

(1988) 04 OHC CK 0011

In the Orissa High Court

Case No : Jail Criminal Appeal No. 174 of 1983

Bibhisen and Mutru Mahanta

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 14-04-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302

Citation : (1988) 1 OCR 447

Hon'ble Judges : L. Rath, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : K.C. Mohanty, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The Appellant having been convicted u/s 302 IPC and sentenced to imprisonment for life has preferred this appeal from jail. The case against the Appellant as developed by the prosecution is that he is the nephew (husband's younger brother's son) of the deceased Parbati who was aged about eighty years, and was cultivating her lands. Since the deceased let out her lands to one Champai Oram on Shag basis, the Appellant had protested and nourished a grudge against her for which in the morning of 10.3.82 at about 10 or 10-30 a.m. he came to her house with an axe, M.O. I. and threatened to kill her since she did not give him any land. As Parbati out of fear entered inside her house, he broke open the door, entered inside and axed her down while she was shouting for being rescued as she was being killed. The incident was seen by P.W. 6, her nephew having the adjoining house, and who was chased a way on threat of assault by the Appellant when he went to the courtyard of Parbati asking the Appellant as to why he was assaulting her.

2. Besides the ocular statement of the sole eyewitness P.W. 6, the case against the Appellant is sought to be established through the evidence of P.W. 1, the

medical officer who conducted the post-mortem examination. P.Ws. 2 and 3 who were witnesses to production of the axe M.O. I by the Appellant while in custody; P.W. 4 examined to prove the motive on the part of the Appellant to commit the crime; P.W. 5 the person before whom an extra judicial confession by the Appellant was made; P.W. 7 the Gramarakshi who was informed by P.Ws. 4 and 5 of the fact of the Appellant having killed Parbati and who lodged the FIR and P.W. 8, the investigating officer. P.W. 9 is the R.I. who on police requisition had prepared the spot map, Ext.16.

3. In his defence the Appellant denied the occurrence contending the same to have been stated falsely against him, and maintaining to have gone away to Bonai having boarded the bus in the morning at 7.30 to 8.00 a.m. at Amgaon and having returned on the same day and of having been arrested by the police after getting down from the bus when he was proceeding to the hospital to a relation.

4. The learned Sessions Judge in finding the Appellant guilty has besides accepting the eye-witness account of P.W. 6 has also relied up the extra-judicial confession of the Appellant, the recovery of the weapon at his instance and also on his conduct of fleeing away from the village to Amgaon immediately after the occurrence.

5. P.W. 5 is the witness to the confession of the Appellant. It is his evidence that on the date of occurrence at about 10 or 10.30 a.m. the accused while passing him while the latter was sitting in his courtyard, said of having killed the old women in her house. The witness explained the word "old women" as referring to the deceased. An extra-judicial confession to be acceptable has to be beyond any possible reproach or apprehension of being tainted. It is admitted by the witness that his brother had been kept by Parbati in her house and his marriage was also performed by her and that the Appellant had protested to such action of the deceased. A decision had also been taken by the villagers in a meeting to drive out the brother of the witness from the house of Parbati in accordance with which decision the brother was so driven out. A suggestion was of course made to this witness of he and his brother having assaulted the Appellant about two years prior to the occurrence but such suggestion has not been substantiated. The evidence, even though not conclusive of any animosity between the witness and that of the Appellant, yet is sufficient to be wary of the confession to put credence therein keeping in view the guidelines enumerated by the Supreme Court in State of U.P. Vs. M.K. Anthony, that an extra-judicial confession can form the basis of conviction if the witness appears to be unbiased, not even remotely inimical to the accused and against whom nothing is brought out which may tend to indicate that he may have a motive to attribute untruthful statements to the accused. Besides, nothing has been shown as to why the Appellant would repose any confidence in P.W. 5 to confess to the crime keeping in view the fact that confession to the offence is not an ordinary human conduct which usually occurs in daily life.

6. The recovery of M.O. I, at the instance of the Appellant has been deposed to by P.Ws. 2, 3 and 8. u/s 27 of the Evidence Act only that much of information as given by the accused while in custody which leads to the discovery of the weapon is admissible in evidence. Both P.W. 2 and 3 merely state that the Appellant while in custody made a statement and brought out the axe from his house. What statement was made has not been deposed to. P.W. 3 in cross-examination stated the Appellant to have opened the door of the house and given recovery of the axe. P.W. 8 the I.O., has only stated of having seized the weapon consequent upon production of the same by the accused. There is thus no evidence as to what information had been given by the Appellant as a consequence of which the weapon was recovered. The evidence regarding giving recovery of the weapon by the Appellant while in custody is not admissible u/s 27. The fact that at the time of seizure of the axe the same was blood-stained which is also found from the Serologist's report is also of no consequence since there is no report that the blood was human blood.

7. The other circumstance relied upon is regarding the Appellant having left for village Amgaon immediately after the occurrence. P.W. 5, the witness for the purpose, has only stated of having seen the Appellant passing on the road towards village Amgaon. Such a fact by itself nor the fact that the Appellant was arrested at Amgaon would establish that he was fleeing away from the scene of occurrence. In his 313 Code of Criminal Procedure statement the Appellant stated of his wife having gone to the house of his father-in-law at Bonai and that on that date he had taken the bus at Amgaon in the morning and had gone to Bonai. His daughter was at home and he returned on the very day but was arrested when he got down from the bus. There does not appear to be anything improbable in such version of the Appellant. Hence, I do not think this to be an adverse conduct on the part of the Appellant.

8. P.W. 7, the Gramarakshi who had lodged the FIR is supposed to have been informed by P.Ws. 4 and 5 who came to his house and informed him of the Appellant having killed Parbati and that he having gone to the spot along with these two witnesses and after seeing the dead body, having gone to the police station and lodged the information. P.W. 4 however did not say anything about either being informed by P.W. 5 regarding the incident or having accompanied him to the Gramarakshi.

9. As regards the motive of the Appellant to kill the deceased it has been purported to be brought out through the evidence of P.W. 4 who stated that Parbati was being helped in her cultivation by Surendra, a brother of her husband, and by the Appellant, Surendra and his brother left for Singhbhum about two years prior to the date of occurrence, however again stated of Surendra having cultivated the lands of Pari during the year of occurrence and that after harvest was over, he left village and after that Parbati let out the lands to Champai Oram on Bhag. The Appellant had protested to such action of the deceased and threatened her saying that he would see her. This very statement

was given a go-by by the witness in the cross-examination admitting that he had heard the Appellant protesting to the lease of the land of Parbati to Champai Oram and also of not having heard him saying that he would see Parbati. The witness also stated that he never heard the Appellant quarrelling with Parbati or his brother. In view of such statements of the witness the motive or the Appellant to kill the deceased on account of her letting out the land on Bhag to another is not established.

10. If the above facts do not count against the Appellant, there remains the sole testimony of P.W. 6. It must be said that the evidence of P.W. 6 is consistent and there is nothing, in the cross-examination I detract the same. Of course his evidence has been assailed by Mr. K.C. Mohanty, learned Counsel appearing for the Appellant, that though he supposed to have informed the villagers of the whole fact after they had returned from Hat that day, yet such evidence of any villager is not coming forth and the villagers examined as P.Ws. 2, 3, 4 and 5 do not state this witness either telling them or the other villagers of the facts. The question has not been put to the witnesses and hence merely because such witnesses did not corroborate. P.W. 6 on his statement I do not think it is adequate to reject his testimony. It is also no requirement of law that a conviction cannot be based upon the evidence of a single witness if he appears trustworthy and free from any bias. It is however the prosecution case that Parbati was issueless as is found from the evidence of P.W. 4 and that while the Appellant was her husband's brother's son, P.W. 6, was also her brother's Son. Thus, both the Appellant and the witness were close relations of the deceased and since the deceased was issueless both the persons had fair chance of succeeding to the Appellant on her demise. Under such circumstances, it cannot be ruled out that P.W. 6 is a person who had an interest adverse to that of the Appellant and hence it would be extremely risky to base the conviction of the Appellant on the sole testimony of P.W. 6. It was observed in *Ramji Surjya Padvi and Another Vs. State of Maharashtra*, :

There is no doubt even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned provided against the accused concerned provided the Court which hears such witness regards him as honest and truthful. But prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or ill-will is suggested.

Because of such circumstances, it cannot be said that the prosecution has established the crime against the Appellant, as the author thereof through unimpeachable evidence and hence the appeal must succeed.

11. In the result the appeal is allowed and the conviction and sentence of the Appellant are set aside. The Appellant be set at liberty forthwith.

G.B. Patnaik, J.

12. I agree.