
(2008) 12 OHC CK 0082
In the Orissa High Court
Case No : Criminal Appeal No. 317 of 2003

Tira ' Srikanta Tarei

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Dowry Prohibition Act, 1961 — Section 4
Penal Code, 1860 (IPC) — Section 302, 304B, 34, 376, 498A

Citation : (2009) CLT 783 (Suppl CrI)

Hon'ble Judges : S. Panda, J;P.K. Tripathy, J

Bench : Division Bench

Advocate : R.K. Kar and M. Bhanja, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

1. Heard further argument and the judgment is as follows:
2. Admittedly, accused Tira " Srikanta Tarei is the husband of Kuni Tarei (hereinafter referred to as the "deceased"), who suffered death on 15.10.2002. Admittedly, accused No. 2 Mili " Nunibala Tarei and accused No. 3 Dukhram Tarei are the parents-in-law of the deceased. Admittedly, deceased died on 15.10.2002 due to asphyxia. Admittedly, P.W.1 Nakula Kumar Ojha and P.W.7 Pramila Ojha are respectively father and mother of the deceased.
3. According to case of the prosecution, deceased had married the accused-Appellant Srikanta Tarei in Baishkha 1999. After the marriage, Appellant Srikanta Tarei was involved in a rape case and thereafter to arrange funds for the purpose of bail and defence of the Appellant, P.W.1 mortgaged the bicycle given as dowry but he did not redeem that bicycle from mortgage and therefore Appellant had a grievance against P.Ws.1 and 7 and he also ventilated the same by ill-treating and torturing the deceased. Because of the conduct of the Appellant and her parents demanding dowry and the Appellant assaulting the deceased, a village punch was convened and in that Appellant Srikanta Tarei undertook not to

assault the deceased any further. On the date of occurrence i.e. on 15.10.2002 in the morning hours at about 7 a.m. the quarrel ensued between the Appellant and the deceased and the later went and reported the matter to P.W.1, who was working on his agricultural field, situated three houses apart from the occurrence house. After some time when P.W.7 was proceeding to the agricultural land on the road by the side of the occurrence house, she heard the quarrel between the Appellant and the deceased and the accused beating the deceased half an hour later when she returned on the same way. P.W.7 found silence in the occurrence house i.e. the house of the accused persons. At that time two acquitted accused persons, viz., Mili and Dukhiram were in front of their house. P.W.7 intended to see her daughter but at the first instance she was registered to proceed into the house but in her second attempt she could be entered into the house and found the deceased lying dead. At about 9 A.M. P.W.1 returned from the field and P.W.1 together with P.W.7 went and saw the dead body and thereafter police was involved by presenting written report, Ext.1. On getting information the O.I.C., Barsahi Police Station, took up the investigation. In course of that investigation the Investigating Officer, P.W.8 held inquest of the dead body of the deceased in presence of Executive Magistrate and prepared inquest report, Ext.2/3, prepared spot map, Ext.1. and forwarded the dead body for postmortem examination. The ropes cut into two pieces together with some incriminating articles like sickle etc., were seized from the occurrence house under seizure list Ext.4. P.W.5, Dr. Pradip Kumar Khuntia held autopsy on the dead body of the deceased and proved the postmortem report, Ext.7 so also the opinion report, Ext.8, after inspection of the plastic rope, M.O.I. By the time of arrival of the Investigating Officer at the spot accused persons were absconding but they could be arrested on the next day i.e. 16.10.2002. By the time of his arrest accused Appellant was subjected to manhandle by the brother of the deceased and others. Therefore, after arrest, Appellant was requisitioned to be examined by medical officers together with providing treatment to him. Accordingly, P.W.5 examined the accused and proved the injury certificate, Ext.10. On the basis of availability of prima facie evidence, not only charge-sheet was submitted but also charges were framed under Sections 302/34 I.P.C. together with offence under Sections 498-A and 304-B/34 I.P.C.

4. In course of the trial, prosecution examined altogether eight witnesses and among them (excluding P.Ws.1,7, 5 and 8), P.W.2, Bipin Ojha was examined to prove about the relationship between deceased and the Appellant and about the village punch conducted for the ill-treatment by the Appellant. He was also a witness to the inquest. P.W.3, Nalini Kumar Dash was examined as a witness to prove the ill treatment and cruelty on the deceased but he declined to support the prosecution and because of that after declaring him a hostile witness, prosecution was permitted to put leading questions. P.W.4, Kati Tarei is the front door neighbour of the Appellant. He stated that he witnessed the quarrel and the tussle between the accused and the deceased in the morning on the date of occurrence. He was also witnessed to the inquest as well as the seizure list.

P.W.6, Rajat Kumar Satapathy was examined as witness to prove about the previous case u/s 376, I.P.C. having been booked against the Appellant and that case being disposed of on compromise and that witness having taken initiative in that respect. He was also examined to prove about the conduct of the Appellant in beating his wife so also about the village punch about seven days before the date of occurrence.

5. Learned Addl. Sessions Judge (Fast Tract Court) on appreciation of evidence tendered by the prosecution recorded findings that in view of evidence of P.W.5, a case of homicidal death has been proved. In absence of direct evidence he considered the charges under Sections 498-A, 304-B and 302/34, I.P.C. on the basis of circumstantial evidence. In that respect, considering the aforesaid evidence both oral and documentary learned Addl. Sessions Judge held that prosecution failed to prove the charge under Sections 498-A and 304-B, I.P.C. against all the accused persons whereas prosecution could not adduce sufficient evidence to prove the charge under Sections 302/34 I.P.C. against the co-accused of the Appellant i.e. his parents Mili and Dukhram. He however found that deceased suffered homicidal death while in custody of the Appellant and he suffered homicidal death when Appellant was present in the house and picked up quarrel with the deceased. Accordingly, he found the Appellant guilty of offence u/s 302 I.P.C. The trial Court, thus", convicted the Appellant u/s 302 I.P.C. together with the offence under Sections 304-B and 498-A I.P.C. and Section 4 Dowry Prohibition Act and respectively imposed the sentence of imprisonment of life with fine of Rs. 5,000/ -, rigorous imprisonment for seven years for the offence u/s 304-B I.P.C. and no separate sentence was awarded for the offence under Section 498-A and Section 4 of the Dowry Prohibition Act.

Aforesaid order of conviction and sentence in Sessions Trial Case No. 5/124 of 2003 of the Fast Track Court, Baripada is under challenge in this appeal.

6. Mr. Kar, learned Counsel for the Appellant argues that prosecution has signally failed to prove a case of dowry death punishable u/s 304-B I.P.C., ill-treatment and cruelty on account of nonpayment of dowry u/s 498-A I.P.C. and offence u/s 4 of D.P. Act for demanding dowry. He submits that as per the evidence of the prosecution the whole dispute was in view of the blazing of the bi-cycle of the accused and not redeeming the same. Even if the defence plea of the accused persons relating to doubtful character of the deceased for maintaining relationship with one Mangal Singh is not favoured, then also the aforesaid fact situation does not substantiate the aforesaid charges. In course of reply, Mr. A.K. Mishra, learned Standing Counsel though tries to justify order of conviction for the aforesaid offences but ultimately concedes to the fact situation that no adequate evidence has been adduced by the prosecution to sustain the charges for the aforesaid offences.

Regard being had to the facts and evidence available from the lower Court record and keeping in view the penal provision in Section 4 of the D.P. Act, besides, Sections 304-B and 498-A I.P.C., we find that prosecution has not been able to

prove the charges for those offences. To that extent, we set aside the order of conviction and the sentence imposed thereon.

7. Mr, Kar, learned Counsel for the Appellant, also argues that so far as charge u/s 302 I.P.C. is concerned, it lacks evidence of any overt act done by the Appellant, so as to do away with the deceased. In that context, his submission is that evidence of P.W.5 does not rule out possibility death of the deceased due to suicidal hanging. That being the foremost point for determination and that circumstance being doubtful conviction for the offence of homicide is far fetched. In course of his reply repelling the aforesaid argument, learned Standing Counsel submits that evidence of P.W.5 together with Ext.7 clearly proves a case of homicidal death. On perusal of evidence of P.W.5, we notice that the doctor conducting postmortem examination found that the dead body was of an average built woman aged about 23 years. He found forth coming out from both mouth and nostril, the back of chest and right arm being stained with mud, cynosis being present in nails and lips and face being congested. Besides, the aforesaid external appearance, P.W.5 found that a horizontal continuous ligature mark of 32 c.m. in length and 2 c.m. width was there around the neck and fractured of three tracheal rings. P.W.5 also noticed red spot abrasion of size of 2 cm. x 1/2 c.m. above and below the ligature mark on right side neck. He accordingly opined that cause of death was due to asphyxia following strangulation. In course of cross-examination he denied to the defence suggestion that it could have been a case of suicidal hanging and for that he has also assigned reasons. He examined the rope, M.O.I and proved the opinion report, Ext.8 in support of his opinion that the strangulation could have been made by that rope. The findings of the trial Court runs in conformity to the evidence of P.W.5 and therefore we do not find any merit in the argument of the Appellant for recording a finding of suicidal death of the deceased when the evidence on record proves a case of homicidal death.

8. Learned Counsel for the Appellant argues that even if it is held that the deceased suffered homicidal death, then also in the absence of direct evidence, the circumstantial evidence tendered by the prosecution is thoroughly insufficient to complete the chain of circumstance. In that respect, he relies on the cases of Sharad Birdhichand Sarda Vs. State of Maharashtra, and Rahman v. State of U.P AIR 1972 SC 110. In the case of Sharad (supra), (consisting of three Hon'ble Judges) their Lordships considered the legal principle in relation to assessment of evidence in a case where the prosecution relies on circumstantial evidence to prove the charge. In paragraph -152 of the judgment their lordships have highlighted five principles for the purpose of guidance and that reads as under:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and must be or should be

proved" as was held by this Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, where the following observations were made:

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

9. In the said citation, their lordship also considered about the manner in which the conduct of the accused is to be evaluated as additional link and in that context their lordship held that:

it will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation" can be used as additional link, the following essential conditions must be satisfied:

(i) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(ii) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(iii) the circumstance is in proximity to the time and situation.

In the case of Rahman (supra) a similar principle was also propounded to the effect that:

the circumstances forming evidence must be conclusively established and even when so established, they must form such a complete chain that it is not only consistent with the guilt but is inconsistent with any reasonable hypothesis of innocence.

In this case also the Apex Court propounded to take note of the subsequent conduct as an adding circumstance to complete the chain of circumstance.

10. While referring to in the case of Sharad Birdhichand Sarda v. State of Maharashtra, learned Counsel for the Appellant argues to follow the principle for

appropriate application in the present case, whereas in the case of Rahaman, he not only argues for such a purpose but also to follow result therein relating to acquittal. Therefore, it would be appropriate to indicate here that the cause of death due to forcible administration of poison and subsequent conduct of the accused and the contradictions in that respect by necessary omissions in 161 statement as well as the statement before the committal Court which were taken note by the Apex Court not to subscribe credibility to the evidence of the relevant witnesses is lacking in this case. Such being not the case before us, under the given facts and circumstances before us, save and except, complying to the test prescribed for judging the circumstantial evidence the conclusion from the aforesaid citation case cannot be ipso facto adopted in this appeal. To that extent, argument of the Appellant is not favoured.

11. After quoting the passages from both the cited authorities, it is needless to burden this judgment with further theory on the manner in which a case should be decided on the basis of circumstantial evidence.

12. In this case the circumstantial evidence which is available against the Appellant and was considered by the trial Court is that:

(i) the Appellant was involved u/s 304-B; I.P.C., and bi-cycle given to him in the marriage was pledged to meet the legal expenditure in connection with that case. After being released on bail in that case accused demanded return of that bicycle and P.W.1 could not comply with that desire and took time for that:

(ii) the deceased was subjected to assault and manhandling by the accused and therefore P.W.1 convened a village punch and the Appellant promised not to commit physical violence on her any further.

(iii) about a week thereafter on 15.10.1999 in the morning at about 7 a.m. P.W.4 could hear the quarrel and scuffle between spouses (Appellant and the deceased).

(iv) the deceased went and reported the matter to P.W.1, who was then on the agricultural field.

(v) that field was three houses, apart from the house of the Appellant.

(vi) about 8 a.m. P.W.7 while going to the field (where her husband was working) could hear the quarrel between the Appellant and the deceased and the later being beaten by the Appellant and she (P.W.7) being commented by the Appellant.

(vii) about half-an-hour later, when she returned from the field, she found complete silence in the occurrence house, unsuccessfully her (P.W.7) entrance to the occurrence house was obstructed by the co-accused and ultimately when she entered therein then she discovered dead body of her daughter lying on the floor.

(viii) that the deceased suffered homicidal death.

13. So far as the factum of homicidal death is concerned, that has been proved

by the prosecution as per detailed discussion made in a preceding paragraph.

14. Learned Standing Counsel in course of his submission argues that the evidence of P.W.4 proves that they had seen the Appellant together with the deceased and that proves the last seen theory and in view of close proximity of the time gap between the quarrel and the death of the deceased that circumstance alone is sufficient to rule out possibility any hypothesis of innocence of the accused. In that respect, he relies in the cases of State of Punjab v. Hardan Singh and Ors. (2004) 27 OCR (SC) 274, Amit " Ammu v. State of Maharashtra 2003 (5) Supreme 576 and State of U.P. v. Satish (2005) 30 OCR (SC) 663.

In the case of Satish (supra) the Apex Court has observed that:

the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any of the positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses P.W.3 and 5, in addition to the evidence of PW-2.

15. Learned Counsel for the Appellant argues that evidence of P.Ws.4 and 7 are contradictory to each other relating to the sequence of events on the altercation of quarrel and the deceased going on and reporting to P.W.1 and departure of P.W.4 together with his wife for medical treatment. He also argues that evidence of P.Ws.1 and 7 are contradictory to each other being suffering from omissions about P.W.7 visiting the field in the morning hours and thereby making herself available to witness the quarrel between the accused and the deceased. In that respect, he also argues that the manner of reactions, which can be termed as no reaction disclosed from the evidence of P.W.7, it is improbable on the part of her mother witnessing assault by son-in-law and not reporting to her husband about the death soon after seeing the dead body and therefore such evidence is not credible. According to him, if such evidence of P.Ws.1, 4 and 7 are eliminated, then there is no evidence to show or suggest that in the occurrence day morning, the Appellant was with the deceased. On failure of the prosecution to prove that part of the case, the charge of murder cannot be fixed on him. Accordingly, he argues to set aside the order of conviction u/s 302, I.P.C. and to grant benefit of doubt to the Appellant.

16. On the other hand, learned Standing Counsel argues that on systematic reading of evidence of P.Ws.1, 4 and 7 one does not find any exaggeration, improbability in conduct or contradictions or omissions as pointed by the

Appellant. Such evidence being credible, therefore the findings of the trial Court be maintained.

17. Evidence, which is on record, has to be perused and decided as to what happened. It is readable from evidence of P.W.1 and there is no dispute to that fact situation by the accused that in the morning hours on 15.10.1999 P.W.1 was engaged in his agricultural work and the deceased at about 7 a.m. went and complained about the ill-treatment to her by the Appellant. In course of cross examination of P.W.1, there is nothing on record to disbelieve that part of the evidence flowing from the deposition of P.W.1. P.W.4 has stated about the quarrel and tussle between the Appellant and the deceased at about 7 A.M. and thereafter he deposed about leaving the house at about 8.20 A.M. together with his wife to go to the hospital. He also deposed that he saw P.W.7 passing on the road by the side of the house of the Appellant. P.W.4. according to spot map is a front door neighbour of the deceased and Appellant. That status of P.W.4 has not been disputed or challenged. Therefore P.W.4 becomes a natural witness. P.W.7 deposed about witnessing the quarrel and while returning found silence in the occurrence house and that is how she entered into the house inspite of resistance and saw the dead body of her daughter (the deceased). As rightly pointed by learned Standing Counsel different people react in different manner on a particular happening. On witnessing the dead body of the deceased or while hearing the quarrel between the Appellant and the deceased, the mode of reaction of P.W.7, as noted in her deposition, cannot be regarded unnatural or improbable for not intimating the fact to P.W.1. In that context, it would be borne in mind that P.W.1 was "aware" of the ill-treatment by Appellant on the deceased. P.W.7 therefore is not guilty of improbable conduct. The aforesaid evidence of P.Ws.4 and 7, on the other hand proves the last seen theory to the hilt and that circumstance proves the circumstance that it is the Appellant alone or together with his parents who committed the murder. In the above context, evidence of P.W.4 gives a clean cheat to the parents-of the Appellant while he stated that in course of quarrel the co-accused, i.e. the parents of the Appellant wanted to subside the quarrel. Therefore, involvement of the co-accused can be safely eliminated by granting benefit of doubt even though they were present in the same premises. Under such circumstance, on thorough examination on record, it is proved that the circumstances which the trial Court took note of (as noted in a preceding paragraph) are in furtherance of completing the chain of circumstance to prove that the Appellant committed the homicidal death of the deceased. No other theory or possibility is emerging from such evidence so as to extent the benefit thereof to the Appellant. Therefore, we sustain order of conviction u/s 302, I.P.C. and sentence of imprisonment for life, which has been imposed by the trial Court.

For the reasons recorded above, the Criminal Appeal is allowed in part by maintaining the order of conviction u/s 302, I.P.C. and the sentence thereof imposed on him by learned Addl. Judge in Sessions Trial Case No. 5/124 of 2003 but setting aside the order of conviction of the Appellant from the charge under

Sections 498-A, 304-B, I.P.C. and Section 4 of the D.P. Act and the sentence imposed thereof.