

(2008) 07 OHC CK 0015

In the Orissa High Court

Case No : Criminal Appeal No. 169 of 2001

Madhab Chenda and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-07-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 323

Citation : (2008) 07 OHC CK 0015

Hon'ble Judges : P.K. Tripathy, J;N. Prusty, J

Bench : Division Bench

Advocate : A.K. Mishra, for the Appellant; A.K. Mishra, Standing Council, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—The Appellants were accused persons in Sessions Case No. 19 of 1999 of the Court of the Additional Sessions Judge, Malkangiri (S.C. No. 198/96 of the Court of Sessions Judge, Koraput-Jeypore) arising out of G.R. Case No. 11 of 1996 of the Court of the S.D.J.M., Malkangiri. They have challenged the order of conviction for the offences under Sections 148,302,323/149 Indian Penal Code.

2. Raghu Khora is the deceased. He along with Padom Khora (P.W.5) was participating in DHEMSA NACHHA (tribal drums) on the occasion of PAUSA PARBA i.e. on 05.01.1996. Accused persons were also participating in that celebration. Deceased Raghu Khora was playing the DRUM whereas P.W. 5 was blowing the MOHURI. At about 4.00 P.M. the deceased wanted to depart from that celebration together with P.W. 5 so as to go to another village to play DRUM and MOHURI having received advance money for that purpose. The accused persons resisted that request and apprehending danger to him when the deceased came out he was chased by the accused persons. The deceased entered into his house, which is at a short distance from the place of celebration. Accused persons being armed with weapons trespassed into his house, broke open the door and dragged him to

the outer Pinda (verandah) and indiscriminately assaulted by the weapons like axe, arrow, Musala and lathi etc. Sustaining injuries on his head, face, hands, chest and legs, the deceased succumbed to the injuries at the spot. Amongst others, the occurrence was witnessed by P.W. 1 Padalam Khora, P.W. 2 Dhona Khora and P.W. 5 Padom Khora besides P.W. 3 Sadhu Khora, son of the deceased and P.W. 10 Beti Khilo, married sister of the deceased. P.W. 1 lodged FIR (Ext. 1). P.W. 9, O.I.C. of Chitrakonda Police Station registered P.S. Case, conducted investigation and submitted charge sheet for various offences including the offence u/s 302/149 Indian Penal Code.

3. The defence of the accused persons is denial to the allegations.

4. To substantiate the charges, prosecution relied on the evidence of twelve witnesses and the documents marked as Exts.1 to 22 and different incriminating materials including the weapons of offence marked as M. Os. I to XII. In defence, the accused persons examined one witness i.e. D.W.1 Madhaba Badnaik. They did not adduce any other evidence.

5. Amongst the witnesses examined by the prosecution, P.W. 7. is the Doctor, who conducted autopsy on the dead body of the deceased and Ext. 2 is the inquest report. P.W. 7 while proving the post-mortem report, Ext. 14 deposed that because of multiple ante mortem injuries sustained on his face, chest, neck and head, the deceased suffered homicidal death due to haemorrhage and shock produced from such injuries. With respect to weapon of offence i.e. axe marked as M. Os. I, II and IV, he opined that injuries are possible by such weapons. That opinion report was marked as Ext. 15. Opinion of P.W. 7 on the homicidal death was not challenged in the Trial Court. While he was cross-examined, all the discrepancies in the injuries as noted in Exts.2 and 14 and his opinion in Ext. 14 were put to test in course of the cross-examination. Learned Additional Sessions Judge for the reasons best known to him did not consider the evidence of P.W. 7. to record a clear finding about homicidal death. Be that as it may, on perusal of the evidence of P.W. 7 and the post-mortem report Ext. 14 and the contention of the Appellants by not challenging homicidal death of the deceased, we record that the deceased suffered homicidal death.

6. P. Ws.1,2,3,5 and 10 were relied on by the prosecution as eyewitnesses to the occurrence to sustain the charges against the accused persons and the other oral and documentary evidence are relied on to provide corroboration and credibility to the evidence of the aforesaid eye witnesses. Learned Additional Sessions Judge referring to such evidence found the evidence of the eyewitnesses to be credible so as to prove the occurrence of assault against the accused persons not only on the deceased but also on the injured witnesses. In course of assessment of evidence, Learned Additional Sessions Judge found that discrepancies, which were pointed out by the defence in the evidence of the eyewitnesses, are minor and non-consequential. Discrepancies found in the ocular and the medical evidence were also similarly found non-consequential and in that respect he recorded that the oral evidence of the eye witnesses are true, trustworthy and

corroborative and therefore the discrepancies in the number of injuries as noticed by P.W. 7 do not make any difference. Referring to the injury certificates Ext. 16 granted in favour of P.W. 1, Ext. 17 in favour of P.W. 10 and Ext. 18 in favour of Saita Khora (not examined) and the supportive oral evidence, Learned Additional Sessions Judge found that prosecution has proved the case for the injuries inflicted. Accordingly, he recorded conviction for the offences under Sections 148, 302, 323/149 I.P.C. and sentenced each of them to imprisonment for life for the offence u/s 302/149 I.P.C. and rigorous imprisonment for six months u/s 323/149 I.P.C. and rigorous imprisonment for one month u/s 148 I.P.C. with direction to run all such sentences concurrently.

7. Mr. Mishra, Learned Counsel for the Appellants further argues that evidence of all the eye witnesses in this case are full of discrepancies in describing the occurrence of assault in different manner and, therefore, such discrepant evidence should be discarded and the accused persons be acquitted. Learned Standing Counsel, on the other hand, argues that there are minor discrepancies though the substratum of accusation against the Appellants is made by each of the witnesses in the same manner.

8. From the evidence of P. Ws 1, 2, 3, 5 and 10, we find that they have differently described the occurrence of assault, though they were consistent about the weapons used by such of the accused persons to whom each of them law dealing the blows. The evidence of such witnesses clearly establishes that each of them had not congregated to witness the occurrence from a common spot. On the other hand, they witnessed the occurrence from different spots. Therefore, the differences in observation and narrations of the occurrence in that manner cannot be regarded as discrepant so as to shake their credibility. On the other hand, it is seen that each of them has truthfully described about the assault made by the accused persons on different parts of the body of the deceased. Under such circumstance, we do not find any merit in the aforesaid argument of the Appellants.

9. Mr. Mishra, Learned Counsel for the Appellants further argues that the evidence of the eyewitnesses describing about the blows inflicted on the deceased and caused injuries is contradictory to the evidence of P.W. 7 and when two of the eyewitnesses are closely related to the deceased, therefore, such evidence should be discarded. In that context, he relies on the cases of Narayan Karjee v. State of Orissa, (1997) 12 OCR 523 , Maula Bux and others v. State of Rajasthan , Madhusudan Ray and Others Vs. State of Orissa, , Surjan and Others Vs. State of Rajasthan, and Chudiamal Jain and Another Vs. State of Orissa, .

Learned Standing Counsel, on the other hand, relies on the cases of Krishnan and Anr. v. State Rep. by Inspector of Police 2003 (3) Crimes 197 (SC) and Vijay Shankar Shinde and Ors. v. State of Maharashtra 2008 (1) Crimes 216 (SC).

10. We may state in brief, that according to the evidence of P.W. 1, accused Madhaba dealt tangia blow to the left side head and Sonu also dealt a similar

tangia blow. Thereafter the other accused persons started assaulting the deceased with other weapons, as a result of which the deceased suffered profuse bleeding. P.W. 2 while describing infliction of the injuries by Madhaba and Sonu in a similar manner also stated that accused Malli Chenda dealt a blow by means of a KHANANTI to the right arm, accused Jayaram by an axe to the right side of neck, accused Rauto by means of an arrow on the right arm pit, accused Madhaba and Gundu dealt blows by means of Kati. P.W. 3 similarly stated about dealing of the blows by accused Madhaba, Sonu, Malli Chenda, Rauto, Jayaram, Narayan, Ghenu and Gundu. P.W. 5 also stated about the assault by Madhaba and Sonu and when intervened to save the deceased, accused Sonu assaulted him (P.W.5) on the forehead by use of the handle of the axe (M.O. II) and, therefore, he left the spot. P.W. 10 also stated that the accused persons assaulted his brother on the left side face, head by various weapons and they also assaulted her. In the inquest report written in vernacular, the injuries have been described that there were four cutting blows on the right side face, two stab blows on the right side near nostril and below the lips. There was further injuries by sharp cutting instrument numbering three on and around the forehead and left cheek above the left eyebrow and front side neck, two injuries on the chest, two injuries on the right side back, two injuries on the backside of the head. It has been stated that there were bleeding from all the injuries. In his deposition as well as in Ext. 14, P.W. 7 has stated that there were

- (1) Four injuries on left side of the face,
- (2) Two injuries on the right side of the nose,
- (3) One injury on the lip,
- (4) Two injuries on the chest,
- (5) One injury on the neck and
- (6) Scrotum was swelling.

11. In the cross-examination, P.W. 7. stated, "so far as external injuries are concerned in Ext. 14 I have not mentioned regarding the classification of those injuries. Because of decomposition of the body of the deceased therefore I could not detect any blood clots in any external injuries. I have not mentioned regarding colour and margin of the external injuries."

12. He also stated that "When I found, the external injuries found in the person of the deceased do not tally with this Inquest Report, as injuries mentioned therein by the I.O., I conducted Post Mortem Examination of the deceased and mentioned all the external injuries and internal injuries whatever I found on the dead body of the deceased as per my post mortem examination Report Ext. 14".

13. The post-mortem report also reveals description of the injuries in that peculiar manner. For the reasons best known to him, P.W. 7 did not mention if the injuries found were incised wound, stab wound or lacerated wound or any

other kind of such wounds. It is elementary for a Doctor to record such nature/ categories of the injuries in the post-mortem report. We feel that because the body was decomposed perhaps P.W. 7 did not take care to properly note the injuries save and except noticing on bare inspection of the dead body and that is why he did not give size of each of the injuries.

14. Under the given circumstance, the evidence given by P.W. 7 regarding the opinion of the injuries cannot be given undue importance. In fact, in course of investigation, the I.O. after receiving the post-mortem report should have confronted the Doctor with regard to such facts to mention the categories of the injuries and their sizes and in the event any inability to do so, the dead body could have been sent to FMT Department for further post-mortem examinations.

15. Be that as it may, the discrepancy, which the Doctor says, is because of apathy on his part to properly examine the injuries. On the other hand, virtually discrepancies are next to nothing on a proper comparison of ocular evidence of the eyewitnesses and the inquest report together with the post mortem report. At the same time, it may be noted that the Doctor's opinion about the ante-mortem character of those injuries is not disputed by the accused persons. The injuries, which were found on the dead body of the deceased have been opined to be the cause of homicidal death of the deceased and under the given circumstance, the discrepancy as argued by the Learned Counsel for the Appellants to obtain the benefit of doubt in this case, is not found to be available to them. The citations relied on by the Appellants in that respect are found to be distinguishable in the facts and circumstance, so as to adopt any of the ratios on the citations of the case in favour of the Appellants. To put it shortly, in the case of Narayan Tyagi (*supra*), the main reason for acquittal was because of discrepancy in discrepancies about the spot of occurrence and non-seizure of bloodstained earth from the alleged spot of occurrence (according to the eyewitnesses). Incidentally therein, the Court noticed discrepancy in the postmortem report and the evidence of the eyewitnesses regarding the number of injuries and opined that such discrepancy creates doubts. In the case of Moula Box (*supra*) *inter alia*, the Apex Court found discrepancy in number of injuries in comparison between the inquest report and the postmortem report and taking note of other incriminating circumstance favouring the accused benefit of doubt was granted to the accused. In the case of Madhusudan Ray (*supra*), there was proved allegation of manipulation in injury reports. In the case of Surjan (*supra*), there was contradiction amongst the eyewitnesses as to the blow given on the head of the deceased and therefore it was not determinable from the evidence on record as to who out of several accused persons dealt the fatal blow to the head. In the case of Chudiamal Jain (*supra*), there was conflict of opinion between the doctor who conducted postmortem examinations and the doctor examined by the defence. When the doctor examined by the prosecution stated about homicidal death, the doctor examined by the defence opined that symptoms of death due to drowning was present. Therefore, the Division Bench granted the benefit to the accused. At the cost of repetition, it is thus held that

the aforesaid citations are of no help being distinguishable on facts and circumstances.

16. In the case of Krishnan (supra), after repelling the argument of the accused persons that there was discrepancy in the medical evidence and the evidence of the eye witnesses relating to the number of injuries and the part of the body where such injuries were inflicted, the Apex Court observed that:?

19. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant"

In the case of Vijay Shankar (supra), while upholding credibility of the injured eyewitnesses, their Lordship propounded that:-

9. The Trial Court was not justified in holding that because P.W. 11 was an injured witness he may have reason to falsely implicate the accused. However, as rightly observed by the Trial Court and the High Court, the evidence of P. Ws. 12 and 13 does not suffer from any deficiency. P. Ws. 11, 12 and 13 were cross examined at length but nothing substantial could be elicited to destroy the credibility of their version. As a matter of fact, the evidence of injured person who is examined as a witness lends more credence, because normally he would not falsely implicate a person thereby protecting the actual assailant.

17. On a conspectus of allegations forming the Charge, the evidence tendered by the parties, findings recorded by the Trial Court and consideration of the arguments of both the parties, we find that prosecution has been able to prove its case beyond all reasonable doubt. Therefore, the order of conviction is unassailable.

18. Accordingly, the Criminal Appeal is dismissed.