

State of Orissa Vs. Sam Dimba Ho

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Court : Orissa

Decided On : Nov-11-1963

Reported in : 30(1964)CLT163; 1964CriLJ105

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

Appellant : State of Orissa

Respondent : Sam Dimba Ho

Judgement :

R.L. Narasimham, C.J.

1. This is an appeal by the State of Orissa against the judgment of the Sessions Judge of Mayurbharij, Baripada acquitting the respondent of an offence under Section 302 Indian Penal Code.

2. The respondent is an aboriginal Ho boy aged about 16 years living in village Simba Sahi, P.S. Raruan in Karanjia sub-division of Mayurbhanj district. It appears that two of his brother died of illness 4 or 5 years ago. His father also was said to be suffering from continued illness for sometime, near about the date of occurrence namely 27-8-1962. The prosecution case was that the respondent suspected the deceased Let Bewa to be a witch and that he killed her on 27-8-1962, during night by first shooting her with an arrow and then by smashing her head with a piece of stone.

3. There is no eye-witness to the commission of the crime and the entire case depends on the extra-judicial confession said to have been made by respondent before several villagers namely P. Ws. 2, 3, 4 and 6 and also on his own confession before a Magistrate (P. W. 10) on 30-8-62. The recovery of a cloth stained with human blood from his possession was also taken as an incriminating circumstance against him.

4. So far as the judicial confession is concern-ed the learned Sessions Judge rightly pointed out that it was not recorded in the manner required by law and that it should not be given any importance. The learned Magistrate (P. W. 10) who recorded the confession has not noted in the record that he informed the accused that he was a magistrate, that he was not bound to make a confession, and that if the confession was made it would be used as evidence against him even though he might retract later on. But he supplied these omissions by stating in Court that he did give him the necessary caution and also disclosed that he was a Magistrate. It is true that subsequent oral evidence is admissible to show that the requirements of Section 164 Criminal Procedure Code were satisfied though the official record may not indicate that those requirements were fulfilled.

But the question arises as to whether the belated evidence of the Magistrate should be admitted in this respect. We feel considerable doubt about the correctness of the Magistrate's statement that he told the accused that he was a Magistrate. He has put verbal questions to ascertain whether the accused was free from police influence but in none of these questions did he state that he was a Magistrate. Apart from this infirmity we find that in Para 5 of the official record of the confession (Ext. 9) where the statements of the

accused were being recorded the Magistrate put them in the form of questions and answers. Some of the questions were of a leading nature.

The statutory form used for recording confessions under Section 164 Criminal Procedure Code itself shows that though questions may be put with a view to ascertain whether the accused is making the confession voluntarily (see parkas 3 and 4 of the form) when the actual statements of the accused about the incident are being recorded, the statements should not be in the form of questions and answers (paragraph 5) especially where the accused is an illiterate and immature youth of the aboriginal class, like the respondent. Some of the questions are definitely of a leading nature and coming as they did from a Magistrate, they might have created in the mind of the respondent an impression that he must admit as true any questions put to him. We are therefore not satisfied that the judicial confession is a complete record of what happened during the fatal night and hence the learned Session's Judge was justified in ignoring it.

5. The extra judicial confession must however be given great importance in this case because the witnesses are all disinterested. The leading witness to prove the extra judicial confession (P. W. 2) also lodged F.I.R. soon after the incident. His evidence shows that sometime in the early morning (at cock crow time) the respondent appeared before him and stated that a witch came to his house and he shot arrows at her, He did not names the witch. The F.I.R. also shows that for sometime the accused was obsessed with the idea that the continued illness of his father was due to witchcraft and that he was sleeping by his father's side, armed with a bow and arrows ready to kill the witch the moment he saw it. During that night some sound was heard as if the door was being opened and then immediately he shot an arrow and pursued the form that was fleeing away and then struck it with stone. The F.I.R. does not show that at the time of attacking that form the respondent was aware that he was attacking a human being. The identity of the person who was killed was discovered later on, on the next morning, when the Padhan (P. W. 5) and other villagers went to the spot and found the corpse to be that of the deceased Let. There is absolutely no evidence on record to show that at the time of attacking the deceased the respondent was aware that he was really attacking a human being. A witch may be a human being, but it is possible for an illiterate aboriginal boy to be under the impression that there are witches who are not human beings and if the prosecution wants to show that the accused knew that he was attacking a woman, some evidence to that effect should have been led. The entire evidence of the prosecution is therefore consistent with the view that the accused while attacking the form which attempted to open the door of the house on that night when his father was lying ill, was under the impression that he was not attacking a human being at all. An impressionable and immature youth of the aboriginal type, aged 16 years could not be expected to make a distinction between a human being who is a witch and a ghost which may also be a witch. The benefit of this doubt must go to the accused-respondent.

6. For these reasons we are satisfied that the order of acquittal was justified. The appeal is dismissed and the respondent should be set at liberty forthwith.

Barman, J.

7. I agree.

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