
(1996) 04 OHC CK 0034

In the Orissa High Court

Case No : Criminal Application No. 148 of 1992

Bilai alias Prasanna Kumar Nayak and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (1996) CriLJ 3171

Hon'ble Judges : R.K. Patra, J;R.K. Dash, J

Bench : Division Bench

Advocate : G. Rath and P.K. Mohanty, for the Appellant; H.K. Jena, for the Respondent

Judgement

R.K. Dash, J.—These six appellants (hereinafter referred to as the "accused persons") and one Jaimohan Mahanta, since acquitted, stood charged under Sections 148 and 302/149 IPC for rioting with deadly weapons and committing murder of Anil Kumar Choudhary (hereinafter referred to as "the deceased")- Learned Sessions Judge, Sundargarh, upon consideration of the evidence led in support of the charge while acquitting accused Jaimohan Mahanta, convicted all these six accused persons for both the offences and contended each of them to suffer rigorous imprisonment for three years for the offence u/s 148 IPC and imprisonment for life for the offence u/s 302/149 IPC. Aggrieved by the judgment and order of conviction, the accused persons have preferred this appeal.

2. Beraft of details the prosecution case may be stated as under: Barsuan, the place of incident, is an industrial belt and Abhaya Kumar Choudhury, P.W.I6, father of the deceased, is an employee of Steel Authority of India Ltd. There are two unions, viz., Central Industrial Trade Union (CITU) and Rourkela Mazdoor Sabha (R.M.S.) of which P.W. 16 is an organiser of the former. Due to bickering and ill-feeling between supporters of the unions, some members of R.M.S. had

attacked P.W. 16 and his son. So his son, the deceased, made a report to the police, whereupon a case was registered against the persons involved in the said incident. In the year 1990 there was election of the office bearers of the union for which there was dispute between the two groups and apprehending breach of the peace, the local police initiated proceedings u/s 107 Cr. P. C. on 1-7-1990 at about 3.30/4.00 P. M. the deceased left for the market to bring betal. At this time these accused persons being armed with cycle chains, rods, farsas and lathis, intercepted and attacked him with the weapons held by them. This incident was witnessed by Gabriel Soran P.W. 14 and Asit Kumar Khandewal, P. W. 15. Immediately after the incident, deceased's brother Asit Kumar Choudhury, P.W.5 and father Abhaya Kumar Choudhury, P.W. 16 and others arrived there. Since the deceased was seriously injured and was not in sense, they removed him to the hospital for treatment. A written report of the incident was given to the police by P. W. 5 whereupon a case under Sections 147, 148 and 307 read with Section 148 I.P.C. was registered. Consequent upon the death of the deceased the case was converted to one u/s 302 IPC. After due investigation, the police filed charge-sheet against the accused persons including the acquitted accused under Sections 148 and 302/149 IPC to stand their trial.

3. The defence plea was one of denial and false implication.

4. To prove its case, prosecution examined as many as eighteen witnesses including the doctor who held autopsy and two eye-witnesses, P. W. 14 and 15 and the defence brought in evidence certain documents to show the strained relationship between the parties. The learned Sessions Judge upon consideration of all materials on record accepted the prosecution version and convicted and sentenced the accused persons as hereinbefore stated.

5. Learned Senior Counsel Shri G. Rath appearing for the accused persons attacked the impugned judgment and challenged the findings and conviction recorded by the trial court on the following grounds :-

(1) That P.W.s. Hand 15, the two alleged eyewitnesses on whose evidence the prosecution heavily relied upon are partisan and interested witnesses. Besides, evidence and circumstances revealed that they are "chance witnesses" and, therefore, without there being no independent corroboration, their evidence Should not have been accepted on its face value.

(2) That prosecution instead of examining independent witnesses, namely, Bijay Kumar Das, Marashallan Lugun, Bijay Kheri and others examined interested witnesses and so, adverse inference should have been drawn against the prosecution.

(3) That statements of P.W.s. 14 and 15 were not recorded on the very day of incident by the first Investigating Officer, P.W. 17 when he had the occasion to see them in the hospital and no explanation was offered for their delayed examination and, therefore, they being got-up witnesses, the learned Sessions Judge should have been slow to rely upon their testimony.

(4) That even accepting the prosecution case that the accused persons assaulted the deceased which ultimately resulted in his death, yet no offence u/s 302 IPC could be made out, inasmuch as some of the accused persons who were allegedly armed with farsa, a cutting weapon, did not use the sharp side in inflicting blows. On the other hand, post-mortem report as well as the evidence of the doctor revealed that external injury No. 6, i.e. bruise over top of forehead on the middle and corresponding to its internal injury caused the death of the deceased and, therefore, the offence squarely falls within the ambit of Section 304 Part II IPC.

6. Learned Additional Government Advocate, on the other hand, supported the trial court's judgment and urged that the two eye-witnesses (P.W.s 14 and 15) have supported the prosecution case in material particulars and their evidence being clear, cogent, convincing and truthful, the learned trial court has rightly placed reliance on it for finding the accused persons guilty of the offence. As to the nature of offence, he on relying upon the decisions of the Apex Court in *Gudar Dusadh Vs. State of Bihar*, and *State of Andhra Pradesh Vs. Rayavarapu Punayya and Another*, would contend that infliction of one blow which proved fatal would attract clause "thirdly" of Section 300 IPC.

7. The informant, P.W.5 having entered appearance through Shri H.K.Jena, Advocate, has filed written note of submission, reference to which is not necessary since no new point has been urged to support the impugned judgment.

8. Dr. Sachidananda Das, P.W.7 conducted autopsy on the dead body of the deceased and found the following external injuries:

- 1) stitched incised wound obliquely horizontal on the right eye brow 2" x 1/2" x deep up to the skull bones.
- 2) One abrasion over right elbow lateral part 1 1/2" x 1/2" antemortem in nature.
- 3) One bruise towards front and inner side of right forearm "1/2" below the elbow, 4 1/2" x 1/2" antemortem in nature.
- 4) Two bruises 2" x 1/2" apart obliquely on front of left arm 2" x 1/2" each, antemortem in nature.
- 5) Two bruises 1/2 x V2" each 1/2" apart with minute abrasion at the centre of each present over back on the middle of left scapula, antemortem in nature.
- 6) Bruise over top of forehead of the middle 3" x 3" antemortem in nature.

On disSection of external injury nos. 1 and 6, he found baematoma at the top of the head over the front and radiating fracture of frontal and upper interior portion of both parietal bones involving both outer and inner table, haematoma over top of frontal lobe and subdural haemorrhage present over both hemispheres with haematoma formation and congestion of brain. According to him, injury No. 6 was sufficient to cause death in the ordinary course of nature. The fact that the deceased died a homicidal death was not challenged by the

defence. In that view of the matter, the question now arises as to whether the accused persons were responsible for the death of the deceased.

9. It may be reiterated that the prosecution mainly rests on the evidence of two eye witnesses namely, P.W.s 14 and 15 to substantiate the charge. Learned Senior Counsel Shri G.Rath has criticised these witnesses as partisan, interested and chance witnesses. So having regard to the background of the case and criticism we have scrutinised their evidence perspicaciously to find if they are true and trustworthy and their evidence inspires confidence. As deposed to by P.W.14, while returning from market he saw the deceased near the shop of P.W.3. Meanwhile the accused persons were coming from the opposite direction being variously armed and seeing the deceased they indiscriminately; assaulted him as a result he dropped down there. To the same effect is the evidence of P. W. 15. According to him he was going to market for betel, when he saw the accused persons beating the deceased with lethal weapons held by them.

10. True it is, P.W.s. 14 and 15 are interested witnesses since they belong to the opposite camp of the accused persons and due to union rivalry security proceedings u/s 107 Cr.P.C. have been taken up against them, but that by itself will not be sufficient to discard their sworn testimony. There is no law which says that the evidence of interested witnesses should be thrown out or should not be relied upon for convicting the accused. What law requires is that where the witnesses are interested, the court should approach their evidence with care and caution to exclude the possibility of false implication by them. It is as good as any other evidence and no fault can be found with the court if it accepts such evidence without there being corroboration by independent witnesses. (See State of U.P. Vs. Ballabh Das and Others, and State of U.P. Vs. Vinod Kumar (Dead) and Udai Bhan Singh, Keeping in view the dictums of the Supreme Court we have scanned the evidence of P.W.s 14 and 15 in detail in an anxiety to find whether in a grave charge of murder the same can be implicitly relied upon and having done so we do not find their evidence falls short of reliability and acceptability.

11. The next criticism levelled against P.W.s. 14 and 15 is that they being chance witnesses, their very presence at the scene of occurrence was doubtful. Referring to the evidence of P.W. 14 who admitted that one need not pass through the shop of P.W.3 (incident of assault having taken place nearby the said shop) while returning from market, the defence wants to impress upon that there was no occasion or reason for P.W. 14 to be present at the scene of occurrence. To appreciate the contention, we may read his evidence with reference to the spot map (Ext.20). It would appear from the said spot map that P. W.3's shop is situated to the side of the road near the crossing. Therefore, it was quite probable and believable that while returning home along the road leading to his house, P.W. 14 on hearing hue and cry rushed to the spot and witnessed the incident, although in normal circumstances he would not have gone there.

12. There is no magic in the words "chance witness". If the presence of a witness is assured and he is present at the time of occurrence he cannot be

termed as a "chance witness". A chance witness is a witness who could not normally be where and when he professes to have been. From that point of view, one may be a chance witness even at one's own house; if for instance, one should at that hour be at one's office. However, if he has given reasons for his presence at that point of time he cannot be said to be a chance witness and his evidence cannot be discarded on that ground. In what circumstances one should be called as a natural witness and not chance witness the Apex Court in the case of Rana Partap and Others Vs. State of Haryana, observed thus :-

...We do not understand the expression "chance witness". Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence.

13. Coming to the next submission of Shri Rath for drawing adverse inference against the prosecution in not examining independent witnesses, it is necessary to have a cursory view on the available evidence to appreciate his contention. It has been brought on record that P. W.5 in his earlier statement to the police, stated that one Manoj Kumar Das had come to his house and informed that the deceased, his younger brother had been assaulted by five to six unknown persons. Referring to this statement, Shri Rath argued that if Manoj Kumar Das had been examined, truth would have been unearthed that the accused persons were not the real assailants, We are not inclined to accept this submission, the reason being that it is neither borne out from the evidence of the two eye witnesses nor the post-occurrence witnesses that in fact Manoj Kumar Das was all along present during the occurrence. When the incident occurred during day time it was probable that passersby who had no prior acquaintance with the accused persons informed Manoj Kumar Das that the deceased had been assaulted and being so informed, he (Manoj) rushed to the house of P.W.5 to pass on the news. So far non-examination of Marshallan Dugan, Bijay Kheri and another is concerned, there is no positive evidence of their having gone to the scene. of occurrence and witnessed the assault. It is the common experience that when a crime is committed in a public place people usually keep themselves as far removed from the spot as possible. So it is quite believable that when the incident occurred, the aforementioned persons who according to P.W. 14 were present at the shop of P.W.3 left the spot out of fear and to avoid police

interrogation.

14. The next submissions of Sri G.Rath is that P.W.s. 14 and 15 were not examined by the Investigating Officer (P.W. 17) on the very day of incident, but were examined on the next day and there being no explanation for delayed examination, their evidence should be viewed with suspicion. In this context it may be stated that within one and half hours of the incident FIR was lodged to the police and in the said FIR names of those two persons find mention as eye witnesses. It is apparent that P.W. 17 could not examine and record the statements of these two eye witnesses for the reasons beyond his control. As would be seen from the record, on receipt of the FIR (Ext.3) P.W. 17 hastened to the hospital to ascertain the condition of the deceased and to get his dying declaration recorded by the doctor. Thereafter from the hospital he came back to the place of occurrence for making arrangement to guard the spot where the blood was lying. In that view of the matter he cannot be blamed for not recording the statement of the eye witnesses on the date of incident.

15. On a conspectus of the facts, circumstances and the evidence as discussed above, we are of the view that these accused persons being armed with deadly weapons attacked the deceased resulting in his death.

16. This takes us to find as to what offence the accused persons committed. To repeat with, there was bad blood between the parties due to union rivalry. Asevidence reveals, for certain incidents the deceased had lodged information to the police for which criminal proceedings were initiated against some of the accused persons. In this background it is to be judged as to whether the accused persons really intended to take revenge by putting an end to the life of the deceased. From the evidence of the eyewitnesses, discussion of which has been made in the proceeding paragraphs, it appears that the accused persons attacked the deceased with lethal weapons, such as, farsa, cycle chain, etc.and caused certain abrasions and bruises. This suggests that sharp side of the farsa had not been used in causing injuries. So if really the intention of the accused persons was to cause death of the deceased, they would not have hesitated to inflict more serious injuries. Added to that, it would appear from the evidence of P.W.14 that after the deceased fell down on receiving injuries, he was not further assaulted. All these facts and circumstances persuade us to hold that the act committed by the accused persons was with the knowledge that it was likely to cause death or to cause such bodily injury as was likely to cause death of the deceased. Therefore, they are liable for punishment u/s 304, Part II read with Section 149 IPC (See Panchaiah and others Vs. State of Karnataka, , Nadodi Jayaraman and Others Vs. State of Tamil Nadu, and Sarman and others Vs. State of Madhya Pradesh, .

17. Learned Additional Government Advocate, in order to support the conclusion arrived at by the learned Sessions Judge that the offence committed by the accused persons was one u/s 302 IPC, relies upon two decisions of the Apex Court in Gudar Dusadh Vs. State of Bihar, and State of Andhra Pradesh Vs.

Rayavarapu Punnayya and Another, distinguishable. In the former case, the accused along with his companion was lying in wait to attack the deceased and gave a heavy blow with a lathi, as a result he died instantaneously. Considering the facts and circumstances of the case and the nature and seriousness of injury, their Lordships held that the case was squarely covered by clause "thirdly" of Section 300 IPC. In the latter case, the accused persons selected heavy sticks, mercilessly pounded the deceased's legs and arms causing no less than 19 or 20 injuries smashing at least 7 bones, mostly major bones and dislocating two more. The beating was administered in a brutal and reckless manner. All these weighed with their Lordships to come to a conclusion that the offence committed by the accused persons was murder. The fact of the present case is altogether different. All the injuries except injury No. 6 were minor and superficial and according to the doctor that injury alone caused the death of the deceased.

18. On an analysis of the evidence and keeping in view the facts and circumstances of the case while maintaining the conviction and sentence of the accused persons recorded u/s 148 IPC, we set aside their conviction u/s 302/149 IPC and convict them u/s 304, Part-II read with Section 149 IPC and sentence each of them to undergo rigorous imprisonment for five years and order that both the sentences shall run condifidently. If the accused persons meanwhile have already suffered the imprisonment as modified by us, they may be set at liberty forthwith if their detention is not required in connection with any other case.

To the limited extent mentioned above, the appeal is allowed.

R.K. Patraj, J.

19. I agree.