

(2023) 09 OHC CK 0238
In the Orissa High Court
Case No : Criminal Appeal No.200 Of 2017

Chinabihari Mohanta

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 29-09-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 173(2), 313(1)(b), 374
Indian Penal Code, 1860 — Section 302
Evidence Act, 1872 — Section 106

Citation : (2023) 09 OHC CK 0238

Hon'ble Judges : S. Talapatra, CJ;Savitri Ratho, J

Bench : Division Bench

Advocate : B.K. Routray, S. Patnaik

Final Decision : Dismissed

Judgement

S. Talapatra, C.J

1. This is an appeal by the convict (hereinafter referred to as the 'Appellant') from the judgment and order of conviction and sentence dated 27.02.2017 delivered in Sessions Trial No.31 of 2014 by the Additional Sessions Judge, Rairangpur, Mayurbhanj. By the said judgment, the Appellant has been convicted under Section 302 of the I.P.C. and pursuant to the said finding of conviction he has been sentenced to suffer rigorous imprisonment life with fine of Rs.10,000/- with default rigorous imprisonment for a period of six month.

2. Briefly noted the prosecution as transpired from the records is that fifteen days prior to the occurrence, the Appellant had left his wife Brundabati (P.W.4) and his minor son Bitun in the house of Pradip Chandra Mohanta (P.W.1) at Bautibeda. On 22.7.2014 around 5pm, the Appellant came to the house of P.W.1 and took Bitun with him from the lap of his wife at that time Brundabati (P.W.4) was feeding Bitun, on the pretext of taking him around the village. Subsequently, the Appellant returned alone without Bitun and being asked about him, he made extra-judicial confession that he had killed Bitun. Despite repeated queries, he

did not give any detail. P.W.1 along with other family members and villagers searched for Bitun at nearby places. But, having failed to find him, they informed the matter to the local police, who came and inquired about the missing son of the Appellant. The search was made throughout the night. However, his dead body was found floating in the water of Adabandha tank of the village situated at a considerable distance from the house of P.W.1. On the basis of the written report (Ext.1) filed by the P.W.1, the police took up the investigation having registered a specific police case being Bisoi P.S. Case No.77 of 2014 under Section 302 of the IPC. Investigating Officer conducted inquest over the dead body of the deceased Bitun at the bank of the said tank in presence of P.W.1 and other villagers. Thereafter, the dead body was transported to S.D.H., Rairangpur for postmortem examination. The police collected a bottle of water from the tank in question. On arrest of the Appellant, the police seized one Nokia phone his possession and he was also medically examined. The biological materials and wearing apparels of the Appellant were seized by the police. On completion of investigation, finding the prima facie materials as regards the involvement of the Appellant in the offence, the police report under Section 173 (2) of the Cr.P.C. was filed against the Appellant for facing the trial. On taking cognizance, charge was framed under Section 302 of the IPC against him for committing murder of his own son, Bitun. The Appellant denied the charge and claimed to be tried in accordance with law.

3. In order to substantiate the charge, prosecution adduced as many as 14 witnesses and introduced 10 documentary evidence, including the First Information Report (Ext.1), inquest report (Ext.2/2), postmortem examination report (Ext.6) and medical examination report (Ext.10). No rebuttal evidence has been adduced by the Appellant.

4. After the prosecution evidence was recorded, the Appellant was examined under Section 313(1)(b) of the Cr.P.C. to have his response to the incriminating materials which surfaced in the evidence. Thereafter, on revaluation of the evidence the trial judge returned the finding of the conviction, which is under challenge in this appeal.

5. Mr. B.K. Routray, learned counsel appearing for the Appellant has at the beginning stated that there is no eye witness as regards the commission of the offence. The prosecution case is purely on the basis of the circumstantial evidence. According to Mr. Routray, learned counsel, the circumstances which were required to be proved for purpose of drawing the conclusion and the guilt in respect of the assailant has not been established at all. There are no conclusive circumstances, against accepting the hypothesis of innocence. Mr. Routray, learned counsel has laid serious emphasis as regards the discharge of burden when a case is totally based on circumstantial evidence. According to him, the case based on circumstantial evidence should be considered systematically and diligently to find out if the fact emerging from each of the circumstances conjointly read, prove the guilt of the Appellant or lead to any other conclusion

through a valid and legal presumption. It may be noted here that Mr. Routray, learned counsel has after concluding the submission placed a short note of submission along with he intends to rely on.

6. Mr. Routray, has contended that the prosecution has based their case on last seen theory and the extrajudicial confession purportedly made by the Appellant. Mr. Routray, learned counsel has made a categorical statement that the appreciation of the evidence as made by the trial judge is substantially perverse. To illustrate the statement, he has referred to the testimony of P.W.1, who in his examination-in-chief had stated that at around 4.00 A.M. they could not notice the dead body of Bitun floating in the village tank. But, in the cross-examination, he made a completely different statement. In Paragraph-9 of the cross-examination, he has stated that they searched Bitun at different places along with the police. A gathering of 50 villagers were present at the spot near the tank, where from the dead body was recovered. Mr. Routray, learned counsel had made serious endeavour to impresses that is a serious incongruity and as a result, these two statements cannot be treated as truthful. P.W.1 has also stated that, he has not stated to the police that the Appellant took the deceased from the lap of his mother and after half an hour brought him and thereafter, feeding him again took him outside with him. The said statement has deviated from the statement made to the police and which statement has been reiterated in the examination-in-chief. P.W.3 the brother of the P.W.1 according to Mr. Routray, learned counsel, has rendered a totally different version regarding the Appellant taking away his minor son. According to him, on the same day at about 7.00 P.M. the Appellant took Bitun outside for a tour towards the village. But, Mr. Routray, learned counsel was quite fair when he has stated that P.W.3 has stated that the Appellant had threatened him. P.W.4, Brundabati, wife of the Appellant has testified that the Appellant took the deceased twice, once he took him out for having round in the village and he came back. Thereafter, he left Bitun with her to feed him. After she completed feeding Bitun, he again took him with him to go round the village and thereafter never returned with him. P.W.4 has stated that the Appellant has confessed that he had killed Bitun. Mr. Routray, learned counsel at this juncture had submitted that the statement is unbelievable in absence of any strong motive, it is not expected that a father will kill his own son. The prosecution has totally failed in this regard and they could not place any evidence to establish the motive to kill. Mr. Routray, leaned counsel has submitted that there is some reason to suspect the involvement of the Appellant in the death of Bitun, but that might have been accidental drowning. As it appears due to malice his wife and her relatives were against the Appellant. Suspicion of doubt, however, strong cannot take place of the legal evidence. In the examination-in-chief, P.W.4 has stated that the Appellant left her and Bitun in the house of her sister for a treatment, as she was carrying for two months and prior to her coming to the house of her sister she had aborted her pregnancy at the Government Hospital, Jasipur. On such statement it appears that, according to Mr. Routray, learned counsel the Appellant is a caring husband and father who

loves his wife and son. P.W.4 in her cross-examination as pointed out by Mr. Routray, learned counsel has stated after search, dead body of her son was recovered by the police from the tank. P.W.4 had stated that she had also accompanied with the police during the search. But, she has stated that by the time of their arrival, the dead body was taken out of the water and laid by the side of the tank. The Investigating Officer P.W.14 has failed to conduct the investigation fairly as from the evidence of the wife no motive can be attributed against the Appellant. According to Mr. Routray, learned counsel due to personal abhorrence, the Appellant has been framed in a false case. P.W.5, sister of P.W.4 has corroborated the fact of coming of P.W.4 to his residence for treatment. He has also stated that the Appellant had confessed that he had killed Bitun. P.W.6 is the younger brother of the informant, who scribed the F.I.R. P.W.6 has stated that he had scribed the F.I.R. at the bank of the tank in presence of the police. The information as laid in the F.I.R. and the content of the extra-judicial confession cannot be relied upon by this court in the interest of fair trial. P.W.6 has, however, admitted that, he did not see the Appellant take away Bitun. P.W.8 another brother of P.W.4, is a hearsay witness. He had come to know about the occurrence from his younger brother. But, as regards imparting him the information about the occurrence, no witness has come forward to corroborate. P.W.9 is Narahari Mohanta another brother of P.W.4. Surprisingly he according to Mr. Routray, learned counsel introduced a new story that he got a phone call from the Appellant, who told him that he had killed Bitun. P.W.9 had also informed his elder brother (P.W.8), but as his evident P.W.8 did not confirm that statement while testifying in the trial. Even, Brundabati did not state anything about the phone call episode. Mr. Routray, learned counsel has at this juncture referred to the impugned judgment particularly its Paragraph-18, where it has been observed as follows:

"18.Bearing in mind the legal principles on the point on evaluating the evidence of P.Ws. 1,3,4,5,6,8 and 9, it transpires on the second occasion, when the accused took Bitun with him after feeding him and on his return after one hour thereafter alone. When he was asked about the whereabouts of Bitun, he confessed before them to have killed him. As has rightly been pointed out by the learned defence counsel, the trial judge has observed that, the evidence of P.Ws. 1,3,8 and 9, is found to be doubtful and not believable in as much as PWs.4 and 6 in their evidence have categorically excluded their presence at the time of making of such confession by the accused stating categorically that when the Appellant came back alone, his wife asked him with regard to the whereabouts of Bitun. The Appellant replied to her their presence as well as in presence of P.W.5 that he had killed Bitun."

The statements of P.Ws.4, 5 and 6 stand in contradiction to the statement of P.Ws.8 and 9 as regards the making of extra-judicial confession. Mr. Routray, learned counsel has stated that the oral extra-judicial confession is a weak piece of evidence. Mr. Routray, learned counsel has submitted that the evidence of P.Ws.1 and 4 are also prevaricating and should not inspire the confidence of the

court. Even though it has been stated clearly by P.W.1 that about 50 villagers were there at the time of locating the dead body of the deceased, but none of them was examined. It has been pointed out by Mr. Routray, learned counsel that the testimonies of P.Ws.7,11,12 and 13 are formal in nature and do not help the prosecution to improve their case. Mr. Routray, learned counsel has finally submitted that the cause of death as stated by P.W.10 (Dr. Sudha Krushna Sahu) is asphyxia due to drowning. From the evidence of P.W.14 it transpires that the edifier of the prosecution basing on the so called extra-judicial confession has been totally brought down. As regards the last seen theory Mr. Routray, learned counsel for the Appellant has submitted that the prosecution has in initial failed to prove any motive behind the alleged homicidal death. There is no leading to discovery for previous reason. No statement of the independent witness is available on the record. As such, Mr. Routray, learned counsel has submitted that on the facts also this judgment of conviction requires to be interfered.

7. Mr. Routray, learned counsel in order to buttress his submission has referred a few decisions of the apex court and the High Court.

In Subramanya vs. State of Karnataka: AIR 2022 SC 5110, it has been held by the Supreme Court that thus:

"at the extra judicial confession is a weak piece of evidence and require and requires appreciation with great detail of care and caution extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the Accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. Where an extra judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance like the case in hand.

Another decision on the same point of the probative value of the extra-judicial confession in absence of motive relied on by Mr. Routray, learned counsel is C. K.

Raveendran vs. State Of Kerala: (2000) 1 SCC 225 wherein Supreme Court has held that, the extra judicial confession has to be excluded from consideration for bringing home the charge when the said is not voluntary.

In Sk. Yusuf vs. State of West Bengal: AIR 2011 SC 2283 the Supreme Court, restated the law on the probative value of the extra-judicial confession. It has been held that, it must be established to be true and made voluntarily and in a fit state of mind. The words of the witness to whom extra-judicial confession was made must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. If the extra-judicial confession made by the accused appears to be not reliable then, it should be straightway discarded and no part of it can be used against the accused person. Mr. Routray, learned counsel has placed his reliance on Digamber Vaishnav and Ors. vs. State of Chhattisgarh: AIR 2019 SC 1367, it has been held by the apex court that, it is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would be one of the strong factors or circumstances inculcating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trust worthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body. Mr. Routray, learned counsel has reminded us that the last seen theory as stated by P.Ws.1 and 4 cannot be relied, in as much as the statement of P.Ws.1 and 4 are divergent on material fact. That apart, nobody has seen the Appellant in the close proximity of the place of occurrence (the tank) with the deceased.

In Kanhaiya Lal vs. State of Rajasthan : (2014) 4 SCC 715, the apex court has restated that the last seen together does not by itself lead to the inference that it was the accused, who committed the crime. It is held thus:

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the Appellant, in our considered opinion, by itself cannot lead to proof of guilt against the Appellant."

Even, in Sk. Yusuf (supra), the apex court dwelled upon the last seen theory and it has been observed that, "the last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen 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." Mr. Routray, learned counsel in respect of testimony of a witness who gave the different version before the police in the court and what would be its effect, has relied on a decision of the apex court in Jaswant Gir vs. State of

Punjab: AIR Online 2005 SC 387, where the Supreme Court has stated that, it is not safe to base the conviction on the doubtful testimony of P.W. 9 who gave different versions before the police and the Court. Mr. Routray, learned counsel has on the point how to prove a fact by circumstantial evidence relied on Ramesh Bhai & Another vs. State of Rajasthan: AIR 2009 SCW 3534, where the apex court had occasion to observe as follows:

"5. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan*: AIR 1977 SC 1063, *Eradu and Ors. v. State of Hyderabad*: AIR 1956 SC 316, *Earabhadrapa v. State of Karnataka*: AIR 1983 SC 446, *State of U.P. v. Sukhbasi and Ors.*: AIR 1985 SC 1224, *Balwinder Singh v. State of Punjab*: AIR 1987 SC 350, *Ashok Kumar Chatterjee v. State of M.P.*: AIR 1989 SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from the Circumstances. In *Bhagat Ram v. State of Punjab*: AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from the circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

6. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors. v. State of A.P.*: (1996) 10 SCC 193, wherein it has been observed thus:

"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...."

A decision of the apex court in *Padala Veera Reddy v. State of A.P. and Ors.*: AIR 1990 SC 79 has been referred by Mr. Routray in order to buttress his contention that when the prosecution rests upon circumstantial evidence, the following tests are to be satisfied:

(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.

Mr. Routray, learned counsel has further referred a decision of the apex court in Shankarlal Gyarasilal Dixit vs. State of Maharashtra: AIR 1981 SC 765, in which the apex court has restated the evidentiary requisites for proving a circumstantial evidence having reference to Mahmood v. State of Uttar Pradesh : AIR 1976 SC 69 and Chandmal v. State of Rajasthan : AIR 1976 SC 917. It has been stated by the apex Court that what the Court has to consider in crux, is that whether the cumulative effect of the proved circumstances establishes the guilt of the accused beyond "shadow of doubt". In the case of circumstantial evidence it is "shadow of doubt", whereas in cases which depend on direct evidence is shadow of "reasonable" doubt. Moreover, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt. Mr. Routray, learned counsel has also relied on a decision of the apex court in Hanuman Govind, Nargundkar and another vs. State of M.P.: AIR 1952 SC 343, it has been held in that report thus:

"It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all. If the statement of the accused is used as whole, it completely demolishes the prosecution case and, if it is not used at all, then there remains no material on the record from which any inference could be drawn that the letter was not written on the date it bears."

Even though, Mr. Routray, learned counsel has placed this decision but, we do not find any relevance of that report in the present context.

8. Ms. S. Patnaik, learned Additional Government Advocate appearing for the State has dissected the submission made by Mr. Routray, learned counsel for the Appellant and submitted that in view of the consolidated legal position as regards proof of a fact on the basis of circumstantial evidence, the submission made by the counsel for the Appellant is in sufficient for purpose of intervention in the finding of conviction as returned by the trial judge. Ms. Patnaik, learned Additional Government Advocate has quite succinctly submitted that the following circumstances are very material in the present case.

- (i) Last seen of the deceased and the Appellant.
- (ii) Non-explanation of the Appellant relating to the missing of the deceased from his company.
- (iii) Extra-judicial confession of guilt made by the Appellant to the P.Ws.1 and 4.
- (iv) Conduct of the Appellant consequent upon the missing of the deceased and

(v) Motive to kill.

It has been contended by Ms. Patnaik, learned Additional Government Advocate that P.W.4 has categorically stated that the deceased was taken away for the second time by the Appellant and after some time, he returned alone. On repeated questions, he did not answer anything but confessed that he had killed Bitun his own son. Even, thereafter, the Appellant did not take part in the search and did not help in the said search operation. He was completely withdrawn. So far as the question of motive is concerned, Ms. Patnaik, learned Additional Government Advocate has submitted that when the chain in the circumstances is otherwise complete on the basis of circumstantial evidence, it is not necessary to have proof of the motive or ill-will to sustain the conviction. In this regard, we have seen the observation of the trial judge having referred to Dasin Bai @ Shanti Bai vs. State of Chhatisgarh (judgment dated 11.02.2015) delivered in Criminal Appeal No.827 of 2008, where it has been held by the apex court that, the plea taken by the defence that she did not have any motive to kill the deceased, does not break the chain of circumstances. When the facts are clear, it is not necessary to have proof the motive or ill-will to sustain the conviction. We may refer to another decision of the apex court in Mulakh Raj and Ors. vs. Satish Kumar and Ors.: (1992) 3 SCC 43, wherein the law relating to the motive or absence of motive has been dilated to a great extent and enunciated as under:

"The case is based on circumstantial evidence and motive being absent, the prosecution failed to establish this important link in the chain of circumstances to connect the accused. We find no force in the contention. Undoubtedly in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case."

9. For appreciating the rival contention as raised by the counsel for the parties, we need to make a brief survey of the evidence on record. P.W.1 is the informant who along with P.W.2 is the witness of the inquest over the dead body conducted by the Investigating Officer (P.Ws.14). P.Ws. 3 and 6 are his brothers, whereas P.W.5 is his wife. P.W.4 as stated is the wife of the Appellant. P.Ws.9 and 10 are his brothers-in-law before all of whom the Appellant said to have made his extra-judicial confession. P.W.6 scribed the F.I.R. whereas P.W.7 is the witness to the seizure of the wearing apparels of the deceased, as well as of the Appellant. P.W.10 is the Medical Officer, who was at the relevant time posted at S.D.H., Rairangpur and conducted the postmortem examination on the body of the deceased. P.Ws.11 and 12 are witness to the seizure of the mobile phone of the

Appellant. P.W.13 is witness to the seizure of physical exhibits and wearing apparent of the Appellant. P.W.1, Pradeep Chandra Mohanta is the informant. He has testified that Bitun (the deceased) came to stay in their house along with his mother 15 days prior to the occurrence. His mother-in-law had also come for treatment of his sister-in-law. Bitun was one year and four months at the time. The Appellant brought them and went away leaving them in their house. On the date of occurrence, the Appellant came to their house and reached around 4 to 4.30 pm. He took Bitun with him from the lap of his sister-in-law (the wife of the Appellant) for purpose of taking him out for a round in the village. After half an hour he returned alone without Bitun. Being asked about Bitun the Appellant could not explained what happened to Bitun. Thereafter, P.W.1 and others searched for Bitun in different places in the village. The search was continued throughout the night. At around 4.00 AM they could notice the dead body of Bitun in the water of Hadabandha tank. His brother Birendra Mohanta scribed the complaint and the same was lodged at Bisoi Police Station. He stated that the police arrived at the spot and the dead body of Bitun was "flushed out" from the water by himself as per the direction of the police. He identified the F.I.R. (Ext.1). During the cross-examination, he has stated that on the evening when the Appellant took Bitun and returned without him, he started search along with 50 villagers and found his dead body floating in the said tank. Therefore, in the cross-examination nothing was elicited from him. P.W.2, Jurilal Mohanta is the witness to the inquest. P.W.3, Harish Chandra Mohanta, is the younger brother of P.W.1. He has stated that on the day of occurrence at about 7 P.M., the Appellant made to feed Bitun and took him away towards the village. But, he returned after an hour without Bitun. On being asked about Bitun without giving any reply threatened him. They searched for Bitun throughout the night at different places. At around 4 A.M. in the morning they detected the dead body of Bitun floating in the water of the said tank. In the cross-examination, he stood by his statement. P.W.4, Brundabati Mohanta, the wife of the Appellant is the most important witness for the prosecution case. She has testified in the trial that at 4 to 5 P.M. the Appellant took Bitun with him and went around to the village. After some time, he came back with Bitun and asked her to feed him. After she completed feeding Bitun, again he took him with him to go round the village. After one hour, the Appellant came back without Bitun. When they asked him as to the whereabouts of Bitun, P.W.4 has stated as follows:

"He confessed that he has killed Bitun. My family members went in search of Bitun and finally his dead body was found floating in the water of the tank of the village."

In the cross-examination, she did not deviate from the said statement but, she denied the suggestion that she aborted her pregnancy at Jashipur Hospital being accompanied by her sister and brother-in-law. What is evident is that the persons who are present at the time of making confession have not been named by her. P.W.5, Kabita Mohanta is the sister of P.W.4 and at her house P.W.4 was staying for treatment of her mother. She had also stated that the Appellant took

away Bitun to go round the village and after sometime they came back and after Bitun was fed, he again took him to go round the village. But, after one hour when he returned, Bitun was not with him. They searched for Bitun inside the village and during early morning on the following day, the dead body of Bitun was found floating in the water of village tank. She has stated that she accompanied her sister to Jashipur Govt. Hospital for medical checkup as her pregnancy was aborted earlier and she developed complicity thereof. She has categorically stated that when the accused arrived at their house, her husband was not present in their house, as he had gone for work. It shows the statement of P.W.1 is totally untrustworthy, if P.W.5 is believed and there is no reason to disbelieve the P.W.5. She has also stated in the cross-examination that she did not deviate from her statement made in the examination-in-chief. P.W.6, Birendranath Mohanta, is the younger of the P.W.1. He scribed the F.I.R. as per "instruction and information" of his brother. He identified the F.I.R. He has narrated the same story how the Appellant took away Bitun, came back and again he took him away after feeding, but returned without him after some time. In the examination-in-chief, he has stated as follows:

"When his wife asked the accused in my presence so also the presence of Bhauja about the whereabouts of Bitun, the accused became angry and stated that he has killed him. We all searched for Bitun throughout the village and on the early hour of next day his dead was found floating in the water of village Tank."

But, in the cross-examination, he stated as follows:

"I can not say when the accused did arrive in our house on the date of occurrence, as I was absent then and has not returned back from my school."

But, he denied the suggestion that in his presence the Appellant did not confess anything. He has further stated in the cross-examination that he cannot say who had informed the police. P.W.7, Naresh Chandra Mohanta is a seizure witness of the wearing apparels of the deceased and the Appellant. He identified the seizure list (Ext.4) by which those materials are seized, but those materials were not brought in the evidence. P.W.8, Trilochan Mohanta is the brother of P.W.4. He has candidly stated that, he came to know from his younger brother that the Appellant had taken Bitun with him and has not returned to the house of his brother-in-law for considerable time. Having received the said information, he rushed to their house. He asked Brundabati (P.W.4) about the whereabouts of Bitun who told that the Appellant had taken him to have a round the village, but returned alone. Being asked, he took part in the search and about 4 to 4.30 A.M. they found dead body of Bitun floating in the bank of the village. It is apparent that he is hearsay witness so far as the extrajudicial confession concerned. But, he was present at the time of the recovery of the dead body. P.W.9, Narahari Mohanta is another brother of P.W.4. He came to know from one of his nephew, namely, Sonu that the Appellant had come to their house and had taken Bitun with him for going round the village and he killed Bitun. He came to the village and asked his sister about Bitun, they told that the Appellant had taken away

Bitun to have a round in the village. He has also apprised that the Appellant had confessed that he had killed Bitun. As they could not believe his version, search was taken out and finally Bitun's dead body was found floating in the water of the village tank. In the cross-examination, he has stated that he reached that village after 9 PM, he was examined by the police. He has stated that he denied the suggestion that the Appellant did not make any confession before him or his sister. Apparent on the face of the cross-examination read with the testimony of P.W.4, this P.W.9 is not truthful so far as the confessional statement at least to the extent that confessional statement was made in his presence, in as much as, according to his statement, he reached the village at 9 PM. P.W.10 is a Pediatric Specialist at S.D.H., Rairangpur. He carried out the postmortem examination over the dead body of Bitun Mohanta. He found rigor motis present all over the dead body and fine forth present in the nostril so also in the mouth. On dissection, he found that both lungs were water logged, stomach contained 100 ml of fluid and half digested food particles. Liver spleen, kidney are intact and congested. According to his opinion, the cause of death was due to drowning. There was no cross-examination by the defence. In the further cross-examination P.W.10 had stated that he did not notice any external injury on the dead body. He has made a very significant statement "from the symptoms it cannot concretely be ascertained, as to if it was a forcible drowning case or a drowning suo motu." P.W.11, Kisun Hembram was a village guard and he was the witness to the seizure of one Mobile set from the possession of the Appellant on 23.07.2014. He identified his signature on the seizure list (Ext.7). P.W.12, Jitu Munda, was also the witness to the said Mobile phone from the Appellant. He identified his signature on the seizure list. P.W.13, Danaya Ranjan Goipai is another Grama Rakhi. In his presence, the Investigating Officer seized two numbers of vials containing physical exhibits and wearing apparels of the deceased being produced by the another constable. He identified his signature on the seizure list (Ext.8). P.W.14, Badrikanath Behera, is the Sub-inspector of Police, who investigated the case. He has stated that IIC, Sriharsha Mishra after registering the case on the basis of First Information Report entrusted the investigation to him. He has briefly stated how he had carried out the investigation. He visited the spot i.e. the tank, prepared the spot map, examined the witnesses, made inquest over the dead body of the small child Bitun and prepared the report (Ext.2). Thereafter, he collected the sample of the water from the tank after preparing the seizure list (Ext.3). He sent the dead body with challan to S.D.H. Rairangpur and arrested the Appellant and seized his Mobile phone set by preparing the seizure list (Ext.7) also produced the Appellant for his medical examination in Primary Health Center, Bisoi. After his medical examination, he seized two nos. of vials containing sample blood and nail clippings of the Appellant being produced by the constable Naresh Chandra Mohanta (P.W.7). He has also stated that, he seized the wearing apparels of the Appellant and the deceased and finally having received the postmortem examination report, he submitted the charge-sheet against the Appellant. In the cross-examination, he has stated that when they arrived at the place of occurrence, the dead body was

kept just near the water of the tank. Pradeep Chandra Mohanta and others stated that they fished out the dead body from the water of the tank. He has clearly stated in his cross-examination that, Pradeep Chandra Mohanta (P.W.1) did not state that the Appellant after taking the child again came to the house after some time and thereafter, feeding him, took him with again. Even, he has stated before him that the Appellant had first taken away the deceased with him. But, he had stated that after feeding the child, he took the child with him. He has also admitted that Kabita Mohanta (P.W.5) has not stated before him that at the first instance, the Appellant took the child within him and subsequently brought him to his house. Similarly, he has stated that P.W.6 had not stated before him that the Appellant returned to their house without Bitun when asked by his wife, he became enraged and admitted to have killed Bitun and at that time his Bhauja was present, but he had stated Brundabati was present. He has also admitted in the cross-examination that P.W.9 had not stated before him the number of persons, who asked the Appellant about the whereabouts of Bitun. He has admitted that, he had not examined Jurilal Mohanta (P.W.2) and Harish Chandra Mohanta (P.W.3). He has revealed that during examination the Appellant had stated to him that his wife during her staying in the house of the informant had gone to Jashipur Hospital and got aborted her conception/fetus.

10. Having read the evidence, we are of the view that except P.W.4 so far as the confessional statement is concerned, nobody can be believed. It is apparent from the scrutiny that the other witness were informed later when the Appellant returned without Bitun and thereafter, the search was carried out. Everybody on the statement of P.W.4 has made their own stories despite that, we would rely on the statement of P.W.4 as there is no reason why she would unnecessarily implicate the Appellant. Her statement appears natural and trustworthy. So far as the part of the search and recovery of the dead body is concerned, the prosecution has proved their case to the hilt.

11. It transpires clearly that there is no eye witness who saw the Appellant throw the deceased into the tank or by any other means. He is author of the death of the deceased by way of drowning. According to the prosecution, the Appellant himself made the confessional statement to P.W.4 in particular on her repeated query about the whereabouts of Bitun (the deceased). P.W.4 has categorically stated that the Appellant has stated he had killed Bitun. No other statement has been made by the Appellant. Immediately, after making of the said statement with a little bit of disbelief a rigorous search was carried out and thereafter, on the following day at dawn, the dead body of the deceased was seen to have been floating in the tank under reference. The dead body was taken to the bank of the tank and there the inquest was carried out by the police. Thereafter, the postmortem examination was carried out at the instance of the police. The wearing apparels of the deceased and the Appellant were sent for chemical examination, but the chemical examination by no means is of any help to the prosecution case as no incriminatory material was present in those wearing apparels. P.W.10, Dr. Sudha Krushna Sahu has clearly observed that the cause of

death is asphyxia by drowning. As we have already noted that the Appellant did not give any explanation as regards what happened after he had taken away Bitun his son for a round around the village and why he returned alone. Neither had he explained to P.Ws.1 and 4 or other relatives nor did he explain the same in the trial. His case was a case of denial. Thereafter, the following circumstances become highly important:

(i) last seen together and;

(ii) the extra-judicial confession as made by him particularly to P.W.4.

Immediately after the extra-judicial confession made by the Appellant, the rigorous search was carried out with and without police and later on the dead body of the deceased was found floating in the tank. There is no explanation from the Appellant. In case of circumstantial evidence, the evidence must satisfy the following aspects as culled out in *Sharad Birdhichand Sarda vs. State of Maharashtra*: AIR 1984 SC 1622, those are as follows:

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

(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.”

In *Chandramohan Sahu vrs. State of Orissa*: 2009 (42) OCR 89, it has been held that, “when a case rests on circumstantial evidence the Court considering it should not be too much technical so also to fail in dispensing justice, be it to the accused or the prosecution, i.e. to the victims of the crime. Balance is to be maintained while considering the circumstantial evidence. At all such times, the pole-star principle of completing the chain of circumstance pointing to the guilt or innocence of the accused has to be borne in mind and not to be departed from.”

In *Muguri vrs. State*: 2016 (63) OCR 289, it has been held by this Court that “while it is true that there should be any missing links in the prosecution case, it is not the law that every one of the links must appear on the surface of the evidence adduced. Some of these links may have to be inferred from the proved facts. While appreciating such cases, there is always a danger that conjecture or suspicion may take the place of legal proof and as such the court must be watchful and ensure that conjecture and suspicion do not take the place of legal

proof.”

12. In our considered view, the Appellant was under obligation to explain what happened to the deceased whom he had taken away from P.W.4. But, he maintained the silence and did not cooperate with the search. Even in the trial, he did not endeavour to give the explanation how the deceased was lost in his company. We are also alive that there is no time gap between his extra-judicial confession and the commencement of the search for the deceased and it appears from the evidence that search was continued uninterruptedly and at last at the dawn of the next day, the dead body of the deceased was found floating in the tank. The provision of Section 106 of India Evidence Act, unambiguously lays down the law with respect to any fact especially within the knowledge of a person. In *State of Rajasthan vs. Kashi Ram* : (2006) 12 SCC 254, it has been observed by the apex court, on Section 106 of the Indian Evidence Act that when there is any fact especially within the knowledge of a person, the burden of proving that fact is upon him. It has been held in *Kashi Ram* (supra) as follows:

“The provisions of Section 106 of the Evidence Act, 1872 itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act.”

It has been also held in *Kashi Ram* (supra) while dealing with issue of case resting on circumstantial evidence, where the presence of the special knowledge is with the accused, the apex court has reiterated time and again that “in a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him by Section 106, that itself provides an additional link in the chain of circumstances proved against him.” The prosecution has established the fact that, the deceased was taken away from the lap of P.W.4 for the second time as referred before and the Appellant did not return with him. He returned alone and when he was queried, he made an extra-judicial confession stating that he had killed the deceased. Without any delay a search was carried out and it transpires from the evidence that the search continued till the dead body of the deceased was seen floating in the water of the said tank. Hence, it was the burden of the Appellant to explain how the deceased was lost from his company or what he did after taking the deceased from the company of P.W.4. But, the Appellant only maintained a silence and he did not cooperate during the search. The doctor’s opinion is very clear that there was no external injury, but he has quite definitely stated that the cause of death was asphyxia by drowning. In this case, there is no apparent motive but, as has been held in *Mulakh Raj* (supra) that absence of proof of motive does not break the

link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. That being the position of law, we have no hesitation to hold that the prosecution has been successful in establishing their case based on circumstantial evidence by completely eradicating the hypothesis of innocence in favour of the Appellant.

13. Having observed thus, we do not find any reason to interfere with the impugned judgment of conviction or the order of sentence.

14. In the result, the appeal stands dismissed.

15. If the physical records are still lying with the Registry, those shall be sent down forthwith.

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