

(2010) 03 OHC CK 0075

In the Orissa High Court

Case No : Criminal Appeal No. 65 of 1989

Bhikari Swain @ Kathi Swain and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 304, 323, 34

Citation : (2010) 1 OLR 623 Supp

Hon'ble Judges : B.P. Ray, J

Bench : Single Bench

Advocate : D. Nayak and Associates in Criminal No. 65 of 1989 and D.P. Dhal and Associates in Criminal No. 81 of 1989, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

B.P. Ray, J.—Both the appeals arise out of the judgment and order dated 27.2.1989 passed by the learned Sessions Judge, Balasore in ST. No. 1 of 1989.

2. Appellants in CRLA No. 65 of 1989 have been convicted Under Sections 304 Part-I read with 34 I.P.C. and sentenced to undergo R.I. for seven years each and further they were directed to undergo R.I. for six months for the offence u/s 323, I.P.C. and the sentences are to run concurrently.

In CRLA No. 81 of 1989, the Appellants have also been convicted u/s 323, I.P.C. and sentenced to undergo R.I. for six months.

3. Case of the prosecution briefly stated is that on 10.01.1988 in the afternoon, a meeting was convened by the officials of Bhadrak block for nomination of members to the Kusun Nagar Village Development Committee. Accused Bishnu Ojha was the Sarpanch of that Gram Panchayat. His supporters, being the minority group, claimed that their men should get more representation in the Committee. The Block Official declared that the members should be elected by

taking votes. When the process of voting was going on, the meeting was disrupted by accused persons by throwing sands and dust. Villagers present there started dispersing. While the deceased-Mani Jena was leaving the place the accused-Bishnu Jena caught hold of his hands and dealt a fist blow. Just at that time accused Bhikari came there and dealt a lathi blow on the head of the deceased, as a result, he fell down. When people came to his rescue they were also assaulted and they received injuries on different parts of their bodies.

4. The deceased in injured condition along with Ors. who had received injuries were removed to the hospital. P.W.1, the son of the deceased, lodged an F.I.R. on the basis of which investigation was taken up. On 12.1.1988, the deceased breathed his last while he was in the hospital accordingly, the case turned into a case u/s 302, I.P.C. After completion of the investigation charge sheet was submitted against 15 accused persons including the Appellants.

5. Plea of the defence is one of complete denial and claimed that they have been falsely implicated due to rivalry and party faction.

6. Prosecution has examined 16 witnesses in all. Amongst them P.Ws.1, 2, 3, 4, 5, 6 & 7 claimed to have seen the occurrence as they were present in the meeting. P.Ws. 8, 9, 14 are witness to the seizure of different articles. P.Ws. 10 & 11 are the-doctors, who have examined the injured. P.W.15 conducted the autopsy. P.W.12, the Amin, who prepared the spot map. P.Ws. 13 and 16 are the police officers who have taken part in investigation.

None has been examined by the defence.

7. Death of the deceased-Mani Jena has not been disputed. P.W.15 who conducted the post mortem has found that there was a lacerated injury on the right temporal region of the skull and one bruise on the maxillary region. All the injuries were ante-mortem in nature. On dis Section it was found that there was intra cranial haematoma of about two ounce present on the left side of the brain on the temporal region pushing the brain to the right side. He has further opined that the cause of death was due to intra cranial hemorrhage caused by head injury. He further held that haematoma on the head could be caused on account of stroke on the head. From the above, it is established that the deceased has died a homicidal death.

8. Prosecution in order to bring culpability to the accused persons for causing death of the deceased has placed reliance on the evidence of P.Ws. 1, 2, 3, 4, 5, 6 & 7 and contended that their evidence are wholly reliable and trustworthy. Further more, all the witnesses except P.Ws. 1 & 2 are injured and therefore, their evidence inspires confidence. Defence has assailed the testimonies of the witnesses on the ground that they were highly interested witnesses and were inimically disposed of towards the accused persons. The evidence of the witnesses are thoroughly discrepant and mutually exclusive therefore, no credence can be given to their version.

9. The evidence of the Investigating Officer P.W.16 and the other prosecution witnesses, namely, P.Ws. 1, 5 & 6 reveal that there was enmity between the prosecution party and the accused persons. Cases of different nature had been instituted starting from 144 Code of Criminal Procedure to 436 I.P.C. It also transpires from the evidence of all the witnesses that on the date of occurrence there was dispute regarding representation to the village development committee and the quarrel ensued there from. Looking at the circumstances, it can safely be concluded that there was strained relationship between two groups and they were inimical to each other. It is the settled law that enmity itself is not a group to disbelieve any witness but the Court should take a note of caution that where there is enmity the witness would not only be tempted to rope in as many accused as possible but also develop the story to fasten the liability on them. Keeping in view the risk and possibility of false implication the evidence of the prosecution witnesses need to be scanned.

10. Before dealing with the case of the Appellants, it is worthwhile to mention that all total 15 accused persons were sent up for trial. Except the bald accusation in the F.I.R., there was absolutely no evidence against 10 accused persons, accordingly, the learned trial Court acquitted them of all the charges. This is one more circumstance which exhibits eagerness and evil intention of the prosecution witnesses to implicate the accused persons falsely.

11. The occurrence alleged to have been taken place at 4.00 P.M. The informant P.W.1 reached the Bhadrak hospital with his injured father and Ors. at 5.30 P.M. The F.I.R. has been lodged in Bhadrak P.S. at 9 P.M. This shows that the complaint has not been lodged hurriedly as the same had been done five hours after the alleged occurrence. P.W.1 in the F.I.R. has alleged that about 12 persons surrounded his father and indiscriminately assaulted him by means of lathi and boulders, as a result, he received serious injury. The narrations in the F.I.R. are all omnibus. There is no specific allegation against anybody. Prosecution case as put forth in the trial that accused Bishnu gave a fist blow on the chest of the deceased and accused Bhikari gave a lathi blow on the head is conspicuously absent. These are not accidental omissions as F.I.R. has been lodged after much deliberation. Involvement of 10 accused persons named in the F.I.R. is found to be false. In such circumstance, the evidence of P.W.1 can never be accepted as reliable and trustworthy. When the F.I.R. version as well as the evidence of the informant becomes unreliable on account of false allegation and implication of innocent persons, the genesis of the prosecution case becomes doubtful. The occurrence does not appear to have taken place as narrated by the informant and a fabricated story has been put forth with an ulterior motive to feed fat their grudge.

12. P.Ws. 2, 3, 4, 5, 6 & 7 have claimed to be the witnesses to the occurrence. The evidence of the witnesses is not only contradictory inter se, but also irreconcilable contradictions exclude each other. It is the consistent case of the prosecution that accused Bishnu gave a fist blow to the deceased. At that time,

the accused Bhikari came running and gave a lathi blow on the head of the deceased causing bleeding injury. Thereafter other accused persons surrounded the deceased. When the prosecution witnesses protested and came to his rescue, they were also assaulted by the accused persons.

13. All these have happened in quick succession. The assault on the deceased and the other persons are very proximate in time to each other. But P.W.5 has deposed that he was assaulted first. When he was going away he saw accused Bhikari dealing a lathi blow on the deceased. Be that as it may, all the so called witnesses claim to be present at the spot more particularly near the deceased as they rushed there to rescue the deceased. The claim of the witnesses that they were present at the spot and got injured on account of assault by the accused persons gets falsified by the evidence of P.W.3. This witness has categorically deposed that all total 8 persons were present near the deceased where he was lying injured when he reached there. He did not see anybody else except 8 persons even from a distance while he was coming there. He did not notice the presence of anybody else within a radius of 50/60 cubits of that place. Out of eight persons present, he deposed that four of them assaulted him and other four were standing near the deceased. This necessarily means that they were the accused. The evidence of these witnesses exclude the presence of any witness not only near the deceased but also within the radius of 60 cubits.

14. P.W.4 though deposed to have seen the assault by Bishnu by fist blow and lathi blow given by Bhikari, but the same are contradicted by his previous statement recorded u/s 161, Code of Criminal Procedure The evidence implicating the Appellants Bishnu and Bhikari are sheer embellishment. In view of this, the evidence of P.W.4 is of no consequence.

15. P.W.5 in his deposition has stated that Bhikari dealt a lathi blow on the right side head of the deceased. This part of the evidence is contradictory to his earlier statement. All that he had stated before the police is that Bhikari assaulted the deceased. Use of lathi and blow given on the head has been introduced at the stage of the trial. Prevaricating statement of the witness casts grave doubt about the veracity. This witness has also been examined in a case u/ s. 436 IPC against the accused persons. False implication gets strengthened from the background facts also. Still there are other circumstances which prove the witness a liar. In the statement recorded Under Sections 161, Code of Criminal Procedure he had stated that accused Bishnu and Arun had also assaulted the deceased. This part of the accusation is completely false and contradictory to the prosecution case. Arun has never been implicated by anybody as an assailant of the deceased. Therefore, the witness (P.W.5) becomes conscious and at the trial he omitted the same. This over zealousness to rope in innocent persons speaks on his reliability.

16. P.W.6, Anr. witness, who claimed to have seen the assault does not implicate Bishnu at all. This witness was also in inimical term with the accused persons. He had initiated a 144 Code of Criminal Procedure proceeding against some of the accused persons. He has also named Arun to have assaulted the deceased in his

statement before the police, but carefully avoided the same, as the same ran contrary to the prosecution case. He has further deposed that after the assault on the deceased he was assaulted by the accused persons and subsequently, Mahendra (P.W.3) and Gobardhan (P.W.4) were also assaulted. The evidence of P.W.3 and P.W.4 do not corroborate the above allegation. P.W.3 has not seen anybody near the deceased prior to his assault. He has not seen the accused persons assaulting anybody other than himself. Similar is the evidence of P.W.4. He has narrated the entire occurrence starting from causing disturbance in the meeting till the alleged assault on him. He has not whispered a word that P.W.6-Jaykrushna had gone to the place of occurrence for less to say about the assault on him. In view of the glaring discrepancies which strike out the credibility, the evidence of this witness cannot be relied upon.

17. As regards the evidence of P.W.7 though he has posed himself as a witness to the occurrence and has seen the occurrence, but the same is wholly unreliable when compared to his earlier statement. In his previous statement, he had stated that the accused Gopal Jena, Sankar Jena and Bhairab Jena were assaulting the deceased Mani Jena. During the trial, he changed his version and did not implicate those persons at all. This witness has given different version at different time looking at the circumstance to suit the prosecution. None of the witnesses has deposed regarding the presence of this witness (P.W.7) except P.W.1 in the F.I.R. Strangely enough, P.W.1 in his evidence, though named three persons who had come running to the spot, conspicuously the name of P.W.7 is absent amongst them.

18. The occurrence alleged is said to have been taken place in an open field i.e. in front of the school; where the meeting was being held. In such circumstances, in ordinary course, the witnesses would have seen persons who were present at the spot. If this witness was in fact there the same would not have gone unnoticed. Further the place of occurrence as deposed to by this witness is completely different from what the other witnesses have stated. In view of the inherent short coming in the evidence of this witness, it would be unsafe to place implicit reliance on the same. The testimonies of the so-called eye-witnesses are not trustworthy and they do not pass through the judicial scrutiny. It is the settled principle of law that one infirm witness cannot lent corroboration to other witness of the same kind.

19. Prosecution has not examined the independent witness to unfold the facts leading to the occurrence. One Mishra Babu of the Block Office had gone for conducting the meeting and election of representative to the Village Development Committee. He was the most vital witness who could have deposed independently. There is absolutely no explanation for his non-examination.

20. Cumulative effect of all these infirmities in the evidence leads to an irresistible conclusion that the prosecution has failed to bring home the charge against Bishnu and Bhikari for causing death of Mani Jena. Therefore, they are entitled for acquittal of the aforesaid charges.

Accordingly, the Appellants in Criminal Appeal No. 65 of 1989 are acquitted of the charges u/s 304-I read with Section 34 I.P.C. as well as Section 323, I.P.C. The Criminal Appeal No. 65 of 1989 is allowed.

21. So far as the Appellants in CRLA No. 81 of 1989 are concerned, it is alleged that the accused persons, namely, Bhairab Jena, Gopal Jena and Arun Jena caused hurt to Mahendra Jena, Jayakrushna Jena, Ananda Jena and Gobardhan Ghadei. All these persons have been medically examined by the doctors P.Ws. 11 & 12. The injury reports have been duly proved under Exts. 5, 6, 7 & 8. There is virtually no material to assail the report. All the injured witnesses have deposed about the assault made on them which has not been shaken in any manner by the accused. In such circumstances, the conviction of the Appellants Under Sections 323, I.P.C. made by the trial Court is maintained.

22. However, it appears the occurrence is of the year 1988 and in the meanwhile more than 22 years have passed. Each of the accused persons has suffered custodial punishment for certain period. Therefore, in my considered opinion, it would meet the ends of justice if the Appellants are sentenced to the period already undergone. Ordered accordingly.

The CRLA No. 81 of 1989 is allowed in part.