

Banka Nayako and Others

Vs

State of Orissa

Criminal Appeal No. 235 of 1971

(R.S. Sarkaria, P.N. Shinghal JJ)

25.02.1976

JUDGMENT

SHINGHAL, J. -

1. This appeal of Banka Nayako, Radhakrishna Choudhury and Dandapani Choudhury, by special leave, is directed against the appellate judgment of the Orissa High Court dated February 10, 1971, upholding their conviction for an offence under Section 302/34 I.P.C. and sentence of rigorous imprisonment for life.

2. It is not in dispute, and is in fact admitted, that there was a longstanding dispute between Ramchandra Choudhury (PW 1) on the one side, the appellants Radhakrishna Choudhury and Dandapani Choudhury on the other. Appellant Banka Nayako is the servant of Radhakrishna Choudhury. The dispute related to partition of joint family properties, and gave rise to several civil and criminal cases. Saita Naik was the servant of Ramchandra Choudhury (PW 1) and was his supporter in the litigation. He had also started some criminal cases against the appellants and was a witness for Ramchandra Choudhury (PW 1) in some cases against the accused. He was involved in some cases started by appellant Dandapani Choudhury. A dacoity case started by Ramchandra Choudhury (PW 1) was pending against the accused on the date of the incident. It is alleged that Ramchandra Choudhury (PW 1) started from his village Punando on March 5, 1969, at about 4 p.m., along with Saita Naik and reached Hinjilikatu at about 6 p.m. He then left for Aska by bus. Saita Naik, Nabadwipa Padhi (PW 2) and Bishnu Gouda (PW 5) left for Punando. While they were passing through the dry bed of Ghodahada river, it is alleged that Saita Naik stayed back to answer the call of nature, while his two companions proceeded towards the northern bank of the river. When they reached the northern bank, it is alleged that Nabadwipa Padhi and Bishnu Gouda found that all the fourteen accused who were challaned in this case were present near a ditch armed with 'khanatis', lathis and 'katis'. They began to attack Nabadwipa Padhi (PW 2) and Bishnu Gouda (PW 5) but they ran away. It is alleged that the accused then attacked Saita Naik. Appellants Dandapani Choudhury and Radhakrishna Choudhury are said to have pierced him with 'khanatis', and Banka Nayako hit him with a 'Kati' on the head. Nabadwipa Padhi (PW 2) went to Hinjilikatu and then to Aska, and narrated the incident to Ramchandra Choudhury (PW 1). Both of them went to Pattapur police station and lodged a report at 2 a.m. It is alleged that, in the meantime, Gola Nahaka (PW 10), who was a nephew of Saita Naik, heard about the incident from Bishnu Gouda (PW 5) at mauza Puddo, and went to Ghodahada river along with some villagers including Saita Naik's son Musa Nayak (PW 3). They found that Saita Naik was lying unconscious in the bed of the river. Musa Nayak is said to have given him some water, and he regained consciousness. It is further alleged that, on inquiry, Saita Naik informed those present that Dandapani Choudhury and Radhakrishna Choudhury had pierced him with 'khanatis' and Banka Nayako had struck him with a

'kati' on his head and that he expressed a desire to be taken to Hinjilikatu where he said he would give further details of the incident. He was accordingly taken there, but he died by the time he reached Hinjilikatu. A report of the incident was lodged by Golla Nahaka performed on the body of Saita Naik by Dr. K. K. Misra (PW 13). He found several injuries on his body, and his report is on he record as Ex. 5. All the injuries were found to be ante mortem and Saita Naik's death was found to be due to the combined effect of syncope and coma. Fourteen accused were challaned and the Sessions Judge of Ganjam-Boudh, Behrampur convicted them all of the offence of rioting armed with deadly weapons under Section 148 and of murder under Section 302 read with Section 34 I.P.C. He sentenced them to undergo rigorous imprisonment for two years for the offence under Section 148, and to imprisonment for life for the offence under Section 302 read with Section 34 I.P.C. On appeal, the High Court upheld the conviction and sentences of the present appellants, but acquitted the remaining eleven accused.

3. The prosecution examined Nabadwipa Padhi (PW 2.), Bishnu Gouda (PW 5), Ganapati Choudhury (PW 4) and Khalli Padhi (PW 8) as eyewitnesses of the incident. At the trial, Bishnu Gouda (PW 5) did not support the case of the prosecution. Of the remaining three witnesses, Nabadwipa Padhi (PW 2) has been held by the High Court to be an interested witness, and rightly so, for he has admitted that he looked after the cultivation of Ramachandra Choudhury (PW 1) for a period of five years. It will be recalled that Ramachandra Choudhury (PW 1) was the person who had employed Saita Naik and was involved in criminal and civil cases against the appellants. Nabadwipa Padhi (PW 2) has also admitted that appellant Dandapani Choudhury had started two cases against him before the date of occurrence, and that he was a witness for Ramachandra Choudhury (PW 1) in four cases against the accused. Moreover Nabadwipa Padhi did not state in his report to the police that the accused were armed with 'khanatis' or 'katis', or that he had seen them surrounding Saita Naik. The High Court has not, therefore, found it possible to convict the appellants on his testimony.

4. Ganapati Choudhury (PW 4) has admitted that he accompanied Ramachandra Choudhury (PW 1) for canvassing for him in the election of sarpanch in 1967, and that he had sworn two affidavits in his favour in two cases against Dandapani Choudhury under Section 145 Cr. P.C. He was also a witness in a criminal cases started by Ramachandra Choudhury (PW 1) against Dandapani Choudhury. The High Court has therefore rightly taken the view that this evidence could not be accepted without sufficient corroboration.

5. Khalli Padhi (PW 8) has stated that when he was going from Hinjilikatu to the village he heard the shouts of Nabadwipa Padhi near the bank of Ghodahada river and saw that the accused were armed with 'khanatis' and 'katis' and they were assaulting or shouting to assault Saita Naik. He has stated further that when he protested he was asked by the accused not to disclose the incident to anybody. He went to his village, and talked about the incident to Dandapani Khandual (PW 7), Murli Biswal (PW 9) and Suma in the morning. The statement of this witness has, however, not been held to be reliable because of the fact that there was no satisfactory explanation why he was not examined for a period of 18 days, and the further fact that he was taken to the police station by no less a person than Ramachandra Choudhury (PW 1). Moreover, Dandapani Khandual (PW 7) and Murli Biswal (PW 9) have not corroborated his statement. The High Court was therefore again right in taking the view that his statement could not be accepted without further corroboration.

6. It would thus appear that the High Court has not found it possible to uphold the conviction of the appellants on he basis of the statements of Nabadwipa Padhi (PW 2), Ganapati Choudhury (PW 4), Bishnu Gouda (PW 5) and Khalli Padhi (PW 8) without the aid of corroborative evidence. It was

also not impressed by the statements of Dandapani Khandual (PW 7) and Murli Biswal (PW 9) that they had seen all the accused at the place of the occurrence. The High Court has, however, taken the view that the evidence of those who claimed to be eyewitnesses of the incident had been corroborated by the dying declaration of Saita Naik as stated by Musa Nayak (PW 3) and Golla Nahaka (PW 10), and it is on account of that corroboration that it has upheld the conviction of the appellants. The question is whether the dying declaration could be said to have been proved by reliable evidence ?

7. Musa Nayak (PW 3) has stated that when he learnt about the incident, he went to the place of occurrence and found that his father was lying senseless in the bed of the river. He put some water in his mouth, and then he came to his senses. The witness has stated further that on inquiry Saita Naik told him That Dandapani Choudhury and Radhakrishna Choudhury pierced him with 'khanati' and Banka Nayako assaulted him on his head with 'kati'. He has stated further that his father told him that he should be taken to Hinjilikatu where he would "tell the rest of the occurrence", but he died on the way. Gola Nahaka (PW 10) is the other witness who has deposed about the dying declaration. He has corroborated the statement of Musa Nayak (PW 3).

8. As has been pointed out, Musa Nayak (PW 3) is the son of the deceased, while Golla Nahaka (PW 10) is his nephew. Their statements are to the effect that the deceases told them that Dandapani Choudhury and Radhakrishna Choudhury 'pierced' him while Banka Nayako assaulted on the head with a 'kati'. We however find that Dr. K. K. Misra (PW 13) has categorically stated that while there was one "incised looking" lacerated wound on the forehead and side of the scalp and one similar lacerated wound on the eyebrow and the left temple, they were lacerated wounds which could have been caused by a blunt weapon. There is nothing in the statement of the witness to show that he found any such injury as could corroborate the version that piercing injuries had been inflicted on the deceased. It appears that this important part of the statement of Dr. K. K. Misra (PW 13) was not brought to the notice of the High Court and it could not therefore Nayak (PW 3) and Golla Nahaka (PW 10) regarding the alleged dying declaration, it went to discredit them altogether. It will be recalled that Musa Nayak (PW 3) and Golla Nahaka (PW 10) had stated that they found Saita Naik lying unconscious in the bed of the river and that he came to his senses temporarily when some water was put into his mouth, but became unconscious once again. Dr. K. K. Misra (PW 13) has however stated that he found, on a post-mortem examination, that there was congestion of the brain of the deceased due to the head injuries and that having "lost consciousness the victim might not have regained consciousness". This part of the statement was also not noticed by the High Court and was also not taken into consideration even though in had a great bearing on the question whether the deceased could regain consciousness and make a dying declaration. As it is, it cannot be said with any amount of certainty that the deceased made they dying declaration as stated by his son Musa Naik (PW 3) and his nephew Golla Nahaka (PW 10), and it could not, therefore, be held that it could the incident. So when the statements of the eyewitnesses have, by themselves, been held by the High Court to be inadequate proof of the commission of the offences by the appellants, they are entitled to benefit of the doubt.

9. The appeal is allowed and appellants Banko Nayako, Radhakrishna Choudhury and Dandapani Choudhury are acquitted. They are in jail and shall be released forthwith. In view of this, there could be no question of their conviction for an offence under Section 148 I.P.C. and they are acquitted of that offence also.

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