

(2002) 11 OHC CK 0049

In the Orissa High Court

Case No : Criminal Appeal No's. 177 of 2001 and 21 of 2002

Arati Das and Others and Sagar Das and Another	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 11-11-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 460

Citation : (2002) 2 OLR 683

Hon'ble Judges : P.K. Misra, J;B. Panigrahi, J

Bench : Division Bench

Advocate : H.S. Satapathy, for the Appellant; G.K. Mohanty, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

B. Panigrahi, J.—This appeal calls in question the order dated 04.09.2001 passed by the learned Additional Sessions Judge Rairangpur, in S.T. Case No. 47/193 of 2000, whereby and whereunder the appellants have been convicted under Sections 302/149 and 148/460 of the Indian Penal Code (for short "IPC") and sentenced to undergo imprisonment for life and rigorous imprisonment for two years on each count respectively, the sentences to run concurrently.

2. The prosecution case, as narrated in the trial Court's judgment, is as follows :

P.W.1 Rohidas Das, the brother of the deceased lodged oral report on 03.04.2000 at 7.00 A.M. at the Rairangpur (Rural) P.S. that since long after the death of their father, the five brothers used to stay separately and the landed property had been amicably partitioned. Till the mother was alive she was staying with deceased Udaya. The two sons of the elder brother of the informant, namely, Maheswar and Jogeswar, used to stay outside and seldom came to the village. Their mother Malli Das used to stay at village Dantuni. About 1 1/2 years before the occurrence, appellant Jogeswar and his wife alongwith their four children came to the village and temporarily resided in the house of deceased Udaya.

After some time, the deceased asked them to vacate the room for which there was a quarrel between them. Since Jogeswar and his wife did not leave the house under their occupation, there was a village Panchayat to resolve the dispute. In the Panchayat, the deceased did not agree to provide accommodation to Jogeswar and his family. Therefore, the wife of Jogeswar took away all the belonging and stayed in the house of one Sufal Das. Two to three days thereafter, she called her husband to the village. On 20.03.2000 Jogeswar came to the village. At that time, Udaya had gone out by locking his house. Jogeswar put another lock on the door and searched for Udaya. However on 25.03.2000 there was a Panchayat and at the instance of the Panch Members, Jogeswar unlocked the door and Udaya once again lived in the house. Jogeswar began construction of a house in front of the house of Udaya and insisted a share from the wooden fixtures fitted in the house of Udaya. The matter was to be decided on 02.04.2000, but the Panch members did not agree to take it up at night and so it was fixed to 03.04.2000. On 02.04.2000 at about 10.00 P.M., the informant and the deceased slept in the latter's house. P.W.3 Radhi Das, the daughter of the informant, and P.W.4 Chhotray Majhi, who had come for some treatment to the house of P.W. 1 who used to practise witchcraft, alongwith his wife and a male child slept in the house of P.W.1. At about 10.30 P.M., appellant Jogeswar and his wife appellant Arati came to the house of the deceased and called him to open the door. When the door was not opened, they dealt kick blows on the same, as a result of which the door was broken open. Immediately thereafter, P.W. 1 came out of the room and noticed appellant Jogeswar holding a lathi and appellant Arati, an axe. He advised them not to pick up quarrel, as the matter was to be decided the next day. The two appellants did not pay any heed to such advice; rather appellant Jogeswar inflicted a lathi blow on his left hand. Therefore, he went away from the spot to call other villagers. While going away, he noticed appellants Dasarath Das, his wife appellant Dukhini Das and appellant Sagar Das arriving at the spot being armed with lathis, etc. After calling some villagers, when P.W.1 returned to his house, he found Udaya lying dead in front of his house. There was bleeding from his mouth and nostrils and marks of injury on the head and back. He was informed by his daughter (P.W.3) that all the appellants dragged the deceased from his house and killed him by assaulting with lathi, axe, etc. In absence of the O.I.C., the oral report of P.W. 1 was reduced to writing by the A.S.I. (P.W. 11) and was treated as F.I.R. The contents of the FIR were read over and explained to P.W. 1 who after having understood the same, put his L.T.I. P.W. 11 registered a case and took up preliminary investigation, in course of which he examined witnesses, held inquest over the dead body and sent the same for post mortem examination. Subsequently, the C.I. of Police, who took charge of the investigation, seized the bloodstained earth, sample earth, one underwear stained with blood, a piece of wood with iron nails three plastic buttons and three capsules from the spot. He also seized one lungi from appellant Dasarath. Thereafter, he arrested the accused persons, sent them to custody, sent the incriminating materials to the F.S.L. for chemical examination, and after completion of investigation, placed charge-sheet against

the appellants.

3. The defence plea was one of complete denial. In their statement recorded u/s 313, Cr.P.C. the accused-appellants claimed to have been falsely implicated in this case.

4. In order to sustain conviction against the appellants, the prosecution had examined as many as twelve witnesses. P.Ws. 1 to 4, 6, 7 and 10 are said to be eye-witnesses and post-occurrence witnesses, P.W.5 was the Ward Member of the village. P.W.9 is the doctor who conducted autopsy over the dead body. P.Ws. 11 and 12 were police officers. The trial Court on evaluation of the evidence on record was inclined to convict and sentence the appellants, as already stated hereinbefore.

5. Mr. Satpathy, learned counsel for the appellants, urged with strong intensity of conviction that in this particular case, the trial Court did not at all consider the evidence placed before it in proper perspective. It has mainly believed P.Ws. 1 to 4 in order to hold the appellants guilty to have committed the murder of Udaya. Learned counsel has taken us through the ocular evidence of these witnesses.

6. P.W. 1 is none other than the brother of the deceased who claimed to have slept along with the deceased in the same room in the night of occurrence. He has testified that in the night of occurrence at about 10.00 P.M., appellant Jogeswar came near the door of the deceased Udaya and asked him to produce Udaya, to which he replied that Udaya was unwell. Then he insisted to see Udaya and the medicine he was taking. So saying, they broke open the door. Jogeswar made an attempt to assault Udaya but the blow hit the left hand of P.W. 1. Hearing hullah, P.W.4 reached at the spot whom P.W. 1 requested to keep a watch over the situation. He also called one Jadu, who did not come. Then he went to call the villagers. At about 2.00 A.M. he returned to the house with some villagers and found Udaya lying dead. Appellants Jogeswar, Arati, Dasarath, Dukhini and Sagar were present at the spot. While critically examining the evidence of P.W. 1, it is noticed that the incident had started at about 10.00 p.m. in the night. When the appellants started beating Udaya, one blow slipped and hit on the left hand of P.W. 1. But, he had not been medically examined, nor is any injury report forthcoming. It is unnatural and against human conduct that the assault was continuously thrust from 10.00 P.M. to 2.00 A.M., and even after the assault was over, all the appellants stood fixed at the spot giving chance to the witnesses to arrive and notice their presence. P.W. 1 has also stated that he heard about the assault from his daughter. In this back ground, since he has not stated about the manner of assault alleged to have been made by the appellants on the deceased and has only stated to have learnt about the assault from P.W.3, it would be unsafe to place implicit reliance on his testimony.

7. P.W.2, a co-villager, has claimed to have gone to the spot in the night of occurrence at about 10.00 P.M. to desist the appellants from quarrelling with the deceased. He had gone there on being informed by P.W.3. From his testimony, it

has appeared that when the deceased was brought out from the room, he tried to intervene. At that time, appellant Dasarath caught hold of him and attempted to assault him by a broken glass. Fortunately, it did not hit him. Out of fear, he left the place. When he again went there alongwith other villagers, he found Udaya lying dead. On a close reading of his evidence, we are of the opinion that it does not help the prosecution while determining the culpability of the appellants.

8. P.W.3 is the daughter of P.W.1. From her testimony it has appeared that in the night of incident, her father was sleeping with Udaya. One Chhotray and his wife had come to their house for treatment. She was sleeping with them in another room. It is important to note here that undisputedly P.W. 1 was sleeping with Udaya in one room. He was also present when the appellants arrived there. He has not stated anything about the assault on the deceased. But, P.W.3, who was sleeping in another room, has come forward with the story to have seen the appellants assaulting the deceased, which does not at all inspire any belief inasmuch as it was a dark night and she has not stated anything as to how she could identify the appellants. In cross-examination, she has stated that her father (meaning P.W. 1) was present when the appellants were assaulting the deceased. This version of P.W.3 has not been supported by P.W. 1. She has also stated that when the appellants were assaulting and threatening Chhotray (P.W.4), she went to call Jadu, the brother of P.W.2. This part of her statement has not been corroborated by P.W.4. Thus, it is unsafe to believe the evidence of P.W.3 while considering the appeal. She had also not stated before the police that the appellants directed her father to bring out deceased Udaya from the room, that appellant Jogeswar broke open the door and that her father desisted the appellants from assaulting Udaya. Since major development was made in course of hearing on material particulars, we, therefore, doubt the credibility of P.W.3.

9. From the evidence of P.W.4, it has appeared that he had come to the house of P.W. 1 in the flight of incident for treatment of his child. He was asked by the appellants to leave the place. He was not present at the time of incident. Therefore, his evidence in no way helps the prosecution case. P.W.5 is the Ward Member of the village. He only proved seizure of some material objects. But, from such seizure, it cannot be said that the case against the appellants have been proved. P.W.6 has only deposed about the information given to her by P.W.3 that the appellants were quarrelling with the deceased. Even after such information she did not bother to proceed to the spot. P.W.7 has deposed that after the incident, he went to the backyard of his house and found Udaya lying on the ground, which he could notice with the help of a kerosene lamp. It may be stated that no other witness except P.W.7 has stated about burning of a kerosene lamp. Therefore, his evidence cannot be believed.

10. P.W.9 is the doctor who conducted autopsy over the dead body of the deceased. He found the following injuries :

(i) Multiple abrasions 3 cm x 2 cm on forehead right side above the eye brow.

- (ii) Multiple abrasion 1 cm x 1 cm on right side of cheek.
- (iii) Abrasions 2 cm x 1 cm on left side of forehead under which haematoma is present.
- (iv) Multiple contusions present on right and left side of chest.
- (v) Abrasions of 3 cm x 2 cm present on lower aspect of sprutom.
- (vi) Multiple abrasions with echymosis present in posterior aspect of right calf and leg below the knee.
- (vii) Multiple echymosis present on right side of waist and buttock.
- (viii) Multiple abrasions of various sizes (2x1.2x3 cms) present on both the right and left side of forehead. Right frontal bone is fractured under which there was large haematoma present crenial cavity and the membrane under right frontal bone is torn and there is large haematoma underneath.
- (ix) Ribs from 5th 9th on right side and 4th to 9th on left side are fractured on multiple sizes. Right lung is raptured, and there is profused collection of blood in the plural cavity (chest cavity). Left lung is raptured and there is also profused collection of blood in the thorax.
- (x) Right lobe of liver is damaged into many pieces and there is huge collection of blood in the abdominal cavity.
- (xi) Spleen is raptured into many pieces and there is collection of blood in the abdominal cavity.

According to P.W.9, all the injuries were ante mortem in nature. Death was due to haemorrhage and shock and due to intercranial pressure on vital organs. The injuries were sufficient to cause the death of the deceased. The injuries could be possible by heavy pressure by hard and blunt weapons. No M.O. was referred to him for opinion whether the injuries could be possible by the same. From the evidence of P.W.9, it can be said that Udaya met a homicidal death.

11. P.Ws. 11 and 12 are the police officers, who after receipt of the FIR, proceeded with the investigation and after closure of the same submitted charge-sheet.

12. After considering the entire evidence on record, we are inclined to hold that the prosecution has signally failed to bring home the charge to the appellants. The trial Court has committed a factual error in finding the appellants guilty of the offence.

13. In the result, the appeals are allowed and the order of conviction and sentence passed by the learned Additional Sessions Judge is set aside. Since appellants Jogeswar, Dasarath and Sagar are in jail custody, they be released and set at liberty forthwith. The bail bonds furnished by appellants Arati and Dukhini stand discharged.

P.K. Misra, J.

14. I agree.