

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRA No. 310 of 2000

Subash Bhuyan and others

....

Appellants

-versus-

State of Orissa

....

Respondent

Advocates appeared in the cases:

For Appellants

:

Mr. Bibekananda Bhola, Advocate
On behalf of Mr. G.K. Nayak
Advocate

For Respondent

:

Mr. Ishwar Mohanty
Additional Standing Counsel

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

JUDGMENT

29.09.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the judgment dated 17th November 2000, passed by the learned Additional Sessions Judge, Bhanjanagar-Aska in Sessions Case No.20 of 1999, convicting the Appellants for the offences punishable under Sections 302/34, 304-B, 498-A, 201 of Indian Penal Code (IPC) as well as Section 4 of the Dowry Prohibition Act, 1961 (DP Act) and sentencing each of them to undergo Rigorous Imprisonment (RI) for life and to pay a fine of Rs.1,000/- each and in default to undergo RI for two months for the offence under Section 302 read with 34 of

IPC; to undergo RI for seven years for the offence under Section 304-B IPC; to undergo RI for two years for the offence under Section 498-A IPC; to undergo RI for three years for the offence under Section 201 IPC and to undergo RI for six months each for the offence under Section 4 of the DP Act. All the sentences were directed to run concurrently.

2. The case of the prosecution is that Accused No.2 (A-2) (Appellant No.2) Pradeep Kumar Bhuyan @ Sambhu had married the deceased Jotsna, the daughter of the informant, namely, Dukhi Jena (PW-11) on 3rd May, 1995. Accused No.1 (A-1) (Appellant No.1) is the father of the A-2 and Accused No.3 (A-3) (Appellant No.3) is the mother of the A-2. It is stated that at the time of the marriage, articles as per custom were given. However, A-2 had demanded a gold chain and on 20th January 1998, he received Rs.4,000/- from PW-11 towards the value of the gold chain.

3. On 27th January 1998, PW-11 went to the house of the accused and he learnt from his daughter that she had been assaulted by her in-laws. The deceased was not allowed to accompany PW-11 to her house. A-2 promised PW-11 that he would take the deceased to her house after harvesting was over.

4. Hearing the news about the death of the deceased, Kalu Pradhan (PW-9) and Biswanath Pradhan of same village of PW-11 and one Murali Swain (PW-13) of village Belapada had gone to Dengapadar, the village of the accused persons. There, they

learnt that her dead body had been cremated in haste without informing anyone. PW-11 then lodged an FIR on 30th January, 1998 at the Balipadar Out-Post.

5. The case of the defence was that they had not subjected the deceased to any torture or made any demand from the parents of the deceased. They pleaded that the deceased suffered from diarrhea and died on account thereof and that they had sent information to her parents. They alleged that PW-11, on the instigation by others, had demanded Rs.80,000/- as well as custody of the son of the deceased and declined to come and see her dead body. The accused claimed that the villagers had pressurized them to cremate the dead body of the deceased as they were prevented from offering Puja to Goddess Laxmi in the Jagannath temple as long as the dead body of the deceased was in the village.

6. Sixteen witnesses were examined on behalf of the prosecution. Three witnesses were examined on behalf of the defence.

7. PWs-1 and 5 were witnesses to the seizure of the ash and the bones of the deceased from the cremation ground. DW-1 claimed that the deceased was leading a happy life with her husband and that she had died of diarrhoea; that the relations of the deceased did not come and the villagers of Dengapadar had pressurized the accused to cremate the dead body so that they can perform Laxminarayan Puja.

8. DW-2 was the brother of the A-2, who also claimed that the deceased and A-2 were leading a peaceful marital life; that she died of diarrhoea and that he had gone to village Goudiabarada to inform the parents of the deceased and PW-10 had asked to bring a cash of Rs.80,000/- as well as the son of the deceased after which, they would go to see her dead body. DW-2 also maintained that the villagers had insisted on cremation of the dead body of the deceased so that they could perform Gurubar Puja. DW-3 was a drummer, who proceeded ahead to the pier of the deceased Jotsna, beating the drum while her dead body was taken to the cremation ground.

9. PW-7, a cousin brother of the deceased, PW-8 is her paternal uncle, PW-10 is her maternal uncle and the two parents of the deceased, i.e., PWs-11 and 12 all stated that the deceased Jotsna informed them that she was being tortured in her in-law's house as she could not bring a gold chain with her at the time of her marriage. PWs-7 and 11 had also seen marks of assault on the deceased evidencing the torture on her.

10. After PW-11 lodged the written report at the Balipadar Out-post, Sri Prafulla Kumar Bodu (PW-14), the Assistant Sub-Inspector of the Balipadar Out-post under the Gangapur Police Station (PS) made a Station Diary Entry and sent the FIR to the OIC at Gangapur PS for registration. During the investigation, PW-14 examined PWs-7, 10 and 11 at the Out-post itself.

Thereafter, he visited the house of the accused and then to the cremation ground and seized from there some ash, charcoal, some pieces of burnt bones and sample earth. He also examined PWs-8 and 9 at village Dengapadar. He then handed over the investigation to Kailash Chandra Mishra (PW-15), the OIC at Gangapur PS. PW-15 then seized the dowry articles in the house of the accused, prepared a seizure list, examined the witnesses and arrested the accused persons except one. He then on 10th March, 1998 handed over the charge of investigation to Ramesh Chandra Das (PW-16), the Circle Inspector of Police. PW-16 sent the seized ash, charcoal, bones and sample earth to the Director, S.F.S.L., Rasulgarh, Bhubaneswar. PW-16 then submitted a charge sheet on completion of investigation. The accused pleaded not guilty and claimed trial.

11. On an analysis of the evidence, the trial Court came to the conclusion that the prosecution has been able to prove its case against the three accused persons beyond all reasonable doubt.

12. The trial Court came to the following conclusions:

- (i) That no illegality had been committed in the oral report given by PW-11 at the Balipadar Out-post to the Police not being reduced to writing immediately; there was no merit in the contention that the original FIR had been suppressed and a concocted one had been sent to the Court.
- (ii) The FIR was lodged on 30th January, 1998 having been scribed by the uncle of PW-11. The FIR was received in the Court

on 1st February, 1998. There was no merit in the contention regarding the delay in dispatch of the FIR or it being ante-dated.

(iii) The so-called minor contradictions in the versions of PWs-7 to 13 did not weaken the case of the prosecution.

(iv) This was a case where there was no eye-witness and no postmortem could be performed as the dead body was cremated soon after the death. The deceased had died while she was in the house of the accused and the cremation took place in the absence of her parents and relations. The cause of the death was specifically within the knowledge of the accused persons and the burden of proving it was on them under Section 106 of the Indian Evidence Act (IE Act).

(v) Although PWs-1, 3 and 5, the villagers of village Dengapadar were cross-examined about the crime and circumstances under which the deceased was cremated, no suggestion was given to them that she died of diarrhea. To none of the PWs except PW-11, any suggestion was given that the deceased died a natural death due to dehydration as a result of diarrhoea.

13. The trial Court noticed the following circumstances which emerged from the analysis of the evidence, which reads as under:

“16. (i) Jotsna was a young lady of 23 years and had no apparent ailment before her death;

(ii) She was able to cover a distance from her in-laws house to pond on her own at 10 A.M. and died soon-after;

(iii) The dead body was cremated hastily without informing the parents and relations of Jotsna;

(iv) The plea of the accused that Jotsna died a natural death due to diarrhoea is not proved;

(v) The evidence of DW2 that he had gone to inform the parents and relations of Jotsna regarding her death and they demanded money and custody of the son of Jotsna and made it a condition precedent to come to see the dead body of Jotsna is false;

(vi) Few days before her death Jotsna was assaulted in her in-laws house and her mother had seen marks of injury on her;

(vii) It is not proved that the dead body of Jotsna was cremated due to pressure of the villagers;

(viii) The parents and relations of Jotsna were deprived of their statutory right for an inquest over her dead body in presence of an Executive Magistrate and get it examined by a qualified medical man.”

14. The trial Court concluded that from the evidence of PW-9, it was plain that DW-2 was not present on the date of death of the deceased. On the other hand, the accused was present in the house and the deceased, a young and healthy bride, had died under mysterious circumstances. The cause of the death as canvassed by the accused was false. The trial Court held that it could therefore be inferred that she was killed by the accused persons and her dead body was cremated “in super haste to conceal the crime”. Reliance has been placed on the decision in *Darshan Singh v. State of Rajasthan 2000 (4) Crimes-36 SC* and *State of West Bengal v. Mir Mohammad Omar 2000 (4) Crimes-1 (SC)*. The death of the deceased was not natural and took place within seven years of the

marriage. Soon before her death, she had been subjected to the cruelty. For all of the above reasons, the trial Court found the Appellants to be guilty of the offences with which they were charged and proceeded to sentence them in the manner indicated hereinbefore.

15. This Court has heard the submissions of Mr. Bibekananda Bhola and Mr. G.K. Nayak, learned counsel for the Appellants and Mr. Ishwar Mohanty, learned Additional Standing Counsel (ASC) appearing for the State.

16. This is a case based on circumstantial evidence. The law in regard to a case based on circumstantial evidence is well settled. In ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116*** as under:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793***, where the following observations were made: [SCC p. 807, para 19: SCC (Cri) p. 1047]

‘19..... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance

between “may be” and “must be” is long and divides vague conjectures from sure conclusions.’

(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.”

17. In *Mahmood v. State of U.P. (1976) 1 SCC 542*, it was held as under:

“(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

18. One glaring fact that stands out is that the hasty cremation of the deceased without waiting for her parents or relations or even informing them of her death. The fact that the accused were

present in the house when the deceased died and the fact that the accused have been unable to establish that she died a natural death due to diarrhoea leads to the irresistible conclusion that after killing the deceased, they hurriedly cremated her in order to destroy the evidence.

19. In *Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681*, the Supreme Court was dealing with a case where the circumstances were more or less similar. There again there were no eye-witnesses to the occurrence and the case was based on circumstantial evidence. Although the general rule in cases of circumstantial evidence was that the circumstances taken cumulatively each should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused, in cases of dowry deaths, some additional factors had to be kept in mind, since the crime is invariably committed in secrecy. It was observed by the Supreme Court as under:

“13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family.

The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.”

20. Highlighting the shifting of the burden of proof under Section 106 of the IE Act in cases of this type, the Supreme Court further observed in *Trimukh Maroti Kirkan v. State of Maharashtra* (*supra*) as under:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab vs. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

21. In the present case, the hurried cremation of the deceased by the accused persons without informing her parents or relations links to a very strong inference of their culpability in the crime. In ***State of West Bengal v. Mir Mohammad Omar (2000) 8 SCC 382***, the Supreme Court took note of Section 106 of the IE Act and held as under:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

22. Likewise, in *Darshan Singh v. State of Rajasthan* (*supra*), where there were no eye-witnesses to the crime of murder of a young woman of 22 years whose dead body had already been cremated, the Supreme Court affirmed the conviction in the above circumstances.

23. In the present case, the accused persons had failed to discharge the burden of showing the circumstances under which the deceased died. The explanation offered by them that she died out of diarrhoea has not been proved by them. The evidence of DWs-1 and 2 in this regard is totally unconvincing and has been rightly rejected by the trial Court.

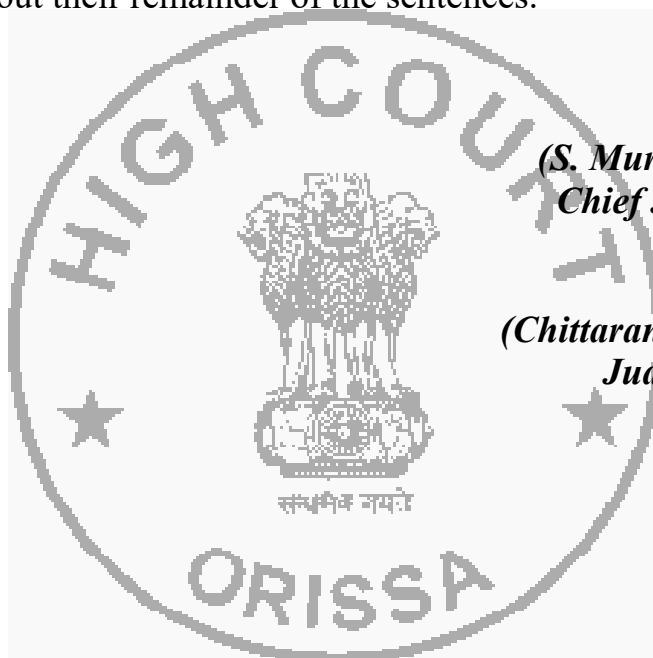
24. Again in *Trimukh Maroti Kirkan v. State of Maharashtra* (*supra*), it was observed as under:

“21. In a case based on circumstantial evidence where no eye-witness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See *State of Tamil Nadu v. Rajendran* (1999) 8 SCC 679 (para 6); *State of U.P. v. Dr. Ravindra Prakash Mittal* (1992) 3 SSC 300 (para 39 AIR para 40); *State of Maharashtra v. Suresh* (2000) 1 SCC 471 (para 27); *Ganesh Lal v. State of Rajasthan* (2002) 1 SCC 731 (para 15) and *Gulab Chand v. State of M.P.* (1995) 3 SCC 574 (para 4)].

25. That the deceased was subjected to cruelty shortly before her death has been adequately proved not only by her own mother PW-11 who had noticed injury marks on her body when she visited but also the evidence of her co-villager who visited the village of the accused and was informed by other villagers there about the ill-treatment given to the deceased by the accused.

26. The Court is, therefore, satisfied that the trial Court has committed no error in holding each of the circumstances highlighted hereinbefore, to have been proved and the chain of circumstances being complete and pointing unerringly to the guilt of the three Appellants and to no one else.

27. Consequently, this Court is not inclined to interfere with the impugned judgment of the trial Court. The appeal is accordingly dismissed but, in the circumstances with no order as to costs. The bail bonds of the Appellants are hereby cancelled. They are directed to surrender forthwith and, in any event, not later than 17th October, 2022 failing which, the IIC of the concerned Police Station will take immediate steps to take them into custody for serving out their remainder of the sentences.



(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S. Behera/ Jr. Steno.