HIGH COURT OF ORISSA: CUTTACK

CRIMINAL APPEAL No.177 of 1996

From the judgment and order dated 4.5.1996 passed by Sri S.P.Acharya, Sessions Judge, Keonjhar in S.T. No. 22 of 1993.

Gatikrushna Naik ..... Appellant

-versus-

State of Orissa ..... Respondent

For Appellant : Mr. D.Sarangi & Associates

For Respondent : Govt. Advocate

P R E S E N T:

THE HON'BLE MR. JUSTICE L.MOHAPATRA
AND
THE HON'BLE MR. JUSTICE B.K.MISRA

Date of Judgment: 29.06.2011

B.K. Misra, J. The appellant being aggrieved with the order of conviction and sentence imposed on him by the learned Sessions Judge, Keonjhar in S.T. Case No. 22 of 1993 has preferred this appeal. The learned Sessions Judge, Keonjhar while convicting the appellant under Section 302 of the Indian Penal Code (for short, "I.P.C.") sentenced him to undergo imprisonment for life.

2. The case of the prosecution is that deceased Sanu Naik happens to be the father of the appellant. The appellant five years prior to the occurrence was given in marriage but since after his marriage dissension arose in the family he started leaving in a separate house in the village. It is alleged that on 26.11.1992, the appellant came to the house of his father and requested the deceased to give him some paddy, as he and his family were starving then. The deceased allowed the appellant to take one 'Khandi' of paddy but when the appellant took some more paddy clandestinely the deceased chastised the appellant for which it is alleged that the appellant had threatened him. It is further alleged that on 28.11.1992 the appellant on getting the news that his parents were seriously ill because of food poisoning had come to see them and that night stayed there. It is alleged that the deceased and the appellant had slept in the 'DHENKISALA' on the night of 28.11.1992 but on the next day morning the deceased was found dead with bleeding injury on his head. Regarding such death of the deceased, one Ballava Chandra Naik (P.W.2) who was then Ward member of the village of the deceased reported the matter at Telkoi Police Station on 29.11.1992 morning. Basing upon such report, U.D. Case No. 8 of 1992 was registered by the O.I.C., Telkoi Police Station and enquiry was taken up. While enquiring into the said U.D. Case, since ample materials

were collected by the O.I.C., Telkoi Police Station (P.W.6) regarding the involvement of the appellant in the murder of his father, plain paper F.I.R. (Ext. 7) was drawn up and Telkoi Police Station Case No. 71 of 1992 under Section 302 of the I.P.C. was registered and P.W.6 proceeded with the investigation of the case. On completion of the investigation, charge sheet was placed against the present appellant under Section 302 of the I.P.C. to stand his trial.

3. The plea of the appellant was of a complete denial of the alleged occurrence and it is his further plea that he has falsely been implicated in this case by Police.

4. During trial in order to bring home the guilt of the appellant, the prosecution had examined six witnesses in all and of them, P.W.1 is the wife of the deceased as well as mother of the appellant. P.W.2 was the Ward member who reported the matter i.e. about the death of the deceased at Telkoi Police Station. P.W.3 was a witness to the inquest which was held over the dead body of the deceased and also a seizure witness. P.W.4 is an independent witness for the prosecution. P.W.5 is the doctor, who conducted post mortem over the dead body of the deceased and P.W.6 was the I.O. The appellant declined to examine any witness in his defence.

5. Learned Sessions Judge on analyzing the evidence of P.W.1 and also the evidence of P.Ws. 3 and 6 believed the case of the

prosecution that it was the appellant, who committed murder of his father on the night of 28.11.1992 and accordingly convicted the appellant under Section 302 of the I.P.C. and passed the impugned sentence which is under challenge in this appeal.

6. Admittedly in this case there is no ocular evidence and prosecution heavily relied upon the circumstantial evidences namely, extra judicial confession made by the accused before his mother as well as recovery of the alleged weapon of offence at the instance of the appellant and above all the last seen theory that is the deceased and the appellant had slept in the 'DHENKISALA' on the night of 28.11.1992 but the deceased was found dead on the morning of 29.11.1992 with bleeding injury on his head.

7. It is well settled and needs no restatement that the principle for basing a conviction on the basis of circumstantial evidence is that each and every incriminating circumstances must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis except the guilt is possible. It is also the trite law that the Courts have to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for some time unconsciously as short step between moral certainty and

legal proof. There is a long distance between may be true and must be true and the same divides conjectures from sure conclusions.

8. The five golden principles laid down by the apex Court in ***Sharad Birdhichand Sarda V. State of Maharastra reported in A.I.R. 1984 S.C. 1622*** governs the field of appreciation of circumstantial evidence and often quoted by the apex Court as well as by this Court.

9. Thus, keeping in mind the principles of law regarding appreciation of circumstantial evidence now let us proceed to examine the evidence on record as to how far the prosecution has been able to complete the chain of circumstances against the appellant which unerringly point to his guilt in murdering his father.

10. Admittedly, the death of the deceased appears to be an homicidal one when we see the evidence of P.W.5, the doctor, who conducted post mortem over the dead body of the deceased. P.W.5 who held the post mortem over the dead body of the deceased on 29.11.1992 found two external injuries namely

i) One penetrating injury on the right side of the cheek 1½" below the zygomatic eminence the side of which was $^{1}/_{3}$" diameter.

ii) One bruise on the right side of the face 1" below the right eye.

Besides that, he also found on internal examination of injury No.1 that external penetrating injury which was detected on the right side of the cheek had extended internally to the mouth cavity. There was also fracture of the right side mandible. P.W.5 opined that all the injuries which were detected on the person of the deceased to be ante mortem and could have been caused by one piercing weapon so far as injury No. 1 is concerned and by blunt weapon in respect of injury No.2. P.W.5 proved the post mortem report prepared by him as Ext.5.

11. As already discussed above, in the instant case, there is no direct evidence of crime and the entire case of the prosecution hinges on circumstantial evidence. Therefore, it is necessary to find out whether the circumstances which the prosecution relies are kept on supporting the sole inference that the appellant is guilty of the crime of which he is charged.

12. The first circumstance which is pressed into service by the prosecution is the extra judicial confession alleged to have been made by the appellant before his mother on the morning of 29.11.1992. P.W.1, who is the wife of the deceased deposed that on the preceding day of the occurrence the accused had come to their house and since reaping of paddy sheaves had already been over they wanted to celebrate the same by organizing a feast. It is the further

evidence of P.W.1 that the accused cooked rice and also prepared chicken curry. It is the further evidence of P.W.1 that the accused poured something like white powder to the rice and after consuming the said rice they all suffered from loose motion accompanied by vomiting. The evidence of P.W.1 also shows that the accused stayed in their house on the night of the occurrence and her husband (deceased) and the accused slept in one room but on the next day morning the deceased was found dead inside the room where he was sleeping with oozing of blood from his mouth and nostrils and there was mark of injury on his right cheek. It is also the evidence of P.W.1 that when he questioned the accused as to how the deceased died and why he killed her husband, the accused denied to have killed his father but later on confessed to have killed the deceased with a half burnt split wood. But in her cross-examination, P.W. 1 deposed that he had not seen the accused pouring white powder in the rice while the same was being boiled and she has also further admitted that she did not state before police that the accused poured white powder in the rice. Most importantly the evidence of P.W.1 in her cross-examination further reveals that she did not state before police that the accused at first did not confess to have killed the deceased but later on he did so. P.W.1 has also admitted that she has not stated regarding the occurrence before anybody after being examined by the

police. P.W.2 is a star witness for the prosecution as he was the Ward Member of the village when the occurrence took place. The evidence of P.W.2 only reveals that on hearing about the death of the deceased Sanu Naik, he proceeded to Telkoi Police Station and orally lodged the report there. Thus, P.W.2 does not say about the extra judicial confession, if any, alleged to have been made by the appellant before P.W.1. P.W.3 deposed that on hearing a cry from the house of the accused when he proceeded there found the deceased dead with oozing of blood from his mouth and nostrils. It is the further evidence of P.W.3 that he questioned the accused so also P.W.1 as to how the deceased died. Save and except this P.W.3 has not breathed a word if to his query as to how the deceased died, the accused appellant disclosed to have killed the deceased with a half burnt split wood. P.W.3 has also not breathed a word if P.W.1 disclosed before him that the accused appellant confessed his guilt in killing his father. P.W.4, who is another person of the village of the deceased simply deposed that Sanu Naik died three years back and on hearing a cry from the house of the deceased he went there but on hearing that the deceased had died he did not ask anything to anybody and returned back. Therefore from the aforesaid analysis of evidence on record it would be extremely hazardous to place any reliance on the evidence of P.W.1 about the alleged extra judicial confession made by the

appellant before her on the morning of 29.11.1992 that he killed his father with a split wood. There is no independent corroboration to the evidence of P.W.1 and P.W.1 herself also admits not to have stated before police about the extra judicial confession alleged to have been made by the appellant before her. We have no hesitation to hold that deliberate improvements have been made by P.W.1 while deposing in Court. We are quite conscious of the position of law that the Courts should not proceed from the very beginning that the extra judicial confession is a weak type of evidence. The value of the evidence as to the confession depends on the reliability of the witnesses to whom it has been made. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. AIR 2011 Supreme Court 1863 (**Bhagwan Das Vrs. State (NCT) of Delhi**. By keeping in mind such cannons of law if we analyse the evidence of P.Ws. 1, 2 and 3 no Court of prudence can accept their credibility with regard to the extra-judicial confession alleged to have been made by the appellant before his mother P.W.1 on 29.11.1992 morning.

13. Now comes the next most important circumstance that is the last seen theory. According to the case of the prosecution after marriage, the appellant was living separately from his parents in a separate house in the village but he had come to the house of his

parents on 28.11.1992 and while celebrating harvesting of crops a feast was organized that day and the accused-appellant poured some white powder and by consuming the said rice all of them suffered from food poisoning for which the accused stayed in the house of his parents. It is the further case of the prosecution that the deceased as well as the appellant slept in one room but on the next day the deceased was found dead with bleeding from his head. On this point, the only evidence available on record is that of P.W.1 who is the wife of the deceased. In her examination-in-chief P.W.1 deposed that the accused and her husband slept in one room but on the next day morning her husband was lying dead inside the room where he was sleeping with oozing of blood from his mouth and nostrils. There was also injury on his right cheek. In her cross-examination she deposed that the deceased and the accused slept in the outer 'Pinda' (outer verandah) whereas, she herself and her daughter had slept in a room by closing the doors. Thus, this evidence of P.W.1 in her cross-examination shows that the deceased had slept in an open place i.e. on the outer verandah and not inside the room. P.W.3 in his evidence deposed that the deceased was lying dead in a room. Ext. 7, the plain paper F.I.R. drawn up by the I.O. P.W.6 shows that on the night of 28.11.1992 because of the illness of the parents the appellant had slept in the 'DHENKISALA' along with the deceased. The inquest

report Ext.1 shows that the dead body of the deceased was found in the 'DHENKISALA' and Ext.6 the spot map prepared by the P.W.6 also shows the spot to be the 'DHENKISALA' of the deceased Sanu Naik. In view of the above discrepancy that appear with regard to the spot and when P.W.1 the wife of the deceased deposed that her husband had slept in the outer verandah on the fateful night along with the accused it has become extremely difficult to arrive at a conclusion that it was the present appellant who killed his father on the night of 28.11.1992. The evidence on record do not at all inspire any confidence to pinpointly hold the appellant as the perpetrator of the crime. If the deceased had slept on the outer verandah of his house on the fateful night the possibility of some other person other than the appellant in the commission of the crime cannot altogether be ruled out. There is also no other corroborating evidence to that of P.W.1 to say the presence of the appellant in the house of the deceased on the fateful night. It is best known to the prosecution as to why the other son and daughter of P.W.1 who were there in the house were withheld from Court from being examined though they were cited as charge-sheet witnesses.

14. Thus, the theory of last seen of the deceased with the appellant on the fateful night has not been established by the prosecution by reliable and clinching evidence.

15. Now coming to the recovery of the weapon of offence, namely, M.Os. I and II at the instance of the appellant, the prosecution has relied upon the evidence of P.Ws. 3 and 6. P.W.3 an independent witness deposed that the accused while in custody disclosed that he had concealed a half burnt wood in the house and so saying led the Police Babu to the place of concealment and gave recovery of the half burnt wood which was seized under Ext.3. P.W.3 identified the said seized half burnt wood as M.O.I. Similarly, P.W.3 also deposed that the accused also while in custody led the Police Babu to the place where he had kept the "Chimuta" (Foreshape) M.O.II which was seized under seizure list Ext.4. But, this evidence of P.W.3 in his cross-examination-in-chief falsifies the case of the prosecution about the recovery of M.Os. I and II at the instance of the present appellant from the place of concealment as P.W.3 in his cross-examination deposed that the half burnt wood and the "Chimuta" (Foreshape) M.O.II belong to the deceased which were there in the room where he was lying dead. In his further cross-examination, P.W.3 also deposed that when police seized M.Os. I and II he had not gone inside the house of the deceased. If P.W.3 had not gone inside the house of the deceased at the time of recovery of M.Os. I and II it appears as a myth, as to how the P.W.3 could see the seizure of M.Os. I and II. For the aforesaid reasons, we are not

inclined to place any reliance on the evidence of P.W.3 as his evidence is not at all believable. P.W.6 is the I.O. of the case. P.W.6 simply deposed that he seized the half burnt wood M.O.I under Ext.3 and one iron "Chimuta" (Foreshape) M.O. II under Ext.4. The I.O. has not breathed a word if M.Os. I and II were seized as per the disclosure statement made by the appellant. If the appellant while in custody led him and the witnesses to the place of concealment and gave recovery of M.Os. I and II, which he had concealed after killing his father. There has been non-compliance of the provisions of Section 27 of the Evidence Act. The exact verbatim of the words used by the appellant before giving discovery of the weapon of offence of M.Os. I and II have not been recorded and proved in the Court. Exts. 3 and 4 shows that M.Os. I and II were seized from the 'DHENKISAL' of the deceased which is adjacent to his house. But P.W.3, the witness to the seizure of those articles deposed that those M.Os. were seized from the room where the deceased was lying dead. At this juncture, it is very pertinent to refer to the evidence of P.W.5, the doctor who held post-mortem over the dead body of the deceased. P.W.5 in his evidence has very specifically deposed that the weapon of offence had not been sent to him for examination and opinion. Besides that P.W.5 also deposed that he did not find any foreign particle on the injuries even if the same were caused by the half

burnt wood. When the M.Os. were not sent to P.W.5 by P.W.6 after their seizure that definitely casts a serious reflection on the case of the prosecution.

16. Thus, from the aforesaid analysis of the evidence on record, and on a resume of the entire evidence, we found that the prosecution has failed to connect the culpability of the appellant to the crime by leading clinching evidence and establishing all the circumstances to unerringly point that it was the appellant who committed murder of his father. Accordingly, we set aside the order of conviction and sentence imposed on the appellant under Section 302 of the I.P.C. and acquit him from the said charge. The appellant is set at liberty forthwith and discharged from his bail bond.

The criminal appeal thus stands allowed.

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L.Mohapatra,J. I agree.

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Orissa High Court, Cuttack
The 29th June, 2011/RNS