

(2013) 09 OHC CK 0009

In the Orissa High Court

Case No : Criminal Appeal No. 277 of 1996

Radheshyam Bhoi and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2014) 1 CCR 44 : (2013) 116 CLT 697 : (2014) 1 ILR (Ori) 64

Hon'ble Judges : Sanju Panda, J;B.R. Sarangi, J

Bench : Division Bench

Advocate : Zaffrulah, A.S.C., for the Respondent

Judgement

B.R. Sarangi, J.—This appeal is directed against the Judgment & Order Dated 28.09.1996 passed by the Learned Addl. Sessions Judge, Sambalpur in S.T. Case No. 238/14 of 1995-96 convicting the Appellants for commission of offence under Sections 341/34, 302/34 & 323/34 I.P.C. & sentencing them to undergo imprisonment for life u/s 302/34-I.P.C., R.I. for three months u/s 323/34 I.P.C. & due to imposition of higher sentence for the offence u/s 302/34 I.P.C. no separate sentence has been awarded u/s 341/34 I.P.C. It was further directed that the sentences shall run concurrently & the Appellants are entitled to the benefit of set off u/s 428 Cr.P.C. The case of the prosecution, in nut-shell, is that on 19.05.1995 at about 10.30 P.M. one Dusmant Bhoi along with one Lalatendu Majhi, Sarpanch Kinaloi appeared at Katarbaga P.S. & orally reported to the O.I.C. that on that day in the evening he along with Babaji Bhoi was returning to village Kinaloi from Rengalpali in a cycle & at about 7.30 P.M. when they arrived near Jamumunda culvert, Bhagban Singh, Radheshyam Bhoi & Nira Bijar of Kinaloi being armed with hockey stick, bhujali & tangia wrongfully restrained them. Bhagban Singh & Radheshyam Bhoi went on assaulting Babaji Bhoi who cried "A Bua-A Bua", Nira Bijar assaulted Dusmant's waist by the handle of the tangia & drove him out from the spot & warned him not to disclose it to anybody else. On returning to the spot, Nira Bijar also assaulted Babaji Bhoi with a tangia, who ultimately succumbed to the injuries. Thereafter said Dusmant ran to the

village & intimated the incident to his maternal uncle, Bhramarbar Bhoi & thereafter to Dayananda Bhoi, the father of Babaji Bhoi & returned to the spot with the villagers with lantern & torch light. On search, they noticed that Babaji Bhoi was lying dead on the side of the road near the culvert with bleeding injuries on different parts of his body. The O.I.C., Katarbaga Police Station reduced the oral report of Dusmant Bhoi into writing & read over the same to Dusmant & Lalantendu Majhi & obtained their signatures on it. Treating the said report as F.I.R., registered the case & took up investigation. On completion of investigation, the Investigating Officer submitted charge-sheet against the Appellants for the offence under Sections 341/323/302/506/34, IPC.

2. The plea of the accused Appellants is of complete denial. They stated that in order to harass them the police had manufactured the papers & utilized those papers against them.

3. In order to bring home the charges levelled against the Appellants, the prosecution examined fourteen witnesses whereas defence examined none. Out of the witnesses examined by the prosecution, P.W. 9 is the informant, P.W. 2 is the Ex-Sarpanch, who had accompanied P.W. 9 to the Police station for lodging the, F.I.R., P.W. 1 is the father of the deceased & a witness to the inquest. P.Ws. 3, 4 & 10 are the witnesses to the extra judicial confession. P.Ws. 5 & 6 are the witnesses to the leading to discovery & seizure of the weapon of offence & blood stained cloths, P.W. 7 is another witness to the inquest, P.W. 8 is the witness to the seizure of the blood stained chapal & towel, P.W. 11 is the medical officer of Katarbaga P.H.C., who had examined P.W. 9 & collected the nail clippings, P.W. 13 is the medical officer of the District Headquarters Hospital, Jharsuguda, who had conducted post mortem examination of the dead body of the deceased Babaji Bhoi, P.W. 12 is the O.I.C., who registered the case & conducted investigation & P.W. 14 is the O.I.C., Katarbaga Police Station, who submitted charge-sheet.

4. Taking into consideration the evidence of the witnesses, the Trial Court held that the prosecution has proved its case beyond all reasonable doubt & therefore, convicted the Appellants for the offence u/s 302/34, 323/34 & 341/34, IPC & sentenced the Appellants as mentioned earlier.

5. The appeal being a year old matter, priority was given for hearing & accordingly, the matter was listed on 31.7.2013 for hearing but none appeared for the Appellants to conduct the case. On perusal of the case record, it is found that this Court vide Order Dated 27.11.1996 directed the Learned Addl. Sessions Judge, Sambalpur to release the Appellants on bail of Rs. 10,000 each with one surety each for the like amount to the satisfaction of the Learned Addl. Sessions Judge in S.T. Case No. 238/14 of 1995-96. Since none appeared on 31.7.2013, this Court directed to cancel the bail & to apprehend the Appellants immediately & posted the matter to 14.08.2013 for hearing. Even on 14.08.2013 none appeared for the Appellants but on the request of Learned Counsel for the State, the matter was adjourned to 21.08.2013 for hearing on which date in absence of the Appellants or the Counsel appearing for them, on perusing the case record

hearing was concluded.

6. Mr. Zafarullah, Learned Addl. Standing Counsel appearing for the State supported the finding of the Trial Court & vehemently argued that the appeal should be dismissed. He further urged that it is not disputed that the death of the deceased was homicidal in nature & the only question which is required to be determined in this case is as to whether the prosecution has been able to prove that the Appellants caused the death of the deceased to death with requisite intention.

7. Dusmant Bhoi, the informant, who was examined as P.W. 9 in this case, is the only eye witness to the occurrence. In examination-in-chief he specifically stated that he knows the deceased but does not know the accused persons standing in the dock & does not know to which village they belong. He also stated that the deceased is dead about one year back but he does not know how he died & he also stated that he has not reported the fact of death of the deceased at the police station but he admits his signature appearing in the F.I.R. Ext. 2/2 dated 19.5.1995. Further he has also narrated how the F.I.R. was drawn by the police & has stated that when he was in his house, police called him to the police station & asked him to sign on five blank papers & with coercion he signed on the same & accordingly he admitted that Ext.2/1 is his signature on the F.I.R. & also admitted his signature in the inquest report Ext. 1/4. But in his examination u/s 154 of the Evidence Act, he has stated that he did not state orally before the police that on the date of occurrence evening he was returning with the deceased in a cycle from Rengalpali that at Damamunda culvert, the accused Appellants being armed with bhujali, tangia & hockey stick obstructed them & accused Nira Bijar dealt a blow on his waist on the wooden handle of the tangi (axe). Accused Bhagban & Radheshyam assaulted the deceased by means of bhujali & hockey stick for which the deceased shouted "Marigali, Marigali", that accused Nira Bijar threatened him not to tell the incident to anybody else & he asked him to go away. On returned to the spot he found Bhagban & Radheshyam were assaulting the deceased, thereafter he came to village & reported the incident to his maternal uncle & others & to the father of the deceased. On being informed the villagers went to the spot with a lantern & torchlight & searched the deceased at the culvert & saw the dead body of the deceased lying on the side of the road near culvert with bleeding injury & that a pair of chapal as well as a piece of broken hockey stick was lying at the spot.

8. The Gram Rakhi, Chudamani Kata, Mahendra Sahu arrived at the spot & on the advice of the villagers, P.W. 9 went to the police station with Sarpanch & orally reported the incident, which was reduced to writing by the police. Litigation relating to landed properties between Bhagban Singh & his mother was continuing & in that the deceased was helping the mother of Bhagban Singh & due to that grudge, the deceased was murdered. P.W. 9 was the eye witness to the occurrence, who has also sustained injuries on the body & examined by the doctor. Fxt.2/2 is the F.I.R., which was reduced into writing on his report by the

O.I.C., P.W. 12, in presence of Sarpanch, P.W. 2. In examination-in-chief, P.W. 9 has stated that he did not know the accused persons but at the same time he admitted that he knew the deceased. Therefore, P.W. 9 has been declared hostile.

9. It is in the evidence of P.W. 1 the father of the deceased that on receipt of information given by P.W. 9, he came to the spot & found the dead body of the deceased lying with bleeding injuries on the side of the road near the culvert. During inquest over the dead body by the police he was present. Chandan Singh Padhan (P.W. 7) has also stated that in their presence, the O.I.C conducted the inquest over the dead body of the deceased. Multiple bleeding injuries were noticed over the dead body. P.W. 13, the Medical Officer has opined that the death of the deceased was due to multiple injuries on his person. Ext.18 is the post mortem report, which reveals the injuries on the person of the deceased.

10. All efforts have been made by the prosecution to establish the allegations through the eye-witness to the occurrence, i.e. P.W. 9, who has been declared hostile. No chain of circumstances are made available to prove the charge on the basis of circumstantial evidence. However, to prove the allegation, reliance has been placed on the evidence of P.Ws. 3 & 4, who were witnesses to the extra judicial confession & the evidence of P.Ws. 5 & 6 the statement of whom were recorded u/s 27 of the Indian Evidence Act on the basis of which leading to discovery of the weapon of offence was made. Subsequently, they have also been declared hostile & they were examined by the prosecution u/s 154 of the Indian Evidence Act.

11. During investigation P.W. 12, the I.O., had also seized the turkis towel of Appellant-Radheshyam in presence of P.W. 8 vide seizure list, Ext.9/1 & reliance has been placed on the report of the chemical examiner, Ext.17 & it appears that there is a missing link to form the chain to establish the case against the accused-Appellants. The only eye-witness to the occurrence P.W. 9 has been declared hostile. There is no other circumstantial evidence available to form the chain to entangle the Appellants for conviction of the offence committed u/s 302/34 I.P.C. & 323/34 I.P.C.

12. Now, the question for consideration is with regard to the admissibility of the evidence adduced by the hostile witnesses. In paragraph-12 of Gura Singh Vs. The State of Rajasthan, the Apex Court has stated that "The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness" "unwilling witness" are all terms of English Law. In para 11 of the aforesaid decision the Apex Court observed that it is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. The evidence remains admissible in the trial & there is no legal bar to base the conviction upon the testimony of such witness.

13. The Apex Court has also considered the evidentiary value of hostile witness in Bhagwan Singh Vs. The State of Haryana, Shri Rabindra Kumar Dey Vs. State

of Orissa, & held that the evidence of a witness, who was declared hostile is not wholly effaced from the record & that part of the evidence, which is otherwise acceptable, can be acted upon. In Syad Akbar Vs. State of Karnataka, the Apex Court held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile & cross-examined him. The evidence of such witness cannot be treated as effaced & washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. The same view has also taken in the case of Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh,

14. In the case of Bhajju @ Karan Singh Vs. State of M.P., the Apex Court held as follows:

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the Appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution & his own statement recorded u/s 161 Cr.P.C., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile & for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In words, there is a limited examination-in-chief, cross-examination by the prosecutor & cross-examination by the Counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial & there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called & cross-examined by the party with the leave of the Court, cannot be believed or disbelieved in part & has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution & is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the Judgment of the Apex Court in the following cases: (a) Koli Lakhmanbhai Chanabhai v. State of Gujarat, (b) Prithi v. State of Haryana, (c) Manu Sharma v. State (NCT of Delhi) & (d) Ramkrishna v. State of Maharashtra. In view of the law governed the field, the evidence of P.W. 9 cannot be acceptable.

15. Mr. Zafarullah, Learned Additional Standing Counsel has relied upon the Judgment in the case of Vasa Chandrasekhar Rao Vs. Ponna Satyanarayana and Another, & stated that even in absence of any eye-witness to the occurrence taking into consideration the circumstantial evidence, conviction can be sustained & rightly therefore the Learned Court below has convicted & sentenced the Appellants. Apart from the same, he has also relied upon the Judgment in the case of Rama Chandra Nayak v. State of Orissa, (2012) 51 OCR 8 & stated that the only eye-witness P.W. 9 did not support the prosecution case for which he has been declared hostile & cross-examined. Even though he has stated about the complicity of the accused-Appellants in his statement recorded u/s 161 Cr.P.C. it cannot be taken as a piece of substantive evidence.

16. On perusal of the records available & relying upon paragraphs 10 & 11 of the impugned Judgment, it is found that basing on the evidence of the sole eye witness P.W. 9, who did not support the prosecution case, conviction has been made. Therefore, the prosecution has failed to prove its case beyond all reasonable doubt as the solitary eye-witness turned hostile to the prosecution & that apart the extra judicial confession made by P.Ws. 3, 4 & 10 is inadmissible in evidence. Therefore, the punishment so imposed cannot be sustained & the Appellants should be acquitted of the charges leveled against them. In view of such position, this Court comes to a conclusion that conviction of the Appellants under Sections 302/34 & 323/34 I.P.C. cannot be sustained. In the result, we allow the appeal, & set aside the order of conviction & sentence passed by the Learned Additional Sessions Judge, Sambalpur in S.T. Case No. 238/14 of 1995-96.

Sanju Panda, J.

I agree.