

(2010) 03 OHC CK 0020

In the Orissa High Court

Case No : Jail Criminal Appeal No. 307 of 1998

Rohita ' Sumanta Dalai ' Das and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-03-2010

Acts Referred:

Evidence Act, 1872 — Section 27

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

Citation : (2010) 1 ILR (Ori) 660 : (2011) 6 RCR(Criminal) 2343

Hon'ble Judges : Pradip Mohanty, J;B.P. Ray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pradip Mohanty, J.—In this appeal from jail, the Appellants challenge the judgment and order dated 27.08.1998 passed by learned Second Addl. Sessions Judge, Cuttack in S.T. No. 185 of 1997 convicting them u/s 302/34, IPC and sentencing them to undergo imprisonment for life.

2. Prosecution case in brief is that on 06.10.1996 at about 3.00 PM both the Appellants called the deceased from his house. The deceased accompanied them. After half an hour of departure of the deceased, one Bharati, who was otherwise called as Bhaga, came and reported the mother of the deceased (P.W.1) that her son was lying in a pool of blood near the house of Mangal Singh. P.W.1, her husband (P.W.2) and their son-in-law (P.W.8) rushed to the spot and found the deceased was lying in a pool of blood. His intestine had come out and there was also injury on the neck. On query, the deceased disclosed that Rohit and Kusa (present Appellants) had stabbed him. The deceased was shifted to S.C.B. Medical College Hospital. P.W.2, the father of the deceased, orally reported the matter in the hospital itself to the I.I.C., Chauliaganj P.S. which was reduced to writing by an A.S.I, of police. On the basis of the said report, the case was initially registered u/s 307/34, IPC and after the death of the deceased it turned to one u/s 302/34, IPC. Police took up investigation and after its completion

submitted charge-sheet against both the Appellants.

3. Plea of the Appellants is complete denial of their involvement in the commission of the offence.

4. In order to prove its case, prosecution examined as many as eleven witnesses including the doctor and the I.O. and exhibited fifteen documents. Defence examined none.

5. Charge was framed against the Appellants u/s 302/34, IPC. The learned Addl. Sessions Judge after conclusion of the trial convicted both the Appellants u/s 302/34, IPC and sentenced them to undergo imprisonment for life basing upon the evidence of P. Ws.1, 2, 6 and 8 as well as leading to discovery and dying declaration.

6. Miss. Tripathy, learned Counsel for the Appellants assails the judgment on the following grounds:

(i) Non-examination of the material witness, namely, Bhaga, who informed the parents and brother-in-law of the deceased that the deceased was lying in a pool of blood, is fatal to the prosecution.

(ii) The oral dying declaration said to have been made by the deceased before his relations cannot be accepted, since there is no independent corroboration.

(iii) Dying declaration as recorded by the doctor without giving certificate with regard to fitness of mind of the deceased has lost its sanctity and cannot be relied upon.

(iv) The requirements for application of Section 27 of the Evidence Act have not been fulfilled inasmuch as there is no material to show that the accused led the police to the place of concealment and gave recovery of the weapon of offence (knife).

(v) There is no material to implicate Appellant No. 2-Kusa " Sanjay Bhoi u/s 302/34, IPC.

(vi) Motive behind the crime has not been proved by the prosecution.

7. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that the dying declaration recorded by the doctor clearly discloses involvement of both the Appellants. There is no material to disbelieve the evidence of P. Ws.1, 2 and 8 which is corroborated by P.W.6, an independent witness. Leading to discovery and seizure of the weapon of offence on production by Appellant No. 1 has been proved under Ext.8. In the instant case, chain of circumstances is complete leading to the only hypothesis that the Appellants alone are the perpetrators of the crime. The trial court has rightly passed an order of conviction and there is no reason for this Court to interfere with the same.

8. Perused the LCR. P.W.2 is the father of the deceased. He is the informant. He deposed that at 4.00 PM when he was present in his house both the Appellants

came and called his son. After putting on pant and shirt the deceased went with the Appellants. After some moments, Soubhagini and Bhaga came and informed that Kusa and Rohita had assaulted the deceased and he was lying injured near the house of Mangal Singh. Getting this information, he along with his wife and son-in-law went to the spot. The deceased was conscious and was lying injured in a pool of blood. His stomach was cut and intestine had come out. The deceased disclosed before him (P.W.2) that Kusa and Rohita had inflicted the injuries by means of knife and fled away. At that time, S.P.'s vehicle was crossing. The people stopped the said vehicle and shifted the injured in it to the hospital. In the hospital, he lodged FIR before the I.I.C., Chauliaganj P.S. vide Ext.1. After some time, the deceased succumbed to the injuries. Nothing substantial has been brought out by way of cross-examination from the mouth of P.W.2 to disbelieve his evidence. The defence, however, confronted him with his statement regarding disclosure of the names of the assailants by Soubhagya and Bhagabati. His evidence gets corroboration from the FIR. P.W.1 is the mother of the deceased and wife of the informant (P.W.2). She corroborated the statement of P.W.2 in material particulars. She specifically stated that the deceased was called by Kusa and Rohita as also about the disclosure of the names of the assailants by the deceased. Nothing has been elicited by way of cross-examination to disbelieve her evidence. P.W.8 is the brother-in-law of the deceased and son-in-law of P. Ws.1 and 2. He corroborated the evidence of P.W.2. There is no material to discard the evidence of P.W.8. P.W.6 is an independent witness who arrived at the spot and found the parents of the deceased holding the injured. He also admitted presence of P.W.8 and shifting of the deceased to the hospital by a police van. He specifically stated that the deceased was alive at the time of admission in the hospital and died after some time. He further stated that the deceased disclosed the names of Rohita and Kusa in presence of everybody at the spot. He is also a witness to the seizure of the wearing apparels of the deceased and has proved Ext.7. Attempt was made by the defence to damage the evidence of P.W.6 but it was intact with regard to the dying declaration. P.W.3 is a police constable and P.W.4 is the S.I. of police. Both of them are witnesses to the inquest and seizure of wearing apparels of the deceased. P.W.5 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:

- (1) A cut wound of size 7 cm x 1 cm x skull bone deep situated on the left side tempera auricular area transversely cutting the middle part of the pina of left ear.
- (2) One penetrating wound of size 5 cm x 2.25 cm x abdominal cavity deep situated on the left side epigastric region, close to mid line and 5 cm above the umbilicus and 92 cm above the left heel.
- (3) A superficial cut of size 1.25 cm x 0.2 cm x skin deep situated on the right hand thumb.
- (4) A superficial cut wound of size 4 cm x 0.25 cm x skin deep situated on the front of left arm and shoulder.

(5) A superficial cut wound of size 8 cm x 0.5 cm x skin deep situated on the front of the neck more towards right 4 cm above the supra sternal notch.

(6) A superficial tangential cut of size 1 cm x 1 cm on the palmer aspect of right hand middle finger.

He opined that the injuries were ante mortem in nature and could have been caused by pointed and sharp cutting weapon. The cause of death was due to shock and haemorrhage resulting from injury No. 2 and its corresponding internal injury which was fatal to cause death in ordinary case. He specifically opined that the injuries found on the deceased are possible by M.O.I. In cross-examination, he admitted that external injury Nos. 3 to 6 are superficial in nature but could not be caused by fall that too over broken glasses. P.W.7 is a local person and a witness to the leading to discovery. He specifically stated that Appellant No. 1 Rohita while in police custody disclosed that he stabbed the deceased with a knife along with Appellant No. 2, led the police to the place where he had thrown the knife and gave recovery of the same. The knife was seized under Ext.8 Nothing has been elicited by way of cross-examination from his mouth to discard his evidence. P.W.9 is the Assistant Professor of Surgery of the S.C.B. Medical College and Hospital who recorded the dying declaration. He specifically stated that the injured was in a very serious condition and at 5.05 PM he recorded his dying declaration. The deceased disclosed before him how he received the injuries and he recorded the same vide Ext. 10. He proved Ext. 10 and his signature thereon as Ext. 10/1. He further stated that the Resident Surgeon on duty Dr. Kalyan Ananda Mohanty was present at that time. He proved the signature of the Resident Surgeon as Ext. 10/2. In cross-examination, he admitted that there was no endorsement in Ext. 10 that the said declaration was recorded by him and that the injured was in a free state of mind and was capable to make such declaration. This apart, nothing has been elicited from the mouth of P.W.9. P.W.10 is the Investigating Officer. He proved the FIR (Ext.1) and the seizure lists. He stated that after arrest Appellant No. 1 Rohita while in custody disclosed before him in presence of the witnesses about the concealment of the Weapon of offence, led him and other witnesses to the place of concealment and gave recovery of the same. He proved Ext. 12, the voluntary disclosure statement of Appellant No. 1, and also Ext.8, the seizure list prepared in token of seizure of the weapon of offence (M.O.I). He also proved seizure of the wearing apparels of the Appellants vide Ext. 13. In cross-examination, he admitted that he was not present at the time of recording of dying declaration by the doctor. He also denied that the injured was throughout unconscious. Nothing has been brought out through cross-examination by the defence to demolish the evidence of this witness.

9. In the instant case, there is no eye witness to the occurrence. The case is based upon circumstantial evidence. Evidence of P. Ws.1, 2 and 8 is very clear, cogent and consistent. There is no material to disbelieve the evidence of these witnesses to the effect, that the Appellants went to the house of the deceased

and called him, that the deceased accompanied them, that on being informed that the deceased was assaulted by the Appellants and was lying injured near the house of one Mangal Singh they rushed to the spot, and that on being asked the deceased disclosed before them that he was assaulted by the Appellants. This part of the evidence gets corroboration from the evidence of P.W.6. Before the doctor P.W.9, who recorded the dying declaration, the deceased took the names of the Appellants as his assailant. After the Appellants were arrested, Appellant No. 1 led the police and gave recovery of the knife (M.O.I). The knife was identified in court by the witnesses. Added to it, clothings of Appellant No. 1 were seized by the police vide Ext.3 which were stained with blood. True it is that prosecution has not ascribed any motive, but that by itself cannot be a ground to treat the case with doubt. It has been ruled by the apex Court in Laxman Vs. State of Maharashtra, that certification by the doctor in the dying declaration to the effect that the patient was conscious was indeed a hyper technical view. Apart from it, in the case at hand the deceased first disclosed before his parents (P. Ws.1 and 2) and other witnesses (P. Ws.6 and 8) the names of the Appellants as his assailants and the same was reiterated by him in the hospital before the doctor, as is evident from the dying declaration.P. Ws.1, 2 and 8 have categorically disclosed that Kusa (Appellant No. 2) was along with Rohita (Appellant No. 1). The deceased also disclosed the names of both the Appellants. For all these reasons, this Court arrives at the irresistible conclusion that prosecution has been able to prove that both the Appellants with their common intention have committed murder of the deceased.

10. In the result, therefore, the Jail Criminal Appeal is dismissed by sustaining the conviction and sentence of the Appellants as recorded by the trial court u/s 302/34, IPC by the impugned judgment.