

ORISSA HIGH COURT, CUTTACK.

Criminal Appeal No. 230 of 2000

Arising out of the judgment of conviction and order of sentence dated 28.08.2000 passed by Shri P. Das, learned Addl. Sessions Judge, Bargarh in Sessions Trial No.303/2 of 1996-97, under Sections 302/324/34, I.P.C.

Upendra Kalet and three others ... **Appellants**

Versus

State of Orissa ... **Respondent**

For Appellants : M/s. C.A. Rao, S.K. Behera and P.K. Sahoo.

For Respondent : Mr. Sangram Das, Addl. Standing Counsel.

P R E S E N T :

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

Date of Argument : 25.04.2012

Date of Judgment : 25.04.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 28.08.2000 passed by learned Additional Sessions Judge, Bargarh in Sessions Trial No.303/2 of 1996-97 convicting appellant no.1 Upendra Kalet under Section 302, I.P.C. and other appellants including appellant no.1 Upendra Kalet under Section 324/34, I.P.C. and sentencing appellant no.1 Upendra Kalet to suffer imprisonment for life and other appellants including Upendra Kalet to suffer R.I. for three years for the

offence under Sections 324/34, I.P.C. with a further direction that the sentences in respect of appellant no.1 Upendra Kalet are to run concurrently.

2. In the meantime, appellant no.4 Madhukar Kalet having expired, the appeal against him is ordered to have abated.

3. The occurrence happened at about 11 P.M. on 28.05.1996 in village Sulsulia under Bhatli P.S. in the district of Bargarh. P.W.1 Rupananda Kalet, who is the nephew of the deceased, lodged F.I.R. vide Ext.1. It is alleged in the F.I.R. that about 14 days before the occurrence, he (P.W.1) along with Raj Kumar Muna (P.W.3) and Sonu Kalet (deceased) negotiated for purchase of three pigs at Rs.2,000/- (two thousand) from appellant no.1 Upendra Kalet. It was agreed that the entire amount is to be paid within a month. They killed one pig on the same day to prepare meat and another pig out of the remaining two was sold to Gunu Kalet (P.W.9) just three to four days before the occurrence. Appellant no.1 Upendra Kalet challenged Raj Kumar Muna (P.W.3) as to why he sold a pig to Gunu Kalet (P.W.9), who is his enemy. On the issue, there were some altercations between Raj Kumar Muna (P.W.3) and Upendra Kalet (appellant no.1). In the evening of the occurrence day, i.e. 28.05.1996 all the appellants, viz., Upendra Kalet, Surendra Kalet, Rajendra Kalet and Madhukar Kalet (since dead) went to Raj Kumar Muna (P.W.3) and picked up quarrel with him demanding price of the pigs. In course of such quarrel between P.W.3 and the appellants, the deceased Sonu Kalet intervened and the matter was subsided. At about 11 P.M. in the night, when the informant (P.W.1) was near a betel shop, he heard commotion from near his house and, coming there he saw the house of his father Gunu Kalet (P.W.9) to be on fire. He (P.W.1) also found the appellants running away from the side of the house of Gunu Kalet (P.W.9).

All the appellants thereafter came to the house of the deceased Sonu Kalet being armed with various weapons such as 'Thenga', axe, etc. Upendra Kalet (appellant no.1) gave three to four blows with an axe to Sonu Kalet, when the latter was sleeping. Wife of the deceased Sonu Kalet namely Jhima Kalet (P.W.11), who was sleeping near her husband (deceased) outside the house and other persons like Sanatan Kalet (P.W.2, Bahadur Sandh (P.W.13), Chhinu Kalet (P.W.14) and Tapasia Kalet (P.W.12 – wife of P.W.2), who were sleeping in front of their respective houses, woke up and protested. All the appellants assaulted the aforesaid persons including P.W.11 Jhima Kalet, wife of the deceased. After the appellants decamped, P.W.1 along with some other villagers brought the deceased and other injured persons in a Mini Truck to the Police Station and took them from there to the hospital for treatment. Sonu Kalet was declared brought dead by the Medical Officer (P.W.10). On the basis of F.I.R. lodged by P.W.1, investigation was taken up. On the next day of the occurrence, P.W.16, the C.I. of Police, Bargarh took charge of the investigation and, on completion of investigation, submitted charge-sheet against the appellants.

4. Prosecution has examined 16 witnesses to prove the charge. As discussed supra, P.Ws.1, 2, 11, 12, 13 and 14 are the eye-witnesses to the occurrence, P.W.10 is the Medical Officer, who, on police requisition, examined the injured witnesses, P.W.15 is the Medical Officer, who conducted autopsy on the dead body of the deceased and P.W.16 is the I.O.

5. Defence plea, as found from their examination under Section 313, Cr.P.C., is one of complete denial. The prosecution witnesses however were suggested that the deceased along with P.Ws.1, 2, 11, 12, 13, 14 and others came to the house of the appellants in a body and assaulted them and

that, at the relevant time the deceased Sonu Kalet was armed with an axe. Appellant no.2 Surendra Kalet as D.W.1 and another Gopinath Sandh as D.W.2 were examined by the defence to prove such a defence plea.

Learned Trial Court, on consideration of the materials on record, found appellant no.1 Upendra Kalet guilty under Section 302, I.P.C. Learned Trial Court, on a thorough discussion, held the charge under Section 302/34, I.P.C. against all the accused persons to have not been proved. On consideration of the evidence of the witnesses namely P.Ws.1, 2, 11, 12, 13 and 14, out of whom P.Ws.2, 11, 12, 13 and 14 had received injuries in course of the transaction, all the appellants were found guilty under Section 324/34, I.P.C. All the appellants were acquitted of the charge under Section 436/34, I.P.C.

6. Learned counsel for the appellants, Mr. C.A. Rao, with all the vehemence at his command, submits that there being discrepancies in the evidence of P.Ws.1, 2, 11, 12, 13 and 14 as to when they happened to see the occurrence, there being non-consideration of the defence evidence regarding the assault on the appellants in front of the house of appellant no.4 and there being non-explanation of the injuries on the appellants by the prosecution, all the appellants are entitled to get benefit of doubt, as the conviction of the appellants, as above, is not sustainable in the eye of law.

Learned Additional Standing Counsel on the other hand supports the impugned judgment and sentence.

7. Coming to the first point of challenge by learned counsel for the appellants, we have to fix the spot of occurrence. According to the prosecution case, the spot of occurrence is the front of the house of the deceased Sonu Kalet. According to the defence, the occurrence happened in

front of the house of Madhukar Kalet (appellant no.4). Blood stained earth and sample earth were seized by the I.O. (P.W.16) from the spot of occurrence in front of the house of deceased Sonu Kalet. P.W.7, who is an independent witness and who admittedly is not related to any of the groups, in paragraph-2 of his evidence has testified that blood stained earth and sample earth were seized from the spot in front of the house of Sonu Kalet, vide Ext.6. Such evidence of P.W.7 has not been challenged or demolished in the cross-examination. Not a single question was asked nor any suggestion was given to P.W.7 by the defence regarding the alternative spot in front of the house of Madhukar Kalet (appellant no.4), as pleaded by the defence. The chemical examination report vide Ext.21 speaks of presence of human blood on the earth seized vide Ext.6. Such a fact corroborates the evidence of the eye-witnesses, i.e. P.Ws.1, 2, 11, 12, 13 and 14, who, in unison have testified that the occurrence happened in front of the house of deceased Sonu Kalet. Per contra, the defence has not proved any fact to show that the spot of occurrence could be in front of the house of appellant no.4 Madhukar Kalet, where all the aforesaid witnesses along with deceased Sonu Kalet had gone and deceased Sonu Kalet was armed with an axe. Such a defence plea regarding the spot of occurrence to be in front of the house of Madhukar Kalet, as testified by D.Ws.1 and 2, therefore cannot be believed. We are therefore of the view that the spot of occurrence is one, as testified by the eye-witnesses P.Ws.1, 2, 11, 12, 13 and 14.

8. Learned counsel for the appellants draws our attention to the evidence of P.W.4, who has testified that the occurrence took place about one year back during summer near the house of Madhukar Kalet. P.W.4 is however not an eye-witness to the occurrence. He is a witness to some

seizures vide Ext.2. According to P.W.7, the distance between the house of the deceased and the house of the appellants is about 25 cubits.

Regard being had to the negligible distance between the house of the appellants and the house of the deceased, P.W.4 might have been saying about the incident which happened after the witnesses, i.e. P.Ws.2, 11, 12, 13 and 14 protested on seeing the assault by Upendra Kalet (appellant no.1) on deceased Sonu Kalet and they were met with assault by the appellants. Even otherwise the sworn testimony of the eye-witnesses and independent witness like P.W.7, who has proved the seizure of blood stained earth from the spot in front of the house of the deceased Sonu Kalet, cannot be disbelieved on the touch-stone of the evidence of P.W.4, who is admittedly not an eye-witness to the occurrence, and when it is not known whether his knowledge about the occurrence in front of the house of appellant no.4 Madhukar Kalet is hearsay or direct knowledge.

9. Coming to the discrepancies pointed out in the evidence of eye-witnesses by Mr. C.A. Rao, learned counsel for the appellants, it is seen that evidence of P.W.1 is challenged on the ground of non-examination of the betel shop owner named Alekh Dora. P.W.1 is stated to have witnessed the occurrence when he was in the betel shop of Alekh Dora (not examined). Learned counsel for the appellants suspects opening of the betel shop at 11 O'clock in the night and submits that for non-examination of the betel shop owner Alekh Dora, the entire evidence of P.W.1 should be disbelieved. It is further submitted that P.W.2, who had come to the spot immediately after the occurrence, having also not stated about presence of P.W.1, his evidence is to be disbelieved.

10. Perusal of the evidence of P.W.16, the I.O., shows that P.W.1 has not been contradicted on any aspect under Section 145 of the Evidence Act. Alekh Dora is not a witness shown in the charge-sheet. The defence has not elicited any explanation from the I.O. as to why aforesaid Alekh Dora, who had the possibility of witnessing the occurrence, was not examined. If the defence felt that the evidence of Alekh Dora (betel-shop owner) would have thrown light on the innocence of the appellants, they having examined two defence witnesses could have also examined aforesaid Alekh Dora. The defence having not examined Alekh Dora, it cannot be held that evidence of Alekh Dora would have been supportive of the defence and for non-examination of said Alekh Dora, P.W.1 cannot be disbelieved. P.Ws.2, 11, 12, 13 and 14 have received injuries when they protested the assault on the deceased by appellant no.1 Upendra Kalet. Their evidence, they being the injured witnesses, cannot be brushed aside lightly. All of them were sleeping in a close proximity when the occurrence happened. The occurrence having happened during summer, it cannot be held that the witnesses deposed falsehood by saying that they were sleeping outside their respective houses. This Court cannot lose sight of the prevalent practice of people sleeping outside their houses on the village road during summer, as such a practice in western part of the State is resorted to even these days due to poverty and absence of provisions of modern amenities like electric fan, etc. in their houses. Generally, people belonging to lower strata of the society sleep outside the house to avoid heat. All the witnesses have testified that they were sleeping in close proximity and they woke up and came to the spot on being attracted by the shout of the deceased Sonu Kalet. P.W.11 is testified to have woken up and raised shout on hearing the shout of her husband and

on seeing the sudden attack on her husband by appellant no.1 Upendra Kalet.

11. All the witnesses having slept nearby, immediately rushed to the spot hearing the shout of the deceased and saw the assault by appellant no.1 Upendra Kalet on the deceased. True it is that there are some discrepancies between the statements of the witnesses, as recorded by the police, and their deposition in Court as to by whose shout they got attracted. Before the police, some of the witnesses have stated that they got attracted by the shout of P.W.11 and before the Court they have testified that they got attracted by the shout of the deceased Sonu Kalet. There being a ring of truth in the evidence of the witnesses so far as the assault on the deceased by appellant no.1 Upendra Kalet is concerned, we loathe to attach much importance to such peripheral discrepancies, which, in our view is minor in the facts and circumstances of the case. Had it been a case of presence of the witnesses at a distance, the appreciation would have been different. We, therefore, find no merit in the contentions raised by learned counsel for the appellants so far as the evidence concerning implication of appellant no.1 Upendra Kalet under Section 302, I.P.C. is concerned.

12. Coming to the offence of the appellants under Section 324/34, I.P.C., it is found that the witnesses, i.e. P.Ws.2, 11, 12, 13 and 14 are specific on the point of implication of each appellant so far as the allegation of assault on them is concerned. No doubt, the appellants have also received injuries, but learned Trial Court has discussed this aspect thoroughly and we do not find any justification to take a different view so far as rationale of the learned Trial Court on non-explanation of injuries on the appellants and

evidence of the witnesses concerning implications of the appellants for offence under Section 324/34, I.P.C. are concerned.

13. In the meantime, appellant no.4 Madhukar Kalet has already expired. Appellant nos.2 and 3 having remained in custody for sometime are on bail. There is no allegation against them so far as assault on deceased Sonu Kalet is concerned. Enmity between the groups is admitted. There might have been free fight between the two groups on seeing the assault by the witnesses on deceased Sonu Kalet. Regard being had to the aforesaid facts and situations, though we do not want to interfere with the conviction of the appellants under Section 324/34, I.P.C., we modify the sentence to the period already undergone so far as appellant no.2 Surendra Kalet and appellant no.3 Rajendra Kalet are concerned, and so far as appellant no.1 Upendra Kalet is concerned, such sentence is reduced to R.I. for six months which is to run concurrently with the sentence recorded for the offence under Section 302, I.P.C.

14. In the result, the appeal is allowed in part. Conviction of appellant no.1 Upendra Kalet under Section 302/324/34, I.P.C. is confirmed. The sentence awarded against him for the offence under Section 302, I.P.C. is confirmed, but the sentence awarded against him for the offence under Section 324/34, I.P.C. is modified to a period of six months' R.I., which shall run concurrently with the sentence recorded under Section 302, I.P.C. So far as appellant no.2 Surendra Kalet and appellant no.3 Rajendra Kalet are concerned, their convictions under Section 324/34, I.P.C. are confirmed and the period of sentence awarded against each of them is modified to the period they have already undergone as U.T.P. Appellant nos.2 and 3 be discharged of the bail bonds executed in the Sessions Trial.

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C.R. Dash, J.

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L. Mohapatra, J.

Orissa High Court, Cuttack.
The 25th day of April, 2012. /*Parida.*