
(1978) 04 OHC CK 0004
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Bhagabat Mahanta and Others

RESPONDENT

Date of Decision : 10-04-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378
Penal Code, 1860 (IPC) — Section 147, 148, 302, 325

Citation : (1978) 46 CLT 23 : (1978) CriLJ 1566

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Judgement

R. N. Misra, J.—This appeal at the instance of the State of Orissa has been filed u/s 378(1) of the Cr. P.C. against the judgment of acquittal passed by the learned Sessions Judge of Mayurbhanj-Keonjhar,

2. Shortly stated, the prosecution case was that Kusa, the deceased and his sons (P. Ws. 3 and 5) had cleaved a piece of Government land in Sunarinali Chaka over which bushes had grown on 11th and 12th of Sept. 1974 On 14th of Sept. 1974, in the morning, these three people along with P. W. 4, a Samandhi of Kusa came with four ploughs, ploughed the land and sowed coolthy seeds. At that time the accused persons "together with four or five labourers were ploughing a neighbouring plot of land belonging to Government. After some time Kusa found that his stock of seeds was exhausted and, therefore, he went home to get some more seeds. During his absence, accused Basudeb accompanied by some of his men entered into the plot cleared by Kusa and his sons and started reploughing it and sowing coolthy seeds. While they were doing so. Kusa returned and protested against the action of the accused persons. Bhagabat rushed at him with an axe dealt a blow with the blunt side of the axe on his head. Kusa sustained bleeding injuries, fell down and became unconscious. P. W. 5 snatched away the axe from Bhagabat's hands, but Bhagabat and Karunakar snatched it back from him and ran away from the spot, Kusa was removed to the hospital; First Information Report (Ext. 4) was lodged at the Police Station and a case u/s 325, I.P.C. was registered. Kusa expired at the hospital on 19-9-1974.

Investigation followed and all the accused persons were charged of the offence u/s 147, I.P.C. while Bhagabat was in addition charged under Sections 148 and 302 of the I.P.C.

3. The defence plea was one of denial. They took the stand that the land in question was in possession of Bhagabat by the date of occurrence and on that day accused Basudeb had come, sown coolthy and left. Bhagabat with his labourers was ploughing it with five ploughs. At that time the deceased Kusa holding an axe and P. W. 3 and 5 armed with lathis came there and started chasing Bhagabat with a view to assaulting him. Kusa had all the time raised his tangia. When Kusa was about to deal a blow with the tangia, Bhagabat snatched it from him and started whirling it in self-defence whereupon Kusa fell down probably being hit by the axe. P. Ws. 3 and 5 snatched away the tangia from Bhagabat's hands and thereupon he ran away in fear of life. The other accused persons were not present at the place of occurrence and had nothing to do with it. They were busy clearing the jungle at a distance.

4. Prosecution examined 8 witnesses in all of whom P. Ws. 3, 4 and 5. are said to be eye-witnesses. P. W. 1 was the doctor who carried the post-mortem examination while P. W. 2 was the Assistant Surgeon of the Primary Health Centre at Patna where the deceased had been admitted as an indoor patient and ultimately succumbed to his injuries. P. W. 6, a co-villager, is a seizure witness while P. Ws. 7 and 8 are the Police Officers, who were connected with the investigation. The learned Sessions Judge did not attach any importance to the evidence of P. Ws. 3 and 4 in considering the claim of Kusa's possession of the land in view of their evidence that they were not at the site prior to the date of occurrence. He also did not rely upon the evidence of D. W. 1 as it had not been suggested to the prosecution witnesses that D. W. 1 was present when the site had been cleared by Bhagabat and his associates. On the basis of the testimony of P. W. 5, he, however, came to the conclusion that the site had been cleared by Kusa prior to the date of occurrence and Kusa and his sons were thus in possession of the same by the time the occurrence took place. The learned Trial Judge came to hold on an assessment of the evidence that the charge u/s 147, I.P.C. had not been made out. He also found that the charge u/s 148, I.P.C. against Bhagabat cannot be sustained. With reference to the charge u/s 302, I.P.C. the learned Sessions Judge came to hold that P. W. 3 was not telling the truth. He found that P. W. 4 was giving a different version. He came to the ultimate conclusion that Bhagabat was entitled to whirl the axe in self-defence and if in the process of whirling the deceased sustained the injury which led to his death, Bhagabat could not be found to have committed the offence of murder. Accordingly, he acquitted all the accused persons,

5. Admittedly the land in question belongs to Government and both parties are trespassers. Learned Additional Government Advocate has, however, contended that the trial court having recorded the finding that the deceased and his party-men were in possession of the land already and Bhagabat and his associates

trespassed upon the land at the time of incident, no question of right of private defence arose. It is again contended that after the axe had been snatched away from the hands of the deceased, the apprehension, if any, had vanished, and as against an unarmed person, Bhagabat could not have exercised right of private defence of person so as to take away his life. Learned Additional Government Advocate has also contended that there was no justification to disbelieve P. W. 3 on the question of possession as also regarding the details of the occurrence on the 14th.

6. Learned Additional Government Advocate relies upon the principles indicated by a Full Bench of this Court in the case of *State of Orissa Vs. Rabindranath Dalai and Another*, that (at p. 1695 of Cri LJ):

A person in possession when attacked by trespassers is entitled to maintain his possession and drive away the aggressors by use of force without applying for protection of public authorities. Where the person in physical possession has been dispossessed by the trespasser, he is even entitled in exercise of the right of private defence to drive away the intruder provided there has been no acquiescence in such dispossession and the trespasser has not obtained settled possession over the property. Here also there is no duty to run for protection and thereby allow the trespasser to the settled possession over the property.

The aforesaid rule is applicable to a case where one party is in settled possession and the other party is a trespasser. As already indicated, according to the prosecution case, the deceased had for the first time exercised acts of possession over the property two days prior to the occurrence, and the only act of possession had been cutting of the bushes. According to the defence version, the accused persons had cleared the bushy growth over the disputed land the day prior to the occurrence. In the facts of this case, it would be difficult to hold that one party is in settled possession of the property and the other party was a trespasser. In order to have settled possession, even without title, it would be appropriate to require proof of clear possession over a reasonable period of time. When it is a case of possession claimed by a trespasser, the evidence must be clear and positive of continuous possession over a reasonable period. There is no evidence in this case that after the clearing of the over-growth, the deceased and his men had raised a fence around the area claimed to be in their possession nor had they raised any hut on the property. Admittedly, they had not been staying there. In view of the fact that possession had commenced hardly a day or two before the occurrence and there was no acquiescence to such possession by the defence, who on the other hand has been advancing a claim of possession prior to the date of occurrence, it would indeed be difficult to hold that Kusa and his men were in possession of the property from before. The learned Sessions Judge, in our view, rightly disbelieved the evidence of P. Ws. 3 and 4 in regard to the claim of possession by Kusa. P. W. 3 came to the property for the first time on the date of occurrence and he had not seen the actual clearance said to have been made two days prior to the incident. P. W. 4 who is a resident of a different

village had admittedly come for the first time on the date of occurrence to the site. In that view of the matter, these two witnesses were indeed not material regarding prior possession. The sole testimony in support of the claim of possession thus came from P. W. 5 only. D. W. 1 is admittedly a resident of the village and is admitted to have been present at the time of occurrence. He was named as a witness in the First Information Report. For reasons best known, to the prosecution, he was not examined to support its case and ultimately he appeared as a defence witness. The reason advanced by the learned Sessions Judge to discard D. W. 1's statement that he had seen the accused persons clearing the site one day prior to the occurrence is not at all impressive,

Most of the prosecution witnesses had been examined by another Trial Judge who before completing the trial ceased to be in service. There was, therefore, a de novo trial. Prosecution witnesses were cross-examined with reference to their earlier statements. It is interesting to note that some of these witnesses have admitted that on the earlier occasion they had stated before the trial court of having seen the accused persons clearing the jungle a day prior to the occurrence. P. W. 6, a Ward Member of the village, had been examined as P. W. 8 and on the earlier occasion, he had said:

All the accused persons with their labourers had cleared up the jungle on the spot prior to the date when I saw Kusa Mahanta laid down on the ground there.

P. W. 6 was confronted with his previous statement and he stated:

....I do not remember if I stated in my previous deposition in this Court that all accused persons with their labourers, had cleared up the jungle at the spot prior to the day when I saw Kusa Mahanta laid down on the ground there....

In this view of the evidence, it is indeed difficult for us to hold that the prosecution has been able to establish its possession over the property and the finding of the learned Sessions Judge that Kusa was in possession of the property is, therefore, not to be sustained.

7. In the First Information Report, several persons had been named as eye-witnesses to the occurrence. Strangely enough, none of them has been examined to support the case and prosecution had remained satisfied in examining three close relations, i. e. P. Ws. 3 and 5, the sons of the deceased and P. W. 4. the Samandhi of the deceased, as the only witnesses to support the case. As already noticed, D. W. 1 was one of the named persons and he has come to support the de-fence stand. As would appear from the evidence of P. W. 3, both sides are close relations. The dispute is with reference to possession over a plot of land. It is thus quite likely that the close relations of Kusa would come to support the prosecution stand even if the prosecution story may not be true. Non-examination of independent witnesses admittedly "available and non-furnishing of any appropriate explanation for withholding them in the facts of the case assumes importance and leads us to draw an adverse inference against the prosecution. P. W. 6 has admitted in cross-examination:

It is a fact that I stated in my previous deposition in this Court that when I saw Kusa at the spot, he was within his senses and on my enquiry, he told me that he had a struggle with Bhagabat Mahanta and he fell down on the ground and did not know how he sustained the injury.

In view of this evidence, it is indeed difficult to accept P. Ws. 3, 4 and 5 as deposing the truth in regard to the occurrence. These witnesses have now given details of the occurrence in a very different way. The statement of the deceased made to P. W. 6 should be preferred to that of P. Ws. 3, 4 and 5. The fact that Kusa had a struggle with Bhagabat and that he was not in a position to say how he sustained the injuries, on his person goes a long way to negative the prosecution story as made out in court at the trial. While P. Ws. 3, 4 and 5 have taken the stand that Kusa became senseless at the spot and continued to be senseless until his death, both P. W. 6 as also D. W. 1 have spoken to the contrary and the defence version seems to have been more or less accepted by P. W. 6. Taking an over-all picture of the case, we are not inclined to reverse the judgment of acquittal. Accordingly the appeal fails and is dismissed. Respondent No. 1, who is in jail custody, is directed to be released forthwith. The bail bonds of the other respondents be cancelled.

K.B. Panda, J.

7. I agree.