

Sana Kabasi Vs. State

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Court : Orissa

Decided On : Dec-08-2008

Reported in : 2009(I)OLR562

Judge : P.K. Tripathy and; Sanju Panda, JJ.

Appellant : Sana Kabasi

Respondent : State

Advocate for Pet/Ap. : Mr. Sarangi

Disposition : Appeal allowed

Judgement :

P.K. Tripathy, J.

1. Conviction of accused Pandu Kabasi @ Burunda (appellant in Criminal Appeal No.471 of 2006) and Sana Kabasi (appellant in Jail Criminal Appeal No.70 of 2006) for offence under Sections 302/201/34, IPC and sentence of imprisonment for life along with order to pay of fine under Sections 302/34, IPC and sentence of rigorous imprisonment for seven years together with fine for the offence under Sections 201/34, IPC is under challenge. Pandu Kabasi is on bail as per order dated 26.6.2007 passed in Misc. Case No. 1005 of 2006 arising out of Criminal Appeal No.471 of 2006. That case together with the Jail Criminal Appeal No.70 of

2006 has been listed to consider correctness of the order of conviction and to hear and dispose of the Criminal Appeal at such stage.

2. Mr. Sarangi, learned Counsel for the appellants, supplied copies of the depositions of the witnesses and the impugned judgment of conviction to Mr. Nanda, learned Addl. Government Advocate on a previous date. Therefore, learned Counsel for the both the parties agree for hearing and disposal of both the Criminal Appeals though only Misc. Case No.61 of 2008 is listed for Orders and the case record of both the Criminal Appeals are available to the Court (being listed). Since the LCR is available, we heard the parties in the above indicated manner and both the Criminal Appeals are being disposed of in the following manner.

3. Prosecution case in brief is that on 21.5.2004 Ganga Kabasi, the deceased had gone to the Block Office at Mathili (in the district of Malkangiri) but did not return to the house. Managudu. Kabasi (P.W.5) is the son of the deceased. He searched for the missing father (the deceased) and when could not find any trace of the deceased, on 26.5.2004 he submitted a missing report. On 30.5.2004 one Dulla Kabasi, a co-villager of P.W.5 intimated, P.W.5 that a dead body had been buried at the canal embankment near the cultivable land of one Trinath Majhi. P.W.5 with some of the co-villagers went to the spot and spotted the exposed limbs of a dead body and removing the sand and looking to the wearing apparels, he became convinced that, that was the dead body of his father. On the requisition of P.W.5 a village Panch was convened and in that, accused-Sana Kabasi made extra judicial confession that he together with accused-Pandu Kabasi killed the deceased by shooting arrow and causing injury and that Guja Kabasi (P.W.2) was an eye-witness to the that occurrence. Thereafter on 1.6.2004 P.W.5 presented the written report and on the basis of that, investigation was taken up.

4. In course of the investigation, inquest on the dead body of the deceased was conducted in presence of Sarat Kumar Padhi (P.W.3), who was then the Addl. Tahasildar-cum-Executive Magistrate at Malkangiri and post-mortem was conducted by Dr. Arun Kumar Mishra (P.W.4). Ext.3 is the inquest report and Ext.4 is the post-mortem report. In view of the extra judicial confession made by

accused Sana Kabasi after his arrest, he was interrogated and in course of that interrogation, he made statement leading to discovery of a bow and two arrows. Such statement of that accused was marked as Ext.8 and the seizure list as Ext.9. Besides that, the nail clippings of the accused persons were seized so also the bloodstained wearing apparels of the deceased and together with the blood stain sample all the articles were sent to the Regional Forensic Science Laboratory, Berhampur for chemical analysis and serological test. Ext.18 is the report from the R.F.S.L, Berhampur. The Investigating Officer produced the bow and arrow and sought for the opinion of P.W.4 and in his opinion report Ext.5, P.W.4 opined that the arrows can possibly cause the injury which was found on the dead body of the deceased. That arrow is marked as M.O.I, and bow as M.O.II. Wearing Apparels of the deceased are marked as M. Os. III to V.

5. On assessment of evidence led by the prosecution, learned Addl. Sessions Judge recorded the finding that notwithstanding the hostility of P.Ws-2 and 5 prosecution case has been proved from the evidence of P.W.4 that the deceased suffered homicidal death and from Ext.8 read with the Statement under Section 164 Cr. P.C. of P.W.2 recorded by the Magistrate and marked as Ext. 15 that accused persons are the author of the injuries and accordingly learned Addl. Sessions Judge recorded conviction against both the appellants and sentenced them in the manner already indicated. Learned Counsel for the appellants argues that save and except proving that the deceased suffered homicidal death, prosecution has not led any acceptable evidence on record to connect the accused persons with such homicidal death of the deceased and therefore, way ward reasons of the trial Court on improper finding be set aside and the accused persons be acquitted. In view of the position of evidence on record, Mr. Nanda, learned Addl. Government Advocate could not place an argument so as to resist the aforesaid criticism on the impugned judgment.

6. On perusal of the evidence, we find that P.W.1 as a witness to the extra judicial confession so also P.W.5, i.e., son of the deceased relating to such extra judicial confession have turned hostile to the prosecution. So much so that, P.W.5 in his evidence stated that 'I know the deceased. My father died about three years back, and a Panchayat was convened. Both of them attended the Panchayat but they

did not tell anything'. It is obvious that by merely proving homicidal death of the deceased from the evidence of P.W.4, prosecution cannot succeed.

7. Circumstantial evidence is not necessary to prove a fact when there is existence of direct evidence. However, circumstantial evidence becomes relevant when there is no direct evidence or for some reason such direct evidence is excluded from consideration. In this case P.W.2 the solitary eye-witness to the occurrence declined to support the prosecution and stated that he knows nothing about the case. His statement, in course of investigation, had been recorded under Section 164 Cr.PVC. and is marked as Ext.15. Trial Court heavily relied on that document to prove the prosecution case. Submission of Mr. Sarangi is that such statement cannot be read as substantive evidence in view of the settled position of law. That position of law is not disputed by learned Adol. Government Advocate. Therefore, if Ext.15 is eliminated and the evidence of P.Ws.1 and 5 does not prove the extra judicial confession then there remains only two more circumstances, such as discovery of weapon of offence under Section 27 of the Evidence Act and the report from the R.F.S.L., Ext. 18. Between the two, the report Ext. 18 indicates that though human blood was found in the wearing apparels of the deceased and the arrow M.O.I, but the group of blood could not be determined either because of the deteriorated condition or non-availability of sufficient quantity. In Ext. 18 however no blood was detected in the arrow which was found in broken condition. According to the prosecution allegations, arrow in broken conditions was the weapon of offence used to cause the injury. Under such circumstance Ext. 18 is of no help to build up a circumstance as against the accused persons or in favour of the prosecution. Under such circumstance, notwithstanding several deficiencies and legal lacunae in Exts.8 and 9, i.e., evidence leading to discovery under Section 27 of the Evidence Act, the lone circumstance in this case does not substantiate the chain of circumstances or result in bringing on record a circumstance to prove guilt of the accused. Under such circumstance, on a threadbare analysis of evidence on record, this Court finds that there is no evidence on record to connect the accused persons with the crime and therefore, the order of conviction is not sustainable.

8. Accordingly, both the Jail Criminal Appeal and Criminal Appeal are allowed by setting aside the order of conviction under Section 302/ 201/34 IPC and the respective sentence imposed thereon and the accuseds, persons are acquitted from the charges by granting benefit of doubt.

9. AS noted earlier, accused appellant-Pandu Kabasi being on bail, his bail bonds are discharged and so far as accused appellant-Sana Kabasi is concerned, he is directed to be set at liberty forthwith, if his detention in jail custody is not required in connection with any other criminal case.

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