



IN THE HIGH COURT OF ORISSA AT CUTTACK  
CRLA 74 OF 2007

In the matter of an Appeal under section 374 (2) of the Code of Criminal Procedure, 1973 and from the judgment of conviction and order of sentence dated 05.01.2007 passed by the learned Sessions Judge, Sambalpur in S.T Case No.343 of 1999.

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1) *Brajen @ Brajendra Panda* .... *Appellants*  
2) *Pinku @ Bikram Keshari*  
*Chouhan*

*-versus-*

*State of Odisha* .... *Respondent*

Appeared in this case by Hybrid Arrangement

(Virtual/Physical Mode):

*For Appellant-* :: Mr. Devasish Panda,  
Advocate.

*For Respondent-* :: Mr. S.K. Nayak,  
Additional Government  
Advocate

**CORAM:**

**MR. JUSTICE D.DASH**  
**MR. JUSTICE V. NARASINGH**

Date of Hearing :12.09.2024 ::Date of Judgment: 01.10.2024



The Appellants, by filing this Appeal have assailed the judgment of conviction and order of sentence dated 05.01.2007, passed by the learned Sessions Judge, Sambalpur, in S.T. Case No.343 of 1999, arising out of GR Case No.754 of 1998, corresponding to Katarbaga P.S. Case No.52 of 1998 of the file of learned Sub-Divisional Judicial Magistrate (SDJM), Sambalpur.

The Appellants (accused persons) thereunder have been convicted for commission of offence under section 147/148/302/149, 323/149 & 324/149 of the Indian Penal Code. Accordingly, they have been sentenced to undergo imprisonment for life for the offence under section 302 read with section 149 of the IPC; rigorous imprisonment for two years for the offence under section 324/149 of the IPC; rigorous imprisonment for one year for the offence under section 323/149 of the IPC; rigorous imprisonment for one year for the offence under section 147 of the IPC; and rigorous imprisonment for two years for the offence under section 148 of the IPC with the stipulation that all such sentences shall run concurrently.

It would be worth mentioning at this stage that accused persons, namely, Gyanendra Panda, Brajen @ Brajendra Panda, Titu @ Srikanta Tripathy, Bhagaban Oram & Pinku @ Bikram Keshari Chouhan in total five



(05) had faced the trial being charged for commission of offence under section 147/148/302/323/324/149 of the IPC and section 25 of the Arms Act, 1959. One more accused, namely, Mahadev Oram having died, had not faced the trial. All the above noted five accused persons, who faced the trial, stood convicted for the offence under section 147 & 148 of the IPC and they too stood convicted for commission of offence under section 302/323/324 with the aid of 149 of the IPC. Accused persons, namely, Gyanendra Panda and Srikanta Tripathy had filed CRLA No.80 of 2007. Both having died during pendency of the Appeal, and as none of their near relations came forward to pursue the Appeal further on their behalf, that Appeal has been dismissed as to have abated vide order dated 12.09.2024.

In the present Appeal, Bhagaban Oram, having died during pendency of the Appeal, none of his near relation has come forward to further pursue the appeal on his behalf. Therefore, this Appeal has also been dismissed as to have abated in respect of the accused Bhagaban Oram and order to that effect has been passed on 12.09.2024. Thus the present appeal is confined to the accused persons, namely, Brajen @ Brajendra Panda and Pinku @ Bikram Keshari Chouhan.



## 2. Prosecution Case:-

On 28.06.1998, around 8.30 p.m, Gopal Sharma (Informant-P.W.12) was present in a video hall at Rengali. His employees, namely, Manoj Pradhan (P.W.6) & Shamy Sharma (P.W.1) had gone to Mahaveer Chaka to take tea. Fifteen minutes after their departure, Gopal Sharma (Informant-P.W.12) was informed that the accused persons were assaulting his employees Manoj Pradhan (P.W.6) & Shyam Sharma (P.W.1). Therefore, Gopal Sharma (P.W.12), Bisu @ Biswanath Sharma (deceased) rushed near that Mahaveer Chaka. There, they saw Manoj Pradhan (P.W.6) lying on the ground being assaulted by the accused persons giving kicks and Shyam Sharma (P.W.1) then tried to protect Manoj (P.W.6). But he was then assaulted by the accused persons. Gopal Sharma (Informant-P.W.12) and Bisu @ Biswanath Sharma (deceased) therefore had to intervene in the matter and they dissuaded accused Gyanendra from assaulting Manoj Pradhan (P.W.6) & Shyam Sharma (P.W.1). At that time, other accused persons including one Girindra Panda came to the spot from a nearby hotel being armed with swords and hockey sticks. Brother of accused Gyanendra, i.e. accused Brajendra was shouting and instigating others to finish Bisu @ Biswanath. Another



brother of accused Gyanendra namely Girindra was also instigating the other accused persons to finish Bisu @ Biswanath stating that he would look after the case that would come to be instituted for the said killing. It is stated that the accused persons assaulted Bisu @ Biswanath by means of swords and hockey sticks. As a result of the same, he fell down with serious bleeding injuries. Bisu @ Biswanath was thereafter repeatedly assaulted and stabbed by sword. The employee of Gopal Sharma (Informant-P.W.12), namely, Shyam Sharma (P.W.1) also received injuries being dealt with blows and assaulted by hockey sticks. After the incident, the accused persons ran away from the spot carrying the weapons with them.

Gopal Sharma (Informant-P.W.12) then having lodged a written report (Ext.10) with the Sub-Inspector (SI) of Police attached to Rengali Police Out Post under Katarbaga Police Station (P.W.13), the same was entered in the Station Diary Book maintained at the Police Out Post. The said written report (Ext.10) received on 29.06.1998 around 8 p.m. was then sent to the Officer-in-Charge (OIC) of Katarbaga Police Station for registration of the FIR and case. Having done so, the SI of Police (P.W.13) took preliminary steps for investigation. The first



I.O (P.W.13) examined the Informant (P.W.12). He then went to the spot. There he saw Bisu @ Biswanath Sharma lying in a seriously injured condition. The I.O (P.W.13) examined Bisu @ Biswanath Sharma, who disclosed the names of his assailants as Gyana Panda, Titu Tripathy and Mahadeb Oram and stated that they had assaulted by sword. Bisu @ Biswanath Sharma was then shifted to the Burla Medical College and Hospital. The spot was guarded and requisition was sent to the Scientific Officer for visiting the spot and collecting the incriminating articles. From the spot, a pair of black and grey leather chappal, white and black check full shirt stained with blood worn by injured Biswanath Sharma along with the blood soaked earth and sample earth were seized under seizure list (Ext.1). The I.O (P.W.13) thereafter handed over the charge of investigation of the case to the OIC (P.W.14) as directed. The OIC (I.O- P.W.14), who had already registered the case receiving the written report from the previous I.O (P.W.13), took charge of investigation. It was around 8 am, he received the information that Bisu @ Biswanath succumbed to the injuries. He (P.W.14) proceeded to the hospital and held inquest over the dead body of Bisu @ Biswanath in presence of witnesses and prepared the report (Ext.4) to



that effect. The dead body was sent for Post Mortem Examination by issuing necessary requisition. The wearing apparels of the deceased were seized being produced by the police constable, who had accompanied the dead body for post mortem examination under seizure list (Ext.2). Few other incriminating articles were seized under that seizure list. On 30.06.1998, the Circle Inspector Sadar, Sambalpur, (P.W.15) took charge of the Investigation. He then examined some witnesses after visiting the spot and got the statements of one Chaturbhuj Khamani recorded under section 164 of the Cr.P.C. He arrested the accused persons, namely, Gyanendra & Titu and seized their wearing apparels under separate seizure lists and forwarded them in custody to the Court. Other accused persons being subsequently arrested were forwarded in custody to Court. Seized incriminating articles were sent for chemical examination through court.

3. Finally, on completion of investigation, Final Form was submitted by the I.O (P.W.15) placing the accused persons to face the trial for commission of the offence under section 147/148/302/323/324/149 of the IPC and section 25 of the Arms Act.



4. Learned SDJM, Sambalpur having received the Final Form as above, took cognizance of the offence under section 147/148/302/323/324/149 of the IPC and section 25 of the Arms Act and after observing the formalities, committed the case to the Court of Sessions for trial and that is how the Trial commenced.

5. In the trial, the prosecution in total has examined fifteen (15) witnesses. As already stated, the Informant, who had lodged the FIR (Ext.10) is P.W.12. P.W.1 is the younger brother of the deceased Bisu @ Biswanath Sharma. P.W.2 is another witness, who had rushed to the spot hearing the incident and seen the accused persons inflicting injuries upon Bisu @ Biswanath. P.W.3 is a witness to the seizure of incriminating articles whereas P.W.4 is a witness to the inquest. The Doctor, who had examined P.W.12 and one Manoj Kumar Pradhan being projected as an injured eye witness has come to the witness box as P.W.6. P.W.7 although had been projected as an eye witness to the occurrence has turned hostile and the Doctor, who had examined Shyam Sharma (P.W.1) has come to the witness box as P.W.8. Another witness, as to have seen the incident has been examined as P.W.9 and P.W.10 is the Doctor, who had conducted autopsy over the dead body of the deceased Bisu @ Biswanath. The





Scientific Officer, whose service had been requisitioned during investigation when has been examined as P.W.11. P.W.13 is the first Investigating Officer whereas P.W.14 & P.W.15 are the Investigating Officers carrying out the investigation till completion.

6. The prosecution besides leading the evidence by examining above the witnesses, has also proved several documents which have been admitted in evidence and marked as Ext.1 to Ext.18. Out of those, the important are the FIR, Ext.10, Injury Reports, Exts.5, 6 & 7 as also the Post Mortem Report, Ext.8. The Chemical Examiner's Report has been admitted in evidence and marked as Ext.9. The inquest report being Ext.4, the rest are the seizure lists and other documents prepared in course of investigation. Few incriminating articles being produced during trial, those have been marked as Material Objects (M.O-I to M.O-X).

7. The plea of the accused persons is that of denial and false implication. They however have not tendered any evidence in support of the said defence being provided the opportunity in that regard.

8. The Trial Court, upon examination of the evidence of the prosecution witnesses and their analysis at its level has held the all the charges except one under section 25 of



the Arms Act against the accused persons to have been established. Accordingly, the accused persons stood convicted for offence under section 147/148/302/323/324/149 of the IPC and they have been sentenced as aforestated.

9. At this juncture, it attracts our attention when we find the Trial Court to have convicted the accused persons for commission of the offence under section 147 & 148 of the IPC. The Trial Court has found the accused persons to be the members of the unlawful assembly and as such in prosecution of the common object of the said assembly, they had assaulted the Informant (P.W.12) and others and thus committed the offence of rioting being armed with deadly weapons such as Sword, Bhujali, Hockey sticks etc. Section 148 of the IPC being a graver offence than the offence under section 147 of the IPC, which is rioting without being armed with deadly weapons and without using the same, the Trial Court should not have again convicted the accused persons for the offence under section 147 of the IPC. Thus, said conviction of the accused persons under section 147 of the IPC and the sentence imposed thereunder are liable to be set aside.



10. Learned counsel for the Appellants (accused persons) submitted that the present Appeal being pursued at the instance of the two convicts, namely, Brajen @ Brajendra Panda and Pinku @ Bikram Keshari Chouhan, the evidence on record being properly scanned, the Trial Court's finding as against them holding them liable for above noted offences cannot be sustained. In support of the same, he has invited our attention to the evidence of all the prosecution witnesses in great detail. He first of all submitted that the evidence of P.W.1, being read in entirety, it would not be possible to conclude that these accused persons namely, Brajen @ Brajendra Panda and Pinku @ Bikram were the members of the unlawful assembly and as such it cannot be said that they had played any role in furtherance of the common object of the said assembly in intentionally causing the death of Bisu @ Biswanath or to have assaulted others. He next submitted that the evidence of P.W.1 in respect of the role played by accused Brajendra is not at all acceptable and believable. Since he during investigation had not stated anything on that score as against this accused Brajendra before the I.O (P.W.14), which has been proved and the same being a material contradiction, the evidence of P.W.1 implicating accused Brajendra is liable to be discarded.



He also submitted that this P.W.1 being the eye witness does not implicate the other accused namely, Pinku @ Bikram, although he has implicated the other accused persons as against whom the case has abated. He next submitted that it being the prosecution case that P.W.1 was assaulted by accused Brajendra during trial, he has not earlier stated anything about that and he has stated before the I.O that when accused Brajendra was trying to assault Bisu @ Biswanath, this witness, P.W.1 having warded off the blow, he had received cut injury on his right palm and that has been well proved through the I.O (P.W.14). He then submitted that the evidence of P.W.2 when is to the effect that accused Gyanendra being armed with sword was present there, he does not state accused Gyanendra to have committed any overt act in the entire incident, and, therefore, even if his evidence to that effect is accepted, since that contradicts with the evidence of P.W.1, cannot be accepted being not reconcilable and furthermore, for mere presence of accused Gyanendra with a sword, without being attributed with any overt act, no criminal liability can be fastened on him.

He submitted that as per the evidence of P.W.2 when he arrived with Bisu@Biswanath in the hospital, the Doctor had asked Bisu@Biswanath about the occurrence



and it was told by him that accused Gyanendra, Titu & Mahadev were his assailants. According to him, when P.W.2 does not implicate any of these two accused persons i.e., Brajendra and Pinku @ Bikram and that is also not stated by the Doctor concerned, the charge against them is bound to fail. He next submitted that the evidence of P.w.6 is not against any of these two accused persons and so also that of P.W.7. Inviting our attention to the evidence of P.W.9, he contended that as per his evidence, accused Brajendra and Pinku had also assaulted the deceased by means of sword but the conduct of this witness P.W.9 renders his evidence highly doubtful and suspect. He has clearly stated that he did not inform anybody about the occurrence nor he reported the matter to the parents of the deceased that night and he only reported the matter to the police on the next day and there police recorded his statement. He then submitted that no evidence has been led by the prosecution in proving the report that P.w.9 had given before the police and the Case Diary reveals that he had been examined by P.W.15 only on 28.06.1998 after more than a month of the incident. He therefore submitted that the evidence of P.W.9 is of no avail to the prosecution, more particularly, in so far as these accused persons are



concerned. He submitted that P.W.12 having not stated anything about these accused persons, his version in the FIR cannot stand as the substantive evidence to support the case of the prosecution as against these accused persons. He, therefore, contended that the judgment of conviction and order of sentence insofar as these accused persons are concerned cannot be sustained and are liable to be set aside.

**11.** Learned counsel for the State submitted that the prosecution having proved that twenty four (24) numbers of external injuries received by him and the evidence on record when clearly establish that these two accused persons had formed the unlawful assembly with others, even though, for a moment, it is said that there is no specific evidence as to any overt act in respect of these two accused persons, they being very much present at the spot, holding lethal weapons, have been rightly held liable for commission of offence as aforesaid and accordingly, sentenced. He also invited our attention to the deposition of the prosecution witnesses insofar as the roles played by these accused persons are concerned and contended that the Trial Court did commit no error in fastening the guilt upon these accused persons under



section 148 of the IPC and section 323/324/302 with the aid of section 149 of the IPC.

**12.** Keeping in view the submissions made, we have carefully read the judgment of conviction impugned in this Appeal. We have also gone through the depositions of all the witnesses P.W.1 to P.W.15. We have also perused the documents which have been admitted in evidence and marked Ext.1 to Ext.18.

**13.** The death of Bisu@Biswanath as to have resulted from the large number of ante mortem injuries received by him was neither under challenge before the Trial Court nor has been questioned before us. The evidence let in by the prosecution through the Doctor, who had conducted autopsy over the dead body of Bisu @ Biswanath i.e. P.W.10 and also the evidence of the first I.O (P.W.13) and the second I.O (P.W.14) as well as other witnesses, who had seen Bisu@Biswanath lying in a seriously injured condition clearly establish that Bisu@Biswanath met a homicidal death.

At present, the question posed before us is whether with the available evidence on record, the complicity of these two accused persons namely Brajen @ Brajendra and Pinku @ Bikram in the said incident of causing death of Bisu@Biswanath has been proved beyond reasonable



doubt. In order to find out the answer to the same by addressing the rival submission, we are thus called upon to undertake the examination of the evidence of the prosecution witnesses.

The brother of the deceased has been examined as P.W.1. He has stated that on 28.06.1998, around 7.30 to 8 p.m, he had been to Mahaveer Chaka to take tea and when they were about to return, they (he and Manoj (P.W.6)) saw accused persons (meaning the five who were facing the trial and the other (Mahadev, dead by then) to be standing on the road. He further states that they abused them in filthy language and assaulted them by giving fist blows and kicks. He further evidence is that his elder brother Biswanth (deceased) and Gopal (P.W.12) then were passing by the side and they intervened asking the accused persons as to why they were assaulting P.W.1 and P.W.6. It is stated that then accused Gyanendra opened his shirt and asked Biswanath to come for a fight when Biswanath expressed his unwillingness to accept his challenge. He has further stated that when they were about to return, accused Titu@Srikanta(dead) brought out two swords from a nearby house and made over one sword to accused Gyanendra (dead) and then Titu (dead) who assaulted





the deceased and thereafter Gyanendra also assaulted Biswanath. His further evidence is that Girindra instigated the accused persons. Insofar as this accused Brajendra is concerned, his evidence is that he then took the sword from accused Titu and tried to assault the deceased and that being warded off by this P.W.1, he received the cut injury on his right palm. It would reveal from the evidence of the I.O (P.W.14) that this part insofar as implication of accused Brajendra is concerned, had not been stated by P.W.1 during investigation before P.W.14. Although, this P.W.1 has asserted to have stated so before the I.O (P.W.14), the I.O (P.W.14) has stated that such was not the version of P.W.1 before him. This P.W.1 when has further attributed accused Gyanendra to have repeatedly stabbed on the belly of Biswanath by sword and twisted the sword while stabbing, that is also not the version of Manoj (P.W.6). The evidence of P.W.6 is completely different. He has not stated anything about the occurrence and he being cross-examined by the prosecution with the permission of the Court, we find no such material to have surfaced therein in support of the evidence of P.W.1 attributing any role to any of these two accused persons.



Next coming to the evidence of P.W.2, we find him to have stated in a general way that he saw accused Gyanendra, Titu, Mahadeb to have been assaulting the deceased; Gyanendra armed with sword, Mahadev with hockey sticks and Titu with bhujali. He has further stated accused Titu to have assaulted the deceased with Bhujali on the back of his head and accused Gyanendra to have stabbed the deceased on the belly repeatedly by means of sword. His evidence is also to the effect that the deceased being asked by the Doctor, had named accused Gyanendra, Titu and Mahadeb to his assailants. Nothing is stated about these two accused persons namely, Brajendra and Pinku @ Bikram. Thus the evidence of P.W.2 belies the evidence of P.W.1 that accused Brajendra had even attempted to give a blow by means of sword on the deceased.

Next comes the evidence of P.W.9. On a careful reading of the entire evidence of P.W.9, we find him to have stated to the effect that accused Brajendra and Pinku had assaulted Biswanath by means of swords which are not the evidence of P.W.1 and P.W.2. Furthermore, the conduct of P.W.9 raises the eyebrows for accepting his evidence as that of a truthful witness. He has stated to have never informed anybody about the occurrence nor



to have reported the matter to the parents of the deceased. Astonishingly, when he states to have reported the matter in the Police Station on the next day, in further asserting that the police (S.I-Suresh Das) recorded his statement. Said S.I of Police (P.W.13) states to have received the written report first from P.W.12 but not from this P.W.9. P.W.13 has clearly stated to have not at all examined P.W.9 nor to have received any oral or written report from him (P.W.9). When it is stated by P.W.15 (I.O) that he had examined P.W.9, Case Diary being perused for proper appreciation, shows that this P.W.9 had been examined by P.W.15 only on 28.06.1998 which is after more than a month of the occurrence. There is no explanation from the side of P.W.9 nor from the side of the prosecution as regards such delayed examination of P.W.9. Therefore, we find the evidence of P.W.9 to be wholly unsafe to be relied upon. The last witness for the prosecution is P.W.12, who is none other than the informant himself and had lodged the FIR (Ext.10). He has given a go-bye to the FIR version and, therefore, the prosecution seeking permission of the Court has cross-examined him. As regards the incident, it is his version that, when he went to the spot and saw the gathering Mahadeb Oram came to him and charged him and dealt



fist blows on his face. His further evidence is that Mahadev gave a push at him for which he fell down and then he started assaulting him. It is also his version that Mahadev was then drunk. He further states that in order to save himself, he ran away from the place. He has stated nothing about any role of any other accused persons, much less, these two accused persons, namely, Brajen@Brajendra and Pinku@Bikram. Although, prosecution has cross-examined P.W.12, we find no such material to have been elicited from him during then in order to provide any support to the case of the prosecution in attributing any role to these accused persons.

With the evidence of the prosecution witnesses as discussed above, we are of the considered view that the charges against these two accused persons have not been established beyond reasonable doubt. Accordingly, we find the judgment of conviction and order of sentence passed by the Trial Court insofar as these two accused persons (Brajen@Brajendra Panda and Pinku@Bikram Keshari Chouhan) cannot be sustained.

In the result we allow this Appeal now at the instance of the Appellants, namely Brajen@Brajendra Panda and Pinku@Bikram Keshari Chouhan and set aside



the judgment of conviction and order of sentence returned by the trial court as against them.

These two accused persons being on bail, their bail bonds shall stand cancelled.

*(V. Narasingh)*  
*Judge*

*(D. Dash)*  
*Judge*

*Gitanjali*