
(2008) 01 OHC CK 0023
In the Orissa High Court

Abhaya Parichha and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:

Citation : (2008) 1 OLR 372

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.N. Biswal, J.—Heard the argument in full and the following judgment is passed.

The appellants, four in number, assail the judgment and order dated 21.12.1993 passed by the learned Addl. Sessions Judge, Paralakhemundi in S.T. Case No. 26 of 1992 (S.T. Case No. 98 of 1992 G.D.C.) convicting the accused-appellants namely Abhaya Parichha, Siba Paik and Prafulla Paik for the offence under Sections 147 and 332 of I.P.C. and sentencing each them to undergo R.I. for two years and the accused-appellant Hallium Nayak for the offence under Sections 147/332/149 of I.P.C. and sentencing him to under R.I. for one year for the offence under Sections 147/149 of I.P.C. and R.I. for same period for the offence under Sections 332/149 of I.P.C.

2. The case, as delineated by the prosecution, is that on 21.10.1990 being directed by P.W.10, the O.I.C. Mohana Police Station, Sri Padmanav Panigrahi, A.S.I. of the said P.S. (P.W.1) proceeded to village Chandiput to enquire into the allegation regarding killing of a bull. While enquiring into the matter, he got information that the accused persons after killing the bull were sharing the meat among themselves in Kapuriapata Jungle. So, the A.S.I, along with Surjyanarayan Dolai (P.W.2), Prasan Kumar Das, Durjyodhan Baliarsingh (P.W.8), Balakrishna Pati (P.W.4), Suryanarayan Behera (P.W.11) and some others went to that jungle and saw about 12 persons were preparing meat of the bull near a rivulet. At the sight of A.S. and the witnesses accompanying him, they took to

their heels. Some of the witnesses chased those miscreants, while the A.S.I. seized some axes, katuris and meat in presence of the other witnesses and prepared seizure list in respect thereof. In the meantime, the A.S.I. got information that some of villagers of village Kapuriapata apprehended five miscreants, who were running away from the spot. So, the A.S.I. and some other witnesses went to that village and found five miscreants to have been detained by the villagers. On query, they disclosed their names to be Nutap Lima, Bikram Dalai, Pratap Nayak, Joseph Naik and Promod Parichha and all of them also admitted that they along with seven other persons had slain the bull. So, the A.S.I. arrested all the five persons and proceeded with the enquiry. In the meantime, 20 to 25 persons, all belonging to Christian community, rushed to the spot and declared to kill the A.S.I. and other witnesses. Accused Abhaya Parichha assaulted P.W.1. the A.S.I. with a wooden plank on his head and hand and some other accused persons also attacked him with fist blows and Lathis causing fracture and bleeding injury on the head and snatched away the Note Book from him. It is further alleged that the accused persons forcibly released the five persons arrested by the A.S.I. and assaulted the witnesses who were present with the A.S.I. On the same date, the A.S.I. orally reported the incident before the O.I.C., of Mohana P.S., (P.W.10), as he was not able to write because of the injury sustained on his right hand, which was reduced into writing and treated as F.I.R. As the F.I.R. revealed a cognizable case, P.W.10 registered Mohana P.S. Case No. 51/90 and took up investigation. In course of investigation, he examined the witnesses, seized some material objects, sent the injured persons, namely, Binod Behera, S. Dalai (P.W.2), B. Pati (P.W.4), Tirtha and S. Pujari to Mohana P.H.C. for their medical examination, arrested the accused persons and forwarded them to Court and after completion of investigation finding a prima facie case against the accused persons, numbering 31 submitted charge sheet against them. The case having been committed to the Court of Session was transferred to the Addl. Sessions Judge, Paralakhemundi for disposal. Accordingly, the Addl. Sessions Judge Paralakhemundi framed charge against all the 31 accused persons for the offence under Sections 148/333/204/323/395 of I.P.C.

3. The plea of the accused persons was complete denial of their involvement in the crime in question. It was their further plea that earlier there was dispute between the Hindu and the Christian communities of village Chandiput for which this case has been falsely foisted against them, all of whom profess Christianity.

4. In order to establish its case prosecution examined as many as 13 witnesses as against none by the defence. After assessing the evidence on record, the trial Court acquitted all, but the four accused-appellants of all the charges. He also acquitted the accused-appellants of the charge under Sections 148/323/204/333/395 of I.P.C., but while convicting accused-appellants Abhaya, Siba and Prafulla for the offence under Sections 147/332 of I.P.C. convicted accused-appellant Hallium for the offence under Sections 147/332/149 of I.P.C. and sentenced them thereunder as stated earlier. Being aggrieved by the said

judgment and order the accused-appellants have preferred this appeal.

5. At the outset, learned Counsel for the appellants submits that as required u/s 141 of I.P.C. five or more persons are required to form an unlawful assembly. In the present case, since the accused-appellants are four in number, the trial Court ought not have convicted them u/s 147 of I.P.C. Per contra, learned Addl. Standing Counsel, Mr. Mishra, submits that there is ample material in record to show that more than four persons were involved in the crime in question. But save and except the identity of the accused-appellants, the identity of the others could not be ascertained to the hilt for which they got acquitted. So, the trial Court has rightly convicted the accused-appellants for the offence u/s 147 of I.P.C. No doubt minimum five persons are required to form an unlawful assembly. But if it is found that in fact five or more than five persons were involved in a particular crime, but because of lack of evidence identity of more than four persons could not be determined, there is no bar for convicting less than five persons for the offence u/s 147 of I.P.C. In the case at hand, as rightly held by the trial Court, more than five persons were involved in the crime in question, but since the identity of other accused persons, except the accused-appellants, could not be proved beyond all reasonable doubt, it acquitted them, which does not mean that the accused-appellants were only involved in the alleged crime.

6. Learned Counsel for the accused-appellants further submits that the trial Court ought not to have convicted the accused-appellants on the solitary evidence of P.W.1, which suffers from major contradiction and infirmities. Evidence is to be weighed and not counted. Conviction can be based on the evidence of a solitary witness, provided such evidence is reliable, clinching and beyond reproach. In the present case, P.Ws. 4, 5, 6, 7 and 9 who were said to be the witness to the occurrence, turned hostile to the prosecution. P.W.2, even though was not declared hostile, did not support the prosecution case in full. P.W.10 is the I.O. and P.W.12 is the Medical Officer who examined P.W.1 and the other injured persons. The other witnesses are the witness to the seizure only. So, in fact, the fate of the case rests on the evidence of P.W.1, the A.S.I. himself. On perusal of the evidence of P.W.1, it is found that on the date of occurrence, being directed by P.W.10 he went Chandiput to enquire into S.D. entry No. 360 of 1990, which relates to killing of a bull. While he was enquiring into the matter, Surjyanarayan Behera (P.W.11), S.N. Dolai (P.W.2), Simanchal Narayan, Prasan Kumar Das, Trinath Gaudo, Tabatia Gaudo and some others saw 12 persons preparing meat of a bull near a rivulet at Kapuriapata and at the sight of P.W.1 and the persons accompanying him, they took to their heels. So, some of the persons accompanying P.W.1 chased them and could be successful in apprehending five of the miscreants. On getting information about their detention, P.W.1 proceeded to village Kapuriapata. On being questioned, the five detained miscreants disclosed their names, as Lima, Bikram Dalai, Pratap Naik, Joseph and Promod Parichha. They also confessed to have killed the bull. They further disclosed that Abhaya Parichha, Prafulla Paik, Ashok Mali, Hallium Nayak and Rickardo Paik and Puma Chandra Naik also participated in killing the bull and

preparing the meat. On the same date, at about 3 P.M. all the seven persons along with some others being armed with Lathi, axe, etc. attacked P.W.1 and the witnesses accompanying him. First accused-appellant Abhaya Parichha inflicted a Lathi blow on P.W.1 for which he fell down and sustained bleeding injury on his head. Again accused-appellant Abhaya Parichha, Siba Paik, Prafulla Paik and accused Purna Chandra Naik assaulted him by means of Lathi and fist blows and due to such assault one of his teeth was loosen and he sustained bleeding injury. It further transpires from the evidence of P.W.1 that accused Siba Paik and Abhaya Parichha snatched away Rs. 53/- from his pocket. When the witnesses intervened, those miscreants assaulted them and forcibly released those five persons who had been arrested by P.W.1. P.W.2 deposed that at their sight five miscreants started running for which he along with some others chased and found them washing themselves in a Nala where they were caught red handed. Those five persons were Nutap Lima, Bikram Dalai, Pabitra, Joseph Naik and Promod Parichha who admitted to have killed the bull. After some time a group of Christian boys numbering 22 to 25 being armed with Lathi came to village Kapuriapata and shouted "MARA EMANANKU". Seeing the accused persons, some of the witnesses accompanying P.W.1 started running. P.W.2 specifically stated that he had not seen the persons assaulting P.W.1.

7. As discussed earlier as per the evidence of P.W.1, twelve miscreants were preparing meat near a rivulet at Kapuriapata and at his sight and the sight of witnesses accompanying him, they took to their heels. Some of the witnesses present with him chased those miscreants and could be able to apprehend five of them. But the evidence of P.W.2 is that the A.S.I., he himself and some other witnesses saw those five persons clearing themselves in a rivulet at Kapuriapata where they were arrested by the A.S.I. It creates a doubt whether those five persons were arrested in the rivulet while they were cleaning themselves or they were arrested in village Kapuriapata. So the very genesis of the prosecution case is doubtful.

8. It transpires from the evidence of P.W.13, the Medical Officer of Mohana P.H.C. that on 21.10.1990 he examined P.W.1 and found the second incisor tooth to have been uprooted. He also noticed one lacerated injury of size 3" x ?" x ?" on the left side of his forehead, one lacerated injury of size 2" x 1" x 1" between his right thumb and index finger and one abrasion of size 2" x 1" x 1" on his right thigh. All those injuries, except the first injury were simple in nature, while the first injury was a grievous one. But admittedly, in the injury requisition, it was not mentioned that one tooth of P.W.1 got uprooted because of the assault on him. The evidence of P.W.1 also does not disclose about such uprooting of the tooth. It further transpires from the evidence of P.W.13 that on 20.10.1990, he examined Baiakrishna Pati, P.W.4 and found one simple abrasion of size 1" x ?" x ?" on lateral aspect of his left leg which might have been caused by blunt weapon, as per his report Ext.-13. On the same date, he also examined Binod Kumar Behera and found one lacerated injury of size 3" x 1" x ?" on the skull, which was simple in nature.

9. It is the case of prosecution that the occurrence took place on 21.10.1990, and P.W.1 and some other witnesses were said to have been assaulted by the accused persons on that date. But P.W.13 examined Baiakrishna Pati and Binod Kumar Behera on 20.10.1990 i.e. one day prior to the occurrence. Furthermore, Binod Kumar Behera has not been examined by the prosecution. If in fact he sustained injuries in course of occurrence, the prosecution ought not to have withheld him from the witness box.

10. As stated earlier, even though the requisition of the I.O. was silent about uprooting of any tooth of P.W.1, the doctor opined that his second right incisor tooth was found to have been uprooted. Similarly, even though the occurrence took place on 21.10.1990, two persons were examined on 20.10.1990 showing that they also sustained injuries in course of the occurrence, which is next to impossibility. There is no evidence, whatsoever to show that P.W.1 had prior acquaintance with any of the accused-appellants. There is also no evidence as to from whom he could know their names. Admittedly, no T.I. Parade was conducted in respect of the accused persons including the accused-appellants. Moreover, the genesis of the prosecution case was doubtful. The trial Court did not examine these aspects properly. In my considered opinion, it would be hazardous to maintain the order of conviction and sentence passed by the trial Court. As such, the judgment and order of conviction and sentence passed by the trial Court warrant to-be interfered with.

11. Accordingly, the appeal is allowed and the judgment and order of conviction and sentence as passed by the trial Court are set aside. The accused-appellants be discharged of their bail bonds.