ORISSA HIGH COURT,
CUTTACK

DSREF NO. 2 OF 2013 & CRLA NO. 274 OF 2013

DSREF No. 2 of 2013

In the matter of a reference under section 366 of the Code of Criminal Procedure arising out of judgment dated 19.03.2013 passed by Sri S.S.Mishra, Ad hoc Additional District & Sessions Judge (FTC), Jharsuguda in S.T.Case No.38/44 of 2010.

State of Orissa ..... Complainant

Versus

Minaketan @ Tekaru Seth ..... Respondent

For Complainant : Mr.B.P.Pradhan,
Addl. Government Advocate.

For Respondent : M/s. B.K.Ragada, and
L.N.Patel.

CRLA No. 274 of 2013

From the Judgment dated 19.03.2013 passed by Sri S.S.Mishra, Ad hoc Additional District & Sessions Judge (FTC), Jharsuguda in S.T.Case No.38/44 of 2010.

Minaketan @ Tekaru Seth ..... Appellant

Versus

State of Orissa ..... Respondent

For Appellant : M/s.B.K.Ragada, and
L.N.Patel.

For Respondent : Mr. B.P. Pradhan,
Addl. Government Advocate.

P R E S E N T:

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY
AND
THE HONOURABLE SHRI JUSTICE D.DASH

Date of hearing : 04.12.2013 : Date of judgment: 20.12.2013

D.DASH,J This proceeding for confirmation of death sentence and the Criminal Appeal having arisen out of the judgment of conviction and sentence dated 19.03.2013 and 22.03.2013 respectively passed by the learned Ad hoc Additional Sessions Judge, Jharusugda in S.T. Case No. 38/44 of 2010 have been heard together and are thus disposed of by this common judgment.

2. The prosecution case is the followings :

On 09.10.2009 it was around 9.00 A.M., deceased, a minor girl had been to the field carrying food for her father (P.W.1) who was working there. After her father took his food, the deceased left for home carrying steel tiffin carrier and the bucket. Father of the deceased after finishing the work in the field when returned home around 2.00 P.M. was surprised to find out that his daughter even by then had not returned. So he with his friends, namely, Hemanta (P.W.18) and Arjuna (P.W.19) went for search. At about 5.00 P.M. they found one chappal of the deceased lying in the agricultural land of Jagannath Bhoi. At Sukarmal Chhack at a little distance they further saw the tiffin carrier and the bucket which the deceased had carried and brought back with her, to be lying. Lastly the search ended when they

recovered the half unrobed dead body of daughter of P.W.1 with her undergarment (chadi) lying near by. While tracking the dead body, marks of dragging over the standing paddy crops on the field were also seen. The dead body was lying there with froth coming out of the lips with blood and sticking thereto. A swollen ligature mark around the neck. Father of the deceased (P.W.1), immediately lodged the written report (Ext.1) at Kandheikela Out Post, where after the investigation commenced.

Police in course of investigation visited the spot, held inquest over the dead body of the deceased daughter of informant, examined witnesses and recorded their statements. The dead body was sent for post mortem examination and the incriminating articles were sent through court for chemical examination.

3. It is pertinent to state here that P.W.1 while lodging the F.I.R. had pointed the finger of suspicion at one Sudam Sha @ Sudarshan who has been examined during trial from the side of prosecution as P.W.4. So initially the case was registered against him. However, in course of investigation police arrested the accused on 13.10.2009 and he was forwarded in the custody to court. On completion of investigation, police placed charge sheet against him for facing trial in the court of law.

4. Charge sheet having been received, the learned S.D.J.M., Jharsuguda took cognizance of offence under Sections 376 and 302 IPC and

committed the case to the court of Session, where after it came to be tried by the Ad hoc Additional Sessions Judge (FTC), Jharsuguda who has rendered the judgment of conviction and sentence as stated above.

5. During trial prosecution in order to bring home the charges against the accused has examined in total twenty three witnesses. P.Ws. 1 and 2 are the parents of the deceased whereas P.W.3 is her paternal uncle. P.W.4 is the person against whom P.W.1 had first pointed the suspicious finger about his complicity in the crime. P.W.5 is the witness who claims that in his and in presence of others the accused confessed to have committed crime. P.Ws.6 and 15 have been examined to prove certain post occurrence conduct of the accused. P.Ws.7 and 8 are the other witnesses to the extra judicial confession said to have been made by the accused before them. So also before P.Ws. 8, 14, 18 and 19 who are the witnesses to prove the later conduct of accused and his confessional statement before them. P.W.9 is a formal witness, who had produced wearing apparels of the deceased after post mortem examination, and so also P.W.10 produced the sample bottle containing nail, blood sample and hair of the accused for their seizure. P.Ws. 11 and 13 are the witnesses to the seizure of the wearing chadi, chappal, steel tiffin carrier and bucket lying near the paddy field. P.W.12 is the witness to the inquest. P.W.22 is the principal investigating officer and P.W.23 took charge of the investigation later till its culmination.

6. The accused took the plea of denial and claimed that he has been falsely arraigned in the case without any rhyme and reason. In his statement made under section 313 Cr.P.C, he has specifically stated that for no reason the case has been falsely foisted against him. Being called upon to enter into the defence, he has examined himself.

7. The trial court on analysis of evidence of the prosecution witnesses have arrived at the conclusion that the prosecution has well proved the case against the accused through clear cogent and acceptable evidence, the circumstances which being joined together as links form a complete chain leaving no scope but to hold that it is the accused who is the perpetrator of the crime of rape and murder of minor girl. Therefore, the accused has been convicted for commission of offence under sections 376 and 302 IPC. He has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.3,000/- in default to suffer R.I. for a further period of five months for the offence under section 376 IPC, while being sentenced to death for the offence under section 302 IPC. That is how the reference made by the learned Ad hoc Additional Sessions Judge (FTC), Jharsuguda under section 366 of the Code of Criminal Procedure, 1973 for confirmation of death sentence and also the appeal preferred by the convict Mineketan Seth challenging the conviction and sentence are before this Court.

8. Learned counsel Mr. B.K. Ragada, appearing on behalf of the accused submits that the evidence let in by the prosecution for establishing

the charges against the accused during trial on their proper analysis can not lead to a conclusion that the prosecution has proved the case beyond reasonable doubt that the accused has committed the offence. According to him, the entire case of the prosecution so far as the authorship of the crime is concerned rests upon the evidence of P.Ws. 7 and 8 before whom it is stated that the accused confessed to have committed the crime. It is his submission that the place, time, manner and circumstances which these two witnesses narrated about the accused to have confessed the commission of crime is highly unbelievable and the same cannot be accepted for a moment. Furthermore, it is submitted that absolutely no evidence or circumstance is emanating there-from as to why the accused on the next date of commission of crime at that place would be plainly making such an open breast confession, when there was absolutely no point of discussion on the subject and also that as to why and how he reposed the confidence on these two witnesses all of a sudden without any such strong relationship. Further submitting that as per the settled principles of law, extra judicial confession is a very weak piece of evidence and that conviction can only be based upon it provided the court examining the evidence to that effect from all angles and on their strict scrutiny believe with certainty that the accused made confession before the witnesses, he contends that the evidence on this score is highly unbelievable and improbable. Therefore, he submits that it is a fit case where the conviction

and sentence are liable to be set at naught and the reference need be accordingly discharged.

Mr. B.P. Pradhan, learned Additional Government Advocate in resisting the submissions of the learned counsel for the accused contends that the evidence placed in the case sufficiently proves and establishes the complicity of the accused in the crime of rape and murder of the minor daughter of P.W.1. It is his contention that the evidence of P.Ws. 7 and 8 can not be doubted in any manner and thus those pass through all the acid tests required to be pressed for the purpose of arriving at the finding that the extra judicial confession have been made by the accused before them. In this connection, he has placed reliance on certain circumstances which will be dealt in course of analysis of evidence of P.Ws. 7 and 8 for their proper appreciation hereafter. It is also his submission that the seizure of lungi and shirt at the instance of the accused was within his special knowledge and by leading the police for such recovery made in presence of the witnesses which lends corroboration to the prosecution case. Thus he contends that in view of unchallenged evidence that the death has been caused due to asphyxia on account of throttling, the learned Sessions Judge has rightly fastened the guilt upon the accused. Lastly he contends that in the facts and circumstances of the case and considering the aggravating and mitigating circumstances the case falls within the category of 'rarest of rare cases'. Thus he urges that the

judgment of conviction and sentence has to get the seal of confirmation and the death reference has to be answered in the affirmative.

9. It is not disputed that the deceased met the homicidal death and also that she was sexually assaulted prior to that. The postmortem examination report, Ext.12 reveals that the doctor conducting autopsy to have found presence of 10 (semi lunar) marks in front and both sides of the neck with one bruise on the front and two on both sides of neck. On dissection extravessation of blood in the subcutaneous tissue under the bruises have been noticed; Mucosa of trachea and larynx have been found as congested and intact with throx wall distended. Both the lungs and heart are found to be congested and intact. Heart has been found to contain little amount of clotted blood in both its chambers. Hymen has been found with tears at 6 and 11 'O' Clock position with the margin containing clotted blood whereas the vaginal mucosa as congested.

From all these features noticed during postmortem examination the doctor is of the opinion that the death was due to asphyxia on account of throttling and the injuries were ante mortem in nature; so there remains that the possibility of sexual assault cannot be excluded.

The postmortem report has been admitted in evidence without objection. Further more, the inquest report reveals about existence of swelling marks in the neck, injuries on the private parts and other portion of the

deceased. Thus this Court finds no difficulty in arriving at a conclusion that the deceased met the homicidal death and was also subjected to forcible sexual assault prior to death. Therefore, the findings of the trial court on this score cannot be found fault with.

10. Now comes the most important question regarding the authorship of the crime in finding out as to whether the prosecution has established its case beyond reasonable doubt against the accused that it is he, who committed sexual assault on the deceased and then has done her to death by throttling.

Admittedly, the case of the prosecution in the instant case is based upon the extra judicial confession and other circumstantial evidence.

Law is well settled that a conviction can be based upon circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. 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. (Ref:- ***Sharad Birdhichand Sarda v. State of Maharashtra***, AIR 1984 SC 1622, ***Krishnan v. State represented by Inspector of Police***, (2008) 15 SCC 430: (AIR 2008 SC (Supp) 2010: 2008 AIR SCW 4065) ; ***Wakkar & Anr. V. State of Uttar Pradesh***, (2011) 3 SCC 306): (AIR 2011 SC (Cri) 518: 2011 AIR SCW 1215): and ***Sk. Yusud v. State of West Bengal***, AIR 2011 SC 2283.

11. The occurrence has taken place during the return journey of the deceased to her house from the paddy field, where her father was working. The dead body has been recovered from the paddy field and so also the chappal, steel tiffin, bucket and the chadi of the deceased. Admittedly, there is no eye witness to the occurrence. The prosecution relies on the evidence of P.Ws. 7 and 8 who are the star witnesses and before whom it is said that the accused confessed to have sexually assaulted the deceased and done her to death by throttling.

12. Let us first scan the evidence of these two witnesses who are witnesses to the extra judicial confession to ascertain as to how far they are reliable and their evidence is acceptable. But before embarking upon that exercise, it is necessary to take note of the position of law with regard to acceptance of extra judicial confession at a circumstance.

The Court while dealing with a circumstance of extra-judicial confession must keep in mind that it is a very weak type of evidence and require appreciation with great caution.

Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The "extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility". (See: State of Rajasthan v. Raja Ram, (2003) 8 SCC 180: (AIR 2003 SC 3601: 2003 AIR SCW 4097); and Kulvinder Singh & Anr. V. State of Haryana, (2011) 5 SCC 258) ☹AIR 2011 SC 1777: 2011 AIR SCW 2394).

In case of ***Ranjit Singh v. State of Punjab***, (2011) 49 OCR (SC) 684, it has been further held that an extra judicial confession is an extremely weak kind of evidence and conviction on its basis alone is rarely recorded, when there is absolutely no other evidence in the case.

In case of ***Jaspal Singh @ Pali v. State of Punjab***, (1997) 12 OCR (SC) 472, the extra judicial confession has not been accepted in absence of reason being given as to how and why the accused reposed such confidence in the witnesses and went to confess his guilty. In that view of the matter, the Hon'ble Apex Court has found it unsafe to rely on such extra judicial confession in facing guilty with the appellant.

This Court in case of ***Beti Suka v. State***, (1997) 13 OCR 120, held that an extra-judicial confession, if voluntary and true, and made in a fit state of mind can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. 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. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passed the test of credibility.

Thus keeping the above in mind and in the touchstone of above, we proceed to analyze the evidence. P.W.7 states that on 10.09.2009 he along with P.W.8 had been to Raigarh to see his ailing mother-in-law and they reached there at about 9.30 A.M., where after the bus reached there which came from their village. It is further stated that they saw the accused alighting from the bus wearing lungi and seeing them the accused tried to conceal his presence, so P.Ws. 7 and 8 came near to him and asked him as to why he had come in such condition by wearing a lungi. It is further stated by him that the accused started shivering and told that he had done some wrongful act in the village. It is next stated by him that they made query and the accused then confessed to have raped and murdered the girl and thereafter having come to know that the police was coming to the village with dog squad, he had to leave the village. It is also stated that the accused had also requested them not to disclose the above fact to anybody to save him.

The evidence of P.W.8 is also running in the same vein. But he has not stated that the accused told before them to have left the village hearing that the police would be coming with dog squad and it is his evidence that he told them that he had left apprehending police arrest. It is also not stated by this P.W.8 that the accused was asked by them as to why he had come in such condition by wearing a lungi. Thus when P.W.7 gives out that because they found accused wearing a lungi and coming in the bus giving rise to a suspicion or creating an anxiety in their mind to run near him to ask about this as to

why such unnatural way of traveling is undertaken by him, P.W.8 is not supporting that version of giving the reason for them to be curious. On the other hand, it is his evidence that they asked as to where he was going. Next these witnesses have stated that they stayed at Raigarh in the night and on the next morning they returned to their village where on the way finding P.W.6 coming to his shop, they disclosed about such confession to have been made by the accused before them at Raigarh on the previous day. Interestingly P.Ws.7 and 8 had not stated before the I.O. any thing that in the morning seeing P.W.6, they narrated the factum of making of confession by the accused before them. P.W.8 also admits the same. Both the witnesses being examined under Section 164 Cr.P.C. on 22.10.2009 had not stated that they had disclosed the factum of making of the confession by the accused to P.Ws. 2 to 6 on their arrival at the village. So this part of their evidence is not acceptable as there arises the material omission amounting to material contradiction. Under such circumstance, the evidence of P.Ws. 2 to 6 that P.W.7 and 8 had disclosed about the extra judicial confession by accused before them is rendered suspect. During the trial both of them stated that they informed the matter to the police. So the fact remains that these two witnesses having heard from the accused about committing the crime of such rape and murder of the girl by him did not disclose the same to anybody at Raigarh even to the police there or any other authority till they informed local police on return that too after a long time and their informing P.W.6 is also highly unbelievable which

they are stating for the first time during trial. For the entire day till next morning they maintained complete silence as it to have taken a vow to that effect and even after hearing about such a serious crime being committed. This appears to be quite an unnatural conduct on their part more particularly when it goes without any explanation whatsoever and thus cannot be lightly brushed aside. This Court for abundant caution and/or for better appreciation perused the case diary which reveals that these P.Ws. 7 and 8 have been examined by the I.O. on 11.10.2009 at 4.00 P.M. Thus it is apparent that after arrival of these two witnesses in the village in the morning, they remained in the village when there is no evidence of P.Ws. 2 to 6 informing police also about it. They finally informed the matter to the police and for all the period they observed total silence. Similarly, if P.Ws. 2 to 6 heard about it from them even accepted for a moment, their conduct also raises eyebrows as to how they also remained mum without telling to police or even how P.Ws. 1 and 2 who are parents of deceased girl and P.W.4, the uncle could remain without slightest reaction. For such a long period these two witnesses P.Ws. 7 and 8 did their normal and routine work in the village having returned from Raigarh even they did not first inform the parents of the deceased against the normal tendency of a human being in such an event would be at least to inform to the parents of the deceased. When these two witnesses are not saying that they were in the second mind whether to disclose or save the accused and for that reason, the delay took place, such evidence of extra judicial confession of accused before

them when cumulatively viewed with above noted circumstances raises grave suspicion in the mind and thus becoming extremely hazardous to accept it on their version. Looking at the status of the accused and the fact that he was earning his livelihood as a daily labourer, his wearing a lungi and moving in the bus can not be said to be a suspicious circumstance of any such significance, so as to give rise to a suspicion in the mind of these two witnesses compelling them to go near and ask him. In view of aforesaid, the evidence on the score do not inspire confidence in the mind of this Court so as to accept same as trustworthy and reliable. Also it is very hard to believe that the accused having left the village out of fear on his way would make confessional statement before these two persons all on a sudden to their query in a plain, simple and casual manner. In such state of affairs in the evidence, we find that the trial court without proper analysis of evidence of these two witnesses along with all the aforesaid attending circumstances did commit an error of both fact land law by relying upon it in coming to a finding that the accused had made the extra judicial confession before these two witnesses. The evidence of these two witnesses also totally differ from the evidence of P.W.6 before whom they claim to have first disclosed. When these two witnesses stated that on seeing P.W.6 they disclosed about such extra judicial confession of the accused, P.W.6 says that first he asked as to wherefrom they were coming, and only then they replied to have gone to and coming from Raigarh. Thus it is held that the prosecution has not been able to establish beyond

reasonable doubt that it is the accused who on 10.10.2010 morning hours had confessed before P.Ws. 7 and 8 that he had committed the crime of sexual assault and murder of the deceased daughter of P.W.1.

14. Next we turn to examine as to whether the other circumstances appearing in the case have been clearly established and if so those being joined together whether form a complete the chain as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and that in all probability the crime had been committed by the accused and none else. It is seen that the trial court has believed the evidence of P.W.4 (the person who was first suspected to be the perpetrator of the crime) that he had seen deceased on her way back and 10/15 minutes thereafter he had seen the accused coming from the side of a pond called 'Bandhatalia Munda' and he had seen none others till his reaching the village. From this the trial court has jumped into the conclusion after believing the evidence of P.W.4 that possibility of commission of crime by some other person can not be ruled out.

We are unable to accept this reason as to how from the evidence of P.W.4 only it cannot be concluded that except the accused none else can be the author of the crime relying out all the possibility of commission of crime by others. The conclusion is fallacious and appears to be a figment of imagination. We also bestowing our anxious consideration and thought are not

able to so conclude even accepting the evidence of P.W.4 in its entirety and thus find no alternative but to disagree with it.

15. Another circumstance comes from the evidence of P.W.15 that on that day in between 1.00 P.M. to 2.00. P.M. he found the accused coming to the pond when he himself was nearby and then saw accused hurriedly leaving the place. The trial court has taken such evidence as a circumstance along with the evidence of P.W.4 that P.W.15 had seen him wearing that lungi and shirt which P.W.4 had seen. We do not find this at all to be a circumstance against the accused. At that time, it was not unusual hour for taking bath in the pond in a rural area. Rather it remains as the habit with the persons in the rural area particularly so far as such class of person like of the accused is concerned in leaving the pond even in a hurried manner and judicial notice of the same can easily be taken. Therefore this is not a circumstance to be taken note of pointing the authorship of the crime to the accused.

16. The other circumstances is that of absconding. It is the settled position of law that absconding at times is a circumstance which comes to the aid of the prosecution to provide further support to the other circumstances in forming the chain.

The prosecution first of all is called upon to prove the factum of abscondance by leading clear, cogent and acceptable evidence. It is true that P.W.22 has stated to have apprehended the accused at Kalakhunta in the

State of Chhatisgarh, but he has not gone to state as to when he was apprehended and there is no other evidence that the accused was not found in the village soon after commission of the crime till said date of arrest. No evidence is there regarding time of arrival and arrest and even as regards the distance of village Kalakhunta. The prosecution has led the evidence that on 13.10.2009 at 9.00 A.M., police came with the accused, his father, elder brothers and others to the village club and there it was stated by P.W.5 that the accused went to make confession again. It is not only highly unbelievable but also legally inadmissible. Whereas P.W.14 has stated that the police brought the accused when the villagers had assembled and on being asked he made confession that he had committed the crime. Therefore this Court is not in a position to take it as a circumstance against the accused.

17. The last circumstance regarding seizure of the wearing apparels of the accused at his instance while in police custody even if taken to have been proved, the prosecution having not established the nexus between those wearing apparels of the accused with that of commission of crime, the said circumstance any pales into insignificance.

In view of the above analysis of the evidence, we hold that the prosecution has not been able to establish the charges beyond reasonable doubt against the accused by leading clear, cogent and acceptable evidence. Therefore, the accused is found entitled to be acquitted.

18. In the wake of aforesaid the judgment of conviction and sentence recorded by the learned Ad hoc Additional Sessions Judge (FTC), Jharsuguda in S.T. Case No. 38/44 of 2010 is hereby set aside. Resultantly, the CRLA stands allowed and the death reference under section 366 Cr.P.C is accordingly discharged. The accused be set at liberty forthwith if his detention is not required by the authority in any other case.

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D.DASH, J.

PRADIP MOHANTY, J. I agree.

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PRADIP MOHANTY, J.

High Court of Orissa, Cuttack
Dated 20th day of December, 2013/Routray