

Nimala Arjun Vs. State

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Court : Orissa

Decided On : Jul-03-1985

Reported in : 1985(II)OLR179

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

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154; [Evidence Act, 1872](#) - Sections 11 and 32

Appeal No. : Jail Criminal Appeal No. 252 of 1981

Appellant : Nimala Arjun

Respondent : State

Advocate for Def. : Indrajit Ray, Addl. Govt. Adv.

Advocate for Pet/Ap. : R.K. Mohanty, Adv. (Through Legal Aid)

Disposition : Appeal allowed

Judgement :

B.K. Behera, J.

1. The Court of Session has held, the case of the prosecution established that during the night of the 18th/19th April, 1380, the appellant killed Nimalu Sukru (hereinafter referred to as the 'deceased') by stabbing him by means of knife while

both 'of them were sleeping on the Rayagada-Gunupur P. W. D. road near the Forest Check-Gate at Penkam in the district of Koraput which the appellant's wife (P. W. 3) sleeping nearby, as the deceased was said to be the paramour of his wife and has convicted him and sentenced him to undergo imprisonment for life under Section 302 of the Indian Penal Code. The plea of the appellant was one of denial and false implication. No one had witnessed the actual stabbing on the person of the deceased by the appellant. The case of the prosecution rested on an oral dying declaration made by the deceased naming the appellant as his assailant and some items of circumstantial evidence.

2. It is not disputed at the Bar that the deceased had died a homicidal death. Mr. R K. Mohanty, appearing for the appellant, has submitted that the evidence with regard to the dying declaration could not be accepted and the evidence in that regard had not even been referred to and relied on by the trial Court and the other circumstances had not been established and even if established, would not be incompatible with the innocence of the appellant. The learned Additional Government Advocate has supported the order of conviction.

3. The prosecution had failed to establish any motive on the part of the appellant to kill the deceased. The evidence of P. W. 3 would show that the appellant had cordial relationship with the deceased. Absence of proof of motive would keep the Court on its guard to carefully scrutinise the prosecution evidence before its acceptance.

4. Coming to the oral dying declaration, it was the case of the prosecution that during the night of occurrence, the deceased had raised a cry that the appellant was his assailant. We notice from the evidence of P. Ws. 1 to 5 that their evidence with regard to the actual words said to have been uttered by the deceased was not uniform. It would appear from the evidence of P. W. 9 that before P, W. 5 went and lodged the first information report, they had discussed about the occurrence in the presence of others including P. Ws. 1, 4 and 8. In such circumstances, P. W. 5 would normally and naturally have mentioned in the first information report about the dying declaration. The non-mention of such a vital fact in the first information report affecting the probabilities of the case is relevant under Section 11 of the

Evidence Act in judging the veracity of the prosecution case. See AIR 1975 S. C. 1026 : Ram Kumar Panda v. The State of Madhya Pradesh). The evidence with regard to a dying declaration requires the strictest scrutiny and closest circumspection. Judged in that light, the evidence in the instant case was far short of the mark.

5. There was evidence that the appellant and the deceased were sleeping together on the P. W. D. road and that after the witnesses came to the spot on hearing a hulla, the appellant was not found. The evidence from the side of the prosecution that the appellant had been seen running away from the spot has not been accepted by the trial Court as the evidence indicated that some one was seen running away.

6. The trial Court has not accepted the case of the prosecution that a napkin (M. O. V) suspected to have stains of blood had been recovered from the possession of the appellant.

7. The knife (M. O. I) had been seized from a place by the side of the road. No-doubt, the doctor had testified that M. O. I could cause the injuries on the person of the deceased. But on chemical test, no blood was found in it. There was no evidence that the appellant had used it as the weapon of attack. This could not, therefore, be a circumstance against the appellant.

8V. Even accepting the case of the prosecution that the appellant and the deceased had slept together in the night and that the appellant was not found after the hulla was raised, it would not lead to a conclusion that the appellant was the author of the crime. The aforesaid circumstances are not incompatible with the innocence of the appellant and may give rise to a suspicion regarding his complicity, but suspicion, however grave, cannot take the place of proof. No Order of conviction can be founded on, suspicions and conjectures.

9. In our view, the order of conviction cannot be sustained and is to be set aside.

10. In the result, the appeal succeeds and is allowed. The order of conviction and sentence passed against the appellant under Section 302 of the Indian Penal

Code is set aside. The appellant be set at liberty forthwith

R.C. Patnaik, J.

11. I agree.

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