

Sita Kandi Vs. State

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Court : Orissa

Decided On : Mar-19-1998

Reported in : 1999CriLJ1642

Judge : A. Pasayat and ;S.C. Datta, JJ.

Acts : [Evidence Act, 1872](#) - Sections 154; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300, 302, 304 and 324

Appeal No. : Criminal Appeal No. 142 of 1987

Appellant : Sita Kandi

Respondent : State

Advocate for Def. : Addl. Government Adv.

Advocate for Pet/Ap. : S.K. Sahoo, Adv.

Judgement :

A. Pasayat, J.

1. Sita Kandi, the appellant (hereinafter referred to as the 'accused') faced trial along with two others, namely, Jhumar Kandi and Sapana Kandi for alleged commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short, 'IPC'): by having brought to an end to the life of Bishnu Patra

(hereinafter referred to as the 'deceased') on 9-1-1986, by intentionally causing an incised wound on the left side face by means of an axe. Accused Sapana separately stood trial for alleged commission of offence punishable under Section 324, IPC by inflicting a cut injury by means of a deadly weapon on the deceased, and on Govind Chandra Patra, (P.W.9) son of the deceased. In addition to it, all the accused person faced trial for alleged commission of offences punishable under Section 302, read with Section 34, IPC, and Section 324 read with Section 34, IPC on the allegations of causing death of Bishnu Patra intentionally by means of a tangia and causing simple hurt by means of a cutting instrument on Govind Chandra Patra in furtherance of their common intention, while the accused-appellant was found guilty, others were acquitted by the learned Second Additional Sessions Judge, Cut-tack in Sessions Trial No. 38 of 1987,

2. Prosecution version as unfolded during trial is that plot No. 719 was the land of the deceased while plot Nos. 728 and 730 were homestead land of accused Jhumar Kandi (since acquitted). Land of the deceased lies adjacent to the homestead land of Jhumar and the same is divided by live fence. Two Chakunda trees and a Simili tree stand on the live fence. This became the subject-matter of heated controversy and debate between the deceased on one hand and all the accused persons (including those acquitted) on the other. Some time prior to the alleged date of occurrence, each one of them advanced exclusive claim of title and/or-possession over the said trees. As a consequence relationship was strained and embittered feelings surfaced. To prevent the situation degenerating to an ugly level, the deceased and accused Jhumar, as advised by well-wishers of the village, made an application to the Tahasildar, Salipur for deputation of an Amin to measure the dividing fence and ascertain whether the trees belong to the deceased or Jhumar. The Amin (P.W.8) visited the spot and in terms of the direction given by the Tahasildar on 4-1-1986 found all the disputed trees to be situated in the homestead land of Jhumar, after measurement in presence of the gentlemen of the locality and a constable deputed for the purpose for maintaining law and order. Notwithstanding the measurements, gentlemen of the village allotted one big Chakunda tree and Simili tree to the share of Jhumar, and allotted a small Chakunda tree to the share of the deceased with the concurrence of parties in order to bury the hatchet and to dampen the smouldering fire of enmity

subsisting between the parties. The allotment was reduced into writing, which was signed by the deceased and accused Jhumar. It was stipulated therein that an amicable settlement had been arrived at, and the deceased shall cut and remove the Chakunda tree allotted to him within eight days from the date of settlement. Accordingly, on the date of occurrence sons of the deceased went in the company of the deceased and his brother-in-law Braja Behera (P.W. 2) to cut the tree for its removal. While the cutting was in progress, Jhumar suddenly appeared at the spot and asked them to refrain from cutting the tree. He raised claim over the same. No heed to his request was paid, in view of the settlement and altercation of words took place between the deceased and Jhumar. During the course of such altercation, Jhumar feeling incensed and irated by the utterance of unsavoury and unpalatable words by the deceased, dealt a slap to the deceased with great impact. Deceased fell down on the ground and soon a tussle ensued between them. During the course of tussle, accused Jhumar called aloud asking the inmates of his family to furnish him an axe, and in response to said call, the accused Sita went to the spot being armed with an axe and dealt a blow by means of it to the left side face near the ear of the deceased. At that time, the informant (P.W.9) was engaged in a contentious conversation with accused Sapana (since acquitted), and during the course of his conversation Sapana snatched away the spade from the hand of the informant and dealt blows by the handle of it to the informant. Not content with it, accused Sapana took away the axe from the hand of accused Sita and dealt a blow to the back of the informant. Thereafter the villagers removed informant and the deceased, in bleeding condition to Salipur hospital for treatment. A written report was lodged and investigation was taken up. As the condition of the deceased deteriorated, the doctor of Salipur Hospital advised for his removal to S.C.B. Medical College Hospital, Cut-tack for better treatment. In spite of treatment tendered, the deceased breathed his last on the same day.

3. The accused persons pleaded innocence. They took the stand that as protest was raised by accused Jhumar, the deceased and his son raised an axe to assault accused Jhumar and Sapana. Apprehending fatal injuries, they tried to snatch away the axe from the clutch of the deceased and informant, and while doing so, both deceased and the informant fell down on the ground. Lest they would commit assault on them after getting up from the ground, accused Jhumar and Sapana

ran away towards their house for their own safety and protection. One witness was examined to substantiate their plea, while prosecution examined 18 witnesses to prop up the charges against the accused. P.W. 1 is the wife of the informant. P.W. 2 is the brother-in-law of informant, P.W. 6 was engaged as a labourer to cut the tree and P.W. 9 was the informant, who claimed to be eye witnesses to the occurrence. P.W. 2 made a departure from the statement made during investigation. After the prosecution was permitted to put leading questions to P.W. 2 under Section 154 of the Indian [Evidence Act, 1872](#), he supported the P.Ws. 1, 6 and 9's statements as regards prosecution version. Placing reliance on the evidence of P.Ws. 1, 2, 6 and 9, who are claimed to be eye witnesses, learned trial Judge found the accused-appellant guilty, while acquitting the others as aforesaid. The defence version was found to be improbable.

4. In support of the appeal, the learned counsel for the appellant has urged that the evidence of eye-witnesses does not inspire confidence as they are related to the deceased. In any event one blow was given during the course of sudden quarrel, and therefore, an offence punishable under Section 302, IPC is not made out. It is submitted that even if it is held that offence under Section 304, Part II, IPC has been committed, a liberal view should be taken about sentence considering various facts placed on record by way of affidavit. Learned counsel for State supported the judgment.

5. There is no probation in law that a person who is related to the deceased is an interested witness. No reason has been indicated as to why the prosecution witnesses would falsely implicate the accused. When an allegation of false implication is made, a foundation has to be led. In the instant case, no material has been brought on record to accept the plea of false implication.

6. In *Dalip Singh v. State of Punjab* 1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465 it has been laid down as under (at page 1468 (of Cri LJ):

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has caused such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely

implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not in sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

7. This decision has since been followed in *Guli Chand v. State of Rajasthan* AIR 1974 SC 276 : 1974 Cri LJ 331 in which *Vadivelu Thevar v. The State of Madras* AIR 1957 SC 614 : 1957 Cri LJ 1000 was also relied upon.

8. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by Apex court as early as in *Dalip Singh's* case 1953 Cri LJ 1465 (supra) in which Apex Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., the Apex Court observed (at page 1467 of Cri LJ):

We are unable to agree with the learned Judges of the High Court that the testimony of the two eye witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such-rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar v. The State of Rajasthan* (1952) SCR 377 : AIR 1952 SC 54 : 1952 Cri LJ 547. We find, however, that it unfortunately still persists, if not in the judgment of the Courts, at any rate in the arguments of counsel.

9. In this case, Apex Court further observed as under :

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has caused such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal causes for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

10. Again, in *Masalti v. State of U.P.* 1964 (8) SCR 133 : AIR 1965 SC 202 : 1965 (1) Cri LJ 226, Apex Court observed :

Again it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice.

11. To the same effect is the decision of Apex Court in *State of Punjab v. Jagir Singh* AIR 1973 SC 2407 : 1973 Cri LJ 1589.

12. Next question is about applicability of Exception 4 to Section 300, IPC. For bringing in its operation it has to be established that the act was committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not governed by the first exception, after which its place would have been more appropriate, the exception is founded upon the same principle for in both there is absence of pre-meditation, but while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urged them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception I, but the injury done is not the direct consequence

of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception I. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without pre-meditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person' killed. To bring a case within Exception 4 all the ingredients Mentioned in it must be found. It is to be noted that the 'fight' Occurring in Exception 4 to Section 300, IPC is not defined in the IPC; It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. Considering the background facts as indicated, the factual position does not show that there was any fight. In fact the evidence of the eye witnesses is to the effect that the deceased assuaged the hurt feelings of the accused persons, and tried to pacify them. Therefore, Exception 4 to Section 300, IPC has no application to the facts of the case.

13. The further question is whether the case is covered under Section 302, IPC. Clause thirdly of Section 300 views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended, the offence is murder. The clause has two parts. The first part is a subjective one with indicate that the injury must be an intentional one, and not an accidental one and the second part is objective one in the sense that looking at the injury intended to be caused, the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death. These two parts 1 are disjunctive and separate. The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause, irrespective of an intention to cause death. Analyzing the Clause, the Apex Court in Virsa Singh v. State of Punjab AIR 1958 SC 465 : 1958 Cri LJ 818 which has become (sic) laid down that the prosecution must prove the following facts :

(i) It must establish quite objectively that a bodily injury is present.

(ii) The nature of the injury must be proved. These are partly; objective investigations;

(iii) It must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further; and

(iv) It must be proved that the injury of the type described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective. Once these four elements are established by the prosecution, the offence is murder under Section 300, Clause 'Thirdly'.

14. It is pleaded that fact situation does not indicate that the particular bodily injury was intended. Only one blow was given. There is no probation that whenever a single blow is given resulting in death, Section 302, IPC will not be applicable.

Though the number of injuries is one of the circumstances which the Court may take into account for coming to a finding about the intention or knowledge of the offender, it is not the determinative factor. It would depend upon the facts and circumstances of each case. The nature of weapon used, background facts leading to the assault, place of injury have to be kept in mind.

Considering these aspects, the case at hand does not appear to be one where Clause Thirdly would be applicable. The conviction under Section 302, IPC is to be altered to one under Section 304, Part II, IPC.

15. The residual question is the sentence to be imposed. Sentence is the judicial determination of punishment itself. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating the individual cases. It is impossible to expect mathematical uniformity in the sentence. Excessive punishment instead often results in an angry contempt of justice because of its severity and does not tend to reform the criminal who perceives injustice towards himself. Severity of sentence is far less effective as deterrent to crime than certainty of detection and sentence. Severity of punishment alone can never permanently solve the crime problem. In new trends of penology, stress is on reformation while not overlooking the basic object of sentencing which is to punish the wrong doer and at the same time acting as a deterrent to others who have a propensity to commit crime. Penal law is now being used as a tool for reforming and rehabilitating, while at the same time being presented as a weapon for deterrence. The corrective machinery makes itself felt through its sentencing process, by deft modulation of sentence, stern where it should be and tempered with mercy where it warrants to be. This is an area where precise scales or evaluation standards are not available. Jack Gibbs in 'Crime, Punishment & Deterrence' has said 'Any legal theory of (behavior must assume that people by and large do not want to be punished and will act so as to avoid fines, jail, whipping or electric chair. That means a threat of real punishment will deter'. Evil of punishment must exceed the advantage of the offence. Man governs his behaviour by consideration of pleasure and pain. Algebraic sum of pleasure and pain must be balanced, said John Spenser. To give lesser punishment, may, render the justicing system suspect. Desirability of deterrence may be the

sacrificial victim, it has to be weighed as to who should be the Principal beneficiary of criminal punishment ~ the community or the criminal. Quadruple objects of sentence are deterrence, prevention, retribution and reformation. Penal treatment should be tailored to the individual involved.

16. So far as the case at hand is concerned, the occurrence took place more than 12 years back. For a considerable length of time the accused was on bail during trial and in appeal before this Court. In the affidavit filed, her physical and economic conditions and also social status have been highlighted. She, fairly advanced in age, belongs to scheduled caste and had lost her husband prior to the alleged incident. Two sons who were minor at the time of occurrence were brought up by her by working as a daily labourer. But to her utter misfortune, they have left her and are staying separately at another place. She met with an accident as a result of which her right eye has been affected. The doctors have ruled out any improvement of the said eye. She has no cultivable land and maintain her livelihood by working as a daily labourer because of her physical condition, she does not, get regular engagement, and sometimes she has to live without food. Additionally, the informant in a rare gesture of nobleness and humanity has filed an affidavit stating that all the afore described aspects indicated in the affidavit are true and correct. This shows that he has also taken note of her pitiable condition notwithstanding the fact that she was responsible for death of his near and dear one. Small genuine gestures of humanity do play a role in the sentencing system. But where 'forgive and forget' documents resulting from mala fide acts like threat, coercion, allure etc. are produced, Court has to be cautious, as they tend to weaken justice dispensation system. The affidavit in the instant case has signs of bona fides, j

Taking note of these factors, we reduce the period of sentence to the period undergone. Accused-appellant be set at liberty forthwith unless required to be in custody in connection with any other case.

The appeal is allowed to the extent indicated above.

S.C. Datta, J.

17. I agree.

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