
(2007) 09 OHC CK 0036
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Duleswar Barik
 Duleswar Barik Vs State of Orissa

RESPONDENT

Date of Decision : 19-09-2007

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 366
Penal Code, 1860 (IPC) — Section 302, 84

Citation : (2008) CriLJ 1065 : (2008) 1 OLR 118

Hon'ble Judges : M.M. Das, J;B.P. Das, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.M. Das, J

1. Upon conviction of the accused-Duleswar Barik in S.T. Case No. 179/74 of 2003 by the judgment dated 21.7.2004 u/s 302 IPC and sentencing the said accused to be hanged by neck till his death by the learned Adhoc Addl. District and Sessions Judge, Sundargarh, the death reference being DSREF No. 3 of 2004 has been made to this Court u/s 366 of the Code of Criminal Procedure. The accused Duleswar Barik has also preferred an appeal against the said order of conviction and sentence being JCRLA No. 80 of 2004. As, both the death reference as well as the appeal relate to one Sessions Trial, the same are disposed of by this common judgment.

2. By order dated 28.9.2004 passed in the Jail Criminal Appeal being JCRLA No. 80 of 2004, Mr. Goutam Mishra, an advocate of this Court, on the request of the Court, agreed to conduct the case on behalf of the convict-appellant, and, thereupon he was appointed to conduct the case on behalf of the appellant in the appeal as well as the death reference, at the cost of the State on the scale fixed to which the Public Prosecutor in the High Court is entitled to.

3. At the outset, we must appreciate the sincere efforts of Mr. Goutam Mishra,

learned Counsel for the accused, in assisting this Court for disposal of the above cases and the erudite manner of his submission made before us.

Even though serious allegations have been made by the prosecution that the accused committed murder of six persons, namely, Sabitri Barik, Basanta Barik, Srikar Rout, Sadhini Rout, Ketaki Barsatia and Kalakar Barik, on the fateful day on 8th January, 2003, Mr. Mishra, learned Counsel made an effort to convince this Court that the accused is entitled to an order of acquittal and did not prefer to advance any argument on the question of sentence.

4. The prosecution alleges in the F.I.R. that on 8.1.2003 at about 10.30 A.M., the accused shouting "MUU BRAHMARAJA, MUU KAHARIKU CHHADIBI NAHI" (I am BRAHMARAJA, I will not spare anybody) came out from his house. One of the deceased, namely, Sabitri Barik was also coming out of her house at the relevant time. The accused seeing her, assaulted her repeatedly by an axe on her back, as a result of which, she fell on the ground and died at the spot. In the meantime, the eldest son of the said Sabitri Barik while coming out of their house, the accused also assaulted him from behind by the said axe. As a result, the said Basanta Barik also expired at the spot. The axe was broken while the accused was assaulting Basanta Barik. The deceased-Basanta was carrying an axe as he was going to collect leaf to feed his goats. The accused threw his broken axe and picked up the axe which was with Basanta and ran towards the village shouting "E GAON RE MUU SAMASTINKU MARIBI". Being afraid, the villagers went inside their respective houses and closed the doors. The accused holding the said axe went towards the Lakraja Nalla by the road which was leading towards Routiapada. The accused while going towards the said Nalla, finding Srikar Rout and his wife Sadhini Rout working in their land, assaulted them on the neck by means of the said axe, causing their death. At that time, some of the other villagers being Dutia Routia, Bhika " Bhima Routia, Judhistir Routia and others saw the accused assaulting the above two deceased persons and started shouting loudly that Duleswar (accused) is killing the people. At this, the accused chased them who ran towards the village. The mother of the informant, being Ketaki Barsatia, was working in their agricultural field. The accused came towards her and gave blows on the head and neck of the said deceased-Ketaki Barsatia by means of the axe. In this process, the accused murdered all the above persons. The villagers being armed with lathies came to the spot, upon which the accused sent back and while returning, finding the deceased Kalakar Barik alone on the way near the Nalla, assaulted and killed him. The F.I.R. was lodged on 9.1.2002 at 8.00 A.M. in the concerned police station. On receiving the F.I.R. the Sub-Inspector of Police (P.W. 22) took up the investigation. On seeing the accused on 9.1.2003, the villagers pelted brick bats on him, as a consequence, the accused sustained injury on his leg and was shifted to the District Headquarters Hospital, Sundargarh. After due investigation, charge sheet was filed against the accused. After the commitment of the case, the same was tried as S.T. Case No. 179/74 of 2003 u/s 302 IPC.

5. During course of trial, the prosecution examined as many as twenty three witnesses and produced various documents including post mortem report, dead body challans, spot map etc. Nine witnesses were examined as eye witnesses to the occurrence. They are, P.W.2 Upendra Barik, P.W.3-Fula Barik, P.W.4-Pratima Barik, P.W.8-Bhika " Bhima Routia, P.W.-9, Yudhistir Routia, P.W.10-Tuleswar Apat, P.W.17-Kapil Barik, P.W.-18-Dutia Routia and P.W.19-Temba Bhagat. P.Ws. 11 to 16 are the doctors who conducted post-mortem of the deceased persons. The accused, who had received injuries due to pelting of stones by some villagers, was also examined by P.W.15-Dr. Sagar Dalai.

6. The defence plea was that, no penal liability can be attributed to the accused as he was of unsound mind at the relevant time and was entitled to the benefits u/s 84 of the Penal Code. On the side of the accused, one witness, namely, Pannalal Bhagat was examined as D.W.1 and the discharge certificate of the accused was marked as Ext. A.

7. On careful scrutiny of the evidence adduced by the prosecution, more specifically, the statements of the eye-witnesses coupled with the fact that no case has been made out by the defence denying the alleged occurrence, we come to the conclusion that the prosecution has successfully proved that the accused killed all the six deceased persons.

8. Mr. Goutam Mishra, learned Counsel for the accused-Duleswar Barik relying upon the lower Court records, submitted that though the accused was arrested immediately after the occurrence, as he was injured due to pelting of stones, he was referred to the District Headquarters Hospital, Sundargarh for treatment where he was treated by the doctor-P.W.15 and was discharged on 10.1.2003. The doctor-P.W.15, in the discharge certificate, specifically referred the accused to the V.S.S. Medical College and Hospital, Burla for treatment of Psychosis. This discharge certificate has been marked as Ext. A, which was available in the police records and was proved by the P.W.23-Circle Inspector of Police, who investigated the case in part. Mr. Mishra, further submitted that no step was taken by the police to take the accused for treatment to the V.S.S. Medical College and Hospital, Burla and the opinion of the doctor-P.W.15 clearly goes to show that the accused suffered from unsoundness of mind on the date of occurrence. He further submitted that even though the accused was arrested immediately after the occurrence but remained unrepresented before the Court and for the first time, a State Defence Counsel was engaged on his behalf at the stage of commitment of the case only on 13.8.2003, i.e., about eight months after the accused was arrested. According to Mr. Mishra, had the accused been taken to the V.S.S. Medical College and Hospital, Burla for treatment by the experts/specialists, it would have been definitely ascertained that the accused, during commission of the alleged crimes, suffered from unsoundness of mind and/or had the accused been provided with a Defence Counsel at the cost of the State on the date when he was produced before the learned Magistrate after his arrest, his counsel could have made a prayer to the Court to get the accused

examined specifically as to whether or not he was suffering from unsoundness of mind.

9. It was also argued by Mr. Mishra that the following factors substantiate the plea of insanity of the accused on the date of occurrence-

- (i) Exhibit A-discharge certificate.
- (ii) The accused was in a state of delusion that he was "Brahma".
- (iii) The accused had a history of insanity.
- (iv) The indiscriminate manner of assault.
- (v) The accused made no attempt to conceal the weapon of offence.
- (vi) The accused had no motive to kill,
- (vii) There was no preparation prior to the commission of offence,
- (viii) The accused had no accomplice,
- (ix) The accused killed in daylight and made no attempt to hide or run away from the scene of occurrence.

10. Learned Counsel for the State, on the contrary, contended that the behavioural pattern of the accused when he committed murder of six persons, one after the other, as revealed from the evidence of the eye witnesses, does not support the case of insanity of the accused. Rather, the same clearly shows that the accused being fully conscious of the consequences of his action, committed the murders and the nature of offences committed clearly reveals that this case comes under the category of "rarest of rare case" where nothing but death penalty can be imposed.

Learned Counsel for the State relying upon the decisions in the case of State of Andhra Pradesh Vs. Bogam Chandraiah and Another, and the case of Subedar Tewari Vs. State of U.P. and Others, contended that as held by the Supreme Court in the aforementioned cases where direct evidence of acceptable nature regarding commission of the offence is available, the question of motive becomes immaterial and the evidence regarding existence of motive which operates in the mind of assassin may not even be known to the victim of the crime and it may be known to the assassin and no one else. It is the assassin who may be the only person having the knowledge as to what gave birth to the thought in his mind and a crime can take place even without pre-meditation or pre-planning in the context of a particular situation on the spur of the moment.

11. Mr. Mishra, learned Counsel for the accused, on the other hand, while not disputing the above contentions, vehemently argued that the action on the part of the accused, as has been alleged by the prosecution, cannot be said to have taken place at the spur of the moment and the nature of offence alleged to have been committed can only lead to the conclusion of insanity of the accused. As

such, the question of motive or mens rea of the offence becomes completely academic in the facts and circumstances of the case. Mr. Mishra, relied upon various decisions of the Apex Court as well as this Court in support of his contentions that the benefit of Section 84 of the Penal Code is to be extended to the accused in the facts and circumstances of this case.

12. As already stated, the defence plea in the instant case was that the accused was of unsound mind incapable of knowing the nature of the acts committed or that he is committing such acts which are either wrong or contrary to law and, therefore, the benefit of Section 84 I.P.C. is extendable to him.

13. Section 84 of the I.P.C. reads as follows:

84. Act of a person of unsound mind - Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is earlier wrong or contrary to law.

14. Mr. Mishra, learned Counsel for the accused submitted that the plea of insanity taken by the accused before the learned Court below has been illegally negatived in the judgment without taking into consideration the facts and circumstances of the case and the materials available on record in support of such plea. In the case of Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, , the Supreme Court has laid down the following propositions in regard to the burden of proof in the context of the plea of insanity;

(i) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests upon the prosecution from the beginning to the end of the trial.

(ii) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down in Section 84; the accused may rebut it by placing before the Court all the relevant evidence, oral, documentary and circumstantial, but the burden of proof upon him is no higher than that which rests upon a party in civil proceedings.

(iii) Even if the accused is not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case, the Court would be entitled to acquit the accused on the ground that the general burden resting on the prosecution has not been discharged.

The same principles have been reiterated and relied upon in a number of decisions of the Supreme Court.

15. A Division Bench of this Court in the case of Shama Tudu Vs. State of Orissa, while considering the case on the ground of plea of insanity taken by the accused

in the facts of the said case, referring to various decisions of the Supreme Court as well as this Court, came to the conclusion that the accused in the said case is entitled to the benefit of Section 84 I.P.C. and acquitted the accused in the said case. It has been held in the said case as follows:

....If at the time of the commission of the offence, the accused knew the nature of the act he was committing, he cannot be absolved of the responsibility for the grave offence of murder, even if at a later stage, he became insane. (See *Gupta v. Union of India and Ors.*). The ceremonial Amrit Bhushan beheading by the father and his relations of a four-year old boy to propitiate some blood-thirsty deity does not by itself show or prove insanity, as held in *Paras Ram and Ors. v. State of Punjab*.

9. Although there is no burden cast on the prosecution to establish negatively that the accused was not of unsound mind when he committed the acts of violence resulting in the death of a person murdered, where the accused has a previous history of mental disease or lunacy and it is revealed during the course of investigation that the accused had such previous history of mental disease or lunacy, fairness of investigation does require probing into this aspect with an unbiased approach, particularly when the accused himself cannot, in the very nature of things, assist in unravelling the necessary facts being in custody and being mentally imbalanced. It becomes obligatory on the part of the investigating agency, particularly when the accused is apprehended at about the time of the commission of the offence or shortly thereafter, to subject the accused to medical examination, to ensure that the accused was, in fact, a person of ordinary state of mind. If that is done, it necessarily rules out the possibility of the accused having committed the acts of violence attributed to him on account of mental disease or lunacy. The prosecution must place all the cards and materials that could possibly be had. The failure to subject the accused to medical examination immediately and to place all the evidence that could be available may have, depending on facts and circumstances of the case, a serious consequence on the prosecution case when such a plea of insanity is raised by the accused at the trial, as that may give rise to doubt whether the act of violence had been committed with the requisite intention to commit a particular offence and any such requisite intention to commit a particular offence and any such failure on the part of the prosecution to collect the evidence and place before the Court on the mental aspect of the accused, creates serious infirmity in the case of the prosecution and consequently the benefit of doubt will have to be given to the accused.

In the said decision, this Court also observed that where it is proved that the accused has committed multiple murders while suffering from mental derangement of some sort and it is found that there is (i) absence of any motive, (ii) absence of secrecy, (iii) want of pre-arrangement and (iv) want of accomplices, it would be reasonable to hold that the circumstances are sufficient to support the inference that the accused suffered from unsoundness of mind.

16. In the case of Shrikant Anandrao Bhosale Vs. State of Maharashtra, , it has been held that the question whether the appellant has proved the existence of circumstances bringing his case within the purview of Section 84 will have to be examined on the totality of the circumstances. The unsoundness of mind, as a result whereof, one is incapable of knowing the consequence of his actions, is a state of mind of a person which ordinarily can be inferred from the circumstances.

17. In the case of Ratan Lal Vs. The State of Madhya Pradesh, , the Supreme Court while dealing with the case of legal insanity set aside the conclusion arrived at by the High Court and held as follows:

10. The High Court, with respect, erred in differing from the trial Court. The High Court observed that the appellant had not examined in defence any expert in mental diseases to substantiate his plea of legal insanity. It is expecting that the great deal from poor villager that he should produce experts in mental diseases specially in view of the certificates issued by the medical authorities after he was arrested. The High Court further erred in holding that the medical reports were of no evidentiary value. It is true that the reports speak of the mental state of the accused at the time when the reports were issued but the High Court failed to note that the appellant was in police custody from January 23, 1965, and the police could have produced evidence to show that he was absolutely sane till the date when they sent him for medical examination....

14. We are inclined to agree with the conclusion arrived at by the learned Magistrate. We hold that the appellant has discharged the burden. There is no reason why the evidence of Shyam Lal, D.W.1 and Than Singh, D.W.2, should not be believed. It is true that they are relations of the appellant, but it is the relations are likely to remain in intimate contact. The behaviour of the appellant on the day of occurrence, failure of the police to lead evidence as to his condition when the appellant was in custody, and the medical evidence indicate that the appellant was insane within the meaning of Section 84 IPC.

18. In the case of Kanbi Kurji Duba Vs. State, , the Gujarat High Court was considering a case involving almost similar facts as the present case, where the accused imagining himself to be "ARJUN" killed his wife and his elder son and disclosed this fact before the Sarpanch of the village addressing the Sarpanch of the village as "Bhishma Pitamaha". The Gujarat High Court considering the totality of the circumstances of the said case, came to the conclusion that the accused was suffering from a delusion or a hallucination that he was a pure blooded "Suryabanshi and Arjun of the Mahabharat". There was absence of provocation for the accused to commit the brutal act of killing his wife and his elder son and after killing them, he openly told the Sarpanch that he has killed his wife and son. There was no attempt on his part to conceal what he had done or conceal the incriminating pieces of evidence i.e., the weapon of offence and his blood stained clothes. There was no repentance on his part. On the above grounds, benefit of Section 84 I.P.C. was extended to the accused in the said case.

It is, therefore, clear from the above discussions that it is only the unsoundness of mind which materially impairs the cognitive faculty of the mind that can form a ground for exemption from criminal liability u/s 84 I.P.C.

19. Learned Counsel for the State relied upon various case laws where the defence of insanity has been negated. We have gone through the facts of the said cases which are clearly distinguishable from the facts of the present case and in each of those cases, the Courts came to the conclusion that the facts do not disclose sufficient materials to show that the accused persons in those cases were suffering from legal insanity and the benefit u/s 84 I.P.C. were not extended to the said accused persons.

20. Applying the principles of law as enunciated in the case of Dayabhai (supra) and the principles as discussed in the other cases referred to above, to the facts of the present case, it would be apt to analyse the materials available in the instant case, in order to find out as to whether the benefit of Section 84 I.P.C. can be extended to the accused or not.

21. From the evidence of the prosecution witnesses, it would be seen that P.W.2-Upendra Barik stated that he has seen the accused assaulting the deceased Sabitri in front of her house, and, thereafter her son Basanta, fatally. When the accused assaulted Sabitri and Basanta, he came to the spot and found Sadhu, Jagannath, Phula and Pratima, present there and the dead bodies of Sabitri and Basanta were lying on the ground. He also saw that as the BUDIA (axe) of the accused was broken, the accused took the axe which Basanta was holding previously and was saying that "I WILL FINISH ALL VILLAGERS, I AM BRAMHARAJA". P.W.4-Pratima Barik who is also an eye witness to the murder of Sabitri and Basanta, corroborated the statement of the P.W.2 and has also stated that the accused was then shouting that "I AM BRAMHARAJA AND I WILL NOT SPARE ANYBODY". This statement of the accused has also been corroborated by P.W.7-Anirudha Barik and P.W.17-Kapila Barik. It is also corroborated by the FIR that the accused was making such statements while assaulting the victims.

22. With regard to history of insanity of the accused, it would be evident from the statements made by the P.W.2-Upendra Barik and D.W.1 -Pannalal Bhagat that the accused had an history of insanity. P.W.2 has also stated that the accused was not pulling on well with his own father due to his mental disorder and his father did not like to allow the accused to continue higher studies due to his mental disorder, from which the accused was suffering. D.W.1 has stated "I know the accused Duleswar Barik standing in the dock. My house is adjacent to his house. One year back his mental condition was bad and he was mad. He was insane and was under the treatment of Jakrisa Bara a village Baidya. I was regularly accompanying the accused to the Baidya. Now he is in same condition...."

23. From the sequence of events, it is also clear that the accused committed the offences in an indiscriminate manner and assaulted whomsoever he came across

and also chased them. In this regard, the evidence of all the eye witnesses are consistent. It is clear that the accused did not pick and choose the persons to whom he assaulted. It further appears from the evidence of the prosecution witnesses that the accused did not make any attempt to conceal the weapon of offence, and, as a matter of fact, the axe which he was holding, having broken, he threw the same at the spot and took up the axe which the deceased Basanta Barik was carrying,

24. It is definitely ascertained from the prosecution case that there was no pre-meditation or pre-planning on the part of the accused to commit the alleged offences nor the accused had any accomplice. All the murders were committed in broad day light and no attempt was made by the accused to flee from justice or conceal any material.

25. Coupled with the above materials, it is seen from the record that the accused was not provided with a counsel when he was produced before the Magistrate after being apprehended immediately after the occurrence, till 13.8.2003, i.e. at the stage of commitment, when a State defence counsel was engaged. In the case of *Khatari and Others Vs. State of Bihar and Others*, , relying upon the decision in the case of *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , the Supreme Court has held that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require. In the words of Justice Blackmun in *Jackson v. Bishop*, 404 F Supp. 26. 571, "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations". The Supreme Court further held that this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at the stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. Thus, it was held that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time.

26. In this case, we also find that even though the accused while being discharged by the Doctor-P.W.15 after being treated for the injuries sustained by him, P.W.15 specifically mentioned in the discharge certificate (Ext.A) that the accused should be referred for treatment of Psychosis to the V.S.S. Medical

College and Hospital, Burla, but nothing has been brought on record by the prosecution to show that any steps were taken for treatment of the accused for Psychosis except the statement of the Investigating Officer that the accused refused to be treated at V.S.S. Medical College and Hospital, Burla. This statement in our view, cannot exempt the prosecution from its responsibility to bring all materials facts before the trial Court for consideration while trying the case. We are, rather, of the view that by not getting the accused treated for psychosis, the same supports the defence plea of insanity, as failure to subject the accused to medical examination immediately and to place all the evidence that can be made available, may, depending upon the facts and circumstances of the case, have a serious consequence on the case of the prosecution, which gives rise to a doubt and amounts to serious infirmity in the prosecution case. As a consequence, the benefit of doubt is to be given to the accused.

27. From the above discussions, considering the facts and circumstances of the case, we are of the view that the accused was successful in establishing that at the time of committing the acts, he was suffering from unsoundness of mind which satisfies the tests laid down in Section 84 of the Penal Code. We arrive at this conclusion also by taking into consideration the conduct of the accused, antecedent, attendant and subsequent to the event. We are of the view that this case comes under the exception of Chapter - IV of the Indian Penal Code and the benefit of Section 84 thereof should be extended to the accused-Duleswar Barik. We are, therefore, not in agreement with the finding of the trial Court rejecting the plea of insanity taken by the accused. Consequently, the accused-Duleswar Barik is entitled to an order of acquittal.

28. In the result, JCRLA No. 80 of 2004 succeeds and the same is allowed. The order of conviction and sentence passed against the accused-Duleswar Barik u/s 302 I.P.C. are set aside. The accused-Duleswar Barik shall be examined by an expert, preferably, by a Professor of the Department of Psychiatry of any of the Government Medical Colleges and Hospitals in the State and if he certifies that it is safe to set the accused-Duleswar Barik at liberty, the said accused shall be set at liberty immediately thereafter. But if the said expert finds otherwise, then the accused-Duleswar Barik shall be rendered necessary treatment as an indoor patient in any of the said Medical Colleges and Hospitals.

DSREF No. 4 of 2004 is accordingly answered.

B.P. Das, J.

29. I agree.