

**HIGH COURT OF ORISSA,
CUTTACK**

CRIMINAL APPEAL No.70 of 1998

From the judgment dated 30.03.1998 passed by Sri G.N. Mishra, Additional Sessions Judge, Parlakhemundi in Sessions Case No.6 of 1996/Sessions Case No.25 of 1996 (GDC).

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Muduli Srinu & others Appellants

Versus

State Respondent

For Appellants - M/s S.K. Padhi, D. Mohapatra,
S.K. Mohapatra, D. Das
G. Mishra and Anand Das
(Appellant Nos.1, 5, 7, 8 & 9)

M/s S.S. Rao, H.S. Misra,
S.A. Ali, B.K. Mohanty
and D.Sahoo.
(Appellant Nos. 2, 3, 4 & 6)

For Respondent - Mr. P.K. Pattnaik,
Addl. Government Advocate.

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PRESENT:

**THE HON'BLE SHRI JUSTICE PRADIP MOHANTY
AND
THE HON'BLE SHRI JUSTICE B.P. RAY**

Date of hearing & judgment : 25.02.2010

PRADIP MOHANTY, J. This criminal appeal is directed against the judgment and order dated 30.03.1998 passed by the learned Additional Sessions Judge,

Parlakhemundi in Sessions Case No.6 of 1996/Sessions Case No.25 of 1996 (GDC). By the said judgment, all the appellants have been convicted under section 148, IPC and sentenced to undergo rigorous imprisonment for one year; appellants 7 and 8 have been convicted under sections 302/149, IPC and sentenced to undergo imprisonment for life; and appellants 1, 2, 3, 4, 5, 6 and 9 have been convicted under sections 323/326/149, IPC and sentenced to undergo rigorous imprisonment for three years for the offence under sections 326/149, IPC but no separate sentence has been imposed for the offence under section 323, IPC.

2. Case of the prosecution in a nut shell is that P.W.10 lodged a written report at Kasinagar Police Station on 10.07.1995 at about 8.00 PM alleging therein that on the same day at about 5.30 PM deceased K.Taviti Naidu of village Vistala had come to village Dhansara to see his paddy field. On his arrival, he found some cattle damaging his paddy seedlings. Seeing that, he drove out the cattle and at the same time abused the villagers of Dhansara in obscene language. Hearing his abusive language, appellants 7, 8 and 9 came there being armed with kati and lathi and assaulted the deceased. In the meantime, P.Ws.9, 10 (informant) and 11 arrived there, rescued the deceased and gave him water. At that time, appellants 1, 2, 3, 4, 5 and 6 came there being armed with kati and lathi and assaulted P.Ws.9, 10 and 11 causing injuries on their person. The informant P.W.10 went to village Vistala and informed the incident to the father of the deceased who immediately came to the spot and found his son lying unconscious in a pool of blood having injuries on his head. The injured persons, namely, the deceased, the informant P.W.10 as well as P.Ws.9 and 11 went to Kasinagar Police Station and lodged FIR. They were initially sent to Kasinagar PHC and then referred to Parlakhemundi Headquarters Hospital. As the condition of the deceased became more critical, he was referred to M.K.C.G. Hospital, Berhampur and then to S.C.B. Medical College & Hospital, Cuttack, but he expired on the way. His body was brought to Parlakhemundi Headquarters Hospital where postmortem was conducted.

After completion of investigation charge-sheet was submitted against all the appellants to stand their trial.

3. Plea of the appellants is complete denial of the allegation. Their further plea is that due to previous enmity and civil litigation, the witnesses have implicated them falsely. Appellant no.6 M. Laxminarayana specifically pleaded that since last ten years he has been litigating in a civil suit with the family of Adinarayana P.W.11 for which the witnesses are deposing falsely against him. Appellant no.1 M. Srinu specifically pleaded that the deceased, Balaji, Haimavati and Gopinath used to make liquor business together to which he objected, and for that a false case has been filed against him and others.

4. In order to bring home the charge against the accused persons, the prosecution examined as many as eighteen witnesses including the doctor and the I.O. and exhibited thirty documents. Defence examined one witness Patala Ramulu and exhibited three documents such as Ext.A-certified copy of judgment in G.R. No.230 of 1986, Ext.B-certified copy of judgment in G.R. No.181 of 1991 and Ext.C-extract of voter list of 1996 of village Dhansara under Kharada Gram Panchayat.

5. The trial court after conclusion of trial relying on the evidence of P.Ws.1, 2, 8, 9, 10 and 11 as well as the dying declaration of the deceased convicted and sentenced the appellant as already indicated hereinbefore.

6. Heard Mr. Das, learned counsel appearing for appellants 1, 5, 7, 8 and 9, Mr. Rao, learned counsel appearing for appellants 2, 3, 4 and 6, and Mr. Pattnaik, learned Addl. Government Advocate.

7. Both the learned counsel appearing for the appellants assail the judgment of the trial court on the following grounds:

- (i) P.Ws.1, 2 and 8 are got up witnesses and they had no occasion to remain present at the scene of occurrence.

- (ii) The trial court has not considered the previous litigation between the accused-appellants and the witnesses, namely, P.Ws.9, 10 and 11.
- (iii) The court below should not have accepted the dying declaration since there was no certificate given by the doctor about the fitness of the deceased to give such statement.
- (iv) There was delay in lodging FIR which has remained unexplained. That apart, on the advice of an advocate the informant scribed the FIR.
- (v) The trial court has not considered the evidence of D.W.1 as well as the documents exhibited from the side of the defence, i.e., Exts.A, B and C in their proper perspective.

8. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that the evidence of P.Ws.1, 2 and 8 is very clear, cogent and consistent. They have vividly described the role played by each of the appellants including appellants 7 and 8. Their presence at the scene of occurrence was also admitted by the deceased in the dying declaration and the injured witnesses P.Ws.9, 10 and 11. There was no inordinate delay in lodging the FIR, since the occurrence took place at 5.00 to 5.30 PM and FIR was lodged at 8.00 PM on the same day and the distance of the police station is 10.00 KMs from the place of occurrence. Furthermore, P.Ws.9, 10 and 11 who came to help the deceased were assaulted by all the accused persons by lathi and kati. There is no major discrepancy in the evidence of the witnesses. The trial court has rightly convicted the appellants under Section 148, IPC basing upon the evidence of the eye witnesses and the injured witnesses, since all the accused-appellants being armed with lathi and kati had come to the spot with an intention to assault the deceased and the injured persons and thereby committed rioting.

9. In support of their respective cases, both the parties cited decisions in **Chandrakant Luxman v. State of Maharashtra**, AIR 1974 SC 220, **Bharat Murmu & Ors. V. State of Orissa**, (2008) 39 OCR 554, **Laxman v. State of Maharashtra**, AIR 2002 SC 2973 and **Karnail Singh and another v. State of Punjab**, AIR 1954 SC 204.

10. Perused the LCR and the decisions cited by the parties. In the instant case, P.Ws.1, 2 and 8 are said to be eye witnesses to the occurrence. Evidence of these witnesses shows that appellants 7, 8 and 9 came to the spot at the first instance being armed with kati and lathi. Appellants 7 and 8 first assaulted on the head of the deceased by means of kati and thereafter again appellant no.7 gave another kati blow to the deceased. P.W.1 specifically stated that at the time of occurrence she along with other female members (P.Ws.2 and 8) was going to fetch water from the well located at the backside of Pano Sahi of their village. Deceased Taviti Naidu was found driving cattle from his land and abusing in obscene language to the people of her village in general. Hearing such abusive words, appellant nos.7 and 8 came there being armed with kati and dealt kati blows to the deceased. First, appellant no.7 dealt a kati blow to the head of the deceased. Then appellant no.8 dealt a kati blow to the head of the deceased near the right ear. Appellant no.7 again dealt a kati blow to the back side of the head of the deceased. At that time, informant P.W.10 intervened to save the deceased. Appellant no.9 dealt a kati blow to the head of the informant P.W.10. When P.W.9 and P.W.11 came to the spot with water to apply the same to the mouth of the deceased, other appellants assaulted them with lathi and kati. But in cross-examination this witness admitted that there was a new well close to her house and the house of P.W.2. The well adjacent to the spot is situated at a distance from her house intervened by Kampo Sahi and two Harijan Sahi. There is a Boring Pipe well near the Kampo Sahi towards the western end. Both the well and Boring well of Kampo Sahi are situated nearer to her house. She also admitted that M. Balaji (P.W.10) and Gopinath (P.W.9) are her front door neighbours. P.Ws.2 and 8 supported the version of P.W.1.

However, P.W.8 has admitted in her cross-examination that her father belonged to the village of the deceased.

P.W.10 is the informant and an injured. He deposed that his bullocks were grazing in the land situated near the land of the deceased. He had been to bring his bullocks from the place of grazing. He saw the deceased driving some cattle belonging to village Vistala from his land and while doing so was abusing in obscene language. When the deceased was abusing, appellants 7 and 8 arrived there, protested him saying as to why he was abusing his villagers being a man of another village and assaulted him with kati. Appellant no.7 first dealt a kati blow to the top of the head of the deceased. Then appellant no.8 dealt a kati blow to the right side head of the deceased near the right ear. When P.W.10 came to the rescue of the deceased and tried to lift the deceased from the ground, appellant no.7 dealt a kati blow to his right side forehead near the eye brow and appellant no.9 dealt a lathi blow to his head. Out of fear, P.W.10 went to a little distance. At that time, other accused persons (appellants 1 to 6) arrived at the spot being armed with lathi and kati and assaulted P.Ws.9 and 11. Then he went to the village of the deceased, informed the incident to his father, went to the P.S. along with others and lodged FIR. He proved the FIR (Ext.3) and his signature Ext.3/1. He was medically examined on police requisition. In cross-examination, the defence suggested about his enmity with the accused persons but he denied the same. Nothing has been elicited through cross-examination to disbelieve his evidence.

P.W.9 is another injured witness who stated in his examination-in-chief that when he arrived at the spot he saw appellants 7, 8 and 9 standing near the spot being armed with kati. Deceased was found lying on the ground and there was profuse bleeding from the injury of his head. He brought water from P.Ws.1, 2 and 8 who were present near the well. While he was applying water to the deceased, all the appellants indiscriminately assaulted him by lathi and kati and he sustained bleeding injury on his head and left hand near the elbow joint. He further stated that at that time P.W.11 was also present with

him and he was assaulted by the appellants and due to such assault he fell down. In cross-examination this witness admitted that in the police station they were waiting for arrival of Balaji (P.W.10). After Balaji came to the police station, he (P.W.9) was examined by the O.I.C., Kasinagar P.S. He also admitted that there were 55 to 60 houses situated in between his house and the well near the spot and that all the witnesses of village Dhansara are agnates. He has further admitted that he did not lose his sense due to the assault on his head and left hand by kati.

P.W.11 is another injured witness who supported the version of P.W.9. He specifically stated that except appellants 7, 8 and 9, other appellants assaulted him and P.W.9 and he sustained bleeding injury on his hands and head. He further stated that appellant no.5 dealt a kati blow to his head causing bleeding injury, appellant no.6 dealt a kati blow to his right forearm, appellant no.3 dealt a kati blow to his right forearm, appellant no.4 assaulted to his left arm by lathi and appellant no.1 assaulted to his right arm by lathi. In cross-examination this witness has admitted that he filed a civil suit against appellants 5, 7 and 9 and also filed a complaint case against appellants 6, 5 and 7 as they forcibly constructed a road on his land.

11. P.W.6, the doctor, who examined the deceased and the injured persons (P.Ws.9, 10 and 11) found the following injuries:

(Injuries found on the person of P.W.10)

- (1) Abrasion 3" x ¼" over occipital region of the scalp.
- (2) Lacerated injury 1 x ½" above the right eye on the right side of the face.

(Injuries found on the person of P.W.9)

- (1) One sharp cutting injury 4" x 1" on the occipital region of scalp.
- (2) Lacerated injury 1 x ½" over the left arm.

(Injuries found on the person of P.W.11)

- (1) One lacerated injury 4" x ½" on occipital region of scalp.
- (2) Sharp cutting injury 2" x 1" present over the same occipital region on the scalp.
- (3) Lacerated injury 1 ½" x 1" over the left arm.

(Injuries found on the person of the deceased)

- (1) Sharp cutting injury 4" x 1 ½" near the left ear of the scalp.
- (2) Another sharp cutting injury 3" x 1" present over the occipital region of the scalp.
- (3) Sharp cutting injury 2" x 1" over the same occipital region of the scalp.
- (4) Another cutting injury 2" x ½" over left ear.

He also opined that all the injuries might have been caused by sharp cutting weapon.

12. P.W.7 who conducted autopsy over the dead-body of the deceased found three external injuries on the skull, which were ante-mortem in nature and caused by a sharp cutting weapon. The injuries were sufficient in ordinary course of nature to cause death. Nothing has been elicited through cross-examination to belie his testimony. P.W.17 is a surgical specialist who was attached to Parlakhemundi Government Hospital at the relevant time. He stated about the dying declaration recorded by the lady Executive Magistrate. He proved the dying declaration Ext.9 and his endorsement with signature as Ext.9/3. But in cross-examination he admitted that he did not remember in which language the deceased answered the questions put by the Executive Magistrate. This witness proved the X-ray plates of the deceased and the injured persons marked Exts.17, 20, 23, 27, 28 and 29. He also admitted that the deceased regained his normal sense and was able to talk and thereafter he was shifted to M.K.C.G. Medical College Hospital, Berhampur for further

treatment. P.W.16 is the Executive Magistrate who recorded the dying declaration of the deceased in the hospital. She specifically stated that at the time of recording statement P.W.17 was present. Deceased made some statement before her implicating appellants 7 and 8. She proved the dying declaration recorded by her vide Ext.9. She also stated that the deceased put his LTI in Ext.9. But in cross-examination she admitted that there were 15 persons near the bed of the deceased when he was recording the statement.

13. From a scrutiny of the evidence, it appears that P.Ws.1, 2 and 8 are chance witnesses. Their evidence suffers from major contradictions and they have tried to develop the prosecution story in court. No explanation whatsoever has been given by them as to why they did not choose to use their new well in front of their house and had gone to a distant place to fetch water. But there is no material to disbelieve the evidence of P.Ws.9, 10 and 11. It is evident from their evidence that assault on the deceased by appellants 7 and 8 was witnessed by P.W.10. When P.W.10 went to rescue the deceased, he was assaulted by appellants 7 and 8 by kati and lathi respectively. By the time P.Ws.9 and 11 reached the spot to rescue the deceased, assault on the deceased and P.W.10 had already over. P.Ws.9 and 11 only saw that the deceased was lying in a pool of blood and appellants 7 and 8 were holding kati and appellant no. 9 was holding a lathi. When P.Ws.9 and 11 tried to give water to the deceased and rescue him, appellants 1 to 6 came to the spot being armed with kati and lathi and assaulted them. Evidence of these witnesses is supported by medical evidence. So far as dying declaration is concerned, in Ext.9 no certificate has been given by the doctor as to fitness of mind of the deceased. But the Executive Magistrate, who recorded the statement on 11.07.1995 at 11.10 AM, has stated that the deceased was in a state of conscious. The doctor (P.W.17) also stated that in presence of him dying declaration was recorded on 11.07.1995 at 11.10 AM. P.W.17 in cross-examination also admitted that the injured was regaining his normal sense on 11.07.1995 and was able to talk. From Ext.9 it reveals that it was recorded at 11.10 AM on 11.07.1995. It has been decided by a Constitution Bench of the apex Court that absence of

certificate by the doctor as to fitness of mind of declarant would not render the dying declaration unacceptable. The person who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make statement even without examination by the doctor, the declaration could be acted upon provided that the court ultimately held the same to be voluntary and truthful. P.W.17, the doctor, has stated that deceased was fit to talk and in his presence the Executive Magistrate recorded the dying declaration. Therefore, this Court feels that the dying declaration recorded in this case was voluntary and truthful and can be acted upon. Taking into consideration both oral and documentary evidence available on record, there is no dispute that appellants 7 and 8 are guilty of committing murder of the deceased and appellants 1 to 6 and 9 are guilty of committing grievous hurt to P.Ws.9, 10 and 11.

14. Appellants 7 and 8 have been convicted under Section 302/149, IPC. But in the instant case, there is no material to convict them under Section 149, IPC. In fact, there is no difference between the object and the intention with which the offence in question was committed. But in the facts and circumstances of the case, it cannot be a case under Section 149, IPC rather it is a case of section 34 IPC.

15. The question now arises whether the act committed by appellants 7 and 8 will come under Section 302, IPC or under Section 304 Part-II, IPC. Admittedly, the deceased was abusing the entire villagers of the appellants' village. As a result, appellants 7 and 8 got provoked and without any premeditation assaulted the deceased. Therefore, this Court sets aside the conviction of appellants 7 and 8 under Section 302/149, IPC and instead convicts them under Section 304 Part-II/34, IPC and sentences them to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5000/- (five thousand) in default to undergo rigorous imprisonment for six months more.

16. So far as the conviction under Section 148, IPC is concerned, the oral evidence of P.Ws.9, 10 and 11 is not sufficient to hold that all the appellants being armed with deadly weapons assembled together to commit riot. Therefore, this Court acquits all the appellants of the charge under Section 148, IPC.

17. As regards the conviction of the appellants 1 to 6 and 9 under Sections 326/324, IPC, there is no material to disbelieve the oral and medical evidence. Therefore, this Court upholds their conviction under section 326/324, IPC. So far as sentence is concerned, in the meantime fifteen years have elapsed and these appellants were in custody for some period and, therefore, interest of justice would be best served if they are sentenced to undergo the period of imprisonment already undergone and pay a fine of Rs.10,000/- (ten thousand) each in default to undergo rigorous imprisonment for one year. Fifty percent of the fine amount, if realized, shall be paid to the injured P.Ws.9, 10 and 11.

18. The Criminal Appeal is allowed in part.

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PRADIP MOHANTY, J.

B.P. RAY, J.

I agree.

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B.P. Ray, J.

Orissa High Court, Cuttack
The 25th February, 2010/**G.D. Samal**