Bata Munda Vs. the State

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SooperKanoon Citation : sooperkanoon.com/530390

Court : Orissa

Decided On : Feb-12-1985

Reported in : 1985(I)OLR332

Judge : B.K. Behera and ;P.C. Misra, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 154; Evidence Act, 1872 - Sections 8

Appeal No. : Criminal Appeal No. 120 of 1981

Appellant : Bata Munda

Respondent : The State

Advocate for Def. : M.R. Mohanty, Addl. Standing Counsel

Advocate for Pet/Ap. : Jibna Ranjan Dash, Adv. (Throught Legal Aid and Advice Committee)

Disposition : Appeal allowed

Judgement :

B.K. Behera, J.

1. We have been called upon to judge the correctness of the order of conviction and sentenced recorded against the appellant finding him to be guilty of the

charge of double murder of two persons, namely, Murgi Munda and his wife Pala Dei (hereinafter described as 'the deceased persons'), on May 5, 1980, at Budhikud in the District of Keonjhar and sentencing him thereunder to undergo imprisonment for life.

2. The appellant, it was alleged, had previously been convicted for having caused grievous hurt to the deceased Murgi by means of an arrow and had been admonished. The deceased Murgi and the appellant had also some dispute over the possession of a land, as the prosecution sought to show, but of this there was no cleat and cogent evidence. No materials had been placed by the prosecution which could constitute any motive on the part of the appellant to commit the murder of the deceased Murgi and his wife. There was no direct evidence of any witness of having seen the commission of murders. In the absence of proof of motive, the circumstantial evidence on which the prosecution sought reliance bearing on the guilt of the appellant would have to be examined with great care before its acceptance.

3. Having heard the learned counsel for both the sides, we are of the view, for the reasons to follow, that the order of conviction is unfounded on facts and cannot be sustained in law.

4. There can be no doubt from the evidence of the doctor who bad conducted the autopsy over the dead bodies of the deceased persons that there deaths were homicidal in nature. This aspect has not been disputed at the Bar.

5. The circumstances on which reliance had been placed by the prosecution were that at about 30 a.m. on the day of occurrence, a cry raised by the deceased Pala Dei roused from their sleep Baraju Munda (P. W. 1,) his sister Suru Dei (P. W. 2) and Menja Dei (P. W. 3), the daughter of the deceased person, who had alept in the house of P Ws. 1 and 2, and on rushing towards the house of the deceased, P. W. 2 had noticed the appellant pulling down the two dead bodies from the cot and keeping them together and the evidence of these three witnesses that they had seen the appellant going away with a Bala in his hand and in addition, the evidence of the Investigating Officer that in spite of making strenuous efforts, he had not been able to apprehend the appellant who had absconded and was

arrested in October, 1980.

6. Although as the evidence of P. Ws. 2 and 3 would show, they had proceeded together during the night after hearing the cry raised by one of the two deceased persons and P. W. 2 had claimed to have seen the appellant pulling down the two dead bodies from the court P. W. 3 had not spoken a word about it. As would appear from the statement of P. W. 2 in her cross-examination. She and P. W. 3 first stood near the house of the deceased which had earlier been burnt and from there, they looked in the direction of the house of the deceased persons for some time and when they proceeded, found the deceased persons lying dead.

7. Each of these three witnesses, namely, P. Ws. 1 to 3, had claimed to have identified the appellant by the light of the moon and each of them had testified that they had been able to identify him from the back side. The evidence of P. Ws. 1 and 3 was that they had seen the appellant at a distance of 30 to 40 cubits and the evidence of P. W. 2 was that she had seen the appellant at a distance of 20 to 25 cubits. On a reference to the almanac, we notice that the date of occurrence was the fifth day in the dark fortnight and the occurrence had taken place at about 10 p. m. as the prosecution evidence indicated. At that point of time, there would be no light of the moon and the moon would just be coming on the horizen. Even if some margin is given to the time of occurrence, it could at best to said that there would be very little light of the moon when P. Ws. 1 to 3 had claimed to have identified the appellant from his back side. None of these three witnesses had informed anyone in the village either during the night or on the day following that they had seen the appellant in such suspicious circumstances as they had claimed to have.

8. The evidence of P. W. 5, who had lodged the first information report, was that on receiving information from P. W. 1 that the two deceased persons were lying murdered, he went and lodged the first information report. Even as the evidence of P. W. 5 would clearly indicate, P. W. 1 had not stated anything about the appellant having been seen by him and P. Ws. 2 and 3 in the previous night. If P. W. 2 had seen the appellant pulling down the two dead bodies from the cot, in the normal and natural course of human conduct, she would have informed P. W. 1 during the night itself in which case P. W. 1 would have passed on this information to P. W. 5

before he went and lodged the report at the police station. In such circumstances, the non-mention of these important aspects on which the prosecution sought to mainly build its case in the first information report would tell its own tale. In the-first information report, against the heading 'Name and residence of accused', it had been stated 'Unknown'. No doubt, the first information report is a previous statement which can, strictly speaking, be used only to corroborate or contradict the maker of it. But omissions of important facts, affecting the probabilities of the cafe, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. (See AIR 1975 S. C. 1026 : Ram Kamar Pande v. The State of Madhya Pradesh).

9. Apart from the aforesaid infirmities and improbabilities to which reference has been made by us, the evidence of P. Ws. 1 to 3 with regard to identification of the appellant, although a co-villager of theirs and was known to them, during that part of the night by the light of the moon, as claimed by them, cannot stand a scientific test. We would quote an extract from Criminal Investigation by Dr. Hans Gross, Fifth Edition, at page 159 :

'By moonlight one can recognise, when the moon is at the quarter, persons at a distance of from twenty-one feet, in bright moonlight at from twenty-three to thirty-three feet, and at the every brightest period of the full moon, at a distance of from thirty-three to thirty-six feet. In tropical countries the distance from moonlight may by increased.'

Dr. Vincent in Legrand and Saule's Legal Medicine has said :

'.....presuming the eyesight to be normal by moonlight one can recognise, when the moon is at the quarter, persons at a distance, of 21 ft., in bright moonlight at from 23 to 33 ft., and at the very brightest period of the full moon, at a distance of from 33 to 36 ft. In tropical countries the distance from for moonlight may be increased.'

These two extracts had been taken note of and relied on by this Court in 58(1984) C.L.T. 155 : 1984(2) Crimes 402 :1984(1) OLR (NOC) 53 402 ; Rama Chandra Jena and three Ors. v. State of Orissa, and in that case, judged in the light of

these scientific observations, the evidence of a witness who had claimed to have indentified the accused persons in the light of the moon had been rejected. In the instant case, even giving an allowance for a longer distance for identification of persons in a tropical country like ours, we find that P. Ws. 1 and 3 could not have identified the appellant from a distance of 50 to 60 feet and P. W. 2 could not have indentified the appellant from a distance of 30 to nearly 37 feet and that, too, by only seeing the back side of the appellant at a time when they must have been in a state of daze and excitement and there would be no light of the moon and if there was any, it would be very feeble. For the aforesaid reasons, we have no heritation in discarding the evidence of P. Ws. 1 to 3. The learned trial Judge ought to have taken this important aspect into consideration while judging and before accepting the evidence of these three witnesses.

10 The only other circumstance on which reliance had been placed by the prosecution was the fact that the appellant could not be apprehended until October, 1980, as he had absconded. This relates to the conduct of an accused person. A criminal trial cannot be equated with an enquiry with regard to the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material. (See AIR 1960 S. C. 500, Anant Chintaman Lagu v. The State of Bombay.)

11. When this circumstance of absconding was brought to the notice of the appellant by the Court while recording his statement, the appellant had stated that he was not present in his village and he had gone out for work. This defence would find some assurance from the statement made by P. W. 1 that the appellant used to go to Cuttack and Athagarh for doing work at times.

12. Even assuming that the statement of the appellant in this regard was false and that he had absconded, mere absconding, by itself is hardly any evidence of guilt. The conduct of an accused making himself scare for some time may be relevant under Section 8 of the Evidence Act and may also indicate to some extent his

guilty mind, but this is not conclusive in this regard, as even an innocent person may, when suspected of grave crimes, be tempted to evade arrest. Such is the instinct of self-preservation in an average human being . (See AIR 1971 S. C. 1050 : 1971 Cri. L. J. 913 Matru alias Girish Chandra v. The State of U.P. and AIR 1971 S.C. 1871: 1971 Cri. L.J, 1314 : Thimma v. The State of Mysore.) Absconding is a week link in the chain of circumstances. Even an innocent person may feel panickv and try to keep out of the way if he learns of his false implication in a serious crime reported to the police. It is not, by itself, conclusive either of ' guilt or of a guilty conscience and may only lend some assurance to the other evidence pointing to the guilt of an accused person. There is none in the instant case.

13. We thus find that the prosecution had failed to establish the charge against the appellant and that he was entitled to an acquittal.

14. It may seam unfortunate that a case of cold-blooded murders of two persons is going unpunished. The fouler the crime, the higher should be the proof. In the absence of legal proof of a crime, there can be no legal criminality.

15. The appeal is allowed and the order of conviction passed against the appellant under Section 302 of the Indian Penal Code and the sentence passed against him thereunder are set aside. The appellant be set at liberty forthwith.

P.C. Misra, J.

16. I agree.