

Sudhakar Naik Vs. State

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Court : Orissa

Decided On : Aug-20-1982

Reported in : 1997(1)ALT(Cri)2; 1983CriLJ299

Judge : B.K. Behera and ;R.C. Patnaik, JJ.

Appellant : Sudhakar Naik

Respondent : State

Advocate for Pet/Ap. : Mr. P. K. Dhal

Judgement :

R.C. Patnaik, J.

1. The appellant, a Lance-naik in the First Battalion of the Orissa Military Police, Charbatia, has preferred this appeal against his conviction under Section 302 of the Penal Code and under Section 25(a) of the Arms Act and the sentence of lite imprisonment imposed under the former and sentence of rigorous imprisonment for one year imposed under the latter; the sentences directed to run concurrently.

2. The prosecution case is that appellant Sudhakar was serving as a Lance-naik in the First Battalion of the Orissa Military Police Station at Charbatia and Maguni, the deceased, was working as a Havildar. The appellant was occupying the first floor of a block of quarters and the deceased was occupying the ground floor with

his wife (P. W. 3), mother and a baby. Three other Sepoys were also occupying quarters on the ground floor. Some months prior to the date of occurrence, some cakes had been brought by the father-in-law of the appellant and were distributed amongst the occupants of the block. At that time, it was comment-ed that the accused was a Harijan. The deceased is said to have observed that the accused was a 'Pan' by caste. Exception had been taken by the accused to such comments and there was an altercation on account of this a month before the occurrence. About one and a half months before the occurrence, the deceased had purchased a chicken from a man and had paid Rs. 7.00 towards the price, the balance of Rs. 0.75 was to be paid by him. He had asked the vendor to collect the same from him at the canteen where he was on duty. The vendor, however, instead of asking for the balance price from the deceased, approached the wife of Maguni (P. W. 3) on various occasions.

When P. W. 3 complained to the deceased, he is said to have observed why the vendor, a Pan by caste, was approaching her instead of him. The accused who was near about is said to have taken exception to this come ment and had given threats. The prosecution has further alleged that some time before the occurrence, the female inmates of the block were stitching cloth mattresses and the mattresses were spread on the common passage. At that time, the accused came with a cycle and wanted to pass through the common passage. There the wife of Maguni is said to have told that the accused could pass with his cycle over the mattresses as those would be washed in any case. The accused is alleged to have observed that as he was a Pan by caste he should not touch the mattresses. Then some discussions had ensued.

3. The accused went on leave for some time before the occurrence and returned on 16-1-1977. As one of the Sepoys assigned duty in Hanger No. 2 was proceeding on leave, the accused was assigned the said duty and he reported for duty in Hanger No. 2 around noon on 16-1-1977. But he had not brought the rifle and ammunitions with him. Being questioned by the Havildar, he told that he would collect the rifle and ammunitions in the evening. On the morning of 17-1-1977, when he was asked by the Havildar if he had brought his rifle, the accused initially gave out the number of the rifle as 404; but immediately corrected saying that be

had brought rifle No. 399 by mistake. The rifle No. 399 had been allotted to the deceased Maguni. It may be noted here that rifles with specific numbers are allotted to the Sepoys for the entire period of assignment to a particular company. The Havildar thereupon asked the accused to return rifle No. 399 and collect rifle No. 404 from the Kote. The Kote remains open till 6 p. m. Around 6 p. m., the accused is said to have asked for permission to go to the Kote to return rifle No. 399 and collect rifle No. 404. He was told then that it was time for the closure of the Kote.

The prosecution case further is that despite the instruction that it was late and the Kote would be closed, the accused left Hanger No. 2 sometime around 6.30 p. m. along with rifle No. 399. He was seen to be proceeding towards his quarters concealing the rifle inside the great coat which he was putting on at that time. It was winter then. Sometime thereafter a gun-shot was heard and the Assistant Commandant (P. W. 1) and wife of Maguni (P. W. 3) ran to the spot from where the sound of firing came. Reaching the place, they found Maguni shot through and lying dead on the ground. Some other people also gathered at the spot. Rifle No. 399 and a great coat had been left near the body of Maguni. The Assistant Commandant (P. W. 1) immediately sent a report to the Choudwar Police Station which report was treated as the First Information Report and investigation was taken up. The accused thereafter remained untraced until he surrendered in the Court of the Sub-Divisional Judicial Magistrate, Cuttack on 28-1-1977.

4. Twenty witnesses were examined by the prosecution, P. W. 1 is the Assistant Commandant who arrived at the spot immediately after the occurrence. From his evidence it is gathered that a great coat and the rifle bearing No. 399 were lying on the ground close to the body of the deceased. He has said that guns were issued to different Sepoys of the Battalion and the details were mentioned in the Register maintained for the purpose. When a great coat used to be issued to a Sepoy or Havildar, his number is used to be noted on it. The spot was at a distance of 200 yards from his office and by the time he reached the place, many people had gathered, P. W. 2 is the Officer-in-charge of Choudwar Police Station who received the report sent by P. W. 1 and drew up the First Information Report. He did not participate in the investigation, P. W. 20, the Circle Inspector having taken up investigation of the case. P. W. 3, Sabitri, is the wife of Maguni. She has spoken

about the ill-feelings between the accused and the members of the family of Maguni. She has further stated that towards evening she found the accused proceeding towards his quarters holding a gun inside his coat, A portion of the gun was visible. P. W. 4 is the doctor who conducted the post-mortem examination. According to him, Maguni died of the gun-shot. P. W. 5 was the Havildar of First Battalion of the Orissa Military Police in charge of Hanger No. 2 at the relevant time. Under him, there were one Lance-naik and three Sepoys. The accused was the Lance-naik and out of the three Sepoys, Banambar and Lajunan have been examined as P. Ws. 8 and 9 respectively.

He has substantially corroborated the prosecution case. He has stated that he specifically asked the accused not to proceed to the Kote to return the rifle as it was already 6 p.m. and the Kote would be closed. He was absent from the Hanger for a short while and when he returned around 7 p. m., he found the accused absent and rifle No. 399 was missing. He was informed by the Sepoys present there that the accused had left with the rifle. He has deposed that since by 9 p. m. the accused did not return to the Hanger, he got worried. At that time, the Commandant arrived at the place and enquired about the accused. Thereafter, the bedding of the accused in the Guard-room was searched and 18 rounds of bullets were recovered. A sepoy was used to be given 20 rounds of bullets which were kept in a pouch. He has further stated that each bullet bore a number and the year of manufacture, While issuing bullets, their numbers and the year of manufacture and the person to whom those are issued are noted in the Register. P. W. 6 is a constable, who identified the dead body of Maguni to the doctor, P. W. 4. P. W. 7 identified a cycle lying in front of a hotel near Gandhi Chowk about it miles away from the quarters of the Sepoys. He is also a witness to the seizure of the cycle by the police under seizure list Ext. 3. P.Ws. 8 and 9, the Sepoys, were on duty at the Hanger along with the accused and they have substantially supported the prosecution case. P. W. 10 is a Jamadar who was on duty at the Hanger at the relevant time. He is a witness to the seizure of the pouch which contained the 18 rounds of bullets and the bayonet.

P.W. 11 is the quartermaster Havildar who assisted the Kote Muhanir. He has deposed that rifle with a specified number is assigned to each member of the

company. Rifle No. 404 had been issued to the accused and rifle No. 399 to Maguni. Three to four months before the occurrence, the deceased had been assigned work in the Canteen. So, rifle No. 399 issued to him was in the Kote. He has said that as per the rules, Kote Muharrir used to hand over rifle assigned to a particular Sepoy and make entry in the issue register. P. W. 12 is a Sepoy who worked as the Kote Muharrir. He speaks about the practice and procedure followed while issuing arms and ammunitions to the members of the force. P. W. 13 is a Sepoy who had seen the deceased in the evening of the date of occurrence. P. W. 14 is the Subedar, viz., the Company Commander. He has deposed that he was in overall charge of arms and ammunitions. The Kote ordinarily remained open from 6 a. m. to 6 p.m. In case of an emergency, the Kote could be opened after 6 p.m.; but only in his presence or in the presence of the Assistant Commandant or Commandant. When the rifle used in the commission of the offence was detected to be Rifle No. 399, the Commandant, the Kote Muharrir and he went to the Kote room for verification and they found that rifle No. 399 was missing from the Kote and rifle No. 404 was in its place. They further found that rifle No. 399 had not been issued to the deceased as he had been assigned civil work in the Canteen four months before the occurrence. Thereafter he accompanied by the Commandant and the Sepoys proceeded to the Guard-room. The bedding of the accused was searched and 18 rounds of bullets kept inside a pouch, were recovered.

He has further deposed that the bullet fired from the gun after passing through the body of the deceased had struck the door leaf of the room occupied by Purusottam Naik, P. W. 17. In his presence, three live bullets and one empty shell were seized from rifle No. 399. The great coat which was lying near the dead body was also seized. A bayonet with scabbard of rifle No. 399 was found lying by the side of the bath-room of Sepoy Purusottam Naik (P. W. 17), a little away from the place of occurrence. The scabbard has been marked as M. O. V. The empty shell bore the manufacturing year 1966. Out of the three live bullets, the year of manufacture of one was 1966 and the other two, 1973. The 18 bullets seized from inside the pouch bore the year of manufacture 1973. He has further deposed that a register was maintained showing issue of bullets, year of manufacture and the person to whom issued. P. W. 15 is the Assistant Commandant. P. W. 16 is a

police officer who forwarded the material objects to the Chemical Examiner. P. W. 17 is Purusottam Naik, a co-occupant of the block occupied by the accused and the deceased. He speaks about the recovery of the broken lead from the door leaf of his quarters and the bayonet with the scabbard. P. W. 18 is the Scientific Officer, Forensic Science Laboratory, Rasulgarh. He is of the opinion that the cartridge of 1966, the empty shell whereof was seized from the rifle, was fired from rifle No. 399. P.W. 19 is another Scientific Officer of the Forensic Science Laboratory. P. W. 20 is the Circle Inspector who conducted the investigation. He has said that he seized a greatcoat M. O. XII and the live cartridge of the year of manufacture 1970 and the live cartridges of the year of manufacture 1973 etc.

5. The plea of the appellant was one of denial. He stated that he did not secure rifle No. 399 deliberately. The mistake was discovered next morning when he was asked by the Havildar to give out the number of his rifle. He carried the rifle with him with a view to returning the same in the evening; but by then the Kote had been closed. So, he returned to his quarters. Depositing the rifle in his quarters, he went to the lavatory to ease himself. When he came out of the lavatory he found the rifle missing and heard shouts that somebody had shot Maguni Mxiduli. When he heard that rifle No. 399 was lying near the dead body, out of panic he fled. He has further stated that while on duty there were two rounds of bullets and as he was in a hurry to return the rifle, he did not remove the bullets. He expressed his ignorance as to how the two bullets one of the year of manufacture 1966 and the other of the year of manufacture 1970 came to be loaded in the rifle. He has disowned any ill-feeling towards the deceased.

6. There is no direct evidence connecting the appellant with the crime. There is no doubt that the death of Maguni was homicidal and was due to gun-shot. The learned Sessions Judge on appreciation of the materials has held the appellant guilty founding his conviction on circumstantial evidence. He has found that the appellant had motive for the commission of the offence and the circumstances connecting the appellant with the crime are:

(a) the appellant had brought rifle No. 399 assigned to the deceased instead of rifle No. 404 assigned to him and failed to return the rifle and obtained his own

despite instructions in that regard by the Havildar (P.W. 5);

(b) though he was told that the Kote would be closed at 6 p. m., he left the Hanger with the rifle and two live cartridges concealing the same inside the great-coat;

(c) death was caused by the bullet fired from rifle No. 399 and the rifle and the great-coat were found lying near the dead body of Maguni; and .

(d) abscondence of the appellant from the evening of 17-1-1977 till 28-1-1977 when he surrendered in the Court of the Sub-Divisional Judicial Magistrate, Cuttack.

According to the learned Sessions Judge, the aforesaid circumstances completed the chain and unequivocally pointed to the guilt of the appellant.

7. Mr. P. K. Dhal, learned Counsel for the appellant submitted that the chain of circumstantial evidence in this case is not complete and the learned Sessions Judge has founded the conviction on suspicion.

8. The evidence regarding motive is not unequivocal and free from doubt. P. W. 3 has said in cross-examination:..Sudhakar and his wife had no quarrel with myself or with my husband or other occupants of the quarters.... My husband and myself had no ill-feeling with accused Sudhakar and his wife. All that I marked that whenever Sudhakar passed by my side, he passed some comments, but I did not mind that. Except this I did not mark any bad attitude in Sudhakar towards us. I have not stated before the police that Sudhakar passed comments whenever he saw me. I am not aware if accused Sudhakar had any quarrel with my husband in the office or anywhere outside our quarters.' There is also no evidence otherwise that the appellant and the deceased were not pulling on well or the appellant had any ill-feeling towards the deceased. From the aforesaid statement of P. W. 3 it is difficult to hold that the appellant had any motive to do away with Maguni. The learned Sessions Judge has omitted to consider the evidence of P. W. 3 in its totality. No witness has been examined to corroborate the allusion made by P. W. 3 regarding the reaction of the appellant on ground of his caste. Her statements in cross-examination on the contrary give him a clean chit.

9. Regarding obtaining of rifle NO. 399, the appellant has explained that the rifle was given to him by mistake and it was he who pointed out the mistake on the 17th morning. It is found from the evidence that there was no attempt on the part of the appellant to conceal the fact. His initial statement when asked to give the number of his rifle, that his rifle bore No. 404 was on account of habit; but immediately thereafter he corrected by stating that the rifle with him bore No. 399. It is not the prosecution case that the true fact was detected by any other person. His carrying rifle from the Hanger and the use of the very rifle for firing on Maguni are no doubt suspicious features, The appellant has given explanations. There is no material on record to hold that the explanations are false or are not compatible with the innocence of the appellant.

10. There are, however, two features in the prosecution case which cause worries. The first is that the bullet used to shoot Maguni was of the year of manufacture 1966 and the rifle contained a live bullet of the year of manufacture 1970. Admittedly, bullets of the years of manufacture 1966 and 1970 had not been issued to the appellant. The bullets bear numbers and years of manufacture. The registers maintained for bullets and issue thereof contained details to show to whom a particular bullet had been issued. Since admittedly the two bullets of the years of manufacture 1966 and 1970 had not been issued to the appellant, it was the bounden duty of the prosecution to find out to whom the said two bullets had been issued. It is worthwhile to note that 20 bullets of the year of manufacture 1973 issued to the appellant had been seized intact, 18 from the pouch and two from the rifle. Absence of evidence on this aspect of the case leaves a gap in the chain of circumstances. If the two bullets had been traced to the person concerned, pursuing that thread further the Investigating Authority could have arrived at materials as to the identity of the culprit.

The next feature is concerning the great coat which was lying near the dead body and was seized by the I. O. marked as M. O. XII. It is in the evidence that when a great coat is issued to a particular force, the number of the member is written on it. No attempt has been made to correlate the great coat, M. O. XII, with the accused or the person to whom the same had been issued. The great coat is the evidence linking the culprit with the crime and would have established the identity if

evidence in that regard had been laid. Prosecution has made no attempt to lead evidence to show as to whom the great coat had been issued. From the failure of the prosecution to lead that evidence; an inference can be drawn that the great coat found lying near the dead-body of Maguni had been issued to somebody else, but not the appellant. Identity of the person using the great coat M. O. XII would have gone a long way in establishing the identity of the culprit. Failure on the part of the prosecution in this regard leaves another gap in the chain of circumstances.

11. The learned Sessions Judge has been in error in connecting the appellant with the great coat, M. O. XII and utilising the said piece of evidence against him. In the absence of evidence that the said coat had been issued to the appellant, the great-coat recovered from near the dead body of Maguni is not a circumstance against the appellant,

12. In our opinion, the chain of circumstances in this case was not complete; but had left two yawning gaps begging answer. It is well settled that suspicion howsoever grave is not a substitute for proof and the circumstances, two of which we have shown to be non-existent, do not unerringly and unequivocally lead to the only conclusion that the appellant was guilty.

13. In the result, the appeal is allowed, the judgment of the learned Sessions Judge convicting the appellant and sentencing him for the various offences as aforesaid are set aside and the appellant is acquitted of the charges. He be set at liberty forthwith,

B.K. Behera, J.

14. I agree.