

(1991) 12 OHC CK 0012

In the Orissa High Court

Case No : Cril. Revision No"s. 350 and 365 of 1987

Bijaya Kumar Swain and Others

APPELLANT

Vs

The State of Orissa

RESPONDENT

Date of Decision : 09-12-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162

Evidence Act, 1872 — Section 21, 25

Penal Code, 1860 (IPC) — Section 307, 34, 354, 455

Citation : (1992) 73 CLT 718 : (1992) CriLJ 3979

Hon'ble Judges : D.M. Patnaik, J

Bench : Single Bench

Advocate : P.K. Dhal and B. Senapati, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

D.M. Patnaik, J.—The above two revisions arise from the judgment in Sessions Case No. 5 of 1985 of the court of the Assistant Sessions Judge, Bhanjanagar. Petitioner Bijaya Kumar Swain was convicted u/s 307, I.P.C. and sentenced to undergo rigorous imprisonment for 5 years, the other petitioners were convicted u/s 307/34, I.P.C. and sentenced to undergo rigorous imprisonment for two years each and all the three petitioners were convicted and sentenced to undergo one year each for the offence punishable u/s 455/34, I.P.C. and appellant Bijaya Kumar Swain was further convicted u/s 354, I.P.C. and sentenced to undergo rigorous imprisonment for one year. The sentences were directed to run concurrently. The appeals against their conviction having been confirmed, the petitioners are in revision before this Court.

2. Prosecution case is, on 21-3-84 petitioner Bijaya Kumar Swain reported before the Officer-in-charge of Gangapur Police Station that at about 12 midnight on that day while he was returning from Aska to his village on his motor-cycle near his house in village Kondupadar one male and a female tried to assault him with deadly weapons and in order to save himself, he assaulted them by means of a sharp cutting weapon and had kept them in his house. The Officer-in-Charge

made a station diary entry to that effect and proceeded to the spot along with petitioner Bijaya. At the spot he found P.Ws. 12 and 14 were in the house of petitioner Bijaya Kumar Swain. Both were found having several bleeding injuries on their person. There P.W. 11 gave an oral report alleging that petitioner Bijaya Kumar Swain prior to the occurrence had threatened to kidnap her. This matter was conveyed through her brother to his maternal uncle who was then staying in village Kalasandhapur. On the date of occurrence i.e. 21-3-84 her uncle Prasanna Panda (P.W. 14) had come with a gun to their house during the day time. At about midnight, the petitioner came and knocked at the door. But P.W. 11 out of fear did not open the door. Thereafter, this petitioner broke open the door and forcibly entered inside. He dragged her as a result of which, her bangles were broken. When her mother (P.W. 12) and uncle (P.W. 14) tried to rescue her, the petitioner physically lifted P.W. 12 to his house. The other two petitioners who were with petitioner Bijaya, assisted him in taking her mother inside the house of petitioner Bijaya. When P.W. 14 tried to rescue P.W. 12, it was alleged, the petitioner also took him inside his house where he assaulted both by means of a knife causing severe cut injuries on their person. Thereafter, petitioner Bijaya again came back to their house and dragged P.W. 11 with an evil motive. When she raised hullah, her sister Bijayalaxmi (not examined) came to her rescue and thereafter petitioner Bijaya went away in the motor cycle with the gun of P.W. 14. After some time when the wife of petitioner Bijaya opened the door, she (P.W. 11) noticed her mother was lying senseless with several bleeding injuries on her person.

2A. Petitioner Bijaya assailed the charges. His defence was that at about 1.30 a.m. of the night while he was returning on his motorcycle to his house, one male and a female tried to assault him with deadly weapons and so he assaulted them and kept them confined in his house. The other two petitioners while denying the occurrence pleaded that they were implicated as accused in the case because they were the witnesses in the trap case against one N. N. Das, the predecessor of the Investigating Officer (P.W. 15).

3. Mr. P. K. Dhal, learned counsel for petitioner Bijaya Kumar Swain and Mr. B. Senapaty, learned counsel for petitioners Simanchal and Ramesh submitted that the prosecution having failed to prove its case against the petitioners beyond reasonable doubt, the petitioners are entitled to an acquittal.

Mr. J. M. Mohanty, learned Additional Standing Counsel for the State, on the other hand, submitted that this is a case where the two injured persons, P.Ws. 12 and 14, were severely injured and further the case of the prosecution has been substantially proved on the basis of the evidence of the injured persons. The evidence, according to Mr. Mohanty, has been duly analysed by both the courts below and, therefore, this Court being a revisional court and the power of the revisional court being limited to the extent of only judging the propriety and correctness of the reasonings and the findings, both the revisions are liable to be dismissed.

4. I have gone through the evidence of the witnesses and other materials on record. P. W. 6 is the doctor who examined Sarojini (P.W. 12) on 22-3-1984 at 3.00 a.m. and found as many as 12 incised wounds on different parts of the body. The dimension of the injuries varied in length from 1 1/2" to 4" including two incised injuries on the right parietal bone above the right ear and another incised wound on the left side of the neck of the size of 1 1/2" x 1/2" x 1/2" away from the mid-point. One of the injuries was of the dimension of 2" x 2" x 2" on the back side of the right arm 2" below the shoulder arm. the rest of the incised wounds injuries were at the back side of the scapula region, spinal column and shoulder joint etc. The doctor reserved his opinion with regard to the nature of the injuries and on account of seriousness of the condition of the patient he referred her to the Berhampur Medical College Hospital. He stated in his evidence that the age of the injuries was within three hours. The doctor confirmed his opinion with regard to the injury in Ext. 6, his injury report. In the cross-examination, the doctor stated that the cumulative effect of these injuries would be fatal. The doctor denied the suggestion that all these injuries could be possible by coming in contact with a sharp and broken piece of glass.

P. W. 10 is the another doctor who medically examined P.W. 14, Prasanna Ku-mar Panda, the brother of P.W. 12. He stated in his evidence that the patient was referred by the Medical Officer, Gangapur and that the injuries were stitched. On opening, the doctor found as many as 11 wounds. All these injuries, according to him, could have been caused by sharp cutting weapon and the age of the injuries was within 24 hours. He was of the opinion that all these injuries taken together would cause death. He confirmed his opinion referring to the report (Ext. 10). On going through the injury report and the evidence of the doctor (P.W. 10) and further considering that all the injuries were incised injuries and that they could be possible only by sharp cutting weapon and also considering that one of the incised injuries i.e. injury No. 11 on the chest of P.W. 14 was a grievous one, I have no hesitation to hold that the cumulative effect of these injuries could cause the death.

In both these cases P.Ws. 12 and 14 had providential escape from death and considering the nature of the injuries the weapon used and the different parts of the body on which the injuries were inflicted (including on the parietal region of the head of P.W. 12 and on the chest of P.W. 14. I have no hesitation to hold that the assailant had the intention to voluntarily cause death but luckily both of them survived. Therefore, this is a case of "attempt to commit murder" and punishable u/s 307, I.P.C.

The next point that arises for consideration is whether the petitioners were the perpetrators of the act.

5. P.W. 11 lodged the F.I.R. with the police. In the F.I.R. she narrated the prosecution case already mentioned in the foregoing paragraphs. In her evidence, she materially corroborated her version in the F.I.R. and she stated as to how petitioner Bijaya Kumar Swain dragged her and that as to how P.Ws. 12

and 14 were forcibly taken inside the house of petitioner Bijaya Kumar Swain. In view of her report that she did not see the assault part, I am not inclined to accept her evidence to have seen petitioner Bijaya assaulting both by Nepali knife. But her evidence is highly relevant to the extent that when both P.Ws. 12 and 14 were brought from the house of the petitioner, she found both to have sustained severe bleeding injuries on their person.

I have carefully gone through the evidence of P.Ws. 12 and 14, the two injured persons. Nothing has been brought out in the cross-examination to disbelieve their testimony. It can be well said that practically there is no cross-examination on behalf of petitioner Bijaya Kamap Swain.

The material part of the evidence of P.W. 12 was that on 21-3-84 midnight, petitioner Bijaya knocked at the front door and ultimately broke open the door and entered inside the house and dragged her daughter (P.W. 11) who raised hullah and cried. Hearing her cry she, P. W. 14 and others got up and P.W. 14 tried to rescue P.W. 11. When P.W. 12 protested, petitioner Bijaya left P.W. 11 and physically lifted her (P.W. 12) and took her to his house. The two other petitioners were present with him. He also took her brother (P.W. 14) to his house. While both of them were trying to escape from his clutches, the other two petitioners prevented. Thereafter, petitioner Bijaya assaulted her and P.W. 14 by means of a Nepali knife. He dealt knife blows on her back, right, arm, neck (front side), left shoulder and head. The learned Additional Sessions Judge has observed that the witness showed healing marks of the wounds on the affected part. She identified the knife in the Court as M.O.I. She sustained severe bleeding injuries and fell down on the ground and became senseless. In para 2 of her cross-examination she stated that about 4 to 5 days prior to the occurrence petitioner Bijaya had threatened her to kidnap and out of fear they took shelter in the house of a neighbour since her husband was away from the house and the family had no adult male member. It was because of this threatening P.W. 14 was informed and the letter came on 21-3-84 at noon. Her evidence has not been shaken.

P.W. 14 fully corroborated the evidence of P.W. 12 in all material particulars. It is needless to repeat the evidence of this witness since nothing has been elicited in the cross-examination to disbelieve the prosecution case. He, however, stated that when he went to the rescue of his sister (P.W. 12), he was assaulted by petitioner Bijaya by a Nepali knife. He identified the knife as M.O. I. He stated to have sustained injuries on his left arm, neck, left side chest, left side scapula, left side forearm etc. and that he had sustained eleven cut injuries on different parts of his body. The learned Additional Sessions Judge noticed healing mark of the injuries on his body.

In the cross-examination he stated that he knew the petitioners long before the incident. No villagers had come to the spot and seen the occurrence. Petitioner Bijaya resides in his own house with his wife and children. P.W. 12 was assaulted inside the room whereas he was assaulted outside the threshold and he was not

assaulted inside the room. He stated that petitioner Bijaya alone assaulted both of them. He denied the defence suggestion that P.W. 12 and he himself attempted to kill petitioner Bijaya and that with that intention he had come to the village with the gun.

6. On going through the evidence of the three witnesses (P.Ws. 11, 12 and 14) I have no hesitation to hold that it was petitioner Bijaya who assaulted both of them.

To add to this, the defence case as suggested was that it was P.Ws. 12 and 14 who attempted first to assault petitioner Bijaya while the latter was returning from Aska to his village and this matter was reported by petitioner Bijaya at the police station vide station diary entry marked Ext. 13. The learned Additional Sessions Judge has taken note of this Ext. 13 the evidence, as rather corroborating the evidence of P.Ws. 12 and 14. I may add that this report of petitioner Bijaya which has been duly proved by the Investigating Officer (P.W. 15) (vide his evidence in para 1 of his examination in chief) was a report which was lodged before petitioner Bijaya was made an accused in this case. This statement made to P.W. 15 by petitioner Bijaya is an admission by the petitioner which is relevant u/s 21 of the Evidence Act. It has been held in the case reported in Faddi Vs. The State of Madhya Pradesh, in para 15 that it is not a confession of the appellant and it is not a statement made to the police officer during the course of the investigation. Section 25 of the Evidence Act and Section 162 of the Cr.P.C. do not bar its admissibility. The report is an admission by the accused on certain facts which has a bearing on the question to be determined by the Court viz., how and by whom the murder took place and whether the accused's statement in the court denying the correctness on certain statements" of the prosecution witnesses was correct or not.

In the above context, it can well be said that such a report i.e. Ext. 13 read with the evidence of P.W. 15, the Investigating Officer, proved the admission by petitioner Bijaya which rather conclusively proved about his presence at the time of occurrence and this circumstance goes against him and in favour of the prosecution.

7-10. The plea of petitioner Bijaya is of vital importance in judging the veracity of the prosecution case. As has been held in the case reported in Mohan Lal Pangasa Vs. The State of U.P., , it is not illegal to take into consideration the falsity of the plea of the accused if the materials indicate such circumstances. Therefore, as has been held in the above decision in the case of Mohan Lal (supra) it will not be illegal to take into consideration, the falsity of the petitioner's case on materials already discussed above and believe the prosecution case.

Further from the chemical examination and serological reports it is found that one white bloodstained full shirt which was seized from the person of petitioner Bijaya was stained with human blood of group "A" which tallied with the

bloodstains on the green saree of P.W. 12. This is also a material of preponderating importance.

11. Thus, the defence case of petitioner Bijaya recriminating an assault by P.Ws. 12 and 14 is disbelieved and, on the other hand, the prosecution case is believed.

So far as other two petitioners are concerned, nothing has been stated in the evidence of P.Ws. 11, 12 and 14 about their part in the assault. Hence, they are acquitted of the charges.

12. In the result, therefore, Criminal Revision No. 350 of 87 by petitioner Bijaya Kumar Swain fails and the same is dismissed. The lower courts' orders are confirmed. Criminal Revision No. 365 of 87 by petitioners Simanchal and Ramesh is allowed. The lower Courts' orders of conviction and sentence are set aside.