

Batapa Bada Seth Vs. the State

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Court : Orissa

Decided On : Dec-15-1986

Reported in : 1987CriLJ1976

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

Appellant : Batapa Bada Seth

Respondent : The State

Judgement :

B. K. Behera, J.

1. Accepting the case presented by the prosecution that on Jan. 20, 1980, after night fall, the appellant committed the murder of Rajanikanta Deo (to be described hereinafter as the deceased), threw the dead body of the deceased inside the forest with the intention of screening himself from the legal, punishment by causing evidence to disappear and committed theft of Rs. 1411 /- by taking it out of the possession of the deceased, the learned Sessions Judge has convicted the appellant under Sections 302, 201 and 379 of the I.P.C. (for short, the 'Code') and sentenced him to undergo imprisonment for life under Section 302 of the Code, without any sentence having been imposed on him in respect of the other two offences.

2. It is not disputed at the Bar that the deceased died a homicidal death in the forest on the way leading to village Tekalamela. While the learned Counsel for the appellant has contended that none of the charges has been brought home to the appellant. Mr. P. K. Mohanty, the learned Additional Standing Counsel, has supported the order of conviction in respect of the three offences.

3. To bring home the charges, the prosecution had examined nine witnesses. The appellant's plea was one of denial and he had not examined any witness in his defence. The case solely rested on some items of circumstantial evidence.

4. Even accepting the case of the prosecution, of which there was no material worth the name, that the appellant was the author of removal of the dead body of the deceased from the place of murder to another place where the dead body was found, Section 201 of the Code would be inapplicable as merely removing the dead body of a murdered person from the scene of occurrence to another place and throwing or keeping it there or hanging it to a tree to give a colour of suicidal hanging, would not amount to causing disappearance of evidence of the commission of the offence of murder and therefore, the order of conviction under Section 201 of the Code is illegal and misconceived. In this connection, reference may be made to 1982 Cri LJ 942 : ILR (1982) 1 Cuttack 159 : (1982) 54 Cut LT 83 : 1982 Cut LR (Cri.) 20, State of Orissa v. Trinath Dash.

5. As regards the charge under Section 379 of the Code, there must be proof of commission of the offence of theft by taking the property out of the possession of another person without that person's consent. It follows that this offence would be wholly inapplicable if property is removed from a dead person. It cannot be said from the evidence in the case on hand that the property had been removed from the possession of the deceased while he was still alive. Section 404 of the Code provides for dishonest misappropriation of property possessed by a deceased person at the time of death. No charge under Section 404 of the Code had been framed against the appellant.

6. There is no evidence other than that of P. Ws. 2 and 3 to establish the theory of the prosecution that the appellant and the deceased had been last seen together prior to the death of the latter. Both these witnesses had been bound down by

statements recorded under Section 164 of Criminal P.C. in the course of investigation and therefore, on the principles laid down in : 1974 CriLJ1486 , Balak Ram v. State of U.P., their evidence is to be examined with great care before its acceptance, as such persons feel tied down to their previous statements and have but a theoretical freedom to depart from such statements as a prosecution for perjury can be the price of such freedom.

7. According to P.W. 2, a resident of village Pangapada, at about 9.00 P.M. on a Sunday night, the deceased told him, while he was in the company of the appellant, that they were going to village Tekalamela and he requested for three battery cells for Use itl his torch light which P.W. 2 spared or payment being hide by the deceased and the deceased asked him as to whether it would be safe to travel in the flight as he had been carrying some money, but he proceeded to travel in spite of P.W. 2's forbidding him to do so. Apart from the inherent improbability of the deceased disclosing to a person with whom he might have had no intimacy about his possession of money, it is important to keep in mind that P.W. 2 had not stated in his statements under Sections 161 and 164 of Criminal P.C. that the appellant had been going with money during the night and that he had dissuaded him from doing so. These important omissions in the earlier statements of P.W. 2 would bring about his condemnation being material contradictions within the meaning of the Explanation to Section 162 of the Criminal P.C, on the facts of the case and in the context on his own showing, before he was examined in the course of investigation, he had told none about his conversation with the deceased.

8. The evidence of P.W. 3 is that in the morning of a Monday, the appellant and the deceased took one utensil called Dekchi (M.O.II) from her for preparation of tea and at about noon, the appellant alone went to her house and returned the utensil and on being asked about the deceased, the appellant told her that he had left the deceased with another person. As stated by P.W. 3, Urbasi Beherdolai was present when the appellant returned the utensil to her. This lady, who could corroborate the evidence of P.W. 3, had not been examined by the prosecution. It is not understood as to why the appellant and the deceased would ask for a Dekchi for mere preparation of tea on their way especially when they did not

require it for cooking their food and they could have taken some tea on the way. According to P.W. 3, Baleswar, Sena and Madan had come to her village in search of the deceased and she had told them that the deceased had come with the appellant to her house on the previous Monday. None of these three persons had been examined to support the version of P.W. 3. This witness had neither stated to the Investigating Officer nor before the Magistrate in the course of investigation that the appellant and the deceased had gone to Jahangada with M.O.II. In view of these highly Unsatisfactory features in her evidence, her evidence is not worthy of credence.

9. As has been submitted on behalf of the appellant, it appears that the prosecution has introduced the evidence of P.Ws. 2 and 3 to set up a theory of the appellant and the deceased being last seen together to bolster up its case. No part of the evidence of P.Ws. 2 and 3 can be accepted as they appear to be unreliable witnesses.

10. No other person than the wife of the appellant has deposed as P.W. 4 at the trial that on a Sunday morning, the appellant left for village Dadakangia with his axe (M.O.I) and on the next day, he returned home with some money and told her that the, money belonged to the deceased and he would return it to him when the deceased would come. Some days thereafter, according this witness, the Investigating Officer came and seized the money being produced by the appellant after she (P.W. 4) handed it over to the appellant. She has admitted that in her statements in the course of investigation both to the police and to the Magistrate, she had not stated that the appellant had left with the axe. She had also not stated that the appellant had returned with money. These material omissions would undoubtedly amount to contradictions and the statements made by this witness at different stages would render her evidence incredible. She is the wife of the appellant and it has not been shown as to why she should have come forward to depose against her husband who is accused of serious offences, but on this ground alone, her evidence, which is otherwise incredible, cannot be rendered reliable and acceptable. It is not necessary for the accused to show as to why a witness has come forward to depose against him.

11. The Investigating Officer has spoken about the finding of the dead body and the axe (M.O.I) consequent upon the statement said to have been made by the appellant and P.Ws. 1 and 5 have also testified about it. In this connection, P.W. 8 has deposed thus :

On 29-1-80 I was attached to Balliguda P.S. as Second Officer. On the same day at about 8.50 A.M. I received the missing report of Rajani Deo from Mukund Deo of Krutumagada and I made a Station diary entry No. 524 dt. 29-1-80. I went to Village Krutumagada to enquire about the missing Rajani. I examined some witnesses and the accused. The accused told us that he had kept the dead body of Rajani in a jungle near the foot-path leading to village Janagada. I arrested the accused after he made his statement. After he was arrested he led us to the Janagada forest to give recovery of the dead body. He pointed out the dead body in a bushy forest close to village Janagada and it was near a footpath.

Section 162 of the Criminal P.C. prohibits use of the statements made by any person to the police officer in the course of investigation except for the purpose mentioned therein and the exceptions include the provision made in Section 27 of the Evidence Act relating to discovery. The expression 'any person' occurring in Section 162 includes an accused person. Unless the statement said to have been made by the appellant comes within the purview of Section 27 of the Evidence Act, the statement would be rendered inadmissible being hit by Section 162 of the Criminal P.C. and also inadmissible under Sections 25 and 26 of the Evidence Act, being confessional statements made to a police officer.

12. In order to render such statement admissible in evidence, the fact must be discovered consequent upon the information received from a person accused of any offence, in the custody of a police officer and so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved. The unequivocal statement made by the Investigating Officer is that he arrested the appellant after he made the statement and after he was arrested, the appellant led them to the place where the dead body was recovered in the forest area near a footpath.

13. Relying on the principle laid down in : 1960 CriLJ1504 State of U.P. v. Deoman Upadhyaya and : 1980 CriLJ1125 Gurbaksh Singh Sibbia v. State of Punjab, it has been contended by Mr. Mohanty for the State that when a person voluntarily surrenders before the police agency and makes a statement, he would be deemed to be in custody and therefore, in the instant case, the Statement could be rendered admissible under Section 27 of the Evidence Act. The appellant had not voluntarily surrendered and made any statement. As would be clear from the evidence of P.W. 8, he had gone to village Krutumagada to enquire about the missing of the deceased and he examined some persons including the appellant and while so examining him, the appellant made the alleged statement. It could not, therefore, be said that the appellant had voluntarily surrendered before the police authorities and made the statement.

14. For the aforesaid reasons, the statement said to have been made by the appellant, as deposed to by P.Ws. 1, 5 and 8, ought not to have been admitted in evidence and could not have been relied on in support of the case of the prosecution that the appellant's statement had led to the discovery of the dead body and the axe.

15. If the statement of the appellant that he had thrown the dead body and kept the axe is taken out of consideration, as it must have to be, it could at best be said on the evidence that the appellant had the knowledge as to where the dead body of the deceased and the axe had been kept, but he could not be said to be the author of concealment of either the dead body or the axe. No human blood had been detected in M.O.I.

16. P.W. 5 has testified that on January 28, 1980, he and other persons met the appellant while searching for the deceased and when asked about the whereabouts of the deceased, the appellant denied even his acquaintance with the deceased and on further interrogation by the villagers, the appellant first denied to have gone with the deceased anywhere, but subsequently admitted that he had gone with the deceased and had left him on the way. The evidence of P.W. 5 in this regard, which could be, had not been corroborated by any of the other persons who had gone with him in search of the deceased. Moreover, even

assuming that the appellant had made some prevaricating statements about the whereabouts of the deceased, in the absence of other legal evidence) this conduct on his part would not destroy the presumption of innocence in his favour. As has been laid down by the Supreme Court in the well-known case *Anant Chintaman Lagu v. State of Bombay* : 1960 CriLJ682 , only that conduct of an accused which destroys the presumption of his innocence can be considered against him.

17. Without a proper and careful consideration of the evidence and the legal questions involved in the case, the learned Sessions Judge has recorded an order of conviction against the appellant in respect of the three offences which cannot be sustained.

18. In the result, the appeal succeeds and is allowed. The order of conviction recorded against the appellant under Sections 302, 201 and 379 of the Indian Penal Code and the sentence passed against him under Section 302 of the I.P.C. are set aside. The appellant be set at liberty forthwith.

K.P. Mohapatra, J.

19. I agree.