

(2001) 08 OHC CK 0008

In the Orissa High Court

Case No : Jail Criminal Appeal No. 401 of 1994

Mandai alias Madhusudan and Khandet alias Khandual

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-08-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2001) 2 OLR 386

Hon'ble Judges : N.Y. Hanumanthappa, C.J;B. Panigrahi, J

Bench : Division Bench

Judgement

B. Panigrahi, J.—This appeal assails the judgment/order passed by the learned Sessions Judge, Mayurbhanj, Baripada, in S.T. Case No. 55 of 1993, whereby the Appellant was convicted under Sections 302 and 201, I.P.C. and sentenced to undergo rigorous imprisonment for life u/s 302, I.P.C. No separate sentence was awarded u/s 201, I.P.C.

2. The scenario of the prosecution case as revealed during course of trial is as follows:

On 4.12.1991, the Appellant along with two other associates took a Video set, Generator, Cassettes from Premsankar Mishra of village Jharadihi on hire with undertaking to return those articles on the next following day. Those articles had been carried by operator Diku Majhi, who went along with the Appellant and his two other associates. But on the following day neither Diku Majhi returned nor the equipments were returned. Suspecting that a mischievous game might have been played by the Appellant and his associates, Premsankar and his nephew Rajesh Kumar Misra moved from village to village on a motor bike in search of Diku Majhi, Operator, and their video equipments. When the search was on, they learnt that the Appellant was working as a servant in the house of one Jagannath Mishra of village Asingi. One person called Panda of village Begladihi took them to village Asinhi, where they found the Appellant present. They brought the Appellant to village Kuali and then to village Jhardihi. At Jhardihi, it is said that

the Appellant disclosed that he and his other associates killed the Video Operator Diku Majhi at Lylen.Ghati with pistol and Bhujali and took away the cassettes and other equipments. The Appellant also led PremSankar and some others to Lylen Ghati and showed the place where the dead body of Diku Majhi was lying. There were cut injury on the neck and gun shot injuries on the back and chest of deceased Diku Majhi. PremSankar and Ors. then came back to Jhardihi with the Appellant and informed about the incident to the police authorities, who started investigation.. During investigation, the police recovered the Video set and other articles from the duck shed of Jagannath Mishra, under whom the Appellant was working. On the information of the Appellant, the police recovered the Generator, T.V. set and other equipments from village Asingi. T.I. Parade was subsequently conducted and after such T.I. parade, the articles seized were handed over to Rajesh Kumar Mishra. To ladies who claimed to have seen the Appellant and his two other associates also identified the Appellant in the T.I. parade. The police also seized the garments of the deceased which were sent for chemical examination and after obtaining the report, charge sheet was placed against the Appellant and his two associates under Sections 302 and 201, Indian Penal Code.

3. The plea of the defence was one of complete denial.

4. After examination of witnesses, the learned Sessions Judge acquitted the two other associates of the Appellant, but since he felt that there was sufficient material against the Appellant, he found the Appellant guilty of the charges under Sections 302 and 201, I.P.C. and convicted and sentenced him in the manner already indicated.

5. Admittedly, the case depends upon circumstantial evidence in absence of any eye witness to the occurrence. Out of the 14 witnesses examined, the learned Sessions Judge has mostly relied upon the evidence of P. Ws. 1, 2 and 3. However, he has not discussed about the relevancy and trustworthiness of the evidence of other witnesses. There has been no discussion in his judgment as to the circumstances which led him to believe that it was the Appellant alone who must have been the author of the crime. Therefore, it has to be seen whether the prosecution is able to make out a case based upon circumstances in order to prove the guilt of the Appellant. Law is well settled that the circumstances must be such as to exclude any other hypothesis than the guilt of the accused.

6. From the evidence of P.W. 1, PremSankar Mishra, who according to the prosecution lent the Video set through the deceased, has stated that on 4.12.1992 the Appellant with two other associates had come and taken the Video set with a promise to return the articles on 5.12.1992 and the deceased had accompanied them. They waited on the following day till noon, but when they did not get back the video set as well as other instruments, they went in search of those persons. Throughout the day on 5.12.1992 they searched for the Appellant and his companions, but could not get any sign of their trace. On 6.12.1992 they got an information from a Brahmin person and one Arun Sarkar that Appellant

was working in the house of one Jagannath Mishra. So, on 7.12.1992, they went along with Jogesh Mishra, Rajesh Misra, Arun Kumar Sarkar to village Asingi and found the Appellant present there. According to P.W. 1, it was only P.W. 2 Rajesh Kumar Mishra, who identified the Appellant. They enquired from him about the Video set and also about the operator Diku majhi. He denied to have any knowledge about it. The Appellant was brought to village Kuali and produced before Sarat Singh Deo, who was the Mukhia of the village. When asked by Sarat Singh Deo, the Appellant is said to have revealed that he had kept the Video set in the house of Kamal Pradhan and Kirtan Mandai of village Asingi. On the advice of Sarat Singh Deo, P.W. 1 and Ors. brought the Appellant to Jhardihi. Subash Panda, Ajit Singh Deo, Dipen Kumar Sarkar and Ors. had also accompanied them to Jhardihi. According to P.W. 1, the Appellant had disclosed that he had kept the Video set in the house of Kirtan Pradhan. P.W. 2, Rajesh Kumar Misra, who is the main witness in this case, deposed in his evidence that although the Video set and other articles were taken by the Appellant and two others and Diku Majhi (deceased) on 4.12.1992, but as the articles were not returned and Diku Majhi did not come back on 5.12.1992, they went to village Begunadihi to the house of one Panda from whom they gathered the information that the Appellant was working in the house of his "Samudhi" Jagannath Mishra in village Asingi. Thereafter, they came to the house of Jagannath Mishra and took the Appellant to Kuali village Mukhia Sarat Singh Deo. When Sarat Singh Deo asked the Appellant with regard to Diku Majhi, he replied that accused Bimal and Kirtan, his two other associates, had detained Diku Majhi at Asingi. Thereafter they brought the Appellant to village Majhigaon. Tapan Sarkar, Manoj Singh Deo and one Panda accompanied them. At village Majhigaon, his brother Jogesh asked the Appellant in presence of gentlemen of the village and the gentlemen of Kuali village who had come, whereupon the Appellant confessed that he and his two associates had done away with the deceased and thrown the dead body at Lylen Ghati. P.W. 2 claimed that in T.I. parade he identified the Appellant and two others before the Magistrate. In cross-examination, it was elicited from P;W. 2 that he was not sure to have seen the Appellant before 2.12.1992. P.W. 3 stated in his evidence that on 5.12.1992 P.W. 2 had informed him that Operator Diku Majhi had taken the Video set along with other accessories in the company of the Appellant and two others, but did not return the articles. Therefore, they made a frantic search to trace them out, but could not get any clue till 7.12.1992 and ultimately they had caught hold of the Appellant. On being asked, the Appellant kept quiet at the beginning, but at last he agreed in presence of Ajit Singh Deo and many others to have killed Dinu Majhi and kept the Video set and other accessories in village Asingi.

7. From the evidence of P. Ws. 1, 2 and 3, we notice that prosecution relied upon a circumstance against the Appellant making an extra-judicial confession. It is stated by P. Ws. 1 and 2 that such disclosure was made by the Appellant in presence of Sarat Singh Deo, who was the Mukhia of Kuali village and also Subash Panda, Tapan Kumar Sarkar. Subsah Panda has been examined as P.W. 8.

He has strongly denied that the Appellant made any disclosure confessing about his guilt in presence of Tapan Sarkar, Arun Sarkar, Ajit singh Deo and that he led them to Lylen Ghati. Sarat Singh Deo, the Mukhia of the village before whom, according to the prosecution, the Appellant made disclosure has been omitted to be examined in this case. Had he been examined, the truth or otherwise of the prosecution story would have come before the Court. There is no explanation from the prosecution as to why it omitted to examine Sarat Singh Deo. P.W. 8, who is alleged to be a witnesses to the extra-judicial confession, has also disowned his statement before the police that the Appellant made such disclosure confessing his guilt. So also, P.W. 10 Arun Sarkar disowned his earlier statement before the police that the Appellant confessed his guilt. On a closer examination of the evidence of the witnesses, we find that the alleged extra-judicial confession made before the Mukhia of the village and Ors. has not been proved by the prosecution. Therefore, this circumstances as attempted to be brought against the Appellant would not succeed. As a matter of prudence, the Court should require some material corroboration to extra-judicial confession. In the circumstances discussed above, it does not lead us to come to a positive conclusion that the Appellant had made such statement confessing his guilt before P. W Section 2 and 3 particularly when the statement of P. Ws. 2 and 3 did not receive corroboration from any other witnesses and other persons before whom it was alleged that the disclosure was made, have not been examined by the prosecution.

8. P.W. 11 only disclosed that Appellant and two other persons came with a Y.C.P. set, Generator and two cycles and they spent the night in her house at village Haladipokhari. Such situation cannot be said to be an incriminating circumstance against the Appellant. Padma Das (P.W. 12) also stated in the same line. According to P.W. 5 the Magistrate, who had conducted the T.I. Parade Rajesh Mishra (P.W. 2) had identified all the accused persons. The trial Court, however, felt unsafe to rely on the sole evidence of P.W. 2 as regards the identity of the two other accused persons and, therefore, acquitted them. If that was the case, could he rely on the very same evidence of P.W.2 to bring home the charge against the Appellant only. The Appellant had claimed that before such T.I. parade, he was shown to P.W. 2 and Ors. by the police. If that be so, it is unsafe to rely on the evidence regarding T.I. parade.

9. Regarding seizure, it is stated that all the articles had been recovered from the house of one Jagannath Mishra. In this case, the prosecution has not made any attempt to examine said Jagannath Mishra. The reason as to why jagannath Mishra had not been examined was also not explained. The seizure-list under which the Video see and other accessories were seized was marked as Ext. 15. The date of seizure has been noted as 14, 12. 1992 at 3.30 p.m. None of the seizure witnesses have been examined including the owner of the house where the articles were allegedly kept concealed. The articles had been taken on 4.12.1992 and the Appellant disclosed while in police custody on 7.12.1992 confessing his guilt and also led them to the place of recovery. If that is so, it is

not understood why the seizure-list was not prepared on the same day when the Appellant was arrested and seizure was deferred till 14.12.1992. From the evidence of the I.O. we do not get any explanation. In the aforesaid situation, the statement of the I.O. as regards the seizure at the instance of the Appellant seems to be a little fishy and, therefore, we are led to believe that such circumstance cannot be used as a ground against the Appellant.

10. Although the prosecution has relied upon the circumstance based on "last seen together" theory and it was stated that the Appellant and two others were found in the company of the deceased on 4.12.1992, but the dead body was recovered only on 7.12.1992. The other two accused persons have been acquitted by the learned Sessions Judge. No proximity of time has been proved between the last seen together and the actual commission of offence of murder of Diku Majhi. This last seen theory should lead to the irresistible inference against the accused being guilty of the crime failing which even if they were found together at a particular time, but thereafter the prosecution failed to prove the proximity of time between last seen together and death of the deceased, no inference can be used against him. Where the accused was 1st seen in the company of the deceased and dead body was recovered on information given by the accused, but the place from where the recovery was effected was not in exclusive possession of the accused, recovery of the articles belonging to the deceased at the instance of the accused is not reliable. In the circumstances, the accused could not be convicted merely on the circumstance of last seen together with the deceased. In this connection, reliance is placed on the judgment reported in *Anant Bhujangrao Kulkarni Vs. State of Maharashtra*, wherein it has been held:

The only circumstances that have been found established are that the deceased was last seen alive in the company of the Appellant on October 13, 1975 at about 6 p.m. and that the dead body of the deceased was found in the Ladni near the residential portion of the Appellant in Paragaonkar's wada. The said two circumstances, in our opinion, cannot be said to be inconsistent with the innocence of the Appellant and on the basis of these two circumstances alone, it cannot be held that the Appellant was a party to the murder of the deceased. The conviction of the Appellant for the offence u/s 302 read with Section 34, Indian Penal Code cannot, therefore, be upheld.

11. It is true that the deceased Diku Majhi had met a homicidal death which had been proved by the prosecution through the evidence of the Medical Officer, who conducted the post-mortem examination and such death could have been caused on account of some fatal injuries, but it is not proved by the prosecution that the Appellant was the perpetrator of the crime. Sine there has been no direct evidence and the case is based on circumstantial evidence and the circumstances have not been proved to bring home the charge against the Appellant, we feel unsafe to uphold the conviction of the Appellant. The evidence of P. Ws. 1, 2 and 3 should be natural, trustworthy, and credible. We find that there are several

inconsistencies and improbability in the prosecution story so as to record a conviction against the Appellant.

12. On a careful resume of the facts and circumstances of the case, we could not, however, agree with the findings of the learned Sessions Judge that the Appellant was guilty of commission of death of Diku Majhi and accordingly, the appeal succeeds. The order of conviction and sentence passed by the learned Sessions Judge is set aside. The Appellant, if in custody, shall be set at liberty forthwith.