

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA No.315 of 2000

Akrura Bag and others

....

Appellants

-versus-

State of Orissa

....

Respondent

Advocates appeared in this case:

For the Appellants

:

Mr. S.N. Sharma, Advocate

For the Respondent

:

Mr. J. Katikia
Addl. Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

JUDGMENT

07.09.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against a judgment dated 25th October 2000 passed by the Additional Sessions Judge, Balangir in Sessions Case No.37/12 of 1998 convicting the Appellants for the offence punishable under Section 302 read with 34 IPC and sentencing them to undergo rigorous imprisonment for life. Additionally, Appellants Kalia Bag and Bidyadhar Bag (A3 and A4 respectively) were convicted for the offences under Sections 323 and 324 IPC respectively. No separate sentence however was passed for those offences.

2. It requires to be noted at the outset that on 26th April 2007, Appellant No.4 was released on bail. By another order dated 1st October 2007, the remaining three Appellants were enlarged on bail.

3. The case of the prosecution is that an FIR was lodged at the Patnagarh Police Station (PS) on 9th November 1997 by Gajin Sunani (P.W.1) that he had expected an untoward incident during harvesting and he had requested Iswar Saltar (P.W.3), Mohan Sunani (P.W.4), Bahadur Sunani (P.W.5), Roopsingh Sunani (P.W.6) and Kunja Sunani (the deceased) to remain present on the land while the harvesting operation was in progress. Likewise, when P.W.1 and his wife Mukhi Sunani (P.W.2) were engaged in the harvesting and in presence of P.Ws.3 to 6, the four Appellants along with one Ichha Bag came to the land armed with deadly weapons like tabli, tangi, tangia, barchi, lathi, bow and arrow and all of a sudden, Akrura Bag-Accused No.1/Appellant No.1 (A1) aimed an arrow shot towards them which was warded off by Mohan Sunani (P.W.4). At this, Bidyadhar Bag (A4) dealt a lathi blow on the head of Mohan Sunani (P.W.4) as a result of which he fell down sustaining bleeding injury. P.W.4 then fled away from the spot. On seeing such assault on P.W.4, the deceased Kunja Sunani protested. Then all the four Appellants indiscriminately attacked him with their respective weapons. As a result, Kunja Sunani sustained multiple injuries. P.W.2- Mukhi Sunani and P.W.5-Bahadur Sunani were also assaulted by the Appellants when they protested. The Appellants then fled away from the spot.

4. Iswar Saltar (P.W.3) reported the matter to Police. An FIR as PS Case No.90 of 1997 was registered in the Patnagarh PS against the Appellants/accused under Sections 147, 148,307,324,323 read with 149 IPC. It was also registered against Ichha Bag, the mother of the Appellants who subsequently was acquitted. After the death of Kunja Sunani, the case was converted to one under Section 302 IPC along with other offences. While aiming an arrow towards P.W.4, A1 was supposed to have threatened him asking why he was present at the spot saying “*sale tumar kain jamibadi je tume achicha*”.

5. Satyanarayan Panda (P.W.13) was the Officer-in-Charge (OIC) at the Patnagarh PS who reduced the information given to him by P.W.3 into writing and registered the case. He then went to the spot and examined P.W.3, the injured Mohan Sunani (P.W.4) and sent him for medical examination. He then collected the wearing apparels of the injured witnesses. At 11.34 AM on the same day, he received intimation from Dr. R.N. Tripathy (P.W.9) about the death of the deceased. P.W.13 then held an inquest over the dead body of Kunja Sunani in the presence of the witnesses and sent the dead body for post mortem examination. He collected the incriminating articles and samples from the spot. He conducted a house search of the accused, seized the weapons of offence and arrested all the accused on the same day at 8PM. While in custody, Kalia Bag made a statement leading to the recovery of tabli which was concealed in the paddy field of Roopsingh Sunani (P.W.6). Likewise, pursuant to the statement of Kalia Bag (A3), tabli from the paddy field of P.W.6 was recovered.

6. On completion of the investigation, a charge sheet was laid against the accused for the aforementioned offences. They pleaded not guilty and claimed trial.

7. Thirteen witnesses were examined for the prosecution and two for the defence. Anirudha Chandan (D.W.1) was the brother-in-law of the present four Appellants and the son-in-law of Ichha Bag who produced rent receipts to show that the land in question belonged to the accused persons. Gokula Sahu (D.W.2) was the owner of the neighbouring land who again was produced to show that the land in question belonged to the accused.

8. On analysis of the evidence, the trial court came to the conclusion that the prosecution had proved the case against the four Appellants beyond reasonable doubt. However, accused No.5-Ichha Bag was acquitted. The convicted accused were sentenced in the manner indicated hereinbefore.

9. This Court has heard the submissions of Mr. S.N. Sharma, learned counsel appearing for the Appellants and Mr. J. Katikia, learned Additional Government Advocate (AGA) for the State.

10. Mr. Sharma first submitted that the present Appellants/accused were acting in self-defence. The land admittedly did not belong to P.W.1 nor had he raised any crop therein at any point in time. Taking the assistance of P.Ws.3 to 6, he was illegally harvesting the paddy from the land of the Appellants and therefore in order to

protect their property, the Appellants along with their mother went to the place of occurrence where there was a quarrel between them. Relying on the decision in ***Pitamber Mohanta v. State of Odisha (2018) 71 OCR 458***, it was submitted that even if the accused did not plead self-defence, it was open to consider such plea if that arose from the materials on record. In other words, it was submitted that the accused need not prove the existence of the right of private defence.

11. Mr. J. Katikia, learned AGA, on the other hand, pointed out that no such plea had been raised by the Appellants at any time during the trial. Even in the statement under Section 313 Cr.P.C., it was only stated by A1 that the prosecution party members fought among themselves after taking liquor which resulted in the death of Kunja Sunani and injuries to the others. He submitted that there was no iota of evidence in support of the plea of private defence. As regards the appreciation of the evidence of an injured eye witness reliance was placed in the decisions in ***Abdul Sayeed v. state of M.P. (2010) 10 SCC 259*** and ***Sadakat Kotwar v. State of Jharkhand 2021 SCC OnLine SC 1046***.

12. It is a fact that none of the witnesses had spoken about the right of private defence being exercised by any of the accused. Even the two witnesses D.W.1 and D.W.2 examined by the defence did not advert to the accused exercising the right to defend their property. Both these D.Ws. only sought to prove the ownership of the land in question as belonging to the accused party. Moreover, the Revenue Inspector (PW 12) deposed that the

case land stands recorded in the joint names of the Appellants and PW-1. Consequently, there is no material on record to sustain the plea of the defence that they were acting in exercise of their right of private defence of the property in question. Consequently, the said plea is hereby rejected.

13. It was next submitted by Mr. Sharma that since P.Ws.1 and 2 were forcibly harvesting the paddy from the land with an evil intention, it could be presumed that the Appellants had acted on strong provocation and therefore, the offence punishable under Section 302 IPC was not attracted. In other words, he contended, that there was no premeditated plan to kill Kunja Sunani who only intervened in the course of the quarrel with the other accused.

14. Here again, the evidence on record does not support the plea of the defence. From the evidence of the injured eye-witness Mohan Sunani (P.W.4), it is plain that no provocation was given to the accused by any of the P.Ws. who were assisting P.Ws.1 and 2 in harvesting paddy. On the contrary, the case is that the accused party attacked them with the deadly weapons without any provocation whatsoever alleging that the prosecution party was illegally harvesting paddy from the field belonging to the accused party. From the injuries sustained by the deceased, it is clear that he had been attacked mercilessly by the Appellants although he had only intervened to prevent P.W.4 from being attacked. Consequently, the Court is unable to agree with the submissions of learned counsel for the Appellants that the attack on the

prosecution party by the accused party was as a result of grave and sudden provocation.

15. It was then submitted by Mr. Sharma that the evidence on record does not prove the case against each of the Appellants beyond reasonable doubt. He in particular pointed to the evidence of the seizure witness P.W.7 who admitted that the weapon of offence had already been seized one or two hours earlier and were formally seized one or two hours after the arrival of Police. P.W. 7 further admitted that it would not be possible to identify the seized tangi when placed with ten other tangis. He also could not say on how many seizure lists signatures were obtained. It was pointed out how P.W.7 was silent about the seizure of the weapons in his presence and therefore it should be presumed that the seized weapons might not have been used in the crime. It was further submitted that there was no blood detected on the *tabli* which was supposed to be seized at the instance of the accused persons. Relying on the decision in *Mohd. Aman v. State of Rajasthan AIR 1997 SC 2960* it was submitted by Mr. Sharma that non-production of the material objects is fatal to the case of the prosecution.

16. It was further submitted that there were inherent inconsistencies and contradictions in the depositions of P.Ws.2, 3, 5 and 6 regarding the assault on the deceased. It was evident that none of them had actually seen the assault. It was submitted that P.W.2 in her examination in chief stated that all injured were taken to the village by bullock cart and then treated at the

Patnagarh hospital. In cross examination, she admitted that all three injured witnesses were sitting in the bullock cart and therefore it was obvious that the injuries were not serious. As far as the deceased is concerned, it was submitted that had he received timely treatment, he could have survived.

17. Mr. Sharma further submitted that there were improvements in the testimonies of the PWs when compared to their previous statements before the police. This was brought out in the cross examination of the investigating officer (I.O.) (P.W.13). Inasmuch as no blood was found on the seized *tablis* it was plain that it was not used in connection with the crime. One Kalia Sunani, stated to have been present along with P.Ws.1 to 6 was not examined. One seizure witness was not examined by the court.

18. The evidence of P.W.7 proved the statement under Section 27 of the Act regarding the weapon used. It showed that the statement was prepared after seizure of the weapon. Therefore, the statement as well as the recovery of weapon was not free from doubt. Reliance was placed on the decisions in ***Bodhraj @ Bodha v. State of J and K (2003) 24 OCR (SC) 171*** and ***Md. Younus Ali Tarafdar v. The State of West Bengal (2020) 78 OCR (SC) 697***.

19. In reply it was submitted by Mr. Katikia, learned AGA that the offence of murder was clearly made out from the deposition of the injured witnesses P.Ws.2, 4 and 5. It was clear that the deceased was mercilessly assaulted by the deadly weapons by the accused and when P.Ws.2 and 5 protested they too were assaulted. These

witnesses were otherwise trustworthy and consistent and any inconsistency thrown up in the cross examination was minor and not on the material aspects. Reliance was placed on the decisions in *Karulal v. State of Madhya Pradesh (2020) SCC OnLine SC 818*; *Satbir v. Surat Singh (1997) 4 SCC 192* and *Karu Marik v. State of Bihar (2001) 5 SCC 284*.

20. The Court proposes to begin its analysis by examining the evidence of one of the injured eye-witnesses P.W.4. He stated how while he and the other P.Ws. were sitting and the deceased Kunja was at the threshing floor, the accused persons came there armed with weapons. A1 aimed an arrow towards P.W.4 and asked why he had come to the place. P.W.4 replied that he had come for the purposes of helping out in “pacifying the matter” in case there was any struggle at the spot. When A1 then aimed an arrow at him, P.W.4 immediately caught hold of it. Thereupon, the remaining accused attacked his back and Kalia Bag dealt a blow with the Tabli. While A4 was about to assault him with a lathi on his head, P.W.4 managed to ward it off. There was nevertheless a severe bleeding injury on his back. Thereafter, P.W.4 left the place out of fear. On the following day, P.W.3 informed P.W.4 that Kunja had been severely assaulted by four accused persons at the spot.

21. P.W. 4 had been subjected to detailed cross-examination. The manner of cross-examination, far from throwing up any inconsistencies in the narration, in fact strengthened it. It brought out the fact that the accused persons were the aggressor party and that they had attacked the prosecution party without any

provocation. Clearly also, there was no attempt by the prosecuting party to attack the accused party so as to justify any right of self-defence or response to grave or sudden provocation by the accused party.

22. The value of the evidence of an injured eye-witness has been explained in several decisions of the Courts. In *Abdul Sayeed v. State of Madhya Pradesh* (*supra*) it was explained as under:

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (*Vide Ramlagan Singh v. State of Bihar, AIR 1972 SC 2593; Malkhan Singh v. State of Uttar Pradesh, AIR 1975 SC 12; Machhi Singh v. State of Punjab, (1983) 3 SCC 470; Appabhai v. State of Gujarat, AIR 1988 SC 696; Bonkya v. State of Maharashtra, (1995) 6 SCC 447; Bhag Singh v. State of Punjab, (1997) 7 SCC 712; Mohar v. State of Uttar Pradesh, (2002) 7 SCC 606(SCC p.606b-c); Dinesh Kumar v. State of Rajasthan, (2008) 8 SCC 270; Vishnu v. State of Rajasthan, (2009) 10 SCC 477; Annareddy Sambasiva Reddy v. State of Andhra Pradesh, (2009) 12 SCC 546 and Balraje v. State of Maharashtra, (2010) 6 SCC 673.*

xxx

xxx

xxx

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the

witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”

23. Likewise in *Ramvilas v. State of Madhya Pradesh* (*supra*), it was pointed out that “evidence of the injured witnesses is entitled to a great weight and very cogent and convincing grounds are required to discard the evidence of the injured witnesses.”

24. In the present case, apart from P.W.4, P.Ws.2, 3 and 5 were also injured eye-witnesses. Their injuries have all been examined by Dr. Nibedita Sahu (P.W.11) who examined P.W.5-Bahadur Sunani and P.W.2-Mukhi Sunani. Dr. R.N. Tripathy (P.W.9) examined Kunja Sunani and noticed as many as eight external injuries of which several were incised wounds. He opined how the injuries (1), (2), (4), (5), (6) and (9) might have been caused by sharp weapon whereas injuries (3), (7) and (8) were caused by a hard blunt object. Of these injuries (1) and (2) which were on the lungs and the left arms and elbow joint resulting in the fracture of the right ulna, were grievous in nature.

25. The non-production of all of the weapons of offence but only two of them can hardly be said to weaken the case of the prosecution. In *Krishna Gope v. State of Bihar AIR 2003 SC 3114* and *Mritunjoy Biswas Vs. Pranab alias Kutti Biswas AIR 2013 SC 3334* it was held that where there is unimpeachable direct evidence of the witnesses for the prosecution, the mere non-

recovery of the weapon of offence would not affect the case of the prosecution.

26. In the present case, P.W.9 also examined Mohan Sunani (P.W.4) and found one clean cut incised wound on the inter-scapular area obliquely crossing the vertebral column and another abrasion on the forehead behind the hairline. P.W.9 was hardly subjected to any cross examination which elicited any answer which could help the defence. It clearly proved the version of the prosecution party that P.W.4 was himself assaulted when he tried to ward off the attack from the accused party and that Kunja Sunani, the deceased, suffered grievous injuries when he too tried to prevent the accused party.

27. The post mortem of the deceased was performed by Dr. Parameswar Rath (P.W.8) who again found those nine external injuries and opined that the death was due to haemorrhage and shock as a result of injuries on the vital organs like lungs. He also opined how the weapon seized by the police would cause these injuries.

28. Thus, it is evident that the eye-witnesses testimony is fully corroborated by the medical evidence. This cannot be explained as an attack by the accused party as a result of grave and sudden provocation. Further, minor inconsistencies in the depositions of P.W.2, 5 and 6 are not on the material aspects and therefore, do not in any way impeach the credibility of their version.

29. In *Karulal v. State of Madhya Pradesh (supra)*, it has been explained how "enmity is a double-edged weapon which cuts both ways". The Court approvingly extracted the following passage from *Sushil v. State of U.P. 1995 Supp. (1) SCC 363*:

"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 there 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....."

30. In *Satbir v. Surat Singh (supra)*, it was opined that "an incident where a number of persons assaulted three persons at one and the same time with different weapons, some contradictions as to who assaulted whom and with what weapon, were not unlikely and such contradictions could not be made a ground to reject the evidence of eye-witnesses, if it was otherwise reliable."

31. In *Karu Marik v. State of Bihar (supra)*, the Court has explained in what context Clause II of Section 300 IPC would be attracted. It was explained as under:

"9. The manner of causing injuries, the nature of the injuries caused, the parts of the body where they were inflicted, the weapon of assault employed in the commission of the offence and conduct of the accused are relevant factors in determining whether the offence committed is one of murder or culpable homicide not amounting to murder. Even the most illiterate and rustic person would know and realize that a savage blow with a sharp-cutting weapon on vital parts like chest and abdomen would cause bodily injury which would result in death. Ordinarily, a man is presumed to intend necessary consequences of his act. This Court, dealing with the second clause of Section 300 IPC in *Rajwant Singh vs. State of Kerala* (AIR 1966 SC 1874), in para 10 has observed that: (AIR p. 1878, para 10)

"10. The second clause deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. The mental attitude here is twofold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury."

10. Many a times, the nature of the injury inflicted itself presents a most valuable evidence of what the intention was but that is not the only way of gauging intention. Each case must be examined on its merits. Intention being the state of mind of the offender, no direct evidence as a fact can be produced. It has to be gathered from the available evidence and the surrounding circumstances in considering whether the offence is covered by clause I of Section 300 IPC. As far as clause II of Section 300 is concerned, it is enough if the accused had the intention of causing such bodily injury as he knew to be likely to cause the death of the person to whom the harm is caused. Such

intention may be inferred not merely from the actual consequences of his act, but from the act itself also."

32. Lastly, it is submitted the failure by the prosecution to put to each of the accused under Section 313 Cr PC, the specific weapon wielded by each of them, would result in that evidence being altogether excluded from consideration. Reliance is placed on the decision in *Maheshwar Tigga v. State of Jharkhand 2020 (II) OLR (SC) 931*.

33. The facts in *Maheshwar Tigga (supra)*, were that the Appellant was charged with the offence of rape and in the examination under Section 313 Cr PC three perfunctory questions were put to him whereas the specific circumstances which would help his defence, particularly about the evidence showing that the prosecutrix was above 18 years of age, and that the Appellant and she had perhaps a consensual relationship, were not put to him. In the present case, the material circumstances appearing against each of the accused were put to each of them. The omission to put a specific question as to the weapon of offence cannot be said to have caused any serious prejudice so as to deprive them of the opportunity to defend themselves in the trial. Consequently, there is no merit in this plea of the Appellants either.

34. Keeping in view the legal position explained in the above decisions, the Court is satisfied that the prosecution has proved in the instant case the guilt of each of the accused beyond all reasonable doubt. The Court is unable to find any legal error

having been committed by the trial court in convicting each of the Appellants and sentencing them in the manner indicated herein before.

35. The appeal is accordingly dismissed. The bail bonds of the Accused-Appellants, who were enlarged on bail, are hereby cancelled and they are directed to surrender forthwith and, in any event, not later than 23rd September 2022 failing which the IIC concerned will take steps to take them into custody to serve out the remainder of their sentences.

S. K. Guin/PA



(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge