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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.3 of 2012

Banda Karkaria

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in these cases:

For Appellant

:

Ms. Mandakini Panda,
Advocate

For Respondent

:

Mr. J. Katikia,
Additional Government Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE R.K. PATTANAİK

JUDGMENT

18.07.2022

Dr. S. Muralidhar, CJ.

1. The present appeal is directed against a judgment and order dated 21st October 2011 passed by the Adhoc Additional Sessions Judge (FTC), Gunupur in Criminal Trial Case No.3 of 2010 convicting the Appellant for the offence under Section 302 read with 34 IPC and sentencing him to undergo imprisonment for life and to pay a fine of Rs.5000/- and in default to undergo RI for one year.

2. The case of the prosecution is that at 10 am on 17th May 2009, in village Tadingipai, Kuinla Karkaria, the son of the accused, took the deceased boys Biju Kausalya aged 3years and Sahadev Mahanandia aged 5years while they were playing. This was seen by Rajani Kausalya (P.W.11), daughter of Bhima Kausalya (P.W.1), who was the Informant. It is stated that one of the deceased boys Biju is the son of P.W.1 and the other Sahadev is the son of Kartik Mahanandia (P.W.2).

3. At around 12 noon, accused with his son and wife left the village on the pretext that his mother was ill. The accused originally belonged to village Rebalkana, but he had come to the village Tadingipai two years prior to the incident. At that time the villagers of the Tadingipai did not pay much importance to the accused leaving the village with his family. However, when by 2 pm, the deceased boys did not return home, the villagers searched for them, but could not trace them out. In the course of search on the following morning at around 6 am, the villagers found the bodies of the boys lying dead with injuries on their necks at the Lamba Kupuli land.

4. The accused was not pulling on well with P.W.1 and was quarreling with him. He had threatened to do away with the children of P.W.1. The villagers accordingly had doubts about the involvement of the accused as well as his son in the murder of the two young boys. P.W.1 presented a written report (Ext.4) at Bissamcuttack Police Station on 18th May 2009, and the FIR was

thereafter registered against both the accused as well as his son Kuinla Karkaria @ Santosh.

5. An inquest was held of the dead bodies of the two deceased. A knife was seized as well as one torn towel, bloodstained earth and sample earth from the spot. The two bodies were sent to the Bissamcuttack Hospital for post-mortem examination.

6. The police arrested the accused and his son at Chintalaguda on 19th May 2009 and seized their wearing apparels i.e., dhoti and shirt. The accused led the police to discover one katuri, one photo of deity, one shirt and jean pant from the house of the accused, which was seized under a seizure list Ext.9. The nail clippings of the accused were also collected. The seized articles were sent for chemical examination.

7. On completion of the investigation, a charge was laid against the accused. The son of the accused being minor and juvenile, his case was sent up to the designated court and the case in sessions court proceeded only against the present accused.

8. The accused pleaded not guilty and claimed trial.

9. The prosecution examined 14 witnesses. No witness was examined for the defence.

10. This is a case based on the circumstantial evidence. To recapitulate the law in relation to cases of circumstantial evidence, in *C. Chenga Reddy v. State of A. P. (1996) 10 SCC 193*, it was explained as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

11. In *Padala Veera Reddy v. State of A.P. AIR 1990 SC 79*, it was held that the following tests must be satisfied in a case based on circumstantial evidence.

"10...(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."

12. The trial court in the instant case has culled out the following circumstances as having been proved by the prosecution to establish the guilt of the accused:

(i) Both the deceased boys were seen last with the son of the accused.

(ii) There was previous enmity between P.W.1 and the accused and the accused had threatened P.W.1 that he would do away with his child.

(iii) Soon after the two boys went missing, the accused and his entire family left village Tadingipai.

(iv) On the arrest of the accused, he made a disclosure which led to the recovery of the katuri, the weapon of the offence.

(v) The medical evidence and the serological evidence established the connection of the accused with the crime. The bloodstains found on the wearing shirt of the accused belonged to the human group of one of the deceased and this clinched the case for the prosecution.

13. As regards the last seen theory, the Court would like to first recapitulate the legal position in that regard. In ***State of U.P. v. Satish (2005) 3 SCC 114*** it was held as under:

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last 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. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

14. In *Ramreddy Rajesh Khanna Reddy v. State of A.P. (2006)* 10 SCC 172 it was explained:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case the courts should look for some corroboration".

15. The two deceased boys were seen last playing at around 10 am when the son of the accused picked them up and took them with him. This was seen by P.W.11, the daughter of P.W.1. The time when the boys went missing was proximate to the time when the accused was seen leaving the village with his family members on the pretext of illness of his mother. This was around 12 noon. Therefore, the time the accused left the village with the boys and his son and the discovery of the dead bodies at 6 am the next morning was proximate enough to make the causal connection. Yet, there is a need to look for further corroboration.

16. P.W.1 has spoken about the fact that the accused was doing witchcraft and worshipping the deity “Majhi Gouria”. He also spoke of the accused slaughtering hens of the villagers and on the protest lodged by P.W.1, the accused had quarreled with him.

17. The cross-examination of P.W.1 has not yielded much for the defence. It has strengthened his deposition on each of the above factors namely, the accused started beginning to stay at the village two years prior to the incident; P.W.1 hearing from P.W.11 that the deceased boys were seen going with the son of the accused at around noon; and P.W.11 objecting to the son of the accused taking the boys and the accused seen leaving the village at around 12 noon. The distance between the village and the location where the bodies were found as indicated in the spot map is so great as to doubt the case of the prosecution.

18. The above deposition of P.W.1 has been corroborated by P.W.2, the father of the other deceased boy Sahadev. He too mentioned P.W.11 seeing the deceased boys go with the son of the accused at 10 am and they were not returning thereafter. He too said that initially, the accused was serving as a cattle herdsman, but subsequently started doing Puja and used to slaughter hens as offerings to the deities. When the villagers opposed, the accused threatened to do away with their children. Although, P.W.2 admitted in cross-examination that he was not on talking terms with the accused, there was no cross-examination

to doubt the essential part of his testimony which completely corroborated the testimony of P.W.1. Consequently, the Court is not satisfied that the circumstance of previous enmity has not been proved or that it somehow discredits the P.W.s who have spoken about it. The case on hand is factually different from the case in *Sanjit Mandal v. State of Odisha 2019 (III) ILR-CUT-626* which has been relied upon by the counsel for the Appellant.

19. The testimony of P.W.11 is also relevant for the prosecution. It was she who saw the two boys being taken away by the son of the accused. She questioned him as to where he was taking the boys to which he replied that he was taking them to give them mangoes and that they would return thereafter. She also noticed the accused putting on a “gerua dress” and going towards Lumbakupuli. When the clothes of the accused were seized, they were also of the gerua colour. Her statement “I saw the accused with his son came in a hurried manner, vacated the house and left for his village saying the mother of the accused was ill” is also relevant. She saw the dead bodies of both the boys lying at a Mahula tree in Lumbakupuli land with cut injuries and bleeding from their throat.

20. Although P.W. 11 states in her cross-examination that “Police babu gave me in writing which I have deposed in the court. One Susila had read over to me. She might have read over 3 to 4 times to me. I have kept in memory and deposed today in the Court.”; nevertheless, if one reads the entire transcript of her cross-

examination, it does not as appear that she has been tutored to give her deposition. The essential part of the testimony about her seeing the two deceased boys last in the company of the son of the accused has remained unshaken. She denied the suggestion to her that she is deposing falsely against the accused “being tutored by the police”. Rustic villagers would have to be given some margin of appreciation in their recalling of the events. The Court is unable to discard the entire evidence of P.W.11 as being tutored only to somehow help the prosecution. The Court is satisfied that the prosecution has been able to establish the last seen theory as well as the motive for the crime.

21. It was sought to be submitted on behalf of the Appellant that between the village and the place where the bodies were found, there were intervening areas busy with people and some independent witness ought to have been examined. It is not unnatural for lay persons among the public to avoid being witnesses in court proceedings. The lack of independent witnesses will not per se weaken the case of the prosecution. The Court has in such circumstances to exercise caution while examining testimonies of the ‘interested’ or ‘related’ witnesses and seek independent corroboration. That the trial Court has indeed done in the present case.

22. Coming now to the disclosures and the seizures. It is seen from the evidence of P.W.12 that the accused admitted to having kept the katuri and other articles in a bag in his house. The

accused was then taken to village Tadingipai and brought out a bag from the house which contained a photo of deity “Majhi Gauri”, one kati and the dress of the son of the accused which was stained with blood. No doubt, P.W.12 states that he signed the papers at the police station, but there is nothing to indicate that he did not actually witness the making of the statement by the accused and the accused taking the police to effect the recoveries.

23. The trial court has noted that there was no bloodstain on the katuri MO-III, but the medical officer (P.W.10) confirms that the injuries found on the two boys were possible with it. The fact that the photo of the deity was seized from the house corroborated the statement of the witnesses about the accused doing Puja.

24. The clinching circumstance was the presence of bloodstains on the t-shirt of the accused. The seized banian was red in colour. As per the chemical examination report, the t-shirt contained human blood of Group-B. The bloodstained earth also contained human blood of Group-B. As noted by the trial court, the Group-B blood was of one of the deceased and was found on the shirt of the accused.

25. This was perhaps the most clinching piece of evidence connecting the accused with the crime. The Court is, therefore, satisfied that each of the links in the chain of circumstances has been established against the accused by the prosecution and they

form one continuous chain which go to point to the guilt of the accused, and no one else, beyond reasonable doubt.

26. The Court is satisfied that the trial court has committed no error in holding the accused guilty of the offence under Section 302/34 IPC and in sentencing him in the manner indicated hereinbefore. There is no merit in the appeal and it is dismissed as such.

S.K.Guin/ Sr. Stenographer



(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge