

Shyamaghana Bindhani and Two ors. Vs. State

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Court : Orissa

Decided On : Apr-04-1986

Reported in : 1986(I)OLR567

Judge : B.K. Behera and ;G.B. Pattnaik, JJ.

Acts : Indian Penal Court - Sections 34 and 302; Evidence Act - Sections 11

Appeal No. : Jail Criminal Appeal No. 82 of 1982

Appellant : Shyamaghana Bindhani and Two ors.

Respondent : State

Advocate for Def. : A. Rath, Addl. S. C.

Advocate for Pet/Ap. : Mira Chose, Adv.

Judgement :

B.K. Behera, J.

1. The three appellants stood charged under Section 302 read with Sec 34 of the Indian Penal Code (for short, the 'Code') with having committed the murder of Gupteswar Mallik (hereinafter to be referred to as the 'deceased') on August 17, 1980, in furtherance of their common intention. The appellant Shyamaghana stood separately charged under Section 25(1)(a) of the Arms Act for being in unlawful

possession of a gun without a licence on the same day. The three appellants, it was alleged, having lost in the litigations with the deceased as evidenced by the judgments and orders (Exts. 13 to 16), went to the land of the deceased where he had gone for the purpose of cultivation with his three labourers (P. Ws. 1 to 3) and the appellant Shyamaghana asked the deceased to pray to God in his last moments. The appellants Shyamaghana and Brundaban had each a gun and the other appellant Sridhar had a Farsa (M. O. II), a knife and a lathi. The appellant Shyamaghana fired a shot from his gun at the deceased whereafter the appellant Brundaban also fired a shot from his gun at the deceased who fell down. The appellant Shyamaghana then snatched away the Farsa from the hands of the appellant Sridhar and dealt blows on the neck of the deceased. The appellant Sridhar thereafter brought away Farsa from the hands of the appellant Shyamaghana and dealt a blow on the chest of the deceased. The assault on the deceased by the three appellants resulted in his death. On the basis of the first information report (Ext.1) lodged by Puma Chandra Pradhan (P. W. 1), investigation allowed in the course of which witnesses were examined. M.O.I was recovered on production by P. W. 12 to whom the gun (M. O I) had been handed over by the appellant Shyamaghana after the occurrence and M. O. II with stains of blood was recovered from the possession of the appellant Shyamaghana. The wearing clothes of the appellant Shyamaghana including a banian (M.O.V) with suspected stains of blood were also seized. The gun had been examined by the Ballistic expert and the articles with the suspected stains of blood had been put to chemical and serological tests. On the completion of investigation, a charge-sheet was placed against the appellants.

2. To bring home the charges, the prosecution had examined thirteen witnesses. Of them, P. Ws. 1 to 3 had figured as witnesses to the occurrence. The defence of the appellants was one of denial and false implication owing to previous strained relationship with the deceased. On a consideration of the evidence, the learned trial Judge has held that the charge under Section 25(1)(a) of the Arms Act against the appellant Shyamaghana had not been established. He has, however, found that the charge under Section 302 read with Section 34 of the Code has been brought home to the appellants, who have accordingly been convicted and sentenced to undergo imprisonment for life.

3. Miss Mira Chose, appearing for the appellants, has submitted that the evidence of P. Ws. 1 to 3 is not worthy of credence and as in the first information report, no allegations had been made that the appellant Brundaban had fired a gun shot and that the appellant Sridhar had gone to the spot with the weapons and had assaulted the deceased, the order of conviction against these two appellants is unfounded and cannot be sustained. She has submitted that the evidence against the appellant Shyamaghana is highly unsatisfactory and should not have been acted upon. Mr. A. Rath, the learned Additional Standing Counsel, has supported the finding of the learned trial Judge that the appellant Shyamaghana had assaulted the deceased to death and had committed his murder. He has submitted and in our view, very fairly so, that the evidence would not warrant a conviction of the other two appellants.

4. There can be no doubt from the evidence that all was not well between the deceased on the one hand and the appellants on the other. Apart from the oral evidence, Exts. 13 to 16. would support the allegation made by the prosecution in this regard. But-motive cannot, by itself, sustain a criminal charge although proof of motive may lend assurance to the evidence with regard to the actual occurrence.

5. Undoubtedly, P. Ws. 1 to 3 are natural and competent witnesses in that they had gone to the land of the deceased on the day of occurrence and were on the scene when the murderous assault took place. These three witnesses have testified that the appellant Shyamaghana with a gun (M. O. I), the appellant Brundaban with another gun and the appellant Sridhar with a Farsa (M. O. II), a knife and a lathi had gone together to the spot. According to these witnesses, the appellant Shyamaghana shouted at the deceased asking him to pray to god and so saying, fired a gun shot at the deceased which was followed by another gun shot by the appellant Brundaban. These witnesses have further testified that the appellant Shyamaghana then snatched away the farsa (M. O. II) from the hands of the appellant Sridhar and dealt blows on the neck of the deceased. They have also deposed that the appellant Sridhar brought away the same Farsa from the hands of the appellant Shyamaghana and dealt a blow on the chest of the deceased. The evidence of the doctor (P. w. 4), who had conducted the autopsy

over the dead body of the deceased would show that he had noticed an incised wound on the left side of the neck and a cut on the chest, a cut on the left ear lobula on the scalp, an entrance wound on the right axillary line between the 5th and 6th ribs, another entrance wound on the right back between the 9th and 10th ribs and an exit wound on the right shoulder joint in the middle. His evidence would not show that any pellet had been lodged inside the body of the deceased. He had noticed but one exit wound. According to the doctor, the cause of the death was due to cardiac respiratory failure and shock due to blood loss and cutting of all the organs on the neck including the large vessels and spinal cord. Ext. 2 is his post mortem report. Thus the medical evidence would show that the gun shots had not caused the death of the deceased and the injuries on the neck which could be caused by M. O. II had resulted in his death and each of the three witnesses, namely, P. Ws. 1 to 3 had testified that the appellant Shyamaghana had assaulted the deceased on his neck by means of M. O. II.' Thus the acceptable evidence of P. Ws. 1 to 3 would warrant a sure conclusion that the appellant Shyamaghana, by means of M. O. II, had evidently with the intention of causing the death of the deceased caused injuries sufficient in the ordinary course of nature to cause his death.

6. The evidence of P. Ws. 1 to 5 corroborated by the medical evidence would find further assurance from the fact¹ that the gun (M. O. I) which was in the hands of the appellant Shyamaghana had been recovered on being produced by P. W. 12 on being directed by the appellant who had led the investigating police officer and the accompanying witnesses to the house of P. W. 12. M. O. II had been seized from the possession of the appellant and the banian (M.O. V) had been seized from his person. The banian of the deceased (M.O. IV) had also been seized after autopsy. M. O. II contained human blood and the banians of the appellant Shyamaghana and the deceased contained human blood of 'A' group as found on chemical and serological tests. These circumstances would tell their own tale and would lend assurance to the evidence of P. Ws. 1 to 3. The Assistant Director and Assistant Chemical Examiner (Ballistic) had not been sure as per his report (Ext. 12) as to when the gun (M. O. I) was last fired. This would not, however, affect the case of the prosecution with regard to the complicity of the appellant Shyamaghana who had caused injuries on the neck of the deceased by M.O. II

which had resulted in his death.

7. The case against the other two appellants, however, stands on a different footing. It would be seen from the evidence of P. Ws. 1 and 3 that together, they had gone to lodge a report with regard to the occurrence. According to P. W. 1, when he reached the Posora Police Out-Post, there were two police constables to whom he had narrated the incident and they had directed him to go to the Assistant Sub-Inspector of Police who had been camping at village Rangmatia. P W. 3 had testified that he had accompanied P.W. 1 to the Posora Police Out-Post where a police constable noted the report and sent it with p. w. 1 to Rangnatia where the Assistant Sub-Inspector of Police was camping and he did not accompany P. W. 1 to Rangmatia. He had specifically stated in his cross-examination that the Constable wrote the report as stated by him and P.W.1 and P.W. 1 signed that report. If such a report had been made it had not been produced and proved by the prosecution. In the first information report (Ext. 1) lodged by P.W. 1, the witness had no doubt stated about the presence of the appellant Brundaban with a gun on the spot but he had not stated therein that the appellant Brundaban had fired a shot from his gun. On his own showing, he had known all the appellants from before and had known their names. It is pertinent to note that in the first information report, the appellant Sridhar had not been named at all and it had been noted that the appellants Shyamaghana and Brundaban and another person had gone to the spot and that the appellant Shyamaghana had snatched away a Farsa from that person. No allegation had been made in the first information report that the appellant Sridhar took away the Farsa from the hands of the appellant Shyamaghana and dealt a blow on the chest of the deceased. According to P. W. 1, he signed the first information report after understanding the contents thereof and admitting the same to be correct.

8. The first information report is not the be all and end all of a case and is not supposed to be an encyclopaedia containing the minutest details about the occurrence. It sets investigation in motion and the details are generally gathered in the course of investigation. But the omissions of important facts in a first information report lodged by no other person than a witness to the occurrence must be taken serious note of As has been laid down by the Supreme Court in AIR

1975 S.C.1026 Ram kumar panday v.The State of Madhya Pradesh, a first information report is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But the omissions of important facts affecting the probabilities of the case are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case. The principles laid down therein are applicable to the facts of the case before us. The non-mention of firing of a gun shot by the appellant Brundaban and the assault on the body of the deceased by means of a Farsa by the appellant Sridhar and even about the presence of the appellant Sridhar in the first information report would not only affect the evidence of P. W. 1, but would affect the veracity of the prosecution case in so far as these two appellants are concerned.

9 P. W. 2 has not been able to say as to whether the appellant Brundaban had fired the gun at Gupteswar from the front side or back side. He had not stated in his statement recorded under Sections. 161 and 164 of the Code of Criminal Procedure that the appellant Sridhar had snatched away the Farsa from the hands of the appellant Shyamaghana and dealt a blow on the chest of the deceased.

10. it would appear to us that the appellants Brundaban and Sridhar have falsely been implicated as the assailants of the deceased at a belated stage although such allegations had not been made in the first information report. Even if the evidence that the appellant Brundaban had gone to the spot being armed with a gun with the appellant Shyama ghana is accepted, this circumstance, by itself, would not be sufficient to hold that he had shared the common intention with the appellant Shyama-ghana to commit the murder of the deceased.

11. For the foregoing reasons, we accept the contentions raised on behalf of the appellants Brundaban and Sridhar that the charge under Section 302 read with Section 34 of the Code had not been brought home to them.

12. In the result, the appeal is allowed in part. The order of conviction passed against the appellants Brundaban Bindhani and Sridhar Bindhani under Section 302 read with Section 34 of the Indian Penal Code and the sentences passed against them there under are set aside. The order of conviction passed against the appellant Shyamaghana Bindhani under Section 302 read with Section 34 of the

Indian Penal Code is set aside and in lieu thereof, he is convicted under Section 302 of the Indian Penal Code and the sentence passed against him to undergo imprisonment for life is maintained.

G.B. Pattnaik, J.

13. I agree.

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