

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA NO.37 OF 2012

From the judgment of conviction and order of sentence dated 20.10.2011 passed by the learned Sessions Judge, Balasore in Sessions Trial No.300 of 2010.

Lusku Hembram

....

Appellant

-versus-

State of Odisha

....

Respondent

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode:**

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For Appellant

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M/s. D. Nayak, Sr. Advocate,
M. Dhir, Advocate.

For Respondent

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Mr. S.K. Nayak,
Additional Govt. Advocate.

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING : 07.12.2022, DATE OF JUDGMENT: 23.12.2022

D.Dash,J. The Appellant, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 20.10.2011 passed by the learned Sessions Judge, Balasore in Sessions Trial No.300 of 2010.

The Appellant (accused) has been convicted for commission of offences under section-302/201 of the Indian Penal Code (for short called as 'the IPC') and accordingly, he has been sentenced to undergo imprisonment for life for commission of offence under section-302 of the IPC and rigorous imprisonment for a period of 7 (seven) years for the offence under section-201 of the IPC with the stipulation that the substantive sentences would run concurrently.

2. Prosecution Case:-

On 21.08.2010, it was around 9.30 am, one Ananta Hembram, P.W.2 lodged an information at Raibania Police Station to the effect that on 13.08.2010, which was a Saturday, the accused had gone to a nearby jungle with his wife Singa Hembram for collection of firewood and when they were returning home as informed by Lusku Hembram, the accused, Singa (deceased) left the place and went somewhere else, for which the accused Lusku and his family members too were searching to trace her out. The Informant has stated to have heard these facts on 28.08.2010. He then heard from the villagers that when they repeatedly asked accused-Lusku regarding the whereabouts of the deceased, the accused in presence of the villagers confessed to have caused the death of his wife,

Singa in Bhadua Cashew Jungle and he further stated to have buried the dead body of the deceased in a place in that Jungle.

On 13.08.2010 around 10 am Singa had come with the accused and from near Hatigarh Bazar, she had gone to bring some firewood, so she having not been able to get those firewood had gone Bhadua Cashew Jungle and on the way Singa met the accused who then by means of a saree, which had been worn by the deceased and strangled her to death and thereafter, having taken the dead body to a nearby place, it was concealed by the accused. The accused having done so had returned home and in the evening hours having gone there with a spade, he buried the dead body there. He also stated to have kept the spade concealed in a place nearby.

Above information having been received by the Officer-In-Charge of Raibania Police Station (OIC), P.W.6, immediately Raibania P.S. Case No.50 of 2010 was registered and the investigation commenced. Upon completion of investigation, charge-sheet was submitted placing the accused for trial for commission of offence under section-302/201 of the IPC.

The accused took the plea of denial and false implication.

3. Learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Balasore on receipt of the police report having taken cognizance of the said offences, after observing the formalities, committed the case to the Court of Sessions for trial. That is how the trial commenced by framing charges against the accused persons for offence under section-302/201 of the IPC.

4. The prosecution in order to bring home the charges against the accused has examined, in total six(6) witnesses and proved the documents such as, the F.I.R., Ext.1/1, postmortem report, Ext.2, disclosure statement of the accused, Ext.3, seizure list showing seizure of the incriminating articles have also been proved as Exts. 4 & 5 and inquest report as Ext.6 and extract of the station diary entry, Ext.7. The spade recovered in course of investigation and seized has been produced in the Court during trial with the packet containing the wearing apparels of the deceased and her other belongings which have been marked as Material Objects Nos.-I and II (M.O.-I and M.O.-II).

5. The Trial Court upon examination of the evidence adduced by the prosecution and their evaluation has found that the cumulative effect of the same, points unerringly at the guilt of the accused who is the responsible for causing the death of his wife. Having said so, the accused

has been found guilty for commission of offence under section-302 of the IPC and sentenced as aforestated.

6. Learned Counsel for the Appellant(accused) submitted that the case here is based on circumstantial evidence and the circumstances relied upon by the prosecution have not been proved through clear, cogent and acceptable evidence. He further submitted that the last seen theory as projected by the prosecution through the witnesses examined in this behalf is of no help to the prosecution in saying that it is a circumstance which stands against the accused. He further submitted that the extrajudicial confession said to have been made by the accused has not been proved through the available evidence. It was also submitted that when the prosecution has projected the recovery of the dead body and spade pursuant to the disclosure statement of the accused said to have made before the Police and others while in custody, the evidence on this score is highly unbelievable. He submitted that the projected circumstances having not been proved beyond reasonable doubt, the question of holding the accused guilty for commission of offence under section-302/201 of the IPC on the basis of the same that those complete the chain in every respect excluding all such hypothesis other than the guilty of the accused does not arise. In view of all these above, he

contended that the Trial Court's finding in holding the accused guilty for commission of offence under section-302/201 of the IPC cannot be sustained.

7. Learned Counsel for the State on the other hand supported the finding returned by the trial court. According to him, the trial court has upon detailed analysis of evidence on record has rightly come to the conclusion that these three circumstances i.e. last seen theory, the recovery of the dead body as also the spade pursuant to his statement given by the accused while in custody being taken with the extrajudicial confession, complete the chain in every respect which excludes all the hypothesis other than the guilt of the accused. He, therefore, contended that the judgment of conviction and order of sentence impugned in this Appeal are not liable to be interfered with.

8. Keeping in view the submissions made, we have carefully read the judgment passed by the trial court. We have also perused the evidence of the prosecution witnesses and the documents which have been admitted in evidence and marked Exts.1 to 7.

9. The principles of law relating to the appreciation of circumstantial evidence are well settled. The case being based on circumstantial

evidence; the following conditions must be fulfilled before a case against an accused can be fully established:-

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

It be noted here that the Apex Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by the Apex Court in case of ***Shivaji Sahabrao Bobade Vrs. State of Maharashtra***; (1973) 2 SCC 793 where the following observations have been made which are important:-

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.

These above five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence”.

10. Keeping in view the settled principles, let's now proceed to analyze the evidence as to the incriminating circumstances relied upon by the trial Court.

(a) **Last Seen Theory:-** The accused is the son of the brother-in-law of P.W.2, who is the Informant. He has stated in his evidence that accused had disclosed before him that the deceased left the accused waiting in a rickshaw and went away and did not returned. He has also stated that the accused had been to the Police Station and reported about the missing of his wife.

P.W.4, who is the brother of the deceased, has prosecuted a different version than that of P.W.2. It is his evidence that during his absence, the accused and the deceased having informed his father, P.W.5, went to the forest to collect firewood and they did not return. He has also stated that when father of the deceased inquired regarding the whereabouts of the deceased from the accused, he again replied that on the previous day, the deceased had left him in the market, went

somewhere else and had not returned. The father of the deceased, P.W.5 has again given a version which is in variance with what have been stated by the P.W.4. It is stated that on a Friday, accused took his wife to the forest to bring firewood and did not say anything about informing him prior to the leaving of the house. When he went to the house of the accused on the next day, P.W.5 informed that the deceased left and went away somewhere from the market on the previous day. The evidence of these witnesses being taken together, there remains a long time gap between the deceased seen last with the accused and the recovery of the dead body of the deceased which has been made after lodging of the F.I.R. and initiation of the case and the passage is more than a week or so. Therefore, with all the above evidence on record, it cannot be held that the last seen theory stand as a strong circumstances against the accused unerringly pointing at his guilt as he is not offering any acceptable explanation.

11. Coming to the extrajudicial confession of the accused, it be kept in mind that there is no bar in law for fastening guilt upon the accused on the basis of the extrajudicial confession. But the rider remains that it has to be proved to be free and voluntary and it also be proved that the person before whom, the accused had so disclosed, on him he had all the

reason to repose full faith and confidence. This fact that the accused had voluntarily made the confession by saying his role with clarity and free from ambiguity has to be proved through clear, cogent and acceptable evidence beyond reasonable doubt.

P.W.1 in his evidence has stated that he was informed by one Budhiram Tudu, who has not been examined from the side of the prosecution that the accused had confessed his guilt and that pursuant to the information; he reached at the Police Station. He has stated that when arrived at the Police Station, he had seen the accused and the police officials to be present.

P.W.2, who is the Informant, has stated that his signature was taken by the police on a report without being aware on its content, which he hints at the F.I.R., Ext.1. He has further stated that the accused had been to the Police Station to give a missing report of his wife. The evidence of P.W.2 in cross-examination is not, he had not stated before the Investigating Officer that the accused had confessed to have murdered his wife and concealed the dead body. Lastly, he has said that the accused had not confessed before him and after his signature was taken in the F.I.R., Police had not also recorded his statement. When it is stated that death has taken place on account of strangulation, the Medical

Officer who had conducted postmortem examination has not found any such indication or marked any such features, which of course may not be taken a miss on account of the fact that the dead body was then in a highly decomposed state. At this stage, turning attention to the evidence of the brother of the deceased i.e. P.W.4, it is seen that he has stated that seven days after the occurrence, the villagers caught the accused and then accused confessed before them to have murdered the deceased. The fact remains that none of these villagers have even been examined from the side of the prosecution. Moreover, the way, the villagers are said to have approached the accused and wanted to know from him regarding the whereabouts of the deceased itself asserted by P.W.4, does not exclude the possibility of coercion and threat from their side upon the accused in extracting the confession on repeated asking which we cannot say to be voluntary. P.W.4 when states that the villagers had not only informed him but also the police, none of the villagers have been named anywhere in the F.I.R. nor by this P.W.4 in his evidence. The evidence of P.W. 4 is also to the effect that accused confessed to have committed the crime before one Ledha who too has not come to the witness box. He has further gone to say that accused has admitted his guilt only after he was assaulted by the villagers and lastly he has stated that all other villagers

also had access to the forest for collecting firewood. Father of the deceased, P.W.5 has stated that he had told the villagers to decide the case and only after that, the accused being asked by the villagers confessed to have committed the crime before them. This P.W.5 had not informed the police that he went to the house of the accused and was informed that deceased was missing since previous day and asked them her whereabouts. P.W.5 has stated to have gone to the market to make inquiry from the rickshaw pullers, who had informed him that a lady had come to enquire to take his Rickshaw. P.W.5 has stated that one Budhiram Tudu had informed one of his co-villagers over telephone, who in turn informed this P.W.5 about the confession and thereafter he had gone to the Police Station. This P.W.5 has also stated that he had been to the forest where the dead body was recovered which directly contradicts the evidence of P.W.6, the Investigating Officer, who has remained silent. With such evidence on record, we are not in a position to accept that the prosecution has proved this fact that the accused had made extrajudicial confession that he was the author of the crime.

12. Next with regard the disclosure statement said to have been made by the accused in giving recovery of the dead body; let us first of all approach the evidence of P.W.1. He says that he was requested by the

police officials to accompany them to the forest where on the disclosure statement made by the accused, one spade was recovered and then the dead body was recovered from the place where it had been kept concealed. During cross-examination, this P.W.1 however has stated that this spade was recovered by a villager and then brought before the police. It is also stated that after recovery of the dead body and other items, his signature was not taken by the police officials either on the disclosure statement or any other contemporaneous documents. P.W.4 says to have dug out the dead body himself and identified the deceased by looking at her face and from her clothes. He has further stated that the spade was brought by accused himself which directly contradicts the evidence of P.Ws.1 and 6 who have stated that the spade was brought out by a villager. The Investigating officer, P.W.6 has stated that he had recorded disclosure statement of the accused, however where such statement was recorded and in presence of which witnesses, he is not coming forward to say. It is the evidence of that P.W.6 that after he had recorded disclosure statement, he had not noted the said important fact in the case diary, which he was maintaining in course of investigation indicating all the steps and activities carried out in at light which throw doubt on his testimony on that score. He has further stated to have not read over and

explained the contents of the same to the accused. In his evidence at paragraph-9, that accused had not said anything specific about the place of concealment of the spade and dead body and the two villagers cited as the witnesses to the disclosure statement have neither been named nor examined. Lastly, it is the evidence of P.W.6 that the spade was recovered by a villager named Atmaram, who has again not been examined from the side of the prosecution. This P.W.6 states that P.W.5 was not present when the dead body was recovered which directly contradicts the version of P.W.5.

With above evidence on record, we find that prosecution in the present case has not been able to prove the motive behind the commission of the crime. Although it is the settled position of law that always motive is of no such significance in establishing the guilt of an accused, yet in a case which is based on circumstantial evidence, the same plays vital role. P.W.4 who is the brother of the deceased has rather stated that there was no quarrel between the accused and the deceased. P.W.6 who is the Investigating Officer has also stated that there was no ill-feeling between the husband (accused) and the wife (deceased). In view of such state of affairs in the evidence, we are clearly of the view that the prosecution here has failed to prove each of the circumstances as

projected against the accused by leading, clear, cogent and acceptable evidence in unerringly pointing at the guilt of the accused. Therefore, we are unable to concur with the conclusion arrived at by the trial court that the case against the accused has been proved through the circumstantial evidence beyond reasonable. In that view of the matter, the judgment of conviction and order of sentence returned by the trial court against the accused cannot be sustained.

13. In the wake of aforesaid, the Appeal stands allowed. The judgment of conviction and order of sentence dated 20.10.2011 passed by the learned Sessions Judge, Balasore in Sessions Trial No.300 of 2010 are hereby set aside. The Appellant (accused) being in jail custody, it is directed that he be set at liberty forthwith being his detention is not required in connection with any other case.

**(D. Dash),
Judge.**

Dr.S.K. Panigrahi, J. I Agree.

**(Dr.S.K. Panigrahi),
Judge.**

Narayan