

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA No. 345 of 2006

Gulgula@ Gulap Khan ***Appellant***

-versus-

State of Orissa ***Respondent***

CRLA No. 293 of 2006

Amjad Khan and others ***Appellants***

-versus-

State of Orissa ***Respondent***

Appeared in this case:

For Appellants : Mr. Bijaya Kumar Ragada, Advocate
(In CRLA No. 345 of 2006)

Mr. Devashis Panda, Advocate
(In CRLA No. 293 of 2006)

For Respondent : Mr. A.P. Das,
Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK

JUDGMENT
06.05.2022

Dr. S. Muralidhar, CJ.

1. These two appeals are directed against the common impugned Judgment and order of the Trial Court and are accordingly being disposed of by a common Judgment.

2. The Judgment under challenge is dated 11th July 2006, passed by the learned District & Sessions Judge, Sambalpur, Phulbani in S.T. Case No.208/30 of 2001/2003, whereby the four Appellants, namely, Amjad Khan, Akbar Khan and Sadu@ Kasim Khan (the Appellants in CRLA No.293 of 2006) and Gulgula@ Gulap Khan (the Appellant in CRLA No.345 of 2006) have been convicted for the offence under Sections 302/452 read with Section 34 of the IPC and Section 27 of the Arms Act. Each of them has been sentenced to Rigorous Imprisonment (RI) for life and fine of Rs.10,000/- and in default to undergo further imprisonment for a period of one year for the offence under Section 302 r/w Section 34 of IPC. For the offence under Section 452 r/w Section 34 of IPC, each of them has been sentenced to undergo RI for two years and fine of Rs.10,000/- and in default to undergo further RI for four months. For the offence under Section 27 of the Arms Act, each of them has been sentenced to undergo RI for three years and fine of Rs.10,000/- and in default to undergo further RI for two months.

3. On 30th June 2011, the Appellant namely, Gulgula in CRLA No.345 of 2006 was granted bail. Sadu@ Kasim Khan, one of the Appellants in CRLA No.293 of 2006 was granted bail on 24th July, 2007.

4. It must be noticed at the outset that seven persons faced trial under Sections 147, 148, 452, 302 r/w Section 149 of IPC and Section 27 of the Arms Act. However, the Trial Court acquitted three of them. The Charges under Section 147, 148 and the substantive offence under Section 149 IPC were dropped. The

remaining accused persons, as noted herein before, were convicted.

5. The case of the Prosecution is that on 27th October 2000 at around 1.00 PM, four of the Appellants, armed with deadly weapons, entered the house of the deceased. They enquired about him from Saira Bee (PW-4), who happened to be the sister-in-law of the deceased and also the informant to the case. After PW-4 replied that the deceased was ill and sleeping, Gulgula, i.e., the Appellant in CRLA No.345 of 2006 pushed PW-4 and assaulted the deceased with a Tangari. At that point, the remaining three Appellants, that is the Appellants in CRLA No.293 of 2006, assaulted the deceased with Bhujali, Gupti and Lathi respectively. The deceased was brought out of the house by the Appellants where he succumbed to his injuries due to severe bleeding.

6. PW-4 was threatened by one Mangalu@ Abdula Khan as he held a Tarwal when she wanted to go to the Police Station to register the FIR. However, the Trial Court noted that the evidence against Mangalu as well as two other accused persons could not be established. What was able to be proved by the Prosecution was only that the present four Appellants attacked the deceased.

7. PW-4 then went over to the IIC of PS Phulbani and gave an oral report which was reduced to writing and then read over and explained to her. She then fixed her Left Thumb Impression (LTI) on the report.

8. On behalf of the Prosecution, sixteen witnesses were examined. Md. Moin (PW-1) and Sekh Dawood (PW-2) were the seizure

witnesses and turned hostile. Prabir Keshar Tripathy (PW-15) and Gopal Ch. Tripathy (PW-16) were the Investigating Officers (IOs).

9. Dr. Abhinav Behera (PW-10) conducted the Postmortem examination. PW-10, who conducted the Postmortem on the deceased, found the following external injuries:

"i. Incised wound- 1cm x 1/2 cm on posterior aspect of left forearm situated horizontally on the middle part

ii. Incised wound- 5 cm x 1 cm across the right eye ball (eyes injured)

iii. Chop wound- 6 cm x 3 cm x 5 cm deep behind the right mastoid process vertically placed.

iv. Incised wound- 1 cm x 1 cm on the right chin.

v. Stab wound- 3 cm x 1 cm in to cavity deep 6 cm medial to right nipple.

vi. Stab wound- 3 cm x 1.5 cm into cavity deep 9 cm below the xiphoid process

vii. Incised wound- 6 cm x 1 cm x 3 cm 2 in number present on right parietal eminence.

viii. Incised wound- 2 cm x 1.5 cm into bone deep at the left parietal eminence.

x. Stab wound- 3 cm x 1 cm into bone deep on first lumbar vertebra.

xi. Stab wound- 2.5 cm x 1 cm into muscle deep on right gluteal region.

xii. Stab wound- 1 cm x 1.5 cm on medial part of left thigh."

10. Along with the above injuries, the PW-10 also detected five old injuries on the deceased. The internal injuries noticed on dissection were described thus:

"3. On dissection I found that in the chest cavity there was haemo thorax. Medial boarder of right lung was punctured which corresponds to wound no.5. Scalp bone was lying loose in the scalp tissue on right parietal region corresponding to wound no.8. Liver was punctured on the right lob about 1 litres of flued blood was drained out of the abdominal cavity. Brain was lacerated on right parietal region. There was fracture of base of skull on posterior cranel fossa measuring 4" length. Mandible was fracture into multiple pieces corresponding to wound no.4. There was subdural haematoma on right hemisphere. All the organs were pale looking."

11. PW-10 opined that all the wounds were anti-mortem in nature and that the incised and chop wounds were possibly inflicted by a weapon like Tangia and the stabbed wounds by a sharp cutting knife. He opined that wound nos. 3, 5 and 6 were fatal in ordinary course of nature. The cause of death was due to shock and haemorrhage as a result of the above fatal wounds. He clearly stated that the death was homicidal in nature and that any one of the injury nos. 3, 5 and 6 were individually capable of causing death. PW-10 also stated that all the incised wounds "could be possible by means of a Bhujali and the stab wounds by means of a Gupti".

12. As it transpired, the weapons used in the attack were also produced before the PW-10 who opined that the injuries caused to the deceased could possibly be caused by those weapons. PW-10 was subjected to cross-examination by the deceased. In his cross-examination, he stated *inter alia* as under:

"9. Probably more than one person had inflicted the injuries on the deceased. I have not mentioned in my report that the death was homicidal. As I only conducted preliminary test of the M.Os. II & III to detect if there was any blood stain mark, I cannot say definitely if the said blood stains was of human being or animal."

13. Nothing could be elicited from the cross-examination of PW-10 to doubt the credibility of his evidence.

14. One plea of Mr. Devasish Panda, learned counsel for the accused was that the postmortem report did not relate to the deceased since the date and time of its examination is given on report itself as 11.30 AM on 27th October 2000, whereas the FIR was lodged at 2.00 PM on 27th October 2000.

15. However, as noted by the Trial Court, the entry in the postmortem report (Ext-10) appears to be a mistaken one as in Column-6 of the same Ext-10, the time of dispatch of the dead body shown to be 4.00 PM. Further as per the inquest report (Ext-23), the dead body was inspected by the Police Officer at 3.00 PM. The dead body challan also revealed that the dead body was received on the next day i.e., on 28th October 2000 at 11.00 AM. Therefore, there can be no manner of doubt that the postmortem was of the deceased only.

16. One of the submissions put forth by Mr. Devashis Panda, learned counsel appearing for three Appellants in CRLA No.293 of 2006 was that PW-4, being the sister-in-law of the deceased, was an interested witness. Further it was stated that she came out of the house after the first assault happened and therefore could not be called as an eye witness. It was further urged that she could not have seen the accused persons if she claims to be in panic condition. Mr. Panda relied on the decision in **Babu v State of UP, AIR 1980 SC 443** to urge that an interested witness can be relied upon only where it is cogent and clear.

17. Mr. A.P. Das, learned Additional Standing Counsel appearing for the State pointed out that there were only three eye-witnesses to the occurrence, namely, PW-4 the sister-in-law, PW-5 (Rabia Bee) was not related and PW-7 (Jainabi Bee) who again was the sister of the deceased.

18. At this stage, the law in relation to the eye-witnesses who may be the interested witnesses needs to be recapitulated. On the issue of appreciation of evidence of interested witnesses, in **Dalip Singh v. State of Punjab AIR 1953 SC 364** it was held as follows:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.

It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and

the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

19. In ***Piara Singh v. State of Punjab AIR 1977 SC 2274*** the Supreme Court held:

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

20. 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."

21. 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."

22. Keeping the above exposition of law in view, the Court has examined carefully the evidence of PWs-4, 5 and 7. They are clear, cogent and consistent and fully support the prosecution case that it is the accused who came to the house of the deceased holding weapons. The accused Gulgula was holding Tangari, accused Akbar was holding Gupti, accused Amjad was holding Bhujali and the accused Sadu was holding Lathi. It was also added that the accused Mangalu was holding a Khanda. After entering the house they uttered abusive profanities. PW-4 was stated to have protested stating that the deceased was sleeping and at that time the accused Gulgula caught hold of her neck and pushed her and she fell down. Thereafter, he gave a blow with a Tangari on the head of the deceased causing bleeding injury, whereafter, the other accused Akbar, Amzad and Sadu also dealt blows by the weapons they had. PW-4 then came out of the house saying that "BACHAO BACHAO" attracting the attention of others. She managed to reach the Police Station with the help of her brother namely, Md. Azgar and by the time the deceased had succumbed to his injuries.

23. PW-4 was cross-examined at great length but the replies in the cross-examination only strengthen her evidence and made her come across a strong and independent witness was clear going to the facts. There may have a few inconsistencies in the statements made by her to the IO and what she said in the Court but these were not material so as to discredit her testimony. Quite naturally she stated "As I was in a panic condition I cannot say whether I gave thumb impression with left hand or right hand".

24. The Court is satisfied that the decision in ***Babu v State of UP*** (*supra*) does not help the case of the accused in any event in view of the clear and cogent evidence of PW-4. Her evidence was totally corroborated by the medical evidence with the injuries matching her description of the attack.

25. Mr. B.K. Ragada, learned counsel appearing for the Appellant namely, Gulgula sought to urge that in the chief examination of PW-10, it was not mentioned that the death could be due to a Tangari. Even if a specific mention is not made of Tangari as a weapon causing the fatal blows, it is clear from the number of injuries on the deceased and the fact that all the accused did attack him and that their presence was established and that they were acting in concert was also established.

26. Mr. Panda argued that no reliance could be placed on the evidence of PW-7 (Jainabi Bee) as she was not initially examined by the IO. Reliance was placed on the decision in ***State of Orissa v Brahmananda Nanda AIR 1976 SC 2488***, where a delay of three days in examining the eye-witness was stated to be fatal, whereas in the present case, PW-7 was not at all examined by the IO.

27. As rightly pointed out by Mr. A.P. Das, learned Additional Standing Counsel, the presence of PW-7 cannot be denied. She was mentioned in the FIR. PW-4 also mentioned of her presence in her deposition. Although PW-7 may not have been examined by the IO, her evidence to the extent that she was present in the house has been corroborated by PW-4 as well as the FIR.

28. Even otherwise examining carefully the evidence of PW-7, she lends assurance to the version of the prosecution and corroborates

PW-4 on all material particulars. Her description of the events is convincing as that of an eye-witness present at the spot. The medical evidence also corroborates her version.

29. Both Mr. Panda and Mr. Ragada, learned counsel for the respective Appellants, pointed out the previous enmity between the deceased and the accused persons. However, as pointed out by the Trial Court, previous enmity is a double-edged weapon and in the present case, it goes against the Defence. It supplies the motive for the crime although in a case of this nature, the Prosecution story is fully proved by the direct eye-witnesses. Motive does not assume a great importance.

30. Mr. Ragada, learned counsel sought to suggest that there was inconsistency in the testimony of PW-7. Whereas PW-4 stated that Gulgula gave the Tangia blow on the head, PW-7 stated that the blow was given on the neck.

31. The Court is unable to find any serious inconsistency here particularly since the injuries suffered by the deceased are numerous and there appears to have been an indiscriminate attack on him by all the accused with the weapons.

32. Mr. Panda, learned counsel sought to suggest that the recovery of the weapons in the instance of the accused ought not to be believed. He pointed out that the two witnesses projected for proving the recovery turned hostile.

33. This is a case of direct evidence where the eye-witnesses have clearly and cogently spoken of the attack by the accused on the deceased, who was unarmed. The description of the weapons used

by them, for the attack is fully corroborated by the medical evidence. Even if the weapons were not recovered, it would not weaken the Prosecution. In majority criminal cases, the recovery of the weapon of offence turns out to be any other piece of evidence on account of the independent witnesses to the recovery turning hostile. This is not an unusual phenomenon. In the present case, it makes no difference to the prosecution successfully proving beyond all reasonable doubts that the Appellants and no one else who were the authors of the crime.

34. In *Karulal v State of Madhya Pradesh 2020 SCC OnLine SC 818*, the Supreme Court explained that "if the witnesses are otherwise trustworthy, past enmity by itself will not discredit any testimony. In fact the history of bad blood gives a clear motive for the crime". As regards related witnesses in the same decision, it was observed as under:

"18. Let us now consider the law on evidentiary value of a related witness. Commenting on the aspect, Justice Vivian Bose in *Dalip Singh v. State of Punjab AIR 1953 SC 364* rightly opined that:

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar v. The State of Rajasthan*. We find, however, that it unfortunately still

persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.....

.....it was appropriately observed by Justice H.R. Khanna in *State of Uttar Pradesh v. Samman Dass* (1972) 3 SCC 201

"23..... It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant....."

35. In ***Khurshid Ahmed v. State of Jammu and Kashmir*** (2018) 7 SCC 429, it was stated as under:

"31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused (See *Harbans Kaur v. State of Haryana*)"

36. On the aspect of previous enmity, the Supreme Court stated that "If the witnesses are otherwise trustworthy, past enmity by itself will not discredit any testimony. In fact the history of bad blood gives a clear motive for the crime."

37. In *Sushil v. State of U.P. 1995 Supp (1) SCC 363*, it was again explained as under:

"8.....It goes without saying that enmity is a double-edged weapon which cuts both ways. It may constitute a motive for the commission of the crime and at the same time it may also provide a motive for false implication. In the present case there is evidence to establish motive and when the prosecution adduced positive evidence showing the direct involvement of the accused in the crime, motive assumes importance. The evidence of interested witnesses and those who are related to the deceased cannot be thrown out simply for that reason. But if after applying the rule of caution their evidence is found to be reliable and corroborated by independent evidence there is no reason to discard their evidence but it has to be accepted as reliable....."

38. Mr. Panda, learned counsel sought to argue that there was a delay in forwarding the FIR to the court of SDJM, Sambalpur in the present case which delay was fatal to the Prosecution. The Court notes that the FIR was lodged on the same day and it has come clear in the evidence of PW-4 that she immediately went and gave an oral report on the same day. It so happened that the FIR was received in the Court on the next day despite the Court and the Police Station being in close proximity. The Court is of the view that this does not affect the credibility to the Prosecution case as the eye-witnesses to the occurrence firmly stood their ground.

39. For all of the aforementioned cases, the Court finds no grounds made out for interference with the well-reasoned Judgment and order of the learned Trial Court. Accordingly, the appeals are

dismissed. The bail bonds of Gulgula (the Appellant in CRLA No.345 of 2006) and Sadu@ Kasim Khan (the Appellant in CRLA No.293 of 2006) are hereby cancelled. They are directed to surrender forthwith and in any event not later than 30th May, 2022, failing which, the IIC will take steps to take them into the custody forthwith for serving out the remainder of the sentences.

40. The appeals are accordingly dismissed.

S. Behera



(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge