
(2008) 12 OHC CK 0098
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Madhu Swain and Others

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 390
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2009) 107 CLT 241 : (2009) 1 OLR 782 Supp

Hon'ble Judges : R.N. Biswal, J;P.K. Tripathy, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. When this Government Appeal is taken up for hearing, Mr. A.K. Misra, Learned Standing Counsel files a memo along with the Death Certificates and submits that accused-Respondent No. 7 Narendra @ -Babula Swain died on 18.05.2006 and accused-Respondent No. 8 Sadhu Swain died on 26.03.2004. Learned Counsel for the Respondents does not dispute to that factual submission. Under such circumstance, the Govt. Appeal abates against the aforesaid two deceased accused- Respondents.

2. Heard argument from the parties. Hearing is concluded and the Judgment is as follows.

3. Nine accused persons (including the two deceased accused persons) faced the trial in the Court of the Sessions Judge, Balasore in Sessions Trial No. 67 of 1992 for the offence u/s 302/201/34, I.P.C. On 04.11.1992 Learned Sessions Judge pronounced the impugned Judgment acquitting all the accused persons from the charges. The State filed application of leave to appeal. On 29.03.1999 leave was granted and this Government Appeal was registered.

4. It reveals from the lower Court's record that Nilamani Jena (hereinafter referred to as deceased") suffered homicidal death on 03.04.1999. According to the case of the prosecution, on that date deceased left the house with a view to

go to Kenduapara High School to ascertain the centre of examination for Matriculation, in which he proposed to appear, and did not return to home. Raghunath Jena (P.W.1) is the father of the deceased and Indramani Jena (P.W.6) is the elder brother of the deceased. Both of them showed concern for missing of the deceased and ultimately gathered information that the accused persons had chased the deceased from the tea stall of Ranjan Das (P.W.2) at Kenduapara. They submitted a report accordingly to the Rural Police, Bhadrak, searched for the deceased and ultimately discovered his dead body minus the head lying on the land of one Jagabandhu Pradhan in village Adeipali under Bhadrak Police Station. After discovery of the headless dead body of the deceased, P.W. 1 identified the same to be of the deceased and at that spot lodged the F.I.R., Ext.1. On a further search the severed head of the deceased was located about half a kilometer away in another mouza. Inquest was held both of the body and the head respectively under Inquest Report, Exts.2 and 3, and were dispatched for post-mortem examination. P.W.9 is the doctor who conducted autopsy besides matching of the head and the body and reported under Post-mortem Report, Ext.4 that the deceased suffered homicidal death and the head had been chopped off from the body by a sharp cutting weapon. In course of the investigation it could be ascertained that the accused persons, who had a grudge against P.W.1 and his family, had secured custody of the deceased at Kapali Road Railway Station and they took him towards Kenduapara. At the second spot, i.e., where the head of the deceased was found, the Investigating Officer also found a "sika", rope and a stick (lathi) with blood-stain lying there and such incriminating articles together with the blood-stained earth were collected from both the spots. In course of the investigation, such articles were also forwarded to the State Forensic Science & Laboratory, Bhubaneswar to ascertain if that contains human blood and the group thereof. In that respect, the report of the S.F.S.L. indicating that human blood group "B" was found on the "sika", lathi and the blood-stained earth, which were relied on as Exts.8 series. Since there was no eye-witness to the occurrence of murder, prosecution banked upon the circumstantial evidence of the conduct of the accused persons in chasing the deceased at about noon time and thereafter dragging him in the evening at about 7.30 to 8 p.m. and discovery of the dead body on the following day as the circumstantial evidence to prove the charge against the accused persons. To substantiate such charges, prosecution tendered evidence of ten witnesses and relied on documents marked Exts.1 to 8. Prosecution relied on the evidence of P.Ws. 2, 3, 4 and 5 besides P.Ws. 7 and 8 and proved the conduct of the accused persons and the last seen theory and the evidence of P.Ws. 1 and 2 about the enmity and the discovery of the dead body, inquest and seizure of incriminating materials. The stick (lathi), rope and "sika" were respectively exhibited as M.Os. I, II and III.

5. On assessment of evidence, Learned Sessions Judge found that P.W.1 was not consistent in naming the persons who had chased the deceased and in that respect he noticed the difference from the F.I.R., Ext.1 and the deposition in the

examination-in-chief. Learned Sessions Judge also commented that the person from whom the information was gathered by P.W.1 was not examined by the prosecution. So far as P.Ws. 7 and 8 are concerned, he also found contradictions in their evidence relating to the conduct of the accused persons and that being also running contrary to the evidence of P.W.3. Learned Sessions Judge also found the evidence of P.Ws. 2, 4 and 5 to be inconsistent in material particulars and accordingly not credible. He also took note of the evidence of the I.O. (P.W.10) in which he deposed that-

I received the report of Raghunath Jena through the O.I.C., G.R.P.S., Bhadrak, in which the murder of the deceased was suspected. Prior to that I received V.H.F. message from the Officer-in-Charge of Bonth Police Station, alleging that the deceased Nilamani Jena was moving with lethal weapon at Kenduapada bazaar, with a view to creating communal tension. I made station diary entry No. 92 dated 4.4-91. I mentioned this fact in the CD. On the basis of both these station diaries, I went to the spot.

Learned Sessions Judge took into consideration the defence plea and the admission of the I.O. and the witnesses about prevailing communal tension at Bhadrak and enforcement of curfew therein during the relevant period and also the further defence plea that the deceased being a hooligan in nature could have been killed by the persons belonging to Muslim Community for his anti-Muslim leadership and activities. Learned Sessions Judge observed that a possibility in that way cannot be ruled out in view of admitted evidence of the I.O. in the above-indicated manner and in view of the order of curfew prevailing in that locality by the relevant time. Accordingly, Learned Sessions Judge entertained doubt on the veracity of P.Ws. 7 and 8 besides finding omission and contradictions in their evidence and accordingly granted the order of acquittal in favour of the Respondents.

6. Mr. A.K. Mishra, Learned Standing Counsel argues with emphasis that the evidence of P.Ws. 7 and 8 are devoid of any contradiction and that such evidence is creditworthy, and once that be so, the evidence of P.Ws. 2, 3, 4 and 5 about the conduct of the accused throughout that day of occurrence becomes corroborative evidence to connect the accused persons with the alleged crime and, therefore, Learned Sessions Judge was wrong in his appreciation of evidence in acquitting the accused persons. Accordingly he argues to set aside the order of acquittal and to convict the accused persons under Sections 302/201/34, I.P.C.

7. Learned Counsel for the accused-Respondents on the other hand reiterates the ground advanced in the impugned Judgment in support of the order of acquittal and also further argues that when admittedly there was curfew in the locality where the alleged murder was committed, it could not have been possible on the part of the accused persons to move with weapons and commit the crime as has been stated by P.Ws. 7 and 8. He argues that this is a circumstance which this Court should take into consideration in properly appreciating the findings

recorded by the Trial Court. He repels the contention of the State and argues to maintain the order of acquittal.

8. On perusal of the evidence adduced by the prosecution and the findings recorded by the Trial Court and considering the submission of the parties, we find that the view expressed by the Trial Court in entertaining doubt on the credibility of the witnesses like P.Ws. 2, 4 and 5, 7 and 8 cannot be regarded as illegal approach or assessment of evidence infested with perversity if the evidence of P.Ws. 7, 9 and 10 together with the evidence of P.W.3 is properly considered. According to the evidence of P.W.9, the doctor, who conducted post-mortem examination, he found that the head had been severed from the body of the deceased by chopping it in clean and clear cut manner. That is why P.W.9 stated in his evidence that such injury was not possible by a knife, i.e., a small knife and an instrument for chopping would have been used to cause that injury. In this case prosecution has not taken any step to ascertain the whereabouts of any such weapon nor it has explained the circumstance through any other evidence. In the above quoted evidence P.W.10 deposed about the deceased moving being armed with dangerous weapon at the time when curfew was prevailing in the Bhadrak locality and there was communal violence and communal tension. If that be so, then the extensive effort by P.Ws. 1 and 6 describing the deceased to be innocent and sacrosanct and he left the house only to ascertain the place of examination centre appears to be untrue. Apart from that, admittedly there is difference in describing the manner of accused persons dealing with the deceased, so far as the evidence of P.Ws. 7 and 8 are concerned. Therefore, if that is to be read with the evidence of P.W.3, doubt arises in the mind about the truthfulness of the aforesaid witnesses. Be that as it may, the view taken by the Trial Court does not suffer from perversity. It is the trite law that when two views are possible from the same set of evidence and one view has been adopted by the Trial Court for recording an order of acquittal, it would be improper for the Appellate Court to take the other view to convert the order of acquittal into conviction. The legal position being so and the position of evidence recorded being in the manner indicated above and the view expressed by the Trial Court being found to be not illegal or unreasonable, we decline to interfere with the impugned order of acquittal and accordingly the Government Appeal is dismissed. The bail bonds of the accused-Respondents u/s 390, Cr.P.C., if any, stand discharged in view of dismissal of the Government Appeal.