

Bholeswar Setha Vs. State

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Court : Orissa

Decided On : Mar-15-1993

Reported in : 1993(II)OLR162

Judge : A. Pasayat and ;D.M. Patnaik, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300; [Constitution of India](#) - Articles 21, 41, 72 and 161; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 433

Appeal No. : Criminal Appeal No. 289 of 1989

Appellant : Bholeswar Setha

Respondent : State

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

Advocate for Pet/Ap. : A. Patnaik, L. Pangari, S. Udgata and T. Mitra

Disposition : Appeal dismissed

Judgement :

A. Pasayat, J.

1. Each criminal act is a censure against society and each time a man or woman is sent to the g allows or is put in prison, society admits its own failure. As Charles

Peguy, renowned human rights activist has observed one single injustice, one single crime, one single act, particularly if it is officially recorded, confirmed one single insult to humanity.

2. A member of administrative service lost his life. Prosecution claims that Bholeswar Setha (hereinafter referred to as the 'accused') was the author of the crime. The act complained of macabre to the core has a poignant tale to tell. The accused, an unemployed youth, is claimed to have taken away the life of Additional District Magistrate, Angul for not being able to provide an employment, not- Withstanding assurances held out.

3. The prosecution case sans unnecessary details is as follows :

Land of different persons had been acquired by the National Aluminium Company (in short, 'NALCO') and a list of persons whose lands had been taken away was prepared so as to provide employment to the family members of such persons. Land of the father of the accused had been acquired and therefore, the accused had made an application to the NALCO authorities for an employment. As no appointment was given to him, he went to the Grievance Cell of the Collector and District Magistrate, Dhenkanal on 23-12-1987 to meet and make request before them for his employment. The Collector was holding the Grievance Cell in the chamber of Shri Gonabandhu Patnaik. who was then working as Additional District Magistrate, Angul (hereinafter referred to as the 'deceased'). The Collector, the deceased and the Stenographer of the deceased were present in the chamber. The work started at about 10 a.m. The grievances of several persons were looked into. At about 1-30 p.m. Pramila Swain (PW 2) was called to the chamber for presenting her case. She had come with several documents for seeking employment of her son. The deceased asked the concerned clerk to check up her documents. The clerk in charge took the documents and went to the adjoining room. So the lady was asked to sit inside the chamber of the Grievance Cell. Thereafter two other persons came and their cases were disposed of. When they were just leaving, the accused was called who went with documents for perusal of the Collector. Since the deceased was dealing with the affairs of NALCO, the Collector asked him to check, up the documents. The deceased told him that his

case cannot be disposed of, hearing which, the accused was annoyed and gave out that although his lands had been taken, no employment has been given to him. The Collector asked the accused as to why he was talking so and told him to go out. The accused without leaving the place remained standing. The deceased also asked the accused to go away. Suddenly the accused brought out a knife kept near the waist and gave a blow to the left side scapula of the deceased, and while the deceased was falling down the accused gave another blow with the said knife to deceased's chest. The Collector tried to prevent the second blow by lifting a chair but he could not successfully prevent, and the accused gave the second blow. The Collector restrained the accused by the four legs of a chair and tried to take him to a corner of the room. The deceased fell down with bleeding injury and he was made to sit on a chair. At that time chainman Nilamani Behera (PW 3) who was standing on the door way to allow persons to enter into the chamber one after the other came and caught hold of the accused from his backside. Ranjit Samal (PW 4), the driver of the Collector also came and caught hold of the hand of the accused in which the accused was holding the knife, and after snatching away the knife from his hand threw it on the ground. The Collector asked the SDO to get an Ambulance, and since there was some delay, the Collector along with other took the deceased to the hospital in his car. The doctor who examined the deceased found that in the meantime he had breathed his last. The Court Sub-Inspector arrived at the spot and kept the accused in guard. The officer-in-charge of Angul Police Station received a phone message about assault on the deceased. He made a station diary entry and rushed to the spot. He learnt on the way that the deceased had been removed to the hospital and proceeded there. A written report was lodged by Akhaya Kumar Sethi, steno to the deceased(PW 8) on the basis of which investigation was undertaken. On personal search another knife was recovered from the inner pant pocket of the accused. The matter was investigated by the Inspector, CID, Crime Branch. Charge sheet was submitted and the accused faced trial Under Section 302, IPC.

4. The plea of the accused was that there were many persons present in front of the chamber of the deceased and were demanding for their employment in NALCO. Suddenly all of them including himself entered inside the chamber and somebody had stabbed the deceased, but he was caught hold of without any fault.

He further pleaded that he was insane and did not know the consequences of the act, if any done by him.

5. In order to further its case prosecution examined 23 witnesses. Out of them PW 1 is the Collector, Dhenkanal, PW 2 is Pramila Swain, who was present at the time of occurrence in the chamber and PW 8 is the Steno to the deceased, who was also present inside the chamber at the time when the occurrence took place. The chainman and the driver were examined as PWs 5 and 4 respectively. The other employees who immediately reached the spot have been examined as PWs 5, 9, 10 and 18. Three witnesses were examined by the accused to speak about insanity of the accused.

6. The learned trial Judge disbelieved the plea of insanity and held that the murder was a cold blooded murder. With reference to an Exercise Book (Ext. 25) wherein the accused used to keep record of his complaints to various authorities, it was held that the accused had nourished a grudge against the authorities and in fact was determined to kill the Addl. District Magistrate. The learned trial Judge accordingly convicted the accused Under Section 302, 1PC and sentenced him to imprisonment for life.

7. The learned counsel for accused has strenuously urged that at first sight the act committed might appear to be a cold blooded murder. But a scanning of the evidence of the witnesses would go to show that it is ultimately a culmination of frustration and pent up feelings. The accused is an unemployed youth who had lost all hopes for employment because of corruption by the authorities. The accused had no hostility towards the deceased. His predecessor in office was the target of his ire. When he was asked to go out of the chamber by the deceased, the accused lost his balance of mind and the act, if any done, can be certainly labelled as one due to grave and sudden provocation. Alternatively, it is pleaded that the background of the case clearly shows frustration, and meek surrender to misfortune. The tribulations were so object and grave that accused committed the offence, and therefore a lenient view is called for.

The learned counsel for State on the other hand contended that undisputedly the deceased had joined the job a few days before the occurrence. When he told the

accused that his application cannot be taken up, the assaults were made. It is thus clear that accused wasted to take away the life of the deceased for which he had come prepared with two knives. There is no question of grave and sudden provocation by the deceased. The murder was a preplanned one and the judgment of conviction and sentence is irreversible.

8. Having looked into the records of the case and having gone through the evidence of the witnesses, we find that the evidence is clear and cogent. The Collector (PW 1) has categorically stated about the manner in which the assaults took place when the deceased told the accused that he had no chance of getting a job. The accused suddenly brought out a knife and gave two blows on the deceased and the blow on the chest caused fatal injury. The evidence of PW 2. the lady is also to the similar effect. The evidence of PWs 3 and 4 corroborates the evidence of PW 1. There is no doubt that the accused was the author of the crime. The question is whether his act is due to grave and sudden provocation.

9. The law on the 'point has been succinctly stated by the Apex Court in the case of K.M. Nanavati v. State of Maharashtra : AIR 1962 SC 605. The test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked to lose his self-control. In India, the words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to Section 300. The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

10. The defence of provocation appears to have first developed in the early 1800's Tindal CJ, in R. v. Navward : (1833) 6 C & P 157, at page 158, told the jury that the defence of provocation was derived from the law's 'compassion to human infirmity'. It acknowledged that all human beings are subject to uncontrollable

outbursts of passion and anger which may lead them to do violent acts. In such instances the law would lessen the severity of criminal liability.

Nevertheless, not all acts done in the heat of passion were to be subject to the doctrine of provocation. By the middle of the nineteenth century, it became clear that the provoking act had to be sufficient to excite an ordinary or reasonable person under the circumstances. As Keating, J., stated in *R. v. Walsh* ; (1869) 11 Cox CC 336, at page 338.

'The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.'

In considering the precise meaning and application of the ordinary person standard or objective test, it is important to identify its underlying rationale. Lord Simon of Glaindale has perhaps stated it most succinctly when he suggested in *Director of Public Prosecutions v. Camolin* : (1978) 2 All E. R. 168 : (1978) 705 at page 726 that 'the reason for importing into this branch of the law the concept of the reasonable man (was) ...to avoid the injustice of a man being entitled to rely on his exceptional excitability or pugnacity or ill-temper or on his drunkenness'.

If there were no objective test to the defence of provocation, anomalous results could occur. A well tempered, reasonable person would not be entitled to benefit from the provocation defence and would be guilty of culpable homicide amounting to murder, while an ill-tempered or exceptionally excitable person would find his or her culpability mitigated by provocation. It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned among other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standard of reasonableness and responsibility. In doing so, the law quite logically employs the objective standard of the reasonable person. In *Mancini v. Director of Public Prosecutions* : (1942) AC 1, the House of Lords endorsed the view expressed in *R. v. Lesbini* : (1914) 11 Cr App R 7 CCA, wherein it was held that the threshold objective test for provocation was to be applied and there must be sufficient provocation to excite a reasonable person. A reasonable or ordinary

person was not one with mental deficiencies. In Mancini's case (supra) Viscount Simon stated that the test to be applied is that of the effect of provocation on a reasonable man so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. The ordinary or reasonable person therefore, was one of normal temperament and average mental capacity.

Lord Simon of Glaisdale formulated the objective test as follows :

'I think that the standard of self-control which the law requires before provocation is held to reduce murder to manslaughter is still that of the reasonable person..... but that, in determining whether a person of reasonable self-control would lose it in the circumstances, the entire factual situation which includes the characteristics of the accused, must be considered.'

The Supreme Court of Canada had also, on occasion, provided guidance on the ordinary person standard for provocation. In *Laylor v. The King* : (1947) SCR 462, Kerwin J , as he then was, made clear that for the purpose of the objective test of provocation, the 'criterion is the effect on the ordinary person.....the jury is not entitled to take into consideration any alleged drunkenness on the part of the accused'. In *R. v. Daniele* : (1983) 7 SCC (3d) 542 (NWTCA), it was observed ;

'The purpose of the objective test prescribed by Section 215 is to consider the actions of the accused in a specific case against the standard of the ordinary person. Hypothetically, the ordinary person is subjected to the same external pressures of insult by acts or words as was the accused. Only if those pressures would cause an ordinary person to lose self-control does the next question arise whether the accused did, in fact, lose self-control. The objective test lacks validity if the reaction of the hypothetical ordinary person is not tested against all of the events which put pressure on the accused.'

These aspects have been elaborately highlighted by the Supreme Court of Canada in *R. v. Hill* : (1987) LJC (Crim) page 374.

11. The accused in the case at hand was pained by the action of the authorities which is amply reflected by his writings in Ext. 25. The words reflect his mental agony, his sense of resignation, his venom at what he considered to be improper, unjust, unfair. He considered the Addl. District Magistrate to be responsible for all his ignominy. The rule of law mandates an orderly society. If people take law into their hands, it would bring in anarchy. As stated at the threshold, the society may throw up its hands accepting defeat, but that does not absolve the offender.

The learned counsel for the accused submits that a clarion call has been given to beat up corrupt officers, and that must be; considered while deciding guilt of the accused. No person is above law. If citizens are permitted to decide who is corrupt and beat up, they shall be both accusers and adjudicators. That is not sanctioned in law. Orderliness in society would be greatly affected. There are forums exposing persons who are corrupt, so that they can be dealt with in accordance with law. Gandhi, Martin Luther King, Lincoln all fell to bullets of assassins who believed that their victims were wrong and deserved to pay with their lives. Individual opinions do not matter. It is ultimately the forum prescribed which decides what is right and what is wrong. There is no scope for a private judgment.

In the instant case carrying concealed knives by the accused shows premeditation. Therefore, the Exception I 10 Section 300 has no application to the facts of the case.

12. But in certain other aspects need to be highlighted. The accused was unemployed. Right to life is protected under Article 21 of the Constitution. What is life is it mere animal existence or a living with dignity, a meaningful living In life worth living That depends on the liver-Anon (C. 1855). When I consider Life, 'tis all a cheat. Yet fool'd with hope, men favour the deceit : Trust on and think tomorrow will repay. Tomorrow's falser than the former day ; Dryden, 'Aurongzeba, IV, 1'. A crust of bread and a corner to sleep in. A minute to smile and hour to weep in, A pint of joy to a pack of trouble, And never a laugh but the moans come double ; And that is life :-paul Laurence Dunbar, 'Life'. The country has not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not

because it considers it any the less fundamental to life. Therefore, it has been placed in the Chapter on Directive Principles, Article 41 of which enjoins upon the State to make effective provision for securing the same within the limits of its economic capacity and development.

13. The accused was unemployed. Lands of his family were taken away. Job was assured. From Ext. 25 it is revealed that the accused had a feeling that unless money is paid he would not get a job. We do not express any opinion about the correctness of feelings of the accused, but nevertheless the entries in Ext 25 are tall-tale. The accused has clearly written that he had no chance of getting a job because he cannot give money for the purpose. The family of the accused had suffered untold miseries. Days after days the family members passed with empty stomachs, a square meal a week was a dream. To them the words of Article 21 were meaningless. Theoretically, they were entitled to fullness of life. But in reality every dawn of the sun was bringing a fresh dread of hunger. Expressions 'life was for them worse than animal existence and a continued drudgery through life. We live in an age which recognises that every person is entitled to a quality of life consistent with his human personality. It is the fundamental right of every Indian citizen to live with human dignity. But such right is practically becoming meaningless to millions of people of this country who live below the poverty line, for whom bare necessities of life are luxuries. How does a citizen bother for dignity when his son kills his sister for eating a greater portion of the rice cooked for the family, when a morsel of food was collected after back-breaking physical labour. How does it matter to him if his existence is described as animal existence. In order to make the provisions of Article 21 of the Constitution meaningful, something more is necessary to be done than merely declaring that a citizen has a right to live with dignity.

14. The learned counsel for accused has submitted that the accused-appellant shall move the appropriate authority for remission/pardon/clemency. Wide powers of remission and commutation of sentences have been conferred on the appropriate government, but an exception has been carved out for the extreme category of convicts who are sentenced to death but whose sentence has been commuted Under Section 433 of the Code of Criminal Procedure, 1973 (in short,

the 'Code') into one of imprisonment for life. Such a prisoner is not to be released unless he has served at least 14 years of imprisonment. These aspects have been highlighted by the Apex Court in *Maru Ram v. Union of India* : AIR 1930 SC 2147. Remission by way of reward or otherwise cannot cut down the sentence awarded by the Court except Under Section 432 of the Code or in exercise of constitutional power under Article 71/161 of the Constitution. Remission cannot detract from the quantum and quality of the Judicial sentence except to the extent permitted by Section 432 of the Code, subject of course to Section 433-A, or where the clemency power under the Constitution is invoked. But while exercising the constitutional power under Article 72/161, the President or the Governor, as the case may be, must act on the advice of the Council of Ministers. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433-A of the Code. This aspect was highlighted by the Apex Court in the case of *State of Punjab and Ors. v. Joginder Singh and Ors.* : Air 1990 SC 1396. It is open to the President or the Governor, as the case may be, in the exercise of the power vested by Article 72/161 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt and sentence imposed on the accused. In doing so, the President/the Governor does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President/the Governor acts in a wholly different plan from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential/Governmental act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial super session of the original sentence. It is apparent that the power under Article 72/161 entitles the President/the Governor to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of relief falling within that power. The President/the Governor is entitled to go into merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by any Court including the apex Court. (See *Kehar Singh and Anr. v. Union of*

India and Anr.: AIR 1989 SC 653). If any prayer for remission/pardon/ clemency is made by the accused, the same shall be dealt with in accordance with law and we express no opinion in that regard. The appeal fails and is dismissed.

D.M. Patnaik, J.

15. I agree.

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