

Naresh Ch. Nath Vs. the State

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Court : Guwahati

Decided On : May-26-1969

Judge : R.S. Bindra, J.C.

Appellant : Naresh Ch. Nath

Respondent : The State

Prior history : R.S. Bindra, J.C. 1. In this Criminal Appeal No. 9 of 1967 Naresh Ch. Nath assails the correctness of his conviction and sentence of life imprisonment, imposed on him Under Section 302, IPC. He has been represented in this Court by Sri S. K. Kar as amicus curiae. 2. The facts of the prosecution story are not much in dispute and they also lie within a short compass. Biraja Debi P.W. 7, sister of the accused, had been married for about 4 years with the deceased Surendra Devnath, who, it is comm

Judgement :

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2. The facts of the prosecution story are not much in dispute and they also lie within a short compass. Biraja Debi P.W. 7, sister of the accused, had been married for about 4 years with the deceased Surendra Devnath, who, it is

commonly admitted, had turned lunatic soon after his marriage. It was a market day in the village of Tilthai, P. S. Dharmanagar, on 12th of March, 1966. About dusk time on that day, two persons, Jatindra and Bhanu, informed Prasanna Kumar (P.W. 1), when the latter was present in the Bazar at Tilthai, that Naresh, the Pagla was administering blows with a dao, a dangerous cutting weapon, to Surendra, the deceased of this case. Prasanna Kumar deputed a few persons including Ananda Nath to the site of occurrence to verify the correctness of information passed on to him. About 10 minutes thereafter another person Binanda Nath communicated to Prasanna Kumar that Surendra had died as a consequence of the injuries inflicted on him and his dead body was lying in a field. Prasanna Kumar then left for Dharmanagar Police-station where he lodged the F. I. R. Ext. P-I at 11-30 P. M. the same day. The S. H. O. Manindra Sen Gupta immediately, after recording the F. I. R., left for the place of occurrence where he reached at about 3-45 A. M. on 13th. He prepared the inquest report and sent the dead body for post-mortem examination, Thereafter he arrested the accused and removed the clothes from his person as they were stained with blood. It is part of the prosecution case that the S. H. O. recovered the dao Ext, PM-6 at the instance of the accused.

3. The post-mortem examination was done by Dr. Cham Chandra Saha (P.W. 13), the medical officer at Dharmanagar. He noticed a large number of incised wounds on the person of the deceased. The head had almost been severed from the trunk part of the body. It was attached to the neck by tag of skin measuring 1/4'. In the opinion of the doctor, all the injuries were ante-mortem and had been caused by a sharp-weapon, and they were sufficient to cause death. The death had occurred, according to the testimony of the doctor, due to syncope resulting from shock and haemorrhage caused by severe injuries.

4. The prosecution also placed reliance on the confessional statement alleged to have been made by the accused before the Magistrate Sri B. Datta (P.W. 14), on 7-5-1966.

5. It is on the basis of the material listed above that the accused was charge-sheeted, on 6-6-1966, Under Section 302, IPC.

6. The accused denied the charge on the plea that he was of unsound mind at the time of the commission of the act attributed to him and so was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law. In other words, his defence was founded on legal insanity within the meaning of Section 84, IPC.

7. On the basis of the material brought before him during the course of trial, the learned Sessions Judge held that the prosecution had proved beyond reasonable doubt that the accused had committed the murder of Surendra and that the accused had failed to substantiate that he suffered from such a fit of insanity at the time of administering blows to Surendra as is contemplated by Section 84, IPC. Consequently the accused was found guilty Under Section 302 and sentenced to lesser of the two penalties, prescribed for the offence of murder.

8. Sri S. K. Kar, the learned Counsel representing the accused, vehemently challenged the finding of the trial Court that the ingredients of Section 84, IPC. are not established from the evidence available on the record. He was equally serious in canvassing that the prosecution had failed in proving convincingly that the accused had administered blows to Surendra with such mens rea as to bring the case within the ambit of Section 300 of the Indian Penal Code.

9. Sri H. C. Nath contended, on the other hand, that it having been established beyond doubt by the prosecution that the accused had hacked Surendra with a deadly weapon like dao the necessary intention or knowledge, contemplated by Section 300, IPC, should be attributed to him, and that it was for the accused to satisfy the Court by dependable evidence that his case falls within the exception mentioned in Section 84, IPC. Sri H. C. Nath also invited the attention of this Court to Section 105 of the Indian Evidence Act which provides, that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances. To complete the legal picture bearing on the arguments advanced by the parties' Counsel reference may usefully be invited to

Section 101 of the Evidence Act which enacts that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. It would, therefore, follow that burden of establishing the various components constituting the offence of murder rests on the prosecution, though it would be for the accused to discharge the onus of the plea of legal insanity if and when adopted by him.

9A. It was observed in *Dahyabhai Chhaganbhai v. State of Gujarat* : 1964 CriLJ472 , that there is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity. The proposition that it is for the prosecution to establish in a case of homicide that the accused had caused the death with the requisite intention or knowledge (mentioned in Section 300 of the Indian Penal Code) was not challenged by Sri H. C. Nath, the learned Government Advocate. In other words, it cannot be gainsaid that the prosecution cannot succeed by merely establishing that the deceased had died as a consequence of the injuries inflicted on him by the accused. It is incumbent on it to prove in addition that those injuries had been caused with such intention or knowledge as finds mention in Section 300. IPC. The defence case, as put before this Court by Sri Kar, was that the prosecution has only established the actus reus (the act of the defendant) but not the mens rea (the guilty mind) and as such the conviction Under Section 302, IPC. has no foundations to rest upon. In my opinion, the Court will have to look into the plea of insanity only after it feels satisfied that the prosecution has proved the charge of murder and not before that stage is reached. If the charge of murder is not proved by the evidence placed on record by the prosecution or if that evidence, examined in the light of defence plea; or evidence, casts doubt in the mind of the Court to the extent that it cannot hold the charge established, properly speaking the question of examining the plea of insanity would not arise and the accused will have earned an acquittal.

It was pointed out in the case of *Dahyabhai A.I.R. 1964 SC 1563* (supra) that the evidence brought on the record by the accused may not be sufficient to discharge the burden Under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of the Judge as regards one or other of the necessary

ingredients of the offence itself. It may, for instance, the Court observed further, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code, and if the Judge has such reasonable doubt, he has to acquit the accused, for in such an event the prosecution will have failed to prove conclusively the guilt of the accused. The doctrine of burden of proof in the context of the plea of insanity was expressed by Subba Rao, J., as he then was, with his usual incisiveness 'in the following classical language:-

(1) the prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code: the accused may rebut it by placing before the court all the relevant evidence - oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings; (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

10. Earlier too in the case of K. M. Nanavati v. State of Maharashtra : AIR 1962 SC605 , the Supreme Court had enunciated a similar proposition. It was pointed out in that case that the alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused Under Section 105 of the Evidence Act is more imaginary than real. It was observed further that where the accused places reliance on an exception, some of the many circumstances required to attract the exception if proved may affect the proof of all or some of the ingredients of the offence. To illustrate this proposition, the provisions of Section 80, IPC. were cited. In such a case, it was observed further, though the burden lies on the accused to bring his case within the exception, the

facts proved by him may fail to discharge the said burden but may still affect the proof of the ingredients of the offence with which he is charged.

11. In view of the principles set out above, the defence Counsel was amply justified in contending that it is primarily for the prosecution to satisfy this Court that all the ingredients of the charge of murder are established, and that even if the evidence available on the record cannot establish that the accused was of unsound mind at the time he administered blows to Surendra yet if that evidence can cast doubt in the mind of the Court in regard to any of the ingredients of the murder, for example the mens rea, the accused would be entitled to claim acquittal. Sri Kar was equally right in submitting that the burden of proof resting on the accused is no higher than that resting upon a party to a civil proceeding.

12. In the background of these principles I now proceed to examine the evidence with a view to determining whether the prosecution has established convincingly the charge of murder, or whether the accused has successfully proved the defence of legal insanity. In the first instance, I would like to dispose of the defence objection that the learned Sessions Judge was in error in taking into consideration the following pieces of evidence:

- (i) The confessional statement recorded by Sri B. Datta on 7-5-1966;
- (ii) The confession made by the accused to the S. H. O. Manindra Sen Gupta; and
- (iii) The recovery of dao Ext. PM-6 at the instance of the accused.

13. I feel convinced that none out of the three pieces of evidence is legally admissible. The Privy Council held in *Nazir Ahmad v. King Emperor* A.I.R. 1936 PC 253 (2), that where in the course of an investigation an accused person is taken to a Magistrate to have his confession recorded but the Magistrate does not record the confession in the manner prescribed by Section 164, Cr.PC the confession cannot be admitted in evidence. Sub-section (3) of Section 164 enjoins that a Magistrate shall not record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. The accused was arrested on 13-3-1966 and he was sent to Sri Datta by the S. H. O.

on 3-5-1966 for recording his confession. On that date the Magistrate directed the Sub-jailor to produce the accused before him on 5th of May, 1966, and when on the latter date the accused was brought again to the Court room, the Sub-Jailor was asked to bring him on 7th of May, 1966, as the Magistrate was busy with other work. In cross-examination Shri Datta, the Magistrate, admitted that on 14-3-1966 he came to know that the accused was insane. Earlier in his examination-in-chief, the Magistrate had affirmed that he had referred the accused on 14-3-1966 to the Medical Officer with the request that the accused should be kept under observation with a view to finding out if he was insane. Despite this background respecting the alleged insanity of the accused, the Magistrate did not probe into the matter of the mental condition of the accused on 7-5-1966 before recording his confession. Nor he questioned the accused on that day to elicit the truth, about that matter.

Admittedly, the Magistrate did not put any questions to the accused to find out why he was making the confession and when the accused had made up his mind to come out with the confession. It is not mentioned in the certificate appended by the learned Magistrate to the confessional statement if he had allowed any time to the accused on 7-5-1966 to reflect on the question of advisability of making the confession, though the Magistrate did affirm that he had given some time to the accused for the purpose. We are not aware how much that time was. Again, no enquiry was made to find out how long the accused had been in police custody after his arrest or why he was making the confession after such a long time. The Magistrate was frank in conceding that he did not inform the accused that even if he happened to retract the confession made it will go against him. Nor the Magistrate told the accused that he would not be handed over to the police even if he did not make any confession. The Magistrate admitted that he had only put stereotyped questions to ascertain if the accused was voluntarily coming out with the confession.

It has been repeatedly pointed out that the questions put under Sub-section (3) of Section 164, Cr.PC should not be in the nature of holding a mere mechanical enquiry, that no element of casualness should be allowed to creep in, and that the Magistrate should be fully satisfied that the confessional statement which the

accused wants to make is in fact and in substance voluntary. The questions put, judicial pronouncements consistently emphasise, must be in pursuance of a real endeavour to find out the object of the confession and must be directed to eliciting facts which will enable the Magistrate to judge the character of the confession that the accused is about to make. I think in the instant case the Magistrate did not come up to all these expectations. His admission that he had put only stereotyped questions to ascertain the voluntary nature of the confession which the accused was expected to make, coupled with the other features outlined above, positively indicates that he had done the job in a casual manner and not with that solemnity which the nature of the job commanded. His further admission that he had not taken the precaution of examining the Medical Officer to whom he had earlier issued the direction to keep the accused under observation with a view to finding out if he was a mental case also takes us to the same conclusion. Therefore, I hold that the confession having not been recorded in the spirit of and subject to salutary precautions, contemplated by Section 164 (3), it is inadmissible in evidence.

14. According to Manindra Sen Gupta, the Investigating Officer, the accused told him on interrogation that he had occasioned the death of Surendra with a dao and that the dao, Ext. PM-6, was then recovered on the pointing out done by the accused. This confessional statement quite surprisingly, was never reduced to writing. Nor it appears to have been made in the presence of any one else. We do not know on what date that confession was made and from what place the weapon was recovered. Though Munindra Sen Gupta affirmed that the recovery memo, Ext. P-4, pertaining to Ext. PM-6 had been attested by witnesses, and the document does purport to have been attested by some persons, those witnesses were never summoned much less examined. The recovery memo does not bear the signature of the accused. In short, excepting the solitary statement of the Investigating Officer, we have no other evidence relating to the confession allegedly made before him by the accused and the consequential recovery of the weapon at the instance of the latter. Hence I have no difficulty in describing the recovery of the weapon, as nothing but a fib in the nature of embellishment. If no recovery was effected pursuant to the confession made by the accused, as held by me, the confession becomes inadmissible in view of Section 25 of the Evidence

Act which provides that no confession made to a police officer shall be proved as against a person accused of any offence. The only exception to this statutory provision is enacted in Section 27 of the same Act. However, Section 27 does not come into play because, as held above, no fact is proved to have been discovered in consequence of the information received from the accused. I would, therefore, rule out of consideration not only the confession alleged to have been made before the Investigating officer but also the latter's averment that he had recovered the weapon pursuant to that confession. It would follow that the learned Sessions Judge had wrongly admitted into evidence the confessional statement, recorded Under Section 164, Cr.PC as also the confession said to have been made by the accused before the Investigating Officer and the alleged recovery of the weapon Ext. PM-6 at the instance of the accused.

15. The case was registered against the accused on the basis of F. I. R. Ext. P-I, lodged by Prasanna Kumar (P.W. 1). At more than one place it is mentioned in that document that not only the accused Naresh but also the deceased Surendra was mad and for quite some time. It was stated therein that Naresh had been mad for about 8 to 9 years and Surendra for about 5 years. It was also stated that after Naresh had run mad his father-in-law took the wife and the son of Naresh away from him, and that Naresh used to spend the major part of his time at Chamtilla and Tilthai as against his native village Padmabil. In the course of his court statement, Prasanna deposed that the accused had been insane since before the present occurrence. He also affirmed the correctness of the recitals made by him in the F. I. R. No prayer was made by the Public Prosecutor to the trial Court for permission to declare Prasanna Kumar as hostile. I, therefore, feel justified in concluding that the learned Public Prosecutor accepted as correct the assertion made by the witness that the accused had been insane since before the occurrence as also the recitals made in the F, I. R. bearing on that point. The next witness Ahlad Debnath also affirmed in his cross-examination that Naresh had been insane since before the occurrence. To the same effect was the testimony of P.W. 3 Jatindra Nath as also of Ananda Nath P.W. 5. The latter witness brought out another fact. He testified that on account of madness the accused had once thrown his son into water. This statement was undoubtedly made during cross-examination, but it could have been challenged by the Public Prosecutor by cross-

examination after seeking the permission of the Court in terms of Section 154 of the Evidence Act. No prayer to that effect was made.

16. Nirmala Debi (P.W. 6) is the mother-in-law of the accused. She too said in her cross-examination that the accused had been mad since before the tragic occurrence. Her statement also remains unchallenged on the record. Bidhu Bhusan (P.W. 8), like others, said that Naresh had been insane since before the occurrence culminating in the trial. P, W. 9 Harendra is the elder brother of the deceased Surendra. He said in his examination-in-chief that Surendra went lunatic soon after his marriage and that despite extensive treatment he could not be restored to health. He stated further that after Surendra became demented he would stay near about the house of the accused Naresh and both of them would loiter together. Of course, the witness deposed that one day Naresh killed Surendra. In cross-examination, however, he admitted that Naresh had been insane for the last 8 years, though he added that Naresh had had some lucid intervals. This last assertion does not gather corroboration from any other quarter. Since the witness happens to be the elder brother of the deceased, that assertion on his part, in the absence of dependable corroboration, can be safely ignored. Sridhar (P.W. 10) deposed in cross-examination that both Naresh and Surendra were mad. Binanda (P.W. 11) affirmed that Surendra and Naresh used to loiter together before the occurrence and Naresh had been insane for the last 8 years.

17. Lastly, we have the testimony of the Magistrate Sri B. Dutta (P.W. 14) that the accused was sent to him by the police on 14-3-1966, and that on the same date he made an order directing the Medical Officer to keep the accused under observation and submit a report to him. He also deposed that the Medical Officer had submitted a report to him on 25-4-1966. However, that report was never exhibited though the Medical Officer Sri Charu Ch. Saha P.W. 13 was examined and he happened to affirm that he had kept the accused under observation. Why the report made by the witness has been withheld from the Court remains unexplained. Further, the accused was examined by the Medical Officer only after the occurrence, while we are concerned, in terms of Section 84 of the IPC, with the state of the mind of the accused at the moment he made the assault on the deceased. Another relevant factor which deserves notice is that the Medical officer

conceded that he is not an expert in mental diseases. Hence his averment that when he examined the accused in the local Sub-Jail he did not notice any abnormality about him is not of much consequence. To be fair to the accused, he should have been kept under observation by the Medical Officer in the hospital itself. A casual examination, once or twice, in the Sub-Jail could not have been sufficient for formulating any firm opinion on the point whether or not Naresh suffered from any mental abnormality or aberration. Hence the statement of the Medical Officer has no probative value.

18. To summarise the evidence reproduced above:

In the F. I. R. itself it is mentioned that Naresh had been insane for about 8 to 9 years and Surendra for about 5 years. Almost all the prosecution witnesses have deposed that Naresh had been mentally deranged for about 8 years. It has come in prosecution evidence that after Naresh had developed lunacy, his father-in-law took his wife and child out of his care. It is also proved that the accused had once thrown his son into water. The accused had abandoned his residence in native village Padmabil and would put up near the house of the deceased Surendra and that both of them would loiter together. We have not a scintilla of evidence to indicate any motive on the part of the accused to kill Naresh intentionally.

The learned Sessions Judge had relied upon one averment of the accused in his confessional statement dated 7-5-1966 to support the theory of motive behind the murder. That averment is that when Naresh tried to persuade Surendra, on 12-3-1966, to take back his wife under his care, Surendra felt upset and registered a slap on his (Naresh's) face. However, I have held above that the confessional statement is inadmissible in evidence and as such we cannot base our finding on what is mentioned therein.

19. All this material, I feel satisfied, is consistent only with the defence plea that the accused was of unsound mind when he administered a number of blows on the person of Surendra and killed him at the spot. I have no misgivings on the point that at the worst the case falls within the wording of third proposition enunciated by the Supreme Court in the case of Dahyabhai A.I.R. 1964 SC 1563 (Supra). That proposition can bear repetition. It is that even if the accused is

unable to establish conclusively that he was insane at the time he committed the alleged offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused, and that in such a case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. I would, therefore, hold that the prosecution has failed to bring home the charge of murder against the accused beyond reasonable doubt. I am equally satisfied that the accused has established the defence of unsoundness of mind within the meaning of Section 84, IPC. I would, therefore, accept this appeal, set aside the conviction and sentence of the accused, and order his acquittal forthwith. Announced.

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