

ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No. 4 of 2008

Arising out of the judgment and order of sentence dated 12.10.2007 passed by Shri L.N. Patnaik, learned Addl. Sessions Judge, Bhanjanagar in Sessions Case No.20 of 2003 (S.C.No.132/2003 GDC), under Section 302/34, I.P.C.

Abhi Gouda

... **Appellant**

Versus

State of Orissa

... **Respondent**

For Appellant : M/s. Niranjan Panda & J.K. Rout, Advocates.

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 : 06.09.2012

Date of Judgment : 24.09.2012

C.R. Dash, J.

This appeal is directed against the judgment and order of sentence dated 12.10.2007 passed by learned Additional Sessions Judge, Bhanjanagar in Sessions Case No.20 of 2003 (S.C. No.132/2003 GDC), convicting the appellant under Section 302/34, I.P.C. and sentencing him to suffer imprisonment for life and to pay fine of Rs.2,000/- (two thousand), in default, to suffer R.I. for six months more.

2. The occurrence happened at about 5.00 P.M. on 02.10.1994 at the agricultural field of deceased Nilachal Sarangi. The spot of the occurrence is

locally known as “Kuradia Goja” field. P.W.1, who happens to be the brother of said Nilachal Sarangi, lodged F.I.R. at about 8.00 A.M. on 03.10.1994 setting the criminal law into motion.

3. A compendium of the prosecution case is that the present appellant and one Satrughna, who are brothers, assaulted the deceased with a ‘Tangia’ (axe) and ‘Katua’ (M.Os. IV and V respectively) while deceased Nilachal was there in his Kuradia Goja field and was engaged in preparing ‘Mahara’ for irrigating water to his land. A search for the deceased was on when he did not return home in the evening and on the next day his dead body was found on the spot, i.e., Kuradia Goja field. In course of investigation, some witnesses were examined and on completion of investigation, charge-sheet was filed implicating both the present appellant and his brother Satrughna in the offence under Section 302/34, I.P.C. Satrughna having faced the trial was convicted since long. The present appellant Abhi Gouda was found to be absconded and on his arrest, trial in the split up case was taken up as against him by the trial court.

4. Prosecution has examined 10 witnesses to prove the charge including P.Ws.2, 3, 4 and 8, who are eye-witnesses to the occurrence and P.W.10, the I.O.

The defence plea is one of complete denial and the present appellant has taken the plea of alibi, as found from the defence suggestion to the prosecution witnesses by taking the stand that at the relevant time of occurrence the present appellant was at Surat in the State of Gujurat to earn his livelihood. The appellant also examined himself as D.W.1 to prove the defence plea.

5. Learned trial court, on consideration of the evidence on record and especially the eye-witness account of the occurrence, as adduced by P.Ws.2, 3,

4 and 8, found the appellant guilty of offence under Section 302/34, I.P.C. and convicted him thereunder.

6. Learned counsel for the appellant submits that out of the witnesses examined as eye-witnesses to the occurrence, P.Ws.4 and 8 being relations of the deceased, their evidence is tainted and there being discrepancy in the evidence of the eye-witnesses, which strikes at the very root of the prosecution case, the aforesaid eye-witnesses should not have been believed to return the finding of guilt as against the appellant.

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

7. It is well settled in law that relationship itself is not a ground to throw the evidence of a witness over board unless there is material to show interestedness on the part of the said witness to see the accused convicted in the case. It is fairly submitted at the Bar that there is no such materials on record to label the evidence of P.Ws.2, 3, 4 and 8 as tainted applying the aforesaid test.

8. P.W.2 is testified to have witnessed the occurrence while he was attending call of nature. He had gone to the "Tiadi Bandha" otherwise also known as "Haguri Bandha" of the village to attend the call of nature at the relevant time of occurrence. He heard a loud shout "MARIGALI..... MARIGALI....." of a person; he stood up and looked back and found the present appellant Abhi Gouda and his brother Satrugna beating inside the paddy field. He rushed towards that place and found both the appellant and his brother holding a 'tangia' and a 'katua' respectively. When he asked them as to what they are beating, they (appellant and his brother) criminally intimidated him (P.W.2). This witness has however been contradicted successfully under section

145 of the Evidence Act so far as his hearing of a loud shout “MARIGALI...” is concerned; threatening of him by the appellant and his brother using words as testified by him. This witness was admittedly present at a distance of about one furlong from the spot, i.e., Kuradia Goja field. He could not have been attracted towards the occurrence unless he would have heard the shout, on which aspect he has been contradicted. Therefore, he (P.W.2) having been contradicted on this aspect of his having heard the loud shout, he could not be believed to have seen the occurrence in the manner he has testified. Other witnesses have testified that the occurrence continued for about 10/15 minutes. P.W.2 is testified to have witnessed the occurrence while attending call of nature. From the place he was attending call of nature, he must have gone to the pond to clean himself and thereafter he would have come over to the spot. None of the eye witnesses has testified to have seen anybody intervening or interacting with the appellant and his brother in course of the occurrence. The assertion of P.W.2 therefore to the effect that coming near the spot he asked the appellant and his brother as to what they are beating at from a distance of 50/60 feet cannot therefore be believed. In view of the aforesaid facts, we are not inclined to accept P.W.2 as an eye-witness to the occurrence.

9. So far as P.W.3 is concerned, he has testified thus –

“.....The occurrence of this case took place on 2-10-1994 at about 5 P.M. on a Sunday at Kuradia Gaja field of village Mathura. On the day of occurrence I was cutting grass near the said Kuradia Gaja field. While I was cutting grass I found deceased Nilanchal was preparing a PANI MAHARA. I also found both the accd. persons near the said Kuradia Gaja field. Abhi (accd.) was holding a tangia and sickle and one basket and accd. Satrughna was holding a katua. First-of-all accd. Abhi challenged Nilanchal saying “MAGIA MARIBU PORA AA” and

therefore Nilanchal told him "Please keep quite and do not be disturbed". Thereafter accd. Satrughna rushed towards Nilanchal and assaulted on the neck of Nilanchal by katua and thereafter Nilanchal fell down in the said field. Thereafter accd. Abhi assaulted on the head of Nilanchal by means of Tangia. While both the accd. Persons were assaulting said Nilanchal, I left the spot out of fear....."

From the cross-examination of the aforesaid witness, it is found that at the time of occurrence he was cutting grass at a distance of about 15 to 20 cubits from the spot, i.e., Kuradia Goja field. He has further testified that the occurrence continued for about 5 to 10 minutes and thereafter he left the spot. When the deceased fell down on the field and the accused persons continued their beating, he left the spot.

10. P.W.4 in his evidence has testified thus –

".....The occurrence took place on 2-10-1994 at about 5 PM inside the Kuradia Goja field of Nilanchal Sadangi. On the said date I had been to my own land for the purpose of irrigating the land and to see the level of water in the land, and my said land is situated at a distance of 100 feet from said Kuradia Goja field of Nilanchal. While I was busy in my said field, at that time I have heard a loud shout and thereafter I looked at the side from where the shout came and I found accd. Satrughna was holding a katua and accd. Abhi was holding a tangia, one sickle and one basket. Thereafter I found accd. Satrughna assaulted on the neck of Nilanchal by means of a katua and thereafter accd. Abhi Gouda assaulted on the head of Nilanchal by means of a tangia and Nilanchal fell down in his said filed. Thereafter both the accd. persons have assaulted said Nilanchal by said Katua and Tangia while he (Nilanchal) was lying on the ground....."

This witness is testified to have seen the occurrence from a distance of 100 feet and at the relevant time he was there in his field, which is situated on the western side of the spot, i.e., Kuradia Goja field.

11. P.W.8 in his evidence has testified thus –

“.....The occurrence of this case took place in the year 1994, but I cannot say the exact date due to loss of time. On the date of occurrence at about 3 or 4 PM I had been to the field to see the condition of my crop (paddy crop). While I was in the field I had seen deceased Nilachal in his Kuradhiagaja field, and it was about 4 or 5 PM. Nilachal was holding a wooden Katua. While Nilachal was in his field, accd. Abhi Gouda and his brother Satrughna arrived there and accd. Abhi was holding a Tangia and one Jalia and his brother Satrughna was holding a Katua.

2. I found accd. Satrughna assaulted Nilachal by means of a katua on his head and accd. Abhi assaulted Nilachal by means of a tangia and Nilachal fell down in the water of the field. I left the field out of fear.”

At the time of occurrence, this witness was also present in his field and he is testified to have seen the occurrence from a distance of 40 to 50 feet. Nothing has been elicited in the cross-examination of the aforesaid witnesses, i.e. P.Ws. 3, 4 and 8 to discredit their sworn testimony. Saving some discrepancies in peripheral matters they are consistent so far as the manner of assault is concerned. Their presence at the spot at the relevant time of occurrence is also natural and they have stated the reasons for which they were there near the spot at the time of occurrence. Their presence near the spot being natural, there being nothing in their cross-examination to discredit their sworn testimony, we do not find any justification to disbelieve P.Ws.3, 4 and 8 as eye-witnesses. Evidence of P.Ws.2, 3 and 4 proves involvement of the appellant so far as the offence under Section 302/34, I.P.C. is concerned.

12. In view of the above facts and circumstances, we do not find any justification to take a different view than what has been taken by the learned Trial Court in its well discussed judgment. In the result, the appeal is dismissed being devoid of any merit.

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C.R. Dash, J.

L. Mohapatra, J. I agree.

.....
L. Mohapatra, J.

Orissa High Court, Cuttack.
The 24th day of September, 2012. /*Parida*.