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IN THE HIGH COURT OF ORISSA AT CUTTACK
JCRLA No.65 of 2009

Bundhu Kanduar @ Munda* *Appellant

-Versus-

State of Odisha* *Respondent

Advocates appeared in this case:

For the Appellant : Mr.D.R.Sundaray, Advocate

For the Respondent : Mr.J.Katikia, Additional Govt.
Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH

DATE OF JUDGMENT :30.09.2022

Chittaranjan Dash, J

Challenge in this Appeal is to the Judgment and order dated 19th June, 2009 passed by the Additional Sessions Judge, Rourkela in Sessions Case No. 90 of 2008 arising out of G.R.Case No. 692 of 2008 corresponding to R.N.Pali P.S.Case No. 87 of 2008 wherein the Appellant has been convicted under Section 302 of the Indian Penal Code (herein after in short “IPC”) and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo Rigorous Imprisonment for one year for the offence punishable under Section 302 IPC.

2. The facts of the case are that the deceased Sunita Kanduar widowed wife of the appellant's younger brother was residing with her two sons near the house of the informant Gurua Munda (PW-2) and the Appellant at village Kanchinda and was engaged as a daily labourer. Since many people were visiting the house of the deceased, the Appellant became intolerant raising doubt on her character and on 15th April, 2008 in the night at about 11.45 P.M when the informant PW-2 was about the sleep, the Appellant arrived in his house with an axe stained with blood and confessed to have murdered the deceased, his brother's wife. Soon thereafter, the informant rushed to the house of the deceased and saw the deceased was lying dead in front of her house at the entrance gate with injuries on her neck. On the request of the Appellant, the informant accompanied him to the house of Sarpanch at village Hatibandh where once again the Appellant disclosed the incident to her. On the advice of the Sarpanch to surrender at Jalda Police Out post, the Appellant wearing his blood stained cloth and holding the blood stained axe surrendered at Jalda Police Outpost in the same night. The In-charge of Jalda Police Out post entered the gist of the fact in the Police Out post Station diary No.341 dated 15th April,2008 and seized the blood stained axe and wearing clothes of the Appellant and rushed to the spot where the informant orally told the incident before him at 1 A.M night. The oral version of the informant was reduced to writing by the In-charge of the Police Out post and as the same revealed a cognizable offence under section 302 IPC, he took up the preliminary investigation and sent the report to R.N.Pali Police station for registration treating

the same as FIR. Accordingly, R.N.Pali P.S.Case No.87 dated 16th April, 2008 was registered and investigation was taken up.

3. In course of investigation, the Investigating Officer (PW-12) examined the informant and other witnesses, visited the spot and prepared the spot map, seized the sample earth and blood stained earth, issued requisition to SO, D.F.S.L, Rourkela for his spot visit, arrested the Appellant and before forwarding him to Court sent him under requisition to RGH for collection of biological sample, recorded his confessional statement (Ext.9), held inquest over the dead body of the deceased vide Ext.11 and sent the dead body to SDH, Panposh for post mortem. Post mortem was conducted under Ext.1. Physical clues were collected from the spot and were seized under Ext.3. Biological sample of the Appellant was also seized. The I.O sent requisition to S.O.,D.F.S.L.,Rourkela for preliminary examination of wearing apparels of the Appellant and the seized weapon of offence and seized the biological samples of the deceased and her blood stained wearing apparels under Ext.4. The IO sent the seized weapon of offence along with query to the Autopsy doctor to opine whether the injuries found on the person of the deceased can be caused by the said weapon. After completion of the investigation, the I.O submitted charge sheet against the present Appellant and accordingly the Appellant stood for trial.

4. The case of the Appellant before the learned court below is one of complete denial and false implication. In the statement of the Appellant recorded under section 313 of the Code of Criminal Procedure he simply expressed his ignorance on

incriminating questions put to him so also denied his involvement in the commission of the said offence.

5. The prosecution in order to prove its case, examined 13 witnesses in all including the I.O. Besides the oral evidence, the prosecution also proved some documents and produced material objects prove vide Exts.1 to 14 and MO-I to MO-VII respectively. The Appellant did not examine any witness in support of his case.

6. The learned trial court having assessed the evidence primarily relying on the circumstances such as the blood stained clothes of the Appellant and blood stained weapon of offence (axe) in possession of the Appellant that contained blood of human origin of 'B' group opined to have matched the group of blood belonged to the deceased and relying on the version of official witnesses viz; PWs.4,12 and 13 as regards the admission of the Appellant to the effect that he had assaulted the deceased by means of an axe suspecting her character, arrived at the conclusion that the prosecution proved its case beyond reasonable doubt, and held the Appellant guilty under Section 302 IPC, convicted him there under and sentenced him as stated herein above.

7. Challenging the impugned judgment and sentence passed by the learned trial court, it is submitted by the learned counsel for the Appellant that the findings of the learned trial court convicting the Appellant is perverse based on conjectures and surmises. He submitted that all the material witnesses from the

prosecution side have turned hostile and the reliance placed on the versions of the official witnesses viz. PW-4,12 and 13 as regards confession made by the Appellant before them being hit U/s. 25 of the Evidence Act cannot be taken as an admission by the Appellant in order to sustain the conviction. He further contended that the sole circumstance as to the blood stained clothes and blood stained weapon, in absence of other circumstances showing the nexus between the Crime and the Criminal deserves the case of the prosecution to be discarded as inadequate to bring home the charge against the Appellant and the conviction of the Appellant is not sustainable in the eye of law. The learned counsel vehemently argued that the trial court has grossly erred by not considering the inherent contradictions appearing in the prosecution story entailing thereby an order of acquittal in favour of the Appellant.

8. Per contra, the learned counsel for the State Mr. Katikia supporting the findings arrived at by the learned trial court argued that the two vital circumstances such as the blood stained weapon and blood stained clothes containing the blood of human origin of group 'B' that belonged to the deceased besides the extra judicial confession of the Appellant are sufficient to fasten the Appellant in the offence alleged as has been rightly held by the learned trial court which calls for no interference.

9. We have heard the learned counsel for the parties and have also carefully examined the impugned judgment, the testimonies of the witnesses and the documents placed on record.

10. Having regard to the nature of offence alleged, before entering into the point as to who perpetrated the crime, it is found imperative to the answer the question as to whether the death of the deceased was homicidal. The sworn testimony of PW-3 Dr. Sandipana Satpathy assumes importance. In her evidence on oath, she stated to have conducted the post mortem on the dead body of the deceased Sunita Kanduar and found the following external injuries;

- (i) Fresh antemortem incised chop wound length 2 ½ width ¾" depth bone deep on the upper lateral side of left side of neck situated transversely.
- (ii) Another chop wound of same dimension parallel and 1" below the above mentioned wound.
- (iii) incised wound of 1" x ½" x 1" depth present transversely situated on the left lower lateral side of neck.
- (iv) One antemortem incised chop wound of 3" x 1" x 2" transversely placed on the lower posterior side of neck. It has incised through the vertebral column and spinal cord on its floor.
- (v) One incised chop wound of 2" x 1" up to bone deep transversely situated on posterior lateral side of left shoulder.
- (vi) Another wound of same dimension situated 2 ½" below and parallel to the above mentioned wound. It has incised scapula beneath it. Red coloured blood & clots present at the site of wound.

11. PW-3 also opined that all the injuries were ante mortem in nature; the cause of death was due to shock and haemorrhage following extensive chop wound over the neck and the time since death was within 12 to 24 hours from the time of post mortem proved vide Ext.1. She further deposed that on the query made by the I.O as regards the point whether the injuries found on the person of the deceased could be possible by the

JCRLA No.65 of 2009 **Page 6 of 12**

seized axe, she answered affirmatively vide Exts. 1 and 2. Nothing material could be elicited from the mouth of this witness by the defence. Record also reveals the Appellant did not dispute the nature of the death of the deceased either in the court below or in this Court. Consequently, it is conclusively to hold that the death of the deceased was homicidal.

12. Once the nature of death of the deceased is held to be homicidal, the next question requires determination is the perpetrator of the crime. Admittedly, there is no direct evidence against the Appellant to have caused the murder of the deceased. All the independent witnesses including the informant turned hostile and gave a complete good by to the prosecution case. The prosecution case, therefore, hinges on circumstantial evidence. The circumstances gathered from the evidence may be recapitulated as under:

- i) The Extra Judicial Confession made by the Appellant before the prosecution witnesses
- ii) The Blood stained cloth recovered from the Appellant; and
- iii) The Blood stained weapon of offence recovered from the possession of the Appellant as carried by him to the police station.

13. The principles that govern the appreciation of circumstantial evidence have been consistently reiterated by the Apex Court. The five golden principles constitute the “panchsheel” of the proof of a case based on circumstantial evidence” held in

Sharad Birdhichand Sarda v. State of Maharashtra (*AIR 1984 SC 1622*) are:

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

(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.

14. The prosecution case, in the present, as recapitulated above revolves around three circumstances. The first circumstance being the extra judicial confession, the prosecution adverted to the same showing the Appellant to have volunteered his overt act in causing the murder of the deceased before P.Ws. 1, 6 & 9. While P.Ws. 1 and 6 who in their respective statements before the I.O stated the Appellant volunteered before them to have caused the murder of the deceased, did not whisper anything in their evidence during trial and feigned their ignorance, thereby turned complete hostile.

15. As far as the evidence of P.W.9 is concerned it is not only inconsistent but prevaricating too. P.W.9 in her sworn testimony while stated that once in the night the accused (Appellant) came to their house with an axe stained with blood and told to have dealt axe blow to the deceased and for that she asked him to go to the police station. However, in her cross examination, she stoutly denied and deposed the accused neither stated before her or her husband anything and that she was not examined by police. Consequently, evidence of none of these witnesses could be free from embellishment so as to read them as conclusive.

16. It is held by the Apex Court in *State of UP v MK Anthony (AIR 1985 SC 48)* that there is no inflexible rule of law or prudence that an accused cannot be convicted on the basis of an extra-judicial confession without corroboration, though it is considered to be very weak evidence. It was also held that it can be sufficient to found conviction provided –

1. It comes from the mouth of witnesses who appear to be unbiased and not even remotely inimical to the accused;
2. There is nothing to indicate that the witness may have motive for attributing untruthful statement to the accused;
3. The evidence given by the witness is clear, unambiguous and unmistakably conveys that the accused committed the crime;
4. Nothing is omitted by the witness which may suggest different conclusion; and
5. The evidence passes the rigorous test of credibility.

17. A reference may also be made in *Sahadevan v State of TN, (2012) 6 SCC 403* in the above context. However, none of these parameters fits in to the case in hand in the present. Consequently, the circumstance as regards the so called Extra Judicial Confession found not established.

18. So far as the circumstance as to blood stained cloth and blood stained weapon is concerned, the serological report reveals the blood stained both in the clothes and the weapon seized carry human origin and group "B". No independent witness found examined to assure the seizure to have been made from the possession of the accused. No explanation has also been assigned by the I.O as regards absence of evidence from any independent witness in the seizure of incriminating articles.

19. The forwarding report discloses the seized articles have been forwarded to the court on 16.04.2008 whereas the same has been sent to the R.F.S.L, Sambalpur on 29.07.2008 after a lapse of three months. The evidence is silent as to the whereabouts of the seized articles so also the manner in which the seized articles were kept. In such eventuality nothing can be deduced in definitive that the article seized was the one sent for examination and that it was not exposed to risk of being in the third hand.

20. The most crucial is that the learned court below has not put any question seeking explanation from the Appellant as to the blood stain found in his banian in his examination U/s. 313 Cr.P.C thereby prevented the accused from giving explanation. This is a serious lapse; absence of such an incriminating

material put to the accused would expose serious prejudice to the Appellant in case the same is utilized against him. Even otherwise, the same could not have been used against the Appellant in absence of any other circumstances leading to the unerringly pointing a nexus between the crime and the criminal since the available circumstances in the given set of fact appears inadequate to bring the Appellant to book in a grave charge U/s. 302 IPC. Consequently, with the infirmities discussed above the circumstances propounded being not free from reproach cannot be taken in isolation to attribute a criminal liability against the Appellant.

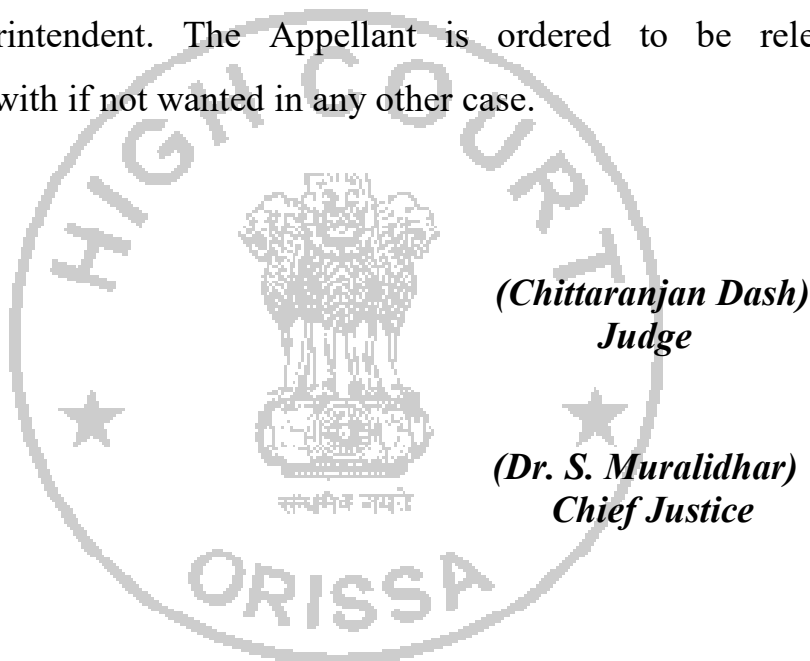
21. Lastly, in a case of circumstantial evidence, motive assumes great significance and importance. In the instant case, the prosecution case reveals that the Appellant had the motive to do away with the life of the deceased in as much as after the death of his brother, the Appellant witnessed many people visiting the house of the deceased to which the Appellant was intolerant suspecting the character of the deceased and took the extreme step of causing her murder. However, the source to this part of the prosecution story has derived from the fact that the Appellant revealed before the witnesses in his so called extra judicial confession, which could not stand the test of scrutiny by the established principle and held not reliable. Further, no witness came forward to support this story propounded by the prosecution.

22. Hence, it is safe to hold the prosecution to have failed to prove the case beyond all reasonable doubt and the learned trial

court having not assessed the evidence in consonance with fact and law has arrived at an erroneous conclusion.

23. In the result, the Appeal is allowed. The impugned Judgment and order are hereby set aside. The Appellant stands acquitted from the charges. He be set at liberty forthwith, if his presence is not required in any other case. He be discharged from the bail bond.

24. A copy of the Judgment be sent to the concerned Jail Superintendent. The Appellant is ordered to be released forthwith if not wanted in any other case.



(Chittaranjan Dash)
Judge

(Dr. S. Muralidhar)
Chief Justice

B.C.Mohanty