

GUPTESWAR BEHERA

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v.

STATE OF ODISHA AND ANOTHER

(Criminal Appeal No. 1586 of 2018)

DECEMBER 14, 2018

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**[UDAY UMESH LALIT AND R. SUBHASH REDDY, JJ.]**

*Penal Code, 1860: ss. 148, 149 and 302 – Prosecution case that victim attacked by five persons with sticks, axe and knife – PW 1, brother of the victim and investigating officer reached the place of occurrence – Victim, named the assailants in his dying declarations made separately to PW 1 and the investigating officer – On basis of the evidence of PW 1 and the investigating officer, eye witnesses and witnesses who were present when the dying declaration was made by the deceased to PW1, conviction and sentence of the accused u/ss. 148 and 149 r/w s. 302 – Upheld by the High Court – On appeal, held: On consideration of the number of injuries suffered and their location and extent, the assertions made by both the medical professionals, that the deceased may not have survived for more than ten minutes after receiving the injuries is accepted – There is no contrary evidence in that behalf – Furthermore, PW 1 received the intimation that his brother was lying in a pool of blood whereafter he rushed to the place of occurrence, admittedly at a distance of 15 minutes by walk – This means the time was taken twice over – Person who had not seen the assault but informed PW1, had to cover the distance first and thereafter PW1 reached the place of occurrence – Investigating Officer, arrived at the scene of occurrence even later – Thus, it is doubtful whether the deceased had survived long enough for PW 1 and investigating officer to arrive at the scene of occurrence and then make separate statements to these witnesses – Thus, the appellant entitled to the benefit of doubt and is acquitted of all the charges leveled against him.*

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1586 of 2018.

From the Judgment and Order dated 29.08.2017 of the High Court of Orissa at Cuttack in Criminal Appeal No. 50 of 1999.

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A Sibo Sankar Mishra, Niranjan Sahu, Tejaswi Kumar Pradhan,  
Advvs. for the Appellant.

Som Raj Choudhury, Adv. for the Respondents.

The Judgment of the Court was delivered by

B **UDAY UMESH LALIT, J.**

1. This appeal by special leave challenges the judgment and order dated 29.08.2017 passed by the High Court of Orissa at Cuttack in Criminal Appeal No.50 of 1999.

C 2. In the present case, crime was registered at 9.00 pm on  
D 15.11.1995 vide FIR No.93 with Rayagada P.S. pursuant to reporting by  
Pradeep Kumar Patra, later examined as PW1. It was submitted that  
one Kumurika Nabina informed said PW1 Pradeep that his brother  
Raghumani was attacked and was lying by the side of a road. Said  
PW1 Pradeep immediately rushed to the place and found cut marks on  
E various parts of the body of said Raghumani who was lying in a pool of  
blood. It was further stated that when questioned about the attack,  
Raghumani replied that persons named Natabar Guru, Trinath Guru,  
Gupteswar Behera, Chandeswar Behera, Malikeswar Behera attacked  
him with sticks, axe and a large knife. According to the report, while  
such statement was being made by Raghumani, Trinath Nayak and  
Mandangi Ramamurty were present.

3. According to the prosecution, Police Officer Utkal Ranjan  
Das (later examined as PW 15) reached the place of occurrence at 8.15  
pm and removed said Raghumani to Gunpur Hospital at 8.45 pm in a  
police vehicle and while inside the vehicle, Raghumani regained  
F consciousness. It is further the case of the prosecution that while in the  
police vehicle Raghumani made a statement (Ext. 5) giving the names  
of the assailants. Raghumani was, however, dead when he was brought  
to the hospital.

4. After conducting due investigation, six accused, namely, Rama  
G Rao Patika, Chandeswar Behera, Gupteswar Behera, Malikeswar  
Behera, Natabara Guru and Trinath Guru were tried for having committed  
offences punishable under Sections 148, 149 read with Section 302 IPC  
in Sessions Case No.15 of 1997 in the Court of the Additional Sessions  
Judge, Rayagada. The prosecution relied upon the evidence of PW1  
Pradeep and PW15, the Investigating Officer in support of its case that  
H the deceased Raghumani had named the assailants in his dying

declarations. PW1 admitted in his cross-examination that the place of occurrence was at a distance of 15 minutes by walk. Apart from this, two other sets of witnesses were also relied on. PWs 4 and 5 were stated to be eye witnesses to the occurrence. Their statements under Section 161 Cr.P.C. were, however, recorded 4 to 5 days after the incident. The second set of witnesses were PWs 2, 8 and 9, who were not eye witnesses but were said to be present when the statement was made by the deceased to PW1 Pradeep.

5. The medical evidence was unfolded through PW13 Dr. Braja Kishore Das who had declared said Raghumani to be dead when he was brought to the hospital and PW 14 Dr. Bipin Chandra Padhy who conducted the post-mortem examination. According to PW14 Dr. Padhy there were fourteen injuries on the person of the deceased, out of which eleven were incised injuries. According to said PW 14, all the injuries were ante-mortem; that the death was due to haemorrhage and shock resulting from extensive injuries over the body of the deceased; that injury Nos.1 and 2 were sufficient in ordinary course of nature to cause death. The aforesaid doctors made following statements in their cross-examination:-

PW 13 Dr. Das stated, "... ..By receiving such injuries as reflected in P.M. report the patient must have lost sense within five minutes. The death might have been possible within ten minutes by receiving such injuries."

PW 14 Dr. Padhy stated, "... ..The injured can survive for few minutes by receiving such injuries. The patient cannot regain sense by loosing sense in this particular type of case" and "... ..The death might be instantaneous taking haemorrhage shock and neurogenic shock. The patient must have become unconscious within five minutes by receiving those injuries. The death my be possible within ten minutes."

6. The Sessions Court found that the prosecution was able to prove its case and that all six accused were guilty of the charges leveled against them. The Sessions Court thus convicted them under Section 148 IPC and also under Section 149 read with Section 302 IPC and sentenced them to undergo rigorous imprisonment for three years under the first count and imprisonment for life under the second.

7. All six convicted accused preferred Criminal Appeal No.50 of 1999 in the High Court challenging their conviction and sentence. During

A the pendency of appeal, original Accused Nos.4,5 and 6, namely Malikeswar Behera, Natabara Guru and Trinath Guru died and as such their appeal stood abated.

B 8. The High Court found that the evidence of so called eye-witnesses, namely, PWs 4 and 5 did not inspire confidence as their statements were recorded belatedly. The High Court relied upon the testimony of PWs 1 and 15 insofar as original accused Nos.2 and 3, namely, Chandeswar Behera and Gupteswar Behera were concerned and confirmed their conviction and sentence. The High Court, however, gave benefit of doubt to accused No.1, Ramarao Patika and acquitted him. The aforesaid judgment and order dated 29.08.2017 was challenged by Chandeswar Behera and Gupteswar Behera by filing special leave petition in this Court. Since Chandeswar Behera did not file appropriate proof of surrender, his challenge stood dismissed for non-prosecution vide order dated 14.09.2018 passed by learned Chamber Judge of this Court. We have been informed that said Chandeswar Behera has since then expired. However, no proof in that behalf has been filed.

C 9. In this matter, we are, thus, concerned with Gupteswar Behera. We have heard Mr. Sibho Sankar Mishra, learned Advocate in support of the appeal and Mr. Rom Raj Choudhury, learned Advocate for the State.

D 10. In the instant case the eye-witness account was rejected by the High Court and was found unworthy of reliance. We are, thus, left with two sets of evidence, the first concerning dying declarations made by the deceased separately to PWs 1 and 15 and the second set of evidence regarding PWs 2, 8 and 9, who were said to be present when the dying declaration was made by the deceased to PW1.

E 11. If the number of injuries suffered and their location and extent are considered, the assertions made by both the medical professionals, namely, PWs 13 and 14 that the deceased may not have survived for more than ten minutes after receiving the injuries appear to be quite correct. These assertions have come in their respective cross examinations and no re-examination was even sought by the prosecutor. There is, thus, no contrary evidence in that behalf. We, therefore, have to accept that the deceased must have survived only for a short duration after he received the injuries.

F 12. If we analyse the evidence, PW 1 received the intimation that his brother was lying in a pool of blood whereafter he rushed to the

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place of occurrence. The place of occurrence was admittedly at a distance of 15 minutes by walk. This means the time was taken twice over. The person who had not seen the assault but informed PW1, had to cover the distance first and thereafter PW1 reached the place of occurrence. The Investigating Officer, namely, PW 15 arrived at the scene of occurrence even later. It would, therefore, be extremely doubtful whether the deceased had survived long enough for PWs 1 and 15 to arrive at the scene of occurrence and then make separate statements to these witnesses.

13. The appellant is, therefore, entitled to the benefit of doubt. In the circumstances, this appeal is allowed. The judgments and orders passed by the Sessions Court and the High Court are set aside and the appellant is acquitted of all the charges leveled against him. He be set at liberty unless his custody is required in connection with any other case.

Nidhi Jain

Appeal allowed.