

(2008) 11 OHC CK 0013
In the Orissa High Court
Case No : Criminal Appeal No. 207 of 1998

Bhagat Meswa and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 27-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 107, 114, 302, 304, 34
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)

Citation : (2009) CLT 349 (Suppl CrI)

Hon'ble Judges : S.R. Singaravelu, J; P.K. Tripathy, J

Bench : Division Bench

Advocate : T.R. Meher, N. Panda, S.N. Sharma, A.K. Nanda, S.D. Das, H.S. Satpathy, D.R. Sundaray, N. Bisoi, M. Panda, D. Mohanty and A.N. Sahu, for the Appellant; A.K. Mishra, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

S.R. Singaravelu, J.—This appeal arises out of a judgment dated 5.8.1998 passed by the Special Judge-cum-Sessions Judge, Bolangir in Sessions Case No. 19 of 1997 convicting the accused-Appellant u/s 302 read with Section 34 Indian Penal Code as well as Section 3(1)(x) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 sentencing the Appellants to undergo R.I. for life for the offence u/s 302 read with Section 34 Indian Penal Code and to undergo R.I. for two years for the offence u/s 3(1)(x) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989 with a direction to run the sentences concurrently.

2. The brief facts of the prosecution case are as follows:-

Deceased Sukadev and the Appellants belong to the same village and there was litigation out of long standing dispute between them regarding their landed property. On 4.7.1996, at 9 a.m. the Appellants were ploughing the land and dressing the ridges. The deceased Sukadev came there with his wife's brother

Anadi Nag (P.W.11) to fetch drumstick leaves. Seeing the accused Appellants: the deceased asked him as to how they were ploughing his land despite the Court's order in his favour. On this, accused-Appellant No. 1 challenged the deceased by using filthy words and exhorted the other accused-Appellants to kill the deceased. Thereafter all the accused Appellants assaulted the deceased by means of lathi and spade. The deceased fell down unconscious. This was witnessed by P.W. 11 (the deceased's brother-in-law) and P.W. 12, the sister of deceased who was planting in the nearby bari. At that time, P.W. 10, co-villager arrived there and heard the incident from P.W. 11 & 12. The deceased was carried in a PHD vehicle which was driven by P.W. 6 who came there incidentally. The deceased died on the way and the body was removed at a place named Satmile Chhak. P.W. 10 went to the Sadar Police Station and lodged F.I.R. The O.I.C. (P.W.14) drew up the F.I.R (Ext. 10) registered the case and took up the investigation.

At 12 noon on 4.7.1996, P.W. 14 the I.O. had reached the Satmile Chhak and held inquest over the dead body through a report (Ext. 1). With the request, the body was sent to District Head Quarter Hospital, Bolangir for post-mortem examination. At 2 P.M., the Investigating Officer visited the spot of occurrence and prepared a spot map (Ext. 14) and prepared crime details also. He recovered the towel, lungis and dhotis which contained blood stains and worn by the accused persons at the time of occurrence under seizure list Ext. 3. M.O.4 is the seized towel, M. Os. X & XI are the seized lungis and M.O. XII is the seized Dhoti. Sample earth was also recovered from the spot at 3 P.M. through Ext. 4. On 6.7.1996 at 11.20 A.M. accused Bhagat Meswa and Khairu @ Laxman Meswa were arrested in Bolangir town. Prayer was made to record the statement of witnesses u/s 164 Code of Criminal Procedure. The seized materials were sent for chemical examination. On 29.8.1996 accused Satrughna was arrested and was sent for remand. After completing the formalities of investigation, a charge-sheet was lodged against the accused on 1.10.1996.

In order to prove the charges against the Appellants, prosecution has examined 14 witnesses and marked 19 exhibits on its side along with MOs. I to XIV. Ext. A was the ROR of Holding No. 181/21 of village Bahalpada exhibited on behalf of the accused persons. While questioning the accused about the incriminating circumstances found in the evidence of the prosecution, they denied the same and pleaded ignorance. Considering the evidence oral and documentary, Learned Sessions Judge found the accused guilty for the offence under 302 read with Section 34 Indian Penal Code as well as Section 3(1)(x) of the S.C. & S.T. (Prevention of Atrocities) Act, 1989.

We have heard Mr. Das, Learned Counsel for the Appellants as well as the Learned Counsel for the State.

The occurrence had taken place at 9 A.M. on 4.7.1996, in the field of the deceased where the accused was having preparation work of agriculture. At that time accompanied by P.W. 11, the brother-in-law, the deceased came there and

questioned the unlawful act of the accused since the deceased got a favourable order in Civil Court regarding that land. Accused No. 1 used filthy language and induced other accused to assault and kill him. Accordingly all the accused assaulted the deceased and the deceased fell down and at the intervention of the co-villagers, he was taken to the hospital and on the way, he died. In the post-mortem report, the following injuries were found. P.W. 13 the post-mortem doctor deposed as follows:-

Externally I found as follows:

- (i) Incised injury measuring 3" x 1 1/2" x brain depth present vertically on the right fronto temporal junction starting 1" above the lateral end of right eye-brow.
- (ii) Incised injury measuring 1/2" x 1/4" brain depth present on the right parietal prominence.
- (iii) Incised wound measuring 4" x 2" x brain depth present on the left fronto temporal junction artero-posteriorly.
- (iv) Bruise measuring 3" x 3" in right shoulder joint.
- (v) Bruise measuring 4" x 2" in right tempo parietal area in artero posterior manner.
- (vi) There was a depressed fracture of right parietal bone.

3. On exploring the skull it was found that there was a big haematoma measuring 4" x 2" covering entire parieto-temporal area. The skull bone of this area was broken into ten pieces measuring 1/2" x 1/2" to 1" to 1/2" each. On dissecting the skull the meninges were torn in the site of external injuries Nos. (i), (ii) and (iii). The brain material was lacerated. The right tempo parietal area i.e. below the right tempo parietal area i.e. below the external injury No. (v) was severely lacerated upto liquefactive. The entire right tempo lobe was over flooded with blood.

4. Cause of death was injuries to brain and intracerebral haemorrhage. Time since death was 6 to 12 hours. All the injuries were grievous, ante-mortem and homicidal in nature.

5. External Injuries Nos. (i), (ii) and (iii) and their corresponding internal injuries were caused by sharp cutting and heavy weapon. External injuries Nos. (iv) and (v) were caused by blunt and heavy object."

External injury No. (vi) was found corresponding to injury No. (v) Injury Nos. (i), (ii), (iii), (iv) and (vi) were found as sufficient in the ordinary course to cause death. The cause of the death was found as injury to brain and intracerebral haemorrhage. It was opined that all the injuries were ante mortem and homicidal in nature.

6. Now we have to find as to whether the accused had nexus with the homicidal death of the deceased. P.W. 11 & 12 are the two eye-witnesses. P.W.

11 is brother-in-law of the deceased. P.W. 12 is sister of the deceased. Since they are relatives, it is alleged that they are interested. But their evidence cannot be discarded if it stands to the strict scrutiny. A careful perusal of their evidence goes to show that it is only the accused persons at the instigation of the first accused who had assaulted the deceased with the weapons above mentioned. Admittedly, there was long standing dispute between the parties in respect of a land and in fact, the deceased was having an order of Court in his favour. It is the accused who had trespassed the land and the same was questioned by the deceased. This was well spoken to by both the eye-witnesses. Thus, there is a strong motive for the occurrence. The accused are not justified in saying that there was any provocation for their assault. Provocation is a question of fact. No one can say that a trespasser would get provoked when the land owner questions the authority of the accused in ploughing the land.

7. The Learned Counsel for the accused submitted that there was some inconsistency in the evidence of P.W. 11 & 12 as to the exact work that was being done by each of the accused at the time of occurrence. One would say that one accused was ploughing and other accused was dressing the ridge and the other witnesses may say the reverse but that is not a serious inconsistency. Once presence of the accused at the scene of occurrence is not disputed, even if, there is minor discrepancy in describing the agricultural activities in different names, that does not spoil the case of the prosecution nor makes it cloud upon presence of the two eye-witnesses. Both the witnesses have uniformly deposed that accused Petu dealt a lathi blow on the chest of the deceased and when the deceased tried to run away, accused Khairu @ Laxman dealt a blow by means of a spade on the back of the head of the deceased and when the latter fell down, accused Satrughna gave a spade blow on the head of the deceased and accused Khairu dealt another spade blow below the abdomen of the deceased. There may not be any corresponding injury either on the abdomen or lower part of the deceased because it cannot be said that what assault would have hit upon a particular portion of the body and witnesses might not have been seen with microscopic eyes. When their evidence is appealing and do tally with the major portion of the fatal injuries found on the body of the deceased, some omission of any injury disconnecting some overt act alleged may not matter much. It only shows the natural way of persons narrating any event. Therefore, the eye-witnesses were rightly believed by the Learned Trial Judge in concluding that there was assault made by the accused on the body of the deceased with a common intention to kill him, as instigated by accused No. 1.

8. The Learned defence Counsel cited two decisions of the Apex Court in the case of Keshaba Naik and Anr. v. State of Orissa reported in 2007 (37) OCR SC 676 and Byvarapu Raju v. State of Andhra Pradesh and Anr. reported in 2007 (37) OCR SC 732. In the first case, the deceased and the Appellants were related and there was land dispute between them. The evidence on record indicated that the Appellants were present on the agricultural field when the deceased and his supporters created disturbance. It was held that there was no previous meeting

of minds of the Appellant to kill the deceased. It was further held that it was at the spur of the moment when blow was given by each of the accused during the course of sudden fight. Therefore, the case was altered to Section 304, Part-I, Indian Penal Code. Likewise in the other above cited case at page 732, the conviction u/s 302 was modified to one u/s 304 Part-I, Indian Penal Code.

9. The Learned Counsel for the Appellants submitted that here also there was no meeting of mind of the Appellants or there was no pre-meditation to kill the deceased. Therefore, it was argued that it was a sudden fight in which at spur of the moment, the assault was made. But one thing, we have to take into consideration is that there was no mutual fight or provocation in this case. Citing a Court order in his favour regarding the disputed land by deceased may not be considered as provocative gesture. No accused sustained any injury at the hands of the deceased or his supporter PW.11. If there was sudden fight creating a heat of passion which had no time to cool down the assault made in such a situation could be considered as attracting Exception 4 to Section 302 Indian Penal Code. Similarly, if any act done by accused at their total deprivation of self-control and due to provocation of deceased, then Exception 1 to Section 302 may get attracted so as to convert the sentence for offence u/s 302 into an offence u/s 304 Part-I.

10. Of course, both the exceptions will apply when there is no pre-meditation by the accused and that when there was provocation by the deceased. Any provocation leading to loss of self-control of accused and his assault may make exception 1 to apply. Any provocation as a result of heat of passion which could not be cooled down in a given time and the resultant assault made may attract Exception 4.

11. In this case, there is no situation where accused got deprived of their self-control. Therefore, Exception 1 cannot be applied. Exception 4 also cannot be applied because there is one more requirement for the application of the same that the accused should not have taken undue advantage of the situation; (undue means unfair). In this case, there is no causative provocation to apply Exception 1 or resultant provocation to apply Exception 4 because there was no fight and no provocation made as mentioned earlier. Provocation is a question of fact and as seen from the situation in the instant case during the course of occurrence, no person in the place of the accused would be assumed to have got provoked by the simple word of the deceased that when Court order is in his favour, they should the accused plough the land. A lawful order cannot be proved to provoke others. Evidence is available to indicate that accused No. 1, instigated the other accused to make the assault. Therefore, this is a case where it cannot be said that it is culpable homicide not amounting to murder.

12. In this context, an analysis is required on the application of either Section 34 Indian Penal Code or Section 107 Indian Penal Code in regard to the overt-act of Appellant-accused No. 1 Bhagabat Meswar, the father of the remaining Appellants" accused.

13. To mention again the over the overt-act of the Appellant No. 1. it can be culled out from the deposition of eye-witnesses P.W. 11 & P.W. 12 that when the Appellants 2 to 4 were engaged in agricultural work and Appellant No. 1. was sitting on the ridge, the latter replied to the protest raised by the deceased and thereafter directed the other Appellants to kill him. True it is that Appellant No. 1. individually did not make any assault upon the deceased much less by any deadly weapon. On the apparently instigated words of Appellant No. 1. accused Khairu left his plough and picked up a spade and gave blow. Accused Petu assaulted with a bamboo lathi which was kept nearby. Accused Satrughna gave spade blows on deceased head. Ostensibly Appellant No. 1. was present there throughout.

14. A pertinent question may arise at this context with the given situation as to whether the instigation of the Appellant No. 1. will attract the penal provision of Section 107 Indian Penal Code or Section 34 Indian Penal Code. While Section 107 punishes an instigator simplicitor, Section 34 may apply if there is a common intention of the participants which could be inferred from the given situation, even though there was no actual participation in the act committed. The dividing line is when Section 107 indicate the element of infusing the intention of the abator into an act required to be done by actual person who commits the offence; whereas Section 34 indicates an inferably pre-existing involvement of mind of all the accused in the actual commission of crime with a community of intent and participatory presence. It is thus, the community of intent or the meeting of the mind of all the persons in committing the assault with a knowledge that it would endanger the life that would make all the accused liable u/s 34. In other words, if the common intention in question animates accused persons and the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Unlike Section 114 which deal with a closure association of one criminal with another. Section 34 creates liability in one for an act done by the other, provided there is sharing of common intention. Although instigation is common in both Sections 107 and 34 Indian Penal Code, when instigator alone had that criminal intention of the act which is induced by him to be Committed by others, Section 107 will apply; when all got intendment of the act of crime and one instigates to do it in a given time, Section 34 Indian Penal Code applies. Further, conspiracy preceding instigation u/s 107, requires only element of agreement of mind, without individual intendment over the act contemplated. This common intention u/s 34 Indian Penal Code may be also such as derivable or inferable from out of the context of occurrence, as one that had flickered on the surface of mind of every accused.

15. In considering the factual scenario of this case, there was prior motive based upon civil litigation in between the two families of accused and deceased and considering the fact that in transgression of a Civil Court order, all the accused who belong to a family as father and sons joined together in going and arranging to plough the land, by unlawfully entering the same and that most of them were

already armed with weapons and it is in this context, if an elderly person directs his other sons to attack and kill the deceased, then it is indicating only the preexisting intent among all the accused and that intent having surfaced in the scene of occurrence momentarily and when one instigates and be present to see the act of guilt initiated is completed, then it may not amount to mere instigation and it will only attract Section 34 Indian Penal Code and not 107 Indian Penal Code. So the conviction u/s 302 read with Section 34 Indian Penal Code is sustainable.

16. But however, there is absolutely no evidence to hold that the Section 3(1)(x) of the S.C. & S.T. (P.A.) Act may be applied against the Appellant-accused; since due to landed dispute alone there was altercation and immediate attack which has nothing to do with any atrocity on the part of the accused on the ground that the deceased happens to be a Scheduled Caste man. Therefore, the conviction and sentence u/s 3(1)(x) of the S.C. & S.T. (P.A.) Act are set aside. The conviction u/s 302/34 I.P.C. is sustained.

The appeal is allowed accordingly in part.

Appeal allowed in part.

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