

Radhey Shyam Narendra and Others

Vs

State of Orissa

Criminal Appeal No. 69 of 1973

(R.S. Sarkaria, O. Chinnappa Reddy JJ)

27.11.1979

JUDGMENT

SARKARIA, J. -

1. Radhey Shyam Narendra, Mochiram Paikera and Madhu alias Satyanarayan Paikerathi were tried by the Sessions Judge, Puri, for causing the murder of Mrusinga Charan Paikerathi. The Sessions Judge acquitted all the accused. The State preferred an appeal against the order of acquittal in the High Court, which by its judgment, dated January 16, 1973, reversed the acquittal and convicted Satyanarayan Paikerathi under Section 302, and Radhey Shyam Narendra and Mochiram Paikerathi under Section 302 read with Section 34, Penal Code, and sentenced each of them to rigorous imprisonment for life. Hence this appeal under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, by the convicted persons.

2. The prosecution case, as it emerges from the record, is as follows :

2a. The appellants as well as the deceased are brothers. Their father had married twice. The appellants are the sons of the same mother, while the deceased was the son of another. Satyanarayan appellant obtained a decree for partition of property against the deceased. In spite of this decree, on the intervention of the Panchayat, the share allotted to the deceased was 12 acres more in area than any of the shares given to the appellants. On account of this unequal division, the appellants nursed a grudge against the deceased. On September 30, 1968 at about 8 a.m., the deceased went to his paddy field to answer the call of nature. All the three appellants surrounded the deceased in the field and started assaulting him with lathis. The deceased raised the outcry : "Morigali ! Morigali !". Kaviraj (PW 4), a servant boy of the deceased, heard the outcry, and while standing on the bank of the bari taull, saw the three appellants assaulting the deceased in the field. On seeing this, Kaviraj ran to the deceased's house and informed his son, Bijoy, and after learning Bijoy that Padmacharan alias Pada Babu (PW 3), the other son of the deceased, was proceeding towards village Dangua, ran and overtook Pada Babu near tank of village Khetrapal, and informed him about the assault. Thereupon, PW 3 rushed home, joined his brother, Bijoy, and then both the brothers ran further to the scene of occurrence. While proceeding to the spot, Pada Babu saw all the three appellants giving "pushes" (thrust blows) with the ends of their lathis" to the deceased who was then lying on the ground. Pada Babu and Bijoy shouted to the assailants to desist. Thereupon, before the sons of the deceased could reach the spot, the assailants went away. Dibya Singh Samantary who was in his adjoining field, Amina Sundara (PW 6) who was weeding the field of his grandmother in the vicinity of the place of occurrence, and Natabar Chhual Singh (PW 5) who was also in the fields to answer the call of nature and PW 8 who was returning from his field, were also attracted by the outcry to the scene of occurrence, earlier than the sons. They also saw the appellants assaulting the

deceased. As a result of the assault, the deceased died on the spot. There was paddy crop and water in the field, in which the deceased was assaulted. Padmacharan (PW 3) then went to Police Station, Berhampur, 13 kilometers away, and lodged first information report (Ex. 3) at 11 a.m.

3. At the trial, the prosecution examined 12 witnesses, while three were examined in defence by the accused, PWs 3, 4, 5, 6 and 8 were examined as eyewitnesses of the occurrence. Dibya Singh Samantray, one of the persons mentioned as an eyewitness in the FIR died before the commencement of the trial. The trial Court rejected the testimony of the eyewitnesses mainly for the reasons : that they were partisan witnesses; that they contradicted their previous statements in certain aspects; and that their evidence had not been corroborated by independent witnesses who, though available, were not examined by the prosecution. The absence of blood at the scene of crime and on the napkin which the deceased was wearing at the time of the incident and the absence of any bleeding from the injuries found, were, according to the trial Court, circumstances casting a doubt on the prosecution version. The trial Court, however, rejected the defence suggestion that the death of the deceased was due to poisoning. In the result, it accorded the benefit of doubt to all the three accused and acquitted them.

4. In appeal by the State, the High Court reappraised the evidence, countered the main reasons given by the trial Court, reversed the acquittal and convicted the appellants as aforesaid.

5. We have heard the arguments of the learned counsel on both sides.

6. The sum and substance of Shri R. K. Garg's arguments is that all the witnesses of the occurrence are 'get-up' witnesses, besides being interested and partisan witnesses. Regarding PW 3, the elder son of the deceased, it is submitted that at the time of occurrence, he was far away at village Dangua, where, according to the prosecution story, he was informed by PW 4, the servant of the deceased. It is pointed out that according to PW 4, on seeing the assault on the deceased while the witness was standing on the embankment of bari taull, he ran home and first informed Bijoy, the younger son, and the wife of the deceased, and then at their suggestion went to search out and call the elder son, Padmacharan. Reference has been made to the cross-examination of the witness where he has stated that he took more than 15 minutes to reach and informed Padmacharan at Khetrupal embankment. Thereafter, Padmacharan first came home and then he and Bijoy both ran to the spot. It is argued that there were only 12 injuries on the deceased and the whole assault could not have taken more than a couple of minutes. On these premises, it is urged the PW 3 could not have seen any part of the occurrence. In this connection, counsel also relied upon the estimate of the various distances given by PW 4 which he had to cover to contact and inform PW 3.

7. It appears to us, this criticism of PW 3 does not stand a close examination. PW 3 is the elder son of the deceased. According to him, the place of occurrence is 300 cubits (about 150 yds.) from his house. He has further stated that the distance of the place where Kaviraj met and informed him (PW 3) about the assault is, according to the witness, 200 cubits (about 100 yds) from the house of the deceased. According to PW 4, bari taull from the embankment of which he saw the occurrence, is 100 yds. from the spot. This means that PW 3 was about 50 yards from the house of the deceased, when he saw the occurrence. In informing Bijoy and then the elder son (PW 3), PW 4 had to cover, in all, a distance of about 150 yards only. According PW 4, he had covered all these distances while running. At an average running speed, a healthy boy of 12 years should be able to cover this distance of 150 yards in about half a minute. Making allowance for a few seconds of halt at the house, PW 4 could not have taken more than one minute, in all, to contact and inform PW 3. PW 4, according to his version, had rushed to the place of occurrence via his house. In reaching the scene

of occurrence, he had to cover a distance of about 250 yards, in all. He would not have taken more than a minute to reach within the witnessing range of the incident. According to him, he saw only the last phase of the incident when all the three accused persons were prodding or giving thrust-blows with their lathis to the victim who was then lying on the ground. Thus, there was nothing improbable in this version of PW 3.

8. Much capital cannot be made out of the loose statement of Kaviraj (PW 4) that it took him more than 15 minutes to go and inform the sons of the deceased. He was merely a boy of 12 years, and according to his own version he had no sense of time. What the witness stated to be 'minutes' might be 'seconds'. The map which is on the file shows that the place from where Kaviraj saw the occurrence is only 90 yards and 2 ft. from the place of occurrence.

9. It may be noted that PW 3 had lodged the FIR with great promptitude at 11.00 a.m. within three hours of the occurrence in the police station which is 13 kilometres from the spot. In the FIR also, barring minor variations, he substantially gave the same story which he later narrated at the trial.

10. Mr. Garg points out some omissions in the FIR for instance, in the FIR he did not state that on receiving the information about the assault, he first went to his house and from there along with his younger brother Bijoy, ran to the spot. These are minor variations which no way detract from the substratum of his story. He clearly mentioned in the FIR that their servant, Kaviraj, came running and informed him that the three appellants were assaulting his father with sticks at the back-side field of their house. In the FIR, also, he does not claim to be a witness of the entire incident. As at the trial, there also, he stated that when he and others went running to the spot, the accused persons were carrying their sticks with them and that when the informant and others reached the spot they found that the deceased was already dead. PW 3 was, no doubt, an interested witness but his evidence was corroborated by the FIR and the other evidence on the record, in all material particulars.

11. As against PW 4, it is submitted by Mr. Garg that, firstly, he was a child witness and was amenable to tutoring; secondly, he was a servant of the deceased and, as such, was an interested witness; and thirdly, in cross-examination, PW 4 himself in so many words admitted that he had not seen the actual assault. It is maintained that the High Court slurred over this admission made by the witness in cross-examination.

12. None of these contentions holds water. Nothing has been brought out in the cross-examination of the witness to show that he was giving a tutored version. In fact, the witness stoutly denied the defence suggestion that he had been tutored by PW 3 and Bijoy. The general tenor of his statement, also, does not warrant any such conclusion. The mere fact that he was a servant of the deceased was no ground to dub him an 'interested' or 'partisan' witness or to brush aside his otherwise reliable testimony. He had no axe of his own to grind against the appellants. It is no doubt true that in cross-examination, the witness stated : "I left the spot hearing hulla but I have not seen the actual assault". But, it will be unfair to tear out this sentence from the context and make a whole argument out of it. This sentence must be read in the context of what precedes and follows it. Earlier, the witness testified in unmistakable terms, in cross-examination : "The spot is about 100 yards (the witness shows the distance) from the village. I saw the occurrence from distance. The deceased was standing while he was being assaulted. Three accused persons had surrounded him and were beating him. I cannot say who assaulted at which place (parts) of the deceased as that was not visible. I cannot say how many blows they had dealt. I left the place as they were raising their lathis. The deceased was shouting 'Morigali Except the three accused persons and the deceased I did not see any other

person there. I did not notice any other person in the neighbouring fields. I did not follow PW 3 and so I cannot say if the deceased was being beaten when he went to the spot. When I went to the spot with the wife of the deceased, many persons had assembled there. I cannot recognise any person from the gathering. I have no idea of time and I cannot say what time I took to inform PW 3 about the incident".

13. The witness has further referred to his informing Pada Babu (PW 3) and the time taken by him to contact and inform PW 3. In examination-in-chief, the witness had clearly testified that he had seen the three accused persons assaulting the deceased with lathis and thereupon he ran to the house of the deceased and informed his son, Bijoy, and then contacted PW 3 near the bank of village Khetrupal and informed him that the accused were assaulting his father. If the sentence on which Mr. Garg has tried to raise the edifice of his arguments, is read in the context, it becomes clear that by saying that he had not seen the "actual assault", he meant that he had seen only the very commencement of the assault when the accused persons were just "raising their lathis" to strike the deceased; that he did not see the main phase of the assault to its finish as at that time he was either on his way to inform the sons of the deceased or had after giving such information gone inside the house and thereafter, he reached the spot along with the widow of the deceased when the assault was over and the assailants had decamped. The appellants were not strangers. They were brothers of the deceased. He saw the occurrence from a distance of about 90 yards and from higher ground at about 8 a.m. in daylight. It was therefore not difficult for him to identify the accused persons while they were opening the assault on the deceased.

14. Be that as it may, the fate of the case did not depend merely on the evidence of PWs 3 and 4.

15. PW 6 was another material witness. According to him, he was weeding grass from the paddy field of his grandmother. A glance at the map on the record would show that this field (where he was working) lies in the proximity of the field of occurrence and only one small field intervenes. His version that he was the first to reach the spot on hearing the outcry of the deceased, thus before the impress of probability. In cross-examination, PW 6 stated that the deceased feared assault from the said accused and so sometimes during night when the deceased wanted to go out in the fields for easing himself, he used to request the witness to accompany him. Consequently, on one or two occasions the witness had so accompanied the deceased.

16. Mr. Garg contends that this admission elicited from the witness in cross-examination shows that he was a party-man of the deceased.

17. We are afraid, no such conclusion can be spelled out of this fact. The deceased was an adjacent eastern neighbour of the deceased. There was nothing wrong or unusual if out of good neighbourly relations, he accompanied the deceased to the fields. This fact elicited from PW 6 in cross-examination rather probalises his presence near the field of the deceased when the latter had gone there to answer the call of nature.

18. Then, there was the testimony of PW 5 who also saw the occurrence. He was in the field known as Panchaman Chak where he had gone to ease himself. This field, according to the map, is at a distance of about 242 yards from the place of occurrence. PW 5 testified that he heard the cry of "Morigali ! Morigali ! Raha ! Maha ! from the spot and thereupon he hurriedly proceeded to the spot and saw the three accused persons hitting the deceased "with lathi-ends" when the latter was laying in the ground.

19. The criticism levelled by Mr. Garg against the evidence of this witness as also that of PW 6 and PW 3 is, that they do not depose to any bleeding injury on the deceased while according to the doctor the deceased might have bled from the lacerated wound (injury no 6). The investigating officer also did not find any blood at the scene of occurrence. Thus, there is, proceeds the argument, a conflict between the medical evidence and the ocular evidence, which throws a doubt on the credibility of the prosecution story as propounded by these alleged eyewitness. Such a contention was raised even before the High Court and was-we think rightly-rejected. The inquest report does not mention about any bleeding. Even the medical witness who conducted the autopsy, did not, in the post-mortem examination report, note any external bleeding injury. All that he stated was that he had noticed clotted blood internally below injury No. 6 which indicated that this was an ante-mortem injury. Probably there was no external bleeding from injury No. 6. Even if there was any such bleeding, there was every possibility of the same being washed away or eclipsed by the water and mud in the field of occurrence. Indeed, in the inquest report (Ex. 1/1) it is mentioned that "the entire body is covered with soil". The mere fact, therefore, that the PWs 3, 4, 5 and 6 do not speak about any bleeding injury or blood on the spot, is no ground to hold that they are not speaking the truth.

20. Mr. Garg further contends that PW 5 must have harboured ill-will against the appellants because eight or nine days prior to the occurrence, Bijoy son of the deceased and Profula son of the witness had assaulted Satyanarayan appellant. In this connection, our attention has been invited to the report (Ex. A 1) lodged by Satyanarayan with the police. The trial Court condemned PW 5 as a 'liar' because he denied the defence suggestion about the assault on Satyanarayan and the latter's reporting the matter to the police. However, no evidence was brought on the record that the police had submitted a charge-sheet under Section 173, CrPC against the alleged assailants. It is, therefore, possible that PW 5 was unaware as to the existence of the Station Diary entry (Ex. A 1). PW 5 therefore could not be branded as liar merely because he had expressed ignorance about the said facts suggested to him in cross-examination. On the other hand, it was brought out in the cross-examination of the witness that Satyanarayan appellant, PW 5 and the deceased had joined and successfully opposed the application of Radhey Shyam appellant for grant of lease of five acres of land to Radhey Shyam's son-in-law. In view of these circumstances, the High Court was right in holding that "PW 5 is not a partisan witness of such a nature whose evidence cannot be relied upon without independent corroboration".

21. After examining the evidence of the material witness, we are satisfied that the view taken by the trial Court was palpably wrong, and that the High Court was fully justified in reversing the acquittal and convicting the appellants as aforesaid.

22. In the result, the appeal fails and is dismissed.

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