - Mr. Saktidhar Das
(Senior Advocate)

For Respondent: - Mr. Lalatendu Samantaray
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 27.08.2020 Date of Judgment: 01.09.2020

S. K. Sahoo, J. The appellants Nitya @ Nityananda Behera and Madhia @ Madhaba Behera faced trial in the Court of learned Sessions Judge, Dhenkanal in S.T. Case No. 53-D of 1986. Appellant no.1 Nitya @ Nityananda Behera was charged under section 302 of the Indian Penal Code on the accusation of committing murder of Raghaba Behera (hereafter 'the deceased')

on 18.02.1986 at about 2.00 p.m. at village Dighi under Kamakhyanagar police station in the district of Dhenkanal and appellant no.2 Madhia @ Madhaba Behera was charged under section 324 of the Indian Penal Code for voluntarily causing hurt to Rohita Behera (P.W.2) at the same time, place and during course of same occurrence.

The learned Trial Court vide impugned judgment and order dated 21.07.1988 found the appellant no.1 Nitya @ Nityananda Behera guilty under section 304 Part-II of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for three years and appellant no.2 Madhia @ Madhaba Behera was found guilty under section 324 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for six months.

The appellants preferred this criminal appeal on 05.08.1988 and the appeal was admitted on 18.08.1988 and on 26.08.1988 the appellants were directed to be released on bail, however taking into account the sentence imposed on the appellant no.1 for three years on his conviction under section 304 Part-II of the Indian Penal Code, this Court issued a notice of enhancement of sentence against appellant no.1.

2. The prosecution case, as per the first information report (Ext.8) lodged by Rohita Behera (P.W.2) on 19.02.1986 before the officer in charge, Kamakhyanagar police station is that there was a Jamun tree in the Bagayat land of Talatota in village Dighi which was in joint possession of five shareholders. On the request of the villagers of Dighi, it was agreed upon by the shareholders to cut the tree and utilise its trunk in the making of doors and windows of village high school and the branches to be divided equally between the shareholders. Accordingly, the tree was cut under the supervision of the deceased few days prior to the occurrence. On 18.02.1986 at about twelve noon, the appellants removed a cartload of branches to their house claiming the entire tree to be their property. At about 2 p.m., the appellants again came to the spot with a cart. P.W.2 along with the deceased, Jaladhar Biswal (P.W.4) and Nandakishore Behera (P.W.5) also arrived at the spot with a cart to take their respective share of branches. When the appellants were confronted as to how they were trying to take all the branches, they abused the deceased, P.W.2 and others. When the deceased challenged them about the abusive words hurled at them, the appellant no.1 Nitya @ Nityananda Behera suddenly assaulted the deceased with the yoke (M.O.III) of the cart on his head, as a result of which he fell down

becoming unconscious. P.W.2 came to the rescue of the deceased but he was assaulted by appellant no.2 Madhia @ Madhaba Behera and given two blows with a tangia on his head and neck for which he sustained injuries. The appellants left the spot and at that time P.W.2 threw a tangia towards them which hit on the back of the appellant no.1 Nitya @ Nityananda Behera. After the appellants left the spot, Balram Behera and Sakhi Bewa (P.W.3) arrived at the spot. P.Ws.4 and 5 brought water from the river and tried to administer it to the deceased but the deceased did not get back his sense. The deceased was first brought near his house and then he was removed to Jiral hospital where the Medical Officer asked to shift him to S.C.B. Medical College and Hospital, Cuttack and accordingly, during midnight the deceased was taken to Cuttack for treatment.

On the basis of such F.I.R., Kamakhyanagar P.S. case no. 21 of 1986 was registered under sections 325, 326 read with section 34 of Indian Penal Code against the appellants on 19.02.1986.

3. P.W.11 Muralidhar Behera, the officer-in-charge of Kamakhyanagar police station after registering the F.I.R., took up investigation. He examined the informant Rohita Behera and issued medical requisition to the Medical Officer, Jiral Hospital for

his examination. Then he proceeded to Jiral Hospital, examined appellant no.1 Nityananda Behera and also issued medical requisition to the Medical Officer, Jiral hospital to examine the appellant no.1 as he had sustained injuries. Then P.W.11 proceeded to the spot in village Dighi where he seized some vomiting substance mixed with blood and prepared seizure list Ext.9 in presence of the witnesses. He also examined other witnesses and on 19.02.1986 at 5.00 p.m., he seized one yoke (M.O.III) being produced by Nandakishore Behera (P.W.5) as per seizure list Ext.12 in presence of the witnesses. He also seized a big trunk of the Jamun tree along with some branches of that tree as per seizure list Ext.9. On that day, he also seized a bullock cart at village Dighi on the village road as per seizure list Ext.13. The deceased was declared dead at S.C.B. Medical College and Hospital, Cuttack whereafter the doctor from Casualty sent information to Mangalabag police station and accordingly Mangalabag P.S. U.D. Case No.42 of 1986 was registered and P.W.9 Umakanta Rout, A.S.I. of police was directed to take up inquiry and he held inquest over the dead body and prepared inquest report vide Ext.15 and then the dead body was sent for post mortem examination and after post mortem examination, the wearing apparels of the deceased were brought to Mangalabag police station and a supplementary diary

of the inquiry was prepared by P.W.9. After post mortem examination, the dead body was brought to the village. The I.O. (P.W.11) searched the house of the appellants and seized two axes (M.Os.I and II) from their house under seizure list Ext.11. On 20.02.1986 he arrested the appellants and forwarded them to Court on 21.02.1986. On 17.04.1986 he sent M.Os. I and II to the Medical Officer, Jiral for his opinion as to whether the injuries sustained by the injured persons including the deceased could have been possible by those weapons. He received the reply from the doctor vide Ext.1. On 27.04.1986 he sent the yoke (M.O.III) to doctor Subash Chandra Sahu, Associate Professor, S.C.B. Medical College, Cuttack for his opinion vide Ext.17 and received his reply vide Ext.18. On 04.04.1986 he received the supplementary case diary of the U.D. case from the A.S.I. of Mangalabag police station and on completion of investigation, he submitted charge sheet on 20.06.1986 against the appellants under sections 302/323/324/34 of the Indian Penal Code.

4. After observing due committal formalities, the case of the appellants was committed to the Court of Session for trial where the learned trial Court framed charges on 01.07.1987 and since the appellants refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

5. In order to prove its case, the prosecution examined eleven witnesses.

P.W.1 Dr. Girija Kumar Mishra was the Assistant Surgeon attached to Jiral hospital and he treated the appellant, P.W.2 as well as the deceased on 18.02.1986 and proved the medical examination reports. He reported to the officer-in-charge of Kamakhyanagar police station as per his report Ext.1 wherein he has mentioned about the shifting of the deceased to S.C.B. Medical College and Hospital, Cuttack and ongoing treatment of the appellant and P.W.2. He also examined the axes M.Os.I and II sent by the I.O. and opined as per his report Ext.5 that injuries found on the deceased was possible by those axes. He also proved the discharge certificates of P.W.2 and the appellant no.1 vide Ext.6 and Ext.7 respectively.

P.W.2 Rohita Behera is the informant in the case and he is the brother of the deceased and an eye witness to the occurrence. He himself is also an injured in the case.

P.W.3 Sakhi Behera is a post occurrence witness who came to the spot after knowing about the condition of the deceased from P.W.2 and found the deceased was lying unconscious and Jalia (P.W.4) and Nandia (P.W.5) were giving

water to the deceased. She accompanied the deceased to Jiral hospital.

P.W.4 Jaladhar Biswal is the domesticated son-in-law of one of the shareholders of Jamun tree namely Kalandi Behera. He is an eye witness to the occurrence who stated about the assault on the deceased by appellant Nityananda with a yoke (M.O.III).

P.W.5 Nandakishore Behera was the agnetic grandson of the deceased and he is also an eye witness to the occurrence who stated about the assault on the deceased by appellant Nityananda with a yoke of the cart.

P.W.6 Babaji Swain was a member of the village committee who stated about the decision taken in the village meeting for utilisation of the trunk of the Jamun tree for making doors and windows of the village high school and for distribution of branches among the co-sharers.

P.W.7 Mayadhar Swain stated about the seizure of the trunk and branches of Jamun tree, two axes from the house of the appellants, a cart and yoke.

P.W.8 Sadasiva Swain took the deceased in a vehicle to S.C.B. Medical College and Hospital, Cuttack where he was declared dead. He is also a witness to the inquest as per inquest report Ext.15 and after post mortem examination, he brought the dead body to the village.

P.W.9 Umakanta Raut was the A.S.I. of police attached to Mangalabag police station and he conducted inquiry of Mangalabag U.D. Case No.42 of 1986, held inquest over the dead body of the deceased and also sent the dead body for post mortem examination and handed over the U.D. Case records to the Investigating Officer.

P.W.10 Adikanda Barik was the Constable attached to Mangalabag police station and he accompanied P.W.9 to S.C.B. Medical College and Hospital, Cuttack where after post mortem examination, he brought the wearing apparels of the deceased and deposited it at Mangalabag police station.

P.W.11 Muralidhar Behera was the officer in charge of Kamakhyanagar police station and he is the Investigating Officer.

The prosecution exhibited nineteen documents. Ext.1 is the report of P.W.1 to P.W.11, Ext.2 is the injury report of the

deceased, Ext.3 is the injury report of P.W.2, Ext.4 is the injury report of appellant no.1, Ext.5 is the opinion of P.W.1 regarding axes vide M.O.I and M.O.II, Ext.6 is the discharge certificate of the deceased, Ext.7 is the discharge certificate of appellant no.1, Ex.8 is the F.I.R., Ext.9 is the seizure list, Ext.10 is the zimanama, Ext.11 is the seizure list of axes M.O.I and M.O.II, Ext.12 is the seizure list of yoke (M.O.III), Ext.13 is the seizure list of cart, Ext.14 is the zimanama of cart, Ext.15 is the inquest report, Ext.16 is the dead body challan, Ext.17 is the requisition for examination of the yoke (M.O.III), Ext.18 is the examination report of the yoke (M.O.III) and Ext.19 is the post mortem report.

The prosecution also proved three material objects. M.O.I and M.O.II are the axes and M.O.III is the yoke.

6. The defence plea of the appellants was that the Jamun tree in question exclusively belonged to them and they never agreed to give its trunk to the village school and to divide the branches among the five shareholders. They further pleaded that on the date of occurrence as the prosecution party tried to remove the branches of the Jamun tree forcibly, they protested. P.W.2 assaulted the appellant no.1 Nityananda Behera first with an axe on his back causing injury on him for which the appellant

no.1 counter assaulted to P.W.2 in self defence after picking up a branch of the Jamun tree which was lying at the spot over the head of P.W.2. When the deceased also attempted to assault the appellant no.1 by the axe which he was holding, the appellant no.1 gave a blow on the head of the deceased with the broken branch in order to save his life. The axe fell down from the hands of the deceased and with that axe, the appellant no.1 assaulted to P.W.2 which hit him on his neck as P.W.2 tried to assault the appellant no.1 further.

7. The learned trial Court after analyzing the evidence on record, has been pleased to hold that the deceased died a homicidal death. It was further held that the appellants cannot claim any right of private defence to the property which in this case was the Jamun tree. It was further held that the appellant no.1 had given a yoke blow on the head of the deceased which was the cause of his death. It was further held that during course of a quarrel, suddenly on the spur of the moment appellant no.1 assaulted the deceased by means of a yoke although he had no intention to kill the deceased. With regard to the assault by appellant no.2 on P.W.2, learned trial Court observed that this part of the occurrence of assault on P.W.2 has not been seen by anybody except P.W.2. It was further held that

there was no right of private defence for appellant no.1, however there was no premeditation or prearranged plan by the appellant no.1 to assault the deceased nor there was any enmity between them and everything happened during course of a quarrel and suddenly on the spur of the moment the assault took place. It was further held that the injury on the deceased caused by appellant no.1 did not cause his instantaneous death and he had also no intention to kill the deceased but he has full knowledge that such blow with the yoke was likely to cause death and accordingly found the appellant no.1 guilty under section 304 Part-II of the Indian Penal Code after acquitting him of the charge under section 302 of the Indian Penal Code. It was further held that P.W.2 had not assaulted appellant no.2 in any manner and therefore, appellant no.2 had no right of private defence to his person.

8. Mr. Saktidhar Das, learned Senior Advocate appearing for the appellants contended that the learned trial Court has not considered the right of private defence of property and person of the appellants in its proper perspective. The evidence of the doctor (P.W.1) falsify that yoke (M.O.III) was utilized for assaulting the deceased. The prosecution party members appear to be aggressors and the injury sustained by

the appellant no.1 during course of occurrence has not been explained by the prosecution and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Lalatendu Samantaray, learned Additional Government Advocate on the other hand supported the impugned judgment and contended that since the appellants have not taken any plea of right of private defence in their accused statements, the same cannot be considered at all. He further argued that when three eye witnesses have stated consistently as to how the occurrence had taken place, merely because the injury sustained by the appellant no.1 has not been explained, it cannot be a reason to discard their evidence in toto and therefore, the appeal should be dismissed.

9. It is first to be seen how far the prosecution has proved the death of the deceased to be homicidal in nature.

The doctor conducting post mortem examination has not been examined, however the post mortem report has been marked as Ext.19 on admission. The report indicates that the deceased had sustained pressure abrasions scattered over an area of 3” x 2” on the back of right elbow, small abrasion overall area of 3” x 2” over the right side back and swelling of scalp over right temporal region. Extradural haemotoma was found

massive on the whole of the temporal region on the left side extending in both ways to frontal and posterior region of size 6" x 4" x ½". The brain was found compressed and visible in the site and in the right side it was 3" x 2" x ¼" over the right temporal region. All the injuries were opined to be ante mortem in nature and caused by blunt force impact and injury to head was opined to be fatal in ordinary course of nature and death was on account of coma as a result of head injury.

The finding of the post mortem report has not been challenged by the learned Senior Advocate appearing for the appellant. The learned trial Court has held that the deceased died a homicidal death. After perusing the inquest report (Ext.15) and the post mortem report (Ext.19), I am of the humble view that the prosecution has successfully proved the death of the deceased to be homicidal in nature.

10. The prosecution has projected P.W.2, P.W.4 and P.W.5 to be the eye witnesses to the occurrence.

P.W.2 Rohita Behera :

He is an eye witness to the occurrence who happens to be the brother of the deceased. The appellants are his agnatic nephews. He has stated that in their village in Talatota, they

along with the appellants were jointly possessing a Jamun tree. The villagers requested all the shareholders to utilise the trunk of that tree for the construction of village high school to which the shareholders gave their consent and accordingly the tree was cut by the villagers. So far as the branches of the tree is concerned, it was decided that those branches were to be divided between the five shareholders. He further stated that the appellants removed some branches in a cart on the date of occurrence in the morning hours and at about 2 p.m. again they came to take another cartload of branches. When P.W.2, the deceased and others came to know about the same, they arrived at the spot and found the appellants were loading the branches of the tree in the cart. When they objected to taking of branches, the appellants claimed the ownership over the tree and did not allow P.W.2 and others to take any branches. The appellant Nityananda Behera dealt a blow on the head of the deceased with a yoke (Juali) (M.O.III) for which the deceased sustained injury and fell down on the ground and became unconscious. The appellant Madhab Behera dealt two blows to P.W.2 by an axe, one on the head and the other on the backside of the head with its sharp side. When the appellants were leaving the place, P.W.2 threw away his axe towards them. He further stated that the deceased was carried in a cart to Jiral Hospital but as his

condition became critical, he was referred to S.C.B. Medical College and Hospital.

In the cross-examination, P.W.2 has stated that the appellant Nityananda was in Jiral Hospital as an indoor patient when Thana babu reached the village at 4 p.m. He further stated that the Patta of the land on which the Jamun tree was standing was with him but he did not show the same to police. However he stated that the Patta relates to Khata No.43 which stands jointly recorded in favour of five shareholders i.e. Jharia Behera and others and Jharia Behera who was his father's elder brother had planted the tree. He further stated that the decision relating to giving the trunk of the tree to village school was decided in Grama Sabha meeting about fifteen days prior to the occurrence and the same was also recorded in the meeting book of Grama Sabha. The prosecution has not produced any such meeting book of the decision taken which according to P.W.2 was reduced to writing. P.W.2 admits that they have President and Secretary of Grama Sabha. Neither the President nor the Secretary has been examined to prove the decision so taken in the Grama Sabha relating to the tree. He further stated that on the date of occurrence before starting from the village, he and the deceased and others had decided to protest and challenge the appellants

not to take the branches and further decided to bring the branches to their house and accordingly they had taken one cart to bring the branches and they had also taken two axes with them.

In the first information report, P.W.2 has stated that when the appellants were fleeing away from the spot, he threw one tangia which hit on the back of the appellant Nityananda. However during trial in the chief examination, he stated that when the appellants left the place after assaulting them, he threw away his axe towards them but he cannot say whether his axe hit any of them or not. He further stated that the tangia which he had thrown fell at a distance of about fifty yards from the place where the tree was lying and he had not marked whether it hit any of the appellants or not. He further stated not to have seen any injury on appellant Nityananda.

The doctor P.W.1 who examined appellant Nityananda Behera at Jiral Hospital on the date of occurrence found one incised wound of 4" x 1" x 1" on the left shoulder obliquely pointed towards left shoulder which was opined to have been caused by sharp cutting weapon. The medical examination report of appellant Nityananda Behera has been marked as Ext.4. P.W.1 has specifically stated that the injuries sustained by

the appellant is not at all possible if a weapon is thrown from his back side at him and the injury must have been inflicted by the assailant standing behind him and assaulting the injured with force by a sharp cutting weapon. Therefore, it appears that the informant first tried to explain away the injury sustained by the appellant Nityananda in the first information report, however when the doctor (P.W.1) stated that the injury on appellant Nityananda could not be possible in the manner in which it is stated in the first information report, P.W.2 tried to change the version.

The defence plea of right of private defence has been suggested to P.W.2 that he first assaulted the appellant Nityananda and caused bleeding injury with an axe on his left shoulder and he again attempted to assault the appellant Nityananda with the same axe and in his self defence, the appellant Nityananda assaulted him on his head by a broken branch of the tree which was lying there. It has been further suggested to P.W.2 that the deceased attempted to assault appellant Nityananda by another axe which he was holding and to defend himself and to save his life, appellant Nityananda gave blow with a branch of the tree on the head of the deceased. It is further suggested that when P.W.2 again attempted to assault

appellant Nityananda by a tangia, the later picked up the tangia which had fallen from the hands of the deceased and counter assaulted P.W.2 for which he sustained another injury on the neck.

P.W.2 further stated in the cross-examination that when something is loaded in a cart, the usual practice is to unyoke the bullocks from the cart but to keep the yoke tied to the cart by ropes as usual and to load things in that condition in the cart. He further stated that on the date of occurrence in the same manner the accused persons were found loading the branches of the cart when they reached there and in the same condition the cart was when a quarrel ensued between them and in the same condition the cart was when appellant Nityananda assaulted the deceased with the yoke. This statement of P.W.2 falsifies that yoke (M.O.III) was used by appellant Nityananda to assault the deceased as the yoke was tied to the cart not only at the time of loading of branches of the tree but also when a quarrel ensued between the parties and when the appellant Nityananda stated to have assaulted the deceased.

Most peculiarly when these aspects about the placement of yoke was brought out in the cross-examination of P.W.2, the prosecution in order to overcome this aspect brought

out in the chief examination of P.W.5 that the appellant Nityananda brought the yoke which was placed against the wheel of the cart and assaulted the deceased on his head. When P.W.2 has stated that the yoke was tied to the cart by ropes as usual at the time of occurrence, the statement of P.W.5 that the yoke was placed against the wheel of the cart runs contrary to the evidence of P.W.2 and therefore, the same cannot be accepted.

P.W.4 Jaladhar Biswal :

He has stated that Jamun tree belonged to five shareholders and one of the shareholders was his father-in-law Kalandi Behera. The villagers cut the Jamun tree with the permission of the shareholders to take the trunk for making of doors and windows for the high school and the branches were to be divided between the five shareholders. He further stated that he along with the deceased, P.W.2 and P.W.5 came to the spot with a cart and found the appellants were tying the branches of Jamun tree. When they wanted to take the branches, the appellants protested saying that the tree belonged to their father and that they would not allow anyone to take its branches and the log. The appellant no.1 Nityananda dealt a blow on the head of the deceased with a yoke (M.O.III) for which the deceased fell down. P.W.4 along with P.W.5 ran to the river to bring water,

soaked their napkins and brought water and administered the same to the deceased who was unable to talk. They brought the deceased to the house in a cart and then the deceased was taken to Jiral hospital.

Though P.W.4 stated in the chief examination that branches of the Jamun tree were to be divided between the five shareholders but in the cross-examination, he has stated that he had no personal knowledge as to how the tree belonged to the five shareholders. He further stated that the appellants were poor persons and their landed property was not sufficient to provide them food for the whole year and that they earned their livelihood on labour and that the villagers were not giving any money for the trunk of the Jamun tree. He further stated that the appellants were complaining that they were not prepared to give any portion of the tree to anybody including the villagers as it was planted by their father and it belonged to them. In view of this evidence which has been brought out by way of cross-examination, it appears improbable that the appellants would have agreed for donating the trunk portion of the jamun tree to the villagers for the purpose of utilizing the same in the making of doors and windows of the school particularly in view of their

miserable financial condition and when they would not be getting anything by giving the trunk for such purpose.

P.W.4 has further stated in the cross-examination that the decision taken by the villagers was not reduced to writing and it was an oral decision and he had no knowledge about the oral decision of the villagers in that regard. Even though he stated about the yoke (M.O.III) being utilized by appellant no.1 in assaulting the deceased, he has stated not to have seen any of the appellants untying the yoke which was tied to their cart. He further stated that the appellant no.1 was standing on the backside of the deceased while delivering the blow on his head with the yoke. At this stage, if the evidence of the doctor (P.W.1) is taken into account, it would appear that in case a heavy weapon like yoke (M.O.III) would have been utilized, it would have caused extensive injury on the head of the deceased and fracture would be inevitable and the fracture would have been a comminuted fracture breaking the bones into pieces. The doctor further stated that the injury on the head of the deceased in his opinion ought to have been caused by a weapon of much lighter weight than M.O.III like a small branch of tree or small lathi etc. and the injury must have been caused by the assailant standing from the front side of the deceased and

not by standing in the backside. Therefore, the evidence of the doctor which was given after taking into account the nature of injury sustained by the deceased and the nature of weapon stated to have been utilized in assaulting the deceased creates doubt about the manner of assault and the weapon of assault as deposed to by P.W.4.

P.W.4 was specifically asked about the injury on the appellant no.1 but he pleaded his ignorance. He further stated not to have seen any injury on P.W.2 when he along with P.W.5 went to bring water for the deceased but stated that after he came back from the riverside, he noticed injury on P.W.4.

P.W.5 Nandakishore Behera :

He has stated that the deceased was his agnatic grandfather and the villagers with the permission of the shareholders cut the Jamun tree which was in joint possession of five shareholders including he himself. He further stated that on the date of occurrence, the appellants brought a cartload of branches to their house and at about 2.00 p.m. again they proceeded to the spot to bring another cartload of Jamun tree. He further stated that he along with the deceased, P.W.2 and P.W.4 went to the spot to bring the branches of the tree taking a

bullock cart and they found the appellants loading some of the branches. When they wanted to bring some branches, the appellants protested saying that their father had planted that tree and they had claim over the tree and they did not allow P.W.5 and others to take any branch of the tree. He further stated that there was exchange of words and during the quarrel, the appellant no.1 brought a yoke placed against the wheel of the cart and dealt a blow on the head of the deceased as a result of which the deceased fell down on the ground. The deceased was in an unconscious state and he along with P.W.4 ran to the river to bring water and they soaked their napkins in the river water and try to administer it to the deceased but he did not drink nor he regained his sense. They carried the deceased in the cart along with the yoke with which the appellant no.1 assaulted the deceased which he later produced before the Investigating Officer. He further stated that the deceased was sent to Jiral Hospital.

In the cross-examination, it has been confronted to P.W.5 and proved through the Investigating Officer (P.W.11) that he had not stated before him that P.W.4 accompanied him to the place of occurrence along with the deceased and P.W.2. He has also not stated that Jamun tree which was standing in Talatota

belonged to five shareholders including he himself and the appellants and that the villagers with the permission of the shareholders cut the Jamun tree to take its trunk for use in the village high school and that branches were to be taken by the five shareholders. He admitted in the cross-examination that he did not attend the village meeting where the decision was taken regarding the Jamun tree. He further stated in the cross-examination that the appellant Nityananda assaulted the deceased from the backside and he did not see any injury on the appellant no.1. He further stated to have seen only one tangia at the place of occurrence which belonged to P.W.2. He further stated that they felt that the appellants would take all the branches of the tree and would not give them anything for which they got annoyed and angry with the appellants.

Thus, not only there are material contradictions in the evidence of P.W.5 but also his evidence relating to the manner of assault on the deceased and the nature of weapon used in the assault gets contradicted by the evidence of the doctor (P.W.1).

P.W.5 has stated that he handed over the yoke (M.O.III) to the I.O. (P.W.11) in his village and yokes like

M.O.III are commonly available in the houses of agriculturist and no blood mark was found on M.O.III.

11. Let me now discuss the evidence of P.W.6 Babaji Swain who claimed himself to be a member of village committee and he stated about holding of a meeting of the villagers in which a decision was taken in presence of the five shareholders of the Jamun tree that trunk of such tree was to be utilised for making doors and windows of the village high school and the branches to be taken by the five shareholders. He further stated that after fifteen days of the decision was taken, the Jamun tree was cut.

In the cross-examination, P.W.6 admits that there is no document to show that he was a member of the village committee. He further admits that the decisions which were taken in the village committee meeting were not recorded in writing as there was no meeting book to record the proceedings which runs completely contrary to what P.W.2 has stated in that regard. P.W.6 has named one Rohita Puhan to be the President and Brhamarbar Jena to be the Secretary of the village committee but none of them have been examined. P.W.6 further stated that dispute regarding the Jamun tree arose between the shareholders including the appellants about one and half months

prior to the occurrence as the appellants claimed the entire tree belonged to them whereas the others stated that they had a share in it. He further stated that the dispute was never referred to village committee and even on the date of occurrence also no dispute was referred to village committee regarding the share of the Jamun tree. In view of the evidence brought out by way of cross-examination, it appears improbable that any meeting was convened in the village where the appellants agreed in taking a decision in respect of the Jamun tree.

It has been confronted to P.W.6 and proved through the I.O. (P.W.11) that he had not stated before him that he was a member of the village committee and that one month prior to the occurrence, the villagers called a meeting and called the five shareholders to the meeting and that the appellants were present in the said meeting wherein it was decided that the trunk of the tree was to be utilised for making of doors and windows for the village high school and the branches would be taken by the five shareholders. Therefore, the evidence of P.W.6 regarding holding of any meeting and taking of any decision relating to the Jamun tree is not acceptable.

Analysing the evidence of the eye witnesses P.Ws.2, 4 and 5 and also the evidence of P.W.6, I am of the humble view

that the prosecution case regarding holding of any meeting in the village relating to the cutting of Jamun tree and taking a decision to give the trunk portion to the village school and sharing of the branches between the five shareholders is not acceptable.

Weapon of assault on the deceased:

12. It is the prosecution case that yoke (M.O.III) was used by appellant Nityananda Behera to assault the deceased. P.W.11, the I.O. specifically stated that on 27.04.1986 he sent the yoke (M.O.III) to Dr. Subash Chandra Sahoo, Associate Professor, S.C.B. Medical College and Hospital, Cuttack for his opinion and received the reply vide Ext.18.

Ext.18 indicates that the yoke which was sent was 52 c.m. length, 25 c.m. in width at ends and 27 c.m. at the middle and rectangular in shape. It is a solid wooden bar and opinion has been given that the head injury found on the body of the deceased was likely to have been caused by the wooden yoke. There is no mention in the seizure list (Ext.12) in which the wooden yoke (M.O.III) was seized that it was containing any blood stain on it. No one including P.W.7 who is a witness to the seizure of yoke has also stated to have noticed any blood stain

on the yoke. P.W.5 who produced the yoke (M.O. III) before the I.O. has stated that there was no blood mark on it (M.O. III) and further stated that yokes like M.O.III are commonly available in the houses of the agriculturists. The I.O. has stated that he did not send articles to F.S.L., Rasulgarh as none of the articles seized contained any stain of blood.

In this case, the doctor who has conducted post mortem examination has not been examined. However, the post mortem report has been marked as Ext.19 on admission on 14.04.1988.

The prosecution case that the yoke (M.O.III) was utilised for assaulting the deceased on his head from the backside is contradicted by the medical evidence as deposed to by P.W.1.

The evidence on record further indicates that the yoke was tied to the cart by ropes as usual when the assault on the deceased took place and when the yoke was not containing any blood stain on it, it is doubtful that the yoke was used as the weapon of offence.

Plea of right of private defence:

13. From the suggestions given to the eye witnesses by the defence counsel, it appears that the appellants have taken a specific plea of right of private defence. It is pertinent to note that in the accused statement, such a plea has not been taken specifically by any of the appellants. Let me now examine how far such plea is acceptable.

Law is well settled that even if the accused has not taken any specific plea of exercise of right of private defence but the materials available on record suggest such exercise, the Court can consider the same and give benefit to the accused in appropriate case. Without even taking a specific plea of private defence, the accused can even rely on the circumstances and admission made by the witnesses in support of the exercise of right of private defence. The burden of establishing the plea of self defence is not as onerous on the accused as it is required by the prosecution to prove its case beyond reasonable doubt. The accused can discharge his burden by showing pre-ponderance of probabilities in favour of his plea by laying basis for that plea in the cross-examination. A right of private defence is a defence right. Where there is no apprehension of danger, there is no right of private defence. Unless one is suddenly confronted with

the necessities of adverting an impending danger which is not of his self creation and the necessities are real and apparent, he cannot exercise right of private defence. Such a right is not a right to take revenge but it is clearly preventive and it cannot be based on surmises and speculations. Sections 96 to 106 of the Indian Penal Code deal with right of private defence and it also indicate how much right of private defence can be exercised and under what circumstances. Such exercise cannot be weighed in golden scale in as much as a person should not be expected to modulate his defence step by step with any arithmetical exactitude by way of giving that much of assault which is required in the thinking of a man in ordinary times or under normal circumstances.

The prosecution has not offered any explanation for the injury sustained by appellant no.1 who was hospitalized in Jiral hospital and the injury sustained was not a minor or a superficial injury but an incised wound of size 4”x1”x1” on the left shoulder which can be caused by sharp cutting weapon as per the opinion of the doctor (P.W.1).

Let me now analyse the sequence of events leading to the assault on the deceased as well as P.W.2 as per the prosecution case.

Sequence No. I

A decision was taken in the village meeting in the presence of five shareholders to cut the Jamun tree and to utilise the trunk for making of doors and windows of the village high school and the branches of the tree to be taken by the five shareholders. Accordingly, the tree was cut by the villagers.

Sequence No. II

The appellants took a cartload of branches of the tree in the morning hours to their house and again they came to the spot in the afternoon with a cart to take more branches and loaded the branches.

Sequence No. III

The deceased along with P.Ws.2, 4 and 5 arrived at the spot with a cart to take the branches and found the appellants loading the branches in their cart and they also tried to take the branches but the appellants prevented them.

Sequence No. IV

A quarrel ensued between the parties and the deceased was assaulted by the appellant no.1 Nityananda Behera and P.W.2 was assaulted by appellant no.2 Madhab

Behera. Appellant no.1 Nityananda Behera also sustained injury during the course of occurrence.

So far as sequence no.I is concerned, it has been brought out in the cross-examination of P.W.2 that the decision was reduced to writing in the meeting book of Grama Sabha but no such meeting book has been proved during the trial. Even the I.O. has stated that he has not seized any document from the village committee President and Secretary in connection with the case. The President and Secretary of the Grama Sabha have also not been examined. P.W.4 has stated about the miserable financial condition of the appellants who were earning their livelihood on labour and further stated that they were never prepared to give any portion of the tree to anybody as they were claiming that the tree was planted by their father and it belonged to them. In view of such financial condition and their claim, it sounds improbable that the appellants would have agreed for donating the trunk of the tree to the village school and distributing the branches among the five shareholders. P.W.5 stated not to have attended the village meeting where the decision relating to cutting of Jamun tree was taken and the evidence of P.W.6 also indicate that the appellants were claiming the entire Jamun tree for which there was dispute which was

never referred to the village committee and even on the date of occurrence also no such dispute was referred to the village committee. In view of such evidence of the witnesses, when the documentary evidence relating to the decision taken in the Grama Sabha has not been proved and the evidence of the aforesaid four witnesses relating to the decision taken in the Grama Sabha is not inspiring confidence, I am constrained to hold that the prosecution has failed to prove that any decision was taken in the village meeting relating to cutting of Jamun tree and its distribution.

So far as the sequence no.II is concerned, P.W.2 though stated in the chief examination that the appellants removed one cartload of branches of the Jamun tree but in the cross-examination, he stated that the appellants had taken two cartloads of branches to their house prior to the occurrence. He further stated not to have told anybody about the appellants taking two cartloads of branches without consulting the other shareholders. He stated so for the first time in Court. P.W.4 has not stated anything in the chief examination that the appellants brought any cartload of branches in the morning hours. Even in the cross-examination, he specifically stated that on the date of occurrence, none of the appellants brought any branches from

the tree prior to the incident. Though P.W.5 stated that he had seen the appellants bringing the cartload of branches in the morning at about 8.00 a.m. to 9.00 a.m. but he stated that he did not make any complain to them nor he informed any other shareholders about the same. No branches of jamun tree were seized by the Investigating Officer from near the house of the appellants though it was seized lying at the spot at Talatota as per seizure list Ext.9. Therefore, it is very difficult to accept that the appellants had removed one cartload of branches of Jamun tree in the morning hours on the date of occurrence.

None of the eye witnesses have stated that the appellants, who were loading the branches of the tree, left the spot with the cart. Even P.W.3 has stated that on the date of occurrence, she found the appellants came running. In view of such evidence, had the appellants taken their cart to the spot on the date of occurrence and loaded it with the branches when the occurrence took place and they ran away from the spot, then their cart loaded with branches would have been found at the spot. The Investigating Officer has not seized any cart loaded with branches at the spot. He only seized one bullock cart on the village road of Dighi as per seizure list Ext.13. P.W.2 has stated that he did not notice any cart at the spot during the spot visit of

the Investigating Officer and all the branches of Jamun tree which he had seen on the date of occurrence at the spot were as usual when the I.O. visited the spot. Therefore, the prosecution evidence that the appellants at the time of occurrence had taken their cart to the spot and loaded it with the branches is not acceptable.

So far as sequence no.III is concerned, P.W.2 has stated that he along with the deceased, P.W.4 and P.W.5 had decided to protest and to challenge the appellants not to take branches before starting from the village and they had also decided to bring the branches to their house. They had taken one cart to bring the branches of the Jamun tree with ropes and two axes (M.Os.I and II). P.W.5 has stated that after reaching the place of occurrence, they felt that the appellants would take away all the branches of the tree for which they got annoyed and angry with the appellants. As I have already disbelieved the prosecution case that the appellants had taken a cartload of branches earlier to their house and again trying to take another cartload of branches, if the prosecution party members came to the spot with the cart, ropes and axes to take away the branches and the appellants protested to them as because they were claiming shares over the Jamun tree, it cannot be said that they

have committed any wrong in raising their protest to the prosecution party members.

Coming to the sequence no.IV, looking at the manner in which the prosecution party members including the deceased had gone to the spot with a cart, ropes and axes to bring the branches of the Jamun tree and they got annoyed with the appellants when they protested and that there was exchange of words and a quarrel ensued between the parties as stated by P.W.5 and the fact that the appellant no.1 has sustained an incised wound on his left shoulder for which he was hospitalized in the Jiral Hospital and the said injury has not been explained by the prosecution, even if it is accepted that the appellant no.1 in such a situation gave one blow to the deceased on his head and that to with the branch of the tree which appears to be more probable in view of the evidence of the doctor (P.W.1), it cannot be said that he has exceeded his right of private defence. Similarly the appellant Madhaba Behera cannot be said to have exceeded his right of private defence of property in causing two simple injuries to P.W.2. The manner in which the prosecution projected its case of assault on the deceased as well as P.W.2 appears to be a doubtful feature. No one from the prosecution side also tried to lodge any first information report on the date of

occurrence which was lodged twenty two hours after the occurrence. In view of the glaring inconsistencies in the evidence of the prosecution witnesses and when the case as was projected by the appellants appears to be more probable, I am of the humble view that it is a fit case where benefit of doubt should be extended in favour of the appellants.

14. In view of the foregoing discussions, the impugned judgment and order of conviction of the appellant no.1 Nitia @ Nityananda Behera under section 304 Part II of the Indian Penal Code and that of the appellant no.2 Madhia @ Madhab Behera under section 324 of the Indian Penal Code and the sentence passed thereunder is not sustainable in the eye of law and hereby set aside. The appellants are acquitted of all such charges. The appellants are on bail by virtue of the orders of this Court. They are discharged from liability of their bail bonds. The personal bonds and the surety bonds stand cancelled.

15. Before parting with the case, I am reminded of the oft-quoted legal maxim, 'Justice delayed is justice denied'. Right to speedy trial is a fundamental right. Appeal is a continuation of trial. After fighting the legal battle for more than thirty four years, the appellants have won the case. The passage of time must have brought wrinkles on their faces and dark hairs turning grey. No one can restore the lost years to them. Changes are

being made in the criminal justice delivery system from time to time to deal with serious problem of delay and arrears and for quicker disposal of cases. Let us hope for a better result in the future with the extra efforts put by all concerned in that regard with active support and participation from the members of the Bar.

Accordingly, the Criminal Appeal is allowed.

Lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 1st September, 2020/Pravakar/Sisir/RKM