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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRA No.11 of 2001

Jaydev Behera

Appellant
....
Mr. P. Mohanty, Advocate

-Versus-

State of Odisha

Respondent
....
Mr. Ishwar Mohanty, ASC

JCRA No.12 of 2001

Govinda Behera

Appellant
....
Mr. P. Mohanty, Advocate

-Versus-

State of Odisha

Respondent
....
Mr. Ishwar Mohanty, ASC

CRA No.14 of 2001

Jayadev Behera and another

Appellants
....
Mr. P. Mohanty, Advocate

-Versus-

State of Odisha

Respondent
....
Mr. Ishwar Mohanty, ASC

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

DATE OF JUDGMENT:05.08.2022

R.K. Pattanaik, J

1. The Appellants have challenged the impugned judgment dated 30th October, 2000 passed in S.C. No.29 of 1998 by the learned JCRA Nos.11 & 12 of 2001
CRA No.14 of 2001

2nd Additional Sessions Judge, Berhampur for being convicted under Section 302 IPC and other offences on the grounds *inter alia* that the findings to be unjustified and hence, liable to be set aside followed by an order of acquittal.

2. The Appellants having been charged under Sections 147, 148, 302 and 149 IPC and Section 9(b) of the Indian Explosive Act were made to face trial. Finally, the learned court below returned with a finding of guilt against the Appellants and convicted them under Section 302 IPC with other offences however acquitting them of the offence punishable under Section 9(b) of the Indian Explosive Act and consequently sentenced each to imprisonment for life for the offence under Section 302 read with 149 IPC without any separate sentences for the rest of the offences.

3. The informant lodged the FIR on 9th October, 1997 alleging therein that on that day at about 10.20 a.m. while his deceased brother was at his medicine shop, at that time, the Appellants and others being armed with sword, kati and bombs attacked and killed him at the spot. After the FIR was lodged, K.S. Nagar P.S. Case No.104(6) dated 9th October, 1997 was registered. Finally, charge sheet was submitted against the Appellants and five others under the alleged offences to stand their trial in the court of law. The learned court below framed charges against the Appellants and thereafter, received evidence during trial and ultimately, convicted them of the alleged offences.

4. The plea of the Appellants is of denial and false implication.

5. Heard the learned counsel for the Appellants and Mr. Ishwar Mohanty, learned ASC for the State.

6. The prosecution story is that on 9th October, 1997 at about 10.20 a.m., the deceased was inside his medical shop and at that time, one Ambassador car arrived and stopped in front of it and seven persons including the Appellants got down from the vehicle being armed with sword and bombs and went inside the shop and assaulted the victim, who out of fear ran from there but was chased by them and was finally killed at the spot. The brother of the deceased lodged the FIR few hours after the alleged incident. The informant named the Appellants and nine others in the FIR by claiming that all of them combinedly killed the deceased.

7. In order to prove its case, the prosecution besides examining witnesses relied upon sixteen documents and some material objects. However, the defence did not lead any evidence. Considering the evidence of the prosecution, the learned court below reached at a conclusion regarding the guilt of the Appellants.

8. The learned counsel for the Appellants contended that there are discrepancies in the evidence of prosecution which the learned court below overlooked. It is further contended that the informant being the brother of the deceased falsely implicated the Appellants, the fact which was lost sight of by the court below and that apart, some independent witnesses were not examined and no clear motive could be revealed but still the learned court

below convicted them which is not legally tenable. On the other hand, the learned ASC contended that the evidence of the prosecution clearly proved and established the involvement of the Appellants in the killing of the deceased and even if the informant is related to the victim, his evidence could not have been entirely brushed aside, as he was most unlikely to falsely implicate someone other than the real culprits. It is further contended that the evidence has been cogent and credible which connected the Appellants with the alleged incident and therefore, the order of conviction suffers from no illegality and therefore, calls for no interference.

9. The learned defence counsel by contending that independent witnesses have not been examined though were available cited a decision of the Supreme Court in the case of ***Hem Raj and others v. State of Haryana (2005) 10 SCC 614*** besides ***Jagdish and another v. State of Haryana (2019) 76 OCR (SC) 411*** which is with regard to appreciation of evidence keeping in view the enmity between the parties. Further, another decision in the case of ***Baliraj Singh v. State of M.P. (2017) 14 SCC 291*** is relied upon which deals with contradictions and improvement in evidence. Whereas the learned ASC referred to a decision of the Apex Court in the case of ***Vijendra Singh v. State of U.P. (2017) 11 SCC 129*** while advancing an argument that there is a distinction between interested and related witness and the settled law is that interested evidence can form the basis of conviction even without corroboration from independent material.

10. The informant has been examined as P.W.1 being the elder brother of the deceased. According to him, on the date of incident, while he was at the shop of one Dinabandhu Sethi, the deceased was attacked and witnessed that the Appellants and others armed with sword went inside the medicine shop and assaulted his brother, who then started to run but was chased and after he fell down near a brick heap, the assailants gave him blows by means of sword and when tried to rescue the deceased, he was terrorized and on account of the alleged assault, the victim died at the spot. The learned counsel for the Appellants contends that P.W.1 was not at the spot and did not even witness the assault and for the first time during trial narrated the incident implicating the accused persons which was never stated in the FIR i.e. Ext.1. On a perusal of the FIR, it appears that P.W.1 barely after an hour or so lodged the report and informed the killing of his brother by the Appellants and other accused persons to the local police. But an FIR is not an encyclopedia which is not expected to contain every minute details of an incident. P.W.1 though did not elaborate in Ext.1, the manner in which the assault was carried out but deposed as a witness about his presence at the spot. The dispute between the deceased and the accused persons and existence of prior enmity between them since three years before the incident was also deposed by P.W.1 and according to him, it was the reason behind the alleged murder. P.W.1 has been cross-examined by the defence at length. Likewise, P.W.2 deposed that at the time of alleged incident, he was at a cycle mart of one Santosh Maharana and noticed the

arrival of an Ambassador car and the Appellants to have got down along with others and narrated the incident by claiming that the victim was assaulted and killed at the spot. The presence of P.W.1 near the spot was also claimed by P.W.2. According to P.W.2, prior to the occurrence, both sides had a dispute for taking lease of a tank. P.W.2 was also cross-examined elaborately about the incident and admitted existence of gang rivalry between both the sides. Similar is the evidence of P.W.3, who said to have witnessed the alleged incident and he too was cross-examined in detail. P.W.4 is the doctor who conducted the postmortem examination of the deceased. From the postmortem report marked as Ext.3, it appears that the deceased received nearly 20 external injuries majority of which were found to be incised wounds. In the opinion of P.W.4, all the injuries were ante mortem in nature. The victim did suffer a homicidal death. The evidence of P.Ws.1, 2 & 3 corroborate the medical evidence. The manner in which the incident happened was narrated not only by P.W.1 but also by other two ocular witnesses which received ample corroboration from the medical evidence as introduced through P.W.4. The I.O., namely, P.W.12 revealed the details of the investigation. All the material objects were collected either by or at the instance of P.W.12 including seizure of weapon of offence.

11. The learned defence counsel contends that P.W s 2 and 3 are habitual offenders and the deceased had enmity with many persons and even though FIR was lodged disclosing names of 11 persons but only 7 of them were charge sheeted. It is further

contended that P.W.1 is a brother of the deceased and is an interested witness and therefore, falsely added the names of the Appellants. In the considered view of the Court, evidence of a witness is not to be straightaway discarded or viewed with great amount of suspicion for the reason that he is a relative of the victim. It is alleged that P.W.1 projected himself as an eye witness by claiming that he was present near the shop of one Dinabandhu Sethi but in the spot map i.e. Ext.10, it has not been indicated, the fact which was admitted by P.W.12. But such elicitation from P.W.12 by itself is not sufficient to reject the entire evidence of P.W.1. Whether P.W.1 was referring to the house or shop of said Dinabandhu Sethi which in any case could not be substantiated cannot be a ground to disbelieve whole of his evidence. It is also contended that the scribe of the FIR was not examined and also a charge sheeted witness, namely, Santosh Maharana at whose shop P.W.2 was present, whereas, the witnesses, namely, P.W.6 and P.W.11 were picked up for examination. In fact, such non-examination of a witness has not affected or dented the prosecution claim as all the material witnesses including P.W.1 have been examined. It is claimed that the vehicle in question in which the accused persons arrived was not seized by P.W.12 which again cannot be a ground to reject the version of the prosecution. Admittedly P.W.12 has not seized any paper with regard to the alleged lease of the tank. However, from the evidence of P.W.2 and others, such fact of dispute between the parties relating to a tank has surfaced to which the motive stands attributed. As to the citations, the Court considers

that since none of the material witnesses have been left out by the prosecution, therefore, the decision in ***Hem Raj*** (supra) which has been relied upon by the learned defence counsel cannot be made applicable. As serious doubt was entertained in the conduct of the informant and since the parties were in litigating term, the Supreme Court in ***K.A.Kotrappa Reddy and another v. Rayara Manjunatha Reddy and others (2016) 14 SCC 729*** disbelieved the prosecution story and confirmed the reversal of conviction. In ***Jagdish*** (supra) as against the background of having animosity between the parties and considering other factors like delay in lodging of FIR, etc. doubted the prosecution case and confirmed the concurrent findings. Therefore, according to the Court, the above rulings which have been relied upon from the side of the defence are distinguishable as it turns on the facts and circumstances peculiar to the said cases. While advertng to the probative value of a relative witness, the Apex Court in ***Vijendra Singh*** (supra) observed as under:

“In this regard reference to a passage from Hari Obula Reddy v. State of AP (1981) 3 SCC 675 would be fruitful. In the said case, a three-Judge Bench has ruled that:

“[it cannot] 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 the 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.”

It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in *Kartik Malhar v. State of Bihar* (1996) 1 SCC 614 has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term “interested” postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.”

Though P.W.1 is the brother of the deceased and despite his claim about existence of a shop of one Dinabandhu Sethi could not be established, the same cannot be a justification to reject his evidence in entirety. The incident is not only narrated by P.W.1 but also by P.Ws.2 and 3, who are outsiders. The evidence of P.Ws.2 and 3 cannot also be discarded on the ground of direct enmity which is always considered to be a double edged weapon. All of them rather successfully withstood the cross-examination. In other words, the defence failed to elicit any such material to demolish the prosecution story. Having had a wholesome appreciation of the evidence on record, the Court reaches at a conclusion that the impugned decision of the learned court below suffers from no legal infirmity.

12. Accordingly, it is ordered.

13. In the result, the appeals stand dismissed. As a logical sequitur, the impugned judgment dated 30th October, 2000 passed in S.C. No.29 of 1998 by the learned 2nd Additional Sessions

Judge, Berhampur is hereby confirmed. Consequently, the bail bonds of the Appellants are cancelled and they are directed to surrender before the court below within seven days and in any case by 15th August, 2022 to undergo the sentence.

(R.K. Pattanaik)
Judge

(Dr. S. Muralidhar)
Chief Justice

KC Bisoi/Secretary

