

Ram Chandra Sahu and ors. Vs. the State

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Court : Orissa

Decided On : Mar-20-1962

Reported in : 28(1962)CLT398; 1963CriLJ377

Judge : R.K. Das and; G.K. Misra, JJ.

Appellant : Ram Chandra Sahu and ors.

Respondent : The State

Judgement :

G.K. Misra, J.

1. Appellants Ramchandra Sahu and Hajari Kondh were charged under Section 302/34 and Section 201, I P.C. Ramchandra has been convicted under Section 302, I.P.C. and sentenced to undergo imprisonment for life and has been acquitted of the charge under Section 201, I.P.C. Hajari has been convicted under Sections 302 and 201, I.P.C. and has been sentenced to imprisonment for life and R.I. for three years respectively, both the sentences to run concurrently. Keshab Jhoria has been convicted under Section 201, I.P.C. and has been sentenced to R.I. for 3 years. Rupsingh Majhi has been acquitted of the charge under Section 201, I.P.C. Admittedly Hajari Kondh, Rupsingh Majhi and Keshab Jhodia were the servants under Ramchandra Sahu in his liquor bhati.

2. The prosecution case is that Nilambar Naik (P.W. 10) is the step-brother of deceased Pitambar. Nilambar took an advance of Rs, 300/- from Ramchandra for supply of bricks. Both Pitambar and Nilambar also took advance of Rs. 450/- from the Manager for supply of bricks. Nilambar did not supply the bricks and left the village. Prosecution case is that Ramchandra put pressure on Pitambar for realisation of the dues against Nilambar. Accordingly at about 4 p.m. on December 7, 1960 Ramchandra called Pitambar to the Bhati. Hajari dragged Pitambar inside the bhati and Ramchandra gave shoe beating to Pitambar for production of Nilambar. Pitambar left the Bhati and at about 9 p.m. on the same day Hajari went to Pitambar's house and called him to the liquor bhati. On his arrival Ramchandra and Hajari assaulted Pitambar in the treasury room of the bhati. About an hour thereafter Hajari, Keshab and Rupsingh carried the dead body and left it on the verandah of Pitambar and ran away. Moti Domuni (P.W. 7), the stepsister of Pitambar, saw these persons running away and made a hulla which aroused Pitambar's mother (P.W. 6). They saw the dead body on the verandah and made hulla as a result of which many persons gathered. The dead body was removed inside the house. Thereafter F.I.R. (Ex. 2) was lodged at about mid-night which was followed up by investigation of the case,

3. The defence is one of complete denial of the occurrence.

4. Durjodhan Gond (P.W. 3 and Choukidar), Ghasiram Dumoni, the mother of the deceased and P.W. 6, and Moti Dumani (P.W. 7) are witnesses to the assault on Pitambar at the bhati at about 4 p.m. P.Ws. 6, 7 and Raghunath Naik (P.W. 8) are witnesses to the fact that at about 8 p.m. Hajari called Pitambar from his house to the bhati. The fatal assault is alleged to have taken place at about 9 p.m. and P.Ws. 1 and 4 are the eye-witnesses to the assault and P.W. 9 spoke to the presence of the deceased at the bhati at 9 p.m. P.Ws. 6, 7 and 8 are the witnesses to the carrying of the dead body by Hajari, Keshab and Rupsingh. P.Ws. 4 and 9 are the sons of P.W. 3. Nothing substantial has been suggested against them. P.Ws. 1 and 8 are two independent witnesses and there is no allegation against them excepting that they are the caste men of the deceased. The deceased and all those witnesses are Adibasis.

5. Dr. J.N. Das (P.W. 2) conducted the post mortem examination on December 8, 1960. He found rigor mortis present all over the body. Marks of dried saliva were found dribbling from left angle of mouth towards the left ear. Trachea and Larynx were congested and contained froth. There were three superfluous scratch marks on the left side of the chest wall without signs of bleeding-size 3' x 3 1/2' x 4'. No mark of injury was visible on the back. There was one ligature mark 1/2' broad 7 1/2' in length lower down on the neck. It commenced 2' below and 1' behind vertical line drawn from the lobule of the left ear passing horizontally and encircling the front of the neck below thyroid cartilage extending to the side of the neck left side 2 1/2' below and 1' behind the vertical line drawn from the lobule of the left ear. The ligature mark is ante-mortem. Both ligature marks on the side of the neck towards their ends to the extent of 1 1/2' length are directed slightly upwards and backwards. Mr. Kanungo contended that the injuries were suicidal and not homicidal. It is unnecessary to discuss them elaborately. The distinguishing features between hanging and strangulation have been enumerated in Modi's Medical Jurisprudence at page 167. On a bare perusal and comparison of these features it would be clear that the injuries were homicidal and caused by strangulation. The doctor opined that death was probably due to strangulation of the neck by a cord. No question has been put to the doctor by confronting him with any of the significant features given in Modi whereby it could be asserted that death was suicidal and not homicidal. There is no substance in the contention that the death was suicidal.

6. As I have already said, P.Ws, 3, 6 and 7 speak about the presence of Pitambar and assault on him at the bhati. Admittedly P.W. 7 got the name of Ramchandra tattooed in her arm. P.W. 7 is in the keep of Ramchandra. It was elucidated from the cross-examination of P.W. 7 that Pitambar scolded her for tattooing the name of Ramchandra and that he alone picked up a quarrel with Ramchandra for this. These three witnesses have stood the cross-examination well and their evidence is reliable. The only suggestion made against all witnesses is that material part of the story finds no mention in the F.I.R.P. Ws. 6, 7 and 8 speak to the fact that at about 8 p.m. Hajari again called Pitambar to the bhati. P.W. 8 is a wholly independent witness and close neighbour and nothing has been suggested against him excepting that he is a caste man of the deceased. The evidence of

P.Ws. 6 and 7 is that when Hajari called for the second time Pitambar was unwilling to go; but P.Ws. 6 and 7 persuaded him to go asking him to take time for 2 to 3 days from the Manager for the production of Nilambar. P. Ws. 1 and 4 speak to the material occurrence at about 9 p.m. at the bhati where they had been for purchase of liquor. At that time they saw Hajari taking Pitambar inside the treasury room and giving him pushes. Ramachandra was inside the treasury room and was shouting 'Bring Sala inside; we would kill him'. Hajari took Pitambar inside the treasury room. Both of P.Ws. 1 and 4 were in the court-yard outside the bhati. After Pitambar was dragged, there was sound of beating and they further heard the voice of Ramchandra directing 'Mar Salaku', Both of them went towards the back side and near the wall of the treasury room they heard sounds of beating. They also heard the voice of Pitambar entreating them not to beat him and that he would produce his brother. Thereafter there was groaning sound of 'ghar, Ghar' like throttling. Sometime after, the sound stopped and they left the place in fear. Their further version is that about two hours after this, they heard the hulla made by the mother of the deceased and the voices of other persons in the village. By the time they reached the villagers were starting for the Police Station which is at a very short distance for lodging their first information report. P.W. 9 supports the versions of P.Ws. 1 and 4 only to the limited extent that in the evening at about 9 p.m. he found Pitambar at the bhati. The statements of P.Ws. 1 and 4 are quite consistent and both are wholly disinterested witnesses. On a perusal of their evidence they impress us as witnesses of truth and we have no reason to discard their evidence.

7. The next group of witnesses are P.Ws. 6, 7 and 8 who deposed to the effect that three persons including Hajari and Keshab left the dead body of Pitambar and ran away. Mr. Kanungo for the appellants very strenuously contended that the F.I.R. filed by P.W. 3 refers only to the first part of the story and the subsequent case of the prosecution is a concoction and development. F.I.R. was given at 12 midnight. The F.I.R. is very cryptic. It does not give details of the entire story. It refers to the presence of Pitambar at the bhati at 4 p.m. as also to the incident when the dead body was found and a hulla was created by P.Ws. 6 and 7. It is however silent as to the fact of assault being seen by P.Ws. 1 and 4 and the factum of P.W. 7 disclosing that 3 persons including Hazari and Keshab were

running away after leaving the dead body on the verandah. It refers to a further fact that Pitambar stated to P.W. 6 that Ramchandra and Hajari assaulted him and so saying Pitambar could not speak further and died. Mr. Kanungo argues that if in point of fact P.Ws. 1 and 4 saw the assault at 9 p.m. and P.W. 7 saw 3 persons leaving the dead body on the verandah and P.Ws. 6, 7 and 8 saw Hajari calling Pitambar from his house at about 8 p.m., all these details could have been furnished by these witnesses at the time when P.Ws. 6 and 7 made hulla on seeing the dead body and a large many persons gathered at the place. According to him, the omission of these facts discredit the testimony of these witnesses who have been engineered for setting up a false case against the appellants. It is striking that these witnesses were not cross-examined and asked to explain as to why they did not divulge this story immediately after they gathered at the place on hearing the hulla. In the absence of such cross-examination, the argument does not carry much value. Moreover soon after the F.I.R. was filed, investigation was taken up and in the very night of the occurrence or in the next morning these witnesses stated before the police what they have deposed in Court. It is difficult to conceive that within a short span of time, a false story was hatched up.

Mr. Kanungo argued that even in the Dead Body Chalan (Ex. 5) which was submitted at 8 a.m. on December 8, 1960, there is no reference to similar details. The dead body chalan was submitted within 12 hours and appears to be mere reproduction of the F.I.R. and the reasons already given by me explaining the omission in the F.I.R. also explains the omission in the Dead Body Chalan. Mr. Kanungo relied on Rule 207(c) of the Orissa Police Manual which is to the effect:

The Chalan shall contain an accurate description of the corpse, a statement of the apparent cause of death and any circumstances which give rise to any suspicion of foul play, and an accurate list of clothes and articles sent with the corpse.' It is emphasised that a statement of the 'apparent cause of death' should have included in its sweep the entire story alleged by the prosecution. I am not impressed by this argument. It was stated clearly in the dead Body Chalan that Pitambar died as a result of the assault by Ramchandra and Hajari. When the real cause of death has been mentioned in the Dead Body Chalan, no further statement is essential. I do not find any substance in this argument.

It was also contended that most of the prosecution witnesses have admitted that they were being examined by the Police 6 or 7 times and their statements were so recorded. Though some of the witnesses have so answered, no such question was put to the I.O. and no weight can be attached to this argument.

8. It is necessary to examine the argument of Mr. Kanungo that the contents of the F.I.R. belie the prosecution story. In the F.I.R. it is mentioned that Pitambar told his mother that Ramachandra and Hajari assaulted him and thereafter Pitambar died. This, according to Mr. Kanungo completely destroys the prosecution case. If this statement in the F.I.R. is accepted, the death of Pitambar necessarily occurred at his own house while in the prosecution story Pitambar died elsewhere and the dead body was put on the verandah. It is pointed out that there is a material discrepancy that P.W. 6 did not see Pitambar after 4 p.m. and if the F.I.R. version is accepted Pitambar must have died at about 5 p.m. It is true that if the statement in the F.I.R. is accepted as representing a true version it is not reconcilable with the prosecution story. But to me the F.I.R. story seems to be a confused version. Admittedly Pitambar did not die by 4 p.m. at his own residence. If he would have died there, it would naturally have drawn the attention of the entire villagers. The story narrated by P.W. 6 has been jumbled up and a distorted version has been given in the F.I.R. by P.W. 3 who had no personal knowledge of the assault at 9 P.M. Even if there is discrepancy between the prosecution version in the Court and that in the F.I.R., the Court is not always bound to reject the prosecution version on account of mere existence of discrepancy.

9. In support of his contention, Mr. Kanungo relied on *Sundar Lal v. Emperor* AIR 1934 Oudh 315, *Narayan Reddy v. State* : AIR1952 Mad821 and *Tahasildar Singh v. State* : AIR1958 All255 their Lordships observed:

Where the case against the accused rests solely on the testimony of the person alleged to have been sleeping close to the cot on which the deceased was sleeping when he was murdered and there is no mention of such person having witnessed the crime in the first information report filed by the brother of the deceased, nor there is mention of the fact of his having slept near the deceased, the omission is very significant and tends to discredit the testimony of the person

secured by the police 3 days after the crime. It would be natural to suppose that the man who had strong suspicion against persons being murderers of his brother would be most anxious to have his suspicions verified from the person who was sleeping along side of his brother at the time of the murder. The evidence of a person who has seen the murder committed, but does not give any information thereof may or may not be better than that of an accomplice; but the truth of the story told by him is not above suspicion.

In : AIR1952 Mad821 it was observed:

Complete variance between the F.I.R. and the case for which the accused have been committed not in regard to the minor details or unimportant matter or side issues but in regard to main charges is enough to throw out a case as an unreliable one which will not commend itself to any tribunal.

In : AIR1958 All255 , their Lordships observed that where the first information report was prepared by an experienced police officer who had personal knowledge of the facts and who immediately after drafting the report was to take up investigation of the crime, in such a case the prosecution cannot take shelter behind the plea of confusion or forgetfulness or lack of intelligence.

These three decisions cited are clearly distinguishable and the observations made therein were peculiar to the facts and circumstances of those cases and have no application to the facts of the present case. As a matter of fact the F.I.R. (Ex. 2) filed immediately after the occurrence clearly refers to the death of Pitambar occurring on account of the assault by Ramachandra and Hajari. That is the very essence of the prosecution case and it finds full support in the F.I.R. itself. It is necessary to examine the law clearly. A F.I.R. is not a substantive piece of evidence and can be used only to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as an evidence to corroborate or contradict other witnesses. *Nisar Ali v. State of U.P.* : 1957 CriLJ550 .

In case of material discrepancy between the F.I.R. and the prosecution story presented in Court, the testimony may be disregarded and not that it must be

disregarded. The doctrine merely involves the question of weight of evidence which the Court may apply in a given set of circumstances, but it is not a mandatory rule of evidence. The maxim does not occupy the status of a rule of law but is merely a rule of caution. I am not impressed by Mr. Kanungo's argument that the non-disclosure of statements made by different witnesses at the time of the assembly in the village when the dead body was found affects the prosecution case.

10. Much argument was advanced as to relevancy of the statement of the deceased inside the bhati at 9 p. m. entreating that he should not be further assaulted and that he would bring his brother. The learned Standing Counsel argued that this statement is admissible under Section 32(1) of the Evidence Act which is as follows:

32. Statements, written or verbal, of relevant facts made by a person who is dead, xx xx are themselves relevant facts in the following cases:

(1) When the statement is made by a person as to ' the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant xx xx in which the cause of that person's death comes into question.

In *P. Narayanaswami v. Emperor* AIR 1939 PC 47 their Lordships observed;

'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae' Circumstances must have some proximate relation to the actual occurrence, x x x It will be observed that the circumstances are of the transaction which resulted in the death of the declarant.

In *Chinnavalavan v. State of Madras* 1959-1 Mad LJ 246 the position was succinctly summarised as follows:

To sum up, to test the relevancy (sic) of the statement under Section 32(1) -is not what the final finding in the case is, but whether the cause 'of death of the person making the statement comes into question in the case x x x The words 'resulted in his death' do not mean 'caused his death'. Thus it is well settled that declarations are admissible only in so far as they point directly to the fact constituting res gestae of homicide; that is to say, to the act of killing and the circumstances immediately attendant thereon like threats and difficulties, act and declarations and incidents which constitute or accompany and explain the fact of transaction in issue admissible for or against either party as forming part of the res gestae.

In *Thannuvan Ratnakaran v. State* AIR 1955 Tray-Co 87 their Lordships observed that where it was the case of the prosecution that the accused wanted to do away with the deceased, because of her pregnancy through him, the statement of the deceased to the witness of her condition and of the person responsible for it would be admissible under Section 32(1) as it was a circumstance which had some proximate relation to her death.

In this case the statement of the deceased heard by P.W. 1 and P.W. 4 stating that he should not be assaulted and he would produce his brother was certainly a circumstance which had some proximate relation to his death and is clearly relevant under Section 32(1). The learned Standing Counsel's contention has considerable force.

11. Mr. Kanungo argued that the absence of injury of assault of shoe beating at 4 p.m. and of other assaults of Dhum Dhum at about 9 p. m. in the post mortem report is destructive of a large part of the prosecution story as narrated by P.Ws. 1 and 4. No question has been put to the Doctor as to what marks should be left on the body of such shoe beating and other assaults. The nature and extent of the mark would much depend upon the nature of the assault inflicted. P.W. 7 should have been asked regarding the nature of shoe-beating. The shape and kind of the shoe had also to be fixed up. In the absence of these investigations, much weight cannot be attached to this argument.

12. To sum up, the prosecution case with regard to the story of murder has been amply established. Ramachandra had strong motive in committing the crime. He

had love and intimacy with P.W. 7 who tattooed his name in her arms. The deceased took her step-sister to task for this love episode and actually picked up a quarrel with Ramachandra. Nilambar was in debts and was untraced. The accused Ramachandra wanted to put pressure on the deceased for realisation of the dues. The assault on the deceased at the Bhati both at 4 p.m. as well as at 9 p.m. is well established. Soon thereafter the other accused persons, who were admittedly the servants of Ramachandra were found carrying the dead body and putting it on the verandah of the deceased at an unusual hour of the night when people of that part were usually asleep. The cycle is therefore complete. The facts and circumstances are fully compatible with the only reasonable hypothesis that the murder was committed at the instance of Ramachandra and Hajari or by them. There were large number of persons inside the bhati and it is difficult to say who actually committed the murder; but both of them are responsible for the murder and are liable to conviction under Section 302/34 Indian Penal Code.

13. It is necessary at this stage to consider the argument of the learned Standing Counsel that the confessions of the co-accused Keshab and Rup singh would be admissible to establish knowledge of the factum of murder by Ramachandra. As I have already said, even apart from this piece of evidence, the other evidence is fully conclusive of the complicity and guilt of Ramachandra and Hajari in the murder. It is not necessary to refer to both the confessions as their characters are almost identical. It would be sufficient to refer to confession (Ex. 3) of Keshab Jhodia which has been retracted. The confession is as follows:

Hajari and Ramachandra killed Pitambar with the help of 'Nada'. Hajari called him. After going with Hajari he noticed that the dead body was lying against a mango tree. Rupsingh, Hajari and he carried the dead body and put it in front of the house of the deceased.

It is conceded that it is not a confession even of Keshab under Section 302 Indian Penal Code. The long controversy was settled in AIR 1939 PC 47 where their Lordships explained the meaning of 'confession'. A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. The admission of a gravely incriminating fact, even a conclusively

incriminating fact, is not of itself a confession. A statement that contains self exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Ex. 3 clearly does not amount to a confession of Keshab of an offence under Section 302 Indian Penal Code and under Section 30 of the Evidence Act it cannot certainly be taken into consideration as against Ramachandra under Section 302 Indian Penal Code. The position seems to be absolutely well established as has been discussed in *In Re Gangavva* AIR 1946 Mad 124. The learned Standing Counsel, so far as I have been able to understand him, does not dispute such a proposition. He, however, contended that Ex. 3 is a confession of an offence under Section 201 Indian Penal Code by Keshab and it is admissible for coming to a conclusion that Ramchandra had knowledge of the factum of murder of the deceased. For this purpose he wants to utilise the first sentence of this confession which is to the effect that Hajari and Ramachandra killed Pitambar with the help of 'Nada'. Nada perhaps means a cord. I am unable to accept this contention. The authorities cited by him *Mirza Zahid v. Emperor* AIR 1938 All 91 and *Emperor v. Shiva Bhai* ILR 50 Bom 683: AIR 1926 Bom 513 do not support such a contention. This confession (Ex. 3) cannot be taken into consideration as against Ramachandra and Hajari to import knowledge of the factum of murder.

14. I would next proceed to consider how far the conviction of Hajari and Keshab under Section 201 Indian Penal Code is justifiable. The confession Ex. 3 in the terms admits commission of offence under Section 201 Indian Penal Code and though it is retracted it has been corroborated in material particulars by the evidence of P.W. 7. The retracted confession can also be taken into consideration against the other non-confessing accused Hajari as it has been corroborated in material particulars - *Vide Ram Parkash v. State of Punjab* : 1959 CriLJ90 . Even without the confession, the convictions are well founded on the evidence of P.W. 7 herself.

15. In the result therefore the convictions of Ramachandra and Hajari under Section 302 Indian Penal Code are altered to one under Section 302/34 Indian Penal Code. The sentences passed by the learned Sessions Judge are upheld. The appeal has no merit and is dismissed.

R.K. Das, J.

16. I agree.

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