ORISSA HIGH COURT : CUTTACK

C.R.A. Nos. 36 & 45 of 1992

(From the order dated 10.01.1992 passed by Shri S.K. Patel, learned Sessions Judge, Bolangir in S.C. No.29 of 1991)

(CRA No.36 of 1992)

Gokula Dalai and another ..... Appellants.

-vrs.-

State of Orissa ..... Respondent.

(CRA No.45 of 1992)

Jaga Dalai ..... Appellant.

-vrs.-

State of Orissa ..... Respondent.

For Appellants : M/s. P.K. Mishra, N.C. Pati, A.K. Nanda, A.K. Mishra, R.N. Dash and B.C. Panda. Mr. Dillip Kumar Mohanty (Amicus Curiae)

For Respondent : Addl. Standing Counsel.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE J.P. DAS

Date of hearing : 05.10.2015 Date of judgment : 30.10.2015

J.P. Das, J. Both the appeals are directed against the judgment dated 10.01.1992 passed by the learned Sessions Judge, Bolangir in Sessions Case no.29 of 1991 convicting all the three appellants under Sections 307 and 394 of the Indian

Penal Code (IPC in short). Gokula Dalai and Nila @ Nilamani Dalai (appellants in CRA 36/92) were sentenced to undergo R.I. for five years each for the offence under Section 307 IPC and Jaga Dalai (appellant in CRA 45/92) was sentenced to undergo R.I. for seven years under Section 307 IPC. Further all the three appellants were sentenced to undergo R.I. for two years each under Section 394 of the IPC with a direction for consecutive running of the sentences. Further all the three appellants were sentenced to pay a fine of Rs.1,000/- each on each count in default to R.I. for six months more.

2. The prosecution case, as presented, was that on 23.10.1990 at about 8.30 a.m. the victim one Bisikeshan Sha (p.w.2) was proceeding on the main road leading from Bolangir to Titilagarh towards his field on a cycle carrying Rs.750/- with him for payment to the labourers engaged by him. The accused Jaga Dalai was following him on a cycle at a little distance. All of a sudden the accused Jaga overtook him and detained him near a tamarind tree by the side of the road. The other two accused persons appeared there and all the three accused persons dragged the victim inside the bushy forest by the side of the road. The accused Gokula was holding a long knife, accused Nila was holding a sword and the accused Jaga was holding a KHUKRI. Accused Gokula snatched away the cash of Rs.750/- from the victim and all the three accused persons assaulted him by the weapons. Thereafter while the accused Gokula and Nila caught hold of the two hands of the victim, the accused Jaga cut the right hand of the victim severing his palm from the hand. Then all the three accused persons fled away carrying the cut palm of the victim. The victim profusely bleeding went near the

house of one Bhaskar Bhanda (p.w.4) and sat down there. He saw Bhaskar Bhanda coming out of his house and requested him to inform the incident at his house and to the police. The prosecution story, as further revealed, was that at the relevant time, one A.S.I. of police (p.w.11) of Deogaon outpost was coming on the road when he noticed the accused Jaga on the road. On seeing the police, Jaga leaving his cycle on the road ran inside the bushy forest. The police officer chased him for a little distance but could not apprehend him. Coming back to the road, he found the cycle on which he noticed blood stains and the name of J.K. Dalai engraved on the handle. He sent the cycle to the Outpost through a Forester. Then he proceeded ahead. After about a kilometre, he noticed an unattended cycle, a pair of chappal and a red coloured towel near a tamarind tree. After covering a little further distance, he noticed some people standing and a man sitting, at a distance of about 100 yards from the road. They called him. Going there he found the victim with bleeding injuries with a severed palm and the victim told him that the three appellants had assaulted him and had taken away Rs.750/- from him. The police officer carried the victim to the Deogaon PHC along with one Kasi Bhanda (p.w.6) as pillion on his motor cycle. The officer also giving a requisition requested the doctor to record the dying declaration of the victim since his condition was serious. There the brother of the victim, one Bharat Sa (p.w.1) arrived and presented the written report to the police officer, which was treated as an F.I.R. The victim was referred to Bolangir hospital for further treatment.

3. Thereafter the investigation was taken up. In course of investigation, the accused persons were arrested, seizure of

clothes and blood stained earth etc., was made and sent for chemical examination, the accused Jaga while in custody led the police to recover the cut palm of the victim and the used KHUKRI, which were seized by the police and the opinion of the doctor was obtained about those. After completion of investigation the charge sheet was placed against the three accused persons under Sections 307 and 394 of the IPC.

4. The accused persons pleaded innocence besides alleging false implication due to earlier disputes and the accused Gokula and Nila specifically took the plea of alibi.

5. The learned sessions Judge after examining 15 witnesses for the prosecution and 4 witnesses in support of the defence plea and considering the materials placed before him passed the impugned order of conviction and sentences. P.W.1 is the informant brother of the victim. P.Ws.2, 3 and 4 are post occurrence witnesses. P.W.5 was examined as a witness to the recording of the dying declaration of the victim. P.W.6 is another post occurrence witness. P.Ws.7, 8, 9 and 10 are seizure witnesses. P.Ws. 11, 14 and 15 are the Police Officers who took part in the investigation and P.Ws.12 and 13 are the doctors.

6. Two separate appeals have been filed, one by the appellants Gokula and Nila and the other by Jaga. It has been submitted in both the appeals almost in similar terms that the learned trial court seriously erred in law and facts by reaching the impugned conclusion. It has been submitted that the learned trial court has ignored glaring discrepancies and lacunae in the evidence as well as in the investigation of the case. It has also been submitted that the learned trial court has wrongly

discarded the defence evidence in support of plea of alibi without any cogent reason.

7. Since the counsels for the appellants did not turn up despite repeated adjournments for hearing, Mr. Dilip Kumar Mohanty, Advocate was engaged as amicus curiae to assist the court to dispose of the appeals. Learned amicus curiae placed his submissions in the line of the grounds taken in the appeal memos besides strenuously contending that the investigation of the case was so very perfunctory that the evidence led on behalf of the prosecution appeared to be planted for the purpose of the case. Per contra, the learned Additional Standing Counsel on behalf of the State supported the judgment of conviction and sentence.

8. It would be convenient to consider the appeal of Gokula and Nila (CRA 36/92) at the first instance since they have taken a plea of alibi, especially in the peculiar circumstances of the case, when the prosecution relied upon the sole testimony of the victim, there being no eye witness to the occurrence as per the prosecution story. To reiterate, as per the statement of the victim before the court, accused Jaga coming on a cycle from behind obstructed him on the road and the other two accused persons namely, the present two appellants appeared from behind the bush and thereafter all three of them dragged him inside the bushy forest and assaulted him. But being confronted with his earlier statement before the police, he was found to have stated that all the three accused persons were standing on the road near a tamarind tree. The F.I.R. lodged by the p.w.1, the brother of the victim did not carry the details in

this respect. The p.w.1 stated in his evidence that at the hospital his brother told him that the three accused persons assaulted him and robbed him of his money. Similar was the version of p.ws.3 and 4. More over the p.w.4 simply named Gokula and was silent about the robbery. Nobody had seen these two appellants nearby the spot or around the time of occurrence albeit the police officer, p.w.11 has said to have seen the accused Jaga. The p.w.2, the victim also substantially differed in his statements given before the police and the court regarding the holding of weapons like sword and knife by these two appellants. That apart neither any sword nor any knife has been seized by the police during investigation, albeit as per the prosecution case the KHUKRI was recovered being led by the accused Jaga while in police custody. It has not even whispered as to whether any effort was made by the Investigating Officer in order to find out the other weapons allegedly used for the crime. It may also be noted that the doctor who examined the victim stated that all the injuries sustained by the victim could be possible by one weapon and having examined the KHUKRI, which was allegedly recovered by the police being led by the accused Jaga while in police custody, the doctor said that the injuries could have been possible by the said weapon.

9. It was contended on behalf of the appellants that if at all the appellants were armed with sword and knife and they had the intention of doing away with the life of the victim, it is unbelievable that the victim sustained some injuries on his hands and not on any vital part of the body. Further as per the seizure list, ext.3, under which some blood stained earth and sample earth were seized from the spot of occurrence, the spot

was an open field being cultivated with 'kolatha'. Hence, it being on the side of the highway and there being no forest, it was improbable that the occurrence could not be witnessed by anybody. Most importantly, it was mentioned in the F.I.R. that the occurrence was witnessed by the labourers carrying earth, Purusottam Dip and Jaladhara Bhanda besides many people present nearby. But none of these specifically named witnesses has been examined on behalf of the prosecution and no explanation comes forth for such serious omission. Added to this, one Jagannath Baghel was examined as a seizure witness as p.w.8. In his cross-examination he stated that he had seen the occurrence since he was cultivating his land nearby. He stated that both the victim and the accused Jaga were quarrelling and scuffling with each other pulling a knife and both sustained injuries. He added that none of the present appellants was present there. The prosecution has not disowned this witness, but the learned trial court has simply ignored this aspect. The learned trial court has observed in paragraph-17 of the impugned judgment that 'no doubt the police officer, p.w.11 saw accused Jaga alone at the scene of occurrence and so also p.w.8 speaks of accused Jaga alone. That does not mean that the other accused persons are not involved and that the injured is falsely implicating them'. Such an observation, I am afraid, is not permissible in a criminal trial, there being no scope for presumption and surmise. The golden thread that runs through the web of criminal jurisprudence is that the prosecution must establish the charge against the accused beyond all reasonable shadows of doubt so as to record a conviction. In the case at hand the parties were admittedly in inimical terms and it was

not the duty of the defence to show as to why the victim falsely implicated the appellants. The prosecution was to prove that the accused–appellants were involved in the alleged occurrence placing cogent and acceptable evidence, which I find lacking in the case.

10. Apart from the above, four witnesses were examined in support of the defence plea of alibi who stated that both the present appellants were in a weekly market during the relevant time and day of occurrence. One of them was the boatman who ferried the appellants along with others over the river. The learned trial court has disbelieved these witnesses observing that they could not have any reason to recollect the date and the names of the two accused persons to have gone to the weekly market on that day since they could not name anybody else or any other date when they saw persons going to the market. In this regard it would be profitable to quote the observation of the Hon'ble Apex Court in the case of ***Dudh Nath Pandey v. State of U.P., (1981) 2 SCC 166***, which seeks to bury the ghost of disbelief that shadows alibi witnesses that;

> "Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses."

11. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that

the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. As discussed herein before, I am unable to find in the present case that the prosecution has succeeded in establishing the presence of these two appellants at the scene of crime or to have participated in the commission of the offence beyond all reasonable shadows of doubt. Hence, the probability of the defence plea of alibi need not be thrashed upon. Consequently, therefore, I am of the view that the finding of guilt against these two appellants namely Gokula and Nilamani for the alleged offences punishable under Sections 307 and 394 of the IPC, as has been reached by the learned trial court, is not sustainable in law.

12. Now coming to the other appeal (CRA 45 of 1992) preferred by the accused Jaga, the attack on behalf of the appellants was on the investigation of the case. It was submitted by the learned amicus curiae that the investigation of the case started even before lodging of any F.I.R. It was contended that the police officer (p.w.11) stated to have found Jaga on the road who ran inside the bushy forest and that the officer chased him to a distance and having failed to apprehend him came back and found a blood stained cycle, which he sent to the outpost through a Forester. But there was no reason for Jaga to run away or the police officer to chase him since it is not the prosecution case that either Jaga was a known criminal or he was wanted by the police. Again the officer noticed the cycle along with chappal and towel left behind by the victim by the side of the road when there might be many such things lying by

the side of the road. Thus it was submitted that all these facts were planted by the police in order to create a story for the prosecution. It was also submitted that the specifically named witnesses in the F.I.R. were not examined by the police and the witnesses, examined by the prosecution simply stated to have heard from the victim about the assault. As against this, it was submitted by the learned Counsel for the State that the accused Jaga, while in police custody, led the police to recover the severed palm of the victim and the alleged weapon of offence, the KHUKRI. Of course it is in evidence that the alleged places of recovery were open fields.

13. However, it has been brought on record by the defence itself by way of cross-examination of the p.w.8 that there was tussle and scuffling between the accused Jaga and the victim and that both of them sustained injuries. The accused Jaga had sustained an incised wound on his palm and he was examined by the doctor on police requisition. Thus considering the circumstances and the material evidence on record, as discussed herein before while dealing with the other appeal, I am of the view that the present appellant Jaga was involved in the affair of the injury sustained by the victim.

14. Now coming to the alleged nature of the offences, it was contended on behalf of the appellant that the learned trial court ignored certain major deficiencies in the prosecution case in the haste of reaching a conclusion of guilt against the accused. Firstly, the victim sustained all the injuries on his hands including the severance of the palm excepting one simple injury on the lateral side of the left eye. Hence, there being no

assault or injury on any vital part of the body, it could never be said that the accused-appellant had any intention or knowledge of causing the murder of the victim so as to make out an offence under Section 307 of the IPC. Secondly, there is no medical evidence that the injuries, as sustained by the victim were sufficient to cause death in ordinary course of nature. Thirdly, the dying declaration, as has been relied upon by the prosecution, did not inspire confidence. Because the police officer carrying the victim simply apprehended that the victim might die. But considering the injuries, the condition could not have been that serious. The doctor also stated that the victim was in fit state to give the statement. Further one independent witness said to have been present at the time of recording the statement stated before the court that he did not see the person from whom the statement was said to have been taken. That apart the victim stated in his dying declaration that accused Jaga cut his hand by means of a 'talwar' (sword) whereas the prosecution case so also all other versions of the victim was that the accused Jaga assaulted him and cut his hand by means of a 'KHUKRI'. Fourthly, accused Jaga had also sustained injury on his palm, which has gone unexplained by the prosecution. Although unexplained injury on the accused is not always fatal to the case of the prosecution still it gains importance depending upon the facts and circumstances of the case. In this case, in view of one evidence that there was tussle and scuffling between the accused Jaga and the victim, the injury sustained by the accused gains importance for consideration. Considering all these aspects, which definitely have sustainable force, and the circumstances, I am of the view that the acts, as alleged against

the appellant Jaga, make out an offence punishable under Section 308 of the IPC and not under Section 307 of the IPC.

15. Now coming to the alleged offence under Section 394 of the IPC, it has been the consistent allegation of the prosecution, as to have been stated by the victim, that the accused Gokuli snatched away the amount of Rs.750/- from the victim. But as held earlier, the prosecution failed to establish the presence of the other two appellants at the crime scene beyond reasonable doubts. Secondly, no money has been recovered by the police during investigation. Thirdly, although it was alleged that the victim was carrying the money to pay the labourers engaged by him for digging earth, still no labourer was examined by the prosecution, even though it was specifically mentioned in the F.I.R. that they had seen the occurrence. Lastly, the p.w.4, before whom the victim first disclosed the occurrence requesting him to inform at his house and to the police, did not say about the snatching of money, so also the pw.6 who reached the victim shortly thereafter along with the police officer, p.w.11. In view of these facts and circumstances, I am of the considered opinion that the alleged offence under Section 394 of the IPC has not been established against the present appellant Jaga beyond reasonable doubts.

16. In the result of my aforesaid discussions and findings, it is ordered that the CRA No.36 of 1992 preferred by the appellants Gokuli and Nilamani is allowed and the order of conviction and sentence passed against them is set aside. Both of them are set at liberty being discharged from their bail bonds furnished at the time of filing of the appeal.

17. So far as the CRA no.45 of 1992 is concerned, the order of conviction against the appellant Jaga is modified to be only under Section 308 of the IPC instead of under Sections 307 and 394 of the IPC. As regards the sentence, the alleged occurrence took place more than 25 years back. The sword of conviction remained hanging on the head of the appellant throughout these more than two and half decades. It is seen from the record that the appellant Jaga had remained as Under Trial Prisoner for more than five months. Hence, I feel, to sentence the appellant under Section 308 of the IPC for the period already undergone as UTP would meet the ends of justice, and order accordingly. He is discharged from the bail bond furnished at the time of filing of the appeal.

18. Both the appeals are disposed of accordingly. Before I part, I must put on record my appreciation for Mr.Dillip Kumar Mohanty, Advocate, learned amicus curiae for the able assistance provided for disposing the appeals.

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J.P. Das, J.

High Court of Orissa, Cuttack,
Dated the 30th October, 2015/Secretary