
(1970) 02 OHC CK 0012
In the Orissa High Court
Case No : Criminal Appeal No. 120 of 1967

Parikhita Jena and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 06-02-1970

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304

Citation : (1970) 36 CLT 750

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : S.N. Kar, for the Appellant; G.S. Sahu, for Government Advocate, for the Respondent

Judgement

R.N. Misra, J.—The three Appellants have been convicted u/s 304/148 Indian Penal Code and each of them has been sentenced to undergo R.I. for seven years by the learned Additional Sessions Judge, Cuttack.

2. Appellant No. 3 is the son of Appellant No. 2 and all the Appellants are against. The prosecution case in short is that the Appellants along with many others were members of an unlawful assembly being armed with deadly weapons and in prosecution of their common object they committed the murder of one Siba Jena by intentionally causing Me death they also caused both simple and grievous injuries on the persons of Tila Jena (p.w. 19), Siba Pirei (p.w. 16), Haladhar Pirei (p.w. 10), Champa Bewa. (p.w. 9) and Chancheri Dei (p.w. 22) with sharp cutting weapons at about 11 "O" clock in the morning on 10-12-1965.

2. The deceased Siba Jena was not pulling on well with accused Lakshmidhar (who has since been acquitted) and this Lakshmidhar was an influential man of the locality. The deceased was also" not on good terms with many others of the village on the date of occurrence the deceased had been working on his field. The accused persons who" were put on trial before the Court below along with 8 to 9 more came in a body armed with deadly weapons like Bhalla, Pharsa, Gupti, bows and arrows as also lathis. As they came near, accused Sudarsan (since

acquitted) who was coming ahead of the mob shot an arrow which struck the forehead of the deceased. He fell down and was immediately removed to a neighbouring field of one Nisakar Mallik by the three Appellants and some others. He was thrown on the ground and mercilessly assaulted by the people who" carried him and when his relations and labourers went for his rescue they were also assaulted. After committing the assault the accused persons left the spot. The deceased was carried to his house and information was lodged with the Police at about 11 P.M. that night. The Police party came early next morning and the I.O. visited the spot. The dead body of Siba Jena was sent for post-mortem examination and after investigation eleven accused persons were charge-sheeted. Therein the names of eight persons were also" shown as absconders.

3. The defence taken in the Court below was that seven of the accused persons were not present at the spot and were not within the mob. The remaining four persons including the three Appellants admitted their presence at the spot at the time of occurrence, but gave a very different account of what happened. According to them when Appellant No. 2 and one Bhikari (since acquitted) were in their field the deceased picked up quarrel with them and taking the assistance of the persons who were near about including his nephew Kirtan assaulted Bhikari seriously. To protect Bhikari Appellants 1 and 3 and another person came to the spot with arms. There was mutual fight after which both the parties left the place. Umakanta (Appellant No. 3) and Bhikari received injuries on their persons.

4. Before the learned Trial Judge 25 witnesses were examined for the prosecution including 4 Doctors, 3 police officers, 2 police constables and some eye-witnesses. The defence did not adduce any evidence. The learned Sessions Judge acquitted all the persons excepting the three Appellants. He came to hold;

On a consideration of the evidence along with the statement of the accused persons it appears to be reasonable that the trouble started between the two parties all on a sudden and without any premeditation. The parties were not in good terms from before and in course of a sudden quarrel both parties got prepared. I also find on a consideration of the circumstances that deceased Siba was the aggressor and that is why he was the target of the assaults. It is he who set the ball in the motion by shooting an arrow at accused Bhikari first.

Summing up his discussion, the learned Trial Judge again stated,

On a close scrutiny of the evidence I find that there was a marpit at Nisa Mallik's field. The trouble started as a result of the aggressive attitude of deceased Siba and his shooting an arrow at accused Bhikari. Siba was beaten at the spot by accused Parikhita, Umakanta and Duruju along with some others whose identity cannot be definitely established. In view of his injury I am inclined to hold that accused Bhikari did not take part in the assault... Having found that deceased Siba was the aggressor, I am now to see whether the three accused persons named above can take shelter under the right of private defence. The injuries of

the deceased and of the five P.ws. definitely show that the assailants had exceeded the right of private defence. The assailants had received practically no injury. Bhikari had only received an injury which apparently a serious one at the time of occurrence ultimately proved to be a simple one. The assailants were larger in number and they over-powered not only the deceased but also the P.ws. and assaulted them and even their female folks who obviously went there to stop the assault. So having given my utmost consideration I come to the conclusion that the above three accused persons cannot take advantage of the right of private defence.

He ultimately concluded that these three Appellants were liable for conviction u/s 304/148 Indian Penal Code and sentenced them to imprisonment in the manner already indicated.

5. Mr. Kar who argued the appeal on behalf of the Appellants mainly raised two contentions. According to him in the present case the charge u/s 148, Indian Penal Code was not sustainable on account of the fact that the Appellants cannot be taken to be members of an unlawful assembly on the basis of the judgment of the learned Sessions Judge. His next contention was that the evidence of the prosecution witnesses in relation to the part played by these three Appellants is indeed vague and indefinite and it would be difficult to sustain the conviction on the basis of such evidence. He also contended that these witnesses were relations and admittedly their relationship with the accused persons was strained and, therefore, they should not be relied upon.

6. I will now proceed to examine the first contention. The charge in this case so far as the offence u/s 148, Indian Penal Code is concerned ran thus:

That you (11 persons named above) on about the 10th December 1965 at 11 A.M. in village Ranagundi were members of an unlawful assembly being armed with deadly weapons in prosecution of the common object.

The learned Additional Sessions Judge has not found that of these eleven persons implication of eight as members of the unlawful assembly has not been proved. Though there were some others in the charge-sheet who were stated to be absconders the charge did not indicate that these eleven persons named in the charge along with others were members of the unlawful assembly. In this background Mr. Kar seeks to rely upon a decision of the Supreme Court in Mohan Singh Vs. State of Punjab, . Gajendragadkar, J., as he then was, in paragraph 9 of the judgment discussed this aspect at length and indicated the circumstances under which the applicability of Section 149, Indian Penal Code would be attracted. There is no dispute that the same principles would be applied to the offence punishable u/s 148, Indian Penal Code also. His Lordship indicated,

In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bore in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the

prosecution proves that charge against all of them, that is a very clear case where Section 149, can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge u/s 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted u/s 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial alongwith their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 in applicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring borne a charge u/s 149 it is not necessary that five or more persons must necessarily be brought before the Court and convicted. Similarly, less than five persons may be charged u/s 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the Court can be convicted u/s 149 though the unnamed and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried then Section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge u/s 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and 80 have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge u/s 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five.

In the present case though the charge-sheet names some absonders the evidence does not refer to other persons. All that have been named seem to be eleven. That apart the learned Trial Judge has not recorded a finding that there were others who have not been put on trial. I have also not been shown any evidence on the record which can justify a finding of the type indicated by their

Lordships in the last portion of the extract from their judgment on the other hand, I think the present case comes squarely within one of the instances indicated, that is, where all the persons have been shown in the charge and less than five have been convicted and there is a clear finding that the case as against others has not been made out. In the aforesaid premises the only conclusion that can emerge is that the conviction of the Appellants u/s 148, Indian Penal Code must fail and the Appellants are entitled to an acquittal of the charge under that section.

7. I will now proceed to consider the case as against the Appellants for their main offence u/s 304, Indian Penal Code. The learned Sessions Judge has clearly found that the deceased's party was the aggressor. He has also found that it was he who started the entire thing by shooting an arrow at Bhiari. The injuries on Bhikari's person are also quite serious.

8. I have gone through the evidence of the witnesses who were referred to as the eye-witnesses in this case. It is true p.w. 9 is the mother, p.w. 19 the brother and p.w. 22 a sister of the deceased, but I find their evidence is corroborated by other witnesses who also were present at the spot. In the circumstances, I cannot discard the prosecution evidence in its entirety as coming from interested source. I, however, find that the evidence as against Appellant No. 1 Parikhita does not appear to be consistent. The role he has been assigned by the different witnesses is not consistent, nor his implication in the direct assault spoken to by all the witnesses. I am, therefore, of the view that he should be entitled to the benefit of doubt. So far as 813 the case against Appellant No. 2 Durjodhan and Appellant No. 3 Umakanta is concerned, it seems to be very clear and spoken to by all the witnesses for the prosecution. I would, therefore, not interfere in their conviction.

9. Coming, however, to the question of sentence, I am satisfied that R.I. for 3 years would meet the ends of justice so far as these two Appellants are concerned. The Criminal Appeal is partly allowed. All the Appellants are acquitted of the charge u/s 148, Indian Penal Code and Appellant No. 1 Parikhita is wholly acquitted. The conviction of Appellant No. 2 Durjodhan and Appellant No. 3 Umakanta u/s 304, Indian Penal Code is maintained and their sentence is, however, reduced to a period of 3 (three) years.