

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.36 of 2012

From the judgment of conviction and order of sentence dated 16.11.2011 & 18.11.2011 respectively passed by the learned Adhoc Additional Sessions Judge (F.T.C-II), Balasore in Sessions Trial Case No.54/24/252 of 2011/2008.

Babuli @ Sriram Patra

....

Appellant

-versus-

State of Orissa

....

Respondent

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellant

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Mr.D. Nayak
(Advocate)

For Respondent

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Miss.Samapika Mishra
Additional Standing Counsel

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K. PANIGRAHI

Date of Hearing : 01.12.2022 : Date of Judgment:08.12.2022

D.Dash,J. The Appellant, by filing this Appeal, from inside the jail, has called in question the judgment of conviction and order of sentence dated 16.11.2011 & 18.11.2011 respectively passed by the learned Adhoc Additional Sessions Judge (F.T.C-II), Balasore in Sessions Trial Case No.54/24/252 of 2011/2008 arising out Criminal Trial (G.R.) No.90 of 2008 corresponding to Khaira P.S. Case No.21 of 2008 of the Court of the learned J.M.F.C., Soro.

The Appellant (accused) thereunder has been convicted for commission of offence under section 302 of the Indian Penal Code, 1860 (for short, 'the IPC') and sentenced to undergo imprisonment for life.

2. Prosecution Case:-

On 18.02.2008 around 7.00 p.m., the accused came to the house of the deceased and called him to go to Village-Barpada to get a Video Cassette. The deceased (Subash Patra) then left with the accused in his bicycle. In the night, the accused alone returned to his house. When the father of the deceased enquired from the accused regarding the whereabouts of the deceased, he failed to give any satisfactory explanation about such non-return of the deceased. The members of the family of the deceased then went for search of the deceased. They did not get any trace or clue.

On 21.02.2008 around 2.00 pm, they came to know from some children, who used to tend goats of the villagers that a dead body was lying on the cultivable land in Village-Kalamuchua. The family members of the deceased immediately rushed to the place and saw the deceased lying dead with injuries. It is also stated that seven days before the incident, accused and one Raju Barik had a quarrel with the deceased and they had threatened the deceased with life. So, suspecting said accused and the Raju to have committed the murder of the deceased, the father of the deceased, namely, Sukadeb Patra (P.W.1) lodged a written report at Khaira Police Station. On 05.03.2008 around 8.30 p.m., the Officer-in-Charge of Khaira Police Station, having received the above written report, immediately registered P.S. Case

No.21 of 2008 and requested the Superintendent of Police, Balasore to depute one Deputy Superintendent of Police to take up investigation as according to him, the case involved as to commission of the offence under the provision of Scheduled Caste and Scheduled Tribe (Prevention of Atrocity) Act, 1989.

It be stated here that on 21.02.2008, the Informant (P.W.1) had gone to Khaira P.s. and reported regarding the death of his son, namely, Subash Patra (deceased) and the then Officer-in-Charge of Khaira P.S. had registered U.D. Case No.5 of 2008 and had directed the ASI of Police (P.W.15) to enquire into the matter.

In course of that enquiry, the ASI of Police had examined the Informant and other witnesses and recorded their statement. He had also gone to the spot, which is the paddy field of one Sudarmohan Panda. He found the dead body of the deceased lying there. On the next morning, he had held the inquest over the dead body of the deceased in presence of the witnesses and prepared the report (Ext.2). Having found eight pieces of split bamboos lying at the spot, he had seized those same in presence of the witnesses and prepared the seizure list. One full pant and one full shirt of the accused were then seized from the spot. He then collected the blood stained and sample earth from the spot under the seizure list (Ext.3). The dead body of the deceased was sent for post mortem examination. However, coming to know about the registration of Khaira P.S. Case No.21 of 2008 in connection with the said incident, he then closed the U.D. Case and handed over the record of the said U.D. Case to the Officer-in-Charge of Khaira P.S. (P.W.11). The Deputy Superintendent of Police (P.W.14), having taken over the charge of the investigation of the case from P.W.11, examined the Informant

(P.W.1) and other witnesses. He too visited the spot and prepared the spot map (Ext.8). The post mortem report (Ext.4) then being received, he arrested the accused on 15.03.2008. The accused was then forwarded in custody to Court. Finally, on completion of the investigation, he submitted the final form placing the accused to face the trial for commission of offence under section 302 IPC.

3. In the trial, the plea of the accused is that of complete denial and false implication.

In the Trial, the prosecution, in total, has examined eighteen (18) witnesses. Out of whom, as already stated, P.W.1 is the father of the deceased and the Informant of the case whereas P.W.2 is the mother of the deceased. P.Ws.3 & 4 are co-villagers, who are the witnesses to the inquest. The scribe of the FIR (Ext.1), which had been presented by P.W.1 at the Police Station, has come to the witness box as P.W.5. The Doctor, conducting the post mortem examination over the dead body of the deceased, has been examined as P.W.6 and the brother of the deceased, who arrived in the village after hearing from his parents has come to the witness box as P.W.7. P.W.8 is another brother of the deceased. The elder brother of the accused has been examined as P.W.9. P.W.10 is an eye witness to the seizure of the wearing apparels of the deceased. The ASI of Police, who had first made the enquiry into the U.D. case has been examined as P.W.15 whereas P.W.11 is the Officer-in-Charge, who had registered the case and taken some step in the investigation P.W.14 is the Deputy Superintendent of Police, who having taken charge of investigation from P.W.11 has completed the sdame.

Besides examining the above witnesses and leading evidence through them, the prosecution has also proved several documents, which have been marked Exts.1 to 11. Out of those, the important are: the FIR (Ext.1), inquest report (Ext.2), Post mortem report (Ext.4), chemical examination report (Ext.11), spot map (Ext.8) etc. During trial, the prosecution has also produced the split bamboos seized by P.W.15 from the spot (M.O.I to M.O.VIII) and the full pant and full shirt of the accused (M.O.IX & M.O.X).

The defence having not examined any witness has, however, proved the signature of the father of the deceased (P.W.1) on Ext.9, which is the UD FIR.

4. The Trial Court, on going through the evidence of the Doctor conducting the autopsy over the dead body of the deceased (P.W.6) and his report (Ext.4), taking a view over the injuries, as noticed by P.W.6 and their nature with the evidence of the ASI of Police (P.W.15) and others, has held the death of the deceased to be homicidal. This aspect was not challenged before the Trial Court and it is also the situation here.

The Doctor (P.W.6), having held the post mortem examination over the dead body of the deceased on 22.02.2008, has found one lacerated injury on right side mandible and cheek; one lacerated injury on the right side of upper lip and maxillary area of face; and one lacerated injury on the right side of temporal region. He had also noticed one fracture of shaft of right side of mandible below injury and depressed fracture of right side temporal bone which he has clearly noted in his report (Ext.4). This, being seen with other evidence on

record, such as the evidence of the ASI (P.W.15) and the inquest report prepared by him (Ext.2), this Court finds itself wholly in agreement with the view taken by the Trial Court that the death was homicidal.

5. Learned counsel for the Appellant submitted that the case of the prosecution is based on circumstantial evidence and no direct evidence has been tendered in implicating the accused to be the author of the injuries on the person of the deceased, which have resulted his death. He further submitted that the only circumstance relied upon by the prosecution here is the last seen theory, which according to him, has not also been established beyond reasonable doubt through clear, cogent and acceptable evidence. He further submitted that even if the evidence of the prosecution witnesses are accepted that the deceased had left their village Barapada with the accused in proceeding towards Village-Kalamchua, that itself is not enough to fasten the guilt of the accused in holding that it is he, who has committed the murder of the deceased when as the deceased did not return and the deceased was found to have met a homicidal death. He, therefore, submitted that when no such other incriminating circumstance is surfacing from the evidence of the prosecution witness, the Trial Court merely drawing certain inferences, which too are farfetched, has erred in fastening the guilt upon the accused. He submitted that in the present case, the prosecution has failed to prove the circumstances unerringly pointing the guilt at the accused and, therefore, the question of the chain of circumstances being complete does not arise. He further submitted that rather the circumstances projected by the prosecution being taken with other

evidence would show that those are compatible with the innocence of the accused.

6. Learned Additional Standing Counsel for the Respondent, while supporting the finding of the Trial Court in holding the accused guilty for commission of offence under section 302 IPC, has submitted that the prosecution, having led evidence that in the evening, the deceased and the accused had left their village together by bicycle during the evening hours and then during night, the accused when returned without the deceased and two days thereafter in the morning, when the deceased has been found lying in the paddy field of another; the accused can very well be said to be the perpetrator of the crime as in the meantime, nothing is shown to have intervened.

7. In order to judge the sustainability of the finding of the Trial Court in holding the accused guilty to have committed the murder of the deceased by inflicting the injuries on his person, in addressing the rival submission of the parties, let us now turn to the evidence on record.

As already stated, the circumstances projected by the prosecution here is that the deceased and accused were seen together in the evening of 18.02.2008 and in the night, the accused had returned whereas the deceased did not and on 21.02.2008, dead body of the deceased had been recovered.

P.W.1 is the Informant and father of the deceased. It is his evidence that on that day, around 7.00 p.m., the accused called the deceased and told him to come with him for watching video show at Villagae-Barpada and then the deceased went with the accused taking the bicycle of P.W.1 but did not return thereafter. He further states that

when the accused returned to his house around 2.00 a.m. to return his cycle, he was asked as to why the deceased did not return and then he replied that he came on his cycle and the deceased was coming through the paddy field. The accused and the deceased were good friends since their childhood days. When it is stated by P.W.1 in the FIR (Ext.1) that accused coming to the house of P.W.1 at 2.30 p.m. asked as to whether the deceased had returned home or not and he, in turn was being asked by P.W.1 that when both had gone together, how he was asking the whereabouts the return of the deceased. It is also mentioned in the FIR that in that night, the accused and P.W.1 with other two villagers had gone to search the deceased, but could not trace him. This part of the act of the accused in going to the house of the deceased and asking about his return and then joining P.W.1 in the search of the deceased is suppressed by P.W.1 for the reasons best known to him. However, it is seen that such conduct on the part of the accused to some extent stand to militate against the case of the prosecution that he is the perpetrator of the crime particularly, when no other evidence is available on record to show that the paddy field where the dead body of the deceased was lying was by the side of the road and the accused and the deceased had never reached that Village-Kalamchua to watch video show or had been to that paddy field. This witness has also stated that there was quarrel between the deceased and Raju Barik when the accused was simply present and then Raju Barik had threatened the deceased to finish him but not this accused. This P.W.1 when has lodged the U.D. FIR (Ext.9), has not stated such important fact that the deceased and accused had left in the evening and in that night, the deceased did not return whereas the

accused had been to his house, thereby in pointing suspicious finger at the accused for the said unnatural death at the accused.

The mother of the deceased has stated in the same vein that during evening hour, the accused came to their house and told her son (deceased) to go with him to fetch video cassette from Barpada whereas P.W.1 is saying that the accused asked him to go to that village to watch the video show and it is indicated in the FIR (Ext.1) that the accused asked the deceased to go to the village to bring video cassette when P.W.1 is stating that the accused had come to their house around 2.00 p.m. and had returned his cycle. Such an important fact is not stated by P.W.2. She rather states that around 2.00 pm, the accused came without bicycle. This P.W.2, during cross-examination, has stated that P.W.1 had not heard as to what had transpired between the accused and the deceased. Thus, there stands great variance in the evidence on matter P.W.1 & 2 on material particulars touching upon the base.

P.W.2 has not stated before the Investigating Officer when had been examined on 22.02.2008 that the accused had come to their house and told her son to go to Village-Barpada.

P.W.8 is the daughter of P.W.1 and sister of the deceased. She has stated that when her brother went with the accused, her mother (P.W.2) and she were present in the house. She is not stating about the presence of P.W.1. She has further stated that P.W.1 returned home at 8.00 p.m. and enquired from them as to where the deceased had gone. It is her evidence that around 2.30 a.m., accused came to their house alone on bicycle and then keeping the same in their house, asked P.W.1 as to whether the deceased had returned home or not and thereafter the accused replied that the deceased was returning through the paddy field.

She further states that hearing that from P.W.8; P.W.1 and accused went in search of the deceased. P.W.8 when states that the accused took P.W.1 towards the Panchayat Office for search of the deceased instead of taking towards paddy field, P.W.1 is not stating that the accused had taken him towards the Panchayat Office for search instead of taking him towards the paddy field. Although he states that prior to that, accused had disclosed before him that the deceased left his company and wanted to go through the paddy field and came as such; P.W.1 is silent as to why he did not go to the paddy field to search.

With the above prosecution evidence, when it is seen that the accused was present in that night in the village, We are unable to find out as to how the Trial Court so that the accused remained absconded. Mere presence of the human blood of Group-A on the pant of the accused here is of no significance when the blood group of the deceased has not been shown.

In view of the evidence, as already discussed, the motive is also not shown when the prosecution evidence that the deceased and the accused had a quarrel, some time before the incident has not been proved beyond reasonable doubt. Moreover, it runs against the normal human conduct that if they had the enmity, in the evening simply on a call being given by the accused, the deceased would sit on the back carrier of the cycle and go as such being driven by the accused to another village that too even without asking anything more as to when they would return. The conduct of other members of the family member, who claimed to be present at the relevant time is also very unnatural that knowing fully well about the enmity between the accused and deceased,

they would say nothing when the accused called the deceased and the deceased readily accepted to go with him on the bicycle.

8. In case of **Sudama Pandey -V- State of Bihar; (2002) 1 SCC 679**, the following points have been stated to be kept in mind for holding the matter to have been proved with the aid of circumstantial evidence:

- a) circumstances from which the inference had been drawn should be fully proved that they existed;
- b) all the facts that have been proved support the hypothesis of the guilt of accused;
- c) the chain of circumstances should be well connected and thus be completed so that it is conclusive; and
- d) the circumstances should toss out every possibility of the accused of being innocent.

9. Coming to the last seen in the theory doctrine, it be noted that this theory is found upon the principle of probability, cause and connection as no fact exists or takes place in isolation. Basically, it means that if an event happens then other event also occurs which are the probable consequences of the major event or is related to it either retrospectively or prospectively. These inferences or presumptions are drawn logically, according to how a reasonably prudent man will connect the dots in the prevailing scenario. It has its root with section-7 of the Indian Evidence Act called the 'Doctrine of Inductive Logic'. That states that if any fact related to the occasion cause or effect lead to the circumstance in which that thing occurred or it provided an opportunity in the occurrence of that thing then those facts will be relevant and in the last seen theory

also a person who was last present with the victim would have a reasonable opportunity to commit the crime.

This presumption of fact is taken under section-114 of the Evidence Act under which the Court can presume that certain facts exist, if some other facts are proved to be in cases of natural events, human conduct and public and private business. As for example if a person was the last person seen with another just before his murder, then it can be presumed that such a person murdered the other under this theory since that person had adequate scope and opportunity to commit the crime. Be that as it may, the presumption is not considered as conclusive proof of the guilt of the person and these are rebuttable. It only shifts the onus upon the person to prove that he is innocent which is an exception in the criminal law as the burden of the proving the guilt of the accused always lies upon the prosecution. Though the last seen theory relieves the prosecution of the onus of proving the guilt yet it is weak evidence and it needs to be corroborated with other factors like if there is motive with the person who was last seen with the deceased or he could have even inflicted the kind of injury that caused the death.

10. In case of **Jaswant Gir -V- State of Punjab; (2005) 12 SCC 438** it has been held by the Apex Court that if other links are not present to corroborate the theory, then it is not safe to solely base the finding on this theory. The fact of last seen should also be supported by other facts in such a way that the circumstances are unerringly determinative in nature and conclusively prove the guilt of the person. The Court thus has to be on guard when deciding these kind of matters as even minute details can change the whole scenario of the case.

11. The settled law for a case to be held proven entirely based on circumstantial evidence, as has been detailed out in catena of decision are that:-

- (a) every circumstance that leads to the guilt of the accused should be proved beyond reasonable doubt by the prosecution; and
- (b) all the circumstances should cogently depict the guilt of the accused leaving no incongruities, suspicions so as to lead to the establishment of the guilt beyond reasonable ground and not in a half-backed situation.

12. In case of **Digambar Vaishnab -V- State of Chhatisgarh; (2019) 4 SCC 522**, it has been held that there should be reasonable proximity between the time of seeing the person and recovery of the body to point the needle towards the person last seen with the deceased. However simply that they were last seen together cannot be the sole criteria to convict the accused. Last seen theory with other obtained circumstances negating the innocence of the accused can lead to base the conviction banking upon the doctrine of last seen. In some cases though there are huge time gap between the occurrence of the event and the time when last seen together still if the prosecution establishes the fact that no other person could have interfered or intervened as there was exclusive possession of the accused to the place where the incident occurred, then based on this, also the last seen theory can be established and presumption can be taken despite a huge time gap. **(Ref:-Satpal Singh -V- State of Haryana; (2010) 8 SCC 714.**

In view of what has been discussed hereinbefore, it can here be said that the circumstances projected by prosecution are not adequate to establish the guilt of the accused. The Trial Court has not considered the

above discussed vital aspect surfacing in the evidence for which the impugned judgment of conviction and order of sentence are vulnerable and thereby warrant interference.

13. For the foregoing reasons, We are of the considered view that the impugned judgment of conviction and order of sentence cannot be sustained in the eye of law.

14. In the result the Appeal is allowed. The judgment of conviction and order of sentence dated 16.11.2011 & 18.11.2011 respectively passed by the learned Adhoc Additional Sessions Judge (F.T.C-II), Balasore in Sessions Trial Case No.54/24/252 of 2011/2008 are hereby set aside. The Appellant (Accused) being on bail, the bail bonds shall stand discharged.

**(D. Dash,
Judge.**

Dr.S.K. Panigrahi, J ★ I agree.

**(Dr.S.K.Panigrahi)
Judge.**

Basu