

CASE NO.:
Appeal (crl.) 1779-1780 of 1996

PETITIONER:
State of Orissa

RESPONDENT:
Lodu Swain & Ors.

DATE OF JUDGMENT: 23/09/2003

BENCH:
K.G. Balakrishnan & B.N. Srikrishna.

JUDGMENT:
J U D G M E N T

K.G. BALAKRISHNAN, J.

These appeals are preferred by the State of Orissa against the judgment of the Division Bench of the High Court of Orissa. The respondents 1 to 4 herein were tried by the Second Addl. Sessions Judge, Berhampur, for the offences punishable under Section 302 read with Section 34, Section 307 read with Section 34 and Section 324 IPC. The Sessions Judge found the second accused, Jogi @ Jogendra Swain, guilty of having committed the offences punishable under Section 302, 307 and 324 IPC. The other three accused persons were acquitted of all the charges framed against them. Aggrieved by decision of the Sessions Court, accused Jogi @ Jogendra Swain filed a criminal appeal before the High Court of Orissa against his conviction and sentence. The State of Orissa, meanwhile, filed an appeal against the acquittal of the other three accused persons. The appeal filed by Jogi @ Jogendra Swain was partly allowed by the High Court and he was acquitted of the charge under Section 302 IPC, but was found guilty of the offence under Section 326 IPC. The appeal preferred by the State was dismissed. Aggrieved by the judgment of the High Court in not interfering with the acquittal of the three accused and for alteration of the conviction of accused Jogi @ Jogendra Swain for a lesser offence, these appeals are filed by the State.

We have heard appellant's counsel and also the counsel for the accused.

The prosecution case was that in the afternoon of 31.5.1988, Lodu Swain, the first accused father of the third accused Kalakar @ Karatan Swain picked up a quarrel with PW-1 on the issue of the accused Jogi @ Jogendra Swain deserting his wife Bhagini and for courting a second marriage. In the same day at about 9 P.M., when PW-1 was going to sleep in his thatched shed away from his house, the accused Jogi @ Jogendra Swain came there with a 'khanda-kati' and assaulted him. PW-1 sustained a serious injury on his left hand. He shouted for help and on hearing the shouts, his father, Gania and PW-5 came to his rescue. Accused Jogi @ Jogendra Swain then dealt a blow on the right cheek of PW-5. Then, all the accused surrounded Gania and started attacking him. The other accused were holding 'Katis' and all of them simultaneously dealt blows on the deceased Gania. Gania fell down on the ground and was later carried in a bullock-cart to a nearby public health centre. Gania died while undergoing treatment and PW-1 had to be in the hospital for about 30 days for treatment. The investigating officer, PW-9 came to know of the incident at about midnight. He along with other policemen came to the place of incident where PW-8 made the statement to PW-9. From the place of incident, PW-9 recovered a 'Kati' and other weapons used in committing the offence. Some other articles which were blood-stained were taken into custody. The accused Jogi @ Jogendra Swain was absconding and he could be arrested only later. PW-12 conducted the post-mortem examination on the body of the deceased and the report showed that there were as many as 16 injuries on the body of deceased

Gania.

The Sessions Judge held that the prosecution successfully proved the incident. The Sessions Court was of the opinion that Jogi @ Jogendra Swain caused the fatal injuries to deceased Gania. However, the Sessions Judge was of the view that the eye witnesses had not narrated in detail the part played by other accused persons and therefore it was held that the prosecution failed to show that the other accused shared a common intention to cause the death of deceased Gania. The learned Sessions Judge also noted that in the First Information Report, it was not specifically stated that the other accused persons shared a common intention.

The High Court in the impugned judgment held that the evidence of eye-witnesses, PW-1, PW-4, PW-5 and PW-8 showed that the appellant Jogi @ Jogendra Swain, along with other accused persons jointly assaulted deceased Gania, but further held that the evidence did not disclose whether the appellant Jogi @ Jogendra Swain caused any of the three fatal injuries which were responsible for the death of Gania. In that view of the matter, the High Court altered the conviction of the appellant from the charge under Section 302 IPC to 326 IPC. The finding of the High Court is challenged by the appellant's counsel.

We have carefully examined the evidence adduced by the prosecution in this case. PWs 1, 4, 5 and 8 gave almost a consistent version regarding the incident. PW-1, who was seriously injured, deposed that accused Jogi @ Jogendra Swain first assaulted him with a 'khanda-kati' and when the blow was directed on his neck, he tried to ward off the same and thus sustained injuries on his left hand and when PW-5, deceased Gania came to his rescue, all the accused attacked deceased Gania. This witness also deposed that all the accused persons were armed with weapons like 'kati' and 'lathis'. The Sessions Judge also believed all the witnesses examined by the prosecution, but erroneously failed to hold that the other accused shared a common intention to cause the death of deceased Gania.

It is important to note that all the witnesses deposed that deceased Gania was simultaneously attacked by all the accused. Accused Kalakar @ Karatan Swain and Raju Swain were armed with weapons. The extensive nature of injuries sustained by the deceased clearly prove the prosecution case that he was not attacked by a single person. It is clear that accused A-3 (Kalakar) and accused A-4 (Raju Swain) also shared the common intention of causing injuries to deceased Gania. Of course, the first accused, Lodu Swain was more than 70 years of age even at the time of the incident might not have been an active participant in the attack and the trial court gave benefit of doubt to him and it was affirmed by the High Court. Therefore, as regards acquittal of the accused Lodu Swain, we are not inclined to interfere. However, it is satisfactorily proved that accused A-3 Kalakar and accused A-4 Raju Swain joined in causing injury to deceased Gania. Their acquittal by the sessions court is erroneous and against the evidence adduced by the prosecution. From the evidence adduced in this case, it is proved that they shared a common intention in causing grievous injuries to deceased Gania. The evidence of eyewitnesses clearly establishes that these respondents actively participated in the crime by causing injuries to the deceased. Therefore, we set aside the acquittal of these two accused, namely, A-3 Kalakar and A-4 Raju Swain and hold them guilty of the offence under Section 326 read with Section 34 IPC for having caused injuries to deceased Gania. Though the counsel for the State made a strong plea against the acquittal of accused Jogi @ Jogendra Swain from the offence under Section 302 IPC, we do not propose to reverse the finding recorded by the High Court inasmuch as the incident relates to a period as early as 1988 and this accused has already undergone the substantial portion of imprisonment awarded to him.

In the result, the appeals are partly allowed and the conviction and sentence of Jogi @ Jogendra Swain under Section 326 is maintained. The acquittal of accused A3 Kalakar and A-4 Raju Swain is set aside and they are found guilty of offence punishable under Section 326 read with Section 34 IPC and sentenced to undergo R.I. for a period of 5 years. The trial court is directed to take appropriate steps to arrest these accused to serve out their sentences.

JUDIS