

Babu @ Prabhat Mohapatra Vs. State of Orissa and ors.

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Court : Orissa

Decided On : Feb-02-2009

Reported in : (2009)107CALLT496(NULL)

Judge : P.K. Tripathy and; R.N. Biswal, JJ.

Appellant : Babu @ Prabhat Mohapatra

Respondent : State of Orissa and ors.

Disposition : Appeal dismissed

Judgement :

1. Heard further argument and the Judgment is as follows.

2. The Appellant together with Kishore Kumar Mohanty and Manmohan Pradhan faced trial in the Court of Sessions Judge, Khurda at Bhubaneswar In S.T. Case Nos. 50/3/51 of 1997, arising out of G.R. Case No. 2689 of 1995 of the Court of S.D.J.M., Bhubaneswar. Amongst the aforesaid three accused persons, the Appellant and accused Kishore were charged for the offence under Sections 302/34 I.P.C. with the allegation that in the night of 23rd August 1995 at about 10.50 P.M. they along with the absconding accused Chitti @ M. Harihar Rao intentionally committed murder of Sayed Mahammed Anjum and thereby committed offence under Section 302/34 I.P.C. Accused- Manmohan Pradhan was charged under Section 212 I.P.C. with the allegation that during the course of absconding, he harbored absconding accused fully knowing his complicity in the

murder of the deceased. Appellant and the co-accused facing the trial denied to the charge and claimed for trial.

3. To substantiate the charge, prosecution examined as many as 13 witnesses and relied on documents marked Exts.1 to 19. Prosecution also exhibited the weapon of offence (sword) M.O. I and wearing apparels of the deceased M.Os. II to V. In support of plea of denial of Appellant, accused persons examined three witnesses as D.Ws. 1 to 3, No document was adduced on behalf of the defence.

4. It appears from the impugned Judgment that Learned Sessions Judge, Khurda recorded that:

The plea of the accused Kishore Kumar Mohanty and Manmohan Pradhan is a denial simpliciter. As no incriminating material has surfaced against them in the prosecution evidence, their statement under Section 313 Cr.P.C. was dispensed with.

Though the above quoted portion is not very much material so far as the case of the Appellant and the order of conviction is concerned, yet the aforesaid order of Learned Sessions Judge, being contrary to law and procedure in the Code of Criminal Procedure, 1973, (in short Cr.P.C) therefore we feel it proper to record our observation.

5. After a case is committed to the Court of Session, it is guided by the provision in Chapter-XVIII of the Cr.P.C. Unless an accused is discharged under Section 227, charge has to be framed in accordance with Section 228, Cr.P.C. If the accused does riot plead guilty, for recording the conviction under Section 229 Cr.P.C. then the Trial Court has to proceed with the trial by recording prosecution evidence. Once prosecution case is closed (after recording evidence from the side of the prosecution), Learned Sessions Judge is called upon to peruse the evidence on record and to examine the accused persons, obviously under Section 313, Cr.P.C. and hear the parties and to pass order as to whether the accused or any of the several accused persons is entitle to acquittal under Section 232 of the Code. If in the opinion of the Trial Court, there is no evidence that the accused or any of them committed the offence, for which charge has been framed or any other offence

proved in course of the trial then order of acquittal and the grounds thereof be recorded. A combined reading of Sections 232 and 313 Cr.P.C. thus makes no departure for recording the statement of the accused who is to be acquitted under Section 232 Cr.P.C. When categorical evidence is not available against the accused (as in this case against accused Kishore Kumar Mohanty and Manmohan Pradhan), then such accused persons are to be questioned generally before considering the factum of acquittal under Section 232 Cr.P.C. Unfortunately, such a procedure in the Cr.P.C. was not taken care of by the Learned Sessions Judge.

6. According to the case of the prosecution in the occurrence night, while deceased with P.W.10 Md. Javed started leaving the shop at Unit-I Market, Bhubaneswar, as alleged the Appellant and three others intercepted them and absconding accused Chitti inflicted the injury by means of a sword. For the sake of clarity amongst four accused persons, Appellant Kishore Kumar Mohanty faced the trial for harboring the accused and accused Chitti and another are still absconding.

7. In the process of interception by the accused persons and blow given by accused Chitti, both the deceased and P.W.10 fell down from the bicycle and each of them ran for their life. The deceased fell down and the Appellant and accused Chitti and two others overpowered him at that spot near the office of Samajabadi Party and accused Chitti dealt sword blows, which caused bleeding injuries. Thereafter, the culprits fled away and the deceased catching hold of his injured abdomen and bleeding from other injuries entered into the nearby Police Station, i. e., Capital Police Station, Bhubaneswar. P.W.10 also entered into the Police Station simultaneously with the deceased and there the deceased stated to the police officer the names of his assailants. Immediate step was taken to shift the deceased to the hospital and P.W.10 lodged the F.I.R. Ext.8. The deceased succumbed to the injuries and thereafter the case was investigated for the offence under Section 302 I.P.C. On 24.8.1995 Dr. Santosh Kumar Mishra of F.M.T. Department of Capital Hospital, Bhubaneswar conducted post-mortem examination on the dead body of the deceased and proved the post-mortem report, Ext.3 with the opinion that the deceased suffered homicidal death due to ante mortem injuries. Learned Sessions Judge on appreciation of evidence of

P.W.3 and postmortem report recorded that prosecution proved beyond all reasonable doubt homicidal death of the deceased. We find from record that there was as many as 2 incise penetrating wounds, one on the chest cavity on the left flank of chest below left arm pit and other one on the abdomen on right side 5' from umbilicus. There are also three other incised wounds, one on the left side of waist and the remaining two on the left buttock. Another cut injury resulted in missing of ring r finger from the base of nail level. There were pressure abrasion on the left forearm, right midline and right leg at two places. On dissection, P.W.3 found relevant corresponding internal injuries which resulted in haemorrhage and shock. Learned Sessions Judge, recorded that the defence did not dispute the medical evidence and opinion of P.W.3 on homicidal death of the deceased. Before us also Learned Counsel for the Appellant does not dispute to the aforesaid finding of the Trial Court. Thus, we record out agreement to the finding of the Learned Sessions Judge that the deceased suffered homicidal death.

8. Though various points have been raised by the Appellant in the appeal memo as well as written note of submission but Learned Counsel for the Appellant argues with emphasis to reject the reasoning assigned by the Trial Court for acceptance of evidence of P.W.10 on the face of evidence to P.Ws. 4 and 9, the two eye witnesses, who did not support the prosecution and D.Ws. 1, 2 and 3, three shopkeepers who deposed positively eliminating presence of the Appellant amongst the assailants.

9. Learned Sessions Judge has discarded the evidence of hostile witnesses like P.Ws.4 and 9 and did not give any importance to the evidence of D.Ws. 1, 2 and 3. On the other hand, relying on the evidence of P.W.10 and statement of Police Officer that the deceased made dying declaration and that there was seizure of weapons of offence Exts.6 and 7 on the basis of statement made and spot shown by the Appellant, he held that prosecution has proved the case against the Appellant beyond all reasonable doubt.

10. In view of the submission of Learned Counsel for the Appellant and on perusal of evidence of P.Ws.4 and 9, we find no substance therein which can help the Appellant. So far as D.Ws.1, 2 and 3 are concerned, each of them has claimed to

be the eyewitness to the occurrence but none of them figured as witness in the charge sheet. The police officers examined in this case were not cross-examined so as to prove on record that they or any of the three defence witnesses were present at the spot of occurrence by the relevant time. Therefore, evidence of D.Ws. 1, 2 and 3 were rightly rejected by the Trial Court.

11. Coming to the evidence of P.W.10, it is seen that he has supported the prosecution on the aforesaid charge and has deposed about the occurrence honestly and truthfully. In course of cross-examination, nothing has been brought out from his mouth so as to discard his veracity. His evidence is duly supported by other circumstantial evidence, which are on record and duly discussed by the Trial Court. Such evidence of P.W.10 proves that the Appellant was amongst the assailants and actively participated in the process of intercepting, chasing and assaulting the deceased. The fact remains that only Chitti was armed with sword and all the injuries were caused by him but for that reason when sharing of common intention is well proved from the evidence on record Appellant cannot escape the liability. Thus, we find no merit in the contention of the Appellant. On the other hand, the findings recorded by the Trial Court are Based on evidence on record and therefore that needs no interference. Accordingly, the Criminal Appeal is dismissed.

12. Before parting with the case, In view of the submission made, we make the following observations.

13. The occurrence took place on 23.8.1995, Appellant was arrested on 12.11.1995 and from that date, he is detained inside the jail custody. Therefore, by now he is already inside the jail custody for over a period of thirteen years. Under such circumstance, if his conduct in jail is satisfactory and if there is recommendation by the Jail Superintendent or other competent authority, the State Government may consider the case for his premature release in accordance with the provisions in Sections 433 and 433A Cr.P.C.