

(2008) 12 OHC CK 0016

In the Orissa High Court

Case No : DEREf No. 2 of 2004 and Criminal Appeal No's. 140, 145, 146, 147, 155 and 156 of 2004

State and Others

APPELLANT

Vs

Prasanta Kumar Rout @ Teru and Others

RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161, 315
Evidence Act, 1872 — Section 154
Explosives Act, 1884 — Section 9(B)
Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 342

Citation : (2009) CLT 224 (Suppl CrI)

Hon'ble Judges : Sanju Panda, J;P.K. Tripathy, J

Bench : Division Bench

Advocate : Bigyan Kumar Sharma, G.K. Dash, S.R. Mohanty and B.K. Dash and Ors, for the Appellant; Gourisankar Pani, Standing Counsel and Ors., for the Respondent

Final Decision : Dismissed

Judgement

Sanju Panda, J.—Since Death Reference No. 2 of 2004 and six Criminal Appeals are interlinked and the common judgment in ST. No. 13/13 of 2001, S.T. No. 36/92 of 2001, S.T. No. 21/28 of 2002, S.T. No. 31/43 of 2002 and S.T. No. 43/86 of 2002 passed by the Learned Addl. Sessions Judge, Bhadrak on 6.4.2004 is the subject matter of challenge, they are taken up together for disposal.

2. The above named Appellants faced trial of the charge under Sections 148/302/307/436/506/342/149 Indian Penal Code read with Section 9 (B) of the Indian Explosive Act and Section 27 of the Arms Act in the aforesaid Sessions cases in the Court of Learned Addl. Sessions Judge, Bhadrak.

3. As per the prosecution case, one Parbati Pradhan (P.W. 16) on 15.6.1999 lodged an oral report before the A.S.I. of Police of Bhadrak Rural Police Station at village Jagannathpur that at about 12.30 P.M. to 1.00 P.M. the Appellants along

with other accused persons (some of whom have been acquitted and Ors. are still absconding) forming an unlawful assembly being armed with swords, bhujalis, katuri, revolver, bombs, bow and arrow surrounded the dwelling house of Bhagirathi Jena (P.W.18), exploded bombs, set fire to the house and positioned with weapons at the entrance-exit doors. On hearing the sound of bombs, she (informant) saw from outside that the accused persons armed with weapons encircled the house and told her younger brother Dusmanta that villagers of Padampur encircled the house. While she opened the door to escape along with others, Sangram Rout (absconder) aiming at her shot an arrow (MO I) which struck her left side chest. When she asked other inmates to escape, she found that Madan Behera, Sarat Rout, Sangram Rout, Amulya Rout were setting fire to the dry palm leaves kept on the verandah of the house as a result of which the house burnt. When her mother Rukmini Jena (P.W.11) came out, accused Prasanta Rout @ Teru put the sword on her neck to kill while accused Sarat Rout and Bharat Rout pounced upon her. At that time the informant and deceased Dusmanta started running towards cowshed of Gaya Mohanty and concealed themselves. Prasanta along with others ran towards the cowshed. At that time, Sunakar Mallik and Thakura @ Prafulla Kumar Das started running. Sunakar was killed by the accused persons but Prafulla managed to escape with minor injury. Dusmanta was dragged out from the cowshed. Sangram Rout, Prasanta Rout, Bharata Rout, Sarat Rout and Ors. asked Dusmanta to kneel down after they assaulted him by means of sword and bhujali. Thereafter, they tied up Prafulla Jena and took him to the place where Duryadhan @ Baili was buried and they killed him at Samadhi of Duryadhan. The informant could survive by hiding herself under straw heap. When police came to the village, she came out and reported the matter orally before ASI of Police, Bhadrak Rural Police Station-Harekrishna Das (P.W.17) which was reduced into writing and the same was treated as FIR vide Ext.5 and sent to Bhadrak Police Station for registration of the case. Thereafter, the informant was sent to the hospital where the arrow was removed by operation. The case of the prosecution is that the accused persons with a common object formed an unlawful assembly and to revenge the death of Duryadhan Jena, attacked the house of the informant and killed her brothers Dusmanta @ Ghungadi @ Babu, Prafulla and Sunakar and burnt the house to ashes. After completion of investigation, charge sheet was submitted against 25 persons out of whom ten persons faced trial. Other 15 accused persons remained absconded and they were shown as absconder in the charge sheet. Those persons are yet to face the trial. The further case of the prosecution is that prior to the alleged occurrence on 15.6.1999 on the report of Sangram Rout, G.R. Case No. 1520 of 1998 was registered which disclosed that Bhagirathi Jena and his two brothers Prafulla and Dusmanta along with Kumar Gourab Jena and Udha @ Uttam Jena committed murder of Duryodhan Jena @ Balli, son of Rath Jena of village Padampur in the evening of 6.12.1998. Said accused persons were arrested and released on bail. Investigation is still in progress in the said G.R. Case and the present accused persons are cited as charge sheet witnesses.

4. Thereafter, on the report of Parbati Pradhan against Sangram Rout, Prasanta Rout, Bharat Padhy, Balli Jena @ Duryodhan Jena, Laxmidhar Sethi, Madan Behera, Ramakanta Jena and Karunakar Jena, G.R. Case No. 1525 of 1998 was registered on the allegation of house trespass, assault and theft of cash and ornaments in the evening of 6.12.1998 forming a counter to the G.R. Case No. 1520 of 1998. After investigation the same was found to be false. G.R. Case No. 615 of 1999 was registered on the report of Parbati Pradhan alleging wrongful restraint, hurt, use of obscene words and criminal intimidation in Bhadrak Court premises on 18.5.1999 and charge sheet was submitted against Madan Behera, Sangram Rout, Puria Pal and Karunakar Jena.

5. To prove the case, prosecution examined as many as 22 witnesses and also exhibited a number of documents which are marked as Exts.I to 30. The defence examined four witnesses and exhibited documents which are marked as Exts.A to M.

6. P. Ws. 11, 16 and 18 are the members of one family and deceased Prafulla and Dusmanata were the brothers of P. Ws.16 and 18 and deceased Sunakara was the Godbrother. P. Ws.9,10 and 15 conducted autopsy on the dead bodies of deceased Sunakar, Dusmanata and Prafulla. The post-mortem reports are Exts.2, 3 and 4 respectively. P.W.22 examined the informant and removed the arrow vide injury report Ext. 15. P. Ws.19 to 21 are police officers who investigated the case. P. Ws.1 to 7, 12,13 and 15 turned hostile and no fruitful materials came out despite their examination u/s 154 of the Evidence Act.

7. Four witnesses were examined on behalf of the defence out of whom accused Madan Behera was examined as D.W.4 u/s 315, Code of Criminal Procedure, Surendra Das was examined as D.W.1 who said to be the Labour Officer in Indocount Choongam Textiles Limited, Manjalpur, Baroda. In addition, accused Sarat Chandra Padhy produced identity card of D.W.1 and other relevant paper relating to the employment in that company as a workman vide Ext.A. Accused Prasanta Kumar Rout examined two witnesses (D. Ws.2 and 3), who are residents of Choudwar, to prove his plea of alibi. They also produced F.I. Rs in G.R. Case Nos. 1520 of 1998, 1525 of 1998 and 615 of 1999, statement u/s 161 Code of Criminal Procedure in the said G.R. cases and copy of an application filed by Parbati Pradhan in course of trial of the present case was also exhibited Ext.M.

8. The accused persons pleaded innocence and false implication in the case in general. The specific pleas of defence of the accused persons are given herewith chronologically.

The plea of accused Prasanta Rout of Padampur was that after Matriculation he left the village and started business at Choudwar. Due to political rivalry his and his brother's names were impleaded in the case.

Accused Chandramani Jena & Budhiram Jena @ Sukta completely denied to the charges.

Accused Madan Behera of Sental took a plea that he was arrayed as an accused in G.R. Case Nos. 1525 of 1998 and 615 of 1999 on the basis of the allegations of P.W. 16, the informant, and in a usual manner in the present case he was also arrayed as an accused person. His village is 2 kMs. away from the occurrence village.

The plea of accused Bisnu Mohan Behera of Jagannathpur was that as he was a charge sheet witness of G.R. Case No. 1520 of 1998 relating to murder of Duryadhan Jena and his brothers were accused, he was impleaded in the case. His further plea was that on the date of occurrence he went to his sister's house and was absent in the village.

The plea of accused Ghanashyam Jena was that as he has a land dispute with P.W. 18, he was implicated in the case. He had gone to cattle market on 15.6.1999 and returned from the market in the evening.

The plea of the accused Abhaya Kumar Sahu of Rasulpur was that he is a supporter of Janata Party and the informant is a supporter of Congress Party. Due to political rivalry, he was implicated as an accused in the case. His village is half a kilometer away from the village where the, occurrence took place. Accused Purosottam Pal of Padampur took a plea that since he was a charge sheet witness in Duryadhan's murder case, he was falsely implicated in this case.

9. P. Ws.9, 10 & 14 are the doctors who conducted autopsy over the dead bodies of the deceased. The following injuries were found on the dead body of deceased Sunakar Mallik, vide Inquest Report Ext. 18 which are as follows:

Cut injuries on left side ear, neck, left side back, right hand, five cut injuries on left hand, cut injuries on left leg at back side knee and right leg at back side knee, three injuries on right leg at thigh possibly by sharp cutting weapon, body found lying on the land of Purastam Gahan.

Post Mortem report vide Ext.2 Injuries found

- (i) Back of right knee 4" x 1 1/2" x 2"
- (ii) Back of left knee 3 1/2" x 2" x 1 1/2" (iii) Between Buttocks 5" x 2" x 1 1/2" (Sacral area)
- (iv) Left side lower chest wall (back) 3" x 1 1/2" x 1/4"
- (v) Below left scapula 3" x 1" x 1/2"
- (vi) Below left elbow 2 1/2" x 1 1/2" x 1/2"
- (vii) Above left elbow 2" x 1 1/2" x 1/4"
- (viii) Above left elbow 1" x 1/2" x 1/4"
- (ix) Above left elbow 2 1/2" x 1" x 1/2"
- (x) Above left elbow 1 1/2" x 1/4" x 1/4"

(xi) Middle of back neck 2" x 3/4" 1/2""

(xii) Back of left ear 3" x 1/2"" x 1/2""

(xiii) Above right wrist 3/4" x 1/2" x 1/2"

(xiv) Below right elbow 1" x 1/2" x 1/2"

All ante mortem and by sharp cutting weapon. Cause of death was due to hemorrhage and shock. Time since death within 72 hours.

10. The following injuries were found on the dead body of deceased Babu @ Dusmanata Kumar Jena vide Inquest report Ext.2.

Two strong blows with sharp cutting weapon on neck extending up to cheek, cut injury on right elbow and left shoulder, body lying close to and in front of cowshed of Jaga Mohanty.

Post Mortem Report - Ext.3 Injuries found:

i. Incised wound 16 cm x 8 cm x 10 cm over back of neck just below hair line extending from right cheek to middle of neck cutting muscles of neck, C-4 Vertebra and spinal cord,

ii. Incised wound 8 cm x 5 cm x 8 cm extending from left end of injury No. (i) to below left ear,

iii. Incised wound 6 cm x 2 cm x 2 cm near right elbow cutting lateral epicondyle of humerus,

iv. Incised wound 4 cm x 2 cm x 2 cm in left supra scapular region extending horizontally, Incised wound 2cm x 1 cm x 1 cm in right posterior axillary fold.

All injuries- ante mortem in nature. Cause of death - Shock and hemorrhage from above mentioned injuries. Time since death within 24 hours to 36 hours from time of examination.

11. The following injuries were found on the dead body of deceased Prafulla Kumar Jena vide Inquest report vide Ext.24.

Cut injuries on back and back side neck by sharp cutting weapon.

Body found lying on the fallow land of Ratha Jena of village Padmapur where Rath Jena's deceased son Duryodhan Jena was cremated.

Post Mortem Report - Ext.4 Injuries found:

i. Big injury 9" x 4" x 6" on the base of the skull

ii. One cut injury on the back near the scapula region 2" x 1" x 0.8"

iii. Two small abrasions 2" x 1" x 0.5"".

The margin of the skull injury is sharp and very deep. All injuries are ante

mortem. Cause of death -Haemorrhage and shock, massive haemorrhage from the incised injury. Time since death within 36 hours 12. On assessing the evidence on record, the Learned Addl. Sessions Judge came to a finding that the death of deceased Dusmanta, Prafulla and Sunakar is homicidal in nature on the basis of the opinion of the doctors who conducted the post-mortem examination over the dead bodies of the deceased vide Exts.2,3 and 4. In all the three post-mortem reports, the doctors opined that the death was due to shock and hemorrhage from the injuries sustained by the deceased. On the basis of the statement of P. Ws.11, 16 and 18 the Trial Court came to a conclusion that the prosecution was able to prove the charge under Sections 148/302/307/437/506/342/ read with Section 149 of the Indian Penal Code, Section 9(B) of the Explosive Act and Section 27 of the Arms Act against the accused Prasanta Kumar Rout @ Teru, Budhiram Jena @ Sukuta, Chandramani Jena @ Chagulu, Bishnu Mohan Behera and Ghanashyam Jena and Abhaya Kumar Sahoo and convicted them thereunder.

13. The allegation against the accused Gangadhar Jena is that he tied the hands of deceased Prafulla with a rope whereafter while he was dragged towards Samadhi of Duryadhan but he did not commit any overt act and as the prosecution was not able to prove the alleged rope with which deceased Prafulla was tied, the Learned Addl. Sessions Judge disbelieved the involvement of accused Gangadhar Jena in the incident.

14. So far as accused Bishnu Mohan Behera and Ghanashyam Jena are concerned, they were sentenced to imprisonment for life u/s 302/149 Indian Penal Code.

15. On the basis of the above finding, the Learned Addl. Sessions Judge sentenced accused Budhiram Jena @ Sukuta, Chandramani Jena @ Chagulu and Madan Behera each to imprisonment of life u/s 302 read with Section 149 of the Indian Penal Code with a direction that they shall not be released unless they served at least imprisonment of 20 years and R.I. for two years u/s 148 Indian Penal Code and R.I for seven years u/s 436/149 Indian Penal Code, but did not impose any separate sentence for the offence u/s 307/506/342 read with Section 149 Indian Penal Code. He also sentenced to undergo R.I. one year u/s 9(b) of the Explosive Act and R.I. three years u/s 27 of the Arms Act. He directed that all the sentences shall run concurrently.

16. As the role played by Prasanta Kumar Rout @ Teru comes under the category of rarest of rare cases, the Learned Addl. Sessions Judge awarded him death sentence u/s 302 read with Section 149 Indian Penal Code.

17. Since none of the witnesses involved the Purosottam Pal and Gangadhar Jena to the alleged crime while deposing in Court and nothing was proved on facts that any overt act was committed by them, they were acquitted from the aforesaid charges and as none of the witnesses specifically stated about the overt act committed by accused Sarat Chandra Padhy, he was also acquitted

from all the charges. In course of hearing it is ascertained that the State Government has filed appeal challenging such orders of acquittal.

18. Mr. G.S. Pani, Learned Counsel appearing for Appellants-Prasanta Kumar Rout @ Teru and Madan Behera, submitted that the Learned Addl. Sessions Judge did not properly scrutinize the evidence on record and the discrepancy in the statement of P. Ws.11, 16 and 18 and the facts and circumstances under which the offence was committed and as stated by the prosecution witnesses, a definite conclusion cannot be reached that Appellant-Prasanta Kumar Rout @ Teru is the author of the crime and none else. Therefore, the order of conviction and sentence passed against him is liable to be set aside.

So far as P.W.16-Smt. Parbati Pradhan, the informant is concerned, she is in the habit of making complaint against the present Appellants in G.R. Case No. 615 of 1998 and G.R. Case No. 1520 of 1998 which was found to be false. Therefore, her statement is liable to be discarded in toto.

Since P.W.18-Bhagirathi Jena @ Bhagirathi Jena was not present at the spot, he was not a witness to the occurrence. Therefore, his statement is liable to be discarded.

The statement of P.W.11-Rukmini Jena does not inspire confidence regarding the manner in which the offence was committed involving the Appellants. Therefore, her statement is not reliable in respect of the Appellants. As such, the conviction and sentence against the accused persons are liable to be reversed.

The Learned Counsel for the Appellants in support of his contention has cited a decision of the Supreme Court in the case of Suresh Chaudhary v. State of Bihar 2003 SCC (CrL.) 801 wherein the Apex Court considering the omissions and contradictions of the eye witness (who is the relative of the deceased) held that it became incumbent on the Court to consider and assess the evidence of such witness cautiously to see whether Court can place reliance upon his evidence while convicting the Appellant.

The aforesaid decision is distinguishable on facts and circumstances of the present case because P.W.16 as eye witness to the occurrence has not made any material omissions and contradictions which affects the prosecution case.

19. Mr. D.P. Dhal, Learned Counsel appearing for accused-Bishnu Mohan Behera and Ghanashyam Jena, submitted that both the accused persons stand at par with accused Sarat Chandra Padhy, Purosottam Pal and Gangadhar Jena and as those three persons have been acquitted, on the same set of evidence the above named Appellants should not have been convicted and hence the sentence passed against them are liable to be set aside. The statement of P.W.18 is omnibus and he has not specifically stated about the overt act committed by the Appellants and the role of the Appellants in the commission of offence. Therefore, the conviction order passed and the sentence imposed by the Learned Addl. Sessions Judge are liable to be reversed.

20. Mr. D. Nayak, Learned Counsel appearing for the accused-Budhiram Jena @ Sukuta, reiterated the plea advanced by Appellants Bishnu Mohan Behera and Abhaya Kumar Sahoo and stated that Appellant Budhiram Jena @ Sukuta stands at par with accused Sarat Chandra Padhy, Purosottam and Gangadhar. As such, he is also entitled to get an order of acquittal.

21. Mr. A.K. Mishra, Learned Standing Counsel appearing for the State submitted that one Duryadhon Jena was murdered and in that case P.W. 18 along with his two deceased brothers, namely, Dusmanta and Prafulla and two other brothers, namely, Kumar Gourab Jena and Uttam Jena, were arrayed as accused persons. They were arrested and released on bail after a short stay in judicial custody. P.W. 16 the informant earlier lodged an FIR against the group supporters of Duryadhan Jena and after investigation the case was found to be false and final report was submitted against which the informant has not filed any protest petition. She was attending the Court to release the brothers who were in custody. In G.R. Case No. 615 of 1999, charge sheet was already filed against the accused persons, namely, Madan Behera, Sangram, Purusottam and Karunakar Jena. Therefore, the supporters of deceased Duryadhan retaliated the murder and to take revenge tried their best and waited in search of an opportunity. To fulfil their intention, the present accused persons formed an unlawful assembly being armed with deadly weapons having a common object of killing many persons of the informant's family and to put fire in their house, attacked on the informant's house on 15.6.1999, killed three persons, injured P. Ws.11 and 16 and the dwelling house was burnt to ashes. P.W.16 the informant is the injured eye-witness to the occurrence on whose oral report FIR Ext.5 was lodged. As she was not in a position to put her signature on the said document, the ASI (P.W.17) wrote that document and she was also taken to the hospital where the arrow was removed from her body and taking into consideration her serious condition her statement was also recorded which was later on marked as Ext. 10.

22. Mr. Mishra further submitted that Parbati Pradhan (P.W.16), the injured eye-witness to the occurrence in her statement (Ext.5) stated that the overt act was committed by the accused persons, namely, Prasanta, Chandramani, Budhiram, Madan, Bisnumohan and Abhaya with the weapon of offence. Her statement was trustworthy as she did not name the accused persons because of her earlier enmity and she did not want the real culprits to escape. Therefore, she being the informant at the earliest gave detailed description of the occurrence and the active participation of the above accused persons in the offence committed by them and by the time P.W.18 reached the police station, his sister had already went to the hospital for removal of the arrow which had pierced in her body and she informed P.W.17 the ASI about the incident which was reduced into writing vide Ext.5. The argument of the accused persons is that in the FIR the name of the accused persons were not mentioned and their implication in the alleged crime was doubtful, as the FIR is not a substantive piece of evidence. It is also not an encyclopedia of factual aspect. It can only be utilized for the purpose of

testing the veracity of the statement made by the informant regarding the offence. Though P. Ws.11,16 and 18 are close relations of the deceased persons and there was a previous enmity between the two groups, it is more natural that one group, accused persons, assembled together with an intention to kill a number of persons of the other group i.e. deceased persons. When they suspected the culprit of the earlier incident and those witnesses being relation of the deceased, it cannot be assumed that they would allow the real culprit to escape and name other persons as culprits. Therefore, the finding of the Learned Addl. Sessions Judge shall be confirmed and the sentence awarded should not be disturbed.

23. From the above submissions of the parties, on analysis of the evidence adduced by the prosecution and looking into the post-mortem reports vide Exts.2,3 and 4 of the three deceased in which the cause of death has been mentioned as shock and hemorrhage due to the injuries which are antemortem in nature, this Court confirms the conclusion of the Sessions Court that all the three deceased suffered homicidal death. Though there might be some contradiction in the evidence of P. Ws.11, 16 and 18 who are the witnesses to the initial part of the occurrence, P.W.16 the injured eye-witness at the earliest disclosed before P.W.17, ASI of Police as to how the occurrence took place and her statement was consistent and trustworthy and omission in the statement made by P. Ws.11 and 18 who have not witnessed the entire occurrence are not so material to disbelieve the case of the prosecution, as such contradiction is bound to occur when the occurrence was witnessed in panic and the witnesses are rustic villagers and aged persons like P.W.11 who was aged about 70 years. As the murders took place in course of the occurrence which she experienced and suffered as a victim of the occurrence and also sustained the loss of life of her sons, some omissions in her evidence are not at all material so as to discard her credibility.

24. As regards argument for parity, accused stand at par with acquitted accused Sarat, Gangadhar and Purosotam on reference to the decision of the Apex Court in the case of Sucha Singh and Anr. v. State of Punjab 2003 (5) Supreme 445 it is found that the Apex Court has held that merely because some of the accused persons have been acquitted, though evidence is against all of them, so far as direct testimony went, it does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted.

25. The doctrine of "falsus in uno falsus in omnibus" is a dangerous one specially in India. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient or exaggerated, it does not necessarily follow as a matter of law that it must be disregarded in all respect. The evidence has to be shifted with care. The chaff has to be separated from the

grain. Assessment of evidence is to ascertain the truth so as to reach to a decision whether or not the alleged charge has been proved.

26. In the present case, P.W. 16 who is not only an injured but also an eye-witness to the entire occurrence has described the incident and the involvement of the Appellants in the commission of the crime. From the narration of prosecution story and the proved facts, it reveals that when the occurrence took place the present Appellants were present at the spot with deadly weapons and they attacked the informant's house because of previous enmity and three persons died due to such assault by some members of the unlawful assembly i.e. the Appellants. P.W.16 saw the Appellants were armed with deadly weapons and committed different overt acts. Therefore, this Court confirms the finding of the Trial Court that the Appellants are the author of the crime and the prosecution has been able to prove the charges under Sections 148/302/307/436/506/342/149 Indian Penal Code read with Section 9(B) of the Explosive Act and Section 27 of the Arms Act against the Appellants.

27. So far as Appellant-Prasanta Kumar Rout @ Teru is concerned, though the offence committed by him is very grave but still it falls short of the "rarest of the rare" category for death penalty in view of the ratio of the Apex Court in the case of State of U.P. v. Satish (2005) 30 OCR and Bachan Singh v. State of Punjab (1980) SCC 684 and for that reason imprisonment for life appears to be the appropriate punishment.

28. Therefore, while maintaining the order of conviction of all the Appellants and sentenced imposed on them so far as Appellant-Prasanta Kumar Rout @ Teru is concerned, we set aside the death penalty and in that place, we impose on him punishment of imprisonment for life for the offence u/s 302 Indian Penal Code.

29. We also direct that all the sentences of all the Appellants to run concurrently.

30. Accordingly, the death reference is discharged and the criminal appeals are dismissed.

P.K. Tripathy, J.

31. I agree.