

(2007) 10 OHC CK 0005

In the Orissa High Court

Case No : DSREF No. 3 of 2007 and JCRLA No. 48 of 2007

State

APPELLANT

Vs

Charan Ho
 Charan Ho Vs State of Orissa

RESPONDENT

Date of Decision : 31-10-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366

Evidence Act, 1872 — Section 27

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

Citation : (2008) CLT 197 (Suppl CrI) : (2008) 1 OLR 96 Supp : (2008) OLR 197 (Suppl CrI)

Hon'ble Judges : R.N. Biswal, J;P.K. Tripathy, J

Bench : Division Bench

Advocate : B.K. Nayak, for the Appellant; A.K. Mishra, for the Respondent

Final Decision : Allowed

Judgement

1. DSREF No. 3 of 2007 referred u/s 366 of Code of Criminal Procedure by the Ad hoc Addl. Sessions Judge (F.T.C.), Baripada, Mayurbhanj to confirm the death sentence passed in Sessions Trial Case No. 9/41 of 2006 and JCRLA No. 48 of 2007 preferred by the condemned prisoner, Charan Ho are heard analogously and disposed of by this common judgment.

2. Succinctly stated, the facts of the case as unfolded by the prosecution is that on 27.9.2005, son of accused Charan Ho, aged about ten months suddenly expired. In the cremation ground while the dead body of the aforesaid child was being cremated, deceased Rupa Ho and his wife Ganaro Ho declared that Anr. son of the said accused would also die shortly. So the accused suspecting that they killed his son by practicing sorcery planned to do away with their lives. He disclosed his intention to accused Mangala Ho who supported him. During evening hour, while both the deceased were returning home alone, accused Charan Ho and Mangala Ho followed them. On the way near Champada Banka of village Jadhidhar, accused Charan Ho inflicted several axe blows on Rupa Ho

causing severe injuries leading to his death at the spot. At this ghastly sight, while Ganaro Ho was running away, he chased her and struck several blows with the same axe causing her instantaneous death. When P.W. 11, grandson of the deceased persons raised hullah, both the accused persons fled away. It is further alleged that accused Charan Ho concealed the blood stained axe in his house. Immediately P.W.11 informed this fact to Sagar Ho (P.W.5), elder brother of deceased Rupa Ho, but as darkness had already set in by that time, he did not prefer to go the Police Station to lodge F.I.R. On the daybreak, coming to know that the O.I.C. of Khuhta P.S. (P.W.14) was camping in village Jadidhar, P.W.5 got the report scribed through P.W.8 and made over the same to him. Treating the report as F.I.R., P.W.14 sent it to Khunta P.S. for registration and accordingly the A.S.I, of the said P.S. registered it, u/s 302/201 read with Section 34 of I.P.C. P.W.14 took up investigation, in course of which he visited the spot, sent the dead bodies to the hospital for post-mortem examination, examined the witnesses, seized the wearing apparels of both the accused persons, sent them to hospital for collection of their nail clippings and blood sample and arrested them. It is the further case of the prosecution that while accused Charan Ho was in police custody, he confessed to have murdered both the deceased and to have concealed the weapon of offence (axe) in his house which was reduced into writing by the I.O. as per Ext.9. So saying, accused Charan Ho led the police personnel and the witnesses to his house and gave recovery of the axe (M.O. II) to P.W.14 who seized it and prepared seizure list in respect thereof. Then he forwarded the accused persons to Court. 3.12.2005 the Circle Inspector of Police, Udala (P.W.13) took over charge of investigation of the case from P.W.14 re-examined the witnesses and submitted Charge Sheet against the accused persons on 12.12.2005. The case having been committed to the Court of Sessions Judge, Baripada, Mayurbhanj was transferred to the Court of Ad hoc Addl. Sessions Judge (F.T.C.), who framed charge u/s 302/34 of I.P.C. and under Sections 302/201 of I.P.C. against both the accused persons.

3. The plea of the accused persons was complete denial. Accused Charan Ho further took the plea that, because of previous enmity with the informant party, the case was falsely foisted against him.

4. In order to bring home the charges against the accused persons, prosecution examined 14 witnesses in all. The defence did not prefer to examine any witness. After assessing the evidence on record, while acquitting accused Mangala Ho of all the charges and accused Charan Ho of the charge u/s 201 of I.P.C, the trial Court found the latter guilty u/s 302 of I.P.C, convicted him thereunder and sentenced him to death. The trial Court submitted the proceeding to this Court for confirmation of the death sentence, while the condemned prisoner preferred the appeal challenging the legality and propriety of the order of conviction and sentence passed against him, as stated earlier. Accordingly both the matters are heard together.

5. It transpires from the evidence of P.W.3, Asst. Lady Surgeon of Sub-Divisional

Government Hospital, Udala that on 28.9.2005 she conducted autopsy over the dead body of Ganaro Ho and found the following injuries:

- (a) One incised wound present on the right side neck 2" below the right ear. The size of the incised wound was 3" X 2" X 2".
- (b) One incised wound of size 3" X 2" X 3" on upper 1/3rd of the right arm, with cutting of right humerus.
- (c) One incised wound of size 3" X 1 CM X full skin depth on right temporal region just behind the right ear.
- (d) One incised wound of size 3" X 2" X 2" on the left side of the neck just below the left ear,
- (e) One incised wound of size 3" X 2 CM. X 1 CM. in front of the left ear with cutting of the pinna.
- (f) Two incised wounds of size 3" X 3 CM. X 2 CM. present on the back of the neck.

As per the opinion of P.W.3 all the injuries were ante mortem in nature and caused by heavy cutting weapon like Budia (axe). Injury Nos. (c) and (d) as stated above were fatal in nature. The cause of the death of the deceased was due to shock and haemorrhage, because of cutting of blood vessel of neck.

Similarly, P.W. 10, the then Gynaecologist of Sub-Divisional Government Hospital, Udala on police requisition, conducted post-mortem examination over the dead body of Rupa Ho and found the following injuries :

- (a) Incised wound of size 4" X 2.1/2" X 8" on the right side of the neck, 2" below mastoid process. The neck muscle was cut open and right caotid artery was also cut open.
- (b) Incised wound of size 4" X 1.1/2" X 5" over the occipital bone, situated 3 inches above the first injury.
- (c) Incised wound of 3" X ?" X 2" on the mastoid process of right temporal bone, 3 inches behind the ear.

He further stated that all the injuries were ante mortem in nature and might have been caused by heavy cutting weapon like axe. The cause of death was due to haemorrhage and shock.

The evidence of P.Ws.3 and 10 go to show that both the deceased persons died homicidal death. In the trial Court as well as before this Court, the counsel appearing for the accused person/persons did not challenge the homicidal death of either of the deceased persons. Thus, finding of the trial Court on homicidal death is accepted.

6. Now, it is to be seen whether the Appellant is the author of the crime as held

by the trial Court. The only eye witness to the occurrence is P.W.11, a teen aged boy of about 12 years old. No doubt, conviction can be based relying on the testimony of a solitary witness, but the evidence of such witness should be trustworthy, clinching and beyond reproach. Similarly, order of conviction can be passed on the basis of evidence of a child witness, if it is found that he was capable of knowing the difference between truth and falsehood and that he was not tutored to depose in a particular manner. In the present case, as certified by the trial Court, P.W.11 was also able to understand the questions put to him and gave rational answers to the questions. On perusal of his evidence, it is found that on the date of occurrence during evening hour, while he was sitting in his house, both the deceased persons called him. At the very moment Appellant Charan came and assaulted deceased Rupa by means of a Budia (axe) on his head causing bleeding injury, for which he fell down and expired. Then he assaulted Ganaro by the same axe on her back causing bleeding injury. So, out of fear P.W.11 left the spot and informed the matter to P.W.5. During cross-examination it was elicited from him that both the deceased persons had been to the burial ground to bury the dead body of the son of Charan Ho (Appellant) and as they did not return in the evening, they searched for them and found their dead bodies lying on the spot. When P.W.11 and some others went in search of the deceased persons and found their dead bodies lying at the spot. Thus, it does not inspire confidence that P.W.11 saw the Appellant assaulting deceased Rupa to death and also assaulting the other deceased causing bleeding injury. If in fact he saw the occurrence, there was no need of going in search of them. He could have very much pointed out the dead bodies of the deceased persons to others. Moreover, this witness is the grandson of the deceased persons as found from the evidence on record. P.W.5, the informant is the elder brother of the deceased Rupa. So the possibility that on being tutored by P.W.5 or some close relative of P.W.11, the latter deposed before the Court as per their tutoring cannot be ruled out. This aspect was not taken into consideration by the trial Court while assessing evidence of P.W.11.

7. Now, the only material evidence left is the discovery of the Budia (axe) u/s 27 of the Evidence Act. In that respect evidence of P.W.8 and the I.O. (P.W. 14) are material. It transpires from the evidence of P.W. 14 that while the Appellant was in his custody, he confessed his guilty as per his statement recorded under Ext.9 and led him and the witnesses to his house and brought the weapon of offence i.e. Budia which was seized under seizure list (Ext.4). In his examination-in-chief P.W.8 deposed that during investigation of the case the Appellant confessed to have killed Rupa and Ganaro with an axe and also disclosed to have kept the axe in his house. The I.O. recorded his confessional statement under Ext.9, on perusal of which it is found that the Appellant confessed to have murdered the deceased persons and to have concealed the axe in his house and so saying, led P.W.14 and other witnesses to his house and brought out the Budia (axe) and made over it to P.W. 14. So, there is no evidence whatsoever about the specific place wherefrom the Appellant brought the axe. There is also no evidence to

show that it had been concealed in his house. Recovery of any article cannot be described as a discovery u/s 27 of the Indian Evidence Act, where it is not recovered from a hidden place and in normal course of investigation the investigating agency would have seen it. In the present case in absence of any evidence showing the axe to have been concealed, it can be said that it could have been seen by P.W. 14 during investigation of the case. Furthermore, after the Constitution of India came into force, only voluntary confessional statement leading to discovery of facts are admissible u/s 27 of the evidence Act. But in the case at hand, P.W.8 during his cross-examination stated that the I.O. asked the Appellant to produce the Budia. He also threatened him. So, the statement said to have been made by the Appellant and recorded under Ext.9, cannot be said as a voluntary one. As such, it cannot be held that on the basis of voluntary confessional statement of the Appellant the axe was recovered. This aspect was also not considered by the trial Court. The Appellant might have caused the murder of the deceased persons, but there is much gap between might have and must have. It is incumbent upon the prosecution to bridge that gap, but it has failed to do so.

Therefore, under such facts and circumstances, the JCRLA is allowed and the Reference is discharged by setting aside the order of conviction and sentence passed by the trial Court against the accused-Appellant. Accordingly, the accused-Appellant is acquitted of the charge u/s 302 of I.P.C. by granting benefit of doubt. He be set at liberty forthwith, if his detention in jail is not required in any other case.