

(2004) 09 OHC CK 0025

In the Orissa High Court

Case No : Criminal Appeal No. 165 of 1998

Baikunthanath Jena alias Dhuna and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 29-09-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2004) CLT 1299 (Suppl CrI) : (2004) 29 OCR 658 : (2004) 2 OLR 570 : (2004) OLR 1299 (Suppl CrI)

Hon'ble Judges : P.K. Tripathy, J;A.K. Samantray, J

Bench : Division Bench

Advocate : Dharanidhar Nayak, M. Mohanty, B.K. Das, P.K. Mohanty, D.P. Pradhan and C.R. Sahu, for the Appellant; Government Advocate, for the Respondent

Judgement

A.K. Samantray, J.—The subject matter of challenge in this appeal is the order of conviction and sentence u/s 302/34, I.P.C. in Sessions Trial No. 51/10 of 1997 on 20.6.1998 of the Court of 2nd Addl. Sessions Judge, Cuttack.

2. The factual foundation of the prosecution case is furnished in the following paragraph.

On 8.8.1996 in the late evening at about 8.00 p.m. Pitabas Mallik, the deceased (hereinafter referred to as such) suffered a homicidal death due to anti mortem injuries near the High School at a little distance from "Akhandalamani" temple of the village Itua under Tangi P.S. of Cuttack district. The prosecution came up with allegation that the Appellants sharing common intention inflicted injuries by deadly cutting and stabbing weapons and iron rod and committed the murder of the deceased. Prosecution has alleged that when deceased was in front of the tea stall of Nabakishore Panda (P.W.11), the accused persons arrived there and accused Dhruba dealt a push to the deceased, as a result the deceased fell in the

adjoining ditch and all the accused persons jumped into the ditch and launched attack on him by "gupti", knife and fist dealing blows indiscriminately. The deceased managed to crawl out of the ditch and came to the platform in front of the temple and while was seeking divine protection against the attack, kneeling down there, accused Keshab dealt a blow by an iron rod (M.O.II) to the back side of the head of the deceased and all the accused persons fled the spot. The deceased in injured state was carried to Tangi Hospital where he was received dead. Immediately thereafter F.I.R. was lodged at Tangi Police Station at 9.30 P.M. and after registration of case and investigation, the I.O. submitted charge sheet against the Appellants. On being committed to the Court of Session, the Appellants were charged for the offence punishable u/s 302/34, I.P.C. by the learned 2nd Addl. Sessions Judge, Cuttack and faced trial.

3. The plea of the accused persons is one of complete denial and false implication.

4. To substantiate the accusation, the prosecution examined as many as 15 witnesses and exhibited several documents, out of which the F.I.R. (Ext.1), Seizure List u/s 27 of the Evidence Act (Ext.4 series), Post Mortem Report (Ext.8), Spot Map (Ext.11/2) and the Chemical Examination Report (Ext.13) are most relevant pieces of evidence. One axe and an iron rod have been identified as M. Os. I and II, which are said to be the weapon of offence.

5. Accused persons did not adduce any defence evidence.

6. The doctor (P.W.7), who proved the Post mortem Report-Ext.8, indicates in his evidence that he conducted post mortem and found as many as seven external injuries situated respectively on left parietal region and scapular region besides on the back, vide Injury No. 4, affecting the lungs. He also found corresponding internal injuries and, in his opinion all the injuries were ante mortem and such injuries conjointly contributed to the death of the deceased, though Injury Nos. 2, 3 and 4 were individually fatal and sufficient to cause death in the ordinary course of nature. He also opined that the injuries on the back of the head (Injuries No. 1) are possible by iron rod (M.O.-II). The above noted evidence of P.W. 7 undoubtedly proves that the deceased suffered a homicidal death. Mr. Dharanidhar Nayak, learned Counsel for the Appellants stated that the Appellants do not at all quarrel on that aspect and also do not oppose to the recording of finding that deceased suffered a homicidal death. He argued that merely because the deceased suffered a homicidal death, the Appellants cannot be convicted for an offence u/s 302 of the I.P.C. unless there is connecting evidence to bring home the charge against them. We find substance in his contention.

7. The learned Addl. Sessions Judge, on appreciation of evidence of P. Ws. 6, 8, 9 and 10, has branded them as eye-witnesses to the occurrence and relying on their evidence recorded the finding that evidence of such witnesses are complementary and supplementary to each other and corroborated to the fact and circumstance that Appellants are the assailants and because of the assault and attack inflicted by them, the deceased suffered the injuries and succumbed

to death. While attacking to that finding of the trial Court, the learned Counsel for the Appellants argued that this is a manifested case of perversity in as much as on a bare glance at the evidence of such witnesses, no such circumstance emerges in favour of the prosecution. In course of argument he placed the evidence of each of the witnesses, and we have patiently perused the same along with him. It appears on a bare reading of the evidence of P. Ws. 6, 8, 9 and 10 that their evidence in the examination-in-chief though is not complete in all respects to attribute specific allegation of assault on each of them for any of the injuries suffered by the deceased, then also the omnibus statement of assault in their examination-in-chief has been completely shattered in the cross-examination in as much as during the course of cross-examination such witnesses were confronted with their previous statements recorded u/s 161, Code of Criminal Procedure by the Investigating Officer to indicate that they did not make statements as eye-witnesses while examined by the police (I.O., P.W. 15). Though each of them specifically denied to the suggestion, the I.O. P.W. 15, in course of his cross-examination, has admitted that none of these witnesses had stated before him about seeing the assault or attack by the accused persons with or without weapons on the deceased. Posted with this circumstance, the learned Addl. Government Advocate concedes that the deficiency and infirmity in the evidence of P. Ws. 6, 8, 9 and 10 has remained unexplained on the score, as to why there was absence of such statements u/s 161, Code of Criminal Procedure though they were eye-witnesses to the occurrence. in a case of this nature when a person is charged with such serious offence like murder, prosecution cannot be conducted in such a casual manner leaving it to the realm of conjecture to the Court to draw inference as to who the culprits are. It is the duty of the prosecution to bring clear and cogent evidence and, if not available, to explain the circumstances and to fall back on circumstantial evidence. Of course, Mr. Das, learned Addl. Government Advocate incidentally argued that evidence of P.W. 12 can be accepted as the evidence of an eye-witness. On perusal of the evidence of P.W. 12, we find that the same is not in any better footing than that of P. Ws. 6, 8, 9 and 10.

8. Learned Counsel for the Appellants also argues that, according to the case of the prosecution the occurrence took place in front of the tea stall of Naba Kishore Panda (P.W. 11). According to the Spot Map (Ext. 11/2) the tea stall and the betel shop so also the ditch are all situated in a close circuit and persons available at any of those places would have seen the occurrence. According to the owner of the tea stall, who has been examined as P.W. 11, he was present in his shop at the time of occurrence but he was not examined by the police or the prosecution as an eye-witness to the occurrence. He therefore emphasizes that the evidence of P.W. Nos. 6, 8, 9, 10 and 12 when does not improve the prosecution case to fasten the charge to the accused persons, that factor appears more stronger in favour of the Appellants when prosecution does not come with any explanation for non-examination of the eye-witnesses to the occurrence so also non-examination of the betel shop owner as a witness, who

was present at the time of occurrence and near the spot. Learned Addl. Govt. Advocate has also no answer to that criticism levelled against the prosecution.

9. Prosecution has strongly relied on the evidence u/s 27 of the Indian Evidence Act, vide Ext. 4, and recovery of M.O.-II. That evidence indicates that about a month after the occurrence the iron rod was recovered from the ditch, adjoining the temple and adjacent to the tea stall, which is being visited by public at large. There is nothing on record to indicate that the discovery of the weapon of offence could not have been made unless there would have been a leading to discovery. The Investigating Officer and before him the A.S.I. of Police, the Scientific Officers and the Dog Squad had visited the spot of occurrence more than once, and at no point of time that weapon of offence was discovered. In course of the investigation if the eye-witnesses could account for the occurrence as well, they could have stated about the conduct of the accused in throwing the iron rod into the ditch and running away. Because of such circumstance, the evidence u/s 27 of the Evidence Act does not remain free from doubt.

10. Therefore on analysis of the evidence of P. Ws. 6, 8, 9, 10 and 12, we find that the same does not inspire confidence with us to accept them as eye-witnesses to the occurrence to sustain the order of conviction recorded against the Appellants. We also find that though the deceased suffered homicidal death, yet due to improper investigation and slack prosecution the evidence is too slender to fasten an order of conviction to the Appellants and, as such, we extend the benefit of doubt to them.

11. This aspect was not at all visualized or appreciated by the learned Addl. Sessions Judge and indeed by reading the evidence, which are not on record, he recorded finding of corroboration and consistency in the evidence of said eye-witnesses and wrongly recorded the order of conviction.

12. In the net result, we set aside the impugned judgment and order of conviction and acquit the Appellants from the charge u/s 302/34, I.P.C. by granting them the benefit of doubt. All the accused persons/Appellants be set at liberty forthwith, if their detention in the custody is not required in connection with any other criminal cases.

P.K. Tripathy, J.

13. I agree.