

(1976) 01 OHC CK 0001

In the Orissa High Court

Case No : Criminal Appeal No. 67 and Criminal Revision No. 221 of 1975

Chakradhar Mohapatra

APPELLANT

Vs

State of Orissa
 Tilottama Bewa Vs Chakradhar
Mohapatra and Others including State of Orissa

RESPONDENT

Date of Decision : 23-01-1976

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 201, 212

Citation : (1976) 42 CLT 611

Hon'ble Judges : K.B. Panda, J

Bench : Single Bench

Advocate : Sadan Gupta, R. Mohanty, Manjuri Gupta, in Criminal Appeal No. 67 of 1975 and S.C. Mohapatra, in Criminal Revision No. 221 of 1975, for the Appellant; S.C. Mohapatra, B.L.N. Swamy, A.S.C. in Criminal Appeal No. 67 of 1975, Sadhan Gupta, R. Mohanty and Manjuri Gupta, in Criminal Revision No. 221 of 1975, for the Respondent

Final Decision : Dismissed

Judgement

K.B. Panda, J.—Thirty-four persons were facing trial under Sections 147, 148, 149, 302, 323, 334, 307, 452, 426, 201 and 212 of the Indian Penal, Code and ultimately the Appellant alone was convicted u/s 304, Part I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years by the Sessions Judge, Puri in Sessions Trial No. 71 of 1974 on 15-4-1915 occasioning this appeal.

2. The facts in brief are thus: The members of the accused party belong to the Communist Party of India (M.L.) while the members of the prosecution party to the Congress. There is admittedly one Juvak Sangha run by the accused party. The Appellant is the Secretary and as such a leader of that Juvak Sangha. The prosecution party and most of the accused persons, at least the Appellant, belong to village Tipuri. There is a piece of land measuring 29 cents (plot No. 1151 of Khata No. 252) in Blichak of that village in the neighbourhood of the

bustee intervened by a tank caned Samuka. The evidence is that from the extremity of the village, this plot is visible. There seems to be a scramble for possession between these two parties ensued over this piece of land. The Juvak Sangha wanted to have it for their own purpose while the prosecution party, particularly deceased Bauribandhu Mohapatra, wanted to have it for himself.

The prosecution case is that on 21-4-1974, about 51 persons including the Appellant formed an unlawful assembly and being armed with deadly weapons such as Farsas and Bhallis went over this land and uprooted the groundnut raised by deceased Bauribandhu. At this, Bauribandhu and his associates sent two persons, namely, Gunanidhi (p.w.16) and Baikuntha of their party to Kansa Out Post which is only at a distance of 3 to 4 kilometres from the village to report about this matter. Since there was considerable delay in their return, the deceased and his party thought it fit to go and protest against the high-handed action of the accused persons. Thus, according to the prosecution, Bauribandhu and 7 to 8 others proceeded towards the disputed land and when they were midway on the embankment of the tank, it is alleged, that two of the accused persons now acquitted exhorted that the complainant's party should be first driven out and then the uprooting operation would proceed. At this, it is said, that all the 51 who were on the field rushed at the complainant's party, who attempted to escape but unfortunately were surrounded and the Appellant gave a Bhalli thrust on the abdomen of the deceased Bauribandhu. Bauribandhu lost his senses and fell down. As a result of the injury the intestines came out. Thereafter the further case of the prosecution is that Gouranga and Sudarsan now acquitted pulled out the Bhalli with force by pressing against the chest of Bauribandhu and then they attacked the relations of the complainants party in the village. It is also alleged that the post office of village was ransacked. After the dispersal of the accused persons, p.w. 1 went to the Out Post of Kansa and lodged the F.I.R. Ext. 1 at about 10 am. the same day, involving 51 persons. Accordingly the G.R. case was registered and after investigation, charge sheet was submitted as against 34 accused persons only.

3. The defence in general was that the land in question was in possession of one Bhagabat Menta who had raised the groundnut crop along with 11 others some of whom were accused persons. On the date of occurrence those who raised the crop were collecting groundnuts and had taken two carts for the purpose. After finishing the job they proceeded with their carts on the embankment of Samuka tank and when they had crossed almost half the way, the complainant's party armed with deadly weapons opposed them and demanded half of the produce as their owners share, but the same was declined. The prosecution party then asserted that they had got the land by way of lease on 8-1-1974 from the landlord and as such they were entitled to half, share. The defence denied knowledge of any such lease. However, they agreed that the matter might be decided later in the village. This the prosecution party did not accept and Bauribandhu gave a Farsa blow to accused Bula which evoked a scuffle between the parties. Thereafter, accused Jayakrishna and Bharmar were also assaulted by

the members of the prosecution party. At this in self-defence of their person and property, some of the defence party whirled the implements with which they were digging out the groundnuts and the goading sticks (Panchana) and thus escaped. In short, their defence was that the prosecution party had no possession over the disputed land; that they were aggressors; that they in order to feed fat their ancient grudge gave a report at the Police Station roping in as many persons as they could though in fact most of them were not present in the village much less on the scene of occurrence. So far as the present Appellant is concerned, his plea was that he being one of the leaders of the Juvak Sangha had been falsely implicated in causing the injury on the deceased Bauribandhu.

4. The prosecution examined 19 witnesses and the defence 9. The prosecution filed a registered deed dated 8-4-1974 to show how the deceased and 7 others had got permanent lease of the disputed land from p.w. 12 the authorised agent of the land-lord in support of its fact of possession.

5. The learned Sessions Judge on an assessment of the evidence held that the allegation on the side of the prosecution that the deceased and his party-men were in possession of the disputed land and had grown the crop, cannot be said to be true; that the further assertion that the accused party were the aggressors is also not true; that indications were there that it was the accused party who was in possession of the disputed land; that the prosecution was guilty of suppression of material witnesses and exaggeration in implicating some of the persons who were not at the spot at all; that whatever happened developed on the spur of the moment and there was no pre-meditation that there was a tree fight in which nobody could be said to be the aggressor. In that view of the matter, he acquitted all the 33 accused persons of all the charges. But, however, he held the Appellant responsible for the injury indicted on the deceased Bauribandhu that resulted in his death and hence convicted and sentenced him as above mentioned.

6. It was contended by Mr. Gupta that the learned lower Court having disbelieved the very foundation of the prosecution case, namely, the possession of the disputed land by the prosecution party and further having disbelieved all other elements that constitute the various offences with which all the 34 accused persons had been charged, and consequently having acquitted 33 of all the charges, went wrong in convicting the Appellant on the self-same evidence which he characterised as tainted and exaggerated. In that context, he cited certain decisions to establish that it was the onus of the prosecution to prove every link in the chain of circumstances that constitute the offence and not to say generally that the case has been established.

7. On behalf of the State it was contended that the finding of the learned lower Court on the question of possession is incorrect; that there is ample evidence to show that the Appellant inflicted the injury on the stomach of Bauribandhu resulting in his death and as such his conviction is very meet and proper.

8. Out of the 19 witnesses, the relevant witnesses for our purpose are p. ws. 1, 2, 3, 5, 6, 9 and 11 who are the eye-witnesses to the occurrence. P.w. 8 is the doctor who held the postmortem examination. P.w. 12 is the authorised agent of the land-owner of the disputed land who executed on behalf of the land-owner Ext. 2 the lease deed in favour of the deceased Bauribandhu and 2 others. P. ws. 18 and 19 are the two Investigating Officers in the case. D. ws. 1 and 2 are two doctors who examined some of the accused persons regarding the injuries they sustained in course of the same transaction. The rest of the d. ws. are not material for our purpose except pointing out that the learned lower Court relying on the evidence of some of them has believed the alibi advanced by some of the accused persons now acquitted.

9. The eye-witnesses referred to above have deposed to the possession of the land by Bauribandhu and have also deposed to the fact as to how the accused party attacked Bauribandhu and his party-men on the Samuka tank embankment and how the Appellant gave the Bhalli blow on the stomach of the deceased. These prosecution witnesses admittedly belong to the camp of the deceased. Further, p. ws. 1, 2, 6 and 16 are the co-lessees along with the deceased in respect of the disputed land under Ext. 2. That apart, p. ws. 1, 3 and 5 are all brothers being sons of one Baikunthnath Mohapatra. P.w. 9 Jayakrishna's father Benudhar is the brother of Baikuntha and father of p.w. 2 is the brother of p.w. 9. P.w. 11 is the adult married daughter of the deceased. It is in evidence that village Tipuri is a fairly large bustee having a population of 300 to 400. Some of these eye-witnesses have admitted that one Bhagabat Menta was the Bhagchasi in respect of the disputed land 4 to 5 years before the date of occurrence while some of them pretended ignorance of the same. The land I being so close to the village and in view of the fact that no independent eye-witnesses of the locality were examined and the prosecution witnesses made unconvincing statements, the learned lower Court disbelieved the possession asserted by the prosecution party. While doing so he has also taken into consideration the circumstantial evidence, namely, that the lease deed was executed only on 8-1-1974, obviously the ground nut crop had been raised before that. It is 13 days after the execution of Ext. 2 that the occurrence took place. According to the prosecution, Bauribandhu was in possession of this land and had grown the crop. If it were 50 there was no need for him to get a lease deed on 8-4-1974 on payment of a substantial consideration which he could not afford to pay and for which he had to take the assistance of six others who were included as co-lessees under Ext. 2. In that exhibit it is stated that the land was given on permanent lease to the I deceased and 6 others along with the crop. Obviously this would mean as if the crop had not been grown by Bauribandhu; but either by the landlord or somebody on his behalf. Much was made of this Ext. 2 and it was argued that it was a documentary evidence regarding the possession of the prosecution party. The learned lower Court has attached no importance to Ext. 2 and has held, and rightly so, that it was a document created for the purpose of ousting the previous Bhagachasi Bhagabat Menta and to introduce a new Bhagchasi which under the

tenancy law the zamindar could not legally afford to do. The explanation from the side of the prosecution is that as the accused party had a covetous eye on this piece of land, lest they take it, Bauribandhu hastened to take a lease deed in his favour and as he had not sufficient funds he borrowed money from other six and those 7 persons became lessees under Ext. 2. For a piece of land of 29 cents which was being admittedly according to the prosecution under the possession of Bauribandhu alone. 7 persons to get the lease deed is something very much telling. The learned lower Court has rightly posed the point that possession of the land is the starting point and so discussing the same elaborately has held that it was not the prosecution party who was in possession of it and that rather it was some of the accused persons along with Bhagabat who were in possession of the land. On a reading of the evidence of the eye-witnesses, Ext. 2 and the circumstantial evidence that flows therefrom I am unable to disagree with the learned lower Court's finding about possession.

10. In that context, the evidence of p.w. 12 may be referred to. He has admitted that Bhagabat Menta was cultivating the disputed land during the years 1969-70 and left the disputed land out of his own accord. A rent suit has also been filed against Bauribandhu of which the learned lower Court has taken notice of and has held it to be collusive. Ultimately the finding of the learned lower Court is thus:

So on a consideration of the evidence adduced by the prosecution I find that the prosecution failed to prove satisfactorily that it is Bauribandhu that raised the groundnut crop in question.

11. Regarding raising of the crop by the accused party, a reference may be made to Ext. 27 a Station Diary entry made by accused Nos. 23 and 24 now acquitted on 12-4-1974 at Kansa Out Post. Substantially it is to the effect that Bauribandhu and his henchmen were attempting to remove the groundnut Crop that had been raised by the defence party. The learned Court (see para. 11 of his judgment" has, however, held that he is unable to definitely say as to who had raised the groundnut crop. But this Ext. 27 almost clinches the issue.

12. According to the prosecution case quite a large number of persons armed with deadly weapons had become busy in collecting the groundnut crop from 6 a.m. Seeing this, the prosecution party has deputed two persons to Kansa Out. Post for intervention. It is also in evidence that as these two people did not return, some of the prosecution party could not wait further and went to protest against the illegal action of the accused persons ignoring the request of the family members not to go and intervene. It is further the prosecution case that 7 to 8 of the prosecution party including the deceased came via Samuka Pokhari towards the disputed land unarmed. This evidence is incompatible with the broad feature's of the case. Ordinarily 7 to 8 people would not venture to face a mob of 34 or 35 who were determined in uprooting the groundnut crop and more so when they were deadly armed. Besides they would not further venture to challenge their action unarmed. What is more strange is, if they apprehended

any danger, they would at once slip back to escape the wrath of the accused persons but the circumstances, as they transpire in this case, indicate otherwise. There appears to have been on the embankment of the Samuka Pokhari a regular encounter between these two parties. Unless their number was almost equal or unless they were equally armed, such a confrontation cannot be reasonably visualised. The learned lower Court in his own way on this aspect of the case has found thus:

So the prosecution story that while the prosecution party were still on their way to the disputed land the accused rushed at them, chased them and surround them, assaulted them sounds inherently improbable and more so in view of the other features of the prosecution case.

I see no reason to differ from this- finding of the learned lower Court.

13. That some of the accused party had injuries cannot be cavilled at. It is supported by the evidence of p.w. 5 as well as d. ws. 1 and 2 who are doctors who examined them. The accused persons who had injuries were Bula Mohapatra, Bhramar Baral and Joykrishna Mohapatra. Evidently there is no explanation from the side of the prosecution as to how these three received injuries which is also a circumstance against the prosecution that it was the accused persons who were the aggressors. The learned lower Court on this aspect of the case has held thus:

So on a consideration of the evidence on the various aspects of the matter, I find that the prosecution story that as the members of the prosecution party were on their way to the disputed land, they were chased and attacked without any provocation from their side and that they were merely the victims of aggression at the hands of the accused party cannot be believed:

14. For an appreciation of the arguments advanced on behalf of the Appellant, some of the observations of the learned lower Court need be mentioned. The learned Court has further held that:

.... As the members of the accused party attempted to take the groundnuts in question to their village there was such an altercation between the parties that It had set both the parties to indulge in a sudden free fight with whatever weapons they had at that time resulting in injuries on members of the prosecution party as well as on the members of the accused party although it cannot be said as to which of the parties struck the first blow. Thus the occurrence was not the outcome of any pre-meditated planned aggression on the part of either of the parties.

Thereafter he proceeds to examine the case of the individual accused and finally concludes:

.... The prosecution has come out with a false and grossly exaggerated version when they allege that some of the members of the accused party trespassed into their houses and caused damage to their property.

.... the eye witnesses to the occurrence are coming out with a grossly exaggerated version of the prosecution case and some of them do not even shirk to speak falsehood for securing the conviction of all the accused persons.

From the above caustic remarks of the learned Court it can be well judged as to what view he had taken about the evidence adduced on the side of the prosecution. Accordingly he had acquitted all the accused persons excepting the Appellant all the charges. Mr. Gupta, therefore, argued that when the entire prosecution case has been thrown out in toto there was nothing residue left to convict the Appellant. Merely because somebody has died, it will not necessarily be the job of the Court to find somebody guilty and convict him. In this connection, Mr. Gupta dilated much on the weapon said to have been used in the infliction of the injury. The substance of his argument was that not only, the witnesses "have lied but even the weapon said to have been used in infliction of the injuries could not have been the weapon used for the evidence of the eye-witnesses on that score is inconsistent with the medical evidence in the case. Admittedly, the alleged weapon of offence the Bhalli has not been recovered, but all the same, the prosecution obtained a similar weapon M.O. IV and produced the same before the doctor p.w. 8 so that he could give his opinion as to whether the injury on the deceased could be possible with a weapon like M.O. IV. The alleged weapon that is a Bhalli with which the injury is said to have been inflicted is a bamboo lathi with an iron end in the shape of, according to the evidence of p.w. 1, a betel-leaf attached to it. The evidence of the doctor p.w. 8 who held that post-mortem is that the injury on the stomach of the deceased is only possible with a piercing weapon which has a uniform width. Evidently M.O. IV or for that matter the alleged Bhalli has never a uniform breadth. It is pointed at the end and at the point of contact with the lathi it is much broader. Thus the weapon said to have been used by the prosecution witnesses is not supported by the medical evidence in the case. Further, it is the consistent case of all the witnesses for the prosecution that as a result of the injury, the intestines came out while the weapon was pulled out with force. The doctors evidence is that intestines had not come out, that if really it had come out even, it would be difficult for an expert to put them in their proper place and that in the instant case for pulling out the weapon no force would have been necessary. Thus, that aspect of the prosecution case is further belied. Accordingly Mr. Gupta contended that there is nothing left in the prosecution case for which the Appellant should be convicted. In this respect he cited several decisions of different High Courts to the effect that it is the bounden duty of the prosecution not only to prove its case generally, but every bit of it.

15. The citations to which my attention was drawn are Shew Moni Shaw Vs. The State, , Tarachand Sah and Others Vs. Emperor., Anama Rout and Others Vs. Trilochan Das, , Chhotan Mahton and Others Vs. State, , Mohar Rai and Bharath Rai Vs. The State of Bihar, and Zwinglee Ariel Vs. State of Madhya Pradesh, . It is

not necessary to deal with all the citations excepting Tarachand Sah and Others Vs. Emperor, , which lays down the proposition in the following manner:

Accused cannot be convicted upon a criminal charge merely on the ground that he did not put forward a defence which was open to him. The prosecution must clearly establish its case irrespective of the defence taken,

In the same volume at page 365 Rambrichh Singh and Others Vs. Emperor, , it is held:

.... it would be dangerous to act upon the evidence of an interested witness without corroboration.

(vide dictum (b))

and that

Even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true.

(vide dictum (c)) It has also been held therein that

If a fight took place between two armed mobs, then there is no evidence as to what actually occurred. A mere suspicion that the accused or some of them were present can form no basis for conviction. Once the Court has any doubt about the truth of the version even as first recorded, then the accused is entitled to the benefit of that doubt.

(vide dictum (d))

In Mohar Rai and Bharath Rai Vs. The State of Bihar, , the proposition of law laid down is failure of the prosecution to offer any explanation regarding the injuries on the accused and the version of the accused that he sustained the injuries at the time of the occurrence were held to be only highly probable. The prosecution evidence in that case indicated that the accused could not have used the revolver alleged to have been used by him and hence the case against him stood falsified.

The witnesses for the prosecution who were examined after the doctor (p.w.8) in this case, made an attempt to depose in the line the doctor had given his opinion. In that respect the decision in Ram Narain v. The State of Punjab AIR 1957 S.C. 1720, may be profitably quoted:

Where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence, if the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.

It may be stated here that an earlier case of the Supreme Court, i.e., Mohinder Singh v. The State AIR 1958 S.C. 415, was followed in that case. It was further held that:

.... in the circumstances of the case, the High Court overlooked most of the circumstances which were damaging to the prosecution case. It lightly brushed aside the inconsistency between the medical evidence and the prosecution version. The question of the time of occurrence having been shifted from 8-00 p. m. to 6-30 p. m. had been blindly believed as also the evidence regarding the production of the weapons by the accused. In view of these striking circumstances the High Court should have approached the case with much more care and caution than it has, particularly when a death sentence was involved. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye-witnesses in the Court was a belated attempt to improve their testimony and braying the same in line with the Doctor's evidence with a view to support an Incorrect case.

As it seems, the learned lower Court after discarding the prosecution case has dealt with the case of the Appellant from a different footing. In doing so he has made an attempt to distinguish the case law in Mohinder Singh v. The State AIR 1958 S.C. 415, which lays down thus:

In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case.

As already indicated, this case has been followed in the latter case referred to above (Ram Narain v. The State of Punjab AIR 1957 S.C. 1720). The grievance of Mr. Gupta is that the learned lower Court's approach to the case and appreciation of the dictum laid down in Ram Narain v. The State of Punjab AIR 1957 S.C. 1720, have been wrong. It needs no reiteration that the prosecution cannot rest content with merely saying that the accused inflicted the injury, but it must establish the manner and the circumstances in which it alleges the injury to have been inflicted. Here the background of the infliction- of the injury has been totally disbelieved. Further, the weapon of offence with which the injury is alleged to have been inflicted is contrary to the evidence of the doctor. Thirdly, the effect of the injury is also inconsistent with the doctor's evidence. In the examination of the Appellant, he was asked as if to have inflicted the injury with a Bhalli and not any other pointed weapon. This having failed the Court cannot introduce an alternative case - not even urged by the prosecution. That being so, I think there is, enough force in the contention of Mr. Gupta that there was no point in judging the case of the Appellant from a different standpoint while acquitting the rest of the 33 accused persons of all the charges on the basis of

identical evidence.

16. To sum up, therefore, the bulk of the prosecution case having been jettisoned, there is hardly anything left to convict the Appellant, when the eye-witnesses have been rightly disbelieved, what developed remains in the realm of speculation and conjecture. Obviously a criminal Court cannot act on conjectures. It is unfortunate that the deceased has died of an injury on his stomach. But, for that, somebody cannot be convicted unless there is unimpeachable evidence in support of the same. May be that in that melee the Appellant might have inflicted the injury with a piercing weapon with which he was uprooting the groundnut plants. But it is not a mere possibility that would help the prosecution, but, it must prove beyond all reasonable doubt that the Appellant and the Appellant alone was responsible for the injury. There is a long way between "may" and "must" and the entire distance the prosecution must traverse before it can urge for a conviction and in the instant case it has signally failed in that. Accordingly I would set aside the conviction and sentence of the Appellant and direct that he be released forthwith.

17. A criminal revision has been filed by the widow of the deceased Bauribandhu which has been numbered as Criminal Revision No. 221 of 1975. The same has not been admitted. Mr. Gupta, the learned Counsel for the Appellant contends on the basis of Thakur Ram Vs. The State of Bihar, , that the widow has no locus standi. In view of my finding in this criminal appeal and in view of the fact that no appeal has been preferred by the State as against the acquittal of the rest of the accused persons, under any of the sections in which they were charged, I do not consider it necessary to dispose it of on merits and as such it is dismissed.