

(2022) 09 OHC CK 0201

In the Orissa High Court

Case No : Criminal Appeal No. 259 Of 1996

Seshadev Swain And Others

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 26-09-2022

Acts Referred:

Code of Criminal Procedure, 1973 — Section 107

Indian Penal Code, 1860 — Section 34, 120B, 201, 302, 304I

Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 — Section 3, 3(2)(v), 3(2)(vi)

Citation : (2022) 09 OHC CK 0201

Hon'ble Judges : Dr. S. Muralidhar, CJ;Chittaranjan Dash, J

Bench : Division Bench

Advocate : Trilochan Panigrahi, D.P. Dhal, Saswata Patnaik

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. This appeal is directed against the judgment of conviction and order of sentence dated 20th August 1996 passed by the learned Additional Sessions Judge, Khurda in Sessions Cases arising out of G.R. Case No.224 of 1991 committed by the JMFC, Banpur, convicting the present six Appellants for the offence punishable under Section 302 read with 34 IPC for causing the death of Rabindra Swain and Kubera Jani on the crest of Bhalleri hill near village Pratap between 4 and 5 pm on 16th September, 1991. Each of the Appellants was sentenced to undergo imprisonment for life. The Appellants and twenty other co-accused were all acquitted of the offences under Section 3(2)(v) and (vi) of the SC and ST (PoA) Act, 1989 and Section 120 (B), 201 IPC.

2. The case of the prosecution is that the deceased Rabindra Swain was the younger brother of Golakha Swain (P.W.1), the Informant, who belonged to village Pratap. Rabindra Swain was in need of a servant for tending his buffaloes. Therefore, in the morning hours of 16th September 1991, he and his field

servant Kubera Jani, the second deceased, went to the village Chhaka Singh situated in the terrains of Bhalleri hill. However, till 5 pm that evening he did not return leading P.W.1 to suspect that something was amiss.

3. Therefore, P.W. 1 along with Barendra Swain, son of deceased Rabindra Swain and Bijaya Patnaik (P.W.4) went towards village Chhaka Singh searching for the deceased. Before P.W.1 went up the hill, he met Raja Baliarsingh (P.W.3) who was working on a brinjal field in the foothill of Bhalleri. P.W. 3 asked P.W.1 where he was headed to. On hearing that P.W.1 was looking for his brother, P.W.3 disclosed to him that he had seen six of the accused (A1 to A6) going with deadly weapons towards Chhaka Singh an hour before. This increased the suspicion of P.W.1 and he requested P.W.3 to accompany him towards Chhaka Singh.

4. P.W.3 then accompanied P.W.1 and P.W.4. While they proceeded further towards Chhaka Singh they heard the entreaties of someone pleading not to be killed. These were feeble. P.W.1 recognized it to be the voice of his brother Rabindra Swain. He along P.W.3 and others went towards the direction from where the voice came. They noticed the first six accused persons coming down the slope of the hill with bloodstained Katis. Besides, the clothes of the accused were also stained with blood. When they noticed P.Ws.1, 3 and 4 and Narendra Swain i.e., the son of the deceased, the accused are stated to have made a hasty retreat into the jungle.

5. The search party went further up the hill to a place where a deity known as Dalakhai Thakurani had been installed on the Ghat Road. They then found blood clots on the Ghat road in front of the temple. They could not trace out the two deceased persons and decided to return to the village. P.W.1 then informed the APR force posted in village Pratap to prevent a breach of peace. The APR force advised P.W.1 to go to the Banpur Police Station (PS) to lodge an FIR at once.

6. At 11 pm, on 16th September 1991, P.W.1 lodged an FIR at the Banpur PS before Surendra Kumar Baliarsingh (P.W.16) who was the Officer-in-Charge (OIC) who registered PS Case No.132 of 1991 under Section 302/34 read with 120-B IPC and Section 3 of SC & ST (PoA) Act, 1989. P.W.16 then took up investigation, visited the spot in the early hours of 17th September 1991 and found a patch of blood on the footpath (Ghat Road) at a distance of 10 feet from the Dalakhai Thakurani Deity. He followed the trail of blood into the bushes and found the dead body of Kubera Jani at a distance of 30 feet from a ditch. He took out the body and kept it on a plain surface. At around 4.30 am, he discovered the headless body of Rabindra Swain lying near a bushy growth. He further discovered the head of the deceased Rabindra Swain lying at a distance of 40 feet from the trunk under a bamboo clump soaked with blood.

7. At 6 am on 17th September 1991, P.W. 16 held an inquest on the dead body of Kubera Jani and prepared an inquest report. Sometime later he held a similar inquest over the dead body of Rabindra Swain and prepared a report.

8. This was followed by arrest of some of the accused and recovery of material objects at the instance of the accused. On 20th September 1991, P.W.16 handed over investigation to Dibakar Ray Pritam (P.W.17), the Circle Inspector of Police, Balugaon for further investigation as per the order of the Superintendent of Police (SP), Puri. At the conclusion of the investigation, a charge sheet was laid against the 26 accused of the aforementioned offences. They pleaded not guilty and claimed trial.

9. On behalf of the prosecution, 18 witnesses were examined. None were examined for the defence. This was a case based on circumstantial evidence. The trial court culled out the following circumstances as forming a continuous chain and pointing unerringly to the guilt of the accused:

" (i) That there was a deep seated village faction verging on enmity between the members of the prosecution party and the members of the accused party;

(ii) That the members of the prosecution party were led by deceased Rabi Swain and one Madhab Dalei (P.W.9);

(iii) That the accused persons in a meeting held in the house of one of them (Jadumani Swain) on 15.9.91 decided to eliminate both the deceased;

(iv) That accused Seshadeb Swain had heard deceased Rabi Swain talking to one Pramod Manasingh regarding hiring of a field servant in the grocery shop of Bidyadhar Swain (P.W.6) at about 7 A.M. on the date of occurrence;

(v) That deceased Rabi Swain and deceased Kubera Jani went to village Chhaka Singh at about 9 A.M. on the date of occurrence, which is on the terrains of the hillock Bhalleri;

(vi) The first six accused persons named above, were seen going towards Chhaka Singh up above the Bhalleri hill by P.W. 3 (Raja Kishore Baliarsingh) some time prior to 3.30 P.M. on the date of occurrence armed with Kati, sword and lathi;

(vii) That P.Ws. 1 and 3 while ascending the slopes of Bhalleri hill, heard a feeble voice entreating not to be killed and the said voice was identified to be that of Rabi Swain;

(viii) That P.Ws. 1 and 3 found the above named six accused persons after a while descending down the slopes of Bhalleri hill with a Kati, sword and lathi while their clothings were stained with blood like substance;

(ix) That the above named six accused persons made a hasty retreat by way of receding into the jungle when they stumbled across P.Ws. 1 and 3 and two others;

(x) That P.Ws. 1 and 3 going a little further therefrom up above the hill, found a patch of blood on the Ghat road just in front of the Bijie Sthali of Goddess Dalakhai and also marks of violence on the ground;

(xi) That the above named six accused persons were seen by P.W. 5 (Anant

Maharana), when they had deadly weapons in their hands near a Nalla on the foot of Bhalleri hill in the evening hours on the date of occurrence;

(xii) That the above named six accused persons made an extra judicial confession before Madan Swain (P.W.8) in the evening hours of the date of occurrence to have hacked Rabi Swain and his field servant Kubera Jani on the crest of Bhalleri hill, when he asked them as to how their clothings were stained with blood;

(xiii) That the above named six accused persons while discussing something on the foot of Bhalleri hill, at evening hours preceding the date of occurrence, told one Bhikari Swain (P.W.7) that they would play foot ball with the heads of Rabi Swain and Madhab Dalei (P.W.9) even if some settlement was reached or arrived at in connection with the village dispute;

(xiv) Seizure of wearing apparels of accused Niranjana Rautaray from his house, which were worn by him at the time of alleged occurrence and the weapon of offence (Katari) concealed in the mango tree of Uchhab Samantaray on 19.9.91, respectively at the instance of Pagala alias Niranjana Rautaray and Seshadeb Swain having volunteered to give discovery of those articles while they were in police custody; and

(xv) That some amount of blood was noticed in the nail clippings of accused Sashadeb Swain by the Chemical Examiner."

10. Of the above circumstances, the trial court held that the prosecution had not proved circumstances (iii), (iv), (xiv) and (xv). The trial court concluded that a homicidal death occurred high on the crest of the Bhalleri hill that the injuries were caused sharp and cutting weapon like MO I. The trial court concluded that the remaining circumstances taken together proved the case of the prosecution beyond reasonable doubt against the six Appellants who were accordingly convicted for the offence under Section 302 read with 34 IPC. The remaining accused were acquitted of all charges. The present Appellants were also acquitted of the offences under the SC & ST (PoA) Act and Section 201 IPC.

11. This Court has heard the submissions of Mr. T. Panigrahi, learned counsel for the Appellant Nos.1 and 3 and Mr. D.P. Dhal, learned Senior Advocate appearing for Appellant Nos.5 and 6. Ms. Saswata Patnaik, AGA made submissions for the State. The learned counsel for the Appellants have also submitted written notes of submissions.

12. This being a case of circumstantial evidence, the law in this regard requires to be recapitulated. In *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116, the Supreme Court explained as under:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be

fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

xx xx xx

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in *Shankarlal* case where this Court observed thus: [SCC para 30, p. 43]

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

13. Again in *Devi Lal v. State of Rajasthan* (2019) 19 SCC 447, it was held as under:

"17. It has further been considered by this Court in *Sujit Biswas v. State of Assam* 2013(12) SCC 406 and *Raja v. State of Haryana* 2015(11) SCC 43. It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

14. This was reiterated by the Supreme Court in *Parubai v. State of Maharashtra* (2021) SCC OnLine SC 566.

15. The Court now proceeds to examine each of the circumstances put forth by the prosecution. On circumstance (i), there was no dispute that there was a faction in the village one of which was led by Rabindra Swain and Madhab Dalei (P.W.9) and the other faction to which the accused belonged. Not much of an argument has been advanced questioning the prosecution evidence to prove this circumstance.

16. As far as the leadership of the faction is concerned i.e., circumstance (ii), the evidence of P.W.1, it is clear that his brother Rabindra Swain and P.W.9 led one group while accused Gagan Swain, Balabhadra Swain (Appellant No.4) and others who are leaders of the Appellants. This was in fact elicited by the defence in its cross examination of P.W.1. Here again there has not been much argument to question the proof of circumstance (ii).

17. As regards the conspiracy hatched by all the accused persons in the house of one Jadumani, the witness relied upon by the prosecution was P.W.1. The trial Court found that according to P.W.1, he heard of this from P.W.13 and one Balaram Swain who has not been examined. It also did not find place in the written FIR. P.W.16 too admitted that P.W.1 had not stated before him that P.W.13 and Dinabandhu (not examined) had made such disclosure before P.W.1 about the accused persons conspiring to kill his brother. Further, although P.W.13 and two others left the meeting in a half, they did not disclose this fact to the deceased or P.W.1 or even to anyone in the village. The trial Court rightly therefore concluded that the evidence of the prosecution in this regard was not trustworthy and therefore circumstance (iii) was not proved. This Court is unable to come to a different conclusion as far as circumstance (iii) is concerned.

18. The evidence of P.W.6 Bidyadhar Swain was relied upon to prove circumstance (iv) that accused Seshadev Swain had heard deceased Rabindra Swain talking to one Pramod Mansingh regarding hiring of a field servant. This too was therefore not believed by the trial court and this Court again is unable to take a different view in the matter.

19. As far as the circumstance (v) about the two deceased going towards village Chhaka Singh at around 9 am, the evidence of P.W.1 had not been assailed by the defence. This circumstance stood, therefore, proved by the prosecution.

20. Circumstance (vi) was about the Appellants going towards Chhaka Singh with weapons. The trial Court has dealt with this circumstance in quite some detail including the arguments of the defence. It transpires that even before P.W.16, P.W.1 stated that according to P.W.3 he had seen the present six Appellants going armed with Kati and Sword. The evidence of both P.Ws.1 and 3 were believed by the trial Court. Having carefully examined the evidence, this Court concurs with the trial Court on this aspect. Likewise, both these witnesses have stood firm on hearing feeble entreaties in the voice of Rabindra Swain to the Appellants that they should not kill him. The evidence of P.W.1 in this regard stood unchallenged. The evidence of P.W.3 in this regard also had not been seriously questioned by the defence.

21. The criticism by Mr. Dhal of the depositions of P.Ws.1 and 3 was that although in the body of the FIR, P.W.1 had named six persons, in the formal FIR, the accused persons were mentioned as 'unknown'.

22. Mrs. Patnaik, learned Additional Government Advocate, on the other hand, pointed out that the answer given by P.W.16 in his cross-examination was

significant. That answer was as under:

"In the FIR it is disclosed by the Informant that he had seen his brother Rabi and field servant Kuber in the morning of 16.09.1991. Since the Informant has specifically mentioned towards last part of Exhibit 7 that the accused persons named therein have committed murder, therefore I registered the case under Section 302/34 besides other provisions of law. In the formal FIR Exhibit-1, I have mentioned the assailants to be unknown because the Informant though disclosed 6 names as stated that he doubted their complicity. I drew up Exhibit-1 after I registered PS Case No.132 of 1991. The ink used to draw up Exhibit-1 is different from the ink used in the endorsement in Exhibit-7."

23. The above answer appears to be satisfactory. If indeed P.W.1 was doubting the complicity of the six accused, it became clearer only later. The mere fact that the column of accused reads as 'unknown' would not mean that an original FIR was suppressed and replaced by Ext.7. Consequently, the Court does not find the decision in *Balgopal Panda v. State* 1990 CrIj 1848 and of the Supreme Court in *Sevi v. State of Tamil Nadu* AIR 1981 SC 1230 to be of much relevance in the present context.

24. As far as P.W.3 is concerned, it was submitted that he was a witness to the inquest report but had not stated a word about the cause of the death of the deceased in the columns available in the inquest report. Reliance was placed on the decisions of the Supreme Court in *Balak Singh v. State of Punjab* 1975 SCC Cri. 601 and *Reddy Ramesh Pradhan v. State* 2001 21 OCR 516 to urge that the incomplete inquest report would seriously weaken the prosecution case. It was also submitted that P.W.3 was in inimical terms with the accused and, therefore, his evidence required careful scrutiny.

25. The trial Court has sufficiently dealt with this aspect of the matter as far as the evidence of P.W.3 is concerned. His evidence that he had seen the accused persons going towards Chhaka Singh armed with deadly weapons has actually not been shaken in the cross-examination. As rightly pointed out, merely because he had filed some case against the accused persons 11 years ago and was himself a member of the second party in a proceeding under Section 107 Cr PC. would not by itself discredit his entire testimony. In fact, P.Ws.1 and 3 are consistent as far as this aspect of the case is concerned. Consequently, there is not much merit in the argument of Mr. Dhal criticizing the testimonies of P.Ws.1 and 3.

26. It is significant that the evidence of both P.Ws.1 and 3 that they heard the enfeebled voice of Rabindra Swain when they approached further into the jungle was not seriously questioned by the defence in cross-examination. Circumstances (v) to (ix) have been fully proved by the evidence of P.Ws.1 and 3. The finding of a blood patch on the Ghat road has been further affirmed by the evidence of P.W.16 himself.

27. Two crucial circumstances are circumstances (xii) and (xiii). As regards

circumstance (xii), it was the extra judicial confession allegedly made by the accused persons before P.W.8, who had gone to the canal near a foothill of Bhalleri to ease himself. There he saw the six accused persons coming from the side of Bhalleri hill towards the village. When he questioned them about their clothes being stained with blood, they unhesitatingly replied that they had hacked Rabindra Swain and Kubera Jani on the crest of Bhalleri hill. The defence sought to point out that P.W.16 in his cross-examination admitted that P.W.8 had not stated before him that the accused told him that they had hacked the deceased Kubera there.

28. As rightly pointed out by the trial Court, apart from a solitary suggestion of P.W.8 that he was deposing falsely, there was nothing to shake his evidence. At least in regard to the killing of Rabindra Swain, there appears to be no doubt at all of the extra judicial confession made to him by the accused, perhaps in a show of bravado.

29. Circumstance (xiii) stands proved by the unchallenged evidence of P.W.7, about seeing the six accused persons sitting together at one place and hearing accused Seshadeb and Basudev stating that even if a settlement of the dispute was reached they would still play football with the heads of the deceased Rabindra Swain and Madhab Dalei (P.W.9). The criticism of the evidence of P.W.7 by Mr. Dhal was that he had not informed P.W.9 and the deceased about the threat given by Basudev and Seshadeb. He also did not disclose it to the APR force. As pointed out by the trial Court, no such question was put to P.W.7 by the defence in cross-examination as to why he had not passed on the information to the APR force. Particularly, when he asserted in his cross examination that the accused persons had held out similar threats on many occasions before. It is possible that P.W.7 did not suspect they would actually carry out the threat on the fateful day and therefore did not consider it necessary to inform the APR force.

30. It was then submitted by Mr. Dhal that if two views are possible on the same evidence, one favouring the accused must be preferred. In this context, reliance was placed on the decisions in *Kali Ram v. State of Himachal Pradesh* AIR 1973 SC 2773 and *Chandran @ Surendrn v. State of Kerala* AIR 1990 SC 2148. Reliance was also placed on the decisions in *Sattatiya v. State of Maharashtra* (2008) 3SCC 210 and *G. Parshwanath v. State of Karnataka* (2010) 8 SCC 593.

31. While the above legal proposition is well settled, in the present case it is not possible to take a different view of the evidence of P.W.7 and to read it in favour of the accused. His evidence has largely gone unchallenged.

32. The criticism of the evidence of P.W.8 by Mr. Dhal was that extra judicial confession is itself not a substantive piece of evidence but only a corroborating one and further that he had omitted to say before P.W.16 what the accused had precisely said. Reliance is placed on the decision in *Dutia Putel v. State of Orissa* (2020) 78 OCR 436.

33. The evidence of P.W.8 has been discussed threadbare by the trial Court. Apart from suggesting to him that he was deposing falsely against the accused, nothing much has been brought out to discredit his testimony. Further, P.W.8 did state before the Police that the accused persons told him to have hacked Rabindra Swain to death on the crest of Bhalleri hill. The Court is unable to come to a different conclusion than that reached by the trial Court while analyzing the evidence of P.W.8 and therefore rejects the pleas of Mr. Dhal in this score.

34. At this stage, a discussion must be made of the medical evidence of P.W.15-Dr. Dayanidhi Jena. According to Mr. Dhal, the death of the deceased could not have taken place before 8 pm on 16th September, 1991, if one would go strictly by the evidence of P.W.15. Having carefully examined the evidence of P.W.15, the Court does not find that he was seriously cross-examined on this aspect by the accused. The answers given by him in the cross-examination do not throw serious doubts about the hour of death as stated by Mr. Dhal. Nevertheless, when this evidence is seen in toto collectively with the rest of the evidence, it does not weaken the case of the prosecution at all.

35. Last two circumstances have been disbelieved by the trial court and for valid reasons. This Court would like to observe that the trial Court has undertaken an exhaustive analysis of the evidence and has given very clear and cogent reasons for reaching the conclusion that the present Appellants are liable for the murder of the two deceased persons. The circumstances taken collectively do point unerringly to their guilt.

36. Consequently, the Court is unable to find any error having been committed by the trial court. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs. The bail bonds of the Accused-Appellants, who were enlarged on bail, are hereby cancelled and they are directed to surrender forthwith and, in any event, not later than 10th October 2022 failing which the IIC of the concerned PS will take steps to take them into custody to serve out the remainder of their sentences.

.....