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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.65 of 2006

Bhagawan Bag

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in these cases:

For Appellant

:

Ms. Tapaswini Sinha,
Advocate

For Respondent

:

Mr. J. Katikia,
Additional Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE R.K. PATTANAİK

JUDGMENT

29.07.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the judgment dated 12th July, 2006 passed by the *Ad hoc* Additional Sessions Judge, Bonai in Sessions Trial No.3/78 of 2001-2004 convicting the Appellant for the offence punishable under Section 302 IPC and sentencing him to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.5000/- and in default to undergo RI for one year. Although the Appellant was also found guilty for the offences punishable under Sections 459/307/324 IPC, he was not separately sentenced for those offences.

2. The prosecution case in brief is that on 13th August, 2000 at around 11 PM in the night, while Yudhistir Bhainsa (P.W.13) was sleeping on a cot lying on the verandah of his house, his wife, the deceased Mukta Bhainsa, was sleeping on the floor on the said verandah near him. The accused being armed with a Budia (axe) entered into their house and assaulted the deceased Mukta Bhainsa with it. On hearing the scream of the deceased, P.W.13 woke up and at that point the accused also assaulted him with the said Budia. Hearing the hue and cry of both Yudhistir Bhainsa and Mukta Bhainsa, Rajendra Kumar Mahakud (P.W.1), the informant, the son-in-law of Yudhistir Bhainsa as well as Golap Mahakud (P.W.2), the daughter of Yudhistir Bhainsa, who was sleeping in the adjoining room, came out of that room. They noticed the accused ran away from the house. They found bleeding injuries on Yudhistir and Mukta.

3. On being asked by P.W.1, P.W.13 told him that the accused had assaulted Mukta Bhainsa by means of an axe on her head and hand and assaulted him on his head, leg and back with the said axe.

4. P.W.1 then informed the matter to the Rohit Sethy (P.W.10), Hatia, Basanta Rana (P.W.4) and others of his village, who reached the spot. Both the deceased and P.W.13 were shifted to a hospital and the matter was reported to the Tikayatpali Police Station (PS), where it was registered as P.S. Case No.21 of 2000.

5. On the completion of the investigation, a charge-sheet was filed. The accused pleaded not guilty and claimed trial.

6. At the trial, the prosecution examined 17 witnesses. The defence examined no witness. The trial Court on an analysis of the evidence found that the prosecution had proved the case against the Appellant beyond all reasonable doubts and proceeded to convict the Appellant for the offence aforementioned and sentenced him accordingly.

7. This Court heard the submissions of Ms. Tapaswini Sinha, learned counsel appearing for the Appellant and Mr. J. Katikia, learned Additional Government Advocate for the State.

8. Ms. Sinha submitted as under:

i. Although P.W.13 was projected as an injured eye-witness, he was unreliable and his deposition was unnatural. His evidence was also not corroborated by other independent evidence. He had actually not seen the assault on the deceased and, therefore, his deposition could not form the basis for the conviction;

ii. There is a delay in the examination of the key eye-witness, P.W.13. Although the incident took place on 13th August 2000, the FIR was lodged only on 14th August, 2000 on which date the inquest took place in the presence of P.W.13. The Investigating

Officer (IO)- P.W.15 disclosed that he had examined P.W.13 only on 16th August, 2000. This delay weakened the case of the prosecution;

iii. Neither P.W.1 nor P.W.2 had actually seen the occurrence. They were also interested witnesses being related to the deceased and the injured. Accordingly, their evidence was not reliable;

iv. Amin @ Anadi Pradhan (P.W.3) was also not a reliable witness. The accused is stated to have made an extra judicial confession before him about assaulting his uncle (P.W.13) and aunt (deceased) with an axe and yet, P.W.3 allowed him to sleep in his house. The said extra judicial confession was a weak piece of evidence and should not be relied upon unless there was corroboration by independent evidence. The conduct of P.W.3 about not informing the family members of the deceased about the confession, or even to the villagers or police, threw grave doubts on the reliability of P.W.3;

v. The FIR was lodged only on 14th August, 2000 and there was no credible reason for the delay;

vi. The manner of assault on the deceased did not bring it within the four corners of Section 302 IPC. At best it could be an offence of culpable homicide punishable under Section 304 Part I or Part II IPC;

vii. In absence of motive, the conviction under Section 302 IPC cannot be sustained;

viii. The judgment of conviction and order of sentence was even otherwise unsustainable in law and should be set aside by this Court. Reliance was placed on the judgment of the Supreme Court of India dated 12th October, 2020 passed in Criminal Appeal No.335 of 2015 (*Amar Singh v. The State*);

9. Mr. Katikia, learned AGA, on the other hand, submitted as under:

a. A careful examination of the deposition of P.W.13 reveals that a suggestion was given to him about he having sustained injuries only when he tried to snatch the axe away from the accused. Therefore, the presence of the accused was acknowledged by the defence itself;

b. P.W.2 was also an eye-witness as she is stated to have seen the accused giving blows to her mother by means of Budia and when P.W.13 intervened, the accused also assaulted him by the said axe. The spot was illuminated by the light of a lamp, which was burning nearing the spot. Even otherwise, the next day was Rakshi Purnima and, therefore, it was moon lit night;

c. P.W.1 also saw the accused, who ran away from the spot while the deceased was lying with severe bleeding injuries on her head

and hand and P.W.13, his father-in-law, had bleeding injuries on his head, back and leg;

d. Dr. Sarat Kumar Sahoo (P.W.5), who examined the deceased as well as P.W.13, has corroborated the eye-witnesses' testimonies and has opined that the injuries were ante-mortem in nature and sufficient in the ordinary course to cause death of the deceased;

e. The occurrence took place on 13th August, 2000 at around 11 PM in the night whereas the deceased died on 19th August, 2000. The axe used to commit the crime was shown to P.W.7. He has given a clear opinion that the injuries revealed in the Post-Mortem Report are possible by the said axe/Tangia, which had been marked as Material Object (MO)-I;

f. The stained earth, the Tangi with the wooden handle, one check lungi of the accused and a yellow printed saree of the deceased were all carrying blood of human origin. As far as the Tangia is concerned, the chemical examination report showed that the blood stains on it was of Group 'B', which was similar to the blood on the saree of the deceased. The check lungi of the accused was carrying moderate blood of human origin, but the exact grouping of it could not be ascertained as the stains had deteriorated. Exhibits C and E are tallying with each other as regards the blood group.

g. The conjoint reading of the depositions of P.Ws.1, 2, 10 and 13 coupled with the medical evidence and scientific reports pointed out unerringly to the guilt of the accused.

h. On the presence of P.W.13 at the scene of the occurrence, his testimony has remained unshaken. He was not an unnatural witness as sought to be projected by the defence. Although he was an interested witness, he was an injured eye-witness and the medical and scientific evidence have sufficiently corroborated his version. P.Ws.1 and 2, although related witnesses, have also fully corroborated the version of P.W.13. Reliance is placed on the decisions of the Apex Court in *Abdul Sayeed v. State of Madhya Pradesh*, (2010) 10 SCC 259, *Sadakat Kotwar v. State of Jharkhand*, 2021 SCC OnLine SC 1046 and *Ramvilas v. State of Madhya Pradesh*, (2016) 16 SCC 316, and the decision of this Court dated 31st March, 2022 passed in JCRLA No.72 of 2005 (*Govinda Chandra Tripathy v. State of Orissa*);

i. The oral dying declaration by the deceased to P.W.4 was admissible in evidence. Reliance is placed on the decisions in *Parbin Ali v. State of Assam* (2013) 2 SCC 81 and *Lakhan v. State of M.P.* (2010) 8 SCC 514.

j. The extra-judicial confession by the accused to P.W.3 was also admissible in evidence. Reliance is placed on the decisions in *Piara Singh v. State of Punjab* (1977) 4 SCC 452 and *Gura Singh v. State of Rajasthan* (2001) 2 SCC 205.

10. The above submissions have been considered.

11. The case of the prosecution rests essentially on the evidence of the injured eye-witness, P.W.13. Although the defence has sought to project him as an unnatural and unreliable witness, the Court finds, on a careful examination of his deposition, that he has spoken clearly and cogently about the attack of the Appellant on the deceased and on him with the axe in sequence. His cross-examination has, far from throwing doubts about the credibility of his testimony, actually strengthened it. The suggestion to him that it was a rainy season was not relevant because the occurrence happened inside the house. Although there was no electricity in the house, it was a moonlit night with the following day being the day of Rakshi Purnima. The suggestion put to this witness in cross-examination in para-11 of the deposition is significant. It reads as under:

"11. It is not a fact that I sustained injuries while I tried to snatch away the axe from the accused and that accused had not caused any injury on me."

12. While it is strange that this kind of suggestion has been put to the witness by the defence presumably with a view to demonstrating that P.W. 13 was not injured by the accused, it actually ended up affirming the presence of accused at that very moment along with P.W.13. The suggestion that the accused is a mentally retarded person has also been denied. About there being insufficient light, P.W.13 denied it by stating as under:

"12... It is not a fact that that was a dark night. The witness volunteers that that a moon lit night as the next day was Rakshi Purnima."

13. The Court is unable to accept the plea of the counsel for the Appellant that P.W.13 was an unnatural and unreliable witness. He was an injured eye-witness, who was very much present when the occurrence took place. The injuries on him were being fully proved by P.W.5, who examined him and noticed the following injuries:

"i. Incised wound over left frontal region of scalp 5c.m. x 0.5 cm depth.

ii. Incised wound over occipital region of scalp 3 c.m. x 0.3 c.m. depth;

iii. Incised wound over left knee medial aspects 7 x 0.5 c.m. depth.

iv. Incised wound over back 4. x 0.2 c.m. depth.

All the injuries are simple in nature might have caused by sharp and heavy weapon. Age of injury is within 6 hours."

14. The above are indeed cut injuries and there was no way that P.W.13 would not be able to clearly recall who had assaulted him and his wife on that night.

15. In *Abdul Sayeed (supra)*, the Court has explained in great detail the weight that should be attached to the deposition of an injured witness. It was explained as under:

"Injured Witness

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide *Ramlagan Singh v. State of Bihar*, AIR 1972 SC 2593; *Malkhan Singh v. State of Uttar Pradesh*, AIR 1975 SC 12; *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470; *Appabhai v. State of Gujarat*, AIR 1988 SC 696; *Bonkya v. State of Maharashtra*, (1995) 6 SCC 447; *Bhag Singh v. State of Punjab*, (1997) 7 SCC 712; *Mohar v. State of Uttar Pradesh*, (2002) 7 SCC 606(SCC p.606b-c); *Dinesh Kumar v. State of Rajasthan*, (2008) 8 SCC 270; *Vishnu v. State of Rajasthan*, (2009) 10 SCC 477; *Annareddy Sambasiva Reddy v. State of Andhra Pradesh*, (2009) 12 SCC 546 and *Balraje v. State of Maharashtra*, (2010) 6 SCC 673.

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30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

16. Likewise in *Ramvilas* (*supra*), it was pointed out that "evidence of the injured witnesses is entitled to a great weight and

very cogent and convincing grounds are required to discard the evidence of the injured witnesses.”

17. The Court has examined the decision in *Amar Singh* (*supra*) and finds that the facts there are different. One factor that weighed the Supreme Court in that case was that the Doctor

“opined in his statement that injuries have been caused by sharp edged weapon and since no weapon was shown to him, he has not given any opinion. Admittedly the tip of knife which was recovered on the disclosure statement of accused appellant Inderjeet Singh was broken and it was not pointed but blunt. Whether the type of stab and incised wound found on the body of the deceased could have been inflicted by a knife with a broken tip, is in our opinion, extremely doubtful. The opinion of the Doctor has not been obtained as to whether such injuries could have been caused by knife with a broken tip by showing him the same.”

18. The Supreme Court viewed the above lapse on the part of the IO in that case to be 'serious'. Further, on the facts of that case, two brothers of the deceased remained mute spectators while a third brother was being assaulted and this itself showed that the eye-witness was not present at the spot. There are numerous other infirmities, which have been pointed out in the judgment of the Supreme Court.

19. As far as the present case is concerned, the testimony of P.W.13 is quite straight forward. There was no such infirmity in his testimony, which had been brought out in his cross-examination, which can discredit the veracity of his version.

Further, his version finds full corroboration from the medical evidence.

20. P.Ws. 1 and 2 were the son-in-law and the daughter of the deceased. P.W.2 stated clearly that when she heard the scream of her father, she came out and found that the accused is assaulting her mother and when her father intervened, he too was assaulted by the accused. One lamp was burning near the spot and that it was a moon lit night. The improvement of the testimony is that what was told to the police in the first instance viz., that she did not tell to the police that the occurrence took place on the previous night of Sravana Purnima and the axe was stained with blood, are not so material as to discredit her entire testimony. Nothing else in her cross-examination has been brought out to discredit her testimony. The presence of P.Ws.1 and 2 in the house at the adjoining room has been more than sufficiently established. Although they were related witnesses, they have been independently corroborated both by the medical evidence as well as other independent witnesses.

21. Rohit Sethy (P.W.10) is another witness, who has supported the case of the prosecution. He rushed to the spot immediately after the occurrence and found that both the deceased and P.W.13 were lying injured in a pool of blood. P.W.13 told him at the spot about the accused having assaulted the deceased and P.W.13 by means of an axe. A suggestion was given to him that the axe was seized at the police station, which he denied.

22. P.W.10 explained how P.W.13 disclosed that while he caught hold of the accused, the deceased snatched away the axe from him and this axe was handed over by P.W.13 to P.W.10 for being produced before the police. P.W.15 clearly stated that he seized the axe from the spot and that it was produced by P.W.10. All of these only strengthened the deposition of P.W.13 and point out unerringly to the guilt of the accused.

23. There is hardly any delay in lodging the FIR, which was lodged on the very next day of the occurrence having happened in the late night of 13th August, 2000. Likewise, there is no delay in recording the statements of the injured eye-witness P.W.13 particularly considering the number of injuries on his person.

24. The absence of motive will not weaken the case of the prosecution where the case is based on direct evidence of injured eye-witness. The legal position in this regard has been explained in several decisions, some of which will be discussed hereafter. In ***State of U.P. v. Kishanpal (2008) 16 SCC 73*** it was explained as under:

“39.The motive may be considered as circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eye-witnesses is available, because even if there may be a very strong motive for the accused persons to commit a

particular crime, they cannot be convicted if the evidence of eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of eye-witnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction.

40. As pointed out, even the accused persons have stated that they have been falsely implicated due to previous enmity, in such circumstances, it cannot be said that the accused persons had no motive to commit the crime in question. In fact, the prosecution witnesses have specifically adverted to this without any contradiction and all of them denied the suggestion that the alleged incident was due to attack by the dacoits and the accused persons have nothing to do with it.” (emphasis supplied)”

25. In ***Bipin Kumar Mondal v. State of West Bengal (2010) 12 SCC 91***, the Supreme Court reiterated thus:

“22. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime.

23. In Shivji Genu Mohite Vs. State of Maharashtra, AIR 1973 SC 55, this Court held that in case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye- witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not

established, the evidence of an eye-witness is rendered untrustworthy.

24. It is settled legal proposition that even if the absence of motive as alleged is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. (Vide Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; and Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91)."

26. Even if one keeps aside the evidence of P.W.3 before whom the accused is said to have made the extra judicial confession, there is sufficient evidence otherwise to bring home the guilt of the accused. So also, the Court does not consider it necessary to discuss the purport of the dying declaration of the deceased stated to have been made to P.W.4 since the other evidence as discussed is sufficient to bring home the guilt of the accused.

27. For all of the aforementioned reasons, the Court finds that there have been no grounds made out for interfering with the impugned judgment of conviction and order of sentence of the learned trial Court.

28. The appeal is accordingly dismissed.

29. The bail bond of the accused-Appellant is hereby cancelled. He is directed to surrender on or before 16th August, 2022 failing which, the IO of the concerned police station will take immediate steps to have him apprehended in order to serve out the remainder of the sentence.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge



M. Panda