

(2003) 07 OHC CK 0029
In the Orissa High Court
Case No : Criminal Appeal No. 26 of 1992

Sunia Alias Sanatan Mallik and Three Others	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 24-07-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304

Citation : (2003) CLT 920 (Suppl CrI)

Hon'ble Judges : Sujit Barman Roy, C.J; L. Mohapatra, J

Bench : Division Bench

Advocate : D.P. Dhal and M. Jena, in CrI.A. 26/92, D.P. Dhal, B.N. Saiha and A.K. Acharya, in CrI.A 56/92, for the Appellant; M.R. Dhal, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—The above appeals are directed against an order of conviction and sentence passed by the learned addl. Sessions Judge, Jajpur in S. T. No. 112/13 of 1988. The appellants in Criminal Appeal No. 26 of 1992 have been convicted for commission of offence u/s 148 of the Penal Code and sentenced to imprisonment for one year whereas the appellants in Criminal Appeal No. 56 of 1992 have been convicted for commission of offence u/s 302/34 of the Penal Code and have been sentenced to imprisonment for life and pay fine of Rs. 2,000/-.

2. The case of the prosecution is that the informant Dari Mallik (P. W. 1) and accused- appellant Sania Mallik are cousin brothers. They had some disputes relating to land and their houses are adjoining each other. On 25.10.87 appellant Kirtan Mallick had planted a Papeya plant on his homestead close to front court-yard of P.W. 1. On 26.10.87 at about 6 O" clock in the morning the wife of P.W.1. who has been examined as P. W. 4 while sweeping the court-yard damaged the Papeya plant as a result of which appellant Kirtan Mallik scolded her. It is also alleged that the appellant Kanhu and Bata abused P.W. 4 as a result of which she

raised alarm. When her husband Dari Mallik (P. W. 1) came out of the house hearing hulla of his wife, he was surrounded by all the accused persons who were armed with deadly weapons and appellant Kirtan Mallik and Sania Mallik assaulted P. W. 1 as a result of which he sustained grievous injuries. When Dari Mallik (P.W. 1) raised alarm, deceased Tima Mallik and other witnesses who have been examined on behalf of the prosecution during trial came to the rescue of Dari Mallik (P.W. 1). At that point of time, appellant Bhima Mallik shot an arrow to the deceased Tima Mallik. When the said deceased Tima Mallik after receipt of the injury caused by the arrow was trying to go away from the spot, he was assaulted by two other accused persons and fell down on the floor. It is alleged that thereafter the appellant Kirtan Mallik gave a Tenta blow on the head of the deceased Tima Mallik as a result of which he died later on. In course of such fight some other witnesses examined during trial on behalf of the prosecution received injuries. An FIR having been lodged by P. W. 1 initially the case was registered for commission of offences under Sections 147, 148, 323, 324, 325, 149 of the Penal Code and after death of deceased Tima Mallik the same was again registered u/s 302 of the Penal Code and after investigation, charge sheet was submitted for commission of offences under Sections 148,302/149, 325/149, and 323/149 of the Penal Code. On examination of the evidence adduced before the court during trial, the learned Additional. Sessions Judge found the appellants in Criminal Appeal No. 26 of 1992 guilty of charge u/s 148 of the Penal Code whereas the appellants in Criminal appeal No. 56 of 1992 were found guilty of charge u/s 302/34 of the Penal Code.

3. The plea of the appellants is that a false case has been foisted against them. The specific plea of Kirtan Mallik is that P.W. 1 called the other witnesses examined during trial and assaulted them whereafter in order to save himself, he used twig in defence. The appellant Sania Mallik took the plea that since they were assaulted by the prosecution party, he resisted.

4. In order to bring home the charge, prosecution examined 15 witnesses and defence in order to prove its case that the prosecution party assaulted them examined one witness. Out of the 15 witnesses examined on behalf of the prosecution, P.W. 1 is the informant eye witness and P.Ws. 2, 4 and 9 are also eye witnesses to the occurrence. P.Ws. 1, 3, 5, 7 and 8 received injuries in course of the occurrence. P. W. 10 is the doctor who examined P.W. 8 and also proved the Bed-Head Ticket of the deceased pertaining to the treatment in the S.C.B Medical College and Hospital. P.W. 12 is the doctor who examined the injured witnesses and P.W. 13 is the doctor who conducted the post mortem examination. P.Ws. 14 and 15 are the Police Officers. D.W. 1 is the Medical Officer of Dharmasala P.H.C. who examined the appellants Sania Mallik, Kirtan Mallik, Kanhu Mallik and Bata Mallik.

5. Shi Dhal, the learned counsel appearing for the appellants in both the appeals contended that evidence on record clearly indicates that the prosecution party was the aggressor and in exercise of right of private defence to property and

person, the accused persons also assaulted the injured persons and in the process there was a free fight resulting in death of the deceased. Shri Dhal referring to the deposition of the prosecution witnesses also contended that there is no evidence of any common object and, therefore, no conviction can be made u/s 148 of the Penal Code and in absence of any evidence also the appellants in Criminal appeal No. 26 of 1992 could not have been convicted for commission of offence u/s 302/34 of the Penal Code. He further contended that D.W. 1 on police requisition had examined some of the appellants who received injuries in course of the fight and the injuries sustained by these appellants are not explained by the prosecution. According to Shri Dhal, the very fact that some of the appellants had received injuries, it is clear that there was free fight between the prosecution party and the accused persons and when there is free fight between the two groups of persons neither Section 148 nor 34 of the Penal Code can be invoked and individual conduct of each accused has to be looked into. He also contended that if evidence of the prosecution witnesses is looked into the order of conviction and sentence so far as each individual accused is concerned cannot be sustained. The learned Addl. Standing Counsel submitted that there is no evidence on record to show that the prosecution party was the aggressor. On the other hand, the evidence clearly indicates that the appellants were the aggressors and once it is accepted that the appellants are the aggressors, Section 148 of the Penal Code is attracted so also Section 34 of the Penal Code. There being no dispute that the appellants participated in the assault, the order of conviction and sentence passed by the trial court is justified.

6. In order to appreciate the rival contentions of the parties, it is necessary to look into the evidence of eye witnesses first P.W. 1 is the informant and is also an injured. This witness in his deposition before the court has stated that on the date of occurrence in the morning, hearing the hulla of his wife Chanchala (P.W. 4), he came out and saw his wife crying and accused Kirtan, Sania, Kanhu, Batia, Chaitan, Arjun and Natha Mallik were standing there armed with deadly weapons. When he protested, he was surrounded by those accused persons and appellant Kirtan dealt a lathi blow on his head and Sania dealt a blow on his back. When he raised alarm the deceased Tima Mallik and other injured persons such as Dhani Mallik, Manguli Mallik and Dai Mallik came to the spot. The deceased Tima Mallik wanted to pacify those persons but appellant Bhima Mallik shot an arrow to the leg of the deceased. After receiving the injury when the deceased Tima Mallik tried to go away from the spot, appellant Kanhu Mallik dealt a blow on his back side and appellant Sania Mallik also dealt a blow on his leg. At that point of time, appellant Kirtan dealt a Tenta Blow on the head of Tima Mallik which pierced through the right side. Thereafter, appellant Kirtan pulled out the Tenta. The deceased was carried to the hospital and ultimately succumbed to the injuries, P. W. 2 is also an eye witness to the occurrence and in his deposition he has stated that on the date time of occurrence he had been to his thrashing floor to spread straw for the cows and heard the voice of P.W. 1 and his wife P.W. 4. When he rushed to the spot, he found all the accused persons

standing with arms and he also saw them assaulting P.W. 1. When he raised alarm the other villagers assembled including the injured and the deceased. When the deceased protested the accused persons left P.W. 1 and appellant Bhima shot an arrow to the left leg of the deceased. When he tried to go away from the spot he was assaulted by two other appellants, i.e., Kanhu and Sania., as a result of which he fell down. Thereafter, appellant Kirtan dealt a Tenta blow on his head. A suggestion was made to this witnesses in cross-examination that there was assault and counter assault between the parties. The said suggestion was denied. P.W. 3 is another eye witness who also received injuries and he has also implicated the appellants in commission of the crime. P.W. 4 is the wife of P.W. 1 who has stated that while she was cleaning the flooring with cow-dung, appellant Kirtan enquired from her as to who destroyed his Papeya tree. When she expressed her ignorance, appellant Kirtan scolded her and when she was about to be assaulted by appellant Kirtan, she raised alarm and her husband came out from the house. When her husband protested, he was surrounded by the appellants and was assaulted by the appellants Kirtan and Sania. At that point of time the deceased and other injured persons came to the spot and appellant Bhima shot an arrow to the left leg of the deceased and appellant Kirtan gave a Tenta blow on the head of the deceased. This witness has also denied the suggestion of the defence that there was assault and counter assault between the both the parties. P.W. 7 is an injured witness who saw appellant Bhima shooting an arrow to the leg of the deceased and two other appellants and also assaulting the deceased. P. W. 8 is another injured who saw appellant Bhima shooting an arrow to the deceased and two other appellants assaulting the deceased. These witnesses have not stated any thing about the assault by appellant Kirtan by means of a Tenta. P.W. 9 another witness to the occurrence has stated about the assault by the accused persons as other eye witnesses have stated. P.W. 10 who has been working as a Lecturer in S.C.B. Medical College in the department of Surgery examined P.W. 8 who had received injury in course of the incident and also proved the Bed-Head-Ticket of the deceased showing his admission to the S.C.B. Medical College and Hospital on 26.10.92 at about 2.00 P.M.. P.W. 12 is the Medical Officer of Dharmasala P.H.C. who examined the injured persons such as Manguli Mallik, Dai Mallik (P.W. 1), Dhani Mallik (P.W. 8), Daitari Mallik (P.W. 7), Goura Mallik (P.W. 5), and Tikan Mallik (P.W. 3) and found some injuries on their person. P.W. 13 is the doctor who conducted the post mortem examination of the deceased and found injuries on the body of the deceased which correspond to the injuries as described by the witnesses to have been sustained by the deceased. P.W. 14 is the I.O who had investigated into the case.

7. From the evidence adduced before the court there cannot be any dispute that the appellants Sania Mallik, Kirtan Mallik, Kanhu Mallik and Bata Mallik had been examined on police requisition by D.W. 1 who was working as Medical Officer of Dharamsala P.H.C. The said witness in his deposition has stated about the injuries sustained by those appellants and they were examined on 26.10.87 i.e.

the date of occurrence. The witnesses examined on behalf of the prosecution had not stated anything as to how some of the appellants had received injuries in course of the incident though they have implicated the appellants in commission of the offences. It is, therefore, necessary to look into the evidence of the I.O who had examined those witnesses during investigation. P.W. 14 in course of his examination has stated that P.W. 4 Chanchala during investigation had stated before him that while sweeping the floor unknowingly the Papeya tree had been damaged by her. She has also stated that her husband had come out of the house with a Lathi and abused the accused persons. She had also stated that deceased Tima Mallik and some other witnesses examined on behalf of the prosecution came armed with Lathi hearing the hulla. Relying on the statement of P.W. 14, Shri Dhal submitted that the prosecution party was armed and was the aggressor and the same has been suppressed during trial. From the evidence of this witness it further appears that during investigation P.W. 2 had stated before him that some other injured examined on behalf of the prosecution had come with the arms to the house of P.W. 1 and there was assault and counter assault between the parties. However, P.W. 2 is silent about it during examination in court and the suggestion put by the defence was denied by him. The evidence of eye witnesses read with the evidence of P.W. 14 do not give a clear picture as to who was the aggressor. Since some of the appellants also received injuries in course of the incident, which has not been explained by the prosecution and P.W. 2 had stated before the police during investigation that there was assault and counter assault and that the P.W. 3 had stated before the police during investigation that prosecution party was also armed, we accept the contention of the learned counsel Shri Dhal that both the parties were armed and there was assault and counter assault in course of which not only some members of the prosecution party were injured and one died but also some of the accused persons received injuries. Since there was a free fight resulting in assault and counter assault, it cannot be said that there was common object of assaulting the prosecution party. Having come to a conclusion that there was free fight between the members of the prosecution and defence we cannot uphold the conviction in Criminal Appeal No. 26 of 1992 for commission of offence u/s 148 of the Penal Code. So far as appellants in Criminal Appeal No. 56 of 1992 are concerned, we also hold that in view of our finding that there was assault and counter assault between both the parties, it cannot be said that there was common intention to cause death of the deceased Tima Mallik and in course of such assault and counter assault Tima Mallik received injuries and ultimately succumbed to the injuries. Since Section 34 is not attracted to the present facts of the case, the individual conduct of the appellants has to be examined. There is consistent evidence on record to show that the appellant Bhima shot an arrow which hit the leg of the deceased and appellant Kirtan assaulted by means of a Tenta on the head of the deceased. P.W. 13 who conducted the post mortem examination found fracture of tibia and fibula in left leg of the deceased and also found depressed fracture of parieto temporal bone. Both the injuries support the case of the prosecution that Bhima shot an arrow to the left leg of the deceased

and appellant Kirtan assaulted by means of Tenta on the head of the deceased.

8. Considering the individual conduct of the appellants, we are of the view that appellant No. 1 Bhima Mallik having caused fracture of leg is liable for conviction u/s 326 of the Penal Code whereas appellant No. 2 Kirtan Mallik having given one blow on the head, had knowledge that such injury may cause death but had no intention to cause death and accordingly is liable for conviction u/s 304, Part II of the Penal Code.

9. In view of the discussions made above, the Criminal Appeal No. 26 of 1992 is allowed and the appellants therein are acquitted of the charge. So far as Criminal Appeal No. 56 of 1992 is concerned, the same is allowed in part and the appellant No. 1 Bhima Mallik is convicted for commission of offence u/s 326 of the Penal Code and sentenced to imprisonment for three years. Appellant No. 2 Kirtan Mallik is convicted u/s 304, Part-II of the Penal Code and sentenced to imprisonment for eight years. It is further directed that if both the appellants Bhima Mallik and Kirtan Mallik have served the sentence as indicated above, they may be released forthwith, if their detention is not required in connection with any other case.