

ORISSA HIGH COURT,CUTTACK

CRA NO. 200 OF 1996

CRA NO. 202 OF 1996

AND

CRA NO. 211 OF 1996

From the judgment and order dated 20.7.1996 passed by Shri G.C.Mohanty, Sessions Judge, Keonjhar in Sessions Trial No.68 of 1994.

Laxmidhar Swain & another (in CRA No.200/96),
Nirakar Swain and two others, (in CRA No.202/96)
Bhupati Bhusan Mallik (in CRA No.211/96).

... Appellants

-versus-

State of Orissa (in all the appeals) ... Respondent

For appellants - M/s S.K.Mund, D.P.Das,
and J.K.Panda
(in CRA Nos.200 & 202 of 1996).

M/s P.Palit, J.Katikia, B.S.Das,
S.Sen, A.K.Padhi, L.Jena,
S.Palit & P.K.Majee.
(in CRA No.211 of 1996)

For respondent - Mr. Sangram Das,
Additional Standing Counsel.

PRESENT:

THE HONOURABLE SHRI JUSTICE L.MOHAPATRA
AND
THE HONOURABLE SHRI JUSTICE B.K.PATEL

Date of hearing - 14.2.2012 :: Date of judgment-24.2.2012

B.K.Patel,J. The three appeals are directed against the judgment and order dated 20.7.1996 passed by the learned Sessions Judge, Keonjhar in Sessions Trial No.68 of 1994 in which the six appellants faced trial along with 10 co-accused persons for commission of offences under sections 148, as well as 341 and 302 read with 149 of

the Indian Penal Code (for short 'I.P.C.'). While acquitting the co-accused persons, the learned Sessions Judge convicted the appellants for commission of offences under which they stood charged and sentenced each of them to undergo imprisonment for life under section 302 read with 149 of the I.P.C. No separate sentence was passed for commission of offences under sections 148 and 341 read with 149 of the I.P.C. Aggrieved, appellants have preferred the present appeals.

2. Accused persons are residents of occurrence village Dantia. Deceased Bishnu Prasad Mallik was their co-villager. Prosecution case is that prior to the occurrence some of the residents of the occurrence village cut and removed laterite stones from nearby reserved forest in connection with which deceased, P.W.2 who is agnate brother of the deceased, and others made allegations against accused persons before Forest Guard P.W.6. P.W.6 seized laterite stones from the spot and kept in zima of the deceased. It is alleged that infuriated by the above incident, on 30.12.1993 at about 6 P.M. the accused persons surrounded and brutally assaulted the deceased by means of lathis, iron rods, etc. when he was returning home on a bicycle. Deceased sustained injuries, shouted and fell down at the spot. When people gathered the accused persons fled away. Being informed about the occurrence deceased's father's brother informant P.W.1 came to the spot. Deceased was taken to Sainkul C.H.C. and thereafter to S.C.B. Medical College & Hospital, Cuttack where he succumbed to the injuries on 31.12.1993. On presentation of written report Ext.1 by P.W.1 at Sainkul Out Post at 7.P.M. on 30.12.1993, P.W.11 Sub-Inspector of Police made station diary entry, sent the report for registration to Ramchandrapur Police Station and took up investigation. On completion of investigation, charge-sheet for commission of offences under sections

147,148,149,341,323,325,307 and 302 of the I.P.C. was submitted against the accused persons.

3. Appellants took plea of complete denial. In addition, appellant Bhupati Bhusan Mallik took a plea of alibi.

4. In order to substantiate the charge prosecution examined 12 witnesses. Informant P.W.1 is a post-occurrence witness. P.Ws. 2,7 and 8 deposed to have seen the occurrence. Also P.W.8 deposed to have witnessed recording of dying declaration of the deceased Ext.5 by P.W.5 at Sainkul C.H.C. P.W.3 Assistant Professor of Forensic Medicine and Toxicology, S.C.B. Medical College & Hospital, Cuttack conducted post-mortem examination over the dead body of the deceased. P.W.4 is the doctor who medically examined P.W.2. P.W.5 is a doctor who medically examined the deceased and recorded his dying declaration Ext.5 at Sainkul C.H.C. P.W.6 is the Forest Guard who deposed regarding earlier incident of seizure of laterite stones. P.W.9, Assistant Sub-Inspector of Police attached to Mangalabag Police Station, was associated with the enquiry in connection with U.D.Case No.600 of 1993. P.W.10 was the Officer-In-Charge of Ramachandrapur Police Station. P.W.11 was the Sub-Inspector of Police attached to Sainkul Out Post. P.W.12 was the Circle Inspector of Police, Anandpur. Prosecution also relied upon documents marked Exts. 1 to 26 and material objects M.Os. I and V.

D.Ws. 1 and 2 were examined and documents marked Exts. A to D were relied upon by the defence in support of plea of alibi raised by appellant Bhupati.

5. On appraisal of evidence on record, placing reliance on the evidence of P.Ws.2 and 7 stated to be eyewitnesses to the occurrence and the evidence of P.Ws.5 and 8 with regard to dying

declaration stated to have been made by the deceased as well as the medical evidence of P.Ws. 3 and 5, trial court held the appellants guilty of the charges under sections 148 as well as 341 and 302 read with 149 of the I.P.C. Prosecution was held to have not been able to prove of the charge against co-accused persons.

6. In assailing the impugned judgment it is submitted by the learned counsel for the appellants that though P.Ws. 2,7 and 8 claimed to be eyewitnesses to the occurrence, learned Sessions Judge rightly did not refer to or rely upon evidence of P.W.8 with regard to his claim to have seen the occurrence in view of candid statement of P.W.2 in his cross-examination at paragraph 20 of the deposition that P.W.8 and others reached the spot after the occurrence was over. However, trial court miserably failed to appreciate evidence of P.Ws.2 and 7. P.W.7 made allegations against all the accused persons as well as others in an omnibus manner. Both P.Ws.2 and 7 materially contradicted in their evidence in court as well as with their statements made earlier before the Investigating Officers. It was further contended that the occurrence took place in the evening late in the month of December which fact has not been taken note of by the trial court. It was strenuously contended that it was not possible for any one to see the incident or identify the assailants due to darkness, especially when allegations are made against more than 16 persons. Therefore, P.W.2's claim to have seen the occurrence is not capable of being accepted. With regard to the dying declaration Ext.5, it was contended that circumstances of recording of dying declaration is shrouded in mystery. P.W.8 did not, and rather failed to, state regarding questions put to and answers given by the deceased. From the evidence it is obvious that dying declaration was recorded without any requisition from any of the Investigating Officers before registration of the case. P.W.5 has not

appended any certificate to the effect that the deceased was in a fit state of mind to make any statement. P.W.3, who conducted post mortem examination, categorically opined that in view of the nature of injuries sustained by the deceased, he could not have been in a proper state of mind due to shock that would have developed immediately after the assault. In view of the infirmities in the evidence, the impugned judgment is not sustainable.

7. Placing reliance on the evidence of P.Ws.1,2,3,4,5,7 and 8, learned counsel for the State supported the impugned judgment. It was specifically argued that P.W.2 being an injured eyewitness there is no infirmity in the impugned judgment.

8. In this case, prosecution relied upon direct evidence of the eyewitnesses and dying declaration of the deceased. P.Ws. 2,7 and 8 deposed to have seen the occurrence. However, learned Sessions Judge has neither relied upon nor referred to the evidence of P.W.8 as an eyewitness because of the unambiguous statement made by P.W.2 in cross-examination at para-20 of the evidence that P.W.8 Subash Chandra Mallik reached the spot after the occurrence was over. Also evidence of P.W.8 itself suffered from material contradictions.

9. P.W.2 happens to be one of the agnate brothers of the deceased. He stated in his evidence that on the date of occurrence he along with the deceased was coming from Barapada to the occurrence village. P.W.2 was riding the cycle whereas deceased was sitting on the front rod. No sooner did they reach near a bridge adjacent to the embankment of village tank than the co-accused Udit who was armed with a bamboo lathi dealt blow over the left side back of the head of the deceased. Deceased fell down upon P.W.2 and there was profuse bleeding from his left side back of the head. P.W.2

could not maintain his balance to hold the cycle and the deceased fell down on the ground. P.W.2 left the cycle and jumped therefrom. Immediately thereafter co-accused Udit dealt a blow by means of bamboo lathi which struck over P.W.2's right palm. When deceased fell down on the ground, co-accused Rajendra, who was armed with a bamboo lathi, dealt a blow which struck left side forehead of the deceased resulting in bleeding injury. Co-accused Kulamani dealt a blow by means of bamboo lathi over the left side below the knee of the deceased resulting in bleeding injury. At that time appellant Dayanidhi raised a cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFA KARIBA and accused Udit again dealt blow on P.W.2 but P.W.2 warded off the blow. P.W.2 raised cry to the people to come to their rescue. At that time other accused persons namely, appellants Bhupati, Dibakar, Laxmidhar and Nirakar as well as accused persons Lambodar, Kshyamakar, Ganeswar, Basudeb, Babaji, Sailendra and Suresh came from the side of a bush being armed with lathis, and surrounded and brutally assaulted the deceased. Appellant Bhupati went upon the chest of the deceased and pressed repeatedly. At that time deceased was shouting 'MARIGALI MARIGALI' and asked for water. Then appellant Bhupati told that it would be proper to pass urine over deceased's mouth and appellant Dibakar told appellant Bhupati that he would finish the deceased. Appellant Laxmidhar also threatened to finish the deceased. At that time, P.W.7 reached the spot. Accused persons abused him and P.W.7 went away. Accused persons having assaulted the deceased threw him by the side of the embankment near the spot. It was further stated by P.W.2 that while the deceased was shouting MARIGALI MARIGALI and asked for water, he and P.W.8 came to the rescue of the deceased and gave water to him. P.W.2 testified that he came to his house from the spot where he saw P.W.1 and reported about the occurrence to him. Then again P.W.2 along

with P.W.1 came in a scooter to the spot. Deceased was taken to Sainkul C.H.C. His condition having deteriorated the deceased was referred to S.C.B. Medical College & Hospital, Cuttack where he died. P.W.2 categorically deposed that he himself was not examined medically.

9.1 In his cross-examination at para-10 of the evidence P.W.2 stated that co-accused Rajendra first dealt blow on the deceased, and thereafter all the accused persons together assaulted the deceased. Said assertion is not in conformity with the sequence of events as deposed by P.W.2 in his examination-in-chief. Therefore, P.W.2 contradicted himself while deposing in court.

9.2 It has been elicited in evidence that P.W.2 had told before P.W.9 that after the assault on the deceased, out of fear he left the spot and ran to his house, and that as soon as he and the deceased reached near the bridge they saw some people of their village viz. appellants Dibakar, Laxmidhar and Bhupati as well as accused persons Basudeb, Udit, Rajendra, Lambodhar and some others standing armed with lathis and iron rods and that they suddenly attacked on them upon which both of them fell down from the cycle. Such allegations are also not in conformity with P.W.2's evidence in Court that co-accused Udit first assaulted the deceased upon which he fell down from the bicycle.

9.3 Though P.W.2 gave a graphic description of the occurrence ascribing specific overt acts to some of the accused persons, it has also been elicited that P.W.2 had not stated before P.W.9 that no sooner did they reach the bridge adjacent to the embankment of the village tank than co-accused Udit being armed with bamboo lathi dealt blow on the head of the deceased, or that the deceased fell upon P.W.2 and there was profuse bleeding, or that

P.W.2 could not maintain balance and the deceased fell down on the ground, or that immediately thereafter co-accused Udit dealt blow by means of bamboo lathi which struck on P.W.2's right palm, or that when the deceased was on the ground co-accused Rajendra with a bamboo lathi dealt blow which struck on the left side forehead of the deceased, or that co-accused Kulamani dealt blow by means of bamboo lathi on the left side leg below the knee of the deceased, or that appellant Dayanidhi raised cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFI KARIBA, or that co-accused Udit again dealt blow but P.W.2 warded off the blow, or that P.W.2 raised a cry to the people to come to their rescue, or that at that time other accused persons came from the side of a bush being armed with lathis, or that other accused persons viz. appellants Bhupati, Dibakar, Laxmidhar and Nirakar as well as accused persons Lambodar, Kshyamakar, Ganeswar, Basudeb, Babaji, Sailendra and Suresh came from the side of a bush being armed with lathis, or that the aforesaid accused persons surrounded and brutally assaulted the deceased by means of lathis, or that appellant Bhupati went upon the chest of the deceased and pressed it repeatedly and the deceased shouted MARIGALI MARIGALI and asked for water, or that appellant Bhupati told that it would be proper to pass urine over deceased's mouth, or that appellant Dibakar told appellant Bhupati that he would finish the deceased, or that appellant Laxmidhar threatened to finish the deceased, or that accused persons having assaulted the deceased threw him near embankment of the tank.

9.4 P.W.2 had stated before P.W.11 also that co-accused Udit and three accused persons were coming in a cycle from their opposite direction from village Dantia. However, P.W.2 had not stated before P.W.11 that after reporting to P.W.1 he along with P.W.1 came in a scooter to the spot, or that when the deceased fell

down on the ground co-accused Rajendra who was armed with a bamboo lathi dealt blow which struck the left side forehead of the deceased resulting in bleeding injury, or that appellant Dayanidhi raised cry SASURA SALA PADICHHI HABUDARE DAUDI ASA PITIKISAFA KARIBA, or that co-accused Udit again dealt blow on him which could not strike him as he warded off the same, or that appellant Bhupati went upon chest of the deceased and pressed repeatedly, or that deceased shouted MARIGALI MARIGALI and asked for water, or that appellant Bhupati told that it would be proper to pass urine over deceased's mouth, or that appellant Dibakar asked appellant Bhupati that he would finish the deceased, or that appellant Laxmidhar also threatened the deceased to finish him, or that P.W.7 was going on a cycle from the occurrence village.

9.5 Further, P.W.2 had not stated before P.W.12 also that after reporting to P.W.1, he along with P.W.1 came in a scooter to the spot.

9.6 It is interesting to observe that P.W.2 admitted in paragraph 16 of his cross-examination to have alleged in his statement recorded under section 164 Cr.P.C. that 12 of the accused persons including appellants Dibakar, Laxmidhar, Nirakar and Bhupati assaulted the deceased with one bamboo lathi and reiterated that such statement was true.

9.7 According to P.W.2, occurrence took place when he along with the deceased was coming on a bicycle and being informed by him informant P.W.1 came to the spot along with him. However, F.I.R. Ext.1 is altogether silent that the deceased was sitting on P.W.2's cycle or was with P.W.2 when the occurrence originated. There is no mention in the F.I.R. that P.W.2 sustained injury in course of the occurrence. In the dying declaration Ext.5 also there is

no indication regarding P.W.2's presence at the time of occurrence. No bicycle appears to have been seized from the spot though P.W.2 stated at paragraph 11 of his evidence in course of cross-examination that he left the bicycle at the spot. In addition, P.W.7, who claimed to have seen the assault on the deceased, stated in cross-examination that while accused persons were assaulting the deceased surrounding him he found none at the spot.

9.8 Thus, it is found that P.W.2 made material omissions in his statements made in course of investigation and developed the case from stage to stage. He contradicted himself in court and was contradicted by other materials on record. Worth of evidence of P.W.2 as an injured witness is substantially corroded in view of his admission that he was not examined medically. His presence with the deceased at the time of occurrence is not borne out from the contents of the F.I.R. and is negated by P.W.7. Therefore, evidence of P.W.2 cannot be accepted on face value as that of a wholly reliable evidence.

10. Seeking corroboration to the evidence of P.W.2 from the evidence of P.W.7, it is found that P.W.7 stated in his evidence that at the time of occurrence he was returning from Barpada weekly market to his house in village Gadabandogoda. He alleged in an omnibus manner without naming any of the accused persons that no sooner did he reach the embankment of the tank of the occurrence village than he saw accused persons having surrounded the deceased were assaulting him by means of lathis and iron rods etc. Seeing the assault, he went away from the spot out of fear. Admittedly, occurrence took place in the evening of late December. P.W.7 stated in his cross-examination that he saw assault on the deceased by the accused persons at a distance of 50 feet while going on the way. He also stated that he was examined by police one and

half months after the occurrence. It has been elicited in evidence that P.W.7 had stated before P.W.12 that he could not identify all the accused persons who were assaulting the deceased. He had also stated before P.W.12 that at the time of assault by the accused persons on the deceased, some other persons came armed with lathis and assaulted the deceased. This witness admitted that he was a classmate of the deceased. In view of the nature of evidence of P.W.7, it falls far short of a firm basis to provide assurance or corroboration to the evidence of P.W.2.

11. Dying declaration Ext.5 is stated to have been recorded by P.W.5, a Medical Officer attached to Sainkul C.H.C., at 8.30 P.M. on 30.12.1993 in presence of P.W.8 and one Pradip Kumar Mishra. P.W.5 stated that he medically examined the deceased at 8.05 P.M. on police requisition. It is stated by P.W.5 that the deceased, in his dying declaration, implicated the six appellants, and others, who were not named, to have assaulted him by lathis and thenegas. Dying declaration Ext.5 has been recorded in a question-answer form. To a question put to the deceased as regards the persons who had witnessed the occurrence, the deceased is found to have told that he was unable to remember about the same. It is also observed that in the dying declaration Ext.5 P.W.5 has mentioned that it was recorded in Ramchandrapur P.S. Case No.99 of 1993, though it appears from F.I.R. Ext.1 that the case was registered at 11.30 P.M.. In Ext.5 there is no certificate regarding the state of mind of the deceased to be fit to make any statement. In fact, P.W.5 stated in cross-examination at paragraph 11 that he had not mentioned in Ext.5 nor directed his investigation while recording the dying declaration that the deceased was found in a sound state of mind to make the declaration and that he had not given any certificate in Ext.5 that the deceased was capable and fit to make the dying

declaration. At paragraph 7 of his evidence in course of cross-examination P.W.5 stated that since the deceased had head injuries and multiple injuries, so, he felt it necessary to record the dying declaration. It has been elicited in the evidence that P.W.5 had stated before P.W.11 that he had recorded the dying declaration of the deceased on the requisition of P.W.10. It is observed that P.W.10 had never been associated with the investigation of this case. He stated in his evidence that on receipt of F.I.R. Ext.1, he registered the case, and directed P.W.11 to continue with the investigation. He also admitted that he had not maintained any case dairy. P.W.10 has not proved the requisition stated to have been issued for recording of dying declaration and P.W.12 stated that he did not seize the requisition of P.W.10 or P.W.11 for recording the dying declaration. P.W.8 the only witness examined by the prosecution to support P.W.5's claim to have recorded the dying declaration Ext.5 simply stated that the doctor had recorded the dying declaration of the deceased in his presence to which he was a witness and put his signature Ext.5/3. P.W.8 did not whisper about the nature of statement made by the deceased in his dying declaration. On the contrary, P.W.8 stated at paragraph 15 of his evidence in course of cross-examination that besides the first question put by the doctor to the deceased at the time of recording the dying declaration he did not remember the answers given by the deceased during the course of dying declaration. He also stated that he had not seen what the doctor wrote in the dying declaration Ext.5. P.W.2 claimed at paragraph 11 of his evidence in course of cross-examination that he accompanied the deceased to Sainkula P.H.C. and, thereafter to Cuttack, and that he was all along with the deceased till his death at Cuttack hospital. However, evidence of P.W.2 is altogether silent regarding recording of dying declaration of the deceased. The assertion of P.W.5 to have recorded the dying declaration Ext.5 at

8.30 P.M. is further rendered vulnerable in view of the statement of investigating officer P.W.12 at paragraph 6 of his evidence in course of cross-examination that his investigation disclosed that the deceased was received at Sainkul C.H.C. at about 8.30 P.M. and that at that time the doctor was not present at the C.H.C.. That apart P.W.2 has not made any allegation against appellant Niranjana by name to be among the appellant's assailants. In such circumstances, contentions raised on behalf of the appellants to assail Ext.5 as doubtful is not found to be without substance.

12. P.W.1, who admittedly is a post occurrence witness, stated in his evidence that when he was going towards the spot he saw the accused persons, being armed with lathis and iron rods, were going towards the southern side of their village. He further stated that on his arrival, the deceased raised a cry by saying that the accused persons, namely, Bhupati, Dibakar, Laxmidhar, Ganeswar, Nirakar, Niranjana, Dayanidhi, Basudeb, Babaji, Udit, Kulamani and others having assaulted him brutally threw at the spot. Learned counsel for the State placed reliance on such statements of informant P.W.1 to urge that evidence of P.W.1 provided assurance to evidence of P.W.2. However, in the First Information Report Ext.1 informant P.W.1 had alleged neither to have seen the accused persons on his way to the spot nor stated regarding any oral dying declaration made by the deceased on his arrival at the spot. While deposing in court also P.W.1 admitted in course of cross-examination at paragraph 11 of the evidence that he had not made any such allegations in the F.I.R. Rather, it has been elicited in evidence that P.W.1 had stated before P.W.9 that after receiving news regarding the assault on the deceased he immediately went to Ramachandrapur P.S. and reported the matter. Therefore, evidence of P.W.1 with regard to another dying declaration made by

the deceased at the spot implicating the accused persons is also not acceptable.

13. Thus, on appraisal of evidence on record, neither direct evidence nor any of the dying declarations relied upon by the prosecution to establish the complicity of the appellants in commission of deceased's murder, inspires confidence to constitute basis to sustain any finding against the appellants. The impugned judgment is, therefore, not sustainable.

14. In the result, all the appeals are allowed. The judgment and order dated 20.7.1996 passed by the learned Sessions Judge, Keonjhar in Sessions Trial No.68 of 1994 convicting the appellants and sentencing each of them to undergo imprisonment for life under Section 302 read with 149 of the I.P.C. is set aside. The appellants are acquitted of the charge.

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B.K.Patel,J

L.Mohapatra,J. I agree.

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L.Mohapatra,J.