

HIGH COURT OF ORISSA ; CUTTACK

JCRLA NO.37 OF 2004

From an order dated 13.2.2004 passed by the learned Additional Sessions Judge, Jharsuguda in S.T. Case No.228/23 of 2000.

Rajesh Thappa

...

Appellant

Versus

State of Orissa

...

Respondent

For Appellant : Miss Maheswata Sahu

For Respondent : Smt. Saswat Patnaik,
Addl. Government Advocate.

P R E S E N T :

**THE HONOURABLE MR. JUSTICE S.K.MISHRA
AND
THE HONOURABLE MR. JUSTICE B.P.ROUTRAY**

Date of Judgment: 23.12.2020

S.K.Mishra,J. The appellant, in this appeal, assails the judgment of conviction and order of sentence dated 13.2.2004 passed by the learned Additional Sessions Judge, Jharsuguda in S.T. Case No.228/23 of 2000 convicting the appellant under Section 302 of the Indian Penal Code 1860 (hereinafter referred to as "I.P.C." for brevity) and sentenced him to undergo imprisonment for life for having committed murder of one Rajib Singh in the night of 26.3.2000.

2. Shorn of unnecessary details, the prosecution case is that, Rajib Singh was running a Hotel situated at Bijunagar of Jharsuguda. The accused-appellant was an employee of the said Hotel. In the night of 26.3.2000 Rajib Singh went to sleep in the upstairs of his Hotel after his day to day work. The accused-appellant also went to sleep in the upstairs. The other employees of the Hotel slept in the ground floor of the Hotel. In the morning of 27.3.2000 Rajib Singh was found injured in the upstairs with severe bleeding injuries on his head and face. One 'Katari' used for cutting meat stained with blood was found near Rajib Singh. The gold chain which he used to wear was not in his neck. The employees of the Hotel removed Rajib Singh to Headquarters Hospital, Jharsuguda for treatment. At that time the accused-appellant was not found in the Hotel. As the condition of Rajib Singh was serious, the Doctor of Jharsuguda Hospital advised to shift him to Burla Medical College and Hospital. Accordingly, Rajib Singh was shifted to Burla Medical College and Hospital. Subsequently on the advice of the doctor of Burla Medical, Rajib Singh was again shifted to Kalinga Hospital, Bhubaneswar. During treatment in the said Hospital, Rajib Singh expired on 18.4.2000. The Medical Officer of Kalinga Hospital reported the death of Rajib Singh at Chandrasekharpur Police Station, Bhubaneswar. The Police held inquest over the dead body of Rajib Singh, registered an U.D. Case and sent the dead body for post mortem examination. An intimation was sent to Jharsuguda Police Station by Chandrasekharpur Police about the death of Rajib Singh. Earlier Shyamababu Sahu, the uncle of Rajib Singh, (P.W.3) had lodged a

report about the occurrence at B.T.H. Police Out Post of Jharsuguda Police Station. On such report the case was registered. After receipt of the report about the death of Rajib Singh the case was turned in a case of murder and Police of B.T.H. Out Post investigated into the case.

3. In course of investigation, one blood stained bed sheet and the weapon of offence were seized from the spot. The accused-appellant was arrested and while in Police Custody he disclosed to have assaulted Rajib Singh by the 'Katari' in order to take away his gold chain. The accused further disclosed that he concealed the gold chain along with the blood stained clothes inside a room in the back side of the Hotel. At the instance of the accused and in presence of the witnesses, police seized the gold chain of the deceased, blood stained pant and shirt of the accused. The seized Katari, blood stained bed sheet, shirt and pant were sent for chemical examination. The records of U.D. case were received from Chandrasekharpur Police Station by the Investigating Officer of B.T.H. O.P. and after completion of investigation of the case, charge sheet was submitted by the I.O. (P.W.7) against the accused under Sections 302/394 of the I.P.C.

4. The defence plea is one of complete denial. No witness has been examined in support of the defence plea. The accused was not in a position to engage of an Advocate of his own, a State Defence Counsel was appointed to defend him.

5. In order to prove its case, the prosecution has examined 7 witnesses. P.W.1-Dr. R.K. Choudhury is the then Medical Officer of District Headquarters Hospital,

Jharsuguda. P.W.2-Dr. S.K.Mishra, the F.M.T. Specialist, Capital Hospital, Bhubaneswar. P.W.3-Shyamababu Sahu is the informant. P.W.4-Dr. Anupam Brahma the Sr. Medical Officer of Kalinga Hospital, Bhubaneswar. P.W.5- Sudam Charan Biswal the then I.I.C., Chandraskharpur Police Station. P.W.6-Rabi Seth an employee of the Hotel and P.W.7-Ekadasia Dehury, the then S.I. of Police, B.T.H. Out Post, who investigated into the case and submitted charge sheet.

6. While arguing the case the learned defence counsel appearing for the appellant does not dispute the findings recorded by the learned Addl. Sessions Judge that the death of Rajib Singh was due to assault on his person and the deceased has met with homicidal death. Since this aspect is not disputed by the learned counsel for the appellant, it is not necessary to go into a detailed discussion of the same. Moreover, it reveals that the Doctor (P.W.2) namely Dr. S.K.Mishra has conducted post mortem examination and their opinions are very much clear on this aspect.

7. There is no direct evidence in this case. The Learned Addl. Sessions Judge after taking into consideration the cases of **Anthony D' Souma and others Vrs. State of Karnataka, C.L.T. (2003) Supp. CrI. 504 S.C.**, has categorized 11 circumstances. In addition to that the first circumstance is homicidal nature of Rajib Singh. A conspectus of the judgment rendered by the learned Addl. Sessions Judge, the evidence led and other materials available on record reveal the circumstances that are appearing in this case. They are:-

- (1) The death of Rajib Singh was objectively determined to be due to severe assault by means of 'Katari' and death is held to be homicidal in nature.
- (2) The deceased Rajib Singh was running a Hotel under the name and style "Raj Hotel".
- (3) In the said Hotel the accused was an employee.
- (4) On the following morning of the of the occurrence night the accused was not seen though all other employees of the Hotel were present.
- (5) According to the evidence of P.W.6, another employee of the Hotel, in the night of 26.3.2000, the deceased and the accused both slept in the upper floor of the Hotel. In the ground floor he along with Ranjan and Ujal slept. In the morning of 27.3.2000 at about 7 to 7.30 A.M. Rajib Singh was found in a pool of blood having bleeding injuries on his person and the accused not found in the Hotel.
- (6) The gold chain, which Rajib Singh had worn, was not in the neck.
- (7) Absence of the accused in the Hotel following the night of the occurrence is a piece of incriminating circumstance against him.
- (8) While the accused was examined, he was put a question about his absence in the Hotel on 27.3.2000, but he stated that he does not know anything.
- (9) The stolen gold chain and the blood stained clothes were discovered at the instance of the accused.
- (10) Blood stains of human origin of group 'A' were found on the Katari, shirt and pant as it seems from Ext.14.
- (11) Stains of human blood of Group 'A' were also found on the bed sheet which was seized from

the spot (Hotel) as per the statement of P.W.7, the I.O.

- (12) False explanation by the accused supplies an additional link in the chain of circumstances against the accused in a case based on circumstantial evidence.

8. The principles guiding cases based only on circumstantial evidence came up for consideration before the Supreme Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***, AIR 1984 SC 1622. Justice Fazal Ali, as His Lordship was then, very pithily summarized the law of the land in this respect. The Supreme Court in that case laid down five golden principles or the Panchasheela to prove a case based on circumstantial evidence; they are :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not '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.

9. In view of the aforesaid principles, it is the duty of the court to reassess the evidence as well as the conclusions arrived at by the learned Addl. Sessions Judge. As far as Circumstance No.1 is concerned, learned counsel appearing for the appellant do not dispute the same. The second circumstance is that Rajib Singh was running a Hotel in the name and style of "Raj Hotel". The third circumstance is that in the said Hotel the accused Rajesh Thappa was an employee. To prove this fact, the prosecution heavily relies upon the evidence of two witnesses, i.e. P.Ws.3 and 6. P.W.3, Shyamababu Sahu happens to be the uncle of the deceased. He has stated that the accused was working in the said hotel of Rajib at the time of occurrence. When he arrived at the Hotel in the morning of 27.3.2000 the accused was not in that Hotel though all other employees were there. Hence, they suspected the accused to be the assailant. In the cross-examination, he has stated that he has no connection in running of the Hotel by the deceased. The deceased had taken the premises from him for running his hotel, which was a two storied building. On the upper floor Rajib was living with his family members. He has further stated that he cannot say who were working in the Hotel of Rajib at the time of occurrence.

Coupled with the evidence of P.W.3, P.W.6 has stated that the accused was also working in the Hotel along with him and the accused used to sleep in the upper floor of the Hotel. But the witness P.W.6, along with Ranjan and Ujal slept on the ground floor. The

deceased was also sleeping in the upper floor of the Hotel on a charpoy. He has admitted in the cross examination that the deceased was maintaining a muster roll of the workers who were working in that Hotel. However, no such muster roll has been seized by the Investigating Officer in this case. He denied the defence suggestion that he did not state before the I.O. that the proprietor of the Hotel Rajib Singh and the accused was sleeping in the upper floor of the Hotel. He further denied the defence suggestion that he did not state before the I.O. that they found blood stains on the wearing apparels of the accused. He asserted that he has stated before the I.O. that there was blood stained foot marks from the spot upto the place where accused Rajesh Thappa had slept. Further the witness no.6 has stated that on the night of 26.3.2000 he along with Ujal, Chandan and 3 to 4 others had slept on the terrace of the upper floor. This is a major contradiction as far as his evidence is concerned. It is the prosecution case that only the accused and the deceased slept in the upper floor and all other servants of the Hotel slept in the ground floor. However, P.W.6 has stated that Ujal, Chandan and 3 to 4 others had slept on the terrace of the upper floor creates a doubt regarding the prosecution case as put forth during the trial. Moreover, it is already noted that P.W.3 has stated that the deceased was staying in the upper floor along with his family, but none of his family members has been examined as witness in this case.

P.W.6 has further stated in his cross examination that the heavy knife (Maunsa Kata Katuri) use for cutting meat has been marked as M.O.I. He further stated that if one stands near the place of

sacrificing a goat or stands near a meat shop his wearing apparels becomes blood stains. He has stated in the cross examination that he cannot say what bed sheet the accused had used when he had gone to sleep on the verandah in front of the staff room. So a new fact has come into picture that the accused was sleeping in front of the verandah of the staff room. Nobody has stated in their evidence whether the staff room situates in the first floor or the ground floor. Moreover, no spot map has been prepared in this case to show the exact location of the staff room in front of which the accused was sleeping. P.W.7, Ekadasia Dehury, has not described the spot in his examination in chief delineating the exact place where the dead body of the deceased was found and the place where the accused was sleeping. Thus, there is a reasonable doubt regarding the very case the prosecution proposes regarding the place of sleeping of the deceased and the accused to the exclusion of all other persons. We have examined the case diary and found that the I.O. has mentioned that he has prepared a spot map as per separate sheet. However, no such spot map has been exhibited as observed earlier. We have also very carefully examined the trial court records to find out if any spot map has been attached to the case diary. No spot map has been attached to the case diary. Generally when there is no dispute regarding the spot of occurrence such a flaw on the part of the I.O. is not attaching the spot map as a part of the Annexure to the case diary would not have weighed much in the minds of the Court, but keeping in view the nature of the case, as it is based entirely on circumstantial evidence and the very basis of the prosecution case is that the deceased and

the accused were sleeping on the fateful night on the upper floor, but P.W.6 has stated that the accused was sleeping in front of the staff room; the absence of spot map in the case diary maintained by the I.O. assumes significance.

10. It is the settled principles of law that the circumstances from which the conclusion of guilt is to be drawn against the accused should be fully established. The circumstances concerned “must” or “should” and not may be established. In this case, there is no clinching evidence that the deceased and the accused were sleeping on the first floor as P.W.3 does not know about that aspect of this case. In fact, he does not know the details of the persons, who are working in that hotel of Rajib, the deceased. P.W.6 has contradicted himself in material particulars. The muster roll has not been seized, no spot map has been prepared. So it cannot be said that the circumstance that have been relied upon by the learned Addl. Sessions Judge can only be consistent with hypotheses of the guilt of the accused and are not explainable on any other hypothesis except that the accused is guilty.

11. If those circumstances are excluded from consideration, the remaining circumstances that are propounded by the prosecution is the discovery of the blood stained gold chain and the wearing apparels of the deceased. On a statement purported to be made under Section 27 of the Indian Evidence Act, 1872; and the finding of blood stained of Group-A in the chemical examination on all materials object which includes the blood stains collected from the cement floor, blood stained iron katuri and one check blood stained bed

sheet (the second and third items have been collected by the S.I., E. Dehuri from the spot), blood stained black and white shirt and full pant on production by the accused. All the articles are found to be stained with human blood of origin Group-A. However, the full pant and full shirt seized on the discovery statement of the accused under custody were stained with moderate amount of blood.

12. Firstly, we have carefully examined the statement of the accused-appellant recorded by the learned Addl. Sessions Judge under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred as 'the Code' for brevity). Though nine questions have been put to him, not a single question has been put to the accused to explain how blood stains were found on his wearing apparels which matched with the group of blood stains of the deceased collected from the spot and the weapon of offence. In ordinary case, such a lapse on the part of the learned Sessions Judge could have rectified by the appellate court by remanding the case for trial by putting this incriminating material to the appellant, but it is seen that the occurrence took place in the year 2000 and in the mean while 20 years have elapsed. So it will not be expedient on our part to remand the matter to the learned Addl. Sessions Judge, Jharsuguda for hearing afresh and as we are of the opinion that prejudice has been caused to the appellant for not putting this very vital piece of evidence to the appellant in his examination under Section 313 of the Code. Moreover, there are other salient point that need to be given weightage to by this Court. They are enumerated below:-

(1) The prosecution has not examined Subrat Naik and Pravat Rout, alleged witnesses to the discovery statement and leading to the discovery of the gold chain and wearing apparels of the accused stained with blood.

(2) Gold chain was not produced in the court. It was not subjected to chemical examination.

(3) The vital witnesses, Ranjan and Ujal who could have said about the presence of the appellant on the first floor along with the deceased in the fateful night have not been examined. There is also prevaricating circumstances of the prosecution witnesses that the upstairs was only inhabited by the deceased where as P.W.3 has stated that in the upstairs the deceased was sleeping with his family.

(4) As far as the employment of the appellant in the Hotel run by the deceased is concerned, though muster roll was kept by the deceased it has not been seized by the I.O.

(5) It appears that the investigation of the case is thoroughly perfunctory and superficial.

13. Moreover, the very assertions of the prosecution through P.W.6 that the accused was working in the Hotel along with him and the accused slept on the upper floor along with the deceased is also doubtful in the sense that P.W.6 has not stated so in his statement recorded under Section 161 of the Code by the I.O., i.e. P.W.7. He has stated in his cross-examination at para-10 that he has examined Rabi Sethi (P.W.6) on 27.3.2000. He has further added that the said witness did not state before him specifically that the accused was working in the hotel along with him; and that the accused slept on the upper floor along with

the deceased. This is a major contradiction as the prosecution relies only on P.W.6 to prove the very factum of the accused and the deceased sleeping on the first floor to the exclusion of others in the fateful night.

14. The prosecution has also not subjected the accused for medical examination though it is admitted by the I.O. that the accused was assaulted near Bombay Chhak, which is about 100 yards from the hotel of the deceased. In such a situation it was the duty of the prosecution to determine the blood group of the accused in order to obviate any possibility of his own blood staining his own wearing apparels. This having not been done, though individually will not demolish the prosecution case goes a long way in not being a basis of conviction in view of the lacuna found in the prosecution evidence as we have discussed in the preceding paragraphs.

15. In the ultimate analysis, therefore, we are of the opinion that in this case, the prosecution has not established each and every circumstance except the one relating to nature of death of the deceased, with a certain degree of certainty. In fact many of the circumstances relied upon by the learned Addl. Sessions Judge, especially the circumstance nos.3,4 and 5 are not fully established.

16. In that view of the matter on a conspectus of the entire materials available on record, we are of the opinion that the prosecution has not established the very case it proposes by proving each circumstance beyond all reasonable doubt, for establishing a complete

chain of circumstances unerringly pointing to the guilt of the accused.

17. In that view of the matter we are of the opinion that the prosecution has failed to prove that the appellant committed murder of the deceased as alleged by the prosecution and, therefore, he is entitled to be acquitted. Therefore, we set aside the conviction and sentence recorded by the learned Addl. Sessions Judge, Jharsuguda under Section 302 of the I.P.C. and set the appellant at liberty forthwith. The appellant, appears from the records, is on bail upon appeal having been so ordered by this Court. The bail bond executed by him upon appeal be cancelled.

The JCRLA is disposed of.

L.C.R. be sent back immediately.

B.P.Routray, J.

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S.K.Mishra, J

I agree

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B.P.Routray, J

Orissa High Court, Cuttack
Dated 23rd December, 2020/A.K.Behera.

