

**(1983) 12 OHC CK 0010**

**In the Orissa High Court**

**Case No :** Jail Criminal Appeal No's. 93 and 117 of 1980 and Criminal Appeal No. 102 of 1980

Makaradbwaja Bhoi and Another, Jogendra Sahu and Others  
and Jogendra Sahu

**APPELLANT**

**Vs**

The State of Orissa

**RESPONDENT**

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**Date of Decision :** 15-12-1983

**Acts Referred:**

Evidence Act, 1872 — Section 27

**Citation :** (1984) 1 OLR 122

**Hon'ble Judges :** Pathak, C.J.;D.P. Mohapatra, J

**Bench :** Division Bench

**Advocate :** Krushna Prasad Misra, for the Appellant; Indrajit Ray, A.G.A., for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Pathak, C.J.—All these three appeals arise out of a common judgment dated 15-3-80 passed by the learned Additional District & Sessions Judge, Bhawanipatna, in Sessions Case No. 21-K/15 of 1979.

Appellants Makaradhwaja Bhoi and Jhaja Bhoi have filed Jail Criminal Appeal No. 93 of 1980 and appellant Jogendra Sahu has filed Jail Criminal Appeal No. 117 of 1980. All the three appellants have also filed a regular appeal being Criminal Appeal No. 102 of 1980 through Mr. D P. Sahu, Advocate. But before the said appeal was taken up for hearing, Mr. Sahu withdrew his appearance as he was appointed Public Prosecutor for the State. In view of this contingency, we appointed Mr. Krushna Prasad Misra, Advocate, to represent the appellants in all the three appeals at the State expense.

2. All the three appellants stood their trial Under-section 302/34, I. P. C. and they have been convicted Under-section 392, I. P. C. and sentenced to undergo R. I. for life.

3. The prosecution case in brief is that on 26th May, 1978 at about 7 P. M. while the deceased Nandeswar Bhoi was coming from the village tank, on the Duli (land) of one Lingar j Sahu, he was waylaid by all the three appellants who assaulted him with Gupti and Knife. It was only in the next morning that Nandeswar was found by P. Ws 7, 8, 9, and 5 to be lying dead in a pool of blood at the place of occurrence P. W. 5, Kartke-swar Bhoi, lodged the First Information Report (Ext. 5) at the police station. On receipt of the information, the police swung into action and investigation was started. In course of investigation, inquest was held on the dead body, the dead body was sent for post-mortem examination and the spot map was drawn up. On completion of the investigation, the appellants were charge-sheeted U/S 302 read with section 34, I. P. C. and have been convicted and sentenced as stated above.

4. The appellants pleaded not guilty to the charge.

5. 13 witnesses were examined by the prosecution. P. .W. 13 is the Investigating officer; P. W. 1 is the doctor who held autopsy on the dead body and P. W. 9 is the doctor, who examined appellant Jogendra Sahu and found some injuries on his person.

No witness has been examined for the defence.

6. The factum of death of deceased is not in dispute. That has been testified by P. Ws 5, 7, 8 and 6 and corroborated by P. W. 1.

P. W. 1 on post-mortem examination found the following external injuries on the dead body of Nandeswar: --

(1) An incised wound 5" x 2" x 2" on the back left side 3" below the left shoulder joint situated obliquely towards the vertebral column starting from mid-axillary line. The margins were clear-out. The left side ribs 7, 8 and 9 were cut

(2) A punctured wound 1/2" x 1/2" x 1/2" on the back left side 1" left to the vertebral column.

(3) A punctured wound on the right side of the chest 1" x 2" x 1" left to the right nipple. The margins were clean-out.

(4) A punctured wound 1" x 1/2" x 1/2" on the left side of the 1/2" below and 1" left to the left nipple.

(5) An incised wound 1" x 1/2" x 1/2 on the lateral side of the upper 3rd of the left thigh. The margins are clear-out.

P. W. 1 found the following internal injuries:--The right lung was punctured 1/2" x 1/2" x 1" and it contained ante-mortem blood clots. The spleen was cut into two pieces and ante-mortem blood clots. There " was a punctured wound on the greater curvature. The mouth oesophagus, liver and kidneys were pale Both the chambers of the heart were empty. The stomach contained undigested food particles. The intestine was swollen.

According to P. W. 1, all the injuries were ante-mortem in nature and were caused by sharp-cutting weapons. He has opined that the death was due to shock and haemorrhage resulting from the injuries in the lung, spleen and stomach.

7. Mr. Misra, the learned counsel appearing on behalf of the appellants, submits that there is no cogent and reliable evidence to bring home the charge against the appellants and that the learned trial court has convicted the appellants on the basis of the evidence which is suspicious in nature. He further submits that in view of the material contradictions and discrepancies running through the evidence of the prosecution witnesses the learned trial court should not have relied on their evidence and recorded a conviction on the basis of such evidence.

8. Mr. Inderajit Ray, the learned Public Prosecutor, submits that there are only two circumstances which are of telling nature. They are :--

(i) The statement made by appellant Jhaja when examined Under-section 313, Cr. P. C. that it was he who committed the murder and that the other two appellants were not with him at the time of the commission of the murder; and

(ii) The discovery of certain weapons of offence from the house of appellant Jhaja.

To take the second point of the learned Public Prosecutor first, suffice it to say that the discovery of the weapon of offence by itself is not sufficient to base the conviction of the appellants. The effect of such discovery may be of corroborative nature provided there is some reliable evidence on record implicating the appellants as the authors of the crime.

So far as the statement Under-section 313, Cr. P. C. of appellant Jhaja is concerned, merely on the basis of that statement it would be difficult to secure the conviction of this appellant. It is for the prosecution to prove to the hilt by reliable and dependable evidence that the appellants were responsible for the death of the deceased.

9. P. W. 7 Makunde Chalan has been accepted by the trial court to be the only eye witness to the occurrence. On a careful scrutiny and scanning of his evidence, we find that his evidence is of such halting nature that it will be unsafe to hold the appellants guilty of the offence on his evidence. A mere perusal of his evidence would show that it was not possible for him to see the occurrence from the place where he was sitting. The occurrence took place late in the evening, i. e. at the time of taking the night meals, at a distance of 50 to 60 cubits from the place where the witness was sitting. In his evidence he has stated that at the time of the occurrence he was sitting in front of the door of his house. At that time he heard the cry of the deceased saying "Oh Baulo" from the side of the field of Lingaraj Sahu. On hearing the sound, he immediately stood up and looked towards that side and saw the three appellants murdering the deceased. It is further found from his evidence that he saw appellant Jogendra jumping over the Bari of Bhagatram Sahu and going away and appellants Jhaja and

Makaradhwaja running away by the side of his house towards the village with two weapons in their hands. In cross-examination this witness has given a graphic description of the place and the time of the occurrence from which it is evident that it was not possible for him to see the place of occurrence which was at a distance of 50 to 60 cubits from the place where he was sitting. He has stated that from his door, the place of occurrence would not be visible. When he stood up on hearing the cry raised by the deceased, he could see the occurrence. He has also stated that he had put up a bamboo fence in his courtyard and that height of the fence would be more than six feet and one could not see what was happening outside from his courtyard. This statement in his cross-examination gives a complete lie to his evidence in examination-in-chief that from the place near the door where he was standing, he saw the occurrence at a distance of 50 to 60 cubits on the Duli of Lingaraj Sahu. This witness was examined by the police before whom he, did not make any such statement. He has stated that it was not a fact that he did not state before the police that he saw the appellants assaulting Nandeswar. From the statement of the Investigating Officer, P. W. 13, it is also found that P. W. 7 did not make any such statement before him. In his cross-examination he has stated that on one side of the Duli, there is a road and on the other side of the Duli there are ridges. The road would be about waist-deep from the Duli. The ridges of the Duli would be about less than one cubit. In view of the topography described by him it was not possible for this witness to see the occurrence from such a distance. This witness was also examined u/s 164, Cr. P. C. In the trial court he has stated that he made the statement before the Magistrate that he saw the appellants assaulting the deceased. But on going through his statement Under-section 164, Cr. P. C. we do not find any such statement having been made by him before the Magistrate about the fact of assault. The witness has stated that he saw Dulamani Naik (P. W. 10) standing in front of his house at the time of the occurrence and that he did not have any talk with Dulamani except that Dulamani asked him whether he had seen the occurrence. In view of the evidence of P.W. 10 we find that it was not possible for P.W. 7 to see him. Dulamani in his evidence has stated that he did not hear Makunda (P. W. 7) calling him. He has further stated that it is not a fact that he had stated before the police that Makunda (P. W. 7) called him first and enquired from him as to whether he saw the appellants. Therefore, the fact that P. W. 7 had some discussion with P. W. 10 at the time of the occurrence is not supported by the evidence of P. W. 10.

From the evidence of P. W. 7 we further find that on the night of occurrence he told his son Gobardhan that the three appellants murdered the deceased, but this Gobardhan has not been examined nor any explanation has been offered by the prosecution for his non-examination. It is hard to believe that throughout the whole night of occurrence P. W. 7 did not report to anybody about the murder of the deceased except his son. Apart from the darkness of the night, from his evidence it is clear that it was not possible for him to see the occurrence.

In view of all the above suspicious features in the evidence of P. W. 7 we do not

place any reliance on his evidence.

10. The only other material, i. e. the motive for the murder, relied upon by the prosecution is that there was land dispute between the deceased and appellants Jhaja and Makaradhwaja. This is merely a suspicious circumstance, and suspicion cannot be a substitute for proof which is necessary for recording a conviction,

11. There is yet another serious infirmity in the prosecution case. P. W. 5, Kartikeswar Bhoi, is the Ward Member of the village. He lodged the First Information Report (Ext. 5) in the police station on the basis of the information received from P. W. 7 had seen the occurrence, it was quite natural that he should have mentioned the names of the assailants of the deceased to P. W. 5. We have gone through the evidence of P. W. 5 as well as the First Information Report, Ext. 5. Ext. 5 narrates that P. W. 5 got the information in the following morning about the dead body of Nandeswar lying on the Duli of Lingaraj Sahu. But the First Information Report is completely silent about the fact that it was P. W. 7 who told this witness that he saw the appellants inflicting injuries on the deceased. Therefore, the prosecution case has been improved from stage to stage. In the earlier stage, i. e., at the stage of lodging the First Information Report, there is no mention therein that the appellants assaulted the deceased. The only fact that comes to the old relief is the factum of the dispute between the deceased and two of the appellants over Pujari lands, mentioned in the F. I. R. and nothing else,

12. P. W. 8, Aidu Chalan, is the brother of P. W. 7 and is his immediate neighbour. In his evidence he has stated that prior to the occurrence, the three appellants were seen sitting in the school and he suspected them to be the murderers of Nandeswar. That there was a land dispute between the appellants and the deceased has also come out in his evidence. He has stated that both the parties were claiming the Pujari lands to be their own. He has stated in his examination-in-chief that when he saw appellants Makaradhwaja and Jhaja running away with weapons in their hands and when he heard the hue and cry raised by a person just before he saw them running away, he suspected that these appellants might have murdered somebody.

13. From evidence of P. W. 13, the Investigating Officer, it is found that the place from where the weapons of offence were seized was accessible to all. There is nothing to show that any statement was made by appellant Jhaja as a result of which the weapons of offence were discovered from his house. The prosecution has not proved any such statement having been made by this appellant. In Bahadul-V-State of Orissa 48(1979) C. L. T. 456 their Lordships of the Supreme Court have observed that in a case where the statement of the accused leading to the discovery has not been proved, such discovery, if any, will not avail the prosecution. It has been observed that:

"As there is nothing to show that the appellant had made any statement u/s 27 of the Evidence Act relating to the recovery of this weapon, the factum of

recovery thereof cannot be admissible u/s 27 of the Evidence Act. Moreover, what the accused had done was merely to take out the axe from beneath his cot. There is nothing to show that the accused had concealed it at a place which was known to him alone and no one else other than the accused had knowledge of it. In these circumstances, the mere production of the tangia would not be sufficient to convict the appellant."

In view of the settled principle of law, we are constrained to hold that the discovery of certain weapons and seizure thereof in this case will not be of any assistance to the prosecution.

14. On a careful scrutiny and giving our anxious thought in appreciation of the evidence on record in its proper perspective, it becomes clear that the prosecution case is mainly based on suspicion and there is no impeccable evidence of clinching nature to connect the appellants with the commission of the offence.

15. For the reasons stated above, we hold that the prosecution has completely failed to prove its case against the appellants beyond all reasonable doubt. Accordingly, the order of conviction and sentence is not sustainable in law.

16. In the result, all the three appeals are allowed and the order of conviction and sentence passed against the appellants is set aside. The appellants be set at liberty forthwith unless their detention is required in connection, with some other case.

D.P. Mohapatra, J.

17. I agree