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Court : Orissa

Decided On : Dec-27-2002

Reported in : 2003(I)OLR233

Judge : B. Panigrahi and ;P.K. Misra, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 162; Indian Penal Code (IPC) - Sections 302, 341, 379 and 506

Appeal No. : Criminal Appeal No. 60 of 1994

Appellant : Samir Swaln Alias Samir Kumar Swain

Respondent : State of Orissa

Advocate for Def. : G.K. Mohanty, Addl. Govt. Adv.

Advocate for Pet/Ap. : D. Nayak, ;D.P. Pradhan, ;R.K. Pradhan and ;J. Pal

Disposition : Appeal allowed

Judgement :

P.K. Misra, J.

1. This appeal is directed against the order dated 22.12.1993 passed by the learned Sessions Judge. Dhenkanal, in S.T. Case No. 56 of 1992, whereby the appellant has been convicted under Sections 302, 341, 379 and 506 of the Indian

Penal Code (for short, 'IPC') and sentenced to under- go imprisonment of life for the offence under Section 302, IPC, six months each under Sections 506 and 379, IPC, and three months under Section 341, IPC, the sentences to run concurrently.

2. The appellant and six others had faced trial before the learned Sessions Judge, Dhenkanal, who on consideration of the evidence on record, convicted the appellant alone and acquitted the other accused persons.

3. The prosecution case, as revealed during trial is that on 19.09.1991 at about 9.00 A.M., informant Damodar Swain (P.W.6) and deceased Ananda were going to Dhenkanal on their respective bicycles. On the way near Barakanya hillock, the appellant who had hidden himself behind Amari bushes, all on a sudden appeared being armed with a sword, obstructed their way and threatened the deceased to eliminate his family. All entreaties for forbearance made by the deceased were in vain and the appellant pushed the sword into the abdomen of the deceased. When the appellant attempted a second blow, the deceased caught hold of the sword. On protest being raised by the informant, the appellant fled away towards Dhenkanal with the sword in his hand. As a result of the injuries inflicted on the deceased, there was profuse bleeding, not only from the abdomen but. also from the right hand fingers. He was removed to the Dhenkanal District Headquarters Hospital on a rickshaw after being given first aid. However, he succumbed to the injuries in the hospital. It is the prosecution case that the occurrence was the outcome of a land dispute between the deceased and the appellant. F.I.R. was lodged by P. W. 6 before the O.I.C., Sadar Police-station, Dhenkanal, in the hospital, which was sent to the police-station for registration of a case. The I.O. examined witnesses, made inquest over the dead body, sent the same for post mortem examination and seized some incriminating materials including the weapon of offence. Incourse of investigation it was revealed that the other accused persons (since acquitted), who are the relations of the appellant, had instigated the appellant and abetted the commission of murder. On completion of investigation chargesheet was placed against all the accused persons.

4. The defence plea was one of complete denial.

5. In order to prove the case, prosecution had examined as many as eleven witnesses, of whom P.Ws.3 and 6 had claimed to be the eye-witnesses to the occurrence. P.W.4 a post-occurrence witness, P.Ws. 1, 5 and 9, seizure witnesses, P.W. 7, the blacksmith who had prepared a sword at the behest of the appellant, P.Ws.8 and 10. inquest witnesses, P.W. 2 the doctor who conducted post mortem examination over the dead body, and P.W. 11 the Investigation Officer.

6. Before discussing the merits of the appeal, it has to be first discussed as to whether the deceased Ananda met a homicidal death or not. In this connection, the evidence of P.W. 2, the doctor who conducted post mortem examination over the dead body, is quite relevant. From his evidence it is transpired that he found four injuries including a stab wound on the abdomen of the deceased. The intestine had protruded and there were two nicks with contusion on the protruding portion. On dissection, he found that the abdominal cavity was filled with liquid blood, visceral organs like stomach, spleen, kidney, bladder and large intestine were in tact and pale. About 2' away from the deodenum, the small intestine was cut exposing the lumen on one of its surface. There was a cut in the mesenteric close to its line of fixation. The superior mesenteric vessel and its intestinal ramification were severed leading to profuse intra abdominal haemorrhage. In addition, he had an incised wound on the base of palmar aspect of right little finger extending medially of the size of 3/4 cm to 1 cm x skin depth. According to P.W. 2 all the injuries were ante mortem in nature and cause of death was due to haemorrhage and shock. The sword (M.O.I) was referred to him for opinion and he opined that the injuries found on the deceased could be possible by the same. Thus, it has been established that the deceased met a homicidal death.

7. Now, let us advert to the other evidence adduced by the prosecution. P.W. 3 has claimed to be an eye-witness to the occurrence. While discussing his testimony, it has to be considered how far the statement of this witness can be relied upon. It is seen that he is a chance witness going to a blacksmith's workshop for an iron ream for his bullock-cart. It is strange to note that he was not able to say the name of the blacksmith to whose workshop he was going on that day and how much he paid to him. His village was about 4 Kms. away from the

place of occurrence. There was no reason for P.W.3 to cover such a distance for getting an iron ream, particularly when he was suffering from rheumatism. It is also seen from his evidence that he was examined by police five days after the occurrence when for the first time he disclosed about seeing the incident. It is unrealistic, unnatural and against normal human conduct, that a person witnessing a ghastly crime would not disclose the fact to any one and observe complete silence for a period of five days, It is also revealed from his evidence that even though there was hue and cry in the village about the incident, he did not disclose before anybody to have seen the same. The cross-examining counsel had shown a spectacle to this witness from a distance of 7' to determine whether he was able to see the object. But P.W.3 could not identify the same. In such circumstances, it is unrealistic to comprehend that he could have witnessed the occurrence from a distance of 15'. There has been no unequivocal or rigid norm that the testimony of a chance witness should be totally rejected. It has to be considered in the facts and circumstances of each case. But. in this case. due to the above reasons, it shall be highly unsafe to place reliance on the version of P.W.3. While assessing the credibility of the testimony of this witness, another striking feature cannot be overruled, P.W.6, who claimed to be present at the scene of occurrence from the beginning till end, has not. stated anything about the presence of P.W.3. Therefore, we decline to place any reliance on the version of P.W.3.

8. From the testimony of P.W.4 it has appeared that he reached the spot immediately after the occurrence and found Ananda Swain, the injured, sitting beneath a tree. He learnt, from Juang (P.W.6) that, the appellant had stabbed a knife into Ananda's abdomen. Ananda was then unable to talk. He has declared hostile since he did not stick to his previous statement. However, since this witness has no direct knowledge regarding the assault on Ananda, his evidence is of little assistance to the prosecution while determining the culpability of the appellant. P.W. 5 is also a post-occurrence witness and has claimed to have reached the hospital after having learnt about the incident from P.W.6. His testimony, which has been embodied in the trial Court's judgment, discloses that report was lodged before the police by P.W.6 where he also figured as a signatory. He has further claimed to be present at the time of seizure of the sword (M.O.I.). According to him, he himself went inside the well to recover the sword. It is true

that M.O.I. was seized under Ext.5. But, it has to be seen whether the same sword had been used for commission of the crime. From the evidence of P.W.2, it has transpired that the sword (M.O.I.) was referred to him to opine whether the injuries found on the deceased could be possible by the same, to which he has answered in the affirmative. But. the prosecution has examined P.W.7. who had supplied a sword to the appellant, who has unequivocally deposed that M.O.I was not the same sword which had been supplied by him. Thus, it can safely be inferred that the sword which the appellant had allegedly brought from P.W.7 was not used by him. The statement, which the prosecution wants to make use of against the appellant. does not help it in any manner.

9. P.W.6 is the star witness for the prosecution on whose testimony the prosecution relies heavily to bring home the charge to the appellant. It is albeit true that in case the testimony of a single eye-witness is found true, conviction can certainly lie against the accused. In this case, from the evidence of P.W.6. it has. however, appeared that at about 9.00 A.M., on the fateful morning while he was proceeding to his office with the deceased, they were waylaid on a turning near Barakanya hillock. The appellant suddenly appeared being armed with a. sword and intercepted their way. At that time, deceased Ananda entreated the appellant not to cause any assault. But the appellant, paying a deaf ear to such request, pushed the sword into the abdomen of Ananda and thereafter pulled it out. When he attempted for a second blow, the deceased tried to ward it off. as a reason whereof the sword hit his right palm. After giving the blows, the appellant disappeared from the scene of incident by taking away the bicycle of the deceased. At that time P.W.4 came near the spot, to whose query he replied that the appellant had poked the sword into the abdomen of Ananda. Driver Mallik, who was a rickshaw puller picked up the deceased and took him to Dhenkanal Hospital. It is found that Driver Mallik has not been examined. It was morning office and P.W.6 was supposed to report to duty at 7.00 A.M. Though P.W.6 has stated that he had taken permission to reach office late, nothing has been produced from the office where he was working to establish that in fact such permission was sought. According to P.W.6, after leaving the deceased at the hospital. he reported to duties and after some time again came back to the hospital. Police arrived after he reached the hospital. While ascertaining the truth

or otherwise of the evidence of P.W.6, his statements made in course of cross-examination must be taken, into account. It is elicited that after Ananda received the injuries, he was brought to the hospital and admitted there by P.W.6. Thereafter he proceeded to his office. Subsequently, Indramani (P.W. 10). Nrusingha (not examined) and Harihar (P.W.5), reached the hospital. P.W. 10 was the brother of the deceased while the other two persons were his cousins. At about 11.30 A.M. P.W.6 left for his office and came back to the hospital at 12.00 noon. The distance between the hospital and the office was about 1 1/2 Kms. By the time he came back from the office, the statement of other witness was being recorded. P.W. 10 had taken his signature on some blank papers. It was 12.30 P.M. to 1.00 P.M. when he lodged the F.I.R. (Ext.4).

10. At this stage, it has to be considered as to when and where the F.I.R. was lodged and whether it is hit by Section 162, Cr.P.C. In this connection, the evidence of P.W. 11 must be taken into consideration. It is elicited from him that on 19.09.1991 at about 11.20 A.M. he received a telephonic message from the I.I.C. that a person of Tarava after receiving stab injury had been admitted to Dhenkanal Hospital where he collapsed. The message was diarised vide S.D. Entry No. 703 dated 19.09.1991. From Entry No. 704, it appears that the O.I.C., Sadar P.S., proceeded to the spot for investigation. Thus, whether the S.D. Entry itself would be treated as F.I.R. or not requires careful consideration. In this respect, we rely upon a recent decision of the Supreme Court in T.T. Antony v. State of Kerala and Ors., AIR 2001 SC 2637 wherein it has been held :

'Apart from a vague information by a phone call or cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr. P.C. All their information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of Cr. P.C. No such information/statement can properly be treated as an F.I R. and entered in the station house diary again, as it would in effect be a second FIR and

the same cannot be in conformity with the scheme of the Cr. P.C. The scheme of the Cr. P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr. P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of Cr. P.C, as the case may be, and forward his report to the concerned Magistrate under Section 173(2) of Cr. P.C. However, even after filing such a report if he comes into possession of further information or material, he need not 'register a fresh FIR, he is empowered to make further investigation, normally with the leave of the Court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of Sub- section (8) of Section 173, Cr. P.C. Under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr. P.C. only the earlier or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154, Cr. P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offence. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr. P.C.'

11. Thus, a trite position has emerged that on receipt of information about the cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the Station House Entry, the Officer-in-charge has to investigate not merely the cognizable offence reported in the F.I.R. but also other connected offences found to have been committed in course of the same transaction. Any further information after commencement of investigation is bound to be hit by Section 162, Cr.P.C. In this case, it is lucidly clear that P.W. 11 first received the information from the I.I.C. that a person met a homicidal death, which

was arisen, and thereafter P.W. 11 proceeded for investigation. P.W. 10 had taken the signature of P.W. 6 on some blank papers. Either one such paper might have been utilised to prepare Ext.4 or it might have been introduced during the course of investigation to suit the purpose of the prosecution after due deliberation, consultation and discussion.

12. The evidence of P.W.6 has further clarified that by the time he reached the hospital, other persons, such as, Indramani (P.W. 10), Hari (P.W.5) and Nrusingha (not examined) were being examined by the police. In that event, Ext. 4 is a mere statement, which could not have been treated as F.I.R. P.W.6 also claimed to have admitted the injured Ananda. in the hospital at 10.30 A.M. when he had informed the doctor the circumstances in which Ananda received the injuries and the name of the assailant, and the doctor had noted down his report. It is not understood why the report, which was given to the doctor has been withheld from being produced in Court. Since that was the earliest statement purported to have been made by P.W.6, it could have been treated as F.I.R. As already discussed, there is nothing to show that P.W. 6 had taken permission to attend office late on that day. His usual office having started at 7.00 A.M.. it was unlikely for him to accompany the deceased at 9.00 A.M.

13. The defence has produced a letter purported to have been sent by P.W.6 to one Mangulu Charan Samal. P.W.6 has admitted that he had written the said letter, but has offered an explanation that the letter had been snatched from him under constant threat 4 to 5 months back. While considering his statement, first of all we have to take note of the fact that the letter was addressed to the son-in-law of his maternal uncle, who was not unknown to him. There was no report till the date of his examination that such letter was procured by Mangulu by using force. On a mere look to the letter it bears the post-office seal of despatch and receipt. When it was despatched, the ordinary presumption would be that the addressee must have received it. Learned trial Judge has marginalised the merit of such letter while considering the F.I.R. In the letter, it has been unambiguously stated that some unknown assailants had killed Ananda. Taking this statement into consideration along with the further evidence of P.W.6 that his signature was taken by P.W. 10 on four blank papers, it can safely be concluded that one such

blank paper must have been utilised to write out the F.I.R. In this background, the prosecution story that appellant Samir had committed the offence of murder cannot be believed.

14. Another significant feature is that blood stains have been found on the sword (M.O.I.). From the evidence it is seen that the sword was submerged under water for some days whereafter it was recovered. It is quite unlikely that even after the sword is deepened into water for quite some time, there would still be blood stains on the same. As already discussed, P.W.7 has stated that M.O.I, was not the same sword which was given by him to the appellant. No other independent witness except P.W.5 has stated about the seizure of a sword from the well. Therefore, recovery of the same cannot be taken as an incriminating material while considering the involvement of the appellant in the crime.

15. For the foregoing discussion, we are of the opinion that the prosecution has not been able to bring home the charge to the appellant. The appeal is, therefore, allowed and the order of conviction and sentence of the appellant is hereby set aside. He be released from jail custody and set at liberty forthwith, if his detention is not required in connection with any other case.

B. Panigrahi, J.

16. I agree

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