

Baikuntha Nath Chaudhury

Vs

The State of Orissa

Criminal Appeal No. 59 of 1970

(C.A. Vaidialingam, I.D. Dua, K.K. Mathew JJ)

10.04.1973

JUDGMENT

VAIDIALINGAM, J. -

1. This appeal, by special leave, by the second accused is against the judgment and order, dated October 9, 1969, of the Orissa High Court confirming his convictions for offence under Section 302, read with Sections 34 and 201 of the Indian Penal Code and the sentence of imprisonment for life awarded for the former offence. The appellant along with his brother, Baishnab Charan Chaudhury alias Kuturi, who was the first accused, was tried for offences under Section 302, read with Section 34 and Section 201 of the Indian Penal Code. Along with them their mother, Jema Bibya, who was the third accused. Was also tried for offences under Section 302, read with Sections 34 and 201 of the Indian Penal Code. The learned Sessions Judge acquitted the mother, the third accused, of all the offences with which she was charged. The appellant and his brother were convicted for the offence under Section 302, read with Section 34 and each of them was sentenced to undergo rigorous imprisonment for life, and both of them were also convicted of the offence under Section 201, I.P.C. The learned Sessions Judge, however, did not award any separate sentence for this offence.

2. Both the appellant and his brother appealed to the High Court in Criminal Appeal No. 45 of 1967. The State did not challenge the acquittal by the Sessions Judge of the third accused. The High Court by its judgment under consideration acquitted the appellant's brother, the first accused, of both offences for which he had been convicted. The High Court, however, confirmed the conviction of the appellant. The appellant has come up to this Court challenging his conviction. The State has not challenged the acquittal of the first accused by the High Court.

3. The prosecution case was as follows :

The deceased, Bhairab Charan Chaudhury alias Bauri was the brother of accused 1 and 2 and the son of the third accused. There was a dispute between the three brothers regarding the family properties and hence the deceased had instituted a suit for partition against accused 1 and 2 in the Court of the Subordinate Judge at Balasore. The deceased was staying separately in Balasore. The first accused was, at the relevant time, working in the office to the Public Works Department and was residing in P.W.D. quarters at Balasore. The appellant with the members of his family and his mother was, however, staying in the family house.

4. On December 18, 1965, P.W. 13, who was an Advocate and a Receiver appointed in the partition suit, had gone to the family house of the appellant for taking charge of the paddy from the tenants.

The deceased had also accompanied the Receiver. When the Receiver and the deceased came out of the house, the deceased was called back by the appellant on the ground that he was wanted in the house by their mother. After the deceased came into the family house, he was questioned by the appellant as to why he cut and removed certain trees from the compound. The appellant caught hold of the deceased and the first accused gave lathi blows on his head. The deceased was begging both the brothers to let him go and was assuring them that he would not come again. In spite of this, the deceased was given further blows by both the accused as a result of which he died. Both the accused 1 and 2 dragged the body to the back side of the house and put it in a gunny bag, which was brought by their mother, the third accused. After the body was tied in the gunny bag, both the brothers carried the gunny bag further west of the house and drowned it in a tank after tying a heavy stone on it. On information given by the appellant, the body was recovered from the tank and P.W. 14, who held the postmortem examination, found as many as 26 injuries. The injuries in the head were sufficient in the ordinary course of nature to cause death. The plea of all the accused was that they are innocent.

5. The prosecution examined witnesses to show that there was a quarrel between accused 1 and 2 and their brother, the deceased, immediately after the court Receiver, P.W. 13, left the house and that after causing the death of Bauri, both accused 1 and 2, with the active assistance of their mother, the third accused, threw the body in the tank for causing disappearance of the evidence of murder. Eye-witnesses to the occurrence are P.Ws. 9 and 10. The evidence of the other witnesses will assume important and significance only if the evidence of these two witnesses is accepted. In the view that we are taking that the offence against the appellant either under Section 302 or 302 read with Section 34 or under Section 201 has not been established beyond reasonable doubt, we do not propose to refer to the other items of evidence.

6. Though P.Ws. 9 and 10 categorically implicated the third accused, as an abettor to the murder, the learned Session Judge did not choose to accept their evidence, so far as that accused was concerned, and acquitted her of all the charges. Even with regard to P.Ws. 9 and 10, the learned Sessions Judge has pointed out several discrepancies and suppression of material facts. Nevertheless, the learned Judge accepted their evidence and convicted both accused 1 and 2. Though both P.Ws. 9 and 10 deposed that it was the first accused who had a thenga with which he inflicted injuries on the head of the deceased, which injuries proved fatal, nevertheless, the High Court rejected their evidence so far as the said accused was concerned. On the other hand, with the evidence of the two witnesses to the effect that the appellant was only catching hold of the deceased, while the latter was being mercilessly beaten by the first accused, the appellant has been convicted under Section 302 simpliciter.

7. Mr. Gobind Das, learned counsel for the appellant, has very strenuously urged that the findings recorded by the High Court are quite contrary to the evidence adduced in the case. The counsel also urged that the position ultimately is that the first accused, who, according to the prosecution witnesses, inflicted the fatal injuries, has been acquitted by the High Court and the appellant, whose part, even according to the evidence, was only very insignificant, has been convicted under Section 302. The counsel also pointed out that the charge against the appellant and the first accused was under Section 302, read with Section 34 and when the first accused has been acquitted, the conviction of the appellant alone under Section 302 is bad in law. In any event, the counsel urged that when the evidence of P.Ws. 9 and 10 has been rejected by the Sessions Judge in respect of the third accused and by the High Court also in respect of the first accused, that evidence was not safe to be acted upon even as against the appellant.

8. Mr. Santosh Chatterjee, learned counsel for the State, however, stressed the following points :

The evidence of P.W. 2 establishes that it was the appellant who called back the deceased on the pretext that their mother wanted to talk to him. Immediately after the deceased went back into the house, there was an altercation between the appellant and the deceased and soon afterwards the deceased was found lying dead with serious injuries. He has also referred us to the evidence of P.W. 7 to show that the assistance of this witness was asked for by the appellant to carry the dead body to the tank as also a heavy stone. The dead body was discovered on information given by the appellant. When the police came to the house late in the night, it was only the appellant who was present there.

9. Based upon the above circumstance, the counsel for the State stressed that the offence was committed only by the appellant and, therefore, the acquittal of the first accused by the High Court as well as the conviction of the appellant are both justified. We are not inclined to accept the contentions of the learned counsel for the State.

10. It is now necessary to briefly refer to the evidence of the two eye-witnesses, P.Ws. 9 and 10. The material evidence of P.W. 9 is to the following effect :

She resides near the family house of the appellant. She knows the deceased, accused 1 and 2 as well as their mother. The appellant with the members of his family and his mother was staying in the family house. Bauri Babu (the deceased) was the elder brother of accused 1 and 2. Accused 1 was also known as Kuturi and the appellant used to be called as Baya. Bauri Babu was killed by his two brothers. Kuturi and Baya. She saw the said two accused assaulting the deceased on the evening of a particular day during the harvest season. She saw P.W. 13, the Receiver, the appellant and the deceased counting the paddy sheaves that had been brought by the tenants. The first accused was also present then. After the Receiver left, the appellant caught hold of the deceased while Kuturi gave blows on his head with a thenga. Even after the deceased fell down appealing to the two brothers to let him go, he was beaten by both to them. She went and informed P.W. 10. In cross-examination, she had stated that she was positive that she saw the first accused beating the deceased on his head with a thenga, while the appellant caught hold of the deceased. She mentioned about the assault in a very loud tone to P.W. 10 and informed him that both the brothers were beating the deceased. Though she was examined by the police later in the day, she denied any knowledge about the occurrence. She has again repeated the part played by the appellant and his brother. She has further emphasised that she saw two blows being given to deceased, one on the head and another near the left ear, and that both the blows were given by a thenga by Kuturi, the first accused. She has further stated that though the appellant was also assaulting the deceased, she could not say in which part of the body of the deceased the appellant was assaulting. She has further stated that the deceased was dragged by both the brothers to the back side of the house.

11. The substance of the evidence of P.W. 10 on material aspects in follows :

He resides near the family house of the appellant and he knows the appellant, his two brothers as well as their mother. On the evening of the day of the occurrence, he saw the deceased and the appellant counting the paddy sheaves along with the Court Receiver, P.W. 13. When he was in house, P.W. 9 told him that the deceased was being assaulted by the appellant and his brother. He ran to the house of the appellant and saw Bauri lying on the ground with serious injuries. He saw both the appellant and the first accused dragging the deceased to some distance and assaulting him with a lathi. But Accused 1 and 2 dragged their injured brother to the western part of their house. He has also referred to the third accused getting a gunny bag and the dead body being put in that gunny

bag. But his evidence has not been accepted even by the Sessions Judge. After it became dark, the appellant and his brother carried the body by a pole and took it away towards the fields, which situated west of the house. A little later, the appellant came to the witness and asked his assistance for carrying a big cement slab to be tied along with the body so that it could be drowned in the tank. But the witness, however, refused. The same request was made to P.W. 7, who gave some assistance. Some time afterwards, the first accused, Kuturi, came to his house and warned him not to tell anybody about what he saw. In cross-examination also, he has more or less given the same version.

12. The evidence of P.Ws. 9 and 10, if accepted, will establish that it was the first accused, who had a thenga with which he inflicted blows on the head of the deceased, while the appellant was catching hold of his deceased brother. The medical evidence is to the effect that the fatal injuries were those found on the head of the deceased, which had been inflicted by the first accused. The prosecution led the evidence of P.Ws. 9 and 10 as it was consistent with its case and as the charge against the two brother was under Section 302, read with Section 34. If the occurrence, as spoken by P.Ws. 9 and 10, is established, the appellant will be constructively liable under Section 302/34 for the part played by him, though the fatal injuries were inflicted by his brother. The first accused will also be guilty of the said offence. But the result of the decision of the High Court is that the first accused, who caused the fatal injuries, according to the evidence, has been acquitted of the offence of murder. That means the High Court has not accepted the evidence of P.Ws. 9 and 10 regarding the first accused. Having acquitted the first accused, the High Court has not attempted to find out the nature of the offence, if any, committed by the appellant on the basis of the individual part played by him. But, nevertheless, it has convicted the appellant for the substantive offence of murder under Section 302. After the first accused was acquitted, there was no further scope for invoking against the appellant any constructive liability under Section 34. To convict the appellant under Section 302, there should be evidence that he caused the fatal injuries. The High Court should have taken pains to find out from the evidence the nature of the injuries inflicted by the appellant. Such an attempt would have been futile, because the evidence is completely in favour of the appellant. The more serious part played in the assault is attributed to the first accused, who has been acquitted. P.W. 9 has categorically admitted that she cannot say on which part of the body of the deceased was the assault made by the appellant. P.W. 10 did not see the first part of the attack because he came into the picture only when he was informed by P.W. 9. But he is also positive that the two accused dragged the deceased and carried the dead body for being drowned.

13. In spite of the definite evidence of P.Ws. 9 and 10 regarding the active participation of the first accused, the High Court has acquitted him. That means the High Court has not chosen to place any reliance on their evidence. If so, we are not able to appreciate as to how the High Court can base conviction of the appellant alone and that for an offence under Section 302 on the same evidence. In fact there is no evidence on record to sustain his conviction. In our opinion, the evidence of the two witnesses cannot be accepted against the appellant also when their evidence has been rejected by the Session Court, so far as the third accused is concerned and by the High Court when it acquitted the first accused. There is a strong suspicion about the guilt of the appellant. But suspicion cannot take the place of proof of guilt. On the materials on record, the conviction of the appellant under Section 302 cannot be sustained. As the evidence against the appellant regarding the offence under Section 201 is also substantially the same, as for the offence under Section 302, the appellant's conviction for the said offence cannot also be sustained. The first and the third accused have been acquitted of the said offence also.

14. From what is state above, it is not necessary for us to consider the contention of Mr. Gobind Das that the High Court was in error in convicting the appellant under Section 302 while the charge

against him and the first accused was under Section 302, read with Section 34 and the High Court had acquitted the first accused of that offence. When the direct evidence of P.Ws. 9 and 10 is disbelieved regarding the main incident relating to the assault on the deceased, the circumstances relied on by the counsel for the State and which have been set out by us earlier, are of no consequence.

15. In the result, the conviction of the appellant by the Session Judge under Section 302, read with Section 34 and Section 201 and by the High Court under Section 302 and Section 201 and the sentence of imprisonment for life of the offence under Section 302, are all set aside and the appeal is allowed. The appellant is acquitted of all the charges for which he was tried.

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