HIGH COURT OF ORISSA: CUTTACK

CRA No.183 of 1999

(From the judgment dated 02.07.1999 passed by Shri M.C.Ray, O.S.J.S., Additional Sessions Judge, Angul in S. T. No.49-A of 1995/12 of 1998)

Prakash Dehury	**...**	**...**	**Appellant**
	Versus		
State of Orissa	**...**	**...**	**Respondent**

For Appellant : Shri G. K. Mohanty,
G. P. Samal, S.R. Swain,
D.K. Nanda and
P. K. Panda, Advocates

For Respondent : Shri Janmejaya Katikia,
Additional Government Advocate

PRESENT

THE HONOURABLE KUMARI JUSTICE S. PANDA
AND
HON'BLE SHRI JUSTICE S. K. PANIGRAHI

Date of Hearing – 28.08.2020 Date of judgment – 30.09.2020

S. K. Panigrahi, J.

1. The appellant in the present appeal has assailed the judgment dated 02.07.1999 passed by the learned Additional Sessions Judge, Angul in S. T. No. 49-A of 1995/12 of 1998 convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. The brief factual conspectus as reflected in the FIR is that one Bijaya Kumar Pradhan lodged an FIR before Handapa Police Station at 3:30 AM on 13.04.1995 alleging that on 12/13.04.1995 at about 1:00 AM, one Prahallad Dehury, the elder brother of the appellant came to the house of the informant and intimated him stating that the appellant Prakash Dehury had cut the throat of his own wife, named Soudamini (the deceased) and requested the informant to provide a truck to carry the injured to a nearby hospital. He further stated that the informant had seen the cut injury inflicted on the throat of the deceased and he was part of the pre-hospital transport arrangement facilities. Thereafter, Prahallad Dehury, Pramod Dehury and the present appellant took the injured to the hospital for treatment. Initially, the case was registered under Section 307 of IPC. Since the injured died, the case was turned to under Section 302 of IPC.

3. On the basis of the FIR, the police registered it as P.S. Case No. 17/95 and started investigation of the case and after completion of the same, charge-sheet was

submitted against the present appellant for the offence punishable under Section 307 of IPC and later under Section 302 of the IPC because of the death of the victim. After commitment, the appellant was charge-sheeted under Section 302 of IPC before the learned Sessions Judge, Dhenkanal.

4. In order to prove the prosecution story, the prosecution examined as many as 13 witnesses namely;

PW-1: Dr Jayakrishna Nayak
PW-2: Lambodar Dehury
PW-3: Srinivas Roul
PW-4: Pramod Dehury
PW-5: Tilottama Dehury
PW-6: Artatrana Pradhan
PW-7: Sanak Kumar Pradhan
PW-8: Bijay Kumar Pradhan
PW-9: Prahallad Dehury
PW-10: Paramananda Dehury
PW-11: Rajkishor Dora
PW-12: Debabrata Pradhan
PW-13: Dr L.K.Sahu

It was the case of the defence that on the night of occurrence, the accused/appellant accompanied by his brother Prahallad and some other villagers had been to watch 'danda nata (Opera)' being staged in the nearby village. The appellant and some of the co-villagers who were present at the venue of the said "Danda nata" were informed about the sharp-cut injuries on the neck of the

deceased which were inflicted by somebody and on getting such information; the appellant along with some other co-villagers took the injured to the hospital in promptitude for medical treatment. She made a gallant fight for life but ultimately she breathed her last. There is no ocular witness who could state that he has seen the accused attempting to kill the deceased. The facts and circumstances of the case, does not attribute a supervening role with respect to the said act of the accused. The appellant also consistently pleaded innocence as he did not have any ill-motive towards his deceased wife. He further submits that the prosecution story is dotted with probabilities and it is tainted. It is contended that important eyewitness has turned hostile yet the trial court has not given credence to this aspect.

5. The Investigating Officer has examined the informant and other witnesses. He visited the spot and seized some incriminating materials used in the commission of the offence. Since it is a case under Section 302 of IPC, the Investigating Officer sent all the information to the Court of the learned SDJM, Athamalick while examining the

accused Prakash Dehury. The appellant confessed his guilt and disclosed that he had concealed the weapon of offence i.e. axe near a 'Dimiri' tree at Rajabandha Nala. The appellant led the Investigating Officer to the spot where he had concealed the weapon of offence and gave recovery of the axe stained with blood in presence of some independent witnesses. The Investigating Officer also seized the blood-stained lungi and a blood-stained napkin belonging to the accused/appellant. In addition to that, the Investigating Officer also seized one red colour saree, some chudi (bangles) and two steel rings. After seizure of those articles, the weapon of offence and other articles, the same were sent for examination. The Medical Officer also opined that the injuries had been caused on the body of the deceased, could be possible by a sharp weapon like axe produced by him.

6. According to the prosecution, the presence of extensive human blood of 'O' group, on the axe, on the napkin of the appellant and on the wearing apparels (saree) of the deceased, as is clear from the chemical examination report, which are pointer to the involvement of the

appellant and establishes that he is the author of the crime.

7. On the other hand, it is pleaded in grounds of appeal that on the night of occurrence the accused along with his brothers and some other co-villagers had been to watch Danda Nata (Opera), hence no motive can be ascribed to the present appellant. It is further pleaded that the accused did not have the motive to kill his wife. Most interestingly, no independent witness has supported the prosecution case and all were in a denial mode and turned hostile, especially the prosecution has heavily relied on the evidence of PW-9 and PW-11 who were already proved the leading recovery of the alleged weapon under Section 27 of the Evidence Act. The Ld. Addl. Sessions Judge has relied on the evidence of PW-8 to prove his motive and the evidence of PW 11 has been relied upon to prove the leading to the discovery of the alleged weapon used in the offence which is erroneous. Apart from that, the witnesses don't support the factum of discovery of the seized weapon.

8. He further pleaded that the learned Additional Sessions Judge has failed to appreciate that PW-9 has stated in the Court on oath that he along with the accused appellant has gone to see opera on the night of the occurrence. At about 9:00 PM, at that time, his mother, his wife and children as well as deceased were all there in their home. They were intimated by the accused brother and others regarding the said incident in the venue of opera. Thereafter, on return, PW-9 along with the accused appellant and deceased had come to the house of the PW-8 to request him to arrange a truck to take the injured to the P.S. The truck was arranged from Bibekananda Biswal. The deceased succumbed at the hospital. It is not known under what circumstances how the statements of the injured were neither recorded by the Doctor nor by the Inspector of Police, though the injured was alive till she was treated at the Angul Hospital.
9. Learned counsel for the appellant states that admittedly there were no eye-witnesses present at the spot of occurrence and the present case is purely based on

circumstantial evidence. The learned Additional Sessions Judge has solely relied on two circumstances, namely, the accused had a motive to do away with the life of his wife and secondly, the accused had led to the recovery of the weapon under Section 27 of the Evidence Act while he was in police custody. Both the observations and findings of the learned Additional Sessions Judge are erroneous and not substantiated by proper evidence which can not be taken as a cogent piece of evidence to convict the appellant.

10. He further submits that the learned Additional Sessions Judge has relied on the evidence of PW-9 (post occurrence witness), who is the elder brother of the appellant, during cross-examination. The said witness has attributed the motive to the crime by his own younger brother/the present appellant. Learned Additional Sessions Judge has failed to appreciate that the statement of PW-9 went uncooroborated. Further the brother of the deceased was also never examined by the trial court to prove that PW-9 had given such statement during examination by the Public Prosecutor.

Furthermore, there was no discord or quarrel amongst the accused appellant and the deceased. No witnesses have talked about anything relating to their quarrel or disturbances in their relationship which is also wholly uncorroborated.

11. It is pleaded on behalf of the appellant that while dealing with the evidence of PW 8, the Ld Trial Court has made mountain out of mole hill and arrived at a conclusion hastily. In fact, the Apex Court in ***Navaneetha krishnan vs. The State by Inspector of Police***[1] has held that, Section 27 of the Indian Evidence Act, incorporates the theory of confirmation by subsequent facts, that is, statements made in police custody are admissible to the extent that they can be proved by subsequent discovery of facts. Discovery statements made under Section 27 of the Indian Evidence Act can be described as those which furnish a link in the chain of evidence needed for a successful prosecution. In the present case, such link is conspicuously missing. The quintessential requirements

[1] *Criminal Appeal No. 1134/2013 (Supreme Court of India)*

of Section 27 of the Indian Evidence Act, 1872 have been succinctly summed up in the matter of ***Anter Singh* V/s *State of Rajasthan*[2]**, in the following words:

> *"…16. The various requirements of the section can be summed up as follows:*
>
> *(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.*
>
> *(2) The fact must have been discovered.*
>
> *(3) The discovery must have been in consequence of some information received from the accused and not by the own act of the accused.*
>
> *(4) The person giving the information must be accused of any offence.*
>
> *(5) He must be in the custody of a police officer.*
>
> *(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.*
>
> *(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible…"*

The aforesaid chain is grossly absent in the evidence of PW-11 before whom the appellant has allegedly made a statement which led to the discovery of the alleged weapon of offence. This demonstrates a clear inapplicability of Section 27 of the Evidence Act.

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[2] (2004) 10 SCC 657

12. It is further pleaded that the facts and circumstances of the case do not indicate nor does it prove the involvement of the appellant in the said crime. The trial court has ignored the material evidence and facts available on face of record. It has failed to apply its judicial mind and grossly failed to appreciate evidence in correct perspective. Learned counsel for the appellant also submits that there is complete absence of any *mens rea* to kill his own wife. Though the cloud of suspicion is still looming large as to who has caused the grievous injury in the neck of the deceased.

13. The appellant further pleaded that the learned Additional Sessions Judge should have read the evidence of PW-9 in entirety and appreciated the evidence in proper prospective. The said PW-9 has stated in the cross examination that:

> *" ... So far my knowledge goes accused was pulling on well with the deceased Soudamini, there was no discord and disharmony in between them. On the night of occurrence, in day time the accused was living with the deceased happily. The brother of deceased brought the deceased Soudamini many days prior to this incident to our house"*

This statement makes it abundantly clear that under no stretch of imagination, it can be said that this appellant had any motive for killing his own wife. But the Ld. Trial Court has used this piece of evidence against the appellant. Further, Ld Trial court has also erred in assessing the evidence of PW 8 to come to a conclusion that the deceased died before she was brought to the house of PW-8. On the contrary, the I.O. (PW-11) has categorically stated that the victim lady Soudamini was alive while she was brought to the Police Station.

14. In the absence of any corroboration of evidence of PWs 8, 9 and 11 are inadmissible under the law. In fact, the broad spectrum or the prosecution version has been very chequered and confusing. The Rule of Prudence, however, only requires a more careful scrutiny of the evidence of the independent witnesses, since they can be said to be interested in the result of the case projected by them but in the present case the independent witnesses have turned hostile except PW-11.

15. Learned counsel for the State Mr Katikia states that admittedly there were no eye-witnesses present at the spot

of occurrence and the present case is purely based on circumstantial evidence. The learned Additional Sessions Judge has solely relied on two circumstances, namely, the accused had a motive to do away with the life of his wife and secondly, the accused had led to the recovery of the weapon under Section 27 of the Evidence Act while he was in police custody.

16. He further submits that assuming for the sake of argument but not admitting the fact that there is no ill motive of the accused against the deceased. According to him, in the absence of any *mens rea* for committing such a heinous crime, how could the deceased get such a severe injury and who has committed the murder, which is a larger issue needs to be resolved and the Ld Trial Court has rightly resolved the issue.

17. Learned trial Court in Paragraph-16 of the judgment has clearly discussed the above aspect especially with respect to the absence of knowledge by the family members of the appellant, when the offence was committed. It is also quite improbable that some unknown culprits who had committed such crime. The family

members of the deceased also deposed before the Court and failed to state anything about the real culprit who had committed the crime. During the course of investigation, it was unearthed that on account of love affairs with another girl, the appellant was torturing the deceased and out of anger, he committed the murder. Shri Katikia, learned counsel for the State submits that there is no doubt over the finding of the learned trial Court that the accused is the author of the crime. Hence, this Court should not interfere with the justifiable and prudent finding of the learned trial Court.

18. We heard Mr G. K. Mohanty, learned counsel for the appellant and Mr J. Katikia, learned Counsel appearing on behalf of the respondent, scanned through the prosecution witnesses examined during the trial. Pertinent question confronted by this Court is that who is the real culprit involved in the offence. The appellant had repeatedly stated that he had no ill motive against the deceased and he had also not present at the spot at the time of committing the offence. It was curious to know as to how the Investigating Officer could be able to recover

the weapon of offence i.e. axe used by the accused which was led by the accused to recover the same though the same is also under cloud being uncorroborated.

19. In fact, PW-9 has been declared hostile as during the course of examination, PW-9 has answered in negative to all the questions put by the Public Prosecutor. In the above circumstances, the learned Additional Sessions Judge has relied upon the evidence of PW-9 to come to a conclusion that the accused appellant had a motive to kill his wife, is totally unacceptable in the eyes of law. Though motive has an important role in punishment theory as it reinforces the centrality of shared moral judgments, it is markedly absence in the present case.

20. In so far as the alleged recovery of weapon of offence used in the crime and other incriminating materials, the learned Additional Sessions Judge has relied on the evidence of PW-11, who has stated on oath that the appellant confessed his guilt and admitted that he had concealed the weapon which is again not supported by the witnesses. It is curious to know that during cross-examination, PWs-3 & 7 (i.e. seizure witness and post

occurrence witness) have not whispered a single word about the seizure of the weapon of offence leading to the discovery of weapon of offence. However, the axe was seized by the Investigating Officer from an open space and it was not found to be concealed. Therefore, no stretch of imagination, it can be concluded that weapon of offence is recovered.

21. PW-9 has categorically stated on oath that on the night of occurrence, he along with the accused appellant had gone to see 'danda nata' and the wife of the deceased was at their home alive. They came to know about the alleged occurrence at the opera place, it means that the occurrence had taken place while the appellant was not at home. This part of the statement of PW-9 had neither been refuted nor objected by the prosecution. Hence, the present appellant cannot be said to be the author of the alleged crime. He has also heavily emphasized on the confessional statement of PW-8, which is reflected in Para-9 of the trial Court's judgment that it cannot be said that the wife died in the hospital. Though he has proved from the statements of PWs, the wife of the appellant was taken

to PW-8's house and thereafter she was taken to the P.S., where initially the case was registered under Section 307 of IPC, at that time she was alive. Thereafter, the wife of the appellant was sent to Handapa Hospital and was referred to Angul Medical, where she was stitched. Hence, the learned Additional Sessions Judge seems to be eclipsed by prejudice which has impacted his internal calculus sentencing. In view of the facts and circumstances narrated hereinabove by the appellant, the prosecution has miserably failed to bring home the charges against the appellant as there is no other circumstance to prove that the appellant is in any manner remotely connected with the above crime.

22. Doctor of Handapa Hospital then referred the patient to the Headquarters Hospital at Angul because of her seriousness. Doctor stitched the injuries of the injured in the morning but she could not be saved and she was expired at about 12 noon. It was also stated by PW-9 that the relationship between the accused and the appellant was quite normal. There was no discord and disharmony, which could be attributable to such a heinous crime by

the appellant. The statement of PW-13, who is the Medical Officer, conducted post-mortem examination and stated that Larynx injured oedematus and conjested. Trachea oedematus and conjested. Both lungs, pleura are oedematous and conjested. The above injuries have cut the platysme muscle, sternohyoid muscle and thyohyoid muscle, jugular vein and vocal cord and recurrent laryngel nerve. All other internal viscera of thorax and abdomen are intact and congested. He has opined that cause of death is due to asphyxia resulting from injury to larnynx and vocal cord.

23. The difficulty presented by the instant case in finding out the recognisable contributory causes leading to bringing about the effect and then to find whether the responsibility for the result could be assigned to the present appellant or not. But how far can indirect indictment to the present appellant be sustainable in criminal jurisprudence? Though *mens rea* as a legally essentially ingredient in fixing the criminal liability, it is not visible in the instant case.

24. The entire story is based on a heightened appreciation of circumstantial evidence with nimble narrative without substantiated by cogent evidence. In the case of **Sharad Birdhichand Sarda v. State of Maharashtra**[3], the Supreme Court opined that before arriving at the finding as regards the guilt of the appellant, the following circumstances must be established:

> *152. (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(3) the circumstances should be of a conclusive nature and tendency;*
>
> *(4) they should exclude every possible hypothesis except the one to be proved; and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

Further in the case of **Navaneetha Krishnan vs The State** (Supra), the Supreme Court while allowing the appeal of the accused opined that:

[3](1984) 4 SCC 116

> *23. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the Accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to Rule out a reasonable likelihood of the innocence of the Accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the Accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes; unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the Accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.*

25. The Investigating Officer has grossly failed to corroborate the prosecution story. Only seizing the weapon, used in the crime and other articles at the instance of the accused, does not indicate that the accused is the brain behind the crime. The theory of cause and effect relationship is not based on the hypothesis of

guilt in the present case. The entire circumstantial evidence fails to show beyond reasonable doubt regarding the involvement of the accused. The Trial Court's findings that circumstances were more than enough to install a reasonable doubt is unacceptable in the light of the discussion hereinabove.

26. PW-9, Prahallad Dehury, in his cross-examination, turned hostile. Even though a witness has turned hostile, it is not necessary that his testimony be rejected in toto as established in the cases of **Rabindra Kumar Dey v. State of Orissa**[4] and **Syad Akbar v. State of Karnataka**[5]. However, the Court may decide to rely upon the credit-worthy parts of his testimony only after corroboration with other reliable evidence as iterated in the case of **Rabindra Kumar Dey** (supra):

> *"18. It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."*

[4]AIR 1977 SC 170.
[5]AIR 1979 SC 1848.

Even though the motive of the accused has not been proven beyond reasonable doubts, it may be a fact that the family members of the appellant did not utter a single word regarding the crime nor did anybody talk about the so-called love affairs with another girl as propounded by the prosecution. There was no sign of skirmishes reported during their day to day life and even complete absence of any kind of dressing up theory on the part of appellant. The Investigating Officer has grossly failed to corroborate the prosecution story on this aspect. In our considered opinion, only seizing the weapon used in the crime and other articles at the instance of the accused proves to be a huge circumstantial gap sans corroboration. The circumstances so found do not appear to be conclusive in nature. The entire circumstantial evidence is half-baked and seems to be more fictionalised. We, therefore, have no hesitation in holding that the submission of the prosecution has also dotted with probabilities and failed to go beyond mere suspicion. The Ld Trial Court has floundered to appreciate the evidences in proper perspective as law is well settled to exclude the evidence

which is embedded in probabilities and went downhill to complete the chain of evidence. Thus, the prosecution has grossly failed to prove the charge against the accused beyond reasonable doubts to get Section 302 of IPC attracted. The accused would then at any rate be entitled to the benefit of doubt on the cause of death. In view of the above facts and circumstances, we find sufficient reasons to differ from the learned Additional Sessions Judge, Angul.

27. Accordingly, the Criminal Appeal filed by the appellant stands allowed. The judgment of conviction and sentence dated 02.07.1999 passed by the learned Additional Sessions Judge, Angul in S. T. No.49-A of 1995/12 of 1998 is hereby set aside. The bail bond of the appellant stands discharged.

The LCR be returned forthwith to the Court from which it was received.

(S.K. Panigrahi, J.)

S. Panda, J. I agree.

(S. Panda, J.)

Orissa High Court, Cuttack
The 30th day of September, 2020/AKK/AKP