

Rati Khora and anr. Vs. the State

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Court : Orissa

Decided On : Aug-05-1996

Reported in : 1997CriLJ704

Judge : D.M. Patnaik and ;P.K. Misra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 307 and 341; Code of Criminal Procedure (CrPC) - Sections 161

Appeal No. : Criminal Appeal No. 387 of 1992 and Jail Cri. Appeal No. 3 of 1993

Appellant : Rati Khora and anr.

Respondent : The State

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : Manoj Misra, ;B.C. Patnaik, ;P.K. Das, ;B. Mishra, ;D. Sarangi and ;Anil Deo, Advs. (through Legal Aid and Advice Board)

Disposition : Appeal dismissed

Judgement :

P.K. Misra, J.

1. Criminal Appeal No. 387 of 1992 has been filed by the two appellants who have been convicted under Section 302/34, Indian Penal Code, and sentenced to

undergo imprisonment for life in Sessions Case No. 22 of 1992. After filing the aforesaid appeal through Advocate, a petition has been sent on behalf of both the appellants through jail subsequently which has been registered as Jail Criminal Appeal No. 6 of 1993. Both the appeals are being disposed of by this common judgment.

2. The prosecution case, briefly stated, is as follows: Bhagawan Khora, the deceased, along with some others had been acquitted in a criminal case wherein it had been alleged that they had killed one Lachhu Khora, brother of present appellant No. 1. It is alleged that appellant No. 1 bore grudge against the deceased. On 11-9-1991 in the evening, the deceased, Laichhan Hantal (P. W. 4) and Puma Khora (P. W. 5), the brother-in-law and first cousin of the deceased respectively, proceeded towards Bariniput Crossing from the house of the deceased to take tea. It is alleged that while they were near Kashmir Hotel, the two accused-appellants suddenly came and appellant Ghasi Mandi caught-hold of the deceased from behind and appellant No. 1 stabbed on the belly of the deceased by means of a knife. The deceased was taken to the Sub-Divisional Hospital Jeypore, where he succumbed to the injury on the next day at about 6.15 p.m. The F.I.R. was lodged by P.W. 6 on 11-9-1991 at about 6.30 p.m. which was registered under Sections 341, 307/34, Indian Penal Code. Subsequently, on the death of Bhagban Khora, the case turned to one under Section 302, Indian Penal Code, and charge-sheet was accordingly, filed.

3. The plea of the accused was one of denial.

4. The prosecution has examined in all 14 witnesses of whom P.Ws. 4, 5 and 6 are the eye witnesses. Though P.W. 7 was examined as an eye witness, he did not support the prosecution case and was declared hostile. P.W. 14 is the doctor who had examined the deceased while he was undergoing treatment in the hospital. P. W. 13 conducted postmortem examination. P.Ws. 11 and 12 are the two Investigating Officers. P.Ws. 8 and 9 were examined to prove recovery and seizure of the alleged weapon of offence. Other prosecution witnesses are formal witnesses.

The accused persons examined 4 witnesses including some of the witnesses, who were alleged to be present at the time of occurrence.

5. The trial court held that death was homicidal in nature. Relying upon the evidence of the eye witnesses, P.Ws. 4, 5 and 6 and the evidence relating to recovery of the knife as well as the dying declaration recorded by P.W. 11, the Investigating Officer, it convicted both the appellants.

6. The finding of the trial court that the death was homicidal in nature is not disputed. In fact, in view of the evidence of the doctors (P.Ws. 13 and 14) and the post-mortem report (Ext. 15), there cannot be any doubt that the death was homicidal.

7. The learned Advocate appearing on behalf of the appellants vehemently contended that the evidence of the so-called eye witnesses being highly discrepant and in view of the evidence of the D.Ws. who have contradicted the evidence of the prosecution witnesses, the ocular evidence cannot be accepted. He further submitted that the so called dying declaration allege to have been made before the-Investigating Officer should not have been accepted, as no such statement has been recorded before the doctor or any other independent witness. According to his submission, the circumstances relating to recovery and seizure of the knife are also suspicious and unreliable. It has been further submitted by him that there was delay in sending the F.I.R. to the Magistrate and delay in arresting the accused persons indicating thereby that the prosecution case has been subsequently concocted.

The learned Public Prosecutor appearing on behalf of the State has supported the order of conviction.

8. Coming to the last submission of the learned counsel for the appellants, first, it is true that the F.I.R. though lodged on 11-9-1991 was received in the Court of the Sub-Divisional Judicial Magistrate on 13-9-1991. The accused persons were also arrested on 14-9-1991. However, it is in the evidence of the I.O. (P.W. 11) that he was searching for the accused persons. There has been no suggestion either to the informant (P.W. 5) or to the Investigating Officer (P.W. 11) that the F.I.R. had

been subsequently manipulated. In the absence of any other material or suspicious circumstance, it is difficult to accept the contention of the learned counsel for the appellants that the F.I.R. had, in fact, been ante dated. The principle laid down in the case of *Ishwar Singh v. State of U.P.* AIR 1976 SC 2423 : 1976 Cri LJ 1883, relied upon by the counsel for the appellants is not applicable to the peculiar facts and circumstances of the present case.

9. P.Ws. 4, 5 and 6, the three eye witnesses examined on behalf of the prosecution have been believed by the trial court. No doubt, P.Ws. 4 and 5 are related to the deceased being his brother-in-law and first cousin. Though their evidence requires, stricter scrutiny, the same cannot be discarded merely because the witnesses are related to the deceased. As soon from the evidence of D.W. 1, who as per his own version was present immediately after the occurrence, P.Ws. 4 and 5 were present near the place of occurrence. P.W. 7 who was supposed to be an eye witness but turned hostile to the prosecution was suggested by the defence that P.Ws. 4 and 5 came to the spot after the occurrence being informed by P.W. 7. However, the said suggestion was denied by P.W. 7, who stated thus:-.It is not a fact that Purna Khora (P.W. 5), Laichan Hantal (P.W. 4) came to the spot after the occurrence being informed by me....

From the evidence of D.W. 1 and P.W. 7, at least it is apparent that P.Ws. 4 and 5 were present at the time of occurrence. Even if they are close relations of the deceased, that is not sufficient reason for them to falsely implicate a person and screen the real offender. Though there is some minor discrepancy in the evidence, of P.Ws. 4 and 5, their evidence received sufficient corroboration from P.W. 6 who is a co-villager. The evidence of P.W. 6 has been criticised on the ground that his name had not been disclosed in F.I.R. to be one of the witnesses. It is not the law that in every case, the F.I.R. must contain the names of all witnesses present. It is quite possible that P.W. 6 saw the occurrence from a place unseen by the informant (P.W. 5) and as such his name had not been indicated in the F.I.R. His presence near the place of occurrence is also admitted by D.W. 1. The evidence of P.Ws, 4 5 and 6 regarding the actual occurrence received sample corroboration from the evidence of the two doctors (P.W. 13 and 14). D.W. 1 and 4 examined by the accused persons claim that they are post-occurrence witnesses and came

near the spot after hearing shout of the deceased. Their evidence as such is not sufficient to discard the evidence of P.Ws. 4, 5 and 6.

10. The dying declaration recorded by one of the Investigating Officers also corroborates the statements of the eye witnesses. Law is well-settled that dying declaration even if recorded by a police officer during investigation is admissible in law to be considered as a material against the accused persons and such statement is not hit under Section 161, Code of Criminal Procedure. Besides the aforesaid dying declaration, the doctor (P.W. 14) who treated the deceased at the hospital has also stated that the deceased had indicated that he had been stabbed by appellant No. 1. There is no reason to discard the , statement of the doctor on this score. Accordingly, we are of the opinion that the ocular evidence has received sufficient corroboration from the postmortem report as well as the dying declaration recorded by P.W. 11 as well as the statement of the doctor (P.W. 14).

11. Apart from the aforesaid materials, on record, the recovery of the weapon of offence at the instance of appellant No. 1 lends further corroboration. Thus, there is no doubt regarding the complicity of the accused persons.

12. The prosecution evidence is consistent that while the deceased and others were going, the two accused persons suddenly came and appellant No. 2 caught-hold of the deceased from behind and appellant No. 1 gave the stab injury and thereafter both of them ran away together. From the aforesaid circumstances, it is clear that the offence has been committed pursuant to the common intention shared by the two appellants. Keeping in view the nature of the injury, there is no escape from the conclusion that both the appellants are liable under Section 302/34, Indian Penal Code. Accordingly, there is no merit in the appeal which is dismissed.

D. M. Patnaik, J.

13. I agree.