
(1999) 08 OHC CK 0002
In the Orissa High Court
Case No : Criminal Appeal No. 190 of 1988

Sikhar Jena and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 31-08-1999

Acts Referred:

Explosives Act, 1884 — Section 9

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 333

Citation : (2000) CriLJ 1277 : (1999) 2 OLR 575

Hon'ble Judges : P.K. Misra, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : G.N. Mohapatra and T.N. Senapati, for the Appellant; Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—Appellants 1 to 5 have been convicted u/s 302/149, Indian Penal Code (in short, the "I.P.C.") for having caused the death of deceased A.K. Kanungo and sentenced to undergo imprisonment for life. Those five appellants have also been convicted u/s 307/148. I.P.C. for attempting to cause murder and sentenced to undergo rigorous imprisonment for seven years; u/s 338/149, I.P.C. and sentenced; to undergo rigorous imprisonment for two years; u/s 333/149, I.P.C, and sentenced to undergo rigorous imprisonment for five years and u/s 9(b) of the Indian Explosives Act read with Section 149. I.P.C. and sentenced to undergo rigorous imprisonment for two years. Appellants 1 to 3 have further been convicted u/s 149, I.P.C. and appellants 4 and 5 have been convicted u/s 147. IPC and sentenced to undergo rigorous imprisonment for three years and two years respectively. All the sentences have been directed to run concurrently. Appellant No. 6 has been convicted u/s 353. IPC and sentenced to undergo rigorous imprisonment for two years.

Originally, 114 accused persons were prosecuted and faced trial under twenty-nine heads of charges. Out of the 114 accused persons, a few expired during the

trial. Ultimately, apart from the six appellants, all other accused persons have been acquitted. In the absence of any appeal against acquittal at the instance of the State, the acquittal of all other accused persons has become final.

2. The occurrence took place on 1.9.3.1984 between 9.30 A.M. and 10.00 A.M. The FIR was drawn-up by the Circle Inspector of Police. Paradeep, purportedly on his own information on 19.3.1984 at 11.15 A.M. and was formally registered at the Paradeep Police Station at 12.15 P.M. on 19.3.1984. The informant (the Circle Inspector) who has been examined as P.W. 49 is admittedly not a witness to the occurrence, but it is evident from the FIR as well as his statement and statements of other witnesses that the FIR was drawn-up on the basis of narration given by some of the police officials and others. In the FIR itself, it was mentioned that the informant had enquired into the whole episode from the police personnel and outsiders. The prosecution case, as revealed from the FIR indicates that prior to 19.3.1984 there was some internal dispute between the groups of labourers working in the Paradeep Port area. It is further revealed that since tension was prevailing a section of the Orissa State Armed Police (OSAP) had been deployed since 14.3.1984 near Atharbank, popularly known as "Iron Ore Plot" to maintain law and order. In the FIR it was mentioned that in the previous night, that is to say, the night of 18.3.1984, a meeting had been held by Pandab Swain (acquitted), Bata Sasmal (appellant No. 2), Bishnu Pradhan (appellant No. 4) Sikhar Jena (appellant No. 1), Sankar Sasmal (appellant No. 3) and their supporters, wherein it was decided to furnish Bhima Jena (one of the deceased). It was also stated that in the said meeting it was further decided to kill police personnel if they would come to the rescue of Bhima Jena, who was the leader of the rival group. In the FIR it was further recited that at about 9.00 A.M. on 19.3.1984, Havildar U.C. Jena (P.W. 2) had informed at the police station that Pandab Swain and his supporters were contemplating to attack the rival members and they were armed with weapons like lathis, bombs, farsas et cetera and had stacked brick-bats. It is further indicated that in view of such development, the Officer-in-Charge of Paradeep Police Station (Sub-Inspector A.K. Kanungo (deceased) proceeded towards the Iron ore plot along with A.S.Is. K.T.Rao (P.W.3), S.K. Rout (P.W.8), Hav. U.C. Jena (P.W.2) and several other constables as well as personnel of APR Froce in a Trekker being driven by D.K. Das (P.W. 9) to tackle the situation. After reaching near Iron ore plot, these police officials found Pandab Swain, appellants 1 to 4 and several others (named in the FIR) and five hundred others (not named in the FIR) all of whom had assembled near the area. It is further alleged that these people were armed with lathis, farsas, iron rods, et cetera and were shouting to murder Bhima Jena and his supporters and had already surround Bhima Jena. Seeing this, the police party rushed near the place of assembly but the mob became furious and started brick-batting the police party. Immediately a group of the violent mob overturned the Trekker in which the police officials had gone and assaulted the driver and set fire to the Trekker. Sikhar Jena (appellant No. 1) and hundred others chased the OIC and party for assault and simultaneously set fire to the OSAP Tent. Lathi-

charge effected by the police to scare the violent mob was not effective and the police party including the OSAP were over-powered by the turbulent mob and "police personnel including Bhima Jena were brutally assaulted by Maheswar Swain (acquitted), Bipin Dalei (not an accused), Ganan Lenka (acquitted) and others by iron rod and farsas. It is further recited that the OIC having no other alternative ordered for firing and himself fired from his revolver in self-defence. The mob attacked the OIC and the police personnel and snatched away the revolver from the OIC and three rifles from OSAP Sepyos along with ammunition and themselves fired from it. Simultaneously certain members of the violent mob also inflicted fatal injuries on the head of the OIC and other police personnel. As a result, OIC A.K. Kanungo, APR Mustaque Mohammad, APR Constable Niranjan Sahu, OSAP Sepoy No. 3, P.K. Mohapatra and leader of the opp. group Bhima Jena succumbed to the injuries instantaneously at the spot. Besides, A.S.Is. K.T.Rao, S.K.Rout, APR Constables. OSAP Sepoys and Hav. U.C.Jena have sustained severe injuries. The unruly mob have also set fire to the hutments of the rival labour group. Due to firing by the police some of the members of the mob have also received injuries. The Police Trekker number OSU 2847 and OSAP Tent have been completely gut by fire. The informant further recited that after having received the information regarding serious law and order situation involving loss of lives of police personnel, he himself rushed to the spot and after arrival found the mob escaping in different directions and he saw the dead bodies of the police personnel and Bhima Jena lying scattered on the road.

On the aforesaid allegations, after completion of investigation charge sheet was submitted against all the accused persons who faced the trial and some others who had absconded.

3. The plea of the accused persons was. one of denial Accused Pandab Swain took the plea of alibi as he claimed that he was attending a meeting in the office of the Chairman of Paradeep Port Trust at the relevant time.

4. In support of the prosecution case. 49 witnesses were examined. Out of them, P.Ws. 2, 3, 8 to 11, 14 to 16. 25, 28 to 31 and 36 were examined as occurrence witnesses. Out of those occurrence witnesses. P.Ws. 2, 3, 8, 9; 10, 28 to 31 and 36 were police personnels. whereas P.Ws. 11, 14, 15, 16 and 25 were the supporters of deceased Bhima Jena. P.W. 1. an A.S.I. of Police only proved one station diary entry P.Ws. 4 to 7 are other police officials who assisted P.W. 49 in the investigation. P.W. 13 turned hostile P.Ws. 12, 22, 24, 33 to 35 were seizure witnesses P.Ws. 17, 18, 19 are the doctors who examined some of the injured witnesses. P.W. 21 is another doctor who examined a police sepoy who has not been examined. P.W. 26 is another doctor who examined some of the accused persons who had been injured as well as several others who had received gunshot injuries. P.W. 39 conducted the post-mortem of deceased A.K. Kanungo and P.Ws. 40, 41 and 45 conducted post-mortem in respect of other deceased persons. P.W. 47, S.I. of Police, helped P.W. 49 in the investigation. P.W. 48 is another Investigating Officer who ultimately submitted the charge sheet. P.W. 20

is a constable who had received phone call from P.W. 3 and had made a station diary entry (Ext. 23). P.W. 23 is a Sub-Inspector of Police who took zima of Arms Register. P.W. 27 escorted the dead bodies to the S.C.B. Medical College and Hospital, Cuttack, for post-mortem. P.W. 32 proved the Arms Issue Register. P.W. 37 was the M.V.I. who examined the police Trekker. P.Ws. 38 and 44 are employees under Stevedores who proved about formation of pool of labourers which had resulted in the creation of tension between the rival groups of labourers. P.W. 43 is the Ballistic expert. P.W. 46 was the S.D.P.O., Paradeep. at the relevant time.

On behalf of the accused persons. 10 witnesses were examined primarily to prove the plea of alibi and other matters which are not relevant for the purpose of the present appeal.

5. The death of five persons for which charges had been framed took place in the same area, but at different spots. The trial Court though believed about the murderous attack on the deceased persons, disbelieved the involvement of the various accused persons in the murders of Mustaque Mohammad, Niranjan Sahu, P.K. Mohapatra and Bhima Jena and those accused persons have been acquitted of all the charges. The trial Court, however convicted appellants 1 to 5 for having caused the murder of Officer-in-Charge A.K. Kanungo and in respect of other allied offences. For proving the incident relating to death of A.K. Kanungo, prosecution had examined P.Ws. 2, 8, 15, 16 and 25. Out of these witnesses, the trial Court has discarded and disbelieved in toto the evidence of P.Ws. 15, 16 and 25, as would be evident from the discussion contained in paragraphs 27 to 31 of the judgment of the trial Court, While supporting the judgment of the trial Court, the learned counsel representing the State has not tried to place any reliance upon the evidence of those witnesses, namely P.Ws. 15, 16 and 25 who have been disbelieved by the trial Court. A perusal of their evidence clearly indicates that the reasonings given by the trial Court for disbelieving their evidence are quite appropriate. The conviction of appellants 1 to 5 is ultimately based on the evidence of P.Ws. 2 and 8. Appellant No. 5, Bipin Mohanty has been implicated by P.Ws. 2 and 8, whereas the other four appellants convicted u/s 302/149, IPC. have been implicated by P.W. 2. (At this stage, we are not concerned with the conviction of appellant No. 6. which shall be considered at the latter stage of the judgment.).

6. P.W. 2 was one of the Havildars of Paradeep Police Station who was attached to Ghanagolia Out Post which was near the Iron ore plot. Before noticing the evidence deposed by P.W. 2, it is necessary to notice certain undisputed aspects which are as follows :

The Iron ore plot is the place where about 2000 workers including Bhima Jena, many of the accused persons and some members of public- were residing in different hutments. There had been a strike and stoppage of port's work since the night of 18.3.1984 and OSAP personnel had been deployed. Some of them had pitched a tent near the Iron ore plot by the side of the main road at a slight

distance. On 19.3.1984, a procession of the workers was scheduled to reach to give a charter of demands of workers and the Chairman of the Port Trust had called a meeting for conciliation in his office chamber. It has been now found on the basis of evidence that Pandab Swain had attended the said meeting in the office of the Chairman of Paradeep Port Trust.

The substance of the relevant portions of the evidence of P.W. 2 relating to the incident of killing of deceased A.K. Kanungo can be noticed. He states that after he had delivered a letter containing the message of Bhima Jena to the OIC, he (P.W. 2) disclosed that the situation was very tense. The OIC accompanied by P.W- 8, P.W. 3 and other police personnel along with P.W. 2 went near the spot in a Trekker. After getting down near the place, P.W. 2 was sent by the OIC to find out what Bhima Jena was doing. At that time while P.W., 2 was going near the hutment of Bhima Jena, he was prevented by Panchu Mangaraj and due to the obstruction given by Panchu, there was exchange of words followed by tussle and P.W. 2 lay flat on the ground. Observing the above incident, the OIC sent P.W. 8 and P.W. 3 who apprehended Panchu Mangaraj and at that time Panchu Manragaj raised alarm. While the witness and other police officials were taking Panchu Mangaraj to OIC, some of the labourers of the Iron ore plot pelted brick-bats at the police officials including P.W. 2. The OIC explained the people to refrain from brick-batting, but to no avail, as accused Pandab Swain was instigating them saying "SALAKU MARABE AHURITEKA PATHARA PAKAO etc." and he was also making gestures by his hand. Some of the police personnel and APR personnel sustained injuries due to brick-batting. As the situation became uncontrollable, the OIC directed for explosion of tear-gas, but that was also ineffective. The OIC directed to make lathi charge and when lathi charge started two or three hand bombs were thrown at the police people. As the members of the public did not stop and came towards the police personnel being armed with lathis, farsas, etc. the OIC directed to open fire. The OIC who had taken a gun from a police personnel fired three rounds into the sky and at this the persons came rushing towards the police personnel in a menacing mood and went on indiscriminately assaulting the OSAP Havildar and two other constables, who fell down on receiving the blows. While the OIC was returning with the gun in hand, Bipin Mohanty went to the OIC from his back-side and dealt with a lathi blow on the back-side of his head due to which the OIC fell down. While the OIC was lying on the ground, three persons who were armed with farsas and about four others who were armed with lathis (whom the witness claimed that he could identify) went on dealing blows by farsas and lathis on the OIC. During course of such assault, another person threw a stone over the head of the OIC as a result of which the head crushed. Seeing all these, the witness ran away out of fear. The witness named Bata Sasmal, Sankar Sasmal. Sikhar Jena as the assailants with farsas and Bishnu Pradhan, who was armed with lathi. However, he identified accused Budhishyam Sethi, Sankar Swain, Ugrasen Jena and Paramananda Naik as the other assailants of the OIC.

7. The evidence of P.W. 2 relating to alleged conspiracy has been discarded by

the trial Court. His evidence regarding the alleged instigation by Pandab Swain has been disbelieved by the trial Court. It has been found on the evidence of no less a person than the Chairman of Paradeep Port Trust that, in fact, Pandab Swain was present in the meeting of the Chairman of the Port Trust by that time. Though P.W. 2 claims that initially Panchu Mangaraj had stopped him and there was a tussle as a result of which the witness fell down on the ground he could not identify Panchu Mangaraj in the dock though he spent about twenty minutes trying to identify Panchu Mangaraj. (This is evident from the observation recorded by the trial Court itself in paragraph-25 of the deposition of P.W. 2). It is the prosecution case that after the OIC was assaulted, the gun held by him was taken away by a member of the mob and the OIC was fired at close range by the person. Though the evidence relating to identity of such person being discrepant such person alleged to have fired has been acquitted, the admitted fact remains that the OIC had received gun-shot injury. P.W. 2 is totally silent about any gun-shot being fired at the OIC. Though on the first date of examination-in-chief he had identified a few persons as the assailants of the deceased with lathis, on the subsequent date of cross-examination, he could not identify those persons and instead, identified a few others as the assailants. Subsequently in cross-examination he has further stated :

"24. Out of the mob of 500 people about 50 persons chased Aswini Kumar Kanungo for assault. While chasing those people had scattered. Out of those 50 persons who chased Aswini Babu for assault in a scattered manner, 1 saw 4 or 5 of them actually assaulting him. The four persons to whom I identified yesterday as 1 did not know their names, assaulted Aswini Babu by means of lathis....."

If the aforesaid evidence of P.W 2 is taken into consideration, his statement implicating appellants 1 to 4 as the assailants is not acceptable, as the witness had identified Budhishyam Sethi, Senkar Swain, Ugrasen Jena and Paramananda Naik as the assailants with lathi. His subsequent statement contained in paragraph-24 rather indicates that apart from four or five persons who had assaulted with lathi, this witness had not seen the assaults by other accused persons. His failure to whisper a single word regarding the gun-shot is indicative of the fact that possibly at the time of incident resulting the death of A.K. Kanungo, this witness was not present at that part of the place of occurrence. This is further fortified by the fact that the witness though claimed to have sustained injuries on different parts of his body had only one minor injury, namely a bruise 1/4" x 1/2" on the right side of the hip joint. Moreover it is the admitted case of the prosecution that this witness as well as other police officials had narrated the occurrence to Nikunja Babu, the informant P.W. 2 has specifically denied the suggestion that while he narrated the incident, he had not implicated Bipin Mohanty, Bata Sasmal, Sikhar Jena and Bishnu Pradhan as the assailants of the OIC. In the FIR itself, some of the other assailants of other deceased persons had been specifically named. If actually, P.W, 2 or for that matter any other police personnel present at the time of incident relating to death of A.K. Kanungo would have disclosed the names of any of the assailants,

it would have been in normal course reflected in the FIR itself. In the FIR it is recited that "certain members of the violent mob also inflicted fatal injuries on the head of the OIC..." The absence of the names of any of the appellants as the assailants of the deceased A.K. Kanungo in the FIR which had been drawn-up on the basis of own information and admittedly on the basis of narration gathered from occurrence witnesses like P.W. 2, P.W. 3 and P.W. 8, is clearly indicative of the fact that appellants 1 to 5 were not the assailants of deceased A.K. Kanungo. It had been asserted that appellant Bipin Mohanty had given a lathi blow on the back-side of the head of A.K. Kanungo. However, there is no such injury directly or indirectly hinting that lathi blow had been given on the track-side of the head as claimed by P.W. 2 or the other witness P.W. 8 who has merely stated about such assault on the head by appellant Bipin Mohanty and P.W. 8's evidence is silent about the alleged role of appellants 1 to 4 regarding assault on deceased A.K. Kanungo. The trial Court has surmised that the deceased must have worn a cap on his head and as such there was no sign of injury due to lathi blow given by appellant Bipin. Apart from the fact that no prosecution witness has stated about wearing of a cap/ hat/helmet by A.K. Kanungo, there is no seizure of any such cap/hat/helmet from near the deceased at the place of occurrence though other materials such as revolver etc. have been seized.

8. The aforesaid aspects in the evidence of P.W. 2 clearly indicate that P.W. 2 cannot be considered to be a reliable witness. Absence of any injury save and except one minor one is indicative of the fact that P.W. 2 had run away before the attack on the police personnel began in full flow. If actually P.W. 2 had seen appellants 1 to 5 as the assailants of the deceased OIC and had stated so before the informant, there is no reason as to why their names were not so indicated in the FIR. Moreover, P.W. 14 (who has been otherwise discarded by the trial Court) has deposed that by the time fire was set to the police tent, P.W. 2 was not present near about the place of occurrence and had gone away somewhere. Giving of contradictory statements relating to assault on the deceased OIC is indicative of the fact that possibly P.W. 2 had not seen that part of the occurrence. If actually he would have been present, it is not understood as to how he had kept quiet about the firing incident and the wound received by the OIC because of the firing. As already indicated the evidence of P.W. 8 is only relating to the role of Bipin Mohanty in assaulting the deceased on the head with a lathi. In the absence of any injury to corroborate such assertion, this part of the evidence of P.W. 8 or of P.W. 2 cannot be accepted. It is to be noticed that in the FIR also, no such assault by Bipin Mohanty on the head of the deceased OIC had been described. Apart from these infirmities it appears that P.W. 8 himself had made certain station diary entry (Ext. A) which only describes "... Due to assault by Pandab Swain and his followers 1 have been injured". This station diary entry (Ext. A) made by P.W. 8 completely belies his statement regarding any assault on deceased A.K. Kanungo, as if he would have been aware of any such assault, he would not have failed to indicate about the assault on no less a person than the OIC himself instead of stating about his own injury. For the

aforesaid reasons, it is difficult to sustain the conviction of appellants 1 to 5 on the basis of unreliable evidence of P.Ws. 2 and 8.

9. Appellant No. 6 has been convicted u/s 353, 1PC on the ground that he had obstructed P.W. 2 and had a tussle. As already noticed. P.W. 2 has failed to identify appellant No. 6 as his own assailant. The other evidence on record is not sufficient to sustain such conviction.

10. The trial Court on the basis of evidence of prosecution witnesses had held that initially there was no unlawful assembly even though about more than five hundred people had gathered. The prosecution evidence relating to death of four other persons has not been accepted vis-a-vis the various accused persons. There is no specific evidence on record to indicate as to when the assembly became unlawful. It may be that some of the labourers after seeing the police suddenly became violent and because of the assault and counter assault by police, the violence flared up and assumed much more seriousness. It is claimed that many outsiders were present, but they have not been examined. The trial Court itself has discarded a major portion of the prosecution evidence. In this state of affairs, it is difficult to sustain any adverse findings against the appellants regarding other lesser offences alleged to have been committed by them.

11. For the aforesaid reasons, the appeal is allowed and the appellants are acquitted.

D.M. Patnaik, J.

12. I agree.