

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA Nos.227, 232 and 233 of 1996

***Kartika Chandra Swain @ Kartika
Swain and others
(In CRA No.227 of 1996)***

***Sankar Lenka and others
(In CRA No.232 of 1996)***

....

Appellants

***Gandhi Rout and others
(In CRA No.233 of 1996)***

State of Odisha

-versus-

....

Respondent

Advocates appeared in this case:

For the Appellants

:

**Mr. Dharanidhar Nayak
Senior Advocate**

For the Respondent

:

**Mr. Janmejaya Katikia
Addl. Government Advocate**

**CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH**

**JUDGMENT
31.10.2022**

Dr. S. Muralidhar, CJ.

1. The present three sets of appeals (CRA Nos.227, 232 and 233 of 1996) are directed against a common judgment dated 13th August, 1996 passed by the learned Additional Sessions Judge, Khurda in S.T. No.22/111 of 1995 convicting the Appellants

under Sections 148, 302, 307 read with Section 149 IPC and Sections 25 and 27 of the Arms Act.

2. It requires to be noticed at the outset that before the trial Court, there were 32 accused persons. One of the accused Kulamani Nayak, Accused No.26 (A26) was convicted under Section 302 IPC apart from the above offences. He had filed a separate Criminal Appeal No.268 of 1996. After he had served more than 10 years in custody, he was enlarged on bail by this Court by an order dated 1st February, 2007. However, during the pendency of the present appeal, he expired on 7th June, 2019. The appeal filed by Kulamani Nayak, (A26) i.e. Criminal Appeal No.268 of 1996 was disposed of by this Court as having abated by an order dated 30th August, 2022.

3. As far as the remaining accused are concerned, during the pendency of the Appeals, Udayanath Pradhan-A18 (who was also Appellant No.1 in Criminal Appeal No.227 of 1996) and Makadam Sahu-A25 (Appellant No.1 in Criminal Appeal No.233 of 1996) expired. Consequently, the appeals as far as the said two accused-Appellants were concerned, were disposed of as having abated by the order dated 30th August, 2022 of this Court.

4. It requires to be further noticed that by an order dated 23rd August 1996, the Appellants in Criminal Appeal No.227 of 1996 were enlarged on bail by this Court. By the identical orders dated 29th August 1996, the Appellants in the remaining two appeals i.e.

Criminal Appeal Nos.232 and 233 of 1996 were enlarged on bail by this Court.

5. This Court has heard the submissions of Mr. Dharanidhar Nayak, learned Senior Counsel appearing for the Appellants and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

Case of the prosecution

6. The case of the prosecution is that on account of alleged attempt at removal of earth from the gochar land in village Raghunathpur by the villagers of village Ghumusarpadar, there was a misgiving and misunderstanding between the two sets of villagers. It is the case of the prosecution that at around 9 am on 23rd June 1994, some of the villagers of Ghumusarpadar assembled in their Jubak Sangh Office with a view to evolve a compromise formula using the good offices of one Lingaraj Pradhan (P.W. 17), who was a Sarpanch of a different village i.e. Singheswar Grama Panchayat.

7. While the villagers of Ghumusarpadar were thus engrossed, the accused party i.e. the Appellants herein belonging to village Raghunathpur, armed with deadly weapons, such as country made guns, lathi, kanta, bhali, etc., formed an unlawful assembly and marched towards the village Ghumusarpadar. Some of them were wearing helmets. Seeing them, P.W.17 went forward to persuade them not to cause any breach of peace. However, in front of the house of Raja Kishore Tarai (P.W.7), P.W.17 was given a lathi

blow on his head by Madhu Lenka-A5 (Appellant No.3 in Criminal Appeal No.232 of 1996).

8. Seeing P.W.17 fall on the ground, some of the villagers of Ghumusarpadar i.e. Shyama Sundar Raut (deceased), Madhusudan Tarai (P.W.8), Mahendra Tarai (P.W.10), Dasarathi Raut (P.W.16), Bhikari Raut (not examined) and certain others, who were sitting on the verandah of the Jubak Sangh Office, rushed to rescue P.W.17. The accused persons belonging to village Raghunathpur were stated to have abused them in filthy language and threatened them. Kulamani Nayak (A26) (the deceased Appellant in Criminal Appeal No.268 of 1996), Hazari Rout (A28) (Appellant No.9 in Criminal Appeal No.232 of 1996), Jitendra Nayak @ Tukuna (A29) (Appellant No.10 in Criminal Appeal No.232 of 1996) and Hazari Pradhan (A27) (Appellant No.11 in Criminal Appeal No.233 of 1996) being armed with country made guns opened fire. Further, the case of the prosecution is that Kulamani Nayak (A26) opened fire as a result of which Shyama Sundar Raut was seriously injured.

9. The case of the prosecution is as a result of A27, A28 and A29 opening fire with their respective country made guns, Mahendra Tarai (P.W.10), Madhusudan Tarai (P.W.8), Doma Barik (P.W.13), Dasarathi Raut (P.W.16), Bhikari and others were seriously injured. Shyama Sundar Raut succumbed to his gunshot injuries after he was taken to Balugaon Government Hospital. Apart from the above, Trinath Raut, Pabitra and Bhagaban Pradhan (who were not examined) and Bijaya Dalei (P.W.9) as

well as Harihar Tarai (P.W.11) were stated to be seriously injured. It is stated that Indramani Swain (A31) (Appellant No.12 in Criminal Appeal No.233 of 1996) dealt a blow on the head of Kedar Lenka (P.W.12) by means of a kati, as a result of which P.W.12 became seriously injured. The other accused persons were stated to have also indiscriminately used brickbats as a result of which some more persons of village Ghumusarpadar were injured.

Investigation

10. Debendra Tarai (P.W.3) lodged an oral report at the Balugaon Police Station (PS) on 23rd June, 1994 at 9.45 am before Chandra Sekhar Das (P.W.25), the Investigating Officer (IO), who was the Officer-in-Charge (OIC) at Balugaon PS, who then registered the FIR as PS Case No.24/1994 and took up investigation. P.W.25 is stated to have visited the spot at 10 am, prepared a spot map and issued injury requisitions in respect of Bijaya Dalei (P.W.9), Ramesh Raut (P.W.5), Rohita Tarai (P.W.2), Rama Dalai (not examined), Dasarathi Raut (P.W.16), Kedar Lenka (P.W.12), Doma Barik (P.W.13), Prasant Raut (P.W.6) and Madhusudan Tarai (P.W.8) for their medical examination. At 12 noon, he is stated to have held an inquest over the dead body of Shyama Sundar Raut inside the Balugaon PHC premises and prepared an inquest report. Later, he despatched the dead body of Shyama Sundar Raut for Post-Mortem (PM) Examination.

11. At 2 pm on 23rd June 1994, P.W.25 is stated to have searched kothaghar of village Raghunathpur, seized 12 company made card board cartoons of Aerostar mini helmets and prepared a seizure

list. At 2.30 pm on the same day, he is stated to have seized four wooden lathis from the house of A26 (Kulamani Nayak), one farsa having wooden handle, one small tangia with wooden handle and one mini white fibre helmet. From the house of A31 (Indramani Swain), P.W.25 is stated to have seized a katuri having a bamboo handle. He is stated to have searched the house of Gandhi Raut (A24) and seized a Bhali having a bamboo handle, one Khanati having bamboo handle and a bamboo lathi. From the house of A25 (Makadam Sahu), P.W.25 is stated to have seized one Todi Ankus and 2 bamboo lathis. Other seizures were effected on 25th June 1994, by P.W.25. On 18th July 1994, he seized a tenta having 11 spikes, which was dangling from the body of Bijaya Dalei (P.W.9) and 2 pellets extracted from the body of Doma Barik (P.W.13). On completion of investigation, P.W.25 filed a charge-sheet against the aforementioned accused persons, who pleaded not guilty and claimed trial.

12. The case of the four accused i.e. A26 to 29, who were allegedly armed with country made revolvers, was that they were not present at the material time and subsequently got information that 10 to 15 persons belonging to Raghunathpur village were assaulted and injured by villagers of Ghumusarpadar and that a false case had been foisted on them due to previous enmity among village factions.

13. A6 (Matia Nayak) pleaded alibi stating that he was performing duty as a lineman in a sub-station inside the Chilka Naval base from 6 am to 2 pm on 23rd June, 1994. Some of the accused

pleaded that they attended the meeting at the Jubak Sangh Office of Ghumusarpadar at 8 am on 23rd June, 1994; while the meeting was going on, there was a hot exchange of words, as a result of which the villagers of Ghumusarpadar attacked them with deadly weapons, which were kept ready in the Jubak Sangh Office and caused various injuries to them. The accused fled away from the spot fearing for their lives despite which the false case had been foisted on them because of the previous enmity.

14. Certain other accused pleaded that they were neither present at the spot nor had assaulted anyone. Kartika Swain (A7) pleaded that he was returning after selling milk and was assaulted by villagers of Ghumusarpadar and that a false case had been foisted on him.

15. 25 witnesses were examined for the prosecution. Of these, P.Ws.1 to 3, 5 to 13 and 16 were projected as occurrence witnesses and P.W.17 as an injured witness. Of the occurrence witnesses, P.Ws.2, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 and of course P.W.17 were all injured witnesses in respect of whom injury certificates were sought to be produced by the prosecution. Two police officers - Bhabani Prasad Rath, the Assistant Sub-Inspector (ASI) of Police, Balugaon PS (P.W.15) and the IO (P.W.25) were examined. As many as 7 doctors (P.Ws.18 to 24) were examined. Bansidhar Baral (P.W.4) and Sk. Jamir (P.W.14) were the two seizure witnesses.

16. One Durga Prasad Padhi (D.W.1), Junior Engineer, GRIDCO, Balugaon was examined to prove the alibi plea of A6 (Matia Nayak). Likewise, the injury certificates of Gandhi Raut (A24), Rankanath Pradhan (A22), Narasingh Raut (A19), Makadam Sahu (A25), Udayanath Pradhan (A18), Kartika Swain (A7), Trinath Raut (A21), Panchanan Rout and Jogendra Swain (A11) were marked as Exhibits A to K, which had been issued by the Medical Officer of Balugaon PHC. The attendance sheet and duty chart of A6 (Matia Nayak) (Exhibits L and M) were also produced.

Trial Court judgment

17. On an analysis of the evidence, the trial Court came to the following conclusions:

(i) The evidence of P.W.17 that 20 to 25 persons of Raghunathpur marched towards the Jubak Sangh Office of Ghumusarpadar in a violent manner and that he went forward to stop them to prevent breach of peace was not assailed by the defence. From his evidence, it appeared that the accused persons had formed an unlawful assembly in village Ghumusarpadar on 23rd June, 1994 at 9 am;

(ii) The evidence of the P.Ws. also showed that the accused persons had made a thorough preparation by arming themselves with deadly weapons and wearing helmets, thus, forming an unlawful assembly sharing a common object of committing rioting with the villagers of Ghumusarpadar to cause bloodshed. Section 149 of the IPC was available to be raised in the case

inasmuch as even if one of the members of the accused was guilty of committing the offence, other members would be equally liable for that offence having shared a common object with the one who purported it;

(iii) The death of Shyama Sundar Raut was a homicidal one;

(iv) All the occurrence witnesses had unequivocally stated that Kulamani Nayak (A26) opened fire from a country made gun and due to such firing, Shyama Sundar Raut was seriously injured and subsequently succumbed to the pellet injuries after he was taken to the Balugaon PHC;

(v) The evidence of Dr. Ashok Kumar Samantaray (P.W.20), who conducted the PM on the deceased Shyama Sundar Raut, confirmed that he died due to gunshot injuries to the vital organs like heart and lungs as evidenced by the PM report (Ext.26);

(vi) Of the 8 injured occurrence witnesses, Dr. M.V.S. Rao (P.W.21) attached to the MKCG Medical College and Hospital, Berhampur found entrance wounds caused by fire arms on Madhusudan Tarai (P.W.8) and Harihar Tarai (P.W.11). The injury reports of P.Ws.2, 5, 7 and 16 showed that they had suffered simple injuries. Likewise, P.W.21 also noticed simple injuries on P.Ws.6, 9, 10, 12 and 13 and in some cases, found penetrating wounds;

(vii) Dr. Banambar Senapati (P.W.19) had marginalized the injuries found on P.Ws.8, 12 and 16 and this was clearly an attempt by P.W.19 to fabricate the evidence thereby trying to derail the prosecution. The trial Court recommended that he be prosecuted for this. The injury reports furnished by P.W.21 as regards P.Ws.8 and 11 were far more acceptable and reliable as those were corroborated by the radiological findings of Dr. Balakrushna Bastia (P.W.22) and Dr. Nervadyswari Deep (P.W.23);

(viii) In the final analysis, it appeared that Shyama Sundar Raut was fatally injured as a result of the gunshot fired by at least Kulamani Nayak. Due to the opening of gun fire from the country made guns by Jitendra Nayak @ Tukuna (A29), Hajari Raut (A28) and Hajari Pradhan (A27), P.Ws.8 and 11 suffered entrance wounds. Further, it appeared that Digambar Swain (A30), Matia Nayak (A6) and Madhu Lenka (A5) and certain others assaulted Bijaya Dalei (P.W.9), Lingaraj Pradhan (P.W.17) and some others in the course of rioting;

(ix) Thus, the prosecution had proved its case under Section 302 IPC against Kulamani Nayak (A26) and Section 302 read with Section 149 of the IPC against other accused persons. Further, the prosecution also proved the case under Section 307 read with 149 IPC against all accused persons;

(x) The prosecution had proved its case under Sections 25 and 27 of the Arms Act against A26 to A29 and against other co-accused

persons under Section 25/27 of the Arms Act read with Section 149 IPC;

(xi) Although there were several lapses in the investigation by P.W.25 (as listed out in para 31 of the judgment of the trial Court), these could not be glossed over or soft pedalled. The Inspector General of Police was called upon to launch a full scale enquiry into the “highly questionable conduct of P.W.25 vis-a-vis this case and to take exemplary action against him so that it serves as a lesson to others fence sitters or wrong doers of his ilk.”

18. The trial Court then proceeded to sentence all of the Appellants to undergo imprisonment for life without separate sentences for other offences. However, it was observed that in case, the sentence under Section 302 and Section 302 read with 149 IPC was set aside or varied, in such case, the convicts would be deemed to have been sentenced to RI for one year, four years, one year and three years each respectively for the offences under Sections 148, 307 IPC and Sections 25 and 27 of the Arms Act respectively and in such event, all sentences would run concurrently.

Submissions on behalf of the Appellants

19. Mr. Dharanidhar Nayak, learned Senior Counsel appearing for the Appellants, submitted as under:

(a) The consistent finding of the trial Court in the impugned judgment was only that Shyama Sundar Raut had died as a result

of the gunshot injuries fired by Kulamani Nayak (A26), who was now dead. As far as the other accused are concerned, they could not be said to have shared the common object of committing the murder of Shyama Sundar Raut as it took place in a free fight at the spur of the moment. There was no intention as such to kill specifically Shyama Sundar Raut;

(b) The failure of the prosecution to explain the injuries on the accused for which there were injury certificates had considerably weakened the prosecution case particularly since it was the case of the defence that the aggressor party was the prosecution party i.e. the villagers of village Ghumusarpadar and not the villagers of village Raghunathpur;

(c) There were considerable discrepancies in the depositions of the eye-witnesses and in particular, there was no clarity on which of the accused had caused what injuries and to whom. As a result of previous enmity between the factions of the two villagers and in the absence of any independence witness, the evidence of the P.Ws., projected as injured witnesses, had to be approached with great caution. They were prone to make exaggerations and embellishments. They could not have been implicitly believed by the trial Court;

(d) It could not be said that the versions of the so-called eye-witnesses were fully corroborated by the medical evidence as there was serious discrepancy in the evidence of the doctors themselves, particularly P.Ws.19 and 21. There were serious

lapses in the investigation which went to the root of the matter and could not have been glossed over by the trial Court.

Submissions on behalf of the State

20. In reply, Mr. Janmejaya Katikia, learned Additional Government Advocate submitted that the evidence of the injured eye-witnesses deserved acceptance by the trial Court and their evidence was rightly believed by it. According to him, there was no merit in the contention that the injured eye-witnesses were unreliable on account of the previous enmity between the two village factions when it was clear from the evidence of P.W.17, who was an independent witness, unrelated to either faction that it was the villagers of village Raghunathpur, who had formed an unlawful assembly and had come in a violent mood with deadly weapons with an intention of causing rioting and bloodshed in village Ghumusarpadar.

21. Mr. Katikia submitted that the medical evidence of P.W.21 was fully corroborated by the report of the Radiologists (P.Ws.22 and 23). The trial Court itself had found discrepancies in the medical evidence of P.W.19 and asked for disciplinary action to be taken against him.

22. The mere lapses in investigation on the part of P.W.25 would not enure to the benefit of the accused. Particularly those lapses were found, as the trial Court has in the instant case, to be caused only to help the accused. These lapses by themselves therefore would not help the accused escape guilt. The offence under

Sections 149 of IPC was clearly attracted since the evidence of the prosecution clearly proved the formation of an unlawful assembly by the accused, who shared the common object of committing the offence of killing one of the villagers and attempting to kill the other villagers of village Ghumusarpadar.

Analysis and reasons

23. The above submissions have been considered. At the outset, the Court must note that this is a case based on the direct evidence of injured eyewitnesses. One of the injured eyewitnesses is P.W.17 and he does not belong to either of the two villages, which were having misunderstandings over the alleged attempt of excavation of earth from village Raghunathpur by the villagers of village Ghumusarpadar. In other words, P.W.17, who was the Sarpanch of a different village viz., Singheswar Grama Panchayat, could be said to be an independent witness, who was himself injured having been dealt with a lathi blow by accused Madhu Lenka (A5).

24. The deposition of P.W.17 has been carefully examined by this Court. He stated that on the date of occurrence, he had in fact gone to village Raghunathpur and had met some of the villagers there including the deceased Shyama Sundar Raut, Matia Nayak (A6) and they had requested him to settle the matter on that date itself. They had told him that they were about to come to him, but the villagers of Ghumusarpadar were not allowing them to pass through the public road which was running through their village. P.W.17 then expressed his difficulty saying that it was not

possible to settle the dispute on that day itself. He told them that he would call a Panchayat meeting to decide the disputes between the two villagers. He asked five of them to come with him to the Panchayat Office. In the meanwhile, a hut of an old lady was gutted. So, it took time to put out the fire and this delayed all of them coming to the Panchayat Office.

25. According to P.W.17, at this stage, Matia Nayak (A6) met him in the front of house of one Ananta Ch. Naik and challenged him saying that he was incapable of dispensing justice. P.W.17 asked A6 to have patience, extricated himself and returned to village Ghumusarpadar where fifteen persons were sitting in the Jubak Sangh premises. When they asked P.W.17 about his efforts in settling the dispute, he told them that “the villagers of Raghunathpur have agreed for an amicable settlement” and that “five of them might come to the Panchayat Office.”

26. According to P.W. 17, he then heard the hue and cry near the tank of village Ghumusarpadar which is 200 cubits from the Jubak Sangh Office. That group belonged to village Raghunathpur and comprised “about 20 to 25 persons”. They were raising “hullah violently”. On hearing the hullah, P.W.17 went forward to meet them to prevent breach of peace since he sensed that there could be rioting if the two groups came face to face. When he went close to the group of persons, he could “see accused Madhu Lenka only” and no sooner did he reach there that Madhu Lenka (A5) dealt a blow by a lathi to his head as result of which P.W.17 slumped to the ground. Thereafter, he lost his senses.

27. It is important to note that P.W.17 was not examined by the police. Interestingly, the defence did not choose to cross-examine P.W.17 at all. It is plain that the evidence of P.W.17 could be used only to prove the following:

(I) There was a brewing discontentment among the two sets of villagers;

(II) Even the villagers of village Raghunathpur were ready for a settlement, but were getting impatient;

(III) That about 20 to 25 persons of village Raghunathpur had approached near the tank of village Ghumusarpadar and were raising hullah while the meeting was in progress;

(IV) Importantly, P.W.17 does not mention that they were armed much less armed with deadly weapons;

(V) P.W.17 could only recognize A5 and none of the other accused. P.W.17 only states that A5 dealt a lathi blow on his head after which he lost his senses;

(VI) Since P.W. 17 was not examined by the police, there was also no injury report to prove the injury stated to have been suffered by him.

28. Therefore, the evidence of P.W.17 cannot be relied upon, as was done by the trial court, to hold that the prosecution had proved that the villagers of Raghunathpur had come armed with deadly weapons with a view to causing riot and bloodshed. Since P.W.17 is the only independent witness in the case, with all other witnesses for the prosecution belonging to village

Ghumusarpadar, the evidence of the other injured eyewitnesses has to be approached with a great deal of caution. The case law in this regard needs to be discussed at this stage. In ***Hari Obula Reddy v. The State of Andhra Pradesh (1981) 3 SCC 675*** the Supreme Court observed:

"13...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence.

All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

29. Again in ***Ramashish Rai v. Jagdish Singh (2005) 10 SCC 498***, it was held:

"7....The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

30. The principle to be kept in view is that the evidence of an inimical eye-witness must inspire confidence and must not suffer

from embellishments or exaggerations. The evidence of an interested witness must receive independent corroboration.

31. At this stage, the Court would like to take note of the lapses committed by P.W.25 during his investigation, which have been listed out by the trial Court. These include:

(A) Failure to send some of the material objects to the State FSL, Rasulgarh for chemical examination;

(B) Failure to issue injury requisitions in respect of those P.Ws who were referred to the MKCG Medical College and Hospital in time. He also failed to record their evidence within a reasonable time;

(C) Although he was supposed to have visited the spot on 23rd June, 1994 at 10 am, P.W.25 waited till 25th June, 1994 to seize brickbats and lathis;

(D) P.W.25 failed to record the statements of P.Ws.2, 5, 6, 7 and 13 and one Achuta Tarai (not examined) though he lodged that he recorded their statements;

(E) Although P.W.17 was assaulted by a lathi, P.W.25 did not consider it necessary to examine him and to issue a police requisition for his medical examination;

32. The clear finding of the trial court in regard to P.W.25 is as under:

“xxx

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(viii) This witness appears to have distorted and mutilated the statements of witnesses recorded u/s 161 Cr.P.C. The injuries found on some of the injured persons in this case, were such that they could not have stated in the manner in which p.w.25 recorded their statements u/s 161 Cr.P.C. This is why, the statements recorded by him were not given much importance in view of the judgments discussed earlier.”

33. Thus, the trial Court has chosen to completely overlook the improvements made during their depositions in Court by several of the injured P.Ws.

34. There is merit in the contention of Mr. Nayak about the failure of the P.Ws. to specifically state which of the accused caused injuries to which PW. Further, there are some obvious inconsistencies and discrepancies in the depositions of the PWs. P.Ws.1 and 3 stated that P.Ws.6 suffered gunshot injuries whereas P.W.6 himself did not assert that he had received any gunshot injury. P.Ws.8 and 11 say that they received firearm injuries and this is supported by the medical evidence. However, P.W.8 says that the firing by Hajari Raut (A28) hit him on the left side chest, right side belly and on the right leg above the knee joint and below the knee joint. He also speaks about P.Ws.10, 11 and 13 being hit by the gunfire opened by A28 and A29 although he says he lost consciousness soon after he was fired upon. That part of the evidence is, therefore, only hearsay. Likewise, on examination of the deposition of P.W.11, he too attributes his injuries to the

gunshot from A28. However, these witnesses were examined by the police more than a month after the incident. An important fact to be noted here is that none of the firearms purportedly used in the commission of the offence was seized.

35. Turning to the evidence of Kedar Lanka (P.W.12), he states that his injury was as a result of the tenta blow given by A32 Indramani Raut and lathi blows by Indramani Swain (A31). He too talks of Kulamani Nayak (A26) firing upon the deceased and three others i.e., A27 to A29 opening fire in quick succession. However, as pointed out by the trial Court itself, these depositions were recorded much later by the police. In his cross-examination, he states that he was examined by the police one and half months after the incident and he had not disclosed anything to anyone earlier. P.W.11 states in his cross-examination “I have not seen any assault on anybody other than Shyam Rout and Sarpanch. I was examined by the police after one month or one to one and half month after I was discharged from the Medical College Hospital, Berhampur.”

36. Witness after witness talks of the delay during examination by the police. It will be recalled that among the lapses in investigation pointed out by the trial Court is the failure by the IO to record the statements of P.Ws.2, 5, 6, 7, 13 and even P.W.9, who suffered the tenta blow on the right side chest from A6-Matia Nayak, states that he was examined by the police one and half months after the date of the occurrence. In other words, there was sufficient time for the witnesses to be tutored to parrot the same

narrative. This kind of evidence does not inspire any confidence whatsoever. What is uniformly stated by all these injured witnesses therefore has to be viewed with some suspicion. In the absence of corroboration by some independent witness, or unambiguously by the medical evidence, the said evidence of the PWs, although injured, does not inspire confidence. As will be noticed later, the medical evidence is also not very clear and does not fully corroborate the narrative of the injured eye witnesses.

37. The trial Court found fault with P.W.19 for handling the injuries of all accused persons as well as the ten of the prosecution party in a matter of one and half hours only. However, what is significant is P.W.19 is still retained as prosecution witness and he has not been declared hostile by the prosecution. Importantly, it has not been put to him by the prosecution that the injury reports at Exts. A to K are false. On the other hand, this has been proved by the defence in his cross-examination. The trial Court could not have therefore overlooked the above aspect of the evidence of P.W.19 and to have discarded it in toto on the basis of the fact that he examined as many as 20 persons within a span of one and half hours. No suggestion was given to him by the prosecution that he could not have done so. The Court is therefore not satisfied at all with the manner in which the trial Court has simply rejected the evidence of P.W.19 and recommended action against him only because there was a variance in the reports submitted by him and that submitted by P.W.21.

38. The following further findings of the trial Court on the variance of the injury reports submitted by P.W.19 on the one hand and those by P.W.21 on the other, are important:

“xxx. More importantly, there is great deal of variance in the injury reports submitted by P.W.19 vide Exts.21, 22 and 25 when those reports are compared with Exts.27, 29 and 31 furnished by P.W.21.”

Non-explanation of injuries on the accused

39. Turning next to the injuries on the accused persons, it is plain that P.W.19 did issue those injury certificates and yet the prosecution did not attempt to explain how it occurred. In ***Mohar Rai v. State of Bihar (1968) 3 SCR 525***, commenting on the effect of the prosecution’s failure to properly explain the injuries on the accused, the Supreme Court held: “...the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true.”

40. In ***Lakshmi Singh v. State of Bihar (1976) 4 SCC 394***, the Supreme Court explained the legal position thus:

“It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

- (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a

most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.”

41. During their statements under Section 313 Cr.P.C. each of the 10 accused persons maintained that they were assaulted in the Jubak Sangh Office of Ghumusarpadar all of a sudden by the members of the prosecution party. Although the trial Court placed the burden of proving this on the accused themselves, the fact remains that the injury reports probabilise their being assaulted by the prosecution party. Merely because the place of assault is proved to be false by the unchallenged evidence of P.W.17, it would not falsify the injury reports Exts.A to K.

42. Thus on a perusal of the entire evidence, this Court is not satisfied that it safe to base the conviction of the Appellants on the testimonies of the injured PWs. The entire truth has not emerged from their narratives. The evidence throws up more than a reasonable doubt that the events transpired as depicted by the prosecution through the voices of the aforementioned PWs. In this context, the following observations of the Supreme Court in *Padam Singh v. State of Uttar Pradesh* 2000 SCC (Cri) 285, in

context of the duty of the appellate Court while examining a trial Court judgment on conviction are relevant:

“2...It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court. The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding the conviction.”

Delay in lodging the FIR

43. Among the lapses pointed out is that although the FIR was lodged at 9.45 am on 23rd June 1994, the Informant (P.W.3) stated that he had come to the PS after having sent P.Ws.8, 9, 10, 12 and 16 to the MKCG Medical College and Hospital, Berhampur. From the injury reports of the said P.Ws., it was plain that they were still at the Balugaon PHC till 11.10 am. If the above statement of P.W.3, the informant, were to be accepted, then the FIR could not have been registered at 9.45 am. The trial Court notices this

discrepancy but tries to overcome it by accepting the explanation of P.W.3 that he assumed that some of the injured had been sent to the MKCG Medical College and Hospital, Berhampur on the advice of local doctors even though actually they were not sent by them and their examination had not taken place by the local doctors. This explanation is not convincing at all. There actually appears to be a discrepancy as to the exact time of lodging the FIR. When this is seen with the lapses committed by the IO, then it raises even more serious doubts. The fact that the FIR was received in the Court of JMFC, Banpur through the Balugaon PS, which is only 10 KMs from the Court only on 24th June, 1994 further raises serious doubts.

44. The delay in lodging the FIR has not been convincingly explained at all. If indeed the IO had rushed to the spot and was busy being preoccupied, then it is not possible for him to have registered the FIR at 9.45 am. In fact, this was noted as one of the serious lapses by the trial Court. It notes that “(i) as pointed out above by Mr. Kanungo, P.W.25 is forced to admit that while he was present at the spot at 10 A.M. on 23.6.94, in this case, he has mentioned in the case diary of the counter case that he was present at the Police station on the same day and same time, as aforesaid.”

45. The failure to properly examine the delay in lodging the FIR can actually be fatal to the prosecution as explained in the following cases. In *Thulia Kali v.State of Tamil Nadu AIR 1973 SC 501*, it was held:

“12...First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.”

46. Again, in *State of A.P. v. Punati Ramulu* AIR 1993 SC 2644, it was held:

“5.Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stooped to fabricate evidence and create false clues.”

47. In the instant case, the serious lapses in the investigation by the I.O. (P.W. 25) have already been noted. These cannot be

brushed aside as lapses deliberately made to help the accused particularly when there is very little credible material to counter-balance the large gaps in the prosecution evidence. It is too simplistic to attribute the lapses to the defence and to convict them on that basis even while recommending disciplinary action against the IO. This way the true picture would never emerge.

48. It appears that the trial Court was in a dilemma faced with the serious lapses of the above investigation and the closeness of the time period from the date of occurrence when the judgment was being delivered i.e., within slightly above two years from the date of occurrence. There had been a clash between two sets of villagers where one had died and several had been injured on both sides. It must have been very difficult for the trial Court to accept the fact that the investigation had been botched up by P.W.25 and further that there were serious discrepancies in injury reports submitted by two Government doctors i.e., P.Ws.19 and 21. The trial Court chose the path of ignoring the lapses in investigation and ignoring the conflicting injury reports and instead recommending disciplinary action against the IO and P.W.19. What was perhaps overlooked was that the above lapses had seriously weakened the case of the prosecution throwing very grave doubts on the manner in which the evidence was led in the Court.

49. As far as the present appeals are concerned, the Court is of the view that on a complete analysis of the evidence that while the eye witness testimonies and the medical evidence unmistakably

prove that accused Kulamani Nayak by opening gunfire did kill Shyama Sundar Raut and, therefore, was rightly convicted for the offence under Section 302 IPC, it is difficult to infer from the evidence led by the prosecution that the other co-accused shared the common objective of causing that death. The trial Court also appears to have harboured a doubt in this regard as in the last paragraph of the impugned judgment the trial Court anticipated this result and, therefore, ordered alternative sentences.

50. The accused other than Kulamani Naik were charged with the offences with the aid of Sections 148 and separately under 149 IPC. The evidence of the prosecution seeks to project the case of attack on the prosecution party by the accused party whereas it is more of a free fight with there being injured persons on both sides. In such cases, the Court has to be extra careful that 'innocent bystanders' are not roped in. In *Eknath Ganpat Aher v. State of Maharashtra (2010) 6 SCC 519* the facts were that it was a free fight in which the injuries on the accused were not properly explained. The Supreme Court observed as under:

“22....Despite the fact that a number of accused persons had received injuries and also despite the fact that no reason was forthcoming from the prosecution in regard to the injuries suffered by the accused persons, the Courts below discarded the said injuries holding that the said injuries were extremely minor and that injured accused persons could not prove that they had been assaulted by the complainant party. The Courts below were of the opinion that stand taken by the accused persons was not enough to discard the credible evidence of the injured eye-witnesses.

23. In our considered opinion the aforesaid approach of the Courts below was incorrect. Nine persons including four witnesses belonging to the complainant party received injuries whereas as many as 14 accused persons received injuries including some who even suffered grievous injuries. Admittedly, there was a mob of about 75-100 persons who descended from the hill side to the place of occurrence by pelting stones and a melee followed. Not even a single witness including the injured witnesses could specifically state as to who had caused what injury either to the deceased or to the injured witnesses or to the accused. A very general statement has been made that the accused persons were armed with deadly weapons and caused injuries to the complainant party. In a situation where a mob of 75-100 persons entered into a clash with the complainant party it could not have been possible for any of the witnesses, who would naturally be concerned with their own safety and to save themselves from the assault, to see as to who had inflicted what type of injury either on the deceased or on the injured witnesses.

24. In view of such omnibus and vague statements given by the witnesses, the Court below acquitted as many as 21 accused persons on the ground that there is no evidence on record to implicate them in the offences alleged. There being no other evidence to specifically ascribe any definite role to any of the 14 appellants herein, it is difficult to hold that any of the present appellant had inflicted any particular injury on any of the deceased or the injured witnesses. Unless there is cogent and specific evidence attributing a specific role in the incident to the accused persons, who have themselves been injured and there being no explanation forthcoming as to such injuries, it would be unsafe to pass an order recording conviction and sentence against the appellants, more so when the prosecution has produced, in support of its case, witnesses who are inimical to the accused persons. It is crystal from the records that land of Gat No. 170 is the bone of contention between the complainant party and the

accused. As noted above, civil cases with regard to the question of title and ownership to the said land have been instituted by both the accused and the complainant party which are pending final adjudication.”

51. Again, in *Subal Ghorai v. State of West Bengal (2013) 4 SCC 607*, in the context of the principle of constructive liability embodied in Section 149 IPC, it was observed by the Supreme Court as under:

“53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do

not dilute the concept of constructive liability. They embody a rule of caution.”

52. In the considered view of this Court the charges against the accused, other than Kulamani Naik, with the aid of Sections 148 and 149 IPC have not been convincingly proved by the prosecution. So also, the charge against all of them for commission of the offence punishable under Section 307 IPC or Sections 25/27 of the Arms Act has not been convincingly proved.

Conclusion

53. Consequently, the Court is not satisfied that the case against the co-accused, other than Kulamani Nayak, has been convincingly proved by the prosecution beyond all reasonable doubt. With the appeal as far as Kulamani Nayak has filed being Criminal Appeal No.268 of 1996 having been already abated, the Court is not therefore called upon to deal with that anymore.

54. As far as the remaining appeals are concerned, the Court is not satisfied that the prosecution has been able to prove the case against the accused beyond all reasonable doubt and, therefore, they be given the benefit of doubt and acquitted of the charges. The impugned judgment of the trial Court as far as they are concerned is set aside.

55. The appeals are accordingly allowed. The trial Court will ensure compliance by each of the Appellants with the provisions

of Section 437 A Cr PC, till such time the bail bonds furnished by the Appellants in the present appeal shall remain in force.

(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

M. Panda.

