

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA NO.61 OF 2014

From the judgment and order dated 12.06.2014 passed by Shri Prasanna Kumar Hota, Sessions Judge, Koraput at Jeypore in Criminal Trial No.1 of 2012.

Jhituku Paraja Appellant

-Versus-

State of Odisha Respondent

For Appellant : Mr. Gourishankar Pani, Advocate

For Respondent : Ms. Saswata Pattanaik, AGA

P R E S E N T:

THE HONOURABLE SHRI JUSTICE S. TALAPATRA

A N D

THE HONOURABLE SHRI JUSTICE M.S. SAHOO

Date of hearing: 25.07.2022 Date of judgment: 09.09.2022

M.S.SAHOO, J The appellant, in the present Jail Criminal Appeal, Jhituku Paraja is aggrieved by the judgment of the learned Sessions Judge, Koraput at Jeypore dated 12.06.2014 convicting him for offence punishable U/s.302 of the Indian Penal Code, 1860 (in short 'IPC'), convicted U/ss.235(2) of the Code of Criminal Procedure, 1973 (Cr.P.C. for short) and sentencing him to undergo imprisonment for life and to pay a fine of Rs.10,000/- (Rupees Ten

Thousand) only, and in default of payment of fine to undergo rigorous imprisonment for one year, after completion of criminal trial No.1/2012 (arising out of G.R. Case No.476/2011, corresponding to Jeypore Sadar P.S. Case No.113 of 2011 committed by the S.D.J.M., Jeypore).

2. Before the learned Sessions Court, the appellant was the sole accused. The incident out of which the proceeding arose occurred on 06.09.2011 at about 11.00 P.M. in Village-Kadamguda within the jurisdiction of Jeypore Sadar Police Station in the district of Koraput. The First Information Report ('FIR' for short) was lodged at about 8.15 A.M. on 07.09.2011. The I.I.C. Jeypore Sadar P.S., Koraput registered P.S. Case No.113 of 2011 and took up the investigation of the case.

3. The FIR written by one Ghenu Muduli (P.W.5) marked as Ext.2 before the learned Sessions Court, as per the statement of the informant-Somanath Pujari, written in Odia. Translated to English the FIR describes the following:-

"I, Somanath Pujari, S/O- Late Parsu Pujari, resident of Kadamguda, Police Station-Jeypore Sadar, Dist.- Koraput giving this written information that my father Parsu Pujari had brought and broken stones of Jhituku Paraja of our village, therefore Jhituku Paraja used to always quarrel with my father. Yesterday, Tuesday (Dt.06.09.2011) night at about 11 P.M., Jhituku Paraja while quarrelling with my father regarding the issue of breaking of stones near his house brought 'tangia' from his house inflicted cuts on my father's chest and face resulting in lot of bleeding. My father died immediately there. After seeing the same, me and my co-villagers Hari Pujari, Sunadhara Pujari and Chakra Muduli and others ran to Catch hold of Jhituku Paraja but he ran away in the darkness after throwing the 'tangia' at the place of occurrence. We searched a lot but could not

find him. This incident has been also seen by the daughter of the accused, Soshi Paraja and son Suna Paraja. My father, Parsu Pujari died as Jhituku Paraja of our village inflicted cut injury on him with a 'tangia'.

Therefore, it is informed the culprit must be caught and punished."

4. Prosecution alleged that the deceased Parsu Pujari and accused Jhituku Pujari, both inhabitants of village Kadamguda, were earning their livelihood by selling small stones after collecting and breaking bigger pieces of stone. It is alleged, some days prior to the occurrence the deceased had taken some big stones collected by the accused, had broken the same into small pieces and sold them, for which there was a quarrel between them.

On the fateful night, i.e., on 06.09.2011 at about 11.00 P.M. there was a quarrel between the accused and the deceased, near the house of the accused relating to the issue of breaking and selling of stones by the deceased. The accused brought a 'tangia' from his house and gave blows on the chest and the face of the deceased that led to severe bleeding injury and the deceased died at the spot.

5. The prosecution narration further reveals at that time Somanath Pujari (P.W.2), son of the deceased, informant before the police, was present at some distance from the spot along with other co-villagers, namely, Hari Pujari, Sunadhara Pujari (P.W.6) and Chakra Muduli (P.W.3). They rushed to the spot and chased the accused. The accused-appellant vanished into darkness after

throwing the weapon of offence : 'Tangia' at the spot and they could not catch hold of him.

6. It is further narrated that after the FIR was lodged on 07.09.2011, the Inspector-in-charge of Jeypore Sadar Police Station took up investigation (I.O:P.W.10), examined the complainant, deputed constable no.659: Shri A.Gada Nayak to the spot to guard the dead body of the deceased. On the same date, i.e, on 07.09.2011, the Investigating Officer visited the spot, prepared a spot map (marked as Ext.9). Inquest on the dead body of the deceased was held at the spot and inquest report was prepared (Ext.3). The dead body was dispatched to the Sub Divisional (S.D) Hospital, Jeypore for post-mortem by issuing a dead body challan (Ext.10).

7. In continuing the investigation, the I.O. further seized 'tangia' (M.O.I): the alleged weapon of offence, collected some sample blood stained earth from the spot, prepared seizure list, (Ext.4). After arresting the accused, his wearing apparels were seized, i.e., one full shirt (M.O.II), one lungi (M.O.III) by preparing the seizure list (Ext.5). After post-mortem examination, the wearing apparels of the deceased were seized and seizure list was prepared (Ext.1). The shirt worn by the deceased is marked as (M.O.IV). Lungi of the deceased is marked as (M.O.V). As stated by the I.O., the accused was arrested from village "Sandhiguda." The accused was forwarded to the Court of the Sessions Judge on 15.10.2011. The nail clippings of the accused were collected, kept in a sealed vial as

per the seizure list Ext.6. The weapon of offence, i.e., 'tangia' was sent to the Medical Officer, S. D. Hospital, Jeypore with a query in writing as to whether the injuries found on the dead body of the deceased can be caused by the said weapon. The written query is marked as Ext. 8/2. The post-mortem report was received by the I.O., the MOs were sent to the Deputy Director, Regional Forensic Science Laboratory (R.F.S.L.), Berhampur through the learned S.D.J.M., Jeypore by a forwarding letter (Ext.11). The chemical examination report received from the R.F.S.L. has been marked as Ext.12. After completion of investigation, charge-sheet against the accused was submitted.

8. Learned trial court has dealt with evidence of P.Ws.2, 3 and 6 treating them to be the "eye-witnesses to the occurrence." P.W.4 has been treated to be the post occurrence witness and based on the evidence of the "eye-witnesses", the learned trial court has found the appellant guilty.

9. The points for determination has been formulated in paragraph-5 of the judgment and is quoted herein :

*"The point for determination in this case:-
Whether the accused on 6.9.2011 night at about 11.00 p.m.
at village-Kadamuguda committed the murder by
intentionally or knowingly causing the death of his co-
villager Parsu Pujari?"*

10. Further, the learned trial court has dealt with the requirement of proving the charge under Section 302 of the I.P.C. in paragraph-6 of the judgment, which is quoted herein :

“To establish a charge under Section 302 of the Indian Penal Code the prosecution must prove:

- (i) That the death of a human being caused by a human being has actually taken place;*
- (ii) That such death has been caused by or in consequence of the act of the accused;*
- (iii) That such act was done with the intention of caused death, or that it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death, or (b) was sufficient in the ordinary course of nature to cause death, or that the accused caused death by doing an act known him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.”*

11. We heard detailed arguments of Sri Gouri Shankar Pani, learned counsel for the appellant and Ms. S. Pattnaik, learned Additional Government Advocate for the State

12. Mr. Pani, learned counsel for the appellant has challenged the findings of the learned trial court regarding the “eyewitnesses’ version” based on the evidence of P.Ws.2, 3 and 6. The learned trial court in paragraph-8 (internal page-16) of the judgment has dealt with the evidence of P.Ws.2, 3 and 6 and has opined :

“... ...In my opinion, the aforesaid evidence of P.Ws.2, 3 & 6 that the accused gave ‘tangia’ blows on the chest and face of the deceased is trustworthy, believable and acceptable.”

13. For the aforesaid finding of the learned trial court and the challenge to the same by the learned counsel for the appellant, we deem it appropriate to evaluate the same and the statements of P.W.2, 3 and 6 are quoted herein. P.W.2 in examination-in-chief has stated:

"I know the accused. The deceased is my father one year back Tuesday at 11.00 P.M. night the occurrence took place. I was talking with Hari, Sunadhar and Chakra on the road. At that time the accused quarrelled with the deceased in front of his house for cutting of stone. During such quarrel the accused assaulted the deceased by means of an axe. He dealt one blow to his face and another blow to the chest by axe as a result my deceased father fell on the ground and sustained bleeding injury and died at the spot. The accused then left the spot leaving the axe there. At the time of the incident there was a 'lanthan' in lighting condition on the verandah of the accused.

13.1. In Cross-examination the statement of P.W.2 is reproduced :

"... ... Hearing hullah of the children of the accused we went to the spot. By the time I reached the spot my deceased father was lying on the ground with injuries. M.O.I was also lying near him by the time I reached there. I along with other witnesses such as Chakra, Hari and Sunadhara reached the spot at the same time. In the night of occurrence, i.e., after the incident we could not meet the accused. There is no electricity in our village. The incident took place in front of the house of the accused at a distance of five feet from the 'lanthan'. The that time the children of the accused were inside his house. Other villagers came to the spot after we four reached there."

14. Learned counsel for the appellant argues that if the statements of P.W.2 in his examination-in-chief and in the cross-examination are compared, it cannot be said that the statement of P.W.2 is to be relied on as ocular evidence of the fatal incident as in examination-in-chief/cross-examination he has not stated that he saw the accused attacking the deceased.

15. The statement of the next witness presented by prosecution to be the eye witnesses, in examination-in-chief, i.e., P.W.3-Chakra Muduli is quoted herein :

"I know the accused. I also know the deceased. On year and four months back in the night at 11.00 P.M. the

occurrence took place in front of the house of the accused. I along with Somanath Pujari, Sunadhar Pujari and Hari Pujari wer standing on the village road. At that time, the accused and the deceased quarreled among themselves. During such quarrel the accused brought an axe from his house and dealt blows one on the chest and the other one the forehead of the deceased with that axe. As a result the deceased sustained bleeding injuries and fell down. He died at the spot due to such injuries. Then the accused fled away from the spot throwing that axe there. Immediate we reached at the spot.

15.1. The statement in the cross-examination of P.W.3 is quoted herein :

“At the time of such quarrel we did not go to spot to restraint. At the time of the incident the child of the accused shouted and hearing such shout we went to the spot. By the time we reached the spot the deceased was lying dead. We ascertained from the children of the accused that the accused killed the deceased.”

3... ..

There was a ‘Dibiri’ light inside the house of the accused which is a small hut. The light was not sufficient to give clear vision inside the house. First Somanath went to the spot and sometimes after we three went there.”

It is submitted by the learned counsel that the P.W.3 also has not stated that he saw the accused attacking the deceased.

16. Learned counsel for the appellant further refers to the examination-in-chief of the 3rd “eye-witness”, P.W.6, presented by the prosecution as eye-witness before the learned trial court to point out the discrepancies. The examination-in-chief of P.W.6-Sunadhar Pujari is reproduced herein:

“I know the accused and the deceased. One year and four months back in the night at about 11.00 P.M. the occurrence took place in front of house of the accused. There was dispute between the accused and the deceased over breaking of the stone. At the time of occurrence I along with Hari, Somanath and Chakra were present on the village road and at that time the accused and the deceased quarreled among themselves.

During such quarrel the accused brought an axe from his house and assaulted the deceased with that axe on his chest and head causing bleeding injuries and the deceased fell down and died at the spot. We immediately rushed to the spot. The accused fled away from the spot leaving the axe at the spot."

16.1. The statement of P.W.6 in cross- examination is reproduced herein :

"... .. We are at a distance of 30 to 40 feet from the spot at the time of the incident. We did not intervene when they were quarrelling. Heard the shout of children of the accused we rushed to the spot."

17. It is submitted by the learned counsel for the appellant that since the learned trial court has relied extensively on the evidence of P.Ws.2, 3 and 6, the evidence of the said witnesses are to be closely scrutinized as to whether their statements are sufficient to prove beyond all reasonable doubts that the accused is the author of the crime.

18. It is further submitted that apart from P.W.6 in his cross-examination stating that "... .. I have seen the accused while assaulting the deceased by an axe. I have seen the accused bringing an axe from his house." The other two so called eye-witnesses have not indicated in their statements to have seen the accused while assaulting the deceased by an axe. It is further submitted that it was a dark night and there was not electricity in the village, as has been stated by all the three witnesses. It is submitted that the occurrence took place at 11.00 P.M., therefore, the source of light that led to seeing of the occurrence by P.Ws.2,

3 and 6, i.e., attack by the accused-appellant on the deceased has to be closely scrutinized.

19. To further highlight his contention, the learned counsel for the appellant refers to the statement of P.W.2 regarding the source of light “at the time of incident there was a *“lanthan’ in lighting condition on the verandah of the accused”* and the occurrence took place outside the house about five feet away.

20. Attention of this Court is drawn to the statement of P.W.3, P.W.3 in his statement in cross-examination states that *“there was a ‘Dibiri’ light inside the house of the accused which is a small hut. The light was not sufficient to give clear vision inside the house.”* Further, the learned counsel for the appellant refers to the statement of P.W.6 in his examination-in-chief as well as cross that P.W.6 has not referred to any source of light to see the occurrence, though he has categorically stated that *“it was a dark night and there was no electric light in our village”*.

It is submitted that “Dibiri” and “Lanthan” (i.e., Hurricane Lantern) are completely different in their construction and appearance only thing common being that both are kerosene wick lamps. It is argued “Dibiri” is a round container with wick (fabric) lamp with open flame where as “Lanthan” is a flat wick adjustable lamp with glass cover.

21. To bring out the inconsistencies in the evidence, it is submitted by the learned counsel for the appellant that all the three P.Ws-2, 3 and 6 have stated that they were talking together

on the village road at a distance about 50 to 60 ft. from the place of occurrence. It is stated by all the three that they went together to the spot of occurrence, on the said aspect, P.W.2.-Somanath Pujari in his cross-examination stated that *"hearing the hullah of the children of the accused we went to the spot. By the time I reached the spot my deceased father was lying on the ground with the injuries.... I reached there. I along with other witnesses, such as Chakra, Hari and Sunadhar reached the spot at the same time."*

P.W.3-Chakra Mudli; regarding his presence and response to the situation states that he along with P.Ws.2 and 6, were standing on the village road, the appellant and deceased quarrelled among themselves. In cross-examination states *"at the time of such quarrel we did not go to the spot to restrain. At the time of the incident the children of the accused shouted and hearing such shout we went to the spot. By the time we reached the spot the deceased was lying dead. We ascertained from the children of the accused that the accused killed the deceased."*

P.W.6-Sunadhar Pujari; regarding his presence at the spot of occurrence and being a witness to the fatal incident has stated that he along with Hari (Not a charge-sheet witness), Somanath (P.W.2) and Chakra (P.W.3) were present at the village road. They rushed immediately to the spot. In cross-examination, he has stated that *"we were at a distance of 30 to 40 feet."*

22. It is contended by the learned counsel for the appellant that P.Ws. 2, 3 and 6 presented by the prosecution before the learned

trial court, have been considered by the learned trial court to be the eye witnesses to the fatal incident being present about 30 to 40/50 to 60 feet from the place of occurrence and also they are witnesses to the activities of each other in response to the situation at the spot. It is submitted that as per P.W.6-Sunadhar, P.W.3-Chakra went to the spot first; as per P.W.3-Chakra, P.W.2-Somanath went to the spot first and as per P.W.2-Somanath all of them, i.e., Somanath, Chakra and Sunadhara went to the spot together, therefore, there is inherent contradictions in the statements regarding availability of the P.Ws at the spot of occurrence.

23. It is further contended that P.W.2 stated in his cross-examination all the P.Ws.2, 3 and 6 hearing hullah of the children went to the spot. P.W.3 has stated after he went, Sunadhara and Somanath went to the spot. *They ascertained from the children of the accused that the accused killed the deceased.* It is contended by the learned counsel for the appellant that even the P.Ws on their own have stated to have ascertained the fact from children of accused who have not been presented as witnesses.

24. It is contended by the learned counsel for the appellant that the sequence of events of P.Ws. witnessing the occurrence of attack by the appellant on the deceased, all of them responding to the situation and seeing the occurrence, has been differently narrated by each of P.Ws.2, 3 & 6, which causes doubts and cannot be relied upon to be the proof beyond all reasonable

doubts, to the extent relied upon by the learned trial court to hold the appellant guilty.

25. Learned counsel for the appellant has taken us through the evidence rendered by autopsy surgeon before the court as P.W.9, he has drawn our attention to the statement of doctor in cross-examination which is quoted for ready reference :

“...I have not mentioned in the post mortem examination report that the injuries are ante mortem in nature. I have also not mentioned in my postmortem examination report that the nature of death was homicidal in nature. I have not mentioned in the P.M. examination report that the injuries found on the dead body of the deceased was sufficient to cause death in ordinary course of nature.”

26. In view of the significance of the opinion of the autopsy surgeon, we also perused the Ext.7. P.M. report to find that in fact the doctor has not mentioned the facts, as noted above, in his statement in evidence before the learned trial court.

It is submitted by learned counsel for the appellant that not mentioning regarding “*the injuries to be ante mortem in nature*” and “*death was homicidal in nature*”, goes on to affect the very basis of the prosecution story that the deceased died homicidal death by injuries inflicted by the accused.

It is submitted by the learned counsel for the appellant that the conspectus of the facts and evidence presented before the learned trial court would lead to the conclusion that there are too many loopholes in the prosecution theory to bring home the guilt of the accused by the standard of proving to the hilt.

27. Per contra, it is submitted by Ms. S. Pattnaik, learned Additional Government Advocate that even if P.Ws.2, 3 and 6 have stated that there was darkness and there is no electricity in the village, but as it is said, *darkness has its own light*. It is further submitted by the learned counsel for the State supporting the judgment of the learned trial court that the evidence is to be considered in its totality, the discrepancies that is found in the statements of P.Ws.2, 3 and 6 are minor discrepancies and this Court has to go to the core of the evidence which leads to the conclusion of the guilt of the accused.

27.1. It is further submitted that motive has been clearly established by the prosecution as all witnesses have stated that there was a persisting quarrel between the accused and the deceased prior to the incident regarding breaking of stone by deceased those were collected by the accused. Therefore, the motive of the accused attacking the deceased is well proved.

27.2. Referring to the forwarding report (Ext.11) and chemical examination report (Ext.12), it is submitted by the learned Additional Government Advocate that the blood stains on the Exts marked 'B' & 'C', i.e., the wearing apparels of the accused having blood Group 'O', stain of blood group 'O' on the 'taniga' (axe) and the stain of blood group on wearing apparels of the deceased, (i.e., Exts.D & E) of blood group-'O' points to the guilt of the accused.

27.3. Learned Additional Government Advocate to fortify her submissions that discrepancy in testimony of the witnesses is not

always fatal to the prosecution case places reliance on the decision rendered by the Hon'ble Supreme Court in **Munshi Prasad and others v. State of Bihar : (2002) 1 SCC 351**, paragraph-10. The learned Additional Government Advocate refers to paragraph-10 of the said judgment, which is reproduced herein:

"10. It is on the above factual score, Mr Venkataramani strongly contended that the proceedings initiated in the matter cannot but be ascribed to be a case of blind murder, which has not been witnessed by any person. It has been contended that the prosecution story is a fabricated one as regards the involvement of the accused persons and the case of blind murder has been converted into one of involvement of the accused by reason of enmity and hostile relationship between the family of PW 5, the brother of the deceased and the accused persons. The enmity aspect will be dealt with at a later stage in this judgment but presently it would be convenient to note the submissions in support of the appeal as regards the happenings of the event of blind murder — the circumstances relied upon are, however, as follows:

(i) PWs 1 to 5 are supposedly interested witnesses by reason of the factum that they belong to the same village and are related to each other. Strong criticism has been levelled on the evidence of PWs 3, 4 and 5, who claimed to be eyewitnesses and in a similar vein, criticism has also been levelled against the evidence of PWs 1 and 2, who claimed to have heard the shouting from a distance of about 700 to 800 yards. Let us thus analyse the evidence of the prosecution witnesses — records depict that PWs 1 and 2 are independent witnesses, who have stated that while they were proceeding towards Jagdishpur Market and when they reached near the place of occurrence, they saw the appellants running away with dabia in their hands and it is only on seeing the accused persons running away with weapons, they came at the place of occurrence and saw the dead body of the deceased lying there. It is this evidence which has been attributed to be highly improbable by Mr Venkataramani since they were carrying a load of about 15 kg of vegetables on their shoulders — a rustic villager growing vegetables and selling it to the market place obviously will carry the load on his shoulders. Weight of 15 kg may be of some consequence to a sophisticated city baboo but the same may not be so to a

village peasant or even a trader. The cross-examination of these two witnesses, though effected extensively, has not yielded any benefit to the appellants and the evidence remained totally unshaken and thus worthy of acceptance by a court of law. The evidence of PWs 3, 4 and 5 stands thus corroborated by two independent witnesses and it is on the evidence of the other three prosecution witnesses, the main plank of submission of Mr Venkataramani is that a contradiction in the evidence is the only merit in the story made out by the prosecution.

Incidentally, be it noted that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of, and we do not see any justification to pass a contra-note, as well, on perusal of the evidence on record. In this context reference may be made to two decisions of this Court. The first being State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105] as also a later one in the case of Leela Ram v. State of Haryana [(1999) 9 SCC 525 : 2000 SCC (Cri) 222]. Needless to record that difference in some minor detail, which does not otherwise affect the core of the prosecution case, may be there but that by itself would not prompt the court to reject the evidence on minor variations and discrepancies. In Leela Ram [(1999) 9 SCC 525 : 2000 SCC (Cri) 222] this Court observed in para 10 of the Report : (SCC pp. 532-33)

"10. * * *

'24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.'

[Emphasis supplied]

28. Learned trial court has relied on **Rajwant Singh v. State of Kerala: AIR 1966 SC 1974; Virsa Singh v. State of Punjab: AIR 1958 SC 465** and **Kalegura Padma Rao and another v. State of A.P. represented by Public Prosecutor: 2007(2) Crimes 217(SC)** to hold that “act of the accused resulting the death of the deceased comes under the purview of Section 300 clause(3) of Indian Penal Code which amounts to murder and punishable under Section 302 of the Indian Penal Code. In other words, it can be safely held beyond reasonable doubt that the accused has committed the murder of the deceased which is punishable under Section 302 of the Indian Penal Code.”

29. Before advertent to the rival contentions as noted above it would be profitable to notice the pronouncements of the Hon'ble Supreme Court regarding approach of a Court in scrutinizing evidence presented as “eye witness account.”

29.1. In **Rammi v. State of Madhya Pradesh : 1999(8) SCC 649** paragraph-24 relying on **Tahasildar Singh v. State of U.P.; AIR 1959 SC 1012**.

“24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

29.2. In *Sharad Birdhi Chand Sarda v. State of Maharashtra* :

1984 SCC (4) 116 at paragraphs- 151, 161, 162 & 163 of SCC it has been held:

“151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

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161. This Court, therefore, has in no way departed from the five conditions laid down in *Hanumant* case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in *Hanumant* case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] , the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.

162. Moreover, in *M.G. Agarwal* case [AIR 1963 SC 200 : (1963) 2 SCR 405, 419 : (1963) 1 Cri LJ 235] this Court while reiterating the principles enunciated in *Hanumant* case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] observed thus:

“If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.”

In *Shankarlal* [(1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : (1981) 2 SCR 384, 390 : 1981 Cri LJ 325] this Court

reiterated the same view thus : [SCC para 31, p. 44 : SCC (Cri) p. 322]

“Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment.”

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In *Kali Ram v. State of Himachal Pradesh* [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773 : (1974) 1 SCR 722 : 1974 Cri LJ 1] this Court made the following observations : [SCC para 25, p. 820 : SCC (Cri) p. 1060]

“Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.”

[Emphasis supplied]

29.3. The Hon’ble Supreme Court in ***Arulvelu & another v. State Represented by the Public Prosecutor and another : (2009) 10 SCC 206***, Court has held that finding contrary to the evidence is “perverse”, the finding of the trial court in ignorance of the relevant materials on record is undoubtedly perverse and ripe for interference from this Court.

29.4. In the case of ***Sharada Birdhi Chand Sarda*** (*supra*) at paragraphs-160 and 176 of the SCC, the Hon’ble Supreme Court referring to the decision of the High Court in that particular case, held that the High Court has taken a completely wrong view of law in holding that even if the prosecution may suffer from serious

infirmities, it could be reinforced by additional link in the nature of a false defence in order to supply the lacuna and has thus committed a fundamental error of law. Since two views are clearly possible in the present case, the question of defence being false does not arise and the argument of the High Court that the defence was false does not survive.

30. Since it is contended by the learned counsel for the appellant that there are material variations in the evidences of P.Ws.2, 3 and 6, presented by the prosecution to be the witnesses, who have seen the occurrence, we would cull the following aspects of the evidences of the said witnesses.

30.1 The statement of P.W.2 in his examination-in-chief as well as the cross-examination have been quoted above, who has stated that *“Hearing hullah of the children of the accused we went to the spot. By the time I reached the spot my deceased father was lying on the ground with injuries.”* He has further stated that he along with P.Ws.3 and 6 reached the spot at the same time regarding the source of the light and its location in the dark night, the village being without any electricity, P.W.2 has stated that *“lanthan in lighting condition was there on the verandah of the accused.”*

30.2. Regarding the incident and response of the P.Ws.2, 3 & 6, P.W.3 has stated *“At the time of such quarrel we did not go to spot to restraint. At the time of the incident the child of the accused shouted and hearing such shout we went to the spot. By the time we reached the spot the deceased was lying dead. We ascertained*

from the children of the accused that the accused killed the deceased.”

Regarding the source of light and its location, P.W.3 has stated thus in his cross-examination :

“There was a ‘Dibiri’ light inside the house of the accuse which is a small hut. The light was not sufficient to give clear vision inside the house. First Somanath went to the spot and sometimes after we three went there.

30.3 P.W.6 in his evidence has stated thus :

“.... We did not intervene when they were quarrelling. Heard the shout of children of the accused we rushed to the spot.”

In his cross-examination, P.W.6 has further stated *“I have seen the accused while assaulting the deceased by an axe. I have seen the accused bringing an axe from his house.”*

Regarding the source of light P.W.6 has not referred to anything as to how he was able to see the darkness the act of the accused attacking the deceased and then escaping from the spot though he has categorically stated that it was a dark night and the village is without any electricity.

31. Regarding their individual response to the situation and the sequence of them reaching at the spot, as has been noted above, in their evidence before the learned trial court, P.W.2 states that he along with P.Ws.3 and 6 reached the spot at the same time. P.W.3 states that he along with P.Ws.2 and 6 did not go to the spot to restrain when the deceased and the accused were quarrelling, they went to the spot when the children of the accused shouted and they ascertained from the children of the accused that the accused killed the deceased.

P.W.6 has further stated in his cross-examination, Chakra Muduli (P.W.3) reached the spot first.

32. The source and location of light has been described by the three witnesses as follows : P.W.2 says it to be a “lanthan” located at the “Verandah” of house of accused at about 5ft from the place of occurrence outside the house; the P.W.3 states the source of light to be “Dibiri” inside the small hut of accused not sufficient to give clear vision inside the house and lastly the P.W.6 does not refer to any source of light or it’s location.

If P.Ws.3’s version is to be believed, then the light was not sufficient to give clear vision inside the house, therefore the light inside the house illuminating the spot of occurrence which is outside house about five feet from verandah of the house becomes improbable. Further, if the P.Ws.2, 3 & 6 were standing together and went to the spot together their statements could not have varied as to how they came to know about the incident or to the extent they reached the spot at a time interval.

32.1 In **Ashoksinh Jayendrasinh v. State of Gujarat: (2019) 6**

SCC 535, it has been held:

“10. The occurrence was of 23.11.1997 at 09:00 PM in the agricultural field of complainant-Somabhai Rupabhai (PW-3), where it was dark. The panchnama of the scene of occurrence (Ex.P-73) shows no indication of the electric light either in the animal shed situated behind the house of complainant or that there is any electric pole anywhere in the vicinity or that there is a light on the well which is supplying water. Case of prosecution is that the appellant and six other co-accused surrounded the complainant party and there were three gunshots fired. The injured

witness (PW-6) in his cross-examination has admitted that he had not stated anything about the burning light either in the animal shed or anywhere in the vicinity. In the absence of any evidence as to the light aspect, the possibility of identifying the accused in the darkness of the agricultural field of the complainant, particularly at 09:00 PM becomes doubtful. It is also to be pointed out that there is no evidence as to whether there was moonlight on 23.11.1997 and complainant has also not stated that he has identified the appellant or other co-accused with the help of moonlight. In the absence of evidence as to the availability of sufficient light, the identification of the accused and the overt act attributed to the appellant becomes doubtful.

[Emphasis supplied]

32.2. Though the prosecution has presented that the P.Ws saw the occurrence in the available light, as testified by the P.Ws.2, 3 & 6 inconsistently, for the sake of argument, to answer the proposition advanced by the learned Additional Government Advocate that *darkness has its own light*, the answer would be, in the case at hand in view of the discrepancies in the evidence adduced regarding the source and location of light, darkness did not have enough light to see the occurrence about 50 feet away much less to fasten the liability on a person on the basis of the statements of P.Ws.2, 3 & 6.

33. In our considered opinion even if this Court does not adopt too serious a view in evaluating the evidence adduced by P.Ws.2, 3 and 6, the variations in the narrative of the incident by P.Ws.2, 3 and 6 show that there is discrepancy regarding the response of the three witnesses to the fatal occurrence, discrepancy regarding the three persons becoming eyewitness to the occurrence and, further

there is discrepancy regarding the source and location of light enabling them to see the occurrence. In our considered view, such discrepancies are serious enough not to treat their evidence as proof beyond all reasonable doubts.

33.1 The other aspect that the medical opinion, i.e., the evidence of autopsy surgeon not mentioning regarding *the injuries to be antemortem* in nature and that the *death was homicidal in nature*, further affects the prosecution case, inasmuch as, the medical evidence is not consistent with the prosecution case that the accused could have inflicted the fatal wounds on the deceased.

33.2 In the case at hand, it has been suggested by the learned Additional Government Advocate that the accused went missing and subsequently caught and stain of blood on clothes is also not explained by the accused.

In our considered view, the said materials on their own are not sufficient to hold the accused guilty due to infirmities and inconsistencies in the evidence of the prosecution witnesses presented and relied upon to be the eyewitnesses of the fatal incident before the learned trial court.

33.3 In response to submissions of the learned AGA regarding incriminating nature of the forensic evidence like chemical examination report, it is submitted by the learned counsel for the appellant that chemical examination report on its own cannot form the basis of conviction of the accused when the veracity of the fatal incident of which the appellant has been accused to be the author,

is shaken due to inadequacy of evidence presented by the prosecution. In our considered opinion, the submissions of the learned counsel for the appellant are to be upheld. It has to be marked that the recovery of “Tangia” from the spot, which is alleged to be the weapon of offence was not at the instance of the accused nor there is any further evidence like “fingerprints” on the handle of the axe to connect the accused to the extent that the accused was holding the weapon. The circumstances of the seizure of clothes allegedly worn by the accused have not been presented before the trial court though the accused was arrested by the Investigating Officer from another village.

34. Dealing with circumstantial evidence, like recovery of blood stained weapon to what extent can be relied upon to prove the guilt of the accused the Hon’ble Supreme Court in **Sattatiya v. State of Maharashtra : (2008) 3 SCC 210: A 2008 SC 1184** have held paragraphs-10, 26 & 30 of SCC :

“10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances

[Emphasis supplied]

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26. *The next thing which is to be seen is whether the evidence relating to the recovery of clothes of the appellant and the half blade, allegedly used for commission of crime,*

is credible and could be relied on for proving the charge of culpable homicide against the appellant. In this context, it is important to note that the prosecution did not produce any document containing the recording of statement allegedly made by the appellant expressing his desire to facilitate recovery of the clothes and half blade. The prosecution case that the accused volunteered to give information and took the police for recovery of the clothes, half blade and purchase of handkerchief is highly suspect. It has not been explained as to why the appellant gave information in piecemeal on three dates i.e. 3.10.1994, 5.10.1994 and 6.10.1994. Room No.45 of "Ganesh Bhuvan" from which the clothes are said to have been recovered was found to be unlocked premises which could be accessed by any one. The prosecution could not explain as to how the room allegedly belonging to the appellant could be without any lock. The absence of any habitation in the room also cast serious doubt on the genuineness and bonafides of recovery of clothes. The recovery of half blade from the road side beneath the wooden board in front of "Ganesh Bhuvu" is also not convincing. Undisputedly, the place from which half blade is said to have been recovered is an open place and everybody had access to the site from where the blade is said to have been recovered. It is, therefore, difficult to believe the prosecution theory regarding recovery of the half blade. The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the Chemical Examiner's Report the blood stains found on the shirt, pant and half blade were those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human blood stains on the cloths of the accused and half blade were sufficient to link him with the murder.

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30. On the basis of above discussion we held that the prosecution failed to establish the chain of circumstances which could link the appellant with the crime. The learned Trial Court and the High Court committed a serious error by relying on the circumstantial evidence of last scene, the recovery of pant and shirt from Room No.45 of "Ganesh Bhuvu" building, half blade from under the wooden board and the sale of the handkerchief by PW7 to the appellant."

[Emphasis supplied]

Sattatiya (*supra*) has been followed in the decision rendered by a Bench comprising of three Hon'ble Judges in **Balwan Singh vs The State Of Chhattisgarh : (2019) 7 SCC 781** and held at paragraph-12:

“12. In Sattatiya v. State of Maharashtra (2008) 3 SCC 210, one of the crucial factors that had led this Court to reverse the conviction was that the bloodstains on the items seized in the recovery could not be linked with the blood of the deceased. This factor was treated as a serious lacuna in the case of the prosecution.”

[Emphasis supplied]

Balwan Singh (*supra*) relied on the Constitution Bench decision of the Hon'ble Supreme Court in **Raghav Prapanna Tripathi vs The State of Uttar Pradesh : AIR 1963 SC 74** which has been thus quoted at paragraph-14 of **Balwan Singh** (*supra*):

“It is also important to note the following observations made by a Constitution Bench of this Court in Raghav Prapanna Tripathi & others v. State of U.P., AIR (1963) SC 74 (AIR P-78, para-21):

“21. In this connection, reference may also be made to circumstances 9 and 10, relating to the recovery of the bloodstained earth from the house.

The bloodstained earth has not been proved to be stained with human blood. Again, we are of opinion that it would be farfetched to conclude from the mere presence of bloodstained earth that earth was stained with human blood and that the human blood was of Kamla and Madhusudhan. These circumstances have, therefore, no evidentiary value.”

(Emphasis supplied)

Therefore, the five-Judge Bench had ruled that in that case the prosecution needed to prove that the bloodstains found

on the earth or the weapons were of a human origin and were of the same blood group as that of the deceased.”

[Emphasis supplied]

In **Balwan Singh** (*supra*), it has been held paragraphs-20,

21, 22 & 23:

“20. However, we cannot lose sight of the fact that the accused would be in a disadvantageous position in case if the aforementioned dictum laid down by this Court in the cases of R. Shaji v. State of Kerala: (2013) 14 SCC 266, Gura Singh v. State of Rajasthan (2001) 2 SCC 205, Jagroop Singh v. State of Punjab : (2012) 11 SCC 768 and State of Rajasthan v. Teja Ram: (1999) 3 SCC 507 relating to the bloodstains is applied in each and every case. Non-confirmation of bloodgroup or origin of the blood may assume importance in cases where the accused pleads a defence or alleges mala fides on the part of the prosecution, or accuses the prosecution of fabricating the evidence to wrongly implicate him in the commission of the crime.

21. In *John Pandian v. State of Tamilnadu: (2010) 14 SCC 129*, this Court, on facts, observed that the evidence of recovery of weapons was credible. The Forensic Science Report (FSL) report had disclosed that the blood was of human origin. The Court proceeded to conclude that since the evidence of recovery of weapon was proved to the satisfaction of the Court, it was sufficient that the prosecution had proved that the bloodstains were of human origin, even though the blood group could not be ascertained.

22. The cases discussed above highlight the burden that the prosecution would ordinarily have to discharge, depending on the other facts and circumstances of the case, for the evidence relating to recovery to be considered against the accused. At the same time, as mentioned above, we are conscious of the fact that it may not always be possible to inextricably link the bloodstains on the items seized in recovery to the blood of the deceased, due to the possibility of disintegration of bloodstains on account of the timelapse in carrying out the recovery. For this reason, in Prabhu Dayal v. State of Rajasthan: (2018) 8 SCC 127,

where one of us (Mohan M. Shantanagoudar J.) had the occasion to author the judgment, this Court, relying on Teja Ram (supra), had held that the failure to determine the blood group of the bloodstains collected from the scene of offence would not prove fatal to the case of the prosecution. In Prabhu Dayal case (supra), although the FSL report could not determine the blood group of the bloodstains on account of disintegration, the report clearly disclosed that the bloodstains were of human origin, and the chain of circumstantial evidence was completed by the testimonies of the other witnesses as well as the reports submitted by the Ballistic Expert and the Forensic Science Laboratory regarding the weapon used to commit murder.

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23. *From the aforementioned discussion, we can summarise that if the recovery of bloodstained articles is proved beyond reasonable doubt by the prosecution, and if the investigation was not found to be tainted, then it may be sufficient if the prosecution shows that the blood found on the articles is of human origin though, even though the blood group is not proved because of disintegration of blood. The Court will have to come to the conclusion based on the facts and circumstances of each case, and there cannot be any fixed formula that the prosecution has to prove, or need not prove, that the blood groups match.*

[Emphasis supplied]

In the present case, the prosecution somehow has not presented the evidence as to the blood group of deceased as well as of the accused. It is not known whether there was any effort to determine the blood groups of the deceased as well as of the accused.

Applying the law laid down in **Balwan Singh** (supra) it has to be held that recovery of blood stained “tangia” and the clothes alone would not be sufficient circumstance to hold the accused guilty as there cannot be any such fixed formulae to apply to each

case and in the case at hand the testimonies of witness have failed to link the accused with the crime.

35. As we have referred to **Rammi** (*supra*), the High Court in appeal can jettison the evidence of an eye-witnesses when the discrepancies in the evidence is incompatible with the credibility of his version.

By applying the above principles in our considered opinion discrepancies in the evidences of P.Ws.2, 3 & 6 are incompatible with the credibility of their versions individually as well as collectively taken together and their evidences have to be jettisoned.

By applying the law laid down by the Hon'ble Supreme Court in **Sharad Birdhi Chand** (*supra*), regarding the appreciation of the evidence presented by the prosecution, it has to be held that the prosecution has not been able to prove that the accused is the author of the crime beyond all reasonable doubt.

The material inconsistencies in the statement of the prosecution witnesses, who have been treated to be the eyewitnesses based on which a verdict of guilt has been returned by the learned trial court fundamentally affects the prosecution story and the material inconsistencies cannot be ignored, when the requirement of standard of proof is proving to the hilt, beyond all

reasonable doubts. The appeal is allowed and accordingly the judgment dated 12.06.2014 of the learned trial court in Criminal Trial No. 1 of 2012 is set aside. The appellant is to be set at liberty unless wanted in connection with any other case.

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M.S.Sahoo, J.

S.Talapatra, J. I agree

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S.Talapatra, J.



Orissa High Court, Cuttack
The 9th September, 2022/ dutta/ Gs