Babuli alias Narayan Bahera

Vs

The State of Orissa

Criminal Appeal No. 147 of 1970

(M. H. Beg, Y. V. Chandrachud JJ)

22.11.1973

JUDGMENT

CHANDRACHUD, J. -

1. Eight persons were put up for trial before the learned Additional Sessions Judge, Cuttack, on the charge that on 8 p.m. on October 17, 1965, they had committed the murder of one Siba Prusty. The appellant and one other accused were charged under Sessions 302, Penal Code, simpliciter and they were also charged among with others under Section 302 read with Section 34 of the Penal Code. Accused No. 6, Ratnakar Prusti, was granted pardon after the evidence of as many as 31 witnesses was recorded and he was examined as an approver. The learned Judge acquitted all of the accused and in an appeal filed by the State of Orissa that order was confirmed by the High Court of Orissa except in regard to the appellant who has been convicted under Section 302 of the Penal Code and has been sentenced to imprisonment for life. The appellant challenges the correctness of his conviction in this appeal by special leave.

2. On the evening of October 17, 1965, the deceased Siba Prusty and Ghanshyam Ojha (P.W. 1) were returning to their village from a place called Baitarani Road. They were riding on their bicycles, the deceased being a little ahead of Ghanshyam. When they reached the Depada culvert, the appellant is alleged to have stopped the bicycle of the deceased and after the deceased got down the appellant is allege to have dealt a heavy blow on his head with a lathi. Ghanshyam saw the assault but being terrified, turned back and fled away. The First Information Report was lodged at the Korai police station the next evening at about 4.30 p.m.

3. The appellant and the other accused contended that they were implicated in the offence falsely on account of enmity between them and the rival faction of which Ghanshyam was a member.

4. The prosecution examined a large number of witnesses in order to connect the accused with the crime but eventually the case depended for its success on the evidence of Ghanshyam Ojha and the approver, Ratnakar Prusti. Both of these witness were disbelieved by the learned trial Judge and that led to the acquittal of all the accused. The High court was apparently not impressed by the evidence of the approver but differing from the trial Court in regard to the assessment of Ghanshyam's testimony it has taken the view that it would be safe to base the conviction on that testimony.

5. In regard to the evidence of the approver the High Court has held that there was "some divergence in many material aspects of this incident between the evidence of P.W. 1 and that of the approver" and that "the approver's evidence in its material particulars is irreconcilable with that of P.W. 1". The evidence of the two witnesses being irreconcilable the High Court, obviously, could

not believe both the witnesses and had to make its choice between them. The choice perhaps was rightly made because in the circumstances of the case no reliance could be placed on the evidence of the approver.

6. The approver was tendered pardon at a very late stage of the trial, that is, after 31 witnesses were examined. Those witnesses were cross-examined on behalf of the approver and he had the dubious privilege of being able to hear closely almost the entire evidence led by the prosecution. The High Court has observed with plausibility that the prosecution has laid itself open to the criticism that pardon was tendered to one of the accused at the fag end of the trial in and effort to fill up the lacunae in its case.

7. Thus the evidence of the approver has been concurrently discarded by the trial Court and the High Court. That evidence need not therefore detain us, though we would like to add that we have examined it independently and have found the approver an unworthy witness. An interesting sidelight of the approver's evidence is that he put up the presence that he was not aware that even if he honored the terms of the pardon granted to him he could save himself from the prosecution. He also added that he did not understand the implications of a pardon and that he did not know whether the evidence which he was giving in the Court would be used against his erstwhile neighbors in the dock.

8. While criticizing the tender of pardon to one of the co-accused almost at the end of the trial, the High Court observed : "If 31 witnesses for the prosecution have failed to prove the case to the hilt, the approver's evidence should not be allowed to tip the balance it its favour". This is a very relevant consideration but then the trial Court did not allow the approver's evidence to tilt the balance in favour of the prosecution. On the other hand, having rightly warned itself that the unworthy approver should not be allowed to tip the scales of justice, the High Court would seem to have fallen into that error. It did conclude that it was unsafe to place reliance on the testimony of the approver but it has also observed, though in passing, that a part of the approver's evidence was corroborated by other evidence. In view of the basic infirmities attaching to the evidence of the approver, it was futile to seek to improve the statute of the approver by looking out for corroboration.

9. In accepting the evidence of the sole eye-witness Ghanshyam, the High Court has not given due importance to many an important circumstance. It has observed that if Ghanshyam wanted to implicate anyone falsely he would have rather implicated the other accused with whom he had direct enmity and not the appellant "with whom there was no serious conflict of interest or enmity. This itself is a sure test of truth of his testimony". Ghanshyam has himself admitted in his evidence that he, Kanhu Charan Panda (P.W. 12) and the deceased Siba Prusty were members of a faction against which the accused had commenced several litigations. He has further admitted that Kanhu had filed a prosecution against the appellant and his brother under Section 454, Penal Code, and that the prosecution was pending at the time of the present occurrence. The High Court is therefore in error in regarding the assumed absence of enmity between Ghanshyam and the appellant as a sure test of the truth of Ghanshyam's testimony.

10. One of the important points in favour of the appellant was that Ghanshyam had not disclosed the name either of the appellant or of the other accused to any one of the scores of people whom he had met until the First Information Report was lodged about 20 hours after the occurrence. Ghanshyam met Babaji, P.W. 2, within minutes of the incident but told him not a word about the incident. Some time during the night he went back to the scene of offence where nearly 200 persons had gathered but he did not disclose the name of any of the accused to those persons. He went to the police

station the next morning but beat a hasty retreat without giving information of the offence. But the most important point is that after meeting Babaji in a Math he went to a village called Palasa where he met Chakradhar Panda (P.W. 8). Chakradhar says in his evidence that Ghanshyam told him that the blow on the head of the deceased dealt immediately after the deceased got down from his bicycle was given by the approver Ratnakar. The High Court has failed to appreciate the significance of this aspect of Ghanshyam's evidence. It says "That does not affect his testimony as to what he saw at the time of the assault". According to Chakradhar, Ghanshyam implicated the approver and some of the other accused but not the appellant. We are unable to appreciate as to how this does not affect Ghanshyam's testimony. It is difficult to agree that this was "an error of inference" committed by the eye-witness as the High Court calls it. Witnesses are expected to depose to what they have seen and heard and not to draw inferences from what they see. The privilege of drawing inferences is given to Courts not to witnesses.

11. One of the reasons given by the Sessions Court for rejecting the evidence of the eye-witness was that there was hardly any light at the place where Siba was murdered and therefore Ghanshyam could not have identified the assailants. Both the deceased and Ghanshyam were on their bicycles, the deceased being about 10 cubits ahead of Ghanshyam. The bicycle of the deceased had no light but that of Ghanshyam had a dynamo-light. Apart from that feeble light the scene of offence was engulfed in rank darkness. The High Court does not seem to have noticed this circumstance while evaluating the testimony of Ghanshyam.

12. These are serious infirmities which make it impossible to accept the testimony of the sole eye-witness. The appeal must therefore be allowed and the order of conviction and sentence set aside. The appellant shall be released forthwith.

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