

IN THE HIGH COURT OF ORISSA AT CUTTACK

Jail Criminal Appeal No.12 of 2019

From the judgment of conviction and order of sentence dated 29.06.2018 passed by the learned Additional Sessions Judge, Dharamgarh in Criminal Trial (Sessions) No.23 of 2016.

**Tankadhar Gahir, aged about 60 years,
S/o. Late Dhaniram Gahir, Occupation:
Resting due to old age, R/o. Village-Nuagaon,
P.S. Kegaon, District-Kalahandi**

.....

Appellant

-Versus-

State of Orissa

.....

Respondent

For Appellant : Miss. A.K. Dei, Advocate
(Amicus Curiae)

For Respondent : Mr. Sk. Zafrulla,
Additional Standing Counsel

CORAM :

HONOURABLE MR. JUSTICE C.R. DASH

HONOURABLE MR. JUSTICE M.S. SAHOO

JUDGMENT

Date of Hearing:19.04.2022

Date of Judgment :09.05.2022

C.R. Dash, J.

Having been convicted for the offence of uxoricide under

Section 302 of IPC and sentenced to suffer imprisonment for life as well

as to pay a fine of Rs.5,000/- (Rupees five thousand), in default to suffer further rigorous imprisonment for six months by the learned Additional Sessions Judge, Dharamgarh in C.T.(Sessions) No.23 of 2016, the Appellant-husband has preferred this appeal.

2. A compendium of the prosecution case as found from the record is as follows:

The occurrence happened at about 10.30 AM on 16.01.2016 in the dwelling house of the Appellant at village Nuagaon. Hearing the sound of crying, one Pinku Patra (P.W.5) came to the house of the Appellant. The Appellant told him that, he should convey the message to his son (P.W.1) that, his mother has expired. P.W.1, son of the Appellant received telephone call from Pinku Patra (P.W.5), at about 11.00 AM, when he was in the market along with his wife (P.W.7). They had left the house in the morning leaving the Appellant and his wife together in the house. The Appellant is alleged to have assaulted the deceased with a stone Chakki (a country grinder made of granite stone to grind pulses etc).

The Appellant's son (P.W.1), lodged F.I.R. before the I.O. (P.W.17), who conducted investigation and during investigation held inquest over the dead body, seized incriminating materials, examined the

witnesses and filed charge-sheet against the Appellant for offence under Section 302 of IPC.

3. The defence plea is one of complete denial and false implication. Further from the defence suggestions to the prosecution witnesses, it is found that defence has taken a plea that, as the deceased was ill she fell down on the Chakki for head reeling and died.

4. Prosecution has examined 17 (seventeen) witnesses to prove the charge. P.W.1 is the informant. P.W.7 is the wife of the informant. P.Ws.2 and 4 along with P.W.1 are witnesses to inquest over the dead body of the deceased. P.Ws.6 and 12 along with P.W.2 are seizure witnesses. P.W.11 is the scribe of the F.I.R. P.W.8 is the daughter of the Appellant and sister of P.W.1. P.W.9 is the son-in-law of the Appellant. P.W.5 is the principal witness who did not support the prosecution case. P.Ws.3, 10, 13, 14 and 15 are co-villagers of the Appellant, but they do not know anything about the occurrence. P.W.16 is the Medical Officer, who conducted the postmortem over the dead body of the deceased. P.W.17 is the I.O.

5. Defence has examined none as witness.

6. Admittedly, there is no eye witness to the occurrence. The case of the prosecution is based entirely on circumstantial evidence and

the single circumstance is P.W.1, the son and P.W.7, his wife had left the Appellant and his wife together in the house, as they went to market at about 8.00 AM in the morning. On the basis of the single circumstance of “last seen together”, learned Trial Court has found the Appellant guilty of the offence of murder of his wife.

7. Miss A.K. Dei, learned Amicus Curiae submitted that, learned Trial Court has not properly appreciated the evidence of the Medical Officer as well as other witnesses on record and on the basis of the circumstance of “last seen together”, the conviction of the Appellant under Section 302 of IPC could not have been based.

Mr. Sk. Zafrulla, learned Additional Standing Counsel, on the other hand, submits that at the time of occurrence husband and wife were together in the house and there was no scope for any other person of coming to the spot house to cause murder of the deceased in presence of the Appellant and in all probability of things the Appellant must have committed the murder.

8. P.W.1, the informant in his evidence has testified that, he along with his wife (P.W.7) were in the Kegaon Bazaar at the time of occurrence and on receiving the phone call from Pinku Patra (P.W.5), he came to his house to find that her mother has been dead. He has further

testified in his cross-examination that when he came to his house, he saw that the dead body of her mother was lying and his father (Appellant) was crying catching hold of the dead body of his mother in his lap. When he asked his father about the cause of death of his mother, he (Appellant) told him that his mother Tikemani has expired by falling on the Chakki owing to her head reeling as she was suffering from fever. This witness has not been declared hostile.

P.W.5 who is the principal but admittedly the immediate post occurrence witness has testified that when he was in his shop in the village, he suddenly heard sound of crying from the house of the Appellant. After hearing the same, he rushed to the house of the Appellant and found bloodstain on the ground near his house and Appellant had sat there. When he reached there Appellant asked him to telephone his son (P.W.1) and to tell him that his mother has expired. In his cross-examination this witness testified that at the time of his arrival in the house of the Appellant, the Appellant was crying and he told him to inform his son (P.W.1) in crying condition. He, in the cross examination has also testified that there was no marital discord between the Appellant and his wife. This witness has been cross-examined under

Section 154 of the Evidence Act, as he did not support the prosecution case on the aspect, the prosecution wanted to adduce his evidence.

9. As Pinku Patra (P.W.5) has turned hostile and has been cross-examined by the prosecution under Section 154 of the Evidence Act, a question may arise as to whether the evidence of P.W.5 is of any avail and if so to what extent?

Hon'ble the Supreme Court in the case of ***Rabindra Kumar Dey vs. the State of Orissa (1976) 4 SCC 233 (243)*** has held thus:

“It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether.....”

It is also well settled that the Court need not straightaway discard the evidence of hostile witness, if helpful to either of the sides and found to be consistent with the theories put forth either by the prosecution or by the defence. In other words, if a witness on the ground that he is suspected to have turned hostile is permitted by the Court to be cross-examined by the party who called him, the whole of the evidence of that witness does not become worthless and such evidence in its entirety cannot be erased from record. It is open to the Court to consider the

evidence, and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

On the aforesaid analogy, if we consider the evidence of P.Ws.1 and 5, it is found that P.W.5 has corroborated P.W.1 so far as the defence case is concerned.

10. The Medical Officer (P.W.16) has found the following injury on the dead body and his evidence reads thus:

“xxx xxx xxx

I found bleedings from both nostrils, ears and mouth, fracture of parietal area of skull of size 6 cm x 1 cm x 1 cm, fracture of mandible size 2 cm x 1 cm x 1 cm, one lacerated wound at left ear size 2 cm x 1 cm x 1 cm, fracture below right thigh, one lacerated wound at right elbow size 2 cm x 1/4th cm x 1/4th cm, lacerated wound over right knee size 1/2 cm x 1/4th cm, brain matters were found outside the skull.”

He (P.W.16) has further testified that the cause of death was shock due to brain haemorrhage. All injuries were *atemortem* in nature and it was a case of homicide.

In cross-examination P.W.16 has testified that if a person falls from very high altitude on a rocky surface such injuries can be possible.

11. From the aforesaid evidence it is clear that, when prosecution is harping on the point that the death of the deceased was a homicidal death, the defence is harping on the point that death of the deceased is an accidental death. The opinion of the Medical Officer (P.W.16) in his cross-examination to the effect that, such injuries can be possible, if a person falls from high altitude is too specious an opinion, in as much as, if a person falls with sufficient force from a standing position and his head hit a substance like alleged weapon of offence, these injuries may be possible, because such fall is an unguarded fall and the countryside women in their premenopausal period or after menopause suffer from acute calcium deficiency and fractures are bound to occur with slight force also in such a person. These questions could have been confronted to the Medical Officer making a vivid study of the age, body built, previous ailment, etc of the deceased. But such thing has not been done here by the defence.

We are of the view that, it is high time when experienced defence counsels should come forward pro bono to conduct cases of such poor people to provide them justice.

12. Generally, we would not have taken a different view from what has been taken by the Medical Officer in a given case as per law.

But here the witnesses are saying that the Appellant was remorseful and he was crying keeping the dead body of the deceased on his lap at the time the witnesses saw him. The Appellant himself has stated before the witnesses that the deceased fell down and her head hit on the stone Chakki. We also do not find any mark of external injuries on the site “below the right thigh” of the deceased which has caused fracture of that site of the body by referring to the post-mortem report. Such a fracture might have been caused due to awkward fall by the deceased, as she was suffering from fever and head reeling before the fall. In such a fall from a standing position a person falls with sufficient force awkwardly and parietal area of the head being the most vulnerable part, death can also be caused by simple fall with sufficient force hitting the parietal area of the head on a substance like alleged weapon of offence.

We do not substitute our opinion in place of the opinion of the Medical Officer. But our discussion supra regarding the alleged accidental death of the deceased is a probability in the proved fact and circumstances.

13. Hon’ble the Supreme Court in the case of *Anjan Kumar Sarma and Others v. State of Assam* (2017) 14 SCC 359 relying on *Kanhaiya Lal v. State of Rajasthan* (2014) 4 SCC 715, *Arjun Marik v.*

State of Bihar 1994 Supp (2) SCC 372, Bharat v. State of M.P. (2003)

3 SCC 106 in Paragraph-23 of the judgment has held thus:

“It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction....”

Keeping in mind the above principle, if we analyze the entire case, it is found that the only evidence that is there on record is that, the Appellant and his wife were together in the house when P.Ws.1 and 7 left for the market in the morning. Admittedly, there is no other evidence to prove the culpability of the Appellant so far as the offence alleged is concerned. Much less, no other circumstance has been proved by the prosecution except the circumstance of last seen together.

14. In view of such fact, plea of denial or silence of the Appellant during his examination under Section 313 of Cr.P.C. cannot be capitalized to form an additional link to find him guilty as suggested by Mr. Zafrulla, learned Additional Standing Counsel especially when

there is probability of accidental death of the deceased also and there was no marital discord between the Appellant and his wife.

15. In view of our discussion supra, we are constrained to hold that the prosecution has failed to discharge its burden of proving the case against the Appellant beyond reasonable doubt and the appeal, therefore, must succeed.

16. In the result, the conviction of the Appellant and consequent sentence recorded by learned Additional Sessions Judge, Dharamgarh in C.T. (Sessions) No.23 of 2016 are set aside. The appeal is allowed. The Appellant be released forthwith from custody, if his detention is not required in any other case.

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(C.R. Dash, J.)

M.S. Sahoo, J.

I agree.

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(M.S. Sahoo, J.)

Orissa High Court, Cuttack.
The 9th day of May, 2022.
L. Murmu, Senior Stenographer.