

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.71 of 2009

Sanmat Kumbhar

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in the cases:

For Appellant

:

Mr. Pradip Kumar Dhal,
Advocate

For Respondent

:

Mrs. Saswata Patnaik,
Additional Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

JUDGMENT

18.10.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the judgment dated 14th September, 2009 passed by the Additional Sessions Judge, Titilagarh in S.C. No.27 of 2006 convicting the Appellant for the offences punishable under Sections 302 and 376 (2)(f) of the I.P.C. and sentencing him, for the offence under Section 302 I.P.C., to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.2,000/- and in default to undergo RI for one year; and for the offence under Section 376 (2)(f) I.P.C., to undergo RI for

10 years and a fine of Rs.2,000/- and in default to undergo RI for one year. The Appellant was also convicted under Section 201 I.P.C. and sentenced to undergo RI for 7 years and to pay a fine of Rs.2,000/- and in default to undergo RI for one year. All the sentences were directed to run concurrently.

2. The case of the prosecution is that on 13th February, 2006 at around 10 am, the Appellant-accused visited the house of the informant-Bada Bibhar (P.W.22) and talked with his granddaughter, the deceased (Sima Bibhar) aged 6 years. The Appellant then called the deceased and Durjan, the grandson of P.W.22 to eat chana (nuts) in his house. While the accused was taking the deceased and Durjan Kumbhar to his house, the sarpanch of the village, Krupasindhu Mohananda (P.W.7), Duryodhan Chhura (P.W.9) and Sashi Chhura (P.W.14) noticed it.

3. One hour later, Durjan returned home alone and on being asked, he informed that the deceased was sitting on the verandah of the accused. Thereafter, P.W.22 came to the house of the accused along with Durjan but could not find the deceased. On being asked, both the accused and his wife informed them that Sima had gone away. P.W.22 then searched for Sima in the village and paddy field but could not find her. When P.W.22 again went to the house of the accused, he found the door was locked. The wife of the accused was sitting there. On being asked, she stated that the keys of the house were with her husband and

then she went looking for him. Sometime thereafter the accused came there and on being asked to open the lock, he stated that his wife had the keys and went away. The informant then suspected something amiss and informed the sarpanch (P.W.7) and ward member. P.W.7 and the ward member then went searching for the accused but could not find him. P.W.7 then informed the police. Thereafter, the wife of the accused pulled out the chain (sikuli) of the door and inside the house, the dead body of the deceased was found concealed in a gunny bag. It was kept in the 'kukudabhadi'. There were injury marks on the forehead, below the mouth, neck and other parts. The black underpants worn by the deceased and her copper chain were lying near the spot.

4. P.W.22 then presented a written report before the Inspector in-Charge (IIC), Titilagarh Police Station (PS) i.e. Sri Satyanarayan Panda (P.W.16). After the inquest, the dead body of the deceased was sent for post-mortem Examination, which revealed that the deceased had died due to throttling and massive injuries to the genital organs. From the house of the accused, P.W.16 seized many material objects including the gunny bag with the blood like stains, the copper chain, the black colour underpants, the wearing apparels of the deceased.

5. On 19th February 2006, PW 16 conducted a raid at village Sibtala in the house of one Govinda Dip and apprehended the Appellant. He seized a white colour dhoti from the house of the

Appellant and sent it for chemical examination. Exhibits were sent to the Regional Forensic Science Laboratory (RFSL). On completion of the investigation, a charge-sheet was laid against the Appellant for the aforesaid offences. He pleaded not guilty and claimed trial.

6. On behalf of the prosecution, 22 witnesses were examined. The Appellant examined himself as D.W.1 and claimed that on the relevant date, he had been to the local school on the instructions of P.W.7 and to beat the drum in certain villages. He claimed to have returned home at 6 pm.

7. On an analysis of the evidence, the trial Court came to the conclusion that the prosecution had been able to prove the case against the Appellant for the commission of the aforementioned offences beyond all reasonable doubt and proceeded to convict and sentence him in the manner indicated hereinabove. *Inter alia*, the trial Court held as under:

- (i) The deceased was last seen with the Appellant as spoken to by P.Ws.1,7,9,10,14 and 22. There was no occasion to disbelieve their testimonies.
- (ii) In the presence of many of the witnesses, the dead body of the deceased was recovered from inside the house of the accused from the *kukudabhadi*.
- (iii) There were several injuries on the dead body of the deceased including her private parts.

(iv) The medical evidence proved that it was a homicidal death after she had been raped.

(v) In view of the recovery of the dead body from the house of the accused, which was locked, a rebuttable presumption arose that the accused had committed the rape and murder of the deceased.

(vi) The onus lay on the deceased to rebut the presumption by adducing evidence as to how the dead body was found inside his house. However, the Appellant, who examined himself as D.W.1, offered no explanation for this.

(vii) The version of the accused, pleading alibi, was totally unbelievable.

(viii) The dhoti seized from the Appellant was shown in the RFSL report to have a stain of human blood.

8. The trial Court concluded that the above circumstances formed a continuous chain and each of the links had been satisfactorily proved by the prosecution. The circumstances taken as a whole, pointed unerringly to the guilt of the accused.

9. This Court has heard the submission of Mr. Pradip Kumar Dhal, learned counsel for the Appellant and Mrs. Saswata Patnaik, learned Additional Government Advocate for the State.

10. This is a case based on circumstantial evidence and the law in this regard is well settled. 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.

11. 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 the accused."

12. Among the circumstances put forth by the prosecution, the first is that the deceased was last seen in the company of the accused and another grandson of P.W.22 i.e. Durjan Kumbhar. This has been spoken about without any contradiction whatsoever by P.Ws.1,7,9,10,14 and 22. As regards the last seen theory, the legal position is well settled. In *Nizam v. State of Rajasthan AIR 2015 SC 3430*, the Supreme Court explained:

“14...Undoubtedly, the “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

13. In *SK Yusuf v. State of West Bengal (2011) 11 SCC 754*, it was further explained:

“21. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide: *Mohd. Azad alias Samin v. State of West Bengal, (2008) 15 SCC 449*; and *State thr. Central Bureau of Investigation v. Mahender Singh Dahiya, (2011) 3 SCC 109*).”

14. In the present case, the time-period between the deceased child accompanying the accused and her dead body being discovered is not so large so as to break the causal chain. The possibility of someone else entering the house of the accused and committing the crime is also completely ruled out given the fact that the door of the house of the accused had to be opened to find the dead body in a sack inside the house. Consequently, the last

seen circumstance, as far as the present case is concerned, is a strong pointer to the culpability of the Appellant.

15. From the evidence of P.Ws.7,9,10, 14 and even P.W.22, the conduct of the accused in giving misleading answers to claim that he had no knowledge where the deceased was, whereas her dead body was found in a gunny bag inside his house locked from outside is another strong circumstance. As rightly pointed out, although the accused examined himself as D.W.1, he offered no explanation for the discovery of the dead body from inside the house. In this context, Section 106 of the Indian Evidence Act, 1872 places an additional burden on him to explain the circumstances under which the said dead body was found in his house.

16. 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***.

17. Again in ***Gian Chand v. State of Haryana AIR 2013 SC 3395*** the Supreme Court reiterated the above principles. In ***Trimukh***

Maroti Krikan v. State of Maharashtra (2006) 10 SCC 681, the Supreme Court explained:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab vs. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The

burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

18. The third circumstance is the fact that the deceased died a homicidal death due to the multiple injuries all over her body apart from serious injuries to the genital parts. P.W.12, the doctor, who conducted the PM, found the following injuries on the body of the deceased:

- “i. Abrasion multiple in number of size 2 c.m. x $\frac{1}{4}$ c.m. x $\frac{1}{2}$ c.m. over the right angle of the mouth and cheek.
- ii. Multiple abrasions of size 2 c.m. x $\frac{1}{4}$ c.m. x $\frac{1}{2}$ cm. over the right side of the neck just below the angle of the mandible.
- iii. Multiple abrasions over the left side of the neck.
- iv. Labia majora was congested. Labia minora was avulsed and congested. Hymen ruptured at multiple sides with haemorrhage.
- v. Posterior vaginal wall is lacerated towards the anus with haemorrhage.”

19. The medical evidence, therefore, sufficiently proves the important link in the chain of circumstances regarding homicidal death of the deceased.

20. As regards the forensic evidence, although blood stains were found on the dhoti worn by the accused as well as the wearing apparels of the deceased, it was also noted by the trial Court that PW 3, the witness to the seizure of the dhoti did not mention noticing any blood stain on the dhoti. This prompted the trial Court to observe that the recovery of the dhoti on production of the accused “appears not to be free from doubt.” Likewise, the trial Court also observed that the fact of taking of the photo of the body of the deceased at the spot in the house of the accused either by P.W.20 or by the ASI “is not free from doubt.” This was because the dead body was removed for PM Examination prior to 11 am and the possibility of taking photographs thereafter appeared remote.

21. As rightly observed by the trial Court, notwithstanding the above discrepancy, the evidence of P.Ws.1,7,9,10,14 and 22 about the deceased being seen last with the accused and the recovery of her dead body from inside his house has remained unshaken.

22. The last circumstance, which conclusively proves the case of the prosecution, is the evidence of the accused himself as D.W.1 and his desperate attempt to plead alibi, which was totally unbelievable in the facts and circumstances of the case. Each of the witnesses spoke about the wife of the accused stating that the accused had taken away the keys and not that he was present in and around the house. The plea of alibi was obviously a false one.

23. Learned counsel for the Appellant pointed out that the genuineness of the FIR was doubtful. He referred to the evidence of P.W.21, who stated that he scribed the FIR as per the direction of P.W.22. However, in his cross-examination, he denied having gone to village Sirol and could not say the exact date he scribed the FIR. P.W.16, the IO, in his cross-examination stated that he had received the FIR first. Having examined the evidence, the Court is not satisfied that the above minor discrepancies shake the case of the prosecution. They do not in any way dilute the prosecution's case qua the circumstances already outlined hereinbefore, which point clearly to the guilt of the accused.

24. It was lastly argued that the motive for the crime has not been proved. However, when the case is examined as a whole, it appears that this has not made much difference to the case of the prosecution. In *State of U.P. v. Kishanpal (2008) 16 SCC 73* it was held as under:

"39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same

way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

25. Accordingly, the Court is satisfied that the prosecution has been able to prove the case against the accused beyond all reasonable doubt. There is no merit in the appeal and it is dismissed as such.



M. Panda