

**P. Dasarathi and ors. Vs. State**

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**Court :** Orissa

**Decided On :** Jul-04-1990

**Reported in :** 1991CriLJ2985

**Judge :** L. Rath and ;J.M. Mahapatra, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 114, 302, 326; ;Code of Criminal Procedure (CrPC) - Sections 202

**Appeal No. :** Criminal Appeal No. 234 of 1985

**Appellant :** P. Dasarathi and ors.

**Respondent :** State

**Advocate for Def. :** J. Mohanty, A.S.C. and ;A.S. Naidu, Adv.

**Advocate for Pet/Ap. :** M.N. Das, Adv.

**Judgement :**

**L. Rath, J.**

1. The appellants stood trial under Section 302, I.P.C. while five other accused who have since been acquitted faced trial under Section 114 read with Section 302, IPC. The appellants having been convicted under Section 302, IPC and sentenced to imprisonment for life have approached this Court in appeal.

2. The prosecution case is that the deceased P. Haribandhu was coming to his house after taking bath and while he was near the Khala of appellant No. 1, all the accused except one who were inside that Khala armed with deadly weapons like Khandakati and Kati surrounded the deceased. Appellant No. 1 who was armed with a Khandakati hit the deceased on his head and thereafter appellant No. 3 struck a Kati blow on his right leg on account of which the deceased fell down and thereafter appellant No. 2 gave a Kati blow on his left leg. While the deceased was still alive, appellant No. 1 gave a Khandakati blow on his neck as a result of which his wind pipe was severed and death was instantaneous. According to the prosecution, the incident was witnessed by P.Ws. 4, 6, 7, 8 and 10 of whom P.W. 6 is the widow of the deceased, P.W. 10 is his son and P.Ws. 7 and 8 are villagers of neighbouring villages. F.I.R. was lodged by another son of the deceased, P.W. 9, on information received by him from P.W. 10. The assault on the deceased is stated to be out of previous enmity and grudge.

3. The defence of the appellants was a complete denial.

4. P.W. 3 is the medical officer who had conducted the post-mortem examination. His evidence shows that the following external injuries were found on the body of the deceased:--

(1) A cut abrasion linear in shape in front of both shoulder, 3' in length on right side and 3 1/2' length on left side.

(2) A small cut wound at the base and inter digital space in between the ring finger and middle finger traversing through the web space.

(3) Incised wound on the left frontoparietal region longitudinally directed 3 1/2' away from the midline of the size of 3 1/2' x 1/4 x bone deep.

(4) A cut wound over the front of the neck just below the chin in the midline above the thyroid cartilage of size 4' x 3' bone deep cutting the wind pipe, food pipe, all the corresponding muscles, vessels, nerves and body of the 6th cervical cut and visible through the wound.

(5) Incised wound 3' below the left patella partially cutting the tibia of size 4' x 1/2' x bone deep transversely situated. The bone was visible through the wound.

(6) Incised wound obliquely situated over the front of the left leg almost at its middle of size 4' x 2' x bone deep with evulsion of muscles. The bone was visible through the wound.

(7) Multiple cut wound over and above and below the right knee separating the right leg from the right thigh with a tag of skin and tissue posteriorly, cutting the lower end of the femur, the lateral condyle of right femur cut tangentially and dislodged, the tibia cut at the level of tubercle of tibia and the bone piece separated transversely and the right patella dislocated. At this level all the muscles, vessels and nerves cut. This wound is due to three strokes.

(8) Cut abrasion over right wrist on back of length of 2'.

On dissection of external injury No. 4, he found all the structure of the neck cut and contused, the greater cornu of the hyoid bone on both sides cut, the cartilage cut and contused and the sixth cervical vertebra cut and separated into two halves. In his opinion the cause of the death was due to shock and haemorrhage as a result of the injuries and that the death was instantaneous. According to him the external injury No. 4, i.e. the injury on the neck, was sufficient in ordinary course of nature to cause the death. It is the submission of Mr. Das, the learned counsel appearing for the appellants, that the prosecution story does not inspire any credence because of the fact that the very same witnesses had tried to rope in innocent persons like five other accused since acquitted for which their evidence regarding the culpable conduct of the present three appellants should not be relied upon, that some of the witnesses were examined belatedly, that the admitted witnesses in the F.I.R. were not examined and that the evidence as it is suffers from contradictions and exaggerations for which the prosecution case is liable to be thrown out.

5. A perusal of the evidence of P. Ws. 6, 7, 8 and 10 shows a consistent story to have been developed in support of the prosecution that while the deceased was returning after taking his bath and was near the thrashing floor of appellant No. 1

where the accused had assembled he was attacked by the appellants with appellant No. 1 giving a blow first on the head of the deceased and then appellants Nos. 2 and 3 successively giving blows on the left leg and right leg and lastly appellant No. 2 giving a blow almost severing the neck of the deceased. The witnesses are categorical and specific in their description of the occurrence. The main ground of attack is non-examination of one Trinath Sahu, son of Khetra Sahu, a witness named in the F.I.R. In the F.I.R. the persons named as witnesses were Raghunath Sahu, P. Dharma Rao (P.W. 10), G. Krushna Murty (P.W. 8) and Trinath Sahu, son of Khetra Sahu. Besides, P.W. 6 was also mentioned as an eye-witnesses. Except Raghunath Sahu and Trinath Sahu, all other persons have been examined. It is well settled in law that prosecution is not obliged to examine all witnesses to the occurrence there being no such mandatory requirement in law. It has however been strenuously urged by Mr. Das that not only Trinath Sahu has not been examined, but all witnesses have stated Trinath not to be present during the occurrence and have denied his presence. P.W. 7 is D. Trinath whose presence has been consistently stated by the other witnesses during the occurrence. P.W. 9, the informant, has stated in his evidence that while he reported the matter orally in the P.S. it was reduced to writing by somebody whom he does not know and he had spoken about the presence of P.W. 10 only but not of Trinath Sahu though it was so recorded wrongly. According to him there are four or five Trinaths in the village and Trinath Sahu, son of Khetra Sahu is one of them. He has denied to have made any statement in the F.I.R. of Trinath Sahu, son of Khetra Sahu having witnessed the occurrence though in fact he was cited as a witness. But however in view of the fact that P.W. 9 is not an eye-witness to the occurrence and merely relied upon the version of P.W. 10, it is not unlikely that while P.W. 10 had given the name of P.W. 7 as an eye-witness he had by mistake mentioned the name of Trinath Sahu which fact was sought to be explained in evidence. The other submission of Mr. Das regarding the witnesses in general is that since their evidence regarding the complicity of the five accused since acquitted was not acted upon they having stated falsely regarding their participation in the crime and the participation of such persons in the crime being integral and vital aspect of the prosecution case as unfolded, their evidence is not to be acted upon. The submission does not find any force with us since it is not

that the presence of the accused who were acquitted was disbelieved, but it was the manner of their participation which was disbelieved. The learned Sessions Judge came to the conclusion that the five accused were present during the occurrence but they had not participated in the occurrence nor is there any overt act alleged against them. Thus the statement of the witnesses regarding the presence of those accused persons was believed but in view of the omnibus statement of their having participated in the crime, the overt acts alleged to have been committed by them having been disbelieved and their complicity being not proved, the charge was held not to have been established against them. It is not the same thing to contend that the evidences of the witnesses were totally unworthy of credit. Mr. J. Mohanty, learned A.S.C. has placed reliance on AIR 1973 SC 1409 : (1973 Cri LJ 1120), Ranbir v. State of Punjab wherein it was pointed out that the maxim 'falsus in uno falsus in omnibus' is not a sound rule to be applied in India, and what is necessary, the evidence of the witnesses is to be scanned to separate grain from the chaff to find out the essence of the substance of their evidence and where the general substratum of the occurrence cannot be held to arouse any reasonable doubt or suspicion about its having taken place, the prosecution witnesses, provided they are held to have witnessed the occurrence and to be in a position to identify the assailants, are ordinarily not to be assumed to have left out the actual offenders or the guilty persons. For such reasons, the submission of Mr. Das must fail.

6. As regards P.W. 6 it was commented that he was examined two days later on 25-7-84. We also do not find any force in this submission since there is no evidence as to averment when she was examined. A statement was taken from her that she was examined two days later. The question was not put to the I.O. as to on what date he examined her. It was held in AIR 1972 SC 2478 : (1972 Cri LJ 1704), Bharat Singh v. State of U. P. that a defect in the investigation is not available to be pressed for the benefit of the defence unless the Investigating Officer has been cross-examined and afforded opportunity to explain any defect in the investigation. Since admittedly no question was put to the I.O. in that regard, we do not think any benefit is available of the same to the defence. Apart from such facts, we, to satisfy ourselves, referred to the case diary and found that in fact P.W. 6 was examined on 26-7-84 itself. So far as P.W. 7 is concerned, his

evidence has also been assailed because of delayed examination on 25-7-84, he being not an F.I.R. witness, and he having stated that he did not disclose regarding the occurrence to anybody else prior to his examination by the police. For the reasons we have discussed earlier, we also do not think that there is anything to discredit his evidence. In the first place he does not belong to the village of the deceased or the accused and secondly his name being not mentioned as a witness to the occurrence has been stated and explained by P.W. 9.

7. Reliance has been placed by Mr. Das on AIR 1977 SC 673 : (1977 Cri LJ 261), Prem Singh v. State of Punjab to contend that since the eye-witnesses were either relations of the deceased or his field servants, their evidence in relation to the accused should not be believed. Firstly there is no credible evidence to show that P.Ws. 7 and 8 were the field servants of the deceased, it being the statement of P.W. 1 alone apart from the suggestions to the prosecution witnesses. The evidence of P.W. 1 is not believable which we will discuss a little later. Secondly the decision cited has no application to the facts of the case as the case against the accused is not based only on the evidence of the relations of the deceased as was in the said case. Another decision, AIR 1975 SC 1962 : (1975 Cri LJ 1734), Balaka Singh v. State of Punjab was also relied upon by Mr. Das to show that where the prosecution case against the convicted accused and the acquitted accused is so inextricably mixed up that it is not possible to sever one from the other, it is not possible to accept the evidence for one purpose and reject the same for other. Such decision has also no application since it is not a case where the evidence is inextricably mixed up and on the contrary the evidence is categorical against the three appellants and so far as the five acquitted accused are concerned, the evidence regarding their culpability also does not form a substantial part of the case.

8. It has also been urged by Mr. Das that P.W. 8 could not be a witness to the occurrence and that appellant No. 3 could not have been present at the site in view of the evidence of P.W. 1 whose evidence has not been challenged that on the date of the occurrence at about 11 a.m. both P.W. 8 and appellant No. 3 had got down from a bus at the Chatrapur Bus Stand and hence they could not have

been present at the site either to witness the occurrence or to participate in it. The learned Sessions Judge has discussed this aspect of the evidence to come to the conclusion that the evidence of P.W. 1 who was a seizure witness was not believable. P.W. 2 who was declared hostile has stated that he had taken both appellant No. 3 and P.W. 8 to Chatrapur to be witnesses in a case of his and they had boarded the bus from Kukudakhandi. The order sheet of the case has been exhibited as Ext. 11 which shows that the case was posted to 26-6-84 when it was adjourned to 11-7-84 for orders regarding 202, Cr. P.C. enquiry. The order having not been made ready on 11-7-84, the case was posted to 17-7-84 for orders on which date cognizance was taken and the case was posted to 5-9-84 for appearance of the accused. On 5-9-84 the case was taken up on which date it was adjourned to 2-11-84. As such there could not have been any occasion for P.W. 2 to have taken P.W. 8 and appellant No. 3 as witnesses on 23-7-84 the case having never been posted to that date. We find no reason to differ from the conclusion reached by the learned Sessions Judge and hence P.W. 1 must be taken not to be a believable witness.

9. In such circumstances it must be held that the prosecution was able to prove the culpable conduct of the three appellants. Even if it is so, yet it is to be seen as to how far the appellants can be convicted under Section 302, IPC. Admittedly there was no charge under Section 34, IPC against any of the accused. It is admittedly the case of the prosecution that the fatal blow was dealt by appellant No. 1. The first blow was given by appellant No. 1 on the head but that was not fatal. The Khandakati blows given by appellants Nos. 2 and 3 on the left side leg and right side leg though were of very serious character, yet these appellants cannot be said to have participated in the intention of appellant No. 1 to commit the murder of the deceased which was done under the sole authorship of appellant No. 1. The intention of appellant No. 1 to commit the murder was preceded by the assaults of appellants Nos. 2 and 3 and hence their culpability may be under different sections, and not under Section 302, IPC. However, so far as appellant No. 1 is concerned, the evidence is tell-tale and the conclusion is irresistible that he in fact intended the death of the deceased and had attacked on his neck almost severing the head and resulting in instantaneous death of the deceased and hence he must be held to have rightly been convicted under

Section 302, IPC. So far as appellant Nos. 2 and 3 are concerned, the gravity of the injuries was also very high and hence though they are not liable to be convicted under Section 302, IPC, should be properly convicted under Section 326, IPC and hence their conviction is modified from that of Sections 302, IPC to 326, IPC and they are sentenced to R.I. for six years each besides to pay a fine of Rs. 2,000/- each. From the fine so realised, the legal representatives of the deceased shall be compensated by 50% of the amount. In default of payment of fine, appellants Nos. 2 and 3 shall suffer R.I. for a further period of one year each. Subject to the above modification, the appeal is dismissed.

10. Issue warrant of arrest against the appellants.

**J.M. Mahapatra, J.**

11. I agree.

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