State of Orissa

Vs

Bansidhar Singh

Criminal Appeal No. 1600 of 1995

(Faizanuddin, N. P. Singh JJ)

05.12.1995

JUDGMENT

FAIZAN UDDIN, J. –

1. Leave granted.

2. This appeal under Article 136 of the Constitution of India has been directed against an order dated 28-7-1994 passed by the High Court of Orissa in Criminal Revision No. 271 of 1993 quashing the order dated 15-4-1993 passed by the Sub-Divisional Judicial Magistrate, Udala taking cognizance of an offence against the respondent herein for an alleged offence under Section 302 of the Indian Penal Code.

3. According to the prosecution on 8-12-1992 at about 4.00 a.m. deceased Santosh Kumar Nayak, who was the Brother-in-law of the respondent (brother of his wife) was admitted in the Sub-Divisional Hospital, Udala with 80 per cent injuries on his body. Dr. P. K. Sahu, Surgery specialist of the said Hospital attended the victim and found his condition to be serious. Dr. Sahu, therefore, at the first instance recorded his dying declaration on the bed-head ticket in which the victim is said to have mentioned that his brother-in-law Bansidhar Singh (respondent herein) had set fire by pouring kerosene on him. The patient, thereafter was referred to the headquarters hospital at Baripara and at the same time the doctor sent intimation to the Officer-in-charge of Udala Police Station in writing. The victim died in the hospital the same day.

4. Shri G. L. Behera, Officer-in-charge, Udala Police Station obtained a written FIR from the son of the respondent on the basis of which Case No. 102 of 1992 was registered under Section 309, IPC against the victim himself for attempting to commit suicide. But after the victim succumbed to burn injured the investigating officer submitted the final report declaring the case having been abated.

5. On perusal of the material available, the dying declaration and the statement of one Badal Mukhi, recorded under Section 161, Criminal Procedure Code, the learned Magistrate was satisfied that there existed a prima facie case under Section 302 IPC against the respondent and taking cognizance of an offence under Section 302, directed on 15-4-1993 for insurance of summons and non-bailable warrants against him for his appearance on 30-4-1993. The respondent challenged the aforementioned order of the learned Magistrate in the High Court of Orissa praying that the said order of the learned Magistrate be quashed on the ground that the condition of the deceased was so serious that he could made any dying declaration which is the only basis for taking cognizance against the respondent. The High Court observed that the material on record did not indicate that the respondent had poured kerosene on the deceased and set fire and that there was also absence of

allegation in the first information report about the respondent causing death of the deceased in the manner stated in the dying declaration. The High Court also observed that the father of the deceased, his father-in-law, wife and daughter of the respondent had all given statements that the deceased was mentally unsound since a few months prior to the occurrence and that he was treated for the unsoundness of the mind and, thus there was ample material that the deceased was mentally unsound on the date of occurrence. The High Court further observed that the statement of Badal Mukhi, an attendant of the Sub-Divisional Hospital, recorded under Section 161 CrPC did not indicate that the deceased had given the dying declaration in his presence. On these findings the High Court took the view that the doctor was the only witness before whom the deceased is said to have made a dying declaration and, therefore, it was hazardous to direct prosecution against the respondent on the basis of this material alone without any prima facie corroborating material.

6. After hearing the learned counsel for the parties and on perusal of the order passed by the learned Magistrate taking cognizance of offence against the respondent as well as the impugned order of the High Court we are of the view that the High Court misdirected itself and made a wrong approach to the facts of the case and the law relating to quashing of the criminal proceedings.

7. From the facts stated above it is a distinctly clear that the dying declaration, said to have been made by the deceased and noted by Dr. Sahu on the bed-head ticket and the statement of hospital attendant Badal Mukhi relating thereto were the materials available against the respondent. The said note by Dr. Sahu runs as follows :

> "Dying Declaration

4.55 a.m.

8/12

> "Patient is telling that his Vinoi, Mr. Bansidhar Singh sprayed kerosene on him and put fire on him."

This statement of the deceased has been brushed aside by the High Court for the reasons, firstly, that there is no mention in the bed-head ticket about the smelling of the kerosene from the body of the deceased. Secondly, Badal Mukhi, an attendant of the hospital did not state in his case diary statement that any dying declaration was given in his presence, and thirdly, there is no corroborating material to the alleged dying declaration. With great respect to the learned Judge we are unable to subscribe and appreciate these observations. The veracity, reliability and truthfulness of the alleged dying declaration would be tested only after the evidence is recorded in the court and if on proper evaluation of such evidence, the court comes to the conclusion that the dying declaration is truthful version of the deceased relating to the circumstances of his death, then there is no question of any further corroboration as the conviction can be founded only on such dying declaration. But in case the court finds that the dying declaration suffers from any inherent infirmities it is bound to be rejected. In the present case the High Court rejected the dying declaration before its veracity could be tested at the trial. As regards the statement of Badal Mukhi recorded under Section 161 CrPC it appears that the High Court did not care to examine and peruse the order of the learned Magistrate by which he took cognizance of the offence against the respondent. The learned Magistrate in his order has clearly mentioned that the witness Badal Mukhi has stated in his case diary statement that the victim disclosed before the doctor that he requested his brother-in-law not to pour kerosene on him as he may die and, therefore, the observations of the High Court that Badal Mukhi did not state

that the dying declaration was made by the victim in his presence, appears to be a mistaken view. Not only this but the learned Magistrate has further indicated in his order that the incident occurred during the short stay of the deceased at the house of the respondent. The learned Magistrate has also indicated that there are various overwritings and manipulations of the date and time made in the written FIR as well as the formal FIR drawn up by the police and that in spite of the fact that there was a dying declaration and statement of Badal Mukhi in support thereof, yet the Officer-in-charge, Udala Police Station registered the case under Section 309 IPC against the victim himself and later, on his death, submitted a final report.

8. Apart from the above facts, the High Court also took into consideration the statements of certain persons for purposes of testing the reliability of the alleged dying declaration. Such evidence could be adduced in defence during the trial but surprisingly enough the High Court took into account the statement of certain persons to the effect that the deceased was a person of unsound mind at the investigation stage itself whose evidence is yet to be recorded at the trial and made observations that the deceased was a person of unsound mind and, therefore, the dying declaration could not be relied on. Such an approach to the case cannot be appreciated. However, after taking into consideration all the facts and circumstances of the case and on perusal of the alleged dying declaration as well as the statement of Badal Mukhi as pointed out earlier, we are satisfied that it was not a case where the taking of cognizance of the offence against the respondent deserved quashing by the High Court. On the contrary it is a fit case where the cognizance should be taken against the respondent for the alleged offence and the learned Magistrate was justified in doing so.

9. It has been repeatedly pointed out by this Court in various pronouncements that the power of quashing an FIR or criminal proceedings has to be sparingly exercised by the courts with due regard to the guidelines laid down in this behalf. Here it would be relevant to refer to a decision of this Court in the case of State of Haryana v. Bhajan Lal [1992 Supp (1) 335 : 1992 SCC (Cri) 426] wherein this Court observed that though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein the power to quash the proceedings may be exercised but this Court observed that certain categories of cases can be stated by way of illustration wherein the extraordinary power can be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice. Those categories of cases in which the FIR and criminal proceedings may be quashed as pointed out in the aforesaid decision by way of illustration, are as follows :

> (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirely do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where the allegations in the FIR do not constitute a cognizable offence but

> constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the a proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. In the present case, having regard to the material placed before the court it can well be said that the present case does not fall in any of the illustrated categories mentioned above and on the contrary it goes to show that there exist a prima facie case against the respondent and hence the impugned order of the High Court could not be sustained.

11. In the facts and circumstances of the case the appeal succeeds and is hereby allowed. The impugned order passed by the High Court is set aside and the order of the learned Magistrate is restored. The learned Magistrate shall deal with the criminal proceedings against the respondent in accordance with law.