

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 14 of 2011

Shiba Dandasena

....

Appellant

-versus-

State of Odisha

....

Respondent

Advocates appeared in the cases:

For Appellant

:

Mr. Debashis Mishra, Advocate

For Respondent

:

Mr. Janmejaya Katikia
Additional Government Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

JUDGMENT

11.08.2022

संयुक्त न्याय

Dr. S. Muralidhar, CJ.

1. The present appeal is directed against the Judgment dated 10th February 2009 of the Sessions Judge, Kalahandi-Nuapada at Bhawanipatna in Sessions Case No.42 of 2007, convicting the Appellant for the offence punishable under Sections 302 and 309 IPC and sentencing him to undergo imprisonment for life for the offence punishable under Section 302 of IPC and to undergo simple imprisonment for one year for the offence punishable under Section 309 of IPC. Both the sentences were directed to run concurrently.

2. At the outset, it must be noted that by the order dated 2nd May, 2018 the Appellant was enlarged on bail by this Court during the pendency of the appeal as he had served more than eleven years in custody by then.

3. The case of the prosecution is that the Appellant, a resident of village Goda-bhanja, married the deceased Hema and they had a son. The Appellant suspected the fidelity of his wife. On 13th November, 2006 in the morning, the Appellant with his wife and son went to their field for reaping paddy. At around 11 am, the Appellant inflicted a cut blow by his axe (MO-I) on the rear side of the neck of the deceased while she was reaping paddy. She died instantaneously on the spot.

4. Fearing the consequences, the Appellant tried to end his life by hanging from the nearby Neem tree by a rope. However, his mother (PW-8) arrived there and called out aloud. Upon hearing her cries, the cousins of the Appellant (PWs-2 and 3) arrived there. Chaitanya Dandasena (PW-3) climbed up the tree, cut the rope and brought the Appellant down. They administered water to him and he was saved. The police who were informed over telephone then reached there. They arrested the Appellant immediately and sent him to the hospital for treatment.

5. An inquest was held over the dead body of the deceased in the presence of the Executive Magistrate (PW-1). The instruments used in the reaping, i.e., two sickles and the axe (MO-I) by which the Appellant had killed his wife was lying at the scene of occurrence and these were seized by the Police.

6. The post-mortem of the dead body of the deceased was performed and her wearing apparels, the bloodstained soil and sample soil collected from the spot, and the bloodstained axe were all seized and sent for chemical examination. The report of chemical examination showed that they were stained with human blood. Thereafter, the charge-sheet was filed and the Appellant pleaded not guilty.

7. On behalf of the prosecution, fifteen witnesses were examined. The Appellant examined himself as DW-1 and claimed that on the relevant date he had gone to the jungle to fetch firewood in the morning and returned only at 4 pm. While returning, he found his wife lying dead with a cut injury. He further claimed that the villagers had chased him in order to assault. So, out of fear, to save his own life he climbed up the neem tree.

8. On an analysis of the entire evidence, the trial Court came to the conclusion that the prosecution had proved the guilt of the Appellant beyond all reasonable doubts and proceeded to convict and sentence him in the manner indicated hereinbefore.

9. This Court has heard the submissions of Mr. Debashis Mishra, learned counsel appearing for the Appellant and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

10. This is a case of circumstantial evidence. The law in relation to the circumstantial evidence is well settled. In ***Mahmood v. State of U.P. (1976) 1 SCC 542***, it was held as under:

“(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

11. These principles have been summarized and reiterated in ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116*** as under:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a

*legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in **Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793**, where the following observations were made: [SCC p. 807, para 19: SCC (Cri) p. 1047]*

‘19..... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between “may be” and “must be” is long and divides vague conjectures from sure conclusions.’

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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.”

12. In the present case, the prosecution has sought to prove the following circumstances, which according to it, form a continuous chain and pointed unerringly to the guilt of the accused:

(i) The Appellant suspected the fidelity of his wife;

(ii) From the evidence of PW-8, the Appellant's mother, who turned hostile, it was clear that the Appellant had gone that morning with his wife and young son to the field to reap paddy. In between, the Appellant returned with his son and left him with PW-8 and ran back to the field. Therefore, the Appellant was last seen with the deceased prior to her death.

(iii) The deceased died a homicidal death;

(iv) PWs-8, 2 and 3 have consistently spoken about finding the accused hanging from the neem tree and about cutting the rope to bring him down;

(v) The chemical examination report revealed the presence of human blood on the Tangia found at the spot.

(vi) The Appellant's plea of *alibi* was totally unconvincing and not proved by credible evidence.

13. In order to prove that the Appellant was last seen with the deceased and that his plea of alibi was false, the prosecution relies on the evidence of PW-8, his mother. Although PW-8 was declared hostile at the trial, there is enough in her examination in chief evidence to prove the above circumstance of last seen. In her examination-in-chief itself she stated "at that time my son-Siba and deceased had gone to our field to cut paddy crops. Except my

accused-son and deceased-Hema none else was present”. In her cross-examination, she admitted that she had stated before the police that the Appellant had married the deceased ten years prior to the incident and that he and the deceased were living separately from her; that her son and the deceased had gone to *Khalia duli* carrying mid-day meal. She further stated that the Appellant had brought his son at about 10 to 11 am “to our threshing floor”; that after leaving his son he “ran towards our land”; that she had followed the Appellant carrying his son “to know the reason of his running” and that “I saw the accused was attempting to commit suicide from neem tree situated on ridge of our *Khalia duli* land...and I shouted Dhan Dhan and hearing my shout Padman, Chaitan, Keshab, Puspa and others arrived there and rescued my son.” She further stated “It is a fact that I have stated before Police that son of accused cried and told to go near his mother, then I went the land where paddy was being cut at *Khalia duli* and found Hema lying dead.”

14. The above admission brings out clearly that it was the Appellant alone who was present with the deceased at the relevant time in the paddy field and no one else was present. The above evidence also puts paid to the attempt made by the Appellant, who examined himself as DW-1, to prove that he was not present at the field but in the jungle at the relevant time. According to him, when he was returning from jungle at around 4 pm, he noticed his wife lying dead with a cut injury and villagers had gathered there.

He then states, “the villagers chased me to assault” and in order to save his life, he “climbed up a neem tree”. This is contradicted by the evidence of his own mother, PW 8, who stated that she found him hanging from the tree. This part of her evidence was also corroborated by PWs-2 and 3, both of whom said that on hearing their aunt, i.e., the mother of the deceased, call out, they rushed to the paddy field and noticed the Appellant attempting to commit suicide by hanging himself by means of a rope. Therefore, the evidence of the Appellant (who examined himself as DW-1) is unbelievable and unconvincing.

15. Although PW-2 was also declared hostile by the prosecution at the trial since he did not totally support the case of the prosecution, he did mention about rushing to the field on hearing the cries of PW-8 and about the Appellant attempting suicide. This is corroborated by PW-3, who remained unshaken in his cross-examination.

16. In ***Sat Paul v. Delhi Administration AIR 1976 SC 294***, the Supreme Court explained the circumstances in which the evidence of a hostile witness need not be excluded altogether. The Supreme Court observed as under:

“42. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party

with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross- examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross- examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

xx xx xx

52. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the

witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

17. The above decision was followed in ***Krishan Chander v. State of Delhi AIR 2016 SC 298***. Therefore, as regards the circumstance of last seen, it has been convincingly proved by the evidence of the two hostile witnesses PWs 2 and 8, corroborated by the evidence of PW 3.

18. The next circumstance which is clearly proved is that the death of the deceased was homicidal. Dr. Rabindranath Singh (PW-4) conducted the post-mortem and noticed the following injuries over the dead body:

“Incised cut injury on the neck (backside of neck) on the level of 3rd cervical vertebra of size 2 ½ inch X 1 inch X ½ inch obliquely situated, which is ante mortem in nature.”

19. The cause of the death was due to neurogenic shock and haemorrhage due to heavy blow on the backside of the neck by a heavy and sharp cutting weapon.

20. Interestingly, PW-4 also examined the Appellant and proved that there was a ligature mark around the upper portion of his neck and it was simple in nature, caused by a rope. This, therefore, clearly proved the attempt by the Appellant to commit suicide. The presence of human blood on the Tangia was also proved. This was another circumstance that completed the chain

of proved circumstances. This remained unshaken although the blood group may not have been established.

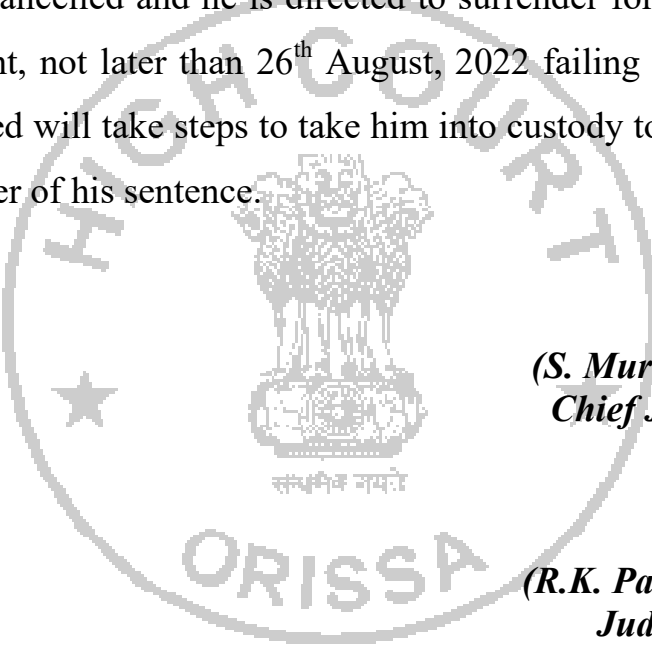
21. It was sought to be argued that there was no motive for the commission of the crime. In any event, as explained in *Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372*, which reads as under:

“10. Mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

22. In the present case, since all the other circumstances have been clearly proved and all of them, when taken collectively, point to the guilt of the Appellant beyond reasonable doubt, and exclude the possibility of anyone else being the perpetrator, the absence of proof of motive by itself does not weaken the case of the prosecution.

23. For all of the aforementioned reasons, the Court is satisfied that the prosecution has been able to establish each of the links in the chain of circumstances, which form a continuous chain, and which point unerringly to the guilt of the Appellant and no one else.

24. The judgment of the trial Court is accordingly affirmed and the appeal is dismissed. The bail bonds of the Appellant are hereby cancelled and he is directed to surrender forthwith and, in any event, not later than 26th August, 2022 failing which the IIC concerned will take steps to take him into custody to serve out the remainder of his sentence.

The seal of the Orissa High Court is a circular emblem. It features the State Emblem of India at the top center, which is a four-lion capital of an abacus. Below the emblem is the motto 'सत्यमेव जयते' in Devanagari script. The words 'HIGH COURT' are written in a semi-circle above the emblem, and 'ORISSA' is written in a semi-circle below it. A five-pointed star is positioned to the left of the emblem.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

M. Panda