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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA No.132 of 2000

Dula Hembram and others ***Appellants***

-versus-

State of Orissa ***Respondent***

Advocates appeared in these cases:

For Appellants : Mr. Saktidhar Das,
Senior Advocate

For Respondent : Mr. J. Katikia,
Additional Government Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

**JUDGMENT
18.07.2022**

Dr. S. Muralidhar, C.J.

1. This appeal is directed against a judgment and order dated 10th April 2000 passed by the Additional Sessions Judge, Baripada convicting the Appellants under Section 302 read with Section 34 IPC and sentencing them to undergo imprisonment for life and to pay a fine of Rs.500/- and in default to undergo rigorous imprisonment (RI) for two months for the offence punishable under Section 302 read with 34 IPC in S.T. Case No.27/94 of 1999/1998.

2. There are three Appellants in the present case. As far as Appellant No.3- Nota Hembram is concerned, the Court has been informed that he has been prematurely released after serving out the sentence. As far as Appellant Nos.1 and 2 are concerned, they were enlarged on bail by an order dated 6th September, 2000 of this Court.

3. The case of the prosecution, in brief, is that on 2nd November 1997, at around 6 to 6.30 PM, the deceased-Dasarathi Soren was killed after Appellant/Accused No.3 (A3) Nota Hembram armed with an axe, Dulla Hembram (A1) and their brother Kandara Hembram (A2) each armed with lathis assaulted the deceased as a result of which, he succumbed to his injuries.

4. The prosecution projected the brothers of the deceased i.e., Faguram Soren (P.W.3), Najal Soren (P.W.4), Rajendra Soren (P.W.5) and Musu Soren (P.W.10) as eye-witnesses. Of the remaining P.Ws., Mangal Murmu (P.W.6) turned hostile. Jadunath Hembram (P.W.7) was said to be an after-occurrence witness. Jalandhara Rana (P.W.8) and Harihar Singh (P.W.9) were the seizure witnesses. Dr. Niranjana Das (P.W.1) was the doctor who had conducted the post-mortem.

5. This Court heard the submissions of Mr. Saktidhar Das, learned Senior Advocate appearing for the Appellants and Mr. J. Katikia, learned Additional Government Advocate (AGA) for the State.

6. Mr. Das made the following submissions:

(i) P.W.10 was just supposed to be 13 years at the time of occurrence and was around 15 years at the time of examination in

the Court. Although he states that when he watched the three accused assaulting the deceased and taking him inside the house of A3, he came running to his house to inform his brother and mother about the incident. He did not call any of the other people in the nearby houses. He also admitted in his cross-examination that he had not stated before the Investigating Officer (IO) that the deceased was shouting and calling out the names of the accused and that they were assaulting him. He also admitted not telling the IO that the deceased was shouting while addressing his brothers that he was being assaulted.

(ii) Although, it is mentioned by both P.Ws.3 and 10 that one other brother Kalyan went with them to the house of A3 after P.W.10 came and informed them, the said Kalyan was also not examined.

(iii) P.W.3 states that although number of people were present at the Jatra in connection with the festival, he did not call anyone else for help.

(iv) The cross-examination of P.W.4 reveals that it was a dark night and therefore it was not possible for these witnesses to clearly see who had taken away the deceased. P.W.5 also admits not stating before the IO that the deceased was shouting and calling out the names of the accused from inside the house. Further, by the time, P.W.5 and the brothers reached the house of A3, the deceased was lying on the ground near the veranda.

7. Mr. Das accordingly submitted that from the depositions of P.Ws.3, 4, 5 and 10, it was plain that nobody had actually seen the occurrence. The sum total of his submissions is that if the evidence of P.W.5 is accepted, then clearly none of them were actually eye-witnesses to the occurrence and the vital witness i.e. Kalyan has not been examined nor has any explanation been offered for his non-examination.

8. Mr. Katikia on the other hand submitted that the evidence of P.Ws.3 and 10 was absolutely clear. Relying on the decision in ***Rattan Singh v. State of Himachal Pradesh (1997) 4 SCC 161***, he submitted that the statement of the deceased just prior to his death about being attacked by the accused was relevant both from the point of view of Section 32 (1) of the Evidence Act as well as Section 6 thereof. He referred to the first illustration of Section 6 to buttress the point. He also relied on the decision in ***Sukhar v. State of Uttar Pradesh (1999) 9 SCC 507*** where this legal position regarding Section 6 of the Evidence Act was reiterated.

9. Relying on ***Nand Kumar v. State of Chhattisgarh (2015) 1 SCC 776***, Mr. Katikia submitted that the choice of witnesses to examine was that of the prosecutor and merely because of several eye-witnesses, some were not examined. This could not weaken the case of the prosecution.

10. Since the case of the prosecution rests on eye-witness depositions, the Court would like to first examine the deposition of Faguram Soren (P.W.3), the brother of Dasarathi. He explains how on the date of the occurrence which was during the Kali Puja

festive season, he was present at the father's own house at village Gandiadiha, when P.W.10 came running to the house and told him that when he was going to witness Bandana Jatra at a field, he saw the three accused assaulting the deceased in the house of A3. He also informed P.W.3 that A3 was armed with an axe while the other two A1 and A2 were armed with lathis. Hearing this, P.W.3 accompanied by P.W.5 and Kalyan went to the house of A3 and they heard the "dhad dhad" sound and Dasarathi was shouting to save him as the three accused were assaulting him and they could hear the voice from inside the house of A3. Although Kalyan pressed the house door of A3, it would not open. Then after standing outside for a few minutes, when the door of A3 opened all the accused persons threw the body of the deceased outside the house and ran away. They found cut and bleeding injuries on the right side forehead above the eye-brow and on the backside of the head of the deceased. They immediately removed the deceased to the house of P.W.3 and laid him on a cot and went to hire a trekker. They then took him to the Kostha hospital and reached there at around 8.30 pm. The doctor opined that he had been brought dead.

11. The cross-examination of P.W.3 yielded nothing for the accused. It only brought out the fact that because there was a festival and many people had assembled in the village and were roaming here and there, it was quite crowded. However, in the cross-examination, he reiterated "I heard the sound of assault from inside the house of Nata Hembram. The assault was not visible to outside as the house door was closed." Although, he does say he

had not seen as to who had assaulted Dasarathi, the fact is that he did hear Dasarathi say who was assaulting him. He denies the suggestion that it was already dark when Dasarathi was thrown out the house.

12. P.W.10 had told P.W.3 that Dasarathi was talking with his wife Luski near the house of A3. The description of the incident by P.W.3, the fact that he heard the deceased shout out the names of the accused from inside the house of A3, the fact that they saw the three accused come out from the house of A3, threw the body of the deceased and runaway have all remained unshaken in the cross-examination.

13. P.W.10 is another important witness for the prosecution. He is a young brother who was only 13 years at the time of the incident and 15 years at the time of deposition. He saw the entire set of events from the beginning. When he was proceeding to witness the Bandana Parba, he saw the deceased talking to Luski near the house of A3. He could notice A1, A2 and A3 picking up a quarrel with the deceased. He clearly saw A3 being armed with an axe and the other two with lathis. While he was running to that place A1 threatened P.W.10 with dire consequences and thereafter, began assaulting the deceased and taking him to the house of A3 while assaulting him. It is this that prompted P.W.10 to run to the house of P.W.3 and inform both his mother and P.W.3 of what was happening. Thereafter, P.Ws.3, 5 and Kalyan came to the house of A3. He clearly stated that when they reached A3's house they could hear the deceased being assaulted inside A3's house and the door was closed from inside. He clearly said "Dasarathi

Soren was shouting while calling our names that Nota, Dula and Kandara were assaulting him.” While Kalyan attempted to open the door, he was unable to do so. From a distance of about 10 feet, they waited and within which time, all the accused persons after opening the house door of A3 threw away the deceased and ran away.

14. There is consistency in the two versions of P.W.3 and P.W.10 on the material aspects of the prosecution case. P.W.10 corroborates P.W.3. P.W.10 also noticed a lacerated wound on the right side forehead above the eyebrow of Dasarathi and a bleeding injury at the backside of the head. This Court has carefully perused the cross-examination of P.W.10. Nothing much has emerged which would discredit him. In fact, the details given by P.W.10 further strengthens the case of the prosecution. For instance, he states that there was a quarrel between the accused and Dasarathi in high pitched voices. The fact of the presence of the three accused with Dasarathi and then their taking him inside the house of A3 and their hearing his being assaulted inside the house of A3 shouting out their names are the essential details which have not been shaken in the cross-examination. Although he does say that he had not stated before the IO that the deceased was shouting while calling the names of the brothers, he reiterated “but, I have stated before him that Dasarathi was shouting while addressing we the brothers that Nota, Dulla and Kandara are assaulting him requesting to rescue him.” This is a complete strengthening of the evidence of P.W.10 in his cross-examination. That is totally consistency between the depositions of P.Ws.3 and

10. In other words, there are two eye-witnesses who have clearly spoken about the role of the three accused and their involvement in the crime.

15. The further evidence that needs to be discussed is that of P.W.5-Rajendra Soren who is one other brother who confirms having accompanied P.W.3 and P.W.10 to the house A3 and noticing the deceased being thrown out of the house by the three accused. To that extent, he too corroborates the evidence of P.Ws.3 and 10.

16. Notwithstanding that P.W.6 may have turned hostile, the eye-witness accounts of P.Ws.3 and 10 are more than sufficient to bring home the guilt of the accused.

17. The statement made by the deceased just prior to his death would be relevant in terms of Section 32 of the Evidence Act. In ***Rattan Singh v. State of Himachal Pradesh*** (*supra*), the Supreme Court explained the legal position thus:

“16. Even apart from Section 32(1) of the Evidence Act, the aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:-

"(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so *shortly before* or after it as to form part of the transaction is a relevant fact."

(emphasis supplied)

Here the act of the assailant intruding into the courtyard during dead of the night, victim's

identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act.

17. In either case, whether it is admissible under Section 32(1) or under Section 6 of the Evidence Act, it is substantive evidence which can be acted upon with or without corroboration in finding guilt of the accused.”

18. The above dictum was reiterated in ***Sukhar v. State of Uttar Pradesh*** (*supra*) which elaborately discussed the position regarding the rule of *res gestae* under Section 6 of the Evidence Act. It was held as under:

“6. Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in *Wigmore’s Evidence Act* reads thus:

“Under the present Exception [to hearsay] and utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The

declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued.”

7. *Sarkar on Evidence* (15th Edn.) summarises the law relating to applicability of Section 6 of the Evidence Act thus:

“1. The declarations (oral or written must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.

2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot &c the declarations of all concerned in the common object are admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.”

8. This Court in *Gentela Vijayavardhan Rao v. State of A.P.* (1996) 6 SCC 241 considering the law embodied in Section 6 of the Evidence Act held thus: (SCC pp.246-47, para 15)

“15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue ‘as to form part of the same transaction’ that it becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But, it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.”

.....
10. Applying the ratio of the aforesaid two cases to the evidence of PW 2, we have no hesitation to come to the conclusion that his statement indicating that the injured told him that his nephew has fired at him, would become admissible under Section 6 of the Evidence Act. We are, therefore, unable to accept the first submission of Ms Goswami, learned counsel appearing for the appellant.”

19. Consequently, the Court is satisfied that the above evidence of the prosecution is sufficient to bring home the charge of the offence under Section 302 read with 34 IPC against the three accused.

20. The criticism that one of the eye-witnesses i.e. Kalyan was not examined and therefore, the prosecution ought to explain why they did not do so is more than adequately answered in the following paragraphs in judgment in *Nand Kumar v. State of Chhattisgarh* (*supra*) :

“31. We are also not impressed by the arguments of the learned counsel appearing for the appellants when he contended that one eye-witness, Kariya was not examined and hence it has weakened the case of the prosecution.

32. The law does not say that the prosecution must examine all the eye-witnesses cited by the prosecution. When the evidence of two eye-witnesses, PWs 1 and 3 was found worthy of acceptance to prove the case then it was not necessary for the prosecution to examine any more eye-witnesses. It is for the prosecution to decide as to how many and who should be examined as their witnesses for proving their case. Therefore, we find no merit in this submission.”

21. Finally, the Court would like to point out that the evidence of Dr. Niranjana Das (P.W.1) who conducted the autopsy, more than adequately corroborates the eye-witness testimony of P.Ws.3 and 10. He found the following injuries on the dead body of the deceased:

- “1. laceration of 7cm x 3cm up to bony depth found over and above the right eye brow extending towards the right ear.
2. Laceration 5cm x 2cm up to bony depth present below occipital protuberance of skull.
3. Abrasion of 3cm x 2cm just below the right nipple of right chest wall.

4. Abrasion of 4cm x 2cm over right arm just below the right shoulder joint.
5. Abrasion of 5cm x 1cm over right thigh 10cm above the right knee joint
6. Abrasion of 3cm x 1cm on left leg 4cm below the left knee joint.

Fracture

1. Fracture (depressed) of 6cm x 6cm frontal skull bone right side with multiple pieces corresponding to injury No.1.
2. Crack fracture of occipital skull bone below the occipital protuberance corresponding to injury No.2.
3. Fracture of 2nd and 3rd rib of right side mid clavicle line.
3. Hematoma (subcutaneous) 5cm x 2cm on the right chest wall medial to right nipple.

Internal Organs

Brain matter of right frontal lob lacerated corresponding to injury No.1 of fracture. Subdural hematoma of 2cm x 1cm present below the occipital protuberance, corresponding to crack fracture.

4. All the injuries described above are ante mortem in nature. Time since death is within 18 to 36 hours at the time of my post mortem.
5. The cause of death is due to injuries to the vital organ like brain. Ext.1 is my report and Ext.1/1 is my signature.”

22. The above medical evidence fully corroborates the eye witness testimony of P.Ws.3 and 10 and makes their deposition natural

and believable. The fact that they are interested witnesses is not necessarily a problem when one examines their evidence in toto. It is intrinsically trustworthy and natural and without any embellishments whatsoever.

23. For all of the aforementioned reasons, the Court finds that the trial court committed no error in either the analysis of the evidence or its reasoning in holding that the prosecution had been able to prove the case against the three accused beyond all reasonable doubt.

24. There is accordingly no merit in this appeal and it is dismissed as such.

25. The bail bonds of Appellant Nos.1 and 2 are hereby cancelled. They are directed to surrender forthwith and, in any event, not later than 1st August 2022 failing which the IIC of the concerned PS shall take steps to take them into custody for them to serve out the remainder sentence.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K.Guin/ Sr. Stenographer