
(2008) 09 OHC CK 0080
In the Orissa High Court
Case No : Govt. Appeal No. 18 of 1995

State of Orissa

APPELLANT

Vs

Upendra Pradhan

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366, 378(1)
Evidence Act, 1872 — Section 154
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2009) 42 OCR 59 : (2009) 1 OLR 344 Supp

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

Bench : Division Bench

Advocate : A.K. Mishra, for the Appellant; Gouri Sankar Pani, for the Respondent

Final Decision : Allowed

Judgement

1. Heard argument from the parties, hearing is concluded and the judgment is as follows,
2. This Government Appeal is directed against the order of acquittal granted to the sole Respondent Upendra Pradhan in the judgment passed on 03.12.1994 by learned Addl. Sessions Judge, Sambalpur in S.T. Case No. 28/7 of 1994.
3. A short narration of the relevant events being in the impugned judgment, is needed to be noted as hereunder.

Accused Sanatan Pradhan is the father and accused Upendra Pradhan, Debendra Pradhan and Rabindra Pradhan are his three sons. Accused Jema Dei is his wife. As per the prosecution allegation, a dispute arose between accused Sanatan and his younger brother Brundaban (P.W.7) when the latter did not yield to the request of accused Sanatan to part with the "Patta".(Record of Rights) of the land so as to facilitate accused Sanatan to obtain a loan on mortgage. Accused Santan convened a village Punch, in which Brundaban was directed to collect "Patta" from the mother and to hand it over to accused Sanatan. Accused

Sanatan and his family members bore grudge against Brundaban for non-complying with that order of the village Punch and declared to eliminate the entire family of Brundaban, P.W.7.

Radha Pradhan (P.W.1) is the wife of P.W.7, Deceased Sanjib, Pravasini and Rajib are their three children. According to the prosecution case, on 29.08.1993 at about 8.00 p.m. all the accused persons, in furtherance of their common intention, attempted murder of P.W.7 and also killed the above-named three innocent children of P.W.7. The local Sarapanch informed the matter to Jujumura Police Station. On the basis of such information, investigation was undertaken and charge-sheet was filed and ultimately after commitment of the case to the Court of Sessions, charges were framed u/s 307 and 302 read with Section 34 of the I.P.C.

To substantiate the charge, prosecution relied on the evidence of 15 witnesses and documents marked Exts.1 to 23 besides the weapon of offence, M.O. I and the wearing apparels of the deceased persons as M.Os. II to IV. In furtherance of their plea of denial, accused persons examined one witness, i.e., D.W.1, to prove the plea of alibi of accused Sanatan.

4. In course of the investigation, accused Rabindra made confession before the Judicial Magistrate First Class (P.W.15) and that confessional statement was marked as Ext.23. The post-mortem reports of deceased Sanjib, Pravasini and Rajib are respectively marked as Exts.15, 9 and 10. No document or Material Object was produced from the side of the defence.

5. On assessment of the evidence, learned Addl. Sessions Judge found accused Sanatan, Rabindra and Debendra guilty of the offence u/s 302/34, I.P.C. Amongst them he sentenced accused Sanatan and Rabindra with capital punishment and awarded life imprisonment to accused Debendra. He also found all the above three convicts guilty of the offence u/s 307/34, I.P.C. and awarded sentence of imprisonment for life. Learned Addl. Sessions Judge granted acquittal to accused Jema Dei and accused Upendra. Prosecution allegation against accused Jema Dei was relating to instigation, whereas, as against accused Upendra in making active participation in the murder of the three children.

6. In view of the death sentence imposed against accused Sanatan and Rabindra, the Trial Court made a reference u/s 366, Code of Criminal Procedure and that was registered as Death Sentence Reference No. 1 of 1994. Accused Santan, Debendra and Rabindra also preferred appeals from the jail and they were respectively registered as Jail Crl. Appeal Nos. 436, 434 and 435, all of 1994. A Division of this Court analogously heard the aforesaid Death Sentence Reference and Jail Criminal Appeals and disposed of the same on 27.03.1995. The Court held in that judgment that, from the evidence on record accusation against each of the Appellants has been proved beyond all reasonable doubt and, therefore, the order of the Trial Court in recording the conviction of the Appellants was sustained. However, in the matter of death sentence Their Lordships held that

the circumstances behind the crime is good enough to take a lenient view and accordingly substituted that sentence by imprisonment for life.

7. The State filed leave application u/s 378(1), Code of Criminal Procedure s against the impugned judgment and on 15.05.1995 leave was granted and this Government appeal was registered. Thereafter service of notice on the accused-Respondent. Upendra Pradhan took a considerable time. However, by virtue of the order of this Court, accused Upendra Pradhan is on bail.

8. Putting forth the argument on behalf of the State, Mr. A.K. Mishra, learned Standing Counsel argues that learned Additional Sessions Judge has completely gone wrong by applying double standard in appreciation of evidence with respect to accused Debendra and Upendra. He argues that evidences of P.Ws.1 and 6 and 12 are the three relevant evidences which were taken into consideration and appreciating the same when accused Debendra was found guilty, the same set of evidence could not have been doubted so as to grant acquittal to accused Upendra. Accordingly he argues to set aside the order of acquittal of accused Upendra Pradhan and to convict and sentence him accordingly.

9. Mr. G.S. Pani, learned Counsel appearing for the accused-Respondent Upendra Pradhan, on the other hand argues that the order of acquittal in favour of accused-Respondent Upendra Pradhan, as noted by the Trial Court, is supported by justification in view of the evidence of P.Ws.6 and 12 and, therefore, no exception should be taken to that order passed in favour of the Respondent. Accordingly, he argues to dismiss the Government Appeal.

10. We may point out that though the appeal has been argued in detail on all relevant aspects, but there being no dispute at the Bar relating to the occurrence on 29.08.1993 and the preceding incidents besides the homicidal death of the three children and when to that effect not only the Trial Court has recorded the specific findings but also such findings, after proper examination, has been up held by this Court in the judgment delivered in the Death Sentence Reference No. 1 of 1994, therefore reiteration of the facts relating to that aspect and re-appreciation of the evidence in the same manner is not again reflected in this judgment save an except mentioning the relevant facts, which are necessary to be discussed to consider the contention of the rival parties.

11. According to the case of the prosecution, because of the threats given by the accused persons P.W.1 and her three children had taken shelter in the house of a co-villager namely Keshab Pradhan (P.W.10) and it was on 29.08.1993 that at about 8.00 p.m. PWs. 1 and 7 together with the children were returning to their house. According to the narration of events in the F.I.R. as well as in the evidence of the eye-witnesses to the occurrence beside the injured P.W.7, when they reached their house and at the point of conducting the children into the house that the male accused persons attacked and assaulted P.W.7. At that time, as alleged, accused Upendra Pradhan was holding a stick. On sustaining injuries caused by axe, P.W.7 groveled into the house of a neighbour namely Kulamani

Budhia and became senseless there and then three sons of the accused Sanatan, i.e., accused Debendra, Upendra and Rabindra focused their attention on the three children in the house and, as alleged, deceased Sanjib, the eldest of the child was caught-hold from both sides by accused Upendra and Debendra and accused Rabindra dealt axe blows causing injuries on the neck and other parts of the body. Then accused Upendra caused injuries on the girl child Pravasini and killed her and thereafter accused Debendra and Upendra caught-hold of child Rajib, the second son of P.W.7 and accused Rabindra dealt axe blows and killed him. P.W.1 as the mother besides P.Ws.6 and 12, as per the prosecution, witnessed this ghastly scene. On the shout of P.W.1 when the co-villagers came out, the accused persons decamped and P.W.1 brought all the three deceased children from inside the room to front of the house. Then P.W.7 in severely injured condition was lying senseless, as stated above, in a neighbour's house.

12. To account for the aforesaid occurrence, prosecution relied on the evidence of P.Ws.1, 6 and 12. Amongst them P.W.1 fully supported the prosecution case and narrated the occurrence in the above-indicated manner. P.W.6 on the other hand stated that by the time of the aforesaid occurrence, i.e., when P.Ws.1 and 7 were coming to their house with the deceased children, she was preparing "Bidi" sitting on the verandah of one Kulamani Budhia and two other ladies namely Dutika and Thaka were also preparing "Bidi" at that time. It appears from the evidence of P.W.12 that at such time sitting on the verandah of one Snehalata she was preparing "Bidi". P.W.6 narrated about the assault on P.W.7 and thereafter the three accused Debendra, Upendra and Rabindra entering into the house of P.Ws.1 and 7 killed the three children and coming out therefrom after half an hour and that thereafter P.W.1 entered into her house and brought out the dead children. However, in course of such examination, being permitted by the Court, prosecution put leading questions in accordance with Section 154 of the Evidence Act and at that stage P.W.6 stated that

It is a fact that I have stated to the I.O. that accused Debendra and Upendra caught hold of the arms of the deceased, 2 sons and one daughter of Brundaban and accused Rabindra gave blows with an axe on their necks, heads and other parts of their body, in presence of P.W.1 and that the deceased had succumbed to the injuries.

In course of the cross-examination of P.W.1 or P.W.6 nothing was brought out from the mouth of these two witnesses to show or suggest that accused Upendra was not present there. Even suggestions were not given denying to the presence or participation of Upendra in the crime in the above-indicated manner. P.W.12 in her evidence also supported the prosecution case regarding P.Ws.1 and 7 returning to their house with the children and P.W.7 being assaulted by means of an axe on his neck and head. She further stated that she found accused Upendra and Debendra entering into the house of P.W.7 and that time she did not see the wife of P.W.7 (i.e., P.W.1) being present there. She further stated that when accused persons entered into the house of P.W.1 out of fear she ran to her house

and could not see anything else. In the cross-examination therefore she has admitted to have not seen accused Debendra and Upendra being present there or holding any weapon.

13. Capitalizing on the aforesaid evidence of P.W.12, learned Additional Sessions Judge recorded that

The evidence of P.W.12 preparing Bidi on the verandah of Kulamani Budhia has not been challenged by the prosecution to the extent of her finding accused Upendra absent from the spot. Statements of P.Ws.1 and 6 showing the part played by Upendra in catching deceased Pravasini are not in conformity with each other. There is scope to entertain doubt about the prosecution involving accused Upendra in this case. The benefit of such doubt shall be given to him.

The aforesaid finding undoubtedly runs contrary to the evidence on record and can be commented as perverse, in as much as P.W.12 stated that he was sitting on the verandah of one Snehadata. Apart from that, her evidence is that she could not notice presence of Upendra. That evidence itself is contradictory in view of the fact that in paragraph-3 of her deposition (in cross-examination) she stated that, "I have not seen any weapon held by accused Debendra and Upendra". If those persons were not present at the spot, then there was no question of seeing them empty handed or with weapons. All that can be said about this witness is that either she had confused and could not give the correct picture about the occurrence or that she had been gained over to suppress a part of the fact relating to participation of accused Debendra and Upendra. In any event the evidence of P.Ws.1 and 6 was found credible with respect to accused Debendra and that finding of the trial Court was also upheld by this Court in the appeal. The evidence of P.W.12 does not make a distinction between accused Debendra and accused Upendra and therefore the same analogy has to follow. P.Ws.1 and 6 have also stated regarding presence of accused Upendra at the scene of occurrence and participation in the crime. Under such circumstance the order of acquittal recorded in favour of accused Upendra is illegal and accordingly set aside. Since he actively participated to facilitate accused Upendra to deal axe blows to deceased Sanjib, Rajib and Pravasini, therefore, there remains no doubt about accused Upendra sharing the common intention in furtherance of the murder of the three innocent children.

14. At this stage learned Counsel for the Appellant argues that by the date of trial accused was aged about 17 to 18 years and in the meantime about 14 years have elapsed and, therefore, an order imposing sentence by curtailing his liberty may not be in the interest of justice. In reply, learned Standing Counsel referring to the cases of *State of Orissa v. Dibakar Naik and Ors.* (2002) 22 OCR (SC) 734 : 2002 (I) OLR (SC) 682, and *State of Orissa v. Raghu Naik* 2002 OLR 665, argues that in those decisions the Hon'ble Apex Court and this Court have interfered with the order of acquittal, recorded the conviction and imposed sentence even after lapse of 15 to 20 years, and therefore in this case no exception should be taken for the lapse of time in between.

15. On consideration of the aforesaid contention and the facts and circumstances involved in this case, we find that when accused Upendra is a party to the ghastly murder of three innocent children, we find him guilty like other co-accused persons for the offence punishable u/s 302/34, I.P.C. Therefore, it is appropriate that accused Upendra should be awarded appropriate punishment instead of taking any other view. Accordingly, we record conviction of accused Upendra u/s 302/34, I.P.C. and sentence him to imprisonment for life, because that is the alternative and lesser punishment as provided in Section 302, I.P.C. Accused-Respondent Upendra Pradhan, who is on bail, be taken to custody to serve the sentence and steps be accordingly taken by the Trial Court immediately.

The Government Appeal is accordingly allowed.