

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.2 of 2011

(From the judgment of conviction and order of sentence dated 18.12.2010 passed by the learned Additional Sessions Judge (FTC-II), Bhadrak in Sessions Trial No.37/18 of 2010).

Kalia @ Kalandi @ Tapas Pallei *Appellant*

-versus-

State of Orissa *Respondent*

Advocates appeared in the case:

For Appellant : *Ms. Tapaswini Sinha, Amicus Curiae*

-versus-

For Respondent : *Mr. S.S. Kanungo, AGA*

CORAM:

MR. JUSTICE D. DASH

DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-23.11.2022

DATE OF JUDGMENT:-23.12.2022

Dr. S.K. Panigrahi, J.

1. The Appellant has preferred this appeal, challenging the judgment of conviction and order of sentence dated 18.12.2010 passed by the Learned Additional Sessions

Judge, Bhadrak in S.T Case No. 37/18 of 2010 arising out of G.R Case No. 940/09 of the court of the learned S.D.J.M., Bhadrak; convicting and sentencing him to undergo imprisonment for life under Sections 363/ 364/ 376(2)(f)/ 302/ 201 of the Indian Penal Code.

I. FACTS OF THE CASE

2. The case of the prosecution, in brief, is that on 17.06.2009, there was a lagnadhar (ceremony before marriage) of the daughter of co-accused-Golak Jena. On that day, Sebati Jena (the wife of the informant-Panchanana Jena) had visited the house of co-accused Golak Jena along with her three daughters. While Jhuma was playing in front of the house of Golak Jena, Sebati Jena returned to her house along with two other daughters. On that day at about 4 P.M, the Informant-Panchanana Jena searched for Jhuma in front of the house of co-accused Golak Jena but Jhuma was not present there.
3. The Informant informed the villagers that Jhuma was missing and had not returned home. On the same day, Babaji Rout and Nrusingha Rout informed the Informant that they had seen the accused Kalia taking Jhuma towards the pump house of Ramakanta Pati near river Reba at about 5pm. After getting the said information, the Informant and the villagers searched for Jhuma and found her underwear

("Chadi") inside the pump house of Ramakanta Pati. However, the whereabouts of Jhuma could not be traced and the accused Kalia had absconded.

4. In the morning of 18.06.2009, Smt. Thaki Jena, the sister of the Informant informed over telephone that the accused Kalia had gone to her house and on being enquired, Kalia disclosed that he had committed rape and murder of Jhuma and had thrown her dead body in river Reba. Thaki Jena further informed that the accused Kalia was detained at her house. One Ranjan Panda and Anadi Nayak went to village Anderi and returned back with accused Kalia.
5. The accused Kalia confessed in presence of the villagers that on 17.06.2009, at about 5 P.M, he committed rape on deceased Jhuma at the pump house and committed her murder and threw her dead body at Baghuakona of river Reba with the help of co-accused Golak Jena and Patan Jena. Thereafter, the accused Kalia took the villagers to River reba and showed the dead body of Jhuma. At about 11 A.M, the Informant lodged the written report at the Police Station.
6. Based on such report, the IIC, Dhusuri P.S registered the case as Dhusuri P. S Case No.77 of 2009 dated 18.06.2009 and started the investigation. The Appellant was arrested on 18.06.2009 and after completion of investigation, he was

charge sheeted under Sections 363/364/376(2)(f)/302/201 of the Indian Penal Code. After the charge was framed, the trial was completed by the Learned Additional District & Sessions Judge, Bhadrak and the Appellant was convicted under Sections 363/364/376(2)(f)/302/201 of the Indian Penal Code and sentenced to undergo imprisonment for life. Hence, this appeal.

II. SUBMISSION ON BEHALF OF THE APPELLANT

7. It is submitted by Learned Counsel for the Appellant that eyewitnesses' account of P.W.9 & P.W.10 cannot be relied on up as they have been declared as hostile witnesses following material discrepancies in their deposition and testimony. Since, the genesis of last seen theory of the accused appellant with the deceased emanates from the evidence of P.W.9, the same is liable to be discredited as a result of him turning hostile.
8. The evidence of P.W.14, P.W.15, P.W.16 that the appellant confessed before them about committing the rape and murder of the deceased, suffers from major infirmities as P.W.15 had not deposed before the police that the accused appellant told her about committing the rape and death of the deceased "on her query "and P.W.16 had not stated before the Police that the accused appellant made confession of having thrown the dead body in the river

Reba. Moreover, P.W.15 & 16 are the relatives of the informant and thus, are interested witnesses; hence, they are bound to depose against the accused appellant.

9. The extra-judicial confession made by the accused appellant was not made before the magistrate as required under Section 26 of the Evidence Act. Moreover, the evidence surrounding the extra-judicial confession of the accused suffers from material discrepancies as there is no similarity in the depositions and testimonies of prosecution witnesses and thus, the same cannot be attributed to the accused appellant.

III. SUBMISSION ON BEHALF OF THE STATE

10. Per Contra, it is contended by Learned Counsel for the State that the dead body of the deceased was recovered at the instance of the accused appellant from river Reba and this proves that the accused appellant had knowledge about the whereabouts of the deceased from the time she went missing.
11. It has been categorically deposed on behalf of P.W.9 that the deceased was last seen with the accused appellant on 17.06.2009 at about 5.00 P.M and the deceased was accompanying the accused appellant to the pump house of Ramakanta Pati. Subsequently, after the disappearance of the deceased, her underwear was seized from the exact

same spot where the deceased and the accused were last seen together. Moreover, the extra-judicial confession of the accused towards committing the rape and murder of the deceased in front of various villagers, in both Anderi and Hetampur, highlights his guilty intention and conduct.

IV. COURT'S ANALYSIS AND REASONING

12. In order to prove the charges, the prosecution has examined as many as nineteen (19) witnesses. Out of them P.W 2, Panchanan Jena is the Informant and father of the deceased and P.W 13-Sebati Jena is the mother of the deceased. P.W 3-Anadi Nayak, P.W 11-Ranjan Panda, P.W 12-Batakrushna Jena, P.W 14-Smt. Thaki Jena, P.W 15-Smt. Basanti Jena and P.W16-Suka Jena are the witnesses to Extra Judicial confession made by the accused Kalia. P.W.8-Hrusikesh Rout, is witness to the inquest over the dead body of the deceased. P.W 9-Babajji Rout is the witness to have last seen the deceased alive along with the accused Kalia. P.W 10-Nrusingha Charan Rout had seen the deceased alive along with accused Kalia, but he did not support the prosecution case and turned hostile. P.W 1-Pagal Rout is the witness to the extra judicial confession made by the accused, but he did not support the prosecution case and turned hostile. P.W 5-Gadhadhara Khatua, is the scribe of the F.I.R, but he did not fully support the prosecution case and turned

hostile. P.W 7-Umakanta Tripathy, is the witness to the seizure of wearing apparel of accused Kalia but he did not fully support the prosecution case and turned hostile. P.W 4-Umakanta Jena is the witness to the extra judicial confession made by accused Kalia but he did not support the prosecution case and turned hostile. P.W 6-Kalandi Pati is the witness to the seizure of the wearing apparel of deceased Jhuma but he did not support the prosecution case and turned hostile. P.W 18-Dr. Dilip Kumar Samantaray conducted autopsy on the dead body of Jhuma. P.W 17-Narayan Chandra Nayak and P.W 19-Jagamohan Mohanty were the Investigating Officer in this case.

13. In a case involving murder, the primary point that arises for consideration is whether the death of the deceased was homicidal in nature. P.W.18 (the doctor) who conducted autopsy on the dead body of the deceased opined that the death was caused by Asphyxia and the time of death was within 48 hours of Post-mortem examination. He also opined that the death might be homicidal in nature though the lacerated injury found on the dead body was possible due to fall on hard and blunt surface and the type of Asphyxia was not specified. Even though nothing has been placed on record on behalf of P.W.18 to confirm that the death was homicidal in nature, the same cannot be

discarded as the time since death as opined by P.W.18 was duly corroborated with the time mentioned in the F.I.R. Moreover, the dead body of the deceased was recovered in a naked state from the river Reba and her undergarments were found nearby in the pump house of Ramakanta Pati. Since, Jhuma was a minor girl, it cannot be said that the reason surrounding her death could have been a result of accident where she drowned in the river and died due to Asphyxia. This possibility is highly improbable because the accused appellant had knowledge about the exact location of the dead body of the deceased and he even accompanied the villagers to the said location where they retrieved the body of the deceased. It is pertinent to mention that the deceased was 4 years old, and it cannot be reasonably expected of her to visit the riverbank in absence of her parents or any guardian. Therefore, it can be construed that the deceased was escorted to the riverbank and was taken away from the lawful guardianship of her parents and it is the only possible way through which the deceased reached the said location. The chemical examination report coupled with the circumstantial evidence, and the mystery surrounding the sudden disappearance of the deceased from the courtyard of the co-accused Golak Jena points to the fact that the death of the deceased could not have been

possible due to accident. Rather, there is an extreme possibility that the death of the deceased could have been a result of homicide as it yields an additional link to the chain of circumstances and makes it more believable from an overview.

14. The second issue that needs to be considered is whether the accused appellant was the perpetrator or the author of the homicide. In the instant case, there are no eyewitnesses to the occurrence and therefore, the entire case of the prosecution is based upon circumstantial evidence. P.W.9 has categorically deposed that on the relevant day, at about 5 P.M, while returning to the village, he had seen the deceased accompanying the accused appellant towards the pump house of Ramakanta Pati. He further stated that he came to know about the missing of the deceased during the evening hour from P.W.10. After receiving information about the missing of the deceased, P.W.9 informed P.W.10 that he had seen the deceased accompanying the accused appellant at about 5 p.m, towards an agricultural land which was about 200 metres from the house of P.W.2(the father of the deceased). P.W.10 has categorically stated in his deposition that he heard halla and came to know about the missing of the deceased following which he informed the same to P.W.9. It is clear from the deposition of P.W.9 &

P.W.10 that P.W.10 had not witnessed the deceased accompanying the accused appellant to the pump house and he came to know about the said fact from P.W.9. Similarly, P.W.9 didn't have knowledge about the missing of the deceased and came to know about this fact from P.W.10. Therefore, it can be ascertained that P.W.9 was only person who had seen the deceased with the accused appellant while they were going to the pump house of Ramakanta Pati. The ocular evidence rendered by P.W.9 that the deceased was last seen with the accused appellant while on their way to the pump house, is duly corroborated by the seizure of underwear of the deceased in the pump house of Ramakanta Pati. P.W.10 was declared hostile as he didn't support the last seen theory of the prosecution. However, the hostility of P.W.10 doesn't discredit the ocular evidence and last seen theory rendered by P.W.9 as in reality, P.W.10 had not seen the deceased in the company of the accused appellant; rather, he was informed about the same by P.W.9. Even though, P.W.9 was declared as hostile by the Learned Defence Counsel, he has fully supported the case of the prosecution regarding the last seen theory.

15. In the case of *Khujji @ Surendra Tewari v State of MP*¹, the Supreme Court observed that:

¹ AIR 1991 SC 1853

"The evidence of a witness, declared hostile, is not wholly effaced from the record and that part of evidence which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court Bhagwan Singh v. State of Haryana²; Rabinder Kumar Dey v. State of Orissa³ and Syed Iqbal v. State of Karnataka⁴ that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

16. In the case of **Gura Singh, Appellant v. State of Rajasthan⁵**, the Supreme Court observed as follows:-

*"11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in **Bhagwan Singh v. State of Haryana⁶** held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In **Rabindra Kumar Dey v. State***

² [1976] 2 SCR 921

³ [1976] 4 SCC 233

⁴ [1980] 1 SCR 95

⁵ AIR 2001 SC 330

⁶ AIR 1976 SC 202 : (1976 Cri LJ 203)

of Orissa⁷, it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy."

17. Even though both P.W.9 & P.W.10 have been declared as hostile, their depositions and testimonies cannot be rendered as unworthy of consideration especially because the underwear of the deceased was also found in the pumphouse of Ramakanta Pati. Furthermore, P.W.9 has supported the case of the prosecution and he was the actual eyewitness who had last seen the deceased with the accused appellant while they were going towards the pump house. The ocular evidence rendered by P.W.9 and the finding of the underwear of the deceased from the pump house of Ramakanta Pati, taken cumulatively forms a chain

⁷ AIR 1977 SC 170 : (1977 Cri LJ 173)

so complete that there is no reason to discredit the deposition of P.W.9. The seizure of underwear of the deceased from the pump house of Ramakanta Pati can be duly corroborated by the deposition of P.W.1 & P.W.19. Even though, P.W.6 had deposed that nothing was seized in his presence, yet the prosecution was able to establish the seizure of underwear of the deceased in his presence during the cross-examination. However, the prosecution has not produced the seized underwear of the deceased as evidence. The non-production of the seized underwear of the deceased does not affect the case of the prosecution substantially as there is ample oral evidence regarding the finding of the underwear and the seizure of the same.

18. In the present case, P.W.9 is an independent witness who had last seen the deceased with the accused appellant. Nothing has been placed on record on behalf of the learned counsel for the appellant that P.W.9 had an ulterior motive to falsely implicate the accused appellant in this case. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that

the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In the instant case, the deceased was last seen with the accused appellant by P.W.9 and thereafter, she went missing. The dead body of the deceased was found near the place where the accused was last seen with the deceased. Moreover, the Post-mortem examination report also reveals that the death was caused within 48 hours.

19.P.W.13 who had gone to the house of co-accused Golak Jena along with her three daughters for the lagnadhara of the co-accused's daughter has categorically deposed that while the deceased was playing in the courtyard of the co-accused, she returned home with her other two daughters at about 4:30 p.m. Thereafter, when P.W.2 enquired about the whereabouts of the deceased, he was informed by P.W.9 & P.W.10 that the deceased was last seen with the accused appellant at about 5 P.M. near the pump house of Ramakanta Pati. It is pertinent to mention that the disappearance of the deceased on 17.06.2009 from the courtyard of the co-accused Golak Jena has not been

disputed by the appellant. If the deposition of P.W.9 & P.W.10 is duly scrutinized, it can be affirmed that there is no discrepancy in the deposition of P.W.2 & P.W.13, insofar as the time is concerned. The deceased was last seen by P.W.13 at about 4.30 P.M. and she informed the same to P.W.2. While P.W.2 was enquiring about the whereabouts of the deceased, he was informed by P.W.9 & P.W.10 that they had seen the deceased accompanying the accused appellant to the pump house at about 5 p.m. If the time factor is given due weightage, the conjoint interpretation of the depositions of P.W.2, P.W.9 & P.W.13 establishes a link in the chain of circumstances and confirms the fact that the deceased was seen with the accused appellant following her disappearance from the courtyard of Golak Jena. If the time factor surrounding the disappearance of the deceased is considered, a continuous chain is established whereby the deceased was taken away from her lawful guardianship after P.W.13 returned home with her other two daughters. P.W.13 returned home at 4.30 P.M. and the deceased was seen with the accused appellant at 5.00 P.M. by P.W.9. Though, the aforementioned fact does not shift the burden of proof on the appellant, the absence of any explanation for the same would result in taking of an adverse inference against the appellant. The learned counsel for the appellant

has not furnished any material on record to disprove the eyewitness account of P.W.9 who had last seen the deceased with the accused appellant. Moreover, if the time factor is considered on a standalone basis, the deposition of P.W.2 & P.W.13 stands corroborated as against the eyewitness account of P.W.9. therefore, the deposition rendered by P.W.9 cannot be discarded as unreliable as it is duly corroborated with the deposition of P.W.2 & P.W.13 with respect to the time factor and it is for the accused appellant to prove that he was not present with the deceased at 5pm on the relevant day.

20. The last seen theory derives its relevance from Section 7 of the Indian Evidence Act which is called the “Doctrine of Inductive Logic” in which it is stated that if any fact related to the occasion, cause, or effect led to the circumstance in which that thing occurred, or it provided an opportunity for the occurrence of that thing then those facts will be relevant. And in the last seen theory also, the person who was the last present with the victim would have a reasonable opportunity to commit the crime. This presumption of fact is taken under Section 114 of the Indian Evidence Act under which the court can presume that certain facts exist if some other facts are proved to be existing in the cases of natural events, human conduct, and public and private business. In

the present case, a presumption can be taken that the accused appellant was present with the deceased after P.W.13 returned home at 4:30 P.M. Since, P.W.9 has deposed that he had last seen the deceased with the accused appellant at about 5.00 P.M., it is incumbent upon the accused appellant to rebut the presumption by furthering some evidence in his defence or by providing an alibi to that effect.

21. The recovery of the dead body of the deceased at the instance of the accused appellant also affirms the last seen theory. It has been stated by P.W.2 in his deposition that the accused appellant made extrajudicial confession of having thrown the dead body inside the river Reba. The deposition of P.W.2 is duly corroborated by the deposition of P.W.3 who also stated that the accused appellant led the villagers to bank of river Reba and pointed out the place where the dead body of the deceased had been disposed. This fact was further affirmed by P.W.12 who has deposed that the accused appellant showed the dead body of the deceased which was lying at the Baghua Kona of river Reba. P.W.19 (I.O) also stated that the accused appellant led him near river Reba and pointed out the place where the dead body of the deceased was lying. P.W.3, P.W.8, P.W.11 & P.W.12 are the independent witnesses in this case and their

evidence is consistent that the dead body of the deceased was recovered at the instance of the accused appellant. The inquest report reveals that the dead body of the deceased was recovered from the Baghua Kona of river Reba and the same can be corroborated by the deposition and testimonies of P.W.2, P.W.3, P.W.8, P.W.11, P.W.12 & P.W.19. Moreover, the statements of P.W.2, P.W.3 & P.W.11 also corroborate each other that the dead body of the accused was brought out of the river by the accused appellant. Insofar as the discrepancy regarding the location of the dead body of the deceased and the manner in which it was taken out is concerned, we are of the view that there is no inconsistency in the material particulars of the evidence rendered by the prosecution witnesses and hence, these minor irregularities/contradictions are not sufficient to discredit the prosecution case as untrue.

22. Furthermore, P.W.15 & P.W.16 are the witnesses to the extra-judicial confession made by the accused appellant at village Mandarmala. According to P.W.15 and P.W.16, the accused appellant came to their house and on query, he disclosed that he had committed the rape and murder of the deceased and had thrown the dead body of the deceased in river Reba. It has been argued by Learned Counsel for the Appellant that P.W.15 had not deposed before the police

that the accused appellant told her about committing the rape and death of the deceased “on her query “and further submitted that P.W.16 had not stated before the Police that the accused appellant made confession of having thrown the dead body in the river Reba. Therefore, the evidence of P.W.15 & P.W.16 regarding the extra-judicial confession of the accused appellant cannot be relied upon. However, we are of the view that insofar as the deposition of P.W.15 & P.W.16 is concerned, there exists no material contradiction or discrepancy to discredit their evidence as untrue. According to P.W.15, the accused appellant was known to her as he was working as a labourer at her parents’ and in-laws’ village. Thus, it can be construed that P.W.15 & P.W.16 were not strangers to the accused appellant and no motive was alleged against them to have falsely implicated the accused appellant for the alleged offences. Similarly, P.W.14 is also a witness to the extra-judicial confession made by the accused appellant. P.W.14 informed about the detention of the appellant at village Anderi following which the appellant was taken back to village Hetampur. Learned Counsel for the Appellant has submitted that the evidence furthered by P.W.14, P.W.15 & P.W.16 cannot be relied upon as they are the relatives of the Informant and therefore, are interested witnesses. In this context only,

their evidence is liable to be rejected. However, we are of the opinion that close relationship of witnesses with the deceased or victim is no ground to reject their evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. The statements made by P.W.14, P.W.15 & P.W.16 have been duly corroborated by the finding of the dead body at the instance of the accused appellant and other pieces of circumstantial evidence. Therefore, we find no reason to discredit the account of P.W.14, P.W.15 & P.W.16 as untrue even though they are interested witnesses.

23. In the instant case, P.W.1, P.W.2, P.W.3, P.W.4, P.W.8, P.W.9, P.W.10, P.W.11, P.W.12 and P.W.13 are the witnesses to the extra-judicial confession made by the accused appellant at Tarini Chakk, Hetampur. Out of them, P.W.1, P.W.4, P.W.9 & P.W.10 did not support the prosecution case and became hostile. According to P.W.2, the accused appellant was brought back to Hetampur from village Anderi by P.W.3 & P.W.11 and upon enquiry about the relevant event, the accused appellant confessed that he had committed rape and murder of the deceased and threw the body of the deceased in river Reba. The evidence of P.W.2 finds corroboration from the evidence of P.W.3 that the

accused appellant had confessed in his presence. The evidence rendered by P.W.2 also finds corroboration from the testimony of P.W.8; however, P.W.8 didn't depose about the same before the Police during investigation; hence the evidence cannot be relied upon. The evidence provided by P.W.11 & P.W.12 corroborate the evidence of P.W.2 to the extent that the accused appellant committed murder of the deceased and threw the dead body in river Reba. The deposition and testimony of P.W.11 & P.W.12 does not provide that the accused appellant had committed rape of the deceased. The evidence of P.W.13 fully corroborate the evidence of P.W.2 that the accused appellant had committed rape and murder of the deceased and had thrown the dead body in the river Reba.

24. Insofar as the discrepancy in the evidence provided by P.W.2, P.W.11, P.W.12 & P.W.13 regarding the extra-judicial confession of the accused appellant is concerned, it is imperative to consider that the witnesses were examined after a gap of one year (1) and therefore, it is practically impossible to extract the minute details regarding the occurrence of incident. It may be apposite to note that merely because there have been certain discrepancies or improvements in the details of the narration, they cannot render the deposition of the witness unreliable. The *maxim*

falsus in uno, falsus in omnibus (False in one thing, False in everything) has not received general acceptance in India nor has this maxim come to occupy the status of rule of law. The following observation of the Supreme Court in ***Rizan v. State of Chhattisgarh***⁸, in this regard is instructive:

“ Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno falsus in omnibus* has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called “a mandatory rule of evidence”.

⁸ AIR 2003 SC 976

25. The evidence of P.W.2, P.W.2, P.W.11, P.W.12, P.W.13 also gets corroboration from the fact that the dead body of the deceased was recovered from the river Reba at the instance of the accused appellant. Moreover, the extra-judicial confession of the accused appellant to P.W.14, P.W.15 & P.W.16 who were not even the resident of village Hetampur where the relevant incident occurred, strengthens the case of the prosecution that the rape and murder of the deceased was committed by the accused appellant. Even though P.W.14, P.W.15 & P.W.16 are the relatives of the Informant and interested witnesses, it is highly unlikely that they are falsely implicating the accused appellant as the details of the incident provided by them pursuant to confession by the accused, is strikingly similar to the version of other post-occurrence and pre-occurrence witnesses in Hetampur. In such circumstances, it is necessary for the court to isolate relevant facts from the versions of witnesses and analyse them in entirety. In the present case, the recovery of the dead body of the deceased in a naked condition from the river Reba, at the instance of the accused, is by far the most compelling piece of evidence that links the accused appellant with the circumstances of the case. Moreover, there are several witnesses to the extra-judicial confession

of the accused appellant which also finds corroboration from the F.I.R (Ext-1)

26. An extra judicial confession though admissible, is considered a weak piece of evidence and ordinarily the Courts would look for other corroboration in order to record conviction on the strength of such extra judicial confession. However, an extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate

that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

27. In the present case, the extra-judicial confession of the accused appellant before various villagers, both in Hetampur and Anderi, coupled with the circumstantial evidence that the accused was last seen with the deceased by P.W.9 at 5 P.M after P.W.13 returned home at 4:30 P.M and the subsequent discovery of the underwear of the deceased from the pump house of Ramakanta Pati, constitutes a chain of evidence so far complete that there is no reasonable ground for a conclusion consistent with the innocence of the accused appellant. Moreover, the recovery of the dead body of the deceased at the instance of the accused appellant also portrays that the accused had special knowledge regarding the whereabouts of the deceased from the time she went missing. Since, the eyewitness account of P.W.9 revealed that the accused was last seen with the

deceased, the recovery of the dead body at the instance of the accused appellant yields an additional link in the chain of evidence that unerringly points towards the guilt of the accused. Thus, the prosecution was able to establish the charge u/s 302 of the IPC against the accused appellant.

28. Insofar as the charge under Section 376(2)(f) is concerned, the Learned Counsel for the Appellant contended that the medical evidence does not support the case of the prosecution about the commission of rape and therefore, the prosecution has failed to establish the said charge. However, we are of the opinion that the absence of requisite medical evidence is not sufficient to discredit the prosecution's claim as untrue, primarily because, the circumstantial evidence coupled with the extra-judicial confession of the accused appellant is adequate to establish the charges under Section 376(2)(f). It is pertinent to mention that the dead body of the deceased was recovered in a naked state at the instance of the accused who was last seen with the deceased by P.W.9. Neither has any evidence been provided by Learned Counsel for the Appellant to disprove the theory of the prosecution, nor the disappearance of the deceased was disputed at the relevant time frame. Further, if the deposition of P.W.9 is considered in detail, it can be ascertained that the place of seizure of the

underwear of the deceased and the location of the accused appellant while he was last seen with the deceased, are the same and both these facts have not been disputed by the accused appellant through furnishing any evidence or alibi. Further, the extra-judicial confession of the accused appellant before various witnesses in both Hetampur and Anderi and the corroboration of the statements of the witnesses with each other and other pieces of circumstantial evidence is sufficient to establish the charge u/s 376(2)(f) of IPC.

29. Insofar as the offence under Section 201/34 of IPC is concerned, it was alleged by the prosecution that the accused appellant disposed the dead body of the deceased with the help of Golak Jena and Patan Jena. In our opinion, the dead body of the deceased was recovered at the instance of the accused appellant from the Baghua Kona of river Reba. As none of the prosecution witnesses have implicated Golak Jena and Patan Jena for helping the accused appellant in disposing the dead body of the deceased in river Reba, the trial court is right in holding that the charge under Section 201/34 against the aforementioned persons have not been established. As regard to the charge under Section 363/364 of I.P.C. against the accused appellant, the same has been established as the

deceased was 4 or 5 years old, and was taken away from the lawful guardianship, after P.W.13 returned home. It has been provided by P.W.9 that the deceased was spotted with the accused appellant at about 5.00 P.M. following which she went missing and on the next day, her dead body was recovered at the instance of the accused appellant himself. Therefore, the charge under Section 363/364 has been duly established and proved by the prosecution.

30. The off-shoot of the above discussion is that in the present case the conjoint interpretation of eyewitnesses' account, deposition & testimonies of post occurrence witnesses and circumstantial evidence affirms the guilty intention and act of the accused towards committing the murder of the deceased. Even if the eyewitnesses' account is not relied upon, the circumstantial evidence and the extra-judicial confession of the accused appellant establishes his guilt in committing the murder of the deceased.

31. In the result, this appeal is without merits and the same is liable to be dismissed. Accordingly, the JCRLA is dismissed. The judgment of conviction and order of sentence dated passed by the learned Additional Sessions Judge (FTC-II), Bhadrak in Sessions Trial No.37/18 of 2010

arising out of G.R. Case No.940 of 2009 of the court of the learned S.D.J.M., Bhadrak are confirmed.

32.The JCRLA is dismissed.

(Dr. S.K. Panigrahi)
Judge

D. Dash, J. I agree.

(D. Dash)
Judge

Orissa High Court, Cuttack,
Dated the 23rd Dec., 2022/B. Jhankar

