

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 118 of 2005

Bhula @ Bhola Mallick

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates, appeared in this case:

For Appellant

:

Mr. R.K. Rout, Advocate

For Respondent

:

Mr. J. Katikia
Addl. Govt. Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH**

JUDGMENT
05.09.2022

Dr. S. Muralidhar, C.J.

1. This appeal is directed against a judgment dated 16th April, 2005 passed by the Addl. Sessions Judge, Boudh in S.T. No.9 of 2004 and S.T. No.32 of 2004 (B) D.C. convicting the Appellant for the offence punishable under Section 302 IPC and sentencing him to rigorous imprisonment (RI) for life.

2. By an order dated 28th September, 2015 this Court enlarged the Appellant on bail during pendency of the appeal.

3. The case of the prosecution is that at around 3.30 pm on 23rd November, 2003 in village Champapur, Dist-Boudh inside the

house of one Basant Mallick (PW-1), the Appellant cut the throat of the deceased Kalas Mallick. There was an instant death of the deceased. The Appellant is said to have fled away from the spot with the weapon of offence.

4. During investigation, the Investigating Officer (IO) Mrutyunjay Sahoo (PW 9) seized a blood-stained lungi from the bhadi, examined certain other witnesses and held inquest over the dead body of the deceased. Later he sent the dead body of the deceased for post-mortem and seized certain incriminating materials. On completion of investigation, a chargesheet was filed. The Appellant denied his guilt and claimed trial. He claimed that he had made a statement under Section 27 of the Indian Evidence Act under threat and that the knife had been planted on him by the Accused.

5. Eleven witnesses were examined by the prosecution. PW 1 i.e. the informant who claimed to be the husband of the deceased; PW 2 was the seizure witness ; PW 3 was a witness to the inquest and discovery of the weapon of offence at the instance of the Accused and PW 4, Dr. Susanta Kumar Garanaik, conducted the post-mortem.

6. Nandakishore Dhal (PW 7) and Astami Mallik (PW 8), who purportedly were eyewitnesses to the occurrence, turned hostile. PW 10 was the post occurrence witness and PW 11 was the

photographer, who on instruction of the IO, took photographs of the scene of crime. No witnesses were examined for the defence.

7. On an analysis of the evidence, the trial Court concluded that the prosecution had proved the case against the Appellant beyond all reasonable doubt and accordingly, convicted him for the offence punishable under Section 302 of IPC and sentenced him in the manner indicated above.

8. This Court has heard the submissions of Mr. R.K. Rout, learned counsel for the Appellant and Mr. J. Katikia, learned Additional Government Advocate for the State (Respondent).

9. Although the case of the prosecution was based on direct evidence, in the form of the testimony of the eye witness PW-7, she turned hostile. Nevertheless, this case could still be proceeded with as one of circumstantial evidence. The settled legal position in that regard is as follows. In *Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793*, the Court noted that the circumstances “must or should be” established and not “may be” established. It was stated that:

“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.”

10. In *Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*, five principles were laid down to prove a case based on circumstantial evidence:

“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.

(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.”

11. In the above context, the evidence of PW-10 and PW-1 are crucial for the prosecution. PW 1 is a post occurrence witness. He mentioned how his sister-in-law, Astami Mallick (PW 8) was present inside the dwelling house and he was present outside the house. His nephew Bikram Mallick (PW 10) came and reported to him ‘Atta Marigala’ and getting that information, he hastened into the dwelling house. Having reached there, PW 1 found that the throat of the deceased had been cut and her dead body was lying

full of blood in the kitchen. On hearing his cries, two of the villagers came there. PW 8 informed them that the accused had cut the throat of the deceased by a knife. In his cross examination, PW 1 claimed that he had kidnapped Kalasa, the deceased, from Titripada to Phulabanisahi and again stated that he had not kidnapped her and that he got her trained in sorcery in different villages of Phulbani areas. The motive for the crime was suggested to this witness by the defence itself, as is evident from the following answers given by him in the cross-examination:

“6. During the life time, Kalasa was doing Athari Puja. At that time of Kartika Dasimi every year Kalasa was doing a Puja with pump and ceremony. Inviting spiritually Asthakati God and Goddess Chandi Chamudi etc. It is not a fact that by practising Black Magic Kalasa was doing positive harm to many villagers, even cause death to some of them and cause disturbance in matrimonial relations of the many villagers and that for the said reason she incurred displeasure and enmity of many villagers in the locality.”

12. He, however, stated that to the best of his knowledge the Accused “was pulling on well with the deceased.” Nothing was elicited in the cross-examination to contradict the material portion of the testimony about finding the deceased with various bleeding injuries with her throat cut and PW 8 having informed him of the Appellant having cut the throat of Kalasa.

13. Although PW 8, the eyewitness, turned hostile, the prosecution placed reliance on the evidence of Lutha @ Bikram

Mallick (PW 10), who was the one who informed PW 1 about the murder. PW 10 stated as under:

“1. ...About one year and three months back on a particular Sunday at about 4 p.m. when I had sat on the outer varandah of Kalasa Mallik after taking my lunch, in the nick of moment, Astami Mallik (P.W.8) raised hulla to the effect “Dauda, Bhola Mallik katidela”. Hearing the said hulla I rushed inside the house, and found that Bhola was holding a knife and there was stains of blood on the knife and wearing clothes of the accused. I also found that Kalasa Mallik having a bleeding injury at her neck was lying inside the house near her kitchen room. Immediately, we tried to give her some water but she failed to drink it. Then we called Basanta Mallik. In my presence Basanta enquired about the incident and P.W. 8 reported him the matter.”

14. This witness was subject to cross-examination and maintained his version. Although he was not an eyewitness to the actual occurrence, the fact was that he found the accused holding a knife at the place of occurrence and there were stains of blood on the knife and wearing apparels of the accused. The report of the chemical examination clearly shows that both the check lungi of the accused and the red colour saree worn by the deceased contained human blood of Group ‘B’. There was human blood on the iron knife and wooden handle of the weapon of offence.

15. Mr. Rout, learned counsel for the Appellant contended that it was not sufficient for the prosecution to show that the blood group on the clothes of the deceased as well as the accused is of the

same group. According to him, a DNA Test should have been performed. He further submitted that the human blood of the knife was not shown to be of Group B.

16. Once it is clear from the serological report that the human blood of Group B was found both on the clothes of the deceased as well as the accused, the burden was on the accused to explain under what circumstances such blood group was found on the clothes. Likewise, finding of human blood on the knife is a circumstance against the accused. These are crucial pieces of incriminating evidence against the accused which he has not been able to satisfactorily explain in his examination under Section 313 Cr PC.

17. As regards the motive for the crime, the defence has itself supplied it by eliciting the abovementioned answers in that regard from the mouth of PW 1. Further, the evidence of PW 8 fixes the presence of the Appellant at the scene of the occurrence with a blood-stained knife and with blood on his clothes. All these circumstances taken collectively clearly prove the guilt of the accused, and the accused alone and no one else, in the commission of crime.

18. For all of the aforesaid reasons, the Court finds no reason to interfere with the well reasoned impugned judgment of the trial Court. The bail bonds of the Appellant stand cancelled. He is directed to surrender forthwith and, in any event, not later than

19th September, 2022 failing which the IIC of the concerned police station will take immediate steps to have him arrested and brought back to custody to serve out the remainder of his sentence.

19. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S.K. Jena/Secy.

