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State Vs. Mitu

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Court : Orissa

Decided On : Dec-15-1976

Reported in : 1977CriLJ1018

Judge : R.N. Misra and; P.K. Mohanti, JJ.

Appellant : State

Respondent : Mitu

Judgement :

P.K. Mohanti, J.

1. This is a reference under Section 366 of the Code of Criminal Procedure by the learned Additional Sessions Judge of Puri for confirmation of the sentence of death passed by him upon Mity alias Narsingh Prusty of village Baghuapasi under Dasapalla Police Station in the district of Puri. There is also an appeal by the condemned prisoner. Both the reference and the appeal have been heard together and will be disposed of by this judgment.

2. The prisoner along' with his son Indramani Prusty, Wife Padma Dei, daughter Puna Dei and brother Basudeb Prusty were jointly tried for causing the death of Sudar San Behera of village Digiri in furtherance of their common intention and for causing disappearance of the evidence of murder. After trial, the learned Judge acquitted accused Puna Dei and Padma Dei of all the charges framed against

them. He convicted the prisoner under Section 302, Indian Penal Code and the other two accused, namely Indramani Prusty and Basudeb Prusty under Section 201, Indian Penal Code.

3. Prosecution case was that the prisoner had given his daughter Puna Dei in marriage to the deceased Sudarsan Beherat The deceased stayed at the house of his father-in-law for about two years and returned to his own house at Digiri about 10 months prior to the occurrence. In the month of Jan, 1975 Padma Dei had been to the house of the deceased to leave her daughter Puna Dei there. There was an altercation between her and the deceased in course of which she threatened the deceased that he would not return if he at all visited her village. Unfortunately the deceased went to his father-in-law's house in the evening of 31-1-1975 and there he was assaulted by a wooden lathi as a result of which he died. His dead body was carried to a forest locally known as Kalasana and was concealed inside a stone cave.

4. When the deceased did not return home for two days his father Mulia Behera (P.W. 1) went to the house of the prisoner and enquired about his son. At his sight, his daughter-in-law Puna cried by covering her face with her cloth. Being asked about her husband she said that he had not come there. This aroused suspicion in the mind of P.W. 1 who went to Dasapalla Police Station and lodged a report (Ext. 2) on 2-2-1975 upon which a station diary entry was made by the Writer Constable (P.W. 9). He was directed by P.W. 9 to return to village Baghuapasi and to collect information about the deceased with the help of the two constables (P. Ws. 2 and 10) who had been posted there on patrol duty. Then P.W. 1 returned to village Baghuapasi and intimated the two constables who proceeded to the house of the prisoner and enquired about the deceased. It was alleged that while under arrest the prisoner made a statement before the constables that he had concealed the dead body of the deceased inside the stone cave of Kalasana forest. He led the police constables to the forest and pointed out the spot where the dead body was lying. P.W. 1 who accompanied the constables identified the dead body to be that of his son Sudarsan. Then the constables watched the dead body and sent the Gramarakhi (P.W. 6) with a report to be delivered at the Police Station. P.W. 13 B.N. Tripathy, the A.S.I. of Police received the report and treated it as F.I.R. He

took up investigation and proceeded to the Kalasana forest. He found the dead body lying in the cave and held inquest over it, He despatched the dead body for post-mortem examination and recorded the statements of P. Ws. 1 and 2. Then he left for Baghuapasi. He seized a blood-stained wooden lathi (M.O.V.), a dhoti (M.O.X) and napkin (M.O.VIII) on production by the prisoner. He also seized a stick, some cloths and a plough-share on production by the accused Indramani Prusty. He further seized an up-rooted door leaf and a door frame (M. Os. III and IV) and some blood-stained earth from the wall of a room in occupation of the accused persons. Then he forwarded the accused persqns to the Court.

5. Post-mortem examination over the dead body was held by the doctor, P.W. 11 on 3-2-75 at 5 P.M. On 4-2-75 the doctor examined the prisoner and found some injuries on his person. On 7-2-1975 the accused persons made judicial confessions before the Magistrate, P.W. 12.' After completion of investigation the police submitted charge-sheet on 30-4-1975 against all the five accused persons and in due course they were committed to the Court of Session to stand their trial.

6. The prisoner denied the charges and pleaded innocence. During his examination under Section 313, Cr.P.C. he retracted the judicial confession and denied the seizure of the lathi and other articles. He also denied having made any statement leading to discovery of the dead body.

7. That the death of the deceased was homicidal is not disputed by the prisoner. On post-mortem examination the doctor found the following external injuries on the dead body:

(1) One lacerated wound 1' X W on the right side forehead.

(2) One lacerated wound %' X 1/4' X 1/4' on the left zygoma.

(3) one lacerated wound 1' X 1/4' X 1/4' midway between left eye and left ear.

(4) Haematoma of different sizes all over the scalp.

(5) Multiple bruises of different sizes on different parts of the body.

Internal examination revealed fracture of the right parietal bone, fracture of the second and third ribs of the right side of the chest and clotted blood in the subcutaneous tissues. In the doctor's opinion the injuries were ante-mortem in nature and could be caused by some hard and blunt weapon like lathis and plough-share M. Os. IV, V and VI. In his opinion the fracture of the right parietal bone was sufficient in the ordinary course of nature to cause death and that the other injuries specially the fracture of the ribs were responsible for accelerating death. The cause of the death, in his opinion, was due to shock on account of the injuries. In his confessional statement (Ext. 12) the prisoner admitted to have caused the death of the deceased by assaulting him with a lathi. The lathi (M.O.V.) was seized on production by the prisoner and on serological test human blood has been detected on it. There is, therefore, no room for doubt that the deceased died as a result of the assault.

8. There is no direct evidence of any eye witness about the factum of murder. The order of conviction is based on the retracted judicial confession of the prisoner and the following pieces of circumstantial evidence:

(1) The disclosure statement of the prisoner before P. Ws. 1, 2, 6 and 10 leading to discovery of the dead body.

(2) Seizure of the lathi (M.O.V.) on production by the prisoner and detection of. human blood thereon by the Serologist.

(3) Seizure of the uprooted door leaf and door frame and some blood-stained earth from the wall of the room in the house of the prisoner.

(4) Presence of injuries on the person of the prisoner.

(5) Presence of the deceased Sudarsan Behera at the village of. the prisoner on the date of occurrence.

9. In his confessional statement (Ext. 12) the prisoner stated that on the day following the Pausa Pumima his wife went with Puna Dei to the house of the deceased but they were returned by the deceased. Two days thereafter at about two gharis of the night the deceased went to the house of the prisoner and told

him that unless he gave away his younger daughter he would be killed. Out of anger the prisoner dealt a lathi blow as a result of which the deceased became unconscious. Thinking that the deceased had died by the blow he took him inside a room and locked it from outside. About one hour after he tried to open the door of the room but it did not open being closed from inside. Then he opened the room by uprooting the door frame. He found the deceased gasping and dealt two lathi blow? On him. The deceased threw an iron pandhari which hit the knee of the prisoner and caused an injury. Then the prisoner along with his brother and son carried the, dead body of the deceased to the Kalasana forest and concealed the same inside a stone cave. In the early morning he took his bath in a tank. His son washed his wearing cloth as it was stained with blood. He admitted to have given information to the police in consequence of which the dead body was discovered. He also admitted to have produced the weapon of offence before the police.

10. The confessional statement having been retracted at the trial it must be proved to be true and voluntary. It is urged on behalf of the prisoner that the confessional statement is inadmissible in evidence due to non-compliance with the requirements of Section 164 Cr.P.C. It is contended that the confession was made in presence of police as deposed to by P.W. 8 and that the Magistrate did not explain to the confessant that any confession. made by him would be used as evidence against him. Both these contentions were raised before the learned trial Judge and he repelled the same on cogent grounds. P.W. 8 Jagannath Behera was examined by the prosecution to prove some seizures. During his cross-examination he introduced the fact that the police officers were present when the confessional statements of the accused persons were recorded. The records reveal that he stood surety for the accused persons and executed a bail bond before the Magistrate. His evidence shows that he was out to save the accused. His statement about the presence of the police officers at the time of recording of the confessional statements does not find support from any source. The Magistrate categorically stated that he took necessary steps to remove police officers from the court premises before recording the confessional statements. He denied the suggestion that some police officers and constables were present on the verandah and threshold of the court room while the confessional statements were being recorded. The evidence in court is corroborated by the certificate

appended by him at the foot of the confessional statement. The certificate is to the following effect:

I have satisfied myself that there is no police officer in the court or in any place whence the proceedings can be seen or heard....

The prisoner did not take the plea during his examination under Section 313 Cr.P.C. that the police officers were present at the time of recording of his confessions and that he made the confessional statement out of fear for the police. Being asked about the judicial confession he remained content with a mere denial, In consideration of all these facts and circumstances the contention that the confession was made in presence of police officers cannot be accepted.

11. The next contention is that the Magistrate before recording the confession did not specifically warn the accused that any confession made by him may be used as evidence against him as required by Sub-section (2) of Section 164 Cr.P.C. Question No. 4 asked by the learned Magistrate before recording the confession is in the following terms:

Once again I want to caution you that I am a Judicial Magistrate of the first class and whatever statement you make before me may go in your, favour or may be used against you.

The prisoner replied:

'Yes, I know that.'

If the Magistrate had simply told the prisoner that whatever statement he would make before him would go in his favour, different considerations would have arisen. But the Magistrate also added that whatever statement the prisoner would make might also be used as evidence against him. It cannot therefore be said that the prisoner was tempted to get some benefit by making the confession. In fact, he did not take the plea that he was misled in any way by the manner of questioning by the Magistrate. No doubt, it is a sound rule of practice to explain to thej accused specifically that whatever he wouldj say might be given in evidence against him.i Such warning is an important element in determining the voluntary nature of the

confession. But in the facts and circumstances of the present case we are inclined to hold that the requirements of Section 164(2) have been substantially complied with and the confessant had the knowledge that any confession made by him might be used as evidence against, him. The object of putting questions is toj enable the Magistrate to be quite sure that(the confession was voluntary and if the same' result can be had by the other questions the confession cannot be rejected merely because of a technical breach.

12. Section 29 of the Evidence Act provides, inter alia, that a confession otherwise admissible does not become inadmissible, because; the accused person 'was not warned that he was not bound to make such confession and' that evidence of it might be given against him.' Section 164 Cr.P.C. does not override Section 29 of the Evidence Act. In view of the specific provision of Section 29, mere absence of warnings would not make the confession inadmissible, provided the Court is satisfied that the accused knew that he was not bound to make the confession and that if he did so it would be used as evidence against him. In AIR 1932 Mad 431 : 33 Cri LJ 526 Vellamoonji Goundan v. Emperor a division Bench held as follows:

Section 164 however does not pretend to override Section 29, Evidence Act The position would therefore seem to be this that though Section 164, of the one Act makes it imperative that the accused person should be cautioned, Section 29 of the other says that his statement is not inadmissible in evidence merely because the prescribed caution has not been administered. And it is to the latter Act that as a rule we have to look, when there is a question of the adrnissiblity of a particular piece of evidence.

In : AIR1954 Bom285 Rangappa Hanamappa v. State a Division Bench consisting of Gajendragadkar and Chamani, JJ. held as follows:

In our opinion, it would, therefore, not be unreasonable to hold that the mere fact that the procedure piwided by Section 164(3) in regard to giving a warning to the accused has not been complied with in recording the confessions would not by itself necessarily make the said confessions inadmissible. The decision on this question must depend upon the application of the rules of evidence laid down by the Evidence Act, and if the confession is otherwise shown to be relevant under

the earlier sections of the Evidence Act it cannot be said to be inadmissible merely for the reason that no warning was given to the accused.

18. The Teal question therefore is whether the accused made the confessional statement voluntarily. The materials on record would show that the questions put to the prisoner on the subject were understood by him and were of a nature which would satisfy a reasonable person that the requirements of the law in this behalf were duly complied with. The prisoner was first produced before the Magistrate on 4-2-1976 when he did not complain of any ill-treatment by the police. On 5-2-1975 he was again produced before the Magistrate and after giving him due warning the Magistrate allowed him time for reflection till 7-2-1975 and remanded him to jail custody. On 7-2-1975 the confessional statement was recorded after necessary warnings. The Magistrate disclosed his identity to the prisoner and cautioned him that he was not bound to make any statement He took particular car(c) to enquire from the prisoner whether he had been tutored by anybody that if he made the confession he would be released or his punishment would be lessened. The prisoner replied that he had not been tutored by anybody. Then he was asked whether he had been coerced or threatened by anybody and the answer given by him was as follows:

I want to say something out of my own free will. I have not been coerced or threatened by anybody.

Thereafter he made the confessional statement which contains a wealth of details. It! gives us the impression that it was not the result of any outside pressure. The Magistrate gave adequate time to the prisoner to remove completely police influence from his mind. He took all possible steps with a genuine desire to know that the prisoner was making a voluntary statement as a result of repentance and contriteness. We are therefore satisfied that the confession was made voluntarily.

14. The next question is whether the confession is true. Truth of the confession has been amply established by the circumstantial evidence on record. The best corroboration is found in the conduct of the prisoner in giving information to the police in consequence of which the dead body of the deceased was discovered. Trie important point is that the circumstances and conduct of the prisoner point

clearly to his knowledge of the exact spot where the dead body had been concealed and in the absence of any explanation the reasonable inference is that he put it there himself. Referring to the evidence of P.W. 1 the learned Counsel for the appellant contended that a joint statement was made by the prisoner and his co-accused Indramani Prusty and therefore it was not admissible under Section 27 of Evidence Act. The relevant statement of P.W. 1 appearing at page 27 of the Paper Book runs as follows:

Narasingh Prusty and Indramani Prusty told that they had concealed the dead body inside the Kalasana Khola and would give discovery of the same.

It was not made clear whether both the accused persons made the statements simultaneously or one after the other. In such a situation, the court should have taken care to get it clarified whether both the accused made the statements simultaneously or immediately one after the other. As a rule of prudence vagueness in such statements should be avoided, The evidence of P. Ws. 2, 6 and 10 clearly indicates that the prisoner gave information first and the initial pointing out of the dead body at the cave was made by him. Having carefully considered the evidence of these witnesses we have no doubt in our mind that the dead body of the deceased was discovered in consequence of the information given by the prisoner.

15. The next circumstance which lends corroboration to the confessional statement is the fact of recovery of the lathi M.O.V. The prisoner admitted in his confessional statement that he assaulted the deceased with a lathi. On 3-2-1975 he produced this lathi before the police officer, P.W. 13 and it was seized under he seizure list Ext, 4/1. This lathi was sent to the chemical Examiner for examination. The forwarding latter of the Magistrate shows that it was this lathi which had been seized on production by the prisoner, The report of the Serologist (Ext. 19) shows that the scrappings from this lathi were found to contain human blood. The doctor P.W. 11 opined that the injuries found on the dead body could be caused by the lathi, M.O.V. During his examination under Section 313 Cr.P.C. the prisoner was not asked any question as to whether this lathi had been produced by him before the police officer. The trial court asked the prisoner about the seizure of the other

articles from him but omitted to ask whether the lathi M.O.V. had been seized from him. To a question asked by the trial Court, the prisoner replied that nothing had been seized from him. In the facts _ and circumstances, non-examination of the prisoner with reference to. M.O.V. is not fatal to the prosecution. The police officer P.W. 13 clearly stated that M.O.V. was seized by him on production by the prisoner and he was cross-examined with reference to that statement. The prisoner was defended by a lawyer and the witnesses were thoroughly cross-examined with reference to all the incriminating circumstances appearing against him. We therefore hold that the prisoner has not been prejudiced in any way by the omission to put any question regarding M.O.V. during his examination under Section 313 Cr.P.C.

16. The statement of the prisoner in thaejudicial confession to the effect that in course of the assault the deceased threw an iron pandhari which caused an injury on his knee gains support from the evidence of the doctor P.W. 11 about the presence of injury on the right knee of the prisoner. In the doctor's opinion, the injury Qn the right knee could be caused if somebody threw the pandhari at the injured. When this evidence was brought to the notice of the prisoner during his examination under Section 313 Cr.P.C. he replied that it was false. There is no apparent reason why the doctor would give false evidence about the presence of injury on the person of the prisoner. Considering the evidence on record we have no hesitation in holding that the prisoner sustained the injury in the manner as stated by him in the judicial confession.

17. The fact of recovery of the uprooted door-leaf and door-frame (M. Os. III and IV) and some blood-stained earth from the wall of the room where the assault took place also lends corroboration to the statement of the prisoner in the judicial confession that he had opened the room by uprooting the Juluki with the help of a plough-share. The seizure of these articles has been duly proved by P.W. 13.

18. Another circumstance relied upon by the prosecution is the presence of the deceased at the village of the accused on the date of occurrence as deposed to by P.W. 14. This witness stated that on 31-1-1975 while he was engaged in the private tuition of some students in the Bhagabatghar a man came and sat there

and sometime thereafter the prisoner and his son Indramani Prusty came and called him to their house for taking food. He stated that from their talks he could know that the man sitting there was related to the prisoner. His evidence leaves no room for doubt that it was the deceased who was called to the house of the prisoner in that night.

19. Considering the circumstantial evidence as discussed above we are satisfied that the judicial confession though retracted is fully believeable inasmuch as it has been corroborated in material particulars by the witnesses whose disinterestedness is beyond question. We have no manner of doubt in our mind that none else but the prisoner caused the death of the deceased with the intention to kill him. His conviction under Section 302, Indian Penal Code is therefore justified.

20. The only question which now remains to be considered is one of sentence. We have very anxiously thought over the question of sentence and our considered opinion is that it is not a fit case where the extreme penalty, provided by law should be inflicted. The deceased was the son-in-law of the prisoner and he stayed at his house for about two years after his marriage. There is no evidence that the prisoner had any previous enmity with the deceased. As to what actually led him to commit the crime it is very difficult to say but it is not difficult to imagine that something must have taken place before the occurrence which caused him to fly into a rage. There is absolutely no evidence to show that there was any premeditation for the murder. In these circumstances we think the lesser penalty provided by law would meet the ends of justice.

21. While therefore maintaining the conviction under Section 302, I.P.C. we set aside the sentence of death and award a sentence of imprisonment for life in Beu thereof. Subject

to this modification the Criminal Appeal is dismissed. The reference is discharged. H N.

R.N. Mishra, J.

22. I agree.

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