
(2021) 03 OHC CK 0009
In the Orissa High Court
Case No : Criminal Appeal No.54 Of 1993

Sudarsan @ Aiban Naik And Others	Vs	APPELLANT
State Of Orissa		RESPONDENT

Date of Decision : 25-03-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 307, 323, 447
Code Of Criminal Procedure, 1973 — Section 394(2)

Citation : (2021) 03 OHC CK 0009

Hon'ble Judges : S. K. Sahoo, J

Bench : Single Bench

Advocate : Smruti Ranjan Mohapatra, Priyabrata Tripathy

Final Decision : Allowed

Judgement

S.K. SAHOO, J

1. The matter is taken up through Hybrid arrangement (video conferencing/ physical mode).

Three appellants, namely, Sudarsan @ Aiban Naik, Saheba Naik and Bhagaban Rout along with one Babu @ Baijendra Naik faced trial in the Court of learned Additional Sessions Judge, Sambalpur in S.T. Case No.67/5 of 1989-92 for offence punishable under section 307 of the Indian Penal Code. The learned trial Court vide impugned judgment and order dated 28.01.1993 though acquitted accused Babu @ Baijendra Naik and appellants nos.2 and 3 namely, Saheba Naik and Bhagaban Rout of the charge under section 307 of the Indian Penal Code but found the appellants nos.2 and 3 guilty under section 323 of the Indian Penal Code and sentenced them to undergo R.I. for three months. Similarly, the appellant no.1 Sudarsan @ Aiban Naik was found guilty under section 307 of the Indian Penal Code as well as under section 323 of the Indian Penal Code and sentenced to undergo R.I. for a period of three years and R.I. for three months respectively with a further direction that the sentences are to run concurrently.

The learned counsel for the State produced a letter dated 21.09.2020 of the Inspector in-charge of Kisinda police station in the district of Sambalpur which indicates that the appellant no.1 Sudarsan @ Aiban Naik died on 19.12.2014 and the appellant no.3 Bhagaban Rout died about seven years back. In view of section 394(2) of Cr.P.C., this appeal so far as appellant no.1 and appellant no.3 stands abetted.

2. The prosecution case, in short, is that Dwaru Rout (P.W.1) was the owner in possession of a piece of cultivable land locally known as Majhimunda, which was situated in village Ghodadian. In the year 1988, he had raised paddy crops thereon and on 14.11.1988 morning, while he was reaping the standing crops with his labourers namely, Keshaba Rout (P.W.2), Rajan Sahu (P.W.3) and Palau Naik (P.W.4), the appellants along with the co-accused Babu @ Baijendra Naik entered into the said land being armed with lathies and axe, challenged them and assaulted them. On account of such assault, Keshaba Rout (P.W.2) received serious injuries and was hospitalized and P.Ws.1, 2 and 3 also sustained some minor injuries.

On the basis of the first information report lodged by P.W.1 before officer in charge of Kisinda police station on 14.11.1988, Kisinda P.S. Case No.22 of 1988 was registered under sections 447/323/307/34 of the Indian Penal Code. P.W.10 Dhabaleswar Bibhar, who was the officer in charge of Kisinda police station, took up investigation of the case, visited the spot, examined the witnesses, sent the injured persons for medical examination, seized the lathies, arrested the accused persons and forwarded them to Court, made a query to the Medical Officer relating to the injuries sustained by P.W.2 Keshaba Rout and also recorded the dying declaration of Keshaba Rout (P.W.2) and on completion of investigation, submitted charge sheet against the appellants and co-accused Babu @ Baijendra Naik under sections 447, 323, 307/34 of the Indian Penal Code on 28.01.1989.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned trial Court framed the charge against the appellants and the co-accused Babu @ Baijendra Naik for the offence under section 307 of the Indian Penal Code on 20.09.1989. Since they refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

4. During course of trial, the prosecution examined ten witnesses.

P.W.1 Dwaru Rout is the informant in the case and he is an eye witness to the occurrence. He stated that while he along with P.Ws.2, 3 and 4 were cutting paddy from his land, all the four accused persons came being armed with lathies and axe and assaulted them.

P.W.2 Keshaba Rout, P.W.3 Rajan Sahu and P.W.4 Palau Naik are the injured eye witnesses to the occurrence.

P.W.5 Durjodhan Behera is the ward member of the village Godadhia of Giripur ward, who is a post-occurrence witness and stated that on being informed by the informant (P.W.1) about the occurrence, he came to the spot where he found Keshaba Rout (P.W.2) was lying in an unconscious state on the disputed land and he also saw bleeding injury on the head of P.W.2.

P.W.6 Kantharu Pera is also an eye witness to the occurrence and he stated that the accused persons came to the spot being armed with lathies, where there was some exchange of words between them and the accused persons assaulted P.W.1 and his labourers.

P.W.7 Chhabi Mahananda is a seizure witness vide seizure list Ext.5.

P.W.8 Raghunath Pradhan is the Sarpanch of Girishchandrapur Gram Panchayat, in whose presence, the 'panch faisala' (Ext.3) was executed.

P.W.9 Dr. Jayakrushna Sahu attached to Girishchandrapur Dispensary examined P.Ws.1 to 4 on police requisition and also the appellants Sudarsan @ Aiban Naik and Saheba Naik and proved the medical reports.

P.W.10 Dhabaleswar Bibhar was the officer in charge of Kisinda police station who is also the investigating officer in the case.

The prosecution proved eleven documents. Ext.1 is the F.I.R., Exts.2 and 5 are the seizure lists, Exts.3 and 4 are the Panch Faisalas, Exts.6 to 9 are the reports of P.W.9, Ext.10 is the opinion of P.W.9 and Ext.11 is the dying declaration.

The prosecution also proved four material objects.

M.Os.I to IV are the lathies.

5. The defence plea of the appellants is that the land belonged to appellant Bhagaban Rout which was transferred in favour of appellant Saheba Naik, who was his son-in-law and Saheba Naik was in possession of the land and on the date of occurrence, while the appellants were harvesting the paddy crops raised by them, the prosecution party members arrived at the scene of the occurrence and assaulted them, as a result of which, appellants Sudarsan @ Aiban Naik and Saheba Naik sustained injuries. It is pleaded by the appellant Bhagaban Rout and one Babu @ Baijendra Naik that they were not present at the spot.

The defence examined two witnesses. D.W.1 Bipina Dehury is an attesting witness to the sale deed (Ext.A) and D.W.2 Sambhunath Behera is a co-villager who is a post occurrence witness.

6. The learned trial Court after assessing the evidence on record has been pleased to hold that the appellant no.2 Saheba Naik had not sustained injuries during course of the occurrence and therefore, no duty was cast upon the prosecution to explain the injuries sustained by him. It is further held that the evidence adduced by the prosecution falls short of proof of any intention on the part of any of the accused to cause the death of any prosecution witnesses and

that the accused persons had no common intention to cause the injuries on P.Ws.1, 2, 3 and 4 and each of the accused shall be liable for his own individual act. Since injuries caused to P.Ws.1, 3 and 4 were simple injuries, it was held that the accused persons are liable for the offence under section 323 of the Indian Penal Code and not under section 307 of the Indian Penal Code. It was further held that so far injury caused to Keshaba Rout (P.W.2), the appellant Sudarsan @ Aiban Naik attempted to commit his murder and accordingly, he was found guilty under section 307 of the Indian Penal Code. The accused Babu @ Baijendra Naik was not found guilty of the charge under section 307 of the Indian Penal Code and he was acquitted. So far as the appellants Saheba Naik and Bhagaban Rout are concerned, though they were found not guilty under section 307 of the Indian Penal Code but they were found guilty under section 323 of the Indian Penal Code. So far as the appellant Sudarsan @ Aiban Naik is concerned, he was found guilty under section 307 of the Indian Penal Code as well as under section 323 of the Indian Penal Code.

7. Since the appeal remains to be decided only for the appellant no.2 Saheb Naik and no one appeared for him to argue the matter and it is a twenty eight years old appeal, Mr. Smruti Ranjan Mohapatra, Advocate was appointed as Amicus Curiae to argue the case for the said appellant. He was supplied with the paper book and given time to prepare the case. He placed the evidence of the witnesses and also the impugned judgment. While assailing the impugned judgment and order of conviction, learned Amicus Curiae raised a very vital contention that it is the prosecution case that the appellant no.2 only assaulted Dwaru Rout (P.W.1) for which he has been found guilty under section 323 of the Indian Penal Code but the statements of prosecution witnesses relating to such assault on P.W.1 are discrepant in nature. He argued that the appellant no.2 was sent for medical examination on police requisition and the doctor (P.W.9) examined him and noticed three injuries on his person i.e. one incised wound on the scalp, another incised wound on the left wrist joint and a bruise on the back side of the forearm and he opined that the injuries nos.1 and 2 might have been caused by heavy sharp cutting weapon like tangia and injury no.3 by blunt weapon like lathi and the prosecution has not explained as to how the appellant no.2 sustained those injuries which indicates that they have suppressed the genesis of the case and they have not come forward with clean hand. It is further argued that the learned trial Court has not given due importance to this aspect on a flimsy ground that the injuries which were sustained by appellant no.2 were fresh injuries and therefore, those were not caused during course of the same occurrence and therefore, no duty was cast on the prosecution to explain any such injuries. According to Mr. Mohapatra, it is a fit case where the appellant no.2 Saheb Naik should be given benefit of doubt.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel for the State, on the other hand, supported the impugned judgment and order of conviction and sentence imposed by the learned trial Court.

8. Adverting to the contention raised by the learned counsel for the respective parties, since the appellant no.2 has been found guilty under section 323 of the Indian Penal Code for causing simple injury on Dwaru Rout (P.W.1), it is to be seen how far the prosecution evidence is consistent in that respect.

P.W.1 has stated that appellant Saheba Naik gave him three lathi blows i.e. on his head (left side), shoulder and left wrist. He has not stated that any other accused persons assaulted him. However, P.W.2 Keshaba Rout, who is an injured eye witness, stated that all the accused persons reached at the spot being armed with axe and lathi and assaulted P.W.1. P.W.3 Rajan Sahu, another injured eye witness has not stated about any assault on P.W.1, whereas P.W.4 has stated that it was appellant Sudarsan @ Aiban Naik who assaulted P.W.1. P.W.6 stated that all the accused persons assaulted to P.W.1. Thus, if the evidence of these five eye witnesses is analyzed, it appears that whereas P.W.3 is completely silent as to who assaulted P.W.1, the evidence of P.Ws.1, 2, 4 and 6 are discrepant with each other so far as assault on P.W.1 is concerned. P.W.1 implicated appellant no.2 only in his assault, P.W.2 and P.W.6 have implicated all the accused persons in the assault of P.W.1, whereas P.W.4 implicated appellant Sudarsan @ Aiban Naik in the assault of P.W.1. In my humble view, the offence alleged against the appellant no.2 being minor in nature, such discrepancies cannot be ignored and be held to be inconsequential.

The investigating officer being examined as P.W.10 stated that a counter case was filed from the side of the appellants on the accusation that witnesses Dwaru Rout (P.W.1), Keshaba Rout (P.W.2), Rajan Sahu (P.W.3) and Palau Naik (P.W.4) assaulted the appellants Sudarsan Naik and Saheba Naik and those appellants sustained injuries and were sent for medical examination. The doctor (P.W.9) has stated that on 14.11.1988, on police requisition, he examined the appellant Saheba Naik and found one incised wound of size 1½" x 1/6" x skin deep on the scalp of the front part of the head, another incised wound 1½" x 16" placed on the back of the left wrist joint and a bruise with abrasion 6" x 1" was found on the back side of the forearm and the injuries were fresh. He further opined that the injury nos.1 and 2 might have been caused by heavy sharp cutting weapon like tangia and injury no.3 by blunt weapon like lathi. When P.W.1 was questioned about the assault on the accused persons in the cross-examination, he simply denied that they have not assaulted the accused persons and further stated that the accused persons had not sustained any injuries.

In the case of Lakshmi Singh -Vrs.- State of Bihar reported in A.I.R. 1976 S.C. 2263, the Hon'ble Supreme Court held that there might be cases where the non-explanation of the injuries by the prosecution might not affect the prosecution case, however, this principle apply only to cases where the injuries sustained by the accused are minor and superficial in nature or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

In the case in hand, one of injuries sustained by the appellant no.2 Saheba Naik was on his head and two of the injuries were caused by sharp cutting weapon and in such a scenario, in my humble view, the non-explanation of injuries by the prosecution witnesses affects the prosecution case which shows that the prosecution has suppressed the genesis of the case and the true story and the evidence of the witnesses cannot be said to be trustworthy.

The learned trial Court was not justified in not giving due importance to this particular aspect mainly on the ground that the wounds were fresh. When immediately after the occurrence, both the parties have approached the police, lodged the first information reports and in the counter case instituted against the prosecution party members, on police requisition, the appellant no.2 was sent for medical examination and similarly, appellant no.1 namely Sudarsan @ Aiban Naik (dead) was also found to have sustained injuries on his person by the doctor (P.W.9), in my humble opinion when the medical evidence has not completely ruled out the possibility of the injuries at the time of occurrence giving specific opinion on the age of injuries, the non-explanation of such injuries particularly in the facts and circumstances of the case when there was civil dispute between the parties, is a serious infirmity in the prosecution case.

9. It view of the foregoing discussions, when the evidence of the prosecution witnesses are discrepant relating to the assault on P.W.1 whose injuries are also simple in nature as opined by the doctor (P.W.9) and when the prosecution witnesses have failed to explain the injuries sustained by the appellant no.2, in my humble opinion, the impugned judgment and order of conviction of the appellant no.2 cannot be sustained in the eye of law which is hereby set aside.

In the result, the Criminal Appeal is allowed. The appellant no.2 Saheba Naik is acquitted of the charge under section 323 of the Indian Penal Code. He was granted bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond stand cancelled.

Trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Smruti Ranjan Mohapatra, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.5,000/- (rupees five thousand only).