Bisi Chhuria Vs. the State

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Court : Orissa

Decided On : Jan-08-1998

Reported in : 1998(2)ALT(Cri)6; 1999CriLJ1078

Judge : S.N. Phukan, C.J. and ;P.K. Tripathy, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 300, 302 and 304; Evidence Act, 1872 - Sections 145 and 161; Code of Criminal Procedure (CrPC) , 1973 - Sections 172, 172(1) and 172(2)

Appeal No. : Criminal Appeal No. 33 of 1992

Appellant : Bisi Chhuria

Respondent : The State

Advocate for Def. : Jairaj Behera, Addl. Govt. Adv.

Advocate for Pet/Ap. : D. Rath and ;R.C. Rath, Advs.

Disposition : Appeal dismissed

Judgement :

P.K. Tripathy, J.

1. The accused in Sessions Case No. 90/5 of 1991 has challenged the order of conviction under Section 302, I.P.C. and sentence of life imprisonment vide

judgment dated 18-11-1991 passed by the learned Addl. Sessions Judge, Bolangir.

2. Prosecution case, as reveals from the lower Court record, is that in the morning hours on 25-7-90 Saibasuta Chhuria, a boy aged about 12 to 13 years (hereinafter referred to as 'the deceased') had gone to the field to tend to the goats. There he was killed by the appellant who dealt axe blow to the neck of the deceased. Though the occurrence was not witnessed by anybody but soon after the occurrence the brother of the deceased Chakaman Chhuria (P. W. 7) reached there to hand over food to the deceased. When he called aloud his brother the accused from the spot of the occurrence on the field responded by saying that the deceased was no more alive as he (the appellant) killed him (the deceased). P. W. 7 went nearer and found the deceased was lying dead with cut and bleeding injury on his neck and the accused was moving round the dead body holding the axe (M. O. I.) and threatened P. W. 7 to kill if he would go further nearer. Similarly, Mununga Mahakud, aunt (father's sister) of the deceased had gone to work on her field (where the occurrence took place) and saw the same scene like P. W. 7 and same reaction of the appellant. She came and informed the matter to her husband Maya Mahakud (P. W. 4) P. W. 4 went to the spot, saw the accused moving round the dead body holding the axe and being advised he went and reported the matter in the Police Station. Said Mununga had also intimated about the murder to her brother Gupteswar Chhuria (P. W. 1) father of the deceased. P. W. 1 rushed to the spot and saw the accused standing with the axe and the deceased lying in a pool of blood and the appellant did not allow him and other co-villagers to go near the dead body. It is the further case of the prosecution that before the co-villagers and relations of the deceased whosoever reached the spot the appellant voluntarily made confessional statement that he killed the deceased. The Investigating Officer (P. W. 12) conducted a routine investigation. On completion of the same and having found a prima facie case submitted charge sheet for the offence of murder. Charge was framed under section 302, I.P.C. Accused pleaded not guilty and claimed for trial.

3. To substantiate the charge prosecution examined 12 witnesses. Out of them P. Ws. 1 and 7 are witnesses to prove extra judicial confession besides relating to the

circumstantial evidence that the dead body of the deceased was lying in the field of P. W. 4 where the accused was moving round the dead body holding the bloodstained axe (M. O. I.) and was not permitting anybody to come near the dead body; P. Ws. 2 and 4 are also witnesses to the circumstantial evidence that the appellant being armed with axe was moving round the dead body of the deceased P. W. 12 is the I. O. who seized the M. O. I., bloodstained and sample earth, bloodstained wearing apparels of the deceased (M. Os. II and III) and bloodstained wearing apparels of the appellant (M. Os. IV, V and VI) and P. Ws. 3, 5 and 10 as witnesses to the different seizures; P. W. 2 as witness to the inquest as well as a witness to the measurement of the land made by the Revenue Inspector (P. W. 9); P. W. 6 as witness regarding collection of nail clippings of the appellant; P. W. 11 the police constable, regarding identification of the dead body taken for post-mortem examination; and P. W. 8, the Doctor who held autopsy on the dead body, to prove the post-mortem report (Ext. 9) and also opinion report (Ext. 10). Prosecution also relied upon the above noted exhibited documents besides the report of the chemical examiner and serologist (Ext. 16) relating to presence of human blood in different material objects.

4. The appellant adhered to the plea of complete denial. However, he did not adduce any defence evidence.

5. It is the admitted fact of both the parties that the appellant is the paternal uncle of P. W. 1, and therefore, the appellant and the deceased are related as grandfather and grandson.

6. Though not in a systematic manner, but substantially the trial Court took into consideration of the evidence adduced and recorded the finding that the appellant is the author of the crime which is murder punishable under Section 302, I.P.C. For that the trial court took into considerations following circumstantial evidence :-

(i) The deceased suffered a homicidal death which is evident from the evidence of P. W. 8 and the post-mortem report (Ext. 9);

(ii) the axe (M. O. I.) is the weapon of offence which is proved from the evidence of independent witnesses as well as P. W. 8 who submitted his opinion report (Ext.

10);

(iii) the wearing apparels of the appellant and the deceased besides the bloodstained earth from the spot were containing human blood of 'B' group which is evident from the report of the Chemical analyst and the Serologist (Ext. 16);

(iv) P. Ws. 1, 2, 4 and 7 have proved that the appellant was present with the bloodstained weapon of offence and was moving round the dead body of the deceased; and

(v) the appellant made extra judicial confession before P. Ws. 1 and 7 that he killed the deceased and did not allow any villager to go on to the dead body of the deceased.

7. Relying on the aforesaid circumstantial evidence the trial Court recorded that the circumstantial evidence points out the complicity of the appellant with the crime and accordingly convicted him for the offence punishable under Section 302, I.P.C.

8. In the appeal, memo appellant has set forth the grounds that circumstantial evidence available in the record is not sufficient to prove the crime against him and in the absence of any enmity the appellant could not have committed murder of his own grandson. Accordingly, he has prayed to set aside the impugned conviction order. In furtherance thereof Mr. R. C. Rath, learned counsel appearing for the appellant advanced argument. Mr. Jairaj Behera, learned Addl. Government Advocate, on the other hand, advanced argument repelling the contention of Mr. Rath and supporting the findings in the impugned judgment.

9. So far as it relates to the death of the deceased the evidence of P. W. 8 and the postmortem report (Ext. 9) are clear and unambiguous that cut injury on the nape of the neck which was ante-mortem and homicidal in nature was sufficient to cause the death of the deceased in ordinary course of nature because as a result of that injury the interver tabral disc between 3rd and 4th cervical vertebra along with the spinal cord was cut and the death was due to shock and haemorrhage consequent to the said injuries both external and internal. This part of the

prosecution evidence was neither disputed in the trial Court nor in this Court. Learned counsel for the appellant conceded that the deceased suffered a homicidal death due to the aforesaid ante-mortem injuries and the aforesaid injuries were sufficient in ordinary course of nature to cause the death of the deceased.

10. Mr. Rath argued that in the absence of eyewitnesses to the occurrence the trump card of the prosecution is the extra-judicial confession said to have been made by the appellant. P. Ws. 1 and 7 are the witnesses who have stated about the same. According to him, their evidence is not acceptable in view of the fact that P. Ws. 1 and 7 are the close relations of the deceased being his father and brother and no other independent witness was examined to prove the factum of extra judicial confession. In that connection, it may be noted here that it is not the case of the appellant that there is any enmity between P. W. 1 and his family with the appellant. According to the sequence of events P. W. 7 reached at the spot with a view to hand over food to his brother and at that time appellant responded that the deceased was dead being killed by him and thereafter P. W. 7 saw the dead body lying in a pool of blood with cut and bleeding injury on the neck. The evidence of P. W. 1 is that when he heard from his sister Mununga about the death of the deceased he ran to the spot and also witnessed the same scene as deposed by P. W. 7 and the appellant confessed that he killed the deceased.

10-A. It is not the rule of evidence that a relation is not a competent witness. In other words, in a criminal trial a relation if a natural witness of a particular sequence of events his evidence cannot be discarded on the ground of his relationship if such evidence is found to be true, trustworthy and reliable. The evidence of a prosecution witness having no enmity with the accused cannot be brushed aside merely on the ground of relationship with deceased. This settled principle of law has been reiterated in a recent decision of the Apex Court in the case of Kailash v. State of Uttar Pradesh AIR 1997 SC 2835 (Paragraph 13).

On perusal of the evidence of P. Ws. 1 and 7 it is found that each of them have made statement relating to the extra judicial confession made by the appellant unambiguously and specifically that he killed the deceased, and he (the deceased)

was no more alive. The aforesaid extra judicial confession does not suffer from any infirmity and therefore merely because P. Ws. 1 and 7 are the father and brother of the deceased their evidence is not liable to be discarded.

11. It is argued by Mr. Rath that Mununga who is the wife of P.W. 4 and sister of P. W. 1 was not examined though she is also a charge-sheeted witness and she had sustained some injuries. There is no force in this contention so as to draw adverse inferene against the prosecution case inasmuch as the prosecution is not bound to examine each and every witness mentioned in the charge sheet. Mununga is said to be the witness to extra judicial confession made by the appellant. She had also seen the appellant and the deceased in the similar situation as was seen by P. W. 7. She ran to the house and intimated her husband as well as P. W. 1. In that process while running she sustained some minor injuries which the Doctor explains that such injuries are possible by fall. Since P. Ws. 1 and 7 were examined to prove that factum of extra judicial confession non-examination of Mununga is not fatal to the prosecution. Due to such non-examination of Mununga the appellant does not show any prejudice against his defence nor does he show any undue advantage having been taken by the prosecution. Under such circumstance the aforesaid argument of the appellant is of no avail to disturb the finding of the trial Court.

12. It is further argued by Mr. Rath that when it is the admitted case of the parties that there is no enmity between the appellant and the deceased or between both the families the prosecution has not unearthed the reason and motive behind the crime. He referred to the confessional statement made by the appellant before the Investigating Officer, that he killed the deceased because the said child annoyed him by repeatedly pulling 'KACHHA' of his Dhoti, and argued that if that sequence would have been taken into consideration then the trial Court could not have convicted the appellant under Section 302, I.P.C. and at best it could have been a case under Section 304, Part II, I.P.C. Learned Addl. Govt. Advocate, however, argued that the prosecution case could not be thrown overboard for the reason, of non-proving the motive behind the crime. Referring to the case diary he further argued that though such a confessional statement of the appellant is available but at this stage the appellant cannot make use of the same. He further argued that

when the nature of the injury on the neck by means of a sharp cutting weapon like M. O. I. was dealt and the injury was sufficient in the ordinary course of nature to cause the death of the deceased it is a culpable homicide simplicitor as defined under Section 300 and punishable under Section 302, I.P.C. The point urged needs careful consideration.

13. At the. outset it may be noted that motive is one of the elements relating to the crime. Motive mostly relates to mental status and thought process of the offender. If the motive is revealed from the conduct of otherwise of the accused arid proved in a trial then that factor would supply necessary link relating to the commission of the crime. But it is the settled position of law that absence of proof of motive is not always vital to the prosecution case (See the case of State of Gujarat v. Anirudh Sing AIR 1997 SC 2780 : 1997 Cri LJ 3397. In this case when the evidence in record clearly establish the crime against the appellant, he cannot get any advantage for absence of proof of motive.

14. Be that as it may the contention of the appellant that the confessional statement of the accused should have been looked into from the case diary to find out the motive behind the crime is also not acceptable in view of the settled position of law. Chapter XII of the Code of Criminal Procedure, 1973 (in short, 'the Code') relates to information to the police and their powers to investigate. Section 172 of the Code reads as here under:-

172. Diary of Proceeding in investigation.- (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purposes of contradicting such police officer, the provisions of Section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872) shall apply.

(Underlined to supply emphasis)

It reveals from the above quoted provision that relating to an investigation the I. O. shall maintain diary for the purpose mentioned in Sub-section (1) of section 172 of the Code. The I.O. may refer to the case diary at the time of trial to refresh his memory or the trial Court may use the statement recorded during the course of investigation for the purpose of cross-examination as to previous statement in writing in accordance with the provisions under Sections 145 and 161 of the Evidence Act as per the provisions of Sub-section (3) of Section 172 of the Code. It is specifically mentioned in Sub-section (2) of Section 172 that a criminal Court may use such diaries to aid it in such inquiry or trial but not as evidence in the case. In other words, Sub-section (2) of section 172 specifically provides not to use such diary as evidence. Law is well settled that case diary cannot be used as a substantive evidence. In that connection, the Apex Court in the case of Habeeb Mohammad v. State of Hyderabad AIR 1954 SC 51 : 1954 Cri LJ 338 has said that :-

Section 172 provides that any criminal court may send for the police diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. It seems to us that the learned Judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question or appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by section 172, Cr.P.C. i.e., during the trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justices between the State and the accused....

(quoted from paragraph 13 at page 60 (of AIR): (at p. 347 of Cri LJ)

In the case of Narayanan v. Krishnan 1981 Cri LJ 563 a single bench of the Kerala High Court examined a similar point and held, which is quoted with approval, that (at p. 569 of Cri LJ):-

20....The Court cannot rely on confessions of the accused and case diary statements of witnesses to come to a conclusion on disputed facts in support of the prosecution or the defence. Even if case diary statements are treated as part of police diaries. Section 172(2) of the Code authorises a criminal Court to send for police diaries and use the diaries not as evidence in the case but to aid the enquiry or trial. In other words, even police diaries can be used only to the limited extent of aiding an enquiry or trial. In the course of taking aid from a police diary, a criminal Court is not justified in reading confessions and statements found there in and using such material to disbelieve the prosecution case or the defence case. The procedure adopted by the trial Magistrate is wholly unjustified in law.

Thus, the law position emerging from Section 172(2) of the Code could not have permitted the trial Court to use that confessional statement of the appellant before the police to be used or accepted as evidence to find out what offence the appellant has committed.

15. The nature and gravity of the injury has already been noted. The deceased succumbed to the injuries. Neck is a vital part of human body and as it appears the death of the deceased was instantaneous because of the fatal injury on the nape of the neck. No acceptable evidence is available that the appellant committed the murder in the feats of anger having been provoked by the deceased. In that connection, the admissible confessional statement of the accused, is of no relevance and cannot be referred to in view of the settled position of law. Thus, no departure should be made from the categorical finding recorded by the trial Court that appellant is guilty of the offence of murder punishable under Section 302, I.P.C.

16. In the result, there is nothing to interfere with the impugned conviction and sentence. Hence, the appeal is dismissed.

S. N. Phukan, C. J.

17. I agree.