

(1969) 01 OHC CK 0016

In the Orissa High Court

Case No : Criminal Appeal No's. 170 and 171 of 1966

Bansidhar Sahu and Bhramar Jena and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 16-01-1969

Acts Referred:

Penal Code, 1860 (IPC) — Section 100, 148, 302, 323

Citation : (1969) 35 CLT 278

Hon'ble Judges : S.K. Ray, J;G.K. Misra, J

Bench : Division Bench

Advocate : B.N. Hiswal, in Criminal Appeal No. 170 of 1966 and H. Kanungo, S. Kr. Dey and P. Misra, in Criminal Appeal No. 171 of 1966, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—In all, nine accused persons stood trial. In the judgment they would be referred to as accused in the order they stand in the cause title of the judgment. Accused No. 9 has been acquitted. Accused Nos. 1 to 8 have been convicted u/s 148, Indian Penal Code and each has been sentenced to R.I. for one year. Accused No. 1 has also been convicted u/s 302, Indian Penal Code and sentenced to R.I. for life. The sentences to run concurrently. Accused Nos. 2, 4 and 6 have been convicted u/s 323 Indian Penal Code and each of them has been sentenced to pay a fine of Rs. 200/- and in default to undergo R.I. for four months each. Out of the fine if realized half is to be paid as compensation to Labani Bewa (p.w. 5), the widow of Akuli Samal (the deceased). Accused Nos. 1 to 7 have filed Criminal Appeal No. 171 of 1966 and accused No. 8 has filed Criminal Appeal No. 170 of 1960. Both the appeals have been analogously heard as they arise out of the same judgment.

2. The prosecution case, as presented at the stage of evidence, runs thus : On 25-7-1965 some time before the sunset Baidhar Jena (p.w. 7) with his labourer the deceased Akuli Samal was working in a jute field at a distance of about 200

cubits from his house. Accused Sanatan was standing on the village road to the north of the jute field which would also be at a distance of about 200 cubits from the jute field. Sanatan started abusing p.w. 7 and the deceased. On protest there was exchange of hot words. Then all the accused persons armed with lathis came towards the jute field. They proceeded to attack p.w. 7. The deceased intervened and dissuaded the accused persons from attacking p.w. 7. Accordingly accused No. 1 dealt a lathi blow on the head of the deceased who fell down on the ground. Some of the other accused persons including Accused Nos. 2, 4 and 6 assaulted the deceased. P.w. 1 the brother of the deceased, p.w. 6 the son-in-law of the deceased, p.w. 2 the wife of p.w. 7, and p.w. 3 the widowed sister-in-law of p.w. 7 came to the spot hearing the hulla. While they were carrying p.w. 7 towards this House, p.w.s. 2, 3 and 6 were assaulted. The accused persons also assaulted p.w. 4 the mother of Baidhar. P.w. 8 the mother of the deceased was also assaulted. The accused persons then went to the Harijan Sahi and gave also lathi thrusts to the door-leaves of the deceased and p.w. 1 who were Harijans. They assaulted p.w. 5 also. Thus the accused persons indiscriminately went, on assaulting the relations of the deceased and p.w. 7 and attacked these houses. P.w. 1 lodged the F.I.R. (Ext. 9) in the Police Station next morning. The deceased died at the spot after some hours of assault. There were post-mortem examination of the deceased and necessary investigation. The accused persons did not plead guilty. Accused No. 2 took the plea of alibi which has not been accepted by the learned Sessions Judge, and this plea has not been pressed by Mr. Kanungo in this Court. All the accused persons admit that the occurrence took place. They however say that the prosecution party was the aggressor and attacked the accused persons. The positive story on behalf of the defence is presented thus. Accused Sanatan had been to the house of Alekh Sadangi for getting some butter. While returning he found that p.w.s. 1 and 6 others including the deceased were creating bulla in the house of Uttam Das. It is to be noted that we are not banking on the accuracy of the measurements given in the spot map. The spot map is referred to merely for the purpose of clarification. The house of Uttam Das and Alekh Sadangi stand on the opposite side of the village road, towards the west of the village. The house of p.w. 7 stands towards the eastern side of the village. The jute field marked in the spot map would be at a distance of about 200 cubits both from the Jenasahi tank and the house of p.w. 7 and the shop of Kulamani which is adjacent to it. When some of the members of the prosecution party were creating bulla in the house of Uttam Das, accused Sanatan intervened. P.W. 7 directed his men to assault Sanatan. Thus the members of the prosecution party pursued Sanatan. P.W. 7 gave a lathi blow on the left hand of Sanatan near the Jenasahi tank, while the deceased gave a lathi blow on the left leg of Sanatan who fell down on the ground. Hearing the hulla, accused Ballribandhu ran to help his brother Sanatan. P.W. 6 gave a Katari blow on the head of Ballribandhu. While p.w. 6 was going to give another blow, Ballribandhu raised his hand for warding off the blow and his hand was cut. P.W. 1 gave a blow on the back of Ballribandhu. Bhakta Jena and Ananta Jena gave two lathi blows on the waist of Ballribandhu. This further case is that some time

after, about 15 persons from the village came to rescue the accused persons from the atrocity of the prosecution party. This led to a Marpit between the parties, but these accused persons were not amongst those 15 persons. The learned Sessions Judge held that the death of the deceased was homicidal and that he died as a result of the murderous attack of accused No. 1. He further found that accused Nos. 1 to 8 were members of an unlawful assembly. He however rejected the prosecution case of the indiscriminate assault on the part of the accused. He accordingly acquitted the accused persons of the offence in respect of the injuries caused individually on p.ws. 1 to 8.

3. The finding that the death of the deceased was homicidal is not challenged by Mr. Kanungo. The Doctor (p.w. 13) held the post-mortem examination. He found 8 external injuries and 7 internal injuries corresponding thereto. Internal injury No. 1 was severe. In his opinion, the death was due to stock and hemorrhage. It is remarkable that the public prosecutor did not put any question to the Doctor as to whether the injuries were sufficient in the ordinary course of nature to cause death. There cannot however be any doubt on the basis of the voluminous oral evidence that the deceased died as a result of the murderous attack on him. Taking the Doctor's evidence into consideration along with the oral evidence we have no doubt that the death was homicidal. Rightly Mr. Kanungo did not assail this finding.

4. The learned Sessions Judge has recorded a finding that accused No. 1 gave a stroke on the head of the deceased with a lathi, as a result of which the latter fell down. Subsequently, after some hours, he died at the spot. The eye-witnesses are consistent that the fatal assault was made by accused No. 1. That finding cannot therefore be assailed.

5. Mr. Kanungo however contends that, the case, as presented by the prosecution, is not a true one, and that the accused cannot, be convicted either u/s 148, or u/s 302, or u/s 323, Indian Penal Code merely because death has been caused or some persons of the prosecution party have been injured. According to him, it is incumbent on the prosecution to establish beyond reasonable doubt as to how the fracas took place and whether the accused were the aggressor. A fracas of this nature can be caused in very many ways. It may be that the members of the prosecution party were the aggressors and attacked the members of the accused party though ultimately the consequence arising from the initial attack was more fatal to them. It may equally be that both the parties came determined to have a free fight, none of them having any right of private defence. It may also be, as pleaded by the prosecution, that the members of the accused party were the aggressors and attacked the prosecution party, and in self defence injuries were caused on some of the accused persons. The liability of the accused for conviction would arise in the latter two cases, and not in the first category of case. It is for this reason law demands that the prosecution must establish beyond reasonable doubt as to how exactly the occurrence took place. The learned Sessions Judge failed to critically examine the

materials on record on this aspect of the matter.

6. One important feature emerging in this case is that the earliest version given in the F.I.R. is directly contrary to the prosecution case, as presented in Court. In the F.I.R. (Ext. 9) p.w. 1, who is an eye witness, stated that the occurrence took place near the shop of accused No. 1. At the evidence stage the place of occurrence is shifted to the jute field belonging to p.w. 7. The I.O. (p.w. 18) admitted that there was jute crop on the land, but no part of it has been either damaged or trampled. When admittedly large many persons were involved on both sides, the attack of the accused on the prosecution party could not be pinpointed to the ridge itself. Obviously therefore on the evidence of I.O., the jute field being the place of occurrence, as presented at the stage of evidence, must be rejected. F.I.R. is not a substantive piece of evidence. It can be used either for contradiction u/s 145 of the said Act, of the maker thereof. P.W. 1 was confronted with his former statement in the F.I.R. He denied to have made such a statement. P.W. 1 seems to be a liar and no reliance can be placed on his evidence. At any rate, as has already been stated, on the evidence of the I.O. (p.w. 18) the place of occurrence cannot be the jute field. The prosecution thus abandoned its initial case of the occurrence having taken place at the shop of accused No. 1.

7. The learned Sessions Judge in his judgment has analyzed the different prosecution witnesses as belonging to 3 classes. He attaches some importance to the independent witnesses p.w.s. 9, 10, 11 and 12. On an examination of the evidence of these witnesses, there appears to be some support for the defence case. P.W. 10 stated that at about 2 P.M. while he was taking food at his house, he could hear some hulla. On going out he found the deceased standing at his tank quarrelling with Uttam Das. On his intervention they stopped quarrelling and went to each other's house. Some time later, accused Sanatan came from Alekh Sadangi's house, stood near a fence, and straining his head looked towards the Nalita Kiari (jute field) of Baidhar. Seeing this, Baidhar Jena (p.w. 7) shouted from his jute field and asked him to go there to test his strength. Sanatan got a lathi from the house of Dama Maharana, and stood on the road near the Jenasahi tank. Seeing him, p.w. 7 and the deceased retorted. Then accused No. 4 came and asked Baidhar to come to him and test his strength. Thereafter p.w. 6 gave a lathi blow on the right palm of Ballribandhu (accused No. 4). In cross-examination he further stated that p.w. 6 and the deceased were standing near the Jenasahi tank and were throwing brickbats at Ballri Jena and Sanatan Jena. As has already been stated, this evidence does not entirely support the defence version, but broadly establishes two important features that p.w. 6 and the deceased were standing near the Jenasahi tank. This is not the prosecution case either at the evidence stage or in the F.I.R. His evidence further supports the defence version that it is p.w. 6 who gave the lathi blow first. That shows that the members of the prosecution party were the aggressors. To the same effect is also the evidence of p.w. 9. He was purchasing his requirements from the shop of accused No. 1 and at that time a female voice cried aloud to the

effect "Bhramar, run up, Maripakeila". The prosecution story was that Bhramar first gave the fatal blow on the head of the deceased with a lathi. If the version of p.w. 9 is believed, already an attack had been made on some members of the accused party and the help of Bhramar was sought for protection. The evidence of p.w. 9 thus substantially supports the defence story. It is unnecessary to examine the evidence of other witnesses. It would be sufficient to say that the evidence of these two independent witnesses largely advances the defence story which has not been independently established by the defence itself.

8. On the aforesaid analysis, two important findings are to be recorded : (1) that the defence version that the members of the prosecution party were the aggressors, may reasonably be true, and (2) that the place of occurrence, as narrated by the prosecution either at the evidence stage or in the F.I.R., definitely stands disproved by the prosecution evidence.

On the aforesaid findings, what is the function of the Court? It has been established in a series of decisions that a Court cannot abandon its duty of thoroughly scanning and scrutinising the evidence, and distinguishing the chaff from the grain. It is well known that witnesses in India cannot be expected to be wholly witnesses of truth. Most of them are illiterate and uneducated, and necessarily there is likely to be some contradiction in this evidence. Mere contradiction however would not be the basis of acquittal, if on a thorough scanning the essence of the prosecution case is found to be established. If on the other hand on the evidence of the prosecution the Court finds difficult to reject the defence story, though on its own merit it might not have been established, and the prosecution case does not appear to be established beyond reasonable doubt, the prosecution case is bound to fail and the accused is entitled to the benefit of doubt. On the aforesaid findings it is not possible for the Court to say that the defence story is not acceptable. On the other hand, they cast serious doubt on the truth of the prosecution case.

9. It would be profitable to apply the aforesaid theory to the present case with reference to the injuries caused on accused Nos. 3 and 4. The Doctor (p.w. 19) examined accused nos. 3 and 4. The Doctor (p.w. 19) examined accused Nos. 3 and 4. Accused No. 3 sustained the following injuries:

1. One bruise 2" x 1" over the left fore-arm (dorsal aspect) simple in nature.
2. One bruise 2" x 2" on the upper one-third of the dorsal aspect of the leg-simple in nature.

Accused No. 4 had the following injuries also :

1. One bruise 3" x 2" over the left scapular region simple in nature.
2. One bruise 2" x 1" over the left maxilla-simple in nature.
3. One cut in the inter-digital space between the right finger and middle finger (punctured wound) 1" x 1" x 1" in between-simple in nature.

4. One cut, i.e., incised wound over the scalp 2" x 1" simple in nature.

Though apparently the injuries on accused No. 3 appear to be 2 bruises, p.w. 19 deposed that as a result of those two injuries the accused was unable to move. The injuries on accused No. 4 were of more serious character. There were 2 cut incised injuries. They do not fit in with the prosecution story that they carried only lathi, and no cutting instrument. One of the injuries was over the scalp. Supposing the members of the prosecution party were the aggressors. They caused these injuries on accused Nos. 3 and 4. Thereafter the members of the accused party came in large numbers sufficiently armed to protect accused Nos. 3 and 4. The question will be whether the accused are entitled to right of private defence.

Section 100, Indian Penal Code, lays down that the right of private defence of body can extend to the causing of death if in fact either death or grievous hurt is caused or there is reasonable apprehension that death or grievous hurt would be caused unless the right of private defence is exercised. The injuries on accused Nos. 3 and 4 are undoubtedly simple, but this number and character do indicate that any person in the place of accused Nos. 3 and 4 would have reasonable apprehension that grievous hurt might be caused. In such a case the members of the accused party are entitled to right of private defence.

In order to reject the theory that the accused are not entitled to such right it is the duty of the prosecution to come with a true story. If the true story is presented, the Court would be in a position to say that the action of the accused persons was illegal and they had no right of private defence. Such a theory does not place the onus of proof of right of private defence, on the prosecution. Such an onus is always on the accused. The theory is embodied in the dictum that the prosecution must stand or fall on its own foot, and if on a thorough scanning of the prosecution case the Court is not in a position to say that the accused were guilty beyond reasonable doubt, they are entitled to an acquittal. This conclusion emerges from the aforesaid two findings.

10. We are therefore unable to agree with the learned Sessions Judge that the conviction is well founded. We accordingly set aside the conviction and sentence and acquit the accused persons. The appeals are allowed. The bail bonds executed by some of the accused persons be discharged and accused No. 1 be set at liberty forthwith.

Ray, J.

11. I agree.