

Bisipati Padhan Vs. State

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Court : Orissa

Decided On : Feb-21-1969

Reported in : AIR1969Ori289a; 35(1969)CLT362; 1969CriLJ1517

Judge : G.K. Misra and ;S.K. Ray, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162, 164 and 288; [Evidence Act, 1872](#) - Sections 45, 101 to 104, 145 and 157; [Indian Penal Code \(IPC\), 1860](#) - Sections 302

Appeal No. : Criminal Appeal No. 13 of 1969 and Death Ref. No. 1 of 1969

Appellant : Bisipati Padhan

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : H.G. Panda, Adv.

Judgement :

G.K. Misra, J.

1. The appellant has been convicted under Section 302 I. P. C. and sentenced to death. A reference has been made under Section 374 Cr. P. C. to the High Court for confirmation of the sentence of death.

2. The prosecution case may be stated in short. One Badal (dead) had four sons Krushna (dead), Kalisingi (P. W. 2), Suma (dead) and Arjun (the deceased). Out of them, only Krushna had 2 sons Tunde (P. W. 1) and Bisipati (the accused). Others had no issues. The four sons of Badal were having joint cultivation of their lands. They had however separate messings. On 28-2-68 at about 4 P. M. the deceased Arjun, P. W. 2 and the accused were sitting in the Bari of the accused. The deceased asked the accused as to why he was loitering with the gun and was not doing work in the fields. The accused went inside his house, brought out his gun (M. O. I.) and shot the deceased. The deceased instantaneously fell down dead. The accused threw away the gun in the Bari and entered into his house. P. W. 1 had gone out to the jungle to bring fuel. P. W. 2 went out and called P. W. 1. Both P. Ws. 1 and 2 tied the accused with a rope to a pole on the verandah of the accused. The dead body was carried to the house of the accused. P. Ws. 4 and 5, the ward members of the village Panchayat, were informed. Before them the accused made an extra-judicial confession that he killed the deceased as the latter asked him as to why he was not doing work in the fields. F. I. R. was lodged on that very day at about 8 P. M. before a head-constable. The formal F. I. R. (Ext. 2) was drawn up at 3 P. M. next day. The defence of the accused before the sessions court was that he came out of his house with the gun (M. O. I.). He stumbled in his own Bari where the deceased and P. W. 2 were sitting. The gun accidentally went off and the deceased was killed. On an analysis of the materials on record, the learned Sessions Judge held that the death of the deceased was homicidal and that the accused killed the deceased.

3. The finding that the death was homicidal is not assailed before us. In fact it is the very defence case that as a result of an accident the deceased died of the shot from the gun (M. O. I.).

4. The only question for consideration is whether the accused killed the deceased with the gun (M. O. I.) or the deceased died as a result of accidental gun-shot. The only eye-witness is P. W. 2. In the committing court P. W. 2 fully supported the prosecution story. There is also no divergence between his statement in the committing court and that before the Sessions Judge, except to the limited extent that he speaks of accidental firing of the gun in the sessions court though he

clearly stated in the committing court that the accused killed the deceased deliberately. The essential part of his statement in the committing Court runs thus:--

'The deceased Arjuna told the accused Bisipati as to why he was loitering with the gun without doing work in the fields. The accused Bisipati went inside his house and brought out his gun and shot the deceased Arjuna with that gun in the Bari of the accused Bisipati at village Rasinaju.'

In cross-examination in the committing court, a suggestion regarding accidental gun-firing was made. P. W. 2 however stoutly denied it. The statement runs thus:--

'It is not a fact that the accused did not shoot the deceased Arjuna. It is not a fact that the accused was holding the gun and that by accident his hand fell on the trigger and that accidentally there-was firing.'

It would thus be seen that the suggestion of accidental firing was repelled by P. W. 2. One more significant feature to be noted at this stage is that the story of stumbling and falling down of the accused on the ground with the gun (M. O. I.), taken up in the Sessions Court, was-not advanced in the committing court. On the contrary, a different story regarding accidental firing was taken. It was to the effect that by accident the hand of the accused fell on the trigger and there was firing. Before the learned Sessions Judge P. W. 2 deposed thus:

'The deceased Arjuna told the accused as to why he (the accused) was simply moving about with a gun instead of doing cultivation, when he (the deceased) had grown old and was incapable of doing cultivation. Then, the accused had not the gun with him. At this, the accused did not reply, but went inside his house and came out with his gun. This is the gun (M. O. I.). The accused then gave out that he was going to the forest for hunting. When the accused was going out with his gun, he suddenly fell down on the ground by the left side, hardly at a distance of about six cubits from me and the deceased. When the accused fell down on the ground as above with the gun in his hand, its muzzle towards us, the gun fired one shot at us, hitting directly the belly of the deceased Arjuna. At this, Arjuna died and fell down on the ground Then my-self and the P. W. 1 tied the accused by

means of a rope.'

In cross-examination P. W. 2 however admitted that his statement in the committing court to the effect 'The accused Bisipati went inside his house and brought out his gun and shot the deceased Arjuna with that gun is a truth. He admits that in his statements under Section 164 and Section 162 Cr. P. C. he did not say about accidental firing out of fear for the police. He further says that he deposed about the accused killing the deceased intentionally, as tutored by the police.

5. As has already been stated, P. W. 2 is consistent in his narration of the story regarding other matters both in the committing court and the sessions court. The divergence in his statements is confined only to the question whether the accused killed the deceased intentionally and deliberately, or whether the deceased died as a result of accidental firing of the gun in the hand of the accused. When there are conflicting versions, the question for consideration is as to which version is true. It is to be noted that the deposition before the committing court brought into the record of the Sessions Court under Section 288 Cr. P. C. constitutes substantive evidence before the Sessions Judge. The section lays down that the evidence of a witness duly recorded in the presence of the accused under Chapter XVII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act. The learned Sessions Judge resorted to the legal formalities in bringing the statement before the committing court to the records of the Sessions Court in accordance with the provision of this section. Thus, there are two substantive pieces of evidence before the Sessions Judge -- One supporting the prosecution version and the other the defence theory.

6. When a person has made two conflicting statements on oath, it is not possible to safely rely on a particular version. The statement before the committing court being substantive evidence, as a matter of law no corroboration is necessary for acceptance of the same. But in order to decide as to which version out of the two is true, as a matter of prudence some corroboration is necessary through extrinsic evidence, in arriving at a conclusion whether one version is to be preferred to the

other. It is however to be noted that there may be some cases in which even without corroboration one version may be preferred to the other from the intrinsic circumstances themselves, if the court of fact keeps to its mind the position that the matter is to be carefully sifted in view of the two conflicting versions. A masterly exposition of the law is to be found in AIR 1964 SC 1357, *Sharnappa v. State of Maharashtra*, (see para 10).

7. In the light of the principles laid down, it is now necessary to examine whether the statement of P. W. 2 in the committing court is to be preferred to his statement in the Sessions Court that there was accidental firing. One of the most important circumstances in this case is that in his earliest version before a Magistrate under Section 164 Cr. P. C. P. W. 2 fully supported his version in the committing court that the accused killed the deceased intentionally and deliberately. The statement before the committing court is substantive evidence. Under Section 157 of the Evidence Act a former statement made by such witness, relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. A statement of a witness under Section 164 Cr. P. C. is not substantive evidence, but is a former statement made before an authority legally competent to investigate the fact. Such a statement can be used either for corroboration of the testimony of a witness under Section 157 or for contradiction thereof under Section 145 of the Evidence Act. The statement of P. W. 2 made on 28-2-63 before a Magistrate, first class, under section 164 Cr. P. C. corroborates the statement in the committing court and contradicts the evidence before the Sessions Court. On this basis the statement before the committing court can be preferred to the evidence before the Sessions Court (see AIR 1954 Orissa 163 -- *State of Orissa v. Banshi Nayak*).

The second circumstance which pro-babilises P. W. 2's statement in the committing court as reliable is the admitted fact by P. W. 2 even before the Sessions Judge that after the deceased was shot down, both P. Ws. 1 and 2 tied down the accused with a rope. If the story of accidental firing was true, P. W. 2 would have immediately stated that the accused had no fault and the deceased died as a result of accidental firing, and there was no justification for tying down the accused when he lacked guilty animus. The tying down of the accused, in

which P. W. 2 played a significant role, indubitably points to the conclusion that because the accused deliberately murdered the deceased, he was tied down.

The third circumstance is that P. W. 2 has no issues. He was also having joint cultivation with P. W. 1 and the accused along with the deceased. The deceased cannot now be brought back to life. P. W. 1 and the accused being the only issues in the family, P. W. 2 is interested in saving the life of the accused. They are aborigines. At the initial stage P. W. 2 came out with the truth, but with the lapse of time the desire to save the accused has impelled him to resile from his earlier statement.

The fourth circumstance is that in his statement under Section 342 Cr. P. C. before the committing court the accused did not advance the story of accidental firing. He resorted to a plea of complete denial of his knowledge as to how the deceased was killed. Under Section 267 Cr. P. C. the examination of the accused recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence. The committing court statement was put to the accused in his statement under Section 342 Cr. P. C. in the Sessions Court and he admits to have made such a statement. The fact that in the committing court the accused made a denial of the occurrence runs counter to his present story that he fell down by stumbling with the gun in hand which resulted in accidental firing and death of the deceased. Clearly the present plea is an after-thought. That apart, in cross-examination of P. W. 2 before the committing Court the plea of accidental firing was suggested in a different manner. The story of stumbling and falling down was not at all presented. On the other hand, it was suggested to P. W. 2 that accidentally the hand of the accused fell on the trigger which resulted in accidental firing and death of the deceased. The divergence between the nature of accident affects the truth of the statement of P. W. 2 in the Sessions Court that he fell down as a result of stumbling.

The next circumstance is that the plea of the accused that the earlier statement before the committing court was made under Police pressure has not been established. The onus is on the accused to establish it (see AIR 1952 SC 214, *Bhagwan Singh v. State of Punjab*).

8. In his statement under Section 162 Cr. P. C. before the police, P. W. 2 had stated that the accused deliberately killed the deceased. Such a statement is not substantive evidence and cannot be used for any purpose other than contradicting P. W. 2. The statement of P. W. 2 before the Sessions Judge thus stands contradicted by his statement under Section 162 Cr. P. C. which proves the falsity of the statement before the Sessions Judge.

9. For the aforesaid reasons, there can hardly be any doubt that the version of P. W. 2 before the committing court that the accused killed the deceased is true, and his plea before the Sessions Judge that there was an accidental firing as a result of which the deceased died is false. The conviction is well founded on the statement of P. W. 2 before the committing court.

10. The learned Sessions Judge also placed reliance on the extra-judicial confession of the accused before P. Ws. 4 and 5. Both these witnesses resile from their statements in the committing court, before the Sessions Judge. We do not place much reliance on the extra-judicial confession and it is not necessary to discuss the reasons at length.

11. On our conclusion that the statement of P. W. 2 before the committing court is true, the conviction must be affirmed. As to the question of sentence, we agree with the learned Sessions Judge that the accused deliberately killed the deceased and the murder was cold-blooded. We however take note of the fact which the learned Sessions Judge ignored that the accused is an aborigin and appears to be of volatile temperament. He purchased the gun M. O. I. and was whiling away his time in hunting without doing manual work in the field which was being jointly cultivated. At the time of occurrence the deceased chastised the accused as to why he was not doing work in the fields: this appeared to have aroused his anger and passion suddenly. The aborigines are more or less of animal instinct. For no reason they use their bow and arrows, and it makes no difference if in this particular case a gun was used. Accordingly we are of opinion that ends of justice would be met if the extreme penalty of death is not imposed upon the accused. We accordingly reduce the sentence to one of imprisonment for life.

12. In the result, the Death Reference is discharged and the Criminal Appeal is dismissed subject to the modification in the sentence.

13. We however cannot part with this case without observing that the learned Sessions Judge ought not to have hurriedly disposed of this case by ignoring certain provisions of law. The accused made a judicial confession before Shri K. V. Patra, Magistrate, First Class, on 9-3-68. This confessional statement has not been marked as an exhibit and has not been brought into record. No opportunity was also given to the accused in his statement under Section 342 Cr. P. C. to say whether the confession was voluntary and true. We therefore express no opinion on the confession itself. From the order dated 9-1-1969 recorded by the learned Sessions Judge it appears that Shri K. V. Patra did not attend the court in obedience to the summons though he received a copy of the summons on 27-12-68. The learned Judge observed. 'In the above circumstances, we cannot wait for his evidence and the Associate P. P. gives him up.' If the learned Judge had cared to look into law, the confessional statement could have been admitted into evidence and made an exhibit without the Magistrate being examined in court. In AIR 1952 SC 159 Kashmira Singh v. State of Madhya Pradesh, their Lordships observed thus:--

'The prosecution were criticised for not calling the Magistrate who recorded the confession as a witness. We wish to endorse the remarks of their Lordships of the Privy Council in Nazir Ahmed v. King Emperor, AIR 1936 PC 253 (2) at p, 258, regarding the undesirability of such a practice. In our opinion, the Magistrate was rightly not called and it would have been improper and undesirable for the prosecution to have acted otherwise.'

If the confessional statement as recorded is not, in conformity with law, the examination of the Magistrate would not have cured it. The learned Sessions Judge and the Associate P. P. should not have ignored this elementary proposition of law.

14. Similarly the learned Judge and the Associate P. P. and the Advocate for the accused did not care to bring into record the injury report of Dr. R. C. Misra with regard to the injuries on the accused. The injury report was an admissible piece of

evidence in proof or disproof of the theory of accident. We have however looked into the injury report. The location and nature of the injuries do not in any way militate against the theory of deliberate gun-shot.

Ray, J.

15. I agree.

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