

(2009) 03 OHC CK 0026

In the Orissa High Court

Case No : Criminal Appeal No. 103 of 1996

Kasi @ Kasinath Nahak and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Explosives Act, 1884 — Section 9

Penal Code, 1860 (IPC) — Section 148, 149, 300, 302, 307

Citation : (2009) CLT 819 (Suppl CrI) : (2009) 1 ILR (Ori) 540(1) : (2009) 1 OLR 226 Supp : (2009) OLR 819 (Suppl CrI)

Hon'ble Judges : Sanju Panda, J;P.K. Tripathy, J

Bench : Division Bench

Judgement

S. Panda, J.—This appeal is directed against the judgment dated 26th February, 1996 passed by the learned 1st Addl. Sessions Judge, Berhampur in Sessions Case No. 34/170 of 1994 (CDC) convicting the Appellants under Sections 148/302/149 IPC and sentencing them to undergo imprisonment for life.

2. The prosecution case in brief is that the informant Bama Nahak is the wife of Ghana Nahak. Her family left the village Khuntakatapalli under Aska Police Station to village Samantapalli in the month of Kartika, 1994 due to complain of witchcraft committed by the informant's family. The villagers of Khuntakatapalli picked up quarrel with the informant's family and forced them to leave their ancestral house of village Khuntakatapalli by giving zima of the household articles to the local Sarapanch. Since then, the informant's family never returned to the village Khuntakatapalli. On 15.1.1994 at about 8 A.M. deceased-Krushna Nahak came to the house of the informant-Bama Nahak. Krushna had a friend namely Amar Nahak the son of the informant. The deceased suggested him to settle all the disputes amicably with the villagers of Khuntakatapalli. As such, all of them went to village Khuntakatapalli and when they opened the door of the house which was under lock and key, the accused persons, namely, Kasia Nahak and Sarat Nahak pulled the saree of the informant for which she fell down. The other accused persons asking her as to why she came again to the village, forced

her to go back from the village immediately. Finding no other way, she started to go away from the village to call her husband. While going away from the village, she saw the deceased running towards her crying for help. The accused persons, namely, Kasia Nahak holding an iron kati, Sarat Nahak holding a lathi and Prafulla Nahak holding a tangia, Indra Nahak and Ramachandra Nahak holding lathies were chasing the deceased and they assaulted the deceased in the agricultural field by means of the weapons they held. As a result thereof, the deceased fell down on the ground and died at the spot. The informant informed the incident to the local police orally which was reduced into writing and the same was treated as FIR and registered as Gangapur P.S. Case No. 6 of 1994. The informant put her LTI on the FIR. Thereafter, police proceeded to the spot for further inquiry. After completion of investigation, police submitted charge sheet against the accused persons.

3. To prove its case, the prosecution examined as many as 27 witnesses. P.W.3 is the Doctor who conducted the post-mortem on the dead body of the deceased. Ext.2 is the post-mortem report. Ext.1 is the inquest report. Ext.15 is the FIR. Ext.19 is the chemical examination report. Ext.4 is the opinion of the doctor in respect of the weapon of offence which is marked as M. Os.I to III, namely, Kati, Axe and Bamboo lathi. M.O.IV is the photograph and M.O.IV/a is the negative of the photograph. P.W.11 is the informant. P.W. 13 is the informant's son. Both of them are eye witnesses to the occurrence. P.W. 15 is the informant in Gangapur P.S. Case No. 7 of 1994 (Ext.A), a counter case to Gangapur P.S. Case No. 6 of 1994. P.W. 16 is the husband of the informant. Ext.B is the requisition for medical treatment and Ext.D is the F.I.R corresponding to G.R. Case No. 12 of 1994 for commission of offence under Sections 307/34 IPC read with Section 9(b) of the Indian Explosive Act.

4. The pleas of the accused persons are of complete denial to the charges. However, they pleaded that the informant's husband and son assaulted P.W.16 by exploding bombs for which a case was registered against them. Therefore, this case was foisted against them.

5. P.W.3 is the doctor who conducted the post-mortem examination on the dead body of the deceased and found the following external injuries:

- i. Lacerated wound 4"x3" on the right supra clavicular fossa with bleeding extending to the middle of the back and neck
- ii. Fracture of both bones of right fore-arm at the middle.
- iii. Lacerated injury of the size of 1" longitudinally on the scalp.
- iv. Cut injury of the size of 1" on the lateral aspects left fore arm at the middle.

On dissection he found the following injuries:

- i. 1st, 2nd and 3rd ribs on the right side were fractured. The underline right plueura were severed at its upper portion and there was collapse of the right

lungs.

ii. There was injury to the right scaleanus and sternomastoid muscle of the right side with bleeding.

iii. There was injury to the right subclavian and right carotid vessels with profuse bleeding.

As per the opinion of the doctor, the death was due to shock as a result of profuse bleeding from the right carotid and subclavian vessels and collapse of the right lung. The external injury No. 1 corresponding to injuries on carotid and subclavian vessels could have been caused by sharp cutting weapon like kati or tangia. As per his opinion, all other injuries might have been caused by hard and blunt weapon like lathi. From the report and opinion of the doctor, it is concluded that the death of the deceased was homicidal. The learned Addl. Sessions Judge, considering the evidence of the eye-witnesses to the occurrence and the evidence of the doctor, came to a conclusion that the accused persons are guilty of the offence u/s 302/149 IPC. Accordingly, he convicted the accused persons u/s 302/149 IPC to undergo imprisonment for life.

6. The learned Counsel appearing for the Appellants submitted that the prosecution story clearly reveals that P. Ws. 11 and 13 are the interested witnesses and they had enmity with the accused persons as they forced the informant and her family members to leave the village Khuntakatapalli which was their ancestral house. As such, on the basis of their evidence, the Appellants should not have been convicted without any further corroboration of the said evidence by other witnesses. F.I.R. (Ext. 15) exhibited by the prosecution has to be completely ignored as the prosecution has not properly proved the same. There was a delay in dispatching the said FIR to the trial court and the trial court did not take into consideration the fact of the counter-case where the informant's son, i.e. P.W. 13, is the accused person and they assaulted P.W. 16 for which a case u/s 307/34 IPC read with Section 9(b) of the Indian Explosive Act was registered.

7. The learned Standing Counsel appearing for the State, on the other hand, submitted that though P. Ws. 11 and 13 had ill-feelings towards the villagers of Khuntakatapalli and the accused persons belong to the said village, their version cannot totally be thrown out. There is no material on record that they had implicated the accused persons falsely and allowed the real culprit to escape.

8. Considering the rival submissions of the parties and after going through the record, specifically the post-mortem report and the evidence of P.W. 3 the doctor who conducted the post-mortem examination (Ext.2) and his opinion (Ext.4) which was not disputed by the learned Counsel for the Appellants that the deceased Krushna met a homicidal death, this Court confirms the finding of the trial court that the deceased met a homicidal death.

P. Ws. 11 and 13, the eye witnesses to the occurrence have corroborated each

other so far as assault by means of weapons of offence seized by the prosecution i.e.M. Os. I to III is concerned. According to these two eye witnesses, accused Kasi @ Kasinath Nahak dealt a kati blow on the back side neck of the deceased, Sarat Nahak dealt a lathi blow on the right arm of the deceased, Prafulla Nahak dealt a tangia blow (M.O.II) on the head of the deceased and Indra Nahak and Ramachandra Nahak dealt lathi blow on the deceased. The defence has not discarded their evidence by cross-examining those two witnesses and the opinion of P. W.3 the doctor that external injury No. 1 corresponding to the injuries on carotid and subclavian vessels could have been caused by sharp cutting weapon like kati or tangia and all other injuries could have been caused by hard and blunt weapon like lathi. In his cross-examination, the doctor (P.W.3) specifically stated that the external injuries could also be possible by stone throwing and violent fall over a rocky surface but in such a case, internal injury corresponding to external injury No. 1 would not have been occasioned. Therefore, there is no doubt that the cause of the death was assault. Kasia @ Kasinath Nahak by means of kati, Sarat Nahak by means of lathi, Prafulla by means of tangia and Indra Nahak and Ramachandra Nahak by means of lathies assaulted the deceased as per the evidence of P. Ws.11 and 13 who were the eye witnesses to the occurrence. Therefore, this Court comes to the conclusion that the present Appellants are the author of the injuries caused to the deceased.

9. The next question comes to consideration is whether the act committed by the accused persons comes u/s 300, IPC and its Exception. The record reveals that accused party as well as the informant's party, both assaulted each other. The accused persons in their statement recorded u/s 313 Code of Criminal Procedure also stated so. Admittedly neither those facts have been taken into consideration by the prosecution nor has the prosecution pointed out anything to discard that material evidence adduced by the defence in this case. If such evidence is taken into consideration, it will reveal that there was an altercation between the two groups regarding witchcraft and its impact on the villagers and as a result of which the villagers on the spur of the moment and due to hit altercation assaulted the deceased. In the cross-examination of the I.O (P.W.22) the said fact was corroborated and charge sheet was filed against P.W. 13 along with three others in the counter case u/s 307/34 IPC read with Section 9(b) of the Indian Explosive Act and on that spot the villagers assaulted the deceased as a result of which he died at the spot and the said act of the accused persons comes under Exception-I of Section 300, IPC which is culpable homicide not amounting murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation.

10. Accordingly, this Court while setting aside the impugned order of conviction and sentence u/s 302 IPC passed by the learned 1st Addl. Sessions Judge, Berhampur in Sessions Case No. 34/170 of 1994 (GDC), convicts the Appellants u/s 304, First Part, IPC for the offence of culpable homicide not amounting to murder and sentences each of them to undergo rigorous imprisonment for ten years u/s 304 IPC and no separate sentence is awarded for offences under

Sections 148/149 IPC.

11. It is stated at the Bar that accused persons, namely Bhagaban Nahak, Ramachandra Nahak, Sarat Nahak and Indra @ Indramani Nahak were granted bail by this Court on 1.8.1996. Therefore, the trial court is directed to issue notice to the said accused persons to surrender before the trial court within one month by cancelling their bail bonds to undergo the rest period of sentence. In case they fail to appear, necessary steps be taken by the trial court to put them into the custody. Thereafter, the trial court shall, in the light of the sentence imposed by this Court, calculate the period of sentence already undergone by the accused Appellants and the accused Appellants who would be found to have completed the sentence as imposed by this Court above and shall be set at liberty if their detention is not required in connection with any other criminal case.

The Criminal Appeal is accordingly allowed in part.