

State of Orissa Vs. Bata Alias Khandi Sethi

State of Orissa Vs. Bata Alias Khandi Sethi

SooperKanoon Citation : sooperkanoon.com/531012

Court : Orissa

Decided On : Aug-17-1989

Reported in : 1990CriLJ1087

Judge : K.P. Mohapatra and ;J. Das, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 to 304, 323 and 324;
Code of Criminal Procedure (CrPC) - Sections 107 and 313

Appeal No. : Govt. Appeal No. 60 of 1983 and Criminal Appeal No. 93 of 1983

Appellant : State of Orissa

Respondent : Bata Alias Khandi Sethi

Advocate for Def. : S.K. Dey, ;Y. Mohanty and ;S. Swain, Advs.

Advocate for Pet/Ap. : B. Misra, Addl. Govt. Adv.

Judgement :

K.P. Mohapatra, J.

1. These two cases arise out of Sessions Trial No. 72 of 1982 of the Court of the Sessions Judge, Cuttack. The appellant, in one case was convicted under Section 302 I.P.C. and was sentenced to undergo imprisonment for life. The other accused persons in the said case who were tried along with the appellant for offences

under Sections 302, 323 and 324 read with Section 34 I.P.C. were found not guilty and were acquitted. The State has preferred the other appeal against the order of acquittal of only one of the accused.

2. The prosecution case in brief is that P.Ws. 1 to 7 and the accused persons are agnates. Their houses and Baris in the village are at one place. Deceased Purna was the natural born son of P.W. 7 and his wife (P.W. 6) and was the adopted son of P.W. 1, the informant and his wife (P.W. 3). P.Ws. 2 and 4 are the brothers of the deceased and P.W. 5 is his widow. These persons, whom we shall refer to as the 'prosecution party' whenever necessary, had long standing land disputes with accused persons and there was no love lost between them. It was alleged that the accused persons cut down a plantain tree from the land of P.W. 1, annexed the land to their own Bari and stacked paddy thereon. For this incident, the accused persons had been abused in the previous evening. The incident took place on 31-12-1980 around 7.30 a.m. Appellant Kapila (accused) came to the house of P.W. 1 and hurled abuses. His father accused Nata intervened and took him away. Thereafter, accused Nata came to the house of P.W. 1 and called the deceased to accompany him to the land to verify if actually the plantain tree had been cut and removed. Accordingly, the deceased accompanied accused Nata and when both of them were proceeding by the nearby lane appellant Kapila stabbed him near the left side chest by means of a spear, as a result of which he fell down on the ground. Accused Shyama, brother of appellant Kapila hit the deceased by a long knife. When P.Ws. 1 to 7 on seeing the assault rushed to the place, they were indiscriminately assaulted by accused Nata, Shyama, Bata (respondent in government appeal) and Jata by means of lathis and knife.

Deceased Purna died on the spot and the other members of the family were injured. P.W. 1 lodged FIR' (Ext. 1) at Dharmasala Police Station. Investigation commenced and from the spot a spear and two lathis were seized. A knife was also subsequently seized. The dead body was sent for post-mortem examination and the injured persons were sent for medical examination. After close of investigation charge-sheet was submitted against all the accused persons for having committed offences under Sections 302, 323 and 324 read with Section 34 I.P.C.

3. The defence of appellant Kapila was that he was not aware how the deceased died because, he was working in the fields. He returned at 9 a.m. and found that his father accused Nata was not in a condition to move. Therefore, he hired a rickshaw and left for hospital. On the way he met the police officer who sent them to the police station. The defence of the respondent Bata was that he was cutting bamboos when deceased Purna and all the family members came and abused his aunt. When he protested they started beating him, his aunt and sister-in-law. At that time he pierced a Farsa (Hoe) on the right shoulder of the deceased as a result of which he collapsed.

4. The learned Sessions Judge on consideration of the prosecution evidence found appellant Kapila guilty of the offence under Section 302 I.P.C, convicted him thereunder and passed the sentence of life imprisonment. He, however, disbelieved the prosecution case that the other accused persons had assaulted either the deceased or any of the P.Ws. 1 to 7 and so he found them not guilty of any of the charges and acquitted them all.

5. P.W. 15 the Medical Officer of Jajpur Sub-Divisional Hospital conducted the postmortem examination of the dead body of the deceased on 31-12-1980 and found the following external injuries:--

(i) A punctured wound of the size of 1' x 1/2' x 2 1/2' in the right axilla through deltoid muscle just at the neck of the humerus.

(ii) A punctured wound of the size of 1 1/2' x 1/2' x 3' piercing obliquely into the left chest through the 5th and 6th ribs below the left nipple.

On dissection he found that corresponding the external injury No. (ii) the left side of the pleura and the lower lobe of the left lung were punctured and had collapsed, the pericardium was punctured near the apex and there was an opening of 1' x 1/2' at the left ventricle of the heart near the apex. The left chest cavity contained blood. The injuries were ante mortem and death was due to injuries to the left lung and heart on account of excessive haemorrhage. External injury No. (ii) and the corresponding internal injury were sufficient in the ordinary course of nature to cause death. The said injuries could be caused by a spear like M.O.I. and the

external injury No. 1 could have been caused by a long knife, such as, M.O. II. In cross-examination, he admitted that the external injury No. 1 could not cause death. M.O.I. the spear could not have caused the external injury No. 1 (vide post mortem report Ext. 10). The aforesaid evidence of the Medical Officer leaves no room for doubt that the death of the deceased was homicidal in character. This fact was not disputed at the hearing.

6. Before discussing the prosecution evidence, it is necessary to make reference to the evidence of P.W. 19, one of the investigating officers of the case, with regard to the scene of occurrence and the evidence of P.W. 20, a medical officer, who had examined accused Nata and respondent Bata one day after the occurrence. P.W. 19 visited the spot on the date of occurrence itself. He stated that the spot where the assault took place was near the house of accused Nata. He found patches of blood on the ground as well as on the dry fence closeby. There were also blood stains on the verandah of his house, as well as on the mud walls of the neighbouring house of Bikal. P.W. 20 examined accused Nata and found the following injuries:--

1. One lacerated wound of the size of 1' x 1/3' x 1/6' under right temporal region of the head; and
2. One abrasion of the size of 1' x 1/2' in the middle of the right leg.

On examination of respondent Bata, he found the following injury:--

1. One lacerated injury on the right side of the forehead of the size of 1/2' x 1/3' * 1/6'.

According to his opinion, the injuries on both of them could have been caused by hard and blunt weapons. The injuries were also simple in nature. It became necessary to refer to the evidence of these two witnesses because of the argument advanced in this Court that the prosecution party also assaulted the accused party who had retaliated in exercise of their right of private defence and further the injuries, which two of the accused persons had sustained on vital parts, such as, on their head and forehead have not been explained by the prosecution.

7. P.W. 1, the adoptive father of the deceased, stated that appellant Kapila stabbed the deceased with a pointed weapon called Ekmuna or Tenta (M.O. I) on the left side of the chest as a result of which the victim collapsed and fell down on the ground. When P.W. 2 Shyama, the natural brother of the deceased, came to his rescue, he was assaulted by respondent Bata by a knife (M.O. II). He stated that he did not see any injury on the accused

P.W. 2, Shyama stated that appellant Kapila stabbed the deceased by means of spear on the left side of the chest as a result of which he fell down on the ground. Respondent Bata stabbed a long knife on the right shoulder of the deceased. When he was trying to lift his brother, respondent Bata assaulted him on the long knife on the left hand.

P.W. 3 the adoptive mother of the deceased, stated that appellant Kapila stabbed spear on the left side of the chest of the deceased. Respondent Bata stabbed a knife on his right arm.

P.W. 4 another brother of the deceased stated that appellant Kapila stabbed a spear on the left side of the chest of the deceased as a result of which he fell down on the ground. Respondent Bata stabbed him by a knife near the right arm. He did not speak anything about the assault by respondent Bata on P.W. 2 Shyama.

P.W. 5 the widow of the deceased stated about her husband being stabbed by appellant Kapila by means of a spear but she did not speak of the same before the investigating officer. So, there being a vital contradiction, her evidence is not to be taken into account.

P.W. 6 the natural mother of the deceased, stated that she saw that appellant Kapila stabbed a spear on the body of the deceased and respondent Bata stabbed him by means of a knife. She has not practically been cross-examined.

P.W. 7, the natural father of the deceased stated that appellant Kapila stabbed a spear on the left side of the chest of the deceased who collapsed and fell down. Respondent Bata dealt a knife blow on P.W. 2 Shyama on the hand.

This is all the evidence of the family members of the deceased.

8. Some co-villagers and neighbours were also examined by the prosecution. They were P.Ws. 8, 9 and 11. All three of them corroborated the prosecution case with regard to the assault on the deceased by means of the spear by appellant Kapila. P.W. 8 stated that respondent Bata stabbed the deceased with a long knife and further assaulted P.W. 2 Shyama by means of it. In cross-examination he stated that along with his son Prafulla, he was being prosecuted in a criminal proceeding with some of the prosecution witnesses. P.W. 9 stated about the assault by appellant Kapila and respondent Bata on the deceased by means of the spear and the long knife respectively, but omitted to speak about the assault on P.W. 2 Shyama. In cross-examination he admitted that his son was party along with P.W. 1 and others in a proceeding under Section 107 Cr. P.C. P.W. 11 corroborated the evidence of P.W. 8 with regard to the assault by appellant Kapila on the deceased as well as by respondent Bata both on the deceased and P.W. 2 Shyama. In cross-examination he has admitted that his brother filed a criminal case against the accused persons which was pending.

The aforesaid evidence of some co-villagers will show that substantially they corroborated the prosecution case, but they cannot be called independent witnesses because they seem to be antagonistic towards the accused party and sympathetic to the prosecution party.

9. It has been consistently held and law is almost settled that relation witnesses and partisan and interested witnesses in a heinous case of murder cannot straightway be disbelieved. Their evidence, however, has to be accepted with caution after thorough scrutiny. If the above guideline is kept in view, and on thorough scrutiny, the evidence of witnesses of such category appears believable, there is no reason why the Court should not accept and believe such evidence so as to base conviction. In one of the latest decisions reported in AIR 1988 SC 1028, *State of U.P. v. Rama Swarup*, it was held that it is wrong to ignore the testimony of eye-witnesses by stating that they are either close relative or partisan witnesses of the deceased. There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the faction opposed to that of the accused by itself does not render their evidence false. Partisanship by itself is no ground for discarding sworn testimony. Interested

evidence is not necessarily false evidence. Therefore, merely because the eye witnesses are associated with one faction or the other, their evidence should not be discarded. It should no doubt be subjected to careful scrutiny and accepted with caution. The learned Sessions Judge applied the aforesaid test and came to the conclusion that appellant Kapila was the assailant of the deceased. Keeping the settled principle of law in the background and on thorough examination of the prosecution evidence and while partially agreeing with the learned Sessions Judge, we hold that not only appellant Kapila assaulted the deceased with a spear, respondent Bata also assaulted him, as well as P.W. 2 Shyama. Otherwise there would have been no second punctured wound on the right axilla of the deceased (injury No. 1) which could have been caused by a knife, as opined by the medical officer (P.W. 15) who had conducted the post-mortem examination of the deadbody and injuries on P.W. 2 Shyama as deposed to by another medical officer (P.W. 12) one of which was subsequently opined to be an incised wound (injury No. ii) by P.W. 18 the Sub-Divisional Medical Officer, Jajpur, who assigned adequate reasons therefor. Thus, the prosecution established that appellant Kapila dealt the fatal stab wound on the deceased and respondent Bata, by means of a long knife, assaulted both the deceased, as well as P.W. 2 Shyama although the injuries were of simple nature.

10. The learned Sessions Judge negatived the theory of right of private defence which was raised before him. Mr. Y. Mohanty learned counsel appearing for appellant Kapila and respondent Bata, urged that the prosecution party were the aggressors. They came with lathis and indiscriminately assaulted the members of the family of the accused party and that is why the front verandah of the house of the latter was found to have been stained with blood. He further went on to submit that if materials on the record justify giving the benefit of the right of private defence to the accused, there is no reason why this Court should hesitate to give such benefit. This contention requires careful examination.

11. Accused Nata stated in his evidence recorded under Section 313 Cr. P.C. that the members of the prosecution party came and assaulted respondent Bata. Respondent Bata stated that the members of the prosecution party came, abused his aunt and sister-in-law and when he protested they started assaulting him. So,

he pierced Farsa on the right shoulder of the deceased. It has already been stated that P.W. 19 who immediately visited the spot found the place of occurrence to be near the house of accused Nata, where he found blood on the ground, on the verandah and on the dry fence. Undoubtedly, therefore, the place of occurrence was the front side of the house of appellant Kapila and respondent Bata. Both respondent Bata and accused Nata had injuries on the vital parts of their body, such as, the head and forehead region as stated by the medical officer (P.W. 20). Although the injuries were of simple nature, the prosecution evidence is absolutely silent as to how these two persons had injuries on the vital parts of their body. No explanation of any sort was offered. According to the settled legal principle, the prosecution is not bound to explain every injury, particularly simple injuries of trifling nature. It was laid down in AIR 1976 SC 2263 : (1976 Cri LJ 1736), *Lakshmi Singh v. State of Bihar*, that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

'(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases

where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.'

(Quoted from headnote)

In view of the settled principle, it was argued by the learned Additional Standing Counsel that the prosecution was not bound to explain the simple injuries sustained by the aforesaid persons, particularly when the main assailant had not received any injury. We would have been inclined to accept the argument but for the fact that accused Nata had sustained the injuries in the right temporal region of the head and respondent Bata had sustained the injuries on the right side of his forehead. It cannot be underscored that lathi blows on the head with some more force could have caused the death of these persons or would have incapacitated them. Therefore, we feel that non-explanation of the injuries on the vital parts of the body of accused Nata and respondent Bata cannot be ignored and should be given due weight with reference to the argument advanced before us that the assault on the deceased and P.W. 2 Shyama was in exercise of right of private defence.

12. The learned counsel for appellant Kapila and respondent Bata relied upon some decisions which are discussed hereunder:--

In AIR 1983 SC 284 : (1983 Cri LJ 429), *Jawahar Lal v. State of Punjab*, a case under Section 302 I.P.C. was converted to Section 304 part II IPC., but the facts of the case were different because the deceased in that case was not a party to the trivial quarrel and the accused who inflicted the injury had no malice against the deceased.

In AIR 1984 SC 759 : (1984 Cri LJ 478), *Tholan v. State of Tamil Nadu* the facts were different. In that case there was no dispute between the accused and the deceased and the incident occurred on the spur of the moment. Therefore, conviction was altered from Section 302 to Section 304 Part II IPC.

The case in AIR 1988 SC 2122 : (1989 Cri LJ 115), Kartar Singh v. State of Punjab, is somewhat similar to the present case. In that case the plea of the accused was right of private defence. The injuries on his person were not properly explained by the prosecution. The knife blow was given on the abdomen after the scuffle started. Therefore, conviction was altered from Section 302 to Section 304 part II I.P.C.

In AIR 1975 SC 1674 : (1975 Cri LJ 1479), Puran Singh v. The State of Punjab, it was held as follows:--

'The right of private defence of person or property is to be exercised under the following limitation:

(i) that if there is sufficient time for recourse to the public authorities the right is not available;

(ii) that more harm than necessary should not be caused;

(iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned.'

13. After going through the pros and cons of the case and in consideration of the settled legal principles referred to above, we are convinced that the prosecution party assaulted the accused party in front of the house of the latter. Therefore, in exercise of the right of private defence, appellant Kapila and respondent Bata inflicted injuries on the deceased as well as P.W. 2, Shyama. Appellant Kapila, however, inflicted the fatal injury and can be attributed with having intention or knowledge that stabbing by means of a spear on the left side of the chest was likely to cause death of a person. Therefore, he clearly exceeded the right of private defence. But respondent Bata did not exceed the right, though he used a knife against lathis. The injuries which were inflicted by him were not fatal, but were simple in nature. He did what a man being attacked would have done in similar circumstances.

13A. In the ultimate analysis, we do not support the conviction and sentence of appellant Kapila under Section 302 I.P.C. He, according to us, committed an

offence under Section 304 Part I IPC, Respondent Bata, in our opinion, cannot be made liable for any offence, because whatever he did, was to save himself.

14. In the result, while the government appeal is dismissed, the criminal appeal is allowed in part. The conviction of appellant Kapila is altered from Section 302 to Section 304, Part I, IPC and instead of life imprisonment, he is sentenced to undergo rigorous imprisonment for a period of eight years.

J. Das, J.

15. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com