Orissa High Court
Brajabandhu Naik And Ors. vs State on 30 January, 1975
Equivalent citations: 1975 CriLJ 1933
Author: K Panda
Bench: K Panda
JUDGMENT K.B. Panda, J.

1. The three appellants have been convicted under Sections 326/34, I. P. C. and 307/34, I. P. C. and sentenced to undergo rigorous imprisonment for three years and five years on the two counts respectively the sentences being directed to run concurrently by Shri D. Panigrahi, Assistant Sessions Judge, Cuttack, on 22-4-1972.

The injured Rangadhar Das (P. W. 2) is a resident of village Chheda. On 11-5-1970, he was returning from a shandy at Champapur which is at a distance of about one and half mile from his village. Brajabandhu Naik, appellant No. 1 (accused No. 1) and Kailash Chandra Naik, appellant No. 2 (accused No. 2) are two brothers belonging to village Chheda Haripur while Nisakar Parida, appellant No. 3 (accused No. 3) belongs to village Kaintha. The place of occurrence is village Sothamunhan which is in between the village of injured P. W. 2 and village Champapur, but nearer to the latter. As it appears, Chheda and Champapur (in the absence of a spot map) are connected by a road that runs along a canal locally known as Nalabandha Rasta.

2. The prosecution case is that while P, W. 2 was returning from the shandy at about 4 p. m., the three appellants were keeping ambush near Gothamuhan school to attack him. Each was armed with a lathi and further Kailash was armed with a dagger which he kept tucked to his waist. They were also in possession of some corrosive acid. It is alleged that as the injured neared the school - which was close to the Nalabandha Rasta, appellant Nisakar came out and obstructed P. W. 2 from proceeding further. The other two appellants surrounded him from behind. At once appellant Nisakar dealt a lathi blow on the left arm over the scapula that caused a fracture on the same. Thereafter the other two appellants assaulted him indiscriminately with lathis over his hand and back. However, P. W. 2 escaped and ran towards village Gothamunhan to save his life. But before he could reach the village he was overtaken at the outskirts and attacked there. He was made to lie flat, Nisakar sitting upon his chest. Appellant Kailash caught hold of his legs. Kailash then directed Braja to bring acid. The injured attempted to cover up his face with his hands to save it from acid being poured over it. As he persisted, appellant Kailash is said to have given a knife blow on his right arm. On receipt of the injury, P. W. 2 took off his hands and appellant Braja poured acid on his face and eyes. Thereafter the three appellants are said to have dragged him to the Nala and abandoned him there. The case, as put up, is that P. W. 4 who was easing himself nearby immediately arrived at the spot and so the appellants took to their heels. Soon after P. W. 5 also arrived and many people gathered there including the Grama-rakhi. The injured was brought to Chhatia and therefrom he was brought to the Sriram Chandra Bhanj Medical College, Cuttack in a jeep. The injured was admitted into a Casualty Ward on 11-5-1970. His condition was very precarious hovering between life and death. An information was thus sent from the Casualty Ward to Mangalabag Police Station which in due course was despatched to Mahanga Police Station under which the place of occurrence comes. But unfortunately, the same has not been traced out. However, in the instant case, a report

has been lodged by one Radhanath Swain, P. W. 1 on 22-6-1970 at Mahanga P. S. (Ext. 1) leading to the investigation of the case arid submission of charge-sheet against the three appellants ending in their conviction and sentence as aforesaid.

3. The defence is a complete denial and their plea is that there is long-standing enmity between the appellants and the injured. Further the injured has got a host of other enemies also. Consequent upon purchase of certain lands from one Sabitri there is litigation between the appellants on one side and P. Ws. 2 and 5 on the other. It is because of this bitter hostility that they have been hauled up on trumped up charges at the instance of P. Ws. 2 and 5.

4. There are 12 witnesses for the prosecution and two for the defence. Out of the prosecution witnesses, the material witnesses are P. W. 2, the injured himself and P. Ws. 4 and 5 who are said to be eyewitnesses to the occurrence. P. W. 1 has merely lodged the First information report at the instance of the injured. P. W. 3 is the wife of the injured who simply attended to her husband in the hospital, P. W. 6 is the Investigating Officer who received Ext. 1, the F. I. R. and P. Ws. 7 to 11 are the doctors who treated the injured at different stages while he was under treatment in the S. C. B. Medical College and finally discharged on 6-10-1970 a disfigured, crippled blind-man. P. W. 12 is the Assistant Sub-Inspector of Police attached to Mangalabag P. S. who proves the entry in Ext. 4 dated 14-5-1970 indicating that the Casualty memo bearing No. 503 dated 11-5-1970 had been despatched to Mahanga P. S.

5. The learned lower court basing on the evidence of the injured and the two eyewitnesses, namely P. Ws. 4 and 5 together with the medical evidence has convicted the appellants.

6. Mr. Dhal, the learned Counsel for the appellants endeavoured to assail the judgment on the following grounds:

(1) That there has been undue delay in lodging the F. I. R.;

(2) That the prosecution is guilty of withholding material witnesses;

(3) That the intrinsic value of the evidence of P. Ws. 2, 4 and 5 is almost nil;

(4) That there is great discripancy in between the statements of P. Ws. 2, 4 and 5; and (5) That the entire prosecution evidence is inherently incredible.

7. Certain facts in the instance case go unchallenged. That the injured and P. W. 5 on the one hand and the appellants on the other were at logger-heads with each other is evident. There is evidence that there are series of litigations inter se. It is also not challenged that the injured in fact had been attacked mercilessly on the alleged day and had been found deserted near a Nala by the side of village Gothamuhan wherefrom he was brought to Chhatia and then to S. C. B. Medical College for treatment. He was an in-patient for nearly six months during which he received various treatment in different departments. It is in evidence that the final place of assault, that is, the outskirts of village Gothamuhan is close to a bustee inhabitated by about 300 families. Ext. 1 which has been treated as

F. I. R. in this case shows that the injured was returning from the market with a co-villager named Sukadeb Das who has not been examined. The prosecution case is that as soon as the three appellants deserted the injured near the Nala. P. Ws. 4 and 5 came up and thereafter several people gathered there including the Grama-rakhi, but none of them has been examined.

8. In this background, the sole point for consideration is if the evidence of P. Ws. 2, 4 and 5 can be accepted to justify the conviction.

9. So far as the question of delay in lodging the F. I, R. is concerned, though much argument was advanced over it, yet I do not consider it worthwhile for in fact. Ext. 1 is not the F. I. R. in this case. The first information over the occurrence is the Casualty memo that was sent to Mangalabag P. S. Unfortunately for the prosecution it has not been located. Thus the F. I. R. in this case is not forthcoming. Ext. 1 which has been treated as F. I. R. has been lodged long after the occurrence at Mahanga P. S. by P. W. I and it is at the instance of the injured who was in a process of recovery then. It was contended on behalf of the State that in the absence of any adult male member in the family of P. W. 2, the injured, to lodge the F. I. R. no adverse inference need be drawn for the delay. That question in the context of the present facts, as would be discussed hereafter, would appear redundant. The F. I. R. is no doubt a very important piece of document in a criminal case, but all the same it is not a substantive piece of evidence. It can only be used to corroborate or contradict the author thereof. However, when this information is recorded after gathering all details, it assumes great importance. Further it assumes greater importance if recorded soon after the occurrence without lapse of time and opportunity to embellish the same or before the informant's memory fades. Undue or unreasonable delay in lodging the F. I. R. therefore legitimately casts a suspicion which puts the court on guard to look for a plausible motive or explanation for the delay so as to consider the totality of its effect on the truth or otherwise of the prosecution case. The consensus of judicial pronouncement is that no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the policy the question of reasonable time being a matter for determination by the court in each case, Mere delay in lodging the F. I. R. with the police is, therefore, not necessarily, a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration varying from facts and circumstances of a given case. In the instant case, it is an admitted fact that information of this occurrence had been given to Mangalabag P. S. through the casualty memo. Again, there was no adult male member in the family of the injured to take independent action in the matter. These are weighty considerations no doubt.

Unfortunately the prosecution case, as unfolded at the time of trial, is not in consonance with Ext. 1 which makes mention of the fact that it was lodged at the instance of the injured himself. Consequently even if Ext. 1 is taken to be the F. I. R. and the delay is overlooked, yet that does not improve the prosecution case.

10. According to Ext. 1 one Sukadeb Das, a co-villager was accompanying the injured while he was attacked. Thus he is a very material witness for the prosecution. But no explanation is there as to why he was not examined as a P. W. Besides it is in evidence that the Gramarakhi of Gothamuhari and many of the villagers had gathered at the spot soon after the occurrence before the injured was

removed via Chhatia to the medical college. But none of them has been examined. At least their evidence would have shown that really the occurrence was at 4 1/2 p. m. and that being the month of May, it was in broad day-light, furthermore if P. Ws. 4 and 5 had seen the appellants throwing the injured in that condition in the Nala they would have necessarily implicated the appellants in the crime, which in ordinary course, must have created a flutter in the locality. But, as it seems, nothing of the sort happened and everything was normal. This is only an indicative of the fact that probably the occurrence did not take place as put up by the prosecution overtly but covertly.

11. The evidence of P. W. 4 is that while he was answering call of nature near the Nalabandha close to his house, he found appellants Braja and Kailas chasing P. W. 2 on the side of the road. Thereafter he found appellants Kailas and Braja dragging P. W. 2 to Nalabandha. At this, he rushed towards the place of occurrence and seeing him, the appellant threw P. W. 2 in the Nala and decamped. He found several injuries including injuries caused by acid on the person of P. W. 2. At that time Bhagirakhi, P. W. 5 also arrived there. The Gramarahi also came to the spot. Thereafter he left the place on his own business. What is significant in his evidence is that he categorically excludes the presence of appellant Niskar there. Further according to him P. W. 5 appeared on hearing the hulla. He also states that the injured, narrated the story of assault to him. From this it flows that the injured was in a state of health when he had not become speechless or was unconscious and that appellant Nisakar was not one of the assailants. Besides, P. W. 4 has not seen the developments of attack on P. W. 2 which was only a matter of moments and the visibility was not at all poor at that time. The evidence of this witness does not fit in with the general trend of the case particularly as deposed to by the injured and P. W. 5. P. W. 2, the injured tells his own tale that he was first attacked on the Nalabandha by the three appellants. He managed to escape but was again overtaken at the outskirts of the village Gothamuhan where acid was poured on his eyes when he had been made flat on the ground with Nisakar sitting on his chest. His evidence is also not very convincing. He has stated that he did not raise any alarm while he was attacked or while he was pursued, not even when he was being further assaulted near the outskirts of the village. If really the occurrence took place at about 4 1/2 p. m. it is difficult to accept the theory that none but P. Ws. 4 and 5 could see it and further P. W. 4 only a part of it. Besides the conduct of P. W. 2 in not raising an alarm while there was a murderous attack on him is something very hard to believe. In this context, the evidence of P. W. 5 is that while he was returning from the market, he saw the appellants chasing P. W. 2. After P. W. 2 was caught, he fell on the ground with face upwards. Thereafter appellant Nisakar sat over him and appellant Kailas then directed appellant Braja to bring acid. Kailas gave a knife blow on the right hand of P. W. 2, Brajabandhu brought acid in a bottle and a glass. He put acid in the glass and poured the same on the face of P. W. 2. Thereafter Kailash and Braja dragged P. W. 2 towards Gothamuhan school sometimes holding his legs; sometimes his pigtail and sometimes his hands and finally left him near the Nala. While he protested, the accused persons threatened him and so he receded. According to him, after him P. W. 4 appeared there and he lifted P. W. 2, which is contrary to the evidence of P. W. 4. His further evidence is that the Chaukidar Kshetrabasi brought a rickshaw and then himself and one Kailash Swain brought P. W. 2 to Chhatia whereafter he was brought to the hospital in a jeep. As already indicated. P. W. 5 is very much interested in the affairs of the injured. His evidence hardly agrees with Ext. 1. Besides, if really two people, namely, P. Ws. 4 and 5 were there while the injured was being attacked, it is ordinary human conduct that they would protest or raise an alram so that the purpose of the culprits is frustrated. But as is clear they allowed

the injured to be attacked at two phases, then dragged and abandoned in the Nala. A little alarm from them would have brought several people from the bustee nearby and the assailants would have been caught red-handed. But nothing of the sort did happen. All this indicate that the prosecution case is inherently incredible and is not in consonance with normal conduct. In this context, another aspect need be stated that if the injured had not lost his senses or speech there might have been somebody who would have carried the news to his wife and family members. But absence of any flutter on account of this incident indicates that the attack was abrupt, concealed and unnoticed by any. A more plausible construction to the incident could be given in that the injured has been attacked after night fall and the first attack had become so violent that either he had become speechless, unconscious or at least stunned which had rendered him ineffective to offer any resistance. Thereafter further assault with other weapons must have followed. The main injuries are a fracture of the shaft of left humerus; a penetrating injury on the outer aspect of the left arm 3" below the shoulder joint; a penetrating injury on the outer aspect of left arm 4" below the left shoulder; a lacerated injury on the right parietal region; and burn all over face and burn of eyes. Ext. 3 is the entry made on that day by the doctor. P. W. 9 at 8.30 p. m. Though there is no such clear evidence, yet from the place of occurrence to Chattia and then by a jeep to the S. C. B. Medical College would lake in the maximum 45 minutes. From this it appears that the incident must have taken place sometime after 7 p. m. Further the prosecution case that he was dragged from the second phase of assault to the Nala is not borne out by medical evidence inasmuch as there are no abrasions or contusions on any part of the body. In this background it is unnecessary to comment on the evidence of P. W. 2, the injured.

12. From the above analysis, it would be clear that the prosecution case that the occurrence took place at 4 1/2 p. m. in two phases does not inspire confidence. Further the presence of P. Ws. 4 and 5 at that time also can hardly be believed. Merely because the injured has been a victim of an inhuman attack would not justify the presumption that the three appellants who are his arch enemies must have been the culprits. Independent corroboration or circumstantial evidence can alone fasten the guilt on the appellants. The weight to be- attached to the testimony of a witness depends in a large measure upon various situations. If on the face of it, the evidence is in consonance with probability and consistent with ordinary human conduct that fits in with the other evidence in the case, there is no reason why to discard such evidence. But if it is otherwise and the evidence is such that it is contrary to natural human conduct and thus artificial, however, vehement or voluminous it might be, hardly can it be acceptable failing as it does the acid test. In the instant case, the evidence as already discussed is at such variance with each other that no prudent man can accept them at their face value.

In fine, I would hold that though P. W. 2 has been a victim of a dastardly attack in consequence of which he has suffered a lot and has become blind of both the eyes, yet it is unfortunate case which does not appear to have been proved as it ought to have been. Maybe that the appellants are the assailants. But criminal law permits of no such presumption. The evidence must be such that the Court must come to finding that the appellants must he the assailants. There is a wide gap between 'may' and 'must' and unless that gap is bridged courts cannot jump at a conclusion of 'must' from 'may' basing on presumptions on shaky evidence inconsistent with ordinary human conduct.

13. In the result, therefore, the appeal has to be allowed and the conviction and sentences set aside. Before closing the judgment I may point out that the learned lower Court has obviously committed an error in convicting the appellants under Section 326/34 and Section 307/34, Indian Penal Code. There is only one injured and the injuries had been inflicted in course of the same transaction. Thus, the simpler offence gets merged in the graver one. In this case, the charge should have been only under Section 307/34, I. P. C. for that covers Section 326/34, I. P. C. and there should not have been an independent charge much less a conviction under both the counts.

14. The appeal is allowed, the conviction and sentence of the appellants are set aside, and they are released from their bail bonds.