

(2022) 07 OHC CK 0099
In the Orissa High Court
Case No : Criminal Appeal No. 96 Of 2013

Kailash Chandra Ojha

APPELLANT

Vs

State Of Odisha

RESPONDENT

Date of Decision : 18-07-2022

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 498A

Citation : (2022) 07 OHC CK 0099

Hon'ble Judges : Dr. S. Muralidhar, CJ; R. K. Pattanaik, J

Bench : Division Bench

Advocate : Samir Kumar Mishra, Janmejaya Katikia

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the order dated 26th March 2011, passed by the Additional Sessions Judge, Fast Track Court No.3, Bhubaneswar, in C.T. (Sessions) No.8/46 of 2009, convicting the Appellant for the offence punishable under Section 302 of IPC and sentencing him to undergo imprisonment for life and also convicting him for the offence punishable under Section 498-A of the IPC and sentencing him to undergo Rigorous Imprisonment (RI) for three years. Both the sentences were directed to run concurrently.

2. The case of the prosecution was that one Silu Ojha (PW-7), the son of the Appellant, lodged a written report before the Inspector-In Charge (IIC), Mancheswar Police Station (PS) at around 8 pm on 6th November, 2008 and stating inter alia that the Appellant had abused and assaulted his wife - the deceased, Bichitra Ojha, dragged her outside his Bari, poured kerosene over her body and set her on fire. She sustained severe burnt injuries on her body and was immediately shifted to the Capital Hospital. It was stated in the FIR that prior to the incident the Appellant was torturing the deceased both physically and mentally and assaulted her very often. Initially, the FIR was registered for the

offence punishable under Sections 498-A and 307 of IPC. Subsequently, the deceased succumbed to her burn injuries, on 8th November 2008 and the offence was converted into Section 302 of IPC. A charge sheet was submitted by the Investigating Officer (IO) (PW-21) on 5th March, 2009 for the aforementioned offences. The Appellant pleaded not guilty and claimed trial.

3. Twenty-one witnesses were examined for the prosecution and three for the defence. On analyzing the trial Court delivered the impugned judgment on 26th March 2011, holding the Appellant guilty of the aforementioned offences and sentenced him in the manner indicated.

4. Mr. Samir Kumar Mishra, learned counsel appearing for the Appellant submitted as under:

(i) The Appellant had been convicted only on the evidence of his children i.e., the son (PW-7) the informant, his other son, Sudhira Ojha@ Kulu (PW-1) who was a child witness and another minor daughter, Rojalin Ojha (PW-17). None of the said witnesses was present at the time of the occurrence. They were not eye witnesses but post-occurrence witnesses.

(ii) This is a case entirely based on circumstantial evidence. The links in the chain of circumstances as projected by the prosecution were neither continuous nor complete and each of the links was not substantiated. The circumstances that were proved, when taken together did not unerringly point to the guilt of the Appellant.

(iii) Several of the PWs turned hostile. PW-3, a sister-in-law of the Appellant, who spoke against the Appellant and in support of the prosecution admitted that there was a land dispute between the brothers of the Appellant and that she did not pull on well with the Appellant who always abused her. Her evidence was therefore that of an interested witness and had to be approached with caution.

(iv) PW-2, the elder brother of the Appellant, turned hostile as did PWs-4 and 5. PW-6 was a hearsay witness and did not depose anything against the Appellant. His evidence was not trustworthy.

(v) PWs-8, 11, 12 and 13 were declared hostile. They were the villagers and immediate neighbours of the deceased. They did not depose anything against the Appellant.

(vi) PWs-9 and 10 were the witnesses to the seizure of some burnt clothes. They admitted to putting their signatures on blank papers without knowing the facts and circumstances of the seizure.

(vii) PW-14 also turned hostile and admitted to not being examined by the Police earlier. PW-17 was a child witness of 12 years of age. Her statement was contradictory. She admitted to not talking with her mother and not being examined by the Police in the case.

(viii) The hair and blood-stains seized by the IO were sent with PWs-18 and 19,

the two Constables. However, they admitted that the envelope, in which the objects were sent, was not in a sealed condition.

(ix) PW-20, who conducted the postmortem, opined that except the head, face, neck, front abdomen, upper limb, back of chest, the scalp hair, eye-brows and eye-lashes, there was no other burn injury and there was no smell of kerosene found over the body and scalp hairs. In his cross-examination, PW-20 stated that the wearing apparels of the deceased were burnt or half burnt and the Saree was not sealed when it was handed over to the Police.

(x) The defence witnesses supported the case of the Appellant. DW-1 categorically stated that he never heard any quarrel between the Appellant and the deceased for the last twenty years and could not say how the deceased died. DW-2 was a co-villager. He stated that at the time of occurrence, except the deceased, none was present at the spot. The Appellant had been to Cuttack for his work. In short, he stated that none was present at the time of the incident.

(xi) DW-3 stated that the deceased was behaving abnormally prior to the incident due to her mental retardation.

5. Mr. Janmejaya Katikia, learned Additional Government Advocate (AGA), on the other hand, supported the Judgment of the trial Court and submitted that the three children would not normally speak against their own father unless they were satisfied that he was guilty of causing the death of their mother by burning her. Notwithstanding that some of the witnesses may have turned hostile, the three children, PWs-1, 7 and 17 were clear and cogent and could not be shaken in cross-examination. Their testimonies were enough to prove the chain of circumstances leading to the incident where the Appellant set his own wife- the deceased on fire.

6. Mr. Katikia, learned Additional Government Advocate pointed to the medical evidence which clearly showed that it was a homicidal death. The only suggestion was that given to the Doctor (PW-20) who conducted postmortem in the cross-examination that the deceased did not die of burn injuries.

7. The evidence of PW-3 lends assurance to the Court on the veracity of the case of the prosecution. No suggestion was put to the IO that PW-3 had not been examined or even that PW-17 had not been examined by the Police. Mr. Katikia, learned AGA pointed out that each of the links of the chain of circumstances was substantiated by the prosecution when taken collectively, pointed unerringly to the guilt of the Appellant and of no one else.

8. Mr. Katikia, further referred to the evidence of PW-3, where she categorically stated that she heard the deceased was found lying down in a burnt condition shouting that it was the Appellant who had set her on fire. This was not able to be shaken in her cross-examination.

9. Before beginning to analyze the evidence, the Court would like to recapitulate the legal position regarding the case, based on circumstantial evidence. In Ram

Avtar v. State 1985 Supp SCC 410 the Supreme Court explained that:

"2. ...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated."

10. In State of Tamil Nadu v. Rajendran (1999) 8 SCC 679 the Supreme Court held:

"6. ... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused."

11. In Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC 681, the Supreme Court held:

"12.The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence."

12. In Brajesh Mavi v. The State (2012) 7 SCC 45 the Supreme Court explained:

"27. ...From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime."

13. On examining the evidence on record in the present case, the following circumstances appear to be put forth by the prosecution as forming a continuous chain and which according to the prosecution taken collectively point unerringly to the guilt of the Appellant:

(i) The burnt body of the deceased was found lying on the floor in the house in which she and the Appellant lived;

(ii) On hearing the hullah, the PW-3 the sister-in-law who also lived in the same village came to the house and she found the deceased in a burnt condition and the deceased was shouting that the Appellant had set her on fire;

(iii) The deceased was taken to the Capital Hospital in a burnt condition on 6th November, 2008 and succumbed to the burns on 8th November, 2008;

(iv) During this period, the Appellant was absconding. A raid was conducted and he was arrested by the IO on 8th November, 2008.

(v) The medical evidence showed that the deceased had sustained 70% burns and the burn injuries involved the entire body surface except head, neck and face. The death was due to complications of burn injuries. There was no suggestion to the IO that this was a case of suicide.

(vi) The three children of the Appellant and the deceased i.e., PWs-1, 7 and 17 have fully supported the prosecution and spoken against their father- the Appellant. The fact that prior to the death of the deceased, the Appellant was continuously torturing her and assaulting her is an important circumstance proved by these three witnesses.

14. To begin with PW-1, he clearly stated that he had been in the School at the time of the incident and when he returned, he found the burnt body of the mother on the ground. He also noticed "the villagers assaulting my father, the accused". It was PW-7 who took the mother to the Hospital for treatment. First to the Capital Hospital and then to the S.C.B. Medical College, Cuttack, where she died. PW-1 stated, "my mother intimated me that the accused set fire on her" and further that "prior to the incident my mother was assaulted by my father (accused) very often." In the cross-examination, PW-1 specifically denied that "it is not a fact that the father was not present in the house on that day". He stood by his version that the villagers were assaulting his father. Only he could not name them. He was also clear that his brother and sister accompanied the mother to the Hospital. Again, in his cross-examination, he stated very categorically, "my father takes liquor and assaults my mother very often. Every day he used to take liquor." He denied the suggestion "it is not a fact that my mother had not told me that the accused had set fire on her person."

15. It is sought to be argued by Mr. Mishra, learned counsel for the Appellant that by the time she was brought to the Hospital, the deceased was in no condition to even speak. Water could not be administered to her and therefore it is unlikely that she was able to tell PW-1 that she was set on fire by her husband.

16. The above submission overlooks the fact that PW-1 saw his mother before she was taken to the Hospital and therefore, there was every opportunity for her to have told him that it was the father who set her on fire. This witness has spoken naturally and has remained unshaken in cross-examination. He is fully

corroborated by his two siblings, i.e., PWs-7 and 17.

17. PW-7 is clear that the occurrence took place at around 3.30pm on 6th November, 2008. He was at work and got a message over the phone that his father had set his mother on fire. He found his mother on the ground with burn injuries and then he took her to the Capital Hospital for treatment and thereafter to the S.C.B. Medical College, Cuttack for better treatment.

18. PW-7, at the relevant time was working in a furniture shop at Hanspal. He stated that "the accused had also accompanied us to the Capital Hospital in the auto-rickshaw." This disputes the elaborate defence of alibi sought to be set up by the Appellant. There was no suggestion to PW-7 that the accused was not present in the house. He denied specifically, "it is not a fact that the accused had not set fire to the person of my mother." The suggestion to him that his mother committed suicide is specifically denied by him. As regards the motive for the crime, he spoke thus:

"4.....The quarrel between my mother and father was taking place regarding payment of money by my father as he had sold some landed property. It is not a fact that my deceased mother was always threatening my father (accused) that unless he pays her money, she would die. It is not a fact that my mother committed suicide by burning herself pouring kerosene on her body as my father did not pay her money. It is not a fact that I am deposing falsehood."

19. This was the only time when there was a suggestion made about the deceased committing suicide and this has been promptly denied by PW-7.

20. PW-1 and PW-7, more or less, corroborate each other. Turning next to PW-17, the minor daughter of the Appellant and the deceased, she also is clear that after returning from School, she found her mother lying with burn injuries. From the neighbours, she came to know that her mother had been burnt by her father by pouring kerosene on her. She also stated that "my father was assaulting my mother at times." She has stated that she was never examined by the Police. She again denied as under:

"5.....It is not a fact that my mother was threatening my father to commit suicide if he would not pay the money to her. It is not a fact that I am deposing falsehood against my father that he burnt my mother by pouring kerosene on her body. It is not a fact that I am deposing such fact at the instance of my maternal uncle."

21. Again there is no need for this child to speak falsely and that too against her own father. She is witness to the continuous assault and torture of the deceased by the Appellant.

22. The evidence of the three children taken together point to a history of violence to which the deceased was subjected at the hands of the Appellant. The three witnesses have spoken naturally. One of them recalls that the mother specifically stated about the accused setting her on fire and that was at the

earliest point in time.

23. The above evidence of PWs-1, 7 and 17 receive support from the evidence of the sister-in-law of the deceased, i.e., PW-3. She stated in her examination-in-chief as under:

"2. The occurrence took place last year during month of Kartik in the house of the deceased. Hearing hulla I woke up and went to the house of deceased and found the deceased was in a burning condition and was shouting that accused set fire on her person. Many persons came there and tried to extinguish the fire. There after she was taken to hospital in an auto-rickshaw for her treatment."

24. Interestingly, in the cross-examination, she was not asked anything about the statement made by the deceased to her. The plea of alibi suggested to her namely that the accused was not present at the time of the incident, is denied by her. She specifically states this in her cross-examination:

"3.....It is not a fact that the accused was not present in his house on the date of incident and had come to Bhubaneswar."

25. She very frankly states that she did not pull on well with the accused. The Court views this not as a negative factor in order to discredit her but doing her good as she spoke the truth. Because very quickly she states that:

"3.....It is not a fact that the accused is in no way involved in this case and I am deposing falsehood against him, as I do not pull on well with him. The deceased was taken to hospital at about 4 P.M."

26. There is nothing in the evidence of PW-3 that even remotely suggests that she is not speaking the truth. Her cross-examination does not discredit her evidence. There is no reason why the Court should not accept her testimony as being truthful.

27. If one examines the above prosecution evidence with that of the defence witnesses, it is clear that a desperate attempt has been made to somehow bring forth the plea of alibi. DW-1, who is a co-villager tried to say that "neither the accused nor his elder son were present in the house." However, he does not seem to have spoken to the Police at all. His evidence does not inspire confidence that he is fully aware of all the facts. It does appear that he is trying to help the accused by setting up a plea of alibi.

28. Again DW-2 is another co-villager who tries to say that except the deceased none else was present in the house and that the accused had been to Cuttack for his work, whereas, DW-1 states that he is to go to Bhubaneswar as a mason. According to DW-2, the accused worked as a Carpenter and was two years senior to him in School.

29. By the time, DW-3 was examined, i.e., on 28th December, 2010, the defence sought to set up a new theory about the "abnormal behavior of the deceased, due to mental retardation". This was nobody's case at any point of time. In fact,

this is not substantiated at all by any medical evidence or witnesses. DW-3 was the nephew of the accused and appears to be desperate somehow to support his case. He was not examined by the Police at any point of time. There is no reason to trust this kind of witness who states in his cross-examination that he does not even know if the deceased was taken to the hospital by the Appellant for treatment.

30. When the defence witnesses are kept on one side and the evidence of the PWs-1, 7 & 17 and the PW-3 on the other, the witnesses for the prosecution appear to be speaking clearly and cogently and without any contradiction whatsoever.

31. Turning now to the medical evidence, PW-20, who conducted the postmortem, found external burn injuries and was clear that:

"The cause of death was due to complications of burn injuries sustained involving 70% of body surface area and was fatal and can cause death in ordinary course of nature. The burn injuries were consistent with flame burn arising out of fire and flame. The time of death would be within six hours at the time of conducting the P.M. examination."

32. There is no suggestion to this witness that the deceased could have died by committing suicide. Strangely, a suggestion was given that it was not a case of burn injuries and that the deceased had not died due to it, which was promptly denied. The medical evidence, therefore, fully corroborates the version of the PWs that the deceased was set on fire by the Appellant and died due to burns.

33. What also stands out is the fact that the accused was arrested after a raid by the IO. In the cross-examination of the IO, there is no suggestion that this was not so. There is no suggestion to the IO that PW-17 was not examined by her. In the cross-examination, the IO states that "I arrested the accused at 11 P.M. from his village." Again there is nothing in the cross-examination of the IO that brings out any inconsistencies in the investigation.

34. The Court is satisfied that each of the circumstances outlined by the prosecution have been proved sufficiently beyond reasonable doubt and each of those proved circumstances forms a continuous chain which point unerringly to the guilt of the accused. The trial Court appears to have made no error in analyzing the evidence and returning the finding of guilt against the accused and sentencing them both for the offence punishable under Section 498-A of IPC as well as Section 302 of IPC.

35. Consequently, there is no merit in this appeal and it is dismissed as such, but in the circumstances with no orders as to costs.

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