Bihari Mandal Vs. State

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Court : Orissa

Decided On : Apr-24-1957

Reported in : AIR1957Ori260; 1957CriLJ1300

Judge : P.V.B. Rao and ;Das, JJ.

Acts : Evidence Act, 1872 - Sections 114 and 133

Appeal No. : Criminal Appeal No. 143 of 1955

Appellant : Bihari Mandal

Respondent : State

Advocate for Def. : H.G. Panda, Adv. for Govt. Adv.

Advocate for Pet/Ap. : G.N. Misra, Adv.

Disposition : Appeal allowed

Judgement :

P.V.B. Rao, J.

1. The appellant Bihari Mandal was convicted by the learned Additional Sessions Judge of Mayurbhanj of culpable homicide not amounting to murder and was sentenced to rigorous imprisonment for ten years.

2. The appellant was charged under Section 302, I. P. C., for having intentionally caused the death of a boy aged 11 years by name Ganesh Mahanti at about noon on Sunday, 6-3-55. The appellant was the Mulia of one Sartuk Mahanti (P. W. 6). P. W. 6 had two Pana Barajas--one big and one small in that village. The appellant used to water the Pana Barajas and dine and breakfast in the house of P. W. 6 on the days he worked in the Pana Barajas. P. W. 6 had a brother who died leaving his widow Ambika (P. W. 3) and a daughter. According to the evidence of P. W, 3, there was some intrigue between her and the appellant in consequence of which Ambika became pregnant and was driven out of the house.

Sachala (wife of P. W. 6) had a son and a daughter, the son Baikuntha being 10 years old and the daughter Lakshmi being 7 years old. The deceased Ganesh was the son of Nilakantha Mahanti (P. W. 4) a neighbour of Sartuk. Nilakan-the also had a Pana Bara:a near about that of Sartuk. Sunday was a day of Hat at two places, namely. Deula and Bhatgran. Both Sartuk and Nilakantha left their village with Pana leaves for marketing them in the respective Hats during the morning hours and were absent from home durine the day. Ganesh the deceased and Baikuntha, the son of Sartuk were playmates being almost of the same age.

3. The case for the Prosecution is that on the fore-noon of the day of occurrence, the apreliant was working at the Pana Baraja of Sartuk and Sachala sent him breakfast consisting of Bhuja. The son and the daughter of Sartuk carried the breakfast and were playing with Ganesh and at that time Ganesh, it is alleged, having disturbed the water, the appellant gave him a slap. After taking the Bhuja the appellant asked the children of Sartuk to tell their mother to come with oil for his bath. The mother after finishing the cooking left with oil towards the Pana Baraja.

It is the prosecution case that when she handed over the oil to the appellant and was returning back, the appellant caught hold of her and forced her down into a depression & started ravishing her. Ganesh who was in the vicinity having been attracted by her cries went near and threatened the appellant that he would Inform this matter to his Bada Bapa, namely, Sartuk Thereupon the appellant got annoyed and gave him a slap Ganesh got offended, abused the appellant for

hitting him and said that he would definitely go and inform this intrigue to Sartuka.

As he was going away so saying, the appel-lant caught hold of him and throttled him by the neck and the boy died on the spot. Then the appellant carried the dead body of the boy into the Pana Baraja Sachala who was still there became dumb-striken and ran away. When she was running away, the appellant gave her a threat that if she would divulge this fact to anyone, he would kill her and her son.

4. As Ganesh did not return home for the day meal, his mother (P. W. 2) went about in search of the boy. but did not find him at the usual places, namely, the Pana Baraja, the fields or the Pokhari. The husband (P. W. 4) of (P). W. 2 Annapurna) who had been to the Hat was communicated with. He returned about 2 Ghadis in the night and with his brother went about in search of the boy, but they could not find, him in the night. Next) morning before dawn, Nila-kantha left for Udaypur to his Sadu's house in expectation that the boy would have gone there, but did not find him there. When he was returning from that place, he learnt that a dark boy was found hanging on a tree at a distance from his Pana Baraja.

Before he reached his house, he met Rudra Patra who told him that his son was the person found hanging on a Badami tree. He at once lost his senses and could not go to the spot till the arrival of the Sub-Inspector. Kara Mahanti (P. W. 1) heard from P. W. 10 the Mulia of Nila-kantha asking people to come quick and he went towards that side and found Ganesh hanging by the neck on the branch of a Badami tree. As the father of the deceased was absent, it was decided that he should go to the Police Station. The information was lodged by the father before the junior Sub-Inspector (P. W. 15) who was camping at a nearby village. P. W. 15 immediately visited the spot, held the inquest but despatched the dead body for post-mortrm examination on 8-3-55. During investigation, it came to light that the deceased was playing with Baikuntha who last saw him; and that Sachala went with oil to the Pana Baraja after which the deceased was not seen. On this information, the police charge-sheeted the appellant under Section 302, I. P. C.

5. The appellant pleaded not guilty, but did not deny that he was a Mulia under Sartuk Ma-hanti: that he was working at the Pana Baraja of Sartuk on 6-3-55 that the son and a daughter of Sartuk took his breakfast to him, and that he

reprimanded Ganesh for disturbing the water.

6. 16 Witnesses were examined by the prosecution. p. W. 10 is the person who discovered the dead body of the boy hanging on the tree. P. W. 2 Annapurna, P. W. 14 the Khundi of the deceased. P. w. 4 the father and P. W. 11 a servant deposed that the deceased boy did not return home for the day meal and a search was made for him. P. W. 3 Anibika deposed to the fact that she was made pregnant by the appellant, in consequence of which she was driven out of the house.

This fact was corroborated by P. W. 5 the wife of Sartuk Mahantl and their son (P. W. 8) corroborated the story given by his mother that she went to the Pana Baraja with o:l on that fore-noon having been informed by him and that the appellant, wanted her there. P. W. 5, one important witness in this case cited that aff-er she took the oil to the Pana Baraja, the appellant forcibly ravished her and that Ganesh came there and threatened a disclosure whereupon the appellant caught hold of the body by, the neck and throttled him to death.

7. The deceased was found hanging on 7-3-55 with the rope (M. O. I) tied to the neck and the string (M. O. II tied around his waist. Though the junior Sub-Insper tor came and held the inquest on 7-3-55. the corpse was despatched to the nearest hospital on .8-3-55 and the postmortem examination was held on 9-3-55. Some witnesses were examined on 7-3-55, but nothing suspicious could be found.

On 10-3-55, the Investigating Officer again came to the village and then came to know that the occurrence was case of murder. The Medi-cal Officer who conducted the post-mortem examination directed sending of viscera to the Chemical Examiner for examination. Till that time the case was suspected to be death by poison. The first indication of complicity of the appellant was brought to light by the Investigating Officer after examining the son of Sartuk Mahanti as also Sachala (P. W. 6).

8. The learned Additional Sessions Judge in discussing the evidence has categorically stated that there is no doubt that as far as the evidence relating to murder is concerned, there is only the evidence of Sachala (P. W. 5). That

evidence, according to the learned Sessions Judge, was corroborated in some material particulars by the Medical Officer. He therefore came to the conclusion that it was the appellant who caused the death of the deceased Ganesh.

But he held that the act of the appellant did not amount to murder, but was only culpable ho-micide not amounting to murder. I may state that I fail to understand the reasoning of the learned Additional Sessions Judge as to how he could treat this case as one of culpable homicide not amounting to murder. The only question to be decided in this case is whether the appellants is guilty of murder or not. There is no appeal by the Government against the acquittal of the appellant under Section 302 I. P. C.

9. P. W. 7 is the Medical officer who held the postmortem examination. He stated that the jute rope (M. O. I.) was tied around the neck with a knot on the left side and that on its removal he did not find any external marks of injury on the neck or any other portion of the body. On discussion also he found no brusing of the tissues around the neck nor extravasation of blood thereunder. He did not notice any features, Indicating a case of hanging. According to the post-mortem report, the heart was in tact right heart empty and left heart empty, the body was decomposed and features were destorted and unrecognisable. No definite opinion as to the cause of death was given but it was reserved pending chemical examination of the viscera.

10. The learned counsel appearing for the appellant contended that the evidence of Sachala (P. W. 5) ought not to be accepted and even if accented the conviction based upon her evidence is not corroborated in any material particulars and as P. W. 5's evidence is in the nature of the evidence of an accomplice, the' conviction cannot stand. P. W. 5, according to her evidence, was cognisant of the murder. She went there with oil for the appellant. She was, according to her evidence, forcibly ravished by the appellant. She had, without any observation or violence on her part, sexual intercourse with the appellant.

During, the act of sexual intercourse the deceased came and threatened that he would disclose it to her husband, where upon the deceased was slapped by the appellant and again the deceased persisted in saying that the matter would be

reported. P. W. 5 also stated that on this the appellant caught hold of the boy and throttled him with both his hands and the boy died, This evidence was accepted by the learned Additional Sessions Judge and he based the conviction saying that this evidence was corroborated by the medical evidence,

The medical evidence, in my opinion, does not help the case in any way. No doubt, the medical evidence, as held by the learned Additional Sessions Judge may not amount to sufficient evidence to show that the death was due to hanging. It may be that the boy being found hanging by rope on the Badami tree is a camouflage.

11. The evidence of P. W. 5 certainly brings home the guilt to the accused. But it is to be considered whether her evidence by itself can be relied upon to convict the appellant on a charge of murder. She was having sexual intercourse with the appellant at the time when the deceased came there and threatened that he would expose the matter and the husband of P. W. 5 who is also the master of the appellant would be informed of the same. She witnessed, according to her evidence, the throttling of the boy and his being done to death.

She did not say this to anybody not even to her husband, but she gave out this story only after the Investigating Officer sent for her and examined her by which time the appellant was found absconding. The occurrence took place on 6-3-55 and the disclosure was made by P. W. 5 to the Investigating Officer on 11-3-55. For five days she did not disclose it to anybody. Under these circumstances, it is to be considered whether her evidence is in the nature of the evidence of an accomplice. A person who is present at the commission of the crime and who is interested in not disclosing the commission of the crime is, in my view, a person who is in the position of an accomplice.

In Sarkar's Law of Evidence at page 1075, it is observed, that a witness who admits that he is cognisant of the crime to which he testifies, and took no means to prevent or disclose it, is a person who is in the position of an accomplice. In the case of Ishan Chandra Chandra v. Queen Empress ILR 21 Cal 328 (A) it was held:

'Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice; but held that his testimony was not such as to justify a conviction except where it was corroborated'.

In the course of the judgment, their Lordships observed,

'The remaining question is the most Important one. We agree with the learned Sessions Judge in thinking that it would be unsafe to act in this case on the unsupported evidence of Gooroo Pershad. We are not prepared to say that he was an accomplice. He may have been one, but it would be impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it, and omitted to disclose it for six days. Prom any point of view, we do not think that his testimony is such as to justify a conviction, except where he is corroborated.'

In the case of Queen v. Chando Chandalinee, 24 Suth WR (Cr) 55 (B) Markby and Mc-Donell, JJ. held.

'An accused person cannot be convicted solely upon the evidence of persons who are more or less participators in the crime of which he is accused. Where a witness admits that he was cognizant of the crime to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice.'

In the case of Umed Sheik v. King Emperor, 45 Cal LJ 581 (C), the learned Judges quoted with approval the above two decisions and observed.

'Several decisions of this Court have been cited to show that a person who has knowledge of the commission of an offence but keeps quiet for some days is not better than accomplice; Ishan Chandra v. Queen Empress (A) and the Queen v. Chando Chandalimnee (B). It should be observed that in all these cases the Judges were considering the value of the evidence of the witnesses the cases being open to them on questions of fact.'

But as the case before them was a case of conviction in a trial by a Jury and the Judge did warn the Jury with regard to the evidence of those witnesses, the learned Judges held that there was no misdirection to the Jury. In the case of Hayatu v. Emperor, AIR 1929 Lah 540 (D), it was held.

'Witnesses who admittedly had witnessed the crime, who have assisted in concealing the evidence of that crime or at least connived at such being done and who have not attempted to give any information either to the police or to any other person to enable the offender to be brought to justice are in a very little better position than that of accomplices and it would be unsafe to accept their testimony unless corroborated by some independent circumstances.'

On the authority of these decisions, it is clear that P. W. 5 is in the position of an accomplice. If not actually a participator in the crime and her evidence cannot be accepted unless it is corroborated in material particulars. The corroboration sought to be relied upon by the learned Sessions Judge in the medical certificate is in my opinion no corroboration. The body was highly decom-posed at the time the post-mortem examination -was held. The Medical Officer could not even give the cause of death in his report.

The result was reserved till after the Chemical Examiner's' report regarding viscera was obtained. This fact on the other hand, shows that the Medical Officer suspected the case to be a case of poisoning and not a case of throttling. There were no external sings of the throttling on the dead body. Even Baikuntha the son of P. W. 6 did not disclose about what took place before the occurrence which he was aware of, till after 4 or 5 days. In these circumstances, I am of opinion that the evidence of P. W. 5 alone, though the evidence is clear about the complicity of the appellant, cannot be made the basis of conviction. It has become a rule of law that the evidence of an accomplice should be corroborated in material particulars.

As there is no corroboration of the evidence of P. W. 5, I am of opinion that the appellant cannot be held to be proved to have been guilty of causing the death of the deceased Ganesh. The case against him cannot be said to have been proved beyond all possibility of reasonable doubt. I give the benefit of doubt to the appellant and acquit him. I set aside the conviction and sentence passed upon

him, allow the appeal and direct that he would be set at liberty forthwith.

Das, J.

11a. I agree.