

Benguli and ors. Vs. State of Orissa

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SooperKanoon Citation : sooperkanoon.com/533224

Court : Orissa

Decided On : Dec-12-1984

Reported in : 1985CriLJ580

Judge : B.K. Behera and ;K.P. Mohapatra, JJ.

Appellant : Benguli and ors.

Respondent : State of Orissa

Advocate for Pet/Ap. : Mr. R. Mohanty

Judgement :

B.K. Behera, J.

1. The appellants stand convicted Under Section 302 read with Section 149 of the Penal Code ('the Code', for short) and sentenced thereunder to undergo imprisonment for life and in addition, each of them has been convicted Under Section 148 of the Code and sentenced thereunder to undergo rigorous imprisonment for a period of one year with a direction that the sentences would run concurrently. All the appellants stood charged Under Sections 148, 302 read with Sections 149 and 302 read with Section 34 of the Code. Besides, two of them, namely, Benguli alias Subarna Khuntia and Keshaba Behera, stood charged Under Section 324 of the Code and the other appellants stood charged Under Section 324 read with Section 149 of the Code.

2. The appellants, it was alleged belonging to a faction hostile to Saroj Baliar Singh (to be described hereinafter as 'the deceased') waylaid him, being armed with deadly weapons after nightfall on Aug. 20, 1980 at Khapuria crossing in the city of Cuttack, with the unlawful common object of committing his murder and attacked and dealt blows which ultimately resulted in his death in the hospital where the deceased had been sent by the Investigating Officer (P.W. 10) after taking up the investigation on the basis of the first information report (Ext. 8) lodged by Ulash Chandra Behera (P.W. 7) who, it was said, besides Mohammad Yusuf (P.W. 4), Omid Kumar Ghose (P.W. 8) and others had witnessed the occurrence in the course of which P.W. 4 had sustained simple injuries at the hands of one of the assailants who could not be identified. Specific acts of assault had been attributed to the appellants Keshab, Benguli and Prasant and it was alleged that the other appellants had been shouting to kill the deceased. In the course of investigation, the doctor (P.W. 1) had conducted the autopsy and had examined the injured witness (P.W. 4). On the completion of investigation, P.W. 5 had submitted a charge-sheet which resulted in the prosecution of the appellants whose plea was one of false implication in the case.

3. To establish its case, the prosecution had examined ten witnesses of whom P.Ws. 4, 7 and 8 had figured as the witnesses to the occurrence. P.W. 4 did not support the case of the prosecution and was put leading questions by it Under Section 154 of the Evidence Act. P.Ws. 5, 6 and 10 had investigated into the case at different stages. The appellants had examined one witness in their defence.

4. The trial Court held that the charge of causing hurt to P.W. 4 had not been established but that the charges Under Sections 148 and 302 read with Section 149 of the Code had been brought home to the appellants by the acceptable evidence of P.Ws. 7 and 8 which had found assurance from the medical evidence.

5. Mr. R. Mohanty, appearing for the appellants, has taken us through the evidence and has contended that the learned Sessions Judge has taken an unreasonable and unfounded view against the appellants by wrongly accepting the evidence of P.Ws. 7 and 8 belonging to a hostile faction which not only bristled with material discrepancies, but were characterised with inherent improbabilities.

Our attention has been invited to some other suspicious features in the investigation and in the evidence adduced by the prosecution. Mr. A. Rath, the learned Additional Standing Counsel has made halting and hesitating submissions with regard to the charge Under Section 302 read with Section 149 of the Code against the appellants other than the three assailants named by P.Ws. 7 and 8 in their evidence owing to paucity of evidence. He has, however, strenuously urged that the three appellants implicated by P.Ws, 7 and 8 had committed the murder of the deceased and were liable to be convicted for that offence on the basis of the evidence of P.Ws. 7 and 8.

6. It admits of no doubt from the evidence of the doctor (P.W. 1) that the deceased had died a homicidal death and as deposed to by P.W. 4, he had sustained an injury during occurrence. These aspects have not been disputed at the Bar.

7. P.W. 4, whose statement Under Section 164 of the Cri.P.C. had been recorded in the course of investigation, had given a go by to what he had stated to the Investigating Officer and before the Magistrate and had not implicated any of the appellants in the Court although he was said to be one of the witnesses to the occurrence. There was, however, nothing to show as to why this witness would be hands-in-glove with the defence and go against the prosecution if, in fact, he had seen the appellants or any of them chasing or surrounding and assaulting the deceased.

8. There was no evidence of any ill-will on the part of the accused persons towards the deceased. A police officer (P.W. 6) had testified about some proceedings Under Section 107 of the Cr.P.C. on the basis of the station diary entries, but on his own showing, he had joined the Madhupatna Police Station in December, 1980 and the occurrence in the instant case had taken place in August, 1980. The evidence of P.W.6 in this regard was, therefore, of no consequences. As held by the learned Sessions Judge, there was no evidence that the deceased belonged to the faction of Bighneswar Swain and there was no evidence with regard to any motive on the part of the accused persons to commit the offence. True it is that the question of motive is of no consequence if the evidence against an accused person is clear and cogent, but the absence of proof of motive would put the Court

on its guard to examine the evidence bearing on the guilt of the accused persons with great care before its acceptance.

9. The order of conviction has been rested on the evidence of P.Ws. 7 and 8. Neither of these two witnesses belonged to the particular locality where the occurrence had allegedly taken place. P.W.7 had testified that he had seen the occurrence while he was returning from the factory of the Orissa Textiles and Steel Ltd. at Nuabazar and it was in the evidence of P.W. 8 that while he was sitting in the shop of 'Asha Furniture', the owner of which was P.W. 1, he heard a cry raised by a person to save his life and then he went and saw the occurrence. His presence in the shop of P.W. 1 had been denied by the latter in his evidence. It would appear from the evidence that a number of shops were close by and the shops were open. None of the shop owners had been examined as a witness for the prosecution. The learned Sessions Judge has observed that people now are generally indifferent and do not go to a scene of attack and in view of the evidence of P.W. 1 that he did not go to the scene although he heard a cry, the other shop owners might not have gone to the place of occurrence. This assumption may not be correct as persons react differently and merely because P.W. 1 did not go to the scene, it could not reasonably be said that the other persons who would be natural and competent witnesses were not likely to go to the scene of occurrence.

10. P.Ws. 7 and 8 had both testified about the occurrence, but it is important to keep in mind that neither of them had spoken about the presence of the other on the spot. There was no evidence of any other person of the locality about the presence of P.Ws. 7 and 8 on the scene and at the time of the occurrence. As observed by the learned Sessions Judge, P.Ws. 7 and 8 belonged to one faction led by Bighneswar Swain opposed to the faction headed by the appellant Subarna Khuntia. While the learned Sessions Judge is certainly right in his observation that the prosecution is not obliged to examine each and every witness who might have seen an occurrence, when P.Ws. 7 and 8 belonged to a hostile faction and other witnesses in the locality including Niranjana Panda named in the first information report were witnesses to the occurrence, the prosecution should have done well in examining the disinterested and independent persons without placing reliance solely on the testimony of witnesses of the nature of P.Ws. 7 and 8, The evidence

of a partisan witness is not to be discarded merely on the ground of partisanship as often enough, where there are factions in a locality and an occurrence takes place, the prosecution may not be in a position to examine independent witnesses. The same was not the case here. The occurrence had taken place in a locality to which P.Ws. 7 and 8 did not belong. Other persons had witnessed the occurrence and some of them had shops nearby. The non-examination of the independent and disinterested persons and the examination of interested ones would certainly cast a serious reflection on the fairness of the trial.

11. P.W. 7 was the first-informant. He had asserted in his evidence that he had lodged the first information report at the police station and had not come to the spot thereafter. P.W. 8 had also stated in his evidence that he had been examined by the Investigating Officer at the police station. This was at variance with the evidence of the Investigating Officer (P.W. 10) who had testified that while he had come to the locality where the occurrence had taken place in connection with the investigation of another case, P.W. 7 lodged the first information report on the spot which was sent by him to the police station for registration and he took up the investigation on the spot and examined P.Ws. 7 and 8. It is, therefore, not clear as to where actually the first information report had been lodged. As deposed to by P.Ws. 7 and 8, they had not been examined on the spot as testified by the Investigating Officer.

12. P.W. 7 had, in the first information report and in his evidence, asserted that Nimai Pashayat was one of the persons in the mob and had taken part in the occurrence. P.W. 8 had also implicated the same person in his evidence. It would, however, be clear from the evidence of one of the Investigating Officers, namely, P.W. 5, that this person was ill and was bedridden at the relevant time and had falsely been implicated. It was for this reason that this Police Officer did not name him as one of the accused persons in the charge-sheet. Thus P.Ws. 7 and 8 had falsely implicated a person in their evidence with the evident purpose of implicating him in respect of an offence punishable with death. It would be hazardous to accept any part of the testimony of such witnesses who had no hesitation to falsely implicate a person who could not have been present on the scene of attack. This aspect has not been taken serious note of by the trial Court.

13. The learned Counsel for the appellants has submitted with reference to the principle laid down by the Supreme Court in : 1974 CriLJ1486 Balak Ram v. State of L.J. P. in which reference had been made to an earlier decision reported in : 1968 CriLJ1473 Ram Charan v. State of U.P. that the evidence of P.W. 8 needs very careful scrutiny as the investigating agency had chosen to get his statement recorded Under Section 164 of the Cr.P.C. in the course of the investigation to bind him down so that any departure from the statement made by him before the Magistrate would land him in trouble by being prosecuted for perjury. As has been laid down by the Supreme Court, the evidence of a witness whose evidence has been recorded in the course of investigation by a Magistrate is not to be rejected on that ground, but his evidence requires careful scrutiny before its acceptance. The learned Sessions Judge should have kept this salient feature in mind while appreciating the evidence of P.W. 8.

14. Apart from the aforesaid features, the fact remains that the occurrence had taken place at about 7 p.m. as alleged by the prosecution itself. The learned Sessions Judge committed an error of record by observing that there had been street-lights as there had been no evidence in this regard. P.W. 7 had not, in terms, stated as to how he was in a position to identify the assailants and some of the other co-accused persons. P.W. 8 had evidently, in an unguarded moment, given out that the place was dark. He had, however, hastened to add that the place had been lighted without specifically stating how. He had not stated as to whether there had been streetlights or there had merely been some lights in some shops nearby. As the prosecution sought to show, a large number of persons had attacked the deceased and some of them had assaulted him. While according to P.W. 7, the culprits chased the deceased, P.W. 8 had not stated so. P.W. 8 had testified that the deceased had been surrounded by the culprits and this was not the evidence of P.W. 7.

15. According to both these witnesses (P.Ws. 7 and 8), the appellant Keshaba dealt a blow on the deceased by means of a stick as a result of which the latter fell down whereafter the appellant Benguli stabbed him by means of a knife. While according to P.W. 7, the appellant Prasant had also stabbed the deceased by means of a knife, P.W. 8 had not specifically named this assailant and he had

testified that somebody also stabbed the deceased by means of a knife and he could not see his face because of the crowd and darkness. The doctor had noticed thirteen ante-mortem injuries on the person of the deceased. The prosecution had not explained as to who were responsible for causing such injuries on the person of the deceased.

16. Although according to P.Ws. 7 and 8, the occurrence had taken place on the road, the Investigating Officer had not seized bloodstains from that spot. P.W. 10 had stated that at the time of his visit, the deceased was lying on a table in front of Dipti Steel Fabricators. According to him, he had examined witnesses to ascertain as to how the deceased came to the table from the place of assault, but no persons had been examined in this regard. It was, therefore, not clear from the evidence as to where exactly the occurrence had taken place and as to how the body of the deceased had been kept on the table.

17. P.W. 7 had not specifically spoken even about the presence of the appellant Ashok Pasayat on the spot although he had made a vague statement that besides the three appellants, the other accused persons were shouting to kill the deceased. It was not in the evidence of P.W. 8 that the accused persons other than the assailants were shouting to kill the deceased. There was no satisfactory evidence as to whether the accused persons other than the assailants had been armed. Vague evidence had been led through P.Ws. 7 and 8 that after the assault, the accused person had rolled the deceased towards the road side. This part of their evidence had not found support in any other evidence.

18. No incriminating articles which could connect the appellants or any of them with the commission of the offences had been recovered from their person or possession.

19. On a consideration of the prosecution evidence and in particular that of P.Ws. 7 and 8, we have no hesitation in holding that none of the charges had been brought home to the appellants or any of them by the prosecution by clear cogent and acceptable evidence.

20. In the result, we would allow the appeal and set aside the order of conviction and sentences recorded against the appellants. The appellants be set at liberty forthwith.

K.P. Mohapatra, J.

21. I agree.

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