

Jadumani Khanda Vs. State

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Court : Orissa

Decided On : Sep-18-1992

Reported in : 75(1993)CLT652; 1993CriLJ2701

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

Acts : Evidence Act - Sections 6; Code of Criminal Procedure (CrPC) , 1974 - Sections 161; Indian Penal Code (IPC) - Sections 302

Appeal No. : Jail Criminal Appeal No. 121 of 1988

Appellant : Jadumani Khanda

Respondent : State

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

Advocate for Pet/Ap. : Sashi Das and ;P.K. Mallik, Advs.

Disposition : Appeal allowed

Judgement :

D.M. Patnaik, J.

1. In this appeal from the jail, the convict assails his conviction and sentence of imprisonment for life for the offence punishable under Section 302, I.P.C.

2. The prosecution case is, on 15-3-87 at about noon time the deceased, a lady (locally called as Bayani for her erratic behaviour and movement) entered the house of the appellant and broke his earthen articles after eating away his food. At this it is stated, that the appellant chased the said Bayani holding an axe and killed her inside Atei reserve forest close to village Bailjodi, the village of the appellant.

The prosecution case further proceeds that after killing Bayani, the appellant came to the village and gave out that he had killed 'Bayani'. This was heard by P.W. 2, daughter of P.W. 1 who informed the latter and P.W. 1 reported the matter at the police station. A Panch was also held in the village on the following day where it was stated that the appellant confessed his guilt before the Panch. A case having been registered, investigation was taken up and charge-sheet having been filed, the appellant faced his trial and convicted and sentenced as stated above.

The appellant denied the prosecution allegation.

3. Mr. Sashi Das, learned counsel for the appellant strenuously urged that the order of conviction recorded by the learned Sessions Judge is wholly erroneous both on account of wrong appreciation of the facts as well as points of law involved. Mr. Das took up to the judgment and evidence on record and pointed out various infirmities in the judgment which we would be discussing in the following paragraphs.

Mr. G.K. Mohanty, learned Additional Standing Counsel, on the other hand, supported the findings of the learned Session Judge.

4. That Bayani died a Homicidal death was not disputed before us. Going through the evidence of the doctor (P.W. 9) who conducted the postmortem examination we find that on external examination he found-

(i) incised wound measuring 8' x 2 1/2' bone deep on the neck. All the layers of the muscles of the neck were cut and vertebra C to C-3 were exposed.

(ii) incised wound 3' x 1' x 1' over left scapular area 3' away from left ear and 3' from left shoulder joint.

(iii) lacerated injury 3' x 1' x bone deep over the occipital area 6' above occiput. Occipital bone was fractured (stellate).

(iv) incised wound 1/2' x 1' over left shoulder joint. Head of the left humerus was found to have been cut.

The injuries were antemortem in nature and the cause of death as opined was due to massive blood loss from the injuries on the neck. The doctor opined that the injuries found were sufficient in the ordinary course of nature to cause death. The doctor further opined that the injuries could be possible by the axe (M.O.I.) which he had the occasion to examine.

The nature of the injuries and the part of the body on which it were inflicted are sufficient for a conclusion that the death was homicidal in nature.

5. Admittedly there are no witnesses to the occurrence and the case based on the circumstantial evidence; such as, extra judicial confession and the recovery of the weapon of offence (M.O.I.) Budia from the house of the appellant on his production. We would like to take the first question of extra judicial confession as recorded by the learned Sessions Judge.

6. The learned Sessions Judge relied on the evidence of P.Ws. 3 and 6 with regard to the extra judicial confession. On going through the evidence of these two witnesses we find that since they did not support the prosecution case, they were permitted to be cross-examined by the P.P. The learned Sessions Judge in para-11 of his judgment has observed that these two witnesses did not state anything about the confession but we are really surprised to note that the learned Sessions Judge utilised the statement of these witnesses recorded under Section 161, Cr.P.C. as substantive evidence before the Court. This is against the fundamental principle of procedural law. All that the learned Sessions Judge has found is that these witnesses saw Bayani entering the house of the appellant and the appellant chasing Bayani towards the jungle and thereafter coming back from the jungle, giving out to have killed Bayani. All these are found to be the statements recorded by the investigating officer under Section 161, Cr.P.C. which are wholly inadmissible and accepting them as evidence is utterly erroneous. Thus we hold

that there was no extra judicial confession before P.Ws. 3 and 6.

The learned Sessions Judge also relied on the evidence of P.W. 2 and while so relying observed that P.W. 2 was related to the appellant as his sister. She stated in her evidence that on the date of occurrence it was about noon time when she along with some other children was playing near the mango tree close to the village tank. At that time the appellant came from the village side and passed by that way and while so passing by that way, he was giving out 'MU AJI BAYANIKU KOTAL KOLT'. At that time, the appellant was holding an axe. We have gone through the evidence of this witness. She admitted not to have asked anything to the accused about the incident. She admitted that on the following morning, she told her father that the accused killed Bayani. On going through the evidence of this witness we find no reason to believe her statement as to extra judicial confession firstly because she is found to be a child witness aged only 14 years and secondly, the evidence clearly indicates that the appellant did not make a confession to this witness, but on the other hand, the witness heard the accused while passing by that way giving out to have killed Bayani. We cannot consider this as an extra judicial confession before P.W. 2, because it is well settled that the confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed some one. No reliance can be put on the evidence of P.W. 2 which has been so held by the learned Sessions Judge and the finding being erroneous cannot be sustained. The learned Sessions Judge has treated this statement of the accused as relevant under Section 6 of the Evidence Act and has found to be a corroborative piece of material to the extra judicial confession made before P.W. 2.

So far as Section 6 of the Evidence Act is concerned, the principle laid down is that to form a particular statement as a part of the same transaction, utterance must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. (Vide decision reported in AIR 1951 Orissa 53, Hadu v. The State).

In the present case, the learned Sessions Judge was oblivious to give a finding as to whether the declaration by the accused to have killed the lady was either at the time of commission of the crime or immediately thereafter so as to form the same transaction. There is no material at what time the appellant committed the act and how long after commission of the act he disclosed this fact by way of extra judicial confession before P.W. 2. In the absence of any such material we cannot consider such utterances by the accused as relevant under Section 6 of the Evidence Act. Therefore, we hold the statement as inadmissible.

7. The learned Sessions Judge also relied on the evidence of P.Ws. 1 and 5 who spoke about the extra judicial confession by the appellant before the village assembly on the day following the date of occurrence.

We have gone through the evidence of these two witnesses. P.W. 1 clearly stated in his evidence that in the month of Chaitra on a Sunday his daughter P.W. 2 told him that the appellant while going on the village road disclosed to have killed Bayani. Thus it is not the evidence of P.W. 1 that he himself had heard the accused blurting out such a confession.

P.W. 5 stated that in the month of Chaitra on a Monday morning P.W. 1, called him to the Thakuraghar of the village saying that the appellant Jadumani had killed Bayani and thereafter he went to the Thakuraghar where others were present. P.Ws. 1 and 5 both sent the village Dakua to call the villagers and thereafter the villagers assembled. P.W. 1 and one Sana Naik called the appellant from the house of Sana Naik. The appellant was called to the verandah of Thakurgarh. Before all P.W. 1 asked whether he had killed Bayani on the previous day to which the accused confessed there that he had done.

Considering the evidence of P.Ws. 1 and 5 that the appellant did not make any extra judicial confession before any of the two witnesses, we are of the view that his confession before an assembly of the villagers which was called solely for the purpose of confronting the appellant as to whether he had killed Bayani cannot be considered to be a confession voluntarily made. There is no evidence from the side of the prosecution that at any particular point of time, the accused voluntarily confessed either before any person or an assembly of persons. Therefore the

extra judicial confession as relied on by the learned Sessions Judge as one of the corner stones of the prosecution case cannot be accepted.

8. The learned Sessions Judge has found that the chemical examination report did not indicate presence of any blood stain in the Budia (M.O.I.). The learned Sessions Judge jumped to the conclusion that the accused might have washed the Budia (M.O.I.) because he was found going by the side of the tank. Even though no blood stains were found on the Budia (M.O.I.), still then the learned Sessions Judge considered its recovery at the instance of the accused, as a circumstance against the accused, holding that this was the conduct which lent support to the prosecution case. We may point out that the learned Sessions Judge found that there was no material as to leading to discovery of the weapon of offence. The mere production of M.O.I, as observed by the learned Sessions Judge, by the accused cannot be considered to be a circumstance against him when there is no finding of the learned Sessions Judge that in fact the appellant had used this Budia (M.O.I) in killing the deceased. That apart, on going through the evidence of P.W. 7 the witness to the seizure, we find that the witness is totally silent as to from where the accused produced Budia (M.O.I). Though from Ext. 5 (seizure list) it is found that the same was produced by the appellant from his house, P.W. 7 is totally silent as to the place of recovery and the place of seizure. For this reason we also cannot rely on the sole evidence of P.W. 10, the investigating officer that the M.O.I, was produced by the accused. Even accepting such production by the appellant, we do not consider this as a circumstance lending support to the prosecution case, since the axe did not contain any blood stain nor materials have been placed to connect the same with the commission of the offence. There is also no other material on record to implicate the accused in the crime.

9. In the result, the appeal is allowed. The order of conviction and sentence passed against the appellant is set aside and he be set at liberty forthwith, unless he is required to be in custody in any other case.

A. Pasayat, J.

10. I agree.

