

**AFR**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLA No. 193 of 2011**

***Trilochan Sethy***

....

***Appellant***

***-versus-***

***State of Odisha***

....

***Respondent***

**Advocates appeared in the cases:**

***For Appellant***

:

**Mr. Partha Sarathi Nayak  
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 12<sup>th</sup> January 2011, passed by the learned Additional Sessions Judge, Talcher in C.T.(Sessions) Case No.2 of 2009, convicting the Appellant for the offence punishable under Section 302 of Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs.2000/- and in default to undergo RI for three months.

2. It must be mentioned at the outset that the Appellant had been charged with for committing the murder of his wife and additionally, he was charged with the offences punishable under

Sections 498-A, 304-B of IPC as well as Section 4 of the Dowry Prohibition Act, 1961 (DP Act). The trial Court has by the impugned judgment, acquitted the Appellant for the offences punishable under Sections 498-A, 304-B of IPC and Section 4 of the DP Act. There were three accused persons apart from the present Appellant which included his brother, sister-in-law and nephew. However, the trial Court has by the impugned Judgment, acquitted them of all the offences they were charged with.

3. The case of the prosecution is that the marriage of the Appellant with the deceased Nirupama Sethy took place on 15<sup>th</sup> July, 2005. She was the daughter of Mahendra Sethy (PW-15), the informant. After the marriage, the accused and the deceased were staying in the house of the accused at Chakrasila Colony of Samal Barrage, where the accused was working. They were staying in the house of Biswanath Sethy, the elder brother of the present Appellant, whose wife is Sabitri Sethy and the son is Hemanta Sethy.

4. The case of the prosecution further is that soon after marriage, the accused started torturing the deceased by demanding a motorcycle for dowry. On the night of 15<sup>th</sup> December 2007, the accused/Appellant assaulted the deceased and abused PW-15 over the telephone while giving a threat that he would finish off the deceased. On the morning of 16<sup>th</sup> December 2007, the accused Appellant informed one Jasoda Sethy (PW-11), the sister of PW-15 over telephone that the condition of the deceased was serious.

She then sent Dhiren Sethy @ Kumar (PW-13), her son, to inform PW-15 about this. When PW-15 along with his relative rushed to the Talcher Hospital, they found the dead body of the deceased.

5. On receipt of this information, U.D. Case No.37 of 2007 was registered in the Talcher Police Station (PS). An inquest was held over the dead body of the deceased. Thereafter, it was sent for postmortem examination to the Talcher Hospital. On the basis of the information lodged by PW-15 at the Samal PS, an FIR was registered on 17<sup>th</sup> December, 2007 and investigation was taken up by Sri Samir Kumar Panda (PW-17) who was the Officer-In-Charge (OIC) of Samal PS. He visited the spot, arrested the accused persons and seized the gold ornaments stated to have belonged to PW-15. Thereafter, one Radha Nath Sahu, the Assistant Sub-Inspector, was sent to seize the dowry articles. The seizure list dated 17<sup>th</sup> February, 2008 was prepared by Sri Sahu in respect of the dowry articles.

6. On conducting the post-mortem of the dead body, Dr. Santilata Mohanty (PW-4), found the following:

“(i) The dead body was that of a woman of average body built, eyes closed, pupils dilated, conjunctivas congested, rigor mortis present over all four limbs.

(ii) Face congested, white coloured fine froth present on the left nostril, dried saliva mark running from left angle of mouth upto left pinna and tongue bite present. Bleeding from left ear present.

(iii) Ant bite mark on left elbow, behind the left ear, lower lip and upper lip were present.

(2) (i) There was an abrasion of size 1/4" X 1/4" on the vertebral column in tenth vertebral area.

(ii) There was another abrasion of size 1" X 1" near the left elbows.

(iii) There was another abrasion of size 1" X 1" on the right elbow.

(iv) Abrasion of the size 2" X 1/2" on the axilla, 2" below the axillary pit.

(v) Abrasion of size 1" X 1" on sternum.

(3) (i) There were two numbers of dry and brown parchment like depressed areas of size 4 cm x 2-1/2" and 4.3 cm x 1½ cm directed downwards and outwards found on the left side of trachea.

(ii) Abrasion of size 3 cm x 1 cm at the top of the depressed areas found.

(iii) Another ill marked depressed area of size 3 cm x 2 cm on right side of trachea having abrasion of one cm at the top of the area was found.

Base of the depressed areas were pale but surrounding areas were ecchymosed."

7. PW 4 opined the cause of the death to be "due to asphyxia due to throttling". In her cross-examination, she explained *inter alia* as under:

"Death due to asphyxia by throttling means putting extra pressure on the throat i.e. pressure on the wind pipe, the vagus nerve and the great vessel of neck."

8. She was then examined extensively about the ligature mark on the neck of the deceased and categorically denied that the death of the deceased was a case of hanging. In other words, she was clear that it was a homicidal death.

9. At the end of the investigation, a charge sheet was laid against four of the accused persons as already mentioned. They pleaded not guilty and claimed trial. On behalf of the prosecution, seventeen witnesses were examined and none on behalf of the defence.

10. On an analysis of the evidence, the trial Court while acquitting three of the four accused, convicted the present Appellant of the offence punishable under Section 302 IPC while acquitting him of the remaining offences. The trial Court sentenced him in the manner indicated hereinbefore.

11. This Court has heard the submissions of Mr. Partha Sarathi Nayak, learned counsel appearing for the Appellant and Mrs. Saswata Patnaik, learned Additional Government Advocate (AGA) for the State.

12. Mr. Nayak, learned counsel for the Appellant first submitted that it has emerged in the evidence of PW-4 that she found 'dried saliva' running from the left angle of mouth upto the left pinna. He referred to Modi's Medical Jurisprudence and Toxicology

(24<sup>th</sup> Edition) stating that the saliva found dribbling out of an angle of the mouth down on the chin and chest was a sure sign of hanging having taken place while the person was alive. He also referred to an Original Research Paper titled “A study of Gross Postmortem Findings in Case of Hanging and Ligature Strangulation” published in Indian Academy of Forensic Medicine. Jan-March 2013, Vol.35, No.1” which was supposed to have concluded that dribbling of saliva was present in 38.37% cases of hanging but was not present in any case of ligature strangulation. According to him, the other signs on the dead body found in the postmortem report were not exclusive to throttling and, therefore, it was not safe to conclude that the death was homicidal.

13. This Court has carefully examined the examination in chief as well as the cross-examination of PW-4. Although searching questions were put to PW-4 on the distinction between throttling and hanging, she was clear that this was not a case of hanging. No question was put to her regarding Modi’s Medical Jurisprudence and Toxicology or the above Research Paper. It is not possible for the Court to agree with the submissions of learned counsel for the Appellant that in this case the medical evidence was not conclusive about the death being homicidal. PW-4 did not find any ligature mark on the neck of the deceased consistent with the theory of the deceased having died by hanging. There was no material brought on record by the defence to counter the clear and

cogent evidence of PW-4 that this was a case of death by throttling.

14. Learned counsel for the Appellant next submitted that in the present case, there is total failure to prove the motive for the crime. Reliance is placed on the decision in ***Bhaskar Rao v. State of Maharashtra* 2018 (3) MLJ (Cri) 289**.

15. The above decision appears to have turned on its own facts. There, the testimonies of the eye-witnesses were found not trustworthy. It was in the overall context of the poor quality of the evidence that the absence of motive became an additional factor in favour of the accused. The absence of proof of motive is not always fatal to the case of the prosecution. The above decision itself notes the settled position of law explained in ***State of U.P. v. Kishanpal* (2008) 16 SCC 73**, where it was observed 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."

16. It is interesting that although the prosecution may not have been able to prove the offences punishable under Sections 498-A, 304-B and Section 4 of the DP Act, the fact remained that the death was unnatural and it was homicidal on account of asphyxia as a result of throttling. There is nothing to suggest that there was any outsider who could have committed such an offence against the deceased. Further, under Section 106 of the Evidence Act, where there is a fact especially within the knowledge of the accused, the burden of proving that fact is important. The law in this regard is very well settled. In *Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 681 it was observed as under:

“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:

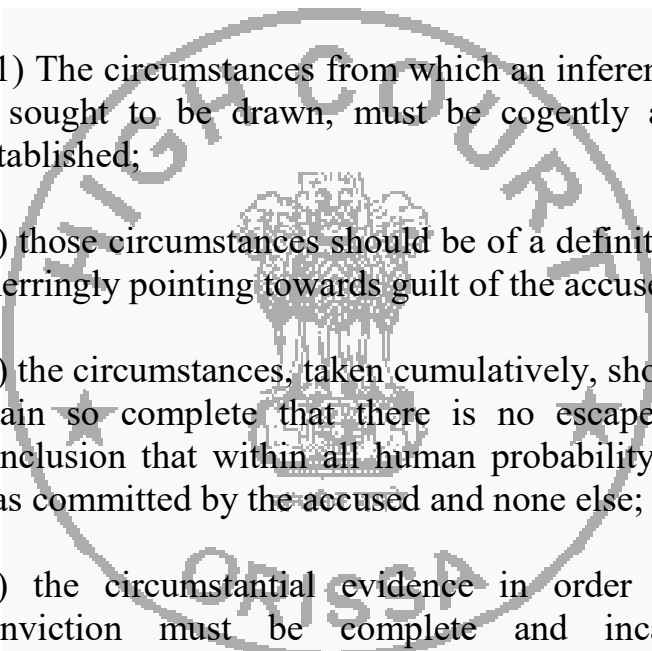
(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

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."

17. Further in *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679*, it has been held that where incriminating circumstances are put to an accused and he has no explanation to offer, this becomes an additional link in the chain of circumstances. The relevant passage reads as under:

"6... In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."

18. Learned counsel then referred to the decision in ***Manjunath Chennabasapa Madalli v. State of Karnataka (2007) 37 OCR (SC) 11*** which reiterates a settled position in law as regards a case based on circumstantial evidence. The reference has been made in the said decision to the decision in ***Sharad Birdhichand Sarda v. State of Maharashtra AIR (1984) SC 1622*** and ***Padala Veera Reddy v. State of A.P. AIR 1990 SC 79***, where it was held as under:

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- “(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
  - (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
  - (3) 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 none else; and
  - (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

19. Learned counsel for the Appellant referred to the decisions in ***Sawal Das v. State of Bihar AIR 1974 SC 778***, ***Union Territory of Goa v. Beaventura D’Souza AIR 1993 SC 1199*** and ***Donthula Ravindranath v. State of Andhra Pradesh AIR 2014 SC 1060***. It was submitted that in the present case, given the circumstances

adduced by the prosecution, it had not discharged the initial burden for the purposes of invoking Section 114 of the Evidence Act.

20. In the present case, the medical evidence clinchingly proves that the death was homicidal. Further, the Appellant has not been able to offer any satisfactory explanation for the occurrence of such a death in the premises in which he was living with the deceased. This Court has perused the decision in ***Shivaji Chintappa Patil v. State of Maharashtra AIR 2021 SC 1249*** and finds that it turned on its own facts. This was not a case of mere staying together of the parties but the deceased dying an unnatural death.

21. For all of the aforementioned reasons, the Court is unable to find any error having been committed by the trial Court in convicting the present Appellant and sentencing him in the manner indicated hereinbefore. The appeal is accordingly dismissed but in the circumstances with no order as to costs.

**(S. Muralidhar)**  
**Chief Justice**

**(Chittaranjan Dash)**  
**Judge**

*S. Behera/ Jr. Steno.*