

IN THE HIGH COURT OF ORISSA AT CUTTACK**CRA No.170 of 2001*****Bana @ Jadabananda Chhotray* *Appellant******-versus-******State of Orissa* *Respondent*****Advocates appeared in these cases:*****For Appellant* : Mr. Dharanidhar Nayak,
Senior Advocate*****For Respondent* : Mr. J. Katikia,
Additional Government Advocate****CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK****JUDGMENT
11.07.2022****Dr. S. Muralidhar, CJ.**

1. This appeal is directed against a judgment and order dated 28th June 2001, passed by the Sessions Judge, Khurda, Bhubaneswar in S.T. Case No.40 of 1998, convicting the Appellant under Sections 302, 304-B and 498-A of IPC and Section 4 of the Dowry Prohibition (DP) Act and sentencing him to undergo imprisonment for life on each count under Sections 302 and 304-B IPC; to undergo rigorous imprisonment (RI) for two years for the offence punishable under Section 498-A of IPC and imprisonment for one year for the offence under Section 4 of the DP Act. The sentences were directed to run concurrently.

2. By an order dated 26th April 2007, the Appellant was enlarged on bail by this Court during the pendency of the appeal.

3. This Court heard the submissions of Mr. Dharanidhar Nayak, learned Senior Advocate appearing for the Appellant and Mr. J. Katikia, learned Additional Government Advocate for the State.

4. The case of the prosecution is that the Appellant/accused had married the deceased wife, Sanjukta @ Kuni on 12th July, 1993. It is stated that at the time of marriage, there was a demand for a sum of Rs.15,000/- in cash and a television set in dowry from the groom side. A sum of Rs.12,000/- was paid to the accused before the marriage and a television was given to him at the time of marriage by PW-7, the brother of the deceased.

5. Two male children were born to the couple. On 25th June 1997, while visiting the house of PW-7, the accused demanded a sum of Rs.10,000/- from PW-7 and threatened them with dire consequences if the amount was not paid.

6. According to the prosecution, on the night of 7th July 1997, at around 10.30 pm, the accused murdered the deceased by means of an iron rod (MO-II) in the entrance room of the house, also being used as a kitchen. He then concealed himself along with his two minor children in the adjacent room by bolting the door from inside.

7. On getting a telephonic message, the Inspector-In-charge (IIC), Lingaraj Police Station (PW-19) proceeded to the house of the accused situated in village Gopinathpur along with Sub-Inspector L.D. Mohapatra and Assistant Sub-Inspector (ASI) Purna Chandra Sahoo (PW-18). They found the dead body of the deceased lying on the cot in the entrance room of the house with multiple bleeding injuries. They found the accused hiding in the other room of the house adjacent to the room of occurrence. In response to the call of the Inspector, the accused opened the door and came out of the room. The IIC (PW-19) drew up a plain paper FIR (Ext-1) on his own information and thereupon P.S. Case No.107 of 1997 was registered.

8. On completion of the investigation, PW-19 submitted a charge sheet. The accused/Appellant pleaded not guilty and claimed trial.

9. For the prosecution, nineteen witnesses were examined. For the defence, three witnesses were examined. The purpose of examination of D.Ws. by the accused was to show that he was not present in the house at the time the murder took place and that he was still working in the Jemadevi High School at the relevant time as Peon.

10. On examining the entire evidence, the trial court came to the conclusion that the prosecution had proved the case against the accused beyond all reasonable doubt for the offences abovementioned and proceeded to sentence him as indicated hereinbefore.

11. On behalf of the accused, Mr. Nayak, learned Senior Advocate made the following submissions:

(i) The prosecution had projected PW-8, the nephew of the Appellant as an eye-witness when in fact he was not an eye-witness at all. PW-8 stated that he saw four persons running away from the spot and after coming to the spot and seeing the ghastly occurrence he raised a hullah. PW-8 did not mention the presence of the accused at all.

(ii) The evidence of the Headmaster (DW-1) and other DWs clearly showed that till 9.45 PM on the alleged date of occurrence, the Appellant was in the school whereas PW-8 at 9.30 am saw four persons running away from the alleged place of occurrence. Therefore, the deceased was done to death by some unknown persons who according to PW-8 ran away from the spot.

(iii) PW-7, the brother of the deceased and PW-6, the brother-in-law of the deceased, turned hostile by saying that there was no demand for dowry. They did not whisper a word relating to any demand of Rs.10,000/- by the Appellant in the month of June 1997. PWs-10 and 12 who allegedly negotiated the marriage also turned hostile. Thus, the material witnesses did not support the prosecution and yet the trial court proceeded to hold the Appellant guilty for the offences punishable under Section 304-B and 498-A IPC and Section 4 of the DP Act. PWs- 9 and 11 also turned hostile. PWs-13 and 15 testified that they had no direct knowledge

regarding the threat given to the deceased by the accused on the way to Khurda bus stand. Thus, the offences under Section 498-A/304-B IPC read with Section 4 of DP Act was not proved at all.

(iv) As regards Section 302 IPC, the sample blood of the deceased vide seizure list Ext.12 was required to be tallied, but that had not been done. The tallying had to be done with the bloodstains of the deceased from the clothes worn by the accused. There was no material to show that there were any bloodstains in the cloths of the accused and since in any event it was not tallied, the bloodstained clothes had no nexus to the alleged murder.

(v) As regards the conduct of the accused in locking himself in the adjacent room with his children, Mr. Nayak sought to suggest that he had come home only after 10pm and having seen the ghastly occurrence, was under fear and when the police came to the spot after mid night, they kept him under surveillance by turning him into a suspect.

(vi) Mr. Nayak also submitted that the version of the Appellant that the police arrested him when he was returning from the school ought not have been rejected by the trial court. Merely because a suggestion had not been given to P.Ws.1, 18 and 19 in that regard would not prove the case of the prosecution beyond all reasonable doubt. There was nothing to show that the IIC had arrested the accused at around 9.30 pm.

12. Mr. J. Katikia, learned AGA for the State on the other hand supported the judgment of the trial court. He submitted that the trial court had correctly culled out the incriminating circumstances forming a continuous chain and concluded that each link in the chain of circumstances to prove substantially had pointed unerringly to the guilt of the accused and to the accused alone and no one else. He submitted that the serological evidence and in particular, the bloodstained dhoti which the accused had worn formed an important link in the chain of circumstances. Another link was that the deceased was found in the house of the accused and the burden was on the accused to explain the circumstances under which she was found having died of homicidal death. Also, it is unnatural that after knowing of the murder of the deceased, the accused did not immediately report the case to the police but hid himself with his minor children with the door bolted from inside. The false plea of alibi was clearly demonstrated. The school which was not at such a great distance from the home that he could not have returned home to commit murder at the time when it is stated to have been committed. The three defence witnesses examined to prove the Appellant's plea of alibi in fact do not inspire confidence at all.

13. Mr. Katikia further pointed out that if in fact the accused had been arrested on his way home from the school as he was sought to be projected, it was impossible for him not to have taken this plea right from the beginning. In fact, the evidence of DW-3 was that the IIC arrested the accused at the school after finding out where the school was and this was contrary to the version of the

accused that he was arrested on his way home from the school. It was unlikely that the IIC did not know the location situated within his jurisdiction as it was just three kilometers from the school from the house of the accused. It clearly would not take the accused 20 minutes to cover 3 Kms distance by cycle. He could have easily reached home and committed the murder. DW-3 admittedly was involved in three to four dacoity cases and was an unreliable witness. He was examined only to show that what was seized from the accused was a trouser and shirt and not dhoti. However, there was no suggestion in this regard to PW-19. Blood of human origin belonging to Group-B was detected on the iron rod, vegetable cutter and bed sheet collected from the room of the Appellant, the wearing apparels of the deceased, the bloodstained earth collected from the floor of the room of occurrence and most importantly the dhoti of the accused. The grouping could not be done of some of the samples only because of the deterioration.

14. The above submissions have been considered.

15. This is a case of circumstantial evidence. Before beginning to examine each of the incriminating circumstances forming a continuous chain, the Court would like to recapitulate the settled legal position as regards the cases of circumstantial evidence. In ***Ram Avtar v. State 1985 Supp SCC 410*** the Supreme Court explained that:

"2...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of

circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

16. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679* the Supreme Court held:

"6... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused."

17. In *Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC 681*, the Supreme Court held:

"12. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively 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 and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

18. In *Brajesh Mavi v. The State (2012) 7 SCC 45* the Supreme Court explained:

“27. From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

19. As rightly noticed by the trial court, the prosecution has projected the following circumstances as forming a continuous chain which point to the guilt of the accused.

- “(i) The accused was pestering the deceased to bring a sum of Rs.10,000/- from the parents’ house.
- (ii) He was in the company of the deceased inside his own house in the night of occurrence.
- (iii) After commission of the murder of the deceased, he was found hiding in the adjacent room along with his minor children with door bolted from inside.
- (iv) Bloodstain of human origin belonging to the group of the deceased was found on the Dhoti he had worn in the night of occurrence.
- (v) He took a false plea of alibi, which as per the settled principle of law rebounds on him.
- (vi) His conduct is incompatible with his innocence, as he did not inform the police agency to bring the assailants of his wife to justice.”

20. The Court would first like to begin with the case against the accused for committing the offence punishable under Section 302 IPC. The medical evidence clearly shows that the death was

homicidal. PW-17, Dr. Santosh Kumar Mishra, who performed the autopsy of the deceased found the following injuries on her person:

- “(i) Lacerated wound 3" x 1/2" x bone deep on left parietal region with under line fracture.
- (ii) Lacerated wound 1/4" x 1/8" x bone deep on the left temporal region.
- (iii) Lacerated wound 2 ½ " x 1/4" x bone deep situated on the left side of forehead above left eye brow with underlying fracture.
- (iv) Lacerated wound 2" x 1/2" into mouth cavity on the chin, left to the mid line vertically placed with corresponding fracture of mandible.
- (v) Lacerated wound 2" x 1/2" x 1/2" on the nose from medial angle of left eye to the right nostril, with underlying fracture of nasal bone, which was dislocated.
- (vi) Fracture of left zygoma. Left side of face and left eye were depressed. Eyes were black.
- (vii) Fracture of both maxilla bones.
- (viii) Lacerated wound 1/2" x 1/4" into bone deep on the left side of chin placed behind injury No. (iv).
- (ix) Irregular lacerations on upper lip and adjoining cheek.”

21. PW-17 found the following internal injuries:

- “(i) Depressed fracture of left temporal bone corresponding to injury No.(ii).
- (ii) This fracture extends on the left side of anterior cranial fossa and on the left fore head. It corresponds to external injury No.(iii).
- (iii) The injury No.(i) is continuous to the transverse fracture involving both parietal bones. (This injury is continuous to the internal injury No.(i).
- (iv) Brain stem was torn, contused with avulsion of corresponding cranial nerves.

All the injuries were accompanied by deep staining of corresponding surrounding tissues, with extravassated blood and clots, which cannot be washed away by water.

4. Opinion:- All the injuries both external and internal were ante-mortem in nature.

Death was caused due to hemorrhage and shock specifically due to injuries to the brain. The time since death was within 12 to 24 hours from the time of post-mortem examination. The deceased was aged about 24 years.”

22. The time of conducting the post mortem was at 3.30PM on 8th July 1997 and according to him, since the death was 12 to 24 hours from the time of post mortem examination, this more or less corroborated the time indicated for the commission of offence i.e. 10.30 pm on 7th July, 1997.

23. PW-17 also examined the iron rod and the vegetable cutter and confirmed that they could be the weapons with which the injuries found on the deceased were caused. There was hardly any cross-examination of this witness. He clearly stated that external injuries 1 to 7 cannot be caused by single blow or by any vehicular accident. In other words, the fact that the death was homicidal and occurred in the house of the accused was proved beyond reasonable doubt.

24. The next important circumstance is that the dead body was found with the bleeding injuries inside the house of the accused and no one else being present at the time it was found. It was

incumbent on the accused to explain the circumstances under which the dead body of his wife was found in the house.

25. In ***Rajkumar v. State of M.P. (2014) 5 SCC 353***, in the context of Section 106 of the Indian Evidence Act, 1872 it was held that Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. Reference was made to the decision in ***State of W.B. v. Mir Mohammad Omar, AIR 2000 SC 2988*** where it was held as under:

“53..... if a fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”

26. In ***State of Rajasthan v. Kashi Ram (2006) 12 SCC 254***, the Supreme Court explained the legal position thus:

“It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how

and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Re. Naina Mohd. AIR 1960 Madras, 218.*”

27. Again in ***Gian Chand v. State of Haryana AIR 2013 SC 3395*** the Supreme Court reiterated the above principles. In the present case, the Appellant has failed to offer any convincing explanation of the circumstances in which the dead body of his murdered wife was found in the residence in which he was the other adult present at the relevant time.

28. A further incriminating circumstance is that bloodstains of human origin belonging to Group-B of the deceased was found on Dhoti worn by the accused at the time of occurrence. This coupled with the fact that the Appellant did not have any injuries, much less grievous injuries, on his person. The seizure of the bloodstained dhoti (MO.V) in the presence of PW-18 under

seizure list Ext.17 has been satisfactorily proved by the prosecution. Nothing has been able to be elicited by the defence from the cross-examination of PW-19 i.e. Investigating Officer (IO) to discredit the seizure evidence.

29. The above circumstance viz., finding the dead body of the deceased with bleeding injuries in the house where the deceased lived with her husband i.e. the accused and her two children with no one else being present, considered together with the fact that the dhoti worn by the accused had bloodstains with no injuries on the accused, were by themselves sufficient to prove the culpability of the accused. It is for this reason that the accused desperately tried to mount a defence of alibi.

30. As explained in *Hadibandhu Jali v. State of Orissa 1997 38 CLT 1044* proving the defence of alibi is indeed a tricky proposition for an accused as it is bound to become counterproductive if he fails on that plea. In *Dudh Nath Pandey v. State of U.P. (1981) 2 SCC 166*, the Supreme Court explained: “The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of the offence by reason of his presence at some other place. The plea can therefore succeed only if it shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed.”

31. Here the accused had tried to desperately show through the depositions of DWs 1 and 2 that he was still working in the school

on the night of the occurrence till about 9.30 pm. The time of the occurrence was 10.30 pm. Even if he was working till 9.30 pm, the school was just 3 kms away from his house and since the accused was returning on his own showing by cycle, it would not take him 20 minutes to reach his house. There was sufficient time even after attending school on the night of 7th July 1997 for the accused to be back in home well before the time of the occurrence i.e. 10.30 pm.

32. DW-3 was examined only to show that the accused was wearing a shirt and trouser and not a dhoti when he brought to the PS. DW-3 admitted in his cross examination that he was an accused in three to four dacoity cases. This was a totally unreliable and untrustworthy witness and his testimony was rightly rejected by the trial court.

33. Turning now to the deposition of PW-8, the nephew of the Appellant, he was declared hostile by the PP since this theory of finding four persons running away from the house was sought to be introduced by him for the first time at the time of examination in court. He made a false statement about what he had told the IO and stood totally discredited. The deposition of the IO is very categorical in this regard.

34. The answer of the accused when he was asked whether he had anything else to say is not about his plea of alibi at all what about some land dispute with the informant PW-1. Importantly, as pointed out by the trial court, no suggestion has been given to

P.Ws.1, 18 and 19 or for that matter to any of the PWs that the accused was arrested by the police on his way home from the school in the night of the occurrence at around 9 pm. In other words, the accused miserably failed to prove the plea of alibi. It turned out to be a false plea. This again forms an important link in the chain of circumstances which points to the guilt of the accused.

35. The fact that the accused did not inform the police of the occurrence is a very strong circumstance and which also stands completely proved from the evidence of PW-1. He was the Informant of the case. He was a next-door neighbour. He was watching a TV serial and at about 10.30 pm he heard the shout of PW-8 who came running out of the house shouting. On hearing his shout, "5 to 6 persons came and entered inside the house of the accused". These five to six persons were named by PW-1. He also entered the house along with them. He very categorically stated "at about 12.30AM or 1AM in the said night, police came and took the accused". He was not asked any question about this in the cross-examination. The only question asked was about there being no demarcating fence between the house of PW-1 and the house of the accused and about his having a dispute over a common area and because of which he was deposing falsely against the accused. PW-1 denied the suggestion. He supported the case of the prosecution that the accused was found in the house and was arrested from the house.

36. The Court is, therefore, satisfied that the prosecution has been able to prove each of the links in the chain of circumstances which form a continuous chain and which point unerringly to the guilt of the accused for the offence punishable under Section 302 IPC beyond all reasonable doubt.

37. Consequently, the Court affirms the impugned judgment of the trial court as far as the guilt of the accused for the offence of murder punishable under Section 302 IPC is concerned.

38. Turning now to the offences punishable under Section 498-A and 304-B IPC, Mr. Nayak sought to contend that PW-13, the younger sister of the deceased did not prove that just prior to the incident, the accused had demanded Rs.10,000/-. If one examines her deposition carefully, she talked about a demand of money that was given at the time of marriage and then about what was demanded in June 1997 when the accused along with the deceased visited the house of PW-13. The demand of Rs.10,000/- soon prior to the death of the deceased was established in the following statements of P.W.13:

“..... My brother Saroj was blessed with a daughter in the month of June, 1997 and the accused along with my deceased sister visited our house on that occasion. The accused refused to take food in our house demanding a further sum of Rs.10,000/- in dowry. The Accused went back to his house while my sister stayed on with her children. 6 days thereafter accused came to our house to escort back my sister. They went to Khurda bus stand by rickshaw. The rickshaw puller told us that on the way accused was threatening to kill Sanju as she had not brought the

cash of Rs.10,000/- as per demand. The accused was demanding a sum of Rs.10,000/- to construct a latrine, to dig a well and to given education to his sister's son."

39. On the above aspect, there has been no cross-examination. In her cross-examination, PW-13 stated that she did not tell the police about the accused not taking food in the house because Rs.10,000/- was not paid. However, this does not go to show that the accused did not demand Rs.10,000/- at the time of his visit to the house of PW-13 in June, 1997. Interestingly, the IO was not asked about the statement made by PW-13.

40. As far as P.W.15 is concerned, the following portion of her deposition is relevant:

"I again visited my parents place at Palla on 25.6.97. Accused came to the house of my parents along with my sister Sanju and children on that day as my brother was blessed with a daughter. The accused without taking food left the place immediately after threatening Sanju. After the departure of accused Sanju told me that accused was demanding a sum of Rs.10,000/- for constructing a latrine, digging a well and giving education to his sister's son and torturing her as the amount was not paid. I left for my matrimonial home on the next day. I received information that six days thereafter the accused escorted back Sanju to his house.

3. In the morning of 8.7.97 I came to know that the accused assaulted Sanju to death."

41. The cross examination of this witness was only on the aspect of paying of Rs.12,000/- at the time of marriage and not regarding the above demand of Rs.10,000/-. Therefore, the evidence of PW-

15 corroborates that of PW-13 as far as the demand of Rs.10,000/- soon prior to the death of the deceased is concerned. In particular, the accused threatening the deceased if the said amount was not paid stands proved. Further as rightly pointed out by Mr. Katikia, learned AGA, the statement of PW-15 that prior to her death the deceased had disclosed to PW-15 about the torture meted out to her by the Appellant is admissible under Section 32 (1) of the Evidence Act, 1872.

42. The legal position in this regard was explained by the Supreme Court of India in *Kans Raj v. State of Punjab (2000) 5 SCC 207* as under:

“Section 32 of the Evidence Act is admittedly an exception to the general rule of exclusion to the hearsay evidence and the statements of a person, written or verbal, of relevant facts, after his death are admissible in evidence if they refer to the cause of his death or to any circumstances of the transaction which resulted in his death. To attract the provisions of Section 32, for the purposes of admissibility of the statement of a deceased the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay or expense or he is incapable of giving evidence and that such statement had been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Act. Section 32 does not require that the statement sought to be admitted in evidence should have been made in imminent expectation of death. The words "as to any of the circumstances of the transaction which resulted in his death" appearing in Section 32 must have some proximate relations to the actual occurrence. In other words the statement of the deceased relating to the cause of death or the circumstances of the transaction which

resulted in his death must be sufficiently or closely connected with the actual transaction. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.”

43. In the considered view of this Court the depositions of PWs 13 and 15 are sufficient to prove the case against the accused for the offences punishable under Section 498-A, 304-B of IPC read with Section 4 DP Act.

44. For the aforementioned reasons, the Court finds no infirmity in the impugned judgment of trial court that calls for any interference. The appeal is dismissed. The bail bond of the accused is cancelled. He is directed to surrender on or before 25th July 2022, failing which the IIC concerned will take him into custody forthwith for serving out the remainder of his sentence. The LCR be returned to the trial Court forthwith.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Guin/ Sr. Stenographer