

(2021) 04 OHC CK 0003
In the Orissa High Court
Case No : Criminal Appeal No. 44 Of 2000

Kangress @ Kailash Lenka & Sarat Lenka	APPELLANT
Vs	
State Of Orissa	RESPONDENT

Date of Decision : 07-04-2021

Acts Referred:

Indian Penal Code, 1860 — Section 148, 149, 302, 323, 354, 447
Code Of Criminal Procedure, 1973 — Section 161, 370, 392

Citation : (2021) 04 OHC CK 0003

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : Sudipto Panda, Karunakar Dash,

Final Decision : Allowed

Judgement

D. Dash, J

1. The Appellants faced the Trial in the Court of learned Additional Sessions Judge, Khurda in S.T. Case No.14/85 of 1999 being charged for commission of offences under section-148/323/447/302/354/149 of the Indian Penal Code. Along with these Appellants, although five other accused persons had faced the said Trial, they have been convicted only for commission of offence under section-447 of the IPC.

The present Appellants have been held guilty of commission of offence under section-447 and 302 of the IPC; and convicted thereunder. The Appellants thereby have been sentenced to undergo imprisonment for life for commission of offence under section-302 of IPC and for the offence under section-447 of the IPC, each of them has been sentenced to undergo rigorous imprisonment for a period of one month.

The Appellants being aggrieved by the above judgment of conviction and order of sentence in the aforesaid Trial have filed this Appeal. The Hon'ble Division Bench of this Court having heard the Appeal delivered the judgment on 23.12.2020.

The Bench delivered two judgments, while one of the Hon'ble Judges is of the opinion that the Appellants have been rightly convicted by the Trial Court for commission of offence under section- 447 and 302 of the IPC; the other Hon'ble Judge has expressed the difference of opinion in arriving at a conclusion that the Appellants are entitled to the benefit of doubt as to their complicity in the occurrence and thus not liable to be convicted and sentenced for the charged offences. This is how; the matter has thus been laid before me as provided under section-370 read with 392 of the Code of Criminal Procedure as per the order of Hon'ble The Chief Justice.

2. The facts having been comprehensively given in the judgments, I shall briefly touch only such as are necessary.

The father of the Appellants on the relevant date, as alleged by the Prosecution was uprooting the southern side of the fence of their Bari. The deceased namely Jalandhar Dalbehera coming to protest, it is said that the accused Jalandhar Lenka, father of the Appellants abused him in filthy languages and called out other accused persons. They reached there with lethal weapons like Lathi and Muli etc. It is further alleged that then they made entry to the Bari of the deceased.

Further prosecution allegation is that all the accused persons dealt blows on the deceased by means of Lathi, Muli etc. and wife of the deceased (P.W.12) when came to protest, her saree was pulled by one of the accused. Son of the deceased (P.W.11) had came to support to rescue his father. The deceased receiving blows from the accused persons fell down. The Appellants and other accused persons left the place as hearing the shout some villagers came rushing.

3. The nature of death as homicidal has been well proved from the side of prosecution by leading evidence; more importantly by the evidence of P.W.10, the Doctor, who had conducted the post-mortem examination over the dead body and that is not so in dispute.

Prosecution in order to bring home the charges against the accused persons including the Appellants in the Trial has altogether examined 13 (thirteen) witnesses. It has projected P.W.5 to 9 and 11 & 12 to have seen the incident. Upon examination of the evidence and on their analysis the evidence of P.W.-5 to 9 in so far as their claim to have seen the incident have been eschewed from consideration being found to be not acceptable assigning good reasons being so culled out from the totality of the circumstances emerging from the evidence on record. A careful reading of the judgment of the Trial Court reveals that the evidence of P.W.10 to 13 have been taken into account in holding the Appellants guilty of the offences for commission of which they have been convicted.

4. Learned counsel for the Appellants at the outset stressed much emphasis on the point that the Prosecution having failed to establish by leading clear, cogent and acceptable evidence being so tendered through reliable witnesses that the incident had taken place on the threshing floor / bari of the deceased of which he

was in possession, the finding as to criminal trespass by the Appellants is not recordable. He submitted that in view of the non-establishment of the exact place of incident i.e. the spot, the substratum of case of the prosecution that the Appellants had gone over the land of the deceased and assaulted him when he was standing there and thereafter others coming to his rescue is not believable and that according to him rather probabilizes a case that it is the deceased and others who had come over the other side of their land where all of a sudden the incident took place with exchange of hot words leading to the push and pull from the side of the members of both the camps. He submitted that the weapon of offence when is said to be Thenga, no blood stain having been detected on the same when other weapon Muli has not even been seized, the prosecution version that the Appellants assaulted the deceased by said weapons cannot be believed. He therefore, submitted that the finding of guilt based on the evidence of PW 11 and 12 without critical examination keeping in view all the above important features appearing in evidence cannot this be sustained.

5. Learned Additional Standing Counsel refuting the above submissions contended that the Trial Court on proper appreciation of evidence on record has rightly held these two Appellants guilty of offences under Section 447 as well as 302 IPC. According to him, the two witnesses i.e. PW 11 and 12 having stated about the role of these Appellants in the said incident and as no such material has surfaced as to wholly discredit their version who are natural witnesses and whose presence then cannot be disbelieved; the Trial Court has committed no mistake in relying upon their evidence so as to base the finding of guilt of the Appellants for the above offences.

6. Admittedly, there stood enmity between the deceased and his family members on one hand and these Appellants on the other. Even as per the prosecution version the very protest from the side of the deceased as to the damage being caused to his fence by the accused-Jalandhar Lenka, was the commencement factor of the incident on that day and time.

The Trial Court having placed the evidence of PW 11 and 12 as the eye-witnesses within the arena of consideration while keeping the evidence of other prosecution witnesses so projected as eye witnesses by assigning good reasons as picked up from the surrounding circumstances emerging from the evidence; this Court finds no such infirmity in that approach of the Trial Court. This now takes me to focus upon the evidence of PW 11 and 12 in ascertaining the complicity of the Appellants in the said incident.

P.W.11 & 12 are the son and widow of the deceased respectively and their evidences have been relied upon by the Trial Court. This P.W.11 being a practicing Advocate is a member of the Banpur Bar Association and he happens to be the informant. It is his evidence that on 21.06.1998 around 7.00 am, when he was taking bath at the well near their bari, the incident took place. His evidence run on the score that he had seen his parents going to that bari for cleaning, when they found that accused-Jalandhar Lenka (not on trial) was

uprooting the southern side fence of their bari. As per his evidence, when deceased protested, accused Jalandhar Lenka abused him and called out other accused persons. In response to the said call, seventeen accused persons came in a group and these two Appellants were among them. It is his further evidence that all of them entered inside the bari and being directed by accused-Jalandhar Lenka, Appellant No.2, Ramesh Lenka (absconding), Appellant No.1 stood around his father and began assaulting him by means of Lathi and Muli on his head and other nearby sensitive parts, which resulted in the fall of the deceased on the ground. It is stated that then other accused persons trampled over the deceased. This being the evidence of P.W.11, as to the assault on his father, he has next deposed on oath that his mother was assaulted by accused-Baikuntha, Subash and Markanda when she had gone to rescue his father and he has specifically implicated accused-Baikuntha to have as pulled his mother's saree and other two only to have assaulted her mother who fell down. As to his arrival at the exact place it is stated to be at the time when accused-Kailash Jena, Amulya Lenka, Sukuti @ Krushna Lenka and Manoj Pradhan had trampled over the deceased who thereafter also assaulted him. When it is stated by the witness that he was assaulted, he has not been medically examined. When it is his specific evidence that he was then taking bath in the nearby well inside her bari, the defence case is that there was no such well existing in the bari of the deceased. The important feature surfacing in his evidence which is to be taken note of here is that in the Trial, he has given a good bye to his previous version that was not exchange of words between his father and the accused prior to the actual incident of assault. He is also silent on the score as to how these Appellants entered into the bari. As per the prosecution case the bari was under fencing and some portions being uprooted by accused, Jalandhar Lenka, the protest came from the side of the deceased. This witness is not explaining as to whether those accused persons including the Appellants entered the bari through that uprooted portion or by demolishing / uprooting further portion of the fence. It having been stated in the F.I.R. that the parents were cleaning their bari for cultivation and it being confronted with, PW 11 has expressed his ignorance as to if he had stated so in the F.I.R. As per the evidence of this witness, by the time he arrived his mother was there at the spot and being asked during cross-examination, he has not been able to state about the details as to which of the accused persons dealt how many blows by which weapons and what were the seat of assault. Rather, as to the role of accused persons namely Kandha Pradhan, Sarat Lenka, Ramesh Lenka and Kailash Lenka in assaulting his father as had been stated earlier has been given a go bye which is evident from the evidence of Investigating Officer, (PW 13). Although it is there in his earlier statement recorded under section 161 of the Cr.P.C in course of investigation, that receiving the direction from accused-Jalandhar Lenka, accused Kandha Pradhan, Sarat Lenka, Ramesh Lenka and Kailash Lenka surrounded his father and assaulted him by Lathi and Muli; attention of the witnesses having been drawn to the same, he has denied to have stated so earlier which have been proved through the Investigating Officer (PW 13) who had recorded the statement. The defence has drawn the attention of

this witness as to the improvements and omissions during the evidence. The defence having again drawn the attention of this witness to his previous statement where he had stated that accused-Kandha Pradhan had assaulted on the head of his father and Ramesh had assaulted on his father's head and near the base of the ear, he has flatly denied to have then so stated which has also been proved through Investigating Officer, PW 13 who had recorded the said statement. Thus the defence stand that this witness having not actually seen the assault upon his father being not present near at the relevant time, has been projected as ocular witness in view of the aforesaid discussion of the obtained evidence being further viewed with the suppressed genesis of the occurrence having the definite tendency to conceal the role of his parents therein gains force which therefore warrants the simultaneous exercise as to scrutiny of the evidence of PW 12.

It is her evidence that on 21.06.1998 around 7.00 am she and her husband had gone to bari land situated near the Kothaghara of the village and the purpose was to have cultivation work. She has further stated that after some time of their arrival, accused-Jalandhar Lenka was found engaged in demolishing their fence which was protested to by her husband and then all the accused persons came inside their bari and as directed by accused-Jalandhar Lenka; these accused persons namely, Kandha Pradhan, Sarat Lenka, Ramesh Lenka, Kailash Lenka and Jalandhar Lenka assaulted her husband with Lathi and Muli and other accused persons were then surrounding the deceased. She has further deposed about the role of that accused-Baikuntha Lenka in pulling her saree and accused-Subash Pradhan, Makaranda Sasmal and Baikuntha pulling her by holding the toft of hair. Her specific evidence is that at that time, when she was being manhandled by the above accused persons, her son, P.W.11 came to intervene in which he was assaulted by accused-Kailash Jena, Krushna Lenka, Amulya Lenka, Manoj Pradhan and Pradeep Lenka gave him the fist blows. This leads to doubt the evidence of PW 11 that he was then closely nearby as PW 12's version is that by the time of his arrival, deceased was lying on the ground receiving the blows. She had not stated before the I.O. that at the time of incident there was hot exchange of words. The defence having drawn the attention of this witness to such omissions in her previous statement those have been proved through Investigating Officer (PW 13) who had recorded said statement of P.W.12. Her previous statement that at time of incident, accused-Jalandhar Lenka came and directed them to put fence in the appropriate place for which there was exchange of hot words is now being suppressed as is evident from the evidence of Investigating Officer (PW 13) who had recorded her statement in course of investigation. This in my considered opinion is vital as having the bearing on the genesis of the occurrence that then accused Jalandhar was uprooting the fence is seen to be a later introduction. The I.O. (PW 13) having visited the spot has not drawn the spot map nor even noted the extent of damage of the fence and more importantly, he has deposed to have got the information that deceased was then the encroacher. Thus the prosecution shares the blame of not presenting the

clear picture on the said vital factual aspect. This rather probabilities a case that then the deceased was putting the fence and accused Jalandhar came and told him to do so on his land. This leads to strong inference that the commencement as to happening of the incident is not being truthfully stated by both the witnesses P.Ws. 11 and 12. Their evidence on a conjoint reading emits the smell that they have resorted to said course lest it may be adversely viewed. All these go to point finger at the veracity of the prosecution case impacting in a negative manner, when these witnesses are seen to be suppressing the said aspect especially as to the initial role of the deceased, Jalandhar Dalbehera, the husband of PW 12 and father of PW 11. This PW 12 while stating before the I.O. that accused Sarat Lenka, Ramesh Lenka and Kailash Lenka assaulted her husband, has not stated regarding assault by accused Jalandhar Lenka. She has also not stated therein regarding the presence of Gundhicha Lenka at the spot. It was not in her statement before the Investigating Officer that when her husband fell down, all the accused persons trampled over him. While stating that only Jalandhar Lenka uprooted one Lathi from the fence, she has not stated that the accused persons uprooted the fence of her Bari and assaulted her husband. She has also not stated before the Investigating Officer that Jalandhar Lenka directed others to finish her husband. She has stated before the Investigating Officer that after her husband fell down on the ground shouting "MARI GALI, MARI GALI", her son reached and she also has not stated before the Investigating Officer that Subash Pradhan, Markanda Pradhan and Baikuntha Pradhan pulled the tuft of her hair. The defence has proved all these omissions and those in my view can not under the circumstances as above dismissed so lightly brushed aside as minor contradicitions.

The evidence of P.W.11 & 12, in my opinion are not consistent as to the happenings right from the beginning till the accused persons are said to have left the place. Their evidence being read as a whole, thus also gives rise to doubt as to the exact place of incident and the exact reason of said happening which in turn makes their version as to the role of these Appellants therein doubtful. For these reasons, the presence of P.W.11 at that time near the well situated on the Bari also appears to be the doubtful. For all the aforesaid, further keeping in view the surrounding circumstances as those emanates from the totality of the evidence let in by the Prosecution, the approach of the Trial Court in accepting the evidence of P.W.11 and 12 in part while discarding the other part, in my considered view is not right and under the circumstances, as also in view of above discussion of the evidence of P.Ws. 11 and 12, said course adopted by the Trial Court in impermissible.

Thus, in the totality of the evidence let in by the prosecution and their critical analysis in the backdrop of the surrounding circumstances obtained in evidence, I am of the considered view that the Appellants were entitled to the benefit of doubt.

In the wake of aforesaid, the judgment of conviction and order of sentence as

have been passed by the Trial Court cannot be sustained. Accordingly, the Appellants being not found guilty of the offences for commission of which they have been convicted and sentenced, they be set at liberty forthwith.

6. Accordingly the CRA stands allowed.