

Sarbeswar Malik Vs. the State

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Court : Orissa

Decided On : Jun-24-1985

Reported in : 1986CriLJ1721

Judge : B.K. Behera and ;G.B. Patnaik, JJ.

Appellant : Sarbeswar Malik

Respondent : The State

Advocate for Pet/Ap. : Mr. P.K. Misra

Judgement :

B.K. Behera, J.

1. The appellant stood charged under Section 302 of the Penal Code (for short, 'the Code') for intentionally causing the death of Narayan Mallik (to be referred to hereinafter as 'the deceased') on May 18, 1980, in village Bayakuda in the district of Puri. The appellant with the co-accused Ramachandra Mallik, his father, also stood charged under Section 302 read with Section 34 of the Code for committing the murder of the deceased in furtherance of their common intention. A separate charge had been framed against the co-accused Ramachandra under Section 323 of the Code for voluntarily causing hurt to Mali alias Malati Dei (P. W. 1) and Pramod Kumar Mallik (P. W. 2), the widow and son respectively of the deceased. We would briefly narrate the case of the prosecution. The deceased was a co-

villager of the appellant and the co-accused and had his residential house adjacent to the coconut garden of the appellant and the co-accused, Raghu Senapati, who originally owned the homestead land on which the residential house of the deceased stood and the deceased had been on litigating terms and Raghu had been negotiating with the co-accused for alienating a portion of the residential site in his favour. For this, there had been ill-feeling between the co-accused and the deceased. On the day prior to the date of occurrence, P. W. 1 rebuked the appellant. On the day of occurrence, the co-accused Ramachandra went with a lathi and asked the deceased as to why his wife had rebuked on the previous day. The deceased refuted this allegation. There was hot exchange of words between the co-accused and the deceased and to the spot came P. Ws. 1 and 2 and also P. W. 5, another son of the deceased. The appellant had also arrived on the scene with a lathi. When the co-accused raised a lathi to deal a blow on the deceased, the deceased and P. Ws. 1, 2 and 5 snatched it away from his hands, The appellant then assaulted P. Ws. 1 and 2 by the lathi he was holding. On being directed by the co-accused, the appellant went to a nearby coconut tree, picked up a Sabal (crowbar) lying there, rushed back to the spot and pierced the crowbar (M. O. 1.) into the left side of the chest of the deceased as a result of which the latter fell down and died. P. W. 1, the widow of the deceased, lodged the first information report (Ex, 1/1), being accompanied by Brahmananda Mallik (P. W. 6) who had taken from the spot M. O. 1. and had produced it at the police station and this weapon of attack was seized at the police station. The Officer-in-charge (P. W. 12) of the Gop Police Station took up the investigation and examined the witnesses. His successor (P. W. 11) completed it and placed the charge-sheet. A counter case had been started on the basis of the first information report (Ex. 14) lodged by the appellant against the other side for causing hurt to him and his father Ramchandra. That case was simultaneously investigated into and a charge-sheet was placed against P. Ws. 2 and 5. On commitment, the accused persons in both the cases were tried in the two separate cases.

2. Of the twelve prosecution witnesses, P. Ws. 1 to 5 had figured as witnesses to the occurrence. P. W. 6, who had gone to the scene of occurrence immediately thereafter, had picked up M. O. 1. from the spot and had produced it at the police station. P. W, 8 was the doctor who had conducted autopsy over the dead body of

the deceased. P. Ws. 11 and 12 had investigated into the case.

3. The plea of the appellant and the co-accused was one of denial about their complicity in the commission of the offences. A case was sought to be made out that the deceased was the aggressor and had, with the assistance of his wife and sons, assaulted and caused hurt to the appellant and his father and while doing so, fell near the fence and a pointed material accidentally pierced into his chest which resulted in his death.

4. On a consideration of the evidence, the learned Sessions Judge has found that the death of the deceased was homicidal in nature. As we notice from the impugned judgment, this fact had not been challenged by the defence as noted in paragraph 8 thereof. At the hearing of this appeal, this finding has not been assailed and in our view, rightly so, in view of the evidence of the doctor who had conducted the autopsy and another doctor (P. W. 9) who had seen the deceased with an injury on his chest and who declared him to be dead whereafter autopsy had been conducted by the other doctor.

5. The learned Sessions Judge held, for the reasons recorded in the judgment, that the charge under Section 323 of the Code against the co-accused had not been established. Taking into consideration the fact that neither in the first information report nor in the statements made by the witnesses to the occurrence in the course of investigation, any allegation had been made that the co-accused had instigated the appellant to assault the deceased although this story was developed at the trial, the trial Court held that the appellant and his father did not have common intention to commit the murder of the deceased. The trial Court accordingly held that the appellant and the co-accused could not be convicted by the application of Section 34 of the Code, In view of the direct evidence of P. Ws. 1 to 5 which, according to the trial Court, was true and trustworthy, the trial Court held that the charge under Section 302 of the Code had been established against the appellant. The appellant was accordingly convicted under Section 302 of the Code and sentenced to undergo imprisonment for life,

6. Mr. P.K. Misra, appearing for the appellant, has contended that the evidence of P. Ws. 1 to 5 was not worthy of credence because apart from the inconsistent

statements made by them from stage to stage, three of them, namely, P. Ws, 1, 2 and 5, are interested witnesses and the statements of P. Ws. 3 and 4 under Section 164 of the Criminal P.C. had been recorded in the course of investigation and in addition, the witnesses examined to unfold the case of the prosecution had not explained as to how the appellant and the co-accused had come by the injuries sustained during the occurrence. It has thus been contended that the findings recorded by the trial Court against the appellant cannot be sustained. The learned Standing Counsel has, however, contended that the evidence of P. Ws. 1 to 5 with regard to the fatal assault made by the appellant on the chest of the deceased by means of M. O, I. is clear and cogent and in the absence of evidence that the appellant and his father had sustained injuries during the occurrence coupled with the fact that the injuries were not serious in nature, it cannot reasonably be said that the prosecution had not presented a true picture about the occurrence.

7. Each one of the five witnesses to the occurrence, namely, P. Ws. 1 to 5, has, in clear terms, stated that the appellant, during the course of occurrence, left the spot, picked up a crowbar which was lying near a coconut tree, came back and abruptly pierced it into the left side of the chest of the deceased which resulted in his death. P. Ws. 1 and 2 had identified M. O. I. to be the weapon of attack in the hands of and used by the appellant. The evidence of P. W. 6 would show that on going to the spot, being informed about the occurrence by his children (P. Ws. 3 and 4), he saw M. O. I. lying on the spot and he carried it to the police station when P. W. 1 went and lodged the first information report. This weapon of attack had been seized in the course of investigation. On chemical and serological test, human blood of 'A' group tallying with the blood group of the deceased found in his two clothes (M. Os. II and III) had been found in M. O. I. This is a telling circumstance in support of the evidence of P. Ws. 1 to 5. No doubt, P. Ws. 1, 2 and 5 were the close relations of the deceased, but witnesses who are related to the deceased are not to be termed as interested witnesses, as has been done by the trial Court. As held by the Supreme Court in : 1981 CriLJ1012 State of Rajasthan v. Smt. Kalki 'related' is not equivalent to interested'. A witness can be called interested only when he or she derives some benefit from the result of the litigation. A witness who is a natural one and is the only possible eye-witness in

the circumstances of a case cannot be said to be interested. P. Ws. 1, 2 and 5 are the close relations of the deceased. Their evidence needed careful scrutiny which had been done by the trial Court. The occurrence had taken place near the residential house of the deceased. P. Ws. 1,2 and 5 were, therefore, natural and competent witnesses. P. Ws. 3 and 4, the two children of P. W. 6, the neighbour of the deceased, were likely to be present on the scene of assault which had followed a serious verbal duel and altercation between the parties. The evidence of these two witnesses is to be examined with great care before its acceptance as in the course of investigation, steps had been taken to bind them down to their statements made on oath before a Magistrate under Section 164 of the Cr. P.C., but their evidence is not to be rejected merely on that ground. The learned Sessions Judge has carefully considered the evidence of P. Ws. 3 and 4 and has held that their evidence with regard to the assault on the chest of the deceased by means of a crowbar by the appellant was worthy of credence and we see no reason to take a different view.

8. Much advantage has been sought by the defence on some statements made by the doctor (P. W. 8) who had conducted the autopsy giving an indication that the external and the consequent internal injuries on the person of the deceased were not likely to have been caused in the manner deposed to by the witnesses to the occurrence. P. W. 8. has stated that the pointed side of M.O.I. could not cause an injury like the injury noticed by him as it was a heavy weapon and in case of use, he would have expected more of laceration and there might have been some internal fractures. He has further stated that without touching the ribs, M.O.I. could not have affected the heart, which had been affected in the instant case, without causing damage to the ribs. He has further opined that if M.O.I. had been used, there would have been laceration to the underlying intercostal muscle and he has found none. He has, however, stated in his cross-examination that the gap between two ribs would be 1 cm. or a little less than that and the distance between the chest wall and the heart would be about 1 inch or a little less. He has further stated that if the breadth of the sharp portion of the weapon penetrating through the chest wall would be less than 1 cm., there would be no chance of the weapon touching the ribs and it could straightway penetrate the heart. In such a case, this doctor has opined, there would be no displacement of the ribs or widening of the

gap between the two ribs and there might not have been any fracture of the ribs. He has given evidence that the thickness of M.O.I. is less than half cm.. Regard being had to these features in the evidence of P. W. 8, the learned trial Judge had held, for the reasons recorded in para 13 of the judgment, that the medical evidence would not demolish the evidence of P. Ws. 1 to 5 with regard to the manner of assault on the person of the deceased by the appellant and in our view, he has reached the correct conclusion on the facts of the case and in view of the evidence. Another doctor (P. W. 9) has stated that although he did not have any chance of noticing the internal injuries of the deceased, he had noticed the length and breadth of the injury quashed on the front side of the chest and his opinion is that M.O.I. could cause that injury sustained by the deceased.

9. For the foregoing reasons, it is not a case where it can be said that the medical evidence would negative the theory of the prosecution. If direct evidence of the witnesses to the occurrence is satisfactory and reliable, it cannot be rejected on hypothetical medical evidence. Unless medical evidence rules out the possibilities of the injuries in the manner deposed to by the prosecution witnesses, the evidence of witnesses to the occurrence is not to be discarded. (See (1983) 1 Crimes 625 : 1983 Cri LJ 822 (SC) Solanki Chimanbhai Ukabhai v. State of Gujarat and : 1984 CriLJ921 Punjab Singh v. State of Haryana.

10. We thus find, agreeing with the trial Court, that the evidence of P. Ws. 1 to 5 with regard to the assault on the person of the deceased by the appellant by means of a crowbar is true and trustworthy and is supported and not demolished by the medical evidence. The finding recorded by the trial Court that the appellant had assaulted the deceased to death by means of M.O.I. cannot successfully be assailed.

11. As the evidence of P. Ws. 1 to 5 would show, while the deceased was in front of his house, the appellant and the co-accused with two lathis went to that spot and the evidence of P. Ws. 1 to 3 would show that the appellant's father attempted to deal a blow on the person of the deceased by means of the lathi he was holding and it was snatched away from him. There had been a verbal duel prior to that between the appellant and the deceased when the former challenged the latter as

to why his wife had abused him. In the circumstances of the case, it would be reasonable to hold that the appellant and his father were the aggressors.

12. As noticed by the doctor (P. W. 9), the appellant's father had sustained four injuries on his person, simple in nature, as per his report (Ex. A) and the appellant had also sustained four injuries on his person, simple in nature, as per his report (Ex. B). The appellant's father had a lacerated bleeding injury above the right ear, another lacerated bleeding injury on the left side of the vault, an abrasion on the right collar bone and a bruise on the right forearm. According to the doctor, the abrasion on the right collar bone could be caused by finger nail and the other injuries could be caused by sharp and blunt weapons. The appellant had a lacerated injury on the left side of the vault of the scalp above the left ear, a bleeding incised injury on the left side of the back below the scapula, an abrasion on the left knee on the front and another abrasion on the left elbow. The doctor had opined that the two abrasions could be caused by fall on the ground and the lacerated injury could be caused by a hard and blunt weapon, whereas the incised bleeding injury could be caused by sharp cutting weapon. After the occurrence, the first information report in the counter case had been lodged by the appellant as per Ex. 14 and injuries had been noticed on the appellant and his father on medical examination. As would appear from the materials placed before the trial Court, a charge-sheet had been placed by registering that case as a counter case to this one and P. Ws. 2 and 5 had been prosecuted. The aforesaid facts and circumstances would show that the injuries on the person of the appellant and his father had been caused during the occurrence and some injuries had been caused to vital parts. But as the evidence of the witnesses to the occurrence would clearly show, after the appellant and his father started aggression and there had been a verbal duel and altercation, there was a fracas on the scene and there had been a free fight between both the sides. There was no evidence that at the time of dealing the fatal blow on the person of the deceased, the latter was still armed or that he had made any attempt to assault either the appellant or his father. In such circumstances, the question of right of self-defence either of the person of the appellant or that of his father while causing the fatal injury on the person of the deceased did not arise. Each person would be responsible in a case of this nature for his own act. True it is that in their statements in the course of investigation, the

witnesses to the occurrence had attributed assault on the person of the appellant and his father to P. Ws. 2 and 5, a fact which they seem to have suppressed at the stage of trial and it would be reasonable to hold that the appellant and his father had sustained some injuries on their persons during the occurrence, but in view of the clear and cogent evidence that the appellant had, by means of M.O.I., caused the death of the deceased, it would not be appropriate to hold that the prosecution has not presented a true picture as to how and in what circumstances the deceased had met with his death.

13. As has been laid down by the Supreme Court in : 1971 CriLJ1540 , Bankey Lal v. State of Uttar Pradesh if the prosecution witnesses are proved not to have deposed truly in all respects, their evidence is required to be scrutinised with care, but simply because the prosecution has not explained some injuries on the person of the accused, the Court is not to discard the entire prosecution evidence. In our view, it cannot reasonably be said, in the facts and circumstances of the case before us, that the witnesses for the prosecution, who have deposed about the occurrence, have not presented a true story with regard to the murderous assault on the person of the deceased merely because they have given a go-by to what they had stated in the course of investigation with regard to the assault on the person of the appellant and his father.

14. By a dangerous instrument, the appellant had pierced into the chest of the deceased which affected the heart and resulted in his death. Mr. Misra for the appellant has contended that if in spite of his submissions regarding the acceptability of the evidence of P. Ws. 1 to 5, the case of the prosecution against the appellant is accepted, as has been done by us, the offence would be culpable homicide not amounting to murder coming under the second part of Section 304 of the Code. Undoubtedly, there had been previous quarrels between the parties. Even preceding the assault, there had been a sudden quarrel between the appellant's father and the deceased followed by an altercation between the parties. The appellant, a very young lad at the time of the occurrence, being aged about seventeen years then (as his age had been noted at the time of the examination under Section 313 of the Criminal P.C. in July, 1981 to be eighteen years), being incensed by anger and on the spur of the moment, without any

premeditation or pre-plan, suddenly picked up M, O. I. from near the spot and pierced it but once into the chest of the deceased which resulted in his death. In the circumstances in which the appellant had been placed at the time of the attack on the deceased, it could not reasonably be said that he had the intention of causing the death of the deceased or causing a bodily injury likely to cause his death. He could, however, be attributed with the knowledge that by his act, he was likely to cause the death of the deceased. For these reasons, we would accept the submission made on behalf of the appellant and hold that the appellant was liable to be convicted under Section 304, Part II of the Code and not under Section 302 of the Code. While coming to this conclusion, we are fortified by the observations of the Supreme Court in : 1984 CriLJ478 Tholan v. State of Tamil Nadu and the view taken by this Bench in 1984(2) Crimes 400 : (1984) 58 Cut LT 226 Krushna Chandra Sahu v. State of Orissa.

15. In the result, the appeal is allowed in part. The order of conviction and sentence passed against the appellant under Section 302 of the Penal Code are set aside and in lieu thereof, the appellant is convicted under Section 304, Part II of the Penal Code and sentenced thereunder to undergo rigorous imprisonment for a period of four years which would meet the ends of justice.

G.B. Patnaik, J.

16. I agree.

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