

(2009) 04 OHC CK 0068

In the Orissa High Court

Case No : Criminal Appeal No. 182 of 2004

Bandhana Barla and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 10-04-2009

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2009) 1 ILR (Ori) 712

Hon'ble Judges : Pradip Mohanty, J; L. Mohapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—This appeal is directed against the judgment and order dated 27.4.2004 of the learned Sessions Judge, Sundargarh in Sessions Trial No. 174 of 2003 convicting all the three Appellants for commission of offence u/s 302 read with Section 34 of the Indian Penal Code (in short "IPC.") and sentencing each one of them to imprisonment for life and fine of Rs. 5,000/-.

2. The Appellants, the deceased and one Karma Barla are brothers. There was a partition between them and they were possessing their respective shares. Kamala Barla died without leaving behind any legal heir and his share was distributed among the surviving four brothers. The deceased had complained that he had not been given an equitable share and for that reason there was dispute between the three Appellants and the deceased. On 8.7.2002 morning, the bullocks of the deceased trespassed into the paddy field of one of the Appellants for which all the three Appellants assaulted the deceased in his house. Thereafter, the three Appellants called the deceased to go to the police station to report the matter and they were accompanied by the first and second wife of the deceased. On the way near Andha Behena the Appellants suddenly attacked the deceased by means of lathi and knife and killed him. The second wife of the deceased tried to save him but she was also assaulted. The second wife of the

deceased Sukanti, P.W.1, lodged the F.I.R. before the Officer-in-Charge of Kinjirkela Police Station whereafter investigation was taken up. On completion of investigation charge sheet was submitted against the three Appellants for commission of offence u/s 302/34 IPC.

3. The prosecution in order to prove the charges, examined fifteen witnesses out of whom P.W.1, the informant and P.W.14 Samari Barla are the second and first wife of the deceased respectively. They are eyewitnesses to the occurrence. P.W.2 and 5 had been examined as eyewitnesses to the occurrence, but they turned hostile. P.W.3 is the Sarpanch of the village, who had gone to the police station to call the Police Officers. P. Ws.4 and 8 were examined to prove the prior enmity between the Appellants and the deceased. P. Ws.11 and 12 were examined to prove the seizure of weapon of offence u/s 27 of the Evidence Act. P.W.6 is the doctor, who conducted postmortem examination and P.W.7 escorted the Appellants to the hospital. P.W.9 is the Constable who accompanied the dead body for postmortem examination and P. Ws.10, 13 and 15 are the Investigating Officers. The plea of defence is complete denial and false acquisition. A plea was also taken to the effect that the deceased had married twice in his life and there was dispute between the first and second wife and that he might have been murdered by one of the wives. The trial court on the basis of the evidence of the eyewitnesses coupled with other materials available on record found all the Appellants guilty of the charges and convicted them thereunder.

4. Shri J.R. Dash, the learned Counsel appearing for the Appellants assailed the impugned judgment on several grounds. It was contended by the learned Counsel Shri Dash that P. Ws.1 and 14 are the two wives of the deceased and claimed to have witnessed the occurrence. The occurrence took place in two parts i.e. the assault on the deceased by the Appellants in the house of the deceased and the murderous assault on the deceased on the way to the police station. P.W.1 in her evidence has ruled out the presence of P.W.14 so far as second part of the incident is concerned and, therefore, P.W.14 cannot be accepted as an eyewitness to the occurrence.

So far as P.W.1 is concerned, it is contended that because of the inconsistencies available in her evidence, she cannot be relied upon. It was further contended by the learned Counsel that even P.W.1 did not allege that all the three Appellants assaulted the deceased and there being no material to support the charge u/s 34 IPC, individual conduct of the three Appellants is required to be seen. According to the learned Counsel, if the evidence of P.W.1 is accepted, the Appellant Jagannath Barla " Jagar can only be convicted and the other two Appellants are entitled to an order of acquittal.

The learned Counsel for the State relied upon the evidence of P.W.1 and other materials available on record and submitted that there is no reason for discarding the evidence of P.W.1 who has specifically implicated all the three Appellants to have taken part in assaulting the deceased. According to the learned Counsel for the State, the common intention can develop at the spur of the moment and the

evidence of P.W.1 clearly proves the charge u/s 34 IPC.

5. Undisputedly the prosecution examined P. Ws.1 and 14 as eyewitnesses to the occurrence and also examined P. Ws.2 and 5 as independent eyewitnesses to the occurrence. P.W.1 is the second wife of the deceased and she is also the informant. She in her deposition has stated that on the date of occurrence her husband, the deceased, had taken the bullock for grazing but when he was returning, those bullocks entered into the paddy fields of the Appellants and for that reason there was quarrel between the Appellants and the deceased. Her husband returned from the land at about 8.00 A.M. At that time the Appellants were present in her house. While she and P.W.14 were proceeding to take bath hearing some hue and cry they returned to their house and found that their husband had been assaulted by the Appellants on the head which had caused bleeding injury. Thereafter, all of them decided to go to the police station and after covering half a mile, suddenly Appellant Jagannath and Appellant Nehuru declared that they would kill the deceased and Appellant Jagannath assaulted the deceased by means of a lathi used as the handle of an axe. Appellant Bandhana caught hold of the deceased and Appellant Nehuru stabbed the deceased by means of a knife on his chest. She was also assaulted in that process when she tried to rescue the deceased. She has further stated, at that time P.W.14 ran away from the spot saying that she would inform the villagers. In cross-examination she has stated that when Jagannath alias Jagar and Nehuru declared that they shall commit murder of the deceased, P.W.14 fled away towards the village and by the time P.W.14 returned, her husband was already dead. Relying on this statement of P.W.1, it was contended by the learned Counsel that P.W.14 had not seen the second part of the incident in course of which it is alleged that the deceased died. We have carefully examined the evidence of P.W.14, the first wife of the deceased, and we find that she is a witness to the first part of the incident and had also accompanied the Appellants, the deceased and P.W.1 to the police station. Her claim that she had seen the occurrence on the way to the police station is negated by P.W.1. We therefore agree with the contention of the learned Counsel for the Appellants that P.W.14's claim to have seen the occurrence on the way to the police station is not free from doubt. P. Ws.2 and 5 are the other two witnesses who had been examined by the prosecution as eyewitnesses to the occurrence. P.W.2 in his deposition has stated that on the date of occurrence after 9 A.M. while he was ploughing in his field, he was informed by P.W.1 that the Appellants are killing the deceased whereafter he along with three others went to the spot. They saw the deceased lying on the ground in an unconscious condition. All the three Appellants were present there. He saw Jagannath assaulting the deceased by means of a lathi. At that time the deceased was on the verge of death. This witness was declared hostile. P.W.5 is another witness who was examined by the prosecution as an eyewitness to the occurrence. He has corroborated the evidence of P.W.2 to the extent that when they went to the spot, they found Jagannath alias Jagar assaulting the deceased by means of lathi, but this witness was also declared

hostile. The evidence of P. Ws.2 and 5 is acceptable to the extent that at the time of incident all the three Appellants were present at the spot and one of the Appellants namely, Jagannath alias Jagar was assaulting the deceased by means of a lathi. So far as the contention of the learned Counsel for the Appellants that the evidence of P.W.1 is full of inconsistencies, we find that she in the FIR. had alleged that on the way to the police station suddenly Appellants Jagganath and Bandhana declared to kill the deceased and Jagganath assaulted the deceased by means of a lathi he was holding. Appellant Bandhana caught hold of the hands of the deceased and when she tried to rescue the deceased, Appellant Nehuru pulled her to a distance. Appellant Jagannath while assaulting the deceased by means of a lathi, the lathi broke for which the said Appellant Jagannath brought out a knife from his pant pocket and stabbed the deceased at different places. In her deposition before the court she has stated that Appellant Nehuru stabbed the deceased by means of a knife on his chest. This is the only inconsistency in the evidence of P.W.1 that has been pointed out by the learned Counsel for the Appellant. According to the learned Counsel, if the F.I.R. story is accepted, it is the Appellant Jagannath who alone assaulted the deceased by means of a lathi and thereafter by means of a knife and other two have no role to play. It was further contended by the learned Counsel that in absence of any evidence to satisfy the ingredients of Section 34 of the Penal Code, the two Appellants namely, Bandhana Baral and Nehuru Barla are entitled to an order of acquittal. The learned Counsel for the Appellants also drew attention of the Court to the charge and submitted that there is nothing in the charge to show that in furtherance of common intention all the three Appellants assaulted the deceased.

We have carefully examined the F.I.R. and the evidence of P.W.1. It is true that in the F.I.R. Appellant Jagannath is alleged to have assaulted the deceased first by means of a lathi and thereafter by means of a knife whereas in her evidence P.W.1 has stated that Appellant Nehuru assaulted the deceased by means of a knife. Such inconsistency is natural considering the fact that P.W.1 was examined in court on 15.9.2003 whereas the occurrence took place in July, 2002. The witness having been examined almost one and half years after the incident, some inconsistency appearing in the evidence of P.W.1 is natural. But the evidence of P. Ws.1 and 14 clearly establish that the Appellants first assaulted the deceased in his house and when they were proceeding to the police station to report about the matter, two of the Appellants namely, Jagannath and Bandhana declared to kill the deceased. The evidence of P.W.1 clearly shows that after making such declaration, Jagannath assaulted the deceased by means of a lathi, Bandhana caught hold of the hands of the deceased and Nehuru stabbed the deceased by means of a knife. It was contended by the learned Counsel that in order to attract Section 34 of the Penal Code, it is necessary that common intention of each one of the participants should be known to the rest of them and shared by them. Reliance has been placed by the learned Counsel on the decisions of the Apex Court in the case of Parasa Raja Manikyala Rao and Anr. v. State of A.P. (2004) 27 OCR (SC) 206, Ramakanta Panda and Others Vs. Smt.

Satyabhama Panda, and Krishnan and Anr. v. State represented by Inspector of Police (2003) 26 OCR (SC) 159. In the aforesaid three decisions the Supreme Court as well as this Court observed that common intention may develop at the spot but there must be evidence showing pre-arranged plan and prior concert. It is necessary that intention of each one of the participants be known to the rest of them and shared by them. Mere presence of a person at the time of commission of an offence by his confederates is not enough. There is no quarrel about such proposition of law which has been a settled law for more than three decades. If the evidence of the eyewitnesses namely, P. Ws.1 and 14 are examined carefully, it will be found that the Appellants had assaulted the deceased in his house first and thereafter on the way to the police station two of the Appellants declared to kill the deceased and all the three Appellants participated in commission of the offence. They were armed with lathi and a knife. Therefore, their intention is very clear from the fact that all the three Appellants participated in commission of the offence. We are therefore of the view that not only there was common intention of each one of them but also they shared the common intention. The charge also clearly shows that all the three Appellants committed murder of the deceased intentionally in furtherance of their common intention. The evidence of P.W.1 is corroborated by the evidence of P.W.6, who conducted the postmortem examination. In course of postmortem examination, P.W.6 found as many as 16 injuries out of which seven are incised wounds and the rest are abrasions and bruises. P.W.6 was of the opinion that all the injuries were antemortem in nature and the cause of death is haemorrhage and shock and also injury to the liver and lungs. On the requisition of the police he also opined that the injuries could be caused by the weapon used by the Appellants. Apart from the above evidence, the evidence of P.W.8 shows that the Appellants and the deceased had previous enmity which ultimately resulted in the unfortunate incident. The knife which had been used for the purpose of assaulting the deceased was sent for chemical examination and human blood was found having the same group as that of the deceased, but there is no explanation by the Appellants as to how the human blood of origin belonging to the deceased could be found on the knife seized from them. In view of the discussions made above, we find that the prosecution has been able to prove through P. Ws.1 and 14 that the Appellants assaulted the deceased in his house first and when they were proceeding to the police station on the way two of the Appellants declared to kill the deceased. The prosecution has also been able to prove through the evidence of P.W.1 that all the three Appellants participated in commission of the offence and their presence at the spot was seen by the two hostile witnesses namely, P. Ws.2 and 5. The prosecution has also been able to prove that the evidence of P.W.1 is corroborated by the medical evidence as well as the chemical examination report. Having found no force in each of the contentions of the learned Counsel for the Appellants, we are of the view that there is no infirmity in the impugned judgment convicting all the three Appellants for commission of the aforesaid offence.

The appeal being devoid of any merit, is dismissed.