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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 587 of 2016

Sunil Kumar Mohanty

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in the cases:

For Appellant

:

Ms. C. Kasturi, Advocate

For Respondent

:

Mrs. Saswata Patnaik
Additional Government Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH**

**JUDGMENT
22.09.2022**

Dr. S. Muralidhar, CJ.

1. This appeal is directed against an order dated 19th April, 2016, passed by the learned 1st Additional Sessions Judge, Sambalpur in S.T. Case No.247/03/175 of 2013-14, convicting the Appellant for the offence punishable under Section 302/201 read with 34 of the IPC and sentencing him for the offence punishable under Section 302 IPC to undergo imprisonment for life with a fine of Rs.25,000/- and in default to undergo Rigorous Imprisonment (RI) for two years and for the offence punishable under Section 201 of IPC, to undergo RI for seven years with a fine of Rs.10,000/- and in default to undergo RI for one year.

2. The case of the prosecution is that one Bhaskar Matiary (PW-1) gave a complaint on 2nd November, 2012 at around 10.30 pm at the Naktideul Police Station (PS) that on 28th October, 2012 in the evening at around 7.00 pm, the present Appellant along with two juveniles had called his youngest son, Bandhuraam Matiary from his house and had murdered him. The complainant had alleged that one Ranjan Kumar Nayak was also involved in the murder. According to PW-1, on 28th October 2012, the deceased contacted him over the phone and informed him that the present Appellant along with the aforementioned accused, were at Rairakhola with him and they would return the following morning.

3. The case of the prosecution further was that one Nabin Kumar Nanda (PW-10) and Asit Kumar Raula (PW-11) had also seen the deceased with the accused. On the above complaint, Jogeswar Panda (PW-16), who was the Officer-In-Charge (OIC) at Naktideul PS, registered Naktideul PS Case No.64 under Sections 302/201 read with 34 of IPC and took up the investigation.

4. PW-16 then visited the house of the complainant at village Hitasara and on 3rd November, 2012 in the night, apprehended the two juveniles as well as the present Appellant. On the basis of the statement purportedly made by the Appellant while in custody, the dead body of the deceased was recovered from a bush near the Tantisara forest, Charnal. PW-16 then conducted an inquest on the dead body of the deceased in the presence of the family

members. He prepared a report and sent the body for postmortem examination. He seized the wearing apparels of the present Appellant as well as the two juveniles.

5. On 8th November 2012, PW-16 arrested the co-accused, Ranjan Kumar Nayak and seized his Indigo car purportedly used as conveyance during commission of the crime as well as his mobile phone and prepared a seizure list. The exhibits were seized and sent to the R.F.S.L., Sambalpur. On completion of the investigation, he submitted a charge sheet on 26th February, 2013 against the present Appellant and the two juveniles for the aforementioned offences.

6. The accused pleaded not guilty and claimed trial. It must be mentioned here that even according to PW-16, the two juveniles and the deceased were of the same age group, whereas the present Appellant was four years senior to them.

7. As many as sixteen witnesses were examined on behalf of the prosecution and none on behalf of the defence. This was a case based on circumstantial evidence. The trial Court culled out the following circumstances as emerging from the case of the prosecution:

“(i) Accused Sunil Kumar Mohanty and two JCLs Kalia @ Ajit Kumar Pradhan and Toutan Biswal called the deceased from his house and took him with them.

(ii) Accused Sunil Kumar Mohanty and two JCLs Kalia @ Ajit Kumar Pradhan and Toutan Biswal returned to village but the deceased did not return to the village.

(iii) The deceased told to his sister over phone that he was with Sunil Kumar Mohanty, Kalia @ Ajit Kumar Pradhan and Toutan Biswal at Sambalpur and they would return home next morning.

(iv) Accused Sunil Kumar Mohanty while in police custody led the police and other witnesses to Tantisara forest and gave discovery of the dead body of the deceased under a bush in Tantisara forest.”

8. The trial Court has thereafter, without any discussion, simply concluded that from the postmortem report in light of the above circumstances that the present Appellant along with two juveniles had committed the murder of the deceased. There is no indication at all in the judgment of the trial Court that how this conclusion was reached. In the same way, the trial Court acquitted the co-accused Ranjan Kumar Nayak. The trial Court did not note what the fate of the case against the two juveniles was since their case must have been separately tried before the Juvenile Justice Board. Learned counsels for the parties before this Court were also unable to inform as to what had happened to the case of the said two juveniles.

9. This Court has heard the submissions of Ms. C. Kasturi, learned counsel appearing for the Appellant and Mrs. Saswata Patnaik, learned Additional Government Advocate (AGA) for State.

10. At the outset, the Court must express its dissatisfaction of the manner in which the trial Court has written its judgment. There is absolutely no analysis of the circumstances culled out by the trial Court. Even those circumstances culled out, do not form a continuous chain of circumstances which point unerringly to the guilt of the accused.

11. Before proceeding to discuss the evidence, the Court would like to recapitulate the governing legal principles in a case of circumstantial evidence. 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."

12. In ***Trimukh Maroti Kirkan 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.”

13. In the case on hand, according to the two sisters of the deceased, i.e., Banita Matiary (PW-3) and Anita Matiary (PW-4), on 28th October, 2012 at around 4.00 pm, the present Appellant and two juveniles called the deceased and took him with them. PW-3 has further stated that she called on the mobile phone of the deceased and he replied that he was present at Rairakhol with the Appellant and the two juveniles; that they were planning to go to Sambalpur and would return home in the next morning. This is the only circumstance available through these two witnesses.

14. PW-1, the father of the deceased and PW-2, the brother of the deceased had no direct knowledge of even this much that is spoken of by the two sisters of the deceased. The two sisters informed the father (PW-1) and the brother (PW-2) of the facts within their knowledge. Collectively, therefore, the four witnesses who are related to the deceased, i.e., PWs-1 to 4 can be only said to have proved a single circumstance, viz., the deceased was last seen with the present Appellant and the two juveniles.

15. In *Nizam v. State of Rajasthan AIR 2015 SC 3430*, the Supreme Court explained:

“14...Undoubtedly, “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.”

16. 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*).”

17. Therefore, the mere fact that the deceased was seen last with the accused will not by itself be a strong link in the chain of circumstances unless the time gap between that and when the dead body was found is small enough to rule out the possibility of some other person having committed the crime. As the further discussion will show, that is not fulfilled in the present case.

18. The next circumstance is the discovery of the dead body of the deceased. What is important was that all the independent witnesses in this case, i.e., PWs-5 to 13 have all turned hostile. In particular, the witnesses put forth by the prosecution as being present when the Appellant was supposed to have made a

statement while in custody and then led the Police to discover the dead body of the deceased, i.e., PWs-7, 8 and 9 have all turned hostile. In other words, there are no independent witnesses to the discovery of the dead body of the deceased.

19. This is coupled with the fact that the dead body which was found was without a head. This is explained from the deposition of PW-1 where it was stated, “the dead body of my son was lying in Charnal jungle in beheaded condition. The head of my son was not traced-out”. Despite this, he does not indicate how he could identify the dead body to be that of his son. Even PW-2 confirms that “the dead body was discovered with head, left hand and the loins missing”.

20. When this is read with the evidence of PW-15, the doctor who conducted the postmortem, it raises more questions. He found the following external injuries on the body:

“02) There were five external injuries on the dead body.

(i) Head in toto was missing from upper part of the neck and margin of the injured site of the neck was found to be lacerated in appearance and two pieces of skull bones found to be attached to the skin of the neck.

(ii) Right upper limb intact and left upper limb appears boney from shoulder joint onwards and distal half of the ulna radius and other distal hand bones were missing.

(iii) Muscle and tissue masses from upper part of thigh of right side was also missing.

(iv) Pelvis organ found to be coming out from the lower abdominal cavity and external genitalia were found to be missing.

(v) Distal fingers of right foot was found missing.

21. He further stated as under:

“03) The body was decomposed and emitting putrified smell. Maggots were present over neck and shoulder fold. Abdomen was grossly distended. Peeling of skin at places throughout the body.

04) On dissection liver intact and softened. Spleen softened and found to be ruptured at its lower border. Kidney intact, Stomach intact and contained 100 ml. of fluid. Heart intact and almost empty. Both lungs were intact and softened. Right 7th and 8th and 9th ribs were fractured at mid clavicular line.”

22. His findings and opinion were as under:

“05) Findings and opinion:

(i) External Injury no.1 was ante-mortem in nature. External Injuries no.2, 3, 4 & 5 appeared to be post-mortem in nature.

(ii) Death of the deceased was due to decapitation of head.

(iii) Time since death at the time of P.M. Examination was within 5 to 7 days.”

23. The Postmortem took place on 3rd November, 2012 that was more than five days after the deceased was last seen with the accused. In the cross-examination, an answer was sought to be elicited from PW-15 as to what could have caused the Injury

No.1, which was the decapitation of the entire head. He stated “External Injury No.1 was caused by a single blow with a heavy sharp cutting weapon”. No such weapon appears to have been found by the Police and shown to the doctor. He frankly stated “I have not given opinion by which weapon the death of the deceased was probably caused”. He further stated “Injury No.2 to 5 can be caused by wild animals”.

24. In the cross-examination of PW-16, who investigated the case, he also clarified “I had not seized any weapon of offence”. According to him, “my investigation reveals that accused Sunil Mohanty dashed a stone on the head of the deceased and killed him. No other weapon of offence was used to kill the deceased”. This does not at all tally with the medical evidence which indicates that decapitation of the head took place and that too with a sharp-edged weapon in a single blow. Therefore, this does not explain in any manner whatsoever how the crime was committed and who committed the crime. This important link in the chain of circumstances is totally missing.

25. There is no other evidence forthcoming from the prosecution to link the Appellant to the crime. As there is a five-day gap between the time the deceased was last seen with the accused, i.e., 28th October, 2012 and the date on which the dead body of the deceased was discovered, i.e., 3rd November, 2012 it is not safe to base the Appellant’s conviction on the sole circumstance of last seen. This gap has not been explained by the prosecution.

Consequently, apart from one single circumstance of the deceased seen going away with the Appellant, there is no other circumstance to link the Appellant to the crime since the so-called finding of the dead body of the deceased at the instance of the present Appellant has not been satisfactorily proved by any independent reliable evidence. The fact that every independent witness put forth by the prosecution to prove that circumstance, has turned hostile is indeed significant.

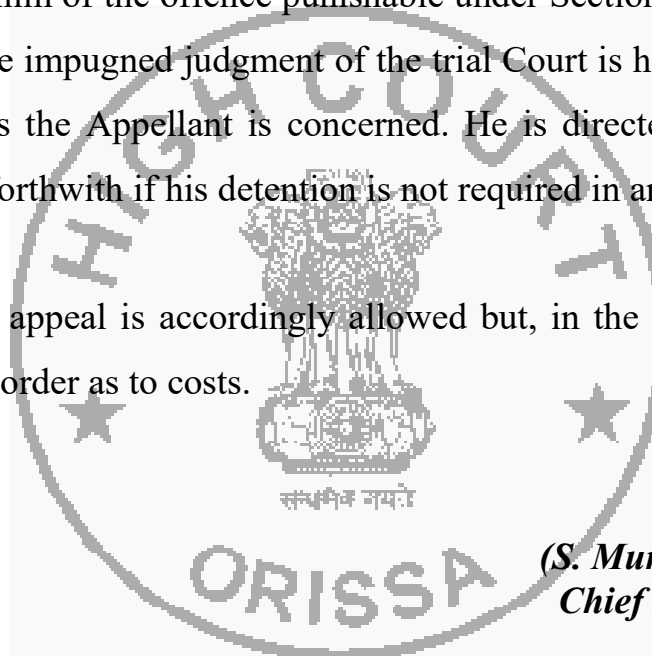
26. As already noticed, the medical evidence also does not support the case of the prosecution. The decapitation of the head by a sharp-edged weapon by a single stroke is the opinion given by the doctor. As to who caused this kind of injury has not been proved by the prosecution. No weapon of offence has been recovered. Although the cloths of the accused were seized, there is no forensic evidence to link them with the deceased. Even the mobile phones of some of the accused do not appear to have yielded anything for the Police.

27. Overall, the above pieces of evidence do not form a continuous chain and do not bring forth a narrative as to who committed the crime and how. The fact that four of the injuries on the deceased may have been caused by wild animals according to PW-15 is another factor that adds a mysterious dimension to the killing of the deceased.

28. When the entire evidence is viewed as a whole, the Court is not satisfied that the prosecution has been able to unerringly prove the guilt of the Appellant alone and no one else in the commission of the crime.

29. Consequently, the Court is not satisfied that the case against the Appellant has been proved by the prosecution beyond all reasonable doubt. Granting him the benefit of doubt, the Court acquits him of the offence punishable under Sections 302 and 201 IPC. The impugned judgment of the trial Court is hereby set aside as far as the Appellant is concerned. He is directed to be set at liberty forthwith if his detention is not required in any other case.

30. The appeal is accordingly allowed but, in the circumstances, with no order as to costs.



(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge