
(2012) 10 OHC CK 0013
In the Orissa High Court
Case No : JCRLA No. 2 and 13 of 2012

State of Orissa and Others

APPELLANT

Vs

Suka Palei and Others

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 235(2), 302, 354(3)

Citation : (2013) 115 CLT 89 : (2013) CriLJ 549

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

Bench : Division Bench

Advocate : B.P. Pradhan, Addl. Government, Mr. Sangram Das, Addl. Standing Counsel and Ors, for the Appellant; Chandana Panda and Ors., for the Respondent

Final Decision : Allowed

Judgement

C.R. Dash, J.—The Appellant Suka Palei was convicted for the offence u/s 302, I.P.C. for committing murder of three persons of a family. He was condemned to suffer the sentence of death. DSREF No. 2 of 2012 at the instance of the State is for confirmation of death sentence & Jail Criminal Appeal No. 13 of 2012 at the instance of the condemned accused Suka Palei is directed against the Judgment & order of sentence dated 03.03.2012 passed by Learned Sessions Judge, Keonjhar in Sessions Trial No. 81 of 2010. The occurrence happened on 10.12.2009. Appellant Suka Palei committed murder of Fulamani Dehury, her son Ramesh Dehury & her husband Sapana Dehury, suspecting Sapana Dehury, to have practised witchcraft on his (Suka Palei's) son. At about 4.00 A.M. on 10.12.2009 Sapana Dehury (deceased), Abhimanyu Dhamulia (P.W. 1-information), Bhagya Naik, Chhalu Dhamulia (P.W. 5) & Sankhali Dhamudia left the village for Mushaghara Mines in the district of Sundargarh for their engagement there as labourer as a means of their livelihood. Nabati Dehury (P.W. 3), who happens to be one of the daughters of deceased Sapana Dehury had also gone to Mushaghara Mines for labour work. At about 10.00 A.M., Appellant Suka Palei, who is their co-villager came to the aforesaid persons. He

requested them to accompany him for cremation of the dead body of his son Guru, saying that Guru has died. On his request all the aforesaid persons started returning to their village through the Ghat road on foot, as that was the regular road, they used to take for commuting their village to & fro from Mushaghara Mines. On the way at Mandatangar all of them took rest. At that place, accused Suka Palei asked deceased Sapana Dehury to take some Dukta (dry tobacco leaf powder). Appellant Suka Palei asked others to proceed ahead saying that he & Sapana Dehury shall follow them after taking Dukta. When others had proceeded a little distance, they heard shouting of Sapana Dehury "Marigali", "Marigali". They rushed back & found that Sapana Dehury was lying on the foot path & Appellant Suka Palei had raised a stone & was telling that Sapana had practised witchcraft on his son & for that reason he will murder him. So saying he (Suka Palei) thrashed the stone on the head of the Sapana Dehury (deceased). Abhimanyu Dhamulia (P.W. 1) & others shouted at Suka Palei to refrain from his act, but could not reach near him at once as it was a Ghat road. After assaulting the deceased, Appellant Suka Palei ran into the jungle. Coming near Sapana, Abhimanyu (P.W. 1) & others found him to be dead. They came back to the village to report about the incident to others. Coming to the village, they found that many persons had gathered in the Courtyard of one Chemutu Dhamudia & sound of crying was coming from the house of the aforesaid Chemutu Dhamudia. Rushing to that place, they found to their surprise that Sapana Dehury's wife Fulamani Dehury was lying dead in the Courtyard of Chemutu Dhamudia & near her dead body her ten years old son was lying unconscious & was about to die. Puni Dehury (P.W. 2) another daughter of Sapana Dehury & Fulamani was present there, From her, Abhimanyu Dhamulia (P.W. 1) came to know that Appellant Suka Palei fled away after assaulting her mother Fulamani Dehury & brother Ramesh. She further reported before P.W. 1 that Appellant Suka Palei assaulted her mother by an axe & crushed the head of her brother by a stone. Some of the villagers took Ramesh to the hospital & Abhimanyu Dhamulia (P.W. 1) came to Nayakote Police Station to lodge the report. On the basis of the report lodged by Abhimanyu Dhamulia (P.W. 1), investigation was taken up by the I.O. (P.W. 10). On completion of investigation, he filed charge-sheet implicating the Appellant Suka Palei implicating him in offence u/s 302, I.P.C.

2. Prosecution has examined ten witnesses to prove the charge. P.W. 2 is a witness to assault on her mother Fulamani & Ramesh. P.Ws. 1, 4 & 5 are witnesses to the occurrence relating to assault on deceased Sapana Dehury. P.W. 3-Nabati Dehury, another daughter of deceased Sapana Dehury is a post occurrence witness. P.W. 9-Hengara Munda is witness to seizure of the weapon of offence, i.e. axe (M.O. I) with which Fulamani was assaulted & the stone (M.O. II) with which Sapana Dehury was assaulted. P.W. 6 is the Medical Officer, who conducted P.W. Examination on the dead body of Fulamani. P.W. 7 is the Medical Officer, who conducted P.M. Examination on the dead body of Sapana Dehury. P.W. 8 is the Medical Officer, who conducted P.M. Examination on the dead body of Ramesh Dehury. P.W. 10 is the investigation Officer.

The defence plea is one of complete denial, but none was examined by the defence.

3. Learned Trial Court on the basis of the evidence on record found the Appellant guilty u/s 302, I.P.C. on three counts & sentenced him to suffer death penalty.

4. Learned Counsel for the Appellant raises the following contentions on merit of the appeal:

(i) Puni Dehury (P.W. 2) being she daughter of deceased Fulamani & sister of deceased Ramesh & she being a highly interested witness, her evidence should not have been relied on to return the finding of guilt as against the Appellant.

(ii) There are discrepancies in the evidence of P.Ws. 1, 4 & 5, which if taken into consideration, charge against the Appellant does not sustain.

5. Mr. B.P. Pradhan, Learned Additional Government Advocate supports impugned Judgment & order of sentence.

6. Puni Dehury is a girl aged about 14 years. She cannot be held to be an interested witness only on the ground of her relationship with the deceased person when her presence at the spot at the time of occurrence is not at all doubtful. The occurrence having happened in the month of December, it was in the winter season & Puni Dehury (P.W. 2) has satisfactorily explained as to how she along with her brother & mother were there in the Courtyard of Chemutu Dhamudia, who is the elder brother of her father at the time of occurrence. There is no effective cross-examination of P.W. 2 to discredit her sworn testimony on the ground of interestedness. So far as discrepancies in the evidence of P.Ws. 1, 4, & 5 are concerned, Learned Counsel for the Appellant is not in a position to bring about any discrepancy which would strike at the root of the prosecution case affecting the ring of truth surrounding the same. Rather, it is fairly submitted at the Bar that in view of clinching evidence of P.Ws. 1, 2, 4, & 5 there is no escape from the conclusion that it was the Appellant Suka Palei, who had committed murder of deceased Sapana Dehury, Fulamani Dehury & Ramesh Dehury. Learned Counsel for the Appellant strenuously submits that though she does not have sufficient ground to dispute the conviction of the Appellant u/s 302, I.P.C., the sentence recorded by Learned Sessions Judge is however bad in law. She relied on a catena of decisions to substantiate her contention to the effect that in ail fitness of things it is a fit case where the convict Suka Palei should have bee sentenced to suffer life imprisonment. She also draws our attention to various mitigating circumstances including illiteracy on the part of the Appellant & lack of awareness on his part & contended that the case is not a rarest of rare case where death sentence should have been awarded.

7. Learned Additional Government Advocate on the other hand relied on decision of the Hon''ble Supreme Court in the case of Dayanidhi Bisoi Vs. State of Orissa, Saibanna Vs. State of Karnataka, & Renuka Bai @ Rinku @ Ratan and Another Vs. State of Maharashtra, to contend that the Appellant has rightly been

sentenced to suffer death penalty. All the decisions relied on by Learned Counsel for the parties have been dealt with in detail in the case of Des Raj Vs. State of Punjab, .

8. Hon''ble Supreme Court in the case of Rajendra Prasad Vs. State of Uttar Pradesh, dealt with the question whether the number of persons killed has a bearing on the sentence to be imposed. Hon''ble Supreme Court held that neither the shocking nature of the crime nor the number of murders committed was the criterion to determine whether death sentence should be imposed. It was held that the special reasons necessary for imposing death penalty must not be related to the crime as such but to the criminal. In Dalbir Singh and Others Vs. State of Punjab, the Hon''ble Bench which decided Rajendra Prasad, while following Rajendra Prasad, put the matter in somewhat better perspective. It held:

Counting the casualties is not the main criterion for sentencing to death, nor recklessness in the act of murder. The sole focus on the crime & the total farewell to the criminal & his social-personal circumstances mutilate sentencing justice.

9. In the celebrated case of Bachan Singh Vs. State of Punjab, the constitution Bench of Hon''ble Supreme Court however did not agree with the decision of Rajendra Prasad that the special reasons necessary for imposing death penalty "must relate not to the crime as such but the criminal". It held that for making the choice of punishment or for ascertaining the existence or absence of special reasons, the Court must pay due regard both to the crime & the Criminal. Thus, the number of persons killed when coupled with the shocking nature of other features of the crime, can certainly furnish the grounds for choice of punishment. Even if only one person is killed, the gruesome or shocking nature of the crime and/or the motive for the murder may make it the rarest among rare cases deserving death penalty. On the other hand, murder of even two or three persons may not invite death penalty where there is no premeditation, no cruelty or torture of the victim or where the act is not diabolic. In this context, Hon''ble Supreme Court in the case of Desh Raj (supra) has referred to the case of Lehna Vs. State of Haryana, which runs as follows:

It is true three lives have been lost. But at the same time, the mental condition of the accused which led to the assault cannot be lost sight of. The same may not be relevant to judge culpability, but is certainly a factor while considering question of sentence. There is no evidence of any diabolic planning to commit the crime, though cruel was the act. Deprived of his livelihood on account of the land being taken away, the accused was, as the evidence shows, exhibiting his displeasure, his resentment. Frequency of the quarrels indicates lack of any sinister planning to take away lives of the deceased. The factual scenario gives impressions of impulsive act & no planned assaults. In the peculiar background, death sentence would not be proper. A sentence of imprisonment for life will be more appropriate.

10. In Bachhan Singh (supra), Hon''ble Supreme Court while upholding the

constitutional validity of the provision for penalty for death for murder, indicated the broad criteria which should guide the Courts in the matter of sentencing a person convicted of murder u/s 302, I.P.C. The Hon''ble Court held thus:-

As we read Sections 354(3) & 235(2) & other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence of absence of "special reasons" in that context, the Court must pay due regard both to the crime & the criminal. What is the relative weight to be given to the aggravating & mitigating factors, depends on the facts & circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime & the circumstances of the criminal in two separate watertight compartments. In a sense, to kill to be cruel & therefore all murders are cruel. But such cruelty may vary in its degree of culpability. & it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of "special reasons" in Section 354(3), circumstance found on the facts of a particular case must evidence aggravation of an abnormal or special degree.

It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care & humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule & death sentence an exception. A real & abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

(Emphasis supplied)

11. In *Machhi Singh and Others Vs. State of Punjab*, Hon''ble Supreme Court addressed the issue of practical application of the "rarest of the rare case" rule laid down in *Bachan Singh*:

every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community & on account of the rule of law enforced by it. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in

every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.

12. Hon''ble Supreme Court recognized that special reasons attracting death penalty may relate to manner of commission of murder, or the motive for murder, the abhorrent nature of the crime or the magnitude of the crime, or even the personality of the victim. The Hon''ble Supreme Court gave the following illustrations though not exhaustive:

(a) Manner of commission of murder:

When the murder is committed in an extremely brutal grotesque, diabolical, revolting, or dastardly manner so as to arouse intense & extreme indignation of the community (Examples: setting a house ablaze to roast alive the victim inside; subjecting the victim to inhuman acts of torture or cruelty to bring about his death; cutting the body of the victim into pieces or dismembering the body in a fiendish manner).

(b) Motive for commission of murder:

When the murder is committed for a motive which evinces total depravity & meanness (Examples: murder by hired assassin for money or reward; or cold-blooded murder for inheriting a property to gain control over property of a person under the control of the murderer or vis-?-vis whom the murderer is in a dominating position or in a position of trust; murder is committed in the course for betrayal of the motherland).

(c) Anti-social or socially abhorrent nature of the crime:

When the murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. Or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(d) Magnitude of the crime:

When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste community, or locality are committed.

(e) Personality of victim of murder:

When the victim of murder is an innocent child or a helpless woman or old or infirm person or a public figure generally loved & respected by the community.

13. Hon"ble Supreme Court in Des Rai's case in paragraph 6 has held thus:

6. The following guidelines emerging from Bachan Singh (Supra) & Machhi Singh (supra) will be of assistance to decide whether death sentence is warranted, on the facts & circumstances of a case:

(i) Life imprisonment in the rule & death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant facts & circumstances of the crime

(ii) There must be special reasons for imposing the sentence of death. Except in gravest cases of extreme culpability, the extreme penalty of death should not be inflicted. The circumstances of the crime should leave no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances. In short death penalty is warranted only in the rarest of rare cases.

(iii) A balance-sheet of aggravating & mitigating circumstances has to be drawn up. The circumstances of the "offender" as also the circumstances of the "crime" should go into such balance sheet. Only when the aggravating circumstances overwhelmingly outweigh the mitigating circumstances, the Court should consider the option of death penalty.

14. Applying the above principles, it is seen in the present case that this is not a case where murder was committed to satisfy any greed or lust. This is not a case involving cruelty to or torture of the victim. The Appellant seems to have acted in an impulsive manner on being guided by the blind belief that his son has been affected by witchcraft practised by deceased Sapana Dehury. This is not a case where the act is brutal, diabolic or revolting viewed from the sense of a prudent man. The Appellant has no bad antecedent nor he is a hard core criminal nor an Anti-social nor an anti-national element. As found from the postmortem reports the Appellant has mounted the minimum assault though on vital parts of the body. So far as the attack on Fulamani & Ramesh is concerned, it occurred in a span of few minutes & Ramesh might be a victim as he was there with Fulamani. To top it all, the Appellants was illiterate, rustic & a believer in blind faith. It is an irony that after so many years of independence, the State has not been able to create awareness among such tribal people to defeat the crime of witch hunting, which is rampant in trial area. An illiterate & rustic when influenced by blind faith are bound to become impulsive his act & he is bound to become mad to complete & act, which in his sense of right & wrong is right. Applying the aforesaid principle, therefore, there can be no doubt that this is not a case which calls for imposing of death sentence being a rarest of rare case, if we give due importance to the mitigating circumstances, discussed supra. On a careful balancing of the aggravating & mitigating circumstances, we find that in spite of the gravity of the culpability of the Appellant, the aggravating circumstances as noticed & enumerated by the Trial Court do not outweigh the mitigating

circumstances much less overwhelmingly.

15. Learned Additional Government Advocate has relied on some cases, out of which in the case of Dayanidhi, the accused who was in financial difficulties, visited the house of the deceased, enjoyed their hospitality & during, night when they were asleep, stabbed & killed the entire host family of three (husband, wife & their three years child) without provocation.& stole the valuables. In the case of Saibanna, the Appellant who was released on parole, while serving the sentence of life imprisonment, suspected the fidelity of his wife & assaulted her & their minor child with a hunting knife. He inflicted as may as twenty-one injuries on his wife & six injuries on his minor child. As a consequence, both his wife & daughter died. In the case of Renuka Bai, the Appellant along with two others kidnapped several minor children, used them for committing thefts & other illegal activities & killed them when they were no longer useful. As many as thirteen children were kidnapped & nine out of them were killed in between 1992 & 1996. The facts of the aforesaid cases are therefore distinguishable so far as facts obtained on record in the present case.

16. We, therefore, allow this appeal in part. While confirming the conviction u/s 302 I.P.C. we modify the sentence of death imposed on the Appellant to one of life imprisonment. The DSREF is accordingly answered in negative & the JCRLA is allowed in part.