

Dhani Alias Dhaneswar Naik Vs. the State

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Court : Orissa

Decided On : Aug-20-1998

Reported in : 1999CriLJ2712

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

Acts : [Evidence Act, 1872](#) - Sections 118; [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 304 and 307

Appeal No. : Criminal Appeal No. 161 of 1993

Appellant : Dhani Alias Dhaneswar Naik

Respondent : The State

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : B. Panda, ;D. Das, ;A.C. Rath and ;S.R. Mohapatra, Advs.

Judgement :

A. Pasayat, J.

1. Relationship of Buli Dei (P.W.1) with Dhani alias Dhaneswar Naik (hereinafter referred to as the 'accused'), and Lalu alias Susant Kumar Behera (hereinafter referred to as the 'deceased') at different points of the is stated to be the background of murder which took place on 23-7-1992. The accused was found

guilty for commission of offence punishable under Section 302, Indian Penal Code, 1860 (in short, 'IPC'), and was convicted and sentenced to imprisonment for life by learned Sessions Judge, Cuttack.

2. The background facts sans unnecessary details are as follows :

Buli was living with the deceased having fallen in love with him. Earlier she had lived with the accused. Though Buli was living with the deceased, the accused continued to visit her. On 22-7-1992 in the night, i.e., one day prior to the date of occurrence, there was quarrel between Buli and the deceased. She told other people of the locality that while she was living with the accused, there was no ill-treatment by him, but when she lived with the deceased, he was torturing her. Next day, that is on the date of incident, there was an altercation between Buli and the deceased. At this time accused took a sword from his residence and proceeded towards canal embankment. After a short while, Arsti Dai, wife of Ajaya Behera informed Rita Nayak (P.W. 5) that the accused plunged a sword into the belly of the deceased as a result of which he fell down being severely injured. P.W. 5, the informant and her mother-in-law rushed to the spot and administered water to the injured. At that time there was profuse bleeding from the abdomen. After arrival of the police, the injured was sent to the Medical College Hospital, but shortly thereafter he was declared dead. On the basis of information lodged by P.W. 5, investigation was undertaken. Initially a case was registered to be one relating to offence under Section 307, IPC, but when the deceased breathed his last the case was converted to one under Section 302, IPC. P.W. 15 was the Sub-Inspector of Police who proceeded to the spot on receipt of telephonic message from Belisahi, i.e. the locality where the occurrence took place. Fifteen witnesses were examined on behalf of the prosecution to further its case.

3. The accused pleaded his innocence and false implication.

4. Manoranjan Das and Kuni Dei, P. Ws. 4 and 6 respectively, are stated to be eye witnesses to the occurrence. Additionally no other features were highlighted by the prosecution to further its case. P.W. 4 is the son of P.W. 1 through her first husband after whose death she lived with accused and deceased at different points of time. It was stated that there was dying declaration by the deceased

before some other witnesses to the effect that the accused was author of the crime. Discovery of the weapon of offence at the instance of the accused while in police custody was made. Wearing apparels of the accused stained with blood were also seized. The learned Sessions Judge, Cuttack placed reliance on the evidence of P.Ws. 4 and 6 and other circumstances, and found the accused guilty, and convicted and sentenced him as aforesaid.

5. In support of the appeal Mr. B. Panda, learned counsel for the accused, submitted that P.Ws. 4 and 6 are not reliable witnesses and on a combined reading of their evidence, it is clear that exaggerations have been made. In any event P.W. 4, who is stated to be eye witness, has been apparently tutored to implicate the accused. He was also not examined by police immediately. Additionally he is a child witness on whose evidence no reliance can be placed particularly when he is a relative. So far as discovery of weapon is concerned, with reference to evidence of P.W. 4 it has been highlighted to show that there was no discovery pursuant to the information given by the accused while in police custody, and on the other hand it was P.W. 11, who did it. The plea of dying declaration is not acceptable as no plausible evidence has been adduced. Chemical Examiner's report did not in any way apply to the case of the accused. Alternatively it is stated that a case under Section 302, IPC is not made out, in view of the background facts stated.

6. P.W. 4 undoubtedly is a child of ten years at the time his examination was made. So far as acceptability of evidence of P.W. 4 is concerned, undisputedly he was a minor boy at the time of alleged commission of offence and while deposing in Court. under Section 118 of the Indian [Evidence Act, 1872](#) (in short, 'Evidence Act') all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from understanding questions put to them, or from giving rational answers. All grounds of incompetency have been swept away by Section 118 under which competency of witnesses is the rule and their incompetency is the exception. Only incompetency that the section highlights is incompetency from premature or defective intellect. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No

precise age-limit can be given, as persons of the same age differ in mental growth and their ability to understand questions and giving rational answers. The sole test is whether witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. The general rule is that the capacity of the person offered as a witness is presumed, i.e., to exclude a witness on the ground of mental or moral incapacity, the existence of the incapacity must be made to appear. under Section 118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto. In the case at hand, P.W. 4 has deposed in Court in a straightforward manner. Answers given by him show his maturity of mind. Therefore, the learned Sessions Judge was justified in placing reliance on his evidence.

7. There is no probation in law that a person who is related to the deceased has to be termed as an unreliable witness. More often than not, a relation is supposed to be a truthful witness. That is because a relation would not normally implicate an innocent person and would shield real culprit. Interestedness should be to get a person convicted. When allegation of interestedness is made, the accused is required to establish it and to show that the witnesses had partisan approach. In such a case, the Court is required to make a careful analysis of the evidence to find out whether allegation of partisan approach is borne out from materials on record. Facts showing that the witness is biased or partial in relation to the parties or the cause has to be elicited in cross-examination or if denied independently proved. It has always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties and to show that he is prejudiced so far as the case being tried is concerned. In *Attorney General v. Hitchcock* (1847) 1 Exch 91 (99) Pollock CJ observed as follows :

It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind.

In view of the position of law indicated above, it cannot be said that the evidence of P.W. 4 is tainted. Though subjected to lengthy cross-examination, he has

elaborately described the scenario, and no crack in his evidence is noticed.

8. P.W. 6 is an independent witness. There is no reason as to why she would falsely implicate the accused. Her evidence is clear and cogent and therefore, there is nothing to discard her evidence. The learned trial Judge has rightly placed reliance on her version.

9. In the aforesaid background, discovery of the weapon is of no consequence, P.W. 11 has categorically stated that she did not tell anybody where she had concealed the weapon. In that view of the position, it would be unsafe to accept the prosecution version regarding recovery of the weapon on the basis of information given by the accused while in police custody. Similarly the so-called dying declaration stated to have been made by the deceased is shrouded in mystery. Various statements have been made at different spells of time. It would, therefore, be not safe to accept the prosecution version regarding dying declaration. As has been rightly submitted by the learned counsel for the accused, the forensic report does not further the prosecution version. But all these other aspects recode to the ground in view of cogent evidence of the witnesses to which reference has been made above. The conclusion is inevitable that the accused is the author of the crime.

9A. Next question is whether the accused was guilty of the offence punishable under Section 302, IPC or some other offence. In the scheme of the IPC, 'culpable homicide' is genus, and 'murder' is the species. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally 'culpable homicide sans special characteristics of murder' is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment proportionate to the gravity of this generic offence, IPC practically recognises three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined as 'murder' in Section 300. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the First Part of Section 304. Then there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable

homicide of this degree is punishable under second Part of Section. 304. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the Courts for long. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299 Section 300A person commits Subject to certain excep-culpable homicide if tions culpable homicidethe act by which the is murder if the act bydeath is caused is which the death is done. doneINTENTION(a) with the intention (1) with the intention ofof causing death; causing death; oror(b) with the inten- (2) with the intention of tion of causing causing such bodilysuch bodily injury as the offenderjury as is likely to knows to be likely to cause death; or cause death of the per- son to whom the harmis caused;(3) with the intention ofcausing bodily injuryto any person and thebodily injury intendedto be inflicted is suffi-cient in the ordinarycourse of nature tocause death; or KNOWLEDGE(c) with the knowl- (4) with the knowledgeedge that the act is that the act is so immi-likely to cause nently dangerous thatdeath. it must in all probabil-ity cause death or suchbodily injury as islikely to cause death,and without any ex-cuse for incurring therisk of causing deathor such injury as ismentioned above.(underlining for emphasis)

10. Considering the background facts and the fact that one blow was given on the deceased, in our view the case is covered under Part II of Section 304, IPC. It cannot be laid down as a rule of universal application that whenever one blow is given the case shall not come under Section. 302, IPC, as several aspects have to be considered which are essentially factual in character. It would all depend on facts of each case. In the background facts indicated above, the appropriate conviction would be under Section 304, Part II, IPC. Accordingly we alter the conviction under Section 302, IPC to one under Section 304, Part II, IPC. Custodial sentence of eight years would meet the ends of justice.

The appeal is allowed to the extent indicated above.

S. C. Datta, J.

11. I agree.

