

(2001) 12 OHC CK 0026

In the Orissa High Court

Case No : Criminal Appeal No. 154 of 1997

Gandua alias Laxman Mallik and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-12-2001

Acts Referred:

Arms Act, 1959 — Section 25, 27

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2002) CriLJ 871 : (2002) 1 OLR 344

Hon'ble Judges : P. Ray, J;A.S. Naidu, J

Bench : Division Bench

Advocate : T. Panigrahi, S.S. Ray, P.K. Mishra and B. Samantray, for the Appellant; Addl. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.S. Naidu, J.—The accused-appellants have been held guilty of the offences punishable u/s 302 read with Section 34 of the Indian Penal Code, for committing murder of Krupa Gochhi by assaulting and firing Gun shots. The trial Court sentenced the appellants to undergo rigorous imprisonment for life. Being aggrieved by the said order of conviction and sentence, passed by the learned Sessions Judge, Puri in Sessions Trial No. 297 of 1993, the appellants have filed this appeal.

2. The F.I.R. was lodged by Krushna Chandra Mohanty - P.W.4. The case of the prosecution is that on the fateful day of 15th September, 1989 at about 3.00 P.M., P.W.4, and the deceased, " who were close friends, started from their respective houses and proceeded to Kantilo. The deceased carried his pant and shirt in a bag on the plea that if he would wear the same, his opponents would come to know that he was going out: of the village and might assault him. He instructed P.W.4 to .proceed ahead of him via Teli Sahi and to wait for him. He intended to proceed through Gokha Sahi. According to their understanding, P.W.4 proceeded to Kantilo via village Ragadipada. Near Village Padmabati, the

deceased came and met him near the culvert, and both of them proceeded towards Kantilo. The son-in-law of Dandu Mallik, who was catching fish sitting on the culvert and Akal Jena of their village who was drying the grains saw them. A query being made, they were informed that both of them were going to Kantilo. P.W.4 further stated in the F.I.R. that the deceased told him that when he was coming from the village, Gandua Mallik asked him where he was going. P.W.4 instructed the deceased to proceed ahead and told him that he would follow him. At about 4.00 P.M. both, the deceased and P.W.4 reached near Goddess Baseli Temple. While they were paying homage to the deity, they saw Rama Chandra Mallik, Satura Mallik and Bharat Mallik, sons of Banambar Mallik standing near the road-side fence. They also noticed that Gandu Mallik was rushing towards them. Seeing them the deceased who had earlier assaulted Bharat Mallik, apprehended that they would attack him. The informant (P.W.4) advised the deceased to leave the place immediately. But as the deceased delayed the informant proceeded towards Ragadipada to purchase "Bidi". All of a sudden, he heard th shriek of the deceased, and looked back and noticed that Gandua Mallik chased the deceased and dealt two Farsa blows on is left side head. He also saw Ram Chandra Mallik and Satura Mallik executing bhali blows on the deceased. Seeing the occurrence, P.W.4 raised alarm and requested the accused persons not to assault the deceased. He also called for help from villagers of Ragadipara. All of a sudden Bharat Mallik fired at P.W.4 with a revolver. P.W.4 dodged and ran towards Ragadipara village. It is stated that while running, he heard firing of two more rounds. He returned with some of the villagers of Ragadipara and standing on the eastern end of the village, saw the accused persons leaving the spot with Farsa, Bhali and Revolver and running towards village Padmabati. After they left the spot, the informant (P.W.4) and some of the villagers of Ragadipara reached the spot and found Kurupa lying dead. Immediately P.W.4 rushed to his village to inform the family members of the deceased and instructed them to report the matter to police and returned to the place of occurrence once again.

The Officer-in-charge (P.W. 10) of Fategarh Police Station on receiving information from one Pankaj and Damodar made a Station Diary entry on September 15, 1989, proceeded to the spot at about 5.40 P.M. The dead body was lying on the Northern side green fence of the court-yard of Chintamani Sahu. P.W. 10 found P.W.4 present at the spot who narrated the incident verbally which was reduced to writing-and was treated as F.I.R. and the investigation commenced. The Investigating Officer arrested the accused persons and after completion of investigation, submitted charge sheet u/s 302/34, I.P.C. against all the accused persons. In addition under Sections 25 and 27 of the Indian Arms Act against accused-appellant Bharat Mallik.

3. The plea taken by the defence is complete denial. It was stated that in course of preparation of Bombs by the deceased, there was an explosion which resulted, in the death and that all the injuries sustained by the deceased were on account of explosion of the Bomb.

4. On behalf of the prosecution, ten witnesses were examined, out of whom P.W. 1 and 4 are the witnesses to the occurrence. P.W.2 proved the previous enmity of the deceased with the accused persons, P.W.3 saw the accused persons following the deceased, P.W. 5 is the police constable who accompanied the dead body to the hospital for post mortem, P.W.6 is a seizure witness who turned hostile, P.W.7 saw P.W.4 and the deceased, proceeding towards Ragadipara when he was catching fish near the Culvert, P.W.8 is the doctor who conducted autopsy, P.W.9 is the S.I. of Police who seized the two pieces of stones stained with blood recovered from the body of the deceased and P.W. 10 is the Investigating Officer.

At the other hand, on behalf of the defence, two witnesses were examined in support of their case. D.W. 1 claims to have seen the explosion of the bomb and D.W.2 is a doctor who opined about the injuries.

5. The trial Court after discussion of the evidence and other materials, disbelieved the prosecution case so far as the allegation that appellant-Bharat fired two shots from his revolver and found him not guilty of the charges under Sections 25 and 27 of the Indian Arms Act. However, believing the statements of P.W. 1 and P.W.4 and other witnesses as well as the evidence on record, found the accused-appellants guilty u/s 302/34, IPC and convicted them thereunder.

6. We heard learned counsel for both the parties at length. Mr. Panigrahi, learned counsel for the appellants submitted that the evidence of P.Ws. 1 and 4, who claim to be the only occurrence witnesses, is highly suspicious and the order of conviction cannot be based on the evidence of these two witnesses. It is submitted that admittedly there was friction between two groups and the deceased had earlier brutally assaulted Bharat Mallik, one of the accused-appellants. P.W. 1 who is said to be an eye-witness is an accused and is on bail. There is also lot of discrepancies between the oral evidence and medical evidence. Apart from that, P.Ws. 1 and 4 both of whom claimed to be the occurrence witnesses, have not seen each other thereby raising a suspicion regarding their presence at the spot. P.W.1 was examined by Police 12 days after the occurrence and submitted that the case against the accused persons has developed from stage to stage. He also submitted that the death, in fact, was caused due to bomb explosion which the deceased was preparing at a secluded place near the temple and taking advantage of old enmity, a false and fabricated case has been foisted against the accused persons, who belong to the rival friction.

At the other hand, the learned Addl. Govt. Advocate relying upon the evidence of P. Ws. 1 and 4 submitted that the discrepancies in the oral evidence being minor in nature, do not affect the veracity of the evidence. Two witnesses have categorically deposed about the assault in details and the learned trial Court rightly convicted the appellants and it is a fit case where the appeal should be dismissed.

7. This being a statutory appeal, this Court must itself reappraise the evidence

afresh and examine the whole records so as to enable it to come to a conclusion as to whether the conviction is justified or not. Keeping in mind the aforesaid dictum, we have carefully scrutinised the evidence, both, oral and documentary.

The doctor (P.W.8), who has conducted the post mortem, has found the following injuries :

- (i) One incised wound 8.7 cm x 6.2 cm x 2.2 cm situated on the lower part of left parietal area beginning at the left temporal area 3/4" in front of left tragus.
- (ii) Incised wound, a flap of scalp tissue oval in shape attached at the lower part 3.2 cm long 1.8 cm deep and 3 mm wide situated on the posterior part of left parietal area.
- (iii) Incised wound on oval flap of skin and subcutaneous tissue attached at the lower part, 5.2 cm long, 3.7 cm wide and 0.5 cm deep situated on the posterior part of the right fore-arm, 0.3 inches above the right wrist joint.
- (iv) Incised wound 11.6 cm x 0.4 cm x 0.2 cm gradually tailing above.
- (v) Penetrating wound oval in shape 7 mm x 5 mm x 2.6 cm deep situated in the medial aspect of right leg 4" below the knee.
- (vi) One penetrating wound 6 mm diameter and 1.8 cm deep situated on the medial aspect of right thigh, 3". above the knee. Track was perpendicular to the skin. One stone piece was recovered.
- (vii) One penetrating wound 0.6 cm x 0.5 cm x 0.8 mm deep situated on the dorsum of right foot, 2" in front of right ankle.
- (viii) Severely lacerated wound 19.8 cm x 11.6 cm x 5.2 cm deep. Skin, subcutaneous tissue, muscles, vessels and tendons were severely mutilated. Large numbers of maggots were crawling in and out of the wound. Wound was situated in the back of left knee and upper part of left leg. Upper wound margin and 1/2 inch skin surface above it was yellowish due to sticking of explosive material.
- (ix) Burn skin blackened 106 cm x 6.2 cm situated on the back of left thigh above the lacerated wound.
- (x) Multiple post mortem ant bite abrasions of various shape and size situated in different parts of left arm, left fore-arm, left middle finger, left ring finger and left little finger.

It is deposed by P.W.8 (Doctor) that all the injuries were ante mortem in nature excepting injury No. (x) and that injury Nos. (i) and (iv) were caused by heavy and sharp cutting weapon like Farsa and Tangi etc. Injury Nos. (v) to (ix) were caused by bomb explosion. Injury No. (i) was grievous and fatal. Injury No. (viii) was also a fatal one and the other wounds were simple in nature. Cause of death was stated to be hypobolomece shock due to profuse bleeding from the wounds caused by sharp cutting weapon and bomb explosion. In cross-examination, the

doctor has further stated that if broken glass pieces are contained in the bomb, in case of explosion, injury Nos. (i) to (iv) can be caused. It is further stated that no weapon of offence was shown to him by the Investigating Officer.

P.W.1 is one of the two-witnesses. According to him, when he reached near Mangala temple at about 4 P.M., he heard alarm raised by the deceased and ran to the side of the temple from where the place of occurrence was clearly visible. He stated that he witnessed the appellants dealing Farsa blows on the deceased. He claims to have concealed himself behind a bush situated at about 20 to 25 feet away from the spot. He categorically stated that one Bharat fired two gun shots to the back of the deceased. Though he deposed that the appellant-Satura Mallick lifted a boulder and crushed it on the left leg of the deceased, the said statement was not made by him before the Magistrate while he was examined under Section 164, Cr. P.C. He has also not made such statement before the police. Though he categorically stated that he watched the incident from behind a bush, he did not state the said fact before the Magistrate u/s 164, Cr. P.C. The spot map also does not reveal presence of any bush in the nearabout vicinity. Admittedly, P.W. 1 is an accused and was on bail. There is enough evidence to reveal that he belonged to the faction of deceased and is inimical towards the accused-appellants.

It is pertinent to mention here that P.W. 1 was not named in the F.I.R. He was examined by the police for the first time on 27.9.1989. i.e. 12 days after the occurrence. If he had in fact seen the occurrence, as he claims to have, we do not find any reason as to why he did not disclose the fact before the police soon after. There is also no explanation, as to why he was examined 12 days after. It is the settled principle of law that if the name of an eye-witness did not find place in the F.I.R., it is unsafe and hazardous to accept him as an eye-witness and rely upon his statement. Last but not the least, the statement that the appellant Bharat fired two shots at the back of the deceased does not find support from the medical evidence. The post mortem report clearly reveals that there was no gun shot injury on the person of the deceased. Law is well settled that if there is conflict between ocular evidence and medical report, the latter should be accepted and it will be presumed that the witness has exaggerated the incident. This witness was also not seen by the other occurrence witness P.W.4. All these circumstances throw a cloud of suspicion regarding the truthfulness of P.W. 1.

P.W.2 is a member of the Panch, which settled the dispute between the deceased and the appellants one month prior to the occurrence. The deed of settlement has been proved by him and marked as Ext-1. The testimony of the said witness clearly reveals that enmity existed between the deceased and the accused persons.

Enmity as usual is a double edged weapon, providing motive both for the offence as well as for false implication. The evidence in such a case has, therefore, to be scrutinised with care so that neither the guilty party wrongly

escapes on the plea of enmity, nor an innocent person gets wrongly convicted on that basis. (See Akalu Ahir and Others Vs. Ramdeo Ram, .

P.W.3 is stated to have seen the deceased and the accused persons proceeding towards the village Ragadipara. He had not seen the occurrence. P.W.4, on the other hand, is the person who has lodged the F.I.R. and also claims to be the eye-witness. He is a close friend and associate of the deceased. In this evidence, he has attributed specific overt acts to each of the accused persons. He also stated under solemn affirmation, that the accused Bharat fired a shot from his revolver at him, but as he dodged, the shot did not hit him. He also stated that he heard two shots being fired. It appears that the said statement was not made by him before the Investigating Officer. The learned counsel for the appellants pointed out that P.W.4 is involved in series of criminal cases and is, in fact, released on bail. In paragraph-9 of the cross- examination, it is suggested to P.W.4 that the deceased was involved in series of dacoity cases and that while preparing bombs, there was an explosion resulting injuries to which the deceased succumbed. It is, however, denied by P.W.4. The evidence of P.W.4 is also criticised on the ground that there is a temple of Mangala Thakurani at the outskirts of village Ragadipara, but there is no temple of Baseli Thakurani as stated in the F.I.R. It appears P.W.4 immediately after the occurrence rushed to his village and intimated the relatives of the deceased, without reporting the matter to the police. The Investigating Officer (P.W. 10) stated that he on the report lodged by one Pankaj Gochhi and Damodar Sahu, made station diary entry No. 289 and then proceeded to the spot.

8. It is argued by the learned counsel for the appellants that the report on the basis of which station diary was made, is to be treated as F.I.R. and not the statement said to have been made by P.W.4 which was reduced to writing by the I.O. (Ext- 3). Perusal of the station diary entry, from the case record reveals, that the same is very cryptic and rightly the O.I.C. accepted the report made by P.W.4 as F.I.R. and conducted investigation.

P.W.5 is a constable who accompanied the Investigating Officer to the temple. P.W.6 is a seizure witness who turned hostile. P.W. 7 is one of the witnesses who has seen the deceased followed by the accused persons proceeding towards Ragadipara. He has not seen the occurrence. P.W.8 is the doctor who conducted autopsy on the dead body. P.W.9 is the Officer-in-charge who first investigated the case and P.W. 10 is the I.O. who took up investigation from P.W.9. The I.O. in his evidence has, stated that he did not find existence of any bush near the spot. He has also stated that though he examined some of the villagers of Ragadipara, they have not been cited as witnesses.

9. So as far as oral evidence adduced by defence is concerned, D.W. 1 is a local inhabitant who had deposed that on the day of occurrence, while he was passing near the place of occurrence, he heard a sound of explosion of a bomb. He looked back and found smokes laminating near the Mango tree situated by the side of the temple. He also found the deceased crawling with bleeding injuries shierking with pain. He has specifically stated that though he found 10 to 20

persons of village Ragadipara standing in the outskirts of the village, he did not notice either P.W.I or P.W.4.

D.W.2 is a doctor and was working as Addl. District Medical Officer of District Headquarters Hospital, Nayagarh. He has examined the post mortem report and deposed in Court that the injuries sustained by the deceased, can be caused by explosion of bomb if the bomb contains sharp cutting glass pieces and metals. The evidence of D.W.2 tallies with the evidence of P.W.8, the doctor who conducted the post mortem.

Apart from the facts narrated above, injury No. (ix) reveals burn skin blackened. This type of injury usually occurs in case of explosion of bomb.

Though the occurrence took place near about the village Ragadipara and number of villagers were present, the prosecution, for the reasons best known, did not examine any independent witness. The evidence of P. Ws. 1 and 4 who are close associates of the deceased, are contrary to the medical report as well as injuries found on the deceased and it is not safe to base a conviction on the basis of evidence of these two witnesses.

10. After threadbare scrutiny of the evidence, the following doubts arise in our mind, which remain unanswered by the prosecution:

(i) Non-mention of the name of one of the eye-witness (P.W.4) in the F.I.R.

(ii) Examination of P.W.4 by the police after ten days.

(iii) The two eye-witnesses who claim to be present during the occurrence have not seen each other which is an improbability.

(iv) The statement of P.W.4, the occurrence witness, that he watched the incident from behind the bush cannot be believed as there was no bush in the vicinity (I.O.- P.W.10).

(v) The statement of P.W.4 that one of the accused fired two rounds on the back of the deceased cannot be accepted in absence of any gun shot injury found by the doctor-P.W.8 (post mortem report).

(vi) The ocular statement did not tally with the medical report.

(vii) P.W. I's statement that one of the accused fired at him, cannot be accepted as no revolver was seized nor any pellet was seized in the vicinity.

(viii) Apart from the two eye-witnesses who belonged to the fraction of the deceased, no other independent witness has been examined, though the I.O. admits that he has examined other villagers.

(ix) The doctor, P.W.8 clearly states that the injuries were caused due to explosion of bomb. The said statement gets corroboration from D.W. 1, a villager, who heard explosion and D.W.2, the doctor whereas the prosecution is silent regarding explosion of bomb.

(x) The injuries, specially the burn injuries clearly reveals that the same was caused by explosion of bomb.

(xi) The deceased was a habitual criminal and involved in many criminal cases.

(xii) The prosecution has not come with clean hands and has suppressed material facts like explosion of bomb and as such, the case as presented by the prosecution by the help of P. Ws. 1 and 4, cannot be accepted without a pinch of salt.

Thus, a suspicion arises in our mind regarding involvement of the appellants with the crime and in absence of convincing evidence, we are unable to agree with the conclusion arrived at by the learned Sessions Judge.

11. The criminal appeal is, accordingly, allowed. The orders of conviction and sentence passed against the appellants are set aside and the appellants be set at liberty forthwith unless their detention is required in any other case.

Pradipta Ray, J.

I agree.