Arjoon and anr. Vs. State

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Court : Orissa

Decided On : Nov-06-1962

Reported in : 1963CriLJ234

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

Appellant : Arjoon and anr.

Respondent : State

Judgement :

G.K. Misra, J,

1. Both the accused-appellants have been convicted under Section 302 read with Section 34 I.P.C. and sentenced to death. Accused Arjoon alias Polka Doraba has been further convicted under Section 392 read with Section 397, I. P, C. but no separate sentence has been imposed.

2. The prosecution case is that at about noon on 22nd January, 1962 Arjoon alias Polka Domb, accused No. 1 took the deceased Durjan, son of Purosattam Soura (P. W. 1) inside the jungle at a distance of about one mile from the village of the deceased. Accused No. 2 Urdhab was tending cows in that area. The boy did not return to the house till afternoon. The father made a search for the boy and learnt from different persons including Jagabandhan Lahara (P. W. 7) that the deceased was found in the company of accused-1 at about noon. Accused-1 denied all knowledge for sometime, but later on admitted that he had been to gather thorns

in Sindiguda forest and found Urdhab (accused-2) and Kuna, a man of another village, going with the deceased and later heard a cry like 'Margalo lo Ma'. He led the villagers to the place where he heard the cry where the villagers found the dead body. The defence is one of complete denial.

3. The doctor (P. W. 3) found the following injuries on the deceased on post-mortem examination:-

1. An obliquely vertical lacerated wound 1 3/4' x 1/3' x 1/2' with exposure of depressed bone fragments and effusion on brain substance with sign of bleeding from the wound on the right side of the head lying 2' above the Pinna of the right ear.

2. A horizontal lacerated wound 3/4' x 1/2' x 1/3' with sign of bleeding lying 1' behind injury No. 1.

3. A contused wound 1/2' x 1/3' x 1/8' in the back of the head lying 2' to the right of occipital prominence (tuberosity).

4. A horizontal contused wound 1/2' x 1/8' x 1/8' lying 1/3' below injury No. 3.

5. An obliquely vertical bruise 1' x 1/2' on the right side of the neck lying 1/2' below the lobule of the right ear.

6. A horizontal bruise 1' x 1/4' in the middle of the right side of the neck lying 1' below in-jury no. 5.

7. A horizontal bruise 1' x 1/4' on the back of the right side of the neck lying 1/2' medial to injury No, 5.

8. Rectangular bruise 2' on opposite side and 1/2' on opposite sides on the left side of the back; upper outer angle of the rectangle lying just medical to the medical angle of the left scapula.

9. A black coloured superficial bruise 7' x 2' extending from the side of the back of the neck over the medial side of the right scapula.

10. Two vertically crescentic bruises 1 1/4' each lying at the top of the right shoulder.

11. A big vertical superficial bruise 4' x 2' on the upper part of the back of the right thigh.

12. A deep abrasion 1/2' x 1/4' on the medial side of the left heel.

13. An abrasion 1/2' x 1/4' on the dorsum of the 2nd metacapro phalangeal joint of left hand.

14. Three superficial abrasions 1/2' 1/4' each on the dorsum of the 2nd, 3rd, 4th matacapro phalangeal joints of right hand.

15. A superficial abrasion 1' x 1/2' on the middle of the pinna of right ear.

Death, according to him, was due to shock and haemorrhage as a result of the depressed fracture of the skull. The injuries were ante-mortem. Injuries 1 and 2 were only fatal and death was instantaneous. Injuries 1 and 2 could be possible by blows with hard blunt weapon. Death was thus homicidal.

4. Both the accused made judical confession before a First Class Magistrate (P. W. 12). Exs. 8 and 9 are the confessional statements. They were produced before P. W. 12 on the 24th January. 1962. The Magistrate allowed them time till the next day for cool reflection and remanded them to jail custody. On the 25th January, 1962, they were produced before the Magistrate and the confessional statements were recorded. The Magistrate put all relevant questions under Section 164 (3) of the Criminal Procedure Code to satisfy himself that the confessions were voluntary and free. The accused stated under Section 342, Cr. P. C. that they did not make any confessional statements. It was held in Sk, Abdul Hanan v. State of Orissa, ILR (1962) Cut 516 : 1963 (2) Cri LJ 229,) that when the explanation for the retraction was false, even a conviction could be based on the retracted confession itself. There was no suggestion of any inducement, threat or promise to the Magistrate (P. W. 12) or to the I. O. (P. W. 17).

A mere bald assertion by the prisoner that he was threatened, tutored or that inducement I was offered to him cannot be accepted as true I without more. P. W. 12 stated that the confessions of both the accused were recorded one after another, and that both the accused were present in Court. It is not clear from this statement whether one accused was present while the confessional statement of the other accused was being recorded. Even assuming that both the accused were simultaneously present in Court and their confessional statements were being taken in presence of each other, nothing has been shown to us how this would affect the voluntary character of the confessions. P. W. 12 categorically asserts that he was satisfied that the confessions were voluntary, There is no substance in this contention.

5. The corroboration required in the case of a retracted confession is not of the same standard as in the case of an accomplice. In the case of the person confessing, who has resiled from his statement, general corroboration is sufficient while accomplice's evidence should be corroborated in material particulars, because on his own saying he is a debased and depraved person. For the purpose of establishing its truth, it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case. The matter has been fully analysed by us in ILR 1962 Cut 516 : 1963 (2) Cri L] 229).

6. It is now necessary to separately examine Exs. 8 and g. Ex. 8, the confessional statement of accused-1, is as follows:-

Durjan alias Saundu came following me while I was going to the Kundul field with an axe in my hand. Near the field and jungle Urdhab was tending cows at about 12 noon. Later on both Urdhab and myself had a talk. We 'killed him. Urdhab caught hold of the hands of the boy and I took off the necklace from the neck of the boy. When I was taking off the necklace, the boy said that he would intimate this fact to his father. Thereafter both of us assaulted the boy, with the axe of Urdhab. Both of us attacked the boy on the back of his head with the blunt side of the axe. In all we assaulted thrice. Urdhab assaulted twice and I assaulted once. After the third assault the boy died. Both of us fled away and Urdhab took away the tangier. I

took the necklace. I kept the necklace in the thatch of my house and after bringing it from the thatch I gave it to the Police Inspector. Urdhab had taken away the axe. His father got the axe burnt.

7. Though general corroboration would be sufficient, in this particular case corroboration in material particulars is available. (After considering -the evidence his Lordship concluded:) Thus the confessional statement (Ex. 8) is fully corroborated in material particulars though general corroboration would have been sufficient.

8. Besides the confessional statement and its corroboration in material particulars by rest, of the evidence and other probabilities of the case, there was the recovery of blood stained cloth (M. O. VII) from accused-1. On serological test no human blood could be traced in it due to disintegration of the blood. Accused-i was given a chance to explain the circumstance, but he denied the recovery of cloth itself. The confessional statement (Ex. 9) of accused-2 implicates not only himself but also accused 1. In ILR 1962 Cut 516 : (1963 (2) Cri LJ 229) we had laid down that it could not be termed as evidence termed Section 3 of the Evidence Act and could not be made the foundation of conviction, but could only be used in support of other evidence. The evidence against accused-i exclud ing the confession can be safely relied on for the purpose of conviction. The confession of the co-accused merely lends assurance to the other evidence under Section 30 of the Evidence Act, though without its aid the guilt of the accused has been established beyond reasonable doubt.

9. I have fully discussed how the retracted confession is corroborated in material particulars. The circumstantial evidence, available in this case, is by itself sufficient to warrant the conviction even if the confession is wholly excluded. It has been clearly established that accused-I went in the company of the deceased to the jungle where the dead body was found, and the deceased was last seen in his company. The gold necklace was established to be the ornament worn by the deceased. The accused gave discovery of the ornament in his own house and he was not in a position to give any satisfactory explanation as to how he came to be in possession of the ornament. He himself pointed out the place wherefrom the

dead body was seen by the villagers. The blood stained cloth worn by him was recovered and he could offer no explanation for the existence of the blood stains on his own cloth. The chain of circumstantial evidence is complete and is consistent only with the guilt of the accused. The conviction is fully justified even on the circumstantial evidence. The learned Sessions Judge jumbled up the whole discussion. He should have clearly analysed the evidence from the legal stand-point.

10. I now take up the case of accused-2. His confessional statement (Ex. 9) is as follows:

I had taken cows for tending. On Monday at about 12 noon Polok alias Arjoon brought the boy to the jungle towards the Kandul field. He took him through a low lying land. There was a gold necklace on the neck of the boy. He asked me to catch hold of the hands. I caught hold of the hands. He took off the necklace and assaulted him. The boy said that he would inform the incident to his father. So he assaulted the boy on the back of his head with the blunt side of my axe. He asked me to assault the boy and gave the axe for the purpose. I also assaulted. I do not remember how many times I assaulted. The boy died. Myself and Polka fled away. Polka took away the necklace. I took away my axe. I kept my axe and my father got it burnt.

This confessional statement though requires general corroboration has also been corroborated in material particulars. P. W. 8 deposed that accused was tending cows. P. W. 7 and 11 stated that at about 12 noon, accused I was going in the company of the deceased towards Kandul Bedi. In the low lying land inside the jungle the dead body of the deceased was found. The evidence of P. W. 1 establishes that the deceased had gold necklace on his neck. That assault was given by the blunt side of the axe is established by the medical evidence and in fact the assaults were given on the back side of the head. The discovery of the necklace was given by Polka, accused-i. The axe M. O. V., was recovered from the house of the accused-2 and the recovery is proved through P. Ws. 6, the I. O. P. W. 17 and the step lather of accused-2 (P. W. 15). The handle had already been burnt and the piece of burnt handle is still there inside the hole of the Tangia.

P, W. 15 has no axe to grind against accused No, 2 and states clearly that because the axe was blood stained he got it burnt. The confessional statement (Ex. 9) is therefore fully corroborated in material particulars and the conviction of accused 2 is fully justified. The confessional statement Ex-8 made by accused -1 substantially tallies with the confessional statement (Ex. 9) of accused-2. Ex. 8 also lends assurances to the evidence against accused-2 as establishing his guilt beyond reasonable doubt.

11. It is now necessary to examine the question of sentence. Mr. Ranga Rao vehemently contended that the appellants being Adibasis, sentence of death should not be passed on them. Reliance was placed on Sohrai Sao v. Emperor, AIR 1930 Pat 247 in which the sentence of transportation imposed by the Sessions Judge was enhanced to death by the High Court. Their Lordships observed:

The reason for passing the lesser sentence must be express and adequate. Such reasons are some times to be found in the order of mentality to which the person belongs. A simple minded ignorant savage who slaughters a person whom he really believes to be the dangerous magician may well fall into this class.x x x x Sometimes also an extenuating fact may be found in the circumstances of the crime itself, such, for example, as those which often occur in agrarian riots where a free and honest fight on equal terms results in death although the crime may nevertheless not fall within the exceptions to Section 300 I. P. C.

This Bench decision makes it absolutely clear that any aborigin cannot escape death sentence in all circumstances, otherwise their Lordships would not have emphasised the fact of simple minded ignorant savage believing in magic. The principle enunciated in this decision was approved and followed in Emperor v. Rameswar, AIR 1934 Pat 356 where also an aborigin was involved. In that particular case death sentence was converted to one of transportation for life as the accused killed the deceased under grief and misconception that his child died on account of poison given by the deceased. The point was also fully considered in Emperor v. Remis Christian, AIR 1947 Pat .152. Their Lordships observed that the aborigins could not be judged by the same standard as applicable to more

civilised races as the aborigins were liable to sudden accessions of rage when they were not entirely responsible for their actions. In that particular case their Lordships were not in a position to know the reason why the murder was committed and expressed the view that they were not sure that there were no grave sudden provocations. It would thus appear that no view has been taken and could possibly be taken that an aborigine would not be liable to death sentence in all circumstances.

12. The murder in this case was gruesome and cold-blooded and was committed purely out of greed I is well known that these Dombs belong to the criminal tribes. This is not a case where the aboriginal was liable to accession of rage without being aware of what he was doing. So far as accused -1 is concerned, it was a planned act of enticing the boy into the jungle with the object of murdering him and taking away the gold necklace purely out of greed. The sentence of death is the proper punishment for appellant No, 1 Arjoon alias Polka Domb,

13. So far as the accused-2 is concerned he did not take the boy into the jungle. There is no evidence that there was a prior conspiracy with accused-1, He has not also shared the booty. It appears that on the spur of the moment in the jungle he had fallen a victim to suggestion of accused- 1 for killing the boy and accordingly he had taken part in the murder. In such circumstances, death sentence should not be imposed upon him and he is liable to be sentenced to imprisonment for life.

14. Mr. Ranga Rao's next contention was that after the amendment of Section 367, Cr. P. C, it is open to the Court, without assigning any reason, to inflict either death sentence or imprisonment for life under Section 302, I.P.C. Section 367, Sub-section (5), as it stood prior to the amendment, was as follows:

if the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

This provision for giving reasons why the death sentence was not passed has been removed from the statute book after the amendment. The amendment does not affect the law for regulating punishment under the Penal Code and merely

relates to the procedure. Courts are no longer required to give elaborate reasons for not awarding the death penalty. But they cannot depart from sound judicial consideration in preferring lesser punishment. The Bench decision of Allahabad High. Court reported in Ram Singh v. State, : AIR1960 All748 has made full discussion of the position arising after the amendment. Section 302, I.P.C. provides two categories of punishment without specifying what sentence should be imposed in what circumstance. The matter has been left to the judicial discretion of the Court to award appropriate penalty. The discretion to determine as to what is appropriate in a particular case must be exercised judicially and not capriciously on irrelevant consideration. As their Lord-ships pointed out, the conduct of the murderer, the nature of the temptation to which he yielded, and the manner in which the crime was committed are some of the considerations which would weigh with the Court.

15. We accordingly dismiss the appeal of Arjoon alias Polka Domb (appellant-1), accept the reference and confirm the sentence of death. No separate sentence was rightly passed under Section 392 read with Section 397 I.P.C. The sentence of death passed on Urdhab Domb (appellant-2) is set aside and he is sentenced to undergo imprisonment for life. Subject to the modification on the question of sentence, the appeal of Urdhab Domb (appellant-2) is dismissed. The reference so far as Urdhab Domb is concerned is discharged

R.K. Das, J.

16. I agree.