

Jadu Behera Vs. the State

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Court : Orissa

Decided On : Nov-29-1989

Reported in : 69(1990)CLT427; 1990CriLJ817

Judge : K.P. Mohapatra and ;J.M. Mahapatra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 97, 302 and 307; Code of Criminal Procedure (CrPC) - Sections 313 and 161

Appeal No. : Cri. Appeal No. 52 of 1987

Appellant : Jadu Behera

Respondent : The State

Advocate for Def. : S. Misra, Adv.

Advocate for Pet/Ap. : S.C. Das, Adv.

Disposition : Appeal allowed

Judgement :

K.P. Mohapatra, J.

1. The appellant has assailed the judgment passed by the learned Additional Sessions Judge, Balasore convicting him for an offence under Section 302 I.P.C. and passing the sentence of imprisonment for life.

2. The appellant Jadu, deceased Madhu and P.W. 1, Kailash were the three brothers living at village Nachhipur within Bhadrak (R) police station in the district of Balasore, The houses of the appellant and the deceased on the east and west respectively are intervened by a narrow lane. During rainy season the rain water from the roof of the deceased's house falls on the side of the walls of the appellant and then flows out. The appellant objected to the rain water falling from the roof of the deceased's house near the walls of his house. On 13-8-85 at 9.00 P.M. there was a quarrel between the appellant and the deceased with regard to the above during which the neighbours intervened and pacified them. They asked the appellant to go inside the house and closed the door and similarly they told the deceased to enter inside the house and closed the front door. Sometime later the deceased broke open the door of his house, came out with an iron rod and in order to attack the appellant broke his front door partially. He became violent and brandishing the iron rod came out shouting that he would kill the appellant. The appellant came out with a Katari in his hand and assaulted the deceased by means of it causing several injuries on different parts of the body. P.W. 1 whose house is at a different place came with other neighbours and removed the deceased, who was alive, to Bhadrak Government hospital where he was treated and was subsequently removed to S.C.B. Medical College Hospital, Cuttack for better treatment. The deceased, however, did not survive and breathed his last. P.W. 1 lodged the FIR (Ext. 1) on 14-8-85 stating the facts in brief. At the first instance a case under Section 307 I.P.C. was registered against the appellant which was converted into one under Section 302 I.P.C. after his death.

3. The appellant in his statement under Section 313, Cr. P.C. took the defence that the deceased picked up the quarrel with him having become violent and brandished an iron rod with the intention of killing him. He, however, denied that he was the assailant of the deceased.

4. Mr. S.C. Das, learned counsel appearing for the appellant has urged that there is no evidence on record to show that the appellant was the assailant of the deceased. He attacked the evidence of the sole eye witness to the occurrence (P.W. 5) on the ground that she suppressed the truth, did not reveal the real story and in any event had contradicted herself because she did not disclose before the

Investigating Officer that the appellant had assaulted her husband, the deceased, by means of Katari. The contention requires careful examination with reference to the evidence on record.

5. P.W. 12 was the Medical Officer of Bhadrak Government Hospital. He examined the deceased who was in an injured condition on 13-8-85 at 11.30 P.M. and found twelve incised wounds of different sizes on different parts of his body. According to his opinion in Ext. 6, three incised wounds i.e. fracture of right parietal and frontal bones and on the left scapula were grievous and the rest were simple in nature. Except the bruises, the rest of the incised wounds could be caused by a sharp cutting weapon. P.W. 11, a Demonstrator in the department of P.M. & T. of S.C.B. Medical College, Cuttack, held the post-mortem examination of the deceased on 19-8-85 and found a large number of wounds which were stitched. According to his opinion in the post-mortem report (Ext. 5), all the injuries were ante-mortem in nature and death was due to infection of the injuries leading to meningitis and cerebral abscesses. The injuries were sufficient in the ordinary course of nature to cause death. On the above evidence there is no doubt that the death of the deceased was homicidal in nature caused by means of a sharp cutting weapon such as Katari (M.G.V.). This fact was not disputed at the time of hearing.

6. It is now necessary to review the evidence of the important prosecution witness. P.W. 1, the brother of the appellant and the deceased stated that they were living separately from one another in separate houses. The house of the appellant was on the east end that of the deceased was on the west intervened by a passage. Water during rainy season passes from the houses through the passage to a nearby river. The sash door of the house of the appellant faced towards the west and that of the deceased faced towards the south. On the date and at the time of occurrence there was a quarrel between the appellant and the deceased regarding the flow of rain water from the roof of the house of the deceased through the passage. The appellant objected on the ground that the rain water from the roof of the deceased damaged the walls of his house. He did not allow the flow of water whereas the deceased insisted that the rain water must pass through the passage as usual. During the quarrel both of them shouted to each other hearing which neighbours arrived and told that they would settle the dispute on the next morning.

They took the appellant and the deceased to their respective houses. Despite such intervention the deceased became uncontrollable and expressed that he would finish the appellant. The neighbours therefore closed the door of their houses. Soon after the deceased broke open the door of his own house and came out with an iron rod having a sharp edge shouting that he would kill the appellant and those who would obstruct him. The witness at that time was at a distance of 300 cubits and saw that the deceased was whirling the iron rod and on seeing it he left the place. Half an hour later he came back and saw that the deceased was lying with bleeding injuries on his person. He did not ask the deceased as to the cause of the injuries. He called other villagers and took the deceased first to the Bhadrak Government hospital and then to the S.C.B. Medical College Hospital, Cuttack, for better treatment. The death of the deceased took place 5 to 6 days later. In cross-examination he stated that the deceased was heavily drunk. He found the sadar door of the appellant partly broken. The appellant was also inside his house. P.W. 2, a neighbour stated that on the date and at the time of occurrence the appellant and the deceased were quarrelling near their respective houses. On hearing shouts along with some other neighbours he came to the place. They took the appellant to his house, and; they, also took the deceased to, his house, Thereafter all of them went to their respective houses. About fifteen minutes thereafter he heard shouts coming from the houses of appellant and the deceased. He came near the place of occurrence and saw that the deceased was whirling on iron rod standing on the passage in front of the house of the appellant and was shouting that he would finish him and those who would come near him. Out of fear this witness did not go near the deceased and went to his house. The witness was declared hostile by the prosecution and was cross-examined. P.W. 3, another villager stated that with regard to the flow of rain water through the passage lying between their houses, the appellant and the deceased had a quarrel. Hearing the quarrel he came to the place along with other villagers. They intervened and told that they would decide the matter next morning. They took the appellant and the deceased to their respective houses. After about half an hour later he heard shouts again and along with other villagers he came near the place of occurrence and saw that the deceased was whirling an iron rod. Out of fear he left the place along with other villagers. Half an hour later when he came back to

the spot he found that the deceased was lying injured and bleeding. A portion of the door of the appellant's house was broken. This witness was also declared hostile by the prosecution and was cross-examined. P.W. 4, another villager also gave the same evidence as P.Ws. 1, 2 & 3 and so it is not necessary to repeat the details of his evidence. He too was declared hostile by the prosecution. P.W. 5 stated about the quarrel between appellant and the deceased and the intervention of the villagers and thereafter he left the place. This witness was also declared hostile by the prosecution. The evidence P.W. 5, the widow of the deceased, is important because the learned Sessions Judge based the conviction on her solitary evidence. She stated that on the date and at the time of occurrence there was a quarrel between the appellant and the deceased regarding the flow of water through the passage lying between the houses of both. On hearing shouts the villagers came to the spot and subsided the matter. After the quarrel was over the appellant and the deceased came to their respective varandhas. The deceased asked her to bring some drinking water and so she went inside the house. When she returned with water she found that the appellant was assaulting the deceased by means of a Katari. She saw him dealing about seven strokes on the head, back, leg and other parts of the body of the deceased. None of the villagers was present at the time of assault. They arrived after the assault was over and took the deceased to Bhadrak Government Hospital. In cross-examination her statement made before the Investigating Officer under Section 161, Cr. P.C. was confronted to her. She had stated before him that the villagers such as Bishnu Mohan Rout, Anadi Behera (P.W. 3), Jagar Behera (P.W. 4) and others intervened between the appellant and the deceased and subsided the quarrel and then they put them in their respective houses and closed the doors from outside. Her husband broke open the door of their house and came out with an iron rod in his hand and proceeded towards the house of the appellant and broke open the door leaf of his house by means of the said iron rod. The deceased whirled the iron rod in order to kill the appellant and at that time the villagers namely, Nakula Behera (P.W. 2), Anadi Behera (P.W. 3), Bishnu Rout and others arrived at the spot and saw the occurrence.

She specifically stated that her husband was holding a lathi in his hand and was attempting to assault the appellant on the head and at that time the latter

assaulted the deceased by means of a Katari. The occurrence of assault took place near the sadar door of the appellant. From the aforesaid, statement of the witness, it appears that she suppressed a part of the story, namely aggressiveness of her deceased husband in the manner she had stated before the Investigating Officer and also as stated by P.Ws. 1, 2, 3 and 6. On the basis of her evidence alone it was wrong on the part of the learned Sessions Judge to hold that the deceased was an innocent person, he was not the aggressor and that the appellant committed the brutal murder without any cause.

7. On consideration of the aforesaid evidence, as contended by Mr. Das two views are possible. First, if the evidence of P.W. 5 is disbelieved, there is practically no eye witness account of the assault of the deceased by the appellant. Therefore, in the absence of any evidence whatsoever, he is entitled to acquittal. The second is that the deceased took an aggressive attitude either due to drunkenness or terrible anger so much that he broke open the main door of his house and in his attempt to assault the appellant he even did not hesitate to break open the front door of the house of the latter. He was armed with an iron rod which he was whirling round and round while expressing that he would finish the appellant. As a matter of fact, even according to P.W. 5, the occurrence took place in front of the appellant's door which proved that the deceased and not the appellant was the aggressor. An iron rod is undoubtedly a heavy material which could easily smash the head of a person and cause serious and grievous injuries on any part of the body. The appellant was confronted with such a situation. In order to save himself he had no other alternative than to use the Katari while defending his person and at such a moment it was not possible on his part to weigh the blows in golden scales. The instinct of self preservation being predominant and uppermost in his mind it was not unlikely that he gave repeated blows to the deceased by means of the Katari on different parts of the body. In such circumstances the appellant is entitled to the benefit of right of private defence. In our view, the first view stated above does not deserve consideration, but the second view was more probable. We, therefore, do not hesitate to hold that the appellant is entitled to the benefit of Section 97 I.P.C. and the case should end in acquittal.

8. In the result, the appeal is allowed and the appellant is found not guilty of the charge under Section 302 I.P.C. and is hereby acquitted. He should be set at liberty forthwith.

J.M. Mahapatra, J.

9. I agree.

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