

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.8 of 2007

Kabasi Padia

.....

Appellant

Ms. Mandakini Panda, Advocate

-Versus-

State of Odisha

.....

Respondent

Ms. Saswata Patnaik,
Addl. Government Advocate

CORAM:

**JUSTICE S. TALAPATRA
JUSTICE SAVITRI RATHO**

**ORDER
14.12.2022**

**Order No.
07.**

1. This matter is taken up through Hybrid Mode.
2. Heard Ms. Mandakini Panda, learned Legal Aid counsel appearing for the appellant. We have also heard Ms. Saswata Patnaik, learned Addl. Government Advocate for the State.
3. This is an appeal under Section-374(2) of the Cr.P.C. based on a petition filed by the appellant from the jail.
4. By means of petition-appeal, the judgment and order of conviction and sentence dated 04.01.2007, delivered in Criminal Trial No.42 of 2003 by the Addl. Sessions Judge, Malkangiri, have been challenged.

5. The appellant was charged under Section-302 of the IPC for committing murder of his brother Kabasi Ganga on 26.06.2001. After culmination of trial, the appellant has been convicted under Section-302 of the IPC and sentenced to suffer Rigorous Imprisonment for life with fine of Rs.1,000/- (Rupees one thousand) with default imprisonment by the said judgment.

6. In brief, the prosecution case is that on 26.06.2001, the appellant assaulted his brother with a wooden plank and his brother, namely Kabasi Ganga died instantaneously at the spot succumbing to the injuries.

7. On the basis of the complaint filed by the son of the deceased namely Kabasi Muka (P.W.3), Malkangiri P.S. Case No.45 of 2009 was registered under Section-302 of the IPC and taken up for investigation.

8. On completion of the investigation, the final Police report charge-sheeting the appellant was filed under Section-302 of the IPC.

9. On taking cognizance of the said offence, the charge under Section-302 of the IPC was framed against the appellant, to which the appellant pleaded not guilty and claimed to be tried in accordance with law.

10. In order to substantiate the charge as afore-noted, eight witnesses were examined by the prosecution including Kabasi Muka (P.W.3), who filed the complaint in Malkangiri Police Station.

11. Except the F.I.R., no document has been admitted on the evidence by the prosecution. Even the defence did not adduce any evidence.

12. After recording the prosecution evidence, the appellant's statements during examination under Section-313(1)(b) of the Cr.P.C. was recorded. The appellant denied all the incriminating materials as surfaced in the evidence and reiterated his plea of innocence.

13. After purported appreciation of the evidence, as lead by the prosecution, the trial judge has observed as follows:

“16. Coming to the facts of the present case, it is also found there is extra judicial confession by this accused in the village meeting as has been gathered from the testimony of P.W.4-Madkami Irma and moreover, there is eye witness account of said P.W.4-Madkami Irma and P.W.3-Kabasi Muka and their testimony before the Court is quite cogent, credible and trustworthy and not to be discredited otherwise.

17. In such circumstances, it is safe to act upon the testimony of P.Ws. 2, 3, 4 & 5 for securing a conviction under Section-302 of the IPC as against this accused and he is convicted accordingly for offence under Section 302 of the IPC for committing murder of Kabasi Ganga in village Udayagiri at about 8 p.m.”

14. Ms. Panda, learned counsel appearing for the appellant has quite succinctly submitted that these findings are grossly perverse, as the court below did not collate the statements made in the cross-examination to weigh their impact on the entire evidence. Moreover, Ms. Panda, learned counsel has pointed out that P.W.4 has resiled from his previous statement under Section-161 of the Cr.P.C. by stating that in his presence, no extra judicial confession was made by the appellant, admitting the commission of crime.

15. Ms. Saswata Patnaik, learned Addl. Government Advocate has fairly admitted that the doctor, who carried out the post mortem examination, has not been examined in the trial nor his report has been admitted in the evidence.

16. That apart, the Investigating Officer, who conducted the inquest over the dead body has not been examined in the trial. So the mode and the process of collecting the evidence in support of the

prosecution case remained unattended in the trial. The trial was closed without recording their evidence.

17. Ms. Patnaik, learned Addl. Government Advocate has submitted that the semblance of truth emanates from the statements of P.Ws. 2, 3, 4 & 5 and, therefore, inference as drawn by the trial court may not be termed as perverse.

18. Having appreciated the evidence, we find that the contention of Ms. Panda, learned counsel for the appellant is totally correct, in as much as P.W.2 in the cross-examination has clearly stated that ***“at the time of occurrence, I was in my field. I had not seen the occurrence but heard it from the villagers.”*** But his testimony has been relied on as the eye-witness account. Even P.W.2 did not disclose from whom, he heard of the said occurrence. As such, his is completely a hearsay statement, hit by Section-60 of the Evidence Act.

19. So far as P.W.3 is concerned, he is the son of the deceased, who filed the complaint.

20. In the examination-in-chief, he testified that hearing the shout of the deceased, he came and saw the occurrence. At that time, two or three persons were present at the spot. Those persons have been identified by him as Padia, Irma and Gangi. In the examination-in-chief, he has stated that ***“I have not seen the actual occurrence. I***

went and saw the occurrence” But he denied to give into the suggestion that the appellant had not assaulted the deceased. As he himself has admitted that he has not seen the actual occurrence, any reliance can hardly be placed on his testimony.

21. Again P.W.4-Madkami Irma, whom P.W.3 has stated to have found in the place of occurrence, has stated in the examination-in-chief that *“I cannot say how he died and I cannot say when he died”*. He has abruptly stated that the appellant assaulted the deceased by means of a stick. He did not disclose the source of his knowledge for making the aforesaid statement.

22. Most importantly, P.W.4 has stated that *“there was a meeting in the village and the accused has confessed his guilt in the village meeting.”* But in the cross-examination, he made a complete turn around by stating that *“nobody has told me about the occurrence and I saw the dead body after the death. I was not present at the time of actual assault. I have not personally attended the village meeting.”*

23. However, he denied the suggestion, that was made to him to the effect that the accused did not confess his guilt. On such testimony, no reliance can be placed in as much as P.W.4 has testified that neither was he present at the time of occurrence and as such, he did not witness who assaulted the deceased nor was he present in the

meeting where the appellant has allegedly confessed his guilt of committing the murder of the father of P.W.3. But the trial judge has placed his reliance on those testimonies resulting in the interference which has been challenged in this appeal.

24. It is well settled that both the examination-in-chief and the cross-examination are to be read together and thereafter, the truth or reliability has to be determined. On the basis of such truth, the inference is to be drawn. The trial judge has been completely oblivious of the statements made in the cross-examination. As such, we are persuaded to interfere with the impugned judgment and order of conviction and sentence.

25. Accordingly, those are set-aside.

26. As consequence, the appellant is entitled to be released forthwith, if he is not wanted in any other case.

27. The appeal, therefore, stands allowed.

28. Send down the LCRs, if any, lying with the Registry forthwith.

(S. Talapatra)
Judge

(Savitri Ratho)
Judge

