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Nilambar Patra Vs. State

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Court : Orissa

Decided On : Sep-03-1984

Reported in : 1984(II)OLR911

Judge : B.K. Behera, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 401; Evidence Act, 1872 - Sections 32

Appeal No. : Criminal Appeal No. 94 of 1984

Appellant : Nilambar Patra

Respondent : State

Advocate for Def. : A. Rath, Addl. Standing Counsel

Advocate for Pet/Ap. : R. Mohanty, Pradipta Mohanty and Pradyot Mohanty

Disposition : Appeal allowed

Judgement :

B.K. Behera, J.

1. The appellant and three other accused persons, namely, Prahallad Mohapatra, Anirudha Sethi and Bhola alias Ramachandra Lenka, stood trial in the Court of the Sessions Judge, Balasore, being charged under Sec 395 of the Indian Penal Code

(for short, the 'Code') for commission of dacoity in the house of Ashamani (hereinafter described as the 'deceased') in village Bajana in the district of Balasore during the night of March 3,1983, after she was dragged out of her house and assaulted in a field and while the appellant Nilambar guarded her in the field where she lay injured, the companion accused persons broke open her house and removed articles. The appellant and the co-accused Prahallad and Anirudha also stood charged under Section 304 Part I read with Section 34 of the Code fox having committed culpable homicide not amounting to murder in furtherance of their common intention by dealing fist blows and kicks to her in the field on March 30, 1983 which, the prosecution sought to show, resulted in her death on April 18, 1983.

2. To bring home the charges, the prosecution had examined nine witnesses including the first-informant (P. W. 1) who had testified that the deceased was his 'Piusi' (father's sister). P. W. 1, Niranjan Dwivedy (P. W. 4) and Surendra Das (P. W.7), two co-villagers of the deceased, had deposed about the verbal dying declarations said to have been made by the deceased. There was, in addition, the dying declaration (Ext. 9) of the deceased recorded in the course of investigation by the Sub-Inspector of Police (P. W. 8) which had been admitted in evidence in spite of the objection raised by the defence-. In the course of investigation, the Sub-Inspector of Police (P. W. 8) had seized from the possession of the co-accused Bhola alias Ramachandra some articles said to have been removed during the commission of the offence of dacoity.

3. The appellant and the co-accused persons had denied the charges framed against them and had pleaded that they had been involved falsely.

4. On a consideration of the evidence, the learned Sessions Judge found that the charge under Sec 395 of the Code had not been established. According to him, the appellant and the co-accused Prahallad and Anirudha could not be held guilty of the charge under Section 304 Part I of the Code, but having caused grievous hurt in furtherance of their common intention, they were liable to be convicted under Section 325 read with Section 34 of the Code. They were accordingly convicted and each of them was sentenced to undergo rigorous imprisonment for

a period of two years and to pay a fine of Rs. 200/-and in default of payment thereof, to undergo rigorous imprisonment for a further period of three months. The Other accused Bhola alias Ramachandra was convicted under Section 411 of the Code for being in possession of properties stolen from the house of the deceased and was sentenced to pay a fine of Rs. 500/-and in default of payment thereof, to suffer simple imprisonment for a period of six months.

5. Jail Criminal Appeal No. 117 of 1984 preferred by Bhols alias Ramachandra against the order of conviction and sentence passed against him has been allowed by this Court on August 9, 1984. [See. 1984 (1) OLR 841--Bhola v. State]

6. The order of conviction against the appellant and the co-accosed Anirudha and Praihallad has been based solely on the recorded verbal dying declarations of the deceased. Mr. Pradipta Mohanty, appearing on behalf of the appellant, has challenged the order of conviction based solely on the verbal and recorded dying declarations said to have been made by the deceased as being inadmissible and unacceptable Mr. A. Rath, the learned Additional Standing Counsel, has supported the order of conviction as well-founded on the basis of the dying declarations.

7. It has been pointed out by the High Court Office that the two other convicted persons, namely, Prahallad Mohapatra and Anirudha Sethi, have not challenged the order of conviction and sentences recorded against them in this Court.. Bat as the case against them is inextricably woven with that against the appellant and questions of law raised on behalf of the appellant which, if accepted, would negative their guilt. I have put the learned Additional Standing Counsel to notice at the hearing of this appeal to submit as to why the order of conviction and sentences passed against the two non-appealing accused persons should not also be set aside in exercise of the revisional jurisdiction of this Court and he has addressed on the questions involved.

8. Section 32 of the Evidence Act in so far as it is relevant for the purpose of this appeal provides that statements, written or verbal, of relevant facts made by a person who is dead are themselves relevant facts when the statements are made as to the cause of that person's death or as to any of the circumstances of the transaction which has resulted in the death in which the cause of that person's

death comes into question.

9. The deceased is alleged to have been assaulted by the appellant and two other convicted persons during the night of March 30/31, 1983 and the assault was said to have been made by dealing fist blows and kicks. The evidence of P. W. 2, the doctor who had examined the injuries on April 3, 1983, is that he had noticed tender swelling on the anterior aspect of the right thing 'which might have been caused due to a blow by any 'firm & hard hut smooth object', such as, Rathi and multiple swelling injuries simple in nature on the back and hands of the deceased which might have been caused by any 'smooth firm object'. He had suspected a fracture, but had advised an x-ray examination in order to be definite about it. According to him, the deceased was having acute and agonizing pain because of body ache. There was no evidence, however, that the deceased suffered from acute pain till her death. The doctor (P. W. 9), who had conducted the autopsy on April 19, 1983, had opined that the cause of death was due to cardiac failure and had occurred about 24 to 36 hours prior to the post mortem examination. The deceased, according to him, was an old lady aged about eighty years and had an enlarged heart and liver. In his opinion, an old lady of the age of the deceased having enlarged heart and liver might die owing to cardiac failure resulting from pain on account of assault on his person. He had, however, clearly stated in his cross-examination that in the instant case, the death of the deceased was on account of cardiac failure in the normal course. He had further stated that he did not notice any fracture on the person of the deceased. It would thus be clear from the medical evidence that the prosecution had not established that the alleged assault at the hands of the appellant and his two companions on the person of the deceased had resulted in her death. Her death could not be attributed directly or even remotely to the injuries sustained by her. On the other hand, her death was due to cardiac in the normal course.

10. Under the Evidence Act, a dying declaration is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death. It is not material whether there existed any expectation of death at the time of the declaration, (See AIR 1979 S. C. 1347-Tehal Singh and Ors. v. State of Punjab). The statement of a dead person would be admissible as a dying

decoration even if death takes place much latter. But as provided in Section 32, the statement of the deceased must have been made as to the cause of the death or as to any of the circumstances of the transaction which resulted in the death in cases in which the cause of that person's death comes into operation. The transactions resulting in death would not possibly mean any fact or series of facts having no direct or organic relation to death.

11. In AIR 1964 S.C. 900-Moti Singh and Anr. v. State of Uttar Pradesh, the Supreme Court had held

'Clause (1) of Section 32 of the Evidence- Act makes a statement of a person who' has died relevant only when that statement is made by a person as to the cause of his death or as to- any of the circumstances' of the transaction which resulted in his deaths in cases in which the cause of that person's death comes into question. When Gaya Chairarr is not proved to have died as a result of the injuries received in the incident his- statement cannot be said to be the statement as to the cause of his death or as any of the circumstances of the transaction which resulted in his death. This is. obvious, and is not disputed for the respondent-State.'

12. In view of what has been stated above, the only legal and reasonable course would be to> rale that the recorded and verbal statements said to have been made by the deceased in the instant case through P. Ws, 1,4,7 and 8 are inadmissible in evidence as they do not come within the purview of Section 32 of the Evidence Act.

13. The order of conviction has been based solely on these inadmissible statements with regard to the complicity of the appellant and the two other co-accused persons.

14. Even assuming that the statements of the deceased to P, Ws. 1, 4,7 and 8 would de admissible in evidence, although could not be under the law as discussed above, the next question would be as to whether the evidence in this regard was worthy or credence. As has been laid down by the Supreme Court in AIR 1976 S.C. 1994-K. Ramachandra Reddy and Anr. v. Public Prosecutor :

'The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it.'

15. The evidence of P. W. 8 would indicate that he had no authority to record the statement of the deceased in the course of investigation on April 1, 1983 as, on his own showing, he had been authorised to take up the investigation by the Officer-in-charge of the Police-station on the day foliown:. e., by on April 2, .1983. There has been an over writing with regard to the date of recording the statement although not with regard to the month or year, as noticed at the hearing tit this appeal. In his cross-examination, P. W. 8 chose to give a go by to what had been deposed to earlier and asserted to have recorded Ext. 9 on April, 1984.

According to Ext. 9, while the deceased had gone out for urination after taking her food, some persons surrounded her, one of them gagged her mouth by a piece of cloth and she was lifted to a field where she was assaulted and she could recognise the appellant, Ptahallad and Anrrudha by the moon light and from their voices and could not recognise the other two. It is important to keep in mind that in the long-drawn-out .statement (Ext. 9) recorded in the course of investigation, the deceased had not stated a word that she had implicated the appellant and the other co-accused persons before P. Ws. 1, 4 and 7 in her earlier narrative about the occurrence. No statement had been made by the deceased in Ext. 9 that the appellant trampled over one of her legs although this had figured prominently in the evidence.

16. The verbal dying declaration said to have made by the deceased naming the appellant and two other persons as her assailants had been deposed to by P. Ws. 1, 4 and 7 of whom P. W. 1 was no other person than the son of her brother and thus a close relation of the deceased who had lodged the first information report.. The other two witnesses in this regard (P. Ws. 4 and 7) had not deposed that when P. W. 1 came to the village of the deceased, they informed him about any such statement having been made by the deceased before them. P. W. 1 had asserted in his evidence that: the deceased told him that the assailants had dealt

fist blows and kicks and that she could recognise the appellant and the two other persons, namely, Prahallad and Anirudha and she had also stated that the appellant stood on her right leg as a result of which a bone got fractured. No statement had been made in the first information report (Ext. 1) lodged by P. W. 1 that the appellant had stood on her right leg. As would appear from the evidence of P. Ws. 4 and 7, no statement had been made by the deceased implicating the appellant and the other two assailants at the field where she was lying and from where she was carried by the co-villagers and she made the statement after she was brought to her residence. Neither P. W. 4 nor P. W. 7 had deposed about any statement made by the deceased that the appellant had stood on one of her legs. The appellant and the other two alleged assailants were the co-villagers of P. Ws. 4 and 7. If any such statement had been made by the deceased implicating them, the natural and reasonable conduct on their part would be to go to or sent for the appellant and the two other assailants and ask them about what had happened. There was no evidence that they had done so. There was no evidence either that after the arrival of P. W. 1, they had informed him about what they had heard from the deceased.

17. The inordinate delay in lodging the first information report on April 1,1983 by P. W. 1 had not satisfactorily been explained by the prosecution. The explanation of P. W. 1 that the delay in making the report occurred because the co-villagers of the assailants had assured him that they would call the culprits and take action in the matter and no action was taken for which he ultimately lodged the report, had not been stated in the first information report itself and there was no evidence in support of that of P. W. 1 in this regard. Although P. W. 1 had come to the scene on March 31, 1983, there was no evidence that he had enquired from any of the alleged assailants before he made a belated report to P. W. 8 on the day following.

18. Although the report was lodged on April 1, 1983, and some steps had been taken by P. W. 8 in the course of investigation, it would clearly appear from his evidence that except the deceased, he had not examined any of the prosecution witnesses prior to April 2, 1983. Thus there had been undue and unexplained delay in the examination of the principal witnesses by the investigating agency. This was yet another highly suspicious feature of which no due notice had been

taken by the Court of trial.

19. The evidence with regard to a dying declaration must be subjected to very close scrutiny before its acceptance. The evidence of P. Ws. 1, 4 and 7 has no intrinsic worth. Their evidence is not to be accepted even if it has not been shown as to how and why they would falsely involve the appellant and the other two co-accused persons. If the evidence of a witness does not have any intrinsic worth and is not acceptable, it cannot be accepted merely because it has not been shown as to why he would falsely involve an accused person. I would reject the evidence of P. Ws. 1, 4, 7 and 8 with regard to the statements said to have been made by the deceased as highly suspicious and unsatisfactory.

20. I thus find that the statements said to have been made by the deceased are not admissible under Section 32 of the Evidence Act. I also find that the evidence in this regard cannot be accepted.

21. For the aforesaid reasons, the order of conviction and sentences passed against the appellant must be set aside and in exercise of the revisional jurisdiction of this Court, the order of conviction and sentences passed against the non-appealing, convicted persons must also be set aside in the interests of justice.

22. In the result, I would allow the appeal and set aside the order of conviction and sentences passed against the appellant. I would also set aside the order of conviction and sentences passed against the non-appealing convicted persons, namely, Prahallad Mohapatra and Anirudha Sethi. If they have been undergoing imprisonment for their conviction in this case, they be set at liberty forthwith.

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