
(2004) 11 OHC CK 0019
In the Orissa High Court
Case No : Criminal Appeal No. 263 of 2003

Kanika Mistry, alies Mandal	Vs	APPELLANT
State of Orissa		RESPONDENT

Date of Decision : 05-11-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 300

Citation : (2005) CLT 26 (Suppl CrI) : (2005) CriLJ 643 : (2004) 29 OCR 884

Hon'ble Judges : P.K. Tripathy, J;A.K. Samantray, J

Bench : Division Bench

Advocate : J.K. Panda, for the Appellant; Debasis Das, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.K. Samantray, J.—The appellant calls in question the order of conviction and sentence passed against her on 18-9-2003 in Sessions Case No. 25 of 2000 by Addl. Sessions Judge, Malkangiri convicting her u/s 302 of the I. P. C. and sentencing to undergo imprisonment for life.

2. The factual position as presented by the prosecution sans unnecessary details is as follows :

On 15-11-1999 at 11.15 A. M. information was lodged at Kalimela P. S. by informant Sita Mistry that she was absent from home at M. V. 57 Village on 14-11-1999 and on her return home at 10.00 A. M. she found her son Sankar Mistry (hereinafter referred to as "deceased") lying dead in front of her house. To ascertain the cause of the death of the deceased a meeting was convened and in the said meeting in presence of Sarpanch and other villagers her daughter-in-law Kanika Mistry (accused) disclosed that she was responsible for the death of deceased. On further questioning she gave out that the deceased, her husband, was not of her choice and she was in love with one Binay of M. V. Village 130 and to get rid of deceased she administered poison in his food, taking which he died.

3. On this information police registered case and took up investigation and ultimately on completion of formalities of investigation charge sheeted the accused u/s 302, 1PC and the accused after commitment to Court of Sessions Judge, Koraput faced trial in the Court of Addl. Sessions Judge, Malkangiri and was convicted.

4. The plea of accused is one of complete denial and false implication. In the Panchayat meeting nothing was asked to her and only to harass her, witnesses had assaulted her and demanded Rs. 10,000/-which since could not pay, they entangled her in false allegation and that she had no knowledge about the cause of death of deceased.

5. To substantiate the accusation prosecution examined as many as 9 witnesses and exhibited 9 documents. Out of the documents exhibited Ext. 6 is the F. I. R. and Ext. 5 is the post mortem report and Ext. 7 a seizure list of one bottle" containing some violet coloured substance are the relevant piece of evidence.

6. The accused in her defence had examined 2 D. Ws. including herself.

7. The post mortem report has been marked Ext. 5 on admission without examination of the doctor who conducted the autopsy over the dead body. The report shows that there was forth discharge from mouth and both nostrils. Stomach contained undigested food particles greenish in colour and having kerosene like smell and death was due to shock attributed to suspected poison, which could be confirmed by chemical examination of viscera.

8. The learned counsel for the appellant Mr. Jugal Kishore Panda fairly submitted that he has nothing to controvert to the finding in the Ext. 5 the post mortem report. He argued that the doctor was not sure if death was due to poisoning and he only suspected there might be poison which was to be confirmed by chemical examination of the viscera. Advancing his argument he submitted that although the viscera was sent for chemical examination no report is forthcoming in the record and exhibited to confirm that the undigested food particulars actually contained position. He submitted further that in absence of clear-cut finding that death of deceased was due to poisoning the report is of no assistance to the prosecution in fastening the charge of murder to the accused. The learned Additional Government Advocate, however, conceded that in a case of murder by poisoning the post mortem report and evidence of doctor about find of poison has to be confirmed by chemical examination of the viscera to conclusively prove that death was due to poisoning and in the instant case due to absence of chemical examination report the evidence is incomplete and no definite finding in that score is possible.

9. The prosecution has relied on the oral evidence of witnesses to prove that it is the accused who made extra judicial confession before the Panchayat convened in the village in presence of Sarpanch and ex-Sarpanch. The accused, however, has denied to have made any such confession. The prosecution, we find, has examined P. Ws. 1, 2, 3, 4, 5, 7 and 8 to prove that accused made extra judicial

confession before a village meeting and confessed to have given poison mixed food to deceased resulting in his death. Out of these P. Ws., P. W. 1 is none other than the mother of deceased, P.Ws. 2 and 3 have not supported the prosecution case of extra judicial confession. P.W. 4 is next door neighbour of deceased, P. W. 5 is another co-villager, P. W. 7 is the husband of deceased's younger sister and P. W. 8 is sister of the deceased. Their evidence is that the accused was brought to the meeting by her father (D. W. 2) and being asked by Sarpanch she confessed about administering poison to the food of deceased and deceased died taking that food.

10. Before we proceed to examine the evidentiary value of such evidence on extra judicial confession we make it clear that admittedly there is no direct evidence available to attribute the commission of the crime to the appellant, but only on the basis of extra judicial confession the learned Addl. Sessions Judge thought it fit to convict her and pass the sentence of life imprisonment.

11. The Apex Court in a decision reported in State of Punjab Vs. Gurdeep Singh, , has held "confession in common acceptance means and implies acknowledgment of guilt. Its evidentiary value and its acceptability however shall have to be assessed by the Court having due regard to the credibility of witnesses. In the event however, the Court is otherwise in a position having due regard to the attending circumstances believes the witness before whom the confession is made and is otherwise satisfied that the confession is otherwise voluntary and without there being any doubt in regard thereto an order of conviction can be founded on such evidence."

12. In the same decision the Apex Court held that "There is no denial of the fact that extra judicial confession is admissible in evidence and the Court in appropriate case can rely thereon to the extent of even basing conviction of the accused. In a long catena of decisions of this Court the settled position of the present day is that the extra judicial confession by itself if, otherwise in conformity with the law, can be treated as substantive evidence and in appropriate cases it can be used to punish the offender. We however hasten to add here that this statement of law stands qualified to the extent that the Court should insist on some assuring material or circumstances to treat the same as piece of substantive evidence."

13. It is the settled principle of law that while deciding a case, Court has to weigh and appreciate evidence on record. Evidence in that context means the evidence adduced by both the parties. Therefore, in this case when we consider reliability of the extra judicial confession as the solitary piece of evidence in respect of the charge u/s 302,1. P. C, at that time we are also to appreciate the defence evidence adduced by the accused. The appellant herself was examined as D. W. No. 1 and she stated in her evidence that after the death of her husband her mother-in-law demanded Rs. 10,000/-(Rupees ten thousand) for the obsequies, the villagers gathered in the meeting joined her and the appellant pleaded about the reason for the death so also denying to the allegation by them

of administering poison to her husband. There is nothing available from the evidence from the side of the prosecution which can inspire confidence relating to voluntariness in the extra judicial confession. When the fact remains thus, the evidence from the side of the prosecution regarding extra judicial confession does not inspire confidence in this case. In the light of the above settled principle when we advert to scan the evidence adduced by the prosecution on that score we find that the confession at the very first place cannot be termed as voluntary, rather it is involuntary in view of the circumstance that to the meeting the appellant was called and she was brought there by her father, she was questioned about the cause of death of deceased and she stated that she administered poison in the food and served it to deceased and taking poisonous food he died. It is admitted case that in the meeting there were about 30 villagers including Sarpanch and ex. Sarpanch who were persons of authority and all of them is one side and the hapless lady on the other facing their questions. In such circumstances, even if she made some statements, tested in the touchstone of the above principle of law, we cannot accept it as voluntary confession. Rather it was to save herself from the situation she was put to. Besides out of the five P. Ws. examined on that score, 3 are close relations of deceased and 2 are neighbours and co-villagers of deceased. Neither the Sarpanch to whose query she made the so-called confession nor the ex-Sarpanch has been examined by prosecution.

14. We have made it abundantly clear that excepting this extra judicial confession there is no other attending circumstance against the appellant and conviction is solely based on this. Now that we have for the reason herein before indicated entertained doubt about the credibility of the witnesses examined and found the alleged extra judicial confession not to be voluntary and if at all there was any it was made by appellant to protect herself from harassment and indignity to which she was put to by the villagers and relations of deceased after deceased's death, we find absolutely no evidence against the accused/appellant to sustain the impugned order of conviction of the trial Court.

15. In view of the above, we set aside the impugned judgment and order of conviction and acquit the appellant from the charge u/s 302, I. P. C. She be set at liberty forthwith.

The Criminal Appeal is accordingly allowed.

P.K. Tripathy, J.

16. I agree.