

Basanta Konhar @ Babula Vs. State of Orissa

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Court : Orissa

Decided On : Feb-15-2005

Reported in : 2005(I)OLR710

Judge : P.K. Tripathy and ;Pradip Mohanty, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 201 and 302; Evidence Act - Sections 8, 25 and 27

Appeal No. : Jail Criminal Appeal No. 216 of 1996

Appellant : Basanta Konhar @ Babula

Respondent : State of Orissa

Advocate for Def. : A.K. Mishra, Standing Counsel

Advocate for Pet/Ap. : Dipali Mohapatra, Adv.

Disposition : Appeal allowed

Judgement :

1. In the above appeal, Appellant has challenged to the judgment and order dated 27.07.1996 passed by learned Sessions Judge, Phulbani in S.T. No. 7 of 1996, whereby he has been convicted under Sections 302/201, I.P.C. and sentenced to undergo imprisonment for life for committing murder of his co-villager Kiabala Konhar and causing disappearance of his dead body.

2. Case of the prosecution, in a nutshell, is that appellant and deceased Kiabala Konhar are co-villagers. Rajkishore Konhar is the son of the deceased. Some years prior to the occurrence, Appellant had snatched away a gold 'Mali' from the neck of the daughter-in-law of the deceased. A Punch was convened in the village, where the appellant admitted the above fact. In the said Panchayat, Appellant also agreed to compensate Kiabala Konhar with the cost of the 'Mali', i.e., Rs. 3,000/- (rupees three thousand), as the same was disposed of by him. Accordingly the appellant paid Rs. 2,500/- (rupees two thousand-five hundred). A couple of months before the occurrence, appellant apprehending that deceased Kiabala is practising witchcraft on him, convened a meeting in the village with a view to drive him out of the village, but failed. On the date of occurrence, i.e, on 17.09.1995 at about 4 p.m., in an isolated place near river Salunki, the appellant finding that deceased alone was proceeding towards Kuchilagada, caused his murder by inflicting several axe-blows on him. With a view to cause disappearance of evidence, he tied a napkin on the left foot of the deceased, dragged the dead body to the river-bed and threw it into the river Salunki. Thereafter he appeared at Tikabali Police-Station at about 6.30 p.m., made a statement before the A.S.I. of Police, namely Gopal Chandra Mohapatra (P.W.7) about the murder of Kiabala committed by him and produced the weapon of offence, i.e., the axe, marked M.O.-I. P.W.7 reduced the statement of the appellant to writing, vide Station Diary Entry No. 345, dated 17.09.1995 (Ext.7/1) and seized the axe and the blood stained 'Dhoti' of the appellant, marked M.O.-II. Immediately thereafter investigation was undertaken, in course of which police along with the appellant went to the house of the deceased and, on the disclosure made by the appellant, son of the deceased and some villagers accompanied the police to the place where Kiabala was murdered and the place where the dead body was thrown. Police seized blood-stained earth and sample earth from the place of occurrence and recovered the dead body from the river. The dead body of the deceased was sent for post mortem examination and thereafter the wearing apparels of the deceased, marked M.Os. III, IV, V & VIII, were seized. On completion of investigation, charge sheet was submitted against the appellant.

3. Defence plea of the accused was one of complete denial. Another plea was taken by the appellant that during the relevant time he was mad.

4. In order to prove its case, prosecution examined as many as ten witnesses. P.W. 1 is a witness to the seizure of M.Os. I and II. P.W.2 is the son of the deceased and he deposed about the post-occurrence and relating to recovery of the dead body of the deceased. P.Ws. 3 and 4 are two co-villagers. They also witnessed recovery of the dead body and inquest. P.W. 5 is the doctor who conducted post mortem examination and proved the post mortem report Ext.2, and his opinion report on M.O.-I marked Ext.4 and the requisition thereof being Ext.3. P.Ws.6 to 9 are police officials who got information of the crime and conducted investigation. On the direction of the trial Court one witness was examined to state about the village Punch, and he has been described as P.W. 10. We observe that he should have been described as Court's witness No. 1. Be that as it may, including the above noted documents, prosecution proved and exhibited documents, vide Exts. 1 to 16. Defence did not choose to examine any witness in support of its plea.

5. Admittedly, there being no direct evidence available of any eye-witness to the occurrence, the trial Court recorded order of conviction on the basis of the circumstantial evidence. In that respect, learned Sessions Judge took into consideration the following circumstances to have been proved to establish the chain of circumstance in support of the guilt of the accused. Those circumstances are :-

(i) Inimical relationship between the accused and the deceased providing the motive for the accused to commit the crime ;

(ii) Though the investigating agency did not collect any evidence that by the time the deceased left his native village with the intention to go to Bapalmendi village, by that time accused also left his village to be present at the spot in Gahi-Pakali Padar at the time of occurrence, but the Station Diary Entry (Ext.7/1) recorded by the Investigating Officer (P.W.7) proves that accused appeared and made statement relating to the crime having been committed by him and produced the weapon of offence as well as his wearing apparels stained with blood, which ultimately corresponded to the blood group of the deceased collected from the wearing apparels of the deceased, and that speaks for his presence at the spot of

occurrence at relevant time. In that context, learned Sessions Judge opined that the statement given by the accused making the confession before the Investigating Officer is though inadmissible, but the seizure of blood-stained articles on production by the accused and such wearing apparels and the weapon of offence being containing the same group of blood which was belonging to the deceased, therefore, such evidence is admissible under Section 8 of the Evidence Act, though prosecution has failed to make out a case under Section 27 of the Evidence Act. Accordingly he held that the accused was present at the spot of occurrence at the relevant time and committed the crime;

(iii) That, at the instance of the accused the dead body of the deceased was recovered from the river;

(iv) The blood-stained and the sample earth recovered from the spot of occurrence comes within the scope under Section 27 of the Evidence Act; and

(v) The report of the serologist goes consistent with the above noted circumstances that the accused is the author of the crime.

In furtherance of that discussion, learned Sessions Judge did not put much emphasis on the plea of madness of the accused notwithstanding the certificate Ext.B, prescription Ext.C and the discharge certificate Ext.A from the M.K. C.G. Medical College & Hospital showing that accused was treated in the psychiatric department for schizophrenia disease and in spite of admission of P.W.2 that accused was mad for about a period of ten years by the date of his deposition. Learned Sessions Judge held that the plea of madness was inadequately proved and therefore he is not entitled to protection on such a plea.

Trial Court while rejecting the defence plea, convicted the accused-appellant for the offence under Section 302 and 201, I.P.C. and sentenced him to undergo imprisonment for life, wrongly mentioning that to be rigorous imprisonment for life, (underlined to note the mistaken part in the sentence).

6. Miss Dipali Mohapatra, learned counsel for the appellant, after referring to the post mortem report and the evidence of the doctor (P.W.5), argues that appellant

has no dispute on the assertion of the prosecution that deceased suffered a homicidal death. On perusal of the evidence of P.W.5, the doctor who conducted post mortem examination on the dead body and the post mortem Report Ext.2, we find that the doctor found the following injuries :-

- (1) Cut wound on the left face below the left ear extending to the neck with fracture of mandible and tearing of muscles underneath. The size of the wound was 5' x 2'.
- (2) Cut wound over the left scalp above the left ear of size 2' x 1' with fracture of left temporal bone, brain matter coming out from the fracture site.
- (3) Cut wound over the right neck above the collar bone of size 3' x 2' with tearing of muscles underneath with extension of injury to the back of the neck.
- (4) Cut wound over left back on the supra-scapular region of size 3' x 2' with fracture of scapula.

According to P.W.5, on dissection he also found corresponding internal injuries and all the above injuries were ante mortem and homicidal in nature. Injuries No. 1 and 2 individually were found fatal and sufficient in ordinary course of nature to cause death. The cause of death was due to asphyxia and haemorrhage. Thus, the deceased died a homicidal death.

7. On proving the case of homicidal death of the deceased prosecution is required to prove that the appellant is the author of the crime. It may be noted here that there is no eye-witness to the occurrence and proof of the above aspect depends solely on the circumstantial evidence.

8. Miss Mohapatra, learned counsel for the appellant contends that P.W. 1 is a co-villager of the appellant, before whom the appellant allegedly made a statement in the police station about committing murder of the deceased and produced the blood-stained axe, but in the cross-examination he stated that he saw the axe on the table of the police station. Therefore, P.W. 1 can by no stretch of imagination be said to be a witness to the alleged confession and production of the axe by the appellant and his statement to that effect during his examination-in-chief cannot be relied upon. P.W.2 is the son of the deceased. His evidence is full of

contradictions. That apart, prosecution has failed to produce any evidence that appellant and the deceased were last seen together or that there was a probable chance of their meeting at Gahi-Pakal Padar land. Though the prosecution has alleged that the appellant dragged the dead body for some distance and threw the same into the river Salunki to cause disappearance of evidence, from the evidence of the doctor (P.W.5) it is found that there was no mark of injury on the body of the deceased to establish such dragging, particularly when admittedly the land was uneven and dry forest land. She further argues that the so-called confession of the accused is hit by Section 25 of the Evidence Act and seizure of the axe or any other article including blood-stained earth is not coming within the provision under Section 27 of the Evidence Act and, above all, during the course of investigation the chain of circumstances have not been made out to unfailingly fix the accusing finger at the appellant.

9. We have carefully gone through the evidence of the prosecution witnesses. As contended by learned counsel for the appellant, P.W. 1 cannot be said to be a witness to the alleged confession and production of the weapon of offence at the police station in view of the evidence that he went to the police station on being called by the Police Babu (P.W.7). Therefore, his appearance at the police station is much after the alleged appearance of the accused before the Investigating Officer and production of the axe and the wearing apparels. Whatever statement the accused had to give, he had given such statement to the police before arrival of P.W.1 in as much as P.W.7 has not stated in his evidence that on seeing the accused in that condition he asked him to keep quiet and sought for appearance of the independent witnesses before hearing the statement of the accused or before accepting the axe and the blood-stained wearing apparels of the accused as incriminating articles in the case. In fact, in the cross-examination P.W.1 has admitted that by the time he reached the police station, accused was already in the lock up and the axe was on the table. Therefore, seizure of the wearing apparels of the accused and the axe-M.O.-I cannot be regarded as evidence under Section 27 of the Evidence Act. However, such evidence is admissible under Section 8 of the Evidence Act, because, according to P.W.7 the accused made admission that he killed the deceased by that axe. Out of the same the admission or the statement that axe is the weapon of offence is only admissible

under Section 8 and not the rest part of the statement of the accused. This legal position is settled by this Court as well as the Apex Court in catena of decisions and a few were cited at the Bar and were also referred by the trial Court. Those decisions are - State v. Mayadhar Rana, Vol. XXXVIII (1972) C.L.T. 725; Dhenka Munda v. State, 1991 (I) O.L.R.-318; Faddi v. State of Madhya Pradesh, A.I.R. 1964 S.C. 1850; and Aghnoo Nagesia v. State of Bihar, A.I.R. 1966 S.C. 119. We find the ratios in the said cases are squarely applicable for the aforesaid opinion.

10. The opinion of the trial Court that seizure of bloodstained earth from the spot is a piece of evidence under Section 27 of the Evidence Act is absolutely incorrect in as much as the place of presence of blood-stained earth was commonly accessible to all and the appellant had done nothing to conceal it from the view of others so as to point out that spot would amount to discovery of the incriminating article. Therefore, seizure of the blood-stained and sample earth from the spot of occurrence cannot be regarded as a piece of evidence under Section 27 of the Evidence Act.

11. Learned counsel for the appellant rightly argued that even if the case of the prosecution is accepted on its face value that accused accompanied the police team to the place wherefrom the dead body was recovered from the river, then also that does not prove the crime against the appellant. She further argues that men may belie but circumstances never belie. She invites our attention to Ext. 11. It appears from the spot map - Ext. 11 that the spot of occurrence and the surrounding places are consisting of rocks, paddy fields, bushes and there was a mark of dragging for a distance of about 150 meters. If the dead body was dragged on such hard and uneven land including the paddy fields, then the doctor who conducted the post mortem examination should have found some injuries on that part of the body, which came in contact with the ground at the time of such dragging. Therefore, in the absence of any such injury the prosecution theory of the deceased being dragged by the accused to the river bank is found to be not substantiated. She further argues that it is nobody's case that the dead body of the deceased was lifted from the spot of occurrence to the river bank till the dead body was thrown into the river. Accordingly she argues that, taking these circumstances along with the defence evidence, Exts. A, B & C and clear-cut admission of the

son of the deceased as P.W.2 that accused, by the date of occurrence, was suffering from madness for a period of ten years, it would be proper to accept the defence theory than to accept the prosecution case.

12. Learned Standing Counsel states that when bulk of the area on the ground was paddy field, therefore, there was less possibility of injury on that part of the body which came in contact with the ground in course of dragging. We are not impressed with that argument, because the occurrence has taken place in the district of Phulbani, which is full of hilly lands. Even if the dead body was dragged across the paddy fields, then also in the process of dragging the dead body had to encounter the ridges and small patches of dry, uneven and rocky surface. Therefore, if the dead body was dragged and there was dragging mark, then there must have been injuries on the back. On the other hand if the dead body was not dragged though there is a dragging mark, then from that dragging mark one cannot conclude that such mark was made due to dragging of the dead body of the deceased. Above all, there is nothing in the evidence of P.W.7 or in the spot visit report that there was blood-soaked earth at patches or the trail of blood-stain from the spot of occurrence up to the river bank consistent with the theory of dragging. If a person is killed by inflicting bleeding injuries, which were found by the doctor, and soon after such injuries the body was dragged, then it was bound to leave a trail of blood drops and at least patches of blood at some places along the dragging mark. Unfortunately, the first Investigating Officer, i.e., P.W.7 did not depose about such situation or having noticed such trail of blood or blood patches along the dragging mark.

13. It is true that Exts. A, B & C alone are not sufficient to prove that by the time of occurrence accused had the frills of insanity so as to get the protection of the exceptions as provided in Chapter-IV of the Indian Penal Code. But such evidence is at least sufficient to hold that accused was a patient of schizophrenia, which is a mental disorder. Some types of schizophrenia patients remain in the realm of imagination, some of them are violent, some of them are with a criminal bent of mind but committing crime deceptively. In that way there are various mental disorders under the category of schizophrenia. In this case there is no specific evidence as to the type of schizophrenia, which the appellant was suffering from. If

we take into consideration his conduct in producing an axe at the police station and reporting about a crime having been committed and he dragged and threw the dead body into the river, then it may be inferred that he was suffering from a symptom of imagining things or being violent at times. This is only a circumstance which is discussed and not to conclude anything in favour of the appellant or against the prosecution. It is the settled position of law that prosecution is to prove its case beyond all reasonable doubt whether or not it is supported by direct evidence and the weakness of the defence plea is no ground to presume guilt of the accused.

14. The other circumstance, which the trial Court took note of in aid of the guilt of the accused is that human blood group 'B' was detected from his wearing apparels. In fact, if the prosecution evidence otherwise would have been consistent and unfailingly suggestive of the appellant as the author of the crime then certainly this evidence would have added to the corroborative factor, but alone such a circumstance is not sufficient to prove the guilt of the accused when the investigating and prosecuting agency did not take any step to ascertain the blood group of the accused. Therefore, even the same blood group found in the wearing apparels of the accused, in this particular case does not clinchingly prove that accused is the author of the crime.

15. On summarizing the circumstances which were taken note by the trial Court we find that even if the enmity between the accused and the deceased is proved but there is lack of circumstantial evidence to complete the chain of circumstances that accused killed the deceased, dragged his dead body to the river bank and threw it into the river. His evidence of producing the axe is admissible under Section 8 of the Evidence Act but seizure of the blood-stained earth or the wearing apparels of the accused and the deceased are not guided by the provision under Section 27 of the Evidence Act. The dead body was devoid of any injury, which could have been suggestive of the fact that the dead body was dragged for a distance of about 150 metres and therefore the chain of circumstances has not been completed to prove the guilt of the accused. Under such circumstance we set aside the order of conviction and acquit the accused-appellant from the charges by granting him the benefit of doubt.

The Jail Criminal Appeal is allowed accordingly.

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