

(2011) 03 OHC CK 0065

In the Orissa High Court

Case No : Jail Criminal Appeal No. 283 of 1999

Santa ' Santu Mukherjee, Muna ' Minaketan Saha, Mitu ' Ajit ' Ashok Kumar Nayak and Mitu ' Ajit ' Ashok Kumar Nayak, Bhaskar Rao APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 09-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2011) 03 OHC CK 0065

Hon'ble Judges : L. Mohapatra, J;C.R. Dash, J

Bench : Division Bench

Final Decision : Allowed

Judgement

C.R. Dash, J.—Learned Trial Court found the appellants in all the aforesaid appeals guilt of offence u/s 302/34, I.P.C. and sentenced each of them to suffer imprisonment for life. As all the aforesaid appeals arise out of the Judgment and order of sentence passed by the learned Second Additional Sessions Judge, Cuttack in Sessions Trial No. 115 of 1998, they are taken up together for disposal of this common judgment.

2. The occurrence happened at about 2 A.M. in the night of 13/14.08.1997 near Hotel Lords situated under Purighat P.S. of Cuttack town. Surendra Sen (P.W. 5), who happens to be the elder brother of deceased Anil Kumar Sen, lodged F.I.R. in Purighat P.S. at 7.30 A.M. on 14.08.1997. It is alleged in the F.I.R. that at about 2 A.M. on 13.08.1997, he (P.W. 5) heard from Bhaskar Rao (Appellant in Criminal Appeal No. 317 of 1999) and Kabu (P.W. 3) that Anil Kumar Sen has been thrown near Lords Hotel after being assaulted. Surendra Sen (P.W. 5) rushed near the Lords Hotel and saw his brother Anil Kumar Sen lying with injuries. He (P.W. 5) brought him to the nearby "Chautara" of the "Sathi" and subsequently shifted him to the hospital. The deceased succumbed to the injuries on the same night while undergoing treatment in the hospital. It is further

alleged in the F.I.R. that on 13.08.1997 at about 3 P.M. two unknown persons aged about 20 to 25 years were searching for the deceased. Santa " Santu Mukherjee (Appellant in Jail Criminal Appeal No. 283 of 1999) was also searching for the deceased at about 7 P.M. on 13.08.1997. On receipt of the written report, a case was registered at the P.S. and P.W. 9, the L.I.C. of Purighat P.S. took up investigation. Consequent upon his transfer, he handed over the charge of investigation to his successor (P.W. 10), who, on completion of the investigation, filed charge-sheet on 12.11.1997 implicating the appellants in the offence punishable u/s 302/34, I.P.C.

3. Prosecution has examined ten witnesses to prove the charge. Besides the prosecution witnesses introduced in the preceding paragraph, P.W. 1 is a witness to the relevant seizures vide Exts. 1 and 2. He is also a witness to the inquest over the dead body of the deceased. P.W.2 is the witness, who had seen the deceased Anil Kumar Sen in the company of the appellant Mitu " Ajit " Ashok Kumar Nayak at about 2 P.M. on 13.08.1997. P.W. 6 is another brother of the deceased. At about 8 P.M. on 13.08.1997 he had seen all the four appellants roaming near the bazar in front of Lords Hotel. He is further asserted to have seen appellant Mitu " Ashok armed with a "gupti", appellant Muna " Minaketan armed with a "Bhujali" and other two appellants armed with knives near the spot, after the occurrence. P.W.4 is the Medical Officer, who conducted post-mortem over the dead body of the deceased. P.W. 7 is the Medical Officer, who gave the preliminary treatment to the injured in the Casualty Ward on his being brought there. P.W. 8 is the Scientific Officer, who collected the incriminating materials from the spot.

4. The defence plea is one of complete denial of the charge, but no witness has been examined by the defence.

5. Learned Trial "Court, on consideration of the evidence on record, returned the finding of guilt against all the appellants u/s 302/34, I.P.C.

6. Learned counsels for the appellants in all the appeals submit that there being no eye witness to the occurrence, the case is based entirely on circumstantial evidence and the learned Trial Court having not appreciated the evidence properly, conviction of the appellants u/s 302/34, I.P.C. is not sustainable in the eyes of law.

Learned Addl. Government Advocate on the other hand supports the impugned judgment.

7. P.Ws. 3, 5 and 6 are the witnesses, who came to the spot immediately after the occurrence. In his examination-in-chief, P.W. 3 has testified that deceased Anil had taken a gold ring from Mitu (appellant in CRLA No. 293 of 1999); Mitu had been to the house of Anil a day before the incident and had asked his brother to tell deceased Anil to return the gold ring to him. He has further testified that in the night of occurrence the appellants stabbed the deceased Anil Sen and he sustained injuries. Assertion of P.W. 3 in his examination-in-chief to

the effect that in the night of occurrence all the appellants stabbed the deceased Anil Sen is belied by the facts testified by him in his cross-examination. From the cross-examination of P.W. 3 it is found that till 12 O" clock in the night he (P.W. 3) was in the company of deceased Anil, but he came to the spot again on getting information that Anil is lying injured, and coming to the spot he saw Anil lying on the road having sustained injuries. He further testified in his cross-examination that when he saw Anil, none was there at the spot. From the cross-examination of P.W. 3 and cross-examination of the I.O. (P.W. 9) it is also found that P.W. 3 has been contradicted so far as his evidence regarding his seeing the transaction of stabbing by the appellants is concerned. In view of the nature of evidence P.W. 3 has adduced, he can be held to have proved facts to the extent that deceased Anil sen had taken a gold ring from appellant Mitu " Ashok and deceased Anil had not returned the said gold ring in spite of appellant Mitu approaching deceased Anil's brother for return of the same; and that he saw the deceased lying in injured condition at the spot.

8. P.W. 5 is the informant. He is one of the brothers of the deceased. From his evidence it is clear that he is not an eye-witness to the occurrence. He has testified about the following facts -

(i) At about 2 P.M. on 13.08.1997 appellant Mitu " Ashok and appellant Muna " Minaketan came to his house and told him that Anil Sen (deceased) ha snatched away a gold ring from the finger of Mitu and they further told him "TU BUJHIBU TA BUJHU, NAHELE TAKU AAJI SESA KARIDEBU" (If you do not take up the matter, we shall finish him today).

(ii) At about 6 P.M. on 13.08.1997 he saw appellants Mitu and Muna with two others standing in front of Lords Hotel being armed with different deadly weapons.

(iii) At about 11 P.M. to 12 O" clock in the night he saw the appellants moving near his house with weapons in their hands.

(iv) At about 8 P.M. Subas Das (not examined), Babuli Sen (not examined) and the priest of the temple (not examined) told him that appellants Muna, Mitu, Bhaskar and Santu were searching for his brother and threatened him when he was sitting in the temple to the effect that after he comes out they would kill him.

(v) At 2 A.M. (night of 13/14.08.1997) Kabu (P.W. 3) informed him that deceased Anil is lying on the road with injuries and that the appellants Mitu, Santu, Bhaskar and Muna had attacked him.

So far as the facts narrated in serial No.(i) supra is concerned, P.W. 5 has been contradicted on the point of text of the conversation between him (P.W. 5) and appellants Mitu and Muna and it is to be held that appellants namely Mitu " Ashok Nayak and Muna " Minaketan Saha had not used the words "SESA KARIDEBU" at the time they came to P.W. 5's house at about 2 P.M. on 13.08.1997 to ask P.W. 5 to interfere in the matter.

So far as the facts narrated in serial No. (ii) is concerned, he (P.W. 5) has been contradicted on the point that the appellants were armed with different weapons while standing in front of the Lords Hotel at about 6 P.M. on 13.08.1997.

So far as the facts stated in serial No.(iii) is concerned, P.W. 5 has been contradicted in as much as he had not stated before the Investigating Officer that the appellants were armed with weapons while roaming at about 11 P.M. to 12 O" clock in the night near his house.

So far as the facts stated in serial No.(iv) supra is concerned, Subas Das, Babuli Sen and the priest of the temple having not been examined, the facts stated by them to P.W. 5 is to be dismissed as hearsay.

So far as facts stated in serial No.(v) supra is concerned, Kabu (P.W. 3) himself having not seen the transaction of stabbing by the appellants, it cannot be believed that he (P.W. 3) named the appellants before him (P.W. 5) to have attacked Anil.

After eschewing the contradictions in the evidence of P.W. 5, on a conjoint reading of the evidence of P.W. 5 and the I.O. (P.W. 9), what remains in the evidence of P.W. 5 are thus -

(a) At about 2 P.M. on 13.08.1997 appellants Mitu and Muna came to his house and told him about the fact that Anil Sen (deceased) had snatched away a gold ring from the finger of appellant Mitu and told him to take up the matter for return of the same.

(b) At about 6 P.M. on 13.08.1997 he saw the appellants Mitu and Muna with two other appellants (not named) standing in front of Lords Hotel.

(c) At about 11 P.M. to 12 O" clock in the night he saw the appellants moving near his house.

(d) At about 2 A.M. he came to the spot on being informed by Kabu (P.W. 3) and saw his brother Anil lying injured at the spot.

9. P.W. 6, is the witness, who is asserted to have seen the appellants near the spot immediately after the occurrence. In paragraph-3 of his examination-in-chief, P.W. 6 has testified thus :-

3. When I went to take meal to my house on 13th day, my brother told me that Anil had taken one ring of Mitu, and I did not give much importance in the matter and went to my shop. After I returned at 8 P.M. from my shop on that day I found these four accused were roaming in the Bazar in front of Lords Hotel. When I was taking meal, Subas Das, Deepak Sen and the Priest of the temple came to our house and told that "TO BHA I KANA MUDI NEICHHI, SEMANE ASI DHAMAKEILENI". All the members of my family were present by then, I told them that I will look into the matter. At about 12 O" clock night, I found Anil has not come to our house and these accused persons were moving around near our house having arms in their hands. Then they went away and I came to my

house. At 2 A.M. there was heavy knocking on our door and I found Kabu had come and conveyed us that Mitu, Muna, Santu and Bhaskar had stabbed my brother Anil and he is lying injured near Lords Hotel. So we immediately, i.e., myself and my brother and Kabu proceeded to the spot. My brother Anil was lying in pool of blood on the road having sustained injuries. I told my brother to take Anil to the Medical telling that let me see who were there nearby and I found Mitu with others are there near the spot. Mitu was having a Gupti in his hand, Muna had a bhujali in his hand, two others were holding knife wherefrom drops of blood were falling on the ground. Then they told me "MAAGIHA JEMETI MUDI NEITHILA, GANDI MAREIHELA SEMETI". After the people woke up, those accused fled away....

10. On cross reference to the evidence of the I.O. (P.W. 9), P.W. 6 is found to have been contradicted on many aspects and his evidence, after eschewing the contradictions, can be held to have proved the following facts :-

(i) He saw appellants Muna and Mitu roaring near his house at about 12 O' clock in the night;

(ii) Coming to the spot on being informed by Kabu (P.W. 3) at 2 A.M. he found his brother Anil lying injured at the spot.

(iii) Coming to the main road from the spot, he found appellants Mitu and Muna running away from the spot in the Biscuit Company lane. Mitu was holding a "Gupti". They were saying "MUDI NELA, GANDI MARAILA.

He cannot be believed to the effect that Kabu (P.W. 3) named the appellants before him to have stabbed the deceased in as much as Kabu (P.W. 3) himself has been contradicted on this point. So far as what Subas Das, Babuli Sen and the Priest of the temple told him (P.W. 6) is to be dismissed as hearsay, as aforesaid Subas Das, Babuli Sen and the Priest of the temple have not been examined in the case.

11. P.W.2, in his evidence, has testified that at about 2 P.M. on 13.08.1997 he saw deceased Anil Sen in the company of another person (identified in the Court as appellant Mitu) in front of his shop. At first, they had friendly talk, thereafter Anil Sen showed a finger ring and thereafter they went away from the spot.

12. There is no other evidence except evidence of P.Ws. 3, 5, 6 and 2, which have been pressed by the prosecution to prove the incriminating circumstances. Admittedly, none has seen the occurrence. Bhaskar Rao (appellant in CRLA No. 317 of 1999) and Santa " Santu Mukherjee (appellant in JCRLA No. 283 of 1999) were known to the witnesses including P.Ws. 5 and 6 earlier to the occurrence as they are their Sahi people. P.Ws. 5 and 6 though had not known the aforesaid appellants Mitu " Ajit " Ashok kumar Nayak and Muna " Minaketan Saha by name, they have described their identity by their place of stay/Sahi and other facts. Both of them have been named in the statement of P.Ws. 5 and 6 recorded u/s 161, Cr. P.C. and they have been identified by the witnesses in the dock. So

far as accused Santa " Santu Mukherjee is concerned, he was seen by P.Ws. 5 along with other appellants at 6 P.M. near Hotel Lords on the date of occurrence. Neither he (Appellant Santu) had come to the house of P.Ws. 5 and 6 to ask P.W. 5 to interfere in the matter for return of the gold ring taken by deceased Anil Sen from appellant Mitu " Ajit nor he was found near the spot of occurrence decamping from the spot by P.W. 6. Appellant Bhaskar Rao belongs to the "Sahi" of the deceased. It is mentioned in the F.I.R. that aforesaid appellant Bhaskar Rao along with Kabu helped P.W. 5 in taking the deceased to S.C.B. Medical College & Hospital, Cuttack for treatment. He was also identified in the dock by P.W. 5 to be that Bhaskar Rao. Neither Bhaskar Rao had come to the house of P.Ws. 5 and 6 along with appellants Mitu and Muna to ask P.W. 5 to interfere in the matter of gold ring nor was he seen by P.W. 6 decamping from the spot; Rather, a conjoint reading of the evidence of P.Ws. 5, 6 and 9 makes it clear that appellant Bhaskar Rao along with Kabu had helped the brothers of the deceased in taking the deceased to the hospital for treatment.

13. From the evidence of P.Ws. 2, 3, 5 and 6 in view of our discussion supra following facts are held to have been proved :-

(i) Deceased Anil Sen had taken a gold ring from the appellant Mitu and appellant Mitu with appellant Muna on 13.08.1997 had come to the house of P.Ws. 5 and 6 to ask P.W. 5 to intervene in the matter and see that the gold ring is returned to appellant Mitu.

(ii) At about 6 P.M. on" 13.08.1997 all the appellants were standing in front of the Lords Hotel, which is the spot of occurrence and a place situated near the house of the deceased.

(iii) At about 12 O" clock in the occurrence night, appellants Mitu and Muna were moving near the house of the deceased.

(iv) At 2 A.M. in the night the deceased was found lying in injured condition near the Lords Hotel.

(v) Immediately after the occurrence, the appellants Mitu and Muna were sighted by P.W. 6 near the spot and P.W. 6 heard them saying "MUDI NELA GANDI MAREILA". At that time appellant Mitu was armed with a "Gupti" (a sharp cutting pointed weapon).

(vi) Evidence of the Medical Officer (P.W.4), who conducted post-mortem, is indicative of injuries on the body of the deceased by sharp cutting pointed weapons.

14. Learned counsel for the appellants relying on the case of K.T. Palanisamy v. State of Tamil Nadu, 2008 (1) Crimes 256 (SC), submits that the prosecution having failed to prove the guilt of the accused to the hilt by circumstantial evidence, the conviction of the appellants is bad in law. Learned counsel for the appellants further points out to certain shortcomings in the investigation relating to non-examination of the Guard of the Lords Hotel or the Market Complex, on

the verandah of which the murder of the deceased is alleged to have been committed, non-examination of the priest of the temple, non-seizure of the wearing apparels of the accused persons and non-seizure of the gold ring in question, which the deceased is alleged to have taken from appellant Mitu.

15. So far as the shortcomings in the investigation, as pointed out by learned counsels for the appellants are concerned, non-examination of some of the witnesses or non-seizure of the wearing apparels of the accused persons who were arrested on later dates, and non-seizure of the gold ring in question, do not affect the prosecution case at all. The defence has also not put any question to the I.O. on the aforesaid points and it is well settled in law that investigation cannot be thrown over board on supposed discrepancies if the I.O. has not been given opportunity to explain such discrepancies.

Hon"ble Supreme Court in the case of K.T. Palanisamy (supra) in paragraph-12 of the judgment, has held thus -

12. It is now well settled that in a case where an offence is said to have been established on circumstantial evidence alone, indisputably all the links in the chain must be found to be complete as has been held in Sharad Birdhichand Sarda Vs. State of Maharashtra, , in the following terms :

A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, where the following observations were made :

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These five golden principles, if we may say so, constitute the panchasheel of the proof of a case based on circumstantial evidence.

16. In the present case, it has been proved by the medical evidence of P.Ws. 7 and 4 that the deceased had sustained injuries by different types of sharp-cutting weapons or by one such weapon. The deceased was found lying in injured condition at 2 A.M. in the night of 13/14.08.1997 near Hotel Lords. On the previous day, i.e., on 13.08.1997 appellant Mitu along with appellant Muna had come to the house of P.W. 5 at about 2 P.M. and asked him (P.W. 5) to intervene, as deceased Anil Sen is not returning the gold ring, which he had "snatched away from the finger of appellant Mitu. At about 6 P.M. preceding the night of occurrence all the appellants were found near Hotel Lords, the spot of occurrence. In between 11 P.M. to 12 O'clock in the night of occurrence, appellants Mitu and Muna were found moving near the house of the deceased. From the evidence of P.W. 3 it is found that he (P.W. 3) was in the company of the deceased till 12 O'clock. P.W. 6 saw appellants Mitu and Muna near the spot immediately after the occurrence and he heard them saying "MUDI NELA, GANDI MAREILA". He (P.W. 6) also saw appellant Mitu decamping being armed with a "Gupti" (a sharp cutting pointed weapon).

17. Taking into consideration the five golden principles, as formulated by the Hon'ble Supreme Court of India in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, , so far as appreciation of the circumstantial evidence is concerned and the circumstances proved in the present case, we are of the view that the learned Trial Court has rightly returned the findings of guilt u/s 302/34, I.P.C. against appellants Mitu and Muna. On the face of the facts proved, no conclusion inconsistent with guilt of appellants Mitu and Muna can be drawn. Muna being peasant with Mitu in course of all the vital transactions, he has been rightly held guilty under Sections 302, I.P.C. by aid of Section 34 thereof.

18. So far as appellants Santu and Bhaskar are concerned, they having not participated in the overt act of threatening P.W. 5 to interference in the matter of gold ring, they having not been seen with appellants Mitu and Muna moving near the house of the deceased at about 12 O'clock in the occurrence night, and they having not been sighted by P.W. 6 near the spot immediately after the occurrence while decamping, the prosecution cannot be held to have proved the guilt against them to the hilt. Appellants Santu and Bhaskar are inhabitants of the same "Sahi" where P.Ws. 5 and 6 are residing. They are also friends of deceased Anil Sen and presumably all of them had friendship with appellants Mitu and Muna. Roaming with the appellants Mitu and Muna alone or being present with those appellants alone without committing any overt act cannot therefore be held to be incriminatory against them in the facts and circumstances of the case. Further, it is there on record that appellant Bhaskar Rao had helped P.Ws. 5 and 3 in taking the deceased to the hospital and he was throughout present there in the hospital.

19. In view of our discussions supra, we do not find any justification to interfere

with the judgment impugned by appellant Muna " Minaketan Saha in Crl. Appeal No. 242 of 1999 and impugned by appellant Mitu " Ajit " Ashok Kumar Nayak in Crl. Appeal No. 293 of 1999. Both the aforesaid appeals are therefore dismissed. The bails granted to said appellants in the aforesaid appeals are hear by cancelled. Those appellants be apprehended forthwith to serve the sentence.

So far as Jail Crl. Appeal No. 283 of 1999 and Crl. Appeal No. 317 of 1999 are concerned, in view of our discussions supra, we set aside the conviction of the appellant Santa " Santu Mukherjee (appellant in JCRLA No. 282 of 1999) and appellant Bhaskar Rao (appellant in CRL A No. 317 of 1999) recorded by learned Trial Court u/s 302/34, I.P.C. against them. Both of them are acquitted of the charges and both the appeals are accordingly allowed. They be discharged of the bail bonds executed in their respective appeals.