
**(1993) CriLJ 3664 : (1993) 3 Crimes 515 : (1993) 3 SCALE 899 : (1994) 1 SCC 493
Supp**

Supreme Court of India

Case No: Criminal Appeal No. 613 of 1982

Sikhar Behera and
Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: Sept. 28, 1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 144#Penal Code, 1860 (IPC) â€” Section 149, 302, 304

Citation: (1993) CriLJ 3664 : (1993) 3 Crimes 515 : (1993) 3 SCALE 899 : (1994) 1 SCC 493
Supp

Hon'ble Judges: K. Jayachandra Reddy, J; G. N. Ray, J

Bench: Division Bench

Advocate: B. S. Chauhan, P.N. Misra and N.R. Choudhary, for the Appellant;

Final Decision: dismissed

Judgement

K. Jayachandra Reddy, J.

There are 14 appellants. They alongwith 25 others were tried for offences punishable under Sections 302,

302/34, 302/149, 232, 324 and 324/149 I.P.C, The trial court convicted 16 of them and acquitted the rest. On appeal, the High Court acquitted

two of them namely A-2 and A-7 and convicted the rest. The 14 convicted accused have preferred this appeal.

2. The prosecution case is as follows.

The accused, two deceased persons and the material witnesses belong to Villages Khejuria and Dimirisena. There was a longstanding dispute

between the two parties regarding possession of the lands belonging to the deity installed at Village Dimirisena. The deity was 150 acres of lands

out of which 100 acres were in possession of the tenants and the remaining 50 acres were being let out for bhag cultivation annually. The

prosecution party claims that 40 families belonging to their party were in possession of those 50 acres of lands. Indra Kumar Patnaik, a trustee,

entrusted the management of the affairs of the deity and its properties to the villagers of Dimirisena to which the prosecution party mainly belongs.

There were Section 145 Cr. P.C. proceedings and a compromise and since then the prosecution party has been in possession of the land. The

present dispute relates to the lands of the deity which are locally known as panchamania lands, an area of 2.04 acres. In one of the plots, paddy

was cut and just before the present occurrence, a proclamation u/s 144 Cr. P.C. was issued and both parties were restrained from going to the

fields. The order u/s 144 was served on some of the accused and a notice u/s 107 Cr.P.C. also was served on the accused as to why they would

not be called upon to execute bonds for keeping peace. On 28.11.74, P.W. 5 A.S.I, went to Village Dimirisena for serving the order u/s 144 and

the notice u/s 107 on some of the other accused persons. When P.W. 5 read out and explained the contents of the order to the members of the

prosecution party and wanted to serve the notice, but they refused to accept the same. The members of the accused party also refused. After

refusing to receive the notice, a group of about 20 to 30 members of the prosecution party went to cut paddy from the Panchamania lands.

Subsequently a group of about 15 persons of the prosecution party went towards the said lands for carrying the paddy sheaves. While the second

group had proceeded upto the Kalapatriri burial ground, they found that a group of 25 persons of the accused party going there with lathis,

bhails, tents and other deadly weapons. The party was led by Mahant Gobinda Das. At the same time another group of 50 persons of the accused

party came armed with various deadly weapons. The members of the accused party surrounded the members of the prosecution party. Mahant

Gobinda Das fired a shot from the gun which hit Kulamani Behera (Deceased No. 1), a member of the prosecution party and he fell down on the

ground. Then Gobinda Das snatched away a tenta from the hand of acquitted accused Chhaila Samal and stabbed Deceased No. 1. Thereafter

other persons assaulted him with deadly weapons as a result of which he died on the spot. When Kunja Samal (Deceased No. 2), came to the

rescue of Deceased No. 1, he was stabbed by A-16 as a result of which he fell down on the ground. Some of the other accused persons also

assaulted Deceased No. 2 as a result of which he became unconscious and subsequently died. In the course of the same incident, P. Ws

2,3,4,6,7,8 and 9 also received several injuries. P. W.5, A.S.I, of Police, who was present on the spot, sent a report through a village servant on

the basis of which a case was registered. All the injured persons were brought to Brahmagiri Hospital and the Medical Officer, P.W. 11 gave first

aid and sent all of them to District Headquarters Hospital at Puri. P.W. 11 recorded Ex.P.4, the dying declaration of Kunja Samal, Deceased No.

2. He also examined the injured witnesses. Later post-mortem was conducted over the dead-bodies of the two deceased. The accused were

arrested.

3. Daitari Behara, one of the accused persons, also gave a report on the basis of which a counter case was registered against 63 persons belonging

to the prosecution party including the injured witnesses. In that case 40 persons were convicted under Sections 148, 324/149 and 323/149 I.P.C.

Coming to the present case, the trial court relied on the evidence of the injured witnesses and discussed their evidence in respect of each of the

accused persons and ultimately held that 16 of them were members of the unlawful assembly and accordingly convicted the 16 accused as

mentioned above and sentenced each of them to undergo imprisonment for life. In the trial Court, the convicted accused admitted their presence

but asserted that they were in possession of the disputed lands and raised paddy thereon and coming to know that the prosecution party armed

with deadly weapons were coming to cut the paddy forcibly, they also went towards the paddy fields. Seeing them the prosecution party attacked

them and inflicted injuries on two of the accused persons. Having examined this plea, the trial court held that the plea of the accused persons

cannot be relied upon to determine as to how the occurrence took place. The trial court as noted that the A.S.I., namely P. W.5, gave a different

story but the same can be relied upon as he was an independent witness. According to P.W. 5's version and as accepted the trial court, the

prosecution party had already got engaged in cutting paddy and seeing the accused party coming, the prosecution party ran towards them carrying

their deadly weapons and there was a fight between both the parties. The learned trial Judge, however, found that the fight between the parties was

not a sudden fight and that the parties went to the lands being armed with deadly weapons and each party had an intention to fight with the other.

Then the trial court proceeded to consider whether the accused party could get benefit of the right of private defence of property and person. The

trial court held that there is no clear proof that the accused persons were in actual possession of the disputed lands. The trial court further observed

that some members of the accused party received injuries which were not explained by the prosecution. Ultimately, the trial court held that the

accused were members of the unlawful assembly and they were responsible for causing the death of the two deceased persons and for inflicting a

number of injuries on the witnesses which were more grave and serious in comparison to the minor injuries received by the accused party. In this

view of the matter, the trial court held that the accused intentionally caused the " death of the deceased persons with cutting weapons and they had

gone to the fields with a view to fight and also assault the prosecution party and even to cause death and ultimately convicted the 16 accused

whose presence was established.

4. The High Court also held that materials on record would show that neither party was in peaceful possession of the lands and there was a

scramble for the possession. The High Court also having examined the evidence of A.S.I., P.W. 5 observed that both parties were prepared for a

fight and that members of the prosecution party went to the place of occurrence knowing that they would meet opposition and likewise the

accused party also did the same thing. Having so observed, the High Court held that assemblies on both sides were unlawful and it is immaterial

which party began the attack. In that view of the matter the High Court held that the accused had no right of private defence. The High Court also

observed that each of the member of the unlawful assembly would be vicariously liable by virtue of application of Section 149 I.P.C. Thereafter the

High Court proceeded to consider the part played by each of the accused.

5. From the above stated facts, it can be seen that inspite of declaration u/s 144 Cr.P.C. and initiation of proceedings u/s 107 Cr. P.C., both

parties heavily armed went to the fields. To that extent, the finding of the High Court that both sides formed into unlawful assemblies can not be

doubted. But the next and most important question would be whether every member of the unlawful assembly particularly of the accused party can

be convicted under Sections 302/149 I.P.C on the ground that each of them had the knowledge that death would be caused to the members of the

other party and still continued to be the members of the unlawful assembly. As noted above, the High Court also-at one stage observed that it was

a free fight. In a case of free fight, though to some extent, they were members of the unlawful assembly in the sense that they had the object to fight

with each other, but it would be difficult to infer that each one of them shared the same object or had the knowledge. As can be seen from the

records, the main object was to take possession of the lands and if necessary to meet any resistance or even to fight. Admittedly a large number of

persons on each side went to the fields. These 14 accused persons alone are convicted because their presence was otherwise established but while

judging the common object of the unlawful assembly, there should be such convincing material that members in the entire crowd formed into an

unlawful assembly and each one of them shared a particular common object. In the instant case the appellants are convicted because they also

gave a report in the counter case and figured as witnesses. However, in inferring the common object in a case of this nature, the attack on the

deceased persons and the nature of the injuries inflicted would be relevant. P.W. 14, the Doctor who examine Deceased No. 1 found only eight

injuries. The first injury was a perforated wound on the right side of the back and two injuries were on the left side of the chest. There was deep

perforated wound in the heart on the left side of the chest. The other injuries were not very serious. On dissection, the Doctor found the fracture of

the left tibia, a deep perforated wound in the heart and injury to the lung. He opined that the two injuries to the heart and lung were fatal and that

other injuries were not either individually or collectively sufficient to cause death in the ordinary course of nature. It can thus be seen that only two

injuries inflicted by the accused persons were of serious nature which would indicate the nature of the attack and the object of the unlawful

assembly. If all the convicted accused shared the common object, one would expect many more injuries. Of course, we are not laying down that

every member of the unlawful assembly should participate in the actual occurrence but we are applying these tests only in view of the fact that the

object of the unlawful assembly was only to fight. Likewise on Deceased No. 2, P.W. 12, another Doctor found only seven injuries and that only

one injury on the stomach was sufficient in the ordinary course of nature to cause death. As a matter of fact, Deceased No. 2 died on 29.11.74 in

the evening.

6. Learned counsel appearing for the appellants submitted that the accused had right of private defence to defend the property as well as their

persons. In view of the findings of both the courts below that neither party was in peaceful possession of the lands in dispute and that there was a

scramble for possession and that both parties were prepared for a fight and in fact fought, the accused can not have a right of private defence. In

such a free fight, the question of one party being aggressor may not arise. However, the members of each party would be members of the unlawful

assembly with the common object to fight. But the nature of the participation, the weapons used and the injuries caused would also be relevant to

infer the nature of the common object. In the instant case, it is not safe to hold that the common object of the unlawful assembly was to commit

murder and that everyone knew that and that the same would attract Section 302 I.P.C. But under the circumstances the accused armed with

deadly weapons formed into an unlawful assembly with a view to fight with the other side and attacked them. One of the deceased received two

fatal injuries and the other deceased received only one fatal injury. In such circumstances, the members of the unlawful assembly must be held to

have knowledge that some of them are likely to cause injuries and thereby likely to cause death. In other words, they had the knowledge that at

least an offence of culpable homicide was likely to be committed. Under these circumstances they can safely be convicted u/s 304 Part II read with

149 I.P.C. Accordingly the conviction of the appellants under Sections 302/149 and the sentence of imprisonment of life awarded there under are

set aside. Instead they are convicted . under Sections 304 Part II read with 149 I.P.C. and each of them is sentenced to undergo seven years" R.I.

Other convictions and sentences are confirmed. Subject to this modification, the appeal is dismissed.