

State of Orissa Vs. Chandra Pentia

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Court : Orissa

Decided On : Feb-13-1981

Reported in : 51(1981)CLT319; 1981CriLJ1060

Judge : J.K. Mohanty, J.

Appellant : State of Orissa

Respondent : Chandra Pentia

Judgement :

J.K. Mohanty, J.

1. The accused-respondent was tried in the court of C.J.M.-cum- Assistant Sessions Judge, Jey-pore, for having committed offences under Sections 307/337/338 I.P.C. The learned Judge acquitted the respondent. Hence this Government Appeal.

2. The case of the prosecution is as follows:-

In the night of 3-11-75. after night meals, Sunadhar Machu (P.W. 1) and his brother Bhakta Machu (P. W. 4) were going on the P.W.D. road (that passes through their village) to see their land. P.W. 1 was holding a torchlight (M. O. II), While proceeding on the road P. W. 1 focused the torchlight which fell on the face of the accused who got annoyed and a quarrel ensued between them. P.W. 4

pacified both of them and thereafter all returned to their respective houses. After about half an hour while P. Ws. 1 and 4 and their family members were in their house they heard the accused shouting and abusing P. W. 1 by standing on the back side of their house. He was in a challenging mood and was asking P. W. 1 to come out. P.W. 1. in order to know what was the hullah about, came out of his house being followed by his brother (P. W. 4), daughter Jamuna Machu (P.W. 3) aged about 13 years and son Nilakantha Machu (P.W. 5) aged about 10 years. Seeing P. W. 1 the accused fired a loaded S. B. M. L. gun (M. O. I) aiming at P.W. 1. As a result of the firing of the gun. P. W, 1 sustained a gun shot injury on his left leg below the knee. P. W. 4 received an injury on his right side chest. P.W. 3 sustained a fracture on her right thumb and P. W. 5 sustained an injury on his right thigh. P. Ws. 1 and 4 fell down unconscious as a result of the injuries received by them. The accused thereafter left the place. P.W. 3 along with their field servant (P.W. 8) went to Bonuses and reported the occurrence to Laxmikant Tanti (P.W. 2), the Sarpanch of Ronaspur Gram Panchayat. P. W. 2 visited the house of P. W. 1, saw the injured and thereafter reported the matter at the police-station. The police took up investigation and sent the injured for medical examination. On a search of the house of the accused, the gun (M.O.I) and some gun powder were recovered which were seized as per seizure list (Ext. 5). The gun was sent to the ballistic expert who gave his opinion as per Ext. 11. After completion of investigation charge-sheet was submitted against the accused-respondent.

3. The plea of the accused was a complete denial of the incident. His further plea was that in the night of 3-11-76 he was going to his land and at that time he was assaulted by P.W. 1 due to some previous enmity. After being assaulted he went to his house. Subsequently P. Ws. 1 and 4 influenced the Sarpanch (P.W. 2) and the police and falsely implicated him in this case after taking out the gun (M. O, I) from the house of one Ganga Poria to whom the gun belongs. He further pleaded that he was not in possession of the gun at any point of time nor he fired the said gun in an attempt to kill P. W. 1.

4. In order to prove the case the prosecution examined 12 witnesses. P. Ws. 1, 3, 4 and 5 are the injured persons who have stated that they recognised the accused by his voice, P. W. 2 is the Sarpanch who reported the matter to police, P. Ws. 6

and 7 are the witnesses to the seizure of the gun and gun powder, P. W. 8 is the servant who accompanied P. W. 3 to the house of P. W. 2, P. W. 9 is the A. S. I. of police who conducted the preliminary investigation, P. W. 10 is the S. I. of police who took over the charge of investigation from P. W. 9. P. W. 11 is the S. I. of Police who completed the investigation and submitted charge-sheet and P. W. 12 is the Doctor who examined the injured. The defence did not examine any witness. The learned trial court after considering the entire evidence on record came to hold that the prosecution has failed to prove the case against the accused beyond reasonable doubt and acquitted the accused-respondent.

5. The learned Additional Government Advocate appearing for the State submitted that P. Ws. 1, 3, 4 and 5 have asserted that they could recognise the accused by his voice and the accused being a neighbour it was not difficult to recognise his voice. He further submitted that M. Os. I and III were recovered from the house of the accused. Just prior to the occurrence the accused and P. W. 1 had a carrel and thus there was motive for the commission of the crime. According to him all the above evidence taken together along with the ballistic expert's opinion will lead to the irresistible conclusion that the accused is the person who has fired the gun at P. Ws. 1, 3, 4 and 5.

On the other hand Mr. Mohapatra, learned Counsel appearing for the respondent, submitted that it is difficult to identify a person in a dark night merely by his voice and it is hazardous to convict a person merely on such identification. He also submitted that nothing has been established from any evidence or from Ext, 11 that this particular gun (M.O. I) was fired. There are serious discrepancies in the evidence of P. Ws. 1, 3, 4 and 5 and their evidence should not be relied upon. In any view of the matter the finding of the learned trial court is Quite reasonable and should not be interfered with.

6. P. W. 1 has stated that the occurrence took place in the night of Diwali. At about 9.00 p. m. in that night he and his brother (P. W. 4) were going to their field. He had a torch light in his hand. While focusing the torchlight, the light fell on the face of the accused who was standing on the road. The accused abused him saying as to why he focused the torch. P. W. 4 intervened and pacified the

accused. About half an hour after his return to home he heard the accused (who was on the back side of his house) challenging him to come out. Hearing this he came out being followed by his son (P. W. 5), daughter (P. W. 3) and brother (P. W. 4). He saw a person like the accused standing. He recognised the person to be the accused from his voice and asked him to go away. The accused was saying 'Sambhale Dek'. So saying the accused fired the gun aiming at him. The distance where he was standing would be 50 cubits from the place where the gun was fired. He was injured. His brother, son and daughter also received injuries. He fell down unconscious and regained sense at Jeypore Hospital. In cross-examination he has admitted that the person who fired the gun could not be identified as it was dark. But he understood from the voice that it was the accused. P. W. 3 in her examination-in-chief has stated in the same manner as P. W. 1. In cross-examination she has stated that she could see the accused and recognise him. She has also stated that before firing the accused told 'Dek Sambhal'. This witness has been disbelieved by the learned Assistant Sessions Judge as according to his finding she could not have possibly seen the accused in the darkness. P. W. 4 has corroborated P. W. 1 regarding the incident prior to the occurrence, i. e. about the focusing of torchlight by P. W. 1 and the Quarrel that ensued. About the actual incident he has also stated in the same manner as P. W. 1. According to him he recognised the accused from his voice. It may be mentioned here that this witness has not stated that the accused stated 'Sambhale Dek' before firing the gun. P. W. 5 has also supported P. W. 1 regarding the actual occurrence. But like P. W. 4 he has not stated that the accused stated 'Sarobhale Dek' before firing. In cross-examination he has stated that it was a dark night. P. Ws. 6 and 7, the seizure witnesses, have stated about the recovery of the gun (M. O. I) and some gun powder from the house of the accused. The Doctor (P. W. 12) has stated that he examined Nilakantha Machu (P. W. 5) and found a lacerated wound on the middle and front of the right thigh. He also found one gun shot injury situated in front of the left leg below the knee of Sunadhar Machu (P. W. 1). He also examined Bhakta Machu (P. W. 4) and found one gun shot wound situated 2' right and upper part of the right nipple. He also examined Jamuna Machu (P. W. 3) and found one gun shot injury in between the junction of the first and second joint of her right thumb. According to him he found pellets in the injuries and he recovered one

pellet from the injury of Bhakta Machu (P. W. 4).

7. As stated earlier the learned trial court has not believed the evidence of P. W. 3 as she has stated that she could see the accused and recognise him. It was Diwali night and was pitch dark as admitted by P. Ws. 1, 4 and 5. According to P. Ws. 1, 4 and 5 they could recognise the accused from his voice. It is seen from the evidence of P. W. 1 that before firing the accused said 'Sambhale Dek'. PWs. 4 and 5 have not stated about it. It is argued by the learned Additional Government Advocate that the accused being a close neighbors, the witnesses could recognise him from his voice. On the other hand Mr. Mohapatra submitted that this evidence should not be accepted. The learned trial court, after considering the evidence, has held that these witnesses could not have recognised the accused from his voice. In support of his contention Mr. Mohapatra cited decisions reported in AIR 1928 Lah 925 : 29. Cri LJ 758 (Bhagtu v. Emperor) and AIR 1937 Rang 407 (Nga Aung Khin v. Emperor). In AIR 1928 Lah 925 : 29 Cri LJ 758 it has been held:

It is very difficult to identify a person in a pitch dark night merely by the modulations of his voice and it is risky to convict a person merely on such identification.

The learned Additional Government Advocate cited a decision reported in (1966) 32 Cut LT 695 (State v. Chaitu Kisan) and contended that from voice also a man can be recognised. But the facts of this case are entirely different from that case. In that case apart from hearing the voice, the witnesses could see the face of the accused persons as there was some light at that place due to the fact that a house was on fire and there was no difficulty for identification.

8. After considering the evidence on record and the discrepancy pointed out about the actual words spoken by the accused before firing the gun and the decisions cited I am of the view that it is unsafe to rely on the evidence of P. Ws. 1, 3, 4 and 5. Regarding the identification of the accused, it is also not safe to convict the accused merely on the identification from his voice. In Modi's Medical Jurisprudence also it has been observed that to recognise a person from his voice is an every day occurrence though it is too risky to be relied upon in criminal cases.

9. The learned Additional Government Advocate submitted that the recovery of the gun from the house of the accused is a circumstance which should be taking into consideration along with the previous enmity between the parties which provides the motive. No doubt, the gun has been recovered from the house of the accused, as stated by P. Ws. 6, 7 and 9. This gun was sent to the ballistic expert. But the pellets recovered were not sent to him. It has been mentioned in the report (Ext. 11) of the ballistic expert 'it is not possible to say when the gun was last used for firing as final products of residue have already been formed'. There is also no other evidence to show that the shot was fired from this particular gun. So, without any convincing evidence that the gun was used by the accused, mere recovery of the gun will not in any way help the prosecution. Regarding the motive of the crime, i.e. the previous quarrel just prior to the occurrence between the accused and P. W. 1. it is a circumstance which may rather so in favour of the accused. As there was quarrel just prior to the occurrence, it is not unlikely that P. Ws. 1 and 4 would have been under an impression that the accused must have been the author of the crime. So, this evidence is of not much help to the prosecution.

10. On a consideration of the evidence on record I am of the view that the prosecution has not established beyond reasonable doubt that the accused fired the Gun which caused the injuries on the persons of P. Ws. 1, 3, 4 and 5,

11. Mr. Mohapatra further contended that the appellate court must keep in mind very vital consideration as to whether or not view taken by lower court could be reasonably possible. High Court should not reverse acquittal merely because it takes different view on same evidence. In support of his contention Mr. Mohapatra cited decisions reported in : 1979 CriLJ957 (Chowdikodlu Asuralli Dyavappa v. State of Mysore). : 1979 CriLJ1332 (Kanbi Pur-shottam Ladha v. State of Gujarat) : 1980 CriLJ386 (Hasan Ahmad Mai Ishaq v. State of Gujarat) and : 1980 CriLJ446 (Marudanal Aueusti v. State of Kerala). There is full force in the above contention of Mr. Mohapatra.

12. Considering the evidence on record, argument of the learned Counsel for both sides and in the facts and circumstances of the case I am of the view that the finding of the learned trial court that the prosecution has failed to prove the case

beyond reasonable doubt cannot be said to be unreasonable and I see no reason to differ from the finding of the learned trial court. The appeal has, therefore, no merit and is accordingly dismissed. The accused-respondent be released from tail custody forthwith unless required in any other case.

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