

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA Nos.28 and 29 of 2012

JCRLA No.28 of 2012

Kuna @ Bhagwan Patra

....

Appellant

-versus-

State of Odisha

....

Respondent

AND

JCRLA No.29 of 2012

Jiten Kumar Das

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in these cases:

For Appellant(s)

:

Mr. Prem Kumar Mohanty, Advocate

(In JCRLA No.28 of 2012)

Mrs. Sunanda Biswal, Advocate

(In JCRLA No.29 of 2012)

For Respondent

:

Mr. J. Katikia

Addl. Government Advocate

(In both the Appeals)

CORAM:

THE CHIEF JUSTICE

JUSTICE R.K. PATTANAİK

JUDGMENT

08.08.2022

Dr. S. Muralidhar, CJ.

1. These appeals are directed against an order dated 19th January, 2012 passed by the Additional District and Sessions Judge, Fast

JCRLA Nos.28 and 29 of 2012

Track Court, Rourkela in S.T. Case No.115/54 of 2010 convicting each of the Appellants for the offence punishable under Section 302/34 IPC and sentencing them to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.3,000/- each and in default to undergo RI for one month.

Case of the prosecution

2. The case of the prosecution is that on 3rd May, 2012 at around 10 pm the informant Sribatchya Kumar Rout (PW 2) returned from his work and found that in front of his house, one Bharat Bahadur (hereafter the 'deceased') was lying with severe bleeding injuries on his body. On inquiry, the deceased informed him that both the present accused had caused the said injuries. Accordingly, an FIR was lodged at Sector 7 Police Station in Rourkela. Sri Jyotimaya Bhukta (PW 15) who was the Investigating Officer (IO) visited the spot and sent the injured for medical examination. He arrested the accused persons on 6th May, 2010 and seized the wearing apparels. From the spot, he seized the sample earth, blood-stained earth and the blood-stained shirt of the deceased.

3. During the course of investigation, PW 15 sent a requisition to the Sub-Collector for deputation of an Executive Magistrate for recording dying declaration of the deceased which was then recorded. He sent the weapon of offence for chemical examination and also seized the bed head ticket after seeing the

post mortem examination and, therefore, led the charge sheet against the accused, who pleaded not guilty and claimed trial. This is a case based on circumstantial evidence. The prosecution examined eighteen witnesses. No witness was examined for the defence.

Trial Court judgment

4. The trial Court began the analysis of the evidence by noticing that PW 2 had proved the FIR and corroborated the narration therein in all the material particulars. Puspa Bindhani (PW 3) spoke about hearing the hue and cry and opening her door to find that the deceased had rushed to her house and was asking for some water. She noticed the injuries on the body of the deceased. After reaching the house, the deceased became senseless.

5. Maya Mustan (PW 4) was the eldest sister of the deceased. She reached the hospital on getting the information that the deceased had been admitted there. On enquiring about the deceased, he disclosed to her that Kuna @ Bhagaban Patra (Accused No.1-A1) had stabbed him with a knife whereas Jiten Kumar Das (Accused No.2-A2) was standing there. Pratima Kumbhar (PW 5) stated that the deceased rushed to her house and told her that A-1 had assaulted him with a knife. The deceased was asking her for a weapon to take revenge on the accused.

6. There were three medical officers who were examined. Dr. Surya Kanta Nayak (PW 8) was on emergency duty at 2 am on 3rd

May, 2010 when the deceased was admitted in the surgery ward. He referred the deceased to the surgeon Dr. Kaushalya Pradhan (PW 13) who stated that the deceased was under the treatment of Dr. P.C. Mohapatra (PW 14). PW 13 had assisted PW 14 during the surgical operation. PW 14 stated that he had examined the deceased on 3rd May, 2010 and found stab injuries on the abdomen. At around 12.30 pm PW 14 conducted the surgery and repaired two stab wounds and again on 5th May, 2010 he conducted the second operation after which the general condition of the deceased is stated to have been improved.

7. PW 11 Dr. Rajat Ranjan Sadwal who was the doctor who conducted the post-mortem, found the following injuries on the body of the deceased:

- “1. Ante mortem incised wound, 2 cm long, 1/2 cm wide, upto muscle deep on the lateral side of upper part of right wrist. age 3 to 5 days.
2. There are two surgical drain incised wounds on the both lower anterior lateral abdomen wall antemortem in nature, 24 to 48 hours.
3. One right para median incision wound of 17 cm long, from label 2” below umbilicus to right sub-coastal region with full muscle deep. It is for repair of two anterior abdominal stab wounds. On opening middle of the wound is 4 cm wide. Age 24 to 48 hours.
4. One repaired incised wound of length 3 cm above down wards, and upto muscle deep, repaired along with the right paramedian incision at the level of umbilicus, age 3 to 5 days.

5. One stitched incised wound, 3 cm long, obliquely placed on lateral side upwards on the left anterior abdominal wall lateral to the umbilicus. It has incised through the anterior abdominal muscle and two places in jejunum through and through in four places, in two loops of jejunum to gradually tapped. The wounds are surgical repaired.”

There were also fresh tears which were described as under:

“1. There are three fresh tears of duodenum and the blood vessel near the repair duodenum, which has caused haemorrhage into the peritoneal cavity. Peritoneal cavity contains blood and clots of approximately 1.8 litres and fresh in nature.”

8. The cause of death was shock due to haemorrhage.

9. The Trial Court discussed the evidence of Executive Magistrate Sri Tribikram Kumra (PW 1) who proved the dying declaration (Ext.1). He had recorded it in a question-answer form. From the answers given by the deceased, it was plain that A-1 had caused the injury on his person. In response to question No.5, he also named A-2 having assaulted him with a paniki. PW 1 stated that at the time of recording dying declaration, the deceased was in good and sound state of mind, he was conscious and able to understand the questions. He admitted in his cross-examination that he had not certified through a physician that the deceased was in a fit state of mind. However, he added “as a rational human being, I have studied his mind” and thereafter recorded his dying declaration. The trial Court concluded that even though the

certificate had not been given by the physician, the veracity of the dying declaration could not be doubted.

10. The trial Court then discussed the recovery evidence. While in custody, A-1 is supposed to have led the police to recover the knife from a deep forest located near his house. He had concealed it under the heap of the stones in the jungle. The trial Court noted that the signature of the independent witnesses on the statement made by the accused was not proved, but the evidence of PW 15, the IO, in this regard could not be overlooked.

11. On the basis of the above evidence, the trial Court held that the guilt of both the accused is established beyond reasonable doubt. They were, accordingly, convicted and sentenced as indicated hereinbefore.

12. This Court has heard the submissions of Mr. Prem Kumar Mohanty and Mrs. Sunanda Biswal, learned counsel appearing for the Appellants and Mr. J. Katikia, learned Additional Government Advocate for the State-Respondent.

Submissions on behalf of the Appellants

13. On behalf of the Appellants it was submitted that:

(i) the dying declaration cannot be accepted as it is not corroborated by independent evidence. Further, it was recorded

four days prior to the death of the deceased which took place on 6th May, 2010 whereas the incident took place on 2nd May, 2010. It was recorded without certificate of a doctor certifying that the deceased was in a fit state of mind to make a dying declaration. From the evidence of PW 1, it appears illogical that when he went at 11 am, the deceased was not conscious but when he went back at 4 pm, he was in a fit state of mind. Reliance is placed on the decision in *Smt. Sundarmani Acharya v. State of Odisha (2010) 45 OCR 210* where it was held that dying declaration tainted by suspicious circumstances should be rejected in toto.

(ii) Non-production of the witnesses to the seizure of the weapon before the Court was fatal to the case of prosecution. This coupled with the fact that PW 15 admitted in the trial Court that he did not produce the weapons of offence in the Court. The chemical examination report regarding the examination of the weapon was not proved. The chemical examination report stated that the weapons had stains of human blood but no opinion had been given as to the blood group. Therefore, there were serious doubts regarding the recovery of weapon.

(iii) In the forwarding report it has been stated that the weapon of offence had been recovered from behind the house of Kuna Patra. However, PW 15 stated that it was recovered from a teak jungle. PW 2 further stated that nothing had been seized from the accused in his presence and that he had put his signature as per directions

of the police. This raised grave doubts on the credibility of the investigation. Relying on the decision of the *State of Odisha v. Mata Munda (2017) CRLJ 4228*, it was submitted that weightage cannot be attached to the recovery evidence if it is not proved in accordance with law.

(iv) In the present case, the IO was himself not speaking the entire truth. The investigation was not honest and it is unsafe to guess the guilt of the accused on this type of evidence. Reliance is placed on the decision in *Mahavir Singh v. State of M.P. AIR 2016 SC 5231*.

(v) PW 7 who turned hostile and failed to support the case of the prosecution stated that he was the uncle of the deceased. He claimed that the deceased was cured after treatment in the hospital. The deceased thereafter went towards Civil Township on his own and while jumping from the wall fell down in the drain of a Marwadi gentleman and died. It is accordingly, contended that the deceased died due to injuries caused while jumping from a wall and not because of the stab injuries, which in any event had been surgically repaired.

(vi) Motive for the crime is not proved and this was critical to a case based on circumstantial evidence. Reliance is placed on the decision in *Basudev Soren v. State (2022) 1 OLR 1072*. This was

an important link in the chain of circumstances which was not satisfactorily proved.

(vii) As far as A-2 is concerned, no question was put to him under Section 313 Cr PC, that he was standing by while A-1 stabbed the accused.

(viii) Also, the inquest report signed by PW-16 which states that both accused killed the deceased with a knife was not put to A-2 in his statement under Section 313 Cr PC.

Submissions on behalf of the State

14. On the other hand, Mr. J. Katikia, learned Additional Government Advocate submitted that:

(a) A dying declaration is a very strong piece of evidence under Section 32(1) of the Indian Evidence Act. The dying declaration could be accepted even without corroboration. There was absolutely no need for any Executive Magistrate (PW 1) to depose falsely about what the deceased told him soon prior to his death. Reliance is placed in the decision in ***State of U.P. v. Veerpal (2022) 4 SCC 741***. Reliance is also placed in ***Laxman v. State of Maharashtra (2002) 6 SCC 710***, where it was held that the certification of the doctor as to the fit state of mind of the patient was not essential when the Magistrate has satisfied himself in that regard by recording in a question answer form. Reliance is also

placed on the recent judgment of this Court dated 4th May, 2022 in JCRLA No.88 of 2006 (*Anjari Rout v. State of Odisha*).

(b) Non production of the weapon of offence cannot discredit the prosecution when all other links in the chain of circumstances have been adequately proved by the prosecution.

(c) Merely because the doctor may have stated that the deceased may have survived if he had not left the hospital, would not mean that the offence would be any less than the one punishable under Section 302 IPC. Reference was made to the decision in *State of Rajasthan v. Dhool Singh (2004) 12 SCC 546*.

(d) Mere lapses in investigation would not enure to the benefit of the accused. Reliance is placed on the decision in *Abu Thakir v. State of Tamil Nadu (2010) 5 SCC 91*.

(e) Motive is not always easy to prove. If circumstances are proved otherwise, proof of motive may not be insisted upon. Reliance is placed on the decision in *Mohd. Mohsin v. State of Delhi 2018 SCC Online Delhi 6412*.

(f) Human blood was detected on the seized weapons. Merely because the grouping of such blood could not be established, will not help the accused. Reliance is placed on the decision in *Keshavlal v. State of M.P. (2002) 3 SCC 254*.

Analysis and reasons

15. The above submissions have been considered. At the outset, it must be noted that this is a case based on circumstantial evidence as there was no eyewitness to the occurrence. The law relating to the case based on circumstantial evidence is well settled. 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."

16. 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.

17. 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.”

18. The first piece of circumstantial evidence which has sought to be proved by the prosecution is the dying declaration of the deceased where he clearly mentions both the accused having assaulted. PW 1 mentions that he recorded the dying declaration in question-and-answer form. The answers to his questions indicated:

- (i) That the deceased was in a fit state of mind when he gave the answers;
- (ii) That the deceased stated that A-1 and A-2 assaulted him with a knife and paniki respectively.

19. It is a fact however that there is no certification by a doctor as to the fit statement of mind of the deceased when he made the above statement. However, this need not by itself discredit the dying declaration.

20. In ***Kushal Rao v. State of Bombay AIR 1958 SC 22*** the Supreme Court laid down the circumstance under which the dying

declaration could be accepted without corroboration. There it is observed as under:

“16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been

made at the earliest opportunity and was not the result of tutoring by interested parties.”

21. This was recently reiterated in *State of U.P. v. Veerpal (supra)*. In the present case, although the certification by the doctor as to the state of mind of the deceased is not forthcoming, as rightly pointed out by the learned Additional Government Advocate, that by itself will not discredit the statement of the deceased. In *Laxman v. State of Maharashtra (supra)* weightage has been given to the recording of the statement by the Magistrate in the question answer form in the absence of the certification of the doctor to the effect that the patient was in a fit state of mind to make a statement. Therefore, the dying declaration in this case can form a relevant piece of evidence on which reliance can be placed to determine the authors of the crime.

22. The dying declaration has had corroboration from the testimonies of PWs 4 and 5 to both of whom the deceased is supposed to have disclosed the authors of crime. Their cross-examination has not elicited anything significant in order to discredit their evidence.

23. As regards the recovery of the knife, although it is a fact that the witnesses who signed the statement supposedly made by the accused under Section 27 of the Indian Evidence Act were not examined, the evidence of the IO (PW 15) in this regard cannot be rejected altogether. However, there are discrepancies inasmuch as

in the forwarding report, it is stated that the knife was recovered from rear of the house of the A-1 whereas PW 15 states that it was recovered from the heap of stones from the jungle. Yet, the weapons were not produced in the Court. Although A-2 is supposed to have used a paniki, that was not spoken about by PW 15. Strangely, he did not even produce those weapons in the Court. This therefore, is a weak link in the chain of circumstances and not adequately proved by the prosecution.

24. The other absent link in the chain of circumstances is the motive for the crime. The prosecution appears to be totally silent of the circumstances under which both the accused attacked the deceased. This is even more questionable by the fact that when the deceased supposedly rushed to the house of PW 5 and demanded a weapon “to take revenge against the accused to which I refused”. Nevertheless, PW 5 states that after searching her house the deceased took away a knife and rushed outside “to take revenge against the accused persons.” No attempt has been made by the prosecution to explain whether there is any previous enmity between the accused and the deceased that led to the commission of the offence.

25. In *Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372* the Supreme Court explained:

“10...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused *if the involvement of the accused is*

otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.” (emphasis supplied)

26. Relying on the above decision the Delhi High Court explained in *Mohd. Mohsin v. State of Delhi* (*supra*), that: “While in the case of direct evidence, motive may not assume much significance, in a case of circumstantial evidence, the failure to prove motive would not be fatal only if all other circumstances have been established beyond reasonable doubt by the prosecution.” In the present case, with some of the other links in the chain of circumstances like the recovery evidence, not being satisfactorily proved, motive does assume importance and it has not been proved by the prosecution.

27. The other serious lacuna in the case of the prosecution is linking the alleged acts of the accused to the death of the deceased. The attack took place on the deceased on 2nd May, 2010. It is clear that from the evidence of PW 14 that he performed the surgeries on the deceased with the second operation

having been performed on 5th May, 2010. PW 14 states that thereafter the general condition of the deceased 'improved'.

28. PW 13, who assisted PW 14 in the surgery, states that on 6th May, 2010 at about 1 pm the patient was absent on the bed and that as per their own report he was brought back to the hospital at 2:20 pm. The report indicated that "the deceased had fallen in a drain of Rourkela Civil Township." The prosecution is silent on what happened during the time the deceased was found absent on 6th May, 2010. Obviously, he had left hospital without a proper discharge and was found on the same day having fallen in the drain. This was not clarified by the PP by re-examining PW 13.

29. Another relevant witness in this regard is PW 11, the doctor who conducted the post mortem. He notes in the report that there were three fresh tears near the cuts in the abdomen which had been repaired. These tears had caused hemorrhage into the peritoneal cavity. The death was due to such hemorrhage. It must be recalled that according to PW 14 who performed the surgeries, the two stab wounds had been repaired after surgery.

30. The defence was able to elicit from PW 11 an answer in the cross-examination that had the deceased not left the hospital, he might have survived. Further that he died due to the injury received as a result of the fall in the drain. This is clear from the further cross examination of PW 11, which is as follows:

“If the deceased would have continued in treatment in the hospital, he would have survived. At the time of submission of P.M. Exam. report, I had not verified the medical report of RCH, Rourkela, as those were not sent to me for my verification. *The deceased died due to the injury that was caused to him on the second stage of the incident as because he saw running away from the hospital for some reason.*” (emphasis supplied)

31. This is different from the fact situation in ***State of Rajasthan v. Dhool Singh***(*supra*), where the Supreme Court noted that “the cause of death as explained by the doctor is primarily due to the injury caused by the respondent.” It was in those circumstances that the Supreme Court in ***Dhool Singh*** held that the answer by the doctor that the deceased might have survived with proper medical care was considered “a hypothetical answer”. On the other hand, in the present case, the question put to PW 11 about the chances of deceased surviving was precisely in the context of his having left the hospital while undergoing treatment.

32. Consequently, one important link in the chain of circumstances viz., that the injuries inflicted by the accused were the direct cause of the death of the deceased has not been proved by the prosecution. On the other hand the possibility of the death occurring due to the injuries received on account of the deceased falling in the drain has been shown through the evidence of PW 11. This is another serious lacuna in the case of the prosecution.

33. The position that emerges is as follows:

(i) The deceased made a dying declaration on 3rd May, 2010 to PW-1 soon after the incident disclosing that both the deceased caused him grievous injuries on the abdomen.

(ii) Those two grievous stab injuries were repaired in the surgery performed by PW 14 on 3rd and 5th May, 2010.

(iii) For some reason on 6th May, 2010 the deceased on his own left the hospital and was found in an injured condition in a drain.

(iv) Three fresh tear wounds appeared near the operated area of the abdomen on 6th May, 2010 and according to the doctor (PW 11) these were caused by the deceased falling into a drain and the prosecution does not link either of the accused to this second stage.

(v) That the death was due to the haemorrhage resulting from the fresh set of tear wounds comes across clearly from the evidence of PW 11.

34. Thus, while the cause of two grievous stab injuries is attributable to the two accused, the cause of death is not. Therefore, the offence made out against the accused is at best the offence under Section 326 IPC. Consequently, the Court is not satisfied that the prosecution has been able to prove the case against the Appellant for the offence punishable under Sections 302/34 IPC.

35. Converting the offence to one punishable under Section 326 IPC, the Court sentences each of the Appellants to the period already undergone.

36. As a result, the conviction and sentence awarded to both the Appellants for the offence under Section 302 IPC including the sentence of fine are hereby set aside. Both the accused are convicted for the offence under Section 326 IPC and sentenced to 10 years' imprisonment each. This will include the default period for the non-payment of fine. In other words, since they have already undergone the said period, the Appellants will be discharged forthwith unless their detention is required for some other case.

37. The appeals are accordingly disposed of.

38. A copy of this judgment be sent forthwith to the concerned Superintendent of Jail.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

SK Jena/Secy.