

IN THE COURT OF THE 1ST ADDL. SESSIONS JUDGE- CUM-
SPECIAL JUDGE (VIGILANCE) BHUBANESWAR.

Present :

Shri N.Sahu, LL.B.,
1st Addl. Sessions Judge,
Bhubaneswar.

CrI. Appeal No. 10/53 of 2012/2011.

(Arising out of the judgment, dt.18.11.2011 passed
in C.T. Case No.56/144/2010(A) by the learned
A.C.J.M.-cum-A.S.J., Bhubaneswar).

Prasan Swain, aged about 35 years,
Son of Bata @ Dhukudi Swain,
resident of Village-Pitapalli,
PS-Jatni, Dist.Khurda.

.... Appellant.

-Versus-

State of Odisha.

.... Respondent.

For the Appellant : Sri C.S.Sethi & Associates.

For the Respondent : Sri S.K.Barik, Addl.P.P.

Date of argument : 30.10.2013.

Date of judgment : 12.11.2013.

J U D G M E N T

1. This appeal has been preferred against the judgment, dt.18.11.2011 passed by the learned A.C.J.M.-cum-A.S.J., Bhubaneswar in C.T. Case No.56/144/2010(A).

2. Briefly stated, the prosecution case is that on 11.11.2007 the informant along with Forest Range staff, Khurda and A.P.R. Staff were guiding the elephants to Chandaka Reserve Forest. At about 1 A.M. hearing shouts, the informant went to the spot and found 25 to 30 people being armed with deadly weapons, were assaulting Banabihari Das, Forester and Godabarisha Hota, Forest Guard. While the informant was

trying to pacify the matter, the present accused along with others assaulted them and the A.P.R. Force captured the present accused and two others. The informant noticed burn injuries in the hands of Banabihari Das and Godabarisha Hota and saw that their uniform were damaged. The culprits had snatched away the search light, walky talky and gold finger ring from the forest guard. The injured forest officials were taken to Khurda Hospital for treatment and the informant lodged FIR basing on which investigation was taken up and after completion of investigation, chargesheet u/s.341, 324, 294, 353, 332, 379, 307,506 IPC was submitted against the present accused along with two others namely, Sukadev Swain and Basudev Swain.

3. After commitment, during course of hearing, when the case was posted for accused statement, this accused remained absent. So, his case was splited up. The case against two other accused persons proceeded and they were acquitted by the learned ASJ vide judgment, dt.2.11.2011. After apprehension of this accused, his statement was recorded on 16.11.2011 and vide judgment, dt.18.11.2011 the learned ASJ found the accused not guilty of the offences u/s.307, 324, 506, 294 read with Section 34 IPC and acquitted him from those offences. But the learned ASJ found this appellant guilty of the offences u/s.323, 332, 353, 379 IPC and convicted him thereunder and sentenced him to undergo R.I. for three months on each count with direction that the sentences shall run concurrently and the period of detention be set off. The said judgment is under challenge in this appeal.

4. The learned counsel for the appellant has challenged the judgment of conviction and sentence on the ground that it is illegal and against the evidence on record. He further contended that there is no independent corroboration to the testimony of official witnesses which are full of material contradictions and there is no evidence against the present appellant. The learned defence counsel further submitted that where evidence against the convicted appellant stood on similar footing as was

against two other co-accused persons acquitted by the trial Court, the present appellant is entitled for acquittal. On the other hand, the learned A.P.P supported the judgment of conviction passed by the lower Court.

5. PW-1 the APR Constable has stated that on 12.11.07 while he was guarding the official jeep, he heard sound of assault on other staff such as PWs-4,5 and 8. He admitted that he was not examined by the I.O. nor stated these facts to the I.O. PW-1 has not stated anything implicating the present accused. PW-2 the informant-Range Officer stated that he is unable to identify the accused persons. He stated that he with Habildar K.C.Dalabehera had been to the spot and the APR Force caught hold of 3 persons. In para-9 of his cross-examination he stated that when they arrived at the spot, they found some people were assaulting to the forester and forest guard, but he does not know them. PW-3 has stated only about the seizure of uniform shirts under Exts.1 and 2.

6. PW-4 one of the injured stated that some villagers attacked them with the flame which they had carried. But in para-7 of his cross-examination he specifically stated that he cannot say the names, fathers' names and the residential addresses or the profession of the accused persons. He stated that the place of occurrence was a forest area and it was dark by the time of occurrence. He also stated that he had not noticed as to who assaulted whom. So also, he could not say as to who torn his shirt nor he could say who assaulted him causing injuries on his hand. It is pertinent to mention that in para-4 of his cross-examination he stated that the accused Basudev Swain with others had assaulted him. He has not specifically named the present appellant to be the assailant. He stated that some villagers attacked them and forcibly took away his gold finger ring, walky talky and damaged his uniform shirt.

7. PW-5 the APR Habildar stated that he does not know the accused persons and he also does not know as to what happened to the forest staff. He has not whispered anything if he with other APR staff and forest staff had caught hold of this accused or any other accused. Even this

witness was not declared hostile by the prosecution. His evidence no way incriminates the present accused rather his evidence renders the prosecution case doubtful. PW-6 stated that he does not know the present accused and also does not know anything about the occurrence of this case. He was declared hostile by the prosecution. But nothing substantial was elicited in his cross-examination to incriminate the present appellant. PW-7 stated that in the occurrence night he heard shouts of some people using obscene words and when he arrived at the spot he found PWs-4 and 8 were assaulted by the villagers and they apprehended the accused persons. In the cross-examination he stated that it was a dark night and he cannot say as to who assaulted whom and he also stated that when he arrived at the spot, the occurrence was already over. So, his evidence is not helpful to the prosecution to incriminate this appellant.

8. PW-8 another injured stated that he with PW-4 and APR Habildar were guarding against the entry of the elephants to the Village-Pitapalli. 4 to 5 villagers of Pitapalli rushed towards him and one out of those persons using obscene words, was instructing the villagers to assault him. Out of them, the present accused and one Dina Mangaraj rushed towards him and this appellant gave a push by holding his neck and he fell down. Accused Dina Mangaraj assaulted on his both arms by means of a stick which was illuminated with fire. They snatched away his money purse and search light. He stated that he had sustained burn injuries along with other injuries. The APR Force and Range Officer apprehended those 3 persons. But neither the Range Officer(PW-2) nor the APR Habildar (PW-5) nor APR Constable (PW-1) have stated so. PW-10 the I.O. stated that he had not seized any stolen property from this appellant. If in fact, this appellant and Dina Mangaraj had snatched away the money purse and search light of PW-8, then naturally the same could have been seized from this appellant as he was allegedly caught redhanded at the spot. But no stolen property has been seized from this appellant. PW-8 has not stated that Dina Mangaraj took away that money purse and search light.

The I.O. stated that he had examined eight villagers of that village, but all of them had not stated anything implicating the accused persons with the alleged offences.

9. The I.O. has also admitted that at the time of occurrence about 30 to 40 villagers of Villages-Pitapalli, Gangapada and Bhatkudi were present at the spot during the time of occurrence. But no independent witness(villager) has been examined by the prosecution, even PW-1 and PW-5 APR staff have not stated anything in support of the prosecution case. PW-8 Bana Bihari Das stated that he had told the medical officer that he was feeling pain, but the medical officer PW-9 has not stated so. PW-8 stated that he had sustained burn injury along with other injuries, but Injury Report Ext.6 shows that he had sustained only two burn injuries, one on each hand. There is no mention in Ext.9 that PW-8 had sustained any injury on his neck or other parts of the body which falsifies the fact that this accused had caught of his neck and given fist blows. It is significant to note that Dina Mangaraj was not even chargesheeted by police. Out of 3 persons who were allegedly caught at the spot, two had been acquitted by the lower Court.

10. The learned defence counsel placing reliance on a decision reported in *2005(2) Acquittal 371, Patna High Court, Awadh Yadav-Vrs.-State of Bihar* submitted that where evidence against convicted appellant stood on similar footing as was against other co-accused acquitted by trial Court, appellate Court has to take the point into consideration.

In the instant case, the learned lower Court has acquitted the chargesheeted accused persons-Sukadev Swain and Basudev Swain, vide judgment, dt.2.11.2011 in the original case. In the impugned judgment the learned lower Court has also held that there is no evidence on record that the present accused had shared his common intention with other accused and in furtherance of such common intention he had assaulted PWs-4 and 8.

11. As discussed above, there is no independent corroboration to the prosecution case. The evidence of P.Ws.4 and 8 on which the prosecution solely bases its case is contradictory to each other on material parts and the same is not clear and clinching. Even the other official witnesses including the informant-Ranger, the APR Habildar and APR Constable do not support the prosecution case. The evidence of P.W.8 which is full of contradictions and which does not get corroboration from any corner including the medical evidence, does not inspire confidence. On a combined reading of the evidence on record and for the reasons discussed above, the present accused cannot be held guilty of the offences u/s.323,332,353,379 IPC. Hence, I am inclined to hold that the impugned judgment of conviction and sentence passed by the learned lower Court is not tenable in law. Hence, it is ordered.

ORDER

The Criminal Appeal is allowed on contest and the impugned judgment of conviction and sentence, dt.18.11.2011 passed by the learned A.C.J.M.-cum-A.S.J., Bhubaneswar in C.T. Case No.56/144/2010(A) is hereby set aside. The appellant be set at liberty.

1st Addl. Sessions Judge,
Bhubaneswar.

The judgment having been typed to my dictation and corrected by me and being sealed and signed by me is pronounced in the open court today this the 12th day of November, 2013.

1st Addl. Sessions Judge,
Bhubaneswar.

