

Kanhu Majhi Vs. State

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Court : Orissa

Decided On : May-14-1998

Reported in : 1998(2)ALT(Cri)14; 86(1998)CLT297; 1998CriLJ3729

Judge : A. Pasayat and ;S.C. Datta, JJ.

Acts : [Evidence Act, 1872](#) - Sections 24 and 105; [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302 and 304; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164

Appeal No. : Jail CrI. Appeal No. 236 of 1992

Appellant : Kanhu Majhi

Respondent : State

Advocate for Def. : Addl. Govt. Adv.

Advocate for Pet/Ap. : V. Narasingh, Adv.

Disposition : Appeal dismissed

Judgement :

A. Pasayat, J.

1. In this appeal from Jail Kanhu Majhi (hereinafter referred to as the 'accused') calls in question legality of his conviction for commission of an offence punishable

under Section 302, Indian Penal Code, 1860 (in short, 'IPC') and sentence of imprisonment for life as awarded by the learned Sessions Judge, Koraput, Jeypore. Accusations which led to trial of accused were that he killed his brother Arji Majhi alias Arjuna Majhi (hereinafter referred to as the 'deceased').

2. In a nutshell the prosecution case runs as follows :

On 22-6-1991 at about 10 p.m. there was a quarrel between the deceased and the accused. Accused chased the deceased holding an axe and dealt one blow at his back as a result of which he fell down on the road and thereafter the accused dealt further blows. As a result of the assaults the deceased met instantaneous death. The occurrence was seen by Neelakantha Majhi (P.W. 3). Subsequently the accused made an extrajudicial confession before Marayana Hial (P.W. 2), Tankadhar Majhi (P.W. 5) and Bogi Majhi (P.W. 4). Law was set into motion by Krushna Majhi (P.W.1), brother of the deceased. Acting on the basis of first information report lodged by Krushna, investigation was undertaken and on completion thereof charge sheet was submitted. Placing reliance on the evidence of witnesses examined to further the case of prosecution, more particularly P.W. 3 who claimed to be an eye-witness and P. Ws. 4 and 5, who stated about the extrajudicial confession, learned trial Judge found the accused guilty, convicted and sentenced him as stated above.

3. In support of the appeal, Mr. V. Narasingh, the learned counsel submitted that the occurrence took place at night at about 10 p.m. Therefore, it is highly improbable that P.W. 3 could have seen it from a distance of about 15 ft. It is stated that no reason has been indicated as to why accused would make confession before P.Ws. 2, 4 and 5. Further, the alleged occurrence having taken place during the course of a quarrel, Exception 4 to Section 300 is attracted.

Learned counsel for State submitted that the factual position has been elaborately analysed by the learned trial Judge and there is no infirmity to warrant interference.

4. So far visibility aspect is concerned, it is to be noted that the occurrence took place in the month of June and the distance is not so much as to render

identification improbable, particularly when the person identified is too well known to the identifier. From the evidence of P.W. 4 it is clear that it was a moonlit night.

5. So far as extrajudicial confession is concerned, it is to be noted that the persons who claim that such a confession was made are co-villagers.

Confessions may be divided into two classes, i.e., judicial and extrajudicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (in short, 'the Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra judicial confessions, two questions arise (i) were they made voluntarily and (ii) are they true As the section enacts, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,

(1) having reference to the charge against the accused person,

(2) proceedings from a person in authority and

(3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person, or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for

supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section

24. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. (See R v. Warwickshall : (1783) 1 Leach

263. It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proof in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat and often the inducement involves both promise and threat, - a promise of forgiveness if disclosure is made and threat of prosecution if it is

not. (See Woodroffe Evidence, 9th Edition, page 284). A promise is always attached to the confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words 'appear to him' in the last part of the section refer to the mentality of the accused.

6. An extrajudicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extrajudicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing

is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extrajudicial confession can be accepted and can be the basis of a conviction if it passed the test of credibility. When the witnesses are co-villagers, there is no reason for making the false claim of the accused having made a confession before them.

7. The fourth exception covers acts done in a sudden fight. This exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle for in both there is the absence of premeditation but while in the one case there is the total deprivation of self-control, in the other there is only that heat of passion which clouds man's sober reason and urges them to deeds which they would not otherwise do. There is provocation in this case as in the first exception, but the injury done is not the direct consequence of that provocation. In fact, the present exception deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. For, a 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side, for if it were so, the exception more appropriately applicable would be Exception 1. The position of combatants under Exception 4 is, in short, this. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to blame. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter. They are, therefore, both equally liable. Where, therefore, during a sudden and unpremeditated fight both the accused and the deceased caused injuries to each other with weapons which they were carrying with them, the application of Exception 4 will be attracted.

Where the accused gives a fatal blow without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and there is no evidence that the accused took any undue advantage or acted in a cruel or unusual manner but merely gave a single stroke on the head of the deceased which ultimately proved fatal and he did not go on assaulting the deceased despite his falling down unconscious on the ground in a given case it can be held that all the elements of Exception 4 Section 300,IPC were fulfilled. The offence committed by the accused would be culpable homicide not amounting to murder and punishable under Section 304,IPC.

8. The help of this exception can be invoked if and only if death is caused -

(a) without premeditation,

(b) in a sudden fight,

(c) without the offender's having taken undue advantage or acted in a cruel or unusual manner, and

(d) the fight must have been with the person killed.

To bring a case within this exception all the ingredients mentioned in it must be found.

In order to bring cases within the ambit of Exception 4, every one of the ingredients mentioned in this exception has to be proved. It has to be proved -

(i) that it was committed without premeditation;

(ii) that it was committed in a sudden fight;

(iii) that it was committed in the heat of passion;

(iv) that it was committed upon a sudden) quarrel; and

(v) that it was committed without the offender having taken undue advantage or acted in a cruel or unusual manner.

Where the prosecution evidence does not justify the inference that there was any sudden fight and the accused certainly acted in a cruel manner and least that can be said is that he took undue advantage of the deceased, there is no justification for applying Exception 4 to Section 300, to the appellant's case.

So long as the fight is unpremeditated and sudden, the accused, irrespective of his conduct before the fight earns the mitigation provided for in the Exception 4 to Section 300 subject to the condition that he did not in the course of the fight take undue advantage or act in a cruel or unusual manner. The term 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the Indian ' Penal Code. It takes two to make a fight. In order to constitute a fight it is necessary that the blows should be exchanged and it is not necessary that, weapon should be used. Heat of passion requires that there must be no time for the passion to cool down and in this case the parties have worked themselves into a fury on account of the verbal altercation in the beginning. The fight, as the nature of the injuries in both sides would show, appears to be on equal terms. In fact, if after exchange of blows on equal terms one of the parties without any such intention at the commencement of the affray snatches a deadly weapon and kills the other party with it, such a killing will be only manslaughter. But if a party under colour of fighting, upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party and kills the other party with such weapon, or if, at the beginning, of the contest, he prepares a deadly weapon so as to have the power of using it at some part of the contest and uses it accordingly in the course of the combat and kills the other party with the weapon, the killing in both these cases will be murder. When two men suddenly engage in a fight the death of one of them is not the most natural or inevitable result nor it can be said that either of them desires the end of the other. In the first place, then, there should be no premeditation. However, it is not perhaps possible to enunciate any general rule as to what shall be deemed to be sudden quarrel. It is question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. But as Parke, J. told the jury : 'If a person receives a blow and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men

are both subject. But the law requires two things first, that there should be that provocation and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation. (See Kirkham, 8 C & P. 115). If you see that a person denotes by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit which the law terms 'malice' in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given and the party struck beat the other's head to pieces by continued cruel and repeated blows, then you could not attribute that act to the passion of anger and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man who gives a blow, with such an instrument as the one which the prisoner used, because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving of such wound to the passion of anger excited by that blow, for no man who was under proper feelings, none but a bad man of wicked and cruel disposing, would really determine before hand to resent a blow with such an instrument.

(see Thomas, 7 C & P. 817).

So Lord Tenterden, C. J. said in another case, : It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter, but it depends upon the time elapsing between the blow and the injury and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. If you think that there was no time and interval sufficient for the passion of a man proved to be of not very strong intellect to cool and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind, then you will find him guilty of murder'. (See Lynch 5 Cr & P. 324). The proper test of the applicability of this exception is, whether or not the accused shows, since the onus is on him, under Section 105, Evidence Act, that he acted solely out of the provocation engendered by the heat of a sudden quarrel followed by a sudden fight. The ordinary inference,

where one person picks up a knife and stabs another in the stomach merely following an exchange of heated words, is that the attacker has acted out of some other motive as well as the provocation that may have been engendered by the verbal altercation. Exception 4 to Section 300 cannot be applied in such a case. (See Sunnumudull v. Emperor AIR 1947 Pat 168 : 1947 (48) Cri LJ 838.

9. Judged in the above background, there is no substance in the plea-that the case is covered by Exception 4 to Section 300, IPC. There is no infirmity in the ultimate conclusion of the learned trial Judge that the accused is guilty. However, she has committed a mistake in the Judgment stating that P.W. 1 was present before whom the confession was made, it has been clearly accepted by the learned counsel for parties that P. W. 1 does not claim that extrajudicial confession was made before him by the accused. Be that as it may, the evidence on record clearly establishes that the accused had killed the deceased in the manner described by the prosecution and conviction has been rightly done and sentence awarded properly.

The appeal is without any merit and is dismissed.

S.C. Datta, J.

10. I agree.

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