

(2008) 10 OHC CK 0054

In the Orissa High Court

Case No : Criminal Appeal No. 251 of 1997 and Govt. Appeal No. 20 of 1999

Ashok Das alias Gopal Das

APPELLANT

Vs

State of Orissa
 State of Orissa Vs Susanta Das and
Others

RESPONDENT

Date of Decision : 15-10-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 209, 428

Evidence Act, 1872 — Section 8

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2009) CLT 62 (Suppl CrI)

Hon'ble Judges : P.K. Tripathy, J;N. Prusty, J

Bench : Division Bench

Advocate : S. Swain, D.P. Pradhan, R.K. Pradhan, J. Pal, M. Mohanty and A.N. Mishra, in Criminal Appeal No. 251 of 1997 and A.K. Mishra, in Govt. Appeal No. 20 of 1999, for the Appellant; A.K. Mishra, Standing Counsel in CrI. Appeal No. 251 of 1997 and J. Patnaik, R. Rath, A.A. Das, B. Mohanty, T.K. Pattnaik, S. Das and P.K. Nayak for Respdt. No. 1, D.P. Dhal, D.K. Das, R.K. Rath, P.K. Tripathy for Respdt. Nos. 2, 4 and 5, D. Nayak, S. Swain and D.P. Pradhan for Respdt. No. 3 in Govt. Appeal No. 20 of 1999, for the Respondent

Judgement

P.K. Tripathy, J.—G.R. Case No. 420 of 1990 of the Court of S.D.J.M., Bhadrak was registered on the basis of Agarpada P.S. Case No. 16/1996. It reveals from the G.R. case record that accused Susanta Das was arrested and produced on 6.4.1996. Thereafter, he remained in judicial custody. Accused Pitambar Giri was arrested and produced before the learned S.D.J.M. on 11.04.1996 and remanded to the judicial custody. Charge-sheet was received on 3.7.1996 showing accused Ashok, Somanath and Mahendra as absconders. Amongst them, accused Somanath Swain and Mahendra Jena surrendered in the Court respectively on 12.7.1996 and 19.7.1996 and remanded to the judicial custody. Non-Bailable Warrant of Arrest was issued against accused Ashok. Since that warrant was not executed till 19.11.1996, therefore, on that date, the case was committed to the Court of Session u/s 209, Code of Criminal Procedure directing the aforesaid

accused persons to face the Trial in the Court of Session. The split up case i.e. G.R. Case No. 420 of 1996 was maintained in the Court of S.D.J.M. to pursue the warrant for appearance of accused Ashok. On 19.03.1997, he was arrested and produced in the Court of S.D.J.M. and was forwarded to the judicial custody. On 29.4.1997, the case was committed to the Court of Session u/s 209, Code of Criminal Procedure directing accused Ashok to face the trial. Because of the aforesaid two orders of commitment, though the occurrence is same but two different sessions cases were registered. A common trial was taken up by the learned Addl. Sessions Judge in S.T. Case No. 55/253 of 1996 and S.T. Case No. 30/105 of 1997. Charge was framed against the accused persons for the offence under Sections 147, 148 and 341/326/307/149, I.P.C. Accused persons denied to the charges and claimed for trial.

2. As it reveals from the lower Court records, case of the prosecution is that on 3.4.1996 at about 4.00 P.M., when Bigyan Mohanty (P.W.11), Rajesh Mohapatra (P.W.8) and Padma Lochan Jena, the deceased, were going from Bhadrak to Agarpada by a Rajdoot Motorcycle about half kilometer back from Kadabaranga Chhaka, the accused persons being variously armed with deadly weapons obstructed them and when the aforesaid three persons wanted to escape, the accused persons chased and assaulted them by means of such weapons. When the assault was going on a Trekker passed on the road. Seeing the Trekker approaching nearer, the accused persons fled away. The Trekker did not stop, but Ramakanta Rath (P.W.7) and one Debendra Padhi, while going on that road on a motor-cycle stopped there and helped the deceased and the two injured persons, (all of them being in injured condition then) for taking them to the hospital in Maa Santoshi Bus, which was then coming on that road. Before they could reach the hospital, Padma Lochan succumbed to the injury. Rabindra Kumar Jena (P.W.1), paternal uncle of the deceased on getting the information went to the hospital and after seeing the dead body and the injured and gathering the facts from the injured persons, came and lodged the F.I.R. Ext.1, in Agarpada Police Station at about 5.45 P.M.

3. To substantiate the charge, prosecution examined fourteen witnesses. Amongst them, Dr. S.N. Panda (P.W.9) conducted autopsy on the dead body of the deceased and proved the postmortem report, Ext.6, Dr. Pravat Kumar Sahu (P.W.12) treated two injured witnesses P.Ws.8 and 11 and proved the injury reports, Exts.7 and 8. P.W.1 is the informant and P.W.5 is witness to the extra-judicial confession of accused Susanta. P.Ws.8 and 11 are two injured and eye-witnesses to the occurrence. P.W.10 Muralidhar Pedi, passenger in the Trekker, was projected as an eye witness to the occurrence, but he did not support the prosecution. P.Ws.13 and 14 are the two police officers, who participated in investigation and rest of the witnesses are relating to inquest or seizure of different incriminating materials. M.Os. II and III are the Bhujali and the Bhujali cover, M.Os. IX and XI are the wearing apparels, M.O. I, is a pair of Chappal, whereas the remaining material objects are plastic comb, plastic glass, whisky and rum bottles. Besides the above noted exhibited documents, Ext.2 is the

inquest report and Ext.10 is the deadbody challan, Exts.3 to 5 and 12 are different seizure lists, Ext.9 is the crime detailed form and Exts.14 to 18 are documents in support of sending the M.Os. to the State Forensic Science Laboratory, Rasulgarh and the opinion report therefrom.

4. In defence, the accused persons examined D.W.1 Bhagaban Panda, a Pharmacist in the Headquarters Hospital, Bhadrak to prove the Indoor Patients' Register, Exts. D and D/1. Spot map, Ext.A, Xerox copy of the F.I.R. of P.S. Case No. 61 dated 25.11.1995 as Ext.B and certified copy of requisition and the injury certificate, Ext.C.

5. On assessment of evidence, learned Addl. Sessions Judge held that evidence of P.W.9 and the post mortem report, Ext.6 proves that the deceased suffered homicidal death. He scanned the evidence of the prosecution vis-a-vis the allegations against each of the accused persons and recorded that -

(i) Accused Somanath Swain (Respondent No. 3 in the Govt. Appeal) is not named in the F.I.R., P.W.1, the informant, in his evidence exaggerated his implication in the alleged occurrence though there is material omission in the F.I.R. about the role played by this accused, P.W.7 is a post-occurrence witness and in his statement to the I.O. he has not named this accused, P.Ws.8 and 11, the two injured witnesses did not state before the I.O. in their statement u/s 161, Code of Criminal Procedure that this accused pressed the cycle chain together with accused Mahendra Jena, evidence of P.W.5 regarding the extra judicial confession (inculpatory) made by accused Sushant is conflicting, contradictory and not reliable as against the present accused, there is no evidence that he was armed with cycle chain though such a charge was made u/s 149, I.P.C. and in that respect there was no seizure of that weapon in course of the investigation, and above all, P.Ws.8 and 11 admitted in their evidence that before the I.O. (P.W.13) they did not name this accused as one of the assailants, (see paragraph-10 of the Trial Court's judgment).

(ii) Accused Pitambar Giri and Mahendra Jena (respectively Respondent Nos. 2 and 4 in the Govt. Appeal) were not assigned specific role in the F.I.R., there is material contradictions in the evidence of P.W.1 and his statement u/s 161, Code of Criminal Procedure relating to the role of these two accused persons in course of the occurrence, P.Ws.8 and 11 admitted in their evidence that they did not state the name of these two accused persons in their statement u/s 161, Code of Criminal Procedure so far as it relates to pressing of cycle chain by accused Mahendra or giving of kick blows by accused Pitambar, the evidence of P.Ws.8 and 11 that accused Pitambar gave leg push/kick blows to the belly of P.W.11 is not supported by the doctor (P.W.12), in as much as, in course of his examination by P.W.12 the injured P.W.11 did not complain about belly pain, the Investigating Officer admitted that P.Ws.8 and 11 did not make statement implicating these two accused persons, extra judicial confession of accused Sushant before P.W.5 is not reliable so far as these two accused persons are concerned, and the Trial Court further recorded that - "in the instant case the

manner in which the witnesses have stated about the happenings of the occurrence appears to be not believable and the genesis of the crime is shrouded with mystery and therefore the only conclusion is to give benefit of doubt to the two accused persons namely Pitambar Giri and Mahendra Jena." (see paragraph-11 of the Trial Court's judgment).

(iii) Accused Sushant Das (Respondent No. 1 in the Govt. Appeal-F.I.R. is silent about specific part played by him, evidence of P.W.1 is not reliable in respect of the part played by this accused in course of the occurrence, P.Ws.8 and 11 though stated in their evidence about the role played by this accused, but in their statement u/s 161, Code of Criminal Procedure they did not state specifically about the manner of assault made by this accused, the extra judicial confession appears to be false and fabricated, F.I.R. was registered on 3.4.1996 but the same was forwarded on 6.4.1996 (wrongly typed as 6.4.1997) and therefore there has been inordinate delay which goes against the prosecution, the seized "Bhujali" was not shown to the witness nor evidence was tendered that such "Bhujali" was containing human blood and there was no independent corroboration to the evidence on record regarding his participation in the crime. In the above context, learned Addl. Sessions Judge also recorded that - "In a case of murder when the F.I.R. is doubtful, alleged recovery of crime of weapon is unreliable and other evidences were not trustworthy, the accused is to be given benefit of doubt." (see paragraph-12 at page 33 of the Trial Court's judgment).

(iv) Accused Ashok " Gopal Das (Appellant in the Criminal Appeal) - His name finds place in the F.I.R., P.Ws.1, 7, 8 and 11 have involved him and stated about dealing of sword blows by this accused to the deceased and P.W.8, no contradictions in the earlier statement u/s 161, Code of Criminal Procedure of the said witnesses in relation to the part played by this accused, the aforesaid evidence receives ample corroboration from the post-mortem report and the injury reports of P.Ws.8 and 11, mere delay in sending the F.I.R. cannot affect the very fabric of the prosecution case when the F.I.R. was lodged promptly after the occurrence and that delay in receipt of the F.I.R. by Magistrate is not a ground to reject the prosecution case, previous enmity between this accused and the deceased and the injured is a double edged weapon and absconding of accused after the occurrence and that too for along time, is a relevant conduct u/s 8 of the Evidence Act to find relevancy of the guilty mind of the accused. Accordingly the Trial Court found him guilty of the offence u/s 302, I.P.C. for the death of the deceased and u/s 326, I.P.C. for causing injury by sword to P.W.8. Accordingly sentence of imprisonment for life and rigorous imprisonment for three years was respectively imposed. He was, however, acquitted for the offences under Sections 147/148/34 r1/307/149, I.P.C.

6. The State has challenged the above noted order of acquittal to be against the weight of evidence and proved charge and accordingly submits to set aside the order of acquittal and to convict each of the accused for the various offences for

which charge was framed against them. On the other hand accused/Appellant Ashok alias Gopal supports the order of acquittal of the co-accused (Respondents in the Government Appeal) and criticizes double standard adopted by the Trial Court in finding him guilty of the offence u/s 302 and 326, I.P.C. He also claims for an order of acquittal on appreciation of the evidence in the same manner as it was done for co-accused. Respondents in the "Government Appeal argued to maintain the order of acquittal on the ground that the Trial Court on proper assessment of evidence and taking note of material omissions and contradictions recorded such finding in their favour and in the absence of any glaring circumstance and lapse of a decade in the meantime, this Court should not upset the order of acquittal. In support of their respective contention, each of the parties relied on citations which has been noted in order No. 27 dated 22.7.2008.

7. It is appropriate to mention that both the appeals were heard analogously and disposed of by this common judgment.

8. Respondents in the Government Appeal have relied on the ratio in the cases of State of Orissa v. Jatadhari Lenka and six Ors. (2007) 38 OCR 259 : 2007 XI OLR 187 and State of U.P. v. Atar Singh and Ors. (2008) 39 OCR (SC) 76. In the first case, this Court in a Division Bench declined to interfere with an order of acquittal on the ground that on perusal of the evidence, order of acquittal was found justifiable. In Atar Singh (supra), conviction of the accused was set aside by the Allahabad High Court inter alia on the ground of non-explanation of injury on accused Mohar Singh and his non-arrest on 5.5.1979 when he appeared before the Police Officer and had been sent for medical examination. The State preferred appeal to the Supreme Court. In the above context, the view taken by the High Court being found to be a plausible view, the Apex Court did not interfere with the order of acquittal. In the above context, their Lordship observed that:

The principle to be followed by Appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

Similar view has also been taken by the Apex Court in the Cases of State of Madhya Pradesh v. Bacchudas " Balram and Ors. (2007) 36 OCR (SC) 700 and State of Goa v. Sanjay Thakran and Anr. JT 2007 SC 146. Respondents also relied on the case of State of Orissa Vs. Subash Chandra Rath, in support of the contention that after lapse of considerable period, even if the order of acquittal is unreasonable, the same should not be disturbed. In the cited case, charge for the offence for taking bribe of Rs. 200/- took place in the year 1994. Learned Single Judge without discussion of the facts, circumstance and finding of the Trial Court, disposed of the appeal by making a comment that the act of the accused should be deprecated but the order of acquittal at such belated stage should not be altered. The aforesaid judgment does not lay down any ratio.

9. The accused-Appellant Ashok alias Gopal Das has also relied on the case of Ram Swaroop and Ors. v. State of Rajasthan, (2004) 28 OCR (SC) 638. State of U.P. v. Punni and Ors. (2008) 39 OCR (SC) 531 and State of Orissa v. Dandapani Das and Ors. (2007) 36 OCR 383 in respect of exercising appellate jurisdiction by the High Court against order of acquittal. In the above citations, it has been held that if two views are possible from the evidence on record, then the Appellate Court would not interfere with the view taken by the Trial Court in recording the order of acquittal.

10. The position of law and the principle which emerges from the aforesaid citations is that:

(1) if the view taken by the Trial Court on appreciation of evidence is not found to be illegal, unjust or improper, then even if another view is possible from such evidence, the Appellate Court should not interfere with the order of acquittal.

(2) if the order of acquittal recorded by the Trial Court is on improper interpretation of the evidence whether or not it is perverse, the Appellate Court may consider the evidence and accept the evidentiary value thereof strictly in accordance with law and accordingly either confirm the order of acquittal or record an order of conviction.

(3) if the finding recorded by the Trial Court suffers from perversity, then evidence on record be perused and appreciated to record a finding which is just and proper and in conformity with law.

11. On a bare reading of the impugned judgment, there remains no doubt that the Trial Court has applied different standards for appreciating the evidence with respect to different accused persons. The above quoted few passages are example of that. Apart from that, he lost sight of the fact situation involved in the case and the sequence in which information was passed on to P.W.1 and the circumstance under which statement u/s 161, Code of Criminal Procedure of P.Ws.8 and 11 was recorded. Under such circumstance, it is necessary to re-appreciate the evidence and to find out whether the view expressed by the Trial Court in favour of the acquittal is a reasonable view. It is needless to mention" here that if that is found to be so, then the order of acquittal shall not be disturbed. The same principle is also to be adopted so far as the order of conviction against accused Ashok " Gopal Das is concerned.

12. Before assessing the evidence of P.Ws.8 and 11, the two victims of the occurrence as well as the eye-witnesses to the occurrence, it is appropriate to record relevant portion of the evidence of P.W. No. 13, the first Investigating Officer. In internal page 4 of that deposition, he stated that "I reached at Agarpada hospital at 6.15 P.M. on 3.4.96. Thereafter I examined injured Rajesh and Bigyan at the Hospital. Except Rajesh and Bigyana, I have not examined any other witness at Agarpada Hospital. Except at the hospital, I have not examined injured Rajesh and Bigyana for the second time at any other places. My investigation reveals that as the two injured persons Rajesh and Bigyana were

not able to disclose the occurrence in detail. I preferred to examine them again after they cured." (underlined by us to put emphasis.) P.Ws.8 and 11 were not again examined by any of the Investigating Officers. Therefore, any omission relating to the details of the occurrence cannot be regarded as an improvement upon the previous version made P.Ws.8 and 11.

13. It is the admitted position on record that P.W.1 Rabindra Kumar Jena is the uncle of the deceased. It is also to admitted position on record that he was not an eyewitness to the occurrence. He came to now about the occurrence from the local rumour and thereafter proceeded to Agarpada hospital and there he saw the dead body of his nephew and talked to P.Ws.8 and 11 and that become the basic for him to lodge the F.I.R., Ext.1. Therefore, the Trial Court should have remanded alive to that circumstance while searching for contradictions in the F.I.R. and the evidence of P.Ws.8 and 11.

14. It appears from evidence of Dr. S.N. Panda (P.W.9) that during the course of conducting postmortem examination on the dead body of the deceased, he found (i) sharp cutting incised wound over the skull on left side starting from left ear extending over the occipital area to right side downwards of the size 8" x 3" x brain depth. As a result of that injury, the occipital bone was cut and brain matter was exposed. (ii) incised wound over the back extending from 1" right side of midline to the left side up to the lower angle of the scapula 4" x 11/2" x muscle deep. (iii) sharp cutting injury on the left hand from posterior aspect of MP joint of index finger to interior aspect of the size 2 11/2 x 1" bone depth. He opined that injury No. 1 is possible by sword and injury Nos. 2 and 3 are possible by Bhujali. He opined that death was due to shock and hemorrhage because of injury to vital organ like Brain and death was calculated to be within 24 hours from the time of postmortem examination conducted on 4.4.1996 at 11.00 A.M. as evident from postmortem report, Ext.6. In the cross-examination, P.W.8 opined that injury No. 1 is possible if-someone while going on a motor-cycle falls down and dashes against sharp edged broken glass or sharp edge of boulder. He has also opined in a similar manner with respect to the injury Nos. 2 and 3. The aforesaid opinion of the doctor is of no relevance when it is not the case of either of the parties that the deceased suffered those injuries by dashing against sharp edged glass or boulder. Apart from that the aforesaid opinion is a general opinion, inasmuch as, all the three injuries could not have been possible on a single fall. Be that as it may, the finding of the Trial Court regarding homicidal death of the deceased is not disputed before us in course of argument. We, therefore, accept that evidence and the finding recorded by the Trial Court on the homicidal death of the deceased.

15. P.W.12, Dr. Pravat Kumar Sahu, is the doctor, who granted injury certificate in favour of P.Ws.8 and 11. He deposed that on 3.4.1996 at 4.25 P.M. he examined P.W.8 and found-

(i) Incised wound involving tip and both nostrils of nose, both the lips and that he noticed chin, skin and upper part of muscles of lower lip and chin is absent.

The size of that injury was measured to be 4" x 3" x 1 1/2" and might have caused profuse bleeding, dislocation of upper two central incised with cutting wound of upper gingival with bleeding;

(ii) incised wound deep to muscle horizontal and outer aspect of shoulder joint on anterior auxiliary fold 1.5" below the left side clavicle. Dimension of that injury was 6"x31";

(iii) Incised wound on anterior medial part of left upper arm 2" below tip of shoulder. Dimension of the injury was 4" x 1" x 1 1/2".

He opined that the patient was referred to District Headquarters Hospital, Bhadrak after the aforesaid examination. He also opined that the injuries were possible by heavy sharp cutting weapon. He also stated that if the injuries found on the body of P.W.8 would not have been treated properly, then it could have caused death in ordinary course of nature. He proved the Injury Report, Ext.8.

16. In case of Bigyan Mohanty (P.W.11), he found (i) abrasion 2" x 1.8" right to the centre of forehead with oozing of blood (ii) incised wound 1/2"x 1/4" x 1/4 on the right ala of nose and deep to floor of nostril; (iii) abrasion 2" x 2" of molar area of right face and (iv) numerous pinpointed punctured wound involving forehead and right face and red in colour.

Amongst the aforesaid injuries, he found that the incised wound being caused by sharp cutting weapon whereas the rest of the injuries by hard and rough object. Accordingly, he proved the injury report, Ext.7. In the cross-examination, suggestion by the defence that the injuries are possible by fall was agreed to by the doctor with added explanation that in the case of P.W.8, there would have been some more injuries. He denied the suggestions of the defence that both the injured persons were unconscious. Similarly he denied the suggestion of the defence that the injury was not serious. On the other hand, doctor said that "at the time of my examination, both the injured persons were serious". In the impugned judgment trial Court has not disbelieved this part of the prosecution case. In other words, P.Ws.8 and 11 were believed by the Trial Court to be the injured persons and also corroborating evidence of the doctor P.W.12.

17. Prosecution tendered direct evidence of P.Ws.8 and 11 as the two injured persons who witnessed the occurrence. Prosecution also tendered evidence of P.W.7, a post-occurrence witness, who arrived at the spot soon after the occurrence and saw the accused persons running away with weapons and arranged for shifting of the injured persons to hospital. In addition to that, prosecution also relied on the evidence of P.W.5 with a view to prove the inculpatory extra judicial confession of accused Sushant. Rest of the evidences tendered by the prosecution is complimentary and supplementary to the evidence of the aforesaid four witnesses.

18. In a foregoing paragraph it has been recorded that the deceased suffered homicidal death because of ante-mortem injuries which are possible by weapons

like sword and "Bhujali". Ext.6 is the Post-Mortem Report. Similarly, from the evidence of P.W.12 and the injury reports Exts.7 and 8 it is proved that P.Ws.8 and 11 are the two injured persons. Evidence of P.Ws.7, 8 and 11 clinchingly proves that the deceased. P.W.8 and P.W.11 suffered injuries at the same place, i.e., the spot of occurrence which situates about half a kilometer away from Kadabaranga Chhak of Bhadrak-Agarpada Road, and that such occurrence took place on 03.04.1996 at about 4.00 p.m. when the deceased and the injured persons were going on a Rajdoot Motorcycle. Such part of the evidence of the aforesaid three witnesses remained unshaken during the trial and that aspect is not disputed before us by any of the accused persons. Being posted with such admitted facts and circumstances, evidence of the three witnesses is to be appropriately appreciated regarding participation of the accused persons in the alleged occurrence.

19. In his examination in chief, P.W.8 deposed that at the spot all the accused persons came from behind a mango tree. Accused Ashok was holding a sword, accused Sushant was holding a "Bhujali" and rest of the accused persons were holding cycle-chains. On seeing them, P.W.11, who was driving the motorcycle, out of fear, slowed the motorcycle. Accused Ashok gave a sword blow to P.W.8 which hit on his face. P.W.11 in nervous condition turned the motorcycle below the road to its right side and then he fell down so also the deceased and P.W. No. 8 Leg of P.W.11 remained under the motorcycle At that time accused Mahendra and Somanath pressed the deceased by means of cycle-chains and accused Ashok dealt a sword blow on the backside of the head of the deceased the latter cried due to pain. At that time accused Sushant gave "Bhujali" blow on the left scapula of the deceased and when he dealt the second blow by "Bhujali the deceased tried to catch hold of that "Bhujali" and that is how he sustained injuries on his left hand. On seeing this assault, P.W.8 tried to get up from the ground and at that time accused Ashok gave a sword blow to the left side side chest (below the arm). Similarly, when P.W.11 tried to run away accused Pitambar gave him 3 to 4 kicks and accused Sushant gave "Bhujali" blows on the face of P.W.11. At that moment a trekker was coming on the road. Seeing that trekker.all the accused person ran away towards Kusunpur by crossing the road and then P.W.7 and one Debendra Padhi (not examined) arrived there in a motorcycle. Seeing the condition of the deceased and P.Ws.8 and 11 they stopped the motorcycle. P.W.7 enquired from them about the occurrence and P.W.8 narrated. At that time a mini bus namely "Maa Santoshi" was coming on that road. P.W.7 stopped that vehicle and the deceased as well as P.Ws.8 and 11 in injured conditions were taken to Agarpada P.H.C. in that bus. Then the deceased as well as P.W.11 had already lost their senses. Rabindra (P.W.1) is the uncle of the deceased. He arrived at that hospital and P.W.8 narrated about the occurrence. In the process of narration P.W.8 named for accused persons but did not name accused Pitambar because he was not aware of his name. He further deposed that at Agarpara hospital the doctor declared Padamalochan to be dead, and after the preliminary treatment P.Ws.8 and 11 were shifted to Bhadrak

District Hospital. He however was removed from Bhadrak Hospital to S.C.B. Medical College and Hospital, Cuttack for further treatment. He also described about the wearing apparels of the deceased and the injured persons and identified them in course of the trial. He also stated about the rivalry due to election of the college union. He also stated that all the accused persons at the time of occurrence were uttering to kill all the three persons.

20. He was cross-examined by four sets of defence counsel representing different accused persons. In the cross-examination made by accused Mahendra and Pitambar, it was brought out from his mouth that in course of his examination by the police at Agarpara hospital he did not state that accused Mahendra and Somanath pressed Padmalochan by cycle-chains. He denied to the suggestion that he did not state before the police that such accused persons were holding cycle-chain or that accused Pitambar gave two to three kick blows to P.W.11 or about arrival of P.W.7 in the motor-cycle and he narrated about the incident to them and about the manner in which they were shifted to Agarpara hospital. In course of the cross-examination by accused Gopal Das, he described about the injuries in the mouth affecting the teeth. He stated that all the three fell down towards right side of the motorcycle about two feet apart from each to her and the motorcycle had fallen in between the earthen portion of the road and Nayanjori. He further stated that when the trekker passed on the road, he did not shout but only raised his hands to stop the trekker, but it did not. He denied to the suggestion that the accused persons chased and assaulted him and he fell down and became senseless. He also denied to the suggestion that he did not state to the I.O. that accused Gopal Das was holding a sword, accused Sushant holding a "Bhujali" and others were holding cycle-chains and that accused Gopal Das gave a sword blow to his nose (face) and rest part of the occurrence as stated in the examination-in-chief. In course of the cross-examination by accused Sushant Das he stated that though he does not know whether accused Sushant is a student of Agarpara College and his educational qualification, but he knew Sushant Das two to three years before the date of occurrence. In course of the cross-examination by accused Somanath, he stated that P.W.7 carried him to the bus and notwithstanding the injury on the lips he was capable of speaking.

21. In his examination-in-chief, P.W.11 also deposed in the same manner like P.W.8 about presence of the accused persons with weapons at the spot and also about the occurrence of assault. He said that when sword blow was given to P.W.8 he (P.W.11) lost balance of the motor-cycle and it went off the road and all the persons riding the motor-cycle fell down. Thereafter he also saw assault by each of the accused persons in the same manner like P.W.8. In that process, he stated that when he tried to come out from under the motor-cycle, accused Pitambar gave 4 to 5 leg pushes to his belly and accused Sushant gave 2 to 3 Bhujali pushes on different parts of his face, so also a Bhujali blow to his nose. On sustaining that injury, he became senseless and regained his sense inside a Mini Bus which carried him to Agarpara hospital. At that hospital, P.W.1 talked with him and he narrated about the incident. He was referred to the Bhadrak

hospital together with P.W.8, but before that, police arrived at the Agarpara hospital and examined him. He also learnt at Agarpara that Padma Lochan (deceased) succumbed to the injuries. P.W.11 further stated that he was treated at Bhadrak hospital though P.W.8 was shifted to S.C.B. Medical College. He also identified the wearing apparels and stated about the rivalry due to college election. In the cross-examination by accused Mahendra and Pitambar, he stated that on seeing accused Gopal Das (Ashok Das) holding a sword, he got frightened and when the sword blow was dealt on the face of P.W.8, he was more frightened. He further stated that accused Somanath pressed back of Padma Lochan by cycle-chain and accused Mahendra pressed both the legs of Padma Lochan by cycle-chain and that he felt pain on belly when leg push was given and he told that fact to the doctor. He further stated that by the time of occurrence though he knew Pitambar Giri but he did not know his name. He was also confronted with the statement u/s 161, Code of Criminal Procedure about the occurrence of assault with the suggestion that he did not make any such statement to the Investigating Officer. In the cross-examination made by accused Gopal Das, accused Sushant and accused Somnath, save and accept repeating the questions relating to the occurrence indifferent manner and thereafter confronting such statement on the ground that no such statement was made before the police, no other material could be brought out from his mouth.

22. Corroboration to the evidence of P.Ws.8 and 11 is available from the postmortem report, Ext.6 and the injury certificates Exts.7 and 8. The nature of the injuries sustained by P.Ws.8 and 11 is such that they could not have been self-inflicted nor such injuries would have been possible on all of them due to single fall from the motorcycle. Their admission to the Agarpada hospital soon after the occurrence is evidence of the fact that the occurrence took place in the manner P.Ws.8 and 11 experienced and deposed. P.W.7, the post occurrence witness in his evidence has corroborated by stating that he saw P.Ws.8 and 11 and the deceased lying in injured condition and the accused persons running away with weapons. He also stated about shifting of the deceased and the injured persons to the hospital. That is the basic fact involved in the case. That is the basic fact has not been dislodged in the process of lengthy and searching cross examination of the aforesaid three witnesses.

23. The Trial Court put much emphasis on omission in the F.I.R. names of accused Pitambar and Mahendra. As noted earlier, P.W.1 lodged the F.I.R. after gathering information from P.Ws.8 and 11 and then both the aforesaid witnesses were severely injured and undergoing treatment. Therefore, omission in details about the manner of assault by particular weapons and absence of name of one or two accused does not make the evidence of P.W.8 and 11 unreliable. It is the trite law that F.I.R. is a piece of document by which information is provided to the Investigating Agency about commission of a cognizable offence and it need not be encyclopedia of the details of the occurrence and the genesis thereof. See the case of Superintendent of Police, C.B.I. and Ors. v. Tapan Kumar Singh, (2003) 25 OCR (SC) 316. Therefore, the reasoning adopted by the Trial Court in

favour of an order of acquittal is not only bad in law but also lacks proper factual appreciation by not taking note of the circumstance under which the information was gathered by P.W.1 to lodge the report. In other words, the omission as noticed by the accused persons and capitalized by the Trial Court, even if exists, that is not fatal to the prosecution and no advantage can be granted to the accused on account of that. Thus, in this case the view taken by the Trial Court is neither a possible nor plausible one.

24. As noted earlier, the Trial Court has taken an adverse view against the prosecution for two days delay in signing the F.I.R. by the S.D.J.M. At the same time, while recording the order of conviction against accused Ashok " Gopal, learned Addl. Sessions Judge held that such delay is not fatal, because the F.I.R. was lodged by P.W.1 promptly after the occurrence. To come over the aforesaid contradictory finding recorded in the impugned judgment, this Court, on perusal of evidence and the lower Court record, finds that P.W.13 did not mention in the case diary about the time of dispatch of F.I.R., though on the formal F.I.R., Ext.1/3, it is noted at the top that the F.I.R. was dispatched on 4.4.1996. Be that as it may, there is no dispute between the parties that the occurrence took place at about 4.00 P.M. and soon thereafter F.I.R. was lodged at Agarpada Police Station by about 5.45 P.M. There is no material on record to show or suggest that the F.I.R. was tampered or it was fabricated at a later date by ante-dating it. That being so, either the delay in sending the F.I.R. by P.W.13 or the delay in placing it before the S.D.J.M. by the Court Sub-Inspector of Police or delay in signing the F.I.R. by S.D.J.M. on 6.4.96 is of title consequence so as to doubt the prosecution. Thus, such delay in this case is not fatal to the prosecution and the acquitted accused persons could not have been granted any benefit on that account. Similar view has been taken in the case of Rati Khora and Anr. v. State, (1996) 11 OCR 399.

25. Accused Susanta was arrested on 6.4.96. Learned Addl. Sessions Judge found P.W.5 to be unreliable in proving the extra-judicial confession only on the ground that he stated that he detained the accused and handed over to the police, though P.W.13 stated in his evidence that he chased and arrested that accused. In the above context, evidence of P.W.13 at internal page 3 of his deposition is that "xxx during investigation I learnt from reliable source that accused Susanta Das is proceeding towards Manguli from Both side. So I immediately proceeded to Bonth and on the way at Ambagadia caught red handed accused Susanta Das with the help of public Bijay Das and Amulya Rout. I Examined the said accused and arrested him. "P.W.5 is that Amulya Kumar Rout. His deposition is to the effect that near the tiffin shop of Bijaya Das at about 3 to 3.30 P.M. on 5.4.1996 he saw accused Susanta in a nervous mental condition and on the query of P.W.5 he stated that together with the other accused persons they assaulted the deceased and the injured persons and also disclosed to go away to Rourkela. P.W.5 further stated that "Thereafter we detained Susanta Das there. When police reached three on patrol duty within half an hour, we handed over accused Susanta to police." On a conjoint reading of the

above quoted evidence of P.Ws.5 and 13, it does not appear that P.W.5 has stated falsehood in relation to extra-judicial confession made by accused Susanta or relating to his arrest. Under such circumstance, the finding recorded by the Trial Court appears to be on the basis of no evidence for doubting the veracity of P.W.5.

26. It appears from the evidence of P.W.13 that on 6.4.1996, as per the order of the Superintendent of Police, he handed over charge of investigation to P.W.14 (internal page 3 of that deposition). Thus, there was no scope for P.W.13 to make further examination of P.Ws.8 and 11 in relation to the details of the manner in which the occurrence took place and about the details of the participation of each of the accused persons. On the other hand, it appears from the evidence of P.W.14 that he did not re-examine or further examined P.Ws.8 and 11. Under such circumstance, the omission noted by the Trial Court from the confronted statement u/s 161 Code of Criminal Procedure of P.Ws.8 and 11 are immaterial so as to doubt their credibility relating to participation of the acquitted accused persons in causing death of the deceased and inflicting the injuries to P.W.8 and 11 in furtherance of their common object. The same analogy is also applicable relating to non-mention in the statement before the police regarding the weapons possessed by each of the accused. In that respect, as noted earlier, the Trial Court has lost sight of the relevant circumstance and unreasonably capitalized on the aforesaid omissions.

27. Argument of the accused-Respondents that the aforesaid finding of the Trial Court is sustainable is not acceptable because of the above pointed lacuna. The view expressed by the Trial Court in furtherance of their acquittal also suffers from improper assessment of evidence and therefore, the view taken by the Trial Court in their favour cannot be regarded as a reasonable and possible view available from the evidence on record. Argument of the accused-Appellant Ashok " Gopal Das is to adopt the finding of the Trial Court recorded in favour of the acquitted accused and to grant the same benefit to him on account of delay in dispatch of the F.I.R., discrepancy in the evidence of P.Ws.8 and 11, unreliability of the evidence of P.W.5 relating to extra judicial confession etc. Without repeating the facts and evidence and appreciation thereof, it can be said that the aforesaid argument is unsustainable because the view taken by the Trial Court in favour of the acquitted accused is not on the basis of sound and proper appreciation of evidence and even the view taken by the trial Court cannot be regarded as a reasonable or possible view emerging from the evidence on record.

28. Learned Standing Counsel while pursuing Government Appeal and opposing the relief claimed in the Criminal Appeal, replied to the contention of the accused persons and argued that in the present case conjoint attack of the accused persons on the deceased and P.Ws.8 and 11 by emerging from behind a mango tree and on being armed with weapons is sufficient to prove the charge u/s 149, I.P.C. In the above context, the alternative argument of the accused persons was to the effect that sharing of common object by the accused persons

has remained not proved. In the above context, in the case of Rajendran and Anr. v. State of Tamil Nadu, 2004 (3) Supreme 284, the Apex Court has held that once a person is found to be a member of unlawful assembly and actively participated in the commission of offence in prosecution of common object, he cannot escape liability on the plea that he did not inflict any serious injury. In other words, his liability u/s 149 is made out. In the case of Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal, , the apex Court has propounded that for attracting the provision u/s 149, I.P.C., it is not necessary that there should be pre-concert by way of meeting of persons of unlawful assembly. If common object is adopted by all persons and shared by them, it shares the award of common object.

29. In this case, participation of the accused persons in the occurrence has been deposed by P.Ws.8 and 11 and there is no contradictions in that respect. According to such evidence (i) accused Ashok " Gopal gave a sword blow to P.W.8 on his face. He also dealt a sword blow on the backside of the head of the deceased. He also gave another sword blow to P.W.8 on the left side of chest (below the arm) (ii) Accused Mahendra and Somanath with the use of cycle-chain possessed by them pressed the deceased while Ashok dealt the sword blow (iii) Accused Pitambar dealt 3 to 4 kicks/leg pushes to P.W.11 and (iv) accused Susanta inflicted injury by Bhujali on the face of P.W.11. The aforesaid act of assault by each of the accused persons when they were in a group clearly speaks that they had common object to commit the alleged violence. As earlier noted, the aforesaid evidence of P.Ws.8 and 11 has been corroborated by the medical evidence so also from the spot visit recorded and seizure of incriminating materials from the spot and the wearing apparels and presence of human blood in different articles as per the report from the S.F.S.L., Exts.16, 17 and 18. Even if evidence of P.W.5 relating to extra-judicial confession is not relied on, then also that does not affect the prosecution to prove the occurrence. Similarly, evidence of P.Ws.1 and 7 relating to the occurrence being merely hearsay, that evidence is of less relevance except relating to the fact of giving information to the police by P.W.1 and witnessing running away of the accused persons from the scene of crime as seen by P.W.7. Their evidence is needed for corroboration and such corroboration is amply available from such evidence of P.Ws.1 and 7.

30. On analysis of the evidence on record and the finding recorded by the Trial Court, this Court set aside the order of acquittal of accused Susanta Das, Pitambar Giri, Somanath Swain and Mahendra Jena and maintain the order of conviction of accused Ashok Das " Gopal Das in a modified manner. Accordingly, all the aforesaid five accused persons are found guilty of the offence u/s 302/149, I.P.C. for the murder of the deceased. They are also found guilty of the offence u/s 148, I.P.C. and also 326/149, I.P.C. for causing grievous injury to P.Ws.8 and 11 by dangerous weapons. So far as the charge u/s 147 is concerned, in view of the conviction of the accused persons u/s 148, I.P.C, conviction u/s 147, I.P.C. is unwarranted. So far as the offence u/s 307/149, I.P.C. is concerned, the evidence of the doctor is only to the effect that the

injured could have died if proper treatment would not have been given. He did not give a opinion that the injury was sufficient in ordinary course of nature to cause death. Therefore, taking that aspect into consideration, all the accused persons are acquitted of the charges u/s 307/149, I.P.C. For their conviction u/s 302/149, I.P.C., each of the accused persons is sentenced to imprisonment for life and therefore no separate sentence is awarded to them for the offences under Sections 326/149 and 148 I.P.C.

31. Accordingly, the Government Appeal is allowed and the Criminal Appeal is dismissed. The accused persons, who are on bail in the Government Appeal, are directed to surrender within four weeks to serve the sentence, and in case of default the Court below is directed to secure their presence in accordance with law for their remand to jail custody. As it reveals on record, accused/Appellant in the Criminal Appeal is in jail custody. The period of detention in jail by each of the accused persons be set off in accordance with the provisions in Section 428, Code of Criminal Procedure.

N. Prusty, J.

32. I agree.