
(1975) 10 OHC CK 0003
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Domana Majhi and Others

RESPONDENT

Date of Decision : 01-10-1975

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (1975) 41 CLT 1283 : (1976) CriLJ 605

Hon'ble Judges : P.K. Mohanti, J;K.B. Panda, J

Bench : Division Bench

Judgement

K.B. Panda, J.—This is an appeal filed by the State of Orissa against an order of acquittal passed by the Sessions Judge, Bolangir-Kalahandi in Sessions Trial No. 19-K of 1072, wherein six of the respondents, namely, Domana Majhi (Respondent No. 1), Lakhidhar Majhi (respondent No. 2), Mahadev Majhi (respondent No. 3), Dhanu Bhoi (respondent No. 4), Prahalkd Majhi (respondent No. 5) and Khageswar Majhi (respondent No. 9) were facing trial under Sections 302 323 and 324, Indian Penal Code and 324 Indian Penal Code and all the 30 respondents under various sections such as Sections 148 302/149 326/149 - and 324/149; Penal Code.

2. The deceased Butla Sindur as well as all the respondents belong to village Jhikimiki under Kalahandi Sadar Police Station lying at a distance of 19 kilometers from the P.S. "The deceased was in possession of certain communal grazing land for ,10 to 12 years. In the year 1971, he had raised Kulthi (horse gram), Rasi(Til), Mania and paddy crops in the said land. The villagers did not relish the and am that account he had enmity with almost all the villagers. : The prosecution ease is thus on 14-10-1971 the deceased went to watch his airproofs. Khageswiar Majhi Rorer who is a arm servant of Domana Bhoi alias Majhi (R. 2) strayed his cattle and damaged the ,crop of the deceased When vie deceased, protested" gainsaid this action. It is .alleged, that respondent No., 2 geese nutmeat, threat with dire consequences. The deceased returned home in a depressed, "mood" about noon on account of the damage is his crops and the

that and feldspar to his often Hlfim-tbars Including; We wife. Some time after he paid otmtvpteto his wife -to obtain rice. His wife (P.W. 1) purchased some rice from the house of Bhutunga Bhoi (R. 14) and while returning home found that all the respondents had gathered in the thrashing floor of respondent No. 1 armed with lathis and were talking amongst themselves to wipe out the family of the deceased and to drive them away from the village at ell cost. P.W. 1 returning home with rice narrated what she had seen and heard. Soon after, the respondents armed with lathis came upon their house. Three of the respondents dragged the deceased from his front verandah to the courtyard and dealt blows on his head. Some one pulled out a Tangi (axe) that was lying there and dealt blows with that also. The deceased's son, and two of the daughters-in-law of the deceased who had concealed themselves in a room adjacent to it for fear of life were also not spared. Six of the assailants broke open the door and caused various injuries on them. Seeing this the wife of the deceased with her younger daughter-in-law (P.W. 4) some how slipped out of the house to village Aphuapada to the house of her another daughter named Kalimati (P.W. 6). While so fleeing, they found how their cottage was levelled to the ground. Then P.W. 1 with her son-in-law Buti Sunari proceeded to Bhawanipatna P.S. and lodged the T. I. R. (Ex. 1) at about 11 p.m. On receipt of the F. I. R., P.W. 10 the Officer-in-charge of Bhawanipatna P.S. drew up the formal F. I. R. (Ex. 29) and (immediately deputed Shri V. G. Sahu, Sub-Inspector of Police to the spot in a police vehicle. While P.W. 10 was still present at the Police Station, the said Sub-Inspector returned with eight of the respondents including Dhanu, Domana, Lakhidhar, Mahadeb and Khageswar who were arrested at about; midnight. Thereafter P.W. 10 visited the spot, took steps for medical examination of the injured persons, held inquest and after some seizure and completion of the investigation submitted charge sheet against the respondents under Sections 147 452 143 326 427 307 and 302 read with Section 149, Indian Penal Code. All the 30 respondents were committed to the Court of Session on the above charges which were heaver modified, in that six of them, namely, Domana. Majhi, Lakhidhar Majhi, Mahadev Majhi, Dhanu Bhoi, Prahallad Wajhi, an& Khageswar Majhi, as above-mentioned were, charged under, Sections 302 326 and 324. Indian Penal Code specifically and they along with all the rest were charged with Sections 148 302/149 328/149 and 324/149, Indian Penal Code. But all the accused persons were acquitted of all the charges against them resulting in this appeal by the State.

3. The plea of the respondents was a bare denial of their participation in the alleged crime with a suggestion that there was no such occurrence and that the family members of the deceased were deposing falsely against them due to enmity.

4. There are 14 witnesses for the prosecution out of whom P.Ws. 1, 2, 3, 4 and 5 are eye-witnesses to the occurrence. P.Ws. 6 and 7 are two post-occurrence witnesses of village Aphuapada. As already said P.W. 1 with her daughter-in-law (P.W. 4) had escaped to the house of P.W. 7 (her daughter P.W. 6's father-in-law)

for shelter. P.Ws. 6 and 7 learning all about the act of lawlessness and vandalism "at sunset time came to the house of the deceased and found the father dead, the son injured and speechless under debris and P.W. 3 (a daughter-in-law) lying injured almost naked with her two children crying helplessly and the cottage pulled down. P.W. 8 the only" witness of the village turned hostile-P.W. 9 a witness to the various seizures (Sampanas of Dadpur Gram Panchayat) deposed in chief that "the roof of the house of the deceased appeared to have collapsed with the walls having given way" but in cross-examination explained it away saying that it was due to heavy rain and storm "the -previous night". If this witness is to be given any credence, then this must have been a very peculiar and discriminating rain and storm that appeared only to affect the cottage of the deceased and no other. P.Ws. 11, 12 and 13 are the three doctors; the first held post-mortem over the dead body and the other two examined the injured P.Ws. 2 and 3. P.Ws. 10 and 14 are the two Investigating Officers and the rest are formal witnesses. There is only one witness for the defence - Phangal Majhi, who supports the plea of alibi taken by Nilambar Bhoi (R. 16).

5. The learned Sessions Judge has acquitted all the respondents mainly on the ground that the evidence of the eyewitnesses is discrepant, that they are all interested belonging, as they do, to the family of the deceased and that there is no independent corroboration. The sole question for consideration therefore is if the assessment of evidence by the learned Sessions Judge in the circumstances of the case is invulnerable and leaves no scope for interference and more so when it is an appeal against acquittal, where to the considerations are stringent.

6. The undisputed hard facts are that the villagers of Jhikimiki did not like that the deceased would cultivate the communal land meant for grazing of the cattle. It is not disputed that on the date of occurrence, that is, U-10-IWtl he has been killed and his son and one of the daughters-in-law had received serious injuries and each of them had been hospitalised. It is also in evidence and not challenged that his humble cottage had been levelled to the ground though attributed to rain and storm. After this occurrence the family members of the deceased have migrated to village Aphua.-pada. The deceased and the injured persons had the following injuries.

P.W. II who held the post-mortem examination on 16-10-1971 at 11 a.m. had detected one contusion of 5" X 3" with fracture underneath the lower part of the back, a contused lacerated wound of 4" X 1" X 1/2" over the left frontal parietal region of the head, and another contused lacerated wound on the right parietal region of the head of 1"X1/2X1/2". The body was slightly decomposed. In his opinion, the injuries were antemortem and death was due to injuries 1 and 2. From this, there can be no doubt that he was the victim of a homicidal attack on the alleged date Judea Sancta is the son of the deceased. P.W. 13 who examined him on 15-10-1971 found the following injuries:

(1) One incised wound 1 1/2" X 1" over the lateral aspect of the lower third of the right arm, simple in nature, caused by sharp weapon.

(2) Comminuted and compound fracture of the left side body of the mandible with loss of left canine and left two incisor teeth.

(3) One incised wound 2" x lip thickness close to the left angle of the mouth on the lower lip.

(4) Dislocation of the right elbow joint.

In his opinion, all the injuries were likely to have been caused within 12 to 24 hours before the examination. He stated that the patient was hospitalised and was discharged on 5-11-1971. His report is Ext. 34/1. From his evidence it is clear how the injuries coincide with the time of occurrence which cannot be caviled at.

The third injured is Satabati Ghasiani (P.W. 3), a daughter-in-law of the deceased, examined by the lady doctor (P.W. 12), She examined her on police requisition on 15-10-1971 at 5 p.m. and found the following injuries:

(1) Lower half of the left arm was swollen and there was abrasion of the skin 1" above the back of the elbow joint of the size 1" X 1/4".

(2) The left hand was found swollen and there was a lacerated wound over the middle and ring fingers of the size 1" x 1/2".

(3) The right hand was found swollen, but there was no mark of any external injury.

(4) The right leg and foot were found swollen, but there was no mark of injury.

(5) There was a fracture of the tibia at the junction of the upper 2/3rd and the lower 1/3rd. This injury was grievous.

According to her (P.W. 12), Satabati sustained the injuries-12 to 48 hours before examination (Ex. 32/1). She further stated that the patient was admitted into the hospital. The only suggestion to her was that injury No. 5 could be caused by a fall. But there was no occasion for the patient to have so many falls to get all the injuries on both the hands and the legs including the grievous one and that too so as to relate to the time when the prosecution alleges the occurrence to have taken place.

7. From the injuries on the deceased and the two injured, P.Ws. 2 and 3, there can be no doubt that in fact the deceased and his family members had been attacked in consequence of which the head of the family died and his son and one daughter-in-law received amongst others two grievous injuries for which they had to be hospitalised the next day. The defence admits of enmity for their implication in the charges. Thus it is only a question of sifting the evidence to appraise how far the prosecution has been able to establish beyond any reasonable doubt that the respondents were involved in this crime. In this context, the further background of the case cannot be lost sight of, in that, all the villagers were hostile to this family for having raised crops on a pasture land;

that his house alone has been levelled to the ground according to the defence suggestion in the alleged storm and rain and that, the family has migrated to another village.

8. The learned Sessions Judge, as already stated, has disbelieved the eye-witnesses to the occurrence on the ground of discrepancy in their statements. As will be discussed hereafter, these discrepancies are inevitable. Further, where he found no contradiction or discrepancy, he characterised that evidence as "parrot-like" and in case of inconsequential discrepancies made much of it and acquitted all the respondents.

9. The very fact that in course of that night at about 11 p-m., P.W. 1 who is an elderly woman rushed to the Police Station 19 kilo metres away and narrated the harrowing tale (Ex. 1) wherein all the broad details of the incident are there, is very significant. Her daughter Kalimati (P.W. 6) to whose house she had escaped that afternoon getting information from her mother came to the place of occurrence with P.W- 7 and both found Butla lying dead in the courtyard and the house razed to the ground. They also found P.W. 2 lying injured under the wreckage and was not able to talk. They further found Satabati (P.W. 3) lying injured in the courtyard almost naked and her two children, a daughter and a son, crying helplessly near her. P.W. 6 covered Satabati with a saree and carried her to village Aphuapada. The next morning the police brought Satabati from Akhuapada to Bhawanipatna P.S. in a bullock cart. The evidence of these two post-occurrence witnesses (P.Ws. 6 and 7) lends great support to the prosecution case. The learned Sessions Judge has also discarded the evidence of the meeting referred to by P.W. 1 in the thrashing floor of respondent No. 1 where deliberations were going on to attack them. P.W. 9 the Sarpanch stated that from the house of respondent No. 14 from whose house P.W. 1 had purchased rice, the thrashing floor of respondent No. 1 would not be visible and so the learned lower Court came to the conclusion that she was deposing falsely. In the admitted background of the case that the entire village was hostile to this family, the conclusion arrived at by the learned Sessions Judge that the occurrence must have taken place at some other time for which the family members are unable to give a consistent version without any discrepancy is something very difficult to accept since that ill accords with the general trend of the case. It is also in evidence that two of the villagers such as Saga Gouda and Nanda Gouda filed a petition before the committing Magistrate on 23-10-1971 offering themselves to be witnesses, but they were not examined. Much was made of this to show that it was a big bustee where independent witnesses were available and even witnesses volunteered to depose but neither the Police examined them nor the Court gave them a chance to be examined. These contentions do not hold any water. The prosecution is not bound to examine witnesses who are hostile to the prosecution and would damage its case. It can very well rely on circumstantial evidence. These two villagers Saga Gouda and Nanda Gouda were ordered to appear on the due date but they were absent on any other occasion to depose. Even the respondents did not offer themselves to be examined nor did they cite

these persons as witnesses in their favour if really nothing of the sort as put up by the prosecution happened on the alleged date and time. Therefore, the criticism that though independent witnesses were available yet only the family members were examined loses all its significance in this background. In this context, it may be stated that there is no rule either of law or of prudence that family members are incompetent witnesses. There may be cases where only the family members will be the witnesses to the occurrence, and their evidence is not to be jettisoned merely on the ground of interestedness, provided it is otherwise credible and fits in with the broad probabilities of the case. In the instant case, the criticism therefore that only the family members were examined and no independent witnesses in view of the background already indicated, is barren of substance.

10. Next coming to the alleged discrepancies in the statement, P.W. 1 has stated in the Sessions Court that respondents Nos. 1, 9 and 14 followed by respondents Nos. 2, 4 and 13, all armed with lathis came rushing towards their house. Her husband was sitting on the verandah. In the Sessions Court she stated that respondents Nos. 1, 9 and 14 first dragged her husband from the verandah, threw him down and thereafter respondent No. 1 gave a lathi blow on the head, respondent No, 9 dealt another blow with lathi on the left side of the head and respondent No, 14 then dealt a third lathi blow to the back side of the head. Thereafter respondents Nos. 1 and 9 exhorted other accused persons to further assault the deceased. Then respondent No. 4 dealt a lathi blow on the right side of the chest and the other two accused also assaulted him. She clearly stated that the remaining 24 accused did not assault her husband but they pulled down the house. The comment over her statement is that she had implicated respondents Nos. 1, 2, 4 and 9 while in the F. I. R. she had implicated respondents Nos. 1, 2 and 5 only in assaulting her husband and in committing Court she had implicated respondents Nos, 1, 2 and 9 to have dragged her husband and Respondents Nos. 10, 13 and 14 taking part in the assault along with Respondents Nos. 1, 2 and 9. Her consistent version in the committing Court as well as in the Sessions Court is that Respondents Nos. 1, 2, 4 and 9 dealt blows on her husband. Regarding assault on others she has stated that "after assaulting her husband six accused broke open the door of a room wherein her son P.W. 2 and daughter-in-law P.Ws. 3 and 4 had concealed themselves and assaulted them severely. In the committing Court she has similarly stated that six accused persons who had assaulted and killed her husband, assaulted her son and his wife. No contradiction has been brought out in her statement before the police or in the F. I R. One cannot expect in the circumstances of this case and the time-lag between which she was deposing a quite non-discrepant statement as to the manner or sequence of assault, as also the location of assault by the different accused persons. This is only natural of any witness much more so in case of an illiterate witness like P.W. 1. To expect the contrary is to expect something which is unnatural.

P.W. 2 the son of the deceased has stated in the Sessions Court that respondents

Nos. 1, 2, 4, 9, 13 and 14 came rushing towards the house and respondents Nos. 9 and 14 dragged the deceased to the courtyard and thereafter respondents Nos. 1, 9 and 14 started assaulting him and on their exhortation respondents Nos. 2, 4 and 13 also assaulted the deceased. Before the Police, P.W. 2 had stated that Respondents Nos. 3 and 5 were among the six persons who first came to their house and respondents Nos. 1, 2 and 5 dragged his father to the courtyard. Before the committing Court he had implicated respondents Nos. 1, 2, 4, 9, 13 and 14 to have come to their house first and out of them, respondents Nos. 1, 2 and 9 dragged his father and all the six respondents (1, 2, 4, 9, 13 and 14) assaulted him with lathis.

P.W. 3 the daughter-in-law, wife of P.W. 2 in the Sessions Court had stated that respondents Nos. 1, 2, 4, 9, 13 and 14 came to their house armed with lathis and thereafter respondents Nos. 1, 9 and 14 dragged the deceased from the verandah to the courtyard and assaulted with lathis. Thereafter, respondents Nos. 2, 4 and 13 further assaulted the deceased. Before the Police she had not stated respondents Nos. 13 and 14 to have come to their house or about respondents Nos. 9 and 14 to have dragged the deceased to the courtyard. It all depends upon the questions put to her by the Police and all omissions are not contradictions. Before the committing Court she did not state that respondent No. 14 had dragged her father-in-law. There was a general comment on the evidence of P.Ws. 2 and 3 that they having concealed themselves behind a closed door, could not have seen anything of the occurrence and were deposing being tutored. This may prima facie appear plausible but really has no force for they did not hide themselves at the mere sight of the mob. It is only when the mob made a determined attack on the deceased that they apprehended assault on them and so took to hiding. Besides the door of the humble room into which they got in, is of split bamboos - which is ordinarily not sight or light proof, nor there is any cross-examination on the point to suggest that it was so.

P.W. 4 is another daughter-in-law of the deceased. She stated that respondents Nos. 1, 9 and 14 came to their house armed with lathis followed by respondents Nos. 2, 4 and 13. Then respondents Nos. 1, 9 and 14 dragged the deceased from the verandah and assaulted him. Thereafter respondents Nos. 2, 9 and 13 further assaulted the deceased. Before the Police she had not stated that respondents Nos. 9, 13 and 14 came to the house and dragged and assaulted the deceased but that is Just a different way of narration - which cannot be said to be a contradiction. She had specifically stated that respondent No, 2 had assaulted the deceased with a Tangy. Before the committing Court she had stated that respondents Nos. 1, 2 and 9 dragged the deceased and assaulted and then respondents Nos. 4, 13 and 14 also assaulted.

P.W. 5 is a girl of 7 years, the grand-daughter of the deceased. She stated that respondents Nos. 1, 2, 4, 9 and 13 and 14 assaulted the deceased with lathis. Before the committing Court also she had stated the same thing. She made certain confusion in identification and so the learned lower Court discards her

evidence saying that she was a tutored witness who was deposing "parrot-like". Of course, we are not going to attach an importance to her evidence and would brush it aside from consideration. But all the same, we wish to point out how the learned Sessions Judge in case of consistency in the evidence dubs it as "parrot-like" and in case of inconsistency discards it as unbelievable without taking pains to sift the grain from the chaff.

11. We have stated the broad features of the case which cannot be doubted. The head of the family, because of animosity with the villagers was killed. The son present was severely assaulted and was salvaged while lying speechless under the wreckage of the cottage that was demolished. The female members who attempted to escape were also not spared. From the evidence of P. Ws, 6 and 7 the post-occurrence witnesses, it is clear how the whole family was in peril; nobody to sympathies with them and little children crying helplessly about Information about the occurrence was lodged in course of the night. What better circumstantial evidence be there; and further if in the circumstances the family members come and depose why should they be disbelieved ? We find no reasonable basis for the learned lower Court in discarding their evidence and acquitting all the accused respondents. The witnesses are interested and their evidence is discrepant is an easy method of disposing of a case in a mechanical manner without proper application of the mind and appraisal of the evidence regard being had to the peculiar circumstances of each case. We are aware of the tendency in cases of village rivalry to rope in even innocent persons or bystanders. But there is no inflexible rule that however convincing the circumstances may be or whatever be the evidence of the victim's family, all that should be ignored. Thus on a thorough scrutiny of the evidence and giving the greatest benefit to accused respondents, we find respondents Nos. 1, 2, 4, 9, 13 and 14 beyond doubt to have taken direct part in the riot. Therefore, on the basis of the oral evidence of P.Ws. 1 and 4 and the injured persons P.Ws. 2 and 3, the medical evidence, the lodging of the F. I. R. immediately after the occurrence, the evidence of the post-occurrence witnesses P.Ws. 6 and 7 and the broad features, namely, demolition of the house and migration of the family to another village in the background of their enmity -with the villages, there is no scope for any doubt that the occurrence did not take place as depicted by the eye-witnesses.

12. All these facts and circumstances clearly establish that respondents Nos. 1, 2, 4, 9, 13 and 14 along with some others formed an unlawful assembly. The manner in which they came in concert and the merciless beating they gave to the deceased and P.Ws. 2 and 3 demonstrates what their common object was. At least they had the common object of committing the murder of Bhutla Sindur and causing hurt to his family members and in prosecution of these common objects, they killed the deceased and caused injuries to P. Ws, 2 and 3. One of the injuries on P.W. 2 has been proved to be grievous in nature. There is however no specific evidence as to who actually dealt the fatal blow to the deceased or caused the grievous injury to P.W. 2. On the facts proved, we are satisfied that

the six respondents must be convicted under Sections 148 302/149 326/149 and 324/149, Indian Penal Code even though it cannot be said who actually caused the fatal blow to the deceased, the grievous injury to P.W. 2 and the simple injury to P.W. 3. The order of acquittal passed against them is set aside and they are convicted under Sections 302/149 and 326/149, Indian Penal Code and on the former count sentenced to imprisonment for life and on the latter R. I for one year each. They are also convicted u/s 148, Indian Penal Code and sentenced to undergo R. I. for one year each. They are further convicted u/s 324/149, Indian Penal Code and sentenced to undergo R. I. for six months each. The sentences awarded against each of them shall run concurrently. The order of acquittal so far as it relates to the other 24 respondents is confirmed. Their bail bonds be cancelled.

13. The appeal is allowed in part. Respondent No. 1 Domana Majhi, respondent No. 2, Lakhidhar Majhi, respondent No. 4, Dhanu Bhoi, respondent No. 9, Khageswar Majhi, respondent No. 13 Gan-gadhar Bhoi and respondent No. 14 Bhu-tunga Bhoi should surrender to their bail bonds forthwith if they are already on bail.

P.K. Mohanti, J.

14. I agree.