ORISSA HIGH COURT : CUTTACK

DSREF No.5 of 2007
And
CRLA No.296 of 2007

From the Judgment and order dated 28.05.2007 passed by Sri Sukumar Sahu, Additional Sessions Judge, Malkangiri convicting and sentencing the appellant in Criminal Trial No. 32 of 2005.

Trinath Dhadia … Appellant

-Versus-

State of Orissa …. Respondent

For Appellant : M/s Jugal Kishore Panda
and A.K. Dei

For Respondent : Standing Counsel

P R E S E N T :

THE HONOURABLE MR. JUSTICE P.K. TRIPATHY
AND
THE HONOURABLE MR. JUSTICE PRADIP MOHANTY

Date of hearing & judgment - 08.08.2007

The Death Reference is made under section 366 Cr.P.C. on the basis of an order of conviction and death sentence passed in C.T.No.32 of 2005 of the court of learned Additional Sessions Judge, Malkangiri, which is also under challenge by the accused-appellant in Criminal Appeal No.296 of 2007. Mr. J.K.Panda, learned counsel appearing for the accused-appellant takes notice of the death reference and undertakes to participate in the hearing without filing a show cause as against the death sentence. Regard being had to the aforesaid submission and on consent of both the parties, both the appeal and the Death Reference are heard analogously and disposed of by this common judgment.

2. Case of the prosecution in short is that accused committed matricide by killing his widow mother (the deceased), who declined to go to her office to collect the monthly salary on the ground of illness. The deceased said to be a daily labourer and the accused with his wife (P.W.1) were living together.

3. Prosecution case in more detail is that in the morning of the date of occurrence deceased replied to the accused about her inability due to illness to go to the office to collect her wage. Accused left the house and returned at about 2.00 P.M. in intoxicated condition. He expressed his displeasure for the manner in which curry had been prepared and assaulted her (P.W.1) and as a result she lost her sense for some time. On regaining sense, she saw that accused cutting throat of his mother by means of a Paniki (kitchen-knife), M.O.I. Thereafter, the accused wrapped a bed-sheet over him and went to sleep. Relatives of the accused and the neighbours came and saw the deceased lying dead and the accused alone is being present there. P.W.1 informed the police and investigation was undertaken. Accused was arrested on 24.11.2004, though the occurrence took place on 19.11.2004 at about 2 P.M. After routine investigation, charge sheet for the offence under Section 302 IPC was filed, charge was framed and on commitment of the case to the court of Session, learned Addl. Sessions Judge, Malkangiri took up the trial. In course of trial prosecution examined 4 witnesses out of 21 charge-sheeted witnesses. Amongst them, P.W.1 is the wife of the accused, P.W.2 is a co-villager and a post occurrence witness, P.W.3 is a police constable, who arrived at the spot after the occurrence on instruction of the police officer and P.W.4 is the Investigating Officer. It is noted in the trial court's record that the post mortem report, Ext.1 and the opinion report of the doctor Ext.11/2 were marked on admission. Mr. Panda, learned counsel for accused-appellant, states that accused never intended to admit the said document and would have opted for cross examination if the doctor could be made available. Beside the above document, prosecution also relied on the F.I.R., Exts.2, inquest report, Exts.3, dead body challan, Ext.4, seizure lists, Exts.5 to 9 and requisition for collection

of nail clippings of the accused, Ext.10. The trial court also marked the wearing apparels of the accused and the deceased respectively as M.Os. II to IV.

4. Learned Additional Sessions Judge quoting a passage from the case of ***Zahira Habibullah Sheikh and another vs. State of Gujarat and others***, (2006) 34 OCR (SC) 43 formed the opinion that the responsibility of the court is to conduct a fair trial and not a mockery trial. Similarly, he took note of the ratio in the case of ***State of Goa Vs. Sanjaya Thakran & another,*** (2007) 37 OCR (SC) 25 about the manner in which circumstantial evidence is to be appreciated. Thereafter on the basis of evidence of I.O. and P.W.3, he found that the conduct of the accused in denying to the allegation in his examination under Section 313 Cr.P.C. is un-excusable. Apart from that, he relied on that evidence and found the accused guilty of the offence under Section 302 Cr.P.C. The offence of matricide, as found by the trial court, is brutal in nature and accordingly capital punishment has been imposed.

5. On the self-same evidence when the accused-appellant argues for acquittal by setting aside the order of conviction, learned Standing counsel argues for remand of the case on the ground that relevant and material evidence available with the prosecution were not brought on record and the inaction and laches of the public prosecutor should not be a ground to grant premium to the accused, who committed the offence of murder. In other words, learned Standing Counsel admits that on the basis of evidence available, there cannot be an order of conviction. At the same time, he argues that the case dairy reveals availability of volumes of evidence and if that would be properly brought on record, then the charge could be proved.

6. Speaking high-sounding words and quoting big theories without following the same is of no value. In fact, that can be termed as an act of hypocracy. Once learned Additional Sessions Judge was conscious of the ratio in the case of **Zahira Habibullah** (supra) his act and conduct while conducting the trial should have been fair. Without brining relevant evidence on record and instead adopting a slipshod method for disposal of the case by examining only

four witnesses and permitting the prosecution to decline examination of relevant witnesses can never be said to be a fair trial. P.W.1, the sole eye witness to the occurrence, is also the wife of the accused and she having resiled from her earlier version, learned Additional Sessions Judge should have seen that the relevant circumstantial evidence is brought on record even by examining the charge sheet witnesses as court witnesses if the public prosecutor did not produce them.

7. In **Zahira Habibullah Sheikh** (Supra), Hon'ble Apex Court observed that:

> "the complex pattern of life which is never static requires a fresher outlook and a timely and vigorous moulding of old precepts to some new conditions, ideas and ideals. If the Court acts contrary to the role it is expected to play, it will be destruction of the fundamental edifice on which justice delivery system stands. People for whose benefit the Courts exists shall start doubting the efficacy of the system. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking that "the judge was biased". (Per Lord Denning MR in Metropolitan Properties Ltd. v. Lannon (1968) 3 all ER 304 (CA). The perception may be wrong about the judge's bias, but the judge concerned must be careful to see that no such impression gains ground. Judges like Ceasers' wife should be above suspicion (Per Bowen L.J. in Lesson v. General Council of Medical Education (1890) 43 Ch. D.366).
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> By not acting in the expected manner a judge exposes himself to unnecessary criticism. At the same time the Judge is not to innovative at pleasure. He is not a Knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness, as observed by Cardozo in "The Nature of Judicial Process".

8. Learned Additional Sessions Judge simply by inflicting conviction and imposing severe punishment is not divested of his duty when there is no evidence on record to connect the accused with the alleged crime. At the same time, non-application of mind to the facts of the case and the evidence available with the prosecution (from the case dairy), the inaction or otherwise motive of

the prosecution in not bringing relevant evidence on record could not have been countenanced by the trial court. That is why, it is time and again said that court should not be a silent spectator and should effectively make endeavour for proper adjudication of the dispute, be it civil or criminal, in a lawful manner. Learned Standing Counsel submits that the Presiding Officer, who disposed of the sessions case has committed such type of glaring mistake, which stands to the extent of failure of justice. One of us may be a party to few more such careless and casual dealing by the same Presiding Officers in some other sessions cases, but we cannot commonly subscribe a view jointly. Be that as it may, this Court, on the administrative side, should verify the records and find out if the Presiding Officer should be given certain guidelines for proper functioning or should be divested of the sessions power. It is better for the system if it is done sooner. We make it clear that we do not express any opinion on his conduct and leave it to the discretion of the Full Court to take a decision after perusal of his judgments.

9. After looking to the conduct of the public prosecutor in declining to examine relevant witnesses and exhibiting some material documents, as found in previous paragraph, we feel it proper that the State Government should take note of this aspect and examine if continuance of learned counsel as prosecutor is beneficial or detrimental to the system. The Law Department of the State may take appropriate steps in that respect.

For the aforesaid purpose, copies of the judgment be sent to the Registry as well as the Legal Remembrancer of Law Department, Orissa.

10. It reveals from the evidence of P.W.1 that she knows nothing as to how her mother-in-law died. She denies to the suggestion given by the prosecution that accused severed the throat of the deceased by means of a paniki (Kitchen knife) and murdered her. It is noteworthy that the learned special public prosecutor even did not bother to confront her with the previous statement made by her in the F.I.R. or statement recorded under Section 161 Cr.P.C.. P.W.2 stated that he saw the deceased lying dead her throat being cut.

Though he resiled from his own statement recorded under Section 161 Cr.P.C, no effort was made by the prosecutor either to put leading question or to confront his previous statement. P.W.3 was a police constable and according to his evidence P.W.1 went to the police station and reported the matter and on being directed he came to the spot and saw that the deceased was lying dead and the accused was sleeping nearby in a drunken state. A novel device was adopted by the learned special public prosecutor, which was allowed to be done by the trial court, for proving the case in the F.I.R. by that witness. The I.O. was, however, permitted to repeat the FIR story and thereafter his evidence was utilized to record the order of conviction. Whatever stated by the I.O. in paragraph 2 of his deposition was, as a matter of fact, the statement made in the F.I.R. by the informant. Therefore, under the law the statement made in the F.I.R. and proved by the I.O. is not admissible, while P.W.1, the informant, was available and examined and was not confronted with the statement made in the F.I.R.

11. Even if the documents were marked without objection, unless those documents were marked on admission, the accused has a right of cross examining the doctor on post mortem report and opinion report so also on the observation made in the inquest and other documents. As noted earlier, Mr. Panda, learned counsel for the accused-appellant states that accused would have opted to cross-examine them, if those witnesses would have been made available.

12. It is indeed lack of evidence, as it exists, so as to make out a case under Section 302 IPC against the accused. Yet, learned additional Sessions Judge recorded the finding of guilt of the accused by making colossal wastage of time and money of the State. The trial, which could have been completed on the same date, continued for so many months. Therefore, we have no hesitation to set aside the order of conviction. At this stage, we consider the submission of learned Standing Counsel and remand the case to the court below for fresh disposal though it is opposed by the accused-appellant, as it has been stressed and stated by the Apex Court that every person is entitled to

be fairly dealt with in a criminal trial. Here, because of the reasons stated above, the prosecution has not fairly dealt with the case in the hands of the special public prosecutor. Under such circumstance, we feel it appropriate that the case should be remanded for fresh disposal in accordance with law by examining relevant witnesses. It is open to the prosecutor to avoid repetition of evidence. The Death Reference is accordingly discharged and the criminal appeal is allowed and the C.T. No.32 of 2005 is remanded to the trial court for fresh disposal in accordance with law.

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Orissa High Court : Cuttack
Dated, 8th August, 2007/ Dash