IN THE HIGH COURT OF ORISSA: CUTTACK

JCRLA No. 30 of 2005

From the judgment and order dated 22.01.2005 passed by Adhoc Additional Sessions Judge (F.T.), Padampur in S.T. Case No.186/15 of 1998/S.T. Case No.32 of 2004.

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Bhaskar Bariha …… Appellant

-Versus-

State of Odisha …… Respondent

For appellant: - Mr. Nayan Behari Das
Mr. B.R. Mohanty

For Respondent: - Mr. Dilip Kumar Mishra
Addl. Govt. Advocate

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P R E S E N T:

THE HONOURABLE SHRI JUSTICE S.K. SAHOO

AND

THE HONOURABLE SHRI JUSTICE B.P. ROUTRAY

Date of Hearing and Judgment: 29.02.2020

By the Bench: Assailing the judgment of conviction and order of sentence dated 22.01.2005 passed by the learned Adhoc Additional Sessions Judge (F.T.), Padampur in S.T. Case No.186/15 of 1998/S.T. Case No.32 of 2004, the appellant has

preferred the present appeal from jail. The appellant has been found guilty for the commission of offence under section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life.

2. The prosecution case sans unnecessary details, is that the informant Sadananda Bariha (P.W.3) is the cousin brother of the appellant. The deceased Sakuntala Bariha was the wife of the informant. The appellant and the informant along with other brothers were staying in their houses fell to their respective shares. The appellant had left his wife in her father's place at village Balipata on account of some dispute between them relating to having no issue. Two days prior to the date of occurrence, there was some quarrel between the appellant and the deceased and the deceased made aspersion against the appellant for not bringing his wife back from her father's place. It is the further prosecution case that in the morning hours on 29.05.1998, while the deceased was cleaning potherb leaves (in Odia 'Saga') in her courtyard for cooking, the appellant all of a sudden came there holding an axe and dealt a blow on the neck of the deceased with that axe from her backside. The axe pierced and stuck in the neck of the deceased and the appellant ran away from the spot. P.W.1 Radhika Bariha, the wife of younger brother of the informant saw the assault on the deceased by the

appellant and raised hulla for which her husband and others rushed to the spot and they immediately shifted the deceased to the hospital where she was declared dead.

On the basis of the first information report lodged by P.W.3 before the officer in charge of Sohela police station, Sohela P.S. Case No.39 dated 29.05.1998 was registered under section 302 of the Indian Penal Code and after completion of investigation, charge sheet was submitted against the appellant. The appellant was charged by the learned trial Court under section 302 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried.

3. During course of trial, the prosecution examined eleven witnesses.

P.W.1 Radhika Bariha is the wife of the younger brother of the husband of the deceased and she is an eye witness to the occurrence.

P.W.2 Kr. Sashi Dei Bariha is the daughter of the younger brother of the husband of the deceased and she is a post occurrence witness who came to the spot hearing hulla of P.W.1 and noticed the deceased lying on the ground with bleeding injuries and she further stated to have seen the appellant coming with an axe to the door of P.W.1. She stated

that P.W.1 disclosed before her about the appellant dealing axe blow to the deceased.

P.W.3 Sadananda Bariha is the informant and the husband of the deceased. He is a post occurrence witness before whom P.W.1 disclosed about the assault made by the appellant on the deceased. He also removed the deceased to the Sohela hospital where she was declared dead. He is also a witness to the inquest report.

P.W.4 Satyananda Bariha is also a post occurrence witness who came to the spot hearing hulla of P.W.1 and found the deceased was having pain and unable to speak. On his query, the deceased disclosed that the appellant dealt axe blow on her. He is also a witness to the inquest report vide Ext.2 and also a witness to the seizure of blood stained earth, sample earth, axe and cot as per seizure list Ext.3 and also seizure of lungi of the appellant as per seizure list Ext.4.

P.W.5 Jagat Bariha is the elder brother of the appellant and he stated to have heard hulla of his wife (P.W.1) and rushed to the spot to see the deceased lying on the ground with the axe pierced to her neck and there was profuse bleeding from her neck. He further stated to have gone to the house of the father-in-law of the appellant and found the appellant present there who was arrested by police later on.

P.W.6 Bhagabatia Naik stated to have come to the spot hearing hulla of P.W.1 where he found the deceased lying on the ground sustaining injury on her neck. He further stated to have located the appellant in the house of his father-in-law and on his query, the appellant made extra judicial confession before him to have dealt blow to the deceased. He further stated about the arrest of the appellant from the house of his father-in-law.

P.W.7 Makardwaj Bhoi also stated to have come to the spot hearing hulla of P.W.1 and noticed injury on the neck of the deceased with profuse bleeding. He stated about the arrest of the appellant from Balikata.

P.W.8 Dr. Ghanashyam Nath was the Assistant Surgeon attached to District Headquarters Hospital, Bargarh who conducted post mortem examination over the dead body of the deceased on 29.05.1998 and noticed injury on her neck and he proved the post mortem report vide Ext.5.

P.W.9 Ramesh Bhoi also stated to have come near the house of the deceased hearing hulla of P.W.1 and noticed her lying on the ground in a pool of blood. P.W.1 disclosed before him about the assault made on the deceased by the appellant. He stated to have removed the deceased to the hospital where she was declared dead by the doctor. He is also a witness to the

seizure of axe, blood stained earth and sample earth etc. under seizure list Ext.3.

The prosecution exhibited five documents. Ext.1 is the first information report, Ext.2 is the inquest report, Exts.3 and 4 are the seizure lists and Ext.5 is the post mortem report.

4. The defence plea of the appellant was one of denial.

5. The learned trial Court in the impugned judgment has been pleased to observe that the investigating officer Sitakanta Das had not been examined and from the case record, it revealed that the case was lingering since 27.03.2001 for examination of the investigating officer and despite repeated summons, W.T. message and letter to D.I.G.(S), Cuttack and D.P.P., Bhubaneswar vide order dated 09.06.2003, the investigating officer did not appear in the Court to adduce evidence. Bailable warrant of arrest was issued against the investigating officer and S.P., Angul was also directed to execute the warrant for the attendance of the investigating officer and despite all such effort, the investigating officer did not appear in the Court for his examination and therefore, the learned trial Court taking into account the fact that the appellant was in judicial custody since 1998 and the case was lingering since 27.03.2001 for the examination of the investigating officer, dispensed with the examination of the investigating officer and

closed the prosecution case on 20.12.2004 and then proceeded to record the accused statement and ultimately after hearing the argument, pronounced the impugned judgment on 22.01.2005. We will deal with this aspect at a later stage.

The learned trial Court discussed the evidence of each witness in extenso and disbelieved the plea taken by the appellant that the death of the deceased was on account of her falling accidentally on a vegetable cutter seized from the spot. The learned trial Court accepted the evidence of P.W.1 to be trustworthy, believable and fully reliable. Taking into account the other corroborative evidence, it was observed that the deceased met with a homicidal death on account of injury inflicted by the appellant which was sufficient in ordinary course of nature to cause death. The learned trial Court further held that the appellant has not been prejudiced for non-examination of the investigating officer and therefore, on such ground the entire prosecution evidence cannot be thrown out.

6. Mr. Nayan Behari Das, learned counsel appearing for the appellant contended that P.W.1 is the solitary eye witness to the occurrence and her version is not trustworthy and she is a highly interested witness. He further contended that on account of non-examination of the investigating officer, the appellant has

been seriously prejudiced and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Dilip Kumar Mishra, learned Additional Government Advocate on the other hand supported the impugned judgment and contended that the evidence of P.W.1 gets corroboration from the evidence of other witnesses who arrived at the spot immediately on hearing hulla of P.W.1 as well as from the medical evidence. He contended that merely because P.W.1 is related to the deceased, the same cannot be a ground to discard her evidence. It is further contended that all possible step have been taken by the learned trial Court to procure the attendance of the investigating officer and since all the attempts failed, the Court decided to dispense with the examination of the investigating officer and closed the prosecution case. It is further contended that when there are no material contradictions in the evidence of the witnesses to be proved through the investigating officer and the learned counsel for the appellant has failed to specifically show in what way, the appellant has been prejudiced on account of non-examination of the investigating officer, the contentions made in that respect should not be accepted and this Court has to adjudicate whether on the basis of available materials on record, the impugned order of conviction is sustainable or not. While concluding his argument, the learned

counsel for the State contended that where there is eye witness to the occurrence and her version is clear and trustworthy, non-examination of the investigating officer is immaterial to the prosecution case and as such, the impugned judgment and order of conviction passed by the learned trial Court is quite justified.

7. Let us first discuss how far the prosecution has successfully proved that the deceased met with a homicidal death.

P.W.8 conducted post mortem examination over the dead body of the deceased and he noticed one incised wound horizontally placed on the neck on its posterior aspect and the size of the injury was 5 c.m. x 2 c.m. x thoracic cavity. The wound had cut seventh vertebrae and spinal cord and it was ante mortem in nature. The doctor opined the cause of death was on account of coma due to injury to the spinal cord. He opined that the injury was possible by blow on the sharp side of axe and he proved his report Ext.5. In the cross-examination, the doctor has stated that he had not examined the weapon of offence. Thus, nothing has been elicited in the cross-examination to disbelieve the evidence of the doctor. The learned counsel for the appellant has also not pointed out any infirmity in the evidence of the doctor. The learned trial Court after analysing the evidence of the doctor came to hold that the death of the deceased was

homicidal in nature. We are of the view that the learned trial Court has rightly come to the conclusion that the deceased met with a homicidal death.

8. It is not in dispute that the star witness on behalf of the prosecution is none else than P.W.1 who is related to the deceased being the wife of the younger brother of the husband of the deceased.

Related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straightaway. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefits for the result of litigation. Close relatives of the deceased are most reluctant to spare the real assailants and falsely mention the names of other persons. The close relationship of the witnesses to the deceased is no ground for not acting upon their testimony. If the evidence is otherwise found to be reliable after close scrutiny, it can be acted upon.

Law is well settled that an order of conviction can also be sustained on the basis of the evidence of a solitary witness if his evidence is found to be truthful, reliable, cogent, trustworthy and above board.

P.W.1 Radhika Bariha has stated that while the deceased was preparing green leaves (saga) for the purpose of cooking, the appellant arrived there being armed with an axe and dealt a blow with the axe to the deceased that cut her neck. P.W.1 further stated that she was close to the spot at a distance of two cubits away from the deceased and she shouted. The axe pierced inside the neck of the deceased and was sticking there. Her husband (P.W.5) who was present in the house came hearing her shout and removed the axe from the neck of the deceased and then others came to the spot and the deceased was removed to the hospital in an injured condition where she died. In the cross-examination, P.W.1 has stated that she was near her husband when the deceased was preparing green leaves for cooking. She further stated that nobody else was present at the spot and the deceased was sitting on the cot and preparing the green leaves and there was no 'paniki' (vegetable cutter) with the deceased. She further stated that she had not seen the injury on the deceased out of fear and cannot say the number of injury. Though she stated about the presence of P.W.2 at the spot but it has been confronted to her that she had not stated so before the investigating officer. It has also been confronted to her that she had not stated before the investigating officer that the deceased fell down on the ground

and also not stated to have seen the appellant dealing an axe blow on the neck of the deceased. On account of non-examination of the investigating officer, in order to verify whether there are in fact material contradictions between the statement made by P.W.1 in Court vis-à-vis her previous statement made before the investigating officer as specifically put to her by the learned defence counsel in the cross-examination, in the interest of justice and in order to arrive at a just conclusion, we verified the statement of P.W.1 recorded by the investigating officer under section 161 of Cr.P.C. and found that she had not stated about the presence of P.W.2 at the spot, however the other contradictions are not correct as P.W.1 has stated specifically in that respect in her previous statement before police. It is very strange and a sorry state of affairs that when the defence counsel is putting some questions to contradict the witness with reference to her previous statement before police, neither the Public Prosecutor nor the Court was apt in verifying the previous statement immediately to find out whether there were in fact any such contradictions or not. Trial Court is not expected to be a silent spectator or mute observer. Though he has to play a proper neutral role but he should actively participate in the trial within the boundaries of law in order to elicit the truth inasmuch as he has to deliver the judgment and

the entire records should indicate that he has left no stone unturned for the proper dispensation of justice.

A Public Prosecutor has a wider set of duties than to merely ensure that the accused is punished. The duties of ensuring fair play in the proceedings, to see all relevant facts are brought before the Court to have an effective determination of truth and justice for all the parties including the victims are with the Public Prosecutor. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused. The Court must ensure that the Prosecutor is doing his duties with utmost level of efficiency and fair play. In a criminal trial, the investigating officer, the Prosecutor and the Court play a very important role. The Court's prime duty is to find out the truth. The investigating officer, the Prosecutor and the Court must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the investigating officer stumbles, the Prosecutor must rise to the occasion, pull him up and take necessary step to rectify the lacunae. The criminal Court must be alert, it must oversee the actions of the Public Prosecutor and investigating agency and in case, it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution.

9. The other witnesses have stated to have heard about the occurrence from P.W.1 but the evidence of P.W.1 is completely silent in that respect. In absence of any evidence from P.W.1 that she disclosed about the occurrence to others, the statements made by the other witnesses to have heard from P.W.1 becomes 'hearsay evidence' which is not admissible. Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to hearsay rule. The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter.

10. P.W.4 Satyananda Bariha stated that at the spot on their query, the deceased disclosed that the appellant dealt her axe blow but the evidence of other witnesses who were present at the spot till the deceased was removed to the hospital is silent in that respect. On the other hand P.W.2 has stated that the deceased was not able to speak due to pain and P.W.3 has stated that water was administered to the injured and she was not in a condition to speak. It has been confronted to P.W.4 by

the defence in the cross-examination with reference to his previous statement before police that he had not stated before the I.O. that on his query, the deceased disclosed before him that the appellant had dealt axe blow to her. On verification of the statement of P.W.4 recorded under section 161 of Cr.P.C., we find that he has not made any such statement relating to the dying declaration made by the deceased at the spot. Thus the evidence relating to dying declaration as deposed to by P.W.4 for the first time in Court is not acceptable.

11. P.W.6 Bhagabatia Naik stated to have located the appellant in the house of his father-in-law where on his query, the appellant made extra judicial confession before him to have dealt blow to the deceased but strangely the other witnesses who accompanied P.W.6 there are silent on this aspect. Moreover it has been confronted to P.W.6 by the defence in the cross-examination with reference to his previous statement before police that he had not stated before the I.O. that on his query, the appellant confessed his guilt stating that he had dealt a blow to the deceased. On verification of the statement of P.W.6 recorded under section 161 of Cr.P.C., we find that he has not made any such statement relating to the extra judicial confession made by the appellant. Thus the evidence relating to extra

judicial confession as deposed to by P.W.6 which is made for the first time in Court is not acceptable.

12. On the scanning of the evidence of the witnesses, we find that there are vital contradictions which could not be proved on account of non-examination of the investigating officer.

The Hon'ble Supreme Court in the case of **Lahu Kamlakar Patil -Vrs.- State of Maharashtra reported in (2013) 6 Supreme Court Cases 417** has held as follows:

> "18. Keeping in view the aforesaid position of law, the testimony of P.W.1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In **Behari Prasad -Vrs.- State of Bihar : (1996) 2 Supreme Court Cases 317**, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In **Bahadur Naik -Vrs.- State of Bihar : (2000) 9 Supreme Court Cases 153**, it has been opined that when no material

contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the Court did not find place in the statement recorded under section 161 of the Code. Thus, this Court in **Arvind Singh -Vrs.- State of Bihar : (2001)6 Supreme Court Cases 407**, **Rattanlal -Vrs.- State of Jammu and Kashmir : (2007) 13 Supreme Court Cases 18** and **Ravishwar Manjhi and others -Vrs.- State of Jharkhand : (2008)16 Supreme Court Cases 561**, has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution."

The examination of investigating officer in a criminal trial is not just a formality but very relevant and it is not just to prove the omissions and contradictions in the statements of witnesses examined by that officer but many important aspect of the prosecution case could be unearthed by examining such a witness. The investigating officer is the principal architect and executor of the entire investigation. He is a crucial witness for the defence to question the honesty and calibre of the entire process of investigation. It will not only be beneficial to the prosecution but also to the defence and moreover it is very much necessary for the Court to arrive at a just decision of the case. However, non-examination of the investigating officer in every criminal case ipso facto does not discredit the prosecution version. Where there are material contradictions in the statements of the witnesses made in Court vis-a-vis before the investigating officer and on some vital aspect the investigating officer's examination would throw light on the acceptability or otherwise of the prosecution version, a very valuable right accrues in favour of the accused to show that, the witnesses have made improvements or have given evidence that contradicts their earlier statements so that he would be able to satisfy the Court that the witnesses are not reliable. The non-

examination of the investigating officer thus deprives the accused of the opportunity to bring before the Court the question of credibility of witnesses, by proving contradictions in the earlier statements and also on many other aspects.

In the case in hand, apart from proving the contradictions, the evidence of the investigating officer would have thrown light as to why the weapon of offence which was seized as per seizure list (Ext.3) was not produced before the medical officer who conducted post mortem examination to find out whether the injury sustained by the deceased on the neck was possible by such weapon or not and whether such weapon was sent for chemical examination and if so, what was the report. When it is the prosecution case that the appellant was in his in-laws' house at Balipata from where he was arrested, the investigating officer would have also thrown light on that aspect. The star witness (P.W.1) on behalf of the prosecution was examined on 29.05.1998 and the appellant was forwarded to Court on 30.05.1998 but the statement of P.W.1 was not forwarded to Court along with the forwarding report as appears from the case records and the investigating officer would have been questioned on this aspect. P.W.1 has stated that the deceased was preparing green leaves (saga) for the purpose of

cooking and at that time she was sitting on a cot. In that position, if there was any assault on her neck from her back side, it was all the same necessary on the part of the investigating officer by producing the weapon of offence before the medical officer to seek for his opinion. The medical evidence adduced by P.W.8 is completely silent in that respect. In other words, there is no evidence what was the size of the blade of the axe in question with which the assault was made on the deceased and whether the nature and size of injury as noticed by the doctor was possible by such weapon or not. All these ambiguities would have been solved had the investigating officer come to the witness box to explain.

On verification of the order sheet of the learned trial Court, it appears that in spite of repeated summons and despite issuance of bailable warrant of arrest, the investigating officer did not turn up for more than three years and the unreasonable delay in disposal of the trial occurred on account of that reason. The trial Court sent W.T. message and letter to D.I.G.(S), Cuttack and D.P.P., Bhubaneswar but nobody responded even though it was a case where the accused was facing trial under section 302 of the Indian Penal Code.

In many cases, after the examination of other witnesses, the trial use to linger for non-attendance of the

investigating officers. The trial Courts face difficulties in procuring their attendance either on account of their transfer or due to their retirement from service. Sometimes at a belated stage, message reaches the Court regarding the death of the investigating officer. It is the duty of the prosecution to produce their witnesses particularly the official witnesses in time to see that no delay on that score occurs in the trial of the cases. Processes issued by the Court cannot be permitted to be taken lazily or casually. If an investigating officer on receipt of summons from the trial Court fails to attend the Court without making proper application through the Public Prosecutor seeking adjournment on genuine grounds, the trial Court may, if it thinks fit, can recommend the appropriate authority of the concerned officer to take departmental action against him. When for non-examination of vital witnesses which is attributable to the negligence of the prosecution, an accused is acquitted of a serious charge, the sufferer is not only be the victim or the family members of the deceased but also the society at large who must be awaiting to see the verdict of the case adjudicated in a proper manner in accordance with law. Large numbers of acquittals in criminal cases are on account of laches on the part of the prosecution either due to improper investigation, lack of experience of the Public Prosecutors to conduct the cases

involving serious offences properly and also for non-cooperation of the prosecuting agencies in an active manner to the Court to decide the case expeditiously and effectively. It is the paramount duty of the prosecuting agency to see that the people do not lose their faith on the criminal justice delivery system. It is high time that a website containing the names of the police officers, medical officers, their posting details, phone numbers, the e-mail addresses of such officers as well as of their higher authorities should be created and made available to the District Courts as well as the Public Prosecutors to cut short the delay of service of summons.

In view of the discussions above and after perusing the order sheet of the learned trial Court, we are of the view that the learned trial Court was quite justified in closing the prosecution evidence on account of non-appearance of the investigating officer for more than three years in spite of issuance of processes in various ways and after grant of forty seven adjournments particularly when the appellant was languishing inside custody. We are also of the view that the entire blame goes to the prosecution and the appellant who was in judicial custody was no way responsible for that. We hope that if the erring investigating officer is still in service,

appropriate departmental action shall be taken against him for non-cooperating with the trial Court in a case of murder.

In view of the forgoing discussions, we are of the view that the evidence of the investigating officer was essential in the case and when material contradictions in the evidence of the witnesses could not be proved on account of non-examination of the investigating officer and the appellant has been seriously prejudiced for such non-examination in bringing many more relevant facts and also for non-production of the weapon of offence either before the doctor or in Court, non-production of the chemical examination report in Court, in our humble view, it is a fit case where the appellant is entitled to the benefit of doubt.

13. In the result, the jail criminal appeal is allowed. The impugned judgment and order of conviction passed by the learned trial Court is hereby set aside. The appellant be set at liberty forthwith, if he is not required to be detained in connection with any other case.

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S.K. Sahoo, J.

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B.P. Routray, J.

Orissa High Court, Cuttack
Dated 29th February 2020/MP