

(2002) 04 OHC CK 0056

In the Orissa High Court

Case No : Criminal Appeal No. 251 of 1984 and Government Appeal No. 6 of 1985

Batakrushna Parida

APPELLANT

Vs

State of Orissa
 State of Orissa Vs Batakrushna Parida
and Others

RESPONDENT

Date of Decision : 11-04-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304II, 307

Citation : (2002) 2 OLR 154 : (2002) 2 OLR 152

Hon'ble Judges : M. Papanna, J;B. Panigrahi, J

Bench : Division Bench

Advocate : S. Padhi, S.S. Das and J.R. Dash in Criminal Appeal No. 151 of 1984 and G.C. Mohanty, in Government Appeal No. 6 of 1985, for the Appellant; G.C. Mohanty, Additional Government Advocate in CrI. Appeal No. 151 of 1984 and S. Padhi, S.S. Das and J.R. Dash in Government Appeal No. 6 of 1985, for the Respondent

Judgement

B. Panigrahi, J.—These two appeals are directed against the common order/Judgment passed by the learned Sessions Judge, Dhenkanal in S.T. No. 25 D of 1983 whereby and whereunder all the accused persons were acquitted of the charges under Sections 302, 307, 148, 302/149 of the Indian Penal Code, (hereinafter referred to as the "IPC") nonetheless appellant-respondent No.1, Batakrushna Parida, was convicted u/s 304, Part II, IPC and sentenced to undergo R.I. for 3 years. The Government of Orissa has filed the aforesaid Government Appeal against the order of acquittal of the respondents whereas appellant-respondent No. 1, Batakrishna Parida, has filed the aforesaid Criminal Appeal against the order of conviction passed against him. Both the appeals were heard together and this judgment will govern both the appeals.

2. The skeletal picture of the prosecution case as unravelled during trial is as follows :

Village Saruali is consisted of three hamlets, namely, Gopal Sahi, Dehury Sahi, and Parida Sahi. There was on love-lost between the villagers of Gopal Sahi and Dehury Sahi on one hand and Parida-Sahi on the other. The long standing enmity existed on account of a dispute over some forest land as such land was allegedly under the possession of the people of Dehury Sahi. Owing to such animosity the people of Dehury Sahi stopped rendering service to the people of Parida Sahi for the last 6 to 7 years preceding the occurrence. Since there was serious law and order problem, therefore, there was a proceeding u/s 107, Cr.P.C. and several suits were pending between the people of Dehury Sahi and Parida Sahi; The respondents in Government Appeal belong to Paridas Sahi whereas the victim as well as the prosecution witnesses belong to Dehury Sahi and Gopal Sahi. It was alleged that in the night of Kumar Purnima falling on 1.11.1982 the Dehury Sahi people had carried the image of Goddess Laxmi to the house of Bali Parida of Parida Sahi with whom Dehury Sahi people had developed some friendship. Therefore, the appellant-respondents who belong to Parida Sahi raided the house of Bali Parida.

3. On the following day, i.e. on 2.11.1982 between 9.00 and 9.30 A.M. the respondents belonging to Parida Sahi being armed with lathis and four muzzle loading guns proceeded to Dehury Sahi and on their arrival near the house of Banka Dehury the appellant-respondent No. 1 Batakrishna Parida fired a gun shot at Sahadev Dehury who was then engaged in washing his face in the backyard of Banka Dehury. After receiving such gun shot Sahadev fell down with bleeding injury and instantaneously died. Respondent Dibakar Parida fired another shot from his gun towards Chota Dehury as a result of which the latter received injury in his knees. Respondent Sankar Parida fired a shot from his gun towards Gopal Sahi and the pellet from his gun, of course, hit on the forehead of Athani Das as a result of which Athani Das fell down under a Mahua tree. After the respondents fired three successive shots from their guns the villagers of Dehury Sahi chased them as a reason whereof the respondents ran hither and thither towards their hamlet "Parida Sahi". While they were running, on being chased by the prosecution witnesses, appellant Bata Krishna Parida received a lathi blow by one Sikar Dehury (P.W.11) as a result of which the gun held by him fell down from his hand and Braja Dehury (P.W.9) picked up the said gun. Respondent Sankar Parida chased Sikar Dehury (P.W. 11) to give him a push with the gun, but he managed to snatch away the gun from the hand of respondent Sankar Parida. Kusana Dehury (P.W.7) and one Kashi Behera chased respondent Lombodar Parida, but respondent Lambodar Parida fired a shot at them as a result of which Kusana Dehury (P.W.7) sustained bleeding injury near his neck.

4. Deceased Dambaru Behera chased Ganga Parida (since dead), but the latter over-powered Dambaru and flung him on the ground. Thereafter Sidheswar (since dead) threw a big stone on the lower part of his abdomen as a result of which he sustained severe injury on his abdomen. He was taken to Kamakhyanagar hospital and immediately shifted therefrom to Dhenkanal Hospital where he breathed his last during treatment. There was exchange of

pelting of stones from both the sides throughout the occurrence.

5. On receiving information the Q.I.C. of Kamakhyanagar Police Station reached the spot at about 10.30 A.M. and after receiving written information from P.W. 1 which he treated as F.I.R. (Ext. 1). immediately swung into action. He examined the informant and noticed the dead body of Sahadev Dehury lying in the bari of Banka Dehury where he held inquest over the dead-body in presence of the witnesses and prepared the inquest report. He despatched the dead-body of deceased Sahadev Dehury to Kamakhyanagar Hospital for post mortem examination and other injured persons, namely, Chhota Dehury (P.W.6), Kusana Dehury (P.W.7), Hanua Dehury (P.W. 12), Athani Das (P.W.5) and Dambaru Behera for treatment. He immediately recorded the statements of some of the witnesses of village Saruali. He also seized the blood stained earth and sample earth from the spot where the dead-body of Sahadev Dehury was lying vide Ext. 10. The I.O. also seized a water pot and some twigs of palm tree branches from the bari of Banka Dehury since he suspected that those objects retained the marks of gun shot- He collected One pellet from the cow shed of Banka Dehury and prepared the seizure list, Ext.3. He also seized one SBML gun being produced by Braja Dehury (P.W.9) and Sikar Dehury (P.W. 11) and prepared the seizure list vide Ext. 8. He collected one big stone from the side of a canal lying on a fallow land and prepared a seizure list, Ext. 31. The I.O. collected one trigger spring of a gun which was lying towards the backside of the house of Banka Dehury and prepared the seizure list, Ext.4. He arrested Dibakar Parida from his house and took him to Kamakhyanagar police station for interrogation. Dibakar Parida gave a written report at about 8 to 9.00 P.M., in the police station. All the injured persons were treated in Kamakhyanagar Hospital, but since the condition of Dambaru Behera deteriorated, therefore. he was sent to Dhenkanal Hospital for better treatment. Subsequently he was also sent to S.C.B. Medical College where he breathed his last on 4.11.1982. The I.O. held inquest over his dead body at Saruali village and prepared the inquests report vide Ext. 12. The dead-body was despatched to Kamakhyanagar Hospital for post mortem examination. The I.O. sent Arjuna Parida, Dibakar Parida and Kaira Parida for medical examination as they complained of injuries on their persons. On 11.12.82 the I.O. seized one small bottle containing a pellet which was taken out by the doctor from the body of Chhota alias Amar Dehury and prepared a seizure list, Ext. 33. On production by the doctor who recovered some pellets from the dead body of Sahadev Dehury the I.O. seized them. He also recorded the statement of deceased Dambaru Behera u/s 161, Cr.P.C. which is said to be the dying declaration. The gun licence of accused-appellant Sankarsan Parida was also seized from the office of Subdivisional Officer, Kamakhyanagar vide seizure list Ext. 34. He sent all the incriminating materials to Forensic Science Laboratory at Rasulgarh for chemical analysis through the S.D.J.M. Kamakhyanagar vide his forwarding letter, Ext. 29. On completion of investigation he placed the charge-sheet against all the respondents.

6. The defence plea before the trial Court was that on Kumar Purnima night i.e.

on 1.11.82 there was a skirmish and mutual assault near the house of Bali Parida in Parida Sahi of village Saruali on account of non-payment of some dues to Srikant Parida by Bah Parida. During that occurrence in the night while deceased Dambaru Behera was running away, he dashed against a stone inside the hamlet of Parida Sahi as a result of which he received injuries on his stomach and subsequently he died. Respondents Sankar Parida and Gangadhar Parida have taken the plea of alibi. It has been stated by respondent Sankar Parida, who as working as Head Pandit of Badasuanlo U.P. School, and respondent Gangadhar Parida, working as a Teacher in Kamakhyanagar P.S.M.E. School, that they were present in their respective Schools at the relevant time on the date of occurrence. As regards the defence story relating to cause of death of Sahadev Dehury, it is stated that on 2.11.82 at about 8.30 A.M. when Gourahari Parida was returning with his brother Gadadhar Parida from their Majhipasichaka land the prosecution witnesses attacked them as a result which Choudhury Parida and Gourahari Parida received some injuries. They further surrounded in front of the house of Banka Dehury where Gourahari Parida fired from his gun which might have hit and caused death of Sahadev Dehury. Their further plea was that they have been falsely implicated on account of previous enmity and party faction in the village.

7. Prosecution had examined 21 witnesses. Similarly, defence placed the evidence of 12 witnesses from their side. Many documents had been marked as exhibits on either side. P.Ws. 1 to 12 had claimed to be the eye-witnesses. P.W. 13 was the widow of deceased Dambaru Behera. P.Ws. 14 and 15 were witnesses to the seizure, P.Ws. 16 and 17 were two constables, P.Ws. 18 and 19 were two doctors, P.W.20 is the Ballistic Expert and P.W.21 is the I.O.

8. The defence has also not denied the death of Sahadev Dehury on account of gun shot injury near the house of his brother Banka Dehury. The doctor (P.W. 18) who conducted post mortem examination over the dead-body of Sahadev Dehury had also opined that his death was on account of injuries due to gun shot and the injuries were homicidal in nature. From the report it reveals that deceased Sahadev Dehury received the following injuries :

(i) Two perforation, large pin head size, one left upper lip and the other on left eye brow 2 C.Ms. above the first.

(ii) Two such types of perforation on the left side of the chest below the clavicle on the third space one CM. apart.

(iii) Bruises and abrasions on nostril irregular 2 cm x 5 cm

(iv) Injury on the left frontal sinus below the perforation mark. The bone was fragmented into six small pieces with direction of the perforation towards eye lid.

(iv) There was a large haematoma below the third rib to sixth rib on mid clavicular line. The media stinum was open. It was full of blood and on pellet was found.

On dissection P.W. 18, the doctor found that the chest wall, plura and lungs were perforated through and through. One pellet made way below the aorta above the heart to enter the pulmonary artery and found inside it causing bleeding to the media stinum. The other piercing the media stinum found by the side of the media stinal surface of the right lung. One pellet found on the posterior part of the tongue piercing the front of the tongue and anterior third. The first pellet was found to escape from the upper lid breaking the left eye brow. The nostril was constused and abraised at the tip and middle with dusting.

9. From the other injury report of Amar Dehury, Athani Das and Kusan Dehury it appeared that they had sustained injuries on account of gun shot. According to him, Dambaru Behera, Hanua Dehury and Digen Dehury received injuries by blunt weapons.

10. Learned Advocate appearing for the respondent Bata Krushna Parida and others has strongly contended that in this case the evidence of the eye-witnesses does not reflect the true picture inasmuch as there was bitter enmity between the parties. Therefore, in this background the trial Court should have insisted for production of the evidence through independent sources.

11. Mr.Mohanty, learned Addl. Government Advocate has however, repelled the contentions of the respondents by stating that in a faction-ridden village it would be extremely difficult to produce evidence from the independent sources. But, however, the Court should be circumspect and wary while examining the intrinsic value of such testimony. In this regard reliance can be placed in a recent judgment of the Supreme Court reported in State of Haryana Vs. Ram Singh, in which Hon"ble Justice Banerjee held in the following manner:

"While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness and it is not that the evidence ought to be discredited by reason of the witness being simply an interested witness but in that event the Court will be rather strict in its scrutiny as to the acceptability of such an evidence. In other words, the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to consider the same upon proper scrutiny."

Let us advert to the evidence placed by the prosecution keeping in view the principles enunciated by the apex Court. In this case the presence of Amar Dehury (P.W.6), Athani Das (P.W.5), Kusan Dehury (P.W. 7), deceased Dambaru Behera, Hanua Dehury (P.W. 12) and Digei Dehury cannot be doubted inasmuch as they were examined by the doctor who found that those witnesses received injuries. Thus in the above context, their presence at the spot can hardly be disputed. While appreciating their evidence the Court shall have to remain on guard to find out as to whether there has been any exaggeration, embellishment or development of the prosecution story during trial.

12. From the evidence of eye-witness, P.W. 1 it has appeared that he was present from the beginning till end on 1.11.82, The people of Parida Sahi had

raided the house of Bali Parida as they entertained a doubt that he was a supporter of Dehury Sahi people. On the following day, i.e. on 2.11.82 at about 9.30. A.M. Parida Sahi people over again being armed with different lethal weapons such as guns, lathis, assembled in a body to attack Dehury Sahi people. Among them Bata Parida, Dibakar Parida, Lambodar Parida and Sankarsan Parida were armed with a gun each and others with lathis. They proceeded towards the house of Banka Dehury in Dehury Sahi which was situated on the flank of canal embankment. The first respondent Batakrushna Parida first fired a shot to deceased Sahadeb Dehury who was then cleaning his hands and face on the back side bari of his brother Banka Dehury as a reason whereof he succumbed to the injuries and instantaneously died. Thereupon the Dehury Sahi people raised an outcry and gathered near the house of Kathi Behera close to the bari of Banka Dehury. The respondent Dibakar Parida fired a shot towards them from his gun as a result of which Chhota Dehury received an injury on his leg and fell down there. At that juncture the other respondents engaged in pelting brickbats towards the prosecution witnesses. While both the groups were engaged in a fracas, Gouda Sahi people raising shrieks advanced towards Dehury Sahi. At that moment Shankarsan Parida fired a shot from his gun towards the mob as a result of which Athani Das sustained an injury on his head and fell down near a Mahua tree. Thereafter when Dehury Sahi people rushed towards the assailants from different directions, the respondents fled away towards their hamlet. At that time P.W. 11 Sikar Dehury gave a blow on the butt of the gun held by respondent Batakrushna Parida as a result of which gun slipped from his hand following which P.W.9 picked up the said gun. Sankarsan Parida attempted to give a push with the gun, but Sikar Dehury snatched away the gun from his hand. The respondent Lambodar Parida fired a shot from his gun at Kusan Dehury and Kurti Behera while they were chasing him as a result of which Kusan Dehury sustained injury near his neck. The respondent Lambodar Parida and Dibakar Parida in the meantime took to their heels from the site.

13. Gangadhar Parida caught hold of Dambaru Behera and made him fall on the ground. Accused Sidheswar Parida threw a stone which hit the abdomen of Dambaru Parida. When more people gathered from Dehury Sahi and Gopal Sahi, the respondents left the place of occurrence towards their hamlet. His testimony further certified that respondents Dayanidhi " Daya Parida, Batulia Parida. Nandua Parida, Sidheswar Parida, Dhabaleswar Parida, Banshi Parida, Jujei " Judhistir Maharana, Arjuna Parida, Sagar Parida, Ganga Parida, Choudhury Parida, Kaira Parida were present at the time of occurrence being armed with lathis. Sahadev Dehury was then washing his hands near the backyard of his brother Banka Dehury. At that juncture Batakrishna Parida fired a shot from his gun at Sahadev Dehury as a result of which he instantaneously died; Such version also substantially corroborated the evidence of P.W.2, Kalyan Mahanta. From the evidence of the prosecution witnesses it has unequivocally been established that some of the prosecution witnesses had received injuries in course of same transaction. Similarly some of the respondents such as Dibakar

Parida, Gourahari Parida and few others had received injuries. Therefore, in this background it can normally be expected that there was a free fight between the villagers of Dehury Sahi and Gopal Sahi and also Parida Sahi. But it is to be seen at the outset whether respondent Batakrushna Parida fired a shot at Sahadev Dehury who instantaneously died. From the evidence of the prosecution there could be no doubt that at the time of occurrence Sahadev Dehury was washing his hand and face at the backyard of his brother. It is proved by the prosecution that Sahadev Dehury was washing the face and there was no provocation from him when Batakrushna Parida opened fire resulting in his death. From the evidence of prosecution witnesses and defence witnesses it can be firmly established that apart from killing Sahadev Dehury, there was a free fight among the other villagers including the respondents.

14. When the respondents assembled near the house of Kati Behera, close to the bari of Banka Dehury the respondent Dibakar Parida fired a shot towards them from his gun as a result of which Chhota Dehury received injury on his leg and fell down. In course of incident Gouda Sahi people raised hulla. therefore, the respondent Sankar Parida fired a shot from his gun towards them as a result Athani Das sustained injury on his head and fell down near Mahua tree.

15. From the topography prepared by the I.O. it appears that Parida Sahi lies by the side of the canal from the side of Dehury Sahi and Gopal Sahi. The house of Banka Dehury where it is alleged Sahadev Dehury was shot dead lies on the eastern outskirts of Dehury Sahi close to the canal embankment. The house of Sahadev Dehury lies at a long distance to the further west of his brother Banka Dehury. The defence version is that while the injured Gourahari Parida along with his brothers returning to their village from Majhipasi chhak they were surrounded by the people of Dehury Sahi and Gopal Sahi near the house of Banka Dehury. Gouraharai Parida fired from his gun towards the house of Banka Dehury. Thus, it becomes apparent that the respondents have admitted that firing took place near the house of Banka Dehury where Sahadev Dehury was found dead. From the evidence of all the prosecution witnesses there can be no room for doubt that Batakrushna Parida fired from his gun aiming at Sahadev Dehury as a result of which he died. He was unarmed and there was no provocation from the side of Sahadev Dehury. There has been no evidence that the respondents other than Batakrushna Parida had attacked Sahadev Dehury nor there was any pre-plan or premeditation to attack him. Therefore, the other respondents would not be held responsible for the act committed by Batakrishna Parida. It is established by the prosecution through the testimony of P.Ws. 1 and 2 and others that respondents Dibakar Parida. Sankarsan Parida and Lambodar Parida had also fired from their respective guns. When there was chasing and pelting of stones by the people of Dehury Sahi and Gopal Sahi, those respondents Dibakar Parida. Sankarsan Parida and Lambodar Parida must have fired from their guns indiscriminately to save their lives.

16. Since Batakrushna Parida alone was responsible for the death of Sahadev

Dehury, therefore, he was accordingly found guilty by the learned Sessions Judge and sentenced u/s 304, Part II. IPC, but according to us such finding does not pass the legal test. From the backdrop of the case we found, Sahadev Dehury was cleaning his face at the backyard of his brother's house. At that time he was unarmed and there was no provocation from his side. It is not understood as to why Batakrushna Parida shot at him resulting in his death.

17. It is difficult to prove the intention of Batakrushna Parida. It has to be gathered from the surrounding circumstances. We are at loss to understand as to why he shot at Sahadev Dehury without any provocation. Accordingly, we hold Batakrushna Parida responsible for causing the death of Sahadev Dehury punishable u/s 302, IPC.

18. As regards the death of Dambaru Behera from the evidence of the prosecution witnesses, if analysed, we found that he was caught hold of by accused Gangadhar Parida who laid him on the ground. Thereafter accused Sidheswar Parida pelted a stone which hit his abdomen. The case of the respondents is that in the preceding night when Dambarudhar Behera with his associates went to attack respondents, namely, Parida Sahi people, he sustained injury in his abdomen by coming in contact with the stone lying near the Mandap. But this aspect of the case has been discussed and the learned Sessions Judge was unable to believe the defence story. According to the doctor, no other injury apart from injuries in intestine of Dambarudhar Behera was noticed. Further it is stated that had Dambarudhar Behera been provided with immediate treatment he could have survived. Therefore, it cannot be said that Sidheswar Parida had intended to cause the death of Dambarudhar Behera. Be that as it may since Sidheswar Parida too is dead, whether he can be punished for causing the death of Dambarudhar Behera or not becomes academic.

19. On the basis of the evidence the trial Court had rightly reached at the conclusion that the respondents cannot be held guilty u/s 148, IPC for rioting with deadly weapons. On the analysis of the evidence the learned Sessions Judge has reached at a conclusion that a person cannot have a private defence by inflicting more harm than what is necessary for the purpose of defence. The burden of proving the existence of circumstances of bringing the case within the purview of exercising right of private defence is on the person who takes such plea. The respondents Sankarsan Parida and Dibakar Parida had taken the plea of alibi, but the learned trial Court disbelieved such plea, but accepted the plea of right of private defence to protect themselves when the prosecution party chased them. Therefore, they can be exonerated u/s 100, IPC. But in so far as respondent Batakrushna Parida is concerned such plea is not available since he intentionally caused the death of Sahadev Dehury by his gun shot within a close range and thus punishable u/s 302, IPC. In this connection, reliance can be placed on a reported decision of Supreme Court in Sukhan Raut and Others Vs. State of Bihar, where it has been held :

"Section 149 of the Code makes the members of an unlawful assembly

vicariously liable where it is proved that the offence is committed in pursuance of the common object of the unlawful assembly which the members of the unlawful assembly knew that such offence was likely to be committed in prosecution of the object of the unlawful assembly. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act for the purposes of incurring the vicarious liability for the offence committed by a member of such unlawful assembly. Under this section the liability of the other members of the unlawful assembly for the offence committed during the continuances of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Common object has to be distinguished from the common intention. There is no question of common intention in Section 149 of the Code. Where no injury is inflicted pursuant to the common object to kill the deceased, but caused only when provoked by one of the witnesses, the members of the unlawful assembly cannot be held guilty for the commission of the offence of murder."

20. There has been no evidence from the side of the prosecution, apart from Batakrushna Parida, others had a common object of killing Sahadev Dehury. From the fact situation, it is apparent that Batakrishna Parida on the spur of the moment had fired a shot from his gun as a result of which Sahadev Dehury died immediately. Therefore, others cannot be responsible u/s 149, IPC for the act committed by Batakrushna Parida.

21. Thus in the above conspectus of the case we hold that appellant Batakrushna Parida is alone guilty of having committed the murder of Sahadev Dehuri punishable u/s 302, IPC the other respondents are concerned, we are of the firm view that the State could not be able to bring home the charge of murder or voluntarily causing hurt to the prosecution witnesses. Thus they have been rightly acquitted by the trial Court. The Government Appeal abates so far as the respondents who have expired.

22. Accordingly the Government Appeal is partly allowed. The conviction and sentence of respondent Batakrushna Parida is modified and he is convicted u/s 302, IPC and sentenced to under go R.I. for life. The Criminal Appeal is dismissed, but the conviction and sentence is modified to the extent indicated above.

M. Papanna, J.

23. I agree.