

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA No.49 of 2004

Bibha Tandi and Others *Appellants*
-versus-
State of Odisha *Respondent*

Advocates appeared in this case:

For the Appellants : Mr. B.K. Swain, Advocate
on behalf of
Mr. N.C. Pati, Advocate
Mr. Devasish Panda, Advocate
For the Respondent : Mr. J. Katikia
Addl. Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK

JUDGMENT
12.05.2022

Dr. S. Muralidhar, CJ.

1. This appeal, directed against the judgment and order dated 13th February, 2004 passed by the learned Additional Sessions Judge, Sonapur in Sessions Case No.60/35 of 2000 and 2/8 of 2002 was filed on 27th February, 2004 by the 14 Appellants. Two of them i.e. Appellants Nos.1 and 2 (who were Accused 2 and 4 respectively in the Trial Court) were convicted for the offence under Section 302/34 IPC and sentenced to undergo imprisonment for life. The remaining accused Appellants were convicted for the

offence punishable under Section 323/149 IPC and sentenced to undergo rigorous imprisonment (RI) for six months; for the offence punishable under Sections 324/149 IPC to RI for one year and for the offence punishable under Section 325/149 IPC to RI for four years.

2. Jadu Tandi (Appellant No.12), Akshya Tandi (Appellant No.14), Bachu Tandi (Appellant No.11) and Danaba Tandi (Appellant No.7) were convicted for the offence punishable under Section 147 IPC and sentenced to undergo RI for six months each. All the Appellants were convicted for the offence punishable under Section 148 IPC and sentenced to undergo RI for one year each. All sentences were directed to run concurrently.

3. It must be mentioned at the outset that on 22nd March, 2004 this Court released on bail the Appellant Nos.3 to 14 i.e. Bhagabatia Tandi, Uttam Tandi, Binod Bisi, Kirtan Tandi, Danaba Tandi, Litar Tandi, Panchanan Tandi, Pankaja Tandi, Jadu Tandi, Hadu Tandi and Akshya Tandi. As far as Appellant Nos.1 and 2 i.e. Bibha Tandi and Khema Bisi are concerned, this Court directed that their bail applications will be considered after receipt of the Lower Court Record (LCR). However, on the next date, i.e. 10th August, 2004 this Court, after the LCR was received, rejected their bail applications after noting that the death of the deceased had occurred as a result of the axe blows given by Appellant Nos.1 and 2.

4. The bails applications of Appellants 1 and 2 were again rejected on 28th July, 2008. Finally, on 24th March, 2011 Appellant Nos.1 and 2 were enlarged on bail by this Court.

5. On 11th November, 2021 the death certificates of the Appellant Nos. 6 and 8 i.e. Kirtan Tandi and Litar Tandi were produced before this Court. This Court, therefore, noted that the appeal in respect of the said two Appellants had abated.

6. This Court has heard the submissions of Mr. Devasish Panda, learned counsel appearing for Appellant No.5; Mr. B.K. Swain, Advocate on behalf of Mr. N.C. Pati, learned counsel appearing for the remaining Appellants and Mr. J. Katikia, learned Additional Government Advocate (AGA) for the Respondent (State).

7. The case of the prosecution is that on account of previous enmity, the accused Appellants along with 15 others tried to close the passage to the house of Garjan Sahu (PW 1) i.e. the Informant on 29th March, 2000 at about 8 am by fencing it. Consequently, PW 1, his wife Suruchi Sahu (PW 2), four sons and daughter-in-law, including the neighbours, protested. According to the prosecution, the accused persons, anticipating the resistance, had made advanced preparation and immediately they brought weapons like axe, spear, lathi etc. which they had stacked in the nearby house and gave a war cry.

8. The further case of the prosecution is that Appellant No.1 i.e. Accused No.1 (A-1) Bibha Tandi is stated to have given one axe blow on the head of Madhu Sahu (the deceased) and Madhu fell down. Accused Khema Bisi (A-4) further assaulted Madhu with an axe. A-6 (Kirtan Tandi) assaulted Nabin Sahu (PW 6), the injured eyewitness who came to save the deceased, on his head with an axe. A-5 (Binod Bisi) assaulted PW 6 with a lathi. A-10 (Litar Tandi) gave a lathi blow to Suruchi Sahu (PW 2), the wife of PW 1. A-12 Pankaj Tandi assaulted Purnami Sahu @ Bhulki (PW 3), who is the daughter-in-law of PW 1 with a spear. It caused a cut on the finger on her left hand. Accused Bhagabatia Tandi (A-1) (Appellant No.3) hit PW 3 on her head by the blunt side of an axe. A-23 (Hadu Tandi, Appellant No.13) is stated to have assaulted PW 1 with a lathi whereas A-4 (Khema Bisi, Appellant No.2) assaulted Makardhaj Naik (PW 10) by an axe on his head. A-11 (Panchanan Tandi, Appellant No.9) assaulted Janma Naik (PW 9) with a lathi. A-15 (Kunchu Tandi) is stated to have injured one Sadhu Sahu (not examined) by pelting stones. A-14 (Jadumani), A-16 (Sudam), A-24 (Akhaya), A-13 (Buchu) and A-1 (Bhagabatia) are stated to have assaulted and dragged Nityananda Sahu (PW-8). The case of the prosecution was that all the accused persons assaulted the PWs mercilessly and fled away from the spot.

9. Garjan Sahu (PW 1) is stated to have brought his injured sons and the PWs to the police station (PS) and lodged an FIR. They were medically examined at Rampur and thereafter referred to

V.S.S. Medical College and Hospital for further treatment. The injured Madhu Sahu is stated to have succumbed to his injuries.

10. All the accused persons faced trial before the Additional Sessions Judge, Sonapur and were charged under Sections 147, 148, 341, 294, 324, 325, 336, 427, 307 and 302 read with 149 IPC.

11. The accused denied the charges and claimed trial. The defence version was that on the date of the occurrence some of the accused persons were repairing their houses standing on the canal acquired land. The Informant party, consisting of a large number of persons went there being armed with different weapons with a view to forcibly take possession of the said premises and prevent them from constructing/repairing of their existing houses by show of force; then assaulted some of the accused persons for which a counter case was filed. The defence plea was that PW 1 and his party men were the trespassers and aggressors. The accused persons also denied assaulting the deceased Madhu Sahu.

12. Sixteen witnesses were examined for the prosecution. As already noticed PW 1 is the informant. PW 2 is the wife of PW 1 and PW 3 is the daughter-in-law of PW 1. PW 8 is another son of PW 1. PW 6 is the husband of PW 3. PWs 9 and 10 were injured neighbours of PW 1 (Informant). PWs 4 and 7 were projected as occurrence witnesses. Dr. Daityanarayan Padhi (PW 5) examined the victims at Rampur PHC and referred them to VSS Medical College and Hospital. The post-mortem of the deceased was

conducted by PW 13 (Dr. Abhiram Behera). PW 2 was examined by Dr. Abani Kanta Mishra (PW 12), a lecturer in the Orthopedic Department. There were two Investigating Officers (IOs), PWs 15 and 16. The deceased was examined by Dr. Sanjib Mishra (PW 11) and Dr. Srikanta Panda (PW 14) who are lecturers in Neurosurgery and resident surgeon respectively.

13. The trial Court, on analyzing the evidence, noted that all the witnesses deposed that Bibha and Khema inflicted two axe blows on the head of deceased Madhu. This included independent witnesses i.e. Sadasiv Behera (PW 4) and Jagannath Sahu (PW 7). A number of persons had gathered there and during the hot exchange of words, the blows were inflicted on the head of the deceased.

14. Dr. Daityanarayan Padhi (PW 5) examined the deceased to find a 'L' shaped laceration on the head. Dr. Abhiram Behera (PW 13), who conducted the post-mortem examination found the stitched wound 'L' shaped on left temporal parietal region of 8 cm on each direction. Therefore, they opined that two blows on the same place from different directions could naturally cause the 'L' type injury on the head.

15. As far as the laceration wounds are concerned, the trial Court concluded that this could be as a result of blunt side of the axe, whereas some witnesses mistook it to be cut blows from the sharp side of the axe. However, this discrepancy did not discredit the otherwise consistent testimony of the eyewitnesses. Two axes

were recovered from the houses of Bibha and Khema and were shown to PW 5, who opined that the injuries on the deceased could be caused by those weapons. The forensic examination of the axes revealed that they contained human blood of 'A' Group. The wearing apparels of the deceased and the other injured persons were also sent to the State Forensic Science Laboratory (SFSL). They revealed the presence of 'A' and 'B' Group human blood.

16. The trial Court accordingly, concluded that the use of the seized axes as weapons could not be ruled out. The trial Court then discussed the injuries on the other witnesses which were caused perhaps by the blunt side of the axe. It was concluded that the act of Bibha and Khema was not attributable to other accused and therefore, they could not be brought under Section 302 IPC read with Section 149 IPC. During the assault, Naveen Sahu (PW 6) came to the help of the deceased and then A-6 (Kirtan Tandi) standing nearby assaulted PW 6 by an axe causing injuries on his person. Thereafter the other persons started assaulting the PWs. It was held that while there was a participation of Bibha, Khema and Kirtan in the assault of the deceased Madhu and PW 6 Nabin, the other accused persons who did not participate in the assault and were not members of the unlawful assembly could not be convicted for the offence under Section 149 IPC and therefore, were liable to be acquitted.

17. The trial Court had no difficulty in convicting Bibha and Khema for the offence punishable under Section 302 IPC read

with Section 34 IPC since the medical opinion which corroborated the eyewitness testimony, clearly showed that they had caused the fatal 'L' shape external injury on the head which resulted in the death of the deceased Madhu. They did it with the knowledge and intention to kill him. However, there was no evidence that the other witnesses harboured the same intention vis-à-vis the deceased. They were correspondingly convicted for the other offences as mentioned hereinbefore and sentenced in the manner indicated.

18. Mr. Devasish Panda, learned counsel appearing for Appellant No.5 (Binod Bisi) pointed out that the case of the prosecution was only that Binod had assaulted Nabin (PW 6) with a lathi. This was apart from the fact that he along with the other co-accused came to the aid of Bibha and Khema when they were attacking Madhu. However, this was a free fight in which both the parties had suffered injuries. He submitted that Binod's name had not been mentioned in the FIR when it was first registered.

19. Mr. B.K. Swain, learned counsel appearing for the other Appellants, submitted that the evidence brought out that there was groupism in the village and the accused at best can be said to have exercised their right of private defence of their property. The prosecution, according to him, failed to bring home the guilt of all the accused who had been arrayed. Further the testimonies of the PWs who were neither reliable nor consistent. He pointed out that all the accused persons belonging to one family except Khema, who was the domesticated son-in-law. The attempt was to book

all the members of the family whether or not they were actually involved in the incident. The previous enmity and litigation was in respect of canal acquired land over which A-1 (Bhagabatia Tandi) had a house.

20. Mr. Swain submitted that a charge sheet had been submitted against PWs 1, 8, 9 and 10 and another son of PW1 under Sections 143, 341, 336, 337 read with 149 IPC in G.R. Case No.40 of 2000 on the allegation that the said PWs had assaulted Gahala Tandi (A-20) Panchanan Tandi (A-11), Hadu Tandi (A-23) etc. had pelted stones. This was in fact supported by Prafulla Kumar Mishra (PW-15). In other words, there was a cross case against the informant party. Mr. Swain accordingly submitted that the trial Court should have held that the prosecution had not come to the Court in clean hands and suppressed the truth.

21. Mr. Swain submitted that the evidence of PWs in a case of this nature had to be examined with great care. He pointed out that while the prosecution case is that Bibha gave one axe blow and Khema another on the head of the deceased, PW 5, Dr. Daityanarayan Padhi only found a single 'L' shaped injury. This was supported by the post-mortem report of Dr. Abhiram Behera (PW 13) and Dr. Sanjib Mishra (PW 11). Consequently, the eye witness testimony was not corroborated by the medical evidence and the benefit of doubt ought to have been given to the accused.

22. Mr. Swain submitted that PWs 1, 3, 6, 8, 9 and 10 are highly interested witnesses and their evidence was full of contradictions.

With the case against some of the accused having been disbelieved by the trial Court, on the same evidence, the trial Court ought not to have proceeded to convict the remaining accused. It was plain from the evidence that the informant party were the aggressors. Accordingly, it was submitted that the charges against Appellants 1 and 2 for the offence punishable under Section 302 IPC read with Section 149 IPC were not sustainable in law.

23. Mr. J. Katikia, learned AGA on the other hand supported the judgment of the trial Court. He submitted that key PWs had all stood firm and despite searching cross-examination, none of them could be broken down by the defence. They were consistent and cogent. Although they may have been related and/or interested witnesses, when their depositions were examined carefully, it was apparent that the contradictions per se were not material so as to discredit them. Moreover, the medical evidence corroborated the version of the PWs. The fact that some of the accused were acquitted only showed that the trial Court had carried out an impartial analysis of the entire evidence. Unless the case of the prosecution was shown to have been proved beyond reasonable doubt vis-à-vis an accused, the trial Court would not proceed to simply convict all the accused persons.

24. Mr. Katikia submitted even assuming that it was a free fight and the accused were trying to defend their property, it is clear that the provocation was by the accused persons and anticipating the reaction of the prosecution party, they did come armed with

deadly weapons. Therefore, the ingredients of Section 302/34 IPC vis-à-vis Bibha and Khema were proved reasonable doubt. Even vis-à-vis the other convicted accused, it was submitted that although they could have also been convicted with the aid of Section 34 IPC, the prosecution did not do so. Consequently, the outcome justified the judgment of the trial Court, which did not call for any interference.

25. The above submissions have been considered. Since in this case the key eye witnesses fit the description of interested witnesses, the law in that regard requires 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."

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

"4.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 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."

27. In *Hari Obula Reddy v. 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."

28. 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."

29. In the light of the above settled position of law, the Court has carefully perused the testimonies of the key prosecution witnesses i.e. PW 1 (Garjan Sahu), PW 2 (Suruchi Sahu), PW 6 (Nabin Sahu), PW 8 (Nityananda Sahu), PW 9 (Janma Naik) and PW 10 (Makardhaj Naik). All of the said witnesses have spoken that the

accused persons led by Bhagabatia Tandi (A-1) closed the passage leading to the house of the prosecution party from the road by raising a fence with the help of bamboo and other materials. All of them have consistently spoken that when a protest was raised by the prosecution party, the accused party prepared with dangerous weapons proceeded to attack the prosecution party. Therefore, the provocation clearly was by the accused party and not by the informant/prosecution party.

30. As regards the actual assault, all these witnesses have consistently spoken of Bibha giving an axe blow on the head of the deceased Madhu and when he fell down, Khema also inflicted another head injury on him. It must be recalled that PW 6 (Nabin Sahu) is an injured eyewitness, who had spoken of A-6 (Kirtan Tandi) giving him (PW 6) an axe blow, A-5 (Binod) assaulting him by a lathi; it was also clear that A-4 (Khema Bisi) had assaulted PW 10 (Makardhaj) with an axe; A-3 (Uttam Tandi) assaulted Sonu Naik with a lathi and A-11 (Panchanan) a lathi blow on the head of Janma (PW 9). A-23 (Hadu) had assaulted PW 1 with a lathi. The lathi blow on PW 2 resulting her right arm being fractured. The spear attack by A-12 (Pankaja) on PW 3 (Bhulki) was also spoken of. A-1 (Bhagabatia) assaulted her with an axe and thereby she suffered injuries. The cross-examination of these PWs may have yielded a few inconsistencies, but these were not on the material aspects of the prosecution case.

31. At this stage, it is important to note the evidence of PW 5 (Dr. Daityanarayan Padhi), who had examined the injured

eyewitnesses. In particular his examination of PW 1 (Garjan), PW 6 (Nabin) and PW 3 (Purnami Sahoo @ Bhulki) is relevant. PW 3 had three lacerated bleeding injuries on her left little finger, left forearm and the skull. As regards the deceased, PW 5 stated as under:

“5. Similarly I also examined Madhusudan Sahu, S/o. Garjan of Balenipali to find one lacerated bleeding injury (‘L’ Shaped) of side 3” of each arm of the ‘L’ having 1” depth and 1” breadth. It should have been caused by hard and blunt weapon within 3 hours of my examination and referred to VSS medical college, Burla for further treatment with suspected underlying intracranial haemorrhage and fractured skull. This is my report and this is my signature marked ext.6 and 6/1 respectively.”

32. PW 5 also spoke of the injuries to Sadhu Sahu, Sonu Naik, Janma Naik, Makardhaj Naik and said that those injuries by and large were simple in nature caused by a hard and blunt object. The injuries to Nityananda Sahoo (PW 8) were also described as being simple in nature. In his cross examination, as regards the injury on deceased, PW 5 stated as under:

“12. There was a single injury in ext.6 belonging to Madhusudan Sahu. Either axe can cause such injury. A single blow by any of these axes can cause such injury. Definitely this injury could be caused by a blow in the blunt side of the axe and not in the sharp side. I have mentioned in my report with reference to query that “the death of a person in ordinary course of life and injury caused by ext. No.L and M’ may be possible or may not be possible as death due to head injury depends on the gravity of the injury.” I agree that such type of injury is also possible by accidental fall on hard and rough surface.

13. I further agree that all these injuries vide ext.2 to 11 are possible by fall depending upon circumstances. I have not mentioned the age of injuries in cases of swellings. Police did not produce M.O. I and II in sealed condition but the police constable carried them in open condition. M.O. I and II are small axes and not heavy weapon.

Re-examination on permission

14. With reference to the injury on ext. 6 of Madhusudan Sahu if 2 blows were inflicted on the same place, a single looking injury can be caused though gravity of the impact will be felt.

Re-cross-examination

15. Shape of the injuries cannot be ascertained by the number of blows. If two blows caused the injury vide ext.6 it cannot be said which blow was fatal.”

33. The above evidence does not substantiate the plea of the defence in the present case that the prosecution has failed to prove two injuries caused to the deceased by the two different accused Bibha and Khema. The cross-examination of PW 5 confirmed that an ‘L’ shape injury as a result of attacks by two different persons on the same spot was possible.

34. Likewise, if one peruses the deposition of Dr. Abhiram Behera (PW 13), he conducted the post-mortem of the deceased and found as follows:

“1) Stitched wound ‘L’ shaped on left temporo parietal region of size 8 cm on each arm. On dissection it was found that the scalp echimosed on left side just below the stitched wound. There was a

circular hole on skull measuring 6 cm in diameter on left parietal bone through which the membrane were visible and the hole was filled with blood clots. There was subdural haematoma of left hemisphere and subpial haemorrhage on temporal lobe. There was intracerebral haematoma measuring 4cm x 3 cm on the temporal lobe and fracture of base of skull of 4 cm on petrous bone in the middle cranial fossa.

35. PW 13 further stated in his deposition as under:

“2. In my opinion, the wounds were ante-mortem in nature with surgical intervention prior to death and the head injury might have been inflicted by hard and blunt trauma and it was fatal in ordinary course of nature and sufficient to cause death and death was due to coma as a result of the above mentioned head injury within 12 to 18 hours of the P.M. examination. This is the report and this is my signature marked ext. 22 and 22/1 respectively.

XXX exam

3. I found one injury which was ‘L’ shaped and the internal injury was the result of the external injury. The injury would be caused by hard and blunt weapon.”

36. The above medical evidence thus corroborates the ocular evidence in the present case. The injuries described by the injured eyewitnesses have also been substantiated by the doctors who examined them namely PW 5, PW 11, PW 13 and PW 14. Consequently, this Court rejects the plea of the counsel for the Appellants that the evidence of the eyewitnesses was not consistent or that it was not fully corroborated by the medical evidence. No doubt, it was a fight between two factions of the same family but clearly the aggressor party i.e. the accused had

come prepared to react to the slightest provocation of the prosecution party. Moreover, the force used by Bibha and Khema in inflicting sharp cutting injuries on the head of the deceased with axes, far exceeds the right of private defence of property as has been claimed. With two injuries having caused an 'L' shape injury by the axes by Bibha and Khema, which was fatal as was opined in the medical opinion, the prosecution had proved beyond reasonable doubt the guilt of the said two accused, Appellants 1 and 2, for the offence of murder. The appeals on their behalf must, therefore, fail.

37. The trial Court has thoroughly and objectively evaluated the evidence and separated such of those accused who were directly responsible for the murder of deceased and those who had not directly participated in that crime, but was guilty of lesser offences. Consequently, vis-a-vis the Appellants other than Appellants 1 and 2, as well, the Court concurs with the Trial Court that their guilt for the offences they have been found guilty of have been proved beyond reasonable doubt.

38. For all of the aforesaid reasons, the Court finds that the well reasoned order of the trial Court calls no interference.

39. The bail bonds of the Appellants stand cancelled. They are directed to surrender forthwith. If they do not do so on or before 1st June, 2022, the IICs of the concerned police station will take immediate steps to have them arrested and taken into custody to serve out the remainder of their sentence.

40. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(R.K. Pattnaik)
Judge

S.K.Jena/Secy.

