

(2001) 12 OHC CK 0009

In the Orissa High Court

Case No : Death Reference No. 2 of 2001 and Criminal Appeal No. 189 of 2001

State of Orissa

APPELLANT

Vs

Muralidhar Sahu

RESPONDENT

Date of Decision : 20-12-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Evidence Act, 1872 — Section 27, 32(1), 32(2), 32(3), 32(4)
Penal Code, 1860 (IPC) — Section 302

Citation : (2002) CriLJ 2096

Hon'ble Judges : B. Panigrahi, J; A.S. Naidu, J

Bench : Division Bench

Advocate : D.P. Das, for the Appellant; A.G.A., for the Respondent

Final Decision : Allowed

Judgement

B. Panigrahi, J.—The accused-appellant has been convicted u/s 302, Indian Penal Code and sentenced to death for having committed murder of his wife Bimala Sahu on 2/3-5-1999. Reference has also been made by the learned Addl. Sessions Judge, Nuapada u/s 374, Criminal Procedure Code for confirmation of the sentence of death in Session Case No. 79/14 of 1999/2000.

2. The skeletal picture of the prosecution story is that on 3-5-1999 around 12.30 p.m. the Medical Officer of Evangelical Hospital, Khariar, Dr. R.N. Raju, sent a report to Khariar police station informing that a patient Bimala Sahu, who was admitted in their hospital died at about 1.45 a.m. on 3-5-1999 due to suspected administration of poison. On the basis of the said report U.D. Case No. 7/99 was registered as a consequence whereof the A.S.I, of Police Sri D.R. Gadtia (P.W. 10) was directed to enquire into the matter. The said A.S.I, held inquest over the dead body of the deceased, sent it for post-mortem examination and also a report to the Officer-in-charge of Khariar Police Station informing him that the deceased-Bimla Sahu, who was a patient in Bed No. 28 of Evangelical hospital had been administered poison which resulted in her death. It was further

narrated that before her death, Bimala Sahu is said to have made a dying declaration before P.W. 1, SaliniTandi, who recorded the same on the bed head ticket at 9.30 a.m. on 2-5-1999. Deceased-Bimala Sahu is said to have disclosed to P.W. 1 Salini Tandi that her husband gave her black coloured liquid in the morning. After some time of taking such liquid she felt pain and discomfort in her abdomen. She was, therefore, shifted to the recovery room verandah and immediate treatment was provided to Bimala Sahu, but no such treatment could bring her to normal life and ultimately she breathed her last around 1.45 a.m. on 3-5-1999. A case was registered u/s 302, I.P.C. against the appellant whereupon further investigation was carried out. During investigation, it is alleged by the prosecution that the accused-appellant while in custody led to the discovery of concealed poison bottle and in consequence of such discovery it was seized.

3. The plea of the accused-appellant before the learned Addl. Sessions Judge was one of innocence and he further stated to have been falsely implicated in the case. After post-mortem examination it is said that the viscera of the deceased along with the poison bottle had been sent for chemical examination and after receipt of the report from the chemical analyst it was found that the death had occurred due to poison. Therefore, prosecution placed the charge-sheet against the accused-appellant. It was committed to the Court of Session and finally the accused stood prosecuted for having committed the offence of murder of his own wife Bimala Sahu.

4. Prosecution in order to sustain the conviction against the appellant had examined 12 witnesses out of which P.W. 1, Salini Tandi was the staff nurse in Evangelical hospital, P.W. 2 the brother-in-law, P.W. 3 Dr. Manas Ranjan Das, Autopsy Surgeon, P.W. 4 clerk of Evangelical hospital, P.W. 5 Constable carrying the dead body for postmortem examination, P.W. 6 the doctor who proved the First Information Report, P.W. 7 the owner of Pesticide shop from whom the appellant alleged to have purchased the pesticide to administer to his wife, P.Ws. 8 and 9 were witnesses to the discovery of pesticide bottle, P.W. 11 the mother of the deceased and P.Ws. 10 and 12 the Investigating Officers.

5. Appellant had also examined two witnesses in support of his plea.

6. Indubitably there has been no direct evidence placed by the prosecution in order to bring home the charge against the appellant. Therefore, the entire case is based on circumstantial evidence.

7. The basic requirement in order to prove a case based on circumstantial evidence has been decided by the Supreme Court in innumerable decisions. The circumstances relied upon to convict an accused must be fully established and the chain of evidence furnished to those circumstances must be so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have not only to be fully established, but all the circumstances so established should be of a conclusive nature and consistent with the only

hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused. Further, all the circumstances cumulatively taken together should lead to an irresistible conclusion that it was the accused only who was the perpetrator of the crime. It is to be borne in mind that the Supreme Court in *Shankarlal Gyarasilal Dixit Vs. State of Maharashtra*, cautioned - "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". The Apex Court has also held time and again that between "may be true" and "must be true" there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned as a convict.

Reliance may be placed on the judgment reported in *Jaharlal Das Vs. State of Orissa*, as to how the circumstances placed against the accused shall be appreciated while holding him guilty. It has been held (at pages 1811-1812; of CriLJ) :-

...It is well settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) 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 none else and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

xx xx xx It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the Courts below in coming to the conclusion that the accused alone has committed the offence.

8. The learned trial Judge in order to arrive at the conclusion that the appellant was guilty of having committed murder of his wife has discussed the following circumstances :

i) Motive of the accused to take away the life of his wife to marry for the second time;

ii) The deceased made a statement before the staff nurse Salini Tandi (P.W. 1) that the accused had given some black colour liquid, as a result of which she felt

pain and discomfort;

iii) The accused has procured the poison, i.e. monocrotophos from the shop keeper Shailendra Kumar Tripedi (P.W. 7);

iv) While in police custody the accused made a disclosure statement to have concealed the half of the poison under a Chakunda tree and gave recovery of the same;

(v) The chemical examination report discloses that the seized poison was found in the viscera of the deceased.

9. Mr. Mohanty, learned Addl. Government Advocate has, however, pointed out that in this case the prosecution has proved the appellant's motive for committing the murder of his own wife. It has been submitted that the deceased was a mental patient since after the marriage and in order to marry for the second time the appellant wanted to exterminate her so that it would be easy for him to go in for a second marriage. In this particular case the prosecution, according to Mr. Mohanty, has led evidence by placing the statements of P.Ws. 2 and 11 who are none else than the brother and mother of the deceased. While repelling such contention Mr. Das, learned Advocate appearing for the appellant has submitted that there has been absolutely no evidence placed against the appellant that he had any motive of doing away with his wife. P.Ws. 2 and 11 were also discredited by the learned Addl. Sessions Judge, who too did not believe their statement regarding the motive of the appellant. We have also closely and carefully examined the evidence of P.Ws. 2 and 11 as regards the proposal for second marriage of the appellant. Such motive was attributed against the appellant only during trial, but not before as is evident from the evidence of P.W. 2. P.W. 12, who is the I.O. in this case made a clean breast admission that P.W. 2 did not reveal any thing in course of investigation that the appellant prior to 8 days of the admission of the deceased in the hospital went to Kacharapali to search for a bride which they prevented. P.W. 2 has also stated that he got this information from his elder brother, but prosecution had not chosen to examine P.W. 2's brother in this case, therefore; the statement with regard to motive ascribed by P.W. 2 appears to be hearsay and accordingly the learned Addl. Sessions Judge tightly had not placed any reliance on such statement. P.W. 11 in her statement made a disclosure that she did not know as to who informed her that the appellant intended to marry for the second time, when her daughter fell ill. She heard this when she was in the village of the appellant. Therefore, in this backdrop we are unable to rely on the evidence of the prosecution which ascribed motive of the appellant for a second marriage.

10. It is true that in all cases motive cannot be directly proved by the prosecution but all such circumstances leading to infer such motive must be placed before the Court. "Motive" is a mental state of mind which can alone be known to the killer, but not even to his kith and kins. Keeping the aforesaid principle in mind we have re-examined the evidence to find out whether the

motive ascribed by the prosecution has at all been proved by the prosecution against the appellant. Indisputably the deceased has lived as long as 13 years of her married life. Out of their wedlock two issues were born. There is nothing on record to suggest that the appellant had ever expressed his unhappiness to anybody as to the mental illness of his wife. In this background it does not, however, convince us that all of a sudden the appellant went in search of a bride and for that he intended to finish his wife Bimala Sahu.

11. Regarding the dying declaration alleged to have been made before P.W. 1 that the appellant had given some black-coloured liquid to the deceased Bimala Sahu as a result of which she felt pain and discomfort in her abdomen, P.W. 1 Salini Tandi has stated in Court that Bimala Sahu around 9.30 A.M. on 2-5-1999 allegedly stated before her that she got on abdominal pain in her stomach. When P.W. 1 enquired about the reason, the deceased is alleged to have stated that her husband gave some black-coloured liquid before 7.00 A.M. which she had taken. This statement is recorded in the Bed-head ticket. It has to be examined whether the so-called dying declaration alleged to have been made by deceased Bimala Sahu is trustworthy and credible. Before placing any reliance on the dying declaration it is to be scrutinised whether "the person making such declaration was in proper state of mind or not. Admittedly the deceased was suffering from mental disease. P.W. 11, the mother of the deceased stated in Court that at the time of giving birth to a second child she was admitted in mission hospital on account of her mental imbalance as noticed by them. Salini Tandi, P.W. 1 in her statement also stated that after admission of the deceased she was given electric shock on 29-4-1999. Due to mental imbalance the patient was getting excited and also some times getting depressed. However, on 1-5-1999 though the deceased was found normal, but she was better than her previous condition; she was able to perform her daily routine life and was giving rational answer. It has to be visualised that a person suffering from insanity for years, was administered with electric shock just two days preceding the occurrence can hardly be considered to be in a fit state of mind. From her outward physical appearance she might have appeared mentally alert, but from the treatment of shock it can well be presumed that she must not have recovered from the electric shock within a day or two.

12. According to P.W. 1 Bimala Sahu, deceased, had not taken anything, besides, black-coloured liquid given by her husband and a cup of tea taken before 7.00 a.m. From the evidence of P.W. 1 it has also revealed that she asked few questions to ascertain about her mental faculties. From her evidence it also comes out that Bimala Sahu, deceased, made a disclosure in presence of the doctor. If that was so, it is curious to note as to why the medical officer who attended the patient did not record the dying declaration. In this case we found that the signatures of Bimala Sahu contained in the Bed-head ticket and on some other papers. They could collect the signatures on other papers, but why not on the statement recorded by the nurse in the bed-head ticket?

13. The deceased Bimala Sahu alleged to have suffered from stomach pain and discomfort at about 7.00 a.m. on 2-5-99. She died around 1.00 a.m. on 3-5-99 and, therefore, she survived for about 13 hours in the hospital. There is nothing on record to show that the doctors attending Bimala Sahu, deceased, had taken any step to get her stomach washed even after they knew that poison was administered on her. During this period no report undisputedly was lodged at the police station stating that the appellant had administered poison as a result of which she felt stomach pain and discomfort. P.W. 6, who was the doctor in Evangelical hospital strangely did not whisper a word regarding dying declaration. Therefore, this is a strong circumstance against the prosecution which unerringly establish that the deceased must not have made a dying declaration as stated by the prosecution. There is no endorsement by the doctor on the recording of the so-called dying declaration. Non-mention of any thing about the dying declaration by the doctor also does not appear to be above suspicion. In order to place credibility on the statements of P.Ws. 2 and 11 who are no other than the relations of the deceased, we examined their evidence in depth. We found that P.W. 11 did not state any thing about the dying declaration during investigation and P.W. 2 for the first time developed the story of dying declaration while being examined in Court. Therefore, their statement as regards dying declaration seems to be incredible and we are unable to place reliance on their statement to bring home the story of dying declaration against the appellant.

14. P.W.I stated to have recorded the dying declaration in the bed-head ticket at 9.30 a.m. on 2-5-99. According to the prosecution it was noted in the bed-head ticket, Ext. 1. If the prosecution story is to be believed that such dying declaration Was noted in the bed-head ticket, in all probability it should have been disclosed in the F.I.R. which was furnished by the doctor on the subsequent date, i.e. 3-5-99 at 12.30 noon. We are unable to understand why such important piece of evidence has been omitted in the F.I.R. even though it was lodged after more than 24 hours of such so-called dying declaration. These circumstances cumulatively taken together create a great doubt regarding the truth of it. Therefore, in this backdrop, we are unable to attach much importance on the dying declaration alleged to have been made by Bimala Sahu, deceased, Vide Ext. 1. Further it is to be noted that the dying declaration was taken in a loose sheet and there has been no page-mark nor did it contain the signature of the doctor. Tampering or manufacturing of the said document cannot also be ruled out. Another important circumstance which shrouds prosecution story about the dying declaration is that P.W. 1 in her statement disclosed that her duty was from morning 7.30 a.m. till 12.30 p.m. She came to duty on 2-5-99 at 7.30 a.m. and the dying declaration was said to have been recorded at 9.30 a.m. and after such dying declaration she said to have left the hospital premises though her duty was till 12.30 p.m. There is no explanation as to why she left the hospital at 9.30 a.m. leaving the patient in lurch. P.W.I is the linchpin in this case to prove the dying declaration. We also found in the list of medicines that

the time has been changed from 8.30 to 9.30 a.m., but there has been no explanation as to under what circumstance such change had occurred. Another significant factor should not be lost sight of regarding the probability of normal human conduct. Why a person will choose the hospital as the place for committing the offence where he was conscious that several persons will frequently visit the premises. The chance of concealment of the offence in the hospital premises is almost bleak and there has been every possibility that the person committing crime might be caught red-handed. Although Bimala Sahu, deceased and the appellant spent their married life for more than 12 years and there was no previous occasion of attempting to take her life, why the accused-appellant will choose the hospital as the venue for commission of the offence.

15. Regarding the trustworthiness of a dying declaration the Hon'ble Supreme Court in a recent judgment in the case of Uka Ram Vs. State of Rajasthan, basing on the Judgments reported in Tapinder Singh Vs. State of Punjab and Another, and in Dandu Lakshmi Reddy Vs. State of A.P., held as follows :-

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without any amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts under the circumstances enumerated under Sub-section s (1) to (8) of Section 32 of the Act. When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the course of that person's death comes into question is admissible in evidence being relevant, whether the person was or was not, at the time when they were made, under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question. Such statements in law are compendiously called dying declarations. The admissibility of the dying declaration rests upon the principle that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under oath *Nemo moriturus praesumuntur mentire*. Such statements are admitted, upon consideration that their declarations made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. The principle on which the dying declarations are admitted in evidence, is based upon the legal maxim "*Nemo moriturus praesumitur mentire*", i.e., a man will not meet his maker with a lie in his mouth. It has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statements is not subjected to cross-examination, it is essential for the Court to insist that dying declaration should be of such nature as to inspire full confidence of the Court in its correctness. The Court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive or product of imagination. Before relying upon a dying declaration, the Court should be

satisfied that the deceased was in a fit state of mind to make the statement. Once the Court is satisfied that the dying declaration was true, voluntary and not influenced by any extraneous consideration, it can base its conviction without any further corroboration as rule requiring corroboration is not a rule of law but only a rule of prudence.

xx xx xx This Court in Dandu Lakshmi Reddy Vs. State of A.P., observed that on the fact situation of a case a judicial mind would tend to wobble between two equally plausible hypothesis was it suicide, or was it homicide? If the dying declaration projected by the prosecution gets credence, the alternative hypothesis of suicide can be eliminated Justifiably. For that purpose a scrutiny of the dying declaration with meticulous circumspection is called for. It must be sieved through the judicial cullendar and if it passes through the gauzes, it can be made the basis of a conviction, otherwise not. It was further held that in view of the impossibility of conducting the test on the version in the dying declaration with the touchstone of cross-examination, the Court as to adopt other tests in order to satisfy its judicial conscience that the dying declaration contained nothing but the truth.

Therefore, in the above backdrop analysing the evidence of the prosecution in the light of the Judgment of the Supreme Court cited above, we have grave doubt on the question of dying declaration alleged to have been made by the deceased.

15. Purchase of poison by the appellant :- In order to establish that the appellant had purchased the poison bottle from Shailendra Kumar Tribedi (P.W.7) the prosecution has solely relied upon the evidence of P.W.7. It is no doubt true that P.W.7 owned a licensed pesticide shop, but his evidence does not disclose that the accused had purchased the pesticide from his shop. Therefore, there has been no credible evidence adduced by the prosecution to prove that the appellant had purchased the poison from the pesticide shop of P.W.7. The evidence is not worthwhile to connect the appellant with the purchase of the poison.

16. Recovery of Poison bottle :- Prosecution has relied upon the circumstance of recovery of the poison bottle from the possession of the appellant on the basis of the statement alleged to have been made by him while he was in custody, over and above, the evidence of P.Ws.8 and 9 and also the evidence of the I.O. P.W.8 is owner of an Electronics shop, but he does not say any bottle having been seized from the possession of the accused - appellant. He, just to accommodate the police authorities, signed the seizure list. He also does not say where from the police authorities seized the bottle. Turning to the evidence of P.W.9, Shyam Sundar Bag, it is also not clear that he was present at the time of seizure of the pesticide bottle. Therefore, the testimony of P.Ws. 8 and 9 does not at all help the prosecution in order to prove the fact that the pesticide bottle had been recovered at the instance of the appellant while he was in custody.

17. Prosecution has relied on the evidence of P.W. 12, the I.O. for bringing recovery of the poison bottle which was kept under the "Chakunda tree" u/s 27 of the Evidence Act. Apart from his evidence, there is no other corroborative evidence to establish that the accused led the police while in custody near the Chakunda tree and gave recovery of the poison bottle. It appears to be against human conduct to assume that after giving lethal dose of poison to the deceased, the appellant will keep half of it and conceal it under a "Chakunda tree" so that it would be detected in future. Had he given such poison he would have immediately destroyed the rest of the poison along with the bottle. Where the circumstances placed against the accused are themselves doubtful, single recovery of the incriminating material which has not been supported by any evidence but only a Panchanama u/s 27 of the Evidence Act has been made, such recovery does not help the prosecution in connecting the accused with the crime. In this regard we may place reliance on a Division Bench decision of this Court on identical question reported in 1988 (II) OLR 120 (Bhaga Gouda alias Vainra v. State) wherein it has been held :-

Though Section 27 of the Evidence Act has no application, yet the fact that while in custody the accused led the police and the witnesses to a Kendu bush and brought out a Tangia (M.O.I.) which was thereupon seized, would be relevant and admissible as a piece of conduct of the accused u/s 8 of the Evidence Act. In view of the evidence of P.Ws. 4 and 7, discussed earlier and to the same effect is the evidence of the Investigating Officer (P.W.9), the fact that the accused led the police while in custody to a Kendu bush and brought out a Tangia (M.O.I.) can be utilised as a piece of incriminating conduct on the part of the accused. But the said piece of incriminating evidence by itself cannot be said to be conclusive and on that basis alone, conviction of the appellant u/s 302, Indian Penal Code, cannot be sustained.

P.W. 12 has no doubt stated in his evidence that the bottle containing half liquid stated to be poison was kept concealed under a "Chakunda tree" which was seized in presence of the witnesses, but since P.Ws. 8 and 9 had not supported, therefore, it is risky to place implicit reliance on his evidence with regard to recovery. It has been brought out in cross-examination that it was 100 ml. bottle which had contained half of the liquid and the other half was administered to the victim. The distance between the place Bimala Sahu, deceased, was being treated and the place from where the bottle was seized would be half a kilo metre. Thus it is quite unlikely that the appellant will carry the empty bottle to half a kilo metre distance only to conceal it under the "Chakunda tree".

18. Let us now advert to the evidence of P.W. 3, Dr. Manas Rajan Das, who is said to have conducted the post-mortem examination over the deadbody of Bimala Sahu, on 3-5-99 on being produced by Constable No. 292 Sri B. Naik and one Gramarakhi Putaram Gouda. He along with one Kailash Chandra Pradhan conducted the postmortem examination on the deadbody. He found that blood and mucus dribbling through nostrils and angles of mouth, brain congested, both

lungs were also congested and looked purple in colour. Stomach contained about 100 grams of dark semi solid purple colour substance (the underlining is mine for emphasis). Time of death is within 1 to 3 days of autopsy. The cause of death was reserved till the chemical analysis on the viscera. On a close reading of his evidence there is nothing to establish that he sealed the viscera of the deceased. After the chemical examination it was ascertained that the stomach contained monocrotophos (poison) From his cross-examination it appears that P.W.3 has stated that one gram of organic phosphorus poison (pesticides) is sufficient to cause the death of healthy man and 6 grams of the same poison is normally fatal. If a fatal dose of the said poison is taken by the healthy man the death is imminent within half an hour to two hours. If there is fatty food in the stomach, the pesticide will work out slowly. In empty stomach, the poison works out immediately. Lethal dose of poison if administered, it would manifest symptom immediately within 15 minutes to half an hour. P.W.3 also did not notice any peculiar smell on opening the stomach.

19. From the evidence of P.Ws. 1, 2 and 11 we found that black coloured liquid mixed with water was given to the deceased around 7.00 a.m. In case such liquid was given it should have assimilated in the body as her stomach was empty. Half of the organic compound if administered, it could have taken an hour to one hour to cause death. There is no evidence that any semi-solid granular purple colour substance was given prior to the time she was taken to recovery room. There is also no evidence that the deceased was given any semi-solid substance after the black coloured liquid said to have been given to her. It is strange to notice how such black coloured granular solid material was found in her stomach at the time of her death. Prosecution is absolutely silent on this aspect. There is no evidence that any sample from stomach or any granular solid substance was sent to the Chemical Analyst to find out whether those substances could have been possible to cause death of the deceased. There is no evidence to establish that even after P.Ws. 1 and 6 came to know regarding the complaints made by the deceased about the abdominal pain and restlessness, they did take any step to get the stomach washed. It is strange to notice that if 50 ML. of poison was administered to the deceased how she could survive for about 18 hours.

20. From the cross-examination of P.W. 1 the defence has extracted an answer from her that at about 8.00 a.m. on 2-5-99 she came to the hospital. Around 9.30 a.m. she claims to have noted on the bed-head ticket the statement of the deceased that her husband gave some black coloured liquid before 7.00 a.m. on that day. From the evidence of P.W.2 it appears that on 1-5-99 in the night, he himself, his mother (P.W. 11) and the appellant had slept by the side of the deceased in the hospital. In the early hours of morning of 2-5-99 they all left for answering call of nature. It is stated that after some time P.W. 11 and the deceased returned back from the Bandha (tank) a little earlier and the appellant came later. After returning from the Bandha (tank), it is stated, the deceased prepared the tea. It further transpired that within half an hour the appellant went

towards Khariar which is 30 Kms. away from that place. Therefore, it is clear that the appellant himself set out for Khariar and the scope of concealing the bottle appears to be remote. The evidence of P.W. 6 to the effect that the liquid was given in the morning and around 9.30 a.m. the deceased felt pain also becomes doubtful.

21. From the report of the Chemical Examiner, Ext. 16, the prosecution has tried to establish that only 12 ML. of liquid was found in the bottle. But from the evidence of P.W. 12 it appears that out of 100 ML. half of it, i.e. 50 ML. was available. There has been no evidence as to what happened so far as the balance liquid from the bottle is concerned. The I.O. had seized the poison on 4-5-99 and the same was sent for Chemical Examination on 29-6-99, i.e. about one month and 25 days after the seizure. The bottle was in the custody of P.W. 12 for the entire period. The viscera had been sent for chemical examination. In this regard P.W. 12 stated in his evidence that on his request the Medical Officer sent the viscera. P.W.3, the Medical Officer, who conducted the autopsy did not utter a word as to who sent it to the Analyst. It is strange to notice that the prosecution has also not proved the forwarding letter under which the viscera was alleged to have been sent. Therefore, several questions come to our mind as to who collected the viscera and from which portion of the body; where the viscera was kept and who kept it; in what condition it was kept and whether there was any seal; and what were the precautions taken at the time of forwarding the same for chemical examination. If these queries are not met by the prosecution, it will be difficult for us to place implicit reliance on the report of the chemical examiner. Besides, the above infirmities, there are other suspicious circumstances which tend to disbelieve the prosecution story, such as interpolation in the bed-head ticket, Ext. 1; the timing of the dying declaration has been already; delay in registration of the F.I.R.; non-mention of the name of the appellant in the information submitted by Dr. Raju; and monocrotophos carries pungent odour yet no peculiar smell was coming out from the stomach at the time of post-mortem examination.

22. We are tempted to place reliance on a Division Bench decision of this Court reported in Vol. 39 (1973) CLT 619 (Hadibandhu Mati v. State) wherein it has been held :-

Similarly the viscera of the deceased girl was collected by Dr. Sunakar Behera, P.W.6 who conducted the postmortem examination on the decease on 19-5-1971. He did not keep the viscera properly sealed in safe custody. Accordingly this important piece of evidence was ruled out from consideration. This doctor was not alive to his legal and social duties. He is unworthy of the position that has been conferred upon him. Proceedings should be started against him for the gross delinquency.

23. Mr. Mohanty, learned Addl. Government Advocate has placed reliance on a decision reported in Bhupinder Singh Vs. State of Punjab, , but the facts of that case are entirely different. It is true that nobody will administer poison to

another in presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the Investigating Officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. In this case how the prosecution has led evidence that 50 Ml. of poison could be recovered at the instance of the appellant. Besides, there are several infirmities in the prosecution story to connect the appellant with the crime.

24. For the aforesaid reason, we are unable to subscribe our views with the findings of the learned Addl. Sessions Judge and accordingly we hold that the prosecution has failed to establish the case against the appellant.

25. In the result, the appeal is allowed. The conviction and sentence passed against the appellant are hereby set aside. The appellant be set at liberty forthwith.

The Reference is also answered accordingly.

A.S. Naidu, J.

26. I agree.