
(2006) 04 OHC CK 0039

In the Orissa High Court

Case No : Jail Criminal Appeal No. 186 of 1996

Upendra Kanhar

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2006) CLT 735 (Suppl CrI) : (2006) 1 OLR 757

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

Bench : Division Bench

Advocate : P.K. Rout, for the Appellant; P.K. Mishra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. Order of conviction u/s 302, I.P.C. and sentence of imprisonment for life pronounced by learned Second Addl. Sessions Judge, Cuttack as against the appellant in Sessions Trial No. 15 of 1995 (Sessions Trial No. 126 of 1995 of the Court of Sessions Judge, Cuttack) is under challenge.

2. According to the case of the prosecution, accused-appellant Upendra Kanhar was serving as a boy in a confectionery shop in the name and style "Cuttack Sweets Stall" situated at College Square, Cuttack. In the occurrence night, i.e., in the night of 04.10.1994 after the shop was closed at about 10 to 11 p.m. other boys retired to their retiring room on the rear side of the confectionery shop, but accused remained engaged in sweeping the canteen room where the deceased being the Manager took rest as usual. Around 4.30 to 5 a.m. of 05.10.1994 near Badambadi Bus-stand area Police Havildar (P.W. 6) found the accused moving carrying two bags. Out of suspicion he put a few questions and accused gave prevaricating statement. Thus, P.W. 6 searched the bags carried by the accused and found much quantity of coins in 17 nos. of polythene bags. He also noticed blood-stain on the left leg of the accused. Then he took him to the nearest police station and produced him before the A.S.I, of Police (P.W. 7). After ascertaining

his whereabouts he was forwarded to Malgodown Police Station and then he was brought to the place of occurrence. By then the crime had been discovered and the police of Malgodown P.S. informed to take up investigation and the Investigating Officer (P.W. 8) so also the scientific officer (P.W. 3) were busy in investigation when the accused was brought to that place. During the spot visit, Investigating Officer found the dead body of the deceased lying in a pool of blood with multiple injuries so also the blood-stain in the iron pounder (pestle) and a knife lying at the basin. Investigating Officer also found that the cash drawer had been tampered with and cash (sale proceeds) removed and the keys of different locks used on gates and the drawer were missing. After arrival of the accused, on interrogation in presence of the witnesses he gave discovery of a "Chadar" which was stained with blood, and accused stated that at the time of committing the crime he was wearing the same. He also took the police and the witnesses to a "Taja" (parapet) of the cycle-stand adjoining to the nearby branch of State Bank of India and the missing keys were discovered at the instance of the accused. All such articles together with the blood-stained knife and the pounder were seized under different seizure lists (details thereof has been indicated in the impugned judgment). The dead body was sent for post-mortem examination and after completion of investigation, charge-sheet was submitted against the accused. In course of the trial, accused denied to the charge and claimed for trial. He took the plea of denial besides the plea of alibi by stating that a day previous to the occurrence he had left the confectionery after obtaining leave from the master. He also stated that he had received his wages on 04.10.1994.

3. To substantiate the charge, prosecution examined eight witnesses and relied on documents marked Exts. 1 to 30 and the material objects marked M.Os. I to XVIII. Accused did not adduce any evidence in defence. On assessment of such evidence, trial Court found it to be a case of proof of the charge through circumstantial evidence in the absence of eye-witness to the occurrence. Learned Addl. Sessions Judge, on analysis of evidence on record, held that:

20. In the present case, the accused without retiring to the rear room to go to the bed for the night was concealing himself in the Stall, he was caught raid-handed while carrying the cash stolen from the counter of the Stall at Badambadi Bus-stand in the last part of the night of the occurrence by the Havildar (P.W. 6) on duty and had blood stains on his left leg. These circumstances, to a moral certainty point to the guilty of the accused and are incompatible with his innocence.

4. Learned Counsel for the appellant argues that the circumstantial evidence accepted by the trial Court are not sufficient to complete the chain of circumstance in furtherance of the allegations made against the accused and, therefore, he is entitled to the benefit of doubt, if not a clean-cut acquittal. In the context of the manner in which the circumstantial evidence should be evaluated, he places reliance on the cases of Samir Chakarabarty alias Kasinath Bagchi v. State of Orissa (2003) xxiv OCR 844 , Jaharlal Das v. State of Orissa 72 (1991)

C.L.T. 289 , Dhenka Munda Vs. State of Orissa, ; Dharani Pradhan Vs. State of Orissa, and Arjun Marik and Others Vs. State of Bihar, Learned Addl. Govt. Advocate on the other hand supports the impugned judgment and the order of conviction and states that minor contradictions in the matter of recovery of the "Chadar" (M.O.I. III) should not have been disbelieved by the trial Court and if that part of the evidence is accepted, then the rest of the evidence on record completes the chain of circumstances.

5. Evidence of the Doctor from the F.M.T.S.C.B. Medical College & Hospital, Cuttack (P.W. 2) and the Post-mortem Report-Ext. 2 indicate that the deceased had the following external injuries on his person:

- (i) Left side of fronto-temporal region of head was contused, abraded and depressed with irregular incised looking lacerated wound;
- (ii) Incised looking lacerated wound on the left side of the upper eye-lid;
- (iii) Contusion with swelling on the right side forehead;
- (iv) Abraded contusion on the left side of the head between left eye and left ear;
- (v) Abraded contusion on the right side molar area;
- (vi) Cut injury up to bone deep of the bridge of the nose with fracture of underlying bones;
- (vii) Dislocation of right side lower incisor and canine teeth and mouth deformed with fracture of mandible;
- (viii) Fracture of upper jaw and dislocation of incisor teeth and contusion of gum and lips;
- (ix) Contusion and perforation of lower lips with extravasations of blood into mucosal surface;
- (x) Penetrating wound with incised entry on the left side upper abdomen;
- (xi) Two penetrating incised wounds at the lower lateral abdominal area, a loop of intestine was found protruded through the opening;
- (xii) Cut wound on the front and left side of the upper neck together with four numbers of small angular cuts of skin tags. Consequently the skin, muscles, vessels, nerves and larynx were found cut and transacted at the corresponding side above the level of epiglottis;
- (xiii) Left side jugular vein and carotid artery were found cut and severe; On dissection, corresponding internal injuries were also found.

According to the opinion of P.W. 2, the above-noted external injury Nos. (i) to (ix) on the head and face were caused by hard and blunt force, whereas injuries on the neck and abdomen were caused by a pointed and cutting weapon. All the injuries were ante-mortem and homicidal in nature and sufficient in ordinary

course of nature to cause the death. The post-mortem examination was made at 4 p.m. on 05.10.1994 and according to P.W. 2 the aforesaid injuries were 12 to 18 hours old from the time of post-mortem examination. On the requisition of the Investigating Officer, P.W. 2 examined the pounder (M.O. II) and the knife (M.O.I) and opined in his opinion-report Ext. 3/1 that the aforesaid injuries were respectively possible by the said weapons. The aforesaid evidence of P.W. 2 was not at all challenged in course of the trial. On the basis of such evidence, trial Court recorded the finding that deceased suffered homicidal death. Before us as well the appellant does not challenge the said finding. After perusal of the relevant evidence on record, we concur with the conclusion recorded by the trial Court that deceased suffered homicidal death.

6. On consideration of the aforesaid contention and on due reference to the evidence of P.Ws. 4 and 8, we find that the trial Court was right in rejecting the evidence u/s 27 led by the prosecution vide Exts. 15 and 23. In that context the seizure list, statement of the accused and evidence of both P.Ws. 4 and 8 do not tally with each other relating to the place from which M.O. III was actually seized. Under such circumstance, such evidence if excluded from consideration, as has been done by the trial Court, then we find that the chain is not completed so as to unfailingly connect the accused with the accusation of murder of the deceased.

7. In the case of Arjun Marik (*supra*) so also in the case of Dharani Pradhan (*supra*), it has been highlighted and reiterated as to the manner in which the circumstantial evidence should be scanned and appreciated. In Dharani Pradhan their Lordships have stated that:

6. When the case of the prosecution is based on circumstantial evidence, it has to establish that there is no missing link in chain of circumstances, which is complete and unerringly point at the accused to be the author of the crime. In a case depending largely on the circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. Suspicion however, strong cannot take the place of legal proof. The Court has a duty to be watchful to ensure that conjectures or suspicion do not creep in to substitute legal proof. Unless the various circumstances on the chain establish clearly and completely, and there is no scope even for entertaining a reasonable doubt about the innocence of the accused, conviction should not be made. It has to be borne in mind that in a case where evidence is of a circumstantial nature, the circumstances from which conclusion of guilt is to be drawn should be in the first instance be fully established to be consistent only with the hypothesis of guilt of the accused. They should be of a conclusive nature and should be such as to exclude every hypothesis, but the one proposed to be proved. Mahajan, J. (as the Hon'ble Judge was then) in *Hanumant v. State of Madhya Pradesh* AIR 1962 S.C. 343, in this regard quoted a passage containing the warning administered by Baron Alderson to the Jury in *Reg v. Hodge* (1938) 2 LawEd 227, which was as under:

The mind was apt to take a pleasure in adopting circumstances to one another

and even in straining them a little, if need be, to force them to form parts of one connected whole and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over-reach and mislead itself, to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete.

The passage was referred to in Shankarlal Gyarsilal Dixit Vs. State of Maharashtra, and Jaharlal Das Vs. State of Orissa, .

8. In a preceding paragraph we have quoted paragraph-20 of the judgment of the trial Court to indicate the circumstances which were considered by the trial Court as the chain of circumstances to indicate the guilt of the accused. At the cost of repetition, we note here that trial Court opined that - (1) accused concealed himself in the stall; (2) he was caught raid-handed while carrying cash stolen from the counter of the stall; and (3) accused had blood stain on his left leg. The evidence on record of any of the witnesses do not reveal that accused had concealed himself in the stall. That finding of the trial Court thus suffers from perversity. Accused was caught while carrying cash (coins in 17 nos. of polythene bags). P.W. 5, another boy of the confectionery has stated in paragraph-9 of his evidence that, "the accused had received salary at 9 p.m. in that night". It is nobody's case that accused had any other money except the coins, which were recovered from him. Therefore, it cannot be unfailingly concluded that coins recovered from him were the stolen property from the cash counter of the stall though by extending imagination such an inference may not be unreasonable. Therefore, that circumstance in the absence of better evidence from the side of the prosecution alone does not indicate about guilt of the accused. P.W. 6 has stated in his evidence that on finding the cash (coins) in his bag and bloodstain on his leg besides the prevaricating statement made before him that he took the accused to the A.S.I, of Police (P.W. 7). In his evidence P.W. 7 has not stated that he noticed any blood-stain on the leg of the accused. P.W. 8, the Investigating Officer also did not make any such statement. P.W. 3 though stated to have noticed such blood stain on the leg of the accused, but he did not take any step to collect sample of the blood so as to get it tested in the laboratory to ascertain the group. Under such circumstance, there is no worthy evidence in the context of blood-stain found on the left leg of the accused so as to connect him with the crime. Therefore, the evidence on record does not complete the chain of circumstances so as to warrant a conviction against the accused. The above indicated evidence clearly gives rise to benefit of doubt and, therefore, accused is entitled to the same.

9. For the reasons indicated above, we set aside the order of conviction by granting benefit of doubt to the accused and acquit him from the charge u/s 302, I.P.C. He be set at liberty forthwith.

The Jail Crl. Appeal is allowed accordingly.