

IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.04 of 2011

From the judgment of conviction and order of sentence dated 30th November, 2010 passed by the learned Ad-hoc Additional Sessions Judge, FTC No.3, Bhubaneswar in Criminal Trial (Sessions) No.16/78 of 2007.

Bichitrananda Nath

....

Appellant

-versus-

State of Orissa

....

Respondent

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

For Appellant

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Mr. S. Behera
Advocate

For Respondent

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Mr.S.K. Nayak
Additional Government Advocate

CORAM:

MR. JUSTICE D.DASH

DR. JUSTICE S.K.PANIGRAHI

Date of Hearing : 27.10.2022 : Date of Judgment:01.11.2022

D.Dash,J. The Appellant, by filing this Appeal, from inside the jail, has assailed the judgment of conviction and order of sentence dated 30.11.2010 passed by the learned Ad-hoc Additional Sessions Judge, (FTC No.3), Bhubaneswar in Crl. Trial (Sessions) No.16/78 of 2007. The Appellant(accused) thereunder has been convicted for commission of offence under section 302/201 of the Indian Penal Code, 1860 (for short, 'IPC') and accordingly he has been sentenced to undergo imprisonment for life and pay fine of Rs.2000/- in default to undergo

rigorous imprisonment for 3 months for the offence under Section-302 IPC and rigorous imprisonment for 3 years and fine of Rs.2000/- in default to undergo rigorous imprisonment for 3 months for the offence under section 201 IPC with the stipulation that the substantive sentences would run concurrently.

2. On the 9th Day of September, 2006 around 12.30 pm one Dologobinda Das, the brother of the deceased namely, Kaibalya Das who happens to be the informant of the case (P.W.10) received information from the Congress Bhawan, Bhubaneswar that his brother Kaibalya had been murdered inside the quarter No.VA/31/4 at Unit-2, Bhubaneswar. Having received such intimation, he immediately rushed to the Congress Bhawan and then came to the quarter. There in the drawing room of the said said quarter, he found a pool of blood on the floor and lump of flesh and one cut finger lying on the floor where the walls too had the blood stains. He noticed the dragging signs from the blood spread over the floor of that room towards the latrine of the house. Proceeding towards latrine, he found that one half cut palm of a person was protruding and the dead body was found to have been concealed in the said latrine covered by a bed roll (durri) that being removed from the dead body in presence of police and others, he saw that it was his brother, Kaibalya with several cut injuries right from the lower part of the lip and neck and major portion of the neck had been cut. Several marks of assault on his neck, backside of the head and so also on the upper portion of the chest, left hand, left palm could be seen. There was deep cut injuries too. Then it was ascertained from Ranjan Kumar Sahoo (P.W.-14) and Trilochan Dharua (not examined) that on the fateful day during the morning hours in between 6.30 to 7 am, the accused had come to that quarter as he was working as a Peon and then this Kaibalya

who too was a Peon in the Congress Bhawan had come with him. Ranjan being asked by the accused told that he would be remaining in the quarter till 10 am and accordingly, he went away from the quarter to come later and thereafter intimated Ranjan over phone from the Congress Bhawan that he would take rest in the said quarter for about 2-3 hours and as told by Ranjan, accused had gone to the quarter with the deceased. He then asked Trilochan Dharua who was working as a cook in that quarter and staying with Ranjan to leave the quarter on the pretext that he and deceased have some personal work to be done in the said quarter. The accused then locked the grill gate of that quarter from inside when Trilochan Dharua left the place. On return, Trilochan Dharua however found the grill gate to have been locked from outside and so also the door of the drawing rooms remaining closed. He pushed the calling bell but that went without any response. The grill gate was opened after arrival of Ranjan with the help of duplicate key and they found the door of the drawing room then was half closed. Having entered the entrance room, they were frightened to see lump of flesh and blood on the floor. So they came out and climbed over the roof and found the that Kaibalya who had come with the accused, was lying dead. It is stated that accused had quarrel with the deceased prior to that and it too had taken place many a times before, when the accused had given life threat to the deceased. From all these, suspicion having arisen in mind that it is the accused who has killed the deceased by bringing him to the quarter; information was lodged at the Capital Police Station which resulted registration of Capital P.S. Case No.351 dated 09.09.2006 under section 302/201 IPC and section 27 of Arms Act.

3. Upon registration of the case, as above, investigation commenced. It may be stated here that before receipt of such information from the

brother of the deceased namely Dologobinda Das (P.W.10), the Sub-Inspector of Police present at the Capital Police Station had received a telephonic information that an unknown person had been murdered in the quarter No.VI/31/4 Unit-2, Bhubaneswar and that fact thus had been entered in the station diary book maintained at the Police Station. There was also an information to the Inspector –in-Charge of the Capital Police Station to that effect.

In course of investigation, besides examining the informant, many other witnesses were examined. Inquest over the dead body of Kaibalya in presence of witnesses was held, followed by preparation of Inquest report. Three pocket diaries, identity card of the deceased, one out patient ticket have been seized with other incriminating materials, Autopsy over the dead body was held on police requisition. Finally, on completion of investigation, the accused was placed to face the trial in the court of law for commission of offence under section 302/201 IPC and section 27 of the Arms Act.

The case being committed to the Court of session, the trial commenced. During the trial, the prosecution examined as many as 17 witnesses. Besides the above, the prosecution has proved documents such as FIR (Ext.9), seizure list, post mortem report, inquest reports etc.

4. The Trial Court, having said that the case rests on circumstantial evidence upon analysis of evidence on record, has held that the prosecution has proved the case beyond reasonable doubt that it is the accused who has committed the murder by intentionally causing the death of Kaibalya by assaulting him with Bhujali and caused disappearance of evidence thereof. Having held as above, the accused

while being convicted for committing the offence under section 302/201 IPC, he has been sentenced as aforestated.

5. Mr.S. Behera learned counsel for the Appellant submitted that here prosecution case is based on circumstantial evidence and the Trial Court has gone completely wrong in holding that the circumstances so projected by the prosecution have been proved through clear and cogent evidence and without discussing as to how those point at the complicity of the accused when such circumstances so projected being joined do not make the chain complete in every respect excluding all the hypothesis other than the guilt of the accused, finding has been rendered that the accused is the author of the crime in committing murder of Kaibalya by intentionally causing his death by inflicting several injuries on his person. He thus submits that the said finding cannot be sustained. In support of the same, he had invited the attention of the Court to the oral evidence let in by the prosecution in further contending that the most important person namely Trilochan Dharua having not been examined in the trial and in the absence of his evidence, the Trial Court ought to have held that a vital link to complete the chain is wanting and for that all those circumstances placed through evidence are not enough for the success of the prosecution which is bound to fail.

6. Mr. S.K. Nayak, learned Additional Government Advocate submitted all in favour of the findings returned by the Trial Court in holding the accused guilty for committing offence under section 302/201 IPC. According to him, the prosecution having successfully proved that the deceased was last seen with the company of the accused and then shortly thereafter the deceased was found lying dead in the quarter where the deceased and the accused were there; the Trial Court

did commit no error in holding that the prosecution has proved its case against the accused in so far as the charges are concerned beyond reasonable doubt.

7. Keeping in view the submissions made, We have carefully read the judgment passed by Trial Court and have extensively travelled through the evidence both oral and documentary and bestowed due attention to all those.

8. Based on the evidence of the Medical Officer who conducted the Autopsy over the dead body and his opinion which has received no opposition as also ocular evidence the death of deceased namely Kaibalya Das has been proved to have to be a homicidal one.

The prosecution in the given case in order to establish the charges against the accused relies upon the circumstantial evidence. As culled out from the facts and circumstances which have emerged from evidence; the important circumstance which the prosecution has projected during the trial is that the deceased was last seen in the company of the accused in the said quarter wherefrom the dead body with several bodily injuries has been recovered.

9. As quoted by the Hon'ble Supreme Court in case of Ramananda V. State of Himachal Pradesh; AIR 1981 SC 738 that "Perfect Proof is seldom to be had in the imperfect world and absolute certainty is a myth". The concept of circumstantial evidence comes in such cases where the direct evidence could not be found when the Court has to rely on the circumstantial evidence for ruling upon the matter. A circumstance if proved through clear and cogent acceptable evidence has to be accepted as such and the same does never betray or mislead. The last seen theory is based in that line as in some criminal cases where

there is no direct or tangible evidence as to how the offence has been committed or who committed the offence, then the last resort in order to decide the case is that theory based on circumstances of the case. In that when a person is last seen with the deceased before his death or within a reasonable period of his death that no other person could have intervened in between them then the presumption can be taken that he i.e. the person who was last seen is the author of the crime and thus the burden of the proof then shifts upon him who seeks to negate this fact and it is only when he is not able to give a lucid and sufficient explanation about his innocence then the presumption gains more strength.

10. The term circumstantial evidence defined by Peter Murphy as evidence from which the desired conclusion may be drawn which requires the Tribunal of fact not only to accept the evidence presented but then to draw an inference from it. The term circumstantial evidence in India was used by Sir James Stephen for the first time stating that these facts depend on other facts and exist if it is proved that the other fact existed. This means that the inference is drawn according to the reasonable prudent man based upon pre-existing fact that has already been proved. Thus the circumstantial evidence does not establish complete guilt until every evidence is negating the innocence of the accused. The whole chain of fact and circumstance of the case should be so complete that from the same the existence of principal fact can legitimately be inferred or presumed and no suspicion or conjecture comes in the minds of the Court regarding the guilt of the accused when he can be convicted on the basis of circumstantial evidence.

The term 'circumstantial evidence' has not been used directly in the Evidence Act. However, in section-3 of the Act, the definition of the

word 'proved' reads that if the existence of any fact is so probable which a prudent man will believe it to exist then that is considered to be proved. This implies that the admissibility of circumstantial evidence that is based on logical inferences that direct evidence and circumstantial evidence are at par if the whole chain of events which happened collectively point unerringly at the guilt of accused. But if there is doubt that the accused is innocent and the chain of event is not complete then the benefit of the doubt has to go in favour of the accused.

11. 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.

12. 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 perspective. These inferences or presumptions are drawn logically, according to how a reasonable prudent man will connect the dots in the

principal 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 burden 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 burden 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.

13. 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 where deciding upon these kinds of matters as even minute details can change the whole scenario of the case.

14. The settled law for the case to be 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.

15. 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.

16. In summing up, it can doubtlessly be said that the last seen theory is an important legal doctrine. It once proved, the burden shifts on the accused to prove his innocence. However, it does not completely discharge the prosecution of its legal obligation of the burden to prove the guilt of the accused beyond reasonable doubt. The prosecution has to present a complete linkage of the accused with the murder of the deceased i.e. there was an opportunity with him as they were last seen him together, he had the motive to do the crime and then the other circumstantial evidence like his behaviour, non-explanation of the situation to prove the guilt. This is based on the fact that in criminal law, the yardstick for proving the guilt of the accused is beyond reasonable doubt. The decision should not be based on suspicion and in a case where even a single circumstance leads to the suspicion that the accused is innocent then he cannot be convicted. The accused will be given the benefit of doubt because our criminal law is based on the principle that no innocent should be punished. The Court should be extra careful while deciding the case based on circumstantial evidence so that there is no miscarriage of justice. But if the proved last seen theory is corroborated by other evidence then it can be adhered to convict the accused based on the circumstantial evidence only and it would be a conviction standing valid.

17. Keeping in mind the above said legal position, in order address the rival submission in judging the sustainability of the Trial Court's finding holding the accused guilty of the charges; let us now have a look at the evidence to see that the same if passed through the tests.

The brother of the deceased who is the informant of the present case has been examined as P.W.10. He has proved the FIR (Ext.9). His evidence is to the effect that having got the message over phone from

Congress Bhawan, he rushed to the place where he found police to have already arrived by then. It is stated by him that he heard from others that there was a quarrel in between the deceased and the accused on many prior occasions as the deceased was being suspected by the accused to be practising witchcraft. He states that he came to know from Ranjan and Trilochan that accused and the deceased had gone to the said quarter on the date of incident and told them to leave the quarter as he had some personal work with the deceased and then on return he found the dead body of the deceased. This Ranjan Sahoo has been examined as P.W.14. His evidence run to the effect that the accused on that day had come to him around 6 to 7 am in the morning and asked him as to how long he would available in the said quarter and then the witness told the accused that he was available till 10 am. He states that thereafter the accused left the place and after 10 am, the witness also left the quarter. It is his evidence that around 10.19 am, the accused rang him and asked him as to where he was and also enquired from him as to if anyone else was there in the quarter. The witness states to have replied him that one Trilochan Dharua would be available in the quarter. This witness then says to have received a phone call from Trilochan Dharua around 12.50 pm that no meal had been cooked since accused was inside the quarter, closing the door from inside and then the witness came to the quarter and saw as what already stated. Trilochan Dharua having arrived there, climbed up and then the dead body was seen. As stated by this witness Trilochan was the cook in the said quarter and was residing with the witness for last six months.

This Trilochan Dharua has however not been examined in the trial and the prosecution has also not offered any explanation on that score as to why that Trilochan Dharua who having seen the accused and

deceased to have together entered into the quarter and had told that to P.W.14 was withheld from the witness box and his evidence on those aspects would have been the most clinching. So, from the evidence of P.W.14 when we accept that in the morning hours, around 6 to 7 am, the accused had come to him when he was in the quarter and discussed with him about the time, till he would be there in the quarter and then around 10.19 am, he had ascertained from him as to if anyone else was present in the quarter, the important facet as to the entry of the accused to this said quarter which could have only been stated by that Trilochan Dharua has not been proved and when Trilochan alone could have thrown light on those facts, he has been withheld from examination without any such acceptable explanation which thus under the circumstances calls for drawal of adverse inference as to the said circumstance. This P.W.14 and other witnesses having simply stated that Trilochan Dharua had stated before them that accused sent him outside and went inside the quarter with the deceased, said evidence cannot thus be taken to be the proof of the fact that the accused and the deceased together had entered into the quarter and sometime thereafter, the accused was not seen in the vicinity and then the dead body such Kaibalya Das was found lying inside.

It has been said by P.W.1 that on that day, the accused told him that he would be going to the house of the President of Congress Bhawan to deliver some articles at his residence and then the deceased had also told him that the accused was with him to accompany to the residence of President and took his permission. But then he does not say that accused and deceased went together from the Bhawan. Thus said evidence of P.W.1 is of no support to the fact that the deceased was last seen in the company of the accused. When We again turn our attention

to the evidence of P.W.10, the evidence of P.W.14 that he was told by Trilochan Dharua that accused had brought the deceased with him to the said quarter and told him to go away from the quarter and went inside saying to have some personal work with the deceased, is not believable, as that P.W.10 says that he heard from Ranjan (P.W.14) and Dharendra Dharua (not examined) that accused had brought the deceased with him to the said quarter during day time and told them to go away from the quarter as he had some work with the deceased and they on their return found the quarter being locked from outside. The evidence of S.I of Police (P.W 13) in that light that Ranjan Sahoo (P.W.14) and Trilochan Dharua told before him that in the morning around 6.30 am, accused had come to the said quarter and requested to take rest there and around 10.30 am, the deceased and accused were present inside the said quarter does not stand. In such state of affair in the evidence, let in by the prosecution, the conclusion of the trial court that the prosecution has established the fact that the deceased was last seen with the accused in the said quarter cannot be sustained.

18. At this juncture, it being there in the evidence that deceased and the accused had quarrel between them on prior occasions and the accused was of the strong belief that the deceased was practising witchcraft against him; doubt arises in mind that normally with that feeling between the two; there should not have been the response from the deceased to accompany the accused on that day, especially as it is not said that the accused had already established a friendly relationship with the deceased sometime before the date of incident which could have been taken as the pre-text on the part of the accused to somehow persuade the deceased to move with him with an evil design. Thus it is held that the prosecution has failed to prove through clear, cogent and

acceptable evidence that the deceased was last seen in the company of the accused and that they entered into the quarter together.

19. Therefore, even if WE say for a moment that the accused was bearing grudge against the deceased being so aggrieved due to suspicion that he was practising witchcraft, the same too being taken together with the factum of recovery of the Bhujali at the instance of the accused while in police custody; these two circumstances do not complete the chain in every respect in pointing the finger at the accused to be the author of the crime by excluding all hypothesis other than his guilt. Furthermore here although it had been said that the accused for the purpose had purchased that Bhujali (M.O-1), the person from whom it was said to have been purchased has not so deposed to have given the Bhujali to the accused and even that Cobbler from whom the accused is said to have taken a leather cover has remained silent in the trial.

20. For all the aforesaid discussions of the evidence as obtained in the trial, We are led to hold that the prosecution has failed to establish the charges against the accused beyond reasonable doubt in establishing the fact that it is he who had murdered Kaibalya by intentionally causing his death and had knowingly caused the evidence as to commission of the said offence disappear with the intention of saving himself from the legal consequences. In that view of the matter, the judgment passed by the Trial Court convicting the accused for commission of offence under section 302/201 IPC and the order of sentence cannot be sustained.

21. Accordingly, the Appeal stands allowed. The judgment of conviction and order of sentence dated 30th November, 2010 passed by the learned Ad-hoc Additional Sessions Judge, FTC No.3, Bhubaneswar in Criminal Trial (Sessions) No.16/78 of 2007 are hereby set aside.

The accused, namely, Bichitrananda Nath being on bail; the bail bonds shall stand discharged.

***(D. Dash),
Judge.***

Dr.S.K.Panigrahi, J.

I Agree.

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



Gitanjali