

(2005) 06 OHC CK 0002
In the Orissa High Court
Case No : Criminal Appeal No. 255 of 1994

Sripati Jena

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 22-06-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Penal Code, 1860 (IPC) — Section 294, 300, 304, 323, 325

Citation : (2005) 06 OHC CK 0002

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : D. Mohanta, S.K. Nayak-4, Amitav Das, A. Sen, C.R. Lenka, S.K. Behera and J. Katikia, in Crl.A. No. 255/94, D. Mohanta, A. Das, S. Sen, B.S. Das, K. Nayak, C.R. Lenka, J. Katikia and A.K. Patnaik, in Crl.A. No. 285/94, for the Appellant; S. Pradhan, A.S.C., for the Respondent

Final Decision : Dismissed

Judgement

JUDGMENT

P.K. Tripathy, J.—The above noted two Criminal Appeals u/s 374(2), Cr.P.C. have been filed by the two convicted accused persons in Sessions Trial No. 20/149 of 1993 of the Court of Additional Sessions Judge, Balasore. Two separate appeals on different dates were filed by the two convicted accused/appellants but by engaging the same set of Counsel and a common argument was advanced. Therefore, this judgment shall abide the result in both the Criminal Appeals.

2. The two Appellants and their father Kalia " Kalicharan Jena faced the trial in the above noted Sessions Case for the offence under Sections 302/323/294/34, Indian Penal Code. Learned Additional Sessions Judge as per the impugned judgment delivered on 10.5.2004 found accused Kalia not guilty of the offence and accordingly acquitted him. He found accused Sripati (Appellant in Criminal Appeal No. 255 of 1994) guilty of culpable homicide not amounting to murder punishable u/s 304, Indian Penal Code second part so also for the offence u/s

323, Indian Penal Code respectively for causing death of Kailash and simple hurt to Gangadhar (P.W. No. 8). Accordingly the Trial Court sentenced accused Sripati to undergo Rigorous imprisonment for four years and six months respectively and directed to run such sentences concurrently. He found accused Goutam (Appellant in Criminal Appeal No. 285 of 1994) guilty of the offence u/s 323, Indian Penal Code for causing simple hurt to Damodar (P.W. No. 5) and accordingly sentenced him to undergo rigorous imprisonment for six months.

3. According to the case of the prosecution, deceased Kailash is the father of informant Gadadhar (P.W. No. 1), Damodar (P.W. No. 5) and Gangadhar (P.W. No. 8). Similarly the acquitted accused kalia is the father of the accused Sripati and Goutam. The informant party are the joint owner of a Gadia (Pond) with 50% interest therein. The 50% share of the co-sharer had been purchased by the accused family and therefore a ridge was put in the middle to demarcate the respective shares of that Gadia. As alleged by the prosecution, on the date of occurrence i.e., on 23.11.1992 in the after noon the accused persons irrigated their vegetable field from the water from their portion of the Gadia and thereafter cut the dividing ridge so as to make up deficit of the water level in their pond by taking water from the pond of the informant party. On getting this information, the deceased and his two sons, P. Ws. 5 and 8 went to the spot, protested against the high handed action of the accused persons and started filling the cut portion of the ridge. That occurrence took place at about 4.30 P.M. Both the Appellants being instigated by their father came and assaulted the deceased as well as P. Ws. 5 and 8 by using lathi causing bleeding head injury to the deceased and P.W. No. 5 and when P.W. No. 8 wanted to rescue his father, he received a lathi blow on his hand dealt by accused Sripati. After assaulting in the aforesaid manner, the accused persons decamped, Gadadhar (P.W. No. 1) the other son of the deceased witnessed this occurrence from some distance and after departure of the accused persons, he took help of others and removed the injured persons to the C.H.C. at Remuna and on the advice of the Doctor of the C.H.C. to the District Headquarters Hospital at Balasore and on the further advice of the doctors of the Headquarters Hospital the deceased was taken to S.C.B. Medical College & Hospital, Cuttack, but on the way the deceased succumbed to the injuries.

4. To substantiate the charge, prosecution examined as many as 17 witnesses including the above noted P. Ws. 1, 5 and 8. Prosecution also stated that P. Ws. 3, 4 and 9 were also eye witnesses to the occurrence. Out of the eye witnesses as noted above, P.W. No. 1 is the informant whereas P. Ws. 5 and 8 are the injured persons. P.W. No. 14 is the Doctor of Remuna and P.W. Nos. 12, 13, 15 and 16 are the Doctors from Headquarters Hospital, Balasore and P.W. No. 11 is the Doctor who conducted autopsy on the dead body of the deceased and proved the post mortem report Ext. 7. The injury certificates with respect to the deceased and P. Ws. 5 and 8 have been marked Exts. 10, 11 and 12 and proved by the Doctor, P.W. No. 14 of Remuna C.H.C. P. Ws. 12, 13, 15, and 16 are the Doctors of the Headquarters Hospital, Balasore. They have proved the factum

relating to the admission of the deceased in a serious injured conditions and the bed-head tickets Ext. 9 series and 13. P.W. No. 17 was the O.I.C. of Remuna Police Station and the Investigating Officer of the case. Ext. 14 is the spot map prepared by the Investigating Officer and three bamboo lathis seized in the case were marked as M. Os. I to III and a bamboo peg as M.O. IV.

5. Defence plea of the accused is a denial to the aforesaid allegations. In addition to that, their contention is that the injured party was the aggressor while the accused party was engaged in the irrigation from their Gadia, the injured party came to attack them and in that process the deceased slipped and dashed against the pump and sustained the head injury. No defence evidence was adduced in proof of such defence plea.

6. The Trial Court on appreciation of evidence on record found that allegation of assault by accused Sripati on Kailash (the deceased) and Gangadhar (P.W. No. 8) and assault by accused Goutam to the head of Damodar (P.W. No. 5) is proved on record by clear and clinching evidence of the injured persons and the eye witnesses (as noted in the preceding paragraph). He found the plea of the accused that the deceased sustained injuries due to fall and hitting against the pump-set is not proved or substantiated. Trial Court also found that evidence on record does not indicate that acquitted accused Kalia Jena assaulted either the deceased or any of the injured persons. Recording such findings Learned Addl. Sessions Judge held accused Sripati guilty of the offence u/s 304, Indian Penal Code second part, for causing death of Kailash. In that context he held that the single blow dealt by him was sufficient to cause the death but that occurrence took place in a sudden fight and in the heat of passion. For that conviction, he sentenced accused Sripati to undergo rigorous imprisonment for four years. He found Sripati and Goutam, both guilty of the offence u/s 323, Indian Penal Code for causing simple hurt to injured Gangadhar (P.W. No. 8) and Damodar (P.W. No. 5) respectively and accordingly he sentenced each of them to undergo rigorous imprisonment for six months for the offence u/s 323, Indian Penal Code.

7. Accused/appellants challenge to that order of conviction and argued that the evidence of the eye-witnesses being that of the interested witnesses, such evidence could not have been relied on by the Trial Court. In the said context, Appellants relied on the ratio in the case of Anil Phukan Vs. State of Assam, . The fact stated in paragraph-2 of the reported judgment indicates that sole eye-witness being a close relative of the deceased ought to have intervened for rescue of the deceased. That witness did not do so as per the evidence adduced in Court. Apart from that, his evidence relating to the time of occurrence would found to be contradictory to the medical evidence. Therefore, the Apex Court held that it is not safe to rely on such evidence. Therefore, the Apex Court held that it is not safe to rely on such evidence of that solitary eye-witness to the occurrence. Such is not the case so far as the occurrence in the present case is concerned. According to the prosecution case and the evidence led, when Gangadhar (P.W. No. 8) intervened to save his father, accused Sripati dealt a

lathi blow, which hit in his right hand. At that time the informant who arrived at the spot a few moment later but before starting of the occurrence of assault did not try to intervene on seeing accused Sripati dealing blows to the deceased and P.W. No. 8. From that circumstance alone, prosecution case cannot be found to be false nor the evidence of P.W. No. 1 to be false or exaggerated. Apart from that P.W. No. 1 has also explained that he did not dare to intervene out of fear. Thus the ratio in the above-cited case is not applicable to the fact and circumstance of the present case.

8. Similarly the evidence of P.W. No. 1 is not liable to be rejected because he did not intervene when his father and brothers were assaulted. In that connection, it may further be noted that according to the evidence of P.W. No. 1 the occurrence lasted for a short time inasmuch as in their "Bari" all of them (i.e., the deceased and the injured persons and P.W. No. 1) were engaged together in agricultural work. The first three came upon the spot to stop drainage of water from their pond through the ridge, which had been cut by the accused party. When they were so engaged, P.W. No. 1 arrived near the spot and then he saw the accused persons dealing lathi blows to the deceased and the injured persons and noticing presence of the villagers and the bleeding injuries on the injured persons they ran away. For the reasons indicated above, the above contention of the Appellant bears no merit to disbelieve P.W. No. 1 or to find his presence improbable or his evidence exaggerated.

9. Appellants further argued that narration of the event by the P. Ws. 1, 5 and 8 so also by the other eye-witnesses to the occurrence indicate that the prosecution party was the aggressor by dumping the cut portion of the ridge and interfering with the irrigation work in which the accused persons were engaged. In that context when part of the prosecution story stated by the eye-witnesses is doubtful relating to manner of assault, therefore, it is unsafe to rely on such evidence. In support of that argument, they have relied on the ratio in the case of *Milkiyat Singh and Ors Vs. State of Rajasthan*, .

10. In the reported case, the case projected and the contradiction relating to conduct of the prosecution party by the evidence on record indicated about a fact situation of both the party in inimical relationship. In such a case, as has been propounded by the Apex Court, when part of the prosecution story was found doubtful the rest of the story told by the eye witnesses be scrutinized carefully. In the present case, from the evidence on record no such fact situation has been brought on record that at the time of occurrence the prosecution party had resorted to violence while dissuading the accused party from removing water from their pond. On the other hand the prosecution case which has been stated by the eye-witness to the occurrence is consistent all through that the deceased and his two sons went to stop the removal of water from their area of Pond and they engaged themselves in filling of the cut portion of the ridge. It is also consistent prosecution case that all such act of the deceased and his sons was resisted by the two Appellants along with their father and in that process they

came upon the spot and the Appellants assaulted the deceased as well as P. Ws. 5 & 8. Under such circumstance, the fact situation in the present case is different than that of the reported case. Be that as it may, when allegation has been made for offence of murder, the evidence given against accused persons has to be scrutinized and verified relating to the credibility and acceptability of the eye-witnesses. That part of the job has been done by the Trial Court by making a scrutiny of the evidence on record. Therefore, aforesaid argument of the Appellants to discard the prosecution evidence is without any merit.

11. Appellants further argued that P. Ws. 1, 3, 5 & 8 are the victims and members of the same family and therefore they are all interested witnesses for the prosecution and therefore their evidence be discarded. In support of that submission Appellants relied on the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, . In the cited case their Lordships have propounded that close relatives of the victims being interested witnesses they may have the tendency to exaggerate or add facts and therefore such evidence should be examined with great care and caution before accepting same to be reliable or credible. There cannot be any quarrel on the aforesaid proposition of law relating to appreciation of evidence. But, however, it is to be seen how far that principle is applicable in this case. On a careful perusal of the evidence of P. Ws. 1, 3, 5 and 8, the Trial Court found that their evidence does not suffer from exaggerations or contradictions on material particulars. On making an independent scrutiny of such evidence, this Court also does not find any emerging circumstance on record to brand the above set of evidence to be infested with exaggeration or falsity. What P.W. No. 1 has stated about the manner of assault has been repeated by each of the aforesaid witnesses in the similar manner though by using different expression by describing the same thing in different manner. Those witnesses have stated that when the deceased and his sons were engaged in putting earth on the cut portion of the ridge, accused Sripati dealt a lathi blow to the head of the deceased and the later fell down sustaining a bleeding injury. P. Ws. 5 & 8 intended to intervene and accused Sripati dealt a blow by lathi, which hit on the head of P.W. No. 8 and at that time P.W. No. 5 was assaulted on his head by means of lathi by accused Gautam and thereafter the accused persons ran away form the spot. Such evidence of the injured and the relative as eye witnesses to the occurrence has been corroborated by the independent eye witnesses to the occurrence namely P. Ws. 2, 4 and 9. Therefore, such evidence being found to be clear, corroborative and trustworthy, the aforesaid argument of the Appellants is found to be devoid of merit.

12. Appellants argued that the deceased sustained injuries while running towards the accused persons as he fell on the ridge of the pond and hit against the motor pump. Though such a defence plea has been taken by the accused persons, there is absolutely no evidence on record to even presume that the deceased suffered that head injury in that manner. Evidence of the Investigating Officer relating to seizure of the pump does not ipso facto mean that the head of the deceased dashed against that. In that context the ratio in the case of Purna

Chandra Naik Vs. State of Orissa, is not applicable to the present case inasmuch as the proposition of law of right of private defence and the requirement of extent to which it should be proved has got no applicability to the facts and circumstance of the present case. Similarly in the ratio in the case of Purna Chandra Barik Vs. State of Orissa, is also not applicable to the present case relating to the principle as to in which case right of private defence of body can extend to cause death of the deceased.

13. In the above context it may be noted that the Appellants have confused about what is the meaning of the term "right of private defence" inasmuch as according to them the deceased chased them and in that process made an accidental slip and fell and sustained bleeding injury on the head by hitting against the motor pump. Accused persons did not state of giving a push to the deceased or in any manner causing harm to the deceased so as to protect their life. Therefore a case of right of private defence of person or property is out and out not available in this case. The plea relating to the deceased and his son chased to assault was put to one or two witnesses in the process of cross-examination and such witnesses have denied to such suggestions and, apart from that there is no evidence on record to indulge in a discussion on such a plea.

14. It emerges on record that so far as the occurrence part of accused person being engaged in irrigating their land by lifting water from the pond, that the deceased and the P. Ws. 5 & 8 arrived at the spot and the deceased and P.W. No. 5 sustained bleeding head injuries and P.W. No. 8 sustained injury on his right hand remained the undisputed fact. The accused persons have also not disputed to their presence, though, according to them, they were present on their side of the premises ("Bari"). Series of Doctor examined to prove the injury certificates, bed-head ticket and the post-mortem report. All considered together reflected about homicidal death of the deceased due to ante-mortem head injury. The eye witnesses have described that such injury was due to lathi blow given by accused Sripati and that part of the evidence of all the eye witnesses to the occurrence has not been shaken or discredited. Therefore, when the homicidal death of the deceased is not disputed and cannot be disputed on the basis of the cogent evidence available on record, the aforesaid different pleas raised by the Appellants, as noted above, are devoid of merit. On the other hand the finding recorded by the Trial Court about culpability of the Appellants and accountable for the injuries inflicted is found to be correct and acceptable.

15. Learned Counsel for the Appellant also argued that if at all the prosecution case is believed, then looking to the fact scenario and the sequence of events it can be said that accused Sripati had no intention to kill the deceased. The single lathi blow dealt by him on the head could not have been judged by him to cause death of the deceased and therefore, his act of dealing that lathi blow may at best amount to causing grievous hurt punishable u/s 325, Indian Penal Code and not u/s 304, Indian Penal Code. In support of that argument he relied on the case of Lokanath Behera v. State 1984 Cri.L.J. 833 and State of Maharashtra v.

Suresh Bhalchandra Gavade and Anr. 1989 Cri.L.J. 1709. In the decisions of the Division Bench of Bombay High Court (1989 Cri.L.J. 1709) their Lordships took note of a stick being used to hit on the head. In this case, the seizure list Ext. 5 gives the dimension of the bamboo lathi used as the weapon of offence and from the size and the dimension of the said lathi it cannot be termed as a small stick. Therefore, the ratio on that case is not applicable to the present case. In the case of Loknath Behera (supra) the order of conviction u/s 304 Part-I was challenged. In that case due to a sudden quarrel the accused dealt a single blow to the chest of the deceased and did not take any undue advantage of his position and did not treat the deceased cruelly. Therefore, taking that circumstance into consideration and defining the meaning of "causing such bodily injury as is likely to cause death", their Lordships held that when the injury was inflicted without any intention to cause death or to cause such bodily injury as is likely to cause death and the single blow caused fracture of a rib which unfortunately resulted in rupture of the spleen and therefore conviction should be u/s 325, Indian Penal Code instead of u/s 304, Part-I, Indian Penal Code, because the assailant had never intended or knowledge of rupture of the spleen as a consequence of fracture of the rib.

16. Though in the above noted case provocation was from the deceased, in this case, provocation cannot be attributed to the deceased or the injured persons inasmuch as they, in exercise of their right, were putting earth to fill up the cut portion of the ridge. Apart from that, head is a vital part of the body and bamboo lathi is a dangerous weapon and the post mortem report indicates that the injury was severe. Under such circumstances even if the accused Sripati had no intention to cause death by inflicting the single lathi blow to the head of the deceased, yet the nature of the injury indicates that the accused had the knowledge that such head injury was likely to cause the death of the deceased. Since that blow was given due to sudden quarrel, therefore, that act of the accused is culpable homicide not amounting to murder as per Exception 4 of Section 300, Indian Penal Code. Therefore, there is no illegality in the order of conviction of accused Sripati u/s 304, Part-II, Indian Penal Code. The Trial Court has already taken a lenient view and sentenced the accused Sripati to undergo rigorous imprisonment for four years. So, no further leniency in sentence is proper. Under such circumstances, the conviction and sentence u/s 304, Part-II, Indian Penal Code is confirmed. So far as the sentence u/s 323, Indian Penal Code is concerned, keeping in view the aforesaid facts and circumstances and the considerable time which has elapsed in the meantime, substantive sentence is substituted by fine. In other words, for their conviction u/s 323, Indian Penal Code both Sripati and Goutam are sentenced to pay a fine of Rs. 1000/- (one thousand) each and in default to undergo simple imprisonment for a period of six months each.

17. With the aforesaid modification in the sentences for the offence u/s 323, Indian Penal Code, this Court finds no reason to interfere with the impugned order of conviction and accordingly both the Criminal Appeals are dismissed.

Modification of sentence, Appeal dismissed.