

(1977) 05 OHC CK 0005
In the Orissa High Court
Case No : Criminal Appeal No. 365 of 1992

Himansu Sekhar Swain

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 05-05-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 300, 302, 304

Citation : (1977) 05 OHC CK 0005

Hon'ble Judges : C.J.MANUOR01391977.htm, J;A. Pasayat, J

Bench : Division Bench

Advocate : S. Panda and D. Panda, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—Out of nine persons, who faced trial for allegedly having committed offences punishable under Sections 148/302/149 and 337/ 149 of the Indian Penal Code, 1860 (in short, IPC) eight were acquitted while the present Appellant Himansu Sekhar Swain (hereinafter referred to as the "accused by name"), was found guilty of offence punishable u/s 302, IPC and sentenced to imprisonment for life by learned Additional Sessions Judge, Jajpur. Undisputedly one Lambodar Routrai (hereinafter referred to as the "deceased") lost his life on 19.4.1990. and the accused-Appellant alongwith -acquitted eight persons were alleged to be responsible for his death.

2. In a nut-shell, the prosecution," version is as follows:

On 10.4.1980, at about 8 a.m. deceased was going to the house of one Bishnu Charan Samantrai with Ashok Kumar Swain (P.W.1). When they arrived near the house of Sashi Samantrai, accused Pradipta Swain (since acquitted) was found reading a newspaper sitting on a bolder. Sashi was present there with a lathi, Pradipta caught hold of the deceased. P.W.1 tried to separate them, but was dealt a push by Sashi. Accused Himansu was holding a Farsa. Prafulla Swain and

Krushna Swain (both acquitted) were also holding Farsas. Pratap, was holding Katari, and Maheswar, Pramod and Khageswar were holding a lathi each. They rushed to the spot, and started assaulting the deceased indiscriminately with those weapons causing severe bleeding injuries all over his body, Swyangprava (P.W.3), and deceased's wife Urmila (P.W.7) lifted him from the place where he was lying in a pool of blood. At that time accused Himansu dealt the last blow. Deceased was removed to Agipadia Chhak and thereafter to S.C.B. Medical College Hospital, but on the way he breathed his last. Manglabag Police conducted inquest and post mortem examination over the dead body. The officer-in-charge of Barchana Police Station arrived at the spot before whom P.W.1 lodged first-information-report. On the basis of F.I.R. investigation was undertaken and charge-sheet was placed. Eleven witnesses were examined to further the prosecution version.

3. Accused persons pleaded innocence. They took a definite stand that Bishnu Samantrai was a rich man and influential person of their village and on account of political differences, between them, they have been falsely implicated.

4. It was indicated by prosecution that the deceased had some differences with some of the accused persons on account of cutting some trees. Further, in the year 1989, at the time of car festival accused Krushna Swain, father of Himansu Swain, assaulted the brother of P.W.1. Because of hostility, the accused persons bore grudge and therefore, killing was done. The learned trial Judge after analysing the evidence of witnesses came to hold that the prosecution failed to establish its case against eight of the accused persons. It was observed that the evidence was clear, cogent and clinching so far as accused-Appellant is concerned. Accordingly, he convicted and sentenced the accused as indicated above.

5. In support of the appeal, Mr. Brahmananda Panda, learned Counsel urged that the motive attributed has too remote live-link for alleged killing and in any event same has not been established. The evidence is discrepant, and is of such shaky nature that eight out of nine accused were acquitted, and therefore, it would be unsafe to convict the accused-Appellant on the self-same evidence. Lastly it is submitted that even if the prosecution version is accepted in toto a case u/s 302, IPC has not been made out. The doctor has categorically stated that none of the injuries individually could have been sufficient for causing death.

Mr. S.C. Satpathy, learned Counsel for State supported the judgment of conviction and sentence.

6. First question is whether even if the plea of absence of motive is accepted, it is a mitigating factor so far as the accused is concerned.

Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of Anr. . Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed

without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice-Champbell struck, a note of caution in *Red v. Palmer* (Shorthand Report at Page 308 COO May, 1856) thus: "But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is, of little importance. We know, from experience of Criminal courts that atrocious crimes of this sort, have been, committed from very slight motives; not merely from malice and revenge, but gain a small pecuniary advantage, and to drive off for a time pressing difficulties". Though, it is a sound proportion that every criminal act is done with a motive it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon." Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant. In *Atley Vs. State of Uttar Pradesh*, , it was held "that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty, but absence of clear proof of motive does not necessarily lead to the contrary conclusion". In some cases it may not be difficult to establish motive through direct evidence; while in some Pothier cases inferences from circumstances may help in discerning the mental propensity of the person concerned: There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes it may appear that the motive established is a weak one. That by itself is insufficient to lead to an inference adverse to the prosecution. Absence of motive, even if it is accepted, does not come to aid of the accused,

7. It is emphatically urged that the evidence is partisan, lacks cogency and credibility. Acquittal of eight out of nine accused persons is the foundation for such plea.

8. Coming to applicability of the principle of *falsus in uno falsus in omnibus*, even if major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of large number of other co-accused persons; his conviction can be maintained; However, where large number of other, persons are-accused, the-Court has to carefully screen the evidence. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity, of particular material witness or material particular would not ruin it from the beginning to end. The maxim "*falsus in uno falsus in omnibus*" has no application in India and the witnesses cannot be branded as liar.

The maxim "*falsus uno unfalsus in omnibus*"(false in one thing, false in everything) has not received general acceptance in different jurisdiction in India,

nor has this maxim come, to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given act of circumstances, but "it is not what may be called a mandatory rule of evidence". (See Nisar Ali Vs. The State of Uttar Pradesh, . "Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted It is always open to a Court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh and Another Vs. State of Punjab, . The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect. It is to be feared that administration of criminal justice would come to a dead-stop. The witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy, of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all aspects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab and Another Vs. The State of Madhya Pradesh, and Ugar Ahir and Others Vs. The State of Bihar, . An attempt has to be made to in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is discard the evidence in toto. (See Zwinglee Ariel Vs. State of Madhya Pradesh, ; and Balaka Singh and Others Vs. The State of Punjab, . As observed by the apex Court in State of Rajasthan Vs. Smt. Kalki and Another, , normal discrepancies in evidence, are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

9. The last plea relates to applicability of Section 302, IPC. In the scheme of the IPC. "culpable homicide is genus, and "murder" is the species. All "murders" are "culpable homicide" but not vice versa. Speaking generally "culpable homicide"

sans special characteristics of murder is "culpable homicide not admitting 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 200

Section 300

INTENTION

A person commits culpable homicide if the act by which the death is caused is done.....

Subject to certain exceptions culpable homicide is murder if the act by which the death is done

(a) with the intention of causing death; or

(1) with the intention of causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or

(2) with the intention of causing such bodily injury as the offender knows to be likely cause death of the person to whom the harm is caused; or

(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death: or

KNOWLEDGE

(c) with the knowledge that the act is likely to cause death.

(4) with the knowledge that the act is "so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death of such injury as" is mentioned above.

(Underlining for emphasis)

10. It is pointed out by the learned Counsel for the accused-Appellant that the

doctor has categorically opined that each individual injury could not be the cause of death. The collective result may have been fatal. Clause Thirdly of Section 300 postulates that a particular injury which resulted, in death should have been intended. In view of opinion of the doctor, it cannot be said with certainty that any particular injury was intended to cause death. Large number of superficial or simple injuries cannot per se be determinative of the intention. But the accused can certainly be attributed with the knowledge to bring in application of Section 304. IPC. In the peculiar circumstances of the case, the conviction u/s 302. IPC is scaled down to 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.N. Phukan, C.J.

11. I agree.