

(2020) 12 OHC CK 0022

In the Orissa High Court

Case No : Criminal Appeal No.73 of 2001

Gandhia @ Gandharba @ Debraj Sahoo

APPELLANT

Vs

State Of Orissa

RESPONDENT

Date of Decision : 16-12-2020

Acts Referred:

Evidence Act, 1872 — Section 122, 154
Indian Penal Code, 1860 — Section 302

Citation : (2020) 12 OHC CK 0022

Hon'ble Judges : S. K. Mishra, J;Savitri Ratho, J

Bench : Division Bench

Advocate : Saktidhar Das, G. N. Rout

Final Decision : Allowed

Judgement

S. K. Mishra, J.

1. Heard Mr. Katar, learned counsel representing Mr. Saktidhar Das, learned Senior Advocate for the appellant-Gandhia @ Gandharba @ Debraj

Sahoo.

2. In this appeal the convict Gandhia @ Gandharba @ Debraj Sahoo assails his conviction U/s.302 of the Indian Penal Code, 1860 (herein after

referred as "I.P.C." for brevity) and order of sentence of imprisonment for life in S.C. Case No.28 of 1999/(S.C. 95 of 1999 GDC) of the Court

of learned Addl. Sessions Judge, Bhanjanagar-Aska, Bhanjanagar on 24.02.2001 (Committed by Sub-Divl. Judicial Magistrate, Bhanjanagar in G.R.

190/98 in his file).

3. The prosecution case in brief is that on 19.05.1998, the informant Prafulla Chandra Mahanty(P.W.13), who is the father-in-law of the deceased

lodged a written report at Jagannath Prasad Outpost at about 12 noon to the effect that on the said day, i.e., dtd. 19.05.1998 at about 8:30 A.M. a

strong rumor was spread that his son-in-law Tuna Behera (hereinafter called deceased), while proceeding towards his house at Jagannath Prasad

Patna, was killed by some anti social elements and his dead body was lying beside the road. The further prosecution case is that the informant lodged

the written report at Jagannath Prasad out post at about 12 noon and thereafter the O.I.C., Buguda Police Station investigated into the matter, arrested

the accused persons and thereafter filed the charge-sheet against the petitioner along with others implicating them for commission of the alleged

offences.

4. The accused took a plea that they were falsely implicated in this case.

5. Fourteen witnesses have been examined in this case by the prosecution. P.W.13-Prafulla Chandra Mohanty is the informant and he is not an eye

witness of the occurrence. P.Ws.3, 5 and 12 are examined as eye witness to the occurrence. P.W.1- Dr. Sushant Kumar Mishra has conducted the

Postmortem Examination of the deceased. P.W.14-Sadi Judhisthiro Reddy is the Investigating Officer. Rest of the witnesses are formal witnesses.

6. Taking into consideration the evidence led on behalf of prosecution though the learned Additional Sessions Judge-Aska,

Bhanjanagar disbelieved the presence of P.W.3 as an eye witness to the occurrence, came to the conclusion that the prosecution has proved its case

beyond reasonable doubt. At paragraph-16 he has stated the reasons for his conclusion. We find it to prove the same to highlight the exact words of

learned Additional Sessions Judge which is as follows:-

“Accused Gandhia was seen fleeing on the road carrying a Kati just after which the dead body of the deceased was found beside the road, his

intimidation to P.W.5 with dire consequence if she dared to implicate him with the murder and the corroborative evidence of P.W.5 and P.W.10 leaves no room for

doubt that accused Gandhia had murdered the deceased. It has not been proved that accused Mitu also took part in killing of the deceased.”

7. Thus, it is apparent from the record that the learned Additional Sessions Judge has relied on three circumstances to convict the appellant-Gandhia

@ Gandharba for the offence of murder. The first is that accused appellant-Gandhia was seen fleeing from the road carrying a

â??Katiâ? just after which the dead body of the deceased was found beside the road. Secondly, he intimidated P.W-5 with dire consequence if she

dares to implicate him with the murder. In addition to this from the corroborative evidence of P.Ws.6 and P.W.10, we made it clear that there is no

dispute either before the learned Trial Judge or before us that the death of the deceased was not homicidal in nature. In view of evidence of P.W.1

together with the contents of the Exhibit-1 reveal that on Postmortem Examination the deceased died because of deep lacerated and cut injuries and

almost severing on the head and from the rest of the tongue.

8. InÂ assailingÂ theÂ findingsÂ recordedÂ byÂ theÂ learnedÂ Addl. Sessions Judge, the learned counsel Mr. Katar has argued that the

evidence regarding the appellant running away from the road carrying a â??Katiâ? just after which the dead body of the deceased was found is not

based on proper appreciation of evidence. P.W.4 on whose evidence much reliance has been placed stated that about two years prior to her

deposition at about 9:00 A.M. she was bathing at Budhabahana Bandha in the backside of her house. After bath she came to the embankment and

saw Gandhia carrying a â??Katiâ? in his hand and was running from the road. The road is about 400 cubits from the back side of the deceased

wherefrom she saw the accused Gandhia. She has not stated anything regarding the finding of the dead body immediately after such where the dead

body of the appellant was found. The evidence of all the other witnesses also did not corroborate the evidence of P.W.5 to establish beyond

reasonable doubt that immediately after P.W.5 saw the appellant running away from the road, the dead body of the deceased was found from the

spot. So this aspect of the case appears to have not been brought home by the prosecution.

9. The second circumstance relied upon by the learned Trial Judge is that P.W.5 was threatened by the appellant that if she dares to implicate him

with the murder then she will face dire consequences. P.W.5 has not stated so in her examination-in-chief. In her cross-examination, under Section

154 of the Indian Evidence Act, 1872, she stated before the police that accused Gandhia threatened to kill their husband if they dared to depose

against him before the Court. Such statement is only an admission of a previous statement not a piece of substantial evidence. So, it was erroneous on

the part of the learned Addl. Sessions Judge to rely upon such statement as a substantive piece of evidence as a whole. The prosecution established

that P.W.5 has been threatened by the appellant with dire consequence if she implicates him in the murder of the deceased.

10. The last piece of circumstantial evidence is that of P.W.6. It is seen that P.W.6 has not supported the prosecution case and has been cross-

examined by the prosecution under section 154 of the Evidence Act. In the examination-in-chief he has stated that he knows Tuna Behera. Bhajani

Pradhan (P.W.5) is his wife. When he returned home about two years prior to her deposition, P.W.5 informed him that she saw accused Gandharba

fled away killing Tuna Behera which she witnessed while returning back from bathing. Any statement made by P.W.5 to her husband (P.W.6) is hear

say and not admissible in evidence. Moreover, the communication between husband and wife is not admissible in evidence under section 122 of the

Indian Evidence Act. So, P.W.6 does not in any way help the case of the prosecution.

11. P.W.10-Saibani[^] Barik[^] stated[^] that[^] she [^] and[^] Padma[^] Arukh were taking bath in the male bathing portion of the tank and Sajani

Pradhan (P.W.5) was bathing in the female portion of the tank. After bathing she and Padma Arukh came the embankment of the tank where P.W.5

informed that accused Gandharba killed Tuna Behera and fled away. This witness was also cross-examined by the prosecution having been treated as

a hostile witness. The statement made by this witness before the Court regarding the disclosure made by P.W.5 will not be admissible in evidence. In

view of the fact that such statement is a hear say.

12. In that view of the matter, this Court is of the considered opinion that there is hardly any evidence to confirm the conviction of the sole appellant-

Gandhia @ Gandharba @ Debraj Sahoo. Hence, we allow the appeal and set aside the conviction of the appellant under section 302 of the IPC. He

be set at liberty forthwith. If he is already on bail, the bail bond executed by him be cancelled.

13. Send back the LCR.

As period of COVID-19 is continuing, learned counsel for the appellant/petitioner may utilize the soft copy of this order available in the High

Court[^]'s website or print out thereof at par with certified copies in the manner

prescribed, vide Court's Notice No.4587 dated 25.03.2020.