

Gandu Kerketa Vs. State

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Court : Orissa

Decided On : Mar-03-1993

Reported in : 1993(I)OLR474

Judge : A. Pasayat and ;B.N. Dash, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; [Evidence Act, 1872](#) - Sections 60, 64, 67 and 91

Appeal No. : Jail Criminal Appeal No. 60 of 1990

Appellant : Gandu Kerketa

Respondent : State

Advocate for Def. : G.K. Mohanty, Addl. Standing Counsel

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

Disposition : Appeal allowed

Judgement :

A. Pasayat, J.

1. In this appeal from Special Jail, Rourkeia, Gandu Karketa (hereinafter referred to as the 'accused') calls in question legality, of his conviction for an offence Under Section 302 of the Indian Penal Code, 1860, (in short, the IPC) and sentence of

imprisonment for life as awarded by learned Addl. Sessions Judge, Rourkela (hereinafter referred to as the 'trial Judge').

2. Filtering out unnecessary details prosecution case as unfolded during trial is as follows :

On 8-8-1989, there was marriage function in the house of Udaya Tanti. Chanhati Karketa (hereinafter referred to as the 'deceased') who was the wife of the accused, wanted to participate in the dance which was going on in the marriage function. The accused forbade her to participate in the dance, but the deceased did not pay any heed to the protest of the accused and started to go out of the house. The accused became angry, caught hold of her and threw her on a heap of stone and then dealt several blows on her head and face with a stone. As a result of assaults, the deceased sustained multiple injuries and became unconscious. This ghastly act was witnessed by Anil, the minor son of the accused and the deceased, who went weeping to the house of Matias, where Akli Karketa (PW 7), the mother of the accused, and Sima Karketa (PW 6), the daughter of the accused were present. He narrated the incident before them. PWs 6 and 7 rushed to the spot and found the deceased lying unconscious. The other villagers were informed and before them also. Anil made a statement implicating the accused with the assaults. The deceased was removed to the Ispat General Hospital, Rourkela where she died on 25-3-1989. One of the villagers Billen Tirkey (PW 5) lodged FIR at the Police Station, investigation was undertaken and on completion thereof, charge-sheet was submitted. The accused took plea of false implication and pleaded innocence.

3. In order to further its case, prosecution examined eighteen witnesses out of whom PWs 5, 6 and 7 were stated to be the persons before whom Anil made statement about assaults by the accused on the deceased. The other witnesses were either seizure or official witnesses Learned trial Judge found that there was no direct evidence. According to him, certain features existed which clearly established the guilt of the accused. The circumstances which were highlighted by him were as follows :

- (i) Many villagers and the daughter of the accused clearly stated that Anil told before them that the accused assaulted and caused injuries to the deceased.
- (ii) PWs 6 and 7 being the daughter and mother of the accused could not have falsely implicated the accused.
- (iii) The villagers could not have tutored Anil in presence of PWs 6 and 7.
- (iv) The shirt of the accused and saree of the deceased which were seized contained human blood of 'A' group and the grouping tallied with each other.
- (v) Though the accused explained that blood-stain marks in his wearing apparel were on account of assaults made by the police in the police station, the same is not acceptable, as he had not complained of any assault or about infliction of injuries at the time of his production before the Magistrate.
- (vi) The deceased died of injuries on her head and face and there was evidence to show that the accused inflicted those injuries voluntarily.

Referring to the aforesaid circumstances, the accused was found guilty and convicted Under Section 302, IPC, as aforesaid and sentenced to imprisonment for life.

4. Mr. R. Mohapatra, learned counsel for the accused-appellant has urged that prosecution has failed to establish its case against the accused and learned trial Judge fell into errors of law in relying on the evidence of PWs 5, 6 and 7, since they had no direct knowledge about the occurrence and their source of information was Anil, the son of the accused and the deceased who was not examined as a witness. The conviction having been based on hearsay evidence and circumstances which have no evidentiary value, the accused is entitled to an order of acquittal. Learned counsel for State on the other hand, supported the judgment and conviction of learned trial Judge.

5. We shall first deal with the acceptability of evidence of PWs 5, 6 and 7. Undisputedly, they have no direct knowledge about the occurrence. Claim of these witnesses is that they heard about assault from Anil, a minor boy, whose age is

alleged to be two years as deposed to by PW 5. From the order sheet of the trial Court, we find that Anil was present in Court on 12-12-1989. The learned trial Judge found his age to be about four years and further found that he had not developed sufficient maturity to give evidence.

6. Section 60 of the Indian [Evidence Act, 1872](#) (in short, the 'Act') deals with oral evidence, and mandates that it must be direct. The section rests on the cardinal rule that the best evidence available must always be given. The provisions of Sections 60, 64 and 91 of the Act are based on this rule. Every element of fact may be proved by direct or circumstantial evidence or by both. Section 60 postulates that oral evidence must always be direct or positive. Evidence is direct when it goes straight to establish the main fact in issue. Paragraphs 2, 3 and 4 of Section 60 refer to facts and lay down that if facts to be proved could be seen, heard, touched, tested or smelt, testimony should be of one who actually saw it, heard it, touched it, tested it, or smelt it. To put differently, the testimony must be of the person who perceived the fact through medium of his own senses. Undisputedly, PWs 5, 6 and 7 have not claimed to have seen the occurrence but to have heard about it from Anil. Their evidence therefore, falls to the category of evidence labeled hearsay evidence. Section 60 of the Act envisages rejection of evidence which is not direct but what is commonly known as hearsay evidence. The test to distinguish between direct and hearsay evidence is, that it is direct if the Court to act upon it has to rely upon not only the witness, whereas it is hearsay if it has to rely upon not only the witness, but some other person also. 'Direct evidence' used in Section 67 of the Act means original evidence in contradistinction to the word 'indirect' or circumstantial evidence or 'hearsay evidence'. 'Hearsay evidence' is also called 'derivative evidence'. Hearsay evidence is properly speaking, secondary evidence of any oral statement. According to Taylor, hearsay evidence is 'all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.' Taylor on Evidence (page 401)]. Bentham's definition is : 'The supposed oral testimony transmitted through orally delivered evidence of a supposedly extra-judicially narrating witness judicially delivered viva voce by the judicially deposing witness'. The reasons advanced for rejection of hearsay are numerous, among them being possible

irresponsibility of the original declarant, depreciation of truth in the process of repetition, opportunity for embellishment which its admission would offer. Two principal objections however are, (a) lack of an oath and (b) absence of an opportunity of cross-examining the declarant. Wigmore is of the view that it is the fact that the adverse party has had no opportunity to cross-examine the maker of an extra-judicial statement that is the real basis of the exclusion of hearsay. But as Phipson points out : 'No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date.'

7. Coming to evidence of PWs 5, 6 and 7. we find that they have differently described the statement of Anil before them. According to PW 6, Anil came and told them that accused had killed the deceased, PW 7's version is to the effect that Anil came and told them that the accused and the deceased were fighting. But that is of very little consequence, in view of our finding that in the absence of Anil as a witness, evidence of PWs 5, 6 and 7 to the effect that they heard from Anil, is not admissible as evidence in law. Add to it, we find that none of the witnesses has even whispered a word as to where the accused was, when they reached the alleged place of occurrence immediately after hearing from Anil. Other circumstances indicated by learned trial Judge are not sufficient to fasten the guilt on the accused.

Accordingly, we set aside the conviction and consequentially sentence, and direct acquittal of the accused. He be set at liberty forthwith unless his detention in custody is required in connection with any other case.

The appeal is allowed.

B.N. Dash, J.

8. I agree.