
(1988) 05 OHC CK 0021
In the Orissa High Court
Case No : Government Appeal No. 48 of 1981

State of Orissa

APPELLANT

Vs

Dayal @ Dayanidhi Ghosh and Others

RESPONDENT

Date of Decision : 09-05-1988

Acts Referred:

Penal Code, 1860 (IPC) — Section 304, 34

Citation : (1988) 66 CLT 218

Hon'ble Judges : V. Gopalaswamy, J; R.C. Patnaik, J

Bench : Division Bench

Advocate : Additional Government Advocate, for the Appellant; D. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—This is an appeal by the State against the acquittal of the Respondents by the Sessions Judge, Mayurbhanj-Keonjhar, of the charges u/s 304/34 of the Indian Penal Code.

2. The First Information Report was lodged at Bangiriposi Police Station on 12-10-1979 at 4.30 p. m. by one Radhashyam Sahu (p.w. 3) that his father Makhan was severely assaulted by the Respondents at 5 p.m. on 11-10-1979. The injured was being treated at Sirsa Public Health Centre. The witnesses were said to be Daka Singh, Mundari Singh and Ors. not named in the F. I. R. Makhan succumbed to the injuries on 16-10-1979.

3. Of the twelve witnesses examined by the prosecution the son (p.w. 8), the widow (p.w. 7) and the mother (p.w. 9) of the deceased were alleged to be the eye witnesses. P. w. 3 treated the deceased at the Public Health Centre. P. w. 1 conducted the post-mortem examination.

4. The plea of the Respondents was a denial of the occurrence.

5. That Makhan died due to the assault on him was not disputed. He suffered

fracture of the parietal bone, fracture of nasal bone mandible, right clavicle and left humerus etc. The question was if the charges had been brought come to the Respondents who were said to be the authors of the crime. The learned Sessions Judge on appreciation of the evidence recorded on acquittal on the following findings:

(a) witnesses named in the F. I. R. were not examined and no explanation was offered for their non-examination;

(b) witnesses not named in the F. I. R. were Examined;

(c) witnesses admitted by the prosecution witnesses to have seen the occurrence were not examined;

(d) evidence of the eye witnesses was discrepant and inconsistent:

(e) ignorance of the witnesses, as to the identity of the assailants immediately after the occurrence;

(f) non-disclosure of the names of the assailants before the doctor, p.w. 2, not only by the deceased but also by the witnesses examined; and (g) delay in the lodging of the F. I. R. .

6. The mother widow and son are not named in the F. I. R. though one of the sons of Makhan lodged the F. I. R. It is highly improbable. If really they were eye-witnesses. P. w. 3 could not have omitted to record that at least some of them had witnessed the occurrence. Daka Singh and Mundara Singh named in the F. I. R. were not examined. No explanation has been offered? by the prosecution as to why they were withheld. P.w.7. the widow admitted that one Kala Behera was returning from the place of occurrence. So also father of Antaryami (p.w. 6) was at a place from which the occurrence was clearly visible. She also stated that wife of Bira Singh whose house was situated close by had seen the occurrence. P. w. 8. the son of Makhan, testified that one Kanka Hadi was at a distance of 8 to 10 cubits from the place of occurrence. Not only the persons named in the F. I. R. were not examined but also the aforesaid persons who, according to the prosecution witnesses had witnessed the occurrence. The prosecution owed a duty to explain the reason for its failure. In the absence thereof, adverse inference is available to be drawn.

7. It is not open to the prosecution to adopt a device of keeping back eye witnesses because the witnesses are likely to go against the prosecution. The prosecution owes a duty to the Court to be fair. Its obligation is not to see that an accused is convicted. Its duty is to see that the truth is reached and justice is done. Where however, it chooses not to examine any of the witnesses named in the F. I. R. or the complaint it ought to bring on record the reasons which impelled it not to examine them. Where it does not come forward with any explanation, ?adverse inference is available to be drawn that had the witnesses been examined, the evidence would have gone against the prosecution. However, where a number of persons have witnessed the occurrence, it is open to the

prosecution to make a fair and honest selection and the purpose should not be to suppress independent witnesses. Where the witnesses named in the F. I. R. are withheld without any explanation and witnesses not named in the F. I. R. are examined to support the prosecution version that introduces unless explained a serious infirmity.

8. This ground alone justify throwing the prosecution case over-board. Therefore, the acquittal recorded by the trial judge is unassailable. However, we touch a few substantial points.

9. P. w. 10 has stated that he heard that the three eye witnesses; P.Ws. 7,8 and 9 were shouting and enquiring as to who had assaulted Makhan. If this statement of p.w. 10 is true and is to be accepted, the evidence of the so-called eye witnesses is wholly untrustworthy. They were not to be enquiring as to who had assaulted if they had witnessed the assault and identified the assailants. Then again, another aspect is non-disclosure of the names of the assailants before the doctor not only by Makhan but by the widow, p.w. 7. In his report p.w. 2 has recorded that Makhan told him that his enemies had assaulted him.

10. Admittedly Makhan had enemies (see discussion in paragraph-13 of the judgment). The Respondents were not also pulling on well with him. It should be, as inferred by the learned Sessions Judge, that during the time when the witnesses discussed about the occurrence and the manner in which the information was to be lodged, they thought of the Respondents as the persons who could have likely assaulted the deceased. Hence, in view of the analysis made above, there is no scope for interference with the judgment of acquittal.

11. In the result, there is no merit in the Government Appeal which is dismissed.

V. Gopalaswamy, J.

12. I agree.