
AIR 1957 Ori 117 : (1957) CriLJ 644

Orissa High Court

Case No: Criminal Appeal No. 142 of 1955

Brundaban Swain and
Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: Feb. 12, 1957

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 225, 537
- Penal Code, 1860 (IPC) - Section 147, 149, 304, 97

Citation: AIR 1957 Ori 117 : (1957) CriLJ 644

Hon'ble Judges: Narasimham, C.J; P.V.B. Rao, J

Bench: Division Bench

Advocate: C.M. Acharya, for the Appellant; Govt. Advocate, for the Respondent

Judgement

Rao, J.

The 22 appellants along with 12 others were tried by the Additional Sessions Judge, Puri on Charges for committing rioting punishable u/s 147, I. P. C., and for being constructively liable of culpable homicide not amounting to murder punishable u/s 304 read with Section 149, I. P. C. in causing the death of Satia Behera and some of them were individually charged for voluntarily, causing hurt to Gatia Behera, Banchha, Behera and Hadu Behera punishable u/s 323, I. P. C. on 20-10-54.

Two of the accused died before trial and ten persons were acquitted by the learned Sessions Judge and all the appellants were convicted of the offence punishable under Sections 147 and 304/149, I. P. C. and were sentenced to rigorous imprisonment for two years each u/s 147, I. P. C. and appellants Benu. Swain, Udayanath Swain and Upendra alias Rupa Swain were sentenced to five years" rigorous imprisonment u/s 304/140, I. P. C. and the rest of the appellants to rigorous Imprisonment for three years each under the said section. Appellants Kanga Behara, Dhanias Behera, Balias Behera, Linga Padhan, Upendra alias Rupa Swain, Punia Behera and Jahan Jena were found guilty u/s 323, I. P.

C. and sentenced to rigorous imprisonment for six months each. The sentences of all the appellants under all the charges were directed to run concurrently.

2. The prosecution case is that on 20-10-54, the accused persons belonging to Kanti and two of them to Chaingailo and Garh-Karamala along with several others about 150 persons went armed with Tadas, sickles and Kuntas to forcibly reap the paddy grown by Amareswar Swain, Amareswar Behera, Dhabala Parida, Chaitan Behara and Satia Behera of Karamala, Accused Brundaban Swain, Kulamani Rai and Jagabandhu Patra were the leaders who ordered their party to cut the paddy. While the paddy was being cut from the disputed fields locally known as Keutabari Chak, the deceased Satia Behera who was driving cattle to the company of his brother Gurubari Behera (P. W. 1) noticed the occurrence and protested as to why his crops were being reaped.

Then accused Brundaban, Kulamani and Jagabandhu gave orders to beat Satia Behera. Prabhakar Rai assaulted him with a lathi when Satia ran away out of fear. The leaders asked their men to stop him and beat. Then accused Benu Swain, Udayanath Swain, Kanga Padhan, Lakshman Padhari, Panchu Swain, Gandharba Swain, Jahan Jena, Linga Padhan, Dinabandhu Parida and Nabina Parida surrounded Satia Behera and assaulted him. Accused Benu Swain-hit him on the left ear with a lathi while Rupa Swain pierced a Kunta into his jaw and the rest assaulted him on different parts of his body. Satia Behera fell down senseless. Gurubari ran home out of fear and raised an alarm on the way calling his brother for help when Gatia Behera (P. W. 4) who was weeding in his Saru field ran there followed by his father Banchha Behera (P. W. 5).

When they protested, they were also assaulted by the accused persons. Accused Nabin, Linga and Jahan beat Gatia with Tadas causing head injuries when he fell down senseless. Banchha was assaulted by lathis by Linga Padhan and Ball Behera resulting in his fall. Hadu Behera (P. W. 22), the uncle of the deceased went there on hearing the alarm and he went back out of fear. The accused persons carried away the paddy sheaves after which P. W. 1 went to the spot accompanied by Radha Parida (P. W. 8), Gouranga Parida (P. W. 25) and Amareswara Swain (P. W. 31) and removed the injured Satia Behera in an unconscious state to the Danda of Amareswar Swain.

He was bleeding from his wounds on the Jaw and through the mouth and the nostrils. They removed also Banchha Behera home. Satia Behera was carried to Gop Hospital in a Sabari supplied by Bauribandhu Misra (P. W. 3) and admitted into the Hospital in a comatose condition by the Medical Officer (P. W. 7)., In the meanwhile, Gurubari Behera lodged the F.I.R. (Ext. 2) at 8 p.m., by submitting a written report to the Writer Constable (P. W. 34) who made a station diary entry (Ext. 19) and sent requisition for medical examination of the injured.

The A.S. I. (P. W. 35) after returning to the Police Station took up the Investigation. Satia Behera died at about 3 a.m. which was reported by the Doctor under Ext. 4- P. W. 10 . held the post-mortem examination on 22-10-54 and in the opinion of the Medical Officer

injury No. 1 might have been caused by a pointed triangular shaped weapon like a Kunta or Tenta, injuries Nos. 3, 4 and 5 might have been caused by sharp cutting instruments like Da (Sickle), and injuries Nos. 2 and 6 might have been caused by hard blunt weapon like lathi. The Medical Officer opined that death was due to shock and haemorrhage as a result of the injuries in question.

The other P. Ws. who received injuries were also medically examined and their injuries were noted in Exts. 5 to 9. Lathis (M. Os. II to XVI) were seized from the houses of the accused Upendra Swain, Udayanath Swain, Lakshman Padhan, Brundaban Swain and Dinabandhu Swain. On 11-11-54, the Investigation Officer seized paddy sheaves from the Khamar of Baidyanath Chinara (P. W. 26) who is the landlord of the disputed lands as per seizure list (Ext. 27) as also some account books (Ext. 15 series) from the landlord.

3. A counter case also was started for the same occurrence on the report of the accused Brun daban Swain producing the injured Somanath Das at Gop P. S. who also died the same night. The Karamala people consisting of P. Ws. 3, 4, 8, 22, 23, 24, 25, 20, 31 and 33 are some of the accused in that case which was simultaneously investigated with the present case. It may be noted that all the accused in the counter case were acquitted.

4. The accused pleaded not guilty to the charges and stated that accused Brundaban Swain grew paddy on the disputed lands and that he went to reap the same with the help of his Mulias among whom Somanath Das was one and while he was tying the paddy sheaves, the Karamala people came in large numbers armed with Tadas and assaulted his reapers causing fatal injuries on Somanath Das and assaulting the other Mulias. On hearing this, the Kanti people came running from the fields and they were also assaulted by the Karamala party.

5. The prosecution examined 18 witnesses who were eye witnesses to the occurrence at Keutabari Chak while paddy was reaped by the appellants. The dispute arose over the reaping of the paddy crops in Keutabari Chak which is on the border of Kanti and Karamala mouzas. It is within the Kanti border but nearer the Karamala Basti. According to the evidence in the case, Baidyanath Chinara (P. W. 26) is the landlord of 5 Kitas, while Alekh Misra (P. W. 32) is the landlord of 2 Kitas. The deceased is said to have cultivated on bhag under Alekh Misra while the lands of Baidyanath Chinara are alleged to be cultivated on bhag by Amareswar Swain (P. W. 31), Dhabala Parida (P. W. 33), Indramani Swain (P. W. 29), Chaitan Behera and Amareswar Behera of Karamala.

It is in evidence that there were disputes with the Kanti people on account of laying a rasta over the Sarbasadharan land by the Karamala people which was resisted to by the Kanti people as their fields were damaged and there were also proceedings with reference to that u/s 107, Cr. P. C. The eye-witnesses spoke to the occurrence as alleged by the prosecution except that the choukidars (P. W.13), P. W. 14, P. W. 15, P. W. 16, P. W. 17 and P. W. 9 gave a different version of the occurrence, to the effect that there was a mutual fight between the Kanti people and the Karamala people over the reaping of the

disputed paddy resulting in the death of one. person on each side and sustaining injuries by several persons of both sides.

6. Mr. C.M. Acharya, the learned counsel appearing for the appellants, contends that as there was a material discrepancy between the evidence and the allegation made in the P. I. R the prosecution case ought not to be believed. The F. I. R. given by P. W. 1 the informant disclosed that the deceased "did not claim the paddy. The question stated to have been "asked by the deceased to the accused was why the accused were cutting the paddy grown by others. He also contended that appellants Nos 1, 2 and 3 were not named in the F. I. R as also appellants No. 7 Rama Behera, No. 13 Gouranga Parida, No. 14 Pravakar Das, No. 15 Jahan Jena, No. 18 Dhanias Behera, No., 19 Puna alias Punia Behera, No. 20 Kanga Behera and No. 21 Balia Behera.

He contended that they were unnecessarily implicated on account of enmity. But appellants Nos. 1 to 3 admitted their presence at the occurrence. With regard to the other appellants, nob named in the F.I.R. in my opinion, Mr. Acharya is justified in saying that they were not at the scene of the occurrence and were implicated unnecessarily on account of enmity. They are therefore entitled to benefit of doubt and therefore appellants Rama Behera, Gouranga Parida, Pravakar Das, Jahan Jena, Dhanias Behera, Puna alias Punia Behera, Kanga Behera and Balia Behera are acquitted and they should be set at liberty forthwith.

7. The learned counsel next contended that the charges framed in the case are not according to law and that the appellants Were prejudiced and consequently the trial was vitiated According to his contention, the charge framed u/s 304/149, I P. C. is not in accordance with law and the conviction, u/s 147, I. P. C. cannot be sustained inasmuch as the common object as found by the learned Additional Sessions "Judge was different from what was stated In the charge u/s 147, I. P. C. The first and second charges against all the accused were as follows:

"First--That you, on or- about the 20th day of October, 1954 at Kanti-Karamala border near Keutabari Chak, were members of an unlawful assembly and in prosecution of the common object of such assembly, viz., to assault the members of Karamala Party and enforce a supposed right and claim over the produce of the fields in the Keutabari Chak, committed the offence of rioting and thereby committed an offence punishable u/s 147 of the Indian Penal Code and within the cognizance of the Court of Session,

Secondly--That you, on or about the same day of same month and year and same place, were members of an "unlawful assembly and in prosecution of the common object of which, viz., to assault the members of the opposite party to enforce a supposed right and claim on the produce of the disputed lands at Keutabari Chak, some of the members, namely, Upendra alias Rupia Swain and others caused such a hurt to deceased Satia Behera which resulted in his death, i.e., committed culpable homicide not amounting to murder and you are thereby, under. Section 149, I. P. C. guilty of causing the said

culpable homicide not amounting to murder, and thereby committed an offence" punishable u/s 304 of the Indian Penal Code and within the cognizance of the Court of Session.""

The contention of Mr. Acharya on the second charge u/s 304/149, I. P. C. is that the appellants had no notice that they had knowledge that in prosecution of the common object of the assembly there is a likelihood of death being caused. In support of his contention he relied upon a case in the case of Queen v. Sabid Ali, reported in 20 Suth WR 6 (A), where it was held:

"Section 149 of the Penal Code is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. In order to bring a case within Section 149, the act must be done with a view to accomplish the common object of the unlawful assembly, or it must be proved that the offence, though committed in prosecution of the common object of the unlawful assembly, is one which the accused knew would be likely to be committed in prosecution of the common object."

In that case number of persons attacked another party who were in occupation of a land with the view to drive them off the land by force and one of the members fired a gun and killed one of the persons of the opposite party. In consequence of a sudden and unexpected resistance which was offered. It was held on a consideration of the evidence that the persons composing the unlawful assembly other than the person who fired the gun could not be convicted of murder u/s 149, Penal Code. In the course of the majority judgment, Jackson J. observed:

"Nor can it be believed that the Legislature intended to attach the consequences, of, say murder, committed by a member of an unlawful assembly in prosecution of the common object to all members of that assembly, unless those members had a knowledge that the commission or murder was likely as an incident of their endeavours to carry out the common object"

In the case of Behari Mahton v. Queen-Empress, reported in ILR 11 Cal 106 (B), it was held:

"An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself. but by others with whom he was in company."

In the course of the judgment, Mitter and Norris JJ. observed:

"We are of opinion that the two first charges are not sufficiently explicit, and that they should have contained such particulars of the manner in which the alleged offence was

committed as would have been sufficient to give the accused notice of the matter with which he was charged..... An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him. Unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself, but by others with whom he was in company.""

In the case of [Nanak Chand Vs. The State of Punjab](#) , it was held:

"If there is a conviction for a charge not framed it is an illegality and not an irregularity curable by the provisions of Sections 535 and 537, Criminal Procedure Code."

In the case of Dalel Ram Sarup v. Emperor reported in AIR 1946 Lah 222 (D), it was held:

"The second alternative of Section 149 is intimately connected with the first. One has to go back to the Question "what was the common object". The expression "knew "to be likely to be committed" imports at least an expectation founded upon facts known to the members of the assembly that an offence of a particular kind committed would be committed. It means something more than a speculation that such an offence might happen to be committed."

On the strength of these decisions, Mr. Acharya contended that inasmuch as the charge, in the present case did not mention that the appellants had knowledge that death was likely to be caused in prosecution of the common object, the charge was illegal and vitiated the trial. But I cannot accept this contention in view of the recent decision of the Supreme Court consisting of five Judges who have elaborately discussed the law on the subject and held that any omission in a charge is not an illegality but is only an irregularity and is a curable defect. In the case of [Willie \(William\) Slaney Vs. The State of Madhya Pradesh](#) , the majority of the Judges Chandrasekhara Aiyar, Jagannadhadas and Imam JJ. held:

"Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without "specifying who are directly liable and who are sought to be made constructively liable.

"In such a situation the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out.

"In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

In view of the later pronouncement of the Supreme Court in the above decision, I do not think Mr. Acharya's contention is correct, especially in view of the fact that the appellants were defended by counsel in the trial, I do not think that the appellants were in any way prejudiced by not mentioning in the charge that they knew that death would be a likely result of the prosecution of the common object of the assembly.

8. Mr. Acharya then contended that as far as charge u/s 147, I. P. C. is concerned, the only common object alleged in the charge was to assault the members of the Karamala party and to enforce the supposed right and claim over the produce of the fields in the Keuta-bari Chak, whereas in the judgment of the learned Additional Sessions Judge, it was found that the common object of the assembly was to commit the offence of criminal trespass and theft of the paddy of Karamala people and also for assaulting them if they offered resistance. According to the learned counsel that finding is vitiated inasmuch as the common object was not stated to be to commit theft and criminal trespass. On the authority of the recent pronouncement of the Supreme Court, I am of opinion that this contention also cannot be accepted.

9. The last but the most important contention raised by the learned counsel is that the appellants were protected by the right of private defence. The learned Sessions Judge on the evidence found that it cannot be said that the Karamala people were the aggressors giving right of private defence to the Kanti people. In order to appreciate this contention of the learned counsel, the question of possession of the disputed lands at the time of occurrence in question is material. Mr. Acharya contended that it was Brundaban's party who were in cultivating possession of the land and grew paddy and to meet the resistance offered by the other side had to defend their property.

It is in evidence that Keutabari Chak land is on the border of Karamala and Kanti and it is near the Karamala Basti. Baidhyanath Chinara is the landlord of this land consisting of 5 Kitis in dispute. Adjoining this land there are 2 Kitis which belong to Alekh Misra (D. W. 32). This land of Alekh Misra was cultivated by Satia Behera at that time and out of the 2 Kitis, one was reaped 4 or 5 days before the occurrence by Satia while the other Kita was reaped by the Kanti people on the day of occurrence. Appellant Brundaban does not claim any right over Alekh Misra's land and he denies to have reaped that paddy as well.

His claim is only with regard to 5 Kitis as being tenant under Baidyanath Chitnara. Brundaban was the Khamari of Baidyanath Chinara but was discharged from service two years previously and Bira Khuntia, Court witness No. 1 was appointed as Khamari. He, Baidyanath Chinara P. W. 26, stated that the Karamala people cultivated the Keutabari Chak land on bhag under him and he denied the possession of Brundaban Swain at any time, The khata book maintained by P. W. 26 shows the names of the tenants from whom bhag paddy had been realised. This relates to the year 1361 Sal and Panchnan Behera of Karamala had been recorded in respect of 3 Kitis of Keutabari Chak. Pandaba Behera, Amareswar Swam and Dhabal Parida of Karamala have been recorded for Dhadasa Chak and it is in evidence that Dhadasa Chak is another name for Keutabari

Chak. It is in prosecution evidence that these same tenants cultivated during 1954 also when the occurrence took place. Alekh Misra (P. W. 32) proved the possession of Satia Behera of his 2 Kitis in question and receipt of paddy from one Kita only as the other one was forcibly reaped by the accused.

He also proved the possession of the Karamala people of the adjoining land of Baidyanath Chinara, Mr. Acharya relied upon the evidence of the Court witness Bira Khuntia who was the Khamari of Baidyanath Chinara in the relevant period and who stated in evidence that appellant Brundaban cultivated the disputed land under Baidyanath. The learned Sessions Judge held that this witness was gained over as he belongs to Kanti mouza and the learned Sessions Judge, for the reasons stated in his judgment, did not accept his evidence

After a careful discussion, the learned Sessions Judge came to the conclusion that the Karamala people were in possession of the disputed land and grew the crop on the same. Under these circumstances, I am of opinion that the lands were in the possession of the Karamala people who had grown the crops and that the Kanti people came to reap the paddy with the help of a large armed mob.

10. Appellants Linga Padhan and Upendra alias Rupa Swain were also convicted u/s 323, I. P. C. for having voluntarily caused the hurt to P. W 3 Gatia Behera. There is evidence that they caused the hurt and therefore their conviction u/s 323, I. P. C., is confirmed.

11. The learned Additional Sessions Judge, though he found all the appellants guilty of the offence u/s 304/149, I. P. C. sentenced appellants Benu Swain, Udayanath Swain and Upendra alias Rupa Swain to rigorous imprisonment for five years for that offence and the others for three years" rigorous imprisonment but stated no reasons in paragraph 21 of his judgment for imposing a higher sentence on these three appellants.

12. In the result, therefore, the convictions of Brundaban Swain, Bimba Kandi, Loka Bhoi alias Behera, Benu Swain. Udayanath Swain, Gandharba Swain, Upendra Swain alias Rupa Swain, Ambu Swain, Dinabandhu parida, Lakshman Padhan, Panchu Swain, Nabin Parida, Lingaraj alias Linga Padhan and Kanga Padhan under Sections 147 and 304/149, I. P. C. as also the convictions of Linga Padhan and Upendra alias Rupa Swain u/s 323, I. P. C. are confirmed. The sentences on the above appellants u/s 147, I. P. C. are also confirmed.

The sentences of five years" rigorous imprisonment passed on Benu Swain, Udayanath Swain and Upendra alias Rupa Swain u/s 304/149, I. P. C. are reduced to three years" rigorous imprisonment each. The sentences of three years" rigorous imprisonment passed on Brundaban Swain, Bimba Kandi, Loka Bhoi alias Behera, Gandharba Swain, Ambu Swain, Dinabandhu Parida, Lakshman Padhan, Panchu Swain, Nabin Parida, Lingaraj alias Linga Padhan and Kanga Padhan u/s 304/149, I. P. C. are also confirmed.

The sentences of six months" rigorous imprisonment passed on Linga Padhan and Upendra alias Rupa Swain u/s 323, I. P. C. are confirmed. The convictions and sentences passed on appellants Rama Behera, Gouranga Parida, Pravakar Das, Jahan Jena, Dhanial Behera, Puna alias Punia Behera, Kanga Behera and Balial Behera on all the charges are set aside; they are acquitted and they will be set at liberty forthwith.

Narasimham, C. J.

13. I agree.