

(2008) 11 OHC CK 0059

In the Orissa High Court

Case No : Government Appeal No's. 20 of 1995

State of Orissa

APPELLANT

Vs

Dayanidhi Tandi and Others

RESPONDENT

Date of Decision : 26-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 235(1)
Penal Code, 1860 (IPC) — Section 304, 323, 34

Citation : (2008) CLT 113 Supp

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

Bench : Division Bench

Advocate : G.S. Pani, for the Respondent

Judgement

1. Heard and the judgment is as follows:

This Government Appeal is against the order of acquittal in Sessions Trial No. 18/3 of 1991 of the Court of Additional Sessions Judge, Bargarh. All the three Respondents were accused persons in that Trial.

2. Substance of the prosecution case is that accused persons and Paltan Bag (hereinafter referred to as "deceased") and his family members are adjoining neighbours. The vacant place between the premises of the accused persons and the deceased was claimed by the accused for tying their cattle. According to the case of the prosecution, on 13.10.1990 at about 12 noon, Shakuntala Bag (P.W.2) stacked some "khais" branches at that place. She had collected those branches to feed goats. Accused Dayanidhi and Jibardhan and female folks of their family protested such act of P.W. 2. There was a retaliation of P.W. 2 followed with exchange of words. Paltan Bag, the deceased was the husband of P.W. 2. By the time of aforesaid occurrence, he was not present in the house having gone to the market. At about 3 p.m., he returned to the house and witnessed the quarrel in which accused Dayanidhi and Jibardhan were abusing P.W. 2. The deceased protested and as a retaliation accused Dayanidhi and Jibardhan came and caught hold of his hands and dealt fist blows and, slaps on

his face and back and during that incident accused Gobardhan, who was busy in playing cards in the nearby house of Basudev Jamdalia, arrived there with a spade and dealt two blows injuring the face and head of the deceased. Sustaining the blow, the deceased fell down and accused persons fled away. The deceased in injured condition was brought to Primary Health Centre, then to the Sub-divisional Hospital at Bargarh, where preliminary treatment was provided and thereafter he was taken to the V.S.S. Medical College Hospital, Burla. In the Medical College Hospital, before commencement of treatment the deceased succumbed. Thus, the case, which had been registered at Ambhabona Police Station, was ultimately registered u/s 302 I.P.C. and the accused persons were asked to face the Trial for the offence under Sections 302/323/34 I.P.C.

3. Accused persons took the plea of denial for their offence together with an alternative plea that it is the deceased who was the aggressor by inflicting umbrella blows which had an iron handle. They also pleaded that in the process of attacking Dayanidhi and Jibardhan by the deceased, his brother Prafulla Bag (P.W.1) also joined hands being armed with spade and that spade blow dealt by P.W. 1 accidentally hit the deceased and caused the injury.

4. To substantiate the charge, prosecution relied on evidence of 11 witnesses. Out of whom, P. Ws. 1 to 5 were examined as eyewitnesses to the occurrence, P. Ws. 6 to 9 are the doctors, who granted treatment and issued injury certificate, besides conducting post-mortem examination. P. Ws.10 and 11 are two police officers, who participated in the investigation. Prosecution also relied on exhibits 1 to 12, out of which, Ext. 1 is the F.I.R., Ext. 2 is the inquest report, Exts. 5 and 6 are two injury reports of P.W. 1 and the deceased and Ext. 8 is the post-mortem report. The weapon of offence was exhibited as M.O.I. Accused persons did not adduce any defence evidence.

5. Learned Additional Sessions Judge accepted the alternative defence plea and also found contradictions in the evidence of eyewitnesses and accordingly found the accused persons not guilty of charge and acquitted them u/s 235(1) Code of Criminal Procedure.

6. Learned Standing Counsel, vehemently, criticizes the impugned judgment on the ground that Learned Addl. Sessions Judge has neither determined the point for determination nor decided the same systematically. He further argues that the view expressed by the Trial Court on the conduct and credibility of the prosecution witnesses is totally partial and also infested with perversity. Accordingly, he argues to set aside the order of acquittal against accused Jibardhan. He argues that the evidence on record clearly establishes a case of homicidal death of the deceased and because of the quarrel preceding the assault, if not u/s 302 I.P.C., at least accused Gobardhan is liable u/s 304 I.P.C. and similarly accused Dayanidhi and Jibardhan under Sections 323/34 I.P.C.

7. Learned Counsel for the accused-Respondents, on the other hand, argues that this being an appeal against the order of acquittal, this Court should go slow to

interfere with such an order unless glaring circumstances are exhibited to show the impugned order to be illegal. He argues that the view expressed by the Trial Court may be deficient in expression but supported by reasons so as to justify that even if not a clean cut acquittal, accused persons are entitled to benefit of doubt for exercising the right of private defence. He also argues that P. Ws. 1 to 3 being brother, widow and brother-in-law (wife's brother) of the deceased, they are highly interested witnesses for the prosecution. When admittedly the other independent eyewitnesses are available, no explanation was put forth by the prosecution for their non-examination. When P. Ws. 1 to 3 suppressed the truth about the manner in which the occurrence took place and that has been sufficiently substantiated from the evidence of P. Ws. 4 and 5, the other two eyewitnesses to the occurrence, the principle of quality and not the quantity is not available in this case so as not to seek corroboration of the independent eyewitnesses. Accordingly, he argues that the order of acquittal may be maintained. Learned Counsel for the accused-Respondents, further, argues that no case u/s 323/34 I.P.C. has been made out against the above named two accused persons and so far as accused Gobardhan is concerned, he is entitled to the protection of exception for exercising right of private defence.

8. Indeed we find that Learned Addl. Sessions Judge was whimsical in deliberating on the issues and determining the same. When the charge is u/s 302 I.P.C. it is the bounden duty of the Trial Court to determine as the first and foremost point if the prosecution has proved a case of homicidal death of the deceased. Notwithstanding failure of the Trial Court, the Appellate Court cannot wriggle out from that position to determine that issue. In that respect, evidence of P.W. 8 is relevant, which is corroborative to the evidence of P.W. 6, the treating physician at the Sub-divisional hospital in respect of injuries on the dead body of the deceased. P.W. 8 described that there were three abrasions respectively on the right side of right eye, 1" x 1", lateral malleolus on left side, 1/4" to 1/4", left ankle 1/4" x 1/4". On dissection, he found linear fracture of skull from left temporal region to right temporal region, depressed fracture of skull on right parietal bone, 2" x 1/2" and extradural blood clot on vertex, 2" x 2" x 1/8", subdural clot on right cerebral hemisphere 4" x 3" x 1/8" and subdural blood clot on the whole of right temporal lobe. P.W. 8 opined that death was due to ante-mortem head injury and such injuries were sufficient to cause the death of the deceased. The post-mortem report, Ext. 8 was proved by P.W.

9. He stated that the head injury was possible by means of weapon like M.O.I. That opinion was not disputed by the accused persons. Therefore, such evidence of P.W. 8 clearly proves that the deceased suffered homicidal death.

10. The next crucial factor falls for consideration is as to whether the accused-Respondents or any of them is responsible for such homicidal death of the deceased. Each of P. Ws. 1 to 3, narrated innocently that accused Jibardhan and Dayanidhi picked up quarrel as the aggressor and the protest of the deceased resulted in physical violence on him by fist and slap blows by the said two

accused persons and then accused Gobardhan suddenly arrived at the spot with spade and dealt two spade blows (on the blunt side of the spade) on the face and the head of the deceased. They denied to the defence question as well as suggestion that the deceased was holding an umbrella of which handle was made of iron and that he assaulted the accused/Respondents as the aggressor. P. Ws. 4 and 5 however did not support the prosecution in the manner P. Ws. 1 and 3 supported. Each of them in course of their evidence stated that the deceased was the aggressor and assaulted the accused. P.W. 4 does not speak of any assault by the accused persons and P.W. 5 declines to be present at the spot to witness the occurrence of assault by the accused persons. Section 164 Code of Criminal Procedure. statement of those two witnesses were confronted to them. Learned Addl. Sessions Judge has recorded that indeed those two witnesses deposed before the Magistrate that the deceased was the aggressor, being armed with an umbrella. Once that be so, even if, P. Ws. 1 to 3 are the close relatives of the deceased, their evidence is to be scrutinized and suppression of facts in their evidence may be looked with suspicion for not accounting for the occurrence in its true and correct manner. In view of the statement of P. Ws. 4 and 5 u/s 164 Code of Criminal Procedure, which was recorded during the course of investigation, P. Ws. 1 to 3 were found to be suppressing the truth. P. Ws.1 and 2 were also confronted with the statement that they did not state before the Investigating Officer about certain parts of the allegation of overt acts of the accused on the deceased. Such evidence has also been confronted to the Investigating Officer, P.W.

11. Thus, notwithstanding the incorrect appreciation of evidence by Learned Sessions Judge, so as to reach to the order of acquittal, on our perusal of the evidence, we find that it is not safe to rely on the evidence of P. Ws. 1 to 3, whose evidence is infested with hostility and suffering from suppression of material facts.

12. For the reasons indicated above, we do not feel it proper to interfere with the order of acquittal. Accordingly, we dismiss the Government Appeal.