

Smt. Dura Devi and Niranjana Mallick Vs. State

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SooperKanoon Citation : sooperkanoon.com/535690

Court : Orissa

Decided On : Jun-30-1996

Reported in : 1998CriLJ293

Judge : P.K. Misra, J.

Acts : Probation of Offenders Act - Sections 4(1)(3); [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 304 and 323; Code of Criminal Procedure (CrPC) - Sections 107 and 313

Appeal No. : Criminal Appeal No. 312 of 1991

Appellant : Smt. Dura Devi and Niranjana Mallick

Respondent : State

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : D.P. Dhal and ;A.K. Acharya, Advs.

Disposition : Appeal allowed

Judgement :

P.K. Misra, J.

1. The two appellants along with two other accused persons faced trial under Section 302/34 of the Indian Penal Code for having Caused the death of

Paramananda Mallick. Appellant Dura Devi is the wife of appellant Nirnanjan Mallick and the other two acquitted accused persons are respectively the father and brother of appellant Nirnanjan. The trial Court while acquitting all the accused persons of the charge under Section 302/34 of the Indian Penal Code convicted appellant No. 1 under Section 323, IPC and released her under Section 4(1)(3) of the Probation of Offenders Act. Appellant No. 2 was convicted under Section 304 Part-1, IPC and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 1,000/-, in default, to undergo rigorous imprisonment for six months. Hence the present appeal.

2. The prosecution case is as follows :- On 25-3-1988 at about 7 a.m. all the accused persons were digging saroo from the land allegedly under the possession of the deceased, Paramananda Mallick. It is alleged that when Paramananda protested, all the accused persons surrounded him and accused Nirnanjan dealt a blow with a crow-bar on the head of Paramananda, as a result of which the latter became unconscious. Dura Dei dealt spade blows whereas the other two accused persons dealt blows by lathi. Paramananda was shifted to Mangalpur hospital and thereafter to Jaipur sub-divisional hospital where he succumbed to his injuries. FIR was lodged by one Kuna Mallick. After completion of investigation, charge sheet was submitted under Section 302/34 IPC.

3. The plea of the accused persons was one of denial. It was specifically pleaded that the accused persons had purchased the disputed land and were in possession and accused Khirod Mallick was assaulted by PW-1, the informant and Paramananda. Appellant Nirnanjan took the plea that his brother was assaulted by Bulei, Kunei and Paramananda and when he went there he was also assaulted.

4. PWs- 1 to 4 are the eye witnesses, PW- 5 is a post occurrence witness, PW- 6 is the doctor who held the post mortem examination whereas M/s. D. P. Dhal and A. K. Acharya, for PW- 11 is a doctor who had treated the deceased, PW-7 is a witness to the inquest, PW- 8 took the dead body and PWs- 9 and 10 are the two Investigating Officers.

5. The trial Court held that though the accused persons were in possession of the disputed land and even though they had raised saroo, a protest from deceased

Paramananda could not have caused any reasonable apprehension of death or grievous hurt and as such there was no right of private defence to the extent of causing death. Though the trial Court found that accused Khorid and Niranjana were injured, according to it the injuries were simple in nature and there was no right of private defence. It further held that since a single blow with the crow-bar was given by accused Niranjana, he was liable under Section 304, Part-1, IPC. Appellant Dura Dei, was convicted under Section 323, IPC. The other accused persons were given the benefit of doubt.

6. In this appeal, the main contention of the learned counsel for the appellants centres round the question of right of private defence of property and person. It is contended that in view of the finding that the accused persons were in possession and further finding that two of the accused persons were injured, the trial Court should have acquitted the two appellants by invoking the principles of right of private defence of property and person. The trial Court held that the injuries on two accused persons were simple and even though the witnesses had not explained about the injuries on the accused persons, relying upon the decision reported in AIR 1976 SC 2263 : 1976 Cri LJ 1736, *Lakshmi Singh v. State of Bihar*, it held that non explaining of injuries was immaterial.

7. The reliance placed by the trial court upon the decision reported in AIR 1976 SC 2262 : 1976 Cri LJ 1736, *Lakshmi Singh v. State of Bihar* in finding the accused persons guilty appears to be misconceived. It was observed in the said Supreme Court decision : at Page 1742 (of Cri LJ)

. . . It seems to us 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 in

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. . . We must hasten to add that as held by this Court in *State of Gujarat v. Bai Fatima*, Criminal Appeal No. 67 of 1971 decided on March 19, 1975 -(Reported in AIR 1975 SC 1478 : (1975 Cri LJ 1079) 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 credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries

In the present case, the prosecution evidence cannot be characterised as independent, disinterested, clear, cogent and creditworthy, nor the injuries sustained by the accused persons can be described as minor and superficial. At least one of the injuries on accused Khirod was a lacerated injury on the left parietal bone which is a vital and potentially vulnerable part of the body. It had been stated by the accused persons under Section 313, Cr. P. C. that blow had been given by crow-bar. Such plea receives some corroboration from the FIR (Ext. 4) which had been lodged on behalf of the accused persons against the prosecution party. The occurrence took place during the day time and the blow given on the head could not have escaped the attention of the prosecution witnesses. The prosecution story that merely because the deceased requested the accused persons not to dig saroo before finalisation of a case between them, could not have led to the assault on the deceased as deposed to by prosecution witnesses. It is evident that the prosecution witnesses have tried to suppress the origin and genesis of the occurrence. PWs- 1 and 4 are the relations of the deceased and though PWs. 2 and 3 are not so related, subsequent to the

occurrence a proceeding under Section 107, Cr. P. C. was pending between them on the side and the accused persons on the other side, which indicates about their inimical relationship. When the prosecution witnesses are not disinterested witnesses and the witnesses have tried to suppress the vital part of the occurrence by denying about the assault on two of the accused persons, it would be unsafe to rely upon their evidence to discard the plea of the accused persons. This is not a case where the prosecution evidence can be characterised as 'disinterested and independent, so clear and cogent and so clear and disinterested, so probable, consistent and creditworthy' so as to outweigh the effect of omission on the part of the prosecution witnesses to explain the injuries on the accused persons. The injuries also are not minor and superficial, specially the injury on the head cannot be described as minor and superficial. In such view of the matter, it must be held that the exception to the general principle of law as enunciated in AIR 1976 SC 2263 is not applicable to the facts and circumstances of the present case. In view of the evidence on record, it is difficult to place absolute reliance on the prosecution case and the defence case becomes probable one. Accordingly, the order of conviction and sentence cannot be sustained.

8. In the result, the appeal is allowed and the order of conviction and sentence is set aside.