

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRIMINAL APPEAL No.316 of 2020

(From the judgment dated 28th February, 2020 passed by Sri Sushil Kumar Rout, learned Additional Sessions Judge, Karanjia in S.T. Case No.56 of 2018)

Dora Mohakud

....

Appellant

-versus-

State of Orissa

....

Respondent

Advocate(s) appeared in this case:-

For Appellant : Mr. Arijeet Mishra, Advocate

For Respondent : Mrs. Saswata Pattnaik,
Additional Government Advocate

**CORAM: JUSTICE S. TALAPATRA
JUSTICE B.P. ROUTRAY**

JUDGMENT
28th June, 2022

B.P. Routray, J.

1. Present appeal is directed against the judgment of the learned Additional Sessions Judge, Karanjia convicting the Appellant for commission of offence under Section 302 of the Indian Penal Code (in short "I.P.C.") and sentencing him to life imprisonment along with fine of Rs.20,000/-.

2. The deceased-Shantilata Mohakud is the elder sister of the Appellant. Their house situated adjacently in the same village –

Bandiraposhi. The deceased was aged about 60 years on the date of occurrence and the Appellant was around 46 years.

3. On 28.6.2018 during evening hour some quarrel ensued between the Appellant and the deceased regarding the death of a hen of the Appellant. As per the prosecution allegations, the Appellant killed the deceased by assaulting him by means of a spade (KODALA).

4. FIR in Jashipur P.S. Case No.70, dated 28.06.2018 was lodged by P.W.1, namely, Nandini Mohakud, the daughter-in-law of the deceased, who resides in another village which is about 4 kilometers away from the place of occurrence. She lodged the FIR stating that she got an information from one Sarat Chandra Mohanta that the deceased was killed by her brother-Dora Mohakud. When she reached at the spot found the deceased lying dead on the village road and on her query, she came to know from the villagers about the killing of the deceased by the Appellant by means of a spade.

5. P.W.22 – Reena Baxla, the Sub-Inspector of Police registered the FIR and took up investigation forthwith. The Appellant was arrested in the next morning at about 6.00 a.m. P.W. 22 held inquest over the dead body and sent the same for post mortem examination to Karanjia Sub-Divisional Hospital. Dr. Gouranga Charan Nayak (P.W.15) conducted the autopsy over the dead body and found one cut injury of size 7 cm x 6 cm x 4 cm below the occipital region on the left side of the head. It was a deep seated injury and ante mortem in nature.

6. In course of investigation, P.W.22 examined many witnesses, visited the spot, seized the wearing apparels of the deceased as well as the Appellant.

7. The Appellant while in Police custody stated to have confessed before the Police regarding commission of murder of the deceased and gave recovery of the weapon of offences, i.e. the spade from his Bari (back-yard) land. Upon completion of investigation, the charge-sheet was submitted for the offence under Section 302, I.P.C.

8. The Appellant faced the prosecution taking the plea of complete innocence and false implication.

9. The prosecution examined as many as 22 witnesses in support of their case and further, exhibited 15 documents marked as Ext.1 to Ext.15. No material object was produced and marked by the prosecution in course of the trial.

10. On the other hand, no evidence was led from the side of the defense, either documentary or oral.

11. Learned trial court upon completion of trial convicted the Appellant with the finding that the alleged offence was committed by him and accordingly held him guilty for commission of the offence under Section 302, I.P.C.

12. It is strenuously argued by Mr. A. Mishra, learned counsel for the Appellant that absolutely no material is there against the Appellant to convict him for the alleged offence. But the learned trial court based

on the statement of the I.O. with regard to the alleged confession made by the Appellant while in Police custody leading to discovery of the weapon of offence has convicted the Appellant.

13. Conversely, Mrs. Saswata Pattnaik, learned Additional Government Advocate submitted supporting the impugned judgment that to prove a fact discovered under Section 27 of the Indian Evidence Act does not require corroboration from the independent witnesses and on the basis of such evidence, as relevant under Section 27 of the Indian Evidence Act, the conviction can be well founded.

14. First of all, the homicidal nature of death of the deceased is not disputed by the Appellant. Otherwise also it is established from the evidence of the autopsy Doctor (P.W.15) that the deceased died homicidal death. As per the opinion of P.W.15, the cause of death was due to homicidal type of injury with massive hemorrhagic shock as a result of the cut injury found below the occipital region of the left side head. Going through the evidence of P.W.15 and the inquest report prepared under Ext.2 as well as the post mortem report under Ext.9, it can safely be concluded that the deceased died with homicidal nature of death.

15. Admittedly no eye-witness is there who have stated to have been seen the occurrence. Among all such 22 witnesses examined by the prosecution, besides the I.O. (P.W.22) and the autopsy Doctor (P.W.15), the only relevant witness found is the informant, P.W.1. Amongst other witnesses, P.W.2, 4 & 7 have turned hostile; P.W.10, 16, 17, 18 & 21 have stated that they do not know anything about the

occurrence; P.W.3 is the scribe of the FIR; P.W.5, 6, 8, 9, 14, 19 & 21 are the seizure witnesses; and P.Ws.12 & 13 who are two other daughters-in-law of the deceased are witnesses to the inquest only.

16. As per the contents of the FIR under Ext.1, the informant admittedly had not seen the occurrence, but came to know about the occurrence from one Sarat Chandra Mohanta. This Sarat Chandra Mohanta, P.W.2 has turned hostile as stated earlier. Going through the evidence of P.W.2, the admissible part of his evidence is to the effect that while returning to his village, he found the deceased lying on the road and then he informed the same to P.W.1 over telephone.

17. Now looking to the evidence of P.W.1, It is seen that upon getting information from P.W.2 when she reached at the spot, found the deceased lying dead on the road and she came to know from other villagers, that just prior to the death there was an altercation between the deceased and the Appellant and in course of such altercation, the Appellant killed the deceased. But this P.W.1 does not say the name of any such particular villager from whom she got the information about the altercation and killing of the deceased by the Appellant. So such evidence of P.W.1 with regard to the alleged altercation and assault by the Appellant on the deceased is found to be in the nature of hearsay evidence and thus inadmissible in absence of disclosure of the source of information. Because, the person who actually has perceived it in his sense should make the statement and no one else since truth is diluted and diminished with each repetition. It is observed in the case of *Kalyan Kumar Gogoi -vs- Ashutosh Agnihotri*, (2011) 2 SCC 532 that,

“38. The reasons why hearsay evidence is not received as relevant evidence are:

(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is concerned, he has a line of escape by saying “I do not know, but so and so told me”

(b) truth is diluted and diminished with each repetition, and

(c) if permitted, gives ample scope for playing fraud by saying “someone told me that....”. It would be attaching importance to false rumour flying from one foul lip to another. Thus statements of witnesses based on information received from others is inadmissible.”

18. As seen from the impugned judgment, the learned trial court has heavily relied on the evidence of the I.O. (P.W.22) regarding the confession made by the Appellant before her while in Police custody to give recovery of the weapon of offence, i.e. the spade allegedly concealed by him in his Bari land (back-yard land) beneath a bush. Said weapon was seized by preparing the seizure list under Ext.3. P.Ws.4 & 7 who are independent witnesses to such seizure of the weapon recovered at the instance of the Appellant have not supported such evidence of the I.O. They have categorically denied about any confession made by the Appellant before P.W.22 in their presence and they further denied about seizure of anything by Police in their presence. Learned trial court despite such denial by the independent witnesses has believed the statement of P.W.22 to establish the fact of leading to discovery of the weapon of offence at the instance of the

Appellant and upon his information. This is seriously challenged by the Appellant before this Court.

19. In terms of Section 27 of the Indian Evidence Act so much of such information as relates distinctly to the fact discovered in consequence of the information received from the accused while in Police custody, is relevant. As explained in the famous case of *Pulukuri Kottaya* (AIR 1947 PC 67), normally the Section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.

20. It is true that to prove the evidence of discovery of a fact under Section 27 of the Indian Evidence Act, independent corroboration to the evidence of the Police Officer is not the thumb rule. It cannot be expected that in every case such statement of the Police Officer should always be supported by independent witnesses. It is the experience of all courts that independent witnesses turn hostile for many reasons. To believe the evidence of the Police Officer in this regard, the facts of each case are to be appreciated accordingly.

Coming to the given facts of the instant case, the alleged weapon of offence is a spade (KODALA), which is commonly available to each villager as an useful tool for agricultural purpose. The place of recovery is allegedly the back-yard land of the Appellant. This means finding a spade on the back-yard land of any villager is not uncommon.

21. The next important factor is that the alleged weapon of offence was not produced before the trial court and no reason has been explained for non-production of the same. Though as per the prosecution case and the chemical examination report under Ext.15, said weapon (spade) was containing stain of blood of human origin, still grouping of such human blood-stain could not be ascertained. Again the blood group of the Appellant was also not ascertained. The prosecution has failed to determine the blood group of the Appellant though his sample blood was taken. The blood group of the deceased has been determined of 'A' grouping. However in absence of any definite opinion of grouping on the smear of blood found on the spade, the mere opinion regarding finding of blood stain of human origin will not suffice the purpose to connect the spade conclusively with the injuries found on the body of the deceased. Moreover, non-production of the alleged weapon of offence before the trial court also plays a great role to cast doubt on prosecution case.

22. As stated earlier this is a case of circumstantial evidence where no direct eye-witness is there. In such cases, the law is settled that every such circumstance sought to be used against the accused must be of conclusive in nature. The Hon'ble Supreme Court of India in the case of *Sharad Birdhichand Sarda vs. State of Maharashtra*, AIR 1984 SC 1622 have elucidated five golden principles on appreciation of evidence in such cases, which are as follows:

- i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The

circumstances concerned 'must or should' and not 'may be' established;

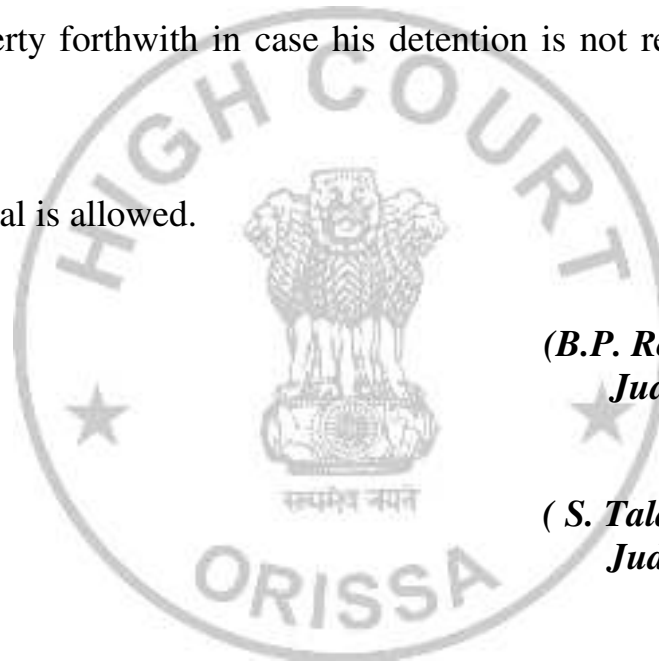
- ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- iii) The circumstances should be of a conclusive nature and tendency;
- iv) They should exclude every possible hypothesis except the one to be proved; and
- v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

23. In the instant case, as it is seen from the discussions made in the earlier paragraphs, the only circumstance brought against the Appellant is relating to discovery of the alleged weapon of offence. It is true that according to P.W.15, the injury noticed on the dead body of the deceased could be possible by such weapon of offence. Nonetheless, it is also important on the part of the prosecution to satisfy the court by establishing a creditworthy connection regarding that weapon of offence and the accused. When the alleged weapon of offence is not produced before the court in course of trial and the seizure of the same at the instance of the accused leading to discovery is denied by both the independent witnesses, then it becomes a weaker circumstance to be used against the accused. Thus the learned trial court has committed error here because every circumstance must point towards the guilt of

the accused unerringly. When there is no other circumstance brought against the Appellant to establish his guilt, the conviction recorded by the learned trial court based on this weaker circumstance is unsustainable. As such we are inclined to hold in favour of the Appellant that the prosecution has failed to prove the charge beyond all reasonable doubts.

24. Resultantly, the Appellant is not held guilty for murder of the deceased and he is acquitted of the charge under Section 302, I.P.C. He be set at liberty forthwith in case his detention is not required in any other case.

25. The appeal is allowed.



(B.P. Routray)
Judge

(S. Talapatra)
Judge

B.K. Barik/Secretary