Rabi Chandra Padhan And Ors. vs State Of Orissa on 16 August, 1979

Equivalent citations: AIR1980SC1738, 1980CRILJ1257, (1980)1SCC240, 1979(11)UJ830(SC), AIR 1980 SUPREME COURT 1738, 1979 UJ (SC) 830, 1980 SCC(CRI) 211, 1979 49 CUTLT 88, 49 CUTLT 88, (1979) 2 SCWR 347, 1979 CRI APP R (SC) 380, ILR (1979) 2 CUT 289, (1979) ILR 2 SC 289, 1980 (1) SCC 240

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Bench: D.A. Desai, R.S. Sarkaria

JUDGMENT

D.A. Desai, J.

1. This appeal under Section 2A of the Supreme Court (Enlargement of Criminal jurisdiction) Act, arises from a trial held by the learned Additional Sessions Judge, Cuttack against the present six appellants and two others in which they were charged for committing the murder of one Lakshman Kumar Das and thereby committing an offence under Section 302 read with Section 34, Indian Penal Code or in the alternative under Section 302 read with Section 149 Indian Penal Code.

2. Prosecution case is a very simple one. There was some litigation between deceased Lakshman Kumar Das on one hand and the appellants on the other and the relations between them were embittered. On 4th April, 1971 in the early hours of the morning deceased went out in the open place to ease himself. He was sitting behind a ridge in the land belonging to one Raghu Padhan. At that time accused 2 Rabi Chandra Padhan approached him and gave him a blow with a bamboo stick on his right thigh. Deceased Lakshmari Kumar Das tried to escape. At that time the other accused came over there. Accused 5 was armed with a Katua and other accused were armed with Dam-boo sticks. All the accused belaboured the deceased. The deceased raised an alarm which attracted the attention of P. W. 1 Chakradhar Muduli, P. W. 2 Kanhai Muduli and P.W. 8 Rajan Muduli. A large crowd collected there and on seeing them the accused ran away. Deceased Lakshman Kumar Das was placed on a cot described as Khatia and was taken to Banki Police Station where first information report. .Ext. 9 on the information given by deceased Lakshman Kumar Das himself was recorded. He was then taken to the hospital nearby. On an intimation being sent, to the local Magistrate, P. W. 9 Prasana Kumar Patnaik, Addl. Tahsildar Banki, went to the hospital and recorded; the, dying declaration Ext. 4 of the deceased. The deceased succumbed to his injuries on 5th April, 1971. The accused were arrested and charge-sheeted for the aforementioned offences.

3. Before, the learned Addl. Sessions Judge the prosecution led evidence of three witnesses, P. W. 1 Chakradhar Muduli, P. W. 2, Kanhai Muduli and P. W. 3, Rajan Muduli and the dying declarations oral as well as written made by the deceased Lakshman Kumar Das. The learned, Addl., Sessions Judge was not impressed with the testimony of the eyewitnesses because in his view the occurrence took place much before day break and. therefore, eye-witnesses could not have been present to witness the occurrence. He was also not satisfied that the two dying declarations Ext. 9 also treated as first information report and Ext. 4 recorded By P.W. 9 Prasana Kumar Patnaik Addl. Tahsildar, Banki, narrated a truthful version of the occurrence. In this view of the matter the trial Court acquitted all the accused observing that the charge was not brought home to them.

4. The State of Orissa preferred an appeal to the High Court of Orissa against the acquittal of the accused. The High Court reversed the findings of the trial Court holding that the dying declarations narrated a truthful version of the occurrence and were an acceptable piece of evidence on which a conviction can be founded even in the absence of any independent corroboration. However, as the deceased had not named accused 1 in Ext. 9 and had also not named accused 8 in Ext. 4 they were given benefit of doubt. The High Court also observed that there is no justification for discarding the evidence of the eye-witnesses. In accordance with these findings the, High Court set aside the acquittal of original accused 2 to 7 and convicted them for committing an offence under Section 302 read with Section 34, I. P. C. and sentenced each of them to suffer rigorous imprisonment for life; The appeal by the State of Orissa against the acquittal of original accused 1 and 8 was dismissed and their acquittal was affirmed. Hence this appeal by original accused $ to 7.

5. Mr. R.L. Kohli, learned Counsel who appeared for the appellants, urged that the two written dying declarations Exts. 9 and 11 in that order do not present a correct and truthful Version of the occurrence in as much as there is variation with reference to participation of accused 1 and 8 and that the deceased having number of litigations between him and the accused, would be motivated to include as many inmates of the family of the accused as possible to wreak vengeance. At any rate it was urged that certain circumstances disclosed in the evidence would affirmatively show that the occurrence must have taken place much before the morning twilight and a simultaneous attack by a number of persons would make it impossible for the deceased to identify his assailants and presumably the deceased was drawing upon his imagination aided by his feeling of enmity towards the accused in implicating large number of persons from me family of the accused. It was urged that presence of eye-witnesses is utterly unnatural and, there are serious discrepancies between the evidence of eye-witnesses and, therefore, it would be hazardous to rely upon their testimony. It was also contended that if the view of evidence taken by the learned trial Judge is reasonable and probable on the evidence led before him, it would be improper for the High Court to interfere with the order of acquittal on the only ground that another view of occurrence is possible on the evidence in the case. In other words, it was said that unless the High Court came to an affirmative conclusion that the view taken by the learned trial Judge is utterly unreasonable and against the weight of evidence, interference by the High Court with the order of acquittal is unjustified.

6. We may first examine the two dying declarations Ext. 9 (treated as F.I.R. also) recorded by P. W. 13 Bamadeb Swain, Officer-in-charge of Banki Police Station when deceased was brought to the police station at about 9 a.m. on 4th April, 1971, and Ext. 4 recorded by P. W. 9 Prasana Kumar

Patnaik Addl. Tahsildar, Banki, on the same day around 11-15 a. m.

7. It is well settled by a catena of decisions of this Court that if after searching scrutiny the Court is satisfied that the dying declaration represents a truthful version of the occurrence in which the deceased received injuries which led to his death then even in the absence of any independent corroboration a conviction can be founded thereon.

8. The first dying declaration Ext. 9 is a fairly detailed dying declaration. In this dying declaration deceased has named original accused 2 to 8 as his assailants. He has also referred to the place where the incident occurred as also weapons with which he was attacked and beaten, and the motive which prompted the accused to belabour him.

9. Mr. Kohli contended that this dying declaration suffers from three serious infirmities. It was urged that accused 1 is not named as one of the assailants in it and secondly that even though deceased had suffered as many as 21 injuries no blood was found at the scene of occurrence and thirdly the names of the witnesses who claim to be eye-witnesses have not been mentioned in the declaration. It was also pointed out that the name of Kanhai Muduli mentioned in Ext. 9 as witness to the occurrence has not been examined because P. W. 2 who was examined was not Kanhai Muduli referred to in Ext. 9. We are not impressed by the submission. The offence was registered on Ext. 9 itself, it being treated as F. I. R., and the names on 7 accused are disclosed therein. The eye-witnesses have referred to the presence of original accused 1 as 8th accused. If the evidence of eye-wit-nesses is to be discarded as urged by Mr. Kohli, then that evidence could not be urged in support of the alleged infirmity in Ext. 9. Similarly, absence of blood at the scene of occurrence ceases to be of any importance in view of the nature of injuries suffered by the deceased. The weapons used were hard and blunt weapons, namely stick and katus. The deceased has not suffered any incised wound. Undoubtedly, as many as 6 lacerated wounds were found on the person of the deceased when examined by P. W. 4 Dr. Z. N. Begum but no suggestion was made in the cross-examination of P.W. 4 Dr. Z.N. Begum that there must have been such profuse bleeding that even if deceased had put on clothes blood should have trickled to the ground or blood should have been traced along the path he crawled over from where he was first attacked to where he was further belaboured. Therefore; no importance can be attached to the absence of blood at the scene of occurrence nor would it introduce any infirmity in the dying declaration. Similarly, absence of names of eye-witnesses in the dying declaration would not by itself introduce an infirmity in the dying declaration. However, ft may ,be pointed out that the name of P. W. 2 is mentioned in the dying declaration. In this connection it was urged that Kanhai Muduli referred to in the dying declaration is not- P. W. 2 but he is some other person and that an imposter has been brought before the Court assuming the name of Kanhai Muduli. P. W. 2 has stated in his evidence that he is also known as Sanai Muduli. P. W. 2 Kanhai, Sanai Muduli is the son of P. W. 3 Rajan Muduli and Rajan Muduli has stated that P. W. 2 is his son. P. W. 2 Kanhai Muduli was cross-examined with reference to his name in the voters' list where he is mentioned as Sanatan Muduli. This is hardly sufficient to condemn P. W. 2 as an imposter because vagaries of electoral roll are not unknown. Therefore, it cannot be said that someone who is named as an eye-witness in Ext. 9 has been deliberately dropped and an imposter has been brought in his place as P. W. 2. There is one more criticism of the dying declaration to which we would refer soon after specific infirmities pointed out with reference to the

second dying declaration Ext. 4 are examined.

10. The second dying declaration Ext. 4 was recorded by P. W. 9 Prasana Kumar Patnaik, Addl. Tahsildar at about 11-15 a. m. on 4th April, 1971. It is a, short cryptic statement. In Ext. 4 the deceased has stated that at 5.30 in the morning he was easing himself when some one gave him a heavy blow. He then stated that accused 2 Rabi Chandra Padhan gave him a blow on his thigh with a bamboo lathi and then accused 3, 4, 5, 6 and 7 attacked and beat him. Now, when a Magistrate records a dying declaration, preferably it should be in question and answer form. That' has unfortunately not been done. In fact, there is no proper questioning to elicit full information, But even here accused 2 to 7 are mentioned by the deceased as his assailants. The time of the occurrence is mentioned. It was contended that the scene of occurrence is not disclosed and that the name of accused 8 is omitted. Undoubtedly, 8 accused were put on trial for committing murder of the deceased. In Ext. 9 the first dying declaration, the presence of accused 1 is not mentioned and the name of accused 8 is omitted in the second dying declaration Ext. 4. After referring to the decision in 'Thurukanni Pompiah v. State of Mysore AIR 1965 SC 989 : (1965) 2 Cri LJ 31 it was urged that where a record of the dying declaration if it is more than one, is not consistent it would introduce an infirmity in the dying declaration. In that case in the first dying declaration names of two assailants were mentioned but in the subsequent dying declaration an improvement was made that the assailants were 4 in number. After rejecting the evidence of eye-witnesses this Court observed that as the improvement would introduce a serious infirmity it would be unsafe to place implicit reliance on such a dying declaration. The decision proceeds on the facts of the case. Moreover, where the deceased in a later dying declaration implicates more persons as his assailants than on the earlier occasion when his memory must be quite fresh, the court is put to caution that the deceased may have been prompted to implicate some innocent persons or is drawing on his imagination, or is using the occasion to wreak vengeance on some persons. But here reverse is the position. In fact, when his memory was very fresh the deceased implicated accused 2 to 8 in Ext. 9 but did not refer to the presence of accused 8 in his second dying declaration. Such a situation cannot be put on par with one that was before this Court in Thurukanni Pompiah's case . In this case there is not the slightest suggestion that there was someone who would prompt the deceased. On the contrary, even though the deceased was taken on a cot to the police station which would imply that some persons must have lifted the cot and some others must have accompanied all the way to the police Station, none-appears to have interposed to prompt the deceased. The High Court has found that the nearest relation of the deceased is his brother who was nowhere in the picture because he was far away. In this background the omission of name of accused 1 from dying declaration Ext. 9 and that of both accused 1 and 8 in dying declaration Ext. 4 would in our opinion, not detract from the credibility of the dying declarations. At best the Court would be put to caution about participation of accused 1 and 8 in the occurrence. They have been on this account acquitted by both the Courts.

11. It was also urged that the deceased must not have been able to identify the assailants inasmuch as looking to certain circumstances elicited in evidence the incident must have occurred before the day break or even before the morning twilight and, therefore, it would be unwise to place reliance on the dying declaration, It was pointed out that the deceased reached the police station according to the Investigating officer P. W. 13 on 4th April, 1971 at 9 a. m. After dying declaration Ext. 9 was recorded at the police station the deceased was taken to Banki Hospital where according to the

evidence of P. W. 5 Dr. Anirudha Acharya the deceased arrived at 9 a. m. It was also pointed out that according to P. W. 13 Bamadeb Swain he took half an hour in recording dying declaration Ext. 9 and then the deceased was sent to hospital. This would imply that the deceased must have* arrived at the police station at least around 8-30 a. m. It was further pointed out that this incident occurred at Village Pasania which according to P. W. 13 Bamadeb Swain, the investigating officer, is at a distance of 20 Km. from Banki Police Station. It was contended that if deceased was taken all the way in a cot lifted by village people, from Pasania to Banki Police Station and covered a distance of 20 Km. they would at least require more than four to 4.30 hours and, therefore, the incident must have occurred much before 4 a.m. because after the incident Some time must have been spent in making arrangements to collect people to bring a cot and to put the deceased on the cot and then take him all the way to Banki Police Station. Accordingly, it was urged that the incident must have occurred when it must be dark and neither the deceased nor the eye-witnesses could have identified the assailants undoubtedly, according to investigating officer P.W. 13. Village Pasania is shown to be at a distance of 20 Km. from Banki police station. The witnesses who accompanied the deceased have stated that they had to cover a distance of about six miles which means about 10 Km. for reaching Banki police station from village Pasania. The question is whether this distance of 20 Km. spoken to by P. W. 13 is the distance along the known road of as the crow flies. It may be that the witnesses had taken the deceased by the shorter route and not along the vehicular traffic road. It is equally true that P. W. 13 asserts that the deceased arrived at Banki police station at 9 a. m. and Dr. Anirudha Acharya asserts that the deceased arrived at the hospital at 9 a. m. Somewhere some error is Committed but the deceased himself has stated both in Ext. 9 and Ext. 4 that he had gone oat for easing at 5-30 a. m. Village people are known to go to ease themselves at an open place and ordinarily it would be in the early morning. Therefore, the consistent version in the two dying declarations can be accepted as representing the correct time subject, of course, to the assessment about time by the rustic villagers. The evidence with regard to the distance is rather not very clear and, therefore, on such an uncertain evidence it would not be wise to reject the dying declaration;

12. We have minutely, examined the infirmities in the two dying declarations as pointed out by Mr. Kohli and We are not impressed by any of them. The High Court has also examined those infirmities and has rejected them. We are in agreement with the High Court that after close and searching scrutiny the dying declarations represent a truthful version of the occurrence and, therefore, they would afford a reliable basis for founding a conviction thereon.

13. The learned Addl. Sessions Judge rejected the dying declarations on grounds which are wholly untenable. The trial Court rejected the evidence of eyewitnesses as unworthy of belief and thereafter picked up some of the statements made by these witnesses to find fault with the dying declarations. This would not be a correct approach to determine the credibility and reliability of the dying declarations. This approach of the trial Court is improper and, therefore, the High Court was justified in differing from the same.

14. The High Court was also of the opinion that there was no justification for discarding the evidence of eye-witnesses P. Ws. 1 to 3 about the occurrence at least on the ground on which the trial Court has discarded their evidence because that ground is not tenable. Now, undoubtedly we would have examined the evidence of these eye-witnesses a little more in detail, however, we would refrain from

doing so because it is not necessary to do so in the facts of this case. Secondly it can be broadly stated that the view of the evidence of the eye-witnesses taken by the learned trial Judge can be a possible view and cannot be discarded as wholly unreasonable though we should point out that some of the reasons that weighed with the learned trial Judge for discarding the evidence are far from convincing. The most important aspect that influences the decision of the learned trial Judge; for rejecting eye-witnesses' account was that if the deceased was taken in a cot over a distance of 20 Km. and yet it they reached the police station at 9 a. m. the incident must have .occurred much before the morning twilight or during the dark hours and, therefore, neither the deceased nor the eye-witnesses were, in a position to identify the assailants of the deceased. This view of the learned trial Judge is utterly unreasonable and untenable and in reaching this conclusion surmises were drawn from incomplete evidence which would not be permissible. On this point we are in agreement with the High Court that the incident must have occurred around 5-30 a. m. on 4th July, 1971. In the absence of evidence to the contrary the almanac would show that there would be enough morning twilight at 5-30 a.m. and this is borne out by a very natural circumstance that the deceased had gone out to ease himself. It is, therefore, not necessary to probe the evidence of the eye-witnesses any further and we would leave it as it is. However, once we accept the dying declarations as narrating a truthful version of the occurrence the charge is brought home to the present appellants and their conviction must be confirmed.

15. Accordingly, this appeal fails and is dismissed. Accused 3 Ganesar Padhen and accused 7 Nilamani Padhan have been released on bail. Their bail bonds are cancelled. They must surrender to serve out the sentence.