

Budu Gouda and anr. Vs. State

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Court : Orissa

Decided On : Nov-16-1964

Reported in : AIR1965Ori170; 1965CriLJ385

Judge : S. Barman and ;G.K. Misra, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3, 17 and 30

Appeal No. : Criminal Appeal Nos. 69 and 78 of 1964

Appellant : Budu Gouda and anr.

Respondent : State

Advocate for Def. : G. Rath, Govt. Adv.

Advocate for Pet/Ap. : G. Narasimham, Adv. in No. 69 and ;S.B. Sahu, Adv. in No. 78

Judgement :

Barman, J.

1. The two accused appellants were convicted on a charge of the murder of one Panchu Gouda on the night of Monday July 15, 1963 at village Khutubai, Police Station Kodinga, district Koraput. The deceased and the accused persons were friends. The motive of the murder is suggested to be that the accused Budu

Gauda who was a bachelor wanted to marry a girl whom the deceased's father had brought under a proposal for the marriage with his son, the deceased; the accused Boidu Jani is said to have helped his friend accused Budu Gauda in the murder. Both the accused appellants denied the charge of murder; in fact they accused each other of the crime. As the deceased was found missing, his father gave police a missing report on Wednesday July 17, 1963. It was not until Thursday July 18, 1963 that the First Information Report about the crime was lodged by the deceased's father P. W. 1 at the police station which is 4 miles from the place of occurrence. The Police took up the investigation and in due course the two accused persons were arrested on July 19, 1963.

2. The prosecution case is this : On the morning of July 15, 1963, which was a Monday accused Budu Gauda went to the house of the deceased and suggested that he should accompany accused Budu Gouda to Kodinga for selecting a bride for him (Budu Gauda). They left the village Churchunda. The other accused Boidu Jani of village Khutubai had also accompanied them. At the end of the day instead of returning home the two accused persons and the deceased went to accused Boidu Jani's house at village Khutubai in the evening. It is said that at night the three went out towards the village tank at Khutubai. Sometime thereafter the accused persons returned but not the deceased. The two accused persons gave out that there was an attack by tiger and so they fled for their life; they did not know which way the deceased had escaped. The deceased having been a new comer to that village Khutubai, accused Boidu Jani's parents (P. Ws. 4 and 5) became worried. They held a search along with the two accused persons but in vain. On the following day July 16, 1963 (Tuesday) they also enquired if the deceased had safely returned to his own village Churchunda but he was not there. The deceased's relations got alarmed. Ultimately on July 17, 1963 (Wednesday) at about noon some people of the deceased's village Ghurchunda including the deceased's father came to village Khutubai in search of the deceased. Then the two accused persons gave out the story of tiger attack which however was not believed on verification. Then what led to the discovery of the dead body and the clue to the murder of the deceased by the accused persons ending in their prosecution and conviction is stated hereunder.

3. On the night of Wednesday July 17, 1963 accused Boidu Jani is said to have confessed to his mother how accused Budu Gouda killed the deceased to have the girl who had been fixed to be married with the deceased. Accused Boidu Jani also confessed that he had assisted accused Budu Gauda in the murder and had given two strokes. The following morning Thursday July 18, 1963 accused Boidu Jani also confessed before the others that the deceased has been killed by the accused persons and that the dead body was concealed in the paddy field. Accused Boidu Jani also led the searching party where the dead body lay. There was a quarrel between the two accused persons in which each blamed the other for the murder : then the accused Budu Gauda tried to escape but he was caught hold of. After everything became known the First Information Report was lodged with the Police by the deceased's father P. W. 1.

4. The Police took up the investigation and held inquest over the dead body which was sent for postmortem examination. The doctor P. W. 7 examined the dead body on July 1963 at 11 a.m., in the morning and found injuries hereinafter discussed. The two accused persons were then charged, committed and sent up for trial before the Sessions Judge, Koraput on a charge of murder under Section 302 Indian Penal Code. He convicted and sentenced them both to undergo imprisonment for life. The accused persons filed appeals separately, the appeal of Budu Gauda being Criminal Appeal No. 69 of 1964, and the appeal of Boidu Jani being Criminal Appeal No. 75 of 1964 which both were heard together.

5. The main grounds on which the prosecution relies for conviction of the two accused persons are these : The circumstantial evidence that the two accused persons were last seen together in the company of the deceased on the night of the murder, the two accused persons left with the deceased and returned home without the deceased sometime thereafter; the accused persons gave a false story about the disappearance of the deceased; the extra-judicial confession by accused Boidu Jani before several persons in which he involved both himself and Budu Gauda; the suspicious conduct of the two accused persons in that each blamed the other for complicity in the murder and the conduct of accused Budu Gauda trying to escape in course of quarrel; the fact of having found, at the instance of the accused Baidu Jani the dead body lying concealed in a paddy field;

and lastly, the fact that the deceased was a victim of a homicidal attack (not alleged tiger attack).

6. The learned Sessions Judge rightly did not accept the evidence of the only eye-witness P. W. 6. In spite of enough flutter in the village over the incident, P. W. 6 kept silent. 'He did not disclose having seen the murder to the investigating police officers particularly when the accused had already been taken into custody. The evidence of this witness is not reliable.

7. This leads us to the consideration of the case of the two accused appellants separately.

8. Re : Criminal Appeal No. 69 of 1964 by Budu Gauda :The extra-judicial confession made by the co-accused appellant Boidu Jani before his mother P. W. 4 involving both himself and the accused Budu Gauda as having committed the murder of the deceased cannot however be utilised against this accused appellant Budu Gauda. The danger of using the testimony of one co-accused to corroborate another has repeatedly been pointed out by the Supreme Court. The testimony of a co-accused can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. The tendency to include the innocent with the guilty is peculiarly prevalent in human nature (as it is) and it is very difficult for the Court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid.

But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a confession. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. Thus, though

confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. Thus the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence, *Kashmira Singh v. State of Madhya Pradesh*, AIR 1952 S C 159 ; *Haricharan Kurmi v. State of Bihar*, AIR 1964 S C 1184.

9. The question is : Is there in the present case other satisfactory independent evidence against the accused appellant Budu Gouda On scrutiny of the entire evidence our answer is; No. All that we find is that this accused Budu Gauda had gone with the deceased and other accused Boidu Jani. On his return the accused Budu Gauda gave a false explanation about the disappearance of the deceased. The evidence of P. W. 1 the father of the deceased supports the prosecution case to the extent that the accused Budu Gauda and the deceased are co-villagers; that the father of the deceased had kept a girl in his house for being married with his son, the deceased; that on the date of the murder the deceased had left his house along with the accused Budu Gauda. It is also in evidence that they went to the house of the accused Boidu Jana at Village Khutubai; that at night all the three--deceased and the 2 accused persons--went out towards the village tank: that the accused persons returned but not the deceased who was found missing; that the two accused persons, when asked, charged each other having killed the deceased; it was then that accused Budu Gauda tried to escape but he was caught hold of. All this conduct of the accused Budu Gauda does not show beyond this that he had somehow a guilty conscience and nothing more: Except a vague suggestion that the accused Budu Gauda was interested in the girl fixed to be married with the deceased, there is no direct evidence of the motive for the

murder. All these are mere suspicious circumstances but not legal proof of accused Budu Gauda's complicity in the murder. These circumstances are not, by themselves, sufficient to connect the accused Budu Gauda directly with the crime. There is no evidence at all of any further movements of the accused Budu Gauda between his going out together with the deceased and the other accused Boidu Jani from the house of the accused Boidu Jani towards the village tank after dusk time and his (Budu's) returning sometime thereafter with the accused Boidu Jani but not the deceased. There is no evidence what happened in between this time. There is nothing to connect the accused Budu Gauda with the crime. There is thus no satisfactory independent evidence against the accused Budu Gauda.

10. It is fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and accused only who was perpetrator of the offence and such evidence should be incompatible with the innocence of the accused.

11. In the present case the learned Sessions Judge was not justified in drawing the conclusion from the mere circumstantial evidence relied on by the prosecution that the accused Budu Gauda was responsible for the murder.

12. What primarily weighed with the learned Sessions Judge in convicting the accused Budu Gauda was his conduct. The material findings on which this accused was convicted were these :

'Accused No. 2 (Budu Gauda) has admitted to have persuaded the deceased to accompany him to Kodingashandy for selecting a bride for him (A. 2) and further admits to have proceeded to Khutubai in the company of the accused No. 1 (Boidu Jani) Accused No. 2 stated that after Accused No. 1's return without his companion, he and the parents of accused No. 1 searched for the deceased though accused No. 1 went to sleep. But that is not the statement of the parents of accused No. 1 nor the case of accused No. 1. As already stated, the conduct of accused No. 2 in keeping quiet and giving false stories about the disappearance of the deceased indicates his guilty mind. Again, as he went back to Churchunda with accused No. 1 just to enquire according to them if the deceased had returned safe, he did not make the disclosure to P. W. 2, the mother of the deceased, that

the deceased was missing as there was an attack of a wild animal and they fled in different directions I do not think he would have behaved in the manner he did if really he was innocent and had not gone out with accused No. 1 on the alleged night and time. Thus, it can be held without doubt that in fact he left in the company of accused 1 and the deceased on the night of Monday.'

In our opinion, all these circumstances can raise mere, suspicion but does not prove, beyond doubt, accused! Budu Gauda's complicity in the crime. Mere suspicion is not proof.

13. Thus in view of the position that the other, independent evidence against this accused Budu Gauda is not satisfactory, the extra-judicial confession by the accused Boidu Jani involving the co-accused Budu Gauda in the murder cannot be utilised against this accused Budu Gauda. In the absence of other evidence against this accused Budu Gauda, the court cannot rely on the extra-judicial confession of the co-accused.

14. We cannot agree with the conclusion reached by the learned Sessions Judge. In our opinion the circumstances relied on by him, by themselves, are not enough without anything more to connect the accused Budu Gauda with the crime, and the accused appellant Budu Gauda is entitled to have the benefit of doubt and be acquitted of the offence with which he has been charged.

15. Re-Criminal Appeal No. 78 of 1964 by Boidu Jani: The case of the accused Boidu Jani is however different. Apart from the circumstantial evidence against him, he made an extra-judicial confession of having committed the murder before his mother P. W. 4 and he pointed out the place of occurrence which led to the discovery of the dead body. The evidence of the mother is that accused Boidu Jani confessed that he had helped the other accused Budu Gauda in committing the murder and that he (accused Boidu Jani) had given the deceased two strokes. This accused Boidu Jani had also confessed before the P. W. 3 and one Dasarathi Karmi and led them to the place of occurrence.

16. The fact that the accused Boidu Jani led to the discovery of the dead body is corroborated by the evidence of P. W. 3. This witness P. W. 3 said that accused

Boidu Jani confessed that they hit the deceased with a lathi and that he (accused Boidu Jani) would point out where the dead body was; accused Boidu Jani then pointed out a place said to be the place of occurrence where they (this party of five including P. W. 3 and others) found some blood stains. It was on a ridge. The accused Boidu Jani then showed them how they dragged the dead body into the paddy field and thrown it in the field where the paddy had grown to a height of 3 feet. Then in course of search, they found some hair sticking to the paddy leaves. The accused Boidu Jani confessed that they had dragged the dead body in that way to bury it in the water. The dead body was found in the paddy field near the ridge.

17. The evidence leading to the discovery of the dead body as pointed out by the accused Boidu Jani is supported by other corroborative evidence. It is clear from the evidence of P. W. 4 and 5 that the accused Boidu Jani was last seen together with the deceased. It is also in evidence that this accused Boidu Jani on his return when asked about the deceased, gave a false story of tiger attack. It is a significant circumstance that both the parents of the accused Boidu Jani, namely P. W. 4 and P. W. 5 deposed against their son. Unless the accused Boidu Jani was really guilty, there is no reason why the parents should depose against their son. Thus apart from the extra-judicial confession there are other strong corroborative circumstances against this accused appellant Boidu Jani.

18. It was argued on behalf of the defence that from the medical evidence of the doctor P. W. 7 who held post-mortem examination, it appears that the external injuries on the deceased were eight in number--incised, lacerated, punctured, cut wound and fracture purporting to indicate that the said eight injuries could not have been caused by lathi alone as confessed by the accused Boidu Jani before P. W. 3. Accused Boidu Jani is said to have told P. W. 3 that they (the accused persons) hit the deceased with lathi and not with tangi. The defence point is that having regard to the nature of the wounds, they could only be possible both by sharp cutting weapon as also by a blunt weapon, and not by a lathi only as confessed by the accused Boidu Jani, and accordingly the confession is not true.

19. This argument, relying on the nature of the injuries on the deceased, however loses its force having regard to the evidence of the doctor P. W. 7 and P. W. 3 and P. W. 4 before whom the accused had confessed. This accused said that he had given two strokes. The evidence of P. W. 3 is that this accused Boidu Jani confessed that the deceased was hit with a lathi and not with a tangi. The doctor P. W. 7 who held the post-mortem examination found as many as eight external injuries on the dead body including injuries Nos. 2, 7 and 8 namely :

'2. An extensive laceration 15 1/4 x 8 1/2' on the lower part of the left side and middle of the lower abdomen lying 4 1/2' below the naval and then extending to the front of the left hip and major part of the left thigh lying 5 1/2' above the left knee with disorganisation of soft tissues and laceration of the underlying muscles and exposure of the left femur. On the upper part of the wound in the abdomen a loop of small intestine and loop of sigmoid colon were exposed.

7. An extensive laceration 5 1/2' x 10' x 3' with extensive disorganisation of soft tissues and muscles of lower half of the left arm.

8. A comminuted fracture of the middle of the lower jaw (mandible) breaking the bone into four pieces with uprooting and loosening of the incisors and all the teeth of the right side of the lower jaw. Four incisors of the under jaw were also loosened.'

Injuries 2 and 7 are lacerated and injury No. 8 is a fracture. The doctor's opinion is that injury Nos. 1, 3, 4 and 5 and 6 are likely to have been caused by a sharp cutting weapon and injury No. 8 by a blunt weapon. It is possible that injuries Nos. 2, 7 and 8 could have been caused by a lathi.

20. It is the settled view as expressed by a Division Bench of this Court in *Bhima Shaw v. State*, 22 Cut L T 317: (AIR 1956 Orissa 177) that a court would be entitled to reject those portions of the confessions or admissions of the accused which have been proved to be false by prosecution evidence while accepting the residue. In the present case there is no evidence as to,--apart from the lathi used by the accused Boidu Jani,--what other weapon was used in committing the murder. Presumably, some sharp cutting weapon was also used. The evidence of

the doctor P. W. 7 supports the prosecution version that some of the injuries including injury No. 8 and the lacerated wounds could have been caused by a blunt weapon like a lathi and therefore to that extent the confession is true. There is nothing to show that the confessional statement is not voluntary.

21. We are satisfied that the confession of the accused Boidu Jani supported by other strong circumstantial evidence as hereinbefore discussed establishes beyond any doubt that the accused Boidu Jani had participated in the murder of the deceased in the manner he did by giving strokes which resulted in his death. The order of conviction and sentence on the accused appellant Boidu Jani is justified.

22. In this view of the case, the order of conviction and sentence passed on the accused appellant Budu Gauda in Cr. Appeal No. 69 of 1964 is set aside and he is directed to be set at liberty forthwith. The order of conviction and sentence passed on the accused appellant Boidu Jani in Cr. Appeal No. 78/64 is upheld.

23. In the result, therefore, Criminal Appeal No. 69 of 1964 is allowed and Criminal Appeal No. 78 of 1964 is dismissed.

Misra, J.

24. I agree.

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