HIGH COURT OF ORISSA : CUTTACK

CRIMINAL APPEAL NO.328 OF 1996

From the judgment and order dated 27.11.1996/30.11.1996 passed by Sri M.R. Behera, Sessions Judge, Kandhamal-Boudh, Phulbani in S.T. Case No.4 of 1996.

Shraban Kumar Behera ..... Appellant.

Versus.

State of Orissa ..... Respondent

For Appellant : M/s. D.P.Dhal, A. K.Acharya and D.K. Das

For Respondent : Additional Government Advocate

PRESENT

THE HON'BLE SHRI JUSTICE PRADIP MOHANTY
A N D
THE HON'BLE SHRI JUSTICE B.K.NAYAK

Date of hearing :24.12.2010 : Date of judgment:24.12.2010

B.K.NAYAK, J. In this appeal the appellant challenges the judgment and order dated 27.11.1996/30.11.1996 passed by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in S.T. Case No.4 of 1996 convicting him under Sections 302/201 of the I.P.C. and sentencing to undergo imprisonment for life and pay a fine of Rs.5,000/- in default to undergo further rigorous imprisonment for six months for the offence under Section 302 of the I.P.C. No separate sentence has been imposed under Section 201 of the I.P.C.

2. The appellant along with co-accused Prasanta Behera, Radhanath Behera, Sachidananda Naik, and Somonath Naik stood his trial in the aforesaid Sessions case. While the appellant was charged under Sections 302/201/34 of the I.P.C., co-accused Prasanta Behera was charged under Sections 201/34 of the I.P.C. The other three co-accused persons stood charged for commission of offences under Sections 176/34 of the I.P.C. for allegedly omitting to give information to the police about the commission of murder of deceased-Ranjulata Digal by the appellant.

During the course of trial co-accused-Prasanta Behera and Sachidananda Naik were acquitted of the charges under Sections 201/34 of the I.P.C. and under Sections 176/34 of the I.P.C. respectively in terms of Section 232 of the Cr.P.C. for non-availability of incriminating materials against them.

3. Shorn of unnecessary details the prosecution case runs as under:

The deceased-Ranjulata Digal, a girl aged about 15/16 years, was the cousin of the appellant being the daughter of appellant's maternal uncle. Sometime in 1995, the appellant's mother was ailing and got hospitalized at Berhampur and, therefore, the deceased was allowed by her parents to stay in the house of the appellant in village-Totaguda to look after some domestic works. It is alleged that while so staying illicit relationship between the deceased and the appellant developed. The former apprised the latter that she had got pregnant. The persuasion of the appellant to terminate the pregnancy was turned down by the

deceased, for which apprehending discontentment in the family and lowering of his prestige and reputation in the event the illicit affair was made public, on 27.7.1995 around 1.00 P.M. the appellant finding the deceased alone in his cowshed committed her murder by strangulation and in order to screen himself from legal punishment threw the dead body in the water of the well of co-accused-Radhanath Behera with the help of co-accused Prasanta Behera in the evening. On 29.07.1995, the appellant sent information to the parents of the deceased through one Bijay @ Jilu that the deceased was missing since a couple of days. On hearing about the missing of their daughter (the deceased), the mother and brother of the deceased came to the village of the appellant but they were not allowed to enter into the village and were forced to come back to their village by a bus. It is the further case of the prosecution that on 30.07.1995 the appellant himself went to Pasara Outpost at about 3.00 A.M. and allegedly reported to the A.S.I. of police (P.W.10) about the commission of murder by him as because the deceased refused to terminate the pregnancy. His statement, which was allegedly given in presence of one Rabi Praharaj (P.W.4), was entered in the Outpost Station Diary vide S.D.E. No.478 dated 30.07.1995 by the A.S.I. of police, who himself drew up the F.I.R. and sent the same to the O.I.C., Tikabali Police Station for registration of case. Thereafter, the A.S.I. himself took up investigation which was subsequently taken over by the Circle Inspector after registration of the case. During the course of investigation, P.W.10 commanded police constables to the spot to guard the dead body of the

deceased and thereafter proceeded to the spot. At 8.00 A.M. on the same day the Circle Inspector of Police, Phulbani (P.W.13) arrived at the spot and took over the charge of investigation from P.W.10. In course of investigation, P.W.13 took photographs of the dead body, conducted inquest and sent the same for postmortem examination and thereafter examined witnesses. On 8.8.1995, P.W.11 the successor of P.W.13 took over charge of investigation from him and ultimately filed charge-sheet. It is further alleged that co-accused Radhanatha Behera, Sachidananda Naik and Somanath Naik having knowledge of such murder intentionally omitted to give information of the same at the police station.

4. The plea of the defence was one of complete denial. The appellant also denied to have made any confessional statement before P.W.10.

5. In order to prove the charges, the prosecution examined 13 witnesses and exhibited certain documents including the statement of the appellant recorded in the station diary entry vide Ext.1/2 and the F.I.R. Ext.6. No evidence was led by the appellant in his defence.

6. P.Ws. 1 and 2 are respectively mother and brother of the deceased. P.Ws.3 & 5 are the seizure witnesses, P.W.4 is said to be a witness to the recording of the statement of the appellant by the A.S.I. of Pasara Outpost. P.Ws.6 and 7 are two police constables. P.W.8 is the driver of the bus, who had brought back P.Ws. 1 and 2 from the village of the appellant. P.W.9 is the inquest witness. P.W.10 is the A.S.I. of Pasara Outpost. P.Ws.11 and 13 are the other Investigating Officers. P.W.12 is

the doctor, who conducted post mortem examination on the body of the deceased.

7. While acquitting other accused persons, the trial court has convicted the appellant by accepting the statement of the appellant said to have been given to P.W.10 to be a disclosure statement under Section 27 of the Evidence Act on the basis of which the dead body was discovered, and the evidence of the mother and brother of the deceased to the effect that they were not allowed to enter into the village of the appellant and were forced to come back when they had gone to that village on receipt of information about the missing of the deceased.

8. In assailing the impugned judgment, the learned counsel for the appellant contended that the so called statement of the appellant (Ext.1/2) cannot be accepted as the confession of the appellant nor cannot it be relied upon as the disclosure statement inasmuch as the appellant did not give discovery of the dead body in pursuance of such statement. It is also contended that even assuming that by virtue of Exts.1/2 the discovery of the dead body was made, that by itself cannot form the sole basis for conviction, there being no other direct or circumstantial corroborative evidence pointing to the guilt of the appellant. He also contends that there are so many doubtful and improbable features which make the whole prosecution case suspicious.

9. The fact that the deceased died a homicidal death is amply borne out from the medical evidence of P.W.12. As per evidence of P.W.12 and the post mortem report (Ext.8), P.W.12 found a bruise on the right

side of the neck and on dissection, he noticed there was echimosis on the right side of the neck, with blood clots in the subcutaneous tissue. The right carotid area contained blood clots and on the left side there was accumulation of blood clots near the thyroid cartilage. The right side of the hyoid bone was fractured. The stomach was empty. No water or mud was found in the stomach. The doctor opined that the death was due to asphyxia, as a result of throttling followed by fracture of hyoid bone. The death has been found to be homicidal. The learned counsel for the appellant does not challenge this finding.

10. In the absence of direct evidence, the entire prosecution case rests on circumstantial evidence. The 'Panchsheel' of proof of a case based on circumstantial evidence which is usually called five golden principles have been stated by the apex Court in **Sharad Birdhichand Sarda v. State of Maharashtra;** AIR 1984 SC 1622 and **Md.Sher Bahadur Khan v. State;** (1996) 10 OCR 167;**.** The principles are as follows :

1. *the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established;*
2. *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;*
3. *the circumstances should be of a conclusive nature and tendency;*

4. *they should exclude every possible hypothesis except the one to be proved; and*
5. *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.*

11. The gravest clinching circumstance according to the prosecution in this case is the confessional statement (Ext.1/2) said to have been given by the appellant to P.W.10, which the trial court has relied upon as one under Section 27 of the Evidence Act that led to discovery of the dead body. The learned counsel for the appellant has submitted that the veracity of the prosecution case that the appellant gave such a statement to P.W.10 is doubtful because of some grave improbabilities and inconsistencies in the evidence and suppressions by the investigating agency.

F.I.R. (Ext.6) has been drawn up by P.W.10, the A.S.I. of Pasara outpost reiterating the confessional statement purportedly given by the appellant. It is evident from the testimony of P.W.1, mother of the deceased that on 29.7.1995 she received information about missing of the deceased from the house of the appellant and, therefore, she came to the village of the appellant to know the details and on arrival at the outskirt of the village she learnt from Radhanath Behera and Somanath Naik (co accused person) that the appellant caused murder of the deceased and had thrown the body in the well and that those two persons did not allow

them to see the dead body and forced them to return to her village by bus. Her testimony further reveals that on the next day i.e., on 30.07.1995 along with some co-villagers she went to Pasara Outpost and got a report scribed by one Ramesh Ch. Digal and lodged the same. It is evident that neither the report lodged by P.W.1 describing the murder of her daughter has seen light of the day nor the scribe thereof nor any other co-villager, who accompanied P.W.1 to the Outpost, has been cited as a prosecution witness. There is no reason as to why the report lodged by P.W.1 was not registered. This amounts to a material suppression of a very important aspect of the prosecution case by the A.S.I. of Pasara Outpost (P.W.10).

12. Evidence of P.W.10 reveals that on 30.07.1995 at 3.00 A.M. the appellant appeared before him at the Outpost and confessed orally which was reduced to writing verbatim in the station diary of the Outpost. It is stated by him further that P.W.4 Rabi Praharaj was present at the Outpost at that time in whose presence the appellant gave the statement. From his cross-examination it transpires that he deputed constable-Rajkishore Naik (P.W.6) to fetch P.W.4 without issuing command certificate. It appears quite improbable that at that hour of night, i.e., 3.00 A.M., P.W.10 sent a constable to fetch P.W.4 to be a witness to the statement to be given by the appellant. P.Ws.6 and 4 have, however, given, two separate versions. P.W.6 has deposed that just before dawn on 30.07.1995 he was asked by P.W.10 to call P.W.4. P.W.4, on the other hand, has stated that he was called by P.W.10 to the Outpost at 8.30 P.M. on that day. P.W.4 has also not supported the prosecution version about

giving of any statement by the appellant in his presence. His evidence reveals that when he went to the Outpost at 8.30 P.M., he found the appellant present there and the appellant merely put his signature. The police also took signature of P.W.4 on the station diary book. Though cross-examined by the prosecution, P.W.4 has denied to have given any statement to the Investigating Officer about the recording of the statement of the appellant in his presence. It is apparent that though the prosecution has attempted to show that the accused gave the statement at 3.00 A.M. on 30.07.1995 in presence of P.W.4, it is in fact not so.

13. In his alleged statement to P.W.10 the appellant disclosed that the deceased had been staying in his house since 5 to 6 years and during such stay she got puberty about a year before the alleged occurrence whereafter the appellant kept physical relationship with her as a result of which she became pregnant, and that she having refused to succumb to his pressure for causing abortion, on 27.7.1995 while the wife and children of the appellant were absent from home, he throttled the deceased to death and subsequently with the assistance of co-accused person Prasanta Behera disposed of the body in the well of co-accused Radhanath Behera. Evidence of P.W.1 in her cross-examination is categorical to the effect that the deceased was not staying in the house of the appellant since 4 to 5 years. Rather she has stated that about a month before her death the deceased was staying in the house of the appellant. In case the evidence of P.W.1 is believed it is apparent that physical relationship of the appellant with the deceased might have

developed within that one month. In such circumstances it was highly improbable that within a month or even less than that both the deceased and the appellant became certain that the deceased had conceived and, therefore, the appellant inculcated a motive to do away with the deceased for her refusal to terminate the pregnancy. At this juncture it is worthwhile to refer to the evidence of the autopsy doctor, P.W.12, who has stated in unequivocal terms that the uterus of the deceased was of normal size and no product of conception was found. In view of such finding by the doctor, it is quite certain that P.W.1 probably spoke the truth that the deceased had been staying in the house of the appellant only about a month before the alleged date of occurrence. In view of such evidence, it is highly improbable that the appellant made a statement before P.W.10 stating that the deceased was staying in his house since 4 to 5 years back and that when the deceased got pregnant the appellant developed a motive to cause her death for her refusal to subject herself to abortion.

14. For the foregoing reasons, we are of the view that the prosecution story that the appellant came to the Outpost at 3.00 A.M. and gave the confessional statement to P.W.10, which was reduced to writing by the latter as per Ext.1/2, is hard to believe.

15. Even otherwise, the statement of the appellant is inadmissible in evidence in view of the bar contained in Section 25 of the Evidence Act. In a similar case reported in AIR 1966 SC 119 **Aghnoo Nagesia v. State of**

Bihar where the accused himself lodged a report confessing to have committed murder, the Hon'ble Apex Court held as follows :

> "….. Section 25 provides; "No confession made to a police officer shall be proved as against a person accused of an offence". The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. ….. "

16. The aforesaid decision was followed by the Supreme Court in the case of **Khatri Hemraj Amulakh v. The State of Gujarat** reported in AIR 1972 SC 922 where the accused purportedly made a confessional statement before the police which formed the basis of the F.I.R. The Hon'ble Court observed as follows :

> "14. The confessional statement, Ext.27, which was made by the accused to Sub Inspector Rojia and which formed the basis of the first information report was not admissible in evidence as the same was hit by Section 25 of the Indian Evidence Act. We may in this connection refer to the case of Aghnoo Nagesia v. State of Bihar (1966) ISCR 134= (AIR 1966 SC 119) wherein this Court held that no part of a first information report lodged by the accused with the police could be admitted into

> evidence if it was in the nature of a confessional statement. The statement could, however, be admitted to identify the accused as the maker of the report. The part of the information as related distinctly to the fact discovered in consequence of the information could also be admitted into evidence under Section 27 of the Indian Evidence Act if the other conditions of that section were satisfied"

17. Ext.1/2 in the instant case, which is said to have been the verbatim recording of the confessional statement of the appellant is, therefore, inadmissible in evidence and cannot be relied upon.

18. Ext.1/2 cannot also be relied upon as a piece of circumstantial evidence under Section 27 of the Evidence Act inasmuch as nowhere in the statement the accused offered to lead the police party to the discovery of the dead body from the well of Raghunath Behera. On the other hand, it is manifest from the evidence of P.Ws.10 and 7 that after recording the statement of the appellant and drawing of the plain paper F.I.R., which was addressed to the O.I.C., Tikabali Police Station, P.W.10 commanded P.W.7, the constable to go to the village of the appellant and guard the dead body in the well. There is no evidence that the appellant accompanied P.W.7 and his companion constable to the well in question and led to discovery of the dead body. It appears from the evidence of P.W.10 that as if P.W.7 had prior knowledge of the location of the well, in which the body had been concealed so that P.W.7 straight went to the well in question without the help and assistance of any other person. The

mistery shrouding the recording of the statement of the appellant makes it wholly unreliable due to want of independent corroboration. Therefore, Ext.1/2 cannot also be accepted as a statement leading to discovery of the dead body under Section 27 of the Evidence Act.

19. Accepting the evidence of P.W.1 to the effect that when she and her son had gone to the village of the appellant after getting information about the missing of the deceased, they were not allowed to enter into the village and forced to come back, the trial court utilized the same as an incriminating circumstance against the appellant. Evidence of P.W.1, however, shows that she was prevented from entering into the village by co-accused-Radhanath Behera and Somanath Naik, who told her that the appellant had murdered the deceased and thrown the dead body into the Well. Her evidence does not reveal that the appellant at all took part in preventing her from entering into the village. Therefore, such evidence of P.W.1 cannot be utilized as a piece of incriminating circumstance against the appellant.

20. In the light of the discussions made above, we hold that the prosecution has utterly failed to prove the guilt of the accused-appellant under Sections 302/201 of the I.P.C. We, therefore, allow this appeal and set aside the impugned judgment and order of conviction and sentence passed by the trial court and acquit the appellant of the said charges.

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B.K.Nayak,J.

Pradip Mohanty, J. I agree.

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Pradip Mohanty,J.

Orissa High Court, Cuttack
The 24th December,2010/ Gagan