Supreme Court of India
Balakrushna Swain vs State Of Orissa on 9 February, 1971
Equivalent citations: AIR 1971 SC 804, 1971 CriLJ 670, (1971) 3 SCC 192
Author: P J Reddy
Bench: S Sikri, P J Reddy, I Dua
JUDGMENT P. Jaganmohan Reddy, J.

1. The Appellant Balakrushna Swain was convicted of an offence of murder under Section 302 and awarded death sentence by the Additional Sessions Judge, Cuttack, subject to confirmation by the High Court. He was further convicted of an offence under Section 148 and sentenced to four months rigorous imprisonment. Two other accused namely Laxmidhar Swain and Pranakrushna Swain were convicted under Sections 148 and 323 Indian Penal Code and both sentenced in respect of Section 148 Indian Penal Code to four months rigorous imprisonment. Further though both of them were convicted under Section 323 the former was sentenced to a fine of Rs. 50/-while the latter to Rs. 200/-in default to undergo respectively one month and four months rigorous imprisonment. Eight other accused who were tried along with them were acquitted. The Appellant and the other two accused appealed to the High Court which while confirming the conviction awarded life sentence instead of death penalty on the Appellant and maintained the sentences passed on the other two convicted accused. The Appellant has come up before us in Appeal by special leave.

2. The deceased Bhramar Swain had after the death of his wife kept Sundari sister of "Chakradhar Swain P.W. 5 as his Mistress. After she had lived with him for sometime it was said that there arose a faction in the village in which the Appellant supported the claim of Sundari that she should be given the status of a wife by the deceased. Sundari's brother P.W. 5 and their maternal uncle Baishnab were also supporting the deceased to make provision for and accept Sundari as his wife. In respect of this dispute there was some strained feeling between Sundari's brother Chakradhar and the deceased. Apart from this there were also some land disputes arising out of purchases by the deceased from one Fakir Swain father of P.W. 9 and P.W, 10 his homestead and house standing in front of his house. The Appellant however raised an objection that he and the deceased jointly purchased this property but the deceased claimed that he alone had purchased it. It is also said there was a disagreement with some of the villagers of Nachhipura because of which the deceased lived for a year or two at village Pokhariapada in the house of his relation Daitari Naik. The deceased came back to Nachhipura a few days before the occurrence namely on 6-1-66. P.W. 5 was helping the deceased in building a part of his house and for this purpose he brought a rafter from the house which the deceased had purchased from Fakir Swain. While this rafter was being fixed for reconstructing the house of the deceased the Appellant came there, started a quarrel and after some exchange of words the Appellant snatched away the wooden rafter and carried it away. On the same evening it is said that a meeting in a lane near the house of Anand Swain was held attended to by 11 accused originally charged before the Sessions Judge, at which there was a talk that the deceased had come to the village and that he should be killed. That night at about 9 p. m. the deceased after taking his night meal wanted to go to sleep in the house of Uttam P.W. 2. As he was apprehending danger he was accompanied by P.W. 2 and P.W. 5 and on the way the deceased and P.W. 5 both went to ease themselves. After easing and washing themselves while they were returning and proceeding towards the house of P.W. 2 the Appellant and the accused Laxmidhar Swain suddenly

appeared from a hay stacked nearby with Lathis or some like weapons. Laxmidhar Swain at once gave a stroke on the head of Chakradhar P.W. 5 while the Appellant gave a stroke on the head of the deceased who fell down. Uttam P.W. 2 who was walking in front, on listening the cry of P.W. 5 came back when Pranakrushna Swain gave him a stroke on his back. After the deceased had fallen down, it is alleged that the Appellant gave a Katuri blow on him, as a result of which the deceased died. All the accused then ran away. The villagers who had heard the disturbance came there and found that P.W. 5 was also having severe bleeding injuries. The dead body of the deceased was then placed on a bamboo platform erected at the spot. P.W. 1 who is deceased's sister's son and who is said to be adopted by the deceased went to the Police Station at Ersama which is situated at about 7 miles away from the Village and gave the F.I.R. at 6 a. m. on 7-1-66 in which he said:

My maternal uncle after easing himself went to clean himself in the common pond of Gurubari Swain, Nisakar Swain and others on the southern side of the village and came out. Balakrushna Swain, Pranakrushna Swain and Laxmidhar Swain came out at once from the side of that tank with Lathis or some like weapon as was visible. Laxmidhar Swain at once gave a stroke on the head of Chakradhar Swain. Balakrushna Swain gave a stroke on the head of my maternal uncle Bhramar. I could not clearly see, in the moonlight, the weapon they held. My maternal uncle at once fell down just after the stroke on him. When Uttam Charan Swain came there hearing the cry of Chakradhar Swain, Panu Swain gave two strokes on his back Thereafter the F.I.R. records P.W. 1 as stating that 20 or 25 people who were standing there said 'kill him catch him'. He further says he was able to recognise by the voice seven accused whose names he gave. Apart from these seven persons he had also named five others who were standing there holding a lathi which he says was visible to him in the moonlight. The Investigating Officer Banambar Ray P.W. 19 started the investigation, went to the spot, held an inquest and collected blood stained mud M. O. XII from the paddy field where the incident is said to have taken place. He also went to the house of the deceased and searched for blood stained earth but did not find it. P.W. 19 says while he was going to the place of incident, he met P.W. 5 who was being carried in a basket, so he gave a requisition Ex. 11 to the Medical Officer, Ersama for examination and treatment. The body of the deceased was also sent on 8-1-66 to Cuttack for post-mortem examination, as carriers could not be arranged earlier. On 7-1-66 he arrested the Appellant and two others and the remaining accused were arrested on different dates. A wooden lathi M. O. IV was recovered from the house of the Appellant on 8-1-66 and M. O. V and VI, the blood stained Lungi and Ganji (Vest) of P.W. 5 was seized on 15-1-66. He then sent the blood stained articles to the chemical examiner. These articles bore a few brown stains of blood with respect to which the seriologist reported that the result of the test on the Ganji was inconclusive while the blood on the Lungi and blood stained earth had disintegrated and therefore it could not be ascertained that what was found on these articles was human blood.

3. The case of the defence is that the accused did not commit the offence and said that due to previous enmity and party faction they have been implicated. The further case of the defence was that on the evening of the incident at about 6 p. m. on 6-1-66 during the course of a quarrel between the deceased on the one side and Chakradhar P.W. 5 and the Appellant on the other in the house of the deceased about a wooden pole brought from the house of the deceased which he had purchased and which the Appellant claimed belonged jointly to him and the deceased; a wooden rafter from the roof fell on the deceased as also on P.W. 5 Chakradhar and injured them. As a result of the injury

thus caused, the deceased died. Thereafter the dead body was removed to the paddy field and placed on a bamboo platform erected for this purpose.

4. The Sessions Judge as well as the High Court rejected this defence relying on the evidence of P.W. 1 who had stated that though a wooden rafter had fallen down it did not cause any injury either to the deceased or Chakradhar P.W. 5. The eye witnesses to this incident are P.W. 1, nephew of the deceased, P.W. 2 Uttam Swain and P.W. 5 Chakradhar, the brother of Sundari. Of these P.W. 2 was declared hostile. The High Court observed that of these eye witnesses the evidence of P.W. 1 and P.W. 2 is not reliable but it believed the evidence of P.W. 5 and confirmed the conviction of the Appellant.

5. It has been contended before us that the evidence of P.W. 5 is also not reliable, in that he is inimically disposed to the deceased and was an interested witness inasmuch as he was the brother of Sundari whose side he was taking to obtain for her the status of a wife. In fact according to the submission of the learned Advocate the Appellant had not killed the deceased but the rafter had fallen while they were all quarrelling in the house of the deceased injuring the deceased and P.W. 5 as a result of which injury the deceased died. Thereafter there was a conference between P.W. 1, P.W. 5 and others all night in that house as to what should be done with the dead body and ultimately it was decided to remove the dead body to the paddy field put it on a bamboo platform which was to be built for this purpose and implicate the accused. Accordingly P.W. 1 was sent to give a report. As we said earlier the High Court did not rely on the evidence of P.W. 1 and P.W. 2 as in its view they could not have witnessed the occurrence. It was also observed that P.W. 1 was an interested witness being the sister's son of the deceased and also that he could not have seen the actual murder and assault as on his own showing he was proceeding to P.W. 2's house when the deceased who had gone to ease himself was assaulted while he was on his way to join hint, P.W. 2's evidence was not relied on although he is stated to have been assaulted by (the accused) the Appellant, Pranakrushna Swain because there was no mark of injury on his person nor was he medically examined P.W. 19, the Investigating Officer admitted that although he had seen P.W. 2 in the Village from January 7 to January 13, 1966 he found no marks of assault on him nor did P.W. 2 consent for being sent to medical examination. As we have pointed out earlier P.W. 2 was also declared hostile and the prosecution allowed to cross-examine, him. In these circumstances their evidence was rightly not relied upon to support the prosecution case as to who and in what circumstances the occurrence took place. The only other evidence is that of P.W. 5 who was not examined till the 15th January i.e. till after 10 or 11 days of the incident. There was no reason why P.W. 19 could not have examined him because on his own showing P.W. 19 had met P.W. 5 while he was going to the Village when P.W. 5 was being taken to the Hospital. No doubt P.W. 19 says that P.W. 5 was not in a condition, for him, to record his statement but apart from his saying so he does not tell us in what condition P.W. 5 was. P.W. 5 went to the Ersama Primary Health center where Dr. Kanungo P.W. 22 who was then the Medical Officer In-charge had examined him on receiving a requisition Ex. 11 from the Police. According to the Doctor, P.W. 5 was under his treatment from 7-1-1966 to 12-1-1966. On examination he found four wounds:

1) One contused wound with, blood clot over the injury over the surrounding tissues, extending to face. The margins were rough and regular.

The size of injury was 11/2" x 1/4". As the injury was bleeding I could not measure its depth, but the injury had a depth. The injury was on the left side head.

2) One contused wound with blood clot, with haematoma of mucous surface on right side upper lip. The size of the injury was 1/4" x 1/4" The colour of the injury was black.

3) One bruise with swelling 3" x 11/2" on the left fore-arm dorsal aspect-close to elbow joint.

4) One bruise with swelling 2" x 1" on left side back over scapula.

In cross-examination the Doctor admitted that P.W. 5 was not treated as an emergency patient and since there were only 2 beds for emergency cases he did not admit him as Indoor patient and that P.W. 5 was making his own arrangement for his stay and attending the Primary Health center daily for his treatment. P.W. 5 however states that he was admitted as an indoor patient for 12 days which cannot be accepted in view of the Doctor's evidence. While noting this divergence in the evidence of P.W. 19 and P.W. 5 the High Court seems to accept an explanation given by the Public Prosecutor that because P.W. 5 was being seen by the P.W. 19 everyday, P.W. 5 may have made arrangements for his stay in the Hospital premises but this is no-one's case. P.W. 19 says that P.W. 5 was coming everyday for treatment but there is no evidence as to whether P.W. 5 was staying in the Hospital premises or elsewhere, as such we find no justification in accepting the statement of P.W. 5 which in our view is a falsehood. In answer to a question by the Additional Sessions Judge P.W. 22 says he found a laceration in injury No. 1 although he did not mention the word laceration. He however admitted that in a contused wound there is always a laceration but the margins are regular. In further cross examination the Doctor said that since the margins of injury were regular he mentioned it as a contused wound instead of a lacerated wound and noted accordingly in his report Ex. 11/1. He further states that by a lathi no incised wound can be caused. Incised wounds have always some depth. In injury No. 1 also he found a depth but says that in contused wound also there can be some depth. This evidence clearly shows that P.W. 5 was not certainly, in a condition where his statement could not have been taken. The statement by P.W. 5 that he was an indoor patient was an attempt to support P.W. 19's explanation for not recording his statement earlier. That there was no valid reason for P.W. 19 not to record his statement earlier when he met P.W. 5 on the 7th itself is clear from his admissions that after he received the injuries he did not lose his senses and in fact sat at the place where the incident took place for two ghadis. The High Court itself has commented on the lapses in investigation and the delay in examination of P.W. 5 who was a material witness; none-the-less it merely says "even so the evidence of Chakradhar P.W. 5 cannot be rejected on account of his delayed examination by the investigating officer. In our opinion the delayed examination does not affect the veracity of Chakradhar Swain". Why when a similar statement made by P.W. 1 regarding the occurrence is not relied on, the statement of P.W. 5 should be relied particularly when such a long delay in his not being examined earlier is not explained. The High Court said that the Doctor P.W. 22 had not mentioned that there was a bleeding injury on the right side fore-head in certificate Ex. 11/1 although such an injury was mentioned in the Police requisition Ex. 11 of 7-1-66. This comment we may observe is not warranted because the Doctor was not cross-examined in respect of these discrepancies. The mere fact that P.W. 19 had given a requisition to examine P.W. 5 for an injury on the right side does not necessarily establish that the injury was on

the right side. A good deal of cross-examination was directed in respect of the Report Ex. 11/2 given by him but nowhere was he asked as to whether there was an injury on the left side and why he had omitted to mention it. It is no one's case that there were two wounds one on the left side and the other on the right side. What P.W. 5 says is that Laxmidhar gave him four lathi blows as a result of which he had bleeding injury on the nostril and on the left side of head and he fell down because of this assault. The Doctor however said that this injury was on the right side. While there could have been a mistake whether the injury was on the right side as spoken by the Doctor or on the left side as spoken by the injured, there could be no mistake as to whether there could be one wound or two wounds because the witness does not speak about his having two wounds one on the left side and the other on the right side. Further P.W. 5 says that the Doctor gave him a discharge slip on the day he was discharged but later took it back after consultation with the Thana Babu and thereafter he did not give him any discharge slip. P.W. 5's blood stained clothes were also seized on the 15th about 10 days after the incident. The witness wants us to believe that for these 10 days he was wearing these blood stained clothes without removing them.

6. In view of all these Incongruities we think there is justification in the comment of the learned Advocate for the accused that the delayed examination of P.W. 5 by P.W. 19 would give an opportunity to P.W. 5 to concoct a different version than what actually took place.

7. On the question of how the deceased received the fatal injury also there is material contradiction in the evidence of P.W. 5, Dr. N.K. Mohanty P.W. 16 who conducted the postmortem, says that he found three external injuries which are:

1) Incised looking lacerated wound on scalp 3" x 3/4" x bone deep extending vertically from a point 2 1/2 " above the root of the nose, on the frontal bone and right parietal bone.

2) Ecchymosis on left fore-head extending over an area of 2" x 2".

3) Ecchymosis of left upper eye lid.

On dissection a linear fracture of the skull 7" long extending in the frontal bone from a point 3" above the root of the nose which after running 2" turns to left vertically downwards on the left temporal bone. There was also a crack fracture 4" long running through the pituitary fossa extending to left along the front margin of the left petrous temporal bone. The injury to the brain in his opinion was the cause of death and that a blunt weapon must have caused the head injury. He was asked in examination-in-chief whether the blunt side of a Katuri might also cause such an injury and his answer was that it could be so caused but in cross-examination he admitted that the head injury on the deceased was not an injury caused by a sharp cutting weapon by using its sharp edge. The evidence of P.W. 5 is that the Appellant gave a lathi blow on the waist of the deceased and after he fell down on the ground the Appellant gave a blow with the Katuri on his head. He further says he could see clearly the Katuri and that the Katuri blow on the deceased was given when P.W. 5 was still standing. According to this witness there was only one blow with a lathi and that too on the waist, if so this evidence is inconsistent with the Doctor's finding that the head injury must have been caused by a blunt weapon like a lathi. P.W. 5 however had stated in the Committal Court that

one blow was given with lathi on the head and the other blow was on the waist and that too with a lathi. When confronted with his statement in the Committal Court that the Appellant had given a lathi blow on the head of the deceased, he denied that he made such a statement. When he was asked that in the Committal Court he had not said the Appellant had given a Katuri blow on the head of the deceased he said it is not a fact that he did not speak of a Katuri blow on the deceased. It was also put to him that he had not stated before the Police that a Katuri blow was given by the accused to the deceased but does not remember whether he stated before the police whether only one blow was given to the deceased. While the High Court noted this contradiction it appeared to it that the evidence of the Doctor that a blunt weapon must have caused the injury to the deceased was consistent with the statement of P.W. 5 in the Committal Court which statement was held to be substantive evidence since it was brought on record after due confrontation under Section 145 of the Evidence Act. The High Court further observed:

In fact, even at the trial before the learned Additional Sessions Judge, Chakradhar (P.W. 5) in course of cross-examination ultimately said that he saw only one lathi blow given by the accused Appellant Balakrushna to the deceased. It is not improbable that there was some confusion not unnatural nor unlikely in a situation in which the three assailants were assaulting three victims at night in the paddy field in the manner they were doing - by reason of which Chakradhar (P.W. 5) at the Sessions trial mentioned Katuri also in addition to Lathi.

On the other hand the Trial Judge while referring to the contradiction in the Committal Court with the statement made by the Appellant before him observed that the outstanding fact is that the Appellant had both a lathi and a Katuri in his hand which fact was corroborated by P.W. 11 when he says he saw the Appellant running and holding in one hand a lathi and in the other a Katuri and since P.W. 16 the Doctor says the injury on the deceased could be caused by a lathi blow and also by the blunt edge of the Katuri he thought it was immaterial "whether some of the eye witnesses speak of a lathi blow being the cause of the head injury of Bhramar and Others speak of a blow given with a Katuri being the cause of the injury. Thus from the above evidence of the occurrence witnesses, P. Ws. 1, 2 and 5 corroborated by the evidence of P.W. 11 in a substantial degree, the irresistible conclusion must be that the accused Balakrishna caused the mortal head injury of the deceased by giving a severe blow with either a lathi or the blunt edge of a katuri and thus, the death of Bhramar was caused instantaneously"

8. The above passage would show that the Sessions Judge was trying to reconcile the contradictions in the two statements of P.W. 5 by holding that the accused had both a Katuri and a lathi in his hands. This is so because P.W. 1 also says that the Appellant had a Katuri and a lathi when he attacked the deceased. It is in our view difficult to comprehend how he could carry a lathi in one hand and a Katuri in the other and still be free to give a Lathi or Katuri blow on the head of the deceased with such force and intensity as would cause the kind of injury which caused the death of the deceased. Be that as it may, the High Court as we have pointed out earlier relied on the statement of P.W. 5 made in the Committal Court in holding that the blow was given by a lathi. We however find that the Sessions Judge brought the deposition of P.W. 5 in the Committal Court on record under Section 288 of the Criminal Procedure Code not at the time when P.W. 5 was being examined but after the evidence for the prosecution was closed and after the statement of all the

accused were recorded. The next day i. e., 8-12-66 it would appear the defence counsel tendered the deposition of P.W. 2 in the Committal Court but the Sessions Judge not only admitted that evidence but also the evidence of P.W. 5 in the Committal Court under Section 288, Criminal Procedure Code. Whether this is the proper procedure need not now concern us but even so the High Court failed to note that in the Committal Court the witness had not said that the Appellant was carrying a Katuri also, but none-the-less in the Sessions Court he insists that he had said so. Similarly he denied that he stated in the Committal Court that the blow on the head was given by a lathi. In any case if the statement in the Committal Court is to be taken the first blow which was given by the Appellant was with a stick and was on the head and the second blow was on the waist. In the Sessions Court however, he stated that the first blow with a lathi was on the waist and after the deceased fell down it was only then the fatal blow was given on the head. These contradictions ordinarily would by themselves not have much significance but where as in this case the witness for no justifiable reasons was not examined for nearly 10 days and he is found to be telling falsehoods on material aspects of the case it becomes difficult to place any reliance on such testimony particularly when he tries to conform to the evidence of P.W. 1 in the Sessions Court that the first blow was given by a lathi on the waist and the second by a Katuri on the head. When this very statement of P.W. 1 has not been relied on by the High Court there is no reason for taking a part of his statement from the Sessions Court and a part from the Committal Court to piece it as a whole for a narration as to how the deceased was killed. There are also other circumstances in this case which though may not support the defence version of how the incident took place none-the-less indicate that there have been confabulations and consultations between P.W. 5 and the other witnesses immediately after the death of the deceased. The fact that the dead body was put on a bamboo platform which was constructed for that purpose in the paddy fields would indicate that the incident may not have taken place as spoken to by the witnesses. The evidence of P.W. 1 shows that on the date of the occurrence he, Mahani, Uttam, Fakir, Nisakar had discussions for two hours in the house of Bharmar. The question naturally arises as to what they were discussing. Were they discussing as suggested by the learned Advocate for the Appellant as to what story must be told about the death of the deceased? This admission merely indicates that the version in first information was not spontaneous. P.W. 2 says that the Appellant dragged the deceased and Laxmidhar Swain caught hold of the neck of the deceased and threw him on the floor and then the Appellant assaulted him with a Katuri on the head. This caused bleeding injury and death on the spot The witness further says in cross-examination that there was a quarrel between the deceased and his brother-in-law (Sala) on the date of occurrence. This quarrel between Sala and Behnoi took place two ghadis before sunset. He also said that the deceased never used to stay in his - the witness's house but on the day of the occurrence he was going to stay in his house. On the evidence of P.W. 1 15 days before the incident, he, the deceased's mother and younger son came to live in the deceased's house at Nachhipura. When the deceased found that his house was broken down, he started to build it, on the day of the incident when there was a verbal wrangle and physical struggle between the deceased on one side and the Appellant and P.W. 5 on the other in respect of a rafter brought by the deceased from the house purchased from Fakir Swain In fact he admits at this time a wooden rafter fell down but it did not cause any injury to the deceased and P.W. 5. The witness also speaks of enmity between P.W. 5 and the deceased because P.W. 5 was supporting Sundari. There seems to have been a Criminal Case filed by the deceased against Sundari. P.W. 5 and the Appellant sometime before the incident and according to the witness on the day of the incident P.W. 5 and the Appellant were on one side when

the physical struggle as spoken to by P.W. 1 took place against the deceased. Relying on this evidence the learned Advocate for the Appellant contends that on the day of the incident there was a quarrel and a physical struggle about the rafter brought from the house purchased by deceased from Fakir Swain, in which P.W. 5 and the Appellant were on one side and the deceased on the other. In this physical struggle it is contended that blows may have been exchanged between P.W. 5 on the one hand and the deceased on the other in which P.W. 5 caused a fatal injury to the deceased, while deceased was responsible for injuries on P.W. 5. Thereafter it is alleged that P.W. 5 with the help of P.W. 1 and others cooked up and concocted the story against the Appellant and others as they were also inimical and would have a motive for killing the deceased. Whether there is justification for this contention which is merely based on the testimony of P.W. 1 that there was quarrel and physical struggle between the deceased on one side and P.W. 5 and the Appellant on the other, there are several features in this case to which we have referred which will certainly create a doubt as to the veracity of P.W. 5's statement. If P.W. 1a's testimony about the occurrence cannot be relied on on the same parity of reasoning the evidence of P.W. 5 also is not dependable. The evidence to which we have referred would show that the eye witnesses have not come out with the truth as to how the occurrence took place and where it took place. In the circumstances it would be unsafe to rely on it, in convicting the accused. We accordingly allow the Appeal, set aside the conviction and direct the accused to be released.