

Olankar Saura Vs. the State

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Court : Orissa

Decided On : Mar-25-1958

Reported in : AIR1958Ori251; 1958CriLJ1335

Judge : R.L. Narasimham, C.J. and ;S. Barman, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 287, 364 and 533

Appeal No. : Criminal Appeal No. 147 of 1956

Appellant : Olankar Saura

Respondent : The State

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : J.C. Lenka, Amicus

Disposition : Appeal dismissed

Judgement :

S. Barman, J.

1. This is an appeal from an order passed by the Sessions Judge, Keonjhar, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to imprisonment for Me.

2. The charge against the appellant was that on 27-10-1955 at Gurasahi he committed murder by intentionally causing the death of one Dhangada. Bhauyan and thereby committed an offence punishable under Section 302 of the Indian Penal Code, He was further charged for causing certain evidence of the said offence to disappear, to wit, throwing the dead body of the deceased in river Mahendra Tanaya, with the intention of screening himself from punishment and thereby committed an offence punishable under Section 201 of the Indian Penal Code.

The appellant was also charged for having committed theft of one gold ear-ring and one gold nose-ring (M. Os. II and III) by taking them out of the possession of the deceased and thereby committed an offence punishable under Section 379 of the Indian Penal Code.

3. The facts, so far as relevant for the present purpose, shortly stated, are as follows: The deceased Dhangada Saura used to be looked upon as the head of the village consisting of about seven or eight houses. The villagers used to perform Bagha Puja by sacrificing a buffalo. They used to raise subscription to pay for the price of the buffalo. The deceased was in charge of raising the subscription.

When he demanded the subscription from the father of the appellant he refused to pay, with the result that there was an altercation between the deceased and the father of the appellant when the deceased threatened to drive away the father of the appellant from the village and take away his lands and house. This is the genesis of the cause of the quarrel between the deceased and the appellant which ultimately ended with the murder of the deceased with which the appellant was charged.

4. On 27-10-1955, being the date of occurrence, the deceased went out to a place named Budurul Bada, about two furlongs away from the deceased's village to tap date-palm juice. The deceased did not return on that day. His wife and son did not mind his not having returned on the first day. When, however, the deceased did not return home on the following day also, the deceased's son (P. W. 2) went out in search of the deceased to Budurul Bada.

On the way he met the appellant who told him that while he (the appellant) and the deceased were proceeding to Jirango to purchase tobacco by crossing the Jirango river (this is the local name of Mahendra Tanaya), the deceased was carried away by the stream. The son (P. W. 2) returned to his mother (P. W. 1) and conveyed to her the information. Thereafter, the mother and the son accompanied by the appellant, went out in search of the dead body in the stream but could not trace it.

Then on 29-10-1955, that is two days after the deceased left his village, the search party consisting of the wife and son of the deceased and the appellant himself went to one Kalia Sadi Bhuyan (P. W. 8), who was then a Congress worker at the village. Then they all approached the Mutha head of Jirango Mutha, named Ramasandar Bisoi (P. W. 17) and on 31-10-1955 the said Mutha head, with a forwarding letter, sent report to the police through one of his Paiks.

On 2-11-1955 the report reached the police station on which a formal F. I. R. (Ext. 1/2) was drawn up by the Assistant Sub-Inspector (P. W. 13). On the following day, 3-11-1955, the A. S. I. came to the village Jirango and visited the village Gurasahi on 4-11-1955. On the following day, he drew up a plain paper F. I. R. (Ext. 6) and arrested all the four accused including the appellant and one Kalia Saura who died during the pendency of the trial before the Sessions Judge.

5. The striking feature of this case is that there was no direct evidence of the murder--no eyewitness. Apart from the fact that there was a previous quarrel between the deceased and the father of the appellant over the raising of subscription to pay for the price of the buffalo for the performance of Bagha Puja, there was nothing directly to connect the appellant with the murder.

6. From the evidence, it appears that the appellant killed the deceased at Budurul Bada near the date-palm tree and then with the help of the other three accused and Kalia Saura, carried the dead body from that place to the deep water in river Mahendra Tanaya, tied the dead body with five stones and threw it into the river after removing the said ornaments from the dead body.

It further appears that during investigation, the appellant himself led the police and others to the date-palm tree and produced the Dhamma Thenga (M. O. I) from a

thorny bush. In course of the search for the dead body, the search party, during investigation, found the dead body tied to stones and recovered the same from deep water and upon the ropes being out, the dead body was taken out with the help of P. Ws. 11 and 12, the two Paikas under the Mutha head (P. W. 17).

The dead body was identified but the ornaments were not found on the dead body. On further information conveyed by the appellant accused, Gonga led the party to his house and produced M. Os. II and III which were identified at a Test Identification Parade held by the local Post Master as there was no Gazetted Officer at Jirango. M. Os. II and III being a gold ear-ring and nose-ring respectively, were identified by the wife and nephew of the deceased (P. W. 1 and P. W. 4) in the presence of the Mutha head (P. W. 17) and they were also identified by P. W. 2, son of the deceased, as having belonged to the deceased.

7. Apart from the circumstantial evidence connecting the appellant with the murder, the appellant made an extra-judicial confession before P. Ws. 7 and 8. The statements of all the accused under Section 164, Criminal P. C., (Exts. 3 to 3/4) were recorded by the Magistrate (P. W. 9). The other witnesses were the Police witnesses and the doctor. The doctor (P. W. 16) who held the post-mortem examination on the dead body, found it in a highly decomposed condition.

He, however., found signs of fracture of the 8th and 9th ribs on the right side and on the thoracic cavity on the right side it was found that the 8th and 9th ribs had been fractured. The death, according to the doctor, was due to haemorrhage and shock as a result of the injuries. The doctor's evidence as to the cause of death was not of much help in this case. It was sufficient, however, that the doctor gave his opinion that a blow with M. O. I could have fractured all the ribs and caused instantaneous death.

8. The appellant pleaded guilty while the other accused persons pleaded not guilty. The defence taken by the appellant at the trial was a plea of private defence, namely that while he was returning by the side of Budurul Bada, the deceased got down from the tree and challenged him with reference to the dispute between him and the father of the appellant.

Then, according to him, there was exchange of words between the two when the deceased struck the appellant on his abdomen with M. O. I and that the appellant fell down and while rising up, he accidentally caught hold of M. O. I and when the deceased was drawing out his Kati to assault him, the appellant in his turn struck the deceased with a view to save his own life. This, in short was his story of private defence.

9. The learned counsel for the appellant cited before us a decision of the Lahore High Court, *Hafiz-ul-Rahman v. Emperor*, AIR 1942 Lah 33 (A). In that case a police constable was charged with the murder of a beggar for striking him with a hatchet on his head as a purely defensive-measure and probably without any conscious intention, with the consequence, however, that the beggar died on the spot.

On the facts of that case, it was held that since it was not proved beyond doubt that the constable was fully conscious of what he was doing, in view of the probable consequences of the injury above his eye, the act of the accused in hitting back the deceased with the hatchet could hardly be called voluntary in any sense as to make it criminal and further that a good case for the exercise of the right of private defence could be made out in favour of the accused, even if he had acted with any conscious intention of inflicting an injury which was likely to result in death.

In the present case I have carefully considered this aspect of the case, as the learned Sessions Judge also did in course of the trial before him. It appears that it was only in the committing Court that the appellant came forward for the first time to take up such a plea. He had advanced no such plea on any previous occasion or before P. W. 7. This defence was sought to be substantiated by the evidence regarding the Kati. No kati was, however, found on the spot by any witness and at any stage and no Kati had been recovered.

In fact, there was no evidence about any Kati that could have been used by the deceased. The learned Sessions Judge in his judgment dealt fully with this aspect of the case and I fully agree with him. I held that the plea of right of private defence could not stand, on the facts and in the circumstances of this case.

10. On analysis of the evidence and from the surrounding circumstances, it was quite clear that the prosecution case rested entirely on the judicial confession made by the appellant, recorded by P. W. 9, corroborated by the extra-judicial confession and facts leading to the discovery of the dead body in which the appellant himself took an active part.

The learned Sessions Judge dealt with the evidence of all the witnesses and he made a thorough analysis of the case by reference to the evidence of the witnesses and to the different exhibits including the M. Os. One outstanding feature of this case was the conduct of the appellant himself after the murder, the part that he played in the search leading to the discovery of the dead body from the deep water.

I must say that the peculiar way in which the appellant behaved since the murder appears to connect him with the crime. Be that as it may, in view of the confession made by the appellant himself, the task of the prosecution was made easier.

11. This leads me to the consideration of the confession of the appellant on which the prosecution case mainly rested. The learned Counsel for the appellant challenged the very admissibility of the statement recorded by the Magistrate under Section 364, Criminal P. C. His point was that this statement before the committing Magistrate dated 9-3-1952 did not appear to have been read over to the appellant or interpreted to him at all.

Nor did it show that it was admitted by the appellant to be correct. In support of this contention the learned Counsel for the appellant cited before us a decision of this Court *Gurubaru Praja v. The King*, ILR (1949) Cut 207: (AIR 1949 Orissa 67) {B}, (Ray C. J. and Narasimham J.) In that case, the prosecution relied on certain confessional statements and the exception taken on behalf of the accused was that the method of questioning of the recording Magistrate did not disclose that the statements were made voluntarily; nor did it show that they were read over and explained to the accused.

On the facts of that case, it was held that where the accused in his statement before the committing Magistrate does not retract the confession but on the other

hand sticks to it, but neither the committing Magistrate nor the Sessions Judge read it or explained it to the accused, such confessional statement to the committing Magistrate is inadmissible and should be excluded, because full and adequate compliance with the provisions of Section 164 of Criminal P. C., is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record and reduces the statement recorded by him to a nullity.

In the present case before us, the facts, however, were somewhat different. In this case, the Magistrate took the statement in one of the old printed Forms, presumably still left in his Court. In the old Form in which the Magistrate took the statement, the certificate--

'It was read over to the accused or interpreted to him in the language which he understands and was admitted by him to be correct.'

did not appear to be incorporated. We got a copy of the new Form of recording examination of accused under Section 364 Cr. P. C. where this certificate which was missing in the Magistrate's copy of the statement in the instant case, now appears to have been incorporated at the foot of the new printed Form. It further appears that subsequently, in course of the trial before the Sessions Judge, the confessional statement was tendered by prosecution, read over and explained to the accused appellant in Oriya and admitted under Section 287 Cr. P. C. and a certificate to that effect had been made at the top of the statement under his signature dated 7-9-56 which reads as follows:

'Tendered by prosecution, read over and explained to the accused in Oriya and admitted under Section 287 of Cr. P. C.

Sd/- A. R. Gun

Sessions Judgi

7-9-56.'

The effect of this certificate was that the very statement which was made before the Magistrate was again read over and explained to the appellan in Oriya and

admitted by him to be correct and therefore, the lacuna, which this confessional statement before the Magistrate initially suffered from had been cured by the subsequent certificate by the Sessions Judge.

In my opinion, this amounted to substantial compliance with the requirements of the law. A 'Ray C. J. observed in the above-mentioned case a p. 218,

'Such compliance must not be undertaken in the spirit of being done as a matter of form but as a matter of essence.'

All that was required was that the confessional statement must be voluntary and it must be read over to him and interpreted to him in the language which he understood and admitted by him to be correct. In my view, these requirements had been satisfied in this case by the subsequent certificate to that effect by the Sessions Judge. Furthermore, the fact and substance of the confession were sufficiently corroborated by the evidence of the Taluk Magistrate (P. W. 9).

Thus, the initial defect in form was subsequently cured and there was sufficient compliance "as a matter of essence" although not done 'as a matter of form.' In this view of the legal position with regard to the admissibility of the confessional statement, I hold that the prosecution could and did rightly rely on the appellant's confession for his conviction.

12. In view of the statement, where the appellant, in clear and unambiguous language, confessed that he told Dema Saura (P. W. 7) and Gopi Saura (P. W. 8) that he had killed the deceased and the fact that he confessed his guilt before the Taluk Magistrate (P. W. 9) on 12-11-1955 admitting that he had killed the deceased, nothing could be more clear a confession than this.

Having regard to his confession and the surrounding circumstances, the learned Sessions Judge was right in finding the appellant guilty of the charge made against him under Section 302, I. P. C. In this view of the matter, I maintain the conviction and sentence of the appellant under Section 302 I. P. C. and dismiss the appeal.

R.L. Narasimham, C.J.

13. I agree.

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