

ORISSA HIGH COURT, CUTTACK.

Criminal Appeal No. 34 of 1997

AND

Govt. Appeal No. 75 of 1998

(Arising out of the judgment and order of sentence dated 15.02.1997 passed by Sri R.N. Bhuyan, learned Addl. Sessions Judge, Sambalpur, in S.T. Case No. 198/8 of 1995-96, for the offence punishable under Section 302/34, I.P.C.)

In Crl. Appeal No. 34 of 1997

Pabitra Mohan Bagh

... Appellant

Versus

The State

... Respondent

For Appellant : Mr. C.R. Swain and P.K. Kuanr.

For Respondent : Addl. Govt. Advocate.

AND

In Govt. Appeal No. 75 of 1998

State

... Appellant.

Versus

Pabitra Mohan Bagh and another ... Respondents.

For Appellant : Addl. Govt. Advocate.

For Respondents : Mr. C.R. Swain, P.K. Kuanr,
J.K. Mohanty and B. Mohanty.

PRESENT :

**THE HONOURABLE MR. JUSTICE L. MOHAPATRA
AND
THE HONOURABLE MR. JUSTICE C.R. DASH**

Date of Hearing : 28.07.2010 Date of Judgment : 28.07.2010

Both the appeals arise out of the same judgment and order of sentence dated 15.02.1997 passed by learned Addl. Sessions Judge, Sambalpur in S.T. Case No. 198/8 of 1995-96. Out of the three accused persons, accused Tikeswar Balua being a juvenile, accused Pabitra Mohan Bagh and his mother accused Sakuntala Bag were tried by the learned Addl. Sessions Judge, Sambalpur in the aforesaid session's trial. Learned Trial Court acquitted accused Sakuntala Bagh of the charge and convicted accused Pabitra Mohan Bagh for the offence under Section 304, Part-I, I.P.C. and sentenced him to suffer R.I. for five years and to pay fine of Rs.2,000/- (two thousand), in default to suffer further R.I. for one year.

2. Government has preferred appeal assailing the judgment of acquittal in respect of accused Sakuntala Bagh and conviction of accused Pabitra Mohan Bagh under Section 304, Part-I, I.P.C. instead of his conviction under Section 302, I.P.C. Convict Pabitra Mohan Bagh has preferred appeal assailing his conviction under Section 304, Part-I, I.P.C. and the consequent sentence recorded thereunder.

3. A compendium of the prosecution case is as follows –

The occurrence happened at about 5 a.m. on 11.03.1995 on the cultivable land of the deceased, which adjoins the cultivable land of the accused Pabitra Mohan Bagh. At the time of occurrence, deceased

Santosh Dip was in his house. All the accused persons including the convict Pabitra Mohan Bagh dragged him outside and assaulted him mercilessly. At the time of assault, convict Pabitra Mohan Bagh was armed with a 'Tangia', accused Sakuntala Bagh was armed with a 'Budia' and accused Tikeswar Balua was armed with a lathi. At that time Mathura Dip (P.W.2), wife of the deceased was engaged in collection of 'mohua' flowers at a distance of 500 yards from her house. She heard 'hulla' in her house. Her minor daughter (P.W.3) came running and told her about the incident. She rushed to see convict Pabitra Mohan Bagh, his mother Sakuntala Bagh and their 'Halia' Tikeswar Balua running away from the spot. She (P.W.2) raised 'hulla', on hearing of which P.W.1 and P.Ws.4 to 10 came to the spot. Pranabandhu Khilar (P.W.1), who is the Ward Member of the village, asked the deceased as to how he got the injuries. To the audience of P.Ws.1 and 4 to 10 the deceased replied that the convict Pabitra Mohan Bagh, his mother Sakuntala Bagh and their 'Halia' Tikeswar Balua dealt blows by 'tangia' inside his house and that when, in order to save his life he tried to run away from the house, he fell down and thereafter they dealt blows on his head, hands and other parts of the body on the blunt side of the 'tangia'. On the basis of the written report lodged at the P.S. by P.W.1 Pranabandhu Khilar, the I.O. (P.W.13) registered the case and took up investigation. On completion of the investigation, he filed charge-sheet against the convict Pabitra Mohan Bagh and his mother Sakuntala Bagh under Section 302/34, I.P.C.

4. Prosecution has examined 14 witnesses to prove the charge. P.W.3, the minor daughter of the deceased is the sole eye-witness to the occurrence. P.W.2, the widow of the deceased is the immediate post-

occurrence witness, P.W.1 and P.Ws.4 to 10 are the witnesses to the oral dying declaration made by the deceased. P.W.11 is the local Revenue Inspector, who prepared the sketch map of the place of occurrence on police requisition. P.W.12 is the Police Constable, who took the dead body for post-mortem examination, P.W.14 is the Medical Officer, who conducted autopsy over the dead body and P.W.13 is the I.O.

5. The defence plea is one of complete denial. In their statements recorded under Section 313, Cr.P.C., it is the specific plea of accused Pabitra Mohan Bagh and his mother accused Sakuntala Bagh that the spot land belongs to them and there is dispute between the parties concerning that land, and on the date of occurrence Pabitra Mohan Bagh was ploughing that land. It is further pleaded by them that at that time deceased Santosh Dip came over the land and assaulted convict Pabitra Mohan Bagh on his chest by a 'tangi'. On hearing his shout, his mother Sakuntala Bagh came over the spot and took her son for treatment. Accused Sakuntala Bagh has taken the further plea that her father, mother, late brother Nabin and deceased Santosh had sold that land to her for consideration of Rs.4880/-, but after death of her parents and brother Nabin, deceased Santosh was creating disturbance over possession of that land by them being instigated by some evil spirited co-villagers. The defence has examined none to prove their case. The F.I.R. lodged by them in the counter case, the seizure list concerning 'tangi' used by the deceased in assaulting convict Pabitra Mohan Bagh, report of the Medical Officer, who examined convict Pabitra Mohan Bagh on police requisition, have been marked as Exhibits on behalf of the defence.

6. Learned Trial Court has believed P.W.3, minor daughter of the deceased, as the eye-witness to the occurrence, P.W.2, the widow of the deceased as immediate post-occurrence witness and P.Ws.1 and 4 to 10 as witnesses to the oral dying declaration made by the deceased before them, to sustain the charge. Taking stock of the spot of occurrence, evidence regarding litigation between the convict Pabitra Mohan Bagh and the deceased since the time of his (deceased's) father over the disputed land and injuries sustained by convict Pabitra Mohan Bagh, learned Trial Court however came to hold that there has been fighting between the deceased and convict Pabitra Bagh in course of which convict Pabitra Bagh has given the vital blows by the axe he was holding. Taking into consideration the nature of injuries sustained by the deceased and the weapon of offence used, learned Trial Court acquitted accused Sakuntala Bagh on the reasoning that the 'budia' held by her must not have been used in assaulting the deceased, and convicted accused Pabitra Mohan Bagh under Section 304, Part-I, I.P.C.

7. Before proceeding to examine the probative value of the evidence adduced by the prosecution, we feel it proper to fix the spot of occurrence. According to P.W.1, the deceased was lying with injuries in the 'Bari' (locally referred to 'backyard'), which is at a distance of about 50 cubits from the house of the deceased. The aforesaid spot, according to P.W.1, is at a distance of about 50 cubits from the house of the accused persons. P.W.2, the widow of the deceased, has also testified that her husband was lying in an open place at a distance of about 50 cubits from the house. She has further testified that it was a ploughed land. The I.O. (P.W.13) in his evidence has testified that the house of the deceased is bounded by green fence and the dead body of the

deceased was lying outside the green fence. He, in paragraph-6 of his cross-examination, has further testified that the spot where the deceased was lying is close to the land, which the deceased was ploughing before the occurrence, and the adjacent plots belong to the deceased. From the evidence of the I.O. (P.W.13), P.W.1 and other materials on record, it is also clear that the house of the convict is near the house of the deceased without house of any other person in between. The R.I. (P.W.11), who prepared the sketch map vide Ext.17 on police requisition, has testified that the plot, on which the dead body was lying, as shown to him by the police, is a piece of government plot. The I.O. (P.W.13) has testified that on examination of Rasananda Bagh, the father of convict Pabitra Bagh, he (P.W.13) seized Xerox copy of the written agreement regarding sale of the disputed land, Xerox copies of two encroachment cases – one against convict Pabitra Mohan Bagh and another against Laxman Dip, father of the deceased. He made seizure of the aforesaid documents vide Ext.23. Learned trial court, on consideration of the aforesaid materials on record, has held thus –

“... Since there is no sufficient evidence to connect that the assault had been given to Santosh inside the house and he was dragged to outside and subsequently he was also assaulted on the bari, it would simply be believed that Santosh was assaulted on his bari at a distance of about 50 cubits from his house and that bari had been ploughed and that may be accepted as the place of assault. ...”

The aforesaid finding of the learned trial court is erroneous, inasmuch as ‘bari’ locally refers to a place inside the backyard; but, according to the I.O. (P.W.13) the spot where the dead body of the deceased was lying was outside the green fencing around the house of

the deceased. The R.I. (P.W.11), on police requisition, has prepared the sketch map (Ext.17) and he has testified that the aforesaid spot is a piece of government land. In that view of the matter, the spot cannot be said to be a place inside the 'bari' of the deceased, and when the prosecution has suppressed the genesis of the occurrence, there is no evidence to come to a finding as to who had ploughed the land and under whose possession the spot land was there on the relevant date of occurrence. From the seizure list Ext.23, it is clear that there was clamour for possession of the suit land and both the parties might have been claiming bona fide right over the spot land.

8. In order to believe P.W.3, a child witness, as the occurrence witness, initially the spot, where the first assault on the deceased was mounted, is to be the house of the deceased, as P.W.3 in her evidence has testified that the convict Pabitra Bagh and others dragged her father from the house and assaulted him by means of 'tangia', 'budia', etc. Except the spot, where the dead body of the deceased was lying, no blood stained earth having been seized from anywhere else, learned trial court, in the conclusion afore-quoted, has rightly held that the spot of occurrence is the place where the dead body was lying and it cannot be inside the house of the deceased, from where he was dragged to outside and the 'bari', where he was assaulted subsequently. In view of such conclusion by the learned trial court, it was erroneous on its part to believe P.W.3 as the eye-witness, when she testified that the assault on his father was mounted on his being dragged from the house. In order to believe P.W.3 that she would have seen the occurrence, the time of occurrence is very important. The occurrence happened at about 5 a.m. in the morning and the date of occurrence is 11.03.1995. The occurrence

having happened at about 5 a.m. in the month of March, it must be the dawn time, and P.W.3 having not testified that she was present with her father (deceased) at that time and the prosecution witnesses having tried to shift the spot inside the house of the deceased to suit the prosecution case, it is to be held that P.W.3 must not have seen the occurrence in the manner she has testified.

9. P.W.2, the widow of the deceased, is the immediate post-occurrence witness. She has only testified that she saw convict Pabitra Mohan Bagh and other accused persons running away from the spot with the respective weapons they were holding. Her evidence is, therefore, of no avail to throw light as to how the occurrence happened and in what manner her husband was assaulted.

10. P.W.1 and P.Ws. 4 to 10 are the witnesses to the oral dying declaration made by the deceased. The aforesaid witnesses, i.e., P.Ws.1 and 4 to 10 have not testified about the exact version the deceased told to them and there is wide variation in the substance of what the deceased told to them.

P.W.1, who is testified to have reached the spot first on hearing sought of P.W.2 (widow of deceased), has testified thus –

“... I asked Santosh as to how he got this injuries. He said that his nephew (sister’s son) Pabitra, his Nani Sakuntala and their Halia Tikeswar Balua dealt me blows by tangia inside his house and that when in order to save his life he ran away from the house, he fell down and thereafter they dealt blows on his legs causing fractures and thereafter they dealt blows on his head, hands and other parts of his body on the blunt side of tangia. ...”

P.W.2 has testified thus –

“... Pranabandhu asked my husband as to who inflicted injury to him. My husband disclosed that his Nani, his Bhanja and their Halia inflicted the injuries on his person. ...”

P.W.4 has testified thus –

“... I asked Santosh as to how he got injuries on his person, he said that he will not survive. He also said that Sakuntala Bagh, Pabitra Bagh and Tikeswar Balua killed him by means of Tangia, budia and lathi. ...”

P.W.5 has testified thus –

“... Pranabandhu asked the injured as to how he got injuries. I also asked the same thing to him. To our question, the injured replied that his sister Sakuntala Bagh, his sister’s son Pabitra and their Halia Tikeswar Balua assaulted him by means of tangia, tangi and lathi, as a result of which he got fracture on legs and hands and injuries on all over the body. ...”

P.W.6 has testified thus –

“... Pranabandhu again asked him as to who has caused injuries to him, he said that his sister Sakuntala, his sister’s son Pabitra and their halia Tikeswar Balua dealt blows to him, thereafter it was asked to him that where he was assaulted, he replied that he was in his house with his baby. When Pabitra Bagh entered into his verandah and asked him to come out and when he did not come out, by means of tangia accused Pabitra dealt blows to him and that when he ran to outside to save his life, accused Sakuntala dealt blows by means of tangi at the door and when he was running towards sahi, he was restrained by the Halia Tikeswar and thereafter when he ran towards bari, he fell down and thereafter again when I asked him as to who murdered him, he said

that his sister, sister's son and their Halia did so by means of tangia, tangi and lathi. ...”

P.W.7 has testified thus –

“... Myself and Pranabandhu asked Santosh as to how he got the injuries and who caused this injuries. He said that his sister Sakuntala Bagh and his sister's son Pabitra Bagh and his Halia Tikeswar Bagh assaulted him by means of tangia, tangi and lathi. ...”

P.W.8 has testified thus –

“... When I asked Santosh as to who assaulted him, he said his sister Sakuntala, his sister's son Pabitra and Tikeswar Balua assaulted him in his house and when he ran to save his life, they dealt blows to me and he will not survive. Again we served water to him. He also said that he will not survive and his advocate Jogelal Sahu of Deogarh be informed. ...”

P.W.9 has testified thus –

“... At that time, Pranabandhu Khillar asked Santosh who caused these injury to him, Santosh said that his sister Sakuntala and his sister's son Pabitra and their halia assaulted him in his house and brought him to outside and made him flat there. Thrice Santosh had given the above statement. ...”

P.W.10 has testified thus –

“... The Ward Member Pranabandhu asked Santosh as to who caused this condition to him. Santosh said that his sister Sakuntala Bagh, his sister's son Pabitra and Tikeswar had assaulted him and caused these injuries. ...”

11. It is well settled in law that unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declarations made by the

deceased. (see – **Ramnath Madho Prasad and others *vs.* State of Madhya Pradesh**, AIR 1953 SC 420). Hon'ble Supreme Court, while dealing with the point on the question of necessity of corroboration of a dying declaration in the case of **Harbans Singh and another *vs.* State of Punjab**, AIR 1962 SC 439, has held that the evidence furnished by the dying declaration must be considered by the Judge, just as the evidence of any witness, though undoubtedly some special considerations arise in the assessment of dying declarations, which do not arise in the case of assessing the value of a statement made in Court by a person claiming to be a witness of the occurrence. One of the special considerations, according to the Hon'ble Supreme Court in the aforesaid case of Harbans Singh, is to make sure as to what the statement of the dead man actually was, which in itself, is often a difficult task. The evidence of the prosecution witnesses quoted supra on the face of it makes it clear that the witnesses themselves are not sure as to what has been stated by the deceased to them. Some of the witnesses have tried to shift the spot exploiting their position as the witnesses to the oral dying declaration made by the deceased though there is no cogent evidence to prove the fact that the occurrence happened at any place other than the spot where the dead body was lying. The witnesses are not consistent about the manner, in which statement by the deceased has been made. P.W.2, widow of the deceased, is the first person to reach the spot. It was natural on the part of the deceased to state before her as to who tried to do his death, as admittedly at that time the deceased was labouring under anticipation of his death. Without doing so why the deceased waited till arrival of P.W.1 and other witnesses to make the statement regarding injuries sustained by him, throws doubt regarding the veracity

of the prosecution witnesses on the point of dying declaration. The evidence of P.Ws.1 and 4 to 10, on the face of discrepancies on the point of the statement of the deceased made before them, their tendency to shift the spot to suit the prosecution case, and variance in their evidence regarding the manner in which the statement of the deceased constituting the dying declaration has been made, suffer from infirmities beyond cure. The evidence of the Medical Officer (P.W.14) regarding ability of the deceased to make the dying declaration after he received injuries and especially injury nos. (vi) and (vii), which are opined to be the fatal injuries, makes us firm in our conclusion that the deceased could not have made the dying declaration in the manner deposed to by P.Ws.1 and 4 to 10. In view of such facts, the evidence of the aforesaid witnesses is not believable.

12. The defence, taking the plea of their presence and assault by the deceased on convict Pabitra Mohan Bagh, has admitted a part of the occurrence; but, in absence of any cogent evidence regarding genesis of the occurrence, which the prosecution has designedly suppressed, such a defence plea, which, at best, may raise a suspicion regarding complicity of the convict and other accused persons in the transaction, cannot, however, take the place of proof to establish their guilt, inasmuch as conjecture and surmises cannot take the place of evidence, as has been well settled in law.

13. In view of all the aforesaid facts, we feel persuaded to hold that the prosecution has failed to prove the charge. In view of our discussion supra, we do not feel persuaded to interfere with the order of

acquittal, as recorded by the learned trial court in respect of accused Sakuntala Bagh.

14. In the result, the impugned judgment and order of sentence are set aside and the Criminal Appeal is accordingly allowed. The Govt. Appeal, for the aforesaid reasons, is dismissed. Appellant Pabitra Mohan Bagh, who is stated to be on bail, be discharged of the bail bond.

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L. Mohapatra, J.

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C.R. Dash, J.

Orissa High Court, Cuttack.
The 28th day of July, 2010. /*Parida.*