
(2009) 09 OHC CK 0042
In the Orissa High Court
Case No : CRA No. 128 of 1997

Dhruba Charan Nayak and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 304, 323, 34

Citation : (2009) CLT 1609 (Suppl CrI)

Hon'ble Judges : S.C. Parija, J;A.S. Naidu, J

Bench : Division Bench

Advocate : D.P. Dhal, A.K. Acharya, D.K. Das, A.K. Ray and K. Rath, for the Appellant;

Judgement

S.C. Parija, J.—This Criminal Appeal is directed against the judgment dated 30.4.1997, passed by the Addl. Sessions Judge, Kendrapara, in S.T. No. 2/2 of 1992, holding the accused-Appellant No. 2 guilty of offence u/s 302 I.P.C., Appellants 1 & 3 guilty of offence u/s 304, Part-II r/w Section 34 I.P.C. & all the accused persons-Appellants guilty u/s 323 I.P.C. & accordingly convicting them thereunder.

2. The case of the prosecution in brief is that on 4.7.1991, at about 4 P.M., the informant Ajaya Kr. Nayak lodged a written report with the O.I.C., Kandiahath Out Post, alleging that at about 3 P.M. accused persons Dhruba & Brusabhanu Nayak were forcibly raising a fence on his land & seeing this, the father of the informant Damodar Nayak asked the accused persons as to why they were putting up a fence in front of his house. On being asked, accused Brusabhanu suddenly assaulted Damodar by means of a crowbar. At that time the informant Ajaya Nayak was on the verandah of his house. Seeing the assault on his father Damodar, he raised hulla & hearing the shout, his brother deceased Surendra Nayak came running from his house to the spot. As soon as Surendra reached the spot, accused Dhurba Nayak & Rabinarayan Nayak attacked Damodar &

accused Rabi assaulted Surendra on his head by means of a stick, as a result of which, he fell down. Thereafter, accused Dhruba assaulted on the chest of Surendra. Bijaya Nayak & Janmejaya Nayak, the relatives of the informant Ajaya arrived at the spot & they were also assaulted. Accused Rabi assaulted Bijaya by means of a stick & accused Brusabhanu assaulted Janmejaya on his head with a crowbar. After the assault, injured Damodar & Surendra were taken to S.D. Hospital, Jajpur on the same day i.e. 4.7.1991. Surendra succumbed to the injury at the hospital on the night of 4.7.1991 & Damodar succumbed to the injury on 6.7.1991 at S.C.B. Medical College Hospital, Cuttack.

3. On receipt of the written report of the informant Ajaya Kr. Nayak, the same was sent, to the Rajkanika P.S., where it was registered as an F.I.R. & investigation was taken up. During investigation, the O.I.C., Rajkanika P.S. (P.W.11) visited the spot, examined witnesses & seized some blood stained earth, prepared a spot map & seized one crowbar from a corner of the cow-shed of accused Brusabhanu & prepared the seizure list, in presence of witnesses. The I.O. also seized one thick black colour bamboo measuring 3'1", having a diameter of 4'1/2", another bamboo thenga measuring 5'9", with a diameter of 3" from the Sarubari of the accused. The I.O. also seized other incriminating articles, examined witnesses, arrested the accused persons & remanded them to custody. On completion of the investigation, charge-sheet was filed against all the accused persons.

4. The plea of defence was one of complete denial. In their statement recorded u/s 313 Code of Criminal Procedure., the accused persons pleaded that due to land dispute with deceased Damodar, a false case has been foisted against them. Accused Dhruba in his statement stated that he & accused Brusabhanu were assaulted by the deceased Damodar for which he had lodged an F.I.R.

5. The prosecution in order to establish the charges against the accused persons examined as many as 13 witnesses. P.W. 1 is the informant Ajaya Kr. Nayak, who is the son of deceased Damodar & is an eye witness to the occurrence. P. Ws. 2, 3 & 4 are also eye witnesses to the occurrence. P.W. 5 is the daughter-in-law of deceased Damodar. She had stated that accused Dhruba dealt a blow by means of a lathi on the left side chest of her husband Surendra. P.W. 6 is another son of deceased Damodar, who stated that the accused person assaulted Janmejaya. P.W. 6, Bijay Nayak, is another son of deceased Damodar, who stated that accused person assaulted him & his brother Janmejaya. P.W. 7, Janmejaya Nayak is another son of deceased Damodar, who is a post-occurrence witness & had stated that the spot where occurrence took place is situated 15 to 20 cubits from his house. He also found Kausalya lying senseless at the spot. P.W. 8 is the doctor who conducted post-mortem examination over the dead body of the Damodar Nayak. P.W. 9 is the doctor, who examined deceased Damodar & Surendra Nayak on 4.7.1991. He also examined Bijoy Nayak (P.W.6). P. Ws.10 & 11 are the Investigating Officers in the case & P.W. 12 is the doctor of S.D. Hospital, Jajpur, who conducted post mortem examination over the dead body of

Surendra. P.W. 13 is the S.I. of Police attached to Jajpur P.S., who conducted the inquest over the dead body of Surendra.

6. P.W. 1, who is the informant & an eye witness to the occurrence is the son of deceased Damodar & brother of deceased Surendra, who stated in his evidence that the occurrence took place on 4.7.1991 at about 3 P.M. near his house & at that time he was reading a book sitting on the verandah of his house. He stated that before the incident, accused persons were putting a fence (Kantabada) in front of his house. At that time, deceased Damodar was going to take a bath & seeing the accused persons putting Kantabada in front of his house, he called accused Dhruba & asked him why the Kantabada is being placed in front of his house. Thereafter a quarrel started between deceased Damodar & accused Dhruba. At that time accused Brusabhanu arrived at the spot armed with a crowbar & dealt two blows on the head of the deceased Damodar, as a result of which he fell down on the ground. P.W. 1 further stated that seeing the aforesaid incident, he shouted for help & his brother Surendra followed by his wife Kausalya arrived at the spot. At that time accused Rabindra was present at the spot & handed over a lathi to the accused Dhruba. Thereafter accused Rabindra dealt a blow on the head of deceased Surendra & due to the assault, Surendra fell down. Thereafter, accused Dhruba dealt a blow by means of a thenga on the left side chest of Surendra, as a result of which Surendra vomited blood. He further stated that accused Brusabhanu also dealt a blow by means of a crowbar on the left side chest of Surendra. P.W. 1 further stated in his evidence that after the incident, the accused persons fled away from the spot carrying the weapon of offence. Due to the assault, Damodar sustained bleeding injury on his head & Surendra sustained head injury & injury on the chest. After the incident, he (P.W.1) lodged a written report with the A.S.I, Kandiahath Out Post & the injured Damodar & Surendra were shifted to Kandiahath P.H.C. & being directed by the doctor, they were shifted to S.D. Hospital, Jajpur. On the way, before reaching Jajpur Hospital, Surendra died & postmortem examination over the dead body of Surendra was done by the doctor of Jajpur Hospital. Thereafter on the advice of the doctor of Jajpur Hospital, Damodar was referred to S.C.B. Medical College & Hospital, Cuttack, where he succumbed to the injuries.

7. P.W. 2 who is said to be an independent eye witness to the occurrence, corroborated the evidence of the informant (P.W.1) & stated that at the time of the incident, he was going to his land & he saw the incident. He stated that there was some altercation between the accused Brusabhanu & Damodar & at that time accused Brusabhanu arrived with a crowbar from the place where Kantabada was put & dealt two blows on the head of deceased Damodar by means of a crowbar. Being assaulted, deceased Damodar fell on the ground. P.W. 2 further stated that hearing the cry of Damodar, Surendra came running from the house to the spot & as soon as he arrived at the spot to lift his father Damodar, accused Rabi dealt a blow on his head by means of a thenga, as a result of which Surendra fell down on the ground. Soon after Surendra fell down, being injured, accused Brusabhanu assaulted on the left side chest of Surendra

by means of a crowbar & accused Rabi dealt a blow on the head of Surendra by means of a thenga.

8. P.W. 3, who is also an eye witness to the occurrence, has fully corroborated the prosecution case. He stated that he heard exchange of hot words between Damodar & Dhruba & at that time suddenly accused Brusabhanu being armed with a crowbar arrived at the spot & dealt a blow by means of that crowbar on the head of Damodar & being injured he fell down on the ground. P.W. 3 further corroborated the fact that hearing the shout, deceased Surendra immediately arrived at the spot being followed by his wife Kausalya. Thereafter, accused Rabi dealt blow by means of a thenga on the head of Surendra as a result of which he fell down on the ground & when his wife Kausalya arrived to lift Surendra, accused Dhruba dealt a lathi blow on the left side head of deceased Surendra. He further stated that accused Dhruba assaulted Surendra on his left side chest by means of a thenga & being injured, deceased Surendra vomited blood & thereafter, accused Brusabhanu assaulted on the left side chest by means of a crowbar, which he was using for digging hole in the ground.

9. P.W. 4 who is another independent eye witness to the occurrence, has also corroborated the prosecution case. He stated in his evidence that at the time of the incident he was present in front of the house of deceased Damodar & at that time the informant (P.W.1) was reading a book, sitting on his verandah. He further stated that deceased Damodar asked something to accused Dhruba & a quarrel took place between them. At that time, suddenly accused Brusabhanu came to the spot being armed with a crowbar & dealt two blows on the head of the deceased Damodar, as a result of which he fell down on the ground. P.W. 4 further stated that the accused Rabi reached spot with two thengas & he handed over one thenga to Dhruba. Thereafter accused Rabi dealt a blow on the head of Surendra by means of a lathi, as a result of which Surendra fell down. He further stated that when Kausalya was trying to lift deceased Surendra, at that time, Dhruba dealt a thenga blow on the left side chest of deceased Surendra, as a result of which blood came out from the mouth of deceased Surendra. P.W. 4 further stated that accused Brusabhanu assaulted on the left side chest of deceased Surendra.

10. P.W. 5 is the wife of deceased Surendra, who stated in her evidence that at the time of the incident she was serving food for her husband & at that time deceased Damodar went to take bath. While cooking, she heard a shout & hearing the shout she rushed to the spot & saw that deceased Damodar was lying on the ground with injury on his head. She stated that when her husband went to lift deceased Damodar, at that time accused Rabi dealt a lathi blow on the head of her husband. She further stated that accused Dhruba dealt a blow by means of a lathi on the left side chest of her husband Surendra & soon after accused Dhruba dealt a blow on the left side chest of deceased Surendra & on seeing the assault on her husband, she became senseless.

11. P. Ws. 6 & 7 are the other two sons of deceased Damodar, who stated that

hearing the shout, they went to the spot & saw their father deceased Damodar lying on the ground with severe injury on his head & also saw deceased Surendra lying on the ground with severe injury on his head & chest.

12. P.W. 9 is the doctor of Kandiahath P.H.C., who stated that on 4.7.1991, on police requisition, he examined Damodar Nayak & found two lacerated injuries of size 3 inches length, 1 inch breadth & half inch depth over the vault of the scalp & prepared the medical report as per Ext. 3. He stated that the said injuries can be caused by a blunt weapon. He further stated that he stitched the scalp injury & after giving first aid treatment, he referred Damodar to S.D. Hospital, Jajpur for X-ray of head & for observation of head injury. P.W. 9 had stated in his evidence that the injury on Damodar can be caused by a crowbar used with some force. P.W. 9 further stated that on the same date, he examined deceased Surendra & found haematoma with abrasion over it with few bleeding points over the swelling with suspected depressed fracture over the scalp bone. The size of haematoma was 3"x2 1/2". He opined that the injury over the scalp can be caused by a blunt weapon. He further stated that the deceased Surendra was brought in an unconscious condition & after giving first aid, he referred Surendra to S.D. Hospital, Jajpur, for observation & specialist opinion.

13. P.W.12 is a doctor who conducted the post-mortem examination over the dead body of Surendra & found lacerated injury of left temporal region of skull size 3"x3" bone depth underlying comminuted fracture of skull, subdural haematoma, a piece of bone pierced into the lobe of the brain on the left side, haematoma of size 3"x3" over right temporal region, fracture of 7th, 8th & 10th rib of the left side chest with rupture of left side lungs & heart, pool of blood in the thoracic case, both the chambers of the heart were empty, all organs were congested, pool of blood inside the abdomen, about 200 ml. of guel inside stomach, mucus membrane of the stomach was congested. P.W. 12 opined that the cause of death was haemorrhage & shock & that all the injuries can be possible by piercing weapon & also by fracture pieces of ribs & that the injury on chest & brain can cause death individually & that the death was homicidal in nature.

14. P.W. 8 is the doctor who conducted post-mortem examination over the dead body of Damodar & found the following injuries:

- (i) Right ear surrounded with swelling.
- (ii) Stitched wound over right parieto-occipital region close to the parietal eminent crossing the mid line of length 7cm., 6 stitches given.
- (iii) Stitched wound over right occipital region of length 4 cm., three stitches given.
- (iv) Abrasion over right occipital region close to the mid line of size 2 x 1 cm.

On dissection the doctor found the following injuries:

- (i) Subscalpal haematoma over right parietotemporal & occipital region.
- (ii) Depressed comminuted fracture of right parieto-occipital bone.
- (iii) The lambdoid suture separated.
- (iv) Extradural haematoma of size 3/4cm. thickness; over right parieto-temporal & occipital region.
- (v) Subdural haematoma of thickness over right parieto-temporal & occipital bone.
- (vi) Right parietal lobe & right temporal lobe & posterior part, right frontal lobe lacerated.
- (vii) Intra-cerebral haemorrhage present.
- (viii) Right hemisphere compressed.
- (ix) Middle Cranial fossa fractured.

15. P.W. 8 opined that all the injuries were ante mortem in nature & the cause of death was due to direct involvement of vital centers such as brain, as a result of injury to the head & that the injury on the head was due to assault & all the injuries can be caused by a crowbar or lathi used with force. P.W. 8 opined that the death of Damodar was homicidal in nature.

16. On the basis of the evidence of the eye witness i.e., P. Ws.1, 2, 3 & 4 & the medical report & the opinion of the doctors P.W. 8 & 12, Learned Additional Sessions Judge, came to find that accused Brusabhanu had assaulted deceased Damodar with an intention to cause his death & therefore guilty of offence u/s 302 I.P.C. As regard the other two accused persons, namely, Rabi & Dhruba are concerned, Learned Additional Sessions Judge, came to find that a petty quarrel gave rise to the incident, which resulted in the death of Damodar & Surendra & as there was no premeditation & an intention on the part of accused Rabi & Dhruba to cause death of deceased Damodar & Surendra & as they have dealt blow on the vital part of the body, having knowledge that the injury to head & chest are likely to cause death, they are guilty of offence u/s 304 Part-II read with Section 34 I.P.C. On the basis of the medical evidence with regard to the nature of injury caused to P. Ws.6 & 7, Learned Additional Sessions Judge also found all the accused persons guilty u/s 323 I.P.C.

17. Accordingly Learned Addl. Sessions Judge proceeded to hold accused Brusabhanu (Appellant No. 2) guilty of offence u/s 302 Indian Penal Code & convicted him thereunder. The other two accused persons (Appellant Nos. 1 & 3) were found guilty u/s 304 Part-II r/w Section 34 Indian Penal Code & were convicted thereunder. Further, all the accused persons-Appellants were found guilty u/s 323 I.P.C. & were convicted thereunder.

18. Learned Counsel for the Appellants forcefully submits that as the so-called eye witnesses i.e. P. Ws. 1, 2, 3 & 4 are interested witnesses, their evidence

should not have been relied upon as the basis for convicting the accused persons. In this regard, it is submitted that as the evidence of the so-called witnesses to the occurrence are not clear, cogent & consistent & there being material inconsistencies & discrepancies, the same should not have been believed for convicting the accused persons. It is further submitted that as there are substantial discrepancies in the story made out in the F.I.R., the statement of the witnesses recorded u/s 161 Code of Criminal Procedure. & the evidence adduced by the witnesses before the court, Learned Addl. Sessions Judge erred in relying on such material to record an order of conviction against the accused persons. It is submitted by the Learned Counsel for the Appellants that as the prosecution case is that due to raising of a fence (Kantabada) by the accused persons in front of the house of the deceased Damodar & Surendra, a quarrel took place & hot words were exchanged & in the quarrel, the accused persons assaulted the deceased Damodar & Surendra as well as Bijaya & Janmejaya, the same was more in the heat of passion & was not a pre-planned or pre-meditated attack & therefore it cannot be said that the accused persons had any prior motive or intention to assault or kill the deceased Damodar & Surendra. It is also submitted that as the accused Brusabhanu had no prior plan or design to assault the deceased person, he stands on the same footing as that of the other two accused persons i.e., Rabi & Dhruba. Accordingly it is submitted that at best the accused Brusabhanu can be held guilty of offence u/s 304 Part-II I.P.C.

19. On an analysis of the evidence on record, we find that the findings of Learned Addl. Sessions Judge is based on clear, cogent & credible evidence adduced by the witnesses in support of the case of the prosecution. There is no material inconsistency or contradictions in the evidence of the eye witnesses, i.e., P. Ws. 1 to 4, coupled with the medical evidence of P. Ws. 8 & 12 clearly established the involvement of accused persons in the alleged offences.

20. However, the admitted case of the prosecution is that due to forcible raising of a fence (Kantabada) by the accused persons in front of the house of deceased Damodar & Surendra, an altercation ensued between the parties & during the quarrel, the accused Brusabhanu assaulted deceased Damodar & Surendra with a crowbar, which he was using at that time for digging hole on the ground for raising the fence. The entire episode appears to have arose out of a sudden quarrel between the accused persons & the deceased Damodar & Surendra & there was no motive or any premeditation on the part of accused Brusabhanu to commit murder of the deceased persons. The entire incident appears to have taken place in the heat of passion & the assault by accused Brusabhanu was in a fit of anger, which was not premeditated or with any design or intention.

21. In view of the above, we feel the interest of justice would be best served, if the conviction of the accused Brusabhanu (Appellant No. 2) convicted u/s 302 I.P.C. is modified & reduced to one u/s 304 Part-II I.P.C. The conviction of other accused persons i.e., Appellant Nos. 1 & 3 u/s 304 Part-II read with Section 34 I.P.C. & the conviction of all the accused persons u/s 323 I.P.C. needs no

interference.

22. Accordingly the conviction of the accused Brusabhanu (Appellant No. 2) u/s 302 is set aside & instead, he is convicted u/s 304 Part-II I.P.C. & sentenced to undergo R.I. for 8 years. The sentence awarded to accused Dhruba Charan Nayak (Appellant No. 1), who is now more than 90 years of age is modified & he is sentenced to the period of imprisonment already undergone by him. The sentence awarded to accused Rabi Nayak (Appellant No. 3) is also modified & reduced to undergo R.I. for 5 years. The sentence awarded to the Appellants u/s 323 I.P.C. is maintained. All the sentences are to run concurrently. It is needless to say that the period undergone by the Appellants shall be treated as set off.

23. With the aforesaid modification of sentence, the Criminal Appeal is disposed of.

A.S. Naidu, J.

24. I agree.