

Orissa High Court

Sri Krushna Chandra Sahoo vs State Of Orissa on 13 September, 2005

Equivalent citations: 2005 II OLR 651

Author: P Tripathy

Bench: P Tripathy, A Samantray

JUDGMENT P.K. Tripathy, J.

1. Appellant was one of the accused persons in Sessions Trial No. 466/46 of 1998 of the Court of Addl. Sessions Judge, Jajpur. He faced the charge for the offence punishable under Sections 302/34, I.P.C. on the allegation that on 06.05.1997 at about 12.30 p.m. (it should be a.m.) in the night at Haladharpur in furtherance of their common intention appellant and two others committed murder of one Dushasan Sahu (hereinafter referred to as the deceased) by dealing 'Khanda' and 'Bhujali' blows. The co-accused persons were Bajia alias Bijay Kumar Mishra and Sudam Charan Sahu. To substantiate the charge, prosecution examined nine witnesses and relied on documents marked Exts. 1 to 7. No material object was exhibited on behalf of the prosecution. The accused persons, in a common defence, took the plea of complete denial and examined one witness namely Ghanashyam Sahu as D.W. No. 1 to prove that because of his antecedent as a dacoit the deceased suffered injuries and death by some unknown persons.

2. On assessment of the evidence and no dispute from the defence about existence of such injuries as per the evidence of P.W. No. 7, the doctor who conducted the post mortem examination and proved the post mortem report-Ext.4, trial Court concluded that deceased suffered a homicidal death. It appears from the evidence of P.W. No. 7 that he found the following external injuries on the body of the deceased ;

1) ... A surgically stitched wound on the left side parietal region of the scalp starting from the left frontal region, 5 cm. Above the lid of the left eye brow extending upto the left parietal eminence passing 8 cm. above the root of the left ear and then obliquely goes to the right side crossing the midlines. Total length of the wound 20 cm. long with 20 stitches.

2) Surgically stitched wound with 7 stitches below the left parietal eminence.

P.W. No. 7 further deposed that on dissection he found corresponding internal injuries and that includes linear fracture extending to the base of the left ear and then posteriorly above the left temporal bone, that extradural blood clots on the left temporo-parietal region was present with features of blood cerebral injuries, that entire left side of the scalp extending to the vertex region was contused and that left side temporal lobe of the brain tissue was lacerated on the outer aspect. According to P.W. No. 7 the injuries were ante mortem in nature and death was due to coma resulting from the said injuries. It appears from Ext.4 that P.W. No. 7 recommended for obtaining "opinion regarding the nature of the weapon and type of injury" by collecting the relevant information and opinion from the treating physician in S.C.B. Medical College, Cuttack. Since the report, Ext.4 and in his evidence P.W. No. 7 did not state that death was homicidal in nature, therefore, cryptic finding of the trial Court on the homicidal death in the following quoted manner is inadequate and improper. In paragraph-8 of the impugned judgment the trial Court stated, "There

being no dispute about the nature of the injuries. I am not going to say much on the same. The medical evidence of P.W. 7 shows that the injuries on the person of Dushan detailed on Ext.4 were the cause of Dushasan's death." Except the above quoted passage there is no whisper in the entire judgment if the deceased suffered a homicidal death. We do not approve such lacuna in the impugned judgments. Be that as it may, while in seisin of the matter as the appellate Court we record the finding that when the death of the deceased was due to the injuries which he sustained and it is nobody's case that such injuries are possible otherwise than by infliction, therefore, we record the finding that due to the said injuries the deceased suffered a homicidal death.

3. On assessment of evidence, trial Court found P.W.5, the widow of the deceased and an injured in that occurrence as per the injury report-Ext.7, was the solitary eye-witness to the occurrence relating to the homicidal death of the deceased. On assessment of her evidence trial Court recorded finding that her evidence suffers from exaggeration and improbability relating to the participation in the crime by the co-accused Bajia alias Bijoy. He also found that in her deposition P.W.5 eliminated presence of accused Sudam at the scene of occurrence. He further recorded a finding that evidence of P.W.4 (son of the deceased) is not acceptable that the said two acquitted accused persons ran away from the spot. Accordingly trial Court held that applying the principle of elimination of unacceptable evidence, P.W.5 is acceptable only with respect to dealing sword blows by the appellant. Accordingly he held the appellant as the author of the injuries and convicted him under Section 302, I.P.C. For the said conviction he sentenced the appellant to undergo imprisonment for life.

4. In the preceding paragraph we have filled up the deficiency and recorded the finding on homicidal death of the deceased. In course of the argument, Mr. Dharanidhar Nayak, learned counsel for the appellant, did not dispute to the homicidal death of the deceased. His contention is focused on the credibility of P.Ws.4 and 5 and to acceptability of the method of appreciation of evidence of P.W.5 by the trial Court. Therefore, he did not challenge to the other aspect about the delay in lodging F.I.R., etc., which were raised in the Court below. He, however, argued that when the charge was framed for the offence under Sections 302/34, I.P.C. on the allegation that injuries were inflicted by use of sword and 'Bhujali', both being sharp cutting weapons, in course of the investigation and trial opinion of the Doctor was not obtained as to whether such injuries were possible by a sword or 'Bhujali' or by both. Accordingly he argued that in the above context the charge under Section 302/34, I.P.C. if fails, then the appellant cannot be convicted under Section 302, I.P.C. on the basis of shaky evidence of P.W.5.

5. On a reference to the finding recorded by the trial Court, we see that he remained confused all throughout as to the manner of appreciation of the evidence of P.Ws.4 and 5 because of some glaring contradictions. Therefore, we summarise the evidence on record to find out whether accused is the author of the crime.

6. P.W. No. 1, a niece of the deceased, deposed that in the occurrence night she along with the others slept inside a room, P.W.5 slept on the verandah and deceased on the 'Daanda'. At about mid night P.W.5 raised a cry that she was assaulted. So P.W.4 and his sister Lalita (not examined as witness) came out and soon thereafter P.W.1 also came to the spot. She saw that P.W.5 had sustained

bleeding injury on her right hand on the backside of the palm and the deceased had sustained three bleeding injuries on his head. Then Lalita stated to her (P.W.1) that Essi (appellant) injured both the deceased and P.W.5. In cross-examination she has admitted that in summer season people usually sleep outside. It is clear from her evidence that participation in the crime by the accused persons (which includes the appellant) was not directly known to her. She derived that information from Lalita, who is the daughter of the deceased. That Lalita was not examined as a witness. There is nothing on record to indicate that Lalita had any direct knowledge as to who injured her parents. Therefore, evidence of P.W. No. 1 is 'hearsay' evidence and not acceptable in view of the provision in Section 60 of the Indian Evidence Act.

7. P.W.3, Sulabha Chandra Sahu stated that deceased was a first cousin to him. Accused Essi la also a cousin to them. In the occurrence night, on hearing the cry raised by P.W.4 he reached at the spot and found that P.W.5 had cut injuries on both her arms and also she had sustained injuries on her lower abdomen and backside waist and the body of the deceased was covered with a 'Chadar'. On removing the 'Chadar' he saw three severely cut injuries on the vault of the head of the deceased causing damage to the brain materials and both sides of the face. He further stated that P.W.5 intimated to him that appellant and co-accused Bijoy killed her husband and fled from the spot. He found the deceased to be alive by then but in a state of coma and therefore With the help of others they brought the deceased to S.C.B. Medical College & Hospital, Cuttack, where, after three days the deceased died. He has also narrated about the antecedents of the deceased and the co-accused persons and about the property dispute, which attributed motive for committing the murder. In the cross-examination he admitted that a theft case was filed against him (P.W.3), P.W.4, the deceased and others by the appellant. Accused Bijoy had also filed a case against him (P.W.3) and the deceased. He further stated in the cross-examination that there were three injuries on the body of the deceased, one on the vault of his head, another on the right side face near the ear and the third one on the left side face. P.W.4 (the informant) is the son of the deceased. According to him, in the occurrence night he along with P.W.1 and his sister Lalita slept in one room. P.W.5 slept on the outer verandah of the said room and the deceased slept at the courtyard. At about mid night P.W.5 raised a cry; so he rushed out of the room with a torch in hand followed by Lalita. He saw the appellant escaping through the backyard of the house holding a sword and accused Bijoy and Sudam were running away through the front yard and then Bijoy was holding a 'Bhujali'. P.W.5 stated to him that the said three accused persons fled away from the spot after inflicting cut injuries on his father. Thus, he raised a cry. P.W.4 saw three bleeding injuries on the head of the deceased who was lying senseless. P.W. 5 had also sustained bleeding injuries on her hands and there were scratch injuries on her abdomen and waist. According to him, the injury on the palm of P.W. 5 was deep cut. His further evidence is relating to shifting the deceased in injured condition to the S.C.B. Medical College & Hospital, lodging the F.I.R. at Mangalabag Police Station and on refusal, in Balichandrapur Police Station on 08.05.1997. He further stated that on 09.05.1997 at 10 p.m. deceased expired in the hospital. He has also stated about the dispute between his father and the accused persons relating to the landed property and the house. In the cross-examination he stated that when he first arrived at the spot of occurrence, body of his father was not covered and the 'Chadar' was lying nearby. P.W.5 has stated in her evidence that in the occurrence night P.Ws. 1 and 4 and Lalita were sleeping in a room, she was sleeping on the inner verandah and the deceased was sleeping at the courtyard. She had kept a lantern burning on the verandah where she had slept. At

about mid night she heard the groaning sound of her husband. She woke up and saw accused Bijoy holding the waist of her husband and the appellant dealing cut blows on the head of the deceased by means of a sword which was about 2 to 3 cubits long. She raised a cry and rushed to her husband to rescue. Appellant dealt a blow, which fell on her left palm and cut it. On sustaining that injury she came back to her bed, but the appellant came near her and dealt successive blows as a result of which she sustained injuries at five places, such as elbow joint, belly, back and fingers of the right palm. While dealing blows to P.W.5, appellant expressed that he would finish her or else she would depose against him in the trial. In response to her cry P.W.4 came out and appellant ran towards backside and accused Bijoy ran towards 'Daanda' side. In the cross-examination she stated that due to excessive heat she and the deceased slept outside the house (room) and some others in the village also had slept outside their houses. P.W.6 is another co-villager of the parties. He has stated that in the occurrence night he was discussing with his wife about the arrangements made so far regarding marriage of their daughter and then he heard the cry raised by P.W.5, but did not come out of the house being afraid of dacoits. When he heard the voice of P.W.4, then he came to the spot and saw two persons running away but he could not ascertain their identity. On reaching at the spot he saw the deceased had suffered severe cut injuries and P.W.5 was turning left and right with the wearing apparels being soaked with blood. After hearing about the incident from P.W.4 he went to the house of the appellant and found him absent from his bed. In his cross-examination he admitted that he is in litigating term with the appellant in Civil Court.

8. P.W.2 is a witness to the seizure of bed-sheet, pillow and the cot stained with blood under Seizure List-Ext.1. P.Ws.8 and 9 are the two Investigating Officers.

9. Before dealing with the aforesaid oral evidence some relevant evidences are needed to be noted Which is emerging from the Injury Certificate-Ext.7 granted in favour of P.W.5 and the Inquest Report-Ext.3 so also the Seizure List-Ext.6 relating to seizure of a torn saya (petticoat) said to be belonging to P.W.5.

10. For reasons best known to the prosecution, the Doctor who granted Injury Certificate-Ext.7 was not examined. It appears from Ext.7 that on 08.05.1997 requisition was given by P.W.9 for examination of P.W.5 and to grant Injury Certificate and such certificate was granted by the Assistant Surgeon on 24.05.1997 indicating therein that P.W.5 was examined by him on 07.05.1997 at 12.30 a.m. The occurrence took place in tn6 night of 06.05.1997. Therefore, when it is described as the occurrence took place at 12.30 a.m. that means the occurrence took place at 0.30 hours of 07.05.1997. If the Doctor would have been examined, he could have stated whether P.W.5 Was examined at 12.30 p.m. on 07.05.1997 or 0.30 a.m. of that date. Since the Occurrence took place at 12.30 a.m., i.e., on 07.05,1997, therefore, she could not have been examined at the same time at the S.C.B. Medical College & Hospital, Cuttack. The documents available from the lower Court's record (though not exhibited) indicates that the deceased was admitted to the S.C.B. Medical College & Hospital at 5.30 a.m. on 0,7.05.1997. Thereafter, if P.W.5 accompanied him, then her examination was at 12.30 a.m. or p.m., as the case may be, but after admission of the deceased in the Hospital. The aforesaid point is highlighted much in view of the fact that in the Injury Certificate the Doctor has opined that, "All injuries are fresh and simple in nature, could have resulted from sharp cutting weapon." If the Doctor would have been examined, then he could have explained what he meant by

stating that the injuries were fresh. If P.W.5 was examined at about 12.30 p.m. on 07.05.1997, then the injuries were already about 12 hours old and that could not have been termed as fresh and if P.W.5 was examined still later at 12.30 a.m. in the night of 07.05.1997, then the injuries would have been about 24 hours old and in that case also such injuries could not have been described as fresh if P.W.5 sustained that injury in the occurrence night, i.e., in the night of 06.05.1997. At the risk of repetition, we may note here that the occurrence having taken place at 12.30 a.m. in the night between 06/ 07.05.1997 at village Haladharpur under Balichandrapur Police Station in the district of Jajpur, therefore, she could not have been examined by the Doctor at S.C.B. Medical College & Hospital, Cuttack at 12.30 a.m. in the occurrence night.

11. Another glaring circumstance emerging from Ext.7 is that on the requisition form for examination of P.W.5 it was stated that, "she sustained bleeding cut injuries on her both hand". The size of the injuries has been noted by the Doctor as incised cut 6x1x2 cm. and 3 x 1/2 x 1/2 cm. and both the injuries were simple and possible by sharp cutting weapon. It appears from Ext.7 that P.W.5 did not suffer any injury on any of the part of her body, as stated by P.W.5 and corroborated by P.Ws. 3 & 4. Though P.W.6 stated that the wearing apparels of P.W.5 was soaked with blood but there is nothing on record to indicate that such blood soaked wearing apparels of P.W.5 were seized and sent for chemical analysis, and serological test to obtain opinion that such were the human blood belonging to P.W.5. Even the 'saya' seized under seizure list was also not produced as Material Object, P.W.5 did not state in her evidence that her 'saya' was seized by the Investigating Officer.

12. In the inquest report-Ext.3 it is stated that the whole of the head was under plaster as per the description under column No. 5. As per the description under column Nos. 6 and 7 it was opined by the witnesses that deceased was injured by 'Bhujali' and as against column No. 9 it was noted that the accused persons inflicted injuries by 'Bhujali' and sword. No attempt was made by the prosecution to reconcile the aforesaid contradictions.

13. It does not appear from the evidence on record and particularly the evidence of P.Ws.8 and 9 that the weapons of offence were attempted to be recovered, but they were unsuccessful. There is nothing in their evidence to indicate that they examined the doctor who treated the deceased so as to ascertain the nature of the injuries and their dimension and the weapon by which such injuries could have been possible. The prosecution evidence in that respect is next to nothing. That circumstance assumes importance when the allegation by the prosecution is for the charge under Sections 302/34, I.P.C. with the allegation that appellant was holding a sword and the co-accused Bijoy was holding a 'Bhujali'. If the deceased suffered death due to the injuries caused by 'Bhujali' and notwithstanding that accused Bijoy is acquitted, then appellant cannot be convicted for the offence under Section 302/34, I.P.C. On the other hand there should be clear evidence on record to indicate that the deceased suffered homicidal death because of the injuries caused by sword so as to prove the guilt of the appellant under Section 302, I.P.C. irrespective of the charge under Section 302/34, I.P.C. Therefore, we find that learned counsel for the appellant has well taken that point that in this case the charge being framed for the offence under Section 302/34, I.P.C, the conviction is not sustainable when prosecution has not been able to prove by clear and cogent evidence that the deceased suffered homicidal death due to the blow caused by a sword in as much as according to the prosecution the appellant was holding the sword.

14. It is stated by learned Standing Counsel that so far as he had obtained instruction, the State did not prefer any appeal against the order of acquittal against accused Bijoy who was allegedly holding 'Bhujali'. Therefore, if the evidence of P.W.5, the solitary eye-witness to the occurrence, is found credible then only the order of conviction of the appellant can be sustained notwithstanding the aforesaid lacunae and the deficiencies in the prosecution case and the evidence adduced by it.

15. Evidence of P.W.5, as rightly commented by the trial Court, suffers from exaggeration. In that respect the evidence of P.Ws.3, 4 and 6 were found contradictory by the trial Court and accordingly discarded relating to participation of accused Sudam and Bijoy. When the evidence of those witnesses are so generally stated that chaff cannot be separated from grain, evidence of those witnesses is not found credible only against the appellant. Apart from that. P.W.5, for reasons best known to her, did not support the prosecution in her allegation against accused Sudam. P.W.4, her son when stated about Sudam being present along with other two accused persons and that there was such a narration of event by P.W.5 to him, therefore, the conduct of P.W.5 is not found to be truthful even if she is the widow of the deceased in as much as she exercised her discretion to eliminate one of the culprits from the zone of punishment by showing favour. In addition to that, as already noted above, her evidence suffers from exaggeration relating to the injuries sustained by her, there is glaring discrepancies and contradictions in the medical evidence as well as the evidence of the other witnesses relating to the time when she sustained that injury, the number of injuries sustained by her and the nature of the injuries which is inconsistent to her evidence that appellant wanted to kill her by dealing successive sword blows. Therefore, as it appears, P.W.5 is much hostile to the appellant and that is how she deposed against him rather than with a view to see that the murderer of her husband should be punished. Under such circumstance, it is not safe to rely on her evidence. Once her evidence is found not reliable, the other evidences on record, as indicated above, are not sufficient to prove the charge under Section 302, I.P.C. against the appellant. The trial Court, therefore, did not properly scrutinize the evidence while recording the finding on the guilt of the appellant. The doubtful circumstances existing on record are sufficient to grant benefit of doubt to the appellant.

Accordingly, we set aside the order of conviction of the appellant and set him at liberty. The Criminal Appeal is accordingly allowed. Appellant be released from jail custody in the event his detention in custody is not required in connection with any other criminal case.

A.K. Samantray, J.

I agree.