

Dhansai Sahu and anr. Vs. State

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Court : Orissa

Decided On : Nov-08-1968

Reported in : AIR1969Ori105; 35(1969)CLT18; 1969CriLJ626

Judge : G.K. Misra and ;B.K. Patra, JJ.

Acts : Oaths Act, 1873 - Sections 5 and 13; [Evidence Act, 1872](#) - Sections 118; ; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300 and 302; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 233 and 537;

Appeal No. : Criminal Appeal No. 79 of 1968

Appellant : Dhansai Sahu and anr.

Respondent : State

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : D. Sahu, Adv.

Disposition : Appeal dismissed

Judgement :

Patra, J.

1. The appellants were convict-ed Under Section 302, I. P. C. by the Sessions Judge, Bolangir and sentenced to imprisonment for life. They are brothers and the

case against them is that at about 11 A. M. on 20-6-1965 they severely assaulted one Pilu Sahu and caused his death.

2. There was a proceeding Under Section 145, Criminal P. C. between the deceased Pilu Sahu on one side and the appellants and two others on the other in respect of an Adakata in mouza Amlidadar. The Court of first instance declared the possession of Pilu Sahu by its order dated 31-8-64 and this order was subsequently upheld in Revision by the Sessions Judge, Bolangir by order dated 4-12-64. There was consequently ill-feeling between the parties.

On the date of occurrence Pilu Sahu was sitting on a chair under a mango tree near the Khamabandh and was guarding the mango crop. Julu Sahu (P. W. 8) aged about 10 years and Sarhu, the grandson of the deceased, a boy aged about 12 years were washing their buffaloes in the Adkata tank, Keshari Bai, the daughter of appellant Dhansai challenged the boys as to why they were doing so and pelted stones at the buffaloes. They retaliated by throwing mud at her and she went home weeping. The prosecution case is that immediately thereafter she came back accompanied by the two appellants each of whom was armed with a wooden pole. Dhansai questioned Pilu as to why he did not prohibit the boys from quarrelling with Keshari. Pilu advised them to convene a Panchayat for the purpose. Thereupon Dhansai gave a blow with a wooden pole which struck the left ear of Juglu and it slipped off and struck the thigh of Pilu. Pilu got up from the chair. The appellant Santhkumar gave a blow with the wooden pole on the back of Pilu's neck and Dhansai assaulted Pilu on his right flank. Meanwhile P. Ws. 3, 4 and 6 who were near about the tank came to the spot and assaulted the appellants and the latter retaliated and assaulted them. P. W. 5 intervened, but being threatened he left the place. The appellants then assaulted Pilu and he fell down. Even after he fell down on the ground, they continued to assault him as a result of which he died.

First Information Report (Ex. 1) was lodged at the Thana by P. W. 1, the son of the deceased at 1-30 p. m. on the same day on which a case was registered against the appellants. Shortly before the F. I. R. was lodged, the appellant Dhansai had gone to the Thana and had made a statement on the basis of which a station diary

entry (Ex. 24) had been recorded. The A. S. I. who in the absence of the Officer-in-charge recorded the F. I. R. came to the place of occurrence that after-noon and sent the dead body for post-mortem examination. The Medical Officer who performed autopsy found the following 19 injuries on the person of the deceased (Ex. 14) : (After enumerating these injuries His Lordship proceeded).

It was found on dissection that the right temporal bone beneath injury No. 18 was fractured into three pieces and the fractured pieces were depressed into the brain substance tearing the membranaeous vessels, at their sites and injuring the brain substance. It was also found that the 8th and 9th ribs of the left side beneath injury No. 12 were fractured at their angles, and the fractured ends tearing the muscles and pleura at their sites pierced into the left lung. Injuries Nos. 5, 12 and 18 were grievous in nature and the rest were simple. In the opinion of the doctor the deceased died due to severe shock and haemorrhage as a result of injuries on vital parts of his body.

3-9. [After discussion of evidence his Lordship proceeded] :

10. We have carefully considered the evidence regarding the occurrence and are fully convinced that the version of the occurrence as given by the prosecution witnesses is the correct one. As stated already, the presence of each of the prosecution witnesses who has spoken about the occurrence is admitted on the defence side, apart from the fact that some of them have also received injuries during the occurrence. From the prosecution evidence we also get an explanation as to how the appellants have received a few minor injuries found on their persons. The defence version has not afforded any explanation as to how Pilu sustained the large number of injuries amounting to 19 found on his body. It is fantastic to believe the suggestion made on the defence side that in the course of the alleged mutual assault the witnesses on the prosecution side have inflicted injuries on Pilu Sahu by mistake. The occurrence took place in broad day light and the persons who were present at the place of occurrence were not more than a dozen. It is impossible to believe that the prosecution witnesses could have by mistake inflicted the several injuries of which some are grievous in nature on Pilu Sahu. In the course of investigation two wooden poles M. Os. V and VI were

seized from the appellants and the prosecution case is that the appellants came armed with the same, to the place of occurrence. None of the prosecution witnesses has said that it is with these identical poles that the appellants had assaulted Pilu. Therefore the evidence of the doctor that some of the injuries on Pilu Sahu could not have been caused by M. Os. V and VI does not in any way affect the truth of the prosecution case. It is quite likely that the appellants came there armed with some other poles and not necessarily M. Os. V and VI and the actual weapons of offence have not been seized in this case. What the prosecution witnesses have said is that appellants came with two wooden poles. That evidence stands unrebutted.

11. Mr. D. Sahu appearing for the appellants then contended that the evidence given by P. Ws. 8 and 9 should be ignored as inadmissible in evidence as they have not been administered any oath and the Trial Judge has not given the certificate as required by the proviso to Section 5 of the Oaths Act. P. Ws. 8 and 9 are aged 10 and 12 years respectively. What the learned Trial Judge did was that before examining them regarding the facts of the case he questioned them generally, obviously with the intention of judging for himself whether they understood the nature of the questions and were capable of giving rational answers to the same. After thus generally questioning them he has recorded the impression that the witnesses did not appear to him to be intelligent and hence oath was not administered to them. Section 5 of the Oaths Act, enjoins that oath should be administered to witnesses and then follows the proviso which may be quoted :

'Provided that where the witness is a child under twelve years of age, and the Court or persons having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.'

Despite the requirement of the Statute and the caution given by their Lordships of the Supreme Court in *Rameswar Kalyan Singh v. State of Rajasthan*, AIR 1952 SC 54 that it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and why they think so; it is regrettable that the opinion of the Court has not been recorded in the manner required in the proviso. The question therefore is whether the opinion referred to above must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken. In this connection a reference must be made to Section 13 of the Oaths Act, and Section 118 of the Evidence Act. The Oaths Act does not deal with the competency of a person to give evidence. Its main object is to render persons who give false evidence liable to prosecution and another object obviously is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth. In fact Section 13 of the Oaths Act says that no omission to take any oath or to make any affirmation and no irregularity whatsoever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence. Section 118 of the Evidence Act deals with the competency of the witnesses and provides that :--

'All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.'

Thus if an omission to take the oath does not by reason of Section 13 of the Oaths Act affect the admissibility of evidence, it follows that an irregularity arising from the fact, that the Trial Judge has failed to record the certificate as required by the proviso to Section 5 of the Oaths Act cannot affect the admissibility either. There was at one time a controversy as to whether Section 13 of the Oaths Act can be pressed into service even though the omission to administer the oath is not accidental. In *Queen-Empress v. Maru*, (1888) ILR 10 All 207, Mahamood, J. held that Section 13 of the Oaths Act is only applicable when the omission is accidental. On the other hand the Calcutta High Court in *R. v. Sewa Bhogta*, (1875) 14 Beng LR 294 (FB) took a contrary view. This conflict of judicial opinion

was, however, resolved by a decision of the Privy Council in *Mohammad Fugal Esa v. King* (AIR 1946 PC 3) in which their Lordships of the Privy Council observed that Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. In the instant case although the learned trial Judge has not recorded the requisite certificate and on the other hand recorded his opinion that P. Ws. 8 and 9 were not sufficiently intelligent, it is quite clear on a perusal of the evidence given by P. Ws. 8 and 9 that they have got the power to understand the questions put to them and give answer to these questions. We are therefore satisfied that P. Ws. 8 and 9 are competent witnesses and their evidence is admissible. It is true that being child witnesses one is to accept their evidence with caution, but as in this case their evidence is substantially corroborated by the evidence given by P. Ws. 3, 4 and 6, we feel that these two witnesses have also spoken the truth. On a careful consideration of the evidence on record and the circumstances of the case we are satisfied that the prosecution version as to the manner in which the occurrence took place is true and that Pilu Sahu died as a result of the injuries inflicted on him by the two appellants.

12. This leads us to a consideration of the question as to what offence the appellants have committed. Mr. Sahu for the appellants has vehemently contended that in the absence of a charge under Section 34 I. P. C. each of the appellants can be punished only for the particular injury or injuries inflicted by him and as there is no evidence to show as to which appellant had caused the injury or injuries which have been proved to be fatal, neither of them can be convicted either under Section 302 I. P. C. or 304 I. P. C. and if at all, they can be convicted only for causing hurt punishable under Section 323, I. P. C. In making this submission he considerably relies on the fact that the appellants were charged only under Section 302, I. P. C. and not 302 read with 34. The charge framed in this case may be quoted :--

'I, Sri R. C. Kar, B. L., Sessions Judge, Bolangir-Kalahandi hereby charge you (1) Dhansai Sahu (2) Santh Kumar Sahu as follows :--That you, on or about the 20th March, 1965 at about 11 A. M. at Amlidadar did commit murder by intentionally causing the death of Pilu Sahu by means of Wooden poles, and thereby

committed an offence punishable under Section 302 of Indian Penal Code, and within my cognizance, and I hereby direct that you be tried by me on the said charge.'

It will be noticed that the words 'in furtherance of the common intention' mentioned in Section 34, I. P. C., had not been embodied in the body of the charge. It is contended that the appellants had no notice to meet a charge or constructive liability and that as such in the absence of any evidence to show that the particular accused caused the fatal injury he cannot be convicted either under Section 302 or 304 I. P. C. It may be remembered that Section 34, I. P. C. does not create any specific offence, but merely enunciates the principle under which one person is liable for the joint act of himself and another when the crime is committed in pursuance of the common intention of both. In furtherance of common intention several acts may be done by several persons resulting in the commission of the crime. In such a situation Section 34 provides that each one of them would be liable for that crime in the same manner as if it were done by him alone.

Now in this case a common charge was framed against both the appellants and they were told that they committed murder by intentionally causing the death of Pilu Sabu by means of wooden poles. Can it be said in the circumstances that the accused had no idea that they would be liable under the explanatory provision under Section 34, I. P. C.? We are of opinion that in view of the fact they were jointly charged for having committed murder of Pilu Sahu, there was sufficient indication to the appellants that each of them would be held liable for the joint acts of both of them. The absence therefore of Section 34 from the charge or of the words 'in furtherance of the common intention' in the circumstances of the case is immaterial, and we feel that the accused were not in any way prejudiced. It has been proved in this case that there was previous litigation between them and the deceased regarding possession of the tank and that the appellants were unsuccessful in that litigation. This is evident from Exts. 3 and 4. It has been established that on the date of occurrence on hearing from Keshari that she was assaulted by P. Ws. 8 and 9, the two appellants together left their house armed with a wooden pole each and went to the tank and questioned the deceased. It is proved that Santha Kumar first gave a blow with the wooden pole on Pilu's neck

and Dhansai also gave a blow on Pilu's right flank. It has been established that even after Pilu Sahu fell down on the ground both the appellants continued to assault him and after he died they left the place of occurrence together, p. Ws. 4 and 9 have stated that after killing Pilu, the appellants said that they had finished one enemy and one more remained to be finished. These circumstances establish beyond any doubt that it is in pursuance of the common intention of both the appellants that they brought about the death of Pilu Sabu. We are satisfied that mere non-mention of Section 34 in the charge has in no way prejudiced the appellants nor is it fatal to the prosecution case.

We may in this connection refer to a Division Bench decision of the Rajasthan High Court in *State v. Bubulal and Bherumal*, AIR 1950 Raj 67 where Wanchoo, C. J. speaking for the Bench observed that-

'Even though there might be no charge under Section 34, I. P. C. it is possible to convict the accused with the aid of Section 34. This does not mean that Magistrates and Judges should not indicate in the charge that Section 34 would be used against the accused. It is always desirable that this should be indicated in the charge.'

But where by oversight or otherwise specific mention of Section 34 is not made in the charge, that defect by itself would not be fatal, if otherwise the Court can come to the conclusion that the accused had notice that they would be liable under Section 34 also, for after all Section 34 is merely an explanatory provision in the Code and does not create any specific offence itself.'

In that case the charge against Bherumal one of the accused persons was that he and Babulal on or about 31-1-52 between 3 and 5 P. M. committed murder by intentionally causing the death of Foujmal and thereby committed an offence punishable under Section 302, I. P. C. The charge against the other accused Babulal was that he and Bherumal at the same time and place committed the murder of Foujmal by intentionally causing the death and thereby committed an offence punishable under Section 302, I. P. C. In neither of the charges there was mention of Section 34 or the words 'in furtherance of the common intention of both' were embodied in the body of the charge. After getting satisfactory proof that the

two accused persons acted in furtherance of a common intention in committing the murder of Foujmal, the High Court convicted them under Section 302/34, I. P. C. although the Sessions Judge acquitted them on the ground that Section 34 had not been included in the charge. We respectfully agree with the view Wanchoo, C. J. had taken in that case. We are not referred to any decision either of this Court or of the Supreme Court where a contrary view was taken.

13. So far as the offence is concerned we have no difficulty in accepting Mr. Sahu's contention that the appellants had no intention to cause the death of Pilu. There is no scope for application of the second clause of Section 300, namely, that the appellants intended to cause such bodily injuries as they knew to be likely to cause the death of Pilu. In our opinion clause 'thirdly' of Section 300 would apply to the facts of the case. That clause speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, there was probability in a lesser degree of death ensuing from the act committed, the conviction should be for culpable homicide not amounting to murder. *Anda v. State of Rajasthan*, AIR 1966 SC 148. It is clear from the evidence in this case that the appellants intended to cause the injuries which were found on the person of Pilu. In fact if there is nothing beyond the injury and the fact that the appellants inflicted them, the only possible inference that can follow is that they intended to inflict the same. Whether the appellants knew of the seriousness of the injuries or intended the serious consequences is not at all material. The question so far as intention is concerned is not whether they intended to kill or to inflict the injuries of a particular degree of seriousness, but whether they intended to inflict the injuries in question and once the existence of the injuries is proved, the intention to cause the injuries will be presumed unless the evidence or circumstances warrant an opposite conclusion. *Harjinder Singh v. Delhi Administration*, AIR 1968 SC 867. Pilu Sahu is a man about 70 years old. As many as 19 injuries were inflicted on his person—some on vital parts of the body. One of the injuries (No. 12) which was dealt on

the left chest caused fracture of the 8th and 9th ribs of the left side of the chest and the other injury caused fracture of the right temporal bone resulting in the fractured pieces, depressing into the brain substance. These are injuries which are sufficient in the ordinary course of nature to cause death. This case therefore comes under clause 'thirdly' of Section 300, I. P. C.

14. In the result both the appellants are liable to be convicted under Section 302/34 I. P, C. We would therefore alter the conviction of the appellants from Section 302, I. P. C. to Section 302/34, I. P. C. and uphold the sentence of imprisonment for life imposed on each of them. The appeal fails and is dismissed.

G.K. Misra, J.

15. I agree.

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