

(2022) 07 OHC CK 0013
In the Orissa High Court
Case No : Criminal Appeal No. 125 Of 2001

Dibakar Swain And Others

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 05-07-2022

Acts Referred:

Code of Criminal Procedure, 1973 — Section 374(2)
Indian Penal Code, 1860 — Section 34, 302, 307, 323, 354, 447, 448

Citation : (2022) 07 OHC CK 0013

Hon'ble Judges : Dr. S. Muralidhar, CJ; R. K. Pattanaik, J

Bench : Division Bench

Advocate : Devashis Panda, P.K. Muduli

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. This appeal is directed against an order dated 13th June, 2001 passed by the Additional Sessions Judge, Cuttack in Sessions Trial Nos.222 of 1997 and 516 of 1998 convicting the Appellants for the offences under Sections 447/323/302/34 IPC and further the Appellant Bijay Kumar Swain for the offence punishable under Section 354 IPC and sentencing each of them to imprisonment for life for the offence under Sections 302/34 IPC and no separate sentence for the remaining offences.

2. Initially, there were five Appellants when the present appeal was filed. The Appellants are Dibakar Swain and his four sons Bijaya Kumar Swain, Ajay Kumar Swain, Akhaya Kumar Swain, Abhaya Kumar Swain, Appellant Nos. 1 to 5 respectively, who were also arraigned as Accused Nos. 1 to 5 in the trial. Accordingly, they are hereafter referred to as A-1 to A-5 respectively. By an order dated 11th September, 2001, A-3 and A-4 were enlarged on bail; by order dated 27th January, 2003 A-1 was enlarged on bail and by order dated 16th March, 2004 A-2 and A-5 were enlarged on bail by this Court during pendency of the

appeal.

3. During the pendency of the present appeal, A-1 Dibakar Swain and A-2 Bijay Kumar Swain expired and the appeal as far as they are concerned, stands abated.

4. The case of the prosecution is that at about 1:30 pm on 23rd October, 1996 when Manoj Kumar Swain (PW 7) was returning to his house to Cuttack, he saw his sister Mamata Swain (PW 9) protesting against the uprooting of the fence of the house by A-2 to A-5. He noticed A-2 assaulting PW 9 by tearing her frock.

5. The deceased Siba Prasad, father of PWs 1, 7, 8 and 9, returned home from the field around that time. A-1, A-2 and A-5 are said to have suddenly caught hold of him and all of them conjointly assaulted him on his head by means of a thenga, iron rod and tangia, which they were respectively holding, as a result of which, the deceased sustained bleeding injuries and fell down. When PW 7 and the other son Mahendra Prasad Swain (PW 1) went to rescue their father, A-2 Bijaya and A-5 Abhaya assaulted both of them with iron rod causing injuries. When their grandfather who also was present protested, A-2 Bijaya pushed him. The deceased was removed to the SCB Medical College and Hospital, Cuttack and was admitted to the Neurosurgery Ward for treatment. Siba died in the hospital at 9.30 pm on 25th October, 1996 and the offence for which the FIR was earlier registered was converted from Section 307 to 302 IPC.

6. On completion of investigation, a charge sheet was filed. The accused pleaded not guilty and claimed trial. The plea of the defence was that on the date of incident, the deceased along with PWs 1 and 7 had trespassed into the house of the accused in the afternoon and abused the wife of A-2 in obscene language and dragged her wearing apparels. When A-1 went to rescue his daughter-in-law, PWs 1 and 7 along with the deceased assaulted A-1 and A-2 causing injuries on their person, whereafter A-1 lodged a written report at the police station, on the basis of which Sadar P.S. Case No.287 of 1997 was registered. After the injured were examined by the doctor and after conclusion of the investigation, a charge sheet was submitted against the deceased and PWs 1 and 7 under Section 448/323/354/341 IPC which was registered as G.R. Case No.1347 of 1996.

7. At the trial in the present case, as many as ten witnesses including PWs 1, 7, 8 and 9, who were the eye-witnesses, were examined by the prosecution. Dr. Nayan Kishore Mohanty (PW 2), who conducted the post-mortem of the deceased was examined. Since the Investigating Officer (IO) was dead by the time the trial was taken up, the Deputy Superintendent of Police Sailendra Kumar Tripathy (PW 10), who supervised the case, was examined. While the defence did not examine any witness, the FIR, Final Form and Injury Reports in G.R. Case No.1347 of 1996 were marked as exhibits.

8. The trial Court while examining the entire evidence came to the conclusion that the prosecution had proved the guilt of the five accused beyond reasonable doubts as well as the guilt under Section 354 IPC and accordingly convicted each of them and sentenced them to undergo imprisonment for life.

9. Mr. Devashis Panda, learned counsel appearing for the surviving Appellants i.e. A-3 to A-5 first submitted that although the case was based on the testimony of the interested eye-witnesses, who were related to the deceased, their evidence was full of material contradictions and inconsistencies and was, therefore, unreliable. He referred to the decisions of the Supreme Court in *Syed Ibrahim v. State of A.P.* (2006) 10 SCC 601 and *Harbeer Singh v. Sheeshpal* (2016) 16 SCC 418 and submitted that the burden of proving its case beyond all reasonable doubt lies on the prosecution and never shifts; further if two views were possible on the evidence adduced in a case, the one pointing to the innocence of the accused must be adopted. He further submitted that where the evidence is based on the testimonies of interested/partisan witnesses, as in the present case, it is required to be corroborated by other independent witnesses. Such evidence was to be examined very carefully and all infirmities must be taken into account. It is the quality of evidence not the quantity which is required to be judged by this Court.

10. Mr. Panda then turned to the inconsistencies appearing in the testimonies of the PWs. He pointed out that the presence of PW 1 at the time of occurrence was doubtful as in his cross examination he admitted that he did not reside with his father but in village Satabatia in his uncle's house. Further, PW 1 mentioned the presence of PWs 7 and 9 but excluded PW 8, who is also said to be an eyewitness. According to PW 1, by the time the deceased reached the house, the uprooting of the fence was over and 10 to 15 minutes had elapsed; the assault continued for 10 minutes during which time all the Appellants were simultaneously assaulting and had dealt eight to ten blows on the head. Yet no incised wounds were found by the doctor (PW 2), who noted only one injury on the head with nine internal injuries. PW 2 admitted that two blows with force can cause the head injuries and further that if successive blows were given with the iron rod of crowbar size as well as lathis, there are possibilities of more severe injuries. Further, PW 1 had deposed that the accused had assaulted the deceased on the chest, waist and legs which was, however, not corroborated by any of the other PWs including PW 2.

11. Mr. Panda submitted that the prosecution projected PW 5 and PW 6 as eye witnesses when they were in fact only hearsay witnesses. Relying on the decision in *Gentela Vijayavardhan Rao v. State of AP.* (1996) 6 SCC 241, he submitted that the evidence of the hearsay witnesses not having been immediately recorded, they could not have been considered by the trial court.

12. Turning next to the evidence of PW 7, Mr. Panda submitted that his evidence contradicts the evidence of PW 1 who said that on the blow given by A-1, the deceased fell down and thereafter A-2 attacked with an iron rod and A-5 with a Tangia and that when both PW 1 and PW 7 intervened they were assaulted and as a result, both had sustained injuries. However, while deposing in Court PW 7 only said that who had threatened and thereafter he left the place and went to the P.S. and when he returned he found that his father had already been

removed to the hospital by PWs 8 and 9. If indeed he left for the P.S. when the assault took place, the delay in lodging of the FIR at about 4 pm has not been properly explained. Reliance is placed on the decision in *Arjun Marik v. State of Bihar* 1994 Supp (2) SCC 372.

13. According to Mr. Panda, there was also no supporting evidence for the time of the return of PW 7 from the P.S. PW 7 stated that he came to the P.S. with PW 1, but the latter did not utter anything about accompanying PW 7 to the P.S. There is also inconsistency about where exactly the incident took place. In the FIR it is stated that the accused were uprooting the fence, put up in the informant's badi while in the Court, the witnesses stated that the incident took place in the courtyard. Although the PWs asserted that there were blood stains at the place of incidence, nothing had been seized in this regard by the IO. From the statement of PW 7, it appeared that he had not seen the uprooting of the bamboo fence or the tearing of the frock of PW 9.

14. Turning next to the evidence of Namita Swain PW 8, Mr. Panda submitted that according to her the fence was put on the front side whereas in the FIR the fence was stated to be in the badi. Further, while she says that it was A-1, who assaulted PW 9 and tore her wearing clothes, PW 1 stated that it was A-2, who tore PW 9's frock. Mr. Panda stated that the story of PW 8 about all the accused having assaulted the deceased is neither supported by PWs 1 and 7 nor have they said that the incident occurred in front of the house. He further pointed out that PW 8 deposed that she and PW 9 took their deceased-father to the hospital and that the deceased sustained 15 lacerated injuries and three cut wounds on the head but the evidence of PW 2 did not corroborate this. Relying on the decision in *Sarada Rout v. State* (1998) 14 OCR 557, Mr. Panda submitted that while appreciating the evidence of eye witnesses both intrinsic and extrinsic corroboration had to be looked into.

15. Mr. Panda next turned to PW 9 and submitted that her version was not supported by the versions of her siblings PWs 1, 7 and 8. According to him, PW 9 did not say that the frock was torn by A-2 or that the accused persons were uprooting the fence and when she raised an objection, she was assaulted and her frock was torn. The statements according to him, were also at variance as to what has been stated in the FIR. There was no oral or documentary evidence to support her story that she was injured too. There was also no record of medical evidence regarding the treatment received by her and her siblings at the SCB Medical College and Hospital. He pointed out that she admitted that her family was not in good terms with the accused and that she had seen A-1 and A-2 in the hospital where they were sent for medical examination by the Police. Mr. Panda submitted that although PWs 1, 7, 8 and 9 had spoken of A-1, A-2 and A-5 being armed, none of them identified any seized weapon or even the torn frock of PW 9.

16. Mr. Panda submitted that the prosecution also failed to prove that the accused shared a common intention. Also, the accused were shown to have

suffered injuries but this was not properly explained by the prosecution. Reliance was placed on the decisions in *Ganesh Datt v. State of UK* (2014) 12 SCC 389 and *Padam Singh v. State of U.P.* (2000) 1 SCC 621.

17. Mr. Panda submitted that the four main elements of the prosecution story viz., the uprooting of the fence, the tearing of the frock of PW 9, assaulting of the deceased, the assaulting of PW 1 and 7 were sought to be proved through PWs 1,7, 8 and 9 but their testimonies were riddled with contradictions and inconsistencies. He submitted that it was therefore, unsafe to rely on the evidence of PWs 1,7,8 and 9 to bring home the charge of guilt against the accused for the offence punishable under Section 302 IPC read with Section 34 IPC.

18. Mr. P.K. Muduli, learned Additional Government Advocate appearing on behalf of the State-Respondent on the other hand supported the trial Court judgment. According to him, there was full corroboration of the evidence of the eye-witnesses by the medical evidence and the contradictions pointed out were not material so as to discredit their testimonies. He relied on the decision in *Laxman v. State of Maharashtra* (2012) 11 SCC 158 and the recent judgment in *State of M.P. v. Ramjilal Sharma*, 2022 Livelaw (SC) 258.

19. The above submissions have been considered. The two factors that immediately stand out on an examination of the evidence in the case is that this is a case of direct evidence where the case of the prosecution rests essentially on the evidence of four eye-witnesses, all of whom are related to the deceased and therefore, could be termed as interested witnesses. The second fact of the case is that it is a case of homicidal death with the medical opinion confirming that the cause of death were the fatal injuries received by the deceased.

20. To begin with, the Court would like to recapitulate the legal principles governing the appreciation of ocular evidence, particularly of interested witnesses. In *Dalip Singh v. State of Punjab* AIR 1953 SC 364 it was held as follows:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.

It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

21. In *Piara Singh v. State of Punjab* AIR 1977 SC 2274 the Supreme Court held:

"4. It is well settled that the evidence of interested or inimical witnesses is to be

scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

22. In *Hari Obula Reddy v. The State of Andhra Pradesh* (1981) 3 SCC 675 the Supreme Court observed:

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence.

All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

23. Again in *Ramashish Rai v. Jagdish Singh* (2005) 10 SCC 498, it was held:

"7. ...The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

24. The decision in *Harbeer Singh v. Sheeshpal* (supra) reiterates the settled position in law on the question of appreciation of evidence, where it holds as under:

"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted."

25. Keeping in view the above legal position, when the evidence of the eye witnesses is examined, it is seen that the families of the accused and the deceased are related. The deceased Siba and the accused A-1 (Dibakar) are brothers. However, they were separated since long and were not on visiting terms. The lands and homestead were separated.

26. The Court would also not like to begin with the evidence of PWs 5 and 6 both

of whom are termed by learned counsel for the Appellants as 'hearsay' witnesses. Instead, the Court like to first begin with examining the evidence of the two daughters of the deceased i.e. Mamata Swain (PW 9) and her sister Namita Swain (PW 8), who are two of the four eye witnesses whose testimonies are relied upon by the prosecution.

27. The incident begins with the accused coming to the house of the deceased on 23rd October, 1996 at around lunch time, uprooting of the fence put up by the deceased and his sons on their land in order to prevent cattle trespass. What PW 9 stated was that at about 1 pm while she was feeding her brother (Manoj Kumar Swain, PW 7), A-2 then came and assaulted PW 7. When PW 7 asked him why he was assaulting, A-2 in turn asked PW 7 why the fence has been put up. When the reason about stray cattle was given, A-2 started assaulting PW 9 at which point the deceased arrived. While PWs 7 and 9 were explaining to the deceased what had transpired, A-1 came and suddenly assaulted the deceased by means of a thenga. Then PW 8 Namita Swain and another brother Mahendra Swain (PW 1) came and tried to lift the deceased. Thereupon, A-2 assaulted PW 1 by means of a thenga and also pelted stones. PW 1 sustained injuries on his head. Both PWs 1 and 7 went outside to prevent further assault and went to the PS to report the incident at which point A-1 and A-2 again assaulted the deceased, as a result of which he fell down. When PW 9 tried to lift the deceased, A-2 assaulted her and A-1 tore her dress and gave a fist blow on her back. She then brought the deceased in an auto to the SCB Medical College, where on 25th October, 1996 the deceased died.

28. In her cross-examination what could be elicited was a statement that she had shown her injury to the doctor and was treated for two days and that PW 1 and PW 8 also got treated there. She further stated that PW 7 had sustained injuries on his body in 10 to 12 places and PW 1 had a bleeding injury on his head. She stated that the blood-stained clothes of herself and her brothers and sister were given to the police. She further stated that the assault went on for 10 to 15 minutes and her father had protested. She then stated that stones were pelted by the accused for 20-25 minutes and after he sustained injuries on his head and knees, the police arrived at the hospital between 1 and 1:30 pm and she narrated the occurrence. According to her, the two brothers arrived thereafter at the hospital.

29. Certain contradictions were sought to be elicited from PW 9 and also from the examination of PW 10. However, on a careful examination of the evidence of PW 10 vis-à-vis what PW 9 informed the IO, it is seen that the essential details about A-2 assaulting PW 7 and about A-1 suddenly assaulting the deceased by thenga and A-2 assaulting PW 8 and PW 1; PW 1 sustaining injuries on his head; then PWs 1 and 7 going outside to prevent further assault; when the deceased was going to the P.S. to report, A-1 and A-2 assaulting him as a result of which he fell down and PW-9 trying to lift the deceased by which time A-2 assaulted her and A-1 gave a fist blow are available both in the previous statement to the

police and in her testimony in Court. The defence was not able to bring out contradictions and inconsistencies in these essential details. The fact that initially before the Police he may not have said anything about her frock being torn cannot be said to discredit her testimony particularly when that part of the occurrence has been spoken to consistently by both PW 7 and PW 8. It must be recalled here that the main occurrence is about the accused coming together and assaulting the deceased with a lathi, iron rod, thenga and the deceased succumbing ultimately to the said attack. On these broad details, there is complete corroboration of the testimony of PW 9 by the testimonies of PWs 7 and 8.

30. Even when one turns to the deposition of PW 1 while his presence was spoken to by PWs 7, 8 and 9 there may be some differences in their description of the exact role played by each of the accused in assaulting the deceased. Also, the difference as to where exactly the fence that was uprooted was located. However, on a broad spectrum, there is a consistent and cogent narration in the testimonies of the four eye witnesses. Although they are related and 'interested' witnesses, a careful scrutiny of their testimonies goes to substantiate the case of the prosecution. It must be remembered that each of these witnesses have been examined more than two years after the event. In fact, PW 9 was examined on 6th April, 2000 which is almost four years after the occurrence. It is but natural that there will be some variations in their narration of events. Some margin has to be allowed for lapses and precise recall of the events or the sequence of events.

However, on the material particulars of the assault and the deceased succumbing to the assault, there is very little that has emerged in the cross examination of the witnesses to discredit their testimonies.

31. The medical evidence corroborates the testimonies of the eye witnesses in large measure. PW 2 - the doctor who conducted the autopsy found the following injuries on the person of the deceased:

"1. Abraded contusion of size 7 cm x 6 cm situated on the left side frontal region along the coronal plane 8 cm above the root of the left ear.

2. Abrasion 3 cm x 1.5 cm looking reddish-brown situated on the lateral aspect of left gluteal region just above the greater trochanter.

3. Abrasion 9 cm x 4.5 cm looking reddish-brown colour situated on left gluteal region 4.5 cm behind the injury no.2

4. 3 small abrasions looking reddish-brown colour size of 1 cm x 1 cm each situated on the right shoulder outer to the lateral end of right clavicle and acromion process 1.5 cm apart from each other.

There are three external injuries, one on the head, two on the buttocks and some small abrasions on the shoulder."

On discussion he found the following internal injuries:

1. Corresponding to external injury No.1 the undersurface of the scalp over left frontal scalp, left parietal scalp and left temporal scalp was contused with contusion and extravasation of blood into the anterior half of left temporalis muscle.
2. Undersurface of right parietal and right temporal scale was contused associated with contusion with extravasations into the right temporalis muscle.
3. Fissure fracture involving the left half of frontal bone with fissure extension involving the left temporal bone and left parietal bone present corresponding to external injury No.1.
4. Fissure fracture involving right temporal bone extending along the coronal suture to cause separation of suture which extends 2 cm left lateral from mid line to join with the fissure fracture over left half of frontal bone.
5. Extradural haematoma corresponding to external injury No.1 and internal injury nos. 1 and 3 found over the left fronto-temporo parietal area of size 11 cm x 6 cm x 1 cm.
6. Extradural haematoma corresponding to internal injury no.4 over the temporo parietal area of size 10 cm x 8 cm x 1.5 cm.
7. Contusion and laceration of the right side temporal lobe to right side middle cranial fossa, i.e. corresponding to internal injury no.4.
8. Contusion of size 5 cm x 4 cm over left fronto-temporo-parietal area of brain corresponding to external injury no.1 and internal injury nos.1, 3 and 5.
9. Fractures as described under internal injury nos.3 and 4 have extended on right side to involve the base of right middle cranial fossa alongwith petrous part of right temporal bone and on left side it involves the base of left middle cranial fossa."

32. The description by the eyewitnesses of the manner of assault by the accused of the deceased more or less corresponds to the injuries detected by the doctor. The multiple fractures on the most sensitive parts of the skull and brain points to the brutal nature of the attack. Also, with the eye witnesses speaking clearly of the assault with deadly weapons, the fact that the weapons may not have been shown to the witnesses really does not weaken the case of the prosecution.

33. The fact that the accused themselves may have sustained some injuries for which they lodged a separate complaint against the deceased as well as PWs 1 and 7 does not detract in any manner from the complete corroboration by the medical evidence of the ocular testimony of the eye witnesses of the assault of the deceased by the accused. The internal injuries were fractures of the temporal and parietal bones, the frontal bones, the base of the right middle cranial fossa along with the petrous part of right temporal bone. The presence of all the

accused have been spoken of consistently by the four eye witnesses. The five accused combined to ensure that the deceased did not survive. That three of them were armed and the other two perhaps not, will make no difference to their sharing a common intention for the purposes of Section 34 IPC. That the accused acted in concert is established beyond reasonable doubt. Even if one or two of the accused may not have been armed, this much is plain that A-1 and A-2 were definitely armed as was A-5 as mentioned in the FIR. The other two accused did act in consort and shared the common intention. The evidence more than eloquently speaks to the commission by each of the accused of the offence punishable under Section 302 IPC with the aid of Section 34 IPC.

34. In *Laxman v. State of Maharashtra*(supra), on the question of injuries on the accused not having been explained, it was observed as under:

"17. Insofar as the injuries sustained by some of the accused are concerned, it is seen from the evidence of Dr. D. Trimabak (PW-2) that those injuries are minor in nature. This Court on various occasions has held that in the case of minor injuries, merely because the prosecution has not furnished adequate reasons, their case cannot be rejected. Considering the fact that the injuries sustained by some of the accused were minor in nature, even in the absence of proper explanation by the prosecution, we hold that the prosecution story cannot be disbelieved."

35. Further in *State of M.P. v. Ramjilal Sharma* (supra), the legal position as far as ocular evidence corroborated the medical evidence, has been clearly explained as under:

"4.2. Even otherwise once it has been established and proved by the prosecution that all the accused came at the place of incident with a common intention to kill the deceased and as such, they shared the common intention, in that case it is immaterial whether any of the accused who shared the common intention had used any weapon or not and/or any of them caused any injury on the deceased or not."

36. As regards the submission that there was delay in despatch of the FIR, and that it was probably manipulated or backdated, the Court finds that the incident occurred on 23rd October, 1996 and the FIR was despatched on the following day to the Court. It is shown to have been received on 25th October, 1996. The so-called delay has not been shown to have been deliberate or to have distorted the case of the prosecution or have caused any prejudice on that score to the accused. The Court is not persuaded that the FIR has been doctored or predated as is sought to be suggested.

37. Consequently, this Court is not persuaded that the trial Court has committed any error in holding that the prosecution has proved its case against the accused beyond all reasonable doubt. They have been rightly convicted for the offence punishable under Sections 302 read with Section 34 IPC and sentenced in the manner indicated before. Thus, the Court finds no merit in this appeal and it is

dismissed as such.

38. The bail bonds of the surviving Appellants i.e. A-3 to A-5 are hereby cancelled and they are directed to surrender forthwith and in any event not later than 20th July, 2022 failing which the Inspector-in-Charge of the concerned police station will take immediate steps to have them arrested and taken into custody to serve out the remainder of their sentences.

39. The appeal is dismissed, but in the circumstances, with no orders as to costs.

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