

(2022) 04 OHC CK 0098

In the Orissa High Court

Case No : Criminal Appeal Nos. 94, 91 Of 2001, 804 Of 2018

Mata Nayak And Others

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 18-04-2022

Acts Referred:

Indian Penal Code, 1860 — Section 147, 148, 149, 302, 452

Citation : (2022) 04 OHC CK 0098

Hon'ble Judges : Dr. S. Muralidhar, CJ; R.K. Pattanaik, J

Bench : Division Bench

Advocate : Anshuman Ray, S K Zafarulla

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, CJ.

1. These three appeals are directed against the same impugned judgment and order dated 19th April 2001 passed by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in S.T. Case No.77 of 1999 convicting the Appellants under Sections 147,148,452/149 and Section 302 read with Section 149 of IPC and sentencing them to undergo life imprisonment under Section 302 read with 149 IPC; three years RI for the offence under Section 452 read with Section 149 IPC and RI for one year for the offence under Section 148 of the IPC. All sentences were directed to run concurrently.

2. CRA No.94 of 2001 is by Mata Nayak and fourteen other accused persons. CRA No.191 of 2001 is by Dillip Kumar Mallik and CRLA No.804 of 2018 is by Kalia Pradhan @ Amiya Kumar Pradhan.

3. The case of the prosecution is that one Pradeep Mallik of village Duguripari, P.S.-G. Udayagiri, District-Kandhamal died in the morning of 11th November, 1998. The villagers held a meeting near a village well and held the deceased Chandra Sekhar Pradhan responsible for Pradeep Mallik's death by practicing sorcery. The meeting said to have ended with some disturbance. At about 9 PM

on that date around 15 to 20 persons came from the meeting place, knocked at the door of Chandra Sekhar's house. Some of them forcibly entered the house and dragged him out and assaulted him.

4. Two of the younger brothers of the deceased Subash Chandra Pradhan (P.W.1) and Gurudeb Pradhan (P.W.2) and Kamala Pradhan (P.W.3), the wife of the deceased, are projected as eye-witnesses to the event of a mob entering the house, forcibly dragging out Chandra Sekhar and taking him away. Beda @ Binayak Sahu (P.W.4), Loknath Sahoo (P.W.5), were projected as witnesses to the meeting in which it had been decided to kill the deceased. However, these two witnesses turned hostile. P.W.6 i.e. T. Harekrishna Murty and P.W.7 i.e. B. Gobardhan Rao were the Investigating Officers (IOs). The dead body was never recovered and therefore, there was no medical evidence as such. The ashes were not sent for forensic examination. So there was no forensic evidence either.

5. On the side of the defence, Gourahari Jena (D.W.1), Allamsetty Khetrabasi (D.W.2), Fakir Charan Dalai (D.W.3), Saroj Kumar Mallik (D.W.4), Rudia Sahu (D.W.5) and Goutam Pradhan (D.W.6) were examined. The defence was one of complete denial. The case of the defence was that the accused were implicated falsely due to political rivalry and animosity.

6. The case of Binod Naik (A-15), his brother Mata Nayak (A-1) and Gopabandhu Naik (A-17) was that the deceased Chandra Sekhar and his brother Subash Chandra Pradhan (Informant) had outraged the modesty of the wife of Binod Naik for which a meeting was held in the village and they were fined Rs.1001/-. By way of retaliation, the Informant Subash roped them and their other relatives in the false case. Kalia Pradhan (A-2) took the plea that in 1992, his father Goutam Pradhan and one Subash Acharya were contesting for the office of Chairman of local Gram Panchayat and the Informant Subash Pradhan was campaigning for the candidate Subash Acharya. However, ultimately, Goutam Pradhan was elected. Since then there was a party function in the village, and the informant falsely roped him in the case.

7. Baleswar Pradhan (A-7) took the plea that he was falsely implicated on account of the defeat of the candidate of the informant in the Panchayat election, and further since the meeting in which Chandra Sekhar and his brother were fined for outraging the modesty of the wife of Binod Naik was presided over by Baleswar (A-7).

8. On an analysis of the evidence, the trial Court came to conclusion that the evidence of P.W.2 was "quite cogent and consistent throughout and free from any material contradiction and discrepancy". The evidence of the IO (P.W.7) and the seizure list (Ext.10) revealed that from the spot where Pradeep was admittedly cremated, and where the deceased Chandra Sekhar was allegedly burnt alive, two five liter kerosene tins having smell of kerosene oil and an unused match box beside other articles were found. This seizure was not challenged in the cross-examination of P.W.7. It was held "Certainly the ignition of a funeral pyre is never

made by using kerosene oil but it is made by using ghee. So seizure of kerosene tins from that spot necessarily shows that the pyre of Pradeep which had not completely extinguished was again ignited with the help of kerosene oil and the wood and Medha collected from the fence of accused Dillip and Chandra Sekhar was burnt alive in that fire."

9. There was no other eye-witness to the killing of the Chandra Sekhar except P.W.2. There was no independent corroboration to the evidence of P.W.2. However, the fact of seizure of kerosene tin in the cremation ground as deposed by the IO was held to lend assurance to the evidence of P.W.2 that his brother Chandra Sekhar was burnt alive. The evidence of D.W.5 was discarded as in the view of the learned trial Court he was a "downright liar". Accordingly, it was held that the entire evidence of D.W. 5 in the examination-in-chief had to be discarded and there was no other material to substantiate the defence's suggestion to P.W.2 that at the relevant night, he was absent from the village having stayed at G. Udayagiri. However, the trial Court surmised that P.W.2 must have returned to the village with his daughter by bus without treatment intending to take her again the next morning for treatment. The trial Court held that the prosecution had home on the guilt of all of the accused and sentenced them in the manner indicated hereinbefore.

10. This Court has heard the learned counsel for the parties. The prosecution has sought to prove the case against the accused by relying principally on the evidence of P.Ws. 2 and 3, who are the brother and wife respectively of the deceased. Therefore, they answer the description of both a related and an interested witness. The law in regard to the appreciation of the evidence of such witnesses is well settled. In *Dharnidhar v. State of U.P.* 2010 (6) SCJ 662, the Supreme Court referred to the earlier judgments on the evidence of interested or related witnesses and held as under:

"In the case of *Jayabalan v. U.T. of Pondicherry* (2010)1 SCC 199, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

" 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

Similar view was taken by this Court in *Ram Bharosey v. State of U.P.* AIR 2010

SC 917, where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called 'interested witnesses' cannot be relied upon by the Court." (emphasis supplied)

11. Keeping in view the above legal position, the Court proceeds to examine the evidence of the two key P.Ws. Since the evidence of P.W.2 has been relied upon quite extensively by the trial Court, the Court takes up that evidence for examination first. In his examination-in-chief, P.W. 2 states as under:

"2. The occurrence took place on 11.11.98 at night on that night I was present in my house. The houses of the four brothers are adjoining each other at one place facing the village road. On that night, on hearing the noise and pushes given to the door of my elder brother Chandrasekhar, I came out and saw the accused persons assaulting my elder brother Chandrasekhar by lathis and sticks and they were also giving him kicks and blows by hand.

The accused persons were telling sala ku jibana re maridia". Due to assault, my deceased brother fell unconscious. Thereafter, the accused persons took away my deceased brother by dragging him and they took him to the northern extreme end of the village. Our neighbours namely Beda @ Binayak Sahu, Baji Sahu, and my elder brother Subash have seen the assault. Since the accused persons threaten to assault us by lathis, we did not follow them."

12. P.W.2 states that he went in search of the deceased brother through the bari lands and bushes. He then states that he saw the accused persons keeping the deceased brother at the cremation ground of the village at the very place where they had cremated Pradeep Mallik, the brother of accused Dillip Mallik during the day time. He explained how he saw this by stating "I saw by concealing my presence behind the betel shop cabin of one Baleswar Konhar, that my elder brother was feeling restless, and was lying in the cremation ground. I heard the accused persons talking among themselves not to spare my elder brother and to burn him alive and they were telling that in case my brother would be saved or he would escape they will all be arrested by the police".

13. However, in his cross-examination, P.W.2 contradicted himself stating "On that night I concealed my presence in the backyard of my house. On that night, my wife and my three children were present in the house. I concealed myself behind the bushes in the backside of my house".

14. Therefore, while on the one hand in examination-in-chief P.W.2 maintained that he concealed himself behind the betel shop cabin of one Baleswar Konhar, in his cross-examination, he stated that he concealed himself in rear of the house. He then stated how he had narrated about the whole incident to his brother Subash in the morning in the backyard of their house where he was present and both of them came together to the police station. He again stated "I did not come away from my place of concealment as I apprehended that the accused persons may discover me there and assault me."

15. Many of the statements made by P.W.2 before the Court were not made before the IO during investigation. This comes across clearly in the evidence of P.W.7. He stated as under:

"P.W.2 has not stated before me that on that night he saw his deceased brother lying on the cremation ground and feeling restless out of anguish and at that time he heard the accused persons talking amongst themselves that in case his brother will be spared, he would report before the police and eventually they will be arrested. (confronted). P.W.2 has not stated before me that since the accused persons threatened to assault him, he returned home from the village well on that night."

16. Clearly therefore P.W.7 renders P.W.2 an unreliable witness. Significantly, even the informant (P.W.1) had not stated that the accused persons had threatened to assault him that night and therefore he came back home although he followed the accused persons till the well of the deceased.

17. The Court finds the evidence of P.W.2 not to be reliable or truthful. It seems to be on shaky ground especially since this witness is unable to recall what he did soon after his brother was dragged away.

18. As regards the names of the accused also there are serious issues. There are almost eighteen accused and all of them have been named supposedly by P.W.3, the wife of the deceased. However, she did not name all the accused as having attacked him. This was what she stated in his examination-in-chief.

"About two years back on a winter night while I was sleeping with my son Brajakanta and my late husband Chandrasekhar, at about 9PM accused persons Kalia, Chandrakanta, Mata and Dillip Kumar Mallik forcibly entered inside our house by breaking open the door and caught hold of my late husband and assaulted him dragging him outside to the Danda. At that time P.W.1 and P.W.2 were present. In our Danda in front of our house, other accused persons being armed with kati, thenga lathi assaulted my husband, when I followed my husband to the Danda side, I was also assaulted by the accused persons for

which I fell on the ground. Thereafter the accused persons after assaulting my husband carried him away towards the Thala Sahi of our village."

19. In her cross-examination, she volunteered that she had identified the accused in a 'dibiri light' which was burning. She added as under:

"But there was street electric light in the Danda in front of our house. In the dibiri light I identified accused Mata Naik, Chandra Pradhan and Dillip Kumar Mallik. It is not a fact that I have not mentioned the name of Dillip Nayak in my statement before police. On the next day morning of the occurrence, G. Udayagiri police visited our house. I showed them the dibiri lamp. Police saw it. Police took it and after two days returned it. Due to assault by the accused persons even though I fell down, I did not lose my sense."

20. The fact of the matter is that there was no street lamp at all outside the house on that date. This comes through the evidence of D.W.2 who was the SDO, Electrical Station at G. Udayagiri from December 1999 onwards. He added in the cross-examination as under:

"I have not filed any document to show that on 11.11.98 no electricity was supplied to the streets of village Duguripari. On 11.11.98 I was not the electrical S.D.O. of G. Udayagiri Sub-Division under which the village Duguripari comes. Even now also there is no street light in village Duguripari."

21. This is a very telling statement. The crucial part of the evidence of P.W.3 where she purportedly could identify as many as eighteen accused by stating that she saw them on a dark night account is rendered totally unbelievable. Further, the above answers in the cross-examination show that she could not have been speaking the truth since there was in fact no street lamp. This is confirmed by Saroj Kumar Mallik (D.W.4).

22. While it is true that the conviction can be based on even a single witness who is reliable and trustworthy, in the present case, the deposition of P.W.3 does not persuade the Court that she is speaking the truth. P.W.3 also appears to be concealing more than what she is aware of. It is not safe to base the conviction of as many as eighteen persons for such a grave offence on her evidence or for that matter on the evidence of P.W.2.

23. The evidence of the above so called eye-witnesses was most crucial to the case. Although only seven witnesses were examined by the prosecution two in fact turned hostile. Further this was a case where there was no dead body to be found. There was no medical or forensic evidence as such to corroborate the testimonies of the P.Ws. The purported ashes recovered of the burnt body of the deceased were not sent for forensic examination. The defence evidence also bore out the defence of the accused that the incident involving Chandra Sekhar and Dillip Mallik's sister acted as a possible trigger for the false implication of the accused.

24. There is no evidence to link each of the appellants to the offence or even

indicate the precise role played by each of them. They are entitled to the benefit of doubt. They are all accordingly acquitted. The appeal is allowed. The bail bonds of the appellants stand discharged.

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