

(1969) 09 OHC CK 0045

In the Orissa High Court

Case No : Criminal Appeal No. 185 of 1967

Haramohan alies Hagaru Naik and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-09-1969

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 232(1), 342, 535
Penal Code, 1860 (IPC) — Section 109, 14, 143, 147, 148

Citation : (1970) 36 CLT 731

Hon'ble Judges : S. Acharya, J;B.K. Patra, J

Bench : Division Bench

Advocate : S.B. Patnaik, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patra, J.—The two Appellants along with others were placed on trial on the following charges which may be quoted:

I. Sri P. C. De, B. L., Additional Sessions Judge, Cuttack. Dhenkanal Circuit at Dhenkanal hereby charge you:

(1) Indra Naik, (2) Bharat Naik, (3) Budhia Naik, (4) Baisnab Naik, (5) Bhaskar Naik, (6) Dasa Naik, (7) Haguru alias Haramohan Naik, (8) Thala Naik, (9) Sagar Naik, (10) Pankaj Naik, (11) Bhramar Naik, (12) Paikara Naik

First-That you, on or about the 19th day of october 1966 at Ranibania were a member of an unlawful assembly and did in prosecution of the common object of such assembly viz. in murdering Sirini Naik commit the offence of rioting armed with deadly weapon such as Barchha, Knife and Lathi and thereby committed an offence punishable u/s 148 of the Indian Penal Code, and within my cognizance;

Secondly-That you, on or about the same day same time and same place did commit murder by intentionally causing the death of Sirini Naik and thereby committed an offence punishable u/s 02, of the Indian Penal Code, and within

my cognizance; and I hereby direct that you be tried by me on the said charge.

The learned Sessions Judge convicted only the two Appellants u/s 302/149, Indian Penal Code and acquitted the rest. Accused 1 to 6 and 11 and 12 were also charged u/s 323/149, Indian Penal Code for voluntarily causing hurt to Khetramohan Naik and Phula Dei P.ws. 1 and 2, but all these eight accused persons were acquitted of the charge. The other four accused persons 7 to 10 were charged u/s 323, Indian Penal Code for having caused hurt to P.ws. 1 and 2 and of the four, only Thala Naik (A/8) has been convicted of the 12 persons who were originally placed on trial, accused 1 to 6 belong to mouza Jharbandh which is about 3 miles off from village Ranibania where the occurrence took place. The remaining six accused persons including the two Appellants are residents of Ranibania village. The deceased Sirini Naik, a resident of Ranibania was admittedly on inimical terms with the accused persons by the time the occurrence took place on 19-10-1966. Two criminal cases were pending in Court. One was against the two Appellants on the complaint of the deceased Sirini Naik on the allegation that he was assaulted by them. The other criminal case was against the deceased and his two sons P.ws. 1 and 6 on the allegation that on 22-9-1966 they assaulted one Indra Naik, who was one of the persons acquitted in this case. This Indra Naik had married the sister of Appellant Haguru alias Harmohan. The house of the deceased Sirini, as the spot map (Ex. 17) would show, consists of two rows of rooms separated by a court-yard. Abutting the northern row of rooms there is a verandah to its south which for convenience of reference is referred to as the northern verandah. Abutting the southern row of rooms to its north is another verandah which for convenience of reference is referred to as the southern verandah. The distance between the northern and southern verandahs is 21 feet. On the night of concurrence, that is, 19-10-1966, the deceased Sirini was sleeping on the southern verandah and his son khetrabasi p.w. 1 aged about 17 years was sleeping on the northern verandah. Adjoining this northern verandah, there are four rooms in a row. In the easternmost room was sleeping the wife of the deceased. In the room adjoining it was sleeping p.w. 3 Lochani, a daughter-in-law of the deceased. In the room adjoining it were sleeping p.w. 2 the daughter of the deceased and Kanchan Dei, another of his daughters-in law. The prosecution case is that shortly after the Talcher train had passed by that way which would be about 10.30 P.M., the 12 accused persons entered into the courtyard of the deceased, some armed with Barchhas and others with Lathis and assaulted him seriously resulting in his death. On hearing the sounds of beating, p.w. 1 who was sleeping on the northern verandah got up and on seeing the assailants he raised a hulla that his father was being killed. Hearing this, the two Appellants along with two others came and assaulted him with Lathis. He again shouted that he was being killed and on hearing the shouts, his sister-in-law Lochani p.w. 1 came out of her room holding a lantern. She dragged p.w. 1 inside the room and bolted the door from inside. P.w. 2 Phula Dei the daughter of the deceased also came out but she was assaulted by Appellant Thala with Lathi and ran inside the room bolting the room

from inside. Sometime after the assailants left the place, the inmates came out into the courtyard and the wife of the deceased went to the Choukidar p.w. 5, and reported the occurrence to him. P.w. 5 went the next morning, that is, 20-10-1966, to the Thana and lodged the F.I.R. On which investigation was taken up.

2. The plea of the accused persons was that none of them had taken part in the occurrence. P.w. 1 deposed that he had seen all the 12 accused persons assaulting his father and that when he raised a hulla he was assaulted by Sagar and Pankaja the two other sons of Appellant No. 1. P.w. 2 Phula Dei stated that when she came out she was assaulted by Thala with a Lathi and that at that time, she saw 10 to 12 persons including the two Appellants assaulting her father. P.w. 3 who came out with a lantern on hearing the shouts of p.w. 1 stated that she saw the Appellant No. 1 Harmohan and also Indra holding Barchhas, Thala, Pankaj, Sagar, Bhramar, Paikara and Dasa holding Lathis and assaulting her father-in-law. She also stated that P.w. 1 was assaulted by the first Appellant Harmohan and his three sons including the Appellant Thala. P.w. 4 admittedly did not come out of her room but says that as the assailants were shouting she could recognize the voice of the two Appellants and also of Pankaj, Sagar, Bhramar and Paikara. P.w. 7 is a neighbour of the deceased. That night when he and his wife woke up to attend the call of nature, they heard some sounds coming from the side of the house of the deceased, but out of fear they did not go there. He states that one of the voices he heard coming from the direction of the house of the deceased appeared to be that of Appellant Harmohan. This is all the evidence available against the accused persons. The learned Sessions Judge thought that the whole occurrence must have taken place in a very short time and as the inmates were aroused from their sleep suddenly and as the night was dark, there was a possibility of these inmates committing a mistake in identifying the assailants. He, however, believed the evidence of p.w. 2, a girl aged about 12 years that Appellant Thala had assaulted her and hence the learned Judge thought that this evidence corroborates the testimony of P.w.s. 1 and 3 regarding the presence of Thala at the place of occurrence. He then thought that the evidence of p.w. 7, who stated that the voice that he heard appeared to be that of Appellant Harmohan lent assurance to the testimony of P.w.s. 1 and 3 regarding the Appellant Harmohan's presence at the place of occurrence. He felt that so far as the presence of other accused persons is concerned, no evidence was forthcoming to corroborate the testimony of the eye-witnesses and therefore acquitted them, although at the same time he held that a number of assailants had taken part in killing the deceased. For the reasons already stated he believed that the two Appellants along with, many others had taken part in the occurrence and convicted them u/s 302/14 Indian Penal Code. He also held Appellant Thala guilty u/s 323 Indian Penal Code for having assaulted p.w. 2.

3. We are unable to agree with the opinion of the learned Sessions Judge that as the inmates of the house were suddenly roused from the sleep, they must have been in a confused state and as such would not have seen and recognized the

assailants properly. There is positive evidence that the assailants were talking and shouting and that the Appellant Harmohan and accused Indra were saying that the deceased must be finished. There is some evidence to show that Charu, the wife of the deceased did not get up from her sleep till after the assailants had left the place. The learned Sessions Judge concludes there from that had there been shouting and hulla Charu could have got up immediately and as she did not get up it must follow that none of the accused persons shouted and talked amongst themselves. We are unable to accept that conclusion. The learned Judge himself accepts the evidence of p.w. 7 that he had recognised the voice of Appellant Harmohan. If p.w. 7. a neighbour could hear the voice of the assailants from his house, there is no reason why the inmates of the house would not have done so. We are not in this appeal concerned with the evidence available against persons who have already been acquitted by the learned Sessions Judge as Government have not filed any appeal against the order of acquittal against them. Confining our attention only to the evidence available against the Appellants, we see no reason to disbelieve the testimony of p.w.s. 1 and 3 that they had seen these Appellants amongst the assailants who were about 10 to 12 in number. It may be that when the occurrence took place, the moon had set, but there is evidence that when p.w. 3 came out of her room she brought with her a lantern which she had left on the verandah when she again went back. This must have given some light for P.w.s. 1 and 3 to recognize some, if not all the assailants. The two Appellants are not strangers but belong to the same village and their voices must have been familiar to these witnesses. We are, therefore, convinced that in the circumstances explained above, there could not have been any difficulty for the inmates of the house to recognize the assailants. True it is, that there was enmity between the Appellants and the deceased, but the facts remains that Sirini had been done to death and it is difficult to accept that P.w.s. 1 and 3 having seen the real assailants would, instead of implicating them, falsely implicate the Appellants simply because they were on litigating terms with their family., on the other band, the fact that the Appellants were on litigating terms with the deceased furnishes the motive for them to murder him. On a careful consideration of the evidence we are satisfied that the participation of the two Appellants along with ten or twelve others in the murder of the deceased has been established beyond all reasonable doubt.

4. The deceased had on his person a large number of external injuries, namely;

(1) one punctured injury over the left side of the chest in the 5th intra-coastal space 1" lateral to the sternum. It was about the size of 1.1/2" x 1/3" x 4".

(2) Multiple injuries of different dimensions found over the chest, abdomen, hands, legs and neck.

(3) Multiple bruises of different dimensions over the chest, abdomen, back, arms and legs.

(4) An incised injury over the head (parietal region) about the size of 5" x 1/2" x

scalp deep.

(5) An incised injury over the frontal region of the head about the size of 3" x 1/2" x scalp deep.

(6) Six punctured injuries over the chest wall of different dimensions on the ribs, cartilages.

(7) Two superficial punctured wounds on the abdominal wall.

On dissection it was found that the pleura was punctured at the left side of the inter costal space, left lungs perforated, and the pericardium and the heart were found punctured. Death was due to syncope as a result of punctured wounds over the heart which were fatal injuries. The opinion of the doctor is that the punctured wounds could have been caused by a sharp cutting weapon like Barohha and the other injuries by blunt and hard substance like Lathi.

The nature of the injuries lends considerable support to the prosecution evidence that about 10 to 12 persons - some armed with Barchhas and some with Lathis - had taken part in the occurrence in assaulting the deceased. The places where injuries were caused leave no doubt in our mind that the common intention and object of these assailants was to cause death of the deceased and that they acted in furtherance thereof.

5. The Doctor also examined p.w. 1 Khetrabasi Naik and found on his person simple injuries consisting of four bruises and two lacerated wounds which, in his opinion, could have been caused by hard and blunt weapons. He also found on examining Phula Dei p.w. 2 that she had a bruise of 3" x 4" over her back which was simple in nature and could have been caused by hard and blunt weapon. This evidence fits in with the prosecution evidence that Phula Dei was assaulted by Appellant Thala with a lathi and that p.w. 1 was assaulted by Appellant Thala and one or two other persons who have been acquitted with lathis.

6. It was, however, argued on behalf of the Appellants that their conviction u/s 302/149 Indian Penal Code is illegal because no such charge was framed against them, the charge framed against them being only u/s 302 Indian Penal Code. In support of this contention, reliance is placed on Tahsildar Singh Vs. State, . In that case, the charge framed against Tahasildar Singh was only u/s 302 Indian Penal Code and an argument was advanced in the High Court that he should be convicted u/s 302 read with Section 149 Indian Penal Code. The Court rejected that contention holding that a man charged u/s 302 Indian Penal Code cannot be convicted u/s 302/149 Indian Penal Code or vice versa. It was, however, made clear in the judgment that this view is based on the ground of prejudice. Section 149, Indian Penal Code cannot apply unless there is proximity of time and place both between the members of an unlawful assembly and the criminal acts of the individual members of that assembly, for there obviously cannot be an assembly unless the five or more persons constituting it are at the same place while Section 149, itself speaks distinctly of "at the time" of the committing the

offence. It was found in that case that the assembly of bandits of which Tahasildar Singh was a member dispersed from Panderi Khar at about 2.30 P.M., that Tahasildar separated himself from the assembly and went to Bhua Khar at about 4 P.M. and that shortly after 4.30 P.M. the deceased was shot dead. Consequently, the Court held that even if they were to assume that Tahasildar Singh was originally a member of the unlawful assembly by being present in it and sharing in its common object, he had separated himself and had thereby terminated his membership of it, and that the unlawful assembly had of itself come to an end by the dispersal of its members at 2.30 P.M.; while the shooting of Dudh Nath took place a couple of hours later. In the circumstances, their Lordships held that the murder was not in furtherance of the common object of the assembly. *Suraj Pal Vs. The State of Uttar Pradesh*, on which the Appellants relied is a converse case. In that case, a number of accused persons were committed to the Sessions Court on charges under Sections 147, 323/149, 307/149 and 302/149, Indian Penal Code. There were no direct and individual charges against the accused for the specific offences u/s 307 and 302, Indian Penal Code. The Sessions Judge found all the accused persons guilty of the various offences as charged and sentenced them. On appeal the High Court acquitted some of them and as regards one of the accused who was suspected of firing his pistol against the deceased, the High Court while setting aside the convictions and sentences of all the accused under Sections 307/149 and 302, Indian Penal Code convicted and sentenced him under Section 307 for transportation for life and to death u/s 302, Indian Penal Code. The Supreme Court held that there were no direct and individual charges against the accused for the specific offences under Sections 307 and 302, Indian Penal Code, and that the absence of such specific charges against the accused under these sections was a very serious lacuna in the proceedings and had materially prejudiced the accused. This decision was considered by their Lordships of the Supreme Court in *Willie (William) Slaney Vs. The State of Madhya Pradesh*. It was contended before their Lordships in *Suraj Pal v. State of Uttar Pradesh*, laid down the law that where a person was charged u/s 302/149, Indian Penal Code, he cannot under any circumstances be convicted u/s 302, Indian Penal Code simpliciter and that the absence of a charge u/s 302 simpliciter was in itself conclusive to establish that prejudice has been caused. Their Lordships explained that *Suraj Pal Vs. The State of Uttar Pradesh*, did not go to that length but that the conclusion therein was based on a careful and lengthy investigation of all the facts of the case and the conclusion was reached that prejudice in fact was caused. In *Willie (William) Slaney Vs. The State of Madhya Pradesh*, each of the two accused W. and R. were charged u/s 302/34, Indian Penal Code. The charge against was as follows:

That you, on or about the 12th day of February 1953, at Civil Lines, Jabalpur, went with your brother Ronnie Slaney to the house of Mrs. Waters at about 7 P.M. and in furtherance of the common intention did commit murder by intentionally or knowingly causing the death of her brother D. Smythe and

thereby committed an offence punishable u/s 302, Indian Penal Code read with Section 34, Indian Penal Code.

An exactly similar charge with the necessary change of name was framed against the co-accused R. There was no separate alternative charge u/s 302, Indian Penal Code against the accused. The Courts held that W. inflicted the fatal blow and held him guilty u/s 302, Indian Penal Code while the other accused was acquitted for absence of evidence against him. It was held that having regard to the nature of the charge framed, the omission to frame a separate charge u/s 302, Indian Penal Code against was only a curable irregularity which in the absence of prejudice could not affect the legality of conviction u/s 302, Indian Penal Code. It was in this connection that their Lordships dictum in Suraj Pal's case came up for consideration.

7. There may be cases where a charge u/s 302, Indian Penal Code read with Section 149, Indian Penal Code is framed against the accused persons and the charge u/s 149 disappears because of the acquittal of some of the accused. A question may arise whether in such cases, it is open to the Court to convict the remaining accused u/s 302 read with Section 34, Indian Penal Code, although no charge u/s 302 read with Section 34, Indian Penal Code had been framed against him. This question came up for consideration before their Lordships of the Supreme Court in Lachhman Singh and Ors. v. The State 4 and it was answered that such a course is permissible where the facts of the case were such that the accused could have been charged alternatively, either u/s 302 read with Section 149 or u/s 302 read with Section 34, Indian Penal Code.

8. ours however is not a case either of the type considered in Willie (William) Slaney Vs. The State of Madhya Pradesh, , or in Lachman Singh and Others Vs. The State, . Here the charge framed against the Appellants is one u/s 302, Indian Penal Code simpliciter, but they have been convicted under Election 302/149, Indian Penal Code. It is really surprising how a senior Sessions Judge could have, on facts of the case placed before him, omitted to add either Section 149 or Section 34 to the charge of murder framed against the accused persons, especially when he had charged 80\\1 the accused persons u/s 149 for having committed rioting with deadly weapons and their common object was said to be to cause the death of Sirini Naik. We see no reason why having regard to the facts of this case, the two Appellants cannot be convicted u/s 302/34, Indian Penal Code, because, we feel that thereby the Appellants cannot complain that they were in any way prejudiced. From the charges framed against them it would be noticed that under the first charge the Appellants were informed; (1) that they along with 10 other accused persons were members of an unlawful assembly; (2) that the object of the unlawful assembly was to murder Sirini Naik; (3) that in prosecution of the common object of murdering Sirini Naik they committed rioting; and, (4) that they were armed with deadly weapons such as Barchhas, knives and Lathis. Immediately thereafter followed the second charge that these 12 persons including the two Appellants on or about the same day,

same time and same place (having reference to charge u/s 148. Indian Penal Code framed against them committed murder by intentionally causing the death of Sirini Naik. True it is that there is some difference in the scope and applicability of Section 34 and 149. Indian Penal Code although they have some resemblance and also to some extent overlap Section 34 itself does not create any offence, whereas Section 149 does. In a charge u/s 34, there is active participation in the commission of the criminal act whereas u/s 149 the liability arises by reason of membership of the unlawful assembly with a common object and there may be no active participation at all in the perpetration or commission of the crime. But in spite of this difference both the sections deal with a combination of persons who become punishable as sharers in an offence. It is therefore that in those cases where a charge had been framed only u/s 302, Indian Penal Code, Courts found no impediment to convict the accused u/s 302/34, Indian Penal Code if the evidence disclosed the commission of the offence in furtherance of the common intention of all. In *B.N. Srikantiah and Others Vs. The State of Mysore*, six accused persons were put on trial. All of them were charged as follows:

That you on or about the 25th day of August 1952 at Mayssandra in Magadi Taluk were members of an unlawful assembly the common object of which was to murder deceased Anne Gowda and thereby committed an offence punishable u/s 143 of the Indian Penal Code and within the cognizance of the Court of Sessions.

(2) That you A-2, A-3, A-4, A-5, and A-6 on or about the 25th day of August, 1952 at Mayasandra in Magadi Taluk did commit murder by intentionally causing the death of Anne Gowda and thereby committed an offence punishable u/s 32 of the Indian Penal Code.

(3) and that you A-1, on or about the 25th day of August 1952 at Mayasandra in Magadi Taluk abetted the commission of the offence of murder by A-2 to A-6 which was committed in consequence of your abatement and thereby committed an offence punishable under Sections 109 and 302 of the Indian Penal Code,.

It may be noted that the charge of murder does not contain the words "in furtherance of the common intention of all". The trial Court acquitted all the accused of the charge u/s 143, Indian Penal Code and also acquitted accused Nos. 5 and 6 of the charge u/s 302, Indian Penal Code, but he convicted accused No. 1 u/s 302/109, Indian Penal Code and the Appellants u/s 302, Indian Penal Code. On appeal, the High Court acquitted accused No. 1 of the charge u/s 302/109, Indian Penal Code but upheld the conviction of the Appellants u/s 302, Indian Penal Code. A further appeal was taken up to the Supreme Court and one of the questions canvassed before their Lordships was whether in the absence of a charge u/s 34, Indian Penal Code, the Appellants could be convicted of liability as shares in an offence by the application of Section 34, Indian Penal Code. In that case it was found that injury No. 5 on the neck was a fatal injury sufficient to cause death. The prosecution had not proved as to who caused that injury nor had it specified the injuries caused by the individual Appellants. There were 24

other injuries on the person of the deceased and of them 21 were incised. They were either on his head or neck, or on the shoulders or on the right and left forearms. Their Lordships held that anybody who caused the injuries with the weapons of the kind the Appellants used must be fixed with the intention of causing such bodily injury or injuries as would fall within Section 300, Indian Penal Code. Their Lordships were however satisfied having regard to the charges framed and the manner in which the accused persons were questioned u/s 342, Code of Criminal Procedure that the Appellants had sufficient notice and indication that the prosecution was relying on their collective responsibility and they having acted with a common intention, and that consequently they were in no way prejudiced. Their Lordships quoted with approval the following observation of Bose, J. in *Willie (William) Slaney Vs. The State of Madhya Pradesh*, referred to above:

We see no reason for straining at the meaning of these plain and emphatic provisions (referring to Sections 232(1) and 535, Code of Criminal Procedure) unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent.

In this view of the case, the conviction of the Appellants u/s 302, Indian Penal Code was upheld.

9. Another case which may be referred to in this connection is *Rawalpenta Venkalu and Anr. v. The State of Hyderabad* AIR 1956 S.C. 171. The case of the prosecution was that on the night between the 18th and 19th February 1953 the two Appellants along with three others (acquitted by the trial judge) in pursuance of a conspiracy to commit the murder of Mohammad Moinuddin had set fire to the single room hut in which he was sleeping, after looking the door of room from outside and thereby caused the death of the deceased. Section 34 was not added to the charge u/s 302, Indian Penal Code framed against them. There was however evidence which clearly showed that each of the Appellants severally and in pursuance of the common intention brought about the same result by his own acts and that the offence was committed after a preconcerted plan as to the method by which it was to be committed. In those circumstances their conviction u/s 302, Indian Penal Code was upheld despite the absence of Section 34, Indian Penal. Code from the charge.

10. In the present case before us, we have already indicated with reference to the charges as to how the Appellants must be deemed to have had notice that they were being charged for collective responsibility. This is further made clear from their examination u/s 342, Code of Criminal Procedure where the common question which was put to all the accused persons including the Appellants is as follows:

That on the night of 19.10-1966, you along with other accused persons formed an unlawful assembly with the intention of killing Sirini Naik and entered into his house and while he was sleeping on his verandah assaulted him with Lathis and Barchhas and brought about his death.

There is sufficient indication to each of the Appellants that he was not being charged individually for having killed the deceased, but that collective responsibility was being tried to be fixed on him. In a recent decision of this Court in Dhansai Sahu and Another Vs. State of Orissa, , to which one of us was a party, it was held that even though there might be no charge u/s 34, Indian Penal Code it is possible to convict the accused with the aid of Section 34, provided the accused thereby is not prejudiced. In the present case, it is found that the Appellants along with others entered into the house of the deceased at the dead of night being armed with Barchhas and lathis. The assailants inflicted several injuries on the person of the deceased as a result of which he died. The presence of the Appellants amongst the assailants is satisfactorily established. There cannot, therefore, be any doubt in the circumstances stated above that all the assailants including the Appellants had a common intention to kill the deceased and that acting in furtherance of their common intention they brought about his death. We would accordingly alter the conviction of Appellants u/s 302/149, Indian Penal Code to one u/s 302/34, Indian Penal Code and uphold "be sentence of imprisonment for life imposed on them. The conviction of Thala Naik u/s 323, Indian Penal Code for causing simple hurt to P.ws. 1 and 2 and the sentence imposed on him are also confirmed.

11. In the result, the appeal fails and is dismissed.

S. Acharya, J.

12. I agree.